Office of the Victorian Information Commissioner

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Notice of Decision and Reasons for Decision

Applicant:	*'BS2'*
Agency:	Department of Health and Human Services
Decision date:	26 June 2020
Exemptions and provisions considered:	Sections 25A(5), 31(1)(a), 31(1)(c) and 38 of the *Freedom of Information Act 1982* (Vic) in conjunction with sections 41, 191(1) and 209(1) of the *Children, Youth and Families Act 2005* (Vic)
Citation:	*'BS2' and Department of Health and Human Services (Freedom of Information)* [2020] VICmr 174 (26 June 2020)

FREEDOM OF INFORMATION – Child Protection documents – refusal to process an FOI request – prejudice proper administration of the law – prohibited disclosure of confidential information – secrecy provision

All references to legislation in this document are to the *Freedom of Information Act 1982* (Vic) (**FOI Act**) unless otherwise stated.

Notice of Decision

I have conducted a review under section 49F of the Agency's decision to refuse access to documents requested by the Applicant under the FOI Act.

I am satisfied the requirements for the application of section 25A(5) are met in that all documents to which the Applicant seeks access, should any exist, would be exempt in full.

Accordingly, I have decided to refuse to grant access to the requested documents in accordance with the Applicant's request under section 25A(5).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

26 June 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to:

> ...copies of all files, case conferences, reports and correspondence including any notifications both which led to the case being re opened or kept on file as reports held on myself, [Name] under my [child's] file [Name] [DOB]. Additionally I would like access to [Name]'s files as well, if the department is agreeable. I would like files from the beginning of my reporting to DHHS Vic through to any current correspondence or documents.

2. The Agency refused to grant access to documents, should any exist, in accordance with the Applicant's request under section 25A(5).

3. In refusing to grant access to documents under section 25A(5), the Agency determined the documents, should any exist, would be exempt under sections 31(1)(a), 31(1)(c), 33(1), 35(1)(b) and 38. In relation to section 38, the Agency relied upon the confidentiality provisions under the *Children Youth and Families Act 2005* (Vic) (**CYF Act**).

4. The Agency's reasons for decision are set out in its decision letter dated 1 June 2020.

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.

6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.

7. I have considered all communications received from the parties, including:

   (a) the Agency's decision on the FOI request dated [date]; and

   (b) information provided with the Applicant's review application.

8. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

Review of section 25A(5) – refusal to grant access to documents

9. Section 25A(5) allows an agency to refuse to grant access to documents in accordance with an FOI request:

   (a) if it is apparent from the nature of the request all documents sought would be exempt under the FOI Act; and

   (b) where it is not possible to provide the applicant with an edited copy of the documents with exempt information deleted, or it is clear the applicant does not seek an edited copy of the documents.

10. Importantly, an agency is not required to identify any or all documents relevant to a request or to specify any relevant exemption under which a document would be exempt.

11. The refusal power under section 25A(5) is 'carefully circumscribed'.[1] Therefore, I must be satisfied the following three requirements are met, which limit its application:

    (a) First, the exempt nature of the documents sought must be objectively apparent from the terms of the applicant's request. The 'nature' of documents refers to their inherent or essential quality or character.

    (b) Second, it must be apparent from the terms of the applicant's request that all documents relevant to the request would be exempt.

    (c) Third, it must be apparent from:

        i. the nature of the documents, as described in the applicant's request, that no obligation would arise under section 25 for the agency to grant access to an edited copy of a document with exempt or irrelevant information deleted; or

        ii. the applicant's request, or through consultation with the applicant, they do not seek access to an edited copy of a document.

What is the essential character of the documents requested?

12. Child Protection documents come into existence when the Agency is notified, or otherwise becomes aware of a child who is at risk of harm, wellbeing or other safety concerns. The CYF Act provides for receipt by the Agency of voluntary information reports from any person and mandatory reporting by persons in certain professions specified in the CYF Act.

13. Parliament has determined strict parameters apply to what information can be disclosed in relation to Child Protection matters, including a prohibition on identifying a person who notifies the Agency about any child protection concerns (**a notifier**) and any subsequent Agency investigations into or action taken to address any concerns. The CYF Act also prohibits disclosure of any information likely to lead to the identification of a notifier, except in certain limited circumstances where disclosure is authorised.

14. I accept Child Protection documents are in the name of the client to whom they relate. In this case, the Applicant's child. The involvement of Child Protection concerns the care provided to a child who is, has been or may become a client of the Agency.

15. Accordingly, I am satisfied the essential quality of the documents, as described by the Applicant's request, should any exist, would be documents relating to the Applicant's child and any involvement with or by Child Protection.

Would all the documents requested, as described by the Applicant in their request, be exempt?

16. As detailed above, in refusing access to documents under section 25A(5), the Agency determined the documents, should any exist, would be exempt under sections 31(1)(a), 31(1)(c), 33(1), 35(1)(b) and 38.

17. In relation to section 38, the Agency relies upon confidentiality provisions under the CYF Act that relate to notifications made to and investigation documents created or obtained by Child Protection. These are discussed in more detail below.

[1] *Knight v Corrections Victoria* [2010] VSC 338 at [37].

Section 31 – Law enforcement documents

18. Sections 31(1)(a) and 31(1)(c) provide:

> **31 Law enforcement documents**
>
> (1) Subject to this section, a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to –
>
> (a) prejudice the investigation of a breach or possible breach of the law or prejudice the proper administration of the law in a particular instance;
>
> …
>
> (c) disclose or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law.
>
> …

19. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.[2] '

20. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.[3]

21. 'In a particular instance' does not require a single specific investigation. This phrase can encompass specific, identified aspects of the law, the administration of the law or an investigation of a breach or potential breach of the law.[4]

22. Section 31(1)(a) may apply in relation to either a particular investigation, or the enforcement or proper administration of the law more generally.

23. I accept the Agency's decision:

> Release of certain information about a child protection matter is likely to prejudice the investigation or enforcement of the law, specifically in relation to the *Children, Youth and Families Act 2005* (Vic). Releasing information about child protection investigative processes would likely prejudice any follow up or investigation conducted by the department in relation to a concern about a child's wellbeing.
>
> This would also include case notes specific to [the applicant], as the release of such information could inadvertently impede further interaction with Child Protective Services and mislead the trajectory of the case.

24. I am satisfied the documents falling within the terms of the Applicant's request, should any exist, would have been prepared in the course of and for the purpose of the Agency carrying out its Child Protection functions under the CYF Act. This role includes the type of monitoring and enforcement activities with which section 31(1)(a) is concerned.

25. The circumstances of Child Protection investigations and proceedings are highly confidential. I am satisfied any information obtained by the Agency from third parties during the course of an investigation would have been provided with an expectation of confidentiality. I am of the view documents falling in the scope of the Applicant's request would contain information that would identify various individuals who, either directly or indirectly, provided information to Child Protection in confidential circumstances and in relation to the Agency's enforcement and administration of the

[2] *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363 at [65], quoting *Binnie v Department of Agriculture and Rural Affairs* [1989] VR 836.
[3] Ibid, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].
[4] *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

CYF Act. Accordingly, I am satisfied such information would be exempt from release under section 31(1)(c). In my view, as discussed below, this information would also be exempt under section 38.

26. The disclosure of such information would, in my view, impair the effectiveness of the Agency's ability to administer Child Protection services in the future. This includes the disclosure of any notifier named in a Child Protection document, any information provided in confidence by a notifier or other person and any information about the assessments and decisions made by Agency officers.

27. I acknowledge the Applicant's personal interest in obtaining access to the requested documents, should any exist. However, the nature and purpose of the Child Protection scheme is of such importance to the protection and welfare of children, that Parliament has determined strict parameters apply to what information can be released in relation to Child Protection matters. This includes the names and identities of those who notify the Agency about child protection concerns and any subsequent Agency investigations into or action taken to address any concerns. Such parameters are set out in, and comprehensively regulated under the CYF Act.

28. Accordingly, on the information before me and given the nature of the requested documents, I am satisfied the requested documents, should any exist, would be exempt under sections 31(1)(a) and 31(1)(c).

Section 38 – Documents to which secrecy or confidentiality provisions apply

29. A document is exempt under section 38 if:

    (a) there is an enactment in force;

    (b) that applies specifically to the kind of information contained in the documents requested by an applicant; and

    (c) the enactment must prohibit persons, referred to in the enactment, from disclosing specific kinds of information whether absolutely or subject to exceptions or qualifications.

30. For section 38 to apply to an enactment, it must be formulated with such precision that it specifies the actual information sought to be withheld.

31. The Agency relies on section 38 in conjunction with sections 191(1) and 209(1) of the CYF Act and advises:

> The document, if it exists, would include information provided in confidence to the department during a child protection investigation. Sections 191(1) and 209(1) of the *Children, Youth and Families Act 2005* (CYF Act) prohibits the disclosure of the identity of any person who has made a report regarding a child who they believe is in need of protection. It is essential that the department protect the confidentiality and privacy of the people who provided the information. Even if [the applicant] had made reports to child protection [themselves], this exemption would still apply to such information.

32. I am also satisfied section 41 of the CYF Act applies, which provides:

> **41 Identity of reporter or referrer confidential**
>
> (1) If a report is made to the Secretary under section 28 or 29, a person (other than the person who made it) must not disclose to any person other than the Secretary or a community-based child and family service –
>
> (a) The name of the person who made the report; and
>
> (b) Any information that is likely to lead to the identification of the person who made the report

Penalty: 60 penalty units.

(1A) If a referral is made to a community-based child and family service under section 31 or 32, a person (other than the person who made it) must not disclose to any person other than the Secretary or a community-based child and family service –

(a) The name of the person who made the referral; and

(b) Any information that is likely to lead to the identification of the person who made the referral.

Penalty: 60 penalty units.

(2) Subsections (1) and (1A) do not apply if the person who made the report or referral –

(a) Gives written consent to the Secretary; or

(b) Gives written or oral consent to the community based child and family service.

(3) To avoid any doubt, the name of a person who made a report or who made a referral may shared between

(a) The Secretary and any community-based child and family service; and

(b) A community-based child and family service and any other community-based child and family service.

33. Section 191 of the CYF Act provides:

191 Confidentiality

(1) If a report referred to in section 190(1) is made, a person (other than the person who made it or a person acting with the written consent of the person who made it) must not disclose to any person other than a protective intervener or a community-based child and family service in accordance with subsection.

(a) The name of the person who made the report; or

(b) Any information that is likely to lead to the identification of the person who made the report

Penalty: 10 penalty units

(2) Subsection (1) does not apply to a disclosure made to a court or tribunal in accordance with section 190.

(3) Subsection (1) does not apply to a disclosure to the Therapeutic Treatment Board of the name or information leading to the identification of a police officer who made a report under section 185.

(4) If a report is made to the Secretary under section 183 or 184, the information referred to in subsection (1) may be disclosed to a community-based child and family service if –

(a) The Secretary has made a determination under section 187(1)(c) in respect of the report; and

(b) The matter is referred to the community-based child and family service under section 30.

(5) A community-based child and family service to which information referred to in subsection (1) is disclosed must not disclose that information to any other person except in accordance with this Part.

Penalty: 60 penalty units

34. Section 190(1) of the CYF Act refers to reports made under section 183 (a report to a 'protective intervener' on reasonable grounds a child is in need of protection); section 184 (a mandatory report to the Secretary on reasonable grounds a child is in need of protection made by a person in the course of practising their profession or carrying out the duties their office, position or employment); reports determined to be a protective intervention report under section 34, and reports under section 185 a child is in need of therapeutic treatment.

35. 'Protective intervener' is defined in section 181 of the CYF Act as, 'the Secretary' [of the Agency] and 'all police officers'.

36. Section 209 of the CYF Act provides:

209 Confidentiality

(1) A protective intervener must not disclose to any person, other than to another protective intervener or to a person in connection with a court proceeding or to a person in connection with a review by the [Victorian Civil and Administrative Tribunal] VCAT—

(a) the name of a person who gave information in confidence to a protective intervener during the course of the investigation of the subject-matter of a protective intervention report; or

(b) any information that is likely to lead to the identification of a person referred to in paragraph (a)—

without the written consent of the person referred to in paragraph (a) authorisation by the Secretary.

Penalty: 10 penalty units

(2) The Secretary may only authorise the disclosure of information to a person under subsection (1) if the Secretary believes on reasonable grounds that the disclosure is necessary to ensure the safety and wellbeing of the child.

(3) In this section **court proceeding** includes a proceeding in the Family Court of Australia.

37. In summary, sections 41, 191(1) and 209(1) of the CYF Act prohibit the disclosure of the name of a person who provided child protection information to the Agency, as well as any information likely to lead to their identification, except in certain authorised circumstances.

38. The unauthorised disclosure of such information is an offence subject to penalties under the CYF Act. The financial penalties associated with these confidentiality provisions highlight Parliament's intention this information be protected and should not be disclosed.

39. I am satisfied the relevant sections of the CYF Act prohibit disclosure of the identity, or any information likely to lead to the identification of a notifier/reporter or person who gives or has given information in confidence to the Agency for child protection purposes. This includes not only the report or record of confidential information itself, but also any subsequent documents created containing details of the report or associated confidential information.

40. Accordingly, I am satisfied:

    (a) the CYF Act is an enactment in force, for the purposes of section 38 of the FOI Act;

    (b) the documents sought by the Applicant, should any exist, would contain specific information the disclosure of which is prohibited under sections 41, 191(1) and 209(1) of the CYF Act;

    (c) Agency officers are prohibited from disclosing documents that would fall within the terms of the Applicant's request; and

    (d) none of the authorised exceptions for disclosure referred to in sections 41,191 and 209 of the CYF Act apply in this case.

41. Accordingly, on the information before me and having considered the terms of the Applicant's request, I am satisfied the relevant documents, should any exist, would contain information exempt under section 38 of the FOI Act in conjunction with sections 41, 191(1) and 209(1) of the CYF Act.

Deletion of exempt or irrelevant information

42. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.

43. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'[5] and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.[6]

44. In their review request, the Applicant advised they do not consider an edited version of the documents would be meaningless. However, having considered the nature of the requested documents, I am satisfied deleting all exempt information in the documents, should any exist, would render them meaningless.

Other exemptions – sections 31(1)(c), 33(1) and 35(1)(b)

45. The Agency also relies on the exemptions under sections 33(1) and 35(1)(b). However, as I am satisfied the requested documents, should they exist, would be exempt in full under sections 31(1)(a), 31(1)(c) and 38, it is not necessary for me to consider the application of these additional exemptions to the requested documents.

Conclusion

46. On the information before me, I am satisfied the following requirements for the application of section 25A(5) are met:

    (a) the essential quality or character of the documents, as described in the Applicant's request, should any exist, would be Child Protection documents, including, documents relating to a Child Protection notification and/or investigation;

    (b) given the nature of the requested documents, I am satisfied the requested documents, should any exist, would be exempt under sections 31(1)(a), 31(1)(c) and 38 of the FOI Act in conjunction with sections 41, 191(1) and 209(1) of the CYF Act; and

[5] *Mickelburough v Victoria Police (General)* [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].
[6] *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

(c) it is not practicable to delete exempt information in the requested documents in accordance with section 25, as to do would render them meaningless.

47. Accordingly, I have determined to refuse to grant access to the requested documents in accordance with the Applicant's request under section 25A(5).

Review rights

48. If the Applicant is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.[7]

49. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.[8]

50. Information about how to apply to VCAT is available at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.

51. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.[9]

52. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

[7] The Applicant in section 50(1)(b) and the Agency in section 50(3D).
[8] Section 52(5).
[9] Sections 50(3F) and (3FA).