

9 May 2022

Alexander

By email: foi+request-8573-2558d0b4@righttoknow.org.au

ACMA file reference: ACMA2022/129

Dear Alexander

**Notice of decision in respect of your request for access to documents
under the *Freedom of Information Act 1982***

I refer to your request under the *Freedom of Information Act 1982* (the FOI Act) received by the Australian Communications and Media Authority (the ACMA) on 8 March 2022 seeking access to:

“the current Declarations of Public Interest documents or the equivalent current public interest disclosures for:

Nerida O'Loughlin

Creina Chapman

James Cameron

Chris Jose

Fiona Cameron

Anita Jacoby

Delia Rickard

Anna Brakey” (the officeholders).

I also refer to my letters to you dated 18 March 2022, 29 March 2022 and 6 April 2022 about your request.

In accordance with my previous letters, I have processed your request on the basis that you are seeking access to the current declarations or disclosures of interests made by the officeholders individually in compliance with their statutory obligations and that you do not want access to other documents.

In relation to the scope of your request, I note that each officeholder, as a member or associate member of the ACMA, makes, annually:

- a declaration of interests in compliance with the officeholder's obligation under the *Public Service Act 1999* (the PS Act); and
- a disclosure of interests in compliance with the officeholder's obligations under the *Australian Communications and Media Authority Act 2005* (the ACMA Act), the *Public Governance, Performance and Accountability Act 2013* (the PGPA Act) and the *Public Governance, Performance and Accountability Rule 2014* (the PGPA Rule).

The officeholder also has an ongoing obligation to declare or disclose any interest that is newly acquired or any change in the nature or extent of an interest that has been declared or disclosed.

Authorised decision-maker

I confirm that I am authorised to make the decision in respect of your request under the FOI Act.

No charges

In the exercise of my discretion, I have decided not to impose any charges for processing your request or providing you with access to the documents.

Documents identified

Enclosed is a schedule which describes the documents identified as falling within the scope of your request (the schedule), the decision on access in respect of each document and the section or sections of the FOI Act upon which I have relied in making that decision (see Attachment A). In some instances, multiple copies of the same document were located, however the schedule does not refer to those copies as I assume that you do not want access to duplicates. Accordingly, where emails are included in an email chain, the schedule refers to the email chain rather than to the individual emails as separate documents.

You will see, from the schedule, that I have identified 19 documents as falling within the scope of your request. Those documents have been ordered in a manner that corresponds to the list of names of the officeholders in your request. Of those documents, there are:

- 8 declarations of interests made in 2021 by the officeholders individually in compliance with their obligations under the PS Act;
- 8 disclosures of interests made in 2021 by the officeholders individually in compliance with their obligations under the ACMA Act, the PGPA Act and the PGPA Rule;
- an email chain between Ms Nerida O'Loughlin, the Chair and Agency Head of the ACMA (the Chair) and Ms Anita Jacoby, Associate Member of the ACMA, which includes an email from Ms Jacoby to the Chair dated 30 October 2021 disclosing her appointment to the role of Chair of the ABC's Advisory Council (Ms Jacoby's new appointment);
- the minutes of the ACMA's 46th meeting of 2021 dated 18 November 2021 which include information about an agenda item on the "Disclosure of relevant interests"; and
- a letter from the Chair to the Hon Paul Fletcher MP, Minister for Communications, Urban Infrastructure, Cities and the Arts (the Minister) dated 18 November 2021 in relation to the standing obligation to disclose interests.

Where the decision specified in the schedule is "Release", I have released the document in full. Where the decision specified in the schedule is "Partial Release", I have prepared an edited copy of the document modified by deletions so that it does not contain any matter that I consider is exempt or irrelevant to your request and have given access to the edited copy. Where the decision specified in the schedule is "Exempt", I have refused access to the document which I consider is exempt in full.

The grounds for any deletions, or any refusal to give access to a document, are set out below.

Material taken into account

I have taken the following material into account in making my decision on access:

- your request;
- the searches conducted and the results of those searches;
- the FOI Act;
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the FOI Guidelines);
- relevant common law.

Decision on access and reasons

Documents that contain irrelevant matter

Some of the documents falling within the scope of your request, namely Documents 17, 18 and 19, contain matter that I consider is irrelevant to your request.

Document 17 is the email chain between the Chair and Ms Jacoby which includes the email from Ms Jacoby to the Chair dated 30 October 2021 disclosing Ms Jacoby's new appointment. The other emails in the chain contain information about subsequent steps. As each other email in the chain is not a declaration or disclosure of interests falling within the scope of your request (but rather is a message about the steps following such a declaration or disclosure), I consider that those other emails are irrelevant to your request.

Document 18 is the minutes of the ACMA's 46th meeting of 2021 dated 18 November 2021 which include information about an agenda item on the "Disclosure of relevant interests". That information records the disclosure of Ms Jacoby's new appointment and describes the arrangements put in place to manage any real or perceived conflict of interest in respect of that appointment. As the description of those arrangements is not a declaration or disclosure of interests falling within the scope of your request (but rather is information about the management of any real or perceived conflict of interest following such a declaration or disclosure), I consider that it is irrelevant to your request. The minutes also include information about other business of the meeting. As that information does not record any declaration or disclosure of interests falling within the scope of your request, I consider that it is also irrelevant to your request.

Document 19 is the letter from the Chair to the Minister dated 18 November 2021 in relation to the standing obligation to disclose interests. The letter refers to Ms Jacoby's new appointment and describes the arrangements put in place to manage any real or perceived conflict of interest in respect of that appointment. As the description of those arrangements is not a declaration or disclosure of interests falling within the scope of your request (but rather is information about the management of any real or perceived conflict of interest following such a declaration or disclosure), I consider that it is irrelevant to your request.

If a document contains any matter that is exempt or would reasonably be regarded as irrelevant to a request for access, an agency may prepare an edited copy of the document modified by deletions so that it does not contain

the exempt or irrelevant matter and give access to the edited copy in accordance with section 22 of the FOI Act.

I have prepared an edited copy of Document 17 so that it does not contain irrelevant matter about the steps following the disclosure of Ms Jacoby's new appointment and have given access to the edited copy, in accordance with section 22. (The edited copy also omits exempt matter, as described below).

In the exercise of my discretion, I have decided not to delete the irrelevant matter contained in Documents 18 and 19 describing the arrangements put in place to manage any real or perceived conflict of interest in respect of Ms Jacoby's new appointment because I consider that none of it is exempt and, in the circumstances, its release would be of benefit to the public.

Consequently, I have prepared an edited copy of Document 18 so that it does not contain irrelevant matter about other business of the meeting referred to above and have given access to the edited copy in accordance with section 22, and I have released Document 19 in full.

Documents that are exempt in full or in part (confidential information)

I have decided that Documents 1 to 16 are exempt in full or in part under section 45 of the FOI Act, as described in the schedule.

Section 45 provides that a document is an exempt document if its disclosure under the FOI Act would found an action, by a person (other than an agency or the Commonwealth), for breach of confidence.

The FOI Guidelines indicate that:

“To found an action for breach of confidence (which means s 45 would apply), the following five criteria must be satisfied in relation to the information:

- it must be specifically identified
- 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
- unauthorised disclosure of the information has or will cause detriment.”

I consider that the exemption in section 45 applies to the documents concerned for the following reasons:

- the documents contain information which I consider is confidential and that information is specifically identifiable, being:
 - most details about the material personal interests of the officeholders¹, including:
 - the financial interests of the officeholders and their immediate family members (where relevant), particularly shareholdings, beneficial interests held in a family or business trust or a nominee company, real estate

¹ Certain details about the material personal interests of some officeholders are common knowledge or in the public domain. I do not consider that those details are confidential.

- holdings, other investments or assets, other substantial sources of income, and liabilities; and
- other interests of the officeholders and their immediate family members (where relevant), particularly membership of (and roles in) other organisations, friendships and other personal relationships; and
- unique identifiers of some officeholders, particularly the Australian Government Staff Number;
- the information has the necessary quality of confidentiality because it comprises details that are only known to a limited group, are not common knowledge or in the public domain and are of sufficient importance to warrant protection against any unauthorised disclosure;
- the information was communicated and received on the basis that it would be kept confidential as:
 - the ACMA held out, through its policy and practice, that this type of information would be treated as confidential, would only be used for the purpose of identification and management of conflicts of interest, and would not be disclosed except as required by law or with consent of the person to whom the information relates;
 - each officeholder, in giving the information, meant for it to be kept confidential, as expressly indicated by those who have marked the documents containing the information “Confidential”; and
 - the ACMA, in receiving the information, accepted the obligation to keep it confidential, by storing it securely in a discrete folder kept and managed by Authority Secretariat in the Office of the Chair, only providing access to persons who have a genuine need to know the information, and ensuring that those persons treat the information as confidential and safeguard it in accordance with the *Privacy Act 1988*;
- as a relationship of confidence exists between the ACMA and each officeholder in respect of the information given by the officeholder, the disclosure of the information outside the relationship without the consent of the officeholder would be a breach of an obligation of confidence and therefore unauthorised; and where the information is personal information about a person other than the officeholder (such as an immediate family member), the person has the same rights against the ACMA in respect of a breach of the obligation of confidence as the officeholder has (see subsection 93(3) of the *Privacy Act 1988*);
- the unauthorised disclosure of the information would cause detriment because each officeholder and any immediate family member to whom the information relates would lose control over how the information is subsequently used or disseminated and would likely be concerned about the disclosure of details of a highly personal nature (which are typically kept private and/or confidential) and the potential for misuse or dissemination of such information.

I have prepared edited copies of some of the documents concerned, namely Documents 13 to 16, so that they do not contain (or otherwise reveal) any confidential information, and have given access to the edited copies, in accordance with section 22. (The edited copies also omit exempt matter, as described below).

I consider that section 22 does not apply to the other documents, namely Documents 1 to 12, as the deletions required to remove the confidential information would be extensive and the remaining content would convey nothing of substance. Accordingly, I have refused to give access to those documents on the basis that they are exempt in full under section 45.

Documents that are exempt in full or in part (personal privacy)

I have decided that Documents 1 to 17 are exempt in full or in part under section 47F of the FOI Act, as described in the schedule.

Section 47F provides that a document is conditionally exempt if its disclosure under the FOI Act would involve the unreasonable disclosure of personal information about any person. In determining whether the disclosure would be unreasonable, an agency must have regard to 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 and any other matters the agency considers relevant. Subsection 11A(5) of the FOI Act provides that an agency must give the applicant access to such a document at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

The documents concerned contain information about the officeholders and their immediate family members (where relevant), including:

- the names, positions/titles and signatures of the officeholders;
- the email addresses of two officeholders;
- the Australian Government Staff Numbers of some officeholders;
- the names and signatures of the immediate family members and details about the nature of their relationship to the officeholders;
- details about the nature and extent of financial and other interests of the officeholders and the immediate family members; and
- the names, positions/titles and contact details of other government officials to whom disclosures were made.

All of that information is “personal information” (within the meaning of the *Privacy Act 1988*) because it identifies individuals and conveys or says something about those individuals.

Some of the personal information is “public servants’ information”, such as the names, positions/titles and work contact details of the officeholders and other government officials. The FOI Guidelines provide that where public servants’ information is included in a document because of their usual duties or responsibilities, it would not be unreasonable to disclose that information unless special circumstances exist. I am not aware of any special circumstances that would make it unreasonable to disclose that kind of information.

Some of the personal information is also publicly known or readily accessible to the public, such as the names, positions/titles and work contact details of the officeholders and other government officials, and the signatures of some officeholders and certain interests declared or disclosed by some officeholders. I do not consider that that it would be unreasonable to disclose that kind of information.

I consider that it would be unreasonable to disclose the other personal information contained in the documents concerned for the following reasons:

- the information is private and/or confidential (as described above) and, as such, it is not well known or readily accessible to the public;
- the information is of a highly personal nature, revealing, for example, the existence of:
 - assets and liabilities held by the officeholders and their immediate family members (where relevant); and
 - family relationships, friendships and other personal relationships involving the officeholders and the immediate family members;
- the information was given and received on the basis that it would only be used for the purpose of identification and management of conflicts of interest, and would not be disclosed except as required by law or with the consent of the person to whom the information relates;
- in those circumstances, the officeholders and any immediate family members to whom the information relates have a reasonable expectation not to have the information disclosed to any third parties;
- the disclosure of the information would cause detriment because each officeholder and any immediate family member to whom the information relates would lose control over how the information is subsequently used or disseminated and would likely be concerned about the disclosure of details of a highly personal nature (which are typically kept private and/or confidential) and the potential for misuse or dissemination of such information;
- the information relates to the interests of officeholders that have been assessed as not giving rise to any actual or perceived conflict of interest and, in the absence of any evidence of common concern about the impartiality of those officeholders, the disclosure of the information would not benefit the public in such a way as to justify any invasion of privacy or breach of confidence or any detriment that would be caused.

I therefore consider that the documents containing that information are conditionally exempt under section 47F.

In working out whether access to those documents at this time would, on balance, be contrary to the public interest, I have taken into account the relevant factors favouring disclosure referred to in subsection 11B(3) of the FOI Act, and I have not taken into account any of the irrelevant factors referred to in subsection 11B(4) of the FOI Act. While access to the documents would promote the objects of the FOI Act by increasing transparency and scrutiny of government processes and activities, withholding the documents would avoid any prejudice to the public interest in the protection of privacy and confidence. For the reasons set out above, I consider that the disclosure of the personal information contained in the documents would not benefit the public in such a way as to justify any invasion of privacy or breach of confidence or any detriment that would be caused. I therefore consider that access to the documents at this time would, on balance, be contrary to the public interest.

I have prepared edited copies of some of the documents concerned, namely Documents 13 to 17, so that they do not contain (or otherwise reveal) any personal information that is private and/or confidential and have given access to the edited copies, in accordance with section 22.

I consider that section 22 does not apply to the other documents, namely Documents 1 to 12, as the deletions required to remove the exempt matter would be extensive and the remaining content would convey nothing of

substance. Accordingly, I have refused to give access to those documents on the basis that they are exempt in full under section 47F.

Rights of review

Enclosed is the ACMA's Information Sheet entitled *Freedom of Information Act 1982 – Rights of Review*, which contains information about the rights of applicants to seek review of decisions made by the ACMA under the FOI Act, the rights of applicants to make a complaint to the Australian Information Commissioner in relation to such decisions and the procedure for the exercise of such rights.

Disclosure log

The ACMA is required by section 11C of the FOI Act to publish a disclosure log on its website of information that has been released in response to a request for access, subject to some exceptions. For further information about the disclosure log, see <https://www.acma.gov.au/foi-disclosure-log>.

Should you have any questions, please contact me at marilyn.woolford@acma.gov.au.

Yours faithfully



Marilyn Woolford
Authority Secretariat
Office of the Chair
Authorised decision-maker under the FOI Act

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