



6 March 2020

Mr Steve Smith

E) [foi+request-5607-75aa0638@righttoknow.org.au](mailto:foi+request-5607-75aa0638@righttoknow.org.au)

Dear Mr Smith,

**FOI REQUEST – REFERENCE NUMBER ABC FOI 201920-019**

I refer your request for access to documents under the *Freedom of Information Act 1982* (the FOI Act) in your email of 30 August 2019. You sought access to the following:

*“In relation to Gavin Morris’s comments in the below article...all documents including messaging service messages relating to Mr Morris being told to leave the AFP search warrant on 5 July 2019. Secondly...all documents relating to the ‘extensive training of journalists involved in investigative or research based journalism’ as divulged by Mr Morris in the linked article: <https://mediaweek.com.au/morning-report-archive/august-29-2019/#>”.*

We confirm a reasonable timeframe for documents was required in order to process this request, as the ABC is constantly engaged in editorial and journalistic training. On 2 October 2019 a timeframe of “the AFP raid (5 June 2019) to the date of your FOI request (30 August 2019)” was put to you, and you did not object.

On 16 January 2020, you clarified that in relation to your second point of request, you were seeking access to any training materials and lists of training attendees, rather than any and every email or document related to the scope of that part.

**Background**

Please note that the ABC publishes details of staff training and attendee analysis each year in the ABC Annual Report. This includes a separate section on Editorial training. The Reports are available at the link below: <https://about.abc.net.au/how-the-abc-is-run/reports-and-publications/>.

The ABC’s Editorial Policies are available at <https://edpols.abc.net.au/>.

**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 have been taken to identify and locate documents that fall within the scope of your request. The search for these documents involved contacting the Director of ABC News, Analysis and Investigations (Gaven Morris), the ABC Editorial Director, and the ABC Learning & Development Consultant.

As a result of this search, 7 documents were found to be within the scope of 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***

With regard to part 1 of your request, access is refused.

With regard to part 2 of your request, access is granted to 3 documents. Access is granted in part to 4 documents.

My reasons for refusal of access are provided below.

### ***Redactions in released 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 or exempt material. Accordingly, documents to which access has been granted have had redactions applied in order to remove material that is irrelevant to the scope of your request (for example, outside the timeframe) or material that has been found to be exempt under the FOI Act, so that the larger document may be released to you.

### ***Reasons for decision – access refusal***

*In relation to part 1 of your request: “...all documents including messaging service messages relating to Mr Morris being told to leave the AFP search warrant on 5 July 2019”*

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

Under section 24A 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. With regard to the first point of your request, 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 section 24A of the FOI Act.

*In relation to part 2 of your request: “...[training materials and lists of training attendees] relating to the ‘extensive training of journalists involved in investigative or research based journalism’ as divulged by Mr Morris in the linked article”*

#### **Section 42 – legal professional privilege**

Access to parts of Document 2 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 each case of exemption here.

The relevant parts of Documents 2 contain the provision of advice by ABC Legal practitioners in their role as independent advisors to the ABC. These parts of the documents are considered confidential and privileged, and the ABC has not waived that privilege. I consider that in this case, the parts of the documents to which you have been refused access were created for the dominant purpose of giving or receiving legal advice and thus attracts legal professional privilege.

Those parts are therefore exempt from release under section 42 of the FOI Act, and access to them is refused.

**Public interest conditional exemption – section 47F (personal privacy)**

Access to parts of Documents 2 and 4–6 is refused on the basis that I have found those parts to contain information that is conditionally exempt under section 47F of the FOI Act; that is, that providing access would constitute an unreasonable disclosure of personal information.

In making that 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.

The information satisfies the definition of ‘personal information’ which is set out in paragraph 6.120 of the Guidelines as follows:

*“...personal information:*

- *is information about an identified individual or an individual who is reasonably identifiable*
- *says something about a person*
- *may be opinion*
- *may be true or untrue*
- *may be recorded in material form or not.”*

The documents contain the personal information of various ABC employees that attended the training relevant to the matter described in your request. The individuals are identified by name and the personal information is shown as directly relating to them.

Secondly, 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), in particular:

- a) the extent to which the information is well known
- b) 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
- c) the availability of the information from publicly accessible sources.

The personal information in the Documents 4–7 is not well known, nor known to be connected with the identified individuals outside a small group, nor is it available from publicly accessible sources. Further, in circumstances where hundreds of ABC employees are listed in the documents, consultation with each employee as to their views on release of their personal information would be an unreasonable diversion of ABC resources. Without consultation, I cannot be assured that release of the information may not cause stress or other detriment to a person.

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*: “...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 protection the personal privacy of a third party...”.

In this case, I consider that the information of value to the public interest has been disclosed via the provision of the released information. With regard to the material redacted under section 47F, I have found the public interest in the protection of an individual’s personal privacy outweighs the public interest in disclosure of that information.

I have found that the parts of Documents 4–7 to which access is refused under section 47F of the FOI Act contain personal information and that it would be unreasonable to disclose that information at this time.

### **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 that the primary factor favouring disclosure would be that disclosure of all material would broadly promote the objects of the FOI Act.

The released documents have personal information, not ABC administrative and operational information, redacted from them. The public interest is served by the ABC’s open disclosure of the majority of information to which it has provided access on this occasion. The information I have found to be conditionally exempt under section 47F of the FOI Act is not of serious concern or benefit to the public, nor related to matters of the public’s common concern (the Guidelines [6.5]). I have found the public interest in maintaining an individual’s personal privacy outweighs any factor that would make that non-disclosure contrary to the public interest.

I am satisfied that, on balance, it would be contrary to the public interest to disclose the relevant information contained in the redacted parts of Documents 4–7 to which access has been refused 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 read 'P Longstaff', is written over a light grey rectangular background.

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

## **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