

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 2013-040

I refer to your request for access to documents under the *Freedom of Information Act 1982* (the FOI Act) in your email of 22 September 2013 in which you sought access to the following documents:

- all documents which refer to or discuss complaints received, the review and the decision to invite [Piers Akerman] back on the show [following his appearance on *Insiders* on 16 June 2013], including any conditions or guidelines concerning his reappearance.
- documents which refer to or discuss his performance on the show on 22 September, including
 any complaints received about or touching upon his allegations against Julia Gillard regarding
 motor vehicle expenses.

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 Head of Policy and Staff Development in the News Division, who in turn consulted with the relevant managers and program teams; and
- the Head of Audience and Consumer Affairs (A&CA), who in turn consulted with the relevant staff within A&CA.

I requested that I be provided with copies of all hard and soft copy records which fall within the scope of your request. As a result of those searches, the following 81 documents were identified.

Document 1 'Complaints and Legal Action' summary document

Document 2	Email string with subject line "Akerman complaint" concluding with message dated 12 July 2013
Document 3	Email string regarding complaints handling process from 5 to 8 July 2013
Document 4	Email string regarding complaints handling process, from 19 June to 9 July 2013
Document 5	Spreadsheet summarising complaints relating to comments on <i>Insiders</i> program of 16 June 2013
Document 6	Email string with subject line "Insiders" dated 22 September 2013
Document 7	Email string with subject line "Piers Akerman/Chris Bowen Insiders September 22" dated 22 September 2013
Document 8	Email string with subject line "Piers Akerman" dated 22 September 2013
Document 9	Email string with subject line "Piers Akerman" dated 22 September 2013
Document 10	Email string with subject line "Piers request" dated 22 September 2013
Document 11	Email string dated 22 September 2013
Document 12	Email string with subject line "Private & Confidential – Piers Akerman" dated 22 September 2013
Document 13	Email string dated 22 September 2013
Document 14	Email string dated 22 September 2013
Document 15	Email string with subject line "Insiders Statement" dated 22 September 2013
Document 16	Email string with subject line "Revised Insiders Statement" dated 22 September 2013
Document 17	Email string with subject line "Akerman" dated 22 September 2013
Document 18	Email string with subject line "FYI – change.org petition to sack Piers" dated 24 September 2013
Document 19	Email string concluding with message dated 26 September 2013
Document 20	Spreadsheet summarising complaints relating to the <i>Insiders</i> program of 22 September 2013
Documents 21-81	Bundle of documents consisting of complaints about the <i>Insiders</i> program of 22 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.

Further, in relation to point 1 of your request, I have assumed that in requesting documents which 'refer to or discuss complaints received' you are not requesting access to the complaints themselves.

Documents that are out of scope

I have formed the view that Documents 2, 3, 4, and 6 to 19 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 include:

"a document created after a program is broadcast [such as] ... documents produced by the ABC or incorporated in its records directly concerning the substantive content of the broadcast program"

The documents you have requested relate directly to the substantive content of the *Insiders* program. 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 to documents

In relation to the documents which are within the scope of the FOI Act, access is granted to those documents, namely:

- Document 1;
- · Document 5; and
- Documents 20 to 81.

Documents 5 and 20 to 81 contain some information which could reasonably be regarded as irrelevant to the request for access, namely the name and contact details of the individual complainants. Similarly, Document 1 contains information that is irrelevant, being information about investigations relating to programs other than *Insiders*. 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, Documents 1, 5 and 20 to 81 have been redacted to remove irrelevant information.

Notwithstanding the ABC's position as expressed earlier in relation to the application of the FOI Act to Documents 2, 3, 4, and 6 to 19 inclusive, in the event that these documents were within scope I consider that access to those documents would be refused for the reasons set out below.

Access refusal – s47C (deliberative processes)

Access to documents 2, 3, 4, and 6 to 19 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.

I am satisfied that the ABC's complaints handling is 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.¹

¹. 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].

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 Documents also contain facts and recommendations regarding the treatment of program material for publication online. For instance, Document 7 to 17 contain confidential communications regarding the facts and circumstances surrounding the *Insiders* program on 22 September 2013, propose a range of matters for consideration, and reflect the decisions made based on those considerations.

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 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.² In the present case, I am satisfied that the collection of facts and opinions from management and relevant staff (in particular, the information in documents 7 to 17) 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 s47C(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 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.

Other than the complaints received by the ABC, I am not aware that this is a matter of public importance. The ABC welcomes feedback on its program material, including complaints. The number of contacts made as a result of the *Insiders* programs on 16 June or 22 September were not unusual having regard to the nature of the program. In my view, providing access to documents will not inform a debate about a matter of public importance.

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

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 law requires complaints about the *ABC Code of Practice* to be made to the ABC. Section 150 of the *Broadcasting Services Act 1992* states:

"If:

- (a) a person has made a complaint to the Australian Broadcasting Corporation or the Special Broadcasting Service Corporation on the ground that the Corporation has, in providing a national broadcasting service or a datacasting service, acted contrary to a code of practice developed by the Corporation and notified to the ACMA; and
- (b) either:
 - (i) the person has not received a response within 60 days after making the complaint; or
 - (ii) the person has received a response within that period but considers that response to be inadequate;

the person may make a complaint to the ACMA about the matter."

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. The complaint investigation function carried out by A&CA is independent of the content-making areas of the ABC, and there is often a requirement for consultation with relevant staff and management. A&CA 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 significant risk that A&CA's ability to effectively investigate complaints will be compromised if staff are concerned about the possible disclosure of information they provide to A&CA.

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.

Access refusal – s42 (legal professional privilege)

In addition to the reasons set out above, access to Documents 2 and 7 to 17 inclusive would be refused on the basis that the material in those documents is exempt under s42 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 documents are 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*.

The information contained in the documents contains a summary of legal advice given by qualified lawyers within the ABC's Legal and Business Affairs Division. 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 note that the legal practitioners who provided the advice maintain Practising Certificates, and the advice was given in their capacity as professional legal advisers and was not an internal communication made as a routine part of the ABC's functions. The legal advisers report directly to the Director of Legal and Business Affairs, who in turn reports directly to the Managing Director. I am satisfied that a legal adviser-client relationship exists in relation to the information in the documents, and that the advice given was independent.

The documents contain confidential information which summarises information that was communicated for the dominant purpose of giving and receiving legal advice. The legal advice was provided in the context of potential legal proceedings against the ABC. The advice was confidential to the ABC and is not widely known. At no time has the ABC waived its legal professional privilege, and the information has been treated as strictly confidential.

I am satisfied that all of the elements have been established for Documents 2 and 7 to 17 inclusive to be subject to legal professional privilege and therefore exempt from disclosure.

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