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ABC
Australian
Broadcasting
Corporation

Mr Dominic Paul

ABC Ultimo Centre
700 Harris Street
Ultimo NSW 2007

GPO Box 9994
Sydney NSW 2001

Tel. +61 2 8333 1500
abc.net.au

By email: foi+request-3487-1e547bbe@righttoknow.org.au

Dear Mr Paul

FOI REQUEST – REFERENCE NUMBER 2017-014

I refer to your request for access to documents under the Freedom of Information Act 1982 (the FOI Act) in your email of 12 May 2017, and FOI Officer Judith Maude’s decision regarding access in a letter sent to you on 6 June 2017.

In that letter, Ms Maude notified you that three documents had been identified which appeared to fall within the scope of your request. Further, all three documents contained information about a person or persons who might reasonably wish to make a contention that the documents are conditionally exempt under s47F and/or s47G of the FOI Act, and that access to the documents would, on balance, be contrary to the public interest for the purposes of s11A(5). Those documents appear below:

No.	Document	Date	Pages
1	Contract	19 December 2016	2
2	Invoice	20 December 2016	1
3	Invoice	Undated	1

I confirm that the necessary consultations with affected third parties have been undertaken.

In accordance with the requirements in s27(6)(b) and s27A(5)(b), I am writing to advise you that I have decided to refuse access to Documents 1, 2, and 3. My reasons for refusing access are set out below.

Documents 1 and 2 – Program material documents

The ABC is specifically excluded from the operation of the FOI Act in relation to its program material, and documents in relation to its program material, by virtue of Section 7(2) and Division 1 of Part II of Schedule 2 of the FOI Act. ‘Program material’ for the purposes of that Part has been interpreted to mean:

“...the program and all versions of the whole or any part of the program, any transmission broadcast or publication of the program, and includes a document of any content or form

embodied in the program and any document acquired or created for the purpose of creating the program, whether or not incorporated into the completed program...

it would include a document created after a program is broadcast. Such documents might include transcripts of radio programs, podcasts, internet pages and documents produced by the ABC or incorporated in its records directly concerning the substantive content of the broadcast program.”¹

Bennett J in the Federal Court² accepted that the expression “in relation to its program material” covered documents relating to program material, as well as program material itself. This conclusion was regarded as unexceptional by the Full Federal Court in another case³ which examined the operation of a similar FOI Act exclusion concerning the CSIRO, and is also consistent with an earlier Federal Court case⁴ in which Hill J observed that the ABC is exempt under the Act “in respect of ‘documents’ in relation to its program material”.

Document 1 is an agreement for the arrangement, production and purchase of broadcast and online rights in a radio program and complimentary digital content. Document 2 is an invoice setting out the fee for purchase of these rights. Accordingly, while the documents prima facie appear to fall within the scope of your request, I consider the documents to be ABC program material, or documents in relation to ABC program material, and therefore outside the operation of the FOI Act.

Document 3 – document in relation to ABC program material

Document 3 is an invoice relating to the purchase of an image for a Radio National publication and associated publicity. It was used for the purposes of the ABC Online version of the Radio National radio program, and also for publicity on ABC Online in relation to the radio program. I consider that for similar reasons to those set out above in relation to Documents 1 and 2, this document also is a document “in relation to ABC program material”.

Exemption applicable if documents not outside operation of the FOI Act – s 47G (business affairs)

In the alternative, if it were considered that one or more of Documents 1, 2 or 3 was not outside the operation of the FOI Act, following consultation with affected third parties access to Documents 1, 2 and 3 is refused on the basis that they are conditionally exempt under s47G of the FOI Act. That is, release of the documents would involve disclosure of information concerning a person or persons (the affected third parties) in respect of their business or professional affairs, in circumstances where that disclosure would unreasonably affect those third parties adversely in respect of their lawful business or professional affairs. I am further satisfied that, on balance, it would be contrary to the public interest to disclose that material at this time.

The information in Documents 1, 2 and 3 falls within the meaning of ‘business or professional affairs’. I have had regard to the Guidelines issued by the Australian Information Commissioner under s93A of the FOI Act (the Guidelines), in particular *Part 6 – Conditional Exemptions*.

¹ *Australian Broadcasting Corporation and Herald and Weekly Times Pty Limited and Anor* [2012] AATA 914 (21 December 2012), see [57].

² *Australian Broadcasting Corporation v University of Technology, Sydney* [2006] FCA 964, see [16] to [19]

³ *Bell v Commonwealth Scientific and Industrial Research Organisation* [2008] FCAFC 40, see [52]

⁴ *Rivera v Australian Broadcasting Corporation* [2005] FCA 661

Paragraph 6.192 of the Guidelines states that:

“The use of the term ‘business or professional affairs’ distinguishes an individual’s personal or private affairs...The term ‘business affairs’ has been interpreted to mean ‘the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs.’

I am satisfied that the information contained in Documents 1, 2 and 3 has relevance to the affected third party in respect of their business or professional affairs.

The s47G conditional exemption is, according to the Guidelines, intended to protect the interests of third parties dealing with the government.⁵

I note that, in accordance with 6.184 of the Guidelines, the operation of conditional exemption s47G depends on the effect of disclosure rather than the precise nature of the information itself. Disclosure of the information in Documents 1, 2 and 3 would not reveal facts already in the public domain. In my view, disclosure of this information could reasonably be expected to have an unreasonable and adverse effect on the business or professional affairs of the affected third parties. All three documents contain commercially sensitive information, the disclosure of which could reasonably be expected to undermine potential income from other clients. The individuals to whom the information relates have expressed their objection to the release of their business information including their rates. Accordingly, I consider the three documents to be conditionally exempt under s47G of the FOI Act (if at applied)

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 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 consider that the primary factor favouring disclosure would be that disclosure of all documents would broadly promote the objects of the FOI Act. However, this being the only factor favouring disclosure on this occasion, it does not outweigh the potential harm that disclosure risks. The third parties have pointed out that their potential income could be undermined by release of this information. The parties would reasonably have expected that their commercial affairs information would be kept confidential. Furthermore, Document 1 contains other sensitive information concerning the terms on which the program was commissioned. Moreover, the information in the documents is not of serious concern or benefit to the public, in my view. I am satisfied that the most important consideration is the risk of commercial harm to the third parties, and therefore, on balance, it would be contrary to the public interest to disclose the documents.

⁵ See FOI Guidelines Version 1.3 (December 2016), Part 6, paragraph 6.185

Exemption applicable if documents not outside the scope of the FOI Act - s47F (personal privacy)

I also consider that if it were considered that one or more of Documents 1,2 or 3 was not outside the scope of the FOI Act, following consultation with affected third parties access to Documents 1, 2, and 3 is further refused on the basis that they are conditionally exempt under s47F of the FOI Act. That is, release of the documents would involve the unreasonable disclosure of personal information concerning a person or persons (the affected third parties). 'Personal information' either directly identifies an individual or is information by which an individual can reasonably be identified.

Paragraph 6.130 of the Guidelines states that:

"Personal information can include a person's name, address, telephone number...bank account details...and signature."

I am satisfied that Documents 1, 2 and 3 contain personal information. Further, the individuals to whom the information relates are not publicly known to have been associated with the matters dealt with in the documents, (with the exception of any relevant credits in relation to the program material, which do not refer to any commercial arrangements in relation to that material) and I consider that there is the possibility of detriment to the individuals involved should their personal information be made available in this context.⁶ An objection to the release of documents containing personal information on this basis has been expressly made by an individual personally identified in Documents 1 and 2, and also an individual personally identified in Document 3. Their concerns include being made the targets of hate speech and attacks should their personal information be disclosed. One of the individuals is concerned to ensure protection of family as well. Accordingly, I consider the three documents to be conditionally exempt under s47F of the FOI Act (if it applied).

Public interest

As with the section 47G exemption, I consider that the primary factor favouring disclosure would be that disclosure of the documents would broadly promote the objects of the FOI Act. However, this being the only factor favouring disclosure on this occasion, it does not outweigh the potential harm that disclosure risks. In particular the concerns expressed about hate speech and anti-homosexual attacks, as support for the individuals' request that their personal information be kept private, should be given a great deal of weight, in my view. I am satisfied that this is the most important consideration and accordingly consider that, on balance, it would be contrary to the public interest to disclose the documents.

If you are dissatisfied with this decision you can apply for Internal or Information Commissioner (IC) Review. Information about your review rights is attached.

Yours sincerely



Michael Martin
Deputy General Counsel

⁶ See FOI Guidelines Version 1.3 (December 2016), Part 6, paragraph