20 August 2015

Australian Broadcasting Corporation

Corporate Affairs
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Sydney NSW 2001
Tel. +61 2 8333 5261
abc.net.au

[redacted]

By email: [redacted]

Dear [redacted]

FOI REQUEST - REFERENCE NUMBER 2015-031

I refer to your request for access to documents under the *Freedom of Information Act 1982* (the FOI Act) in your email of 11 July 2015. Specifically, you have sought access:

1) *Complaints made in writing or by email from the public, internally, or by any other agency to and about the Media Watch Program.*

2) *Complaints made in writing or by email from the public, internally, or by any other agency to and about the host of Media Watch Paul Barry.*

You have indicated that your request is for documents created between 29 July 2013 and 11 July 2015.

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:

- Head, Audience and Consumer Affairs
- Executive Producer, *Media Watch*
- Paul Barry.

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, a total of 190 documents were identified. In order to simplify processing the request, the documents have been grouped together into three broad categories as follows:

Description	Date	Pages
Complaints – Media Watch and Paul Barry (68 documents)	30 Jul – 11 Dec 2013	101
Complaints – Media Watch and Paul Barry (80 documents)	5 Feb – 17 Nov 2014	118
Complaints – Media Watch and Paul Barry (42 documents)	5 Feb – 4 Jul 2015	106

Access to documents

I have formed the view that the 190 documents are all 'program material'. The ABC is excluded from the operation of the FOI Act in relation to its program material by virtue of section 7(2) and Part II, Schedule 2 of the FOI Act. More specifically, s7(2) states that "The persons, bodies and Departments specified in Part II of Schedule 2 are exempt from the operation of this Act in relation to the documents referred to in that Schedule in relation to them". The ABC is listed in Part II, Schedule 2 of the FOI Act "in relation to its program material and its datacasting content".

The meaning of 'program material' for the purposes of the FOI Act has been the subject of judicial consideration.

The Federal Court of Australia considered the scope of the exclusion in s7(2) and Part 2 of Schedule II of the FOI Act in *Australian Broadcasting Corporation v The University of Technology, Sydney* [1], and held that the exclusion applies to "program material" (such as scripts and tapes) and to any document that relates to program material". In that case, the documents being sought related to documents relating to complaints made to the ABC, including "internal files and correspondence, board minutes, investigation files and reports and documents in relation to the complaints". The Court held that such documents were related to program material.

The documents you have requested relate specifically to the ABC's *Media Watch* program and the presenter of that program, Paul Barry. The nature of those documents is substantially the same as those that were considered by the Federal Court in the UTS case. In those circumstances, I am satisfied that the documents you have requested fall within the meaning of program material as contemplated by the Federal Court of Australia.

I note that the decision in *Australian Broadcasting Corporation v The University of Technology*, Sydney was subsequently considered by the Administrative Appeals Tribunal in *Australian Broadcasting Corporation and Herald and Weekly Times Pty Limited and Anor* [2]. The Tribunal in that matter adopted a narrower interpretation of 'program material', but stated that:

> *"While not necessary to determine, we agree with the parties in UTS ... that [program material] would include a document created after a program is broadcast. Such documents might include transcripts of radio programs, podcasts, internet pages and documents ... incorporated in its records directly concerning the substantive content of the broadcast program" [emphasis added]*

[1] [2006] FCA 964
[2] [2012] AATA 914

In my view, the documents you have requested also fall within the narrower definition of 'program material' determined by the Administrative Appeals Tribunal. In any event, I note that the decision of the Federal Court remains the applicable precedent, particularly given the similarity of the documents under consideration.

Having regard to all of the above, I am satisfied that the requested documents fall within the definition of 'program material', and that the ABC would be exempt from the operation of the FOI Act in relation to them.

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