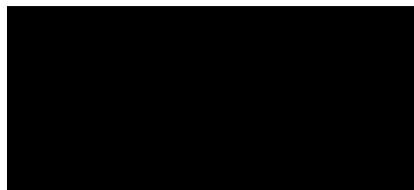


16 October 2014



Australian
Broadcasting
Corporation



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: [Redacted]

Dear [Redacted]

FOI REQUEST - REFERENCE NUMBER 2014-021

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:

“...any advice to the ABC Board relating to Chris Kenny’s legal action, request for an apology and the Chaser/Hamster Decides team.”

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 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 7 documents were identified:

Document 1	Extract from Legal Matters Report	2 pages	10 Oct 2013
Document 2	Extract from Legal Matters Report	1 page	5 Dec 2013
Document 3	Extract from Legal Matters Report	1 page	20 Feb 2014
Document 4	Extract from Legal Matters Report	3 pages	3 Apr 2014
Document 5	Extract from Legal Matters Report	1 page	3 Jun 2014
Document 6	Extract from Legal Matters Report	1 page	6 Aug 2014

Access grant

Access is granted in part to Document 7. Document 7 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 7 has been redacted to remove exempt material.

Access refusal – s47C (deliberative processes)

Access to part of Document 7 is refused on the basis that it is conditionally exempt under s47C of the FOI Act. In my view, disclosure of part of Document 7 under the FOI Act would disclose matter in the nature of advice and recommendations prepared 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.

In determining whether the information in Document 7 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:

“...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

The information in the Documents contains a collection of facts, advice and recommendations which form part of the ‘thinking processes’ associated with the decision to issue an apology to Mr Kenny.

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.

The majority of this information is not incidental, administrative content. I am satisfied that the collection of facts, advice and recommendations contained in Document 7 are part of the process of consultation and deliberation regarding the issuing of an apology.

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 Document 7 contains deliberative matter and is therefore (in part) conditionally exempt.

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] AICmr 19, [15]–[22].

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.

Having regard to the content of the Document, providing access to it would not promote effective oversight of public expenditure, or allow a person to access his or her personal information. Further, the ABC Board relies on the frankness and candour of staff and management when providing information to ensure that appropriate determinations are made. I consider that it is likely that disclosure of the information could reasonably be expected to compromise management's ability to provide advice and recommendations to the Board to support effective decision making.

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 potential detriment to the ABC's decision making processes associated with disclosure.

I am satisfied that some of the material contained in the Document 7 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)

Access to Documents 1 to 6 inclusive 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 from production in legal proceedings on the ground of legal professional privilege.”

In determining whether Documents 1 to 6 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. Documents 1 to 6 were prepared by the Director Legal and Business Affairs in his capacity as a legal practitioner; the dominant purpose of the creation of those Documents was the provision of legal advice to the ABC Board; the advice was prepared independently of the Board or ABC management; the information in Documents 1 to 6 is strictly confidential and the Documents are treated as such.

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

A handwritten signature in blue ink that reads "J Maude". The signature is written in a cursive style with a period at the end.

Judith Maude
Head, Corporate Governance