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Notice of Decision and Reasons for Decision

Applicant:	'CM8'
Agency:	Department of Health and Human Services
Decision date:	8 January 2021
Provision considered:	Section 25A(5)
Citation:	'CM8' and Department of Health and Human Services (<i>Freedom of Information</i>) [2021] VICmr 7 (8 January 2021)

FREEDOM OF INFORMATION – Child Protection documents – refusal to process an FOI request – prejudice proper administration of the law – personal affairs information – secrecy provision – confidentiality provisions – *Children Youth and Families Act 2005*

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.

My decision on review is the same as the Agency's decision.

I am satisfied the requirements for the application of section 25A(5) are met. 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

8 January 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to:
copies (redacted if necessary) of any welfare reports regarding [named child].
2. The Agency refused to grant access to the requested documents in accordance with the Applicant's request under section 25A(5) on grounds all 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 relies upon the confidentiality provisions under the *Children Youth and Families Act 2005* (Vic) (**CYF Act**).
3. The Agency's reasons for decision are set out in its decision letter dated [date].

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 written submission under section 49H(2) in relation to the review.
6. I have considered all relevant 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 the FOI Act must be interpreted so as to further the object of the Act and 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.

Review of application of section 25A(5)

9. Section 25A(5) provides an agency may 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 In *Knight v Corrections Victoria*,² the Supreme Court of Victoria held section 25A(5) will apply to an FOI request only where the following three elements are met:

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

- (a) First, the exempt nature of the documents sought must be objectively apparent from terms of the applicant's request. The 'nature' of a document 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 an applicant's request, that no obligation would arise under section 25 for an agency to grant access to an edited copy of a document with exempt or irrelevant information deleted; or
 - ii. an 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. I accept the Agency's interpretation of the Applicant's request for 'welfare reports' to include:
- case notes or reports recording visits by Child Protection to the family home;
 - case notes or reports recording conversations with [third parties] regarding the welfare of the Applicant's [child];
 - case notes or reports recording conversations with professionals (such as educators, health professionals or police) regarding the welfare of the Applicant's [child]; and
 - notifications.
13. In summary, the Applicant seeks access to Child Protection documents in relation to their child.
14. Such 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.
15. 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.
16. The involvement of Child Protection concerns the care or protection provided to a child who is, has been or may become a client of the Agency. As such, any documents should they exist, will pertain to a Child Protection matters in relation to a child, not an applicant.
17. Accordingly, I am satisfied the essential quality of the documents, as described in the Applicant's request and as interpreted above, should any exist, would be documents relating to the Applicant's child and any involvement with or by Child Protection.

² *Knight v Corrections Victoria* [2010] VSC 338 (per Bell J).

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

18. As detailed above, in refusing access to documents under section 25A(5), the Agency determined the requested 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 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.

Section 38 – Documents to which secrecy or confidentiality provisions apply

19. A document is exempt under section 38:

- (a) If 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.

20. 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.

21. The Agency relies on section 38 of the FOI Act in conjunction with sections 41(1), 191(1) and 209(1) of the CYF Act.

22. 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 –

- (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.

23. 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

24. 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.

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

26. 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.

27. In summary, sections 41(1), 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 identify them, except in certain authorised circumstances.

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

29. 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.

30. 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(1), 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 under sections 41, 191 and 209 of the CYF Act apply in this case.

31. 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(1), 191(1) and 209(1) of the CYF Act.

Section 31 – Law enforcement documents

32. The Agency considers Child Protection documents sought by the Applicant would, if they existed, be exempt in full under section 31(1)(a) of the Act.
33. Subject to section 31, section 31(1)(a) provides that a document is an exempt document if its disclosure under the FOI Act would, or would be reasonably likely to 'prejudice the investigation of a breach or possible breach of the law or prejudice the proper administration of the law in a particular instance'.
34. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.³
35. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.⁴
36. '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.⁵
37. Section 31(1)(a) may apply in relation to either a particular investigation, or the proper administration of the law more generally.
38. The Agency submits:

Any documents in existence would have been created as a result of protective concerns being raised for the Applicant's child and the investigative process that followed. Therefore, all documents may relate to the investigation of a breach or potential breach of the law.

...

the entire child protection process should be viewed as part of the enforcement and administration of the CYF Act, and that release of child protection documents would be reasonably likely to prejudice the department's [investigative], enforcement or proper administration of the CYF Act in relation to the child.
39. I am satisfied any 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 its Child Protection functions under the CYF Act. This includes the type of investigative, monitoring and enforcement activities with which section 31(1)(a) is concerned.
40. Child Protection investigations are highly confidential. Therefore, I am satisfied any information provided to the Agency by third parties during the course of a Child Protection investigation would have been provided with an expectation of confidentiality.
41. I acknowledge the Applicant's personal interest in obtaining access to the requested documents as detailed in their submissions. However, Parliament has determined strict parameters apply under the CYF Act as 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 investigation into or action taken to address such concerns.
42. Accordingly, on the information before me and given the nature of the requested documents, I am satisfied, should any documents exist, they would be exempt under section 31(1)(a).

³ *Bergman v Department of Justice* [2012] VCAT 363 at [65], quoting *Binnie v Department of Agriculture and Rural Affairs* [1989] VR 836.

⁴ *Ibid*, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 at [55].

⁵ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

Section 33(1) – personal affairs information

43. The Agency determined the documents sought by the Applicant would, if they existed, also be exempt in full under section of the Act.
44. A document is exempt under section 33(1) if two conditions are satisfied:
 - (a) disclosure of a document under the FOI Act would involve the disclosure of information relating to the ‘personal affairs’ of a person other than an applicant;⁶ and
 - (b) such disclosure would be ‘unreasonable’.

Do the documents contain personal affairs information?

45. 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.⁷
46. Personal affairs information that relates to an individual ‘concerns or affects that person as an individual’.⁸
47. Based on the terms of the Applicant’s FOI request, I am satisfied the nature of the requested documents means they would contain the personal affairs information of third parties, including, in relation to any Child Protection investigation.

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

48. The concept of ‘unreasonable disclosure’ involves determining whether the public interest in disclosure of official information is outweighed by the interest in protecting a person’s right to privacy in the circumstances.
49. The Victorian Court of Appeal 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’.⁹ Further, ‘[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’.¹⁰
50. I have given weight to the following factors in determining whether disclosure of the personal affairs information would be unreasonable in the circumstances:
 - (a) The nature of the personal affairs information

The documents, as described in the Applicant’s request, would be Child Protection documents and, should any exist, would contain confidential and highly sensitive personal affairs information regarding a minor and other third parties and the Agency’s administration and enforcement of the CYF Act.

⁶ Sections 33(1) and (2).

⁷ Section 33(9).

⁸ *Hanson v Department of Education & Training* [2007] VCAT 123.

⁹ *Victoria Police v Marke* [2008] VSCA 218 at [76].

¹⁰ *Ibid* at [79].

(b) The extent to which the information is available to the public

The personal affairs information sought by the Applicant is not publicly available.

(c) The circumstances in which information was obtained by the Agency

The requested documents, should any exist, would have been obtained by the Agency in the course of its administration and enforcement of the CYF Act.

I am of the view any third party who provided personal affairs information to the Agency would have done so on the understanding the information was collected for the primary purpose of the Agency carrying out its Child Protection functions under the CYF Act. I consider it is reasonably likely such persons would not expect their personal affairs information would be disclosed by the Agency under the FOI Act.

In this regard, I have also taken into account the nature of disclosure under the FOI Act, which provides for unrestricted and unconditional access to information.¹¹ As such, once a document is disclosed under the FOI Act, an applicant is free to use or further disclose a document or information in a document as they choose to do so.¹²

(d) The Applicant's interest in the information and whether their purpose for seeking the information is likely to be achieved

The FOI Act provides a general right of access that can be exercised by any person, regardless of their motive or purpose for seeking access to a document. However, the reasons why an applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable.¹³

On the information before me, I am unable to determine whether the Applicant's purpose for seeking the personal affairs information is likely to be achieved by disclosure of any documents.

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

I acknowledge the Applicant's personal interest in seeking access to the requested documents. However, I am not satisfied any public interest would be promoted by disclosure of the third parties' personal affairs information to the Applicant.

Rather, I am of the view the public interest lies in ensuring the protection and wellbeing of children through ensuring the Agency is able to receive information and conduct investigations under the CYF Act in connection with its Child Protection functions.

If information concerning Child Protection notifications and investigations conducted by the Department were to be routinely disclosed through the FOI process, I am satisfied this would be likely to jeopardise the Agency's ability to conduct Child Protection investigations and ensure the safety and wellbeing of children and others in accordance with its statutory functions under the CYF Act.

I note the Applicant has been provided with advice from the Agency and OVIC on alternative methods, via subpoena, to seek access to certain information as required for court proceedings.

¹¹ *Victoria Police v Marke* [2008] VSCA 218 at [104].

¹² *Ibid* at [66].

¹³ *Ibid* at [104].

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

As the Agency refused to grant access to documents in accordance with the Applicant's FOI request under section 25A(5), there is no information before me to suggest whether any individuals to whom the requested documents, should any exist, object or would be likely object to the release of the information.

Given the nature of the requested documents and the sensitive and personal affairs information in such documents, I am satisfied any third parties named or identifiable from such documents would be reasonably likely to object to the release of their personal affairs information.

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

In determining whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must consider whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.¹⁴

There is insufficient information to satisfy me this is a relevant consideration in this matter.

51. Accordingly, on the information before me and given the nature of the requested documents, I am satisfied the documents, should any exist, would be exempt under section 33(1).

Deletion of exempt or irrelevant information

52. 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.
53. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁵ 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 25.¹⁶
54. Having considered the nature of the information sought in the requested documents that I am satisfied would be exempt under sections 31(1)(a), 33(1) and 38 in conjunction with the CYF Act, I am also satisfied deletion of the exempt information in accordance with section 25 would not be practicable as it would render the documents, should any exist, meaningless.
55. Accordingly, I am satisfied there would be no scope to provide an edited copy of the requested documents to the Applicant in accordance with section 25.

Conclusion

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

¹⁴ Section 33(2A).

¹⁵ *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].

¹⁶ *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].

- (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 concerning the Applicant and their children;
- (b) given the nature of the requested documents, I am satisfied any relevant documents, should any exist, would be exempt under sections 31(1)(a), 33(1), and section 38 of the FOI Act in conjunction with sections 41(1), 191(1) and 209(1) of the CYF Act; and
- (c) it would not be practicable to delete exempt information in the documents in accordance with section 25, as to do would render them meaningless.

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

Other exemption – sections 35(1)(b) and 31(1)(c)

58. The Agency also relied on the exemption under sections 35(1)(b) and 31(1)(c) to refuse access to the requested documents.

59. As I am satisfied the requested documents, should any exist, would be exempt under sections 31(1)(a), 33(1), and section 38 of the FOI Act in conjunction with sections 41(1), 191(1) and 209(1) of the CYF Act, it is not necessary for me to consider the application of the additional exemptions relied upon by the Agency.

Review rights

60. If the Applicant 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.¹⁷

61. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁸

62. 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.

63. 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.¹⁹

¹⁷ Section 50(1)(b).

¹⁸ Section 52(5).

¹⁹ Sections 50(3F) and (3FA).