



1 October 2019

E) foi+request-5561-8ad79f6a@righttoknow.org.au

Dear P Johns

FOI REQUEST – REFERENCE NUMBER ABC FOI 201920-014

I refer to your email of 5 August 2019 in which you sought access to the following under the *Freedom of Information Act 1982* (the FOI Act):

“All documents including emails and messaging service messages (eg whatsapp and similar) between Neil Mercer and Dan Oakes regarding the Afghan files publications.”

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 these documents involved contacting the Executive Manager of ABC News, Analysis & Investigations, who in turn consulted with relevant managers and staff within that team.

As a result of those searches, 32 documents were found to be in scope of this request.

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.

All of the documents found to be in scope of your request contain information that directly pertains to the substantive content, and the publication of, the ABC content known as the Afghan files. Discussions of the particulars of the content, and internal and external views on that material as well as surrounding publication decisions and details, clearly have a direct relationship with ABC program material. None of the 32 documents would exist were it not for a particular 'program' being created for broadcast/publishing.

The documents found to be in scope of your request are, or have a direct relationship to, 'program material'. The ABC is exempt from the operation of the FOI Act in relation to those documents, and on that basis access to the documents described in your request is refused under section 7(2) 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,



Pamela Longstaff
ABC Company Secretary & FOI Coordinator
foi.abc@abc.net.au

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]

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