



Office of the Victorian
Information Commissioner

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Notice of Decision and Reasons for Decision

Applicant:	'BZ5'
Agency:	Department of Environment, Land, Water and Planning
Decision date:	27 August 2020
Exemption considered:	Section 33(1)
Citation:	'BZ5' and Department of Environment, Land, Water and Planning (Freedom of Information) [2020] VICmr 243 (27 August 2020)

FREEDOM OF INFORMATION – heritage listing nomination – nominator – Victorian Heritage Register – third party personal affairs information – disclosure unreasonable

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 is the same as the Agency's decision, as I am satisfied the relevant personal affairs information subject to review is exempt under section 33(1) and is to be deleted from the document in accordance with section 25.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

27 August 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to certain documents in the following form:
 - Details of the nominator as per attached DEWLP letter dated [date],
 - Copy of all material submitted by the nominator in support of the requested nomination as per attached DEWLP letter dated [date],
 - Copies of any response received from [specified council] in respect of the nomination DEWLP letter dated [date].
2. In its decision, the Agency identified a 15 page document that fell within the terms of the Applicant's request.
3. The Agency relied on section 33(1) to refuse access to two pages of the document in part. Its decision letter sets out the reasons for its decision.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the document in part.
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 examined copies of the document subject to review and considered all relevant communications received from the parties in relation to 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.
8. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and that 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 33(1) – Personal affairs information

9. 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'.

¹ Sections 33(1) and (2).

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

10. Information relating to a person's 'personal affairs' includes, but is not limited to, 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
11. Personal affairs information that relates to an individual 'concerns or affects that person as an individual'.³
12. A document will disclose personal affairs information if the document is capable of, either directly or indirectly, identifying a particular individual whose personal affairs are disclosed. 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 potentially identify a third party.⁴
13. The two pages released in part by the Agency contain the full name, address, email address and telephone number of a third party, being a member of the public who nominated a building for inclusion in the Victorian Heritage Register (**VHR**).
14. I am satisfied the document contains the personal affairs information of a third party.

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

15. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the protection of an individual's right to personal privacy in the particular circumstances.
16. In *Victoria Police v Marke*,⁵ the Victorian Court of Appeal held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others', and 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'. The Court further held, '[t]he protection of privacy, which lies at the heart of s 33(1), is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded to a lesser or greater degree'.⁶
17. Therefore, the proper application of section 33(1) involves consideration of 'all matters relevant, logical and probative to the existence of conditions upon which the section is made to depend'.⁷
18. In determining whether disclosure of personal affairs information in the document would be unreasonable, I have considered the following factors:

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

The nature of the personal affairs information in the released document is the name, address and other identifying information of a third party. The information was provided by the third party in nominating a building for inclusion in the VHR.

² Section 33(9).

³ *Hanson v Department of Education & Training* [2007] VCAT 123.

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].

⁵ [2008] VSCA 218 at [76].

⁶ [2008] VSCA 218 at [79].

⁷ [2008] VSCA 218 at [104].

The VHR nomination form contains the following privacy statement:

Who will have access to my personal details?

The section 'Nominator Details & Nominator Statement' will not be provided to other parties at the time of nomination. However, it may be provided to the Heritage Council of Victoria for the purposes of decision making under the Act and to contact you. This nomination form, including your details, may be subject to a Freedom of Information request.

The Agency submitted it is critical to protect the personal details of nominators to ensure they are not subject to claims or harassment. Where the Agency is required by the *Heritage Act 2017 (Vic) (Heritage Act)* to circulate copies of a nomination form, a nominator's details are redacted.

(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

The Applicant advised the land that is the subject of the VHR nomination form is also undergoing a development proposal review in the Victorian Civil and Administrative Tribunal (VCAT). The Applicant seeks the name of the nominator to confirm if they are a party to that VCAT review in order to inform the Tribunal.

(c) Whether any public interest would be promoted by release of the information

On the information before me, I am not satisfied there is a broader public interest that would be promoted by releasing the personal affairs information of the third party in this instance.

In my view, it would be contrary to the public interest to release personal affairs information relating to VHR nominators as there is a public interest in maintaining the Agency's ability to protect the privacy of nominators in exercising its functions under the Heritage Act.

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

In its submission the Agency stipulated the nominator objected to disclosure of their personal affairs information under the FOI Act.

(e) Whether disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person⁹

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

19. Having weighed up the above factors, I am satisfied the personal affairs information on both pages is exempt under section 33(1).

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

⁹ Section 33(2A).

Deletion of exempt and irrelevant information

20. 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.
21. 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
22. In circumstances where the Agency disclosed an edited copy of the document with exempt information deleted in accordance with section 25, in light of my decision in relation to section 33(1), I am satisfied it is practicable to delete the exempt information in the document.

Conclusion

23. My decision on the Applicant's request is the same as the Agency's decision, as I am satisfied the relevant personal affairs information subject to review is exempt under section 33(1) and is to be deleted from the document in accordance with section 25.

Review rights

24. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹²
25. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹³
26. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁴
27. 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.
28. 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

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].

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).