

Notice of Decision and Reasons for Decision

Applicant:	'BF9'
Agency:	Department of Environment, Land, Water and Planning
Decision Date:	12 March 2020
Exemptions considered:	Section 33(1)
Citation:	'BF9' and Department of Environment, Land, Water and Planning (Freedom of Information) [2020] VICmr 60 (12 March 2020)

FREEDOM OF INFORMATION – adverse possession claim – personal affairs information of third parties

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 differs from the Agency's decision in that I have decided to release additional information in the documents.

I have decided the documents are not exempt under section 33(1).

As I have determined it is practicable to edit the document to remove irrelevant information in accordance with section 25, I have decided to release the documents in part.

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
12 March 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to documents relating to an adverse possession application made under section 60 of the *Transfer of Land Act 1958* (Vic) (TLA) concerning the Applicant's registered land.
2. In its decision, the Agency identified 12 documents falling within the terms of the Applicant's request. It decided to refuse access to ten documents in full and release two documents administratively outside of the FOI Act.

Review

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 copies 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. 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 application for review dated 23 December 2019;
 - (c) the Applicant's submission dated 5 February 2020;
 - (d) the Agency's submission dated 15 January 2020; and
 - (e) further information provided by the Applicant and Agency during this review.
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.

Scope of review

8. In their review application dated 23 December 2019, the Applicant advised they do not seek access to names and addresses of third parties. Further, the Applicant listed they sought access to the following documents, should they exist:
 1. statutory declaration by the applicant
 2. evidence supporting the deed of assignment from prior possessors to support that the current conditions were in existence during the time that they assigned their rights ([date] to [date])
 3. statutory declaration by the disinterested witness and supporting evidence
 4. statutory declaration by the legal practitioner
9. By telephone on 22 January 2020, the Applicant advised OVIC staff they only seek access to land surveys relied on by the adverse possession applicant in support of their claim and does not seek access to any statutory declarations.

10. By email dated 5 February 2020, the Applicant advised this Office:

I would still like to continue with the formal decision to access the remainder of the documents. Now that I know there is no historical survey they are relying on, I need to understand on what basis DELWP has allowed this application to progress. There must be some other factual evidence such as a photo(s) to substantiate the stat dec made by the [named persons] or any other interest party to back up their claim. I now seek any other evidence used to substantiate the statutory declarations beyond mere words. I still do not seek personal information but rather evidence as required by DELWP's own guidelines to evidence noted as being photographs or land surveys. If there is an individual in a photograph, I am happy for them to be blacked out to prevent identification.

11. Notwithstanding the Applicant advised they do not seek access to statutory declarations, I have interpreted the Applicant's email of 5 February 2020 as a request for all documentation in support of the adverse possession application, except for names and addresses.
12. Accordingly, for the purposes of this review, I have determined all names and addresses of third parties as irrelevant information to be deleted under section 25.

Review of exemptions

13. The Agency relied on the following exemption under section 33(1) to refuse access to ten documents in full. The Agency's decision letter sets out the reasons for its decision.

Section 33(1)

14. 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'.

Do the documents contain personal affairs information of individuals other than the Applicant?

15. 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
16. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by the capacity of any member of the public to identify a third party.³
17. Notwithstanding the Applicant advised they do not seek access to the names and addresses of third parties, even if this information were to be removed as irrelevant under section 25, I am satisfied other information in the documents would still constitute the personal affairs information of third parties.
18. The documents subject to review consist of documentation provided in support of an adverse possession claim, impacting the Applicant as the registered proprietor of the land. The personal affairs information in these documents also includes occupations and place of work of third parties, descriptions of third parties' use of the land, personal opinions and other information capable of identifying third parties.

¹ Sections 33(1) and (2).

² Section 33(9).

³ *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].

19. Accordingly, I am satisfied the documents subject to review contain the personal affairs information of individuals other than the Applicant.
20. Accordingly, I must decide whether it would be unreasonable to disclose personal affairs information, other than names and addresses, which are irrelevant under section 25.

Is disclosure of the personal affairs information unreasonable?

21. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the circumstances of a matter.
22. I adopt the view expressed in *Victoria Police v Marke*⁴ by the Victorian Court of Appeal, in which it was held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others'. Further, the exemption under 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'.
23. In determining whether disclosure of personal affairs information in the documents would be unreasonable, I have considered the following factors:

(a) The nature of the information and the circumstances in which the information was obtained

The information was obtained by the Agency via a lodgement of an adverse possession application under section 60 of the TLA.

Adverse possession application allows an applicant to apply to acquire title of land that is registered to another proprietor, where the applicant can prove they have had uninterrupted, continuous and exclusive possession of the land for at least 15 years.⁵

Section 60 of the TLA provides:

60 Application for order by person claiming title by possession

- (1) A person who claims that he has acquired a title by possession to land which is under this Act may apply to the Registrar in writing in an appropriate approved form, accompanied by a plan of survey (with an abstract of field records) of the land certified by a licensed surveyor or any other plan, diagram or document describing the land which satisfies the Registrar as to description, for an order vesting the land in him for an estate in fee simple or other the estate claimed.
- (2) The Registrar shall cause notice of the application to be advertised once at least in a newspaper circulating in the city of Melbourne or in the neighbourhood of the land and to be given to any person he thinks proper including every person appearing by the Register to have any estate or interest in the land.
- (3) The applicant shall cause a copy of the notice to be posted in a conspicuous place on the land or at such place as the Registrar directs and to be kept so posted for not less than 30 days prior to the granting of the application.
- (3A) A notice under subsection (3) must be posted on the day on which the application is advertised under subsection (2).

⁴ [2008] VSCA 218 at [76].

⁵ *Transfer of Land Act 1958* (Vic), s 60; also see 'Guide to evidence supporting an adverse possession claim, available at <https://www.propertyandlandtitles.vic.gov.au/data/assets/word_doc/0021/38091/Guide-to-evidence-supporting-an-adverse-possession-claim.docx> and 'Guide to adverse possession', available at <https://www.propertyandlandtitles.vic.gov.au/data/assets/word_doc/0023/38093/Guide-to-adverse-possession-v3.docx> .

- (4) The Registrar shall appoint a period of not less than 30 days from the publication of the advertisement or service of the notice after the expiration of which he may, unless a caveat is lodged as hereinafter provided, grant the application altogether or in part.

To lodge an application for adverse possession, an applicant must submit an application form and supporting documentation to Land Use Victoria in support of their claim.⁶

Once an application is lodged, the current registered proprietor of the land is provided with a notice from Land Use Victoria, advising the registered proprietor that an application has been lodged under section 60 of the TLA.⁷

Following notice of an adverse possession claim, the registered proprietor can file a caveat under section 61 of the TLA to halt processing of the adverse possession application for a period of 30 days.

In order to sustain the objection to the adverse possession application, the registered proprietor must commence court proceedings or lodge an injunction restraining determination of the application under section 62 of the TLA.

The Agency advised the Applicant has commenced legal proceedings in relation to this matter. The Agency has advised in such circumstances, the registered proprietor will have access to all documentation submitted with the adverse possession application.

During this review, the Agency provided this Office with a copy of the Notice provided to the Applicant by Land Use Victoria. A plan of survey was attached to the Notice, identifying the land claimed to have been acquired by adverse possession.

In support of their application for review, the Applicant submitted a 'Deed of Assignment of Possessory Rights' dated [date]. The document has been edited to redact the addresses of third parties, other than the 'Assignees'. The Applicant states they obtained this document via the adverse possession applicant's legal practitioner.

In its decision, the Agency administratively released the following documents to the Applicant:

- (a) 'Adverse Possession Section 60 Checklist' lodged by the adverse possession applicant; and
- (b) a copy of the plan of survey submitted by the applicant in support of their adverse possession application.

On the information before me, I do not consider the Applicant has been provided with any of the substantive evidence relied upon by the adverse possession applicants. However, I am satisfied the applicant has knowledge of the identity of the adverse possession applicants via information already provided to the Applicant by the Agency and the adverse possession applicant's legal representative.

Further, having considered the processes involved in becoming a registered proprietor of land by way of adverse possession, I am satisfied adverse possession applicants submit relevant documentation to Land Use Victoria with a reasonable expectation that the documents may be disclosed to the registered proprietor.

I also note the documents contains signatures, telephone numbers and other identifying information of impartial third parties who have witnessed various documents and provided information relied on by the adverse possession applicant. I also do not consider the personal

⁶ Ibid.

⁷ TLA, section 60(2).

affairs information to be sensitive given it was obtained in the course of their professional duties and does not relate to their private lives.

Accordingly, I do not consider the personal affairs information in the documents is sensitive.

On consideration of the above, I am of the view this factor weighs in support of disclosure of the documents.

(b) The Applicant's interest in the information and whether their purpose for seeking the information is likely to be achieved

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 applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable.⁸

In their application for review dated 23 December 2019, the Applicant states they seek access to the documents in order to understand the evidence provided in support of the adverse possession application, to enable the Applicant to make an informed decision as to whether they should initiate legal proceedings.

In a further submission dated 5 February 2020, the Applicant states they have initiated legal proceedings and seeks review in order to:

understand on what basis DWELP has allowed this application to progress.... I am currently of the belief DELWP has incorrectly allowed this claim to progress to this point and did not follow their own internal processes and guidelines.

I am satisfied release of the documents will assist the Applicant with their purpose for seeking access to the documents.

Accordingly, this factor weighs in favour of disclosure.

(c) The likelihood of further 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.⁹ Accordingly, I must consider the likelihood and potential effects of further dissemination of a third party's personal affairs information, if released.

In this matter, I am satisfied the information will only be disseminated for the purposes of obtaining legal advice.

I am of the view that this factor neither weighs in favour of, or against disclosure.

(d) Whether any public interest or important interest would be promoted by release of the information

I do not consider there is a broader public interest that would be promoted by releasing the personal affairs information of the third party in this instance. I consider the Applicant's interest in the information would serve a personal interest only.

⁸ *Victoria Police v Marke* [2008] VSCA 218 at [104].

⁹ *Victoria Police v Marke* [2008] VSCA 218 at [68].

Given the Applicant has not been provided with substantive information concerning the evidence submitted in support of the adverse possession claim, I am satisfied access to the documents it is a matter of natural justice, so the Applicant has sufficient information to understand the basis of the claim.

On balance, this factor weighs in support of disclosure.

- (e) Whether the individuals to whom the information relates object, or would be likely to object, to the release of the information

The Agency consulted with third parties to obtain their views as to the release of their personal affairs information. The Agency received an email from one of the third parties who purported to provide a response on behalf of all other third parties who were consulted by the Agency. Those third parties were copied into the email.

The third parties objected to the release of their personal affairs information.

Accordingly, this factor weighs against disclosure.

- (f) Whether the disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person¹⁰

There is no information before me to suggest this is a relevant factor in this case.

24. On weighing up the above factors, I have decided it would not be unreasonable to release the personal affairs information contained in this document.
25. Accordingly, I have decided the documents are not exempt under section 33(1).

Deletion of irrelevant information

26. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister 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'¹¹ 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 25.¹²
28. I have considered the effect of deleting irrelevant information, being names and addresses, from the documents. I am satisfied it is practicable to do so, as the work involved is not substantial and the edited document would retain meaning.

Conclusion

29. On the information before me, I am not satisfied the documents are exempt under section 33(1).
30. As I am satisfied it is practicable for the Agency to delete irrelevant information from the documents in accordance with section 25, I have decided to release the documents in part.

¹⁰ Section 33(2A).

¹¹ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

¹² *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140], [155].

Other matters

31. Section 49P(5) states that if I decide to disclose a document claimed to be exempt under section 33(1) I must, if practicable, notify any person who has a right to apply to VCAT for a review of my decision of their right to do so.
32. In considering the meaning of 'practicable' in relation to other sections of the FOI Act, VCAT has stated the following:

The use of the word 'practicable' in the legislation to my mind connotes a legislative intention to apply common sense principles. 'Practicable' is not a term of art or a term of precise meaning.

.... The use of the word indicates there should be imported into the process the exercise of judgment by the agency concerned. It does not allow for the conclusion that because a task is possible, it must, ergo, be undertaken.¹³
33. VCAT also considers the possibility of an unnecessary intrusion into the lives of third parties is relevant when assessing the practicability of notifying them.¹⁴
34. I have decided it is practicable to notify certain third parties of their right to review.
35. I have also decided notifying certain relevant third parties would be an unnecessary intrusion for the following reasons:
 - (a) the information is not sensitive;
 - (b) the personal affairs information was provided in context of their public service profession as opposed to their private lives; and
 - (c) the third parties' names and addresses are not being disclosed.

Review rights

36. 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.¹⁵
37. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁶
38. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁷
39. As I have decided to release documents that contain personal affairs information, the relevant third parties will be notified of my decision and is entitled to apply to VCAT for a review within 60 days from the date they are given notice.
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.

¹³ *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

¹⁴ *Coulston v Office of Public Prosecutions Victoria* [2010] VCAT 1234 at [42].

¹⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁶ Section 52(5).

¹⁷ Section 52(9).

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.¹⁸

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.

¹⁸ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[date]	Statutory Declaration and accompanying documents	8	Refused in full Section 33(1)	Release in part Section 25 Names and addresses of third parties are to be deleted from the document in accordance with section 25. The remainder of the document is to be released.	Section 33(1): I am not satisfied it would be unreasonable to release the personal affairs information in this document for the reasons outlined above in the Notice of Decision. Section 25: The Applicant does not seek access to any names or addresses of third parties. Accordingly, this information is to be deleted as it is irrelevant to the scope of review. I am satisfied it is practicable to delete irrelevant material from the document in accordance with section 25.
2.	[date]	Statutory Declaration and accompanying documents	8	Refused in full Section 33(1)	Release in part Section 25 See comment for Document 1.	Section 33(1): See comment for Document 1. Section 25: See comment for Document 1.
3.	[date]	Deed of Assignment of Possessory Rights and accompanying document	4	Refused in full Section 33(1)	Release in part Section 25 See comment for Document 1.	Section 33(1): See comment for Document 1. Section 25: See comment for Document 1.
4.	[date]	Statutory Declaration and accompanying	4	Refused in full	Release in part	Section 33(1): See comment for Document 1.

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
		documents		Section 33(1)	Section 25 See comment for Document 1.	Section 25: See comment for Document 1.
5.	[date]	Statutory Declaration and accompanying document	4	Refused in full Section 33(1)	Release in part Section 25 See comment for Document 1.	Section 33(1): See comment for Document 1. Section 25: See comment for Document 1.
6.	[date]	Statutory Declaration and accompanying document	4	Refused in full Section 33(1)	Release in part Section 25 See comment for Document 1.	Section 33(1): See comment for Document 1. Section 25: See comment for Document 1.
7.	[date]	Statutory Declaration and accompanying document	3	Refused in full Section 33(1)	Release in part Section 25 See comment for Document 1.	Section 33(1): See comment for Document 1. Section 25: See comment for Document 1.
8.	[date] and [date]	Letters and accompanying document	3	Refused in full Section 33(1)	Release in part Section 25 All names and addresses are to be deleted, including the name contained in the email address, is to be deleted from the document	Section 33(1): See comments for Document 1. Section 25: See comment for Document 1.

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					in accordance with section 25. The remainder of the document is to be released.	
9.	[date]	Letter and accompanying documents	4	Refused in full Section 33(1)	Release in part Section 25 See comment for Document 8.	Section 33(1): See comment for Document 1. Section 25: See comment for Document 1.
10.	[date]	Letter	1	Refused in full Section 33(1)	Release in part Section 25 See comment for Document 1.	Section 33(1): See comment for Document 1. Section 25: See comment for Document 1.