

22 February 2021

Dr Sara Dehm

E) foi+request-6979-db273619@righttoknow.org.au

Dear Dr Dehm

FOI REQUEST - REFERENCE NUMBER 202021-022

I refer to your request for access to documents under the *Freedom of Information Act 1982* (the FOI Act) in your clarification email of 21 January 2021. Specifically, you have sought access to following:

1. *Email communications, created or received from June 2020 onwards, from or to Scott Stephens that are retrieved using the search terms: "Zionist Federation of Australia", "ZFA" or Dr "Bren Carlill";*
2. *Email communications, created or received from June 2020 onwards, from or to Scott Stephens, relating to the publication of Samah Sabawi's opinion piece on ABC Religion and Ethics report, entitled "If Israel's annexation goes ahead, can any response make a difference?" in July 2020, that are retrieved using the search terms "Sabawi" or "Palestine"; and*
3. *Communications (electronic or otherwise) between the Embassy of Israel in Australia and the relevant ABC management concerning ABC online publications or online news content in 2020.*

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.

Material taken into account

In making my decision, I have had regard to:

- the terms of your request;
- the FOI Act;
- guidelines issued by the Office of the Australian Information Commissioner (OAIC) under section 93A of the FOI Act (**Guidelines**).

Decision

In relation to **points 1, 2 and 3** of the request:

Access is refused in full to all documents on the basis that they comprise 'program material', and by operation of s 7(2) of the FOI Act, the ABC is exempt from the operation of the FOI Act in relation to its program material.

Detailed reasons for my decision are below.

Reason for decision

Reasonable steps were taken to identify and locate all relevant documents.

The search for documents relating to points 1 and 2 of your request included contacting Scott Stephens, Editor of the ABC's Religion and Ethics website. The search for documents relating to point 3 involved contacting the offices of the Managing Director, the Director of Entertainment & Specialist, and the Director of News, Analysis & Investigation.

As a result of the searches, I have identified 188 documents relevant to the scope of your request under points 1 and 2, and one document under point 3. A single figure for the total number of documents identified under points 1 and 2 is provided as many of the emails were identified under both points.

The documents you have requested access to are internal ABC email correspondence or email correspondence between the ABC and third parties. The subjects of the emails are all related to articles published on the ABC's Religion and Ethics website.

I have not released the documents in response to your FOI request because the ABC is exempt from the FOI Act in relation to its program material. As further explained below, the exemption applies not only to program material itself (for example, the publication of an article) but also to information relating to program material, such as a complaint about a program; *Australian Broadcasting Corporation v The University of Technology, Sydney* [2006] FCA 964.

I find that the documents requested are about an ABC program, specifically the documents:

- relate to the publication of articles on the ABC's Religion and Ethics website;
- are complaints or correspondence received by the ABC about an article of the ABC's Religion and Ethics website; or
- are responses by the ABC to complaints or correspondence about an article of the ABC's Religion and Ethics website;

and the ABC is therefore exempt from the operation of the FOI Act in relation to the correspondence.

Program material

'Program material' is not defined in the FOI Act, however it has been the subject of judicial consideration.

The Guidelines point to *Herald and Weekly Times Pty Ltd and Australian Broadcasting Corporation* [2012] AICmr 7 (*ABC and HWT*), where “the AAT held that program material means a document ‘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 complete program’”.

Post-broadcast material

ABC and HWT [57] goes further to say that program material “...would include a document created after a program is broadcast. Such documents might include...internet pages and documents produced by the ABC or incorporated in its records directly concerning the **substantive content** of the broadcast program” [emphasis added].

'In relation to' program material

The Federal Court of Australia considered the scope of the section 7(2) exclusion in *Australian Broadcasting Corporation v The University of Technology, Sydney* [2006] FCA 964 (*ABC v UTS*) and held that the exemption also applies to ‘any document that **relates to program material**’ [emphasis added]. In that case, the documents being sought related to documents relating to complaints made to the ABC, including “internal files and correspondence, board minutes, investigation files and reports and documents in relation to the complaints”.

The emails you have requested are directly related to program material as they were created for the purposes of publishing articles on the ABC’s Religion and Ethics website or concern complaints or inquiries about the substantive content of an article published on the ABC’s Religion and Ethics website.

As held in *ABC and HWT* (outlined above), documents acquired or created for the purpose of creating a program, whether or not incorporated into the complete article, satisfies the criteria of relating to ‘program material’. Correspondence to the ABC containing or relating to a complaint about an article also satisfies the criteria of relating to ‘program material’, as was held in *ABC v UTS* (outlined above),

As the documents satisfy the criteria of relating to ‘program material’ they fall under section 7(2) of the FOI Act. Therefore, the ABC is exempt from the operation of the FOI Act in relation to the documents.

Review rights

You have rights in relation to this decision. Those rights are set out at **Annexure A**.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'P Longstaff', written in a cursive style.

Pamela Longstaff
Head of Corporate Governance & FOI Coordinator
foi.abc@abc.net.au

Attachment 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); and
- 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