



26 March 2019

Mr Jonathan Sequeira

**By email:** [foi+request-5153-933212fc@righttoknow.org.au](mailto:foi+request-5153-933212fc@righttoknow.org.au)

Dear Mr Sequeira

**ABC FOI REQUEST – REFERENCE NUMBER 201819-046**

I refer to your request for access to documents under the *Freedom of Information Act 1982* (the **FOI Act**) in your email dated 12 December 2018. Specifically, you sought access to the following:

*“...all correspondence and documents, including emails, sent or received from 10 August 2018 to 1 December 2018 inclusive, relating to The Honourable Anthony Albanese MP’s correspondence (dated 10 August 2018) to David Anderson regarding the ABC’s decision not to acquire Descent into the Maelstrom - The Radio Birdman Story, from or to any of the following people:*

- *David Anderson*
- *Rachael Nathan*
- *Anthony Albanese MP*

*Excluded are documents, correspondence and emails sent by Jonathan Sequeira to the ABC, or received by Jonathan Sequeira from the ABC.”*

**Authorisation**

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**

Reasonable steps were taken to identify and locate all relevant documents. The search for documents included contacting the ABC staff members listed in the request, who conducted searches to identify any documents which might fall within the scope of the request.

As a result of those searches, 15 documents were identified which fall within the scope of your request (see **Appendix A**).

### **Material taken into account**

In making my decision I have had regard to:

- the terms of your request
- the content of the document identified as relevant to your request
- the FOI Act
- guidelines issued by the Office of the Australian Information Commissioner under section 93A of the FOI Act (**the Guidelines**).

### **Decision**

Access is granted in full to Document 15 and in part to Document 1.

Access is refused in full to Documents 2–14.

My reasons for refusal of access are provided below.

### **Reasons for Decision**

#### **Section 7(2) – program material**

Access to Document 3 and parts of Documents 1 and 11 is refused on the basis that they contain 'program material'. The ABC is exempt from the operation of the FOI Act in relation to these 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."

The ABC is listed in Part II of Schedule 2 "...in relation to its program material and datacasting content".

'Program material' is not defined in the FOI Act, however it has been the subject of judicial consideration.

The Guidelines point to *Australian Broadcasting Corporation and Herald and Weekly Times Pty Limited (ABC and HWT)*, in which "the AAT held that program material includes '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.'"<sup>1</sup>

Documents that are sent to the ABC as program submissions, as well as any documents distributed within the ABC that are directly related to those submissions, were created for the purpose of creating a program for broadcast on one or more ABC platforms. Document 3 contains the type of information as described above, in relation to a program that is clearly identified, being *Descent into the Maelstrom – The Radio Birdman Story*. The program was submitted to the ABC with a view to having it broadcast on the ABC and any discussion relating to the program itself constitutes information falling under section 7(2) of the FOI Act.

The parts of Documents 3 and 11 to which access is refused under section 7(2) I have found to be 'related to program material'. The Federal Court of Australia considered the scope of the section 7(2) exclusion in *Australian Broadcasting Corporation v The University of Technology, Sydney*<sup>2</sup> (*ABC v UTS*)

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<sup>1</sup> The Guidelines [2.16]; [2012] AATA 914 [57]

<sup>2</sup> [2006] FCA 964

and held that the exemption also applies to ‘any document that relates to program material’. In that case, the documents being sought related to documents relating to complaints made to the ABC, including “internal files and correspondence, board minutes, investigation files and reports and documents in relation to the complaints”. In *ABC and HWT* the Administrative Appeals Tribunal observed that if the Federal Court’s decision in *ABC v UTS* is applied, the exemption also attaches to documents having “a reasonably direct relationship” with program material.

The Guidelines summarise this case law and adopt the ‘reasonably direct relationship’ test in *ABC and HWT*.<sup>3</sup> I consider this the correct approach; i.e. that the ABC exemption applies to documents comprising ‘program material’ in the sense described above, as well as documents which have a reasonably direct relationship with that program material. The Guidelines contrast ‘reasonably direct’ with a connection that is “indirect, remote or tenuous”.<sup>4</sup> I have taken the same approach.

The information I have found to be ‘related to program material’ comprises feedback or complaints about ‘program material’ in relation to the ABC, that program being *Descent into the Maelstrom – The Radio Birdman Story*. The parts of Documents 1 and 11 containing that information are exempt from the operation of the FOI Act under section 7(2).

I note that Document 15 and part of Document 1 have been released to you, though they also contain program material for the purposes of the FOI Act. As the letter from Mr Albanese is already in the public domain, this document and our response to it have been released to you on this occasion, in alignment with the FOI Act objective of promoting transparency in government processes.

#### ***Access refusal – public interest conditional exemption – section 47C (deliberative processes)***

Access to Documents 2, 4–10, 12–14 and part of Document 11 is refused on the basis that they are conditionally exempt under section 47C of the FOI Act. In my view, disclosure of these documents 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, while, or for the purposes of, the deliberative processes involved in the functions of the ABC.

Section 6.58 of the 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.’<sup>5</sup>”

The documents to which access is refused under section 47C reflect internal consultation taken with a view to providing responses in relation to your and others’ correspondence with the ABC about the program *Descent into the Maelstrom – The Radio Birdman Story*. The material either requests the beginning of a consultative process or furthers that process with a view to reaching a resolution. The information is not operational or purely factual, but rather reflects the steps involved in attaining those resolutions.

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 a specific type, namely deliberative matter. I am satisfied that Documents 2, 4–10, 12–14 and part of Document 11

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<sup>3</sup> The Guidelines [2.16]

<sup>4</sup> The Guidelines [2.16]

<sup>5</sup> 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.

contain deliberative matter, and they are therefore conditionally exempt from disclosure under section 47C of the FOI Act.

I note that access must generally be given to a conditionally exempt document unless (in the circumstances) access to the document at the time would, on balance, be contrary to the public interest. My assessment of the public interest in relation to documents which I consider to be conditionally exempt under section 47C is set out below in the section entitled **Public interest**.

**Access refusal – public interest conditional exemption – section 47F (personal privacy)**

Access is refused to parts of Document 1 on the basis that those parts are conditionally exempt under section 47F of the FOI Act: that is, that release of that material would involve the unreasonable disclosure of personal information about a person.

In making that decision I have considered whether the document contains personal information, and whether it would be unreasonable to disclose that information. I have also had regard to the Guidelines. In my view, each of the elements of the exemption in section 47F are met.

Firstly, the information satisfies the definition of ‘personal information’ in the FOI Act, being “information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information or opinion is true or not, and whether the information or opinion is recorded in a material form or not”.

Document 1 contains personal information about an individual in an external agency, where that information is directly connected to them by name. It also contains the mobile phone number of a person in an external agency. Paragraph 6.130 of the Guidelines states that, “Personal information can include a person’s name, address, telephone number, date of birth, medical records, bank account details, taxation information and signature.” I am satisfied that mobile phone numbers are personal information for the purposes of section 47F.

Secondly, I have considered whether it would be unreasonable to disclose the personal information contained in Document 1. I have had regard to the factors listed in section 47F(2), specifically the extent to which the information is well known, whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document, and the availability of the information from publicly accessible sources.

In exploring the concept of ‘unreasonable’ disclosure, paragraph 6.139 of the Guidelines refers to the AAT in *Re Chandra and Minister for Immigration and Ethnic Affairs*: “...whether a disclosure is ‘unreasonable’ requires ... a consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance ... it is also necessary in my view to take into consideration the public interest recognised by the Act in the disclosure of information ... and to weigh that interest in the balance against the public interest in protecting the personal privacy of a third party...”.

Paragraph 6.144 points to Heerey J in *Colakovski v Australian Telecommunications Corp*: “...if the information disclosure were of no demonstrable relevance to the affairs of government and was likely to do no more than excite or satisfy the curiosity of people about the person whose personal affairs were disclosed...disclosure would be unreasonable’.”

The personal information in Document 1 is not public, nor known to more than a small group of people. I am informed that an individual whose personal information is contained in part of Document 1 has not

consented to the release of their personal information; by contrast, they contend its release.<sup>6</sup> I consider it likely the individual whose mobile phone number has been redacted would have a reasonable expectation that such information would not be disclosed. In both cases, the information is of no demonstrable relevance to the affairs of government and may in one circumstance, in my view, cause stress to a person to no end that serves the public discourse.

Having regard to the circumstances described above, I consider that Document 1 contains personal information, and that disclosure of that information at this time would be unreasonable pursuant to section 47F 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.

### Deliberative processes (section 47C)

I acknowledge there is public interest in how the national broadcaster makes decisions in relation to public-facing content that concerns its programming or presenters, and in the editorial process at the ABC in general. Transparency around the ABC's decision-making promotes effective oversight of the public money which funds the ABC's operations.

At the same time the FOI Act evidences a strong policy intent not to expose deliberations around program material, by making the ABC exempt from the operation of the Act in relation to that material. The deliberations involved in this case all have a demonstrable, direct relationship with the nature and scope of ABC Television's program material, and where disclosure of that deliberative matter would tend to undermine the policy objective behind section 7(2), I consider that a factor against disclosure. There is further public interest in the ABC being able to confidentially manage its editorial concerns independently; an interest reflected in and supported by the ABC Act.

Having regard to these considerations I am satisfied that at this time, access to the deliberative material in Documents 2 and 4–14 would, on balance, be contrary to the public interest. Accordingly, the documents are exempt from disclosure.

### Personal privacy (s47F)

I consider there is no public interest in the disclosure of the personal information Document 1 as this is not information to which you personally are seeking access (i.e. it is not your personal information, but third parties'). Disclosure of this information would, by contrast, affect the public interest in maintaining individuals' privacy where that disclosure would not add to the public discourse. Accordingly, on balance I am satisfied that the personal information contained in Document 1 is, in this instance, exempt from disclosure under section 47F of the FOI Act.

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<sup>6</sup> The Guidelines [6.143]

***Review rights***

You have rights in relation to this decision. Those rights are set out at **Annexure A**.

Yours sincerely,

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

**Pamela Longstaff**  
**ABC Company Secretary & FOI Coordinator**  
[foi.abc@abc.net.au](mailto:foi.abc@abc.net.au)

## Appendix A – Schedule of documents

#	Description	Date	Pages	Decision
1	Email office of A Albanese to D Anderson, with attachment	10 August 2018	1+1	Access granted in part
2	Email thread	16 August 2018	1	Exempt
3	Email thread	16 August 2018	1	Exempt
4	Email thread	22 August 2018	1	Exempt
5	Email thread	23 August 2018	2	Exempt
6	Email thread	24 August 2018	2	Exempt
7	Email thread	24-27 August 2018	3	Exempt
8	Email thread	27 August 2018	1	Exempt
9	Email thread	27 August 2018	2	Exempt
10	Email thread	28 August 2018	3	Exempt
11	Email with attachment	29 August 2018	1+1	Exempt
12	Email thread	29-30 August 2018	2+1	Exempt
13	Email thread	30 August 2018	1+1	Exempt
14	Email thread	30 August 2018	2	Exempt
15	Email from R Nathan to office of A Albanese, with attachment	30 August 2018	1+1	Access granted

## **Annexure A – Review rights**

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.

### **Application for Internal Review**

You have the right to apply for an internal review of the decision refusing to grant access to documents in accordance with your request. If you make an application for review, the Managing Director will appoint an officer of the Corporation (not the person who made the initial decision) to conduct a review and make a completely fresh decision on the merits of the case.

You must apply in writing for a review of the decision within 30 days of receipt of this letter. No particular form is required to apply for review, although it would help if you set out the reasons for review in your application.

Application for a review of the decision should be addressed to:

The FOI Coordinator  
ABC Legal Services  
Building B Level 13  
700 Harris Street  
ULTIMO NSW 2007

Or sent to: [foi.abc@abc.net.au](mailto:foi.abc@abc.net.au)

### **Application for Information Commissioner (IC) Review**

Alternatively, you have the right to apply for a review by the Information Commissioner of the decision refusing to grant access to documents in accordance with your request. Your application must:

- be in writing
- be made within 60 days of receipt of this letter
- give details of how notices may be sent to you (for instance, by providing an email address)
- include a copy of the decision for which a review sought.

You should be aware that the Information Commissioner has a discretion not to undertake a review (see Division 5, FOI Act).

Please refer to the OAIC website FOI review process page for further information and/or to access the online form for applying for IC review:

<https://www.oaic.gov.au/freedom-of-information/foi-review-process>

Application for a review of the decision by the Information Commissioner should be addressed to:

Director of FOI Dispute Resolution  
GPO Box 5218  
Sydney NSW 2001

Or sent to: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

### **Complaints to the Information Commissioner**

You may complain to the Information Commissioner about any action taken by the ABC in the performance of functions, or exercise of powers, under the FOI Act. The Information Commissioner may make inquiries for the purpose of determining whether or not to investigate a complaint.

Complaints should be made via the OAIC's online form <https://www.oaic.gov.au/freedom-of-information/foi-complaints>, or to the following address:

Office of the Australian Information Commissioner  
GPO Box 5218  
Sydney NSW 2001