

20 December 2022

Ms Eleanor Evans

By email: [foi+request-9609-f70748fc@righttoknow.org.au](mailto:foi+request-9609-f70748fc@righttoknow.org.au)

Dear Eleanor Evans

## **DECISION – FOI REQUEST REF. NO. 202223-026– Media Watch communications**

I refer to your email sent Friday 25 November 2022 seeking access under the *Freedom of Information Act* (Cth) 1982 (the **FOI Act**) to:

... any correspondences between any Media Watch producer and any of the following individuals: Katherine Deves, Kat Karena, Kit Kowalski, and Rachael Wong. Also any correspondences between any Media Watch producer and the organisation ACON Exposed.

A decision on your request is due by Wednesday **28 December** 2022.

### **Authorisation**

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

### **Decision**

Under s 7(2) of the FOI Act, Schedule 2 Part II, the ABC as an agency is exempt from the operation of the FOI Act in relation to its program material. All documents located in response to your request were program material. The ABC is not required to take any action in relation to these documents under FOI (refer pages 2 and 3 of this letter).

### **Material taken into account**

In making my decision I have considered:

- the scope of your request
- the information requested
- the FOI Act
- the guidelines issued by the Office of the Australian Information Commissioner under s 93A of the FOI Act (**the Guidelines**)
- relevant case law

### **Locating and identifying documents**

The search for documents included approaching the ABC's Media Watch team.

I consider all reasonable steps were taken to identify and locate relevant documents that answer your request. I am satisfied that the searches conducted were thorough and all reasonable steps have been taken to locate the documents relevant to your request.

## Reasons for decision

### Program Material

All documents returned in searches were program material.

Section 7(2) of the FOI Act provides that (my underlining):

The persons, bodies and Departments specified in Part II of Schedule 2 are exempt from the operation of this Act in relation to the documents referred to in that Schedule in relation to them.

Part II of Schedule 2 lists the ABC in “...*in relation to its program material and datacasting content*”. ‘Program material’ is not defined in the FOI Act, however it has been the subject of judicial consideration.

The Guidelines point to *Australian Broadcasting Corporation and Herald and Weekly Times Pty Limited (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’”.

### ‘In relation to’ program material

The Federal Court of Australia considered the scope of the s 7(2) exclusion in *Australian Broadcasting Corporation v The University of Technology, Sydney (ABC v UTS)*<sup>1</sup> and held that the exemption also applies to ‘any document that relates to program material’. In that case, the documents sought were 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”.

### Reasonably direct relationship to program material

When it comes to documents ‘in relation to’ program material, the Guidelines<sup>2</sup> adopt the ‘reasonably direct relationship’ test in ABC and HWT, i.e. that the ABC exemption applies to documents comprising program material in the sense described above, as well as documents which have a reasonably direct relationship with that program material. The Guidelines contrast ‘reasonably direct’ with a connection that is “indirect, remote or tenuous”.

---

<sup>1</sup> [2006] FCA 964

<sup>2</sup> Paragraph 2.16

### Post-broadcast material

ABC and HWT [57] says 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”.

The documents that answer the request directly relate to program material, and are exempt from the operation of the FOI Act under s 7(2). On that basis, the ABC is not required to take any further action in relation to these documents.

### **Review rights**

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

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Ali Edwards', is positioned above the typed name and title.

**Ali Edwards**  
**Head of Rights Management & FOI Decision Maker**  
[foi.abc@abc.net.au](mailto:foi.abc@abc.net.au)

## **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: [foi.abc@abc.net.au](mailto:foi.abc@abc.net.au)

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](mailto: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