

Notice of Decision and Reasons for Decision

Applicant:	'BQ2'
Agency:	National Gallery of Victoria
Decision date:	12 June 2020
Exemptions considered:	Sections 30(1) and 33(1)
Citation:	'BQ2' and National Gallery of Victoria (<i>Freedom of Information</i>) [2020] VICmr 154 (12 June 2020)

FREEDOM OF INFORMATION – email threads – staff member discussions – internal working documents – matter in the nature of opinion, advice and recommendation – 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 fresh decision in that I have determined to release additional information to the Applicant which I have determined is not exempt under section 30(1) in the circumstances of this matter.

I have determined personal affairs information in the documents is exempt under section 33(1) as I am satisfied disclosure would be unreasonable in the circumstances of this matter.

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

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

12 June 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:

All emails and memos created by [named person #1], [named person #2], and [named person #3] from [date range] on the topic of holding the “[name]” event at the [National Gallery of Victoria] (NGV).
2. In its decision, the Agency identified four documents falling within the terms of the Applicant’s request. It advised two of these documents were simply duplications of the other two documents.
3. The Agency determined that certain information in the two unique documents was irrelevant to the Applicant’s request. The Agency deleted this information from the documents pursuant to section 25 of the Act and subsequently determined to refuse access in full to the documents, on the basis that to release the remaining information in an edited form would render the documents meaningless.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency’s decision to refuse access.
5. During this review, the Agency was provided with my preliminary view that the information deleted under section 25 of the Act was relevant to the Applicant’s request and should therefore be assessed as part of the request. The Agency was afforded with an opportunity to provide further submissions in response to this preliminary view.
6. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
7. On [date], the Agency made a fresh decision within the required 28 days under section 49M(2).
8. In its fresh decision, the Agency relied on the exemptions under section 30(1) and 33(1) to refuse access to the documents in full. Its decision letter sets out the reasons for its decision.
9. 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.
10. I have examined copies of the documents subject to review.
11. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
12. I note in the course of the review, the Applicant confirmed to OVIC staff that they are willing to accept an edited copy of the documents with exempt material removed, if required.
13. I have considered all relevant communications and submissions received from the parties.
14. 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)

15. 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'.
16. 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

Do the documents contain personal affairs information?

17. The documents contain the names, contact details and job descriptions of persons other than the Applicant.
18. I am satisfied the names and job descriptors are reasonably capable of identifying third parties.
19. Accordingly, I am satisfied the documents contain personal affairs information.

Would disclosure be unreasonable?

20. Whether it would be unreasonable to disclose a document involves balancing the public interest in the disclosure of official information with the interest in protecting the personal privacy of third parties other than the applicant in the particular circumstances of a matter.
21. The Agency determined it was not practicable to consult with third parties under section 33(2B) given the Agency had, recent to this request, consulted with the same third parties in a separate matter about the release of their personal affairs information contained in the documents.
22. In *Victoria Police v Marke*,³ the Supreme Court of Victoria 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 in 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. Further, '[t]he protection of privacy, which lies at the heart of section 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'.⁴
24. In determining whether disclosure of the personal information in the documents 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 concerns the personal identifiers contained in an email thread of persons discussing a proposed event at the Agency. The personal affairs information includes names and contact details of Agency staff members, members of the

¹ Sections 33(1) and (2).

² Section 33(9).

³ [2008] VSCA 218 at [76].

⁴ [2008] VSCA 218 at [79].

public and a service provider to the Agency. The persons in the email thread are discussing a proposed event that would potentially cause change to staffing and services.

I consider this factor weighs neither in favour nor against disclosure.

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

As referenced above, the Agency decided not to consult with the relevant third parties on this specific request as it recently consulted with the same third parties about releasing their personal affairs information contained in the documents. I note the Agency's advice that one of the third parties consulted previously provided their consent while the majority of the third parties objected to their personal affairs information being released.

While not determinative, I consider this factor weighs against disclosure.

- (c) The likelihood of further disclosure of information, if released

The FOI Act does not impose any conditions or restrictions on an applicant's use of documents obtained under the FOI Act. Accordingly, I must consider the likelihood and potential effects of further dissemination of a third party's personal affairs information if released.

In light of the Applicant's occupation [description redacted], I am satisfied it is reasonably likely the Applicant may publish or further disseminate the personal affairs information. This factor weighs against disclosure.

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

In this case, having considered the broader context, I consider that there is a public interest in the release of the substance of the documents. However, I do not consider that this public interest would be further promoted through the release of the personal affairs information of third parties as contained in the documents.

I consider this factor weighs neither in favour nor against disclosure.

- (e) Whether disclosure would, or would be reasonably likely to endanger the life or physical safety of any person⁵

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

25. Having weighed up the above factors, I have determined disclosure of the personal affairs information in the documents would be unreasonable in the circumstances.
26. The Schedule of Documents in **Annexure 1** sets out my decision with respect to section 33(1) in relation to each document.

Section 30(1)

27. Section 30(1) has three requirements:

- (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister; and

⁵ Section 33(2A).

- (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
- (c) disclosure of the matter would be contrary to the public interest.

28. The exemption does not apply to purely factual material in a document.⁶

29. The Agency refused access to the documents in full under section 30(1).

30. In its fresh decision the Agency states:

Release of the documents would disclose consultation or deliberation between officers of the [Agency] in relation to its considerations in relation to events, including security considerations.

The emails contain exchanges between officers in the course of and for the purposes of the deliberative processes of the [Agency]. That includes its thinking process as part of it exercising its statutory functions of controlling, managing, operating, promoting, developing and maintaining the [venue] and [venue land] as set out in its governing legislation.

Do the documents contain information in the nature of opinion, advice, recommendation, consultation or deliberation prepared by an officer?

- 31. The term ‘officer of an Agency’ is defined in section 5(1). It includes a member of the agency, a member of the agency’s staff, and any person employed by or for the agency, whether that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply or not.
- 32. The documents relate to the process of considering the use of an event space in relation to a proposed event to be held at the Agency’s premises.
- 33. The documents comprise an email thread generated by members of the Agency. The documents are internal email communications between Agency officers.
- 34. Having reviewed the documents, I am satisfied they contain some content in the nature of opinion, advice, recommendation and consultation prepared by Agency officers and do not comprise purely factual information for the purposes of section 30(3).

Were the documents made in the course of, or for the purpose of, the deliberative processes involving the functions of the Agency?

35. The term ‘deliberative process’ has been interpreted widely. In *Re Waterford and Department of Treasury (No. 2)*,⁷ the Commonwealth Administrative Appeals Tribunal held:

... “deliberative processes” [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ... its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

- 36. As per paragraph 30, the Agency’s fresh decision states the documents contain exchanges between officers including thinking processes as part of exercising the Agency’s statutory functions.
- 37. I am satisfied the opinion and consultation were provided in the course of and for the purpose of the Agency’s deliberative processes with respect to managing staffing and security considerations at the Agency.

⁶ Section 30(3).

⁷ [1981] 1 AAR 1.

Would release of this information be contrary to the public interest?

38. In deciding if release is contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful that the object of the FOI Act is to facilitate and promote the disclosure of information.
39. In its fresh decision and submission, the Agency raised the following factors as relevant to its consideration of the public interest limb of section 30(1) and why it maintains release is contrary to the public interest:
- (a) These documents reveal the thinking processes of [Agency] officers leading to [a] decision on the [Agency's] response in a particular situation.
 - (b) The thinking processes of the [Agency] are revealed by the documents as they contain or would disclose those staff involved in deliberating on the use of function areas within the NGV.
 - (c) These considerations also reveal some of the [Agency's] security processes which are not known to the general public.
 - (d) Disclosure may lead to confusion and unnecessary debate where the documents do not accurately reflect all considerations that led to the final position of the [Agency].
 - (e) Drafts and internal documents by their very nature are likely to omit information or contain errors, particularly where they were exchanged without intention of public review.
 - (f) The sensitivity of the material contained in those documents.
40. I have considered the Agency's position and in deciding whether disclosure of the documents would be contrary to the public interest, I have given particular weight to the following factors:⁸
- (a) the right of every person to gain access to documents under the FOI Act;
 - (b) the nature and degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
 - (c) the stage of a decision or a process being undertaken at the time the communications were made;
 - (d) whether disclosure of the documents would be likely to inhibit communications between Agency officers, essential for the Agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the Agency's functions and other obligations;
 - (e) whether disclosure of the documents would give merely a part explanation, rather than a complete explanation for the making of a particular decision or the outcome of a process, which the Agency would not otherwise be able to explain upon disclosure of the document;
 - (f) the impact of disclosing documents that may not clearly or accurately represent a final position or decision reached by the Agency at the conclusion of a decision or process; and
 - (g) the public interest in the community being better informed about the way in which the Agency carries out its functions, including its deliberative, consultative and decision making processes and whether the underlying issues require greater public scrutiny.

⁸ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

41. If the information is innocuous, dated or already known to the Applicant, it is more likely its disclosure would not be contrary to the public interest. If the information is sensitive, tentatively expressed or unclear, it is more likely its disclosure would be contrary to the public interest.⁹
42. In *Howard v Treasurer*,¹⁰ the Commonwealth Administrative Appeals Tribunal held the more sensitive the issues involved in a communication, the more likely it will be the communication should not be disclosed.
43. I consider the nature of the documents, being email threads recording discussions between Agency staff in the course of their normal duties on the use of function areas, is not, in itself, sensitive in nature. I appreciate there are broader sensitivities linked to the event topic which may impact the Agency's event planning and management processes; however, in my view the content of the documents in question does not focus on this.
44. I accept the Agency's submission that the documents do not constitute the Agency's final decision with respect to the use of function areas within the Agency premises. Similarly, I acknowledge the information in the documents is not a complete record of all matters considered by or deliberated on by the Agency in reaching a decision as to event planning and managing any risks associated with a proposed event. Rather, the documents do not appear to give even a partial explanation of the decision made by the Agency.
45. I consider that release of these documents will go some way to informing the public of how the Agency carries out its functions. I do not consider that release will mislead or cause unnecessary confusion or debate as suggested by the Agency. It is my view that, if the Agency feels strongly that the information will mislead, it can release additional information to assist with providing a better understanding of the documents to the Applicant.
46. While I acknowledge concerns submitted by the Agency, I am not satisfied on the information before me that disclosure of the documents is likely to have an adverse effect on the integrity or effectiveness of future assessments conducted by the Agency in relation to proposed events. Furthermore, I am not satisfied disclosure of these documents would reasonably inhibit internal correspondence given the nature of the discussions the Agency officers are required to undertake as part of their professional duties.
47. As highlighted in my consideration for section 33(1), I appreciate that disclosure of a document under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document as they choose.¹¹ Given the Applicant[s] [occupation], the likelihood of them further disseminating any information released to them has formed part of my deliberation process.
48. Having carefully considered the above factors, with regard to the actual content of the documents, I am satisfied release of the email threads containing the deliberations or opinions of Agency officers would not be contrary to the public interest, in this instance, for the following key reasons:
 - a) the information as contained in the email threads themselves is not particularly sensitive or contentious;
 - b) disclosure of this information would not deter or inhibit Agency officers from accurately and freely recording their opinions and details of consultation in the future in the course of performing their professional duties and responsibilities; and

⁹ *Thomas v Department of Natural Resources and Environment* [2002] VCAT 533 at [27].

¹⁰ (Cth) (1985) 7 ALD 626; 3 AAR 169.

¹¹ [2008] VSCA 218 at [68].

- c) release would not impede the broader deliberative processes of the Agency in carrying out its functions, including the development of plans for managing potential security issues associated with a proposed event.

49. Accordingly, I am not satisfied the documents are exempt in full under section 30(1).

50. The Schedule of Documents in **Annexure 1** sets out my decision with respect to section 30(1) in relation to each document.

Section 25 - Deletion of exempt or irrelevant information

51. Section 25 provides in relation to the deletion of exempt matter or irrelevant material in a document:

Where –

- (a) a decision is made not to grant a request for access to a document on the ground that it is an exempt document or that to grant the request would disclose information that would reasonably be regarded as irrelevant to the request;
- (b) it is practicable the agency or Minister to grant access to a copy of the document with such deletions as to make the copy not an exempt document or a document that would not disclose such information (as the case requires); and
- (c) it appears from the request, or the applicant subsequently indicates, that the applicant would wish to have access to such a copy –

the agency or Minister shall grant access to such a copy of the document.

52. In summary, section 25 permits an agency, if it is practicable to do so and the applicant is agreeable, to release an edited copy of a document with information that either falls outside the scope of the applicant's request or is exempt information to be deleted from the document. Alternatively, if it is not practicable to provide an edited copy of the document, or the applicant is not agreeable to receiving an edited copy, the agency is permitted to refuse access to the document in full.

53. The Agency has a duty to locate and disclose to an applicant all documents relevant to the terms of the request.¹²

54. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹³ 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 25.¹⁴

55. I have considered the effect of deleting exempt information from the documents, noting the Applicant confirmed during this review that they would accept edited copies. In my view, it is practicable for the Agency to delete the exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

56. On the information before me, I am satisfied certain information in the documents is exempt under section 33(1). However, I am not satisfied the documents are exempt in full under section 30(1).

¹² *Roberts v Southern Rural Water* (unreported, VCAT, Preuss SM, 20 April 2000).

¹³ *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].

¹⁴ *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], [155].

57. As it is practicable to edit the documents to delete exempt information, I have determined to grant access to the documents in part.

Review rights

58. 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
59. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁶
60. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁷
61. 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. International callers may dial + 61 3 8685 1462.
62. 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

63. My decision does not take effect until the relevant review period (stated above at paragraph 60) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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

¹⁶ Section 52(5).

¹⁷ Section 52(9).

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] [time stamp]	Email Thread 1	3	Refused in full Section 30(1) and 33(1)	Release in part Section 33(1), 25 The document is to be released with the following information, which is exempt under section 33(1), deleted in accordance with section 25: <ul style="list-style-type: none"> All third party names, email addresses and contact details contained in the email thread, but for those relating to the third party who consented to release. 	Section 33(1): With the exemption of the individual who provided their consent, I consider it would be unreasonable to release the personal affairs information of third parties in the documents for the reasons outlined above in the Notice of Decision. This includes the personal affairs information of staff members, members of the public and an Agency service provider. Section 30(1): For the reasons set out above, I am not satisfied the disclosure would be contrary to the public interest. Accordingly, section 30(1) does not apply to the document.
2.	[Date] [time stamp]	Email Thread 2	4	Refused in full Section 30(1) and 33(1)	Release in part Section 33(1), 25 The document is to be released with the following information, which is exempt under section 33(1), to be deleted in accordance with section 25: <ul style="list-style-type: none"> All third party names, email addresses and contact details contained in the email thread, 	Section 33(1): See comments for Document 1. Section 30(1): See comments for Document 1.

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					but for those relating to the third party who consented to release.	