

Notice of Decision and Reasons for Decision

Applicant:	'BP7'
Agency:	Moyne Shire Council
Decision date:	4 June 2020
Exemption considered:	Section 33(1)
Citation:	'BP7' and Moyne Shire Council (<i>Freedom of Information</i>) [2020] VICmr 150 (4 June 2020)

FREEDOM OF INFORMATION – council documents – building permit – building plans – neighbourhood dispute – personal affairs information

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 fresh 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.

While I am satisfied the set of internal plans in the document are exempt under section 33(1), I have determined disclosure of certain other personal affairs information in the document would not be unreasonable and is not exempt.

As I am satisfied it is practicable to release an edited copy of the document with exempt information deleted in accordance with section 25, I have determined to grant access to the document in part.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to the document.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

4 June 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:
 - Building permit for [address]. (Property at front of [number] on street). (Owned by [named person]). (Drawings by [named person]).
 - Planning permit granted [date]. [date]. Building permit issued.
2. On [date] the Applicant clarified their request to:
 - Building permit documentation drafted by [named person] for [address].
3. In its decision, the Agency identified one document, comprising of nine pages, falling within the terms of the Applicant's request.
4. It decided to refuse access to the document in full under section 33(1).

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. The document relevant to the Applicant's request comprises of a set of nine plans (the **Document**).
7. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review. On [date], the Agency made a fresh decision to allow access to the Document by way of inspection, however denied access to a copy of the Document. This is within the required 28 days under section 49M(2).
8. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
9. I have examined copies of the documents subject to review.
10. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
11. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's fresh decision on the FOI request;
 - (b) the information provided with the Applicant's review application; and
 - (c) all other communications with the Agency and the Applicant.
12. 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.

Review of exemptions

Section 33(1)

13. 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 Applicant¹; and
 - (b) such disclosure would be 'unreasonable'.

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

14. Information relating to an individual'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.²
15. 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.³
16. The information exempted by the Agency under section 33(1) includes:
- (a) the names, addresses and contact details of persons (or third parties), other than the Applicant;
 - (b) a set of internal building plans; and
 - (c) a set of external building plans.
17. I am satisfied the information identified by the Agency amounts to 'personal affairs information' for the purposes of section 33.

Would disclosure of the personal affairs information be unreasonable?

18. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting an individual's right to personal privacy in the circumstances.
19. In *Victoria Police v Marke*,⁴ 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 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'.
20. Even where an applicant claims to know the identity of a third party, disclosure of their personal affairs information may still be unreasonable in the circumstances.⁵

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].

⁴ [2008] VSCA 218 at [76].

⁵ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

21. 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 an FOI request has been received for documents containing their personal information and seek their view on disclosure of information in the document.⁶ However, this obligation does not arise if:
 - (a) 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;
 - (b) the notification would be reasonably likely to increase the risk to the safety of a person experiencing family violence; or
 - (c) it is not practicable to do so⁷.
22. The Agency advised it consulted with relevant third parties and I have reviewed the Agency's consultation documentation.
23. In determining whether release of the personal affairs information in the document would be unreasonable, I have given consideration to the following matters:
 - (a) the nature of the personal affairs information (for example, whether it is sensitive or its current relevance);
 - (b) the circumstances in which the information was obtained;
 - (c) the Applicant's interest in the information, including their purpose or motive for seeking access to the documents;
 - (d) whether any public interest would be promoted by disclosure;
 - (e) the likelihood of further disclosure of the information if it is released;
 - (f) whether the individuals to whom the information relates consent or object to the disclosure; and
 - (g) whether disclosure would cause the individuals stress, anxiety or embarrassment.
24. I have also taken into consideration the nature of disclosure of a document under the FOI Act is unconditional and unrestricted.⁸ This means an applicant is free to disseminate or use a document disclosed to them under the FOI Act as they choose.
25. Having reviewed the document, I am of the view disclosure of the names, addresses and contact details of third parties and the set of external building plans would not be unreasonable based on the following factors:
 - (a) the names, addresses and contact details of the third parties are publicly available online; and
 - (b) the set of external building plans represent the publicly visible exterior of a residential property.
26. However, I am of the view disclosure of the internal building plans would involve the unreasonable disclosure of the personal affairs information of a third party, as the plans concern the property owner's internal renovation and floorplan of their private home.

⁶ Section 33(2B).

⁷ Section 33(2C).

⁸ *Victoria Police v Marke* [2008] VCSA 218 at [68].

27. I have reviewed the consultation documents provided by the Agency and note a third party objected to the release of their personal affairs information in the document. While the view of a third party is a relevant factor, it is generally not determinative. In this matter, however, I consider this factor weighs against disclosure given the nature of the personal affairs information in the documents and relationship to the third party's private home.
28. Finally, in deciding whether 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.⁹ In the circumstances of this matter, I am of the view this factor is engaged and weighs against disclosure of the documents.
29. Accordingly, I am satisfied disclosure of the internal plans in the document would be unreasonable in the circumstances, and these pages are exempt under section 33(1).
30. However, I am not satisfied disclosure of the names, addresses and contact details of third parties, where this information is publicly available, and the set of external building plans, which concern the external part of the building, would be unreasonable. Accordingly, I am not satisfied these pages are exempt under section 33(1).
31. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 33(1).

Deletion of exempt or irrelevant information

32. 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.
33. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁰ 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 25.¹¹
34. I have considered the effect of deleting exempt information from the documents in accordance with section 25. I am satisfied it is practicable to delete such information from the document, as to do so would not require substantial time and effort, and the edited document would retain meaning.

Conclusion

35. On the information before me, I am satisfied the set of internal plans in the document are exempt under section 33(1).
36. However, I am not satisfied the names, addresses and contact details of the relevant third parties, and the set of external building plans are exempt under section 33(1).
37. As I am satisfied it is practicable to release an edited copy of the document with exempt information deleted in accordance with section 25, I have determined to grant access to the document in part.

⁹ Section 33(2A).

¹⁰ *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].

¹¹ *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

38. 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.¹²
39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹³
40. The Agency may apply to VCAT for a review up to 14 days the date it is given this Notice of Decision.¹⁴
41. 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.
42. 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.¹⁵

Third party review rights

43. As I have decided to release documents that contain the personal affairs information of third parties, if practicable, I am required to notify those persons of my decision and inform them of their right to apply to VCAT for a review of my decision¹⁶ within 60 days from the date they are given notice.¹⁷
44. In this case, I am satisfied it is practicable to notify the relevant third parties of their review rights.

When this decision takes effect

45. My decision does not take effect until the relevant third parties' 60 day review period expires.¹⁸
46. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹² The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹³ Section 52(5).

¹⁴ Section 52(9).

¹⁵ Sections 50(3F) and (3FA).

¹⁶ Section 49(5).

¹⁷ Section 50(3).

¹⁸ Section 49P(4).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Month, Year]	Set of nine plans for proposed renovation	9	Refused in full Section 33(1)	Release in part Sections 33(1), 25 Pages 3 and 9 are exempt under section 33(1). Pages 1 and 2 and 4 to 8 are not exempt and are to be released.	Section 33(1): I am satisfied disclosure of the set of internal plans in the document would be unreasonable in the circumstances. Accordingly, I am satisfied these pages are exempt under section 33(1). However, I am not satisfied disclosure of the names, addresses and contact details of the relevant third parties, which are publicly available, and the set of external building plans, which concern the external part of the building, would be unreasonable. Accordingly, I am not satisfied these pages are exempt under section 33(1). Section 25: I am satisfied it is practicable to delete exempt information from the document in accordance with section 25, as to do so would not require substantial time and effort, and the edited document would retain meaning.