

8 February 2018

Dominic Paul



**ABC**  
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Corporation

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Dear Mr Paul

### **Freedom of Information Act request 2017-014 – Internal review**

I refer to your email dated 23 August 2017 requesting internal review of the decision by the ABC's Deputy General Counsel, Michael Martin, who has authority to make decisions regarding requests under the *Freedom of Information Act 1982* (Cth) (**FOI Act**). Your request related to a previous application by you for information via email dated 12 May 2017.

#### ***Background***

I understand that via email on 12 May 2017 you requested access to:

*“Documents, eg. external work request or invoices, pertaining to the total cost to produce ‘Searching for Trough Man’, which went to air on the RN Earshot program at 11am on 9 May 2017” (Documents)*

I understand that no amendments or clarifications were made to this original request. I also understand that three documents were identified as the Documents and I have considered each of these, as described below.

As you are aware, in a letter to you dated 23 August 2017, Mr Martin made a decision regarding your request, and determined that the Documents were exempt from the operation of the FOI Act and access to the Documents will therefore not be provided (**Original Decision**).

I am authorised by the Managing Director, under section 23 of the FOI Act, to make decisions on requests for internal review. I have reviewed your request in accordance with section 24 of the FOI Act and set out my decision below.

#### ***Materials considered***

- Letter dated 23 August 2017 from Michael Martin to Dominic Paul regarding Original Decision;
- Contract dated 19 December 2016 (referred to as ‘Document 1’ in the Original Decision)
- Invoice dated 20 December 2016 (referred to as ‘Document 2’ in the Original Decision)
- Undated invoice (referred to as ‘Document 3’ in the Original Decision)
- Relevant sections of the *Freedom of Information Act 1982* (Cth);

- *Australian Broadcasting Corporation and Herald and Weekly Times Pty Limited and Anor* [2012] AATA 914 [57]
- Letter from the ABC dated 3 July 2017 to the provider of Document 2 providing opportunity to make submission regarding release of information about business affairs
- Letter from the ABC dated 3 July 2017 to the provider of Document 3 providing opportunity to make submission regarding release of information about business affairs
- Letter from the provider of Document 2 dated 1 July 2017
- Letter from the provider of Document 3 dated 3 July 2017

### **Decision and reasons**

Having reviewed your request, I have decided to affirm the Original Decision that the Documents are exempt from the operation of the FOI Act.

My decision-making process took the following path:

#### **1. Right to access**

First, I considered the general right to access provided in section 11 of the FOI Act which is that:

*“(1) Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to: (a) a document of an agency, other than an exempt document;...”*

#### **2. Consideration of whether the Documents are exempt documents**

Section 7(2) of the FOI Act provides that:

*‘The persons, bodies and Departments specified in Part II of Schedule 2 are exempt from the operation of this Act in relation to the documents referred to in that Schedule in relation to them.’*

Division I of Part II of Schedule 2 is headed ‘Agencies exempt in respect of particular documents’ and provides, relevantly:

*‘Australian Broadcasting Corporation, in relation to its program material and datacasting material.’*

#### **3. Consideration of whether the Documents are ‘program material’ for the purposes of the FOI Act.**

I then considered the meaning of ‘program material’. Several decisions have considered the meaning of these words specifically as they relate to the ABC. The Administrative Appeals Tribunal has stated that program material means *‘any document acquired or created for the purpose of creating the program.’*<sup>i</sup>

The RN Earshot program ‘Searching for Trough Man’ constitutes a program for the purposes of the FOI Act. The Documents fall within the meaning of ‘program material’, as explained in the above decision, because they were ‘created’ for the purpose of ‘creating’ ‘Searching for Trough Man’.

On this basis, I have concluded that the Documents are exempt documents for the purposes of the FOI Act and access will therefore not be provided to the Documents.

**4. In the alternative, the Documents are conditionally exempt under s47G of the FOI Act**

I note that in the Original Decision Mr Martin decided that if the Documents were not exempt from the operation of the FOI Act, access to the Documents was refused on the basis that they were conditionally exempt because they relate to the business affairs of third parties who would be unreasonably affected by disclosure. I consider the decision that the Documents are exempt because they are 'program material' is a clear one and does not warrant further consideration. However, given Mr Martin made a decision about the Documents 'in the alternative' I have also considered this.

In the course of making the Original Decision, the ABC wrote to and received responses from relevant third parties and asked for comment on the release of the Documents relevant to them. Both third parties gave reasons why they did not consent to the release of the Documents relevant to them and reasons why disclosure would have an unreasonable and adverse affect on the business or professional affairs of these entities (and their personal privacy). I consider that release of the Documents would have an unreasonable and adverse affect on the business affairs of the relevant third parties. On this basis I consider that, in the alternative the Documents are conditionally exempt under section 47G of the FOI Act.

When a document is determined to be conditionally exempt, the FOI Act requires a decision maker to apply the public interest test – by weighing the factors favouring disclosure against the factors against disclosure.

I have considered the public interest in releasing the Documents. The Guidelines to the FOI Act set out factors favouring disclosure and factors against disclosure. The Documents are invoices and a short contract and are not, in my view, of serious concern or benefit to the public given the amounts of money involved and the services provided. The factor against disclosure is that disclosure could reasonably be expected to harm the interests of an individual (the third parties) and could reasonably be expected to prejudice the management function of an agency (by releasing the contract) and could reasonably be expected to prejudice the protection of an individual's right to privacy (the third parties). On balance, I do not consider that the public interest in releasing the Documents outweighs the factors against disclosure.

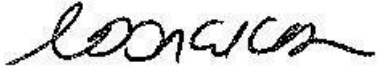
***Right of review***

If you are dissatisfied with this decision, you can apply for review by the Australian Information Commissioner, whose contact details are:

Office of the Australian Information Commissioner  
GPO Box 2999 Canberra ACT 2601 (or) GPO Box 5218 Sydney NSW 2001  
Tel: 1300 363 992 Fax: 02 9284 9666  
Email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)  
Website: [www.oaic.gov.au](http://www.oaic.gov.au)

In making your application to the Information Commissioner, you need to provide an address for notices to be sent (this can be an email address) and a copy of this decision. You may also wish to inform the Information Commissioner of the reasons for seeking review.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Rebekah Donaldson', written in a cursive style.

**Rebekah Donaldson**

FOI Internal Reviewer, authorised pursuant to s 23 FOI Act

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<sup>1</sup>*Australian Broadcasting Corporation and Herald and Weekly Times Pty Limited and Anor* [2012] AATA 914 [57]