



Australian Government

Department of Communications

FOI REQUEST NO. 64-1314

Mr Brendan Molloy, Councillor, Pirate Party Australia

**ACCESS DECISION
STATEMENT OF REASONS**

I, Angela Flannery, General Counsel, Legal Division of the Department of Communications
(Department):

- (a) being authorised by the Secretary under subsection 23(1) of the *Freedom of Information Act 1982* (**FOI Act**) to make decisions about access to documents under the FOI Act, and
- (b) required under section 26 of the FOI Act to provide a Statement of Reasons for my decision,

make the following statement setting out my findings on material questions of fact, referring to the evidence or other material upon which those findings were based, and giving the reasons for my decision.

A. DECISION

1. I hereby decide that the document covered by Mr Brendan Molloy's (**Applicant's**) FOI request, and that is held by the Department, being the ABC and SBS Efficiency Study, conducted by the Department with the assistance of Mr Peter Lewis (**ABC and SBS Efficiency Study**), is wholly exempt from disclosure, as:
 - it is conditionally exempt under sections 47C and 47G of the FOI Act;
 - in relation to the conditional exemption under section 47C of the FOI Act, it is not possible to separate the purely factual material from the deliberative matter in the ABC and SBS Efficiency Study; and
 - access to the document, on balance, would be contrary to the public interest.

B. BACKGROUND

2. On 27 June 2014, the Applicant emailed the Department seeking access under section 15 of the FOI Act to the ABC and SBS Efficiency Study (**FOI request**). In doing so, the Applicant noted that this document was referred to in an electronic news article published by the Sydney Morning Herald on 25 June 2014, at <http://www.smh.com.au/federal-politics/political-news/abc-should-charge-for-iview-lewis-review-recommends-20140624-zskls.html>.
3. In accordance with third party consultation requirements under sections 27 and 27A of the FOI Act, on 8 July 2014 the Department notified the Australian Broadcasting

Corporation (ABC) and the Special Broadcasting Service (SBS) of the FOI request, and invited them to make submissions in relation to the FOI request.

4. On 24 July 2014, the Department received submissions from the ABC and SBS in relation to the FOI request.

C. FINDINGS ON MATERIAL QUESTIONS OF FACT

5. The ABC and SBS Efficiency Study is a report stemming from the announcement on 31 January 2014 by the Minister for Communications, the Hon Malcolm Turnbull MP, that the Department would conduct a study of the efficiency of the operations of the ABC and SBS, with the assistance of Mr Peter Lewis (a former Chief Financial Officer of Seven West Media Limited).
6. The terms of reference for the ABC and SBS Efficiency Study are available on the Department's website at http://www.communications.gov.au/television/abc_and_sbs_television/abc_and_sbs_efficiency_study_terms_of_reference.
7. The project for the ABC and SBS Efficiency Study commenced in February 2014. The draft report was provided to the ABC and SBS and is still in draft format.
8. In its submissions of 24 July 2014, the ABC contended that the ABC and SBS Efficiency Study, insofar as relates to the ABC, should be conditionally exempt from disclosure under sections 47C and 47G of the FOI Act. Specifically, the ABC's submissions were directed to establishing that providing access to material in the document 'would disclose information concerning the business and financial affairs of ... [the ABC] which would, or could reasonably be expected to, adversely affect the lawful business or financial affairs of ... [the ABC]. The ABC also provided reasons for its contention that, for the purposes of subsection 11A(5) of the FOI Act, it would be contrary to the public interest to release the document at this time.
9. In its submissions of 24 July 2014, the SBS provided reasons for its contention that the whole of the ABC and SBS Efficiency Study should be conditionally exempt from disclosure under section 47C of the FOI Act, as the material it contains relates to deliberative processes. The submissions of the SBS also set out reasons why, for the purposes of subsection 11A(5) of the FOI Act, it would be contrary to the public interest to release the document at this time. The submissions of the SBS also noted that disclosure of the ABC and SBS Efficiency Study 'would adversely affect SBS's business activities as confidential, commercially sensitive information is included throughout the document.'

D. MATERIAL ON WHICH MY FINDINGS OF FACT AND DECISION ARE BASED

10. I based my findings of fact and decision on the following material:
 - the terms of the FOI request dated 27 June 2014;
 - the content of the ABC and SBS Efficiency Study;
 - the submissions of the ABC and SBS in relation to the FOI request;
 - relevant provisions of the FOI Act; and

- advice from Departmental officers with responsibility for matters relating to the document to which the Applicant sought access

E. REASONS FOR DECISION

11. In considering the application of the exemptions discussed below, I have had regard to the relevant provisions of the FOI Act and the following relevant guidelines:
 - the *Freedom of Information Guidelines* made under section 93A of the FOI Act by the Office of the Australian Information Commissioner (**the OAIC**); and
 - the Department's *Guidelines for Processing Freedom of Information Requests* (as approved by the then Secretary on 13 July 2011).

Section 47C – Public interest conditional exemption - Deliberative processes

12. Subsection 47C(1) of the FOI Act relevantly provides:

*“(1)A document is conditionally exempt if its disclosure under this Act would disclose matter (**deliberative matter**) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:*

- (a) an agency; or*
- (b) a Minister; or*
- (c) the Government of the Commonwealth...”*

13. Subsection 47C(2) of the FOI Act provides an exception from the scope of subsection 47C(1), stating that deliberative matter under subsection 47C(1) of the FOI Act does not include operational information (as defined in section 8A) or purely factual material. Subsection 47C(3) excludes certain reports, such as scientific reports, from the scope of subsection 47C(1).
14. For the section 47C conditional exemption to apply in these circumstances, it must be shown that the document the subject of the FOI request would, if released under the FOI Act, disclose deliberative processes involved in generally the functions of the Government of the Commonwealth, including the particular deliberative processes involved in the functions of the Department the ABC, SBS and the Minister.

Conditionally exempt material

15. Paragraph 6.62 of the OAIC Guidelines explains that ‘the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or course of action’.
16. As reflected in the terms of reference for the ABC and SBS Efficiency Study, the Study seeks to clarify the breakdown of costs of delivering ABC and SBS Charter responsibilities, and whether those responsibilities could be more efficiently delivered by the ABC and SBS. The ABC and SBS Efficiency Study focuses on the costs of inputs – those cost inputs being the costs of the ‘back of house day-to-day’ operational

and financial operations, structures and processes applied to delivering ABC and SBS programs, products and services.

17. Further, the Department was requested to identify possible options to improve costs transparency, processes and systems for decision-making across different genres, platforms and priorities, and operational governance and management practices/processes.
18. The ABC and SBS Efficiency Study is in draft form and provides information in the nature of advice, opinions, comments and options for consideration by the ABC and SBS. It does not represent a conclusive position.
19. In this regard, the ABC and SBS Efficiency Study performs a role synonymous with the planning and strategic thinking role that ABC's and SBS's officials undertake in relation to their respective broadcasters. Whilst the ABC and SBS Efficiency Study is intended to inform the ABC and SBS in its consideration of issues, trends, strategic capabilities and functions, as part of forward planning processes to realise efficiencies and corporate oversight, the Study comprises the Department's views (as formed with the assistance of Mr Lewis), and does not necessarily reflect the ABC's or SBS' views. The ABC and SBS will need to form their own views about these matters in order to identify and realise efficiencies going forward.
20. As the Minister noted in announcing the ABC and SBS Efficiency Study on 31 January 2014, it is a routine responsibility of the Minister to ensure that the ABC and SBS use public resources as efficiently as possible. Accordingly, the Study also serves to inform the Minister about the use of public resources by the ABC and SBS, for the purposes of the Minister's consideration of any proposals in this area.
21. Given the content of the ABC and SBS Efficiency Study and its intended audience, I am satisfied that its disclosure would, for the purposes of s 47C(1) of the FOI Act, disclose deliberative processes involved generally in the functions of the Government of the Commonwealth, including the particular deliberative processes involved in the functions of the Department, ABC, SBS, and the Minister. The ABC and SBS Efficiency Report is not one of the types of reports covered by subsection 47C(3).
22. The ABC and SBS Efficiency Study contains some purely factual material for the purpose of paragraph 47C(2). However, in my view, it is not possible to separate the purely factual material from the deliberative material in the ABC and SBS Efficiency Study (for example, by redacting the deliberative material). This is because much of the purely factual material is inextricably intertwined or embedded with the deliberative material, such that it is impracticable to separate the two without enabling a reader to infer the content of the deliberative material from the purely factual material.
23. Having regard to the matters set out above, I find that the whole of the ABC and SBS Efficiency Study is conditionally exempt under section 47C of the FOI Act. In reaching this view, I have considered submissions separately made by ABC and SBS, which are both dated 24 July 2014.

Section 47G – Public interest conditional exemption - Business information

24. Section 47G of the FOI Act is a conditional exemption provision, and relevantly provides:

'(1) A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:

- (a) would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs'.*

Conditionally exempt material

25. The ABC and SBS Efficiency Study contains extensive information about the manner in which the ABC and SBS conduct their respective businesses, including (but not limited to): the cost and distribution of their asset bases; their investment in technology and innovation; the cost of content production; transmission and distribution arrangements; details of internal funding allocations; workflows; and employment conditions. Accordingly, the ABC and SBS Efficiency Study contains information that is related to the business, commercial or financial affairs of the ABC and SBS.

26. I agree with the views presented by the ABC, in its submission dated 24 July 2014, that the disclosure of the ABC and SBS Efficiency Study, which contains, for example, information about the ABC's commercial and contractual arrangements with third parties, and information about the ABC's production processes and capability, may compromise ABC's ability to negotiate the best:

- commercial outcome with suppliers for products or services in the future; and
- equity deal or value for money outcome in arrangements with the independent production sector, or reveal the ABC's anticipated expenditure on particular services, thereby allowing the ABC's rivals to outbid it.

27. The above two outcomes would result in the ABC's business, commercial or financial interests being adversely affected.

28. I also agree with the views presented by the SBS, in its submission dated 24 July 2014, that the disclosure of the ABC and SBS Efficiency Study, which contains, for example, the SBS's cost structures and program costs could be used by its competitors to bid against the SBS for programs or to keep price points high if pitching for SBS work.

29. Based on the reasons discussed above, I am satisfied that the disclosure of the ABC's or SBS' commercially sensitive information contained in the ABC and SBS Efficiency Study would have an unreasonable adverse effect on the lawful business, commercial or financial affairs of the ABC and SBS. Accordingly, I find that the Study is conditionally exempt under section 47G of the FOI Act.

Application of the public interest test

30. Subsection 11A(5) of the FOI Act requires that access to a conditionally exempt document must be given to an applicant unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest. In these circumstances, the concept of public interest requires that I:
- weigh the public interest factors for and against disclosure; and
 - decide, on balance, whether disclosure is in the public interest.

Public interest considerations in favour of disclosure

31. In applying the public interest test, I have had regard to subsection 11B(3) of the FOI Act, which sets out factors favouring access in the public interest that apply to the conditional exemptions under sections 47C and 47G of the FOI Act. Such factors include whether access would:
- promote the objects of the FOI Act;
 - inform debate on a matter of public importance;
 - promote effective oversight of public expenditure; and
 - allow a person to access his or her own personal information (not relevant in this instance).
32. I have identified the following more specific public interest factors in favour of granting access to the ABC and SBS Efficiency Study, as they apply to the conditional exemptions under sections 47C and 47G of the FOI Act:
- increasing public scrutiny, discussion and review of actions and decision-making by the ABC and SBS;
 - facilitating and promoting public access to information generally; and
 - the benefit in making the public better informed, and promoting discussion of the activities of government agencies.

Public interest considerations against disclosure

33. Notwithstanding the public interest considerations in favour of disclosure that apply in relation to the ABC and SBS Efficiency Study, it is important that the public interest be not inadvertently damaged through the ABC and SBS Efficiency Study being released without a proper assessment of the possible consequences. As such, it is important to consider public interest considerations against disclosure of the ABC and SBS Efficiency Study.
34. Having regard to the nature of the ABC and SBS Efficiency Study, I have identified the following public interest factors against disclosure of that document as they apply to the conditional exemption under section 47C of the FOI Act:
- disclosure of the ABC and SBS Efficiency Study at a time while still a draft report and when parts of that Study are being used in an ongoing process for ABC and SBS strategic corporate forward planning purposes, may reduce the quality, clarity and frankness value of the ABC and SBS Efficiency Study;

- disclosure of the ABC and SBS Efficiency Study could prejudicially affect the development and finalisation of the future ABC or SBS corporate strategic plans or options for efficiencies by disclosing advice on options, which are not adopted by the ABC Board or the SBS Board. An important role of the ABC Board and the SBS Board is to establish its corporate strategic priorities and to determine key operational arrangements. In doing so it will necessarily consider a wide range of alternative options and evaluate their relative merits;
 - disclosure of the ABC and SBS Efficiency Study at this time may negatively impact on the ability of the ABC and SBS to engage fully and robustly in corporate strategic policy thinking and corporate strategic policy development processes in relation to the matters canvassed in the Study;
 - release of preliminary material that may not reflect the final strategic priorities adopted by the ABC and SBS, or any relevant decisions made by the Minister, has little public benefit as it only represents the advice of the Department; and
 - disclosure of the ABC and SBS Efficiency Study at this time has the potential to create uncertainty for ABC and SBS staff, and the broader broadcasting industry, by fuelling early speculation on the issues that the ABC and SBS may focus on from a corporate strategic policy perspective.
35. Having regard to the nature of the ABC and SBS Efficiency Study, I have identified the following public interest factors against disclosure of that document as they apply to the conditional exemption under section 47G of the FOI Act:
- disclosure of the ABC and SBS Efficiency Study is likely to cause significant harm to the business interests of the ABC and SBS, including its commercial interests and dealings, and price negotiations. It is in the public interest to protect commercially sensitive information, which was provided to the Commonwealth by the ABC and SBS on the basis that it would not be made publicly available; and
 - disclosure of the commercially sensitive information contained in the ABC and SBS Efficiency Study may have an adverse impact on the ability of the ABC and SBS to obtain value for money outcomes in any negotiations with the independent production sector.

Irrelevant considerations in the application of public interest test

36. Under subsection 11B(4) of the FOI Act, I am not allowed to take into account the following irrelevant factors in applying the public interest test to the conditional exemptions under sections 47C and 47G in the case of this FOI request:
- access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
 - access to the document could result in any person misinterpreting or misunderstanding the document;
 - the author of the document was (or is) of high seniority in the Department; or
 - access to the document could result in confusion or unnecessary debate.
37. Accordingly, I have ensured that the irrelevant factors listed above have not been considered in reaching my decision in relation to the FOI request.

Balancing public interest considerations

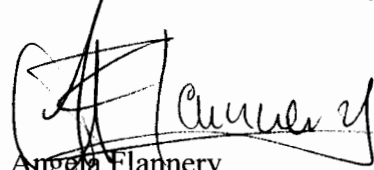
38. Having considered the relative strengths of the public interest factors for and against disclosure as they apply to the conditional exemptions under sections 47C and 47G in the case of this FOI request, I am of the view that, on balance, the public interest factors against disclosing the ABC and SBS Efficiency Study outweigh those in favour of disclosure.
39. Therefore, for the purposes of subsection 11A(5), I find that it would be contrary to the public interest to release the ABC and SBS Efficiency Study.

Section 22 – Deletion of Exempt or Irrelevant Material

40. Section 22 of the FOI Act provides that if the Department decides that granting access to a document would disclose information that would be exempt or reasonably be regarded as irrelevant to the FOI request, then, where it is reasonably practicable to prepare a copy with deletions of exempt or irrelevant material, such a copy should be provided.
41. As discussed above in relation to the consideration of purely factual material and the conditional exemption under section 47C of the FOI Act, I am of the view that a redacted version of the ABC and SBS Efficiency Study would itself be exempt from disclosure in accordance with section 47C of the FOI Act (taking into consideration of the public interest factors set out above).

F. REVIEW RIGHTS

42. This decision is subject to review under either sections 54 or 54L of the FOI Act. The Office of the Australian Information Commissioner's FOI Fact Sheet 12 – *Your review rights* is attached to my letter to the Applicant for his information.



Angela Flannery
General Counsel
Legal Division

26 August 2014