



27 March 2020

Mr Scott Griffen

E) foi+request-5605-276a3d4b@righttoknow.org.au

Dear Mr Griffen

FOI REQUEST – REFERENCE NUMBER 201920-018

I refer to your request for access to documents under the *Freedom of Information Act 1982* (the **FOI Act**) in your email of 29 August 2019, in which you sought access to:

“... all documents relating to, or associated with, the cost of the ABC's current litigation against the Australian Federal Police, including but not limited to any proposals, approvals, invoices, costings, budget allocation (current and forecast), procurement, expenditure and staff breakdown (in-house and external).”

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 General Counsel of ABC Legal, who consulted with her team to identify any documents which might fall within the scope of your request. The ABC Government Relations Lead was also contacted as a part of this search.

As a result of those searches, 43 documents were identified which fall within the scope of your request. Descriptions of those documents are set out in the schedule at **Appendix A**.

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
- the guidelines issued by the Office of the Australian information Commissioner under section 93A of the FOI Act (**the Guidelines**)
- relevant case law.

Decision

Access is granted in full to Documents 2, 3, 18, 34 and 43.

Access is granted in part to Documents 1, 4–13, 15–17, 19–33 and 35–42.

Access is refused in full to Document 14.

My reasons for refusal of access are provided in the section entitled **Reasons for decision**.

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.

I have found parts of Documents 6, 24, 29 and 35 to be irrelevant to the scope of your request. However, as the remaining parts of that document are in scope, I have redacted the irrelevant parts so that the remainder of the documents might be assessed against the FOI Act and potentially released to you.

Third-party consultation

I note that sections 27 and 27A of the FOI Act require the ABC to give affected third-parties reasonable opportunity to make submissions in support of an exemption contention in relation to the release of their business or personal information, if it is practicable to do so.

On this occasion, such a consultation was not pursued, due to the following:

- The amount of necessary third-party consultations was significantly higher than is usual – numbering 23 separate processes in total.
- Recent attempts to contact you to discuss refinement of scope via the provision of an updated spreadsheet document had not been fruitful.
- As a result, undertaking extensive third-party consultation processes in circumstances where we were unsure if you as the applicant remained a party to this case would be an impractical undertaking and an unreasonable diversion of the ABC's resources.

Priority was given to finalising a decision in the matter.

Should you wish to discuss this aspect of the process, the ABC's FOI Advisor, Juliana Walsh, would be happy to assist and can be reached on (02) 8333 5304 or at walsh.juliana@abc.net.au.

Reasons for decision

Section 42 – legal professional privilege

Access to parts of Documents 1, 14, 28, 32, 33 and 39 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.

The documents in question are email messages or invoices shared between the ABC and its external legal consultants, containing cost itemisation that I have found to be subject to legal professional privilege. The information consists of descriptions concerning specific actions taken, and inferences of advice given, by relevant counsel. The information is sufficiently detailed and linear so as to reveal a narrative pointing to the nature of advice received by the ABC and actions taken by counsel throughout the course of legal proceedings.

In *CC and Australian Federal Police* [2014] AICmr 65 (paragraphs [21-22]), the Australian Information Commissioner pointed to *Carey v Korda* [2012] WASCA 228 which found that, in relation to legal invoices:

- the extent to which a bill of costs is privileged “will depend upon a consideration of the circumstances in which the claim for privilege occurs, and the nature and details of entries made in the bill” and
- privilege will be available “where...the content or nature of the privileged communication may be inferred from the document”.

The advice and circumstances revealed by the itemised information and messages in the documents is considered confidential by the ABC and privilege has not been waived. In those circumstances, I have found that information to be exempt from release, and access is refused pursuant to section 42 of the FOI Act.

Section 47 – commercially valuable information

Access to parts Documents 1, 4–13, 15–17, 19–33, 35–8 and 41–2 is refused under section 47(1)(b) of the FOI Act. In my view, disclosure of these parts of the documents would disclose information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

In relation to section 47, paragraph 5.203 of the Guidelines states that, “It is a question of fact whether information has commercial value, and whether disclosure would destroy or diminish that value.”

The information in the documents to which access is refused under section 47(1)(b) is detail linking discrete costings for specific services to the nature of those services and the hours taken to provide them, or in some cases linking the overall cost of a service provided to the ABC by a particular firm or company, in circumstances where that organisation has not been consulted on their views on release of their commercial information.

In my view, this information has intrinsic commercial value for the affected third parties, as release would publicly disclose a business relationship the ABC has with a third party and/or their hourly rates for services in a competitive market. The information is also commercially valuable because:

- it is known only to the relevant consultant or business and a very limited amount of people within the ABC, with the former providing services to the ABC on confidential arrangement, specifically costed in relation to the type of work required by the Corporation
- the information is current or at the least very recent.

It is likely the release of the information in the documents to which access is refused would result in the diminishing of the value of that information for two reasons:

1. The ABC believes that third parties have a reasonable expectation of confidentiality with respect to business transactions. It is reasonable to assume they would not appreciate their business information being released publicly without consent. They may as a result decide not to engage with the ABC in future, damaging a professional relationship where the ABC gained commercial value.
2. Linking a specific type of provider to a specific rate for their services would potentially undercut the third party’s ability to charge their chosen rate in the market and would also alert other service providers to the price the ABC has paid. This potentially limits the ABC’s ability to negotiate rates with similar providers in the future.

I am satisfied the relevant information contained the documents is commercially valuable and the value of that information would be destroyed or diminished if it were disclosed. Therefore, I have found that information to be exempt from release under section 47 of the FOI Act.

Section 47F – personal privacy (public interest conditional exemption)

Access to parts of Documents 1, 6–8, 10–11, 13, 15–16, 20–3, 27–33, and 39–40 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 exemption in section 47F are clearly 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, whether that information is true or not, or even if it is opinion.

The documents in question contain information pertaining to both ABC staff and external legal counsel, including names and contact details. This information is “information about an identified individual...that says something about the person” (The Guidelines, [6.129]).

At [6.130] the Guidelines state that “Personal information can include a person’s name, address, telephone number...and signature”. These types of information all appear in the material in the documents that has been redacted under section 47F.

The names and contact details of the ABC’s external legal advisors are available in the documents. Their involvement in the ABC proceedings is not known publicly or even known outside a small group (the Guidelines [6.140]). The information includes business names and contacts (i.e. work addresses of identified individuals) and personal contacts (for example, mobile numbers). The mobile numbers and home addresses of ABC staff are also contained in the documents.

I consider that disclosure would be an unreasonable on this occasion. Releasing the private employment and work details of unnamed third-party consultants to ABC proceedings without their express consent would not respect the positive working relationships the ABC has with those individuals, relationships within which the ABC finds value for the public purse. I consider it sufficient in the circumstances that the information most pertinent to your request, being the costs of the legal matter, has been released.

I am also satisfied that the disclosure of the mobile phone numbers and home addresses of ABC staff would amount to an unreasonable disclosure of personal information. This is because this information is not known to many people and is not publicly accessible. Furthermore, it is highly personal information and it is likely that the individuals to whom the numbers relate would have a reasonable expectation that such information would not be disclosed. The information does not provide anything material to the substance of your request.

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 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 note that the personal information contained in the documents has no direct, demonstrable relevance to the affairs of government and disclosure of some parts of documents redacted pursuant to this exemption may prejudice the future attainment of external advice that provides value for the public purse. By contrast, the information in the documents that has been released promotes the objects of the FOI Act and effective oversight of public expenditure.

I consider the public interest in maintaining individuals' privacy in circumstances where their views on release of their personal information have not been ascertained outweighs any public interest in disclosure. Accordingly, the relevant information in Documents 1, 6–8, 10–11, 13, 15–16, 20–3, 27–33, and 39–40 is exempt under section 47F of the FOI Act.

Section 47G – business (public interest conditional exemption)

Access to parts of Documents 13–16 and 19 is refused on the basis those parts are exempt under section 47G(b) of the FOI Act: that is, release of that material would involve the disclosure of business information which could reasonably be expected to prejudice the future supply of information to the ABC.

Paragraph 6.198 of the Guidelines states that satisfaction of 47G(b) comprises two parts:

- a reasonable expectation of a reduction in the quantity or quality of business affairs information to the government
- the reduction will prejudice the operations of the agency.

Further, paragraph 6.199 of the Guidelines presents the following:

“In some cases, disclosing the identity of the person providing the business information may be sufficient to prejudice the future supply of information. Disclosure of the person's identity may also be conditionally exempt under s 47F (personal privacy). In these cases, consideration should be given to whether the information may be disclosed without also disclosing the identity of the person supplying the information.”

In this particular case, information that discloses the personal names and business names of the counsel and legal firms representing the ABC in the relevant matter have been redacted, due to the ABC not undertaking consultation with all affected third parties. It is presumed that those parties may not publicly be associated with the matter and may wish to contend that they would prefer to keep all association confidential; and be given opportunity to provide explanation for their position.

To publicly disclose the names and contact details of the businesses without affording them the provision of such an opportunity would jeopardise the business relationship the ABC has with the organisation, and reduce the ABC's ability to secure high quality, high value external legal advice.

A good deal of the relevant information is not only business information, but personal information, which it would be unreasonable to disclose at this time. This has been explored in the section '**Section 47F – personal privacy**'.

Public Interest

I have again had regard to the factors set out in section 11B of the FOI Act which favour disclosure: 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.

The ABC has well established oversight of its interactions with external consultants. Its fiscal information is scrutinised yearly by the Australian National Audit Office (ANAO) and via Senate Estimates hearings in Canberra. Financial information is also disclosed in the ABC Annual Report. As this aspect of public expenditure is covered, and the costings themselves (up to the date of your request) have been disclosed by release of that information, I consider that the public interest has been served on this occasion. Releasing the specific details of the businesses and individuals who provided counsel and advice to the ABC in this legal matter would on

this occasion have the opposite effect, by not protecting the value for public money the ABC receives from those commercial relationships; disclosure therefore being against the public interest in this instance.

Accordingly, the relevant information in Documents 13–16 and 19 is exempt under section 47F of the FOI Act.

Further information

The documents examined for this request cover the period up until the date of your request – 29 August 2019. I note that since this time updated information regarding the same matter has been provided to the Senate. You can find the ABC’s correspondence clarifying that information here: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/PressFreedom/Public_Hearings.

Review rights

You have rights in relation to this decision. Information about your review rights can be found in **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

Appendix A – Schedule of documents

Key

OOS – Out of scope of request

42 – Exempt – Legal professional privilege

47 – Exempt – Commercially valuable information

47F – Conditionally exempt – Unreasonable disclosure of personal information

47G – Conditionally exempt – Prejudice future supply of business information

Doc	Description	Date	Pages	Decision	Reason
1	Invoice	2 November 2018	2	Part Rel	42, 47, 47F
2	Wilson parking receipt	10 June 2019	1	Release	
3	Wilson parking receipt	10 June 2019	1	Release	
4	Travel/accom receipt email	11 June 2019	11	Part Rel	47
5	Travel/accom receipt email	11 June 2019	11	Part Rel	47
6	Itemised invoice - cabs	17 June 2019	3	Part Rel	OOS, 47, 47F
7	Cab trip receipt	5 June 2019	2	Part Rel	OOS, 47, 47F
8	Cab trip receipt	11 June 2019	2	Part Rel	OOS, 47, 47F
9	Cab trip receipt	11 June 2019	2	Part Rel	OOS, 47, 47F
10	Cab trip receipt	5 June 2019	2	Part Rel	OOS, 47, 47F
11	Cab trip receipt	11 June 2019	2	Part Rel	OOS, 47, 47F
12	Cab trip receipt	11 June 2019	2	Part Rel	OOS, 47, 47F
13	ABC internal email	19 June 2019	2	Part Rel	OOS, 47, 47F, 47G
14	Email from ABC to external	20 June 2019	1	Refuse	OOS, 47, 47F, 47G
15	ABC internal email	21 June 2019	1	Part Rel	OOS, 47, 47F, 47G
16	ABC internal email	21 June 2019	1	Part Rel	OOS, 47, 47F, 47G
17	Costs spreadsheet and totals	Unknown	2	Part Rel	47
18	Federal court receipt	25 June 2011	1	Release	
19	ABC internal email chain	25 June 2019	6	Part Rel	47, 47G
20	ABC internal email chain	25 June 2019	3	Part Rel	47, 47F
21	ABC internal email chain	25 June 2019	2	Part Rel	47, 47F
22	ABC internal email chain	25 June 2019	2	Part Rel	47, 47F
23	Invoice for serving a party to the proceeds	9 July 2019	1	Part Rel	47, 47F (MK)
24	Itemised invoice - cabs	15 July 2019	3	Part Rel	OOS, 47
25	Cab trip receipt	24 June 2019	2	Part Rel	47
26	Cab trip receipt	24 June 2019	2	Part Rel	47
27	Invoice for serving a party to the proceeds	31 July 2019	1	Part Rel	47, 47F
28	Email from legal firm to ABC with invoice attachments; internal ABC email	31 July 2019	1+2+7	Part Rel	42, 47, 47F
29	ABC internal email chain	31 July 2019	2	Part Rel	OOS, 47, 47F
30	Email from legal firm to ABC; internal ABC email thread	31 July 2019	2	Part Rel	47, 47F

Doc	Description	Date	Pages	Decision	Reason
31	ABC internal email chain	2 August 2019	1	Part Rel	47, 47F
32	Invoice	5 August 2019	2	Part Rel	42, 47, 47F
33	ABC internal email with SAP info and invoice attachment	8 August 2019	1+2+5	Part Rel	42, 47, 47F
34	Federal Court eLodgment receipt	9 August 2019	1	Release	
35	Itemised invoice - cabs	12 August 2019	4	Part Rel	OOS, 47
36	Cab trip receipt	2 August 2019	2	Part Rel	47
37	Cab trip receipt	2 August 2019	2	Part Rel	47
38	Cab trip receipt	2 August 2019	2	Part Rel	47
39	Email from legal firm to ABC; internal ABC email with invoice attachment	16 August 2019	1+4	Part Rel	42, 47, 47F
40	Federal Court email to ABC; internal ABC email with invoice attachment	20 August 2019	1+1	Part Rel	47F
41	Cab trip receipt	2 August 2019	2	Part Rel	47
42	Cab trip receipt	2 August 2019	2	Part Rel	47
43	Internal timesheets	Unknown	4	Release	

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

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 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