Dear

I refer to your letter of 14 April 2011 in which you sought access to documents under the *Freedom of Information Act 1982* (the FOI Act). Specifically, you have sought access to:

- 1. Policies and documents of the ABC relating to the classification of television programs broadcast on the ABC; and
- Internal policies or documents which explain why the ABC Board amended the section of the ABC Code of Practice entitled "Television program classifications" in the 2006-07 financial year.

I have decided to refuse access on the basis that documents relating to classification of television programs fall outside the scope of the FOI Act. As you are aware, the ABC is exempt from the operation of the FOI Act in relation to documents relating to its program material and datacasting content (see FOI Act, s7(2) and Part II, Schedule 2). I am satisfied that the documents you have sought have a relationship with the ABC's program material such that it falls outside the operation of the FOI Act.

I note that you have expressed the view that the documents you have requested are not program material, and you have sought to rely on the decision in *Bell v CSIRO* to support that view. I have considered the matters you have raised. For the reasons set out below, I do not agree.

- At para [39] in *Bell v CSIRO* makes it clear that the exemption primarily under consideration in that case was significantly different from that in *UTS v ABC*. The exemption in the CSIRO case uses the expression "in respect of", and the meaning of that expression is specifically dealt with in s7(4) of the FOI Act. The exemption in s7(2) and Part II of Schedule 2 uses the expression "in relation to".
- It is not correct to conclude that "it follows from the Full Court's disapproval of Bennett J's interpretation of the ABC's exemption that only the ABC's program material itself is exempt". At [52], the Full Court records that Bennett J found (in UTS v ABC) that the ABC's exemption "covered document relating to program material, as well as program material itself" and that that conclusion is "unexceptional". In other words, the Full Court does not say that the UTS v ABC decision is wrong. That is further reinforced in [53], where the Full Court expressly states that it agrees with Bennett J's finding that "the expression 'in relation to' in s7(2) and in Pt II of Schedule 2 makes it clear that a relevant agency is exempt from the operation of the FOI Act 'in relation to' the documents mentioned in the Schedule 'in relation to them'". The Full Court in Bell v CSIRO expressly agreed with the idea that the ABC's exemption applies to "program material" and to "documents in relation to program material".
- Nothing in *Bell v CSIRO* suggests that Bennett J was incorrect in saying that any document which has a "direct or indirect relationship to program material" is a document "in relation to program material".

Bennett J said (at [17] in UTS v ABC) that "the repeated use of 'in relation to' reinforces an intention to exempt not only the category of documents specified but documents that relate to that category". However, when you read paragraphs [6] to [18] (and see para [7] in particular), it is clear that Bennett J made that statement in the context of considering UTS's argument that the ABC's exemption should be read as applying to program material only. In other words, UTS was arguing that you should read the exemption as saying that the ABC is exempt "in relation to" its program material and datacasting content but nothing more. Bennett J rejected that argument, saying that the repeated use of "in relation to" supported ("reinforced") the idea that parliament clearly intended the exemption to apply to more than just program material and datacasting content. It seems clear, therefore, that Bennett J relied on the repeated use of the expression "in relation to" in concluding that the exemption covered not just program material and datacasting content, but also documents in relation to program material and datacasting content. See also para [31] of Bennett J's judgment. As the Full Court said in Bell v CSIRO, that conclusion by Bennet J is "unexceptional". It is clearly correct.

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.

Regards

Judith Maude Manager, Corporate Planning and Reporting FOI Coordinator