By email:



## Corporate Affairs

ABC Ultimo Centre 700 Harris Street Ultimo NSW 2007 GPO Box 9994 Sydney NSW 2001

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Dear

### FOI REQUEST - REFERENCE NUMBER 2013-041

I refer to your request for access to documents under the *Freedom of Information Act 1982* (the FOI Act) in your email of 11 October 2013.

You have sought access to the following documents relating to Dr David Suzuki's appearances on ABC television, radio and online during September 2013 ("the Appearances"), including the 23 September broadcast of a special edition of *Q&A*:

- All internal ABC correspondence and documents relating to the decision to invite Dr Suzuki for the purpose of making the Appearances;
- All correspondence between the ABC (or any entity acting on its behalf) and Dr Suzuki (or his agent, representative or any other entity acting on his behalf);
- All documents showing the fees, expenses and other payments of whatever nature requested by, and paid to, Dr Suzuki; and
- All internal ABC correspondence and documents relating to the consideration, justification and approval of such fees, expenses and other payments referred to above.

I am authorised by the Managing Director under section 23 of the FOI Act to make decisions in respect of requests made under that Act. Following is my decision in relation to your request.

## Locating and identifying documents

I have taken reasonable steps to identify and locate all relevant documents. My search for these documents involved contacting the following relevant people, who in turn consulted with relevant managers and staff within their respective teams:

- Executive Producer, Q&A
- Head of Policy and Staff Development in the News division;

- Manager Policy and Administration in the Radio division;
- Head of Online and Mobile in the Innovation division;
- Director, Corporate Affairs; and
- · Managing Director's Chief of Staff.

I requested that searches be conducted of all hard and soft copy records for documents which fall within the scope of your request. As a result of those searches, the following 18 documents were identified:

Document 1	Email string, subject line "David Suzuki in sydney in Sept" dated between 12 and 15 April 2013
Document 2	Email string, subject line "David Suzuki interview" dated between 15 August and 19 August 2013
Document 3	Email string, subject line "David Suzuki talk Sept 21 <sup>st</sup> " dated 27 August 2013
Document 4	Email string, subject line "david Suzuki interview" dated 5 September 2013
Document 5	Email string, subject line "David Suzuki's forthcoming visit to Australia" dated between 14 April and 10 September 2013
Document 6	Email string, subject line "david Suzuki interview" dated between 4 and 10 September 2013
Document 7	Email string, subject line "David Suzuki interview" dated between 15 August and 10 September
Document 8	Email, subject line "David Suzuki" dated 11 September 2013
Document 9	Email string, subject line "David Suzuki/roy Williams" dated 11 September 2013
Document 10	Email string, subject line "ABC News Breakfast TV" dated 19 September 2013
Document 11	Email, subject line "ABC Radio interview with David Suzuki/micro-plastics story" dated 16 September 2013
Document 12	Email, subject line "contact details for Suzuki organiser" dated 16 September 2013
Document 13	Email string, subject line "david Suzuki interview" dated between 22 August and 17 September 2013
Document 14	Email string, subject line "Friday, 20 <sup>th</sup> at Sydney Aquarium wharf" dated between 16 and 17 September 2013
Document 15	Email string, subject line "David Suzuki" dated 19 September 2013, including attachment
Document 16	Email string, subject line "Your Suzuki showsome questions" dated 19 September 2013
Document 17	Email string, subject line "David Suzuki on Q&A – Mon 23 Sept, 9.35pm ABC1" dated 19 September 2013
Document 18	Email string, subject line "suzuki Monday" dated 20 September 2013

Please note that in identifying relevant documents, I have excluded duplicates of the same document. Accordingly, email messages which appear as part of a string have not also been included as separate emails.

I confirm that no fees, expenses or other payments were paid to Dr Suzuki. Accordingly, no documents exist which fall within the scope of points 3 and 4 of your request.

# Documents that are out of scope

I have formed the view that Documents 1 to 18 inclusive are all 'program material'. The ABC is specifically excluded from the operation of the FOI Act in relation to its program material by virtue of s7(2) and Part II, Schedule 2 of the FOI Act. 'Program material' for the purposes of that Part has been interpreted to mean:

""the program and all versions of the whole or any part of the program, any transmission broadcast or publication of the program, and includes a document of any content or form embodied in the program and any document acquired or created for the purpose of creating the program, whether or not incorporated into the completed program." (emphasis added)

The documents you have requested were created for the purpose of creating various ABC programs, including *Q&A*, *The World Today*, and *ABC News Breakfast*. Accordingly, they fall within the definition of 'program material' and the ABC is exempt from the operation of the FOI Act in relation to them. In those circumstances, a decision regarding access is not required.

I note that if the documents were considered to be within the scope of the FOI Act (which the ABC considers they are not), access to them would be refused on the basis that they are exempt for reasons which are set out below

## Access refusal – s47C (deliberative processes)

Access to documents 1 to 18 inclusive (collectively referred to as 'the Documents') would be refused on the basis that those documents are conditionally exempt under s47C of the FOI Act. In my view, disclosure of those documents under the FOI Act would disclose matter in the nature of, or relating to, an opinion or recommendation prepared in the course of the deliberative processes involved in the functions of the ABC. I am further satisfied that, on balance, it would be contrary to the public interest to disclose that material at this time.

In determining whether the information in the Documents contains information relating to the ABC's deliberative processes, I have had regard to the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the Guidelines), in particular *Part 6 – Conditional Exemptions*. Paragraph 6.62 of the Guidelines states:

"A deliberative process involves the exercise of judgement in developing and making a selection from different options:

The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes – the

processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.<sup>1</sup>

The information in the Documents contains a collection of facts, advice, opinions and recommendations which form part of the 'thinking processes' associated with the preparation of programs.

I note that the Guidelines state (at paragraph 6.69) that material that is gathered as a basis for intended deliberations may also be deliberative matter. This is consistent with the findings of the Federal Court of Australia that it would be a 'fallacy' to consider the application of exemptions under the FOI Act to documents brought into existence for a particular purpose divorced from the process in which that occurred.<sup>2</sup>

I note that the deliberative processes exemption does not require a specific harm to result from disclosure. Rather, the only consideration is whether the document includes content of a specific type, namely deliberative matter. I am satisfied that the Documents contain deliberative matter and would therefore be conditionally exempt.

## Access refusal – s47E (proper and efficient conduct of operations)

In addition, I consider that access to the Documents would be refused on the basis that they are conditionally exempt under s47E of the FOI, that is, because disclosure would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the ABC's operations.

#### Public interest

Section 11A(5) of the FOI Act would require the ABC to provide access to a conditionally exempt document unless, in the circumstances, access to the document would, on balance, be contrary to the public interest.

I have considered the factors set out in s11B of the FOI Act which favour disclosure, specifically whether disclosure would promote the objects of the FOI Act, inform debate on a matter of public importance, promote effective oversight of public expenditure, or allow a person to access his or her personal information.

I accept that disclosure may promote the objects of the FOI Act in that it would provide access to information. However, having regard to the content of the Documents, providing access to them would not promote effective oversight of public expenditure, or allow a person to access his or her personal information.

Balanced against the factors favouring disclosure, there are public interest factors against disclosure. In my view, it is unlikely that the factors in favour of disclosure would be sufficient to outweigh the factors against disclosure.

<sup>&</sup>lt;sup>1</sup>. See Re JE Waterford and Department of Treasury (No 2) [1984] AATA 67. See British American Tobacco Australia Ltd and Australian Competition and Consumer Commission [2012] AlCmr 19, [15]–[22].

<sup>&</sup>lt;sup>2</sup> Secretary, Department of Employment, Workplace Relations & Small Business v The Staff Development & Training Centre Pty Limited [2001] FCA 382 (at [52])

I am satisfied that the material contained in the Documents would be conditionally exempt under s47C of the FOI Act, and that disclosure of that material at this time would be, on balance, contrary to the public interest.

If you are dissatisfied with this decision you can apply for Internal or Information Commissioner (IC) Review. You do not have to apply for Internal Review before seeking IC Review. Information about your review rights is attached.

Yours sincerely

**Judith Maude** 

Head, Corporate Governance Direct line 02 8333 5316