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VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

REVIEW AND REGULATION LIST

VCAT REFERENCE NO. Z329/2017

CATCHWORDS

Freedom of Information Act 1982 (Vic) ss 30, 33 and 50(4) – whether emails between Monash University personnel following complaint relating to email from the applicant to municipal councillors concerning same-sex marriage are exempt from release – public interest override

APPLICANT	Dr Shimon Cowen
RESPONDENT	Department of Premier and Cabinet
WHERE HELD	Melbourne
BEFORE	Senior Member I. Proctor
HEARING TYPE	Hearing
DATE OF HEARING	6 March 2018
DATE OF ORDERS & WRITTEN REASONS	11 May 2018
CITATION	Cowen v Monash University (Review and Regulation) [2018] VCAT 694

ORDER

1 The decision of the Respondent is varied in that:

a) Document 2 – The personal information of the recipient of an email dated 11 December 2015 at 13:13 pm is to be disclosed (see reasons, para 37);

b) Document 4 and other documents in dispute – The personal information of the recipient of an email dated 11 December 2015 at 5:23 pm is to be disclosed (see reasons, para 73) Where it appears in Document 4 and other documents in dispute;

c) Documents 12 and 13 – The personal information of the sender and the recipient of an email dated 15 December 2015 at 4:22 pm are to be disclosed; (see reasons, para 95).

2 Under s 53A(3) of the *Freedom of Information Act 1982*, the Respondent is directed to give notice of this decision to the persons whose personal affairs information is to be disclosed.

3 Liberty for 28 days to the persons referred to in Order 2 to intervene to seek a stay of these orders and liberty to the parties to apply.

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4 Subject to the above, Order 1 takes effect 28 days from today.

Ian Proctor
Senior Member

APPEARANCES:

For Applicant:	In person
For Respondent:	Mr M. Batskos, Solicitor

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REASONS

What is this proceeding about?

1 In 2015, Dr Shimon Cowen, an alumni of Monash University (**Monash**) had held honorary positions with Monash for many years. Over the years he had undertaken specific tasks for payment. In 2015, he held an Adjunct Research Associate position with Monash's Australian Centre for Jewish Civilisation (**the Centre**).

2 Dr Cowen was also the Director of the Institute for Judaism and Civilisation (**the Institute**). The Institute has no affiliation with Monash University.

3 In early December 2015, Dr Cowen used his Monash email account to send to a group of municipal councillors a booklet which he described as, "a comprehensive briefing on [same-sex marriage] from the standpoint of the Judaeo-Christian tradition."

4 Two local councillors raised issues with Monash via email.

5 One asked whether the Vice-Chancellor condoned the publication of what the councillor viewed as "blatant bigotry and homophobia" from a University email account (**the Complaint**). The Councillor copied the Complaint to Dr Cowen.

6 The other councillor advised Monash that Dr Cowen was "still using his" Monash "email address to lobby municipal councillors". I refer to this below as '**the Notification**'. Dr Cowen does not seek the name of the 'notifier'.

7 The University investigated the issue. The outcome for Dr Cowen was most serious. Monash's Dean of the Faculty of Arts (**the Dean**) declined to continue his ongoing honorary appointment, in the context that at the time Monash was in the process of appointing him to an Associate position.

8 The Dean's email advising Dr Cowen of the outcome said this action was taken because Monash had received "several complaints" concerning his use of his Monash email address to lobby members of the community concerning same-sex marriage in relation to his activities associated with his Institute, with the implication that the Institute is associated with Monash.

9 Dr Cowen appealed that decision to Monash's Vice-Chancellor.[1] In a short 12 January 2016 email she advised she had considered Dr Cowen's letter of appeal and the broader issue. She confirmed the Dean's decision, saying she was aware of and endorsed that decision at the time it was made.

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[1] Also Monash's President.

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10 Under the *Freedom of Information Act 1982* (**FOI Act**), Dr Cowen requested copies of all:

a) Complaints received by the of the Vice-Chancellor's Office and/or the Dean's Office relating to his use of his Monash email account; and

b) Correspondence to and from the Dean's Office, and to and from the Vice-Chancellor's Office, relating to revocation of his appointment as affiliate of Monash's Faculty of Arts.

11 Monash released to Dr Cowen a set of redacted documents. Dr Cowen sought review of that decision by the then Victorian Freedom of Information Commissioner. When the Commissioner did not make a decision within the requisite timeframe, Dr Cowen sought review at VCAT on the basis that his request was taken to be refused.

12 In March 2017, the issue came before me for hearing. Dr Cowen represented himself. Monash was legally represented. I heard the case and reserved my decision.

The FOI Act

13 Under s 13 of the FOI Act, Dr Cowen has the right to obtain documents, unless a document is wholly or in part an exempt document as defined by the Act.

14 Section 3 says the object of the Act is to extend as far as possible the right of the community to access information in the possession of the Government of Victoria and other bodies constituted under the law of Victoria for public purposes and that any discretions conferred by the Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.

15 Section 16 requires agencies to administer the Act with a view to making the maximum amount of information promptly and inexpensively available to the public.

16 Monash bear the onus of satisfying VCAT the redacted text is exempt from release under the FOI Act.

17 Monash relies on exemptions under s 30(1) – the internal working documents exemption and s 33(1) – the personal affairs exemption.[2]

VCAT's role on review

18 VCAT's role in this proceeding is to make what it considers to be the correct and preferable decision based on the evidence and submissions before it.

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[2] With Dr Cowen not seeking the name of the notifier, exemption under s 35 became irrelevant to this proceeding.

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Evidence

19 The evidence before me in this proceeding is witness statements, relevant 'background documents', largely provided through the witness statements, oral evidence and a copy of the documents in dispute. Both parties provided written submissions and made oral submissions at the hearing.

The Documents

20 I now turn to the question of whether each document is exempt. I set out the relevant evidence and relevant law when it first applies to a document. Once an issue is decided, if the issue recurs concerning a later document, I make a decision and provide brief reasons with respect to the reasons previously given.

Document 1

21 Document 1 is the 11 December 2015 Complaint, addressed to a Monash staff member asking the Vice-Chancellor's opinion of Dr Cowen's email to the councillors.

22 By the time this matter came before me, Monash had released Document 1 to Dr Cowen. This is unsurprising given the Complainant had copied the complaint to Dr Cowen at the time. Where the Complaint appears in later email chains, I understand it has also been released.

Document 2

23 Document 2 is an 11 December 2015 brief response from the University to the Complainant councillor, the text of which has been released to Dr Cowen. Monash claims exemption under s 33(1) of the FOI Act.

24 A document is exempt under s 33(1) if two tests are met:

a) The document in question must contain information relating to the personal affairs of a person (including a deceased person); and

b) Disclosure of that information must be unreasonable.

25 Under s 33(9), information relating to the personal affairs of any person includes information:

a) That identifies any person or discloses their address or location; or

b) From which any person's identity, address or location can reasonably be determined.

26 In the decision of the Supreme Court of Victoria Court of Appeal in *Victoria Police v Marke* [2008] VSCA 218, Weinberg JA and Pagone AJA approached the question as to whether release would entail unreasonable disclosure as requiring a balancing exercise. See [96] – [98] per Pagone AJA where His Honour said it was necessary in this context to consider:

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> Any matter that is relevant to the statutory condition, which bears logically upon a consideration of it, and which may have a probative effect upon the decision-maker.

27 The decided cases reveal a variety of criteria said to be potentially relevant to deciding whether it is unreasonable that particular personal affairs information be disclosed.[3]

28 In this context, VCAT's general approach is that personal information of non-executive staff of agencies are exempt from release under s 33(1). This includes their names.

29 *In Smeaton v Victorian WorkCover Authority* (General) [2012] VCAT 1549, I said:

> … the names of non-executive staff should not be released. I repeat the substance of what I said in *Smeaton v Victorian WorkCover Authority* (General) [2010] VCAT 1908 (30 November 2010). In my view, disclosure of the names would involve the unreasonable disclosure of information relating to the personal affairs of non-executive staff. It would be unreasonable because the intrusion on the personal affairs of non-executive staff. …

30 Recently, Butcher SM in *Coulson v Department of Premier and Cabinet* [2018] VCAT 229 at [126] agreed with the above:

> With the passage of years since those [2008 to 2012 VCAT] decisions and the increasing prominence of right of privacy, in my view an approach regarding disclosure of names of staff holding non-executive positions as unreasonable is the correct and preferable approach.

31 Turning to evidence in this proceeding related to s 33(1) exemption, Monash called Mr Anthony Calder, Director, Executive Services, Monash University, as its witness in this proceeding.

32 Concerning Dr Cowen using his Monash email address to email the councillors, Mr Calder pointed to Monash policies. He said it is clear that the predominant use of Monash email is for the performance of University roles, with reasonable use for personal purposes permitted. The 'Information Technology Use Policy – Staff & Other Authorised Users' in part prohibits use of email such as the damage the reputation, image or operations of the University.[4] What amounts to reasonable use is to be determined by the Head of the relevant department or the Administrative Head.[5] Sending of, "mass distribution bulk messages and/or advertising" without approval of the Head of the relevant department or the Administrative Head is prohibited.[6]

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3 For example, see the above-mentioned Marke decision, *Page v Metropolitan Transit Authority* (1988) VAR 243 and *XYZ v Victoria Police* [2010] VCAT 255.

4 Monash information technology use policy – staff and other authorised users, clause 2.1.

5 Ibid, clause 2.3.

6 Ibid, clause 3.3.1.

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33 He gave evidence that Monash had attempted to disclose as far as practicable the substance of various documents without attributing comments to individuals. He described this is being done in order to balance the object of maximising disclosure but at the same time protecting the identity of persons. He said the fact that involvement of certain persons but not others in dealing with the sensitive and very serious matters related to dealing with the Complaint and the Notification may well be known to Dr Cowen, but that Dr Cowen does not necessarily know who said what. According to Mr Calder, this is of more concern to the Monash in relation to less senior staff.

34 Further, according to Mr Calder, identification of officers, in relation to disclosed text, could result in negative impact on the willingness of officers to engage in frank and candid communication by email during decision-making processes. I take this evidence to mainly focus on discussion by senior officers in the context that less senior officers will generally be more involved in the mechanics of taking actions rather than contributing to the debate.

35 Concerning Document 2, I agree with Monash's decision that the name and position of the staff member (not holding a senior position within Monash), is information relating to the personal affairs of the person and is exempt under s 33(1).

36 I take this view despite the fact that Dr Cowen is well aware who that person is and the position the person holds at the University. It is one thing for a person to be aware of and officer's identity; it is another to have a document recording that fact.

37 I do not agree with Monash's decision that the personal information of the councillor complainant is exempt under s 33(1). Dr Cowen is aware of his identity and the email is evidently a reply to the councillor.[7]

Document 3

38 This is a short 11 December 2015 email between Monash officers starting consideration of the Complaint.

Section 33(1)

39 For the reasons given above, the personal affairs information related to one non-executive officer is exempt under s 33(1).

40 The other officer named in the Document 3 holds a senior position within Monash. This officer has provided to VCAT a confidential objection against the officer being identified.[8] The officer is concerned with being identified. The person does not want to be drawn back into debate about

[7] If in fact that information has not already been disclosed to Dr Cowen, this detail not completely obvious in the context of the exempt documents that have been provided to me.

[8] Under the s53A (of the FOI Act) process required to be undertaking in a proceeding such as this.

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this issue. The officer is not a decision-maker with respect to these issues, the decision-makers being the Dean and the Vice-Chancellor.

41 As will be seen below, in his submissions in this proceeding, Dr Cowen makes strong accusations against Monash. While he is at liberty to make those accusations, it is reasonable that I assume that if the name of this officer is disclosed to him, strong accusations may be made against that officer who contributed to a debate but was not the decision-maker. In my view it is unreasonable to permit that possibility where Dr Cowen is well aware of the final decisions and is at liberty to debate that in whatever arena he chooses.

42 I my view, in those circumstances, in the absence of anything improper in that officer's communications on this issue, the officer's name is exempt under s 33(1).

Section 30

43 Monash claims the short discussion in the document is exempt under s 30(1).

44 A document is exempt under s 30(1) if, relevant to this proceeding:

(a) Disclosure of the document would disclose matter in the nature of:

i. opinion, advice or recommendation prepared by an officer; or

ii. consultation or deliberation that has taken place between officers; and

(b) The opinion, advice, recommendation, consultation or deliberation was prepared or took place in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of Government; and

(c) Disclosure would be contrary to the public interest.

45 Returning to Mr Calder's evidence, on the issue of exemption under s 30(1), he says the text which Monash claims is exempt involves exchanges of opinion, advice or recommendations between Monash officers for the purpose consultation and/or deliberation related to the Complaint and the Notification. In his opinion, disclosure would be contrary to the public interest because it may not accurately or fully reflect actions taken by Monash and the reasons for those actions, leading to disclosure giving a misleading and/or inaccurate picture of the final decision arrived at by the Dean, confirmed by the Vice-Chancellor.

46 He described the fact that some of the officers involved hold very senior executive level positions, sometimes physically located at different sites. In his view there is a need to be able to frankly and confidentially discuss by email sensitive matters considered to be "serious breaches of university policy". This is necessary, in his view, to ensure a fair and balanced decision making process.

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47 Mr Calder also puts the opinion that for reasons of compliance with legal obligations and good governance, frank discussion via email is important to document the decision-making processes leading to final decisions being made, such that proper and fair process is evidenced, I take it he means here for internal purposes of the University.

48 He also puts his opinion that a review of the documents in dispute in this proceeding show a fair process leading to the decisions communicated to Dr Cowen.

49 It is time to turn to a central focus of Dr Cowen's application, evidence and submissions in this proceeding, which relates to the issue of exemption under s 30(1) and s 50(4); the public interest override.

50 Dr Cowen submits there is a strong prima facie argument that Monash's actions following the Complaint and the Notification leading to him losing his status at the University was driven by desire to constrain him expressing his views on same-sex marriage; amounting to an improper restriction of the freedom of academic expression and debate stemming from his religious beliefs as an Orthodox Jew; he says his views being largely similar to that of the Catholic Church and Islam.

51 He submits only full disclosure of the documents in dispute can resolve whether Monash:

a) Contravened the *Monash University Act 2009*. Section 5(e)(iii) of that Act describes an object of the University:

> promoting critical and free enquiry, informed intellectual discourse and public debate within the University and in the wider society;

b) Contravened the *Equal Opportunity Act 2010*, by discriminating against him related to his religious belief or activity; and/or

c) Acted improperly in the situation that held an honorary position, with some remuneration and remunerative possibilities; an issue with implications for all Monash University employees.

52 Dr Cowen pointed to what he describes as his previous experience of abridgement of academic freedom at Monash in 2012. At the time he was an honorary associate. He published in the Journal of the Family Association of Australia, of which he is a patron, an article critiquing the Safe Schools Program, which, in his words, incurred the extreme displeasure of an external activist. Monash published a public dis-association of it from his views. Dr Cowen says, supported by correspondence of the time, that when he complained, the then Vice-Chancellor apologised for the distress caused to him by Monash's actions, reaffirmed the principle of academic freedom and promoted him to a senior honorary adjunct position.

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53 He contrasts that distressing but quickly resolved response in 2012 to his 2015/2016 experience.

54 With reference to the documents provided to him, Dr Cowen submitted:

> Prima facie, the [documents released to him] seems to suggest that two external political activists contacted the office of the Vice-Chancellor. Their opposition to my views on the marriage debate coincided with [the] view of the Vice-Chancellor (with which she had disturbingly sought to align University as a whole) whose Office then instructed the Dean to revoke my position at Monash. Even upon my request from the Vice-Chancellor, in a matter as serious as the dismissal of an academic staff member, there was ostensibly no attempt made to read and evaluate the material I had contributed to the marriage debate other than to accept the slanderous and defamatory description by [the Complainant] as "homophobic" and "bigoted". It is absolutely extraordinary that an institution with the rationale of promoting free and critical discussion on matters of public debate should ostensibly refuse even to examine the material in question before dismissing an academic.[9]

55 Dr Cowen submitted the grounds for his dismissal as stated by Monash were spurious and mere camouflage for the real intent of Monash to constrict free public debate. He further submitted, as this was in the context that the Vice-Chancellor's, "conduct in putting Monash University behind one side of the public debate on marriage is surprising to say the least". In his view in the context of academic freedom, Monash should have taken no position on the topic but rather been a venue for discussion of opinions on matters of public debate.

56 On the issue of the Monash environment concerning freedom of expression for those who hold religious beliefs contrary to marriage equality, Dr Cowen called Fr Geoff Harvey, Orthodox Chaplain Monash University Religious Centre to give evidence.

57 Fr Harvey expressed his opinion, also on behalf of four colleagues who are chaplains, that Monash University's support for expression of same-sex sexuality has created an atmosphere of fear amongst students and others who hold contrary religious belief's leading to adverse consequences for those holding those religious beliefs. In his written statement he said in part Monash's:

> … driving of a position advocating same-sex marriage, with global emails and information seminars pushed onto University staff and students which carried this message, created real inhibitions of debate and free speech within the broad sections of religious students and staff who form our constituency. A politicisation of the University and a single view – against that of many members of the University community – made them uncomfortable, frustrated, resentful and inhibited about expressing their own feelings and values. …

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[9] Dr Cowen's submission in this proceeding, pages 5 and 6.

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58 Turning to authorities concerning the application of s 30(1), in *Friends of Mallacoota Inc v Department of Planning and Community Development* [2011] VCAT 1889, Hampel J summarised the considerations that might arise under s 30(1)(b) of the Act:[10]

(a) The nature of the information and the nature of the document. The more sensitive or contentious the issues involved in the communication, the more likely it is that the communication should not be disclosed;

(b) Draft internal working documents or preliminary advices and opinions are more generally than not inappropriate for release, particularly when the final version of the document has been made public;

(c) It is contrary to the public interest to disclose documents reflecting possibilities considered but not eventually adopted, as such disclosure would be likely to lead to confusion and ill-informed debate, to give a spurious standing to such documents or promote pointless and captious debate about what might have happened rather than what did;

(d) Decision-makers should be judged on the final decision and their reasons for it, not on what might have been considered or recommended by others in preliminary or draft internal working documents;

(e) It is contrary to the public interest to disclose documents that would have an adverse effect on the integrity or effectiveness of a decision-making, investigative or other process;

(f) Disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken may be unfair to a decision-maker and may prejudice the integrity of the decision-making process; and

(g) Public interest concerns the interest of the public as distinct from the interest of individuals.

59 Turning from general principles to decisions more focused on the nature of Document 3, in *Yarra City Council v Roads Corporation* [2009] VCAT 2646, VCAT said:

> There is a long line of authority in this Tribunal and its predecessor, the Administrative Appeals Tribunal of Victoria to the effect that draft and incomplete documents which form part of the deliberative process are not appropriate for release. The rationale for that is that to release a draft implicitly attributed to a Government agency or perhaps a Minister or the Government as a whole of views or policies or determinations which were ultimately not taken at all or held at all or were taken or held only in a materially amended form. Hence in the case of a draft which is found to fall within Section 30(1)(a) of the *Freedom of Information Act* in terms of Section 30(1)(b), the

[10] [51], [53].

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> public interest will generally come down against release and in favour of holding the document exempt.

60 In *Graze v Commissioner of State Revenue* [2013] VCAT 869 at [57], VCAT said:

> The outcome of the deliberative process of which this was part is to be found in the letter which the Commissioner wrote to the Grazes. What is important, therefore, is the outcome of the deliberative process. It would be confusing and inappropriate to make public something which is merely a step along the way to a final determination which has, so far as these applicants are concerned, already been made known.

61 In *Coulson v Freedom of Information Commissioner* (Review and Regulation) [2016] VCAT 1521, I discussed the text redacted from the email chain under s 30(1) being two officer's opinions as to the content of correspondence to be sent to Mr Coulson. I said:

> … It is difficult to imagine a world where officers could not collaborate via email toward a final version of a document, without being concerned about the release of the email. That said, the position could be different if the email contained some form of inappropriate content, such that releasing it would not be contrary the public interest.

62 Similarly here, it is difficult to imagine a world where Monash officers could not reasonably communicate without being concerned about release of deliberative emails, the purpose of leading to a final response to an issue raised, which will represent the decision in the matter. As discussed in *Graze*, what is important is the outcome of the deliberative process, here known to Dr Cowen through the content of the Dean's and the Vice-Chancellors decision discussed above.

63 That said, the situation could arise where disclosure of the content of an email in the context of this case was appropriate because that content showed form of inappropriate content concerning the eventual decision, not disclosed to a person in Dr Cowen's position.

64 Concerning Document 3 and s 30(1)(a), the relevant text is mix of opinion, advice and/or recommendation prepared by an officer or consultation or deliberation that has taken place between officers which took place in the course of, or for the purpose of, the Monash's deliberative processes.

65 This was in the context of the early stages of formulating a response to the Complaint and Notification.

66 Concerning Document 3 and s 30(1)(b), in my view, release would be contrary to the public interest.

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67 In the context of having read the documents in dispute, in my view there is nothing in to indicate improper motive on the part of Monash as it responded to the Complaint and the Notification. This is consistent with Mr Calder's evidence.

68 In saying the above, I do not form an opinion as to the merit of the decision in terms of the judgement as to whether Dr Cowen breached Monash email policy or the extent to whether his conduct had the potential to mislead concerning support by Monash for his position. Those are matters for Monash and not to be decided in an FOI proceeding.

69 Concerning freedom of academic expression and Monash's obligations not to discriminate on the basis of religious belief or activity, Dr Cowen is able to pursue any concerns he has on those matters on the basis of the information already provided to him.

70 Therefore, in my view the substance of Document 3 it is exempt under s 30(1).

Document 4

71 This 11 December 2015 email starts with the Notification from the other councillor to a Monash officer, who forwards the email to an officer at Monash, who forwards the email to another officer.

72 With Dr Cowen not seeking the name of the notifier, noting he has assumed who this person is, Monash's decision to exempt that information does not arise for decision in this proceeding.

73 Concerning redaction under s 33(1), one officer, the recipient of an email dated 11 December 2015 at 5:23 pm, has indicated in the course of this proceeding that he consents to the release of his personal information. Therefore, I have varied Monash's decision to release that personal affairs information in Document 4 and wherever else that offices personal affairs information occurs in other documents in dispute.

74 Concerning the other officers, who have indicated no position concerning release, drawing on the reasons given above, the personal affairs information related to those officers is exempt under s 33(1). It is unreasonable to create the risk that for no good purpose they could be drawn into debate about the issues in question.

75 The text of the emails shows nothing more than these offices starting the process of a response to the notification. For the reasons given concerning Document 3 that text is exempt under s 30(1).

76 As Document 4 appears repeatedly in email chains discussed below. This decision applies to that text wherever it appears. Similarly, text decided to be exempt in a particular document is also decided to be exempt wherever it appears in other documents in dispute.

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Document 5

77 Document 5, related to the Notification, is an 11 December 2015 email chain picking up content of Document 4 with further emails later in time. Concerning the fresh material, Monash claims exemptions under s 33(1).

78 The version of Document 5 released to Dr Cowen shows a Monash officer asking another officer to put Dr Cowen's planned promotion on hold pending further notice, with no explanation. There is also a reference in that version to an officer saying "I'll put something together and forward for your comment".

79 For the reasons given above, the personal affairs information related to the officers is exempt under s 33(1).

Document 6

80 Document 6, related to the Notification, is an 11 December 2015 email chain picking up content of Document 5 with a further email later in time. Concerning the fresh material, Monash claims exemption under s 30(1) and s 33(1).

81 For the reasons given above, the personal affairs information is exempt under s 33(1).

82 The substance of the email is deliberative material between two offices about the appropriate action to take concerning the Notification. For the reasons given concerning Document 3, this text is exempt under s 30(1).

Document 7

83 Document 7 is simply an out of office notification in reply to one of the emails, which names officers. Those officers are not involved in the conversations in the documents in question. One of the officers, not holding an executive position (I am not aware of the status of the other officer), objected to disclosure.

84 For the reasons given above, the personal affairs information is exempt under s 33(1).

Document 8

85 Document 8, related to the Notification, is an 12 December 2015 email chain picking up content of Document 5 and saying, in text released to Dr Cowen, that his promotion would be put on hold. Concerning the fresh material, Monash claims exemptions under s 33(1).

86 For the reasons given above, the personal affairs information is exempt under s 33(1).

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Document 9

87 Document 9, related to the Notification, is related to Document 8 with the new email (12 December 2015) saying, in text released to Dr Cowen, that his promotion, "will need to be put on hold".

88 To the extent that there is any fresh text claimed exempt under s 30(1) – it is a little difficult to tell when dealing with hard copies of email chains – I agree it is so exempt.

89 For the reasons given above, the personal affairs information is exempt under s 33(1).

Document 10

90 Document 10 is an email chain picking up content of Document 6 with a new email dated 14 December 2015 expressing opinion by one Monash officer to another Monash officer concerning Dr Cowen's use of his Monash email related to this proceeding and appropriate options that Monash may take.

91 Monash claims the document is exempt under s 30(1) and s 33(1) of the FOI Act.

92 For reasons given above, exemptions apply with respect to Document 10 as decided by Monash.

Document 11

93 Document 11 continues the email chain from Document 10, with a very brief email (14 December 2015) comment that a proposal put to the receiver, "sounds reasonable to me" (that text released).

94 For the reasons given above the redacted text is exempt under s 33(1).

Document 12

95 Here I speak elliptically to convey my decision that the redacted text in this 15 December 2015 email (4:22 pm) from a Monash officer to a person is not exempt under s 33(1). That is necessary to preserve the status quo until it is known whether either the addressee or Monash contest that decision (see below).

96 It is reasonably obvious from the text that is disclosed to Dr Cowen to whom the email is addressed. In my view, that person is unlikely to be troubled by the disclosure.

97 The Monash officer sending it is of sufficient seniority such that there is no basis for exemption under s 33(1).

98 The name of the less senior person which appears in Document 12, is exempt under s 33(1).

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Document 13

99 For some reason, Document 13 is simply a differently formatted version of Document 12. I repeat my decision concerning Document 12.

Document 14

100 As is apparent from the substance released to Dr Cowen, these 16 December 2015 emails relate to the decision to withdraw the offer of an associate position to Dr Cowen and the drafting of an email to advise him of that decision and that his ability to use Monash email would end on 31 December 2015.

101 For the reasons given above the redacted text is exempt under s 33(1).

Document 15

102 Document 15 is a previously undiscussed email chain. On 21 December 2015, Dr Cowen responded to the Dean's advice that she was withdrawing her recent offer of associate appointment at Monash, ending his access to the Monash email, making alternative arrangements for Monash library access.

103 The email chain includes a copy of the Dean's email advising Dr Cowen of the decision, also dated 21 December and other discussion between the Dean and Dr Cowen, including the detail of arranging ongoing access to the Monash library. The email exchange is cordial.

104 I mentioned this for completeness. As far as I understand while, surprisingly, at one point Monash had redacted personal affairs information relating to the Dean, given the email exchange was between Dr Cowen and the Dean, by the time I was hearing this dispute, that information had been released to Dr Cowen. Therefore, Document 15 was no longer in dispute between the parties.

Documents 16, 17 and 18

105 Apart from the Dean's email of 21 December 2015, already released to Dr Cowen, this 11 January 2016 email exchange between Monash officers (in virtually identical text and format between these three versions of the emails) discusses Dr Cowen's response to the Dean's decision.

106 For the reasons given above, the redacted text, is exempt under s 30(1) and s 33(1).

Documents 19

107 This document continues the document chain from Document 17. The substance of the new email dated 12 January 2016 is exempt under s 30(1) and s 33(1).

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Documents 20 to 28

108 These 11 and 12 January 2016 emails discuss between various Monash officers, drafts of the Vice-Chancellor's reply to Dr Cowen's request that she review the Dean's decision.

109 These are the archetypal type of drafts which are exempt from release under s 30(1) and 33(1).

Section 53A(3) notifications

110 Having decided personal affairs information is to be disclosed, with those persons having not intervened in this proceeding, s 53A(3) of the FOI Act requires that if practicable they be given notice of my decision. Adapting a procedure previously used by VCAT in similar circumstances,[11] I have directed Monash to give notice to the persons concerned such that they have the opportunity within 28 days to object to release. That scenario seems unlikely.

Pubic interest override

111 Dr Cowen sought to invoke the public interest override under s 50(4) of the Act to release the documents found exempt under s 30(1). Section 50(4) does not apply to exemption under s 33(1).

112 Section 50(4) says:

> On the hearing of an application for review the Tribunal shall have, in addition to any other power, the same powers as an agency or a Minister in respect of a request, including power to decide that access should be granted to an exempt document (not being a document referred to in section 28, section 29A, section 31(3), or in section 33) where the Tribunal is of opinion that the public interest requires that access to the document should be granted under this Act.

113 The High Court of Australia has said decision-makers must be satisfied to a high threshold that the public interest requires release of the document. In *Osland* v *Secretary to the Department of Justice* [2010] HCA 24, French CJ, Gummow and Bell JJ said at [12] to [14]:

> Relevantly to this appeal, the exercise of the power conferred by s 50(4) requires satisfaction of two conditions. The first is the condition that, as a matter of law, the material before the Tribunal is capable of supporting the formation by it of an opinion that the public interest requires that access to the documents should be granted. That condition may also be expressed as a limitation, namely, that the opinion referred to by the sub-section is an opinion which is such that it can be formed by a reasonable decision-maker who correctly understands the meaning of the law under which that decision-maker acts. The second condition is that the Tribunal actually forms the opinion that the public interest requires that access to the documents should be granted. This is an evaluative and essentially factual

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[11] *Mond v Department of Justice (General)* [2005] VCAT 2817 (22 December 2005)

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judgment. If the Tribunal forms the requisite opinion, its power to grant access is enlivened. In the ordinary case, the exercise of the power will be subsumed in the formation of the necessary opinion.

The FOI Act neither defines nor expressly limits the range of matters relevant to the 'public interest' which may require that access should be granted. As was said in the joint judgment in this Court on the first appeal, "[t]here are obvious difficulties in giving the phrase 'public interest' as it appears in s 50(4) a fixed and precise content". The nature of "public interest" determinations in the exercise of statutory powers was described in *O'Sullivan v Farrer*:

> "the expression 'in the public interest", when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view".

The power to grant access on public interest grounds is not, in terms, vested in the relevant Minister or agency. By virtue of s 16 they retain their freedom to grant access to exempt documents. Rather, it is a power included in the powers conferred on the Tribunal. In this respect it is unique in freedom of information legislation in Australia. It has been called a "significant and exceptional" power and "a most extraordinary provision". These epithets do not justify its characterisation, propounded by the Secretary, as a power to be exercised only in "exceptional circumstances". Those words are not in the statutory text. Their use may misdirect the inquiry required by s 50(4). They may be taken erroneously to limit the range of matters relevant to the public interest. Nor do they sit easily with the proper approach to the construction of the FOI Act, which is to "further, rather than hinder, free access to information" under it.

114 Their Honours continued with the oft quoted statement:

> Having said that, it must be accepted that the word "requires" which appears in s 50(4) directs the decision-maker to identify a high-threshold public interest before the power can be exercised. It is not enough that access to the documents could be justified in the public interest. The terminology of the sub-section does not define a rule so much as an evaluative standard requiring restraint in the exercise of the power. It is, like many common law standards, "predicated on fact-value complexes, not on mere facts", to be applied by the decision-maker.

115 While I accept Dr Cowen's submissions that freedom of academic expression and freedom to hold and practice religious beliefs in a university setting are important public interests, I reject his submission that the public interest requires that access should be given to the documents in contest in this proceeding.

116 As described above, having decided that disclosure of the text in question is contrary to the public interest for the reasons given above, there being nothing of an inappropriate nature in the text, it follows that I am of the

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view that nothing in the text, if access was given, would advance the public interests Dr Cowen asserts.

117 In late 2015 and early 2016, Dr Cowen was advised of Monash's decision and the reasons for that decision. The various documents provided to him provide further insights. He is free to pursue debate concerning academic and religious freedom as he chooses.

118 To the extent that he seeks the documents to pursue personal interests, s 50(4) does not apply.

Ian Proctor
Senior Member

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