12 May 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:

Dear

FOI REQUEST - REFERENCE NUMBER 2014-005

I refer to your request for access to documents under the *Freedom of Information Act 1982* (the FOI Act) in email of 13 March 2014. Specifically, you have sought access to the following documents:

"The first draft of each of the four documents [Editorial Review No 1, January 2014 – by Andrea Wills; News Division Response to Editorial Review No 1; Radio Division Response to Editorial Review No 1; Editorial Review No 2, January 2014 – by Gerald Stone; News Division Response to Editorial Review No 2.]"

and

"any correspondence from anyone within the ABC post-marked from South Australia to those conducting the reviews, or responding to the reviews".

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, Editorial Policies, who in turn consulted with other relevant managers and staff. The Head, Editorial Policies is responsible for coordinating the editorial reviews.

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 5 documents were identified which are relevant to the first part of your request:

- Document 1 Draft of Editorial Review No 1, "ABC Radio Interviews with the Prime Minster and Leader of the Opposition during the 2013 Federal Election Campaign", by Andrea Wills
- Document 2 Draft of Editorial Review No 2, "Breadth of Opinion and Impartiality in Select TV

	Current Affairs Coverage of the Asylum Seeker Issue", by Gerald Stone
Document 3	Draft News Division Response to Editorial Review No 1
Document 4	Draft Radio Division Response to Editorial Review No 1
Document 5	Draft News Division Response to Editorial Review No 2

No documents were identified which are relevant to the second part of your request.

Please note that in identifying relevant documents, I have excluded duplicates of the same document.

Access refusal – s47C (deliberative processes)

Access to Documents 1 to 5 inclusive (collectively referred to as ("the Documents") is refused on the basis that the Documents are conditionally exempt under s47C of the FOI Act. In my view, disclosure of the Documents under the FOI Act would disclose matter in the nature of opinions and recommendations that have been obtained, and consultation that has taken place, 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 at this time.

I have considered whether those deliberative processes relates to the functions of the ABC. The deliberative processes relate to the conduct of reviews of ABC editorial content. The functions of the ABC are set out in section 8 of the *Australian Broadcasting Corporation Act 1983* (the ABC Act). Section 8(1)(c) of the ABC Act imposes a duty on the ABC to ensure that the gathering and presentation of news and information is accurate and impartial. The Editorial Audits provide a mechanism for the ABC to assess its performance of this duty. Accordingly, I am satisfied that the deliberative processes associated with the Editorial Audits relate directly to the functions of the ABC.

I have had regard to the substance of the information in the Documents when determining whether they contain deliberative matter. The material is not procedural or day-to-day content, nor is it operational or purely factual material.

In determining whether the information in the Documents contains information that is 'deliberative matter', 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

Paragraph 6.64 of the Guidelines states that "a deliberative process may include the recording or exchange of ... interim decisions or deliberations". In his decision in *Hunt and*

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].

*Australian Federal Policy*², the Freedom of Information Commissioner confirmed that draft documents may be deliberative.

Documents 1 and 2 are drafts of the following two editorial reviews:

- Editorial Review No 1, "ABC Radio Interviews with the Prime Minster and Leader of the Opposition during the 2013 Federal Election Campaign", by Andrea Wills, dated January 2014; and
- Editorial Review No 2, "Breadth of Opinion and Impartiality in Select TV Current Affairs Coverage of the Asylum Seeker Issue", by Gerald Stone, dated January 2014.

Documents 1 and 2 were submitted to the ABC as part of the agreed methodology for the editorial review process. This process involved consultation with the ABC for the purposes of considering and finalising the Editorial Report Reports. I note that paragraph 6.70 of the Guidelines states that:

"A consultation undertaken for the purposes of, or in the course of, a deliberative process includes any discussion between the agency ... and another person in relation to the decision that is the object of the deliberative process".

Documents 1 and 2 were provided to the ABC to initiate a consultation as part of the deliberative process associated with conducting the Editorial Review. Documents 3, 4 and 5 were prepared in response to Documents 1 and 2, and they form part of that consultation.

Preparing the responses involved senior executives in the News and Radio Divisions reviewing the matters raised in the Editorial Audit Reports, considering the broader programmaking context, identifying relevant factors not addressed or fully explored in the Reports, identifying any changes or improvements which may be warranted as a result of the Reports, preparing an appropriate response, and consulting with senior management regarding the proposed response. This involved the exercise of judgment in developing the ABC's response to the Editorial Audit Reports, and form part of the Editorial Review process.

The Documents are draft only, and as such they represent a stage in the thinking processes prior to arriving at a final, settled position.

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. I am satisfied that the Documents contain deliberative matter and are therefore conditionally exempt.

Public interest

Section 11A(5) of the FOI Act would require 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 considered 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

² [2013] AICmr 66 (23 August 2013)

matter of public importance, promote effective oversight of public expenditure, or allow a person to access his or her personal information.

Section 11B(5) requires agencies, when assessing whether access to a document would on balance be contrary to the public interest, to have regard to the Guidelines. I have had regard to the non-exhaustive list of public interest factors favouring and against disclosure in paragraphs 6.25 and 6.29 of the Guidelines.

While disclosure may broadly promote the objects of the FOI Act in that it would provide access to information, it would not:

- Allow or assist inquiry into possible deficiencies in the conduct or administration of the ABC;
- Reveal or substantiate any misconduct, negligent, improper or unlawful conduct; or
- Reveal the reason for a government decision or provide contextual information which informed such a decision.

Whilst it could be argued that disclosure of those documents may promote the effective oversight of public expenditure, there are well-established processes in place for the scrutiny of the ABC's expenditure. The ABC's governance and financial affairs can be examined by the Australian National Audit Office (ANAO). The ANAO has extensive powers of access to the ABC's documents and information and can perform audits and reviews to provide the Parliament – and therefore the community – with assurance about the ABC's financial reporting, administration and accountability.

The ABC is also required to comply with the public financial reporting requirements set out in the Finance Minister's Orders made under the *Commonwealth Authorities and Companies Act 1997*. In addition, the ABC is required to attend public Senate Estimates hearings, at which time ABC officers are questioned about the objectives, operational procedures and efficiency of the programs for which they are responsible. The Senate Estimates Committee may "ask for explanations from ministers in the Senate, or officers, relating to the items of proposed expenditure" (Senate Standing Order 26(5)).

The Documents do not contain personal information to which an individual is seeking access.

The Documents are draft only and do not necessarily reflect a settled position. Disclosure of draft documents of this kind would not meaningfully contribute to or inform any discussion. Rather, an interim opinion recorded during the report-writing process detracts from and potentially undermines the concluded and considered views expressed in the final Report.

It is in the public interest for the ABC to undertake comprehensive reviews of its editorial activities in order to fulfil its functions under the ABC Act. Disclosing draft documents may compromise the effectiveness of future editorial reviews. The potential disclosure of drafts, which are treated as confidential during the review process, may deter the parties from engaging in consultation as part of that process, which would have an adverse effect on the quality and scope of the final review report.

In my view, there are insufficient factors favouring disclosure to outweigh the factors against disclosure.

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 is, 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.

Mande.

Judith Maude Head, Corporate Governance Direct line 02 8333 5316