

Notice of Decision and Reasons for Decision

Applicant:	'FO6'
Agency:	Department of Education
Decision date:	5 February 2024
Section and provision considered:	Section 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with section 16ZE of the <i>Child Wellbeing and Safety Act 2005</i> (Vic)
Citation:	'FO6' and Department of Education (Freedom of Information) [2024] VICmr 19 (5 February 2024)

FREEDOM OF INFORMATION – school records – close circuit television (CCTV) – incident involving a child – parent seeking access to information concerning incident involving their child – secrecy provision – *Child Wellbeing and Safety Act 2005* (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 on the Applicant's request is the same as the Agency's decision, in that I am satisfied the documents are exempt from release.

I am satisfied the documents are exempt from release under section 38 of the *Freedom of Information Act 1982* (Vic) in conjunction with section 16ZE of the *Child Wellbeing and Safety Act 2005* (Vic).

As 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, I have determined to refuse access to the documents in full.

My reasons for decision follow.

For information about further review rights through the Victorian Civil and Administrative Tribunal, please refer to the end of this decision.

Joanne Kummrow
Acting Information Commissioner

Reasons for Decision

Background to review

1. The Applicant's legal representative made a request to the Agency seeking access to:
 1. A copy of all CCTV video footage in relation to the incident involving [name] and [name] ...
 2. A copy of the report from [business undertaking] dated [date] relating to the incident which was sent to the Commission for Children and Young People.
 3. A copy of the report from [business undertaking] dated [date] relating to the incident which was sent to the Commission for Children and Young People.
2. The Agency identified two documents, being CCTV footage, that fell within the terms of the Applicant's request and refused access to the documents in full under section 33(1). The Agency in its decision stated the reports sought by the Applicant were not held by the Agency. 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 documents 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. During the review, the Agency submitted the documents are also exempt from release under section 38 of the FOI Act in conjunction with section 16ZE of the *Child Wellbeing and Safety Act 2005* (Vic) (**CWS Act**).
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 exemptions

Section 38 – Documents to which secrecy provisions of enactments apply

10. 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.

11. Therefore, for a document to be exempt from release 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?

12. I am satisfied the CWS Act is an enactment in force for the purposes of section 38.

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

13. 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.

14. Section 16ZE of the CWS Act provides:

- (1) A person must not publish, or cause to be published, any information that would enable the identification of a person who has notified the Commission of—

- (a) a reportable allegation; or
- (b) a concern that reportable conduct has occurred.

Penalty: In the case of a body corporate, 300 penalty units;

In any other case, 60 penalty units.

- (2) A person must not publish, or cause to be published, any information that would enable the identification of a child in relation to whom—

- (a) a reportable allegation was made; or
- (b) a finding of reportable conduct was made.

Penalty: In the case of a body corporate, 300 penalty units;

In any other case, 60 penalty units.

- (3) Subsections (1) and (2) do not apply to the publication of information permitted by or under any other Act.

- (3A) Subsections (1) and (2) do not prevent a disclosure that is made for the purposes of Part 5A of the **Family Violence Protection Act 2008** by an information sharing entity (within the meaning of that Act).

(3B) Subsections (1) and (2) do not prevent a disclosure that is made for the purposes of Part 6A by an information sharing entity or a restricted information sharing entity.

(4) In this section—

publish means disseminate or provide access to the public or a section of the public by any means, including by—

- (a) publication in a book, newspaper, magazine or other written publication; or
- (b) broadcast by radio or television; or
- (c) public exhibition; or
- (d) broadcast or electronic communication.

15. 'Reportable allegation' is defined in section 3 of the CWS Act 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;

16. 'Reportable conduct' is defined in section 3 of the CWS Act as:

- (a) a sexual offence committed against, with or in the presence of, a child, whether or not a criminal proceeding in relation to the offence has been commenced or concluded; or
- (b) sexual misconduct, committed against, with or in the presence of, a child; or
- (c) physical violence committed against, with or in the presence of, a child; or
- (d) any behaviour that causes significant emotional or psychological harm to a child; or
- (e) significant neglect of a child;

17. I am satisfied the information to which the Agency refused access falls within the terms of section 16ZE(2)(a) of the CWS Act.

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

18. I am satisfied section 16ZE prohibits persons from disclosing the information in the documents.

Do any exceptions apply to the prohibition?

19. Sections 16ZE(3), 16ZE(3A) and 16ZE(3B) set out exceptions to subsections (1) and (2) of section 16ZE.

Section 16ZE(3)

20. Section 16ZE(3) states that 'subsections (1) and (2) do not apply to the publication of information permitted by or under any other Act'.

21. I have considered whether the FOI Act is an Act where publication of information is 'permitted' for the purposes of section 16ZE(3).

22. I acknowledge 'publish' is broadly defined in section 16ZE(4) as including to 'disseminate or provide access to the public or a section of the public by any means'.
23. Section 20 of the FOI Act requires agencies to provide access to non-exempt documents in response to a request under section 17. I am satisfied release under the FOI Act constitutes disseminating or providing access to the public.
24. However, when interpreting whether section 16ZE of the CWS Act permits disclosure of information under the FOI Act, I have considered whether Parliament intended the exceptions in section 16ZE of the CWS Act to include disclosure under the FOI Act.¹
25. Section 16ZE was introduced by the *Children Legislation Amendment (Reportable Conduct) Act 2017* (Vic) (**Amending Act**). The purpose of the Amending Act was to establish a reportable conduct scheme whereby allegations of reportable conduct or misconduct would be reported to the Commission for Children and Young People (the **Commission**). In addition, the scheme provides for the oversight by the Commissioner for Children and Young People of investigations of allegations and the administration of the scheme by the Commission. The principles of the scheme are set out in section 16B of the CWS Act. One of these principles is that information should be shared during and after the conclusion of an investigation into a reportable allegation.
26. Having considered the information before me, I am not satisfied Parliament intended the exception in section 16ZE(3) to include release under the FOI Act. Although the Amending Act was designed to increase the sharing of information, I consider it is nominally about creating specific channels for that sharing of information to ensure that the information is communicated as effectively as possible to the persons who need to know, such as the Commissioner for Children and Young People. Therefore, I am not satisfied Parliament intended the exception to include release under the FOI Act.

Section 16ZE(3A)

27. Section 16ZE(3A) states, 'subsections (1) and (2) do not prevent a disclosure that is made for the purposes of Part 5A of the Family Violence Protection Act 2008 by an information sharing entity (within the meaning of that Act)'. The CWS Act was amended to introduce section 16ZE(3A) by legislation that created information sharing regimes in respect of family violence. I am not satisfied the exception in section 16ZE(3) applies in the circumstances of this review.

Section 16ZE(3B)

28. Section 16ZE(3B) states, 'subsections (1) and (2) do not prevent a disclosure that is made for the purposes of Part 6A by an information sharing entity or a restricted information sharing entity'.

¹ *XYZ v Victoria Police* (2010) 33 VAR 1; *Tilley v VicRoads* [2010] VCAT 483.

29. Section 41Y sits under Part 6A of the CWS Act and provides:

41Y Voluntary disclosure to child or person with parental responsibility or with whom child is living

- (1) An information sharing entity may disclose confidential information, other than excluded information, to any of the following persons for the purposes of managing a risk to a child's safety—
 - (a) the child;
 - (b) a person who has parental responsibility for the child;
 - (c) a person with whom the child is living.
- (2) A person to whom confidential information has been disclosed under subsection (1) must not use or disclose that information except for the purposes of managing a risk to the child's safety.
- (3) Nothing in this section limits any disclosure that is required or permitted under any Act or law.

30. Section 3 defines 'confidential information' as:

- (a) health information; or
- (b) personal information; or
- (c) sensitive information within the meaning set out in Schedule 1 to the **Privacy and Data Protection Act 2014**; or
- (d) unique identifiers; or
- (e) identifiers within the meaning of the **Health Records Act 2001**;

31. Section 41Q defines 'excluded information' as:

In this Part, confidential information is *excluded information* if—

- (a) the collection, use or disclosure of that information could be reasonably expected to—
 - (i) endanger a person's life or result in physical injury; or
 - (ii) 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; or
 - (iii) prejudice a coronial inquest or inquiry; or
 - (iv) prejudice the fair trial of a person or the impartial adjudication of a particular case; or
 - (v) disclose the contents of a document, or a communication, that is of such a nature that the contents of the document, or the communication, would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege; or
 - (vi) disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law; or
 - (vii) contravene a court order or a provision made by or under this Act or any other Act that—
 - (A) prohibits or restricts, or authorises a court or tribunal to prohibit or restrict, the publication or other disclosure of information for or in connection with any proceeding; or
 - (B) requires or authorises a court or tribunal to close any proceeding to the public; or

- (viii) be contrary to the public interest; or
 - (b) the information is prescribed to be excluded information for the purposes of this Part.
- 32. In my view, section 41Y of the CWS Act permits certain confidential information to be disclosed by an information sharing entity at its own discretion. As sharing confidential information would be at the Agency's own discretion, and would also be subject to the Agency being an information sharing entity, I am not satisfied this section is impacted by the FOI Act such that it provides for disclosure of any confidential information, including information in section 16ZE(2)(a), being information that would identify a child in relation to whom a reportable allegation was made.
- 33. There is no information before me to suggest that any of the exceptions under sections 16ZE(3), 16ZE(3A) and 16ZE(3B) authorise disclosure of the documents to the Applicant in this instance.
- 34. Therefore, I am satisfied no exceptions under the CWS 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 16ZE(2)(a) of the CWS Act.
- 35. Accordingly, on the information before me, I am satisfied:
 - (a) the CWS Act is an enactment in force for the purposes of section 38;
 - (b) all documents sought by the Applicant would identify a child in relation to whom a reportable allegation was made, as set out in section 16ZE(2)(a) of the CWS Act;
 - (c) the CWS Act prohibits persons (in this case Agency officers) from disclosing the relevant information; and
 - (d) the prohibition on disclosure is not subject to any of the exceptions under section 16ZE of the CWS Act or any other part of the CWS Act or any other legislation.
- 36. 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 16ZE of the CWS Act.
- 37. As I have determined the information in the documents is exempt from release under section 38, I have not considered the exemption under section 33(1).

Section 25 – Deletion of exempt or irrelevant information

- 38. 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.
- 39. 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.

² *Mickelburgh 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].

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

40. I have considered the effect of deleting exempt information from the documents. In my view, it is not practicable for the Agency to delete the exempt information, because deleting the exempt information would render the documents meaningless.

Conclusion

41. My decision on the Applicant's request is the same as the Agency's decision, in that I am satisfied the documents are exempt from release.
42. I am satisfied the documents are exempt from release under section 38 of the FOI Act in conjunction with section 16ZE of the CWS Act.
43. As 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, I have determined to refuse access to the documents in full.

Timeframe to seek a review of my decision

44. If the Applicant 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
45. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁵
46. 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.
47. 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.⁶

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 Sections 50(3F) and 50(3FA).