



10 September 2019

P Johns

E) [foi+request-5555-710cc3d6@righttoknow.org.au](mailto:foi+request-5555-710cc3d6@righttoknow.org.au)

Dear P Johns

**FOI REQUEST– REFERENCE NUMBER 201920-013**

I refer to your email of 2 August 2019 in which you sought access to the following under the *Freedom of Information Act 1982* (the FOI Act):

*“...all documents sent and received at the ABC controlled email [ABCinvestigations@protonmail.com](mailto:ABCinvestigations@protonmail.com) in 2019”*

***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 information provided to me by relevant ABC staff in relation 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 refused under section 24A of the FOI Act, as no documents exist at the ABC that come in scope of your request.

Further information regarding the reasons for my decision are provided below.

### **Section 24A – documents do not exist**

I am informed that ABC Investigations no longer have access to the Proton Mail account. Subsequently, the ABC cannot now retrieve emails from this account. The Investigations team also do not hold records of the emails sent to that account during the time it was open. As such, no documents in scope of your request exist at the ABC.

Under s24A of the FOI Act, the ABC may refuse a request for access if all reasonable steps have been taken to find a document and the ABC is satisfied that the document does not exist. In the present case, I consider that all reasonable steps have been taken to locate relevant documents. I am further satisfied that the requested documents do not exist and therefore access to them is refused pursuant to s24A of the FOI Act.

In any case, the account was only used for confidential story tips, and any email that would have been extracted from it by the ABC would have been of this nature. Such documents are, by their nature, 'program material' for the purposes of the FOI Act, and they would not be available for release pursuant to section 7(2) of the Act. More information on 'program material' is provided below.

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

As discussed above, the ABC used the Proton Mail account for receiving information for the sole purpose of creating content to broadcast or publish on its platforms.

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' for the purposes of that Part has been interpreted to mean:

*"... 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 containing information about potential stories for investigation and reporting are documents "acquired or created for the purpose of creating the program", as they would have only existed in a form held by the ABC for the purposes of creating ABC content for publishing or broadcast. The ABC is specifically excluded from the operation of the FOI Act in relation to those documents under section 7(2).

### **Review rights**

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

Yours sincerely,



**Pamela Longstaff**  
**Head of Corporate Governance & FOI Coordinator**  
[foi.abc@abc.net.au](mailto:foi.abc@abc.net.au)

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<sup>1</sup> *Australian Broadcasting Corporation and Herald and Weekly Times Pty Limited and Anor [2012] AATA 914 (21 December 2012)*, see [57].

## **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](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 in writing to the following address:

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