

Notice of Decision and Reasons for Decision

Applicant:	'BB7'
Agency:	Environment Protection Authority
Decision date:	6 February 2020
Exemption considered:	Section 33(1)
Citation:	'BB7' and Environment Protection Authority (<i>Freedom of Information</i>) [2020] VICmr 21 (6 February 2020)

FREEDOM OF INFORMATION – personal affairs information – map – contamination site – sampling results

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.

I am satisfied the document is exempt in full under section 33(1).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
6 February 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to information relating to [an address]. Specifically:
 - Any contamination or potential contamination including arsenic or mercury;
 - Any Environment Audit overlay proposal, consideration or recommendation;
 - Any planning, overlay or zoning proposal, consideration or recommendation;
 - Any Environmental Audit reports or statements;
 - Any orders or notices issued under the EP Act or relevant regulations;
 - Any remediation request, suggestions, recommendations, assessment or report;
 - Any correspondence or communications with current or past owners or tenants;
 - Any correspondence or communications with [location] Council (or predecessor council; the Shire [name]);
 - Any notices, correspondence or communications between EPA and other government agencies or departments including DELWP (or is predecessor); and
 - Any internal reports, communications, or memos prepared by the EPA.
2. In consultation with the Agency, the Applicant agreed to exclude administrative emails from the scope of the request as well as confirmed the date range for documents was between [a 35-year time period].
3. In its decision, the Agency identified 132 documents falling within the terms of the Applicant's request. It decided to grant access to 16 documents in full, 115 documents in part and refuse access to one document in full.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access. In their review application, the Applicant advised they only sought a review of the document to which access was refused in full.
 5. I have examined a copy of the document subject to review.
 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, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Applicant's submission dated 13 December 2019 and information provided with their review application;
 - (c) the Agency's submission dated 18 February 2019; and
 - (d) all communications between this office and the Applicant and the Agency during the review.
 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
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only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

Review of exemptions

9. The Agency relied on the exemption in section 33(1) to refuse access to the document in full. The Agency's decision letter sets out the reasons for its decision.

Submissions

10. The Applicant provided the following information in their submission:

We act as the legal representatives of client's who live in a property [description of proximity to site]. We have previously provided an authority to the EPA from our clients. The release of Document No. 65 would provide our client's with access to relevant and important information about contamination risks in the area around their home. They do not have alternative means of accessing this information without the cooperation of the EPA.

...

We submit that our clients, who are local residents...have a legitimate purpose and interest in obtaining access to information about contamination and high risk contamination areas near their home that the document may disclose. It is in the public interest that information is accessible, and this is reflected in the objects of the FOI Act...

11. In relation to the application of section 33(1), the Agency submitted the following:

- (a) The document contains a map of residential properties, which include several highlighted properties to indicate those considered high risk locations and where sampling was undertaken.
- (b) The map includes details of sampling points and the results associated with sampling.
- (c) The sampling information dates back to [year] The map was used as part of the [year] project. However, it does not correspond to the map detailing the [year] area of impact.
- (d) While the map may be readily available via current map applications, the additional information on the map, properties highlighted as potential impacted properties, sampling sites and results, is not available to the public.
- (e) It was not practicable to undertake consultation under section 33(2A) because:
 - i. the highly sensitive nature of the issue and the potential to cause stress and anxiety for residents;
 - ii. the intertwined nature of the information makes it difficult to release some of the information without inadvertently disclosing information relating to another individuals' personal affairs; and
 - iii. the difficulty with identifying and contacting the large number of individuals to be consulted under the time constraints to complete the request.

Section 33(1)

12. 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;¹ and
 - (b) such disclosure would be 'unreasonable'.
13. 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 this may be reasonably determined.²
14. In *OS v Mudgee Shire Council (OS decision)*,³ the Administrative Decisions Tribunal of New South Wales held an aerial photograph taken by the Council could be categorised as personal affairs information of the property owner:

Documents which themselves do not contain any obvious features identifying an individual may take on the quality by virtue of the context to which they belong. We accept that the photographs of building works, without more, might not reasonably be said to contain 'information ... about an individual whose identity is apparent or can reasonably be ascertained from the information'. However, if the photographs were taken in circumstances where the identity of the owner of the property was known to the photographer, it might at least be arguable that the photographer (and the organisation to which he or she belonged) knew that the photographs recorded the condition of a property owned by a specific individual. This combination of factors might produce the conclusion that the information as a whole was information to which s 4(1) applied. [emphasis added]

Does the document contain personal affairs information?

15. The document is a map featuring residential properties located [description of proximity to the] site. The map identifies where soil sampling was undertaken and the results of those sampling points.
16. I agree the map contains information already in the public domain. Generally, information that merely records the location of a residence would not be enough information to identify an individual. This is because the term 'personal affairs of a person' suggests a deliberate intention of the legislature to draw a distinction between aspects of a person's private life and information recorded for public purpose.
17. However, for similar reasons indicated in the OS decision, when coupled with additional information (ie. the sampling sites and results), I am of the view this would bring the map and its contents within the ambit of section 33(1)(a), as it provides information concerning the properties of local residents, that are of a private concern to those persons.
18. Further, I note section 33(9) provides information relating to the personal affairs of a person includes their address. The fact the address is 'in the public domain' does not alter that conclusion. As disclosure under the FOI Act is not subject to any restrictions or conditions on further dissemination, this is to be interpreted by the capacity of any member of the public to potentially identify a person.⁴
19. Accordingly, I am satisfied the document contains the personal affairs information of persons other than the Applicant.

¹ Sections 33(1) and (2).

² Section 33(9).

³[2011] NSWADT 230 at [15].

⁴ *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].

Would disclosure of the personal affairs information be unreasonable in the circumstances?

20. The reasonableness of disclosure of personal affairs information of a person may not be apparent from the document itself. Unreasonableness may result because of what the information may reveal in light of other information already be known to the applicant.⁵
21. Considering whether disclosure would be unreasonable involves balancing the public interest in the disclosure of official documents with the personal interest in maintaining personal privacy. This involves having regard to any matter that may 'relevantly, logically, and probatively' bear upon whether disclosure of personal affairs information of any person would be unreasonable in its own context.⁶
22. It is clear from the contents of the document and information provided by the Agency; the document contains sensitive information. Information regarding the contamination of soil will elicit concerns of harm to human health, to the productivity of land and the potential for pollutants to contaminate surface or groundwaters.
23. While I understand the Applicant's submissions and genuine interest in accessing the information on behalf of their client, nevertheless, I must consider the potential of dissemination of information in the documents and the effects of broader disclosure. Specifically, I must consider the effects disclosure would have on [proximity to the site] residents, whose personal affairs information appear in the document, noting the FOI Act does not place any restrictions or limitations on a documents further use, once disclosed.
24. I note the Agency's submission on this point, which highlights the concerns made by residents regarding the contamination issue and the potential for the information, if released, to generate further media attention. I accept such concerns to be real and reasonably based, recognising that generally property values are diminished by the issue of soil contamination. Even in instances where it is found properties are not unduly contaminated, the fact a property was subject to such investigation may, nonetheless, attach an unwarranted stigma that it is a property subject to contamination risk.
25. Therefore, having regard to the sensitivities of the matter, I consider property owners and residents would object to the release of their personal affairs information in the document.
26. The Applicant has raised there is a public interest in disclosure of the document that extends beyond a personal interest in the document, namely, the shared interest in access to official information concerning 'contamination and high risk contamination areas near their home'.
27. I accept the importance of the issues raised by the Applicant; however, I note the Agency's advice that individual property owners, including the Applicant's client, were consulted and offered sampling and guidance advice regarding any contamination involving their property.
28. In deciding whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must take into account whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.⁷ I do not consider this is a relevant factor in the circumstances.
29. However, in weighing the above considerations, I consider the need to protect the personal affairs information of third parties other than the Applicant and their client, outweighs the Applicant's personal interest in obtaining access to this information. Accordingly, I am satisfied disclosure of the

⁵ *Victoria Police v Marke* [2008] VSCA 218 at [94].

⁶ *Ibid* at [98].

⁷ Section 33(2A).

personal affairs information of third parties would be unreasonable in the circumstances and the document is exempt under section 33(1).

Section 25 - Deletion of exempt information

30. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
31. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁸ and the effectiveness of the deletions. Where deletions would render the document meaningless, they are not 'practicable', and release of the document is not required under section 25.⁹
32. During the review, the Applicant advised they are willing to accept an edited version of the document with exempt information deleted. I also note the Agency's submission regarding the intertwined nature of third parties' personal affairs information in the document.
33. I have considered the effect of deleting exempt information from the documents. Having considered the nature of the information and the manner in which it is depicted, I am not satisfied it is practicable to delete exempt information as to do so, would result in release of the map only, devoid of meaning for the Applicant's purpose.
34. Therefore, I am satisfied it is not practicable to delete exempt information in the document in accordance with section 25. Accordingly, the document is exempt under section 33(1) in full.

Conclusion

35. On the information before me, I am satisfied the document is exempt under section 33(1).
36. As I am not satisfied it is practicable to delete exempt information in the document, I have determined to refuse access to the document in full.

Review rights

37. 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.¹⁰
38. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹
39. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
40. 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.
41. 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.¹³

⁸ *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].

⁹ *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].

¹⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹¹ Section 52(5).

¹² Section 52(9).

When this decision takes effect

42. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹³ Sections 50(3F) and (3FA).