

#### Corporate Affairs

ABC Ultimo Centre 700 Harris Street Ultimo NSW 2007 GPO Box 9994 Sydney NSW 2001 Tel. +61 2 8333 5261

abc.net.au

By email:

Dear

#### FOI REQUEST - REFERENCE NUMBER 2015-014

I refer to your request for access to documents under the *Freedom of Information Act 1982* (the FOI Act) in your email of 18 March 2015. Specifically, you have sought access to the following documents:

"...any document, emails, notes, handwritten or typed, or audio/visual recordings [dated between August and December 2001] relating to allegations of sexual harassment committed by Jonathan Shier, the former Managing Director of the ABC...[these] may include, but are not restricted to:

- 1. Records maintained by the managing director's office.
- 2. ABC Board notes, emails, or minutes, or any information held by the ABC Board Secretariat. Also any notes or emails or minutes held by or relating to ABC Board members, specifically the former chairman, Mr Donald McDonald.
- 3. Records, emails or notes, held by the ABC [TV] Publicity Department.
- 4. Records, emails or notes in relation to a complaint lodged with the Human Rights and Equal Opportunities Commission by a publicist [working in the ABC TV Publicity department] in 2001.
- 5. Any records, emails or notes held by 'Australia Talks' TV program or its staff.

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:

- Director, Television;
- Director, ABC People;
- Director, Audience and Marketing;
- Managing Director's Chief of Staff; and
- Manager, Board Secretariat.

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 12 documents were identified:

#	DESCRIPTION	DATE	PGS
1	ABC record of conversation	2 Oct 2001	1
2	Internal ABC fax (incl 2 pg attachment)	14 Oct 2001	3
3	Internal ABC email	30 Oct 2001	1
4	Internal ABC email	30 Oct 2001	1
5	File note	31 Oct 2001	1
6	Internal ABC email string	30 Oct-31 Oct	2
		2001	
7	Letter from ABC to third party	2 Nov 2001	1
8	Internal ABC email (incl 1 pg attachment)	2 Nov 2001	2
9	Internal ABC email	5 Nov 2001	1
10	Internal ABC letter (incl 2 pg attachment)	5 Nov 2001	3
11	ABC file note	22 Nov 2001	2
12	Internal ABC email	4 Dec 2001	1

I note that in my letter to you dated 22 April 2015, 20 documents were identified. After further assessment of the documents I have determined that only 12 documents fall within the scope of your request.

#### Access to documents

Access is granted to the following documents:

- In full to Documents 5 and 9
- In part to Documents 2, 3, 6, 10 and 11.

For the reasons outlined below, access to documents 1, 4, 7, 8 and 12, as well as parts of documents 2, 3, 6, 10 and 11, is refused.

Document 5 contains some information which could reasonably be regarded as irrelevant to the request for access, namely file notes relating to matters other than the allegations of sexual harassment which is the subject of your request. 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 irrelevant material. Accordingly, Document 5 has been redacted to remove irrelevant information.

Section 27A of the FOI Act provides for consultation with affected third parties before the disclosure of documents in response to an FOI request. In the present case, I undertook consultation under that section with two affected third parties whose personal information is contained in the documents, being Mr Shier (the person named in your FOI request) and the individual who made allegations of sexual harassment against him. Both of the affected third parties made submissions in support of an exemption contention. In those circumstances, I am required to allow the affected third parties an opportunity to review or appeal my decision before providing you with access to the documents. I will notify you when the opportunities for review or appeal by the affected third parties have run out, and whether at that point the decision to give access still stands.

## Access refusal—s42 (legal professional privilege)

Access to Documents 8 and 12 and part of Document 6 is refused on the basis that some of the material in those documents is exempt under s.42 of the FOI Act, that is, because it would be privileged from production in legal proceedings on the ground of legal professional privilege.

I have had regard to the common law principles for determining whether the document is privileged, namely:

- whether there is a legal adviser-client relationship;
- whether the communication was for the purpose of giving or receiving legal advice or for use in connection with actual or anticipated litigation;
- whether the advice given is independent; and
- whether the advice given is confidential.

I have also had regard to the Guidelines issued by the Australian Information Commissioner under s.93A of the FOI Act (the Guidelines), in particular *Part 5 - Exemptions*.

Document 12 contains a summary of legal advice given by external lawyers engaged by the ABC. The document is marked "Private and Confidential", and it is evident from the content of the document that it was created in connection with actual or anticipated litigation. The advice was confidential to the ABC and was not widely known.

Document 8 and part of Document 6 contains legal advice given by a qualified lawyer within the ABC's (then) Legal Services department. The Guidelines discuss the nature of the solicitor-client relationship when legal services are provided by an in-house lawyer. They state (at paragraph 5.120):

"there must be a true solicitor-client relationship between the legal adviser and the agency before the privilege can arise. The existence of such a relationship is a question of fact to be determined on the evidence. Some relevant factors for consideration include:

 whether, in fact, the lawyer can be said to have the necessary degree of independence whether the lawyer is subject to professional standards."

I understand that the legal practitioner who provided the advice maintained a Practicing Certificate, and that the advice was given in their capacity as professional legal adviser and was not an internal communication made as a routine part of the ABC's functions. The legal adviser reported directly to the (then) Director of Finance and Support Services, who in turn reported directly to the Managing Director. I am satisfied that a legal adviser-client relationship exists in relation to the information in Document 6, and that the advice given was independent.

At no time has the ABC waived its legal professional privilege, and the information has been treated as strictly confidential. I am satisfied that Documents 8 and 12 and part of Document 6 are subject to legal professional privilege and therefore exempt from disclosure under s.42 of the FOI Act.

# Access refusal—s47F (personal privacy)

Access to Documents 1, 4, 7 and 12, and parts of Documents 2, 3, 6, 8,10 and 11 is refused on the basis that the material in those documents is exempt under s.47F of the FOI Act, that is, that disclosure would involve the unreasonable disclosure of personal information about a person.

In making that decision I have considered whether the documents contain personal information, and whether it would be unreasonable to disclose that information. I have also had regard to submissions made by affected third parties, and to the Guidelines.

Firstly, I am satisfied that the documents referred to above contain personal information about a person. The information contained in the documents relates to allegations of sexual harassment by an individual against Jonathan Shier, the person named in your FOI request. Documents 2, 3, 4, 7, 11 and 12 identify both parties by name, and contain information regarding the allegations and surrounding circumstances. The information satisfies the definition of 'personal information' in the FOI Act, being "information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information or opinion is true or not, and whether the information or opinion is recorded in a material form or not".

Second, I have considered whether it would be unreasonable to disclose the personal information contained in the documents. In accordance with s.47F(2), I have had regard to the following factors:

- the extent to which the information is well known
- 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
- the availability of the information from publicly accessible sources.

An online search revealed a number of articles and news stories, published between 2001 and 2002, regarding the former ABC Managing Director. Although some of those stories included information about the allegations of sexual harassment, none appear to identify the individual who made the allegations. While the fact of the allegations of sexual harassment may have been known at the time, details of the allegations were not. Similarly, while Mr

Shier may have been known to have been associated with those allegations, the individual who made them was not. There is no indication that it is currently well known that Mr Shier was associated with the allegations.

It does not appear that the information contained in the documents is available from publicly accessible sources. The public interest in this matter, based on information available online, appears to have ceased many years ago.

Third, I have had regard to the submissions made by affected third parties under s.27A of the FOI Act. Both of the affected third parties made submissions in support of an exemption contention. Those submissions addressed a number of issues, including the sensitivity of the information, potential embarrassment, damage to reputation, and potential inaccuracy of the information. I have had regard to those submissions in making my decision to refuse access under s.47F.

Finally, I have considered the Guidelines, in determining whether disclosure of the documents would be an unreasonable disclosure of personal information, in particular *Part 6* – *Conditional Exemptions*. The Guidelines relevantly state the following (at paragraph 6.13):

"In considering what is unreasonable, the AAT in Re Chandra and Minister for Immigration and Ethnic Affairs stated that:

...whether a disclosure is 'unreasonable' requires ... a consideration of all the circumstances, including the nature of the information that would 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 ... it is also necessary in my view to take into consideration the public interest recognised by the Act in the disclosure of information ... and to weigh that interest in the balance against the public interest in protection the personal privacy of a third party..."

The Guidelines further state (at paragraph 6.133) that:

"...in Colakovski v Australian Telecommunications Corp, Heerey J considered that '...if the information disclosure were of no demonstrable relevance to the affairs of government and was likely to do no more than excite or satisfy the curiosity of people about the person whose personal affairs were disclosed...disclosure would be unreasonable."

In my view, it is likely that disclosure of the information in the documents listed above—nearly 14 years after they were created—could unjustifiably embarrass and distress the individuals involved. In this matter, having regard to all of the above, I have given greater weight to the public interest in protection the personal privacy of the affected third parties. I note that the information contained in the documents are of no demonstrable relevance to the affairs of government.

Having regard to all of the circumstances, including the nature of the information, the passage of time since the documents were created, and the lack of current relevance of the information, disclosure at this time would be unreasonable. I am satisfied that the information

contained in Documents 1, 4, 7 and 12, and parts of Documents 2, 3, 6, 8,10 and 11 is exempt under s.47F.

I note that s.47F is a conditional exemption, and that access must generally be given to a conditionally exempt document unless (in the circumstances) access to the document at the time would, on balance, be contrary to the public interest. My assessment of the public interest in relation to documents which I consider to be conditionally exempt under s.47F is set out below.

## Access refusal—s.47E(d) (operations of agency)

In addition to the reasons outlined above, access to Documents 1, 4, 7 and 12, and to part of Documents 2, 3, 6, 8, 10 and 11 is refused on the basis that some of the material in those documents is exempt under s.47E(d) of the FOI Act, that is, because disclosure could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

The ABC's *Discrimination, Bullying and other Workplace Behaviours Policy* states that the ABC is committed to taking all reasonable steps to (amongst other things) "respect the right to raise legitimate issue or concerns and lodge grievances or complaints in accordance with [the policy] and the ABC Grievance Resolution Guidelines" and that "the ABC will maintain confidentiality in relation to the grievance or complaint to the extent practicable in the circumstance." The reporting of alleged sexual harassment, and the effective investigation of those allegations, relies on the collection of information from the persons involved and potential witnesses, and the frankness and candour of those individuals.

There is a significant risk that the reporting and investigation of allegations (including allegations of sexual harassment) will be adversely affected if individuals believe that the information they provide in confidence—in particular, sensitive or personal information—will subsequently be disclosed under the FOI Act. I am satisfied that the information contained in Documents 1, 4, 7 and 12, and to part of Documents 2, 3, 6, 8, 10 and 11 is exempt under s47E(d).

I note that s.47E(d) is a conditional exemption, and that access must generally be given to a conditionally exempt document unless (in the circumstances) access to the document at the time would, on balance, be contrary to the public interest. My assessment of the public interest in relation to documents which I consider to be conditionally exempt under s.47E(d) is set out below.

### Access refusal—s47C (deliberative processes)

Access to Documents 1 and 12 and part of Document 11 is refused on the basis that some of the material in those documents is conditionally exempt under s47C of the FOI Act. In my view, disclosure of that material under the FOI Act would disclose matter in the nature of, or relating to, opinions and recommendations 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.

I have had regard to the substance of the information in the listed documents when determining that it contains deliberative matter. The material is not procedural or day-to-day content, nor is it operational or purely factual material.

Document 1 contains the record of a discussion between the Chairman of the ABC Board and a senior executive within the ABC. Document 1 is referred to in Document 12, which reflects the weighting up of different arguments, and consideration of the appropriate response. It is clear from the contents of Document 12 that Document 1 was used for the purposes of determining the appropriate action to be taken in response to allegations that had been made against the Managing Director at the time.

In determining whether the information in the documents contains deliberative matter I have had regard to the Guidelines, in particular *Part 6 – Conditional Exemptions*. Paragraph 6.70 of the Guidelines states:

"A consultation undertaken for the purposes of, or in the course of a deliberative process includes any discussion between the agency, minister or government and another person in relation to the decision that is the object of the deliberative process."

Further, 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>

Document 1 is part of a process of consultation that was undertaken for the purposes of considering a particular course of action. It contains a collection of facts and opinions. Document 12 reflects the assessment of the outcomes of that consultation. Accordingly, I consider that they are both deliberative in nature.

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 Documents 1 and 12 contain deliberative matter and are therefore conditionally exempt. Document 11 includes Document 1 as an attachment, and is considered to be deliberative for the same reasons.

I note that s.47(C) is a conditional exemption, and that access must generally be given to a conditionally exempt document unless (in the circumstances) access to the document at the time would, on balance, be contrary to the public interest. My assessment of the public interest in relation to documents which I consider to be conditionally exempt under s.47C is set out below.

#### Public interest

For the reasons outlined above, I have determined that Documents 1, 4, 7, 8 and 12, as well as parts of documents 2, 3, 6, 10 and 11 are conditionally exempt under ss.47C, 47E(d) and

<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] AICmr 19, [15]–[22].

47F. 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 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, as outlined above the subject matter of the documents is not a matter of public importance about which there is current debate. The documents do not promote oversight of public expenditure, nor do they allow a person access to their own personal information.

Section 11B(5) requires agencies, when assessing whether access to a document would on balance be contrary to the public interest, to have regard to the Guidelines. I have had regard to the non-exhaustive list of public interest factors favouring and against disclosure in paragraphs 6.25 and 6.29 of the Guidelines.

Balanced against the factors favouring disclosure, there are public interest factors against disclosure. The facts, opinions and advice contained in many of the documents was sought and provided in confidence, and the information in the documents is not publicly known or available. There is a real risk that disclosure of the information could reasonably be expected to prejudice the management functions of the ABC in particular its ability to effectively investigate allegations of sexual harassment. I have given weight to the personal privacy of the affected third parties.

Having regard to the above, I consider that the public interest factors against disclosure significantly outweigh the factors favouring disclosure. I am satisfied that the material contained in documents that Documents 1, 4, 7, 8 and 12, as well as parts of documents 2, 3, 6, 10 and 11 is conditionally exempt under ss.47C, 47E(d) and 47F of the FOI Act, and that disclosure of that material at this time is, 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