



# Corporate Affairs

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abc.net.au

Dear

#### FOI REQUEST - REFERENCE NUMBER 2014-024

I refer to your request for access to documents under the *Freedom of Information Act 1982* (the FOI Act) in your email of 16 September 2014. Specifically, you have sought access to the following documents:

"...all emails, correspondence and documents—excluding viewer comments—held by ABC's Media Watch unit regarding the program's coverage, on 16 June, of The Australian's coverage of plain packaging laws. This should include correspondence with Alan Sunderland, Tim Latham and Paul Barry and Clive Mathieson."

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 Executive Producer, *Media Watch*, who in turn consulted with other relevant managers and 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 ten documents were identified which are relevant to your request:

Document 1	Email string commencing with email from C Merritt to N Leys	17 June 2014	2 pages
Document 2	Email string between N Leys, T Latham, F Duxfield and P Barry	17 June 2014	14 pages
Document 3	Internal email string to T Latham and P Barry	18 June 2014	2 pages
Document 4	Email between F Duxfield and G Smith	13-20 June 2014	1 page

Document 5	Email from KelyHazellQuill Lawyers to the ABC	19 June 2014	1 page
Document 6	Email string between K McLeiesh, T Latham and P Barry	20 June 2014	1 page
Document 7	Email string between A Klauzner and C Mathieson	20-1 July 2014	2 pages
Document 8	Email from T Latham to K McLiesh	26 June 2014	1 page
Document 9	Document "Media Watch Response – The Australian – Program Broadcast 16 June 2014"	-	4 pages
Document 10	Internal email to T Latham regarding complaint about <i>Media Watch</i> segment (including attachment)	18 July 2014	2 pages

Please note that in identifying relevant documents, I have (in accordance with the instructions in your email of 16 September 2014), excluded duplicates of the same document, as well as documents which are publicly available.

#### Documents that are out of scope

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 include:

"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."

Any documents which form part of the *Media Watch* program broadcast on 16 June 2014, including documents created for the purpose of creating that program, fall within the definition of 'program material' and the ABC is exempt from the operation of the FOI Act in relation to them. Accordingly, documents created prior to the broadcast of the *Media Watch* program on 16 June 2014 have not been included in the search described above, as all such documents would by their nature be program material.

I have formed the view that Documents 3, 4 and 7 are also program material' and therefore outside the operation of the FOI Act. The Administrative Appeals Tribunal, in considering the meaning of 'program material' set out above, held that 'program material':

"... would include a document created after a program is broadcast. Such documents might include ... documents produced by the ABC or incorporated in its records directly concerning the substantive content of the broadcast program."

Documents 3, 4 and 7 were created after the broadcast of the *Media Watch* program on 16 June 2014, however they are each directly concerned with the substantive content of that program, or were created for the purposes of subsequent programs. I am satisfied that Documents 3, 4 and 7 are 'program material' and do not fall within the scope of the FOI Act.

<sup>&</sup>lt;sup>1</sup> Australian Broadcasting Corporation and Herald and Weekly Times Pty Limited and Anor [2012] 914 (21 December 2012) at [57]

#### Access granted

Access is granted in full to Documents 5, 8 and 9. Copies are attached.

Access is granted in part to Document 1. Document 1 contains information that, for the reasons set out below, is exempt under s.47C of the FOI Act, being deliberative matter. Section 22 of the FOI Act allows access to be granted to an edited copy of a document if it is reasonably practicable to remove exempt material. Accordingly, Document 1 has been redacted to remove exempt material.

# Access refusal – s47C (deliberative processes)

Access to Documents 2, 6 and 10 and part of Document 1 (collectively referred to as ("the Documents") is refused on the basis that the Documents are conditionally exempt under s47C of the FOI Act. In my view, disclosure of the Documents under the FOI Act would disclose matter in the nature of opinions that have been obtained, and consultation that has taken place, in the course of the deliberative processes 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.

The conditional exemption in s.47C of the FOI Act requires that the deliberative process to which the exempt documents relate must be deliberative processes involved in the functions of the agency. The Documents relate to consultation within the ABC about a complaint made about the *Media Watch* program broadcast on 16 June 2014. I am satisfied that the ABC's complaints handling processis a process that is directly related to the functions of the ABC. Section 8(1) of the ABC Act states that it is a duty of the Board:

- "
- (b) to maintain the independence and integrity of the Corporation
- (c) to ensure that the gathering and presentation by the Corporation of news and information is accurate and impartial according to the recognised standards of objective journalism
  - ...
- (e) to develop codes of practice relating to:
  - (i) programming matters..."

Consistent with that duty, the ABC has established a code of practice relating to its television and radio programming. The ABC Code of Practice 2011 is currently in force, and is publicly available on the ABC's website here: http://about.abc.net.au/reports-publications/code-of-practice-2013/

# The ABC Code of Practice states:

"A complaint alleging the ABC has acted contrary to its Code of Practice in its television or radio programming may be made to the ABC. A complainant is entitled under section 150 of the Broadcasting Services Act 1992 (Cth) ("the BSA") to take their complaint to the ACMA if, after 60 days, the ABC fails to respond to the complainant or the complainant considers the ABC's response is inadequate."

The ABC has well established procedures in place to deal with complaints which are received. Those procedures include investigating a complaint, considering the facts and circumstances surrounding

the alleged breach, seeking opinions from relevant persons, weighing the evidence, forming opinions and making findings. In doing so, the ABC is applying the *ABC Code of Practice* which has been established under s8(1) of the ABC Act, and as such it is engaged in activities which are directly related to its functions.

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>2</sup>

The information in the Documents contains a collection of facts, advice, opinions and recommendations which form part of the 'thinking processes' associated with responding to complaints under the *ABC Code of Practice*.

The majority of this is information is not incidental administrative content. To the extent that the documents contain incidental administrative content which is not part of the ABC's deliberative processes (and to which access could therefore be granted), the information in those parts of the documents would reasonably be regarded as irrelevant to your request. I am satisfied that the collection of facts and opinions from management and relevant staff are an integral part of the process of making a determination regarding compliance with the *ABC Code of Practice*, and are therefore part of the deliberative process.

I have had regard to s.47C(2) of the FOI Act, and I am satisfied that the information in the Documents is not operational information, nor is it purely factual material.

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. For the reasons outlined above, I am satisfied that the Documents contain deliberative matter and are therefore conditionally exempt.

# Public interest

Section 11A(5) of the FOI Act requires 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 had regard to the factors set out in s.11B 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.

<sup>&</sup>lt;sup>2</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].

I accept that disclosure may promote the objects of the FOI Act in that it would provide access to information.

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 particular, I consider that it is likely that disclosure of the information could reasonably be expected to:

- prejudice the ABC's ability to obtain similar information in the future; and
- prejudice the ABC's management functions.

The ABC takes seriously its obligation to investigate complaints that are made regarding compliance with the ABC Code of Practice, and comprehensive Complaints Handling Procedures are in place. There is often a requirement for consultation with relevant staff and management during the investigation process. The ABC relies on the frankness and candour of staff and management when providing information to ensure that a fair and accurate determination is made. There is a risk that the ABC's ability to effectively investigate complaints will be compromised if staff are concerned about the possible disclosure of information they provide.

Effective complaints investigation procedures is one of the mechanisms available to the Board to determine whether it has satisfied its duty under s8(1) of the ABC Act to ensure that the gathering and presentation by the Corporation of news and information is accurate and impartial according to the recognised standards of objective journalism.

I have weighed the factors in favour of disclosure against the factors against disclosure. Whilst granting access to documents in this matter may provide access to information in the broad sense of the objects of the FOI Act, I do not consider that, on balance, this is sufficient to outweigh the factors against disclosure. Given the important role of the *ABC Editorial Policies* and the *ABC Code of Practice* to the ABC fulfilling its functions and its Charter obligations, I have given weight to the potential detriment that disclosure would have on the ABC's ability to make effective decisions regarding editorial matters.

I am satisfied that the material contained in the Documents is 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** 

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