

ABC submission to the Department of Communications and the Arts

Re: Release of the report on the National Broadcasters Efficiency Review December 2018 (the Report) under the Freedom of Information Act 1982 (the FOI Act)

The ABC contends that the full text of the Report is currently subject to public interest conditional exemption 47C (deliberative processes) under the FOI Act, and access at this time should be refused in full.

Once deliberative processes have concluded, the ABC contends that certain information in the Report should not be released pursuant to section 47 (commercially valuable information) of the FOI Act.

Please find our detailed reasoning below.

47C Public interest conditional exemptions – deliberative processes

Section 47C of the FOI Act conditionally exempts a document if it contains 'deliberative matter'. We can confirm that the Report in its entirety is currently the subject of an active deliberative process of the ABC.

I note the 47C exemption does not apply to purely factual material or records of decision. While the Report is ostensibly such a document – being the findings of the team conducting the Efficiency Review – the ABC is aware that the Government has noted that both the ABC and the SBS require sufficient time to fully consider those findings. The document was provided to the ABC under embargo for the purposes of such a consideration.

The general functions of ABC are set out in Section 6 of the *Australian Broadcasting Corporation Act* 1983 (the ABC Act). One of those functions is to, among other things, provide "...innovative and comprehensive broadcasting services of a high standard as part of the Australian broadcasting system..." This is complemented by section 8 of the ABC Act, which establishes the duties of the ABC Board, which relevantly include ensuring "...that the functions of the Corporation are performed efficiently and with the maximum benefit to the people of Australia".

A deliberative process that is relevant to these functions is the consideration, by ABC management and the Board, of documents relating to the Corporation's efficiency.

The ABC is currently addressing . These and other deliberations are under discussion while the ABC's Managing Director considers his substantive response to the Minister, which the ABC Chair indicated in her letter of 20 March would be forthcoming. In expressing that we hold these concerns, we feel the Report is established as deliberative material in relation to the ABC – until such time as any issues are satisfactorily resolved.

¹ https://www.communications.gov.au/what-we-do/television/national-broadcasters-efficiency-review

Public interest

Section 11A(5) of the FOI Act requires an agency 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 had regard to the factors set out in section 11B(3) 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, or promote effective oversight of public expenditure.

The ABC acknowledges there is significant public interest surrounding its efficiency. Transparency around the ABC's operations promotes effective oversight of the public money invested in the Corporation.

deliberations conclude, the ABC will be happy for the majority of the Report to be released, with the exception of the information described in the following paragraphs.

Once

47 Documents disclosing commercially valuable information

Section 47 of the FOI Act exempts documents or parts of documents from release where disclosure would release information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished as a result of disclosure.

The information the ABC contends should be exempt under section 47 identifies financial arrangements between the ABC and its partner providers , specifically:

In my view, this information is commercially valuable to the ABC because:

- the information is known only the ABC and the specific third party to whom the information would also have commercial value (being a business that provides a service for a specific cost to the ABC)
- the information is current
- the information confers a competitive advantage to the ABC in a space where the ABC has negotiated, and will continue to negotiate, with third parties.²

While the ABC is not a commercial media organisation, it nevertheless operates within a larger commercial environment. The Corporation has an obligation to the taxpayer to make the best use of public funding via careful strategy in respect of that wider space, by sourcing and/or negotiating high-value arrangements with the third-party services they procure in pursuit of providing ABC content to Australians. The ABC needs to be able to continue to work with those third parties to sustain that value, and maintain positive professional relationships going forward.

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² Paragraph 5.203 of the Guidelines issued by the Australian Information Commissioner

It is likely the release of the information in the documents to which access is refused would result in the diminishing of the value of that information for two reasons:

- 1. The ABC believes the third parties would have a reasonable expectation of confidentiality with respect to business transactions. It is reasonable to assume they would not appreciate their business information being released publicly without consent. Disclosure may damage professional relationships where the ABC gained value.
- 2. Linking a specific type of provider to a specific rate for their services would potentially undercut the third party's ability to charge their chosen rate in the market and would also alert other service providers to the price the ABC has paid. This would, respectively, destroy the value of the information for the provider and potentially limit the ABC's ability to negotiate rates with similar providers in the future.

For the ABC, the exemption above is not – as with the 47C co	onditional exemption – a timely issue. We
respectfully request the information remain exempt from dis	sclosure going forward, in order to protect
our arrangements	

Many thanks for the opportunity to provide this submission.