

Notice of Decision and Reasons for Decision

Applicant:	'EP1'
Agency:	Department of Families, Fairness and Housing
Decision date:	15 June 2022
Exemptions considered:	Sections 31(1)(a), 33(1)
Citation:	'EP1' and Department of Families, Fairness and Housing (Freedom of Information) [2022] VICmr 164 (15 June 2022)

FREEDOM OF INFORMATION – Child Protection records – parent request for information relating to child – Client Report Information System (CRIS) – case note

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 a document requested by the Applicant under the FOI Act.

My decision on the Applicant's request is the same as the Agency's decision in that I am satisfied the document is exempt from release in full under sections 31(1)(a) and 33(1).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

15 June 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency, which was subsequently clarified to seek access to the following documents:

...the following from the child protection documents of [name], born [date]:

- the meeting minutes of a video conference call between myself and [Name] and [Name] on [date];
- the case notes of a phone call between myself and [Name] and/or [Name], dated [date].

2. The Agency identified one falling within the terms of the Applicant's request and decided to refuse access to the document in full. The Agency relied on the exemptions under sections 31(1)(a) and 33(1) to refuse access to the document. The Agency's decision letter sets out the reasons for its decision.

Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have examined a copy of the document subject to review.
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 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.

Adequacy of search complaint

9. Alongside their review application, the Applicant raised concerns that a document was not located in response to point 2 of their request.
10. In accordance with section 61B(3), OVIC determined to address these concerns as part of this review.
11. The Agency submitted that no records were made relating to point 2 of the Applicant's request.
12. Without any further information, I do not consider further enquiries are required into the Applicant's complaint under the FOI Act. Rather, I am satisfied the Applicant's key concerns go primarily to the integrity of the Agency's recordkeeping processes rather than the adequacy of the document searches undertaken by the Agency's FOI unit.

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 *Children, Youth and Families Act 2005 (Vic) (CYF Act)*.
14. Child Protection files come into existence when the Agency is notified or becomes aware of a child that 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 an important and significant one. The scheme 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 notifies the Agency about any child protection concerns (**notifiers**) and any subsequent Agency investigations into or action taken to address any such 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 to ensure the confidentiality of notifiers when making sensitive notifications to the Agency in the interests of protecting a child or children from harm or possible harm.
20. Therefore, when a person who has been involved with Child Protection or is 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.
21. Lastly, while Child Protection records are kept in the name of the relevant child, the manner in which the Agency collects and records information generally concerns the child's family unit. This means records often contain information regarding any protective interventions for a sibling group and information relating to a particular child is intertwined with information concerning other persons, such as siblings or family members.

Review of exemptions

Section 31(1)(a) – Disclosure of documents that would prejudice the enforcement or proper administration of the law

22. Section 31(1)(a) provides a document is exempt if its disclosure under this 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. Section 31(1)(a) is subject to other provisions in section 31.

23. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.¹
24. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.²
25. 'In a particular instance' does not require a single specific investigation. This phrase can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of law.³
26. 'Proper administration of the law' includes the manner in which the law is administered, including regulatory, monitoring and compliance activities.⁴
27. The Agency submits disclosure of the document would be reasonably likely to prejudice the investigation of an actual or potential breach of the law and would be reasonably likely to prejudice the enforcement or proper administration of the law in a particular instance.
28. In this regard, the Agency submits:

The *Children, Youth and Families Act 2005* (CYF Act) imposes upon the department certain rights and obligations regarding making decisions for the protection of vulnerable Victorian children via the child protection system. Investigations carried out by Child Protection pursuant to the CYF Act often amount to a monitoring of compliance with the provisions of the law, including potential breaches of the law. Many clients have a long history of child protection involvement, so it is important to consider the potential for future and ongoing matters.

The department is required to comply with a number of statutory obligations either specifically related to children or as part of its broader legislative responsibilities. The most important statutory obligation is the requirement to always put the interests of the child above those of any other party. This is known as the Paramountcy Principle and forms the basis of the department's responsibilities under the CYF Act.

The Principle is also enshrined in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (The Charter) and requires public authorities to always give priority to the best interests of the children when interpreting legislation or making decisions affecting children. Significantly, The Charter requires, inter alia, public authorities, including OVIC and the VCAT, to consider the best interests of the child, even when a consequence is the nullification of other rights or interests.

There are also strict confidentiality provisions in the CYF Act and the inclusion of imprisonment as a penalty for a breach indicates the gravity given to the need to preserve the integrity of information in the child protection context.

In relation to the first limb, the document has been created as a result of protective concerns being raised for the applicant's child. Therefore, the document relates to the investigation of a breach or potential breach of the law.

...

In relation to the second limb, the department submits that context and content of the recording of information in the document should be viewed as part of the enforcement and administration of the CYF Act, and that release of the document would be reasonably likely to prejudice the department's enforcement or proper administration of the CYF Act in relation to the child.

Should certain information be released there is a risk that methods and processes employed by the department during child protection investigations would be exposed. This would impede the

¹ *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363 at [65], quoting *Binnie v Department of Agriculture and Rural Affairs* [1989] VR 836.

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

³ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

⁴ *Ibid* at [23]; *Croom v Accident Compensation Commission* (1989) 3 VAR 441, affirmed on appeal [1991] VicRp 72; [1991] 2 VR 322

department's ability to properly administer the various obligations and duties imposed pursuant to the CYF Act.

29. I am satisfied the document was 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.
30. 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.
31. I acknowledge the Applicant's personal interest in obtaining access to the requested document. 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.
32. Accordingly, I am satisfied the document is exempt under section 31(1)(a).

Section 33(1) – Documents affecting personal privacy of third parties

33. A document is exempt under section 33(1) if two conditions are satisfied:
 - (a) disclosure of the document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant (a **third party**);⁵ and
 - (b) such disclosure would be 'unreasonable'.

Does the document contain personal affairs information of individuals other than the Applicant?

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.⁶
35. A document will disclose a third party's personal affairs information if it is capable, either directly or indirectly, of identifying that person. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.⁷
36. I am satisfied the document contains the personal affairs of third parties as well as the Applicant. Further, I am satisfied the personal affairs information of the Applicant is intertwined with the personal affairs information of third parties.

Would disclosure of the personal affairs information be unreasonable?

37. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
38. In *Victoria Police v Marke*,⁸ the Victorian Court of Appeal held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others'. Further, the exemption under

⁵ Sections 33(1) and 33(2).

⁶ Section 33(9).

⁷ *O'Sullivan v Department of Health and Community Services (No 2)* [1995] 9 VAR 1 at [14]; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].

⁸ [2008] VSCA 218 at [76].

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 The Court further held, '[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 by a lesser or greater degree'.¹⁰

39. I note the Agency's advice in relation to the records:

The child is the client of the department and therefore, child protection records are in the name of the child they relate to, not in the name of the family or parents.

40. In relation to the application of section 33(1), the Agency submits:

The department's primary consideration is the protection of the child's interests and privacy. This is especially so in circumstances where a child does not currently have capacity to defend those rights him or herself.

Relevant factors in determining the reasonableness of the release of a child's personal information to a third party include the department's statutory obligations to children. The department submits that its responsibilities to children has the effect of restricting access to child protection documents and furthermore, the obligations are such that a refusal to grant access is the right and preferable decision under the FOI Act.

As discussed above the department has the obligation to:

1. always put the best interests of the child first, before any other interests (paramountcy principle);
2. consider the department's statutory obligations; and
3. consider the safety and wellbeing of the child.

41. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:

a. The nature of the personal affairs information

The personal affairs information relates to Child Protection matters. I consider this information is sensitive and personal in nature. As stated above, the personal affairs information relates primarily to third parties. I note the document also contains information about the Applicant but this is intertwined with the personal affairs information of third parties.

b. The circumstances in which the information was obtained

The Agency obtained the information in carrying out its Child Protection functions under the CYF Act. I accept such information is ordinarily provided to the Agency on the understanding it will remain confidential unless limited exceptional circumstances require it to be disclosed. Further, individuals who provide information to the Agency in such circumstances would not expect information they provide to the Agency will be released under the FOI Act.

c. The Applicant's interest in the information

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

⁹ Ibid.

¹⁰ Ibid at [79].

applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable under section 33(1).¹¹

I note the Applicant's strong interest in the document as it relates to their child and their stated purpose of providing it to [entity] - [additional contextual information redacted].

However, as submitted by the Agency, Child Protection records are kept in the child's name and belong to them. The Agency is obligated to maintain those records in the strictest confidence.

[Redacted]

d. Whether any public interest would be promoted by release of the personal affairs information

I consider there is an interest shared by the wider community that persons who have had involvement with Child Protection are able to obtain access to as much information as possible in relation to that involvement.

While the public interest in transparency and accountability of official action is a matter to which I give significant weight, in the context of seeking personal and sensitive information under the FOI Act, which relates to not only the Applicant, but also to other individuals whose personal affairs information appear in the document, I must balance the public interest in access to official information against protecting the privacy of those third parties.

For these reasons, I consider the public interest in the Agency preserving the confidentiality of information it receives from third parties and any information that could identify the providers of this information, outweighs the Applicant's personal interest in seeking disclosure of all information held by the Agency regarding their child's involvement with Child Protection.

e. The likelihood of disclosure of information, if released

The nature of disclosure under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document as they choose once it is released.¹²

Accordingly, I have considered the likelihood of the personal affairs information in the document being further disseminated, if disclosed, and the effects broader disclosure of this information would have on the privacy of the relevant third parties.

While I note the only information before me is that the Applicant intends to provide the document to [entity], and that in those circumstances it would not be further disseminated, I must consider that the document is sensitive and any distribution of the information contained therein is likely to cause stress and anxiety to third parties.

f. Whether the individuals to whom the information relates object, or would be likely to object, to the release of the information

In deciding whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, an agency must notify that person (or their next of kin, if deceased) an FOI request has been received for documents containing their personal information and seek their view as to whether disclosure of the document should occur.¹³ However, this obligation does not arise if:

¹¹ Ibid at [104].

¹² Ibid at [68].

¹³ Section 33(2B).

- (i) the notification would be reasonably likely to endanger the life or physical safety of a person, or cause them undue distress, or is otherwise unreasonable in the circumstances;
- (ii) the notification would be reasonably likely to increase the risk to the safety of a person experiencing family violence; or
- (iii) it is not practicable to do so.¹⁴

I agree consultation was not practicable in the circumstances, given notification would likely cause undue distress.

g. Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person¹⁵

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.¹⁶ I cannot discount this factor in this decision.

(a) Whether the disclosure would increase the risk to a primary person's safety from family violence¹⁷

In determining whether disclosure of information relating to the personal affairs of any person in a document would be unreasonable, section 33(2AB) requires if:

- (a) the request is made to an agency that is an information sharing entity or an authorised Hub entity, or to a Minister for access to an official document of an agency that is an information sharing entity or an authorised Hub entity; and
- (b) the document contains information relating to the personal affairs of the person making the request; and
- (c) the person making the request is a person of concern, or a person who is alleged to pose a risk of committing family violence—

in deciding whether the disclosure would involve the unreasonable disclosure of information relating to the personal affairs of any person, the agency or Minister must also take into account whether the disclosure would increase the risk to a primary person's safety from family violence.

Accordingly, I must consider whether disclosure of the relevant documents would increase the risk to the safety of a 'primary person'¹⁸ from family violence.

In this case, I am satisfied disclosure of the personal affairs information would not increase the risk to the safety of a primary person from family violence.

42. Following consideration of the above factors, I am satisfied it would be unreasonable to disclose the personal affairs information in the document. It is therefore exempt under section 33(1).

¹⁴ Section 33(2C).

¹⁵ Section 33(2A).

¹⁶ Section 33(2A).

¹⁷ Section 33(2AB).

¹⁸ Section 33(9) provides 'primary person' has the meaning given in section 144E of the *Family Violence Protection Act 2008* (Vic). Section 144E of the *Family Violence Protection Act 2008* (Vic) provides that 'a person is a *primary person* if an information sharing entity reasonably believes that the person may be subjected to family violence'.

Section 25 – Deletion of exempt or irrelevant information

43. 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.
44. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹⁹ 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 25.²⁰
45. I have considered the effect of deleting exempt information from the document. I am satisfied it is not practicable to delete the exempt information in accordance with section 25 as to do so would render the document meaningless.

Conclusion

46. On the information before me, I am satisfied the document is exempt from release under sections 31(1)(a) and 33(1).
47. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, access to the document is refused in full.

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.²¹
49. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²²
50. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²³
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.²⁴

¹⁹ *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].

²⁰ *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].

²¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²² Section 52(5).

²³ Section 52(9).

²⁴ Sections 50(3F) and 50(3FA).