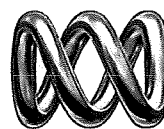


21 December 2017



ABC
Australian
Broadcasting
Corporation

Mr Patrick Wright

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-4072-e19a2247@righttoknow.org.au

Dear Mr Wright

FOI REQUEST – REFERENCE NUMBER 2017-030

I refer to your request for access to documents under the *Freedom of Information Act 1982* (the FOI Act) in your email of 5 September 2017. In our subsequent correspondence, the scope of your request was refined to access to the following documents:

“1. Copies of all directions and editorial guidance, provided by staff responsible for editorial or managerial oversight of coverage, to journalists or other key staff covering marriage equality/same sex marriage:

a) in relation to marriage equality/same sex marriage coverage, from 1 January 2016 to 5 September 2017

b) in relation to coverage of the marriage equality plebiscite.

2. All documents containing directions to ABC staff to refer to ‘same sex marriage’ rather than ‘marriage equality’, and all documents containing information about the reasons why staff should do so.”

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.

Publicly available documents

Please note that some documentation relevant to the scope of your request is publicly available on the ABC’s website. You may wish to visit the following pages, if you have not yet done so:

<https://edpols.abc.net.au/policies/>

The ABC’s Editorial Policies, in particular guidance on ‘Harm and Offence’ and ‘Impartiality’.

<http://about.abc.net.au/2017/10/covering-same-sex-marriage/>

The ABC Editorial Director’s note on same-sex marriage, posted on October 4, 2017. While one month outside the limitations of your request, this may be of interest. The post also contains links to

documents, such as editorial 'spot audits' of same-sex-marriage content, that fall within the timeframe of your request.

<http://about.abc.net.au/reports-publications/use-of-social-media-policy/>

The ABC's social media policy, which provides advice on when the ABC's Editorial Policies apply to its staff's social media activity.

Locating and identifying documents

Reasonable steps have been taken to identify and locate all relevant documents. The search for these documents involved contacting the following people:

- Manager Editorial Policies, ABC NEWS
- ABC Editorial Director

It was 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 six documents were identified:

No.	Description	Date	Pages
1	Email from Mark Maley to ABC employees	10 August 2017	1
2	Internal email exchange between ABC employees and Editorial Director Alan Sunderland	10 August 2017	2
3	Email from Mark Maley to ABC employees, internal email exchange between Mark Maley and individual ABC employee	10 August 2017	3
4	Internal email thread: ABC Editorial Director and ABC staff, including advice on editorial issues to do with same-sex marriage coverage	10–17 August 2017	7
5	Email from ABC Language to ABC Editorial Director: draft ABC Language Report including directions and advice to do with same-sex marriage coverage	23 August 2017	10
6	Email from ABC Editorial Director to all ABC employees: ABC Language Report including directions and advice to do with same-sex marriage coverage	24 August 2017	10

Please note that in identifying relevant documents, I have excluded some duplicate documents. Accordingly, email messages which appear as part of a string have not also been included as separate emails.

Access to documents

Access is granted in full to Documents 1, 2, 3, 5 and 6 and in part to Document 4.

Documents 1–6 contain information which could reasonably be regarded as irrelevant to the request for access, namely information outside the scope of your request and irrelevant personally identifying information about ABC employees, including mobile phone numbers of identified ABC employees. Section 22 of the FOI Act allows access to be granted to an edited copy of a document if it is reasonably practicable to remove irrelevant material. Accordingly, Documents 1–6 have been redacted to remove material that is irrelevant to your FOI request.

Document 4 has also had redactions applied to those parts of the document to which access has been refused.

Access refusal – 47C (deliberative processes)

Access to parts of Document 4 is refused on the basis that those parts are conditionally exempt under section 47C of the FOI Act.

In my view, disclosure of those parts of the document under the FOI Act would disclose matter in the nature of, or relating to, opinions, advice or recommendations obtained, and consultation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions 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.

Document 4 contains correspondence initiated by an ABC employee in order to secure advice and recommendations from the Editorial Director in relation to a specific editorial policy matter. I have determined that most of this exchange constitutes deliberative matter, prepared or recorded for the purposes of a 'deliberative process'. This information is therefore conditionally exempt under 47C of the FOI Act. Section 6.58 of the FOI Guidelines describes a 'deliberative process' as an action which

"...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 competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative process 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

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]. See also *Carver and Fair Work Ombudsman* [2011] AICmr 5 in relation to code of conduct investigations.

The material I have found to be conditionally exempt under 47C is not operational or purely factual material, nor does it constitute a record or formal statement of the reasons for a final decision given in the exercise of an adjudicative function. Rather, the material is consultative and involves the evaluation of considerations that may have a bearing upon a possible course of action. I note that no type of harm is required to result from disclosure for material to be deemed deliberative. For a 47C conditional exemption to be applied, it must only be shown that the material is, in fact, deliberative according to the FOI Act and its Guidelines.

I am satisfied that the material to which access is refused constitutes a consultation or deliberation that has taken place in the course of, or for the purposes of, the deliberative processes of the ABC, and it is therefore conditionally exempt under s47C of the FOI Act.

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.

There can be little doubt that the matter of same-sex marriage itself is of public importance, and the particulars of the consultation contained in Document 4 may contribute anecdotally to that conversation. However, it would stretch the meaning to say it would inform debate on the subject. Conversely, the material in Document 4 to which access has been granted – specifically, statements from the ABC's most senior editorial advisor about same-sex marriage coverage – goes a significant way to informing the debate on same-sex marriage, as it reveals the public broadcaster's guidance on coverage of the matter.

In this particular matter, factors favouring disclosure do not outweigh the potential harm that disclosure risks.

Candour in consultation as regards editorial duties and obligations is essential to the free exchange of information and advice during the course of the ABC's deliberative processes, and to the attainment of the most efficient, fair, and effective outcomes. There is a significant risk that the disclosure of this type of consultation may prove detrimental to the future attainment of such information and advice, by way of staff being disinclined to approach senior staff frankly about internal editorial queries. This would deprive the public of an effective means by which the ABC's processes can be reviewed and regulated: via internal feedback, discussion, and oversight of editorial matters – especially those of public interest.

In assessing whether access to refused parts of Document 4 would, on balance, be contrary to the public interest, I have had regard to the Guidelines issued by the Information Commissioner. I am satisfied that the most important consideration is the risk that staff may not approach senior staff frankly and constructively about editorial matters and issues as they arise, and therefore the

Corporation may lose the effectiveness of a crucial means by which the Board can satisfy its obligations under s8(1) of the ABC Act. Accordingly, I consider that, on balance, it would be contrary to the public interest to disclose the part of Document 4 to which access has been refused.

Copies of the documents to which access is granted are attached.

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

A handwritten signature in black ink, appearing to read 'Connie Carnabuci', with a long, sweeping horizontal line extending to the right.

Connie Carnabuci
General Counsel