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Notice of Decision and Reasons for Decision

Applicant:	'CN6'
Agency:	Department of Health and Human Services
Decision date:	19 January 2021
Exemptions and provisions considered:	Sections 25A(5), 31(1)(a) and 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with sections 41, 191 and 209 of the <i>Children Youth and Families Act 2005</i> (Vic)
Citation:	'CN6' and <i>Department of Health and Human Services (Freedom of Information) [2021]</i> VICmr 14 (19 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.

Sven Bluemmel
Information Commissioner

19 January 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the case files of their children concerning a child protection notification.
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 sections 191(1) and 209(1) of the *Children Youth and Families Act 2005* (Vic) (**CYF Act**).
3. 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. 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 communications 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. The Agency determined any documents falling within the terms of the Applicant's request, should they exist, would be exempt from release under one or more exemptions under the FOI Act. Accordingly, the Agency refused to grant access to documents under section 25A(5) without having identified any documents relevant to the Applicant's FOI request.
10. 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:
 - (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:

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

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

- 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?

11. It is apparent from the terms of the Applicant's request that they seek access to child protection documents concerning their children.
12. Such documents come into existence when the Agency is notified, or otherwise becomes aware, of a child who is at risk of harm, or where there are concerns about the child's 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. The involvement of the Agency in child protection matters 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 child protection matters in relation to a child, or children.
15. 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 children and their involvement with or by the Agency in relation to child protection matters, if any such matters exist.

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 requested documents, should any exist, would be exempt under sections 31(1)(a), 31(1)(c), 33(1), 35(1)(b) and section 38 in conjunction with sections 191(1) and 209(1) of the CYF Act.

Section 38 – Documents to which secrecy or confidentiality provisions apply

17. 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.

18. 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.

19. As stated above, the Agency relies on section 38 of the FOI Act in conjunction with sections 191(1) and 209(1) of the CYF Act.

20. 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.

(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

21. 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 that a child is in need of therapeutic treatment.

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

23. 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.

24. Although the Agency does not rely on section 41 of the CYF Act, I consider it relevant in the circumstances. Section 41 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.

25. 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.
26. 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 should be protected and not disclosed.
27. 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.
28. 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.
29. 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(1)(a) – Disclosure of documents that would prejudice the enforcement or proper administration of the law

30. Section 31(1)(a) provides 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 enforcement or proper administration of the law in a particular instance.
31. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.³
32. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.⁴
33. '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
34. Section 31(1)(a) may apply in relation to either a particular investigation, or the enforcement or proper administration of the law more generally.
35. The Agency's decision letter states:

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].

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.

36. 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 out 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.
37. Child protection investigations are, by their nature, 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.
38. I acknowledge the Applicant's personal interest in obtaining access to the requested documents. 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.
39. 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).

Is there scope to provide an edited copy of the documents requested?

40. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
41. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁶ and the effectiveness of the deletions. Where deletions would render the document meaningless they are not 'practicable', and release of an edited copy of a document is not required under section 25.⁷
42. Having considered the nature of the information sought in the requested documents that I am satisfied would be exempt under sections 31(1)(a) 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.
43. 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.

Application of sections 31(1)(c), 33(1) and 35(1)(b)

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

⁶ *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].

⁷ *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. On the information before me, I am satisfied the following three 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 concerning the Applicant's 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) 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.
46. Accordingly, I have decided to refuse to grant access to the requested documents in accordance with the Applicant's request under section 25A(5).

Review rights

47. 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.⁸
48. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
49. 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.
50. 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.¹⁰

⁸ Section 50(1)(b).

⁹ Section 52(5).

¹⁰ Sections 50(3F) and (3FA).