

Notice of Decision and Reasons for Decision

Applicant:	'BV5'
Agency:	Department of Health and Human Services
Decision date:	28 July 2020
Exemptions considered:	Sections 35(1)(b), 33(1)
Citation:	'BV5' and Department of Health and Human Services (<i>Freedom of Information</i>) [2020] VICmr 206 (28 July 2020)

FREEDOM OF INFORMATION – personal affairs information – Child Protection documents – material obtained in confidence

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 fresh decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request is the same as the Agency's decision in that I have decided to release the document in part.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

28 July 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to certain Child Protection documents.
2. In its decision dated [date], the Agency identified certain documents falling within the terms of the Applicant's request. It decided to grant access to 76 pages in full, release 11 pages in part, and refuse access to 20 pages in full.
3. The Agency relied on the exemptions under sections 33(1) and 35(1)(b) to refuse access to part of the documents. The Agency's decision letter sets out the reasons for its decision.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review. On [date], the Agency made a fresh decision to release further information in the documents. This was completed within the required 28 days under section 49M(2).
6. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
7. The Applicant indicated they only seek review of the Agency's decision to exempt certain information on page two of the document titled Summary Information Form (the **Document**).
8. I have examined a copy of the document subject to review.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
10. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's fresh decision on the FOI request;
 - (b) the information provided with the Applicant's review application, and subsequent correspondence with OVIC staff; and
 - (c) the correspondence received from the Agency during the review.
11. 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 exemptions

Section 35(1)(b)

12. The Agency denied access to the document in part, based on its application of section 35(1)(b).
13. Section 35(1)(b) provides:

35 Documents containing material obtained in confidence

(1) A document is an exempt document if its disclosure under this Act would divulge any information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister, and—

...

(b) the disclosure of the information under this Act would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

14. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator. Confidentiality can be express or implied from the circumstances of a matter.¹
15. In light of the nature of the information and the context in which it was provided to the Agency, I am satisfied certain information in the document was communicated to the Agency in confidence. Accordingly, I am satisfied disclosure of the document would divulge information communicated in confidence to the Agency.
16. Section 35(1)(b) also requires consideration of whether an Agency would be impaired from obtaining similar information in the future if the information were to be disclosed under the FOI Act. This means I must be satisfied, if the information were to be disclosed, others in the position of the communicator would be reasonably likely not to provide similar information to the Agency in the future.
17. The Agency's Child Protection functions are based on the legal framework set out in the *Children, Youth and Families Act 2005* (Vic) (**CYF Act**).
18. Child Protection intervention occurs when it is assessed a child has suffered, or is likely to suffer, significant harm and the child's parent is either unable or unwilling to protect the child from harm. The harm may be a single incident or cumulative in nature.
19. The Agency relies on certain persons to make reports to the Agency in order to carry out its Child Protection functions under the CYF Act and there is an essential public interest in individuals being able to disclose sensitive information to the Agency relevant to its Child Protection functions.
20. In this case, I accept dissemination of information about Child Protection notifications or information provided to the Agency during its involvement in a Child Protection matter would undermine the integrity of the notification, intake and investigation process. This may in turn result in the reluctance of individuals, other than mandatory reporters,² to make notifications or provide other information to the Agency regarding Child Protection matters in the future.
21. I am satisfied disclosure of parts of the document would divulge information communicated to the Agency in confidence, and disclosure would be reasonably likely to impair the ability of the Agency to obtain similar information in future.
22. Accordingly, I am satisfied the relevant information in the document is exempt under section 35(1)(b).

¹ *XYZ v Victoria Police* (2010) 33 VAR 1; [2010] VCAT 255 at [265], citing *Barling v Medical Board* (Vic) (1992) 5 VAR 542 at [561]-[562].

² A range of professional groups are listed in section 182(1) of the CYF Act as mandatory reporters. Mandatory reporters must make a report to Child Protection as soon as practicable after forming a belief on reasonable grounds that a child has suffered or is likely to suffer significant harm as a result of physical injury or sexual abuse, and the child's parents are unable or unwilling to protect the child.

Section 33(1)

23. A document is exempt under section 33(1) if two conditions are satisfied:
- (a) disclosure of the document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant;³ and
 - (b) such disclosure would be 'unreasonable'.
24. Information relating to a person's 'personal affairs' includes information that identifies any person or discloses their address or location. It also includes any information from which such information may be reasonably determined.⁴

Does the document contain personal affairs information?

25. The document contains detailed descriptions and observations of a third party about the Applicant and another individual made to the Agency.
26. I am satisfied this information constitutes personal affairs information.

Would disclosure be unreasonable in the circumstances?

27. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the protection of a person's right to privacy in the circumstances.
28. The Supreme Court of Victoria Court of Appeal⁵ has held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others', and the exemption under section 33(1) 'arises only in cases of unreasonable disclosure' and '[w]hat amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case'.
29. The Supreme Court also stated, '[t]he protection of privacy, which lies at the heart of section 33(1), is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded to a lesser or greater degree'.⁶
30. I acknowledge the Applicant may already know the third party or parties in the document. However, even where an applicant claims to know the identity of a third party, disclosure of their personal affairs information may still be unreasonable in the circumstances.⁷
31. The proper application of section 33(1) involves consideration of 'all matters relevant, logical and probative to the existence of conditions upon which the section is made to depend'.⁸
32. I consider the following factors are relevant in determining whether disclosure of the personal affairs information in the document would be unreasonable in the circumstances:
- (a) The nature of the personal affairs information and circumstances in which it was obtained

The personal affairs information relates to the identity of a third party and to the Agency's Child Protection functions. I consider that type of information to be sensitive particularly in the

³ Sections 33(1) and (2).

⁴ Section 33(9).

⁵ *Victoria Police v Marke* [2008] VSCA 218 at [76].

⁶ *Victoria Police v Marke* [2008] VSCA 218 at [79].

⁷ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

⁸ [2008] VSCA 218 at [104].

circumstances it was obtained by the Agency, in exercising its Child Protection functions under the CYF Act. These factors weigh against disclosure.

- (b) Whether any public interest would be promoted by release of the information

The Applicant's interest in obtaining the information is a matter of private interest. I am not satisfied the public interest would be promoted by release of the personal affairs information in the document to the Applicant.

I am of the view there is a broader public interest in the Agency preserving its ability to receive notifications and conduct investigations under the CYF Act in accordance with its Child Protection functions under that Act.

If such information were to be routinely released under the FOI Act, I am satisfied this would jeopardise the ability of the Agency to investigate, maintain and ensure the safety and wellbeing of children and others in accordance with its functions. These factors weigh against disclosure.

- (c) Whether release of the information could lead the persons to whom it relates suffering stress and anxiety

The document relates to information obtained by the Agency through the exercise of its functions under the CYF Act. I consider the release of this information would be reasonably likely to cause stress and anxiety to those concerned. This factor weighs against disclosure.

- (d) Whether the individuals to whom the information relates object, or would be likely to object to the release of the information

There is no information before me to suggest the Agency consulted with the third party or parties whose personal affairs information is contained in the document. However, given the sensitive nature of the information and the circumstances in which it was obtained by the Agency, I am of the view the individual(s) would be reasonably likely to object to the release of their personal affairs information. This factor weighs against disclosure.

- (e) Whether the disclosure of the information would, or would be reasonably likely to endanger the life or physical safety of any person

In deciding whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must take into account whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.⁹ However, there is no information before me to suggest this to be a relevant factor.

33. Given the factors weighing against disclosure, I have determined disclosure of the personal affairs information in part of the document would be unreasonable in the circumstances.

34. Accordingly, I have determined the document is exempt in part under section 33(1).

Deletion of exempt or irrelevant information

35. 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.

⁹ Section 33(2A).

36. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹⁰ 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 25.¹¹
37. I have considered the effect of deleting exempt information from the document. In my view, it is practicable for the Agency to delete the exempt information, because it would not require substantial time and effort, and the edited document would retain meaning.

Conclusion

38. On the information before me, I am satisfied the document is exempt under sections 35(1)(b) and 33(1).
39. As it is practicable to edit the document to delete exempt information in accordance with section 25, I have determined to grant access to the document in part.

Review rights

40. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.¹²
41. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹³
42. Information about how to apply to VCAT is available online 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.
43. 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.¹⁴

When this decision takes effect

44. My decision does not take effect until the relevant review period (stated above) expires.
45. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹⁰ *Mickelborough 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].

¹¹ *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].

¹² The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹³ Section 52(5).

¹⁴ Sections 50(3F) and (3FA).