

14 July 2021

E) foi+request-7473-clc03e2e@righttoknow.org.au

To Whom It May Concern,

FOI REQUEST - REFERENCE NUMBER 202021-054

I refer to your request dated 13 June 2021 for access to documents under the *Freedom of Information Act 1982* (Cth) ('FOI Act') in your letter that we received on 14 June 2021. Specifically, you have sought access to the following:

[Documents containing:]

The name, agreement, and price of the MetraWeather product and/or service currently being used.

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 content of the documents identified as relevant to your request;
- the FOI Act;
- the guidelines issued by the Office of the Australian Information Commissioner ('OAIC') under section 93A FOI Act (**the Guidelines**).

Locating and identifying documents

Reasonable steps were taken to identify and locate all relevant documents. The search for documents included contacting the relevant team within the ABC Legal department.

As a result of the searches, 2 documents were identified, an 2016 agreement between ABC and MetraWeather (Australia) Pty dated 'Metraweather' and an extension to that agreement (2020).

Decision

The ABC has refused access in full to the requested documents. My reasons for refusal of access are provided below.

Reasons for decision

Section 47(1)(b) – Commercially valuable information

Section 47(1)(b) exempts the disclosure of a document where the following two criteria are satisfied:

- the document must contain information that has a commercial value either to an agency or to another person or body, and
- the commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed.¹

Whether information is commercially valuable, and whether disclosure would destroy or diminish that value, is a question of fact.² Commercially valuable information can include information relating to the profitability or viability of a continuing business operation or commercial activity of an agency.³ Information does not necessarily need to have 'exchange' value in order for it to be commercially valuable, however certain relevant factors as listed in the Guidelines, include, whether the information is known only to the agency or person for whom it has value, whether the information confers a competitive advantage on the agency or person to whom it relates and whether disclosing the information would reduce the value of a business operation or commercial activity.⁴

Details of the agreement between the ABC and MetraWeather is inherently commercially valuable. Recognition of the commercial value of this information is

¹ The Guidelines issued by the Australian Information Commissioner under section 93A of the *Freedom Information Act 1982* (2020) [5.204] ('Guidelines'); *McKinnon and Department of Immigration and Citizenship* [2012] AICmr 34.

² The Guidelines [5.205].

³ Ibid.

⁴ Ibid.

reflected in the fact that the agreement contains a confidentiality clause that protects all information ‘exchanged for or in connection with the Contract, whether during the Term or not, between the parties or among any of their representatives.’

If one party were to disclose this type of information without the consent of the other party to the transaction, the commercial value of the information could reasonably be expected to be diminished. Disclosing the terms is likely to impact on the ABC’s bargaining position in the future, or permit a competitor a commercially valuable insight into the ABC’s contractual arrangements. It could also impact on Metraweather’s bargaining position with other parties.

The Australian Information Commissioner has previously found that price schedules included in documents for the purposes of negotiating with external parties in the course of the business and commercial activities of the ABC, were information which was commercially valuable to the ABC: see *AZ and Australian Broadcasting Corporation*.⁵ The Information Commissioner considered there was commercial value in the ABC maintaining exclusive knowledge of the contents of the documents, as the information within these documents influenced the ABC’s negotiating position in commercial transactions. The Information Commissioner in that case was also satisfied that the commercial value of that information could reasonably be expected to be diminished if it were disclosed, as disclosure would cause the ABC to “be at a disadvantage when negotiating”.⁶ This Information Commissioner decision demonstrates that information contained in the agreement with MetraWeather can be considered commercially valuable information, disclosure of which could destroy or diminish the value of that information and thus exempt under s 47(1)(b).

Section 45(1) – material communicated in confidence

Access to the documents is refused on the basis that the material in the arrangement is exempt under section 45 of the FOI Act – that is, because disclosure under the FOI Act could found an action against the ABC for breach of confidence.

The Guidelines explain at [5.159] that to found an action for breach of confidence (and therefore for section 45 to apply), the following five criteria must be satisfied in relation to the information:

- it must be specifically identified;

⁵ [2014] AICmr 8 [16].

⁶ Ibid [21].

- it must have the necessary quality of confidentiality;
- it must have been communicated and received on the basis of a mutual understanding of confidence;
- it must have been disclosed or threatened to be disclosed, without authority; and
- unauthorised disclosure of the information has or will cause detriment.

I have considered each of these criteria and I am satisfied that they are met in relation to the documents in question.

The agreement has been specifically identified as confidential. The information in the agreement has the necessary quality of confidentiality. It is only known to a limited group and is not common knowledge or in the public domain.⁷ The matters covered by the agreement relate to core business dealings of the ABC and as such is inherently confidential in nature and is treated by the ABC as confidential. The information in the documents were communicated and received on the basis of a mutual understanding that it would be treated by the ABC as confidential; this agreement is expressly confirmed to the third party in the document.

Accordingly, disclosure of the information would be unauthorised and may result in potential claims for damages for breach of the ABC's obligation to maintain confidentiality. Further, for the reasons set out under my reasons for exemption under section 47(1)(b), unauthorised disclosure of the information will cause detriment.

For the reasons set out above, I am satisfied that release of the information in the relevant documents could found an action against the ABC for a breach of confidence, and that the whole document is therefore exempt under section 45 of the FOI Act.

Additional applicable exemptions

I also consider that the public interest conditional exemption available in section 47E(d) of the FOI Act (Operations of agencies) applies to these documents. I have not elaborated given that I have already concluded that the documents are exempt under section Section 47(1)(b) and 45(1) for the reasons outlined above.

⁷ The Guidelines [5.162]

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', is positioned above the printed name.

Pamela Longstaff

Company Secretary and Head of Corporate Governance

foi.abc@abc.net.au

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