



4 December 2019

E) foi+request-5873-4d13bed9@righttoknow.org.au

Dear J D,

FOI REQUEST – REFERENCE NUMBER ABC FOI 201920-032

I refer to your request for access to documents under the *Freedom of Information Act 1982* (the FOI Act) in your email of 10 November 2019. Specifically, you have sought access to the following:

“[All documents containing] communications – including but not limited to email, postal correspondence, text messages by any platform and notes of telephone conversations – [between] ABC News management, and staff, officers or agents of the Minerals Council of Australia and the Business Council of Australia, from June 1st 2019 to September 30th 2019 inclusive.”

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 all relevant documents. The search for these documents involved contacting the Executive Manager ABC News, Analysis & Investigations, who in turn consulted with News management staff.

It was requested that searches be conducted of all hard and soft copy records for documents which may fall within the scope of your request.

Decision – Section 7(2) (program material)

I have reviewed the documents located through these searches and found them to be ‘program material’. The ABC is exempt from the operation of the FOI Act in relation to program material and documents in relation to its program material. As such, access to the documents described in your request is refused under section 7(2) and Division 1 of Part II of Schedule 2 of the FOI Act. Reasons for my decision follow.

‘Program material’ is not defined in the FOI Act. However, it has been considered in case law and is explored in the FOI Guidelines published by the OAIC. It is well accepted that program material includes “documents relating to program material as well as program material itself”,¹ provided that a document

¹ Bell v Commonwealth Scientific and Industrial Research Organisation [2008] FCAFC 40 at [52]. Referring to Australian Broadcasting Corporation v University of Technology, Sydney [2006] FCA 964 at [16] to [19].

has ‘a reasonably direct relationship’ with program material.² The Guidelines contrast ‘reasonably direct’ with a connection that is “indirect, remote or tenuous”.³

Case law also establishes that program material covers “any document acquired or created for the purpose of creating the program, whether or not incorporated into the complete program”⁴ and would include “a document created after a program is broadcast”. In that case [ABC v Herald Weekly Times [2012] AATA 914], it was stated that such documents might include “documents produced by the ABC or incorporated in its records directly concerning the substantive content of the broadcast program.”⁵

Most of the documents found to be in scope of your request relate to identified ABC program material, being broadcast stories that are named in the correspondence, with the substantive content of those stories the basis for discussion. I have found that these documents concern the ‘substantive content of the broadcast program’ and have a ‘reasonably direct relationship’ with the program material.

The remaining documents or parts of documents concern arrangements between parties with the purpose of either discussing ABC program material or creating new ABC program material.

I have considered the OAIC Guidelines and case law in coming to my decision that the documents are ‘program material’ and therefore exempt from operation 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', written in a cursive style.

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

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

³ FOI Guidelines [2.16].

⁴[2012] AATA 914 [57].

⁵ [2012] AATA 914 [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

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