

Corporate Affairs

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By email:

Dear

FOI REQUEST - REFERENCE NUMBER 2014-001

I refer to your request for access to documents under the *Freedom of Information Act 1982* (the FOI Act) in your email of 31 January 2014. On 4 February 2014, the scope of your request was clarified to be a request for the following:

"all correspondence, including e-mail, from Mark Scott to the Minister of the Department of Communications between 8 September 2013 and 20 January 2014".

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 Managing Director's Office and his Chief of Staff.

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 2 documents were identified:

Document 1 Letter from Mark Scott to the Minister for Communications dated 18

December 2013

Document 2 Email dated 7 January 2014

Access refusal – s47C (deliberative processes)

Access to Documents 1 and 2 (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, or relating to, opinions and recommendations 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 had regard to the substance of the information in the Documents when determining that it contains deliberative matter. The material is not procedural or day-to-day content, nor is it operational or purely factual material.

In relation to Document 1, the information in that document contains a collection of facts, opinions and advice, requested by the Minister, regarding specific functions and activities undertaken by the ABC. The information was gathered and provided in confidence as the basis for ongoing deliberations regarding those functions and activities.

In relation to Document 2, the information in that document contains views expressed in response to a matter which was communicated in confidence. The consultation reflected in Document 2 is relevant to the decision making process that is the subject of ongoing deliberations.

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 6.70 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 Documents are each part of a process of consultation that has been undertaken for the purposes of considering a particular course of action, and contain a collection of facts, opinions and advice.

Further, 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

The information in Document 1 provides an assessment of potential courses of actions and decisions, and as such, is clearly part of the process of deliberating.

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

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].

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

I accept that disclosure may promote the objects of the FOI Act in that it would provide access to information. Further, the deliberative processes to which the information in the Documents relate are arguably the subject of current public debate.

Having regard to the content of the Documents, there is no benefit to be gained from disclosure in terms of allowing a person to access his or her personal information.

Balanced against the factors favouring disclosure, there are public interest factors against disclosure. The facts, opinions and advice contained in the Documents was sought and provided in confidence, and the information in the Documents is not publicly known or available.

There is a real risk that disclosure of the information could reasonably be expected to:

- prejudice the competitive commercial activities of the ABC; and/or
- prejudice the management functions of the ABC.

For instance, Document 1 contains confidential information about the cost of services provided to the ABC, disclosure of which may prejudice the ABC's ability to obtain the same or similar services in the future at competitive rates.

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)).

In my view, the factors in favour of disclosure are not sufficient 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.

Yours sincerely

Judith Maude

Head, Corporate Governance Direct line 02 8333 5316