

Notice of Decision and Reasons for Decision

Applicant:	'DY7'
Agency:	Department of Families, Fairness and Housing
Decision date:	25 March 2022
Provisions considered:	Sections 25 and 38 of the FOI Act in conjunction with section 83(1) of the <i>Adoption Act 1984</i> (Vic)
Citation:	'DY7' and <i>Department of Families, Fairness and Housing</i> (Freedom of Information) [2022] VICmr 16 (25 March 2022)

FREEDOM OF INFORMATION – State ward – wardship file – adoption file – personal affairs information – secrecy provision – *Adoption Act 1984* (Vic) – 'relating to an adoption'

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 the review differs from the Agency decision.

I am satisfied the documents are not exempt from release under section 38 of the FOI Act.

Accordingly, access to the documents is granted in full, with exception of Document 4 which is to be released in part with irrelevant information deleted in accordance with section 25.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

25 March 2022

Reasons for Decision

Background to review

1. While a ward of the State, the Applicant was adopted as part of a process undertaken by the Agency.
2. The Applicant requested access to documents on their wardship file, which contains documents about them created prior to their adoption.
3. Following consultation with the Agency, the Applicant amended the terms of their FOI request to:

To obtain my [named centre] Files'

The specific files I seek for the request are:

 - [Named centre] card
 - [Named centre] medical cards
 - [Named centre] register entries
 - Northern Region file
 - Ward index card
4. The [named centre] was a former State-run centre for children admitted into the care of the Victorian Government and operated between 1961 and 1990.
5. The Agency identified documents falling within the terms of the Applicant's request and refused access to the documents in full under section 38 in conjunction with section 83(1) of the *Adoption Act 1984* (Vic) (**Adoption Act**). The Agency's decision letter sets out the reasons for its decision.

Review application

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the documents.
7. I have examined a copy of the documents subject to review
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications and submissions received from the parties, including additional consultation undertaken with the Agency in relation to its interpretation of section 83(1) of the Adoption Act and access to wardship file documents under the FOI Act and via the Adoption Information Service, which now sits within the Department of Justice and Community Safety.
10. 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.
11. 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 exemption

Section 38 – Secrecy provision

12. A document will be exempt under section 38 if the following three requirements are met:
 - (a) there is an enactment in force;
 - (b) the enactment applies specifically to the kind of information in the document subject to review; and
 - (c) the enactment prohibits persons, referred to in the enactment, from disclosing the specific kind of information either absolutely or subject to exceptions or qualifications.
13. For section 38 to apply, an enactment must be formulated with such precision that it specifies the actual information sought to be withheld.
14. The Agency relies on the exemption in section 38 of the FOI Act in conjunction with section 83(1) of the Adoption Act to refuse access to the documents requested by the Applicant.
15. Section 83 of the Adoption Act provides:

83 Restriction on access to reports and records

- (1) Except as provided in this Act—
 - (a) records of or in the possession or under the control of the Secretary or an agency relating to an adoption negotiated or arranged by the Secretary or an agency or any part of such records; and
 - (b) a report to a Court under section 15 or any corresponding previous enactment and the records of a Court of or relating to proceedings (other than an order or decision of a Court) under this Act or any corresponding previous enactment—shall not be made available to, or be open for inspection by, any person.
 - (2) Where, by reason of subsection (1), a report to a Court is not to be made available or open for inspection, a copy of the report or of any part of it shall not be made available or be open for inspection notwithstanding that such a copy or part may be contained in records from which information may be available under this Part.
 - (3) Nothing in this section prevents the Secretary or an approved agency making available to a person who has made application to adopt a child any information referred to in paragraph (a) or (b) of section 84(2) that relates to the application by that person.
16. In summary, section 83(1) of the Adoption Act prohibits disclosure by the Agency of ‘records ... relating to an adoption negotiated or arranged by the Secretary or an agency or any part of such records’.

Is section 83 of the Adoption Act an enactment in force for the purpose of section 38 of the FOI Act?

17. I am satisfied section 83 of the Adoption Act is an enactment in force for the purposes of section 38.
18. Accordingly, the first requirement of section 38 is met.

Does section 83(1) of the Adoption Act describe the protected information with sufficient specificity?

19. The Applicant states the following in their submission:

To confirm, I was adopted formally by law in [year]. The DFFH have placed an adoption act rejection in place when I seek documents in a timeframe that is [time period] prior to actually being adopted. My argument is that I feel the decision made is unfair and unjustified as the documents I seek are in a timeframe significantly separate [sic] from my adoption that took place later in life when I was a child.

...

Each and every person should have the right to know about their medical notes, behavioural notes and general care application from when they were in infant life.

20. In its submission, the Agency states in relation to the nature of the documents on the Applicant's wardship file and their connection to the Applicant's subsequent adoption:

The records directly relate to [their] adoption in that:

- The applicant was adopted as a result of being a ward of the state and therefore the records of [their] wardship are relevant to the adoption.
- Wardship records are relied on in the adoption process to understand the circumstances of the adoptee and to match the adoptee with prospective adoptive parents.

21. I have carefully considered the documents to which the Applicant seeks access on their wardship file and the Agency's interpretation of section 83 of the Adoption Act.

22. I have also considered the Agency's submission and further consultation between OVIC and the Agency from which I understand its position is:

- (a) the Applicant's wardship file relates to their adoption as the Agency relied on records in the wardship file as part of the adoption process 'to understand the circumstances of the adoptee and to match the adoptee with prospective adoptive parents'; and
- (b) the wardship file is subject to section 83(1) of the Adoption Act and prohibited from disclosure by virtue of the Applicant having been a ward of the State and being subsequently adopted through an Agency adoption process.

23. I do not agree with the Agency's interpretation of section 83(1) of the Adoption Act nor that it applies in the circumstances of this particular matter for the following reasons:

- (a) The Applicant was a ward of the State. I understand the Agency would have created a wardship file in relation to the Applicant and its involvement with them as a child.
- (b) The documents subject to review are personal medical records of the Applicant created when they were a ward of the State and held on their wardship file.
- (c) While a ward of the State, the Applicant was adopted with the involvement of the Agency. The requested documents were created prior to their adoption and the related adoption process.
- (d) The Agency holds a separate wardship file and adoption file for the Applicant.
- (e) I acknowledge the Agency's submission regarding the relationship between a person being a ward of the State and subsequently being adopted through an Agency adoption process.
- (f) In making arrangements for their adoption, I accept the Agency may have consulted or relied on information in the Applicant's wardship file. For example, to obtain information about their personal history. However, there is no evidence before me, other the Agency's submission

about a general process that the specific documents subject to review were considered or relied upon by the Agency in relation to the Applicant's adoption process.

- (g) Therefore, I do not accept all documents created while a person is a ward of the State relate to their subsequent adoption or related adoption process. In my view, such an interpretation of section 83(1) of the Adoption Act is overly broad.
- (h) In this case, I consider the Applicant's personal medical records on their wardship file are different from documents that would be more closely related to the Applicant's adoption and adoption process. For example, a report created by the Agency for the adoption process that provides a summary or assessment of an adoptee's family background and personal medical history.
- (i) I accept the phrase 'relating to' is generally interpreted to apply broadly. However, I do not accept it is intended by Parliament for a document to be subject to the prohibition on disclosure under section 83(1) of the Adoption Act merely on the basis it may have been viewed or placed on or with a ward's adoption file or viewed or considered as part of the Agency's adoption process.
- (j) If one accepts the Agency's broad interpretation of section 83(1) of the Adoption Act, it follows that had the Applicant not been adopted, they would be able to access records on their wardship file under FOI. But, as they were adopted, they are prohibited from obtaining access to documents on their wardship file that were created prior to their adoption under the FOI Act.
- (k) The Agency's interpretation and application of section 83(1) of the Adoption Act in this matter means that any document on the Applicant's wardship file would be subject to the prohibition in section 83(1) of the Adoption Act. I do not agree that such an outcome is consistent with the intention and proper interpretation of section 83(1) of the Adoption Act.
- (l) Further, in the event the Agency keeps a person's wardship file together with, or combines it with the person's adoption file for administrative purposes, I do not consider this creates a sufficient nexus between these two separate files such that the wardship file (as a whole) falls within the ambit of section 83(1) of the Adoption Act.
- (m) I acknowledge the Applicant is able to obtain access to their wardship file via the Adoption Information Service, which is facilitated by the Department of Justice and Community Safety.¹ However, I do consider this alternative means of access extinguishes the Applicant's right to access documents on that file under FOI where the documents are not exempt from release, as I consider is the case based on the documents subject to review.

24. Accordingly, I am satisfied the documents subject to review are not subject to the prohibition on disclosure under section 83(1) of the Adoption Act, and the second requirement of section 38 is not met.

25. Therefore, I am satisfied the documents are not exempt from release under section 38 of the FOI Act.

Section 25 – Deletion of irrelevant information

26. 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.

27. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'² and the effectiveness of the deletions. Where

¹ See Department of Justice and Community Safety, 'I was adopted' at <https://www.justice.vic.gov.au/your-rights/adoption/i-was-adopted>.

² *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].

deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.³

28. Document 4 is a register of admissions and discharges for the Allambie Reception Centre. It contains the Applicant's personal affairs information and that of other children.
29. Having considered the terms of the Applicant's FOI request, I am satisfied they seek access to information in their wardship file to the extent it concerns them only. In my view, the entries concerning children other than the Applicant is irrelevant information for the purposes of section 25.
30. I am satisfied it would be practicable to edit this document to delete the irrelevant information in accordance with section 25. Accordingly, access to Document 4 is granted in part.

Conclusion

31. On the information before me, I am satisfied the documents are not exempt from release under section 38 of the FOI Act.
32. Accordingly, access to the documents is granted in full, with exception of Document 4 which is to be released in part with irrelevant information deleted in accordance with section 25.
33. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

34. 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.⁴
35. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁵
36. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁶
37. 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.
38. 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.⁷

When this decision takes effect

39. My decision does not take effect until the Agency's 14 day review period expires.
40. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

³ *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].

⁴ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁵ Section 52(5).

⁶ Section 52(9).

⁷ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	Undated	[Named centre] Card	2	Refused in full Section 38	Release in full	Section 38: I am not satisfied the document is exempt under section 38 in conjunction with section 38(1) of the Adoption Act for the reasons provided in the Notice of Decision, above. Accordingly, the document is to be released in full.
2.	Undated	[Named centre] File	307	Refused in full Section 38	Release in full	Section 38: See comments for Document 1.
3.	Undated	[Named centre] medical cards	89	Refused in full Section 38	Release in full	Section 38: See comments for Document 1.
4.	[date range]	[Named centre] register entries	6	Refused in full Section 38	Release in part Entries concerning persons other than the Applicant is irrelevant information that is to be deleted in accordance with section 25.	Section 38: See comments for Document 1. Section 25: Entries concerning persons other than the Applicant is irrelevant information that is to be deleted in accordance with section 25. I am satisfied it is practicable to edit this document to delete irrelevant information in accordance with section 25. Accordingly, access to the document is granted in part.
5.	Undated	[Named centre] File	106	Refused in full Section 38	Release in full	Section 38: See comments for Document 1.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
6.	Undated	Northern Region File	34	Refused in full Section 38	Release in full	Section 38: See comments for Document 1.
7.	[date]	Ward index card	2	Refused in full Section 38	Release in full	Section 38: See comments for Document 1.