

Notice of Decision and Reasons for Decision

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| Applicant: | 'DYS' |
| Agency: | Victoria Legal Aid |
| Decision date: | 17 March 2022 |
| Exemption and provision considered: | Section 38 in conjunction with section 43 of the <i>Legal Aid Act 1978</i> (Vic) |
| Citation: | 'DYS' and <i>Victoria Legal Aid</i> (Freedom of Information) [2022] VICmr 14 (17 March 2022) |

FREEDOM OF INFORMATION – application for legal assistance – family law – children – independent children’s lawyer – secrecy provision – *Legal Aid Act 1973* (Vic)

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 is the same as the Agency’s decision.

I am satisfied the documents subject to review are exempt from release in full under section 38 in conjunction with section 43 of the *Legal Aid Act 1978* (Vic) (**Legal Aid Act**).

I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25. Accordingly, access to the documents is refused in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
17 March 2022

Reasons for Decision

Background to review

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

Pursuant to the Freedom of Information Act 1982, I am writing to request access to all Victorian legal aid correspondence re the appointment of the Independent Children's Lawyer [ICL] in the [Applicant] matter in the Federal Circuit Court of Australia (now the Federal Circuit and Family Court of Australia), including correspondence and/or communication about the transition of the ICL from [third party] to [third party], and documentation around the new appointment and whether it was in line with normal procedures.

Please note I am a part of these proceedings and separately section 121 (9) (a) and (c) of the Family Law does not negate the release of these information.

2. The Agency identified 71 documents falling within the terms of the Applicant's request and decided to grant access to 6 documents in full and refuse access to 65 documents in full.
3. The Agency relied on the exemption under sections 38 in conjunction with section 43 of the Legal Aid Act to refuse access to information in the documents.
4. The Agency's decision letter sets out the reasons for its decision.

Review application

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. I have examined copies of the documents subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties.
9. 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.
10. 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.

Further documents located by the Agency during the review

11. During the review, the Agency identified an additional four documents falling within the terms of the Applicant's FOI request that it submits are exempt from release in full under section 38 in conjunction with section 43 of the Legal Aid Act. I have also reviewed these documents.

Review of exemption

Section 38 – Documents to which secrecy provisions of enactments apply

12. Section 38 provides:

38 Documents to which secrecy provisions of enactments apply

A document is an exempt document if there is in force an enactment applying specifically to information of a kind contained in the document and prohibiting persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications.

13. Therefore, for a document to be exempt under section 38, three conditions must be satisfied:

- (a) there must be an enactment in force;
- (b) the enactment must be formulated with such precision that it specifies the actual information prohibited from disclosure in the document; and
- (c) the enactment must prohibit persons referred to in the enactment from disclosing the specific kind of information in the document (either absolutely or subject to exceptions or qualifications)

Is there an enactment in force?

14. I am satisfied the Legal Aid Act is an enactment in force for the purpose of section 38.

Does the enactment apply specifically to the kind of information in the documents?

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

16. The Agency applied section 38 in conjunction with section 43(1)(b) of the Legal Aid Act, which provides:

(1) A person to whom this subsection applies shall not without the consent of VLA [Victoria Legal Aid]—

...

- (b) communicate or permit to be communicated to any person other than the legal practitioner acting for the assisted person or give in evidence in a court any information received by VLA or any officer of VLA or by an independent reviewer in relation to an application for legal assistance or the provision of legal assistance.

Penalty: 25 penalty units or imprisonment for 6 months.

17. Under section 43(1AA) of the Legal Aid Act, 'a person' to whom section 43(1)(b) of the Legal Aid Act applies includes a 'a person who is or was':

- (a) the chairperson or another director of the board; or
- (b) the chief executive officer; or
- (c) a member of the community consultative committee; or
- (d) a member of the collaborative planning committee; or
- (e) an independent reviewer; or
- (f) an employee or officer of VLA; or
- (g) a delegate of VLA; or

(h) a person employed by a delegate of VLA.

18. I am satisfied VLA staff are 'persons' under section 43(1AA)(f) of the Legal Aid Act.
19. The phrase 'legal assistance' is defined in section 2 of the Legal Aid Act as 'legal services provided under [the Legal Aid Act] other than by way of duty lawyer services or legal advice.' It is referring specifically to Part V of the Legal Aid Act which regulates the provision of legal assistance.
20. 'Legal advice' is defined in section 2 of the Legal Aid Act to mean 'advice on matters of law given by an Australian lawyer and includes assistance in preparing an application for legal assistance and in furnishing information required for that purpose'.
21. The term 'information' has been interpreted to include both documents received in relation to an application for legal assistance or the provision of legal assistance and any other information received in relation to the same matters.¹
22. The Victorian Civil and Administrative Tribunal (**VCAT**) has accepted section 43 of the Legal Aid Act is an enactment on the kind covered by section 38.²
23. VCAT has interpreted the words 'in relation to' in section 43 of the Legal Aid Act broadly.³
24. More recently, VCAT has interpreted the phrase 'in relation to' less broadly. In *Marke v Victorian Police FOI Division*⁴ VCAT considered section 194(1)(b) of the *Independent Broad-based Anti-corruption Commission Act 2011 (IBAC Act)*, which restricts access under the FOI Act to a document that discloses information that 'relates to... an investigation conducted under [the IBAC Act].' VCAT found that the section only prohibited disclosure of documents relating to an investigation actually conducted by IBAC pursuant to the processes and powers under the IBAC Act, and not an investigation conducted by a third party to whom IBAC refers a complaint.⁵ In light of this decision, I consider that section 43 of the Legal Aid Act should not be interpreted overly broadly.
25. In summary, section 43(1)(b) of the Legal Aid Act is directed toward maintaining the confidentiality of information received by any officer of the VLA or by an independent reviewer in relation to an application for legal assistance or provision of legal assistance.
26. Therefore, I must consider whether the exempted documents contain information of the kind described in section 43(1)(b) of the Legal Aid Act.
27. The Agency submits each of the exempted documents contain information in relation to an application for legal assistance and the provision of legal assistance by the independent children's lawyer. The Agency submits:

Victoria Legal Aid manages the appointment of Independent Children's Lawyers (ICL) and the associated grant of legal assistance funding for lawyers professional fees. Upon a referral and request of the Federal Circuit Court and Family Court of Australia (FCFCOA), VLA appoints ICLs in family law parenting matters and provides a corresponding grant of legal assistance to fund the ICL's professional fees and other associated costs.

An ICL is a separate legal representative which has been appointed by a Court (usually the FCFCOA) pursuant to section 68L of the *Family Law Act 1975*. The ICL's role is outlined in section 69LA of the *Family Law Act 1975*. The role of an ICL is to represent the best interest of a child(ren) in family law

¹ *Dixon v Legal Aid* [1999] VCAT 2313.

² *Corrs Chambers Westgarth v Legal Aid Commission of Victoria* (1996) 10 VAR 338; *Dixon v Legal Aid* [1999] VCAT 2313; *Seaman v Victoria Legal Aid (General)* [2008] VCAT 589 at [24]-[25].

³ *Dixon v Legal Aid* [1999] VCAT 2313 citing *Corrs Chambers Westgarth v Legal Aid Commission of Victoria* (1996) 10 VAR 338; *Seaman v Victoria Legal Aid (General)* [2008] VCAT 589 at [26].

⁴ *(Review and Regulation)* [2018] VCAT 1320.

⁵ *Ibid* at [68].

parenting proceedings. An ICL is a party to the court proceedings and although they will consider the views of the children whose interest they represent they are not obliged to follow those views.

... For clarity, the FOI request sought by [Applicant] relates to the ICL appointed to family law parenting proceedings in relation to [pronoun] children. The ICL is a party to the court proceedings and does not represent [Applicant].

28. I note the Applicant's view that section 43(1)(b) of the Legal Aid Act concerns an application for legal assistance and they consider the application was already in existence at the time that a new independent children's lawyer was appointed.
29. The documents subject to review include:
 - (a) various legal aid applications;
 - (b) various letters of approval for legal assistance and transfer of legal assistance;
 - (c) various tax invoices created by the independent children's lawyer for work performed;
 - (d) an internal email concerning a request for an appointment of an independent children's lawyer;
 - (e) a file outcome submitted by the independent children's lawyer;
 - (f) a file note by VLA staff concerning funding for work performed; and
 - (g) emails between VLA and the independent children's lawyer in relation to approval for the appointment of an independent children's lawyer and related funding.
30. I am satisfied the above documents contain information that relates to applications for legal assistance and the provision of legal assistance under Part V of the Legal Aid Act, specifically, information in relation to the approval of an appointment of independent children's lawyer and their provision of legal assistance.
31. Therefore, I am satisfied section 43(1)(b) of the Legal Aid Act applies specifically to the documents subject to review, which contain information received by VLA or any officer of VLA in relation to an application for legal assistance or the provision of legal assistance under Part V of the Legal Aid Act.
32. Accordingly, I am satisfied the second requirement of section 38 is met.

Does the enactment prohibit persons from disclosing the information in the documents?

33. Section 43 of the Legal Aid Act prohibits persons listed in section 43(1AA) from disclosing information in relation to an application for legal assistance or the provision of legal assistance. The provision attaches strict confidentiality measures and prohibitions on disclosure of information pursuant to section 43(1)(b) of the Legal Aid Act.
34. However, I note section 43(1) of the Legal Aid Act permits disclosure of documents of the kind described in section 43(1)(b) where VLA consents.
35. I acknowledge the Applicant's submission as part of their review application. I also accept the Agency's submission that documents, which contain information purely about the Applicant or court documents that the Applicant is entitled to receive, were released to them in accordance with the FOI Act.
36. In relation to documents received by the Agency for the provision of legal assistance or an application for legal assistance, disclosure requires the consent of the Agency to disclose such

information to an applicant. While the Agency's decision letter is silent on the issue of consent, I accept it can be inferred the Agency does not consent to disclosure in this matter.⁶

37. Accordingly, I am satisfied the third condition of section 38 is met, as the enactment prohibits persons from disclosing the information in the documents.

Conclusion in relation to section 38

38. In summary, I am satisfied section 43(1)(b) of the Legal Aid Act is a secrecy provision to which section 38 of the FOI Act applies as:
- (a) the Legal Aid Act is an enactment in force;
 - (b) section 43(1)(b) of the Legal Aid Act identifies, with precision, the type of information to which the prohibition on disclosure applies and the documents contain information of the kind described in section 43(1)(b) of the Legal Aid Act; and
 - (c) section 43(1)(b) of the Legal Aid Act prohibits specified 'relevant persons' from disclosing 'an application for legal assistance or the provision of legal assistance' to which the prohibition applies.
39. Having reviewed the documents and on the information before me, I am satisfied the documents subject to review are exempt under section 38 of the FOI Act in conjunction with section 43(1)(b) of the Legal Aid Act.

Section 25 – Deletion of exempt or irrelevant information

40. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable 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'⁷ 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 25.⁸
42. I have considered the effect of providing the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25. I am satisfied it is not practicable to do so, as deleting the exempt information would render the documents meaningless.

Conclusion

43. On the information before me, I am satisfied the documents are exempt from release in full under section 38 in conjunction with section 43(1)(b) of the Legal Aid Act.
44. Accordingly, my decision is the same as the Agency's decision.

Review rights

45. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian VCAT for it to be reviewed.⁹

⁶ *Gullquist v Victorian Legal Services Commissioner* [2017] VCAT 764 at [81].

⁷ *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].

⁸ *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].

⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

46. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰
47. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹¹
48. 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.
49. 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.¹²

¹⁰ Section 52(5).

¹¹ Section 52(9).

¹² Sections 50(3F) and 50(3FA).