

26 June 2013



Australian  
Broadcasting  
Corporation

Ms Margot Kingston

Corporate Affairs

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By email: [foi+request-67-b4df5f55@righttoknow.org.au](mailto:foi+request-67-b4df5f55@righttoknow.org.au)

Dear Ms Kingston

### **FOI REQUEST - REFERENCE NUMBER 2013-15**

I refer to your request for access to documents under the *Freedom of Information Act 1982* (the FOI Act) in your email of 15 February 2013. In our subsequent correspondence, the scope of your request was refined to access to the following documents:

1. *In relation to the Jon Faine Smith/Baker broadcast interviews on 23 November 2012 via 774 ABC Melbourne:*
  - *The text of all received complaints;*
  - *The text of the ABC's Audience and Consumer Affairs unit's and involved management's responses to those complainants*
2. *In relation to the Jon Faine Smith/Baker broadcast interviews on 23 November 2012 via 774 ABC Melbourne:*
  - *The text of all documents contained in the ABC's Audience and Consumer Affairs complaints file;*
  - *The members of the complaints committee and their status;*
  - *The record of the complaints committee processes;*
  - *The detailed reasons underpinning the ultimate finding in relation to Jon Faine.*
  - *The text of all communications between the ABC's Audience and Consumer Affairs unit and involved management in relation to the complaints and investigation process.*
3. *In relation to the Jon Faine Smith/Baker broadcast interviews on 23 November 2012 via 774 ABC Melbourne:*
  - *The text of all communication (after the initial complaints and any initial responses) between the ABC Audience and Consumer Affairs unit, involved ABC management and the complainants;*

- *The text of all communication between the ABC's Audience and Affairs unit, involved ABC management and Jon Faine during the entire process of the investigation and the complaints committee process.*
  - *The text of all communications between the ABC's Audience and Consumer Affairs unit, relevant ABC management and Mark Baker and Michael Smith during the entire process of the investigation and the complaints committee process.*
4. *Mr Faine's response to the finding and any request made by Mr Faine to review the finding, including details of the complaints decision review process.*

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***

I have taken reasonable steps to identify and locate all relevant documents. My search for documents involved contacting the Head of Audience and Consumer Affairs (A&CA) and requesting that I be provided with copies of all hard and soft copy records which fall within the scope of your request.

As a result of those searches, the following 27 documents were identified.

- Document 1      Email to A&CA in complaint matter C46752-12 dated 23 November 2012
- Document 2      Email string in complaint matter C46759-12 concluding with message dated 30 January 2013
- Document 3      Email string in complaint matter C46817-12 concluding with message dated 30 January 2013
- Document 4      Email to A&CA in complaint matter C46846-12 date 23 November 2012
- Document 5      Email string in complaint matter C46801-12 concluding with message dated 5 February 2013
- Document 6      Email to A&CA in complaint matter C46879-12 dated 24 November 2012
- Document 7      Email string in complaint matter C46890-12 concluding with message dated 30 January 2013
- Document 8      Email string in complaint matter C46896-12 concluding with message dated 1 February 2013
- Document 9      Email string in complaint matter C46897-12 concluding with message dated 15 March 2013
- Document 10     Email string in complaint matter C46938-12 concluding with message dated 30 January 2013
- Document 11     Email string in complaint matter C46963-12 concluding with message dated 30 January 2013
- Document 12     Email string in complaint matter C46994-12 concluding with message dated 18 February 2013
- Document 13     Email string in complaint matter C52739-12 concluding with message dated 30 January 2013

- Document 14 Email string in complaint matter C52741-12 concluding with message dated 30 January 2013
- Document 15 Email string in complaint matter C52742-12 concluding with message dated 21 March 2013
- Document 16 Email string in complaint matter C52752-12 concluding with message dated 30 January 2013
- Document 17 Email string in complaint matter C52756-12 concluding with message dated 30 January 2013
- Document 18 Email string in complaint matter C52757-12 concluding with message dated 30 January 2013
- Document 19 Email string in complaint matter C52762-12 concluding with message dated 30 January 2013
- Document 20 Email string in complaint matter C52765-12 concluding with message dated 30 January 2013
- Document 21 Email string in complaint matter C52766-12 concluding with message dated 30 January 2013
- Document 22 Email string in complaint matter C7480-13 concluding with message dated 6 February 2013
- Document 23 Email string in complaint matter C7481-13 concluding with message dated 7 February 2013
- Document 24 Internal email string with subject line "Jon Faine - AWU complaints" concluding with message dated 12 December 2012
- Document 25 Internal email string with subject line "Jon Faine proforma" concluding with message dated 22 January 2013
- Document 26 Internal email string with subject line "Faine-Gillard interviews initial findings" concluding with message dated 22 January 2013
- Document 27 Internal email string with subject line "Smith/Baker interviews and complaints") concluding with message dated 30 January 2013

Please note that in identifying relevant documents, I have excluded duplicates of the same document. Accordingly, email messages which appear as part of a string have not also been included as separate emails.

Similarly, in conducting a search for correspondence between A&CA and 'relevant ABC management', I have relied on the documents provided by A&CA and have not sought the counterpart copies from the relevant ABC management employees.

I note that the four parts of your request overlap. To avoid unnecessary repetition in this decision, I have treated it as a single request for documents.

## **Access to documents**

I have decided to:

- a) grant access to documents 1 to 23 inclusive; and
- b) refuse access to documents 24 to 27 inclusive.

Documents 1 to 23 contain some information which could reasonably be regarded as irrelevant to the request for access, namely the name and contact details of the individual complainants. 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. Accordingly, documents 1 to 23 have been redacted to remove personally identifying information which is irrelevant. Copies of those documents are attached.

My reasons for refusing access to documents 24 to 27 are set out below.

### **Access refusal – s47C (deliberative processes)**

Access to documents 24 to 27 is refused on the basis that those documents are conditionally exempt under s47C of the FOI Act. In my view, disclosure of those documents under the FOI Act would disclose matter in the nature of, or relating to, an opinion or recommendation prepared in the course of the deliberative processes involved in the functions of the ABC. I am further satisfied that, on balance, it would be contrary to the public interest to disclose that material at this time.

Section 8(1) of the ABC Act states that it is a duty of the Board:

“ ...

- (b) *to maintain the independence and integrity of the Corporation*
- (c) *to ensure that the gathering and presentation by the Corporation of news and information is accurate and impartial according to the recognised standards of objective journalism*

...

- (e) *to develop codes of practice relating to:*
  - (i) *programming matters...*

Consistent with that duty, the ABC has established a code of practice relating to its television and radio programming. The *ABC Code of Practice 2011* is currently in force, and is publicly available on the ABC's website here: <http://about.abc.net.au/reports-publications/code-of-practice-2013/>

The *ABC Code of Practice* states:

*“A complaint alleging the ABC has acted contrary to its Code of Practice in its television or radio programming may be made to the ABC. A complainant is entitled under section 150 of the Broadcasting Services Act 1992 (Cth) (“the BSA”) to take their complaint to the ACMA if, after 60 days, the ABC fails to respond to the complainant or the complainant considers the ABC's response is inadequate.”*

The ABC has well established procedures in place to deal with complaints which are received. Those procedures include investigating a complaint, considering the facts and circumstances surrounding

the alleged breach, seeking opinions from relevant persons, weighing the evidence, forming opinions and making findings. In doing so, the ABC is applying the *ABC Code of Practice* which has been established under s8(1) of the ABC Act, and as such it is engaged in activities which are directly related to its functions.

In determining whether the information in documents 24 to 27 contains information relating to the ABC's deliberative processes, I have had regard to the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the Guidelines), in particular *Part 6 – Conditional Exemptions*. Paragraph 6.62 of the Guidelines states:

*“A deliberative process involves the exercise of judgement in developing and making a selection from different options:*

*The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, 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 a course of action.*<sup>1</sup>

The information in documents 24 to 27 contains a collection of facts, advice, opinions and findings which form part of the 'thinking processes' associated with investigating and responding to complaints under the *ABC Code of Practice*.

Specifically:

- Documents 24 and 25 contain communications between ABC Radio management and A&CA regarding the investigation process, including the preliminary findings made by the decision maker. It includes information provided by management which is part of the consultation process which aids the decision maker in his investigation and deliberations.
- Document 26 contains the preliminary findings of the decision maker in A&CA. It contains an analysis of facts and circumstances surrounding the interview conducted on 23 November 2012 by Mr Faine with Mr Michael Smith and Mr Mark Baker and which was broadcast on 774 ABC Melbourne. The document includes an evaluation of each element of the alleged breach having regard to the Principles and Standards in the *ABC Editorial Policies* and the *ABC Code of Practice*.
- Document 27 contains communications between A&CA and Mr Faine regarding the alleged breach of the ABC Code of Practice and the investigation into those allegations. It includes information provided by Mr Faine which is part of the consultation process which aids the decision maker in his investigation and deliberations.

The majority of this information is not incidental administrative content. To the extent that the documents contain incidental administrative content which is not part of the ABC's deliberative processes (and to which access could therefore be granted), the information in those parts of the documents would reasonably be regarded as irrelevant to your request.

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<sup>1</sup> See *Re JE Waterford and Department of Treasury (No 2)* [1984] AATA 67. See *British American Tobacco Australia Ltd and Australian Competition and Consumer Commission* [2012] AICmr 19, [15]–[22].

I note that the Guidelines state (at paragraph 6.69) that material that is gathered as a basis for intended deliberations may also be deliberative matter. This is consistent with the findings of the Federal Court of Australia that it would be a 'fallacy' to consider the application of exemptions under the FOI Act to documents brought into existence for a particular purpose divorced from the process in which that occurred.<sup>2</sup> In the present case, I am satisfied that the collection of facts and opinions from management and relevant staff (in particular, the information in documents 24, 25 and 27) are an integral part of the process of making a determination regarding compliance with the *ABC Code of Practice*, and are therefore part of the deliberative process.

I have had regard to s47C(2) of the FOI Act, and I am satisfied that the information in documents 24 to 27 is not operational information, nor is it purely factual material.

I note that the deliberative processes exemption does not require a specific harm to result from disclosure. Rather, the only consideration is whether the document includes content of a specific type, namely deliberative matter. For the reasons outlined above, I am satisfied that documents 24 to 27 contain deliberative matter and are therefore conditionally exempt.

#### *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 s11B 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 A&CA responded to complainants on 30 January 2013 and published a summary of the findings on 1 February 2013. This attracted some public interest at the time, including reports in mainstream media between 31 January and 4 February.

I am aware of the following posts on the 'Australians for Honest Politics' website, which you have referred me to previously:

- Letter from Margo Kingston to Mark Scott dated 4 February 2013 published on an "*Australians for Honest Politics*" website;
- Blog post published by Peter Clarke on 15 February 2013 on the *Australians for Honest Politics*" website; and
- Blog post published by Peter Clarke on 27 February 2013 on the *Australians for Honest Politics*" website.

Other than the posts on the 'Australians for Honest Politics' website, I am not aware of any public debate or commentary about this matter in over four months. In the circumstances, based on the low level of interest in this issue, it does not appear that this is a matter of public importance. Accordingly, providing access to documents will not inform a debate about such a matter.

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<sup>2</sup> *Secretary, Department of Employment, Workplace Relations & Small Business v The Staff Development & Training Centre Pty Limited* [2001] FCA 382 (at [52])

I accept that disclosure may promote the objects of the FOI Act in that it would provide access to information.

Finally, I do not consider that providing access to documents 24 to 27, particularly having regard to the content of those documents, would promote effective oversight of public expenditure, or allow a person to access his or her personal information.

Balanced against the factors favouring disclosure, there are public interest factors against disclosure. In particular, I consider that it is likely that disclosure of the information could reasonably be expected to:

- prejudice the ABC's ability to obtain similar information in the future; and
- prejudice the ABC's management functions.

The law requires complaints about the *ABC Code of Practice* to be made to the ABC. Section 150 of the *Broadcasting Services Act 1992* states:

*"If:*

*(a) a person has made a complaint to the Australian Broadcasting Corporation or the Special Broadcasting Service Corporation on the ground that the Corporation has, in providing a national broadcasting service or a datacasting service, acted contrary to a code of practice developed by the Corporation and notified to the ACMA; and*

*(b) either:*

*(i) the person has not received a response within 60 days after making the complaint; or*

*(ii) the person has received a response within that period but considers that response to be inadequate;*

*the person may make a complaint to the ACMA about the matter."*

The ABC takes seriously its obligation to investigate complaints that are made regarding compliance with the *ABC Code of Practice*, and comprehensive Complaints Handling Procedures are in place. The complaint investigation function carried out by A&CA is independent of the content-making areas of the ABC, and there is often a requirement for consultation with relevant staff and management. A&CA relies on the frankness and candour of staff and management when providing information to ensure that a fair and accurate determination is made. There is a significant risk that A&CA's ability to effectively investigate complaints will be compromised if staff are concerned about the possible disclosure of information they provide to A&CA.

Effective complaints investigation procedures is one of the mechanisms available to the Board to determine whether it has satisfied its duty under s8(1) of the ABC Act to ensure that the gathering and presentation by the Corporation of news and information is accurate and impartial according to the recognised standards of objective journalism.

I have weighed the factors in favour of disclosure against the factors against disclosure. Whilst granting access to documents in this matter may provide access to information in the broad sense of the objects of the FOI Act, I do not consider that, on balance, this is sufficient to outweigh the factors against disclosure. In that regard I note that the ABC provides a range of publicly available information regarding the application of the *ABC Editorial Policies* and *ABC Code of Practice*, and the

complaints handling procedures that are in place (see <http://about.abc.net.au/reports-publications/complaint-handling-procedures/>). More generally, the ABC supports the objects of the FOI Act and provides access to a range of information in accordance with s8(2) of the FOI Act, published as part of the ABC's Agency Plan and Information Publication Scheme. That information is available publicly on the ABC's website (see <http://about.abc.net.au/how-the-abc-is-run/what-guides-us/freedom-of-information/>).

Given the important role of the *ABC Editorial Policies* and the *ABC Code of Practice* to the ABC fulfilling its functions and its Charter obligations, I have given weight to the potential detriment that disclosure would have on the ABC's ability to make effective decisions regarding editorial matters.

I am satisfied that the material contained in documents 24 to 27 is conditionally exempt under s47C of the FOI Act, and that disclosure of that material at this time would be, on balance, contrary to the public interest.

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. Information about your review rights is attached.

Yours sincerely

A handwritten signature in blue ink that reads "Judith Maude".

**Judith Maude**

Head, Corporate Governance  
Direct line 02 8333 5316