

Notice of Decision and Reasons for Decision

Applicant:	'ET3'
Agency:	Commission for Children and Young People
Decision date:	25 August 2022
Exemption and provision considered:	Sections 25A(5) and 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with section 55 of the <i>Commission for Children and Young People Act 2012</i> (Vic)
Citation:	'ET3' and <i>Commission for Children and Young People</i> (Freedom of Information) [2022] VICmr 203 (25 August 2022)

FREEDOM OF INFORMATION – investigation documents – reportable conduct scheme – children and young people – *Commission for Children and Young People Act 2012* (Vic) – CCYP – *Child Wellbeing and Safety Act 2005* (Vic) – refusal to process request on grounds all documents would be exempt – prohibited disclosure of protected information – secrecy provision

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.

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 FOI request under section 25A(5).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

25 August 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
 1. Any documents, records, correspondence, file notes, computer files pertaining to a report of reportable conduct by [Applicant's name], made to the Commission For Children and Young People by [title] [name], [position title] of [organisation name], (or any other representative of [organisation name]), details of the report of reportable conduct are below:

Date: in or around [dates];

Respondent (person alleged to have engaged in reportable conduct): [Applicant's name]

Complainant: Identity unknown [background information].
 2. Any documents, records, correspondence, file notes, computer files pertaining to a report of reportable conduct by [Applicant's name], by any individual or agency, made at any time relating to the reportable conduct referred to and detailed in paragraph 1 above.
2. The Agency determined any documents falling within the terms of the Applicant's request, should any exist, would be exempt from release under sections 31(1)(a), 31(1)(c), 33(1), 35(1)(b) and 38 of the FOI Act and refused to grant access to the request under section 25A(5). In refusing the request, the Agency was not required to identify any documents relevant to the terms of the request.
3. In relation to the secrecy exemption under section 38, the Agency relies on confidentiality provisions under section 55 of the *Commission for Children and Young People Act 2012* (Vic) (**CCYP Act**) and section 16ZE of the *Child Wellbeing and Safety Act 2005* (Vic) (**CWS Act**).
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. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties.
8. 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.
9. 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)

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:

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

² *Knight v Corrections Victoria* [2010] VSC 338.

- (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?

- 11. The Applicant seeks access to documents relating to a report of reportable conduct involving the Applicant under the reportable conduct scheme set out in Part 5A of the CWS Act (**Reportable Conduct Scheme**).
- 12. The Reportable Conduct Scheme is based on several fundamental principles, including the protection of children as the paramount consideration in the context of child abuse or employee misconduct involving a child.³
- 13. I am satisfied the essential nature or character of the documents, as described by the Applicant, is apparent from the terms of the request.
- 14. Accordingly, I am satisfied the first limb of section 25A(5) is met.

Would all requested documents be exempt from release?

- 15. In refusing access under section 25A(5), the Agency determined any documents, should they exist, would be exempt under sections 31(1)(a), 31(1)(c), 33(1), 35(1)(b) and section 38 of the FOI Act in conjunction with section 55 of the CCYP Act and section 16ZE of the CWS Act.

Section 38 – Documents to which secrecy or confidentiality provisions apply

- 16. A document is exempt under section 38 if:
 - (a) there is an enactment in force;
 - (b) that applies specifically to the kind of information contained in the documents; and
 - (c) the enactment must prohibit persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).
- 17. 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.
- 18. As stated above, the Agency relies on section 38 in conjunction with section 55 of the CCYP Act to refuse access to the documents.

³ CWS Act, section 16B(1)(a).

19. Section 55 of the CCYP Act provides:

55 Disclosure of information prohibited

A person who is or has been a relevant person must not disclose to any other person, whether directly or indirectly, any protected information except to the extent necessary to—

- (a) perform functions or exercise powers under this Act or under any other Act; or
- (b) give information that he or she is expressly authorised, permitted or required to give under this Act or under any other Act.

Penalty: 60 penalty units.

20. 'Relevant person' is defined in section 54 of the CCYP Act and provides:

In this Part –

...

relevant person means –

- (aa) the Principal Commissioner;
- (a) a Commissioner; or
- (b) a delegate of the Commission; or
- (c) an authorised person; or
- (d) a member of the staff of the Commission.

21. 'Protected information' is defined in section 54 of the CCYP Act and provides:

protected information means information acquired by a relevant person under this Act or under Part 5A of the **Child Wellbeing and Safety Act 2005** by reason of being a relevant person.

22. Unauthorised disclosure of 'protected information' under the CCYP Act is an offence subject to a penalty under the CCYP Act, as set out above. The financial penalty associated with the confidentiality provision highlights Parliament's intention that such information be protected and not disclosed, except in limited circumstances.

23. I am satisfied the Agency, including its Commissioners and staff, are each a 'relevant person' for the purpose of section 55 of the CCYP Act.

24. I am satisfied section 55 of the CCYP specifically prohibits the Agency from disclosing the 'protected information'.

25. Accordingly, I must decide whether the information the Applicant seeks is 'protected information' within the meaning of the CCYP Act based on the information before me and without viewing the requested documents.

26. In summary, section 54 of the CCYP Act protects the following two classes of 'protected information':

- (a) information acquired by a relevant person under the CCYP Act; and
- (b) information acquired by a relevant person under Part 5A of the CWS Act.

27. In relation to the first class of information, being information acquired by a relevant person under the CCYP Act, I am not satisfied this class of information is specific enough to be exempt under section 38.

28. The CCYP Act creates the Agency and sets out its functions and powers. These include specific functions in Parts 3 and 4 of the CCYP Act, such as reviewing and reporting on the Working with

Children Scheme and monitoring out of home care services for children. It also includes quite general functions in section 8, such as promoting the interests of vulnerable children and providing policies, practices and services relating to vulnerable children. I am satisfied this class of information is not specific enough to fall within the scope of the secrecy provision in section 55 of the CCYP Act.

29. In relation to the second class of information, being information acquired under Part 5A of the CWS Act, I am satisfied this class of information is specific enough to fall within the scope of the secrecy provision in section 55 of the CCYP Act.
30. Part 5A of the CWS Act sets out the reportable conduct Scheme and deals with specific and sensitive information, such as reportable allegations against employees, personal details of employees, detailed information about reportable allegations, evidence gathered, written submissions and the outcome of reportable allegations.
31. Section 16D of the CWS Act provides the Agency is responsible for administering, overseeing and monitoring the Reportable Conduct Scheme.
32. I acknowledge the Applicant is of the view the allegations are not 'reportable allegations' under the Reportable Conduct Scheme as an investigation has not taken place, and because of this view, the Agency is not entitled to rely on section 55 of the CCYP Act.
33. Section 3 of the CWS Act defines 'reportable allegations' as:
 - any information that leads a person to form a reasonable belief that an employee has committed—
 - (a) reportable conduct; or
 - (b) misconduct that may involve reportable conduct—whether or not the conduct or misconduct is alleged to have occurred within the course of the person's employment;
34. Section 16M of the CWS Act requires an entity to inform the Agency within three business days after becoming aware of a reportable allegation that a reportable allegation has been made, and to provide the Agency within 30 days of becoming aware of the reportable allegation detailed information about the reportable allegation.
35. Having considered the submissions provided by the Applicant and the Agency, and the information before me, I am satisfied:
 - (a) information regarding the allegation made against the Applicant and any report of reportable conduct involving them under the Reportable Conduct Scheme falls within the definition of 'protected information' under section 55 of the CCYP Act, irrespective of whether any investigation of the alleged conduct took place; and
 - (b) the 'protected information' was acquired by the Agency in the course of carrying its functions under the CWS Act, including administering, overseeing and monitoring the Reportable Conduct Scheme.

Do any exceptions apply to the prohibition?

36. Section 55 of the CCYP Act provides 'protected information' may be disclosed in the following circumstances:
- (a) for a relevant person to perform functions or exercise powers under the CCYP Act or under any other Act; or
 - (b) to the extent necessary to give information a relevant person is expressly authorised, permitted or required to give under the CCYP Act or under any other Act.
37. The CWS Act permits the Agency to disclose certain protected information.
38. Section 16ZB of the CWS Act provides:

16ZB Disclosure of information about investigations to children, parents and carers

- (1) This section applies to the following information in relation to an investigation conducted under section 16N or 16O—
 - (a) information about the progress of the investigation;
 - (b) the findings, reasons for the findings and the recommendations made at the conclusion of the investigation;
 - (c) any action taken in response to those findings.
 - (2) The Commission, the head of an entity or a regulator may disclose the information referred to in subsection (1) to—
 - (a) the child in relation to whom an employee of an entity is alleged to have committed reportable conduct or misconduct that may involve reportable conduct; or
 - (b) a parent (within the meaning of the **Children, Youth and Families Act 2005**) of the child; or
 - (c) the Secretary to the Department of Health and Human Services if the Secretary has parental responsibility for the child; or
 - (d) a person who has daily care and control of the child, whether or not that care involves custody of the child; or
 - (e) if the child is in out of home care (within the meaning of the **Children, Youth and Families Act 2005**), the out of home carer (within the meaning of section 74 of that Act) who provides that care.
 - (3) Nothing in this section limits any disclosure that may otherwise be made under any Act or law.
39. In my view, section 16ZB of the CWS Act permits certain protected information to be disclosed at the Agency's discretion. As such, I am not satisfied this section is impacted by the operation of the FOI Act such that it provides for disclosure of the 'protected information' in accordance with the FOI Act. Further, I am not satisfied the Applicant falls into any category referred to in section 16ZB of the CWS Act.
40. Section 16B of the CWS Act sets out the principles of the CWS Act. In particular, section 16B(1)(g) states the 'reportable conduct scheme is based on the fundamental principles that ... information should be shared during and after the conclusion of an investigation into a reportable allegation'.
41. The CWS Act was amended to introduce the Reportable Conduct Scheme by the *Children Legislation Amendment (Reportable Conduct) Act 2017* (Vic).

42. The clause notes in the Explanatory Memorandum for the Children Legislation Amendment (Reportable Conduct) Bill 2016 state:

Part 1- Preliminary

Clause 1

.....

The scheme will require information to be shared, as necessary, with the Commission for Children and Young People, regulators, Victoria Police, the head of an entity, the Secretary to the Department of Justice and Regulation (for the purpose of assessing or reassessing whether an employee may hold a working with children check) and any other prescribed person or body.

.....

Part 2- Amendment of the Child Wellbeing and Safety Act 2005

.....

Clause 6 inserts a new Part 5A into the Principal Act which includes new sections 16A to 16ZN. The new Part establishes the reportable conduct scheme.

....

New section 16B provides for the principles which are to guide the operation of the reportable conduct scheme, including any action that is taken, or decision that is made, under the reportable conduct scheme.

Subclause (1) provides the fundamental principles upon which the reportable conduct scheme is based.

...

They also include that persons and bodies involved in the scheme should share information and work in collaboration to ensure fair, effective and timely investigations, and ensure employees being investigated are afforded natural justice.

43. I am not satisfied section 16B(1)(g) of the CWS Act provides for an exception requiring 'protected information' to be shared with employees being investigated. Part 5A of the CWS Act includes exceptions, such as those set out in section 16ZB of the CWS Act, and also in section 16ZC which allow for information sharing between the Agency, the head of an entity and a regulator. However, these sections of the CWS Act do not expressly state that 'protected information' is to be disclosed to employees or individuals who are the subject of the reportable conduct.
44. I acknowledge certain information sought by the Applicant may relate to the Applicant's own personal affairs information. However, the secrecy provision in section 55 of the CCYP Act does not contain an exception with words to the effect of 'with the prior consent in writing of the person to whom the information relates'.⁴ Therefore, I am not satisfied an exception exists allowing the Applicant's FOI request to be 'consent' for the purposes of the exception in section 55 of the CCYP Act.
45. There is no information before me to suggest any of the other exceptions under section 55 of the CCYP Act or any other legislation apply in the circumstances.
46. Therefore, I am satisfied no exceptions under the CCYP Act or under any other legislation apply and in the event the Agency were to disclose the requested documents to the Applicant, it would be doing so in breach of section 55 of the CCYP Act.
47. Accordingly, on the information before me, I am satisfied:
- (a) the CCYP Act is an enactment in force for the purposes of section 38;
 - (b) all documents sought by the Applicant would constitute or contain 'protected information' within the meaning of section 54 of the CCYP Act;

⁴ *Victorian Legal Services Commissioner v Grahame (No 2)* (Review and Regulation) [2019] VCAT 1878.

- (c) the CCYP Act prohibits persons (in this case Agency officers and Commissioners) from disclosing the 'protected information'; and
- (d) the prohibition on disclosure is not subject to any of the exceptions under section 55 of the CCYP Act or any other part of the CCYP Act or any other legislation.

48. Therefore, I am satisfied all documents sought by the Applicant would be exempt from release under section 38 of the FOI Act in conjunction with section 55 of the CCYP Act.

49. Accordingly, I am satisfied the second limb of section 25A(5) is met.

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

50. 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.

51. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁵ and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable', and release of an edited copy of a document is not required under section 25.⁶

52. I am satisfied the Agency would be unable to provide an edited copy of the requested documents in accordance with section 25, as all information to which the request relates would be exempt by virtue of section 38 of the FOI Act in conjunction with section 55 of the CCYP Act.

53. Accordingly, I am satisfied the third limb of section 25A(5) is met.

Conclusion

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

- (a) the exempt nature of the documents is apparent from the Applicant's FOI request, that is, the documents sought would be exempt from release under section 38 of the FOI Act in conjunction with section 55 of the CCYP Act;
- (b) all documents sought by the Applicant would be exempt for that reason; and
- (c) there is no capacity for the Agency to provide an edited copy of the documents in accordance with section 25.

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

56. As I have determined the documents sought by the Applicant, should any exist, would be exempt from release under section 38 of the FOI Act in conjunction with section 55 of the CCYP Act, it is not necessary for me to consider the other exemptions upon which the Agency relies.

⁵ *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].

⁶ *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].

Review rights

57. 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.⁷
58. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸
59. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁹
60. 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.
61. 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

⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁸ Section 52(5).

⁹ Section 52(9).

¹⁰ Sections 50(3F) and 50(3FA).