

Corporate Affairs

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Dear

FOI REQUEST - REFERENCE NUMBER 2015-016

I refer to your request for access to documents under the *Freedom of Information Act 1982* (the FOI Act) in your email of 30 March 2015, and our subsequent correspondence. I confirm that the scope of your request was refined to access to the following documents:

- 1 Documents relating to your complaint made to the ABC's Corporate Affairs department on 16 June 2011 regarding "Questions of 'balance' in moderation of comments to this thread".
- 2 Documents relating to your complaint to the ABC's Corporate Affairs department on 22 November 2011.
- 3 Documents relating to the 'comments' on an opinion piece "All options should be on the table including nuclear", published on the ABC's website on 13 November 2012.
- 4 Documents relating to your complaint to the ABC on 12 December 2012 (reference number C53043-12).
- 5 Documents relating to your complaint to the ABC dated 3 February 2013 (reference number C8331-13.
- 6 Documents (including correspondence) to or from Alan Sunderland regarding your various complaints.
- 7 Documents relating to your complaint to the Office of the Commonwealth Ombudsman.
- 8 Documents relating to your complaint to the Australian Human Rights Commission (their reference number TL/2013-12676).

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. The search for these documents involved contacting the following relevant people, who in turn consulted with relevant managers and staff within their respective teams:

- Editor, The Drum
- Head, Audience and Consumer Affairs
- Alan Sunderland.

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, 25 documents (comprising 246 pages) were identified which are relevant to your request. A schedule of documents is attached.

Please note that in identifying relevant documents, I have attempted to exclude duplicates of the same document to the extent that it was practicable to do so. Accordingly, some email messages which appear as part of a string may not also be included as separate emails.

Access to documents

Access is granted as follows:

- In full to documents 1-3, 5, 8-9, 11-13, 16, 20, 23 and 25;
- In part to documents 7, 17 and 24.

Some of the documents to which access is granted contain information which could reasonably be regarded as irrelevant to the request for access, namely personal information about ABC employees. 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, some of the documents to which access is granted in full or in part have been redacted to remove irrelevant information.

Copies of the documents to which access is granted in full or in part will be provided shortly, once redactions have been applied.

Access refusal – s42 (legal professional privilege)

Access to parts of documents 17, 19 and 21 is refused on the basis that those documents are exempt under s42 of the FOI Act, which states that:

"A document is an exempt document if it is of such a nature that it would be privileged form production in legal proceedings on the ground of legal professional privilege."

In determining whether parts of documents 17, 19 and 21 would be privileged from production in legal proceedings and therefore exempt under s.42, 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 5 –Exemptions*.

Paragraph 5.118 of the Guidelines states:

"At common law, determining whether a communication is privileged requires a consideration of:

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

I am satisfied that the common law test for whether legal professional privilege exists has been met. Parts of documents 17, 19 and 21 were submitted to and prepared by the ABC's Deputy General Counsel in his capacity as a legal practitioner; the dominant purpose of the creation of those part of the documents was the provision of legal advice; the advice was prepared independently of ABC management; the information in documents 17, 19 and 21 is confidential and the documents are treated as such.

Accordingly, access is refused to part of documents 17, 19 and 21 on the basis that those documents are exempt under s42 of the FOI Act.

Access refusal – s47C (deliberative processes)

In addition to the reason outlined above, access to documents 4, 6, 10, 14-15, 18-19, 21-22 and parts of documents 7, 17 and 24 is refused on the basis that those documents (or parts of them) 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 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, 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

Further, 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."

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—which include internal email exchanges between decision makers and with the relevant content area—reflect the internal consultation and deliberation that took place in relation to each of your complaints and the preparation of an appropriate response to them.

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, and consultation about the drafting of responses to your complaints, 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.

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

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].

I have had regard to s47C(2) of the FOI Act, and I am satisfied that the information in the Documents is not operational or administrative 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.

As far as I am aware, there is no current public debate about the matters referred to in the documents. In my view, providing access to documents will not inform a debate about a matter of public importance.

Having regard to the content of the documents, providing access to them would not promote effective oversight of public expenditure.

I accept that disclosure may promote the objects of the FOI Act in that it would provide access to 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 documents 4, 6, 10, 14-15, 18-19, 21-22 and parts of documents 7, 17 and 24 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 Head, Corporate Governance

SCHEDULE OF DOCUMENTS

#	DESCRIPTION	DATE	PG S
1	Internal email exchange between A&CA and R Holmes	16 Jun 2011 – 20 Oct 2011	6
2	Database extract - Complaint C32307-11 (incl attachments)	17 Aug 2011	8
3	Email exchange between A&CA and R Holmes	23 Aug 2011	4
4	Internal ABC email exchange	1 Sep 2011 – 19 Oct 2011	2
5	Database extract - Complaint C46754-11 (incl attachments)	22 Nov 2011	9
6	Internal ABC email exchange	15 - 20 Dec 2011	4
7	Database extract - Complaint C50038-11 (incl attachments)	21 Dec 2011	11
8	Database extract - Complaint C50250-11 (incl attachments)	22 Dec 2011	23
9	Email exchange between A&CA and R Holmes	3 Jan 2012	17
10	Internal ABC email exchange	3 -20 Jan 2012	23
11	Email exchange between A&CA and R Holmes	17 Jan 2012	16
12	Email exchange between A&CA and R Holmes	2 Feb 2012	4
13	Database extract - Complaint C53043-12 (incl attachments)	21 Dec 2012 – 7 Mar 2013	17
14	Internal ABC email exchange	27 Dec 2012 – 10 Jan 2013	2
15	Internal ABC email exchange	5 Mar 2013	6
16	Email exchange between A&CA and Commonwealth Ombudsman's office	5 - 7 Mar 2013	2
17	Email string (incl internal ABC and R Holmes messages)	6 - 7 Mar 2013	8
18	Internal ABC email exchange	7 Mar 2013	3
19	Internal ABC email exchange	7 Mar 2013	2
20	Email exchange between A Sunderland and R Holmes	7 Mar 2013	11
21	Internal ABC email exchange	7 Mar 2013	2
22	Email string (incl internal ABC and Commonwealth Ombudsman's office messages)	21 Mar 2013	2
23	Complaint C66472-13 AHRC (incl attachments)	4 Dec 2013	58
24	Internal ABC email exchange	13 Dec 2013 – 4 Jul 2014	3
25	Letter from AMB to AHRC	16 Dec 2013	3
TOTAL			246