

19 January 2023

CONFIDENTIAL

Mr Alex Pentland

By email to: foi+request-9428-e99d59f9@righttoknow.org.au

Dear Mr Pentland

REVIEW OF FOI DECISION – REFERENCE NO. 202223-016 – Deleted tweet

I refer to your correspondence dated 20 December 2022 requesting an internal review of the decision in respect to your information request, Reference No. 202223-016.

Background

Your information request seeks access to:

documents and correspondence regarding the publication, and subsequent deletion of a Tweet from ABC Reporter David Taylor on 1 October 2022.

A decision in relation to your information request was made by the ABC's Head of Rights Management & FOI Decision Maker, Ali Edwards, who has authority to make decisions in respect of requests made under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

In correspondence to you dated 16 December 2022, Ms Edwards stated that she had identified five documents (the **Documents**) that fell within the scope of your request.

Ms Edwards granted access to Documents 2 to 5 in part and refused access to Document 1. The ABC consulted with affected 3rd parties in relation to release of parts of Documents 2, 3 and 4. Neither 3rd party consented to the release of the parts of documents in question and still have time to exercise their rights of review and I have taken this into account as part of this process.

I am authorised by the Managing Director under s23 of the FOI Act to make decisions on requests for internal review.

I have reviewed your request in accordance with s54C of the FOI Act.

In undertaking my review, I have reviewed the Documents, relevant sections of the FOI Act, relevant case law and the FOI Guidelines published by the Office of the Australian Information Commissioner (**FOI Guidelines**).

Decision

Having reviewed your request, I have decided to affirm the Original Decision that the ABC is not required to take any further action in relation to the Documents.

I have made this decision having regard firstly to the general right of access set out s11(1) of the FOI Act which states:

- (1) Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to:*
(a) a document of an agency, other than an exempt document...

Reasons

Management of Personnel

I confirm that **Document 1** is conditionally exempt under the provisions of s 47E(c) of the FOI Act which deals with the substantial adverse effect on an agency's ability to manage personnel created by the release of documents.

As cited by Ms Edwards 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.

Ms Edwards also references Paragraph 6.114 of the FOI Guidelines which provides that for the exemption to apply the documents must relate to the management of personnel. This has been defined to include the broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassment and occupational health and safety.

If the above limb of s47E(c) is not satisfied, and for the avoidance of doubt I believe that it is, the exemption also applies if the documents relate to the assessment of personal including the broader performance management policies and activities concerning competency, in-house training requirements...counselling [and] feedback. I am of the view that Document 1 involves the assessment of personnel in that it goes the heart of in-house on the job training, feedback, development, and coaching of personnel.

In my capacity as the Head of Employee Relations for the ABC I am acutely aware of the increase of incidents of online abuse and trolling of ABC journalists and the impacts on their well-being. The ABC has put in place significant measures in recent years to ensure the psychological safety of its employee in relation to social media activity and I believe release of Document 1 that includes the names and contact details of ABC employees would undermine these measures. In other words, the substantial adverse effect of release of Document 1 could reasonably be expected to occur and is not merely an assumption or allegation (see 6.101 of the FOI Guidelines) in circumstances where the FOI Act does not restrict dissemination of information once it is released.

Employees in organisations across Australia, including the ABC, hold reasonable expectations of privacy and confidentiality with respect to individual staffing

matters. This includes an expectation that HR matters personal to them will be kept confidential in the same way that other entitlements and employment information is kept confidential between employer and employee.

If ABC employees are exposed to risks to their well-being and health and safety because of the actions of the ABC in releasing documents relating to personal HR matters, I believe this will result in employees being less psychologically safe. A failure to provide a psychologically safe workplace not only risks the health and safety of an individual employee but makes the ABC a less desirable place to work and hinders its ability to attract and retain talent. This would, in a competitive media market, have a substantial and adverse impact on the proper and efficient operations of the ABC and is therefore also conditionally exempt under s47E(d) of the FOI Act.

The Original Decision provided partial release of **Documents 3, 4 and 5** with release refused on various grounds under the FOI Act (I note that for ease of reference the relevant sections of the FOI Act relied upon by the ABC to refuse release is referenced in the documents).

I deal now with the sections of **Documents 3, 4 and 5** that have been found to be conditionally exempt under s 47E(c) of the FOI Act:

Document 3 – I am satisfied that the determination in the Original Decision that information in Document 3 is conditionally exempt because it relates to management of personnel, is correct. I do so on the basis that the effect of release could reasonably be expected to create a substantial adverse impact on the relationship of trust and confidence between the employee and the ABC and hinder the ability of the ABC to manage personnel.

The relationship of trust and confidence is central to the employment relationship and managers must be allowed to communicate freely in order to coach and provide on the job training and feedback to employees about their work. Employees are entitled to expect that in the ordinary course, communication about these matters will be confidential and private. The candour of employees in responding to these types of communications is critical to the proper and efficient operations of an agency (see 6.117 of the Guidelines) and release of information in Document 3 would adversely and substantially effect the proper and efficient operation of the ABC.

Document 4 - I am satisfied that the determination in the Original Decision that information in Document 4 is conditionally exempt because it relates to management of personnel, is correct for the reasons stated above.

Document 5 - I am satisfied that the determination in the Original Decision that information in Document 5 is conditionally exempt because it relates to management of personnel, is correct for the reasons stated above.

The Public Interest

I turn now to consideration of the public interest test in relation to the information in Documents 1,3,4 and 5 that were found to be conditionally exempt under s47E(c) and (d) of the FOI Act.

Under the FOI Act conditionally exempt material must be released unless, in the circumstances, access at this time would, on balance, be contrary to the public interest (section 11 A (5) of the FOI Act).

I have considered the following factors relevant to this matter in favour of disclosure, namely:

- (a) promoting the objects of the Act; and
- (b) informing debate on a matter of public importance, including to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official and to reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct (see 6.19 FOI Guidelines).

and have considered the following factors against disclosure:

- (c) protecting individuals from unreasonable interference with their privacy;
- (d) protecting staff from occupational health and safety risks; and
- (e) maintaining the relationship of trust and confidence in the employment relationship.

The material in question relates solely to the personal use of social media by an ABC employee. The social media activity occurred on their private social media account and did not occur on an ABC official social media account and was not related to any content published by the ABC on the subject matter. As such I see little or no contribution to promoting the interests of the Act or informing debate on a matter of public interest by releasing the information.

To the extent there is any public interest in disclosure, I do not believe that they outweigh the adverse, significant, and real risks to the employee's psychological safety and warrant a breach of their reasonable expectation to privacy and confidence

Accordingly, I have concluded that disclosure would, on balance, be contrary to the public interest and the information in Documents 1, 3, 4 and 5 is exempt in part or full under s 47E (b) and (c) of the FOI Act.

Deliberative Processes

I confirm that parts of **Documents 2 and 4** are conditionally exempt under s47(C) and agree that the relevant sections refused are deliberative in that they generally refer to the process of weighing up or evaluating, competing arguments or considerations and involve the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or course of action¹.

Section 6.58 of the Guidelines describes a 'deliberative process' as an action which:

...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 competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative process 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.

The material in question is more than factual material or operational information and falls squarely within the definition of a deliberative process.

Having determined that the material is conditionally exempt I now turn to consider the public interest.

In doing I have considered the following factors in favour of disclosure, namely:
S47F(2)

- (a) promoting the objects of the Act; and
- (b) revealing the reason for government decision and any background that informed that decision enhancing scrutiny of government decision making (see 6.19 FOI Guidelines).

and have considered the following factors against disclosure:

- (c) could reasonably be expected to prejudice an agency's ability to deliberate on matters including management of its personnel; and
- (d) could reasonably be expected to prejudice an agency's ability to document and consider recommendations, opinions and options with decision-makers.

¹ See *ReJE 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]. See also *Carver and Fair Work Ombudsman* [2011] AICmr 5 in relation to code of conduct investigations See also 6.58 FOI Guidelines.

Having regard to the above factors, the case law correctly cited in the Original Decision defining deliberative matter² together with the circumstances of this matter, I find that the public interest considerations favouring release do not outweigh those weighing against release.

Release could reasonably be expected to prejudice the ABC's ability to deliberate on matters involving management of its personnel and could reasonably be expected to prejudice its ability to document and consider recommendations, opinions and options with communication personnel about how to respond to media enquiries.

I do not believe in light of the fact that this matter involves the personal use of social media by an ABC employee that release furthers the objectives of FOI Act or increases scrutiny of government decision making.

Personal Privacy

I concur with the Original Decision in relation to the redactions made to **Documents 2, 3, 4 and 5** on the basis that they are conditionally exempt for reasons of personal privacy (see s47F FOI Act). I agree that disclosure of the information would result in an unreasonable disclosure of personal information.

Paragraph 6.138 of the FOI Guidelines considers the issue of 'unreasonable disclosure' and states:

'the personal privacy exemption is designed to prevent the unreasonable invasion of third parties' privacy. The test of 'unreasonableness' 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 what is unreasonable, the AAT in *Re Chandra and Minister for Immigration*³ stated relevantly that decision maker must consider all the circumstances including the nature of the information that would be disclosed, the circumstances in which the information was obtained and the likelihood of the information being information that the person concerned would not wish to have disclosed without consent.

In considering whether it would be unreasonable to disclose personal information, without the consent of the relevant individual, I have had regard to the factors listed in s 47F(2), in particular:

- (a) the extent to which the information is well known;
- (b) whether the person to whom the information relates is known to be (or have been) associated with the matters dealt with in the document; and
- (c) the availability of the information from publicly accessible sources.

² LK' and Department of the Treasury (Freedom of Information) [2017] AICmr47 (23 May 2017)

³ [1984] AATA 437 at 259

The relevant employees to whom the personal information relates have not consented to the release of their personal information. As stated previously in this review the potential for the employees concerned to be exposed to online trolling and abuse as a result of release of personal information is a real and significant likelihood. In light of this and their refusal to grant consent, the release of this information would cause the employee's stress. Disclosure of the private information of the employees in these circumstances will not advance the objectives of the FOI Act or the public interest in government transparency and integrity sufficiently to outweigh the risk to the health and safety of employees.

I am satisfied that granting access to the limited conditionally exempt material in the Documents 2, 3, 4 and 5 would, on balance, be contrary to the public interest.

Third Parties – private information

Regarding the private information of third parties, I am of the view that that the image of one party is exempt because it is different to the image that appears publicly with her professional identity (in that regard it is similar to the use of a professional name different to the one used in private dealings).

I am however of the view that the mobile phone numbers of both third parties is private information and is exempt and should not be released. The mobile numbers do not appear on their professional social media accounts or are provided online by their employer. I do not believe that there are sufficient public interest considerations to warrant disclosure of their mobile numbers. Their email addresses are however publicly available on their professional social media accounts and therefore no expectation to privacy arises.

The third parties have review rights that have not yet expired and as a result the Original Decision to defer release of this private information until these rights have been exercised and/or determined is affirmed.

The third parties have also made submissions that their correspondence with the ABC about the personal social media activity of the ABC employee concerned, is of a personal nature. Given the correspondence relates to content published by their employer about the subject matter of their correspondence, I do not believe that their can be any reasonable expectation of privacy and the information should be disclosed.

Again, however I note their review rights are yet to expire and release of this information remains deferred.

Right of review

If you are dissatisfied with this decision, you can apply for review by the Australian Information Commissioner, whose contact details are:

Office of the Australian Information Commissioner
GPO Box 5218 Sydney NSW 2001
Tel: 1300 363 992 Fax 02 9284 9666
Email: enquiries@oaic.gov.au
Website: www.oaic.gov.au

In making your application to the Information Commissioner, you need to provide an address for notices to be sent (this can be an email address) and a copy of this decision. You may also wish to inform the Information Commissioner of the reasons for seeking review.

Yours sincerely

Vanessa MacBean

Vanessa MacBean
Head, Employee Relations
FOI Internal Reviewer, authorised pursuant to s 23 FOI Act
Australian Broadcasting Corporation