



Mr Mathieu Briand

Via email: [foi+request-8528-c9505c19@righttoknow.org.au](mailto:foi+request-8528-c9505c19@righttoknow.org.au)

Dear Mr Briand,

### Decision on your Freedom of Information request

I refer to your request received by the National Gallery of Australia (the **National Gallery**) on 28 February 2022 for access under the *Freedom of Information Act 1982* (**FOI Act**) to the following documents:

- ' Documents relating to the process for selection and approval of the Lindy Lee commission, *Ouroboros*, including the reasons why other artists were not approached to put forward submissions;
- The budget for *Ouroboros*;
- The Purchase Agreement between the National Gallery and artist/artist representative for the commission of *Ouroboros*;
- The names of the National Gallery's Acquisitions Committee members when the commission was approved;
- The names of National Gallery's Commission committee members when the commission was approved; and
- The names of the National Gallery Council members when the commission was approved.'

#### My decision

The National Gallery holds twenty-two (22) documents (totalling 201 pages) that relate to your request.

I have decided to:

- grant you **full access** to six (6) documents (documents 1, 2, 3, 4, 8 and 21);
- grant you **part access** to twelve (12) documents (documents 5, 6, 7, 9, 10, 11, 12, 13, 14, 19, 20 and 22) with some of the content removed; and
- **refuse access** to four (4) documents (documents 15,16, 17 and 18).

I have decided that certain documents, or parts of documents, that you have requested are exempt under the FOI Act as they contain information which:

- would disclose information obtained in confidence and which may found an action for breach of confidence (s45);
- contains deliberative matter (section 47C);
- is personal information about other people (s47F); or
- is about a person's business or professional affairs or the business, financial or commercial affairs of an organisation (s47G).

Please see the schedule at **Attachment A** to this letter for a detailed list of the documents and the reasons for my decision.

**How we will send your documents to you**

The documents are attached.

**You can ask for a review of my decision**

If you wish to seek an internal review, you must apply to the National Gallery within **30 days** after the day you are notified of this decision. An application for internal review must be made in writing by post to the FOI Officer or email to [foi@nga.gov.au](mailto:foi@nga.gov.au).

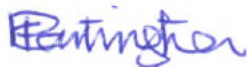
Alternatively, you may apply directly to the Office of the Australian Information Commissioner (**OAIC**) to review my decision. An application for review by the Information Commissioner must be made in writing within **60 days** after the day you are notified of this decision. You can also make a complaint to the Information Commissioner if you have concerns about how the National Gallery handled your request.

You can find information about requesting a review, making a complaint, and other information about FOI on the OAIC website [www.oaic.gov.au](http://www.oaic.gov.au) or phone the OAIC on 1300 363 992.

**Further assistance**

If you have any questions, please email [foi@nga.gov.au](mailto:foi@nga.gov.au).

Yours sincerely



KYM PARTINGTON  
CHIEF FINANCIAL OFFICER & ASSISTANT DIRECTOR BUSINESS ENABLING SERVICES  
29 April 2022

## SCHEDULE - LIST OF DOCUMENTS

Doc No.	Pages	Date	Description	Decision	Exemption	Comments
1.	1	unknown	<ul style="list-style-type: none"> <li>Extract from 2020-21 AR showing who was on Council when the Lindy Lee Commission was approved</li> </ul>	Release in full	• -	<ul style="list-style-type: none"> <li>Please note, that Mr Solomon's term on Council had concluded when the commission was approved.</li> </ul>
2.	1	unknown	<ul style="list-style-type: none"> <li>Extract from 2020-21 AR showing who was on Collections Committee when Lindy Lee was approved</li> </ul>	Release in full	• -	<ul style="list-style-type: none"> <li>Please note, that Mr Nick Mitzevich is also a member of the Collections Committee and Mr Ryan Stokes is an Ex-Officio member of the Collections Committee.</li> </ul>
3.	1	27 July 2021	<ul style="list-style-type: none"> <li>Letter from Minister for Communications, Urban Infrastructure, Cities and the Arts to the Chair of the National Gallery Council approving the acquisition of <i>Ouroboros</i></li> </ul>	Release in full	• -	• -
4.	42	September 2021	<ul style="list-style-type: none"> <li>Heritage Impact Assessment</li> </ul>	Release in full	• -	• -

Doc No.	Pages	Date	Description	Decision	Exemption	Comments
5.	67	28 May 2021	<ul style="list-style-type: none"> <li>Lindy Lee National Gallery of Australia Forecourt Commission Feasibility Study</li> </ul>	Release in part	<ul style="list-style-type: none"> <li>Section 45(1)</li> <li>Section 47F(1)</li> <li>Section 47G(1)</li> </ul>	<ul style="list-style-type: none"> <li>Pages 3, 29, 30, 32, 55-60 and 66: contains material obtained in confidence (s45)</li> <li>Page 67: contains personal information (s47F)</li> <li>Pages 3, 29, 30, 32, 55-60 and 66: contains information about a person's business or professional affairs or the business, commercial or professional affairs of an organisation (s47G)</li> </ul>
6.	3	25 May 2021	<ul style="list-style-type: none"> <li>National Gallery of Australia Forecourt Commission- Desktop Assessment of Cost and Process</li> </ul>	Release in part	<ul style="list-style-type: none"> <li>Section 45(1)</li> <li>Section 47F(1)</li> <li>Section 47G(1)</li> </ul>	<ul style="list-style-type: none"> <li>Pages 1 and 2: contains material obtained in confidence (s45)</li> <li>Page 3: contains personal information (s47F)</li> <li>Pages 1 and 2: contains information about a person's business or professional affairs or the business, commercial or professional affairs of an organisation (s47G)</li> </ul>
7.	12	December 2021	<ul style="list-style-type: none"> <li>National Gallery of Australia Forecourt Commission Lindy Lee Concept Study</li> </ul>	Release in part	<ul style="list-style-type: none"> <li>Section 47F(1)</li> </ul>	<ul style="list-style-type: none"> <li>Page 13: contains personal information (s47F)</li> </ul>
8.	1	24 May 2021	<ul style="list-style-type: none"> <li>Email correspondence between Nick Mitzevich and Alison Kubler titled 'Proposed Lindy Lee commission'</li> </ul>	Release in full	<ul style="list-style-type: none"> <li>-</li> </ul>	<ul style="list-style-type: none"> <li></li> </ul>

Doc No.	Pages	Date	Description	Decision	Exemption	Comments
9.	4	11 November 2021	<ul style="list-style-type: none"> <li>Briefing Paper to the Director titled 'Progress update on the Lindy Lee sculpture commission (<i>Ouroboros</i>)'</li> </ul>	Release in part	<ul style="list-style-type: none"> <li>Section 45(1)</li> <li>Section 47G(1)</li> </ul>	<ul style="list-style-type: none"> <li>Page 3: contains material obtained in confidence (s45).</li> <li>Page 3: contains information about a person's business or professional affairs or the business, commercial or professional affairs of an organisation (s47G)</li> </ul>
10.	3	3 September 2021	<ul style="list-style-type: none"> <li>Briefing Paper to the Collections Committee titled 'Lindy lee sculpture commission'.</li> </ul>	Release in part	<ul style="list-style-type: none"> <li>Section 45(1)</li> <li>Section 47G(1)</li> </ul>	<ul style="list-style-type: none"> <li>Page 3: contains material obtained in confidence (s45).</li> <li>Page 3: contains information about a person's business or professional affairs or the business, commercial or professional affairs of an organisation (s47G)</li> </ul>
11.	2	7 October 2021	<ul style="list-style-type: none"> <li>Extract from the Collections Committee meeting minutes</li> </ul>	Release in part	<ul style="list-style-type: none"> <li>Section 22</li> </ul>	<ul style="list-style-type: none"> <li>Extract provided to remove content which is irrelevant to the scope of the request (s22)</li> </ul>
12.	3	18 December 2020	<ul style="list-style-type: none"> <li>Email correspondence between Nick Mitzevich, Ryan Stokes and Alison Kubler titled 'NGA-potential new commission'</li> </ul>	Release in part	<ul style="list-style-type: none"> <li>Section 47F(1)</li> <li>Section 22</li> </ul>	<ul style="list-style-type: none"> <li>Pages 1 and 2: contains personal information (s47F)</li> <li>Pages 1 and 2: staff details deleted under section 22</li> </ul>
13.	1	27 July 2021	<ul style="list-style-type: none"> <li>Email correspondence between Nick Mitzevich and Ryan Stokes titled 'Great news!'</li> </ul>	Release in part	<ul style="list-style-type: none"> <li>Section 47F(1)</li> </ul>	<ul style="list-style-type: none"> <li>Page 1: contains personal information (s47F)</li> </ul>

Doc No.	Pages	Date	Description	Decision	Exemption	Comments
14.	1	15 December 2020	<ul style="list-style-type: none"> <li>Email correspondence between Nick Mitzevich and Lindy Lee titled 'Ouroboros teaser'</li> </ul>	Release in part	<ul style="list-style-type: none"> <li>Section 47F(1)</li> <li>Section 22</li> </ul>	<ul style="list-style-type: none"> <li>Page 1: contains personal information (s47F)</li> <li>Page 1: staff details deleted under section 22</li> </ul>
15.	26	21 December 2021	<ul style="list-style-type: none"> <li>Commission Agreement between the National Gallery of Australia, Lindy Lee Artistic Productions and UAP Australia Pty Ltd</li> </ul>	Exempt in full	<ul style="list-style-type: none"> <li>Section 45(1)</li> </ul>	<ul style="list-style-type: none"> <li>The entire document is material obtained in confidence (s45).</li> </ul>
16.	23	22 April 2021	<ul style="list-style-type: none"> <li>Business Case National Gallery of Australia 40<sup>th</sup> Anniversary Sculpture Commission</li> </ul>	Exempt in full	<ul style="list-style-type: none"> <li>Section 47C(1)</li> <li>Section 45(1)</li> <li>Section 47G(1)</li> </ul>	<ul style="list-style-type: none"> <li>The entire document contains deliberative matter (section 47C)</li> <li>Pages 10, 14-16, 19-20: contains material obtained in confidence (section 45(1))</li> <li>Pages 10, 14-16, 19-20: contains information about a person's business or professional affairs or the business, commercial or professional affairs of an organisation (s47G)</li> </ul>
17.	3	26 May 2021	<ul style="list-style-type: none"> <li>Briefing Paper to Council titled '40<sup>th</sup> Anniversary Sculpture Garden Commission'</li> </ul>	Exempt in full	<ul style="list-style-type: none"> <li>Section 47C(1)</li> <li>Section 45(1)</li> <li>Section 47G(1)</li> </ul>	<ul style="list-style-type: none"> <li>The entire document contains deliberative matter (section 47C)</li> <li>Page 3: contains material obtained in confidence (section 45(1))</li> <li>Page 3: contains information about a person's business or professional affairs or the business, commercial or professional affairs of an organisation (s47G)</li> </ul>

Doc No.	Pages	Date	Description	Decision	Exemption	Comments
18.	3	5 February 2021	<ul style="list-style-type: none"> <li>Briefing Paper to Collections Committee titled 'Sculpture commissions for the Gallery's 40<sup>th</sup> Anniversary in 2022'</li> </ul>	Exempt in full	<ul style="list-style-type: none"> <li>Section 47C(1)</li> </ul>	<ul style="list-style-type: none"> <li>The entire document contains deliberative matter (section 47C)</li> </ul>
19.	1	5 February 2021	<ul style="list-style-type: none"> <li>Extract from the Council meeting minutes</li> </ul>	Release in part	<ul style="list-style-type: none"> <li>Section 22</li> </ul>	<ul style="list-style-type: none"> <li>Extract provided to remove content which is irrelevant to the scope of the request (s22)</li> </ul>
20.	1	4 June 2021	<ul style="list-style-type: none"> <li>Extract from the Council meeting minutes</li> </ul>	Release in part	<ul style="list-style-type: none"> <li>Section 22</li> </ul>	<ul style="list-style-type: none"> <li>Extract provided to remove content which is irrelevant to the scope of the request (s22)</li> </ul>
21.	1	4 June 2021	<ul style="list-style-type: none"> <li>Extract from the Collections Committee meeting minutes</li> </ul>	Release in full	<ul style="list-style-type: none"> <li>Section 22</li> </ul>	<ul style="list-style-type: none"> <li>Extract provided to remove content which is irrelevant to the scope of the request (s22)</li> </ul>
22.	1	5 February 2021	<ul style="list-style-type: none"> <li>Extract from the Collections Committee meeting minutes</li> </ul>	Release in part	<ul style="list-style-type: none"> <li>Section 22</li> </ul>	<ul style="list-style-type: none"> <li>Extract provided to remove content which is irrelevant to the scope of the request (s22)</li> </ul>

## REASONS FOR DECISION

### What you requested

On 28 February 2022, you requested access to the following documents under the *Freedom of Information Act 1982 (FOI Act)*:

- ' Documents relating to the process for selection and approval of the Lindy Lee commission, *Ouroboros*, including the reasons why other artists were not approached to put forward submissions;
- The budget for *Ouroboros*;
- The Purchase Agreement between the National Gallery and artist/artist representative for the commission of *Ouroboros*;
- The names of the National Gallery's Acquisitions Committee members when the commission was approved;
- The names of National Gallery's Commission committee members when the commission was approved; and
- The names of the National Gallery Council members when the commission was approved.'

On 11 March 2022 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) of the FOI Act.

### What I took into account

In reaching my decision, I took into account:

- your original request dated 28 February 2022;
- other discussions and correspondence with you;
- the documents that fall within the scope of your request;
- consultation with third parties about documents which contain information concerning them;
- information about:
  - the nature of the documents; and
  - the National Gallery's operating environment and functions;
- guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**Guidelines**); and
- the FOI Act.

### Reasons for my decision

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

I have decided that certain documents and parts of documents that you requested are exempt under the FOI Act. My findings of fact and reasons for deciding that an exemption applies to those documents are discussed below.

#### **Section 45 of the FOI Act – Documents containing material obtained in confidence**

I have applied the exemption in section 45 of the FOI Act to documents 5, 6, 9, 10, 15, 16 and 17.



Section 45 of the FOI Act relevantly provides:

A document is an exempt document if its disclosure under this FOI Act would found an action, by a person (other than an agency or the Commonwealth), for breach of confidence.

Paragraph 5.159 of the FOI Guidelines relevantly provides that, to found an action for breach of confidence, the following five criteria must be satisfied:

- the information must be specifically identified;
- it must have the necessary quality of confidentiality;
- it must have been communicated and received on the basis of a mutual understanding of confidence;
- it must have been disclosed or threatened to have been disclosed, without authority; and
- unauthorised disclosure of the information has or will cause detriment.

The above criteria originate from *Re Kamminga and Australian National University* [1992] AATA 84; (1992) 26ALD 585 [592] and *Corrs Pavey Whiting & Byrne v Collection of Customer (Vic)* (1987) 14 FCR 434 [443].

I consider that the documents specified above meet all five criteria listed above, for the following reasons:

- The information was communicated to and received by the National Gallery on the basis of a mutual contractual obligation of confidence limited to use only for the specified purposes outlined in that agreement;
- The information within the documents has been specifically identified as being covered under the contractual obligation of confidence;
- The documents have the necessary quality of confidentiality, in that it is not publicly available and access to the information was prepared for, and is restricted to, the National Gallery;
- The documents have been treated as confidential by National Gallery employees including by keeping them separate from other non-confidential information and ensuring that the documents are not disclosed to any third parties without consent;
- Release of the documents under this request would be disclosure of information without authority, as consent has not been given by the relevant third party; and
- Unauthorised disclosure of the documents will likely cause detriment to the third parties, insofar as it discloses information which could harm the business interests or reputation of those third parties.

#### Conclusion

For the reasons given above, I am satisfied that disclosure of the documents, or part of the document, as set out in the Schedule would found an action for breach of confidence, and are therefore exempt under section 45 of the FOI Act.

#### **Section 47C of the FOI Act- unreasonable disclosure of deliberative matter**

I have applied the conditional exemption in section 47C(1) to documents 16, 17 and 18.

Section 47C of the FOI Act relevantly provides:

'(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 functions of:

- (a) an agency;
- (b) a Minister; or
- (c) the Government of the Commonwealth'.

Paragraph 6.58-6.60 of the Guidelines states that a 'deliberative process' must relate to the functions of an agency and generally refers to the process of weighing up or evaluating competing arguments or considerations or to thinking processes- the process or reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.'

One of the National Gallery's functions under the *National Gallery Act 1975* (Cth) is to develop and maintain a national collection of works of art. This includes determining which works of art should be purchased, commissioned or accepted as a gift into the national collection.

I find that documents specified above contain deliberative matter related to the decision to commission the Ouroboros into the national collection and are therefore conditionally exempt under section 47C(1) 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; and
- promote effective oversight of public expenditure.

(together the **Factors Favouring Disclosure**)

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 the ability of the National Gallery to function effectively and efficiently by disclosing the criteria and processes by which the National Gallery assesses works of art for the collection; and

- prejudice the operational activities of the National Gallery by limiting or restricting the frank and candour deliberations required when determining if a work of art should join the national collection.

Based on the above factors, I have decided that in this instance, the disclosure of the documents would, on balance, be contrary to the public interest.

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.

### Conclusion

In summary, I am satisfied that the documents or parts of documents, as set out in the Schedule, are conditionally exempt under section 47C(1) of the FOI Act. Furthermore, I have decided that on balance it would be contrary to the public interest to release this information. Accordingly, I have decided not to release the documents in full to you.

### **Section 47F of the FOI Act - unreasonable disclosure of personal information**

I have applied the conditional exemption in section 47F(1) to documents 5, 6, 7, 12, 13, and 14.

Section 47F of the FOI Act relevantly provides:

- '(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; and
  - (d) any other matters that the agency or Minister considers relevant.'

### Personal Information

The term 'personal information' is defined as follows:

'...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 documents specified above contain personal information which falls within the definition included in Paragraph 6.130 of the Guidelines.

Whether disclosure is 'unreasonable'

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 ATT 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 available in full or in part from publicly-accessible sources;
- the identity of the individuals concerned is readily apparent or could be easily ascertained;
- the information is current and sensitive and the FOI Act does not control to restrict any subsequent use or disclosure of the information received by the applicant under the FOI Act; and
- the individuals concerned have opposed the release of the information on the grounds that it is of such a nature that disclosure may cause harm or stress and will achieve no public purpose through its release. I am satisfied that the individual's contentions are reasonable in the circumstances.

On this basis, I have decided that the personal information included in the documents referred to in the Schedule are conditionally exempt under section 47F(1) of the FOI Act.

Public interest considerations

As previously stated, 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 Favouring Disclosure.

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;
- adversely affect or harm the interests of an individual or group of individuals;

- prejudice the National Gallery's ability to obtain similar information in the future; and
- prejudice the commercial activities of the National Gallery as artists may not have the confidence to work with the National Gallery if they do not believe their personal information will be protected.

Based on the above factors, I have decided that in this instance, the personal information contained in the documents would do very little to enhance or achieve the factors in favour of disclosure and that disclosure of the documents would, on balance, be contrary to the public interest.

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.

### Conclusion

In summary, I am satisfied that the documents or parts of documents, as set out in the Schedule, are conditionally exempt under section 47F(1) of the FOI Act. Furthermore, I have decided that on balance it would be contrary to the public interest to release this information. Accordingly, I have decided not to release the documents in full to you.

### **Section 47G of the FOI Act - unreasonable disclosure of business and professional affairs**

I have applied the conditional exemption in section 47G(1) to documents 5, 6, 9, 10, 16 and 17.

Section 47G of the FOI Act relevantly provides:

- '(1) a document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:
- (d) would or could, reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or
  - (e) could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.'

### Business or professional affairs

Paragraph 6.192 of the Guidelines defines the term 'business affairs' to mean 'the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs'.

Paragraphs 6.194 and 6.195 of the Guidelines explains 'the word 'profession' is clearly intended to cover the work activities of a person who is admitted to a recognised profession and who ordinarily offers professional services to the public for a fee.'

- I find that the documents specified above contain information concerning the business or professional affairs of an individual and the business, commercial or financial affairs of an organisation which falls within the definition included above.

### Whether disclosure is 'unreasonable'

Paragraph 6.188 of the Guidelines relevantly provides that 'the test of unreasonableness applies not to the claim of harm but to the objective assessment of the expected adverse effect...These

considerations require a weighing of a public interest against a private interest, preserving the profitability of a business.'

While I acknowledge that there is a strong public interest in knowing whether public money was accounted for and administered correctly, I am satisfied that the disclosure of the information regarding the business and professional affairs of the affected third parties would be unreasonable for the following reasons:

- the documents and information was obtained directly from those third party businesses under a contractual obligation of confidence;
- the information is not available in full or in part from publicly-accessible sources;
- the individual and business concerned is known to be (or to have been) associated with the matters dealt with in the information;
- the information is current and the FOI Act does not control to restrict any subsequent use or disclosure of the information received by the applicant under the FOI Act; and
- the third party businesses concerned have opposed the release of the information on the grounds that it is of such a nature that disclosure may cause harm to their business. I am satisfied that their contentions are reasonable in the circumstances.

*Whether disclosure would prejudice the future supply of information to the National Gallery*

Paragraph 6.198 of the Guidelines states that ' this limb of the conditional exemption comprises two parts:

- a reasonable expectation of a reduction in the quantity or quality of the business affairs information to the government; and
- the reduction will prejudice the operations of the agency.

One of the National Gallery's functions under the *National Gallery Act 1975* (Cth) is to develop and maintain a national collection of works of art. To do this, the National Gallery must engage with artists to commission new works into the national collection. If Artists, galleries, brokers and other relevant parties do not have confidence that their commercial and business information will be protected, they will be less likely to work with the National Gallery or to provide the necessary information required to allow the National Gallery to effectively perform its operations and functions.

On this basis, I have decided that the commercial information included in documents, or part of the documents, referred to in the Schedule are conditionally exempt under section 47G(1) of the FOI Act.

*Public interest considerations*

As previously stated, 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 Favouring Disclosure.

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:

- adversely affect or harm the interests of an individual or group;
- adversely affect or harm the profitability of a business;
- prejudice the National Gallery's ability to obtain similar information or other confidential information in the future; and
- prejudice the commercial and operational activities of the National Gallery as artists may not have the confidence to work with the National Gallery if they do not believe their information will be protected.

Based on the above factors, I have decided that in this instance, the disclosure of the documents would, on balance, be contrary to the public interest.

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.

### Conclusion

In summary, I am satisfied that the documents or parts of documents, as set out in the Schedule, are conditionally exempt under section 47G(1) of the FOI Act. Furthermore, I have decided that on balance it would be contrary to the public interest to release this information. Accordingly, I have decided not to release the documents in full to you.

### **Summary of my decision**

In conclusion, I have decided to:

- grant you full access to six (6) documents;
- grant you part access to twelve (12) documents; and
- refuse access to four (4) documents.

I have decided that:

- documents 5, 6, 9, 10, 15, 16 and 17 are exempt, in full or in part, under section 45(1) of the FOI Act;
- documents 16, 17 and 18 are conditionally exempt, in full or in part, under section 47C(1) of the FOI Act, and disclosure would be contrary to the public interest for the purposes of section 11A(5);
- documents 5, 6, 7, 12, 13 and 14 are conditionally exempt, in full or in part, under section 47F(1) of the FOI Act, and disclosure would be contrary to the public interest for the purposes of section 11A(5); and
- documents 5, 6, 9, 10, 16 and 17 are conditionally exempt, in full or in part, under section 47G(1) of the FOI Act, and disclosure would be contrary to the public interest for the purposes of section 11A(5).

As identified in the Schedule, I have deleted the exempt information in the documents and released the remaining material in accordance with section 22(1) of the FOI Act.