

15/01/2020

CONFIDENTIAL

Via Email

Email: foi+request-5873-4d13bed9@righttoknow.org.au

Dear J D

RE: REVIEW OF FOI DECISION – REFERENCE NUMBER ABC FOI 201920-032

I refer to your email dated 17 December 2019 requesting an internal review of ABC FOI 201920-032 Decision. This was a decision by the ABC's Company Secretary and FOI Coordinator, Pamela Longstaff, who has authority to make decisions in respect of requests made under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

Background

Your information requested dated 10 November 2019 seeks:

[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.

On 4 December 2019, Ms Longstaff identified documents within the scope of your request (**Identified Documents**), and made a decision in relation to your request. Ms Longstaff determined that the documents were subject to an exemption, and not required to be released (**Original Decision**).

In your email dated 17 December 2019, you requested an internal review of the Original Decision. In a prior email dated 16 December 2019, you also specifically asked for a list of documents identified, and the name of the program to which that material relates.

I am authorised by the Managing Director under section 23 of the FOI to make decisions on requests for internal review. I have reviewed your request in accordance with section 54C of the FOI Act.

In undertaking my review, I have reviewed the Identified Documents, relevant sections of the FOI Act, the FOI Guidelines published by the Office of the Australian Information Commissioner (**FOI Guidelines**), and relevant case law.

Decision

Having reviewed your request, I have decided to affirm the Original Decision that the Identified Documents are not required to be released.

To the extent the documents fall within the scope of your request, they are not required to be released because they fall within the “program material” exemption, with reasons set out further below.

Reasons

My starting point is the general right of access set out in section 11(1) of the FOI Act) that:

Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to: a document of an agency, other than an exempt document...

I have then considered whether the ABC is exempt from the operation of the FOI Act in respect of the Identified Documents. Under section 7(2) of the FOI Act:

The persons, bodies and Departments specified in Part II of Schedule 2 are exempt from the operation of this Act in relation to the documents referred to in that Schedule in relation to them.

Division 1 of Part II of Schedule 2 headed “Agencies exempt in respect of particular documents” provides, relevantly:

Australian Broadcasting Corporation, in relation to its program material and its datacasting content

I have then considered the meaning of “program material” in this context.

It is well-accepted that “program material” itself is broadly defined, and means “the document (to the extent it falls within the extended meaning of s 4 of the FOI Act) 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 completed program”.¹

A document can also fall within the “program material” exemption if it *relates to* program material.²

A document “in relation to” program material must have a reasonably direct connection with the program material,³ rather than one that is “indirect, removed or tenuous”.⁴

It has also been established that, provided the relevant connection exists, there is no temporal restriction on what can constitute “program material”. Material produced prior to broadcast can still be program material, even if that material is never aired. Similarly, documents produced after a broadcast may also be program material.⁵

¹ *Herald and Weekly Times Pty Ltd and Australian Broadcasting Corporation* [2012] AATA 914 at [57] per Kerr P and Britton SM.

² *Australian Broadcasting Corporation v University of Technology, Sydney* [2006] FCA 964; (2006) 154 FCR 209; approved in *Bell v Commonwealth Scientific and Industrial Research Organisation* [2008] FCAFC 40 at [52].

³ *Herald and Weekly Times Pty Ltd and Australian Broadcasting Corporation* [2012] AATA 914 [73] - [74] per Kerr P and Britton SM.

⁴ *Herald and Weekly Times Pty Ltd and Australian Broadcasting Corporation* [2012] AATA 914 at [99] per Kerr P and Britton SM; FOI Guidelines [2.16].

⁵ *Herald and Weekly Times Pty Ltd and Australian Broadcasting Corporation* [2012] AATA 914 at [57] per Kerr P and Britton SM.

The Identified Documents

The Identified Documents fall within the program material exemption. All documents are directly concerned with, and expressly refer to, the content of a particular ABC broadcast program. In some cases, the documents also refer to arrangements to be made in relation to creating content for a future ABC program.

Response to your specific queries

You have requested a list of the documents found, and that the name of the ABC program be provided to you. I decline to provide this information, as this is not required by the FOI Act or FOI Guidelines, and doing so would disclose program material. You have also cited paragraph [3.22] of the FOI Guidelines. I confirm I have had regard to the FOI Guidelines in arriving at my decision.

You have requested clarification as whether material created after a program was broadcast can be exempted as "program material". The answer to this question is yes; as stated above, there is no temporal restriction on what can constitute "program material".

You have asked whether the material found was created for the purpose of creating the program. I have provided a definition of "program material" above, and my reasons for concluding that the Identified Documents constitute program material.

You have also made reference to a previous Decision (201819-038). That Decision is separate and distinct from my consideration of the relevant issues in this matter.

Right of review

If you are dissatisfied with this decision, you can apply for review by the Australian Information Commissioner, whose contact details are:

Office of the Australian Information Commissioner
GPO Box 5218 Sydney NSW 2001
Tel: 1300 363 992 Fax 02 9284 9666
Email: enquiries@oaic.gov.au
Website: www.oaic.gov.au

In making your application to the Information Commissioner, you need to provide an address for notices to be sent (this can be an email address) and a copy of this decision. You may also wish to inform the Information Commissioner of the reasons for seeking review.

Yours sincerely



Jeanette Davis
A/Chief People Officer
FOI Internal Review, authorised pursuant to s 23 FOI Act