

11 March 2014

Mr Daniel Nolan

By email only: foi+request-489-7d0589d5@righttoknow.org.au



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Dear Mr Nolan

Freedom of Information Act request – Internal review

I refer to your email dated 16 December 2013 requesting access under the *Freedom of Information Act 1982 (Cth)* (FOI Act) for "The Outlook Archive of John McTernan, currently held by the ABC".

I note that you did not receive a response within the initial 30-day decision period and, accordingly, your request was deemed refused under section 15AC of the FOI Act. By email dated 19 February 2014, you requested an internal review of this access refusal decision.

On 26 February 2014, the ABC's original decision-maker provided you with a decision for your information, acknowledging the expiry of time and the fact that you had already sought internal review. In that letter, she advised you that she regarded the requested documents as excluded from the FOI Act on the basis of the ABC's exemption for program-related material.

I am authorised by the Managing Director, under section 23 of the FOI Act, to make decisions on requests for internal review. I have conducted a review of the original access refusal decision in accordance with section 54 of the FOI Act and make a fresh decision.

Identification of documents

I have ascertained that, at the time of your original FOI request, the ABC News Division held a bundle of thousands of documents relating to the email correspondence of John McTernan, the media adviser for the former Prime Minister, Julia Gillard. I regard these documents as falling within the scope of your request.

Decision

Having reviewed your request, I have decided to refuse access on the basis that the requested documents fall outside the operation of the FOI Act as they relate to the ABC's program material and are therefore exempt under section 7(2) and Schedule II, Part 2.

Reasons for decision

The requested documents were received by the ABC in the course of its newsgathering activities and are directly related to its program-making, both on air and online – see, for example:

- ABC News, "Leaked McTernan emails reveal inner workings of Gillard's office" (video), posted 11 December 2013, <http://www.abc.net.au/news/2013-12-11/leaked-mcternan-emails-reveal-inner-workings-of/5149978>;

- ABC News, "Leaked John McTernan emails reveal aggressive approach of Julia Gillard's spin doctor", updated 11 December 2013, <http://www.abc.net.au/news/2013-12-11/leaked-emails-reveal-aggressive-style-of-john-mcternan/5149158>;
- ABC News Breakfast, "John McTernan's vitriolic emails made public" (video), updated 12 December 2013, <http://www.abc.net.au/news/2013-12-12/tables-turn-on-mcternan-vitriolic-emails/5151834>;
- ABC News, "Leaked John McTernan emails reveal he was oblivious to Julia Gillard's position on abortion law", updated 12 December 2013, <http://www.abc.net.au/news/2013-12-12/emails-reveal-john-mcternan-oblivious-on-abortion-law/5150964>;
- ABC News, "Joe Hockey mocks Labor over leaked messages from Julia Gillard's media adviser" (video of federal Parliamentary proceedings), posted 12 December 2013, <http://www.abc.net.au/news/2013-12-12/joe-hockey-mocks-labor-over-leaked-messages/5153444>;
- ABC News, "John McTernan emails: Government mocks Labor over leaked messages from Julia Gillard's media adviser", updated 12 December 2013, <http://www.abc.net.au/news/2013-12-12/govt-hits-out-at-leaked-john-mcternan-emails/5153270>;
- ABC News, "Leaked John McTernan emails: Julia Gillard's media adviser used Twitter army to attack Coalition", updated 17 December 2013, <http://www.abc.net.au/news/2013-12-16/leaked-mcternan-emails-media-advisor-twitter-army-attack-coa/5158680>;
- ABC News, "Leaked John McTernan emails reveal chaos surrounding Julia Gillard's 'men in blue ties' speech", updated 19 December 2013, <http://www.abc.net.au/news/2013-12-19/blue-ties-speech-blackout-defended/5167500>.

In my view, the documents fall squarely within the meaning of "program material". This term was defined by the Administrative Appeals Tribunal of Australia as including "any document acquired or created for the purpose of creating the program, whether or not incorporated into the completed program": *ABC and Herald and Weekly Times Pty Limited and Anor* [2012] AATA 914, <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/AATA/2012/914.html>.

Rights of review

If you are dissatisfied with this decision, you can ask for a 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 | Website: www.oaic.gov.au

In making your application to the Information Commissioner, you should 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


 Michelle Fisher
 FOI Internal Reviewer authorised pursuant to s 23 FOI Act