

11 February 2021

Michael Sudding

By email: foi+request-8083-7c2ce779@righttoknow.org.au

Dear Mr Sudding

DECISION – FOI REQUEST REF. NO. 2021-036

I refer to your email sent 11 November 2021 requesting access under the *Freedom of Information Act 1982* (the **FOI Act**) to:

... ABC management conducted an internal investigation into ex-ABC producer Jon Stephens. He was jailed in 2017 for child sexual abuse. ABC hired lawyers and spent an entire year researching. Michelle Guthrie informed Senator Abetz at Senate estimates that they were interviewing nine ex-employees and others.

Could you please provide all documents and costings related to this investigation.

A decision on your request was due by **13 December 2021**.

On 9 December 2021, we notified you by email that the timeframe for processing your request was extended for the purposes of consultation under s 27 of the FOI Act. Accordingly, a decision on your request was due on **Wednesday, 12 January 2021**.

On 23 December 2021, we sought your consent to extend time under s 15AA due to January leave for staff members, and external counsel with whom we were consulting. On 6 January 2022, you consented to this extension of time. Accordingly, a decision on your request is due on **Friday, 11 February 2022**.

Authorisation

I am authorised by the Managing Director of the ABC to make decisions about FOI requests, under section 23 of the FOI Act.

Locating and identifying documents

I am satisfied that all reasonable steps were taken to identify and locate all relevant documents that answer your request. The search for documents included approaching Legal, People & Culture and Archives areas of the ABC.

In order to make the processing of your request more manageable, I have excluded documents that are exact duplicates of other documents I have included. Where practicable I have also excluded discrete parts of email chains that are otherwise included. This means that I have made a decision on every document relevant to your request, but only one copy of every document.

Interpretation of scope

On 31 January 2022, we advised you by email that we had interpreted the scope of your request to include documents which relate in a substantive way to the investigation and invoices received from external counsel for work that related to the investigation. We proposed to set to one side non-substantive documents that are only peripherally connected to matters of administrative process as irrelevant.

We proposed to exclude the following categories of documents:

- emails making practical arrangements for interviewees to attend interviews with the investigator, such as scheduling and room bookings
- emails recording administrative steps taken to obtain access to relevant ABC files for the investigation, such as requests to retrieve documents from archives or obtain technical support to access electronic files
- emails relating to the budget and cost estimates for the investigation by external counsel (noting that all final invoices from external counsel are included within scope).

To date, we have not received a response to this proposed approach and have proceeded to process your request on this basis.

Material taken into account

In making my decision I have considered:

- the scope of your request
- the content of the documents requested
- the FOI Act
- the guidelines issued by the Office of the Australian Information Commissioner under section 93A of the FOI Act (**the Guidelines**)
- relevant case law
- responses to consultation undertaken with third parties.

Decision

I have identified 48 documents that answer the scope of your request. These documents are described in **Schedule 1**, which is attached to my decision.

I have granted access to 2 documents in full, 24 documents in part and refused access to 22 documents in full.

My reasons for refusal of access are provided below.

Reasons for decision

Section 22(1)(a)(ii) – Irrelevant information

Section 22(1)(a)(ii) provides that information in a document that is irrelevant to the scope of a request can be redacted.

Section 22 has been applied in circumstances where I have decided that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access. Documents that have been partly redacted under s22 are noted in Schedule 1.

Section 42 – Legal professional privilege

Section 42(1) exempts a document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

The Office of the Australian Information Commissioner FOI Guidelines (the **Guidelines**) provide at paragraph 5.129, that determining whether a communication is privileged requires a consideration of:

- a) whether there is a legal adviser-client relationship;
- b) whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation;
- c) whether the advice given is independent; and
- d) the advice given is confidential.

I find that disclosure of the documents exempted under s 42(1) would involve disclosure of documents that would be exempt from production in legal proceedings on the ground of legal professional privilege.

In this matter, external counsel was retained for the purpose of conducting the investigation and preparing advice in relation to that investigation, in the broader context of advising the ABC in connection with its legal obligations and position. External counsel is admitted to practice as a legal practitioner and is independently employed as a barrister at the NSW Bar. I am satisfied that external counsel provided independent legal advice and that a lawyer-client relationship existed between the ABC officers and external counsel.

The advice was given on the understanding that the usual and well-established relationship of confidence between a legal advisor and a client governed the communication. That is apparent from the face of the investigation report, as well as the communications passing between the ABC and the lawyer in the course of the investigation.

Accordingly, I am satisfied that the documents are exempt under 42(1). The communications were at the time and remain confidential. I am further satisfied that there has been no waiver of legal professional privilege.

Where communications between external counsel and ABC officers were not for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation, I have released that information.

Section 47E(c) – substantial adverse effect on the management of personnel

Section 47E(c) of the FOI Act conditionally exempts documents containing information the disclosure of which would, or could reasonably be expected to, have

a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency.

Management of personnel

Paragraph 6.114 of the Guidelines provides that for section 47E(c) to apply, the documents must relate to the management of personnel – which is defined to include the broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassment and occupational health and safety. The main object of work health and safety legislation is to protect workers and other persons against harm to their health, safety and welfare through elimination or minimisation of risks arising from work.

The information the documents exempted under s 47E(c) comprises the names and contact details of ABC staff, in the context of their involvement in assisting external counsel in the course of their investigation, below the level of General Counsel.

Names, email addresses and contact details of staff

In determining that staff names, contact details and direct phone lines are conditionally exempt under section 47E(c), I have considered the guidance in the Australian Information Commissioner's policy document: *Disclosure of public servants' name and contact details in response to FOI requests* (my emphasis):

In certain circumstances, the management of staff and the discharge of the Australian Government's legal responsibility to ensure the health and safety of its staff may be substantially and adversely affected if public servants' names and contact details are routinely disclosed in response to FOI requests. Agencies must take all reasonable steps to minimise the risk of harm to staff to be compliant with their statutory obligations under section 19 of the Work Health and Safety Act 2011. As discussed, these known risks have evolved over time as a result of the changing digital environment.¹

I consider these comments are relevant to ABC staff in this context. If the names of staff, direct contact details or other identifying information are publicly disclosed under FOI, employees could be exposed to unwarranted public contact or criticism. Given the serious, sensitive and emotive subject matter of this investigation, employees could be subject to direct enquiries and/or pressure from members of the public in relation to the subject matter of the investigation or the subject area more broadly. I stress that I do not suggest that you personally would be responsible for such conduct, but the publication of the material via the ABC's FOI disclosure log makes the information available to the world at large.

The FOI Act places no limit on the dissemination of the information once it is released under FOI. The staff members who are mentioned in these documents have not consented to the public distribution of their identity or involvement in matters

¹ <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/public-servants-names-and-contact-details/> at 20 October 2021

described in the documents, and would not be expected to speak on behalf of the ABC with respect to the subject matter of the investigation.

In my view, revealing the identities and direct contact details of staff working at a level below the General Counsel on these matters would interfere with the effective management of those personnel by exposing them to the kind of unwelcome criticism or harassment that I have described above. For these reasons, I find that information in the documents is conditionally exempt under section 47E(c) of the FOI Act, and these details have been redacted.

The public interest

Conditionally exempt material must be released unless, in the circumstances, access at this time would, on balance, be contrary to the public interest (section 11A(5) of the FOI Act). I have considered the factors favouring access in section 11B(3) of the FOI Act and I have not taken into account factors that are irrelevant in section 11B(4).

I have considered the following factors in favour of disclosure:

- a) promoting the objects of the Act, particularly in increasing scrutiny, discussion, comment and review of the Government's activities (section 3(2)(b) of the FOI Act)
- b) informing debate on a matter of public importance, namely the conduct of inquiries in to allegations of wrongdoing by former Commonwealth employees; and
- c) facilitating access to information to members of the public that allows them to be satisfied that proper processes have been followed by the agency.

I have considered the following factors against disclosure:

- a) protecting individuals from unreasonable interferences with their privacy
- b) protecting staff from occupational health and safety risks
- c) preserving reasonably held expectations of confidentiality and trust between employees and the ABC.

In this case, I have formed the view that disclosure of the information will make a limited contribution to those factors that favour disclosure. The contribution of the named employees to the investigation is minimal as the documents in which they are named are largely procedural and incidental to the investigation.

However, the factors that weigh against disclosure are significant. Disclosure of the information will do little to further inform public debate or increase scrutiny of Government affairs (*Warren; Chief Executive Officer, Services Australia and (Freedom of information)* [2020] AATA 4557 at [136]). I find the public interest in protecting individuals from unreasonable interferences with their privacy and the obligation of the ABC to look after the wellbeing of its employees outweighs any public interest in the disclosure of the information.

Accordingly, I have concluded that disclosure would, on balance, be contrary to the public interest and that those documents are exempt in part under section 47E(c) of the FOI Act.

Section 47F – personal privacy

Section 47F conditionally exempts a document to the extent that its disclosure would involve the unreasonable disclosure of personal information about any person.

Personal information

Section 4 of the FOI Act provides that personal information has the same meaning as in the *Privacy Act 1988*. Personal information is defined in section 6 of the Privacy Act as:

... information or an opinion about an identified individual, or an individual who is reasonably identifiable:

(a) whether the information or opinion is true or not

(b) whether the information or opinion is recorded in a material form or not.

The documents contain information including the mobile phone number of the (then) ABC General Counsel, the mobile phone number of external counsel and the full name and mobile phone number of external counsel's legal assistant. I am satisfied that all of these parts of documents over which an exemption under section 47F is claimed, contain personal information.

Whether or not the disclosure is unreasonable

If information is personal information, it will be conditionally exempt if disclosure would be 'unreasonable'. Paragraph 6.138 of the Guidelines provides that the personal privacy exemption is designed to prevent the unreasonable invasion of their parties' privacy, which implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals.

In considering whether disclosure would be unreasonable, section 47F(2) of the FOI Act requires me to take into account:

- the extent to which the information is well known
- whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document
- the availability of the information from publicly accessible sources
- any other matter I consider relevant.

Paragraph 6.142 of the Guidelines provides that key factors for determining whether disclosure is unreasonable include:

- the author of the document is identifiable
- the documents contain third party personal information
- release of the documents would cause stress on the third party

- no public purpose would be achieved through release.

I have also considered whether any public purpose is achieved through release. I do not consider that any obvious public interest arises on the disclosure of external counsel's or General Counsel's mobile number or the name or mobile number of her legal assistant. On the other hand, there is a considerable risk to an individual's right to privacy and the stress that disclosure would cause the individuals involved. On that basis, I have concluded that disclosure of the information would be unreasonable.

I find that these parts of documents are conditionally exempt in part under section 47F of the FOI Act.

The public interest

The above discussion of the public interest in regards to section 47E(c) is also largely relevant to s 47F. In relation to this exemption, I have weighted limited public interest in the release of this information against the protection of individuals from unreasonable interferences with their privacy. Accordingly, I have decided that the documents are exempt part under section 47F of the FOI Act.

Review rights

Your review rights are set out in **Annexure A**.

Yours sincerely

A handwritten signature in black ink, appearing to read 'P Longstaff', written over a light blue horizontal line.

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

Schedule 1

Document Schedule - FOI 2021-036

No.	Date	Description	No. of Pages	Access decision	Exemptions applied	Notes
1.	29 August 2017	Observations in brief to counsel	4	Refuse in full	S 42 – legal professional privilege	
2.	Undated	Dramatis personae	4	Refuse in full	S 42 – legal professional privilege	
3.	Undated	Chronology	8	Refuse in full	S 42 – legal professional privilege	
4.	Various	Interview notes	17	Refuse in full	S 42 – legal professional privilege	
5.	Various	Records of telephone calls	11	Refuse in full	S 42 – legal professional privilege	
6.	13 August 2018	Draft report	57	Refuse in full	S 42 – legal professional privilege	
7.	5 November 2018	Report	88	Refuse in full	S 42 - legal professional privilege	
8.	6 November 2018	Letter from Counsel	1	Grant access in part	S 47E(c) – management of personnel	
9.	16 March 2018	Searches to obtain contact details for potential interviewees	7	Refuse in full	S 42 - legal professional privilege	
10.	28 August 2017	Email chain	3	Grant access in part	S 47F – personal privacy S 47E(c) – management of personnel	
11.	Undated	Attachment: NSW Government Guiding Principles	3	Grant access in full		Publicly available

No.	Date	Description	No. of Pages	Access decision	Exemptions applied	Notes
12.	29 August 2017	Email chain	3	Grant access in part	S 47F – personal privacy S 47E(c) – management of personnel	
13.	29 August 2017	Attachment: Costs Disclosure and Agreement	7	Grant access in full		
14.	29 August 2017	Email chain	3	Grant access in part	S 47F – personal privacy S 47E(c) – management of personnel	
15.	29 August 2017	Attachment: Brief	52	Refuse in full	S 42 - legal professional privilege	
16.	28-30 September 2017	Email chain	5	Grant access in part	S 42 - legal professional privilege S 47F – personal privacy S 47E(c) – management of personnel	
17.	Various	Attachment: Records of telephone calls		Refuse in full	S 42 - legal professional privilege	Duplicate of Document 5
18.	28 September 2017	Email	1	Grant access in part	S 42 - legal professional privilege S 47E(c) – management of personnel	
19.	Various	Attachment: Chronology	10	Refuse in full	S 42 - legal professional privilege	
20.	3 October 2017	Email	2	Grant access in part	S 42 - legal professional privilege S 47E(c) – management of personnel	
21.	Undated	Attachment: Document	3	Refuse in full	S 42 - legal professional privilege	

No.	Date	Description	No. of Pages	Access decision	Exemptions applied	Notes
22.	10 October 2017	Advice	11	Refuse in full	S 42- legal professional privilege	
23.	Various	Email chain	3	Grant access in part	S 42 - legal professional privilege S 47F – personal privacy S 47E(c) – management of personnel	Irrelevant information deleted under section 22
24.	Various	Email chain	3	Grant access in part	S 42 - legal professional privilege S 47F – personal privacy S 47E(c) – management of personnel	
25.	30 November 2017	Attachment: Status update	3	Refuse in full	S 42- legal professional privilege	
26.	5 April 2018	Email	1	Grant access in part	S 42 - legal professional privilege S 47E(c) – management of personnel	
27.	Various	Email chain re meeting	7	Grant access in part	S 42 - legal professional privilege S 47F – personal privacy S 47E(c) – management of personnel	Irrelevant information deleted under section 22
28.	30 April 2018	Email chain re updates	3	Grant access in part	S 42 - legal professional privilege S 47F – personal privacy S 47E(c) – management of personnel	
29.	10 July 2018	Email chain re updates on report	4	Grant access in part	S 42 - legal professional privilege S 47F – personal privacy	

No.	Date	Description	No. of Pages	Access decision	Exemptions applied	Notes
30.	10 July 2018	Email	1	Grant access in part	S 42 - legal professional privilege S 47E(c) – management of personnel	
31.	Various	Attachment: Interview notes	4	Refuse in full	S 42 - legal professional privilege	Duplicate of 4
32.	10 July 2018	Email	2	Grant access in part	S 42 - legal professional privilege S 47F – personal privacy S 47E(c) – management of personnel	
33.	Various	Attachment: Interview notes	4	Refuse in full	S 42 - legal professional privilege	Duplicate of 4
34.	9 August 2018	Email chain	4	Grant access in part	S 47F – personal privacy S 47E(c) – management of personnel	
35.	13 August 2018	Email	2	Grant access in part	S 42 - legal professional privilege S 47F – personal privacy S 47E(c) – management of personnel	
36.	Various	Attachment: Draft Report	57	Refuse in full	S 42 - legal professional privilege	
37.	24 August 2018	Email chain	2	Grant access in part	S 42 - legal professional privilege S 47E(c) – management of personnel	
38.	Various	Attachment: Document	10	Refuse in full	S 42 - legal professional privilege	

No.	Date	Description	No. of Pages	Access decision	Exemptions applied	Notes
39.	28 August 2018	Email chain	5	Grant access in part	S 42 - legal professional privilege S 47F – personal privacy S 47E(c) – management of personnel	
40.	19 September 2018	Email	3	Grant access in part	S 42 - legal professional privilege	
41.	Various	Attachment: Interview notes	4	Refuse in full	S 42 - legal professional privilege	Duplicate of 4
42.	7 October 2018	Email	2	Grant access in part	S 47F – personal privacy S 47E(c) – management of personnel	Irrelevant information deleted under section 22
43.	5 October 2018	Attachment: Final report	84	Refuse in full	S 42 - legal professional privilege	Duplicate of 8
44.	8 October 2018	Email chain	3	Grant access in part	S 47F – personal privacy S 47E(c) – management of personnel	Irrelevant information deleted under section 22
45.	5 October 2018	Attachment: Updated Brief index	11	Refuse in full	S 42 - legal professional privilege	
46.	6 November 2018	Tax Invoice	3	Grant access in part	S 42 - legal professional privilege S 47E(c) – management of personnel	Irrelevant information deleted under section 22
47.	16 October 2017	Email	1	Grant access in part	S 47F – personal privacy	
48.	10 October 2017	Attachment: Advice	10	Refuse in full	S 42 - legal professional privilege	Duplicate of 23

Annexure A – Your Review Rights

If you are dissatisfied with this decision you can apply for Internal Review by the ABC, 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 apply for an internal 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 fresh decision.

You must apply in writing for an internal review of the decision within 30 days of receipt of this letter. No particular form is required, although it would help if you set out the reasons for review in your application.

Application for a review of the original decision should be emailed to ABC: xxx.xxx@xxx.xxx.xx

or addressed to: The FOI Coordinator
 ABC
 Level 13
 700 Harris Street
 ULTIMO NSW 2007

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.

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>

Alternatively, application for IC Review can be emailed to: enquiries@oaic.gov.au or

addressed to: Director of FOI Dispute Resolution
 GPO Box 5218
 Sydney NSW 2001

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 can be made in writing to: OAIC - GPO Box 5218 Sydney NSW 2001