



2 August 2024

Mr Fairless

Via email only: foi+request-11486-41eb344e@righttoknow.org.au

Dear Mr Fairless

Decision on Freedom of Information Request – 24/0095

I refer to your request to the National Gallery of Australia (**National Gallery**), dated 4 June 2024, for access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**). Your request sought related to a portrait of Ms. Rinehart, specifically you requested (extracted below):

- *documents related to the acquisition of these artworks, as well as any documents related to objections of the artwork being displayed,*
- *Where relevant, any correspondence or documents related to the conditions upon which artwork may be displayed in the gallery, and,*
- *any documents related to media requests on this topic in the last three months.*

This letter sets out my decision regarding your request for documents.

I am an authorised decision-maker under section 23 of the FOI Act.

I have found that 51 documents fall within the scope of your request.

I have decided that parts of the documents that you have request are exempt under the FOI Act as they contain information which would involve the unreasonable disclosure of personal information about other people (section 47F).

Attachment A to this letter is a schedule which describes each of the relevant documents and my decision about each document.

Detailed reasons for my decision are set out at **Attachment B**. A copy of the provisions of the FOI Act relevant to your request are at **Attachment C**.

How we will send your documents to you

Documents 4, 5, 16, 24, 25, 26, 27, 28, 33 and 36 cannot be provided to you as they are subject to third party review rights. These documents cannot be provided until the third parties' review rights have expired or have otherwise been exhausted.

The other documents are **attached**.

Review rights

You are entitled to seek review of this decision. **Attachment D** sets out your rights to apply for review if you are dissatisfied with my decision.

Disclosure Log

In accordance with section 11C of the FOI Act, the National Gallery is required to publish the relevant documents on its disclosure log. The documents will be made available on the National Gallery's disclosure log within 10 working days of the date of this decision

Further assistance

If you have any questions about this notice, please do not hesitate to email foi@nga.gov.au.

Yours sincerely

A handwritten signature in black ink that reads "Alison Harper". The signature is written in a cursive, flowing style.

Chief Operating Officer

ATTACHMENT B - REASONS FOR DECISION

What you requested

On 4 June 2024, you requested access to the following documents under the FOI Act:

- *documents related to the acquisition of these artworks, as well as any documents related to objections of the artwork being displayed,*
- *Where relevant, any correspondence or documents related to the conditions upon which artwork may be displayed in the gallery, and,*
- *any documents related to media requests on this topic in the last three months.*

On 18 June 2024, the National Gallery acknowledged your request and advised you that we would not include personal details about our staff. You did not contact the National Gallery again about this. Relevant staff details have therefore been deleted in accordance with section 22(1)(a)(ii) (irrelevant material) of the FOI Act.

What I took into account

In reaching my decision, I referred to the following:

- the terms of your FOI request, dated 16 May 2024;
- the documents¹ that fall within the scope of your request;
- consultation with third parties about documents which contain information concerning them;
- guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**Guidelines**); and
- advice from officers with experience or responsibility for the matters described in the documents.

A copy of the provisions in the FOI Act relevant to your request are at **Attachment C**.

My decision

I am authorised to make decisions under section 23(1) of the FOI Act.

For the reasons set out below, I have decided to

- grant you **full access** to 3 documents; and
- grant you **part access** to 48 documents, because information has been exempted under section 47F of the FOI Act, and irrelevant material has been removed from under section 22(1)(a)(ii) of the FOI Act.

Further details regarding the exempt documents are set out in the schedule at **Attachment A**.

Reasons for my decision

¹ the term 'document' in this notice refers to both full documents and relevant parts of documents.

Where the schedule of documents indicates an exemption claim has been applied to part of a document, my findings of fact and reasons for deciding that the exemption provision applies to that part of a document are set out below.

Section 22(1)(a)(ii) - material irrelevant to the request

Section 22(1)(a)(ii) allows an agency to delete material from a document which would reasonably be regarded as irrelevant to the FOI request.

I find that the parts of documents identified in the schedule at **Attachment A** contain material which is irrelevant to your FOI request, and I have withheld or deleted that material accordingly. This material includes the names and/or contact details of staff at the National Gallery whose fulltime position is NGA Executive Level 1 – NGA Level 2-6 as well as information that is outside the scope of the request, for example document 51 contains information about an additional work that was acquired by the National Gallery that is outside of the scope of the request as well as additional information in regard to funding allocation.

These deletions are detailed in the schedule at **Attachment A**.

Section 47F of the FOI Act – documents affecting personal privacy

Section 47F conditionally exempts a document to the extent that its disclosure would involve the unreasonable disclosure of personal information about any person.

Personal information

Section 4 of the FOI Act provides that personal information has the same meaning as in the *Privacy Act 1988* (Cth) (**Privacy Act**). Personal information is defined in section 6 of the Privacy Act as:

‘..information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- (a) whether the information or opinion is true or not; and*
- (b) whether the information or opinion is recorded in a material form or not.’*

Paragraph 6.130 of the Guidelines provides:

‘Personal information can include a person’s name, address, telephone number, date of birth, medical records, bank account details, taxation information and signature.’

I find that the documents identified in the schedule at **Attachment A** contain personal information (e.g. names, contact details and opinions) about third parties.

Whether disclosure is ‘unreasonable’

If information is personal information, it will be conditionally exempt if disclosure would be ‘unreasonable’. In considering whether disclosure would be unreasonable, section 47F(2) of the FOI Act requires me to take into account:

- the extent to which the information is well known;
- whether the people to whom the information relates are known to be (or to have been) associated with the matters dealt with in the document;

- the availability of the information from publicly accessible sources; and
- any other matter I consider relevant.

In addition to the factors specified in section 47F(2) of the FOI Act, paragraph 6.138 of the Guidelines provides:

'The personal privacy exemption is designed to prevent the unreasonable invasion of third parties' privacy. The test of 'unreasonableness' implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals.'

In *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AAT 437, the Administrative Appeals Tribunal (AAT) stated:

'whether a disclosure is 'unreasonable' requires... a consideration of all the circumstances, including the nature of the information to be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance...'

I am satisfied that the disclosure of the third-party personal information would be unreasonable for the following reasons:

- we do not have the consent from the individuals for the release of their personal information;
- the information is private and not well known. It is not available in full or in part from publicly-accessible sources;
- the identity of the individuals concerned is readily apparent or could be easily ascertained; and
- the information would not shed light on the workings of the National Gallery or enhance accountability or transparency and instead, such disclosure would disproportionately interfere with the privacy of other members of the public.

On that basis, I have concluded that disclosure of the personal information would be unreasonable and this information is therefore conditionally exempt under section 47F of the FOI Act.

Public interest considerations

Section 11A(5) of the FOI Act provides:

'The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.'

When weighing up the public interest for and against disclosure under section 11A(5) of the FOI Act, I have taken into account relevant factors in favour of disclosure. In particular, I have considered the extent to which disclosure would:

- promote the objects of the FOI Act including to:
 - inform the community of the Government's operations;
 - reveal the reason for a government decision and any background or contextual information that informed the decisions; and

- enhance the scrutiny of government decision making;
- inform debate on a matter of public importance;
- promote effective oversight of public expenditure; or
- allow a person to access their own personal information.

In relation to these factors, I consider that disclosure of the conditionally exempt information would:

- would promote the objects of the FOI Act;
- would not inform debate on a matter of public importance;
- would not promote effective oversight of public expenditure; and
- would not allow a person to access their own personal information. .

I have also considered the relevant factors weighing against disclosure, indicating that access would be contrary to the public interest. In particular, I have considered the extent to which disclosure could reasonably be expected to:

- prejudice an individual's right to privacy; and
- adversely affect or harm the interests of an individual or group of individuals, being the individuals to whom the personal information relates.

After considering the public interest factor favouring disclosure, and the factors against disclosure, I consider that the factors against disclosure outweigh the factor favouring disclosure, and that disclosure of the conditionally exempt information would, on balance, be contrary to the public interest.

I am therefore satisfied that parts of documents, as identified in the schedule at **Attachment A**, are exempt under section 47F of the FOI Act.

I have not taken into account any of the irrelevant factors set out in section 11B(4) of the FOI Act in making this decision.

Section 47C - documents disclosing deliberative matter

Section 47C(1) of the FOI Act permits conditional exemption of a document if its disclosure would disclose ***deliberative matter***. Deliberative matter is content that is in the nature of, or relating to either:

- an opinion, advice or recommendation that has been obtained, prepared or recorded, or
- a consultation or deliberation that has taken place, in the course of, or for the purposes of, a deliberative process of the government, an agency or minister (s 47C(1)).

Deliberative process

Deliberative process generally refers to weighing up or evaluating competing arguments or considerations. It can also be a reference to the agency's thinking processes – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

I find that **parts of document 51** contain deliberative material that would, if disclosed, reveal the early and preliminary thinking of the National Gallery staff with respect to the establishment of the review of these issues around authorship. This thinking includes deliberation regarding options and the preliminary

consideration in regard to the National Gallery's Due-Diligence and Provenance Policy. The views expressed in these documents did not reflect a concluded position or a decision made regarding these matters. I am satisfied that parts of **parts of document 51** would disclose deliberative matter. Nonetheless I must give access to the documents unless, in the circumstances, access at this time would on balance be contrary to the public interest.

The public interest

Conditionally exempt matter must be released unless, in the circumstances, access to that document at this time would, on balance, be contrary to the public interest (section 11A(5) of the FOI Act). As the FOI Guidelines state at paragraph 6.5. The public interest test is considered to be:

- something that is of serious concern or benefit to the public, not merely of individual interest;
- not something of interest to the public, but in the interest of the public;
- not a static concept, where it lies in a particular matter will often depend on a balancing of interests;
- necessarily broad and non-specific; and
- related to matters of common concern or relevance to all members of the public, or a substantial section of the public.

I have considered the Factors Favouring (listed above) that are irrelevant in subsections 11B(3) and (4). In balancing the public interest in this case, I have considered the following factors for and against disclosure:

Factors in favour of disclosure:

- promoting the objects of the FOI Act, particularly in increasing scrutiny, discussion, comment and review of the Government's activities (section 3(2)(b) of the FOI Act);
- informing debate on a matter of public importance and promoting effective oversight of public expenditure; and
- facilitating access to information to members of the public that allows them to be satisfied that proper processes have been followed by the National Gallery.

Factors against disclosure:

I have considered the following factors against disclosure:

- the need to protect individuals from unreasonable interferences with their privacy and preserve reasonably held expectations of confidentiality concerning the independent review;
- that disclosure could reasonably be expected to harm the interests of the individuals, organisations and artists involved;
- that disclosure could reasonably be expected to cause prejudice to the National Gallery's ability to obtain confidential information voluntarily from artists or other individuals in the future; and
- that disclosure could reasonably be expected to cause prejudice to the National Gallery's ability to conduct enquires/investigations of a similar nature if needed in the future, including obtaining information from relevant stakeholders.

I acknowledge that there is public interest in documents of the National Gallery being made available to the public for the purpose of encouraging public debate and promoting oversight of the National Gallery's activities. However, in this case, I have formed the view that the public interest in favour of disclosure will be achieved through the release of the public report and that these early preliminary deliberations will make a negligible further contribution to those factors in favour of disclosure. By contrast the interference with the affairs of the relevant individuals and organisations is in my view significant.

I consider that, in the circumstances and taking into account the above, on balance, disclosure of the information is contrary to the public interest. Accordingly, I have decided that the documents are exempt under section 47C of the FOI Act.

Summary of my decision

In conclusion, I have decided to grant you **full access** to 3 documents and grant you **part access** to 48 documents.

I have made my decision on the basis that:

- parts of documents (as identified in the schedule at **Attachment A**) contain information that is irrelevant to the scope of your request under section 22(1)(a)(ii) of the FOI Act;
- parts of documents (as identified in the schedule at **Attachment A**) are conditionally exempt under section 47F of the FOI Act;
- parts of documents (as identified in the schedule at **Attachment A**) are conditionally exempt under section 47C of the FOI Act; and
- disclosure of the conditionally exempt information would be contrary to the public interest for the purposes of section 11A(5) of the FOI Act.

Attachment C - Relevant Legislation

22 Access to edited copies with exempt or irrelevant matter deleted

Scope

- (1) This section applies if:
 - (a) an agency or Minister decides:
 - (i) to refuse to give access to an exempt document; or
 - (ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and
 - (b) it is possible for the agency or Minister to prepare a copy (an edited copy) of the document, modified by deletions, ensuring that:
 - (i) access to the edited copy would be required to be given under section 11A (access to documents on request); and
 - (ii) the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and
 - (c) it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:
 - (i) the nature and extent of the modification; and
 - (ii) the resources available to modify the document; and
- (a) it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.

47F Public interest conditional exemptions—personal privacy

General rule

- (1) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).
- (2) In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:
 - (a) the extent to which the information is well known;
 - (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
 - (c) the availability of the information from publicly accessible sources;
 - (d) any other matters that the agency or Minister considers relevant.
- (3) Subject to subsection (5), subsection (1) does not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

47C Public interest conditional exemptions—deliberative processes

General rule

- (1) A document is conditionally exempt if its disclosure under this Act would disclose matter (*deliberative matter*) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:
 - (a) an agency; or
 - (b) a Minister; or
 - (c) the Government of the Commonwealth.

Exceptions

(2) Deliberative matter does not include either of the following:

- (a) operational information (see section 8A);
- (b) purely factual material.

Note: An agency must publish its operational information (see section 8).

(3) This section does not apply to any of the following:

- (a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;
- (b) reports of a body or organisation, prescribed by the regulations, that is established within an agency;
- (c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

Attachment D – Review Rights

If you are dissatisfied with this decision, you have certain rights of review available to you.

Firstly, under section 54 of the FOI Act, you may apply for an internal review of the decision. Your application must be made by whichever date is the later between:

- 30 days of you receiving this notice; or
- 15 days of you receiving the documents to which you have been granted access.

An internal review will be conducted by a different officer from the original decision-maker. No particular form is required to apply for review although it will assist your case to set out in the application the grounds on which you believe that the original decision should be overturned. An application for a review of the decision should be addressed to:

FOI Contact Officer
(Manager, Governance and Reporting)
National Gallery of Australia
GPO Box 1150
CANBERRA ACT 2601

or by email to foi@nga.gov.au

If you choose to seek an internal review, you will subsequently have a right to apply to the Australian Information Commissioner for a review of the internal review decision.

Review by the Australian Information Commissioner

Under section 54L of the FOI Act, you may seek review of this decision by the Australian Information Commissioner. Your application must be made within 60 days of you receiving this notice.

The Australian Information Commissioner is an independent office holder who may review decisions of agencies and Ministers under the FOI Act. More information is available on the Australian Information Commissioner's website www.oaic.gov.au.

There is an online [Information Commissioner Review Application form](#). Alternatively, you can download and complete the review form ([Microsoft Word 60 KB](#)) and send it via one of the following methods:

- email, send it to foidr@oaic.gov.au (be aware that email isn't encrypted, so it can be copied or tracked); or
- mail, send it to the Director of FOI Dispute Resolution, GPO Box 5288, Sydney NSW 2001 (send it by registered mail if you are concerned about sending it by standard post).

Complaints to Ombudsman or Australian Information Commissioner

You may complain to either the Commonwealth Ombudsman or the Australian Information Commissioner about action taken by the National Gallery in relation to your request. The Ombudsman will consult with the Australian Information Commissioner before investigating a complaint about the handling of an FOI request.

Your enquiries to the Ombudsman can be directed to:

Phone 1300 362 072 (local call charge)
Email ombudsman@ombudsman.gov.au

Your enquiries to the Australian Information Commissioner can be directed to:

Phone 1300 363 992 (local call charge)

Email enquiries@oaic.gov.au

There is no particular form required to make a complaint to the Ombudsman or the Australian Information Commissioner. The request should be in writing and should set out the grounds on which it is considered that the action taken in relation to the request should be investigated and identify the National Gallery as the relevant agency.