



31 January 2020

P Johns

E) foi+request-5548-3b5e1991@righttoknow.org.au

Dear P Johns,

FOI REQUEST – REFERENCE NUMBER ABC FOI 201920-010

I refer your request for access to documents under the Freedom of Information Act 1982 (the FOI Act) in your email of 31 July 2019. You sought access to the following documents:

“A copy of all John Lyons messages sent and received from the device he used to tweet during the AFP search warrant at the ABC HQ. I am requesting all messages on any platform for the duration of the warrant execution and for 2 hours after.”

Locating and identifying documents

Reasonable steps were taken to identify and locate all documents in scope of your request. The search for documents included contacting the Executive Manager ABC News, Analysis & Investigations who consulted with John Lyons in order to retrieve all documents in scope of your request.

As a result of that consultation, and after duplicate emails were withdrawn from the bundle, 63 documents were identified as falling within the scope of your request and were assessed against the FOI Act for release.

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.

Material taken into account

In making my decision I have had regard to:

- the terms of your request
- the content of the documents 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 15 documents. Access is granted in part to 28 documents. Access is refused to 20 documents. My reasons for refusal of access are provided in the section **Reasons for decision** and a schedule of the documents is available at **Appendix A**.

Release of documents

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, or material found to be exempt from disclosure under the FOI Act. Accordingly, redactions have been applied to documents to which access has been granted in part, in order to release the document to you.

Documents to which you have been granted access are attached to the email containing this decision.

Reasons for decision

Section 7(2) (program material)

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' is not defined in the FOI Act. However, it has been the subject of judicial consideration. The FOI Guidelines issued by the Australian Information Commissioner (the Guidelines) summarise this case law at paragraph 2.16:

The exemption for 'program material' of the ABC and SBS has been considered in Federal Court,¹ AAT² and IC review cases.³ Australian Broadcasting Corporation and Herald and Weekly Times Pty Limited, the AAT held that program material means a document 'which is 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 complete program'.⁴

When it comes to documents 'in relation to' program material, the Guidelines adopt the 'reasonably direct relationship' test in *ABC and HWT*.⁵ 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".⁶ I have taken the same approach.

I have found that 19 full documents and part of 1 document you have requested are, or have a direct relationship to, 'program material'. The documents comprise exchanges between Mr Lyons and other

¹ See *Australian Broadcasting Corporation v University of Technology, Sydney* [2006] FCA 964; and *Bell v Commonwealth Scientific and Industrial Research Organisation* [2008] FCAFC 40.

² *Australian Broadcasting Corporation and Herald and Weekly Times Pty Limited* [2012] AATA 914

³ *Herald and Weekly Times Pty Ltd and Australian Broadcasting Corporation* [2012] AICmr 7; 'F' and *Australian Broadcasting Corporation* [2012] AICmr 8; 'ER' and *Special Broadcasting Service* [2015] AICmr 12; and *Fist and Australian Broadcasting Corporation* [2014] AICmr 14.

⁴ [2012] AATA 914 [57].

⁵ [2.16]

⁶ OAIC Guidelines, [2.16]

ABC staff that are directly related to ABC programming, in Mr Lyons' capacity as Head of Investigative & In-depth Journalism and also as a potential subject for interview on ABC stories related to the AFP raid of 5 June.

I consider that these documents were created directly and solely for the purposes of creating ABC program material. The documents are therefore clearly material that was "acquired or created for the purpose of creating the program". The ABC is exempt from the operation of the FOI Act in relation to any such document, and on that basis, access is refused under section 7(2).

Section 42 – legal professional privilege

Access to 1 whole document and part of 1 document is refused under section 42 of the FOI Act. Section 42 exempts from disclosure material that would be privileged from production in legal proceedings on the ground of legal professional privilege.

The Guidelines explain at [5.129]:

"At common law, determining whether a communication is privileged requires a consideration of:

- *whether there is a legal adviser-client relationship*
- *whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation*
- *whether the advice given is independent*
- *whether the advice given is confidential."*

I am satisfied that the common law test for whether legal professional privilege exists has been met in this case. The documents in question involve the requesting and providing of advice by ABC Legal practitioners in their role as independent advisors to the ABC, regarding legal issues surrounding the creation of ABC programming about the AFP raid. The documents are considered confidential and privileged, and the ABC has not waived that privilege. The privileged information in the documents is exempt from release under section 42 of the FOI Act and access is therefore refused.

Section 47F – personal privacy

Access to parts of 27 documents is refused on the basis those parts are exempt under section 47F of the FOI Act: that is, release of that material would involve the unreasonable disclosure of personal information.

In making this decision I have considered firstly whether the documents contain personal information, and secondly whether it would be unreasonable to disclose that information. In my view, each of the elements of the conditional exemption in section 47F are met.

For the purposes of the FOI Act 'personal information' has the same meaning as the *Privacy Act 1988*. Paraphrased, it is information about an identifiable individual.

The relevant documents contain either the mobile phone numbers of ABC staff, or the names and contact details of other individuals operating externally to the ABC. 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 and the names and contact details of people who are not employed by the ABC are personal information for the purposes of section 47F.

I have considered whether it would be unreasonable to disclose the personal information contained in the documents. 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.

On each occasion the information is not publicly known, nor known to more than a small group of people. With regard to affected external parties, reasonable attempts at consultation with those parties was undertaken and I have concluded that unless otherwise explicitly stated by a party – i.e. they are happy for certain personal information to be known – generally the persons involved hold, or would likely hold, opposition to the release of the material.

In my view it would be unreasonable to disclose the information having regard to the concerned individuals' privacy and the lack of relevance of the information to the substantive matter contained in the documents. I am satisfied that the personal information contained in the documents is conditionally exempt from disclosure under section 47F of the FOI Act.

Public interest test

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 section 11B 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 there is negligible public interest in the disclosure of the personal information. The information is not of serious concern or benefit to the public, nor related to matters of the public's common concern. I also note that the personal information contained in the documents has no direct, demonstrable relevance to the affairs of government.

I consider the public interest in maintaining individuals' privacy, in circumstances where all relevant information has been relayed via release, outweighs any public interest in disclosure. Accordingly, the relevant information in the documents is exempt under section 47F of the FOI Act.

Review rights

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

Yours sincerely,

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

Connie Carnabuci
ABC General Counsel & FOI Coordinator
foi.abc@abc.net.au

Appendix A – Schedule of documents

Doc #	Description	Time	Pages	Decision	Refusal Reason
1	The Australian email newsletter	11:50AM	2	Release	
2	New York Times email	11:58AM	1	Partial	47F
3	AFP Media email	12:08PM	1	Release	
4	The Project email	12:23PM	1	Partial	47F
5	ABC internal email + attachment	12:29PM	1+8	Release	
6	Text message New York Times	12:29PM	1	Partial	47F
7	ABC internal email	12:38PM	1	Refuse	PM
8	ABC internal email	1:00PM	1	Refuse	PM
9	Ben Fordham Show email; ABC internal email thread	1:04PM	2	Partial	47F
10	ABC internal email	1:09PM	1	Partial	47F
11	ABC internal email thread	1:21PM	1	Refuse	PM
12	Text message thread The Walkley Foundation	1:21PM	1	Partial	47F
13	ABC internal email	2:00PM	1	Refuse	PM
14	ABC internal email	2:11PM	1	Release	
15	ABC internal email	2:26PM	1	Refuse	PM
16	Radio New Zealand email to John Lyons	2:34PM	1	Partial	47F
17	ABC internal email thread	2:53PM	1	Refuse	PM
18	External email	2:55PM	1	Partial	47F
19	ABC internal email	3:02PM	1	Partial	47F
20	ABC internal email	3:05PM	1	Refuse	PM
21	Text message	3:12PM	1	Refuse	PM
22	ABC internal email thread	3:15PM	1	Release	
23	ABC internal email	3:18PM	1	Refuse	PM
24	ABC internal email	4:19PM	3+10	Refuse	PM
25	Email with link to attachment	4:23PM	1+video	Refuse	PM
26	External email	4:23PM	1	Partial	47F
27	Text message chain The Australian	4:25PM	1	Partial	47F
28	The Australian email newsletter	4:33PM	6	Release	
29	AFP Media email to ABC, forward to internal ABC	4:37PM	1	Release	
30	ABC internal email	4:37PM	1	Partial	47F
31	National Press Club email; ABC internal email	4:59PM	2	Release	
32	ABC internal email thread	5:04PM	2	Refuse	42
33	BBC email	5:22PM	1	Partial	47F
34	Frontiers Press email	5:40PM	3	Release	
35	ABC internal email thread with attachment	5:42PM	2+1	Release	
36	Internal ABC text message chain	5:46PM	2	Partial	PM, 47F

37	ABC internal email thread	5:48PM	1	Release	
38	External email	5:49PM	1	Partial	47F
39	ABC internal email thread	5:54PM	2	Release	
40	The Walkley Foundation email	5:57PM	2	Partial	47F
41	ABC internal email	6:07PM	1+2	Refuse	PM
42	ABC internal email	6:12PM	1	Partial	47F
43	Text message thread SMH	6:15PM	1	Partial	47F
44	ABC internal email thread	6:23PM	1	Refuse	PM
45	ABC internal email thread	6:32PM	1	Release	
46	ABC internal email thread	6:39PM	2	Release	
47	ABC internal email thread	6:40PM	1	Refuse	PM
48	ABC internal email + attachment	6:43PM	1+1	Release	
49	ABC internal email	6:47PM	1	Partial	47F
50	Text message thread Sky News	6:49PM	1	Partial	47F
51	ABC internal email thread	7:08PM	1	Refuse	PM
52	ABC internal email thread	7:08PM	1	Partial	42 / 47F
53	Channel 4 News email	7:29PM	1	Partial	47F
54	Euronews-NBC newsdesk email	7:38PM	1	Partial	47F
55	Internal ABC text message thread	7:39PM	2	Refuse	PM
56	BBC News World Service email	7:40PM	1	Partial	47F
57	Dutch Public Radio VPRO email	8:02PM	1	Partial	47F
58	ABC internal email	8:21PM	1	Refuse	PM
59	ABC internal email	9:41PM	2	Refuse	PM
60	ABC internal email	9:42PM	2	Partial	47F
61	ABC internal email thread	9:44PM	2	Refuse	PM
62	Text message thread Nine News	10:14PM	1	Partial	47F
63	Columbia Journalism Review email newsletter; ABC internal email	10:18PM	7	Release	

PM – Program material: exempt from the operation of the FOI Act under section 7(2)

42 – Legal professional privilege exemption

47F – Personal privacy conditional exemption

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
Level 13
700 Harris Street
ULTIMO NSW 2007

Or sent to: 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

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 in writing to the following address:

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