

Notice of Decision and Reasons for Decision

Applicant:	'CG9'
Agency:	Department of Health and Human Services
Decision date:	9 November 2020
Exemptions and provisions considered:	Sections 33(1) and 38 in conjunction with sections 41(1), 191(1) and 209(1) <i>Children Youth and Families Act 2005</i> (Vic)
Citation:	'CG9' and <i>Department of Health and Human Services (Freedom of Information)</i> [2020] VICmr 312 (9 November 2020)

FREEDOM OF INFORMATION – child protection documents – secrecy provision – *Children Youth and Families Act 2005* (Vic) – personal affairs information

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 documents are exempt under sections 33(1) and 38 in conjunction with sections 41(1), 191(1) and 209(1) of the *Children Youth and Families Act 2005* (Vic) (**CYF Act**).

As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, the documents are to be released in part.

Accordingly, my decision on the Applicant's request is the same as the Agency's decision.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

9 November 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:

...a copy of my entire Child Protection File, including all and any psychologist/psychiatrist report (including a psychologist report written by [named individual] in [year] for a [named] Court proceeding.
2. In its decision, the Agency identified 34 pages of documents falling within the terms of the Applicant's request and granted access to five pages in full, 28 pages in part and refused access to one page in full. The Agency indicated no psychologist or psychiatrist reports were located.
3. The Agency relied on the exemption in sections 31(1)(c), 33(1), 35(1)(b) and 38 in conjunction with sections 191(1) and 209(1) of the CYF Act to refuse access to documents. The Agency's decision letters 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. The Applicant and the Agency were invited to make a submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties.
7. 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.
8. I note Parliament's intention that the FOI Act must be interpreted so as to further the object of the Act and that any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Applicant's concerns regarding adequacy of document searches and missing documents

9. Alongside their review application, the Applicant raised concerns regarding the adequacy of the Agency's document searches. In particular, the Applicant raised a concern regarding a psychiatrist report that was not located as a result of the Agency's document searches.
10. In accordance with section 61B(3), OVIC determined to address these concerns as part of this review.
11. OVIC made inquiries with the Agency in relation to the Applicant's concern. The Agency's response was provided to the Applicant for their consideration.
12. In the circumstances, I am satisfied OVIC has made reasonable inquiries with the Agency regarding the Applicant's concerns and the Agency conducted a thorough and diligent search for relevant documents based on the terms of the Applicant's request.

Child Protection and Child Protection records

13. The Agency is responsible for enforcing and administering the law relating to Child Protection in Victoria under the CYF Act.
14. Child Protection files come into existence when the Agency is notified, or otherwise becomes aware, that a child is at risk to harm, wellbeing or other safety concerns. The CYF Act provides for voluntary reports from a person and mandatory reporting by persons in certain professions specified under the CYF Act.
15. The main functions of Child Protection are to:
 - (a) investigate matters where it is alleged a child is at risk of harm;
 - (b) refer children and family appropriately to services in providing ongoing safety and wellbeing of children;
 - (c) escalate matters to the Children's Court if a child's safety cannot be ensured within the family; and
 - (d) supervise children on legal orders granted by the Children's Court.
16. The Agency publishes the *Child Protection Manual*, which is used by Child Protection practitioners and contains information for families. The manual is available at www.cpmanual.vic.gov.au.
17. The role and mandate of Child Protection is obviously an important and significant one. It is also comprehensively regulated under the CYF Act.
18. Parliament has determined strict parameters apply to what information can be released in relation to Child Protection matters, including a prohibition on identifying any person who notified the Agency about any child protection concerns (**notifiers**) and any subsequent Agency investigations into or action taken to address any concerns.
19. For example, the CYF Act prohibits disclosure of the names of notifiers, as well as any information likely to lead to the identification of a notifier, except in certain limited circumstances where disclosure is authorised. This reflects the strong need for confidentiality around Child Protection notifications and any subsequent inquiries or investigations conducted by the Agency, in order to assure notifiers of confidentiality when making sensitive notifications to the Agency in the interests of protecting a child from harm or possible harm.
20. This means, when a person who has been involved with Child Protection, or the parent or guardian of such a child, seeks access to a Child Protection file, the confidentiality provisions that apply to Child Protection information under the CYF Act are strictly applied.

Review of exemptions

Section 38 – Secrecy provision

21. A document is exempt under section 38 if:
 - (a) there is an enactment in force;
 - (b) that applies specifically to the kind of information in the document; and
 - (c) the enactment must prohibit persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).

22. For section 38 to apply, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.
23. The Agency relies on the exemption in section 38 in conjunction with sections 191(1) and 209(1) of the CYF Act to refuse access to reports made to the Agency as well as information that would identify a person who made a report to the Agency regarding the wellbeing of the Applicant and their [relationship descriptor].
24. For completeness, I will also consider section 41 of the CYF Act, which I consider is relevant to the document.

Application of the confidentiality provisions in the CYF Act

25. Section 41 of the CYF Act 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 to which the matter is referred under section 30—
 - (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.

...

- (2) Subsection (1) does 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.

26. 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 (4)—
 - (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.

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.

...

27. 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 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) or authorisation by the Secretary.
 - (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.
28. In summary, sections 41(1), 191(1) and 209(1) of the CYF Act prohibit disclosure of the names of persons, as well as any information likely to lead to the identification of any person who:
 - (a) provides confidential Child Protection information to the Agency in the course of a protective intervention investigation; or
 - (b) notified the Agency of their concerns for the wellbeing of a child.
29. Unauthorised disclosure of such information is an offence and carries penalties under the CYF Act, highlights the legislature’s intention that such information should remain protected.
30. I am satisfied the relevant sections of the CYF Act prohibit the disclosure of the identity, or any information likely to lead to the identification of a notifier/reporter or person who gave information in confidence to the Agency during a Child Protection investigation. This includes not only the report or record of confidential information itself, but also any subsequent documents created containing details of the report or confidential information.
31. Having considered the information before me, I am satisfied:
 - (a) the CYF Act is an enactment in force, for the purposes of section 38;
 - (b) the document contains specific information prohibited from disclosure under sections 41(1), 191(1) and 209(1) of the CYF Act;
 - (c) these provisions prohibit persons, in this case Agency officers, from disclosing the specific information sought by the Applicant; and
 - (d) the prohibition under sections 41(1), 191(1) and 209(1) of the CYF Act is absolute, in that disclosure is not subject to any exceptions or qualifications.
32. Therefore, I am satisfied section 38 of the FOI Act, in conjunction with sections 41(1), 191(1) and 209(1) of the CYF Act, operates to exempt information in the documents.

Section 33(1) – Personal affairs information

33. Section 33(1) provides a document is exempt if two conditions are satisfied:
 - (a) disclosure of the document would ‘involve’ the disclosure of information relating to the ‘personal affairs’ of a person other than the Applicant;¹ and

¹ Sections 33(1) and (2).

(b) such disclosure would be 'unreasonable'.

34. 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.²

Do the documents contain the personal affairs information of individuals other than the Applicant?

35. I am satisfied the documents contain personal affairs information of third parties being, names, position titles, emails and telephone numbers.
36. A third party's opinion or observations about another person's conduct can constitute information in relation to the personal affairs of a third party.³
37. I consider the documents contain personal details and statements in relation to the Applicant's family. The documents also contain notes made by the Agency's Child Protection officers in the course of the Agency's involvement with the Applicant and their family. I am satisfied this information also relates to the personal affairs information of individuals other than the Applicant.

Would the release of the personal affairs information in the documents be unreasonable?

38. By email dated [date], the Applicant advised they do not seek access to names of Agency officers excluded under section 33(1) in the documents.
39. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the protection of an individual's personal privacy. I have considered the following factors in the circumstances of this case:

(a) The nature of the personal affairs information

The personal affairs information in the documents relates to child protection matters. I consider this to be information of a highly sensitive and personal nature.

(b) The circumstances in which the information was obtained

The Agency obtained the information in the documents from individuals in the course of its Child Protection functions. I accept such information is ordinarily provided to the Agency on the understanding that the information is to remain confidential unless required for a subsequent prosecution or welfare planning. I consider that generally, individuals who provide information in such circumstances would not expect the information they provide to the Agency would be released under the FOI Act.

(c) The Applicant's interest in the information

The Applicant advised they seek access to the redacted information to obtain a better understanding into their childhood. In particular, they seek access to 'information that was written in regards to ME and what was being witnessed/stated by the third parties/ DHHS staff'.

I accept the Applicant has a genuine interest in obtaining access to the exempted information and the documents would provide further insight into the nature of child protection's involvement with their family.

² Section 33(9).

³ *Richardson v Business Licensing Authority* [2003] VCAT 1053, cited in *Davis v Victoria Police (General)* [2008] VCAT 1343 at [43], *Pritchard v Victoria Police (General)* [2008] VCAT 913 at [24], *Mrs R v Ballarat Health Services (General)* [2007] VCAT 2397 at [13].

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

The Applicant's interest in obtaining the information is a private (rather than public) interest. However, I consider there exists an interest, shared by the wider community, in those subject to Child Protection involvement to have a reasonable understanding of such involvement.

While the public interest in transparency and accountability of official action is a matter in which I have given weight, in the context of seeking personal and sensitive information under the FOI Act, which in this case relates not only to the Applicant but also to third parties, I must balance the public interest in protecting the personal privacy of those third parties.

For these reasons, I consider the public interest in the Agency preserving the confidentiality of the statements provided by the various individuals to ensure, to the maximum extent possible, the ability of the Agency to obtain cooperation from witnesses and other relevant individuals in the course of its Child Protection investigations is the stronger of the two.

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

In the absence of written consent provided by the relevant third parties whose personal affairs information was exempted by the Agency in the documents, I consider it would be reasonably likely those third parties would object to the release of their information.

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

There is no information before me to suggest this is a relevant factor in this matter.

40. In balancing the above factors, I have determined it would be unreasonable to release the personal affairs information of individuals in the documents.
41. In light of my decision, it is not necessary for me to consider the additional exemptions relied on by the Agency to refuse access to the documents.

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'⁴ 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 25.⁵
44. I have considered whether it is practicable to provide the Applicant with a copy of the documents with exempt information deleted in accordance with section 25. I am satisfied it is practicable to delete the exempt information in the documents as it would not require substantial time and effort, and the edited documents would retain meaning.

⁴ *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].

⁵ *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].

Conclusion

45. I am satisfied the documents are exempt under sections 33(1) and 38 in conjunction with sections 41(1), 191(1) and 209(1) of the CYF Act.
46. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, the documents are to be released in part.
47. Accordingly, my decision on the Applicant's request is the same as the Agency's decision.

Review rights

48. 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.⁶
49. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁷
50. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁸
51. 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.
52. 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

⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁷ Section 52(5).

⁸ Section 52(9).

⁹ Sections 50(3F) and (3FA).