

14 August 2024

“H”

By email: foi+request-10689-3681b17d@righttoknow.org.au

Dear H

DECISION – REF. NO ABC FOI 202324-031

I refer to your email sent Friday 15 September 2023 seeking access under the *Freedom of Information Act 1982* (the **FOI Act**) to:

1. The licence agreement entered into by the ABC and a third party authorising the use of ABC footage in a Yes commercial. The document I am seeking is referred to in the following article:
[https://urldefense.com/v3/_https://www.theaustralian.com.au/business/media/abc-wont-take-back-yes-campaign-footage-despite-admitting-it-made-the-wrong-decision-to-hand-it-over/news-story/73d66e862810b2b1bb67ce4f1d7a397c_!!FvZmfVE!GWqd5iyif8x5PckghJpzsrcNm8y1olUODj18EBQrVdeJiW6htqy2WDnZ80oulmQD28IfcjmBek_oHaOhcBzw1iSbgmVTgijuquE\\$](https://urldefense.com/v3/_https://www.theaustralian.com.au/business/media/abc-wont-take-back-yes-campaign-footage-despite-admitting-it-made-the-wrong-decision-to-hand-it-over/news-story/73d66e862810b2b1bb67ce4f1d7a397c_!!FvZmfVE!GWqd5iyif8x5PckghJpzsrcNm8y1olUODj18EBQrVdeJiW6htqy2WDnZ80oulmQD28IfcjmBek_oHaOhcBzw1iSbgmVTgijuquE$)
2. Correspondence or communication between the ABC and the third party in relation to the licence agreement since 3 September 2023.
3. Any internal communication (on all platforms including but not limited to emails, whatsapp, signal, sms) since 3 September 2023 that relate to:
 - a. ABC’s decision to licence the relevant footage;
 - b. the breach of ABC policy in licensing the footage;
 - c. the ABC’s decision to allow the continued use of the footage.

As you know the ABC did not make a decision within the statutory timeframe. As such, the ABC was deemed to have made a decision refusing access to the documents you sought (see s 15AC FOI Act). Your FOI request is currently before the Office of the Australian Information Commissioner as a review of that deemed decision.

Authorisation

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

This decision sets aside the deemed refusal decision of 16 November 2023, under s 55G of the FOI Act.

Decision

I have identified 44 documents (or 29 documents, some with attachments) that answer the scope of your request. These documents are described in **Schedule 1**, attached. Attachments are indicated by a number then letter, e.g. document 2A is an

attachment to document 2. Counting attachments separately, I have decided to release 6 documents in full, 32 in part, and to refuse access to 6 as detailed in the schedule.

The ABC is in the process of preparing the documents for release to you. Unless you specify otherwise, we will provide them by email in pdf form.

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 s 93A of the FOI Act (**the Guidelines**)
- relevant case law
- responses to consultation undertaken with third parties.

Reasons for decision

Section 22 – material irrelevant to a request

Section 22(1)(a)(li) FOI Act allows an agency to delete material that is not relevant to the request. I have used s 22 to delete:

- material that is outside the scope of your request, where a document deals with both relevant and irrelevant matters
- metadata generated in the process of compiling the documents relevant to the request (such as emails forwarding relevant documents to the FOI team for processing – documents 7, 8 and 22)
- duplicates of email chains (or annexures if applicable), where an earlier part of a chain is replicated in a longer email chain, such that a decision is made on one version only.

Section 7(2) – 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 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)*¹ 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 Guidelines² 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”. The relevant briefs contain information that is directly related to program material.

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”.

A number of 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 schedule attached to this decision identifies where I have determined that material is exempt on this basis.

Section 42 – Legal Professional Privilege

Under s 42, material that would be privileged from production in legal proceedings on the ground of legal professional privilege is exempt from release under FOI.

The Guidelines explain at paragraph 5.149:

At common law, determining whether a communication is privileged requires a consideration of:

- whether there is a legal adviser-client relationship
- whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation
- whether the advice given is independent

¹ [2006] FCA 964

² Paragraph 2.16

- whether the advice given is confidential³.

The documents include legal advice that is considered confidential by the ABC and privilege has not been waived. Therefore, I have found that information to be exempt from release, and access is refused pursuant to s 42 of the FOI Act.

I am satisfied that the common law test for whether legal professional privilege exists has been met. The document comprises communications and documents created for the dominant purpose of the ABC's internal lawyers advising their client, the ABC. The schedule attached to this decision identifies where I have determined that material is exempt on this basis.

Section 47C – Deliberative Processes – conditional exemption

Section 47C applies to documents the disclosure of which would reveal deliberative matter – that is, matter in the nature of, or relating to, opinions, advice, recommendations, collections of facts or opinions, or patterns of facts or opinions considered, or consultation or deliberation that has taken place for the purposes of the deliberative processes involved in the functions of the ABC.

Paragraph 6.54 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.'¹

Paragraph 6.57 of the Guidelines states that a deliberative process may include the recording or exchange of opinions, advice, recommendations, a collection of facts or opinions (including the pattern of facts or opinions considered)⁴, and interim decisions or deliberations.

The documents to which I have applied s 47C relate to the exchange of opinion, or the determination of a course of action, by the ABC in connection with the matters that are the subject of your request. The information is not operational or purely factual, but rather reflects steps involved in making decisions within the ABC, including the collation of a mixture of advice and options for consideration.

³ *Grant v Downs* (1976) 135 CLR 674; *Waterford v Commonwealth of Australia* (1987) 163 CLR 54. For examples of the application of these considerations see *Hamden and Department of Human Services* [2013] AICmr 41; *'AF' and Department of Immigration and Citizenship* [2013] AICmr 54 and *Rudd and Civil Aviation Safety Authority* [2013] AICmr 56.

⁴ See *Chapman and Chapman and Minister for Aboriginal and Torres Strait Islander Affairs* [1996] AATA 210.

Where possible, the ABC has not claimed the s 47C exemption over operational or purely factual material, and to the extent there may be non-deliberative material within the conditionally exempt sections, the deliberative and non-deliberative matter is inextricably intermingled and cannot be extricated without disclosing the deliberative material. This principle was approved of and applied in *Dreyfus and Secretary Attorney-General's Department*⁵ where Bennett J found that certain deliberative and non-deliberative matter was inextricably intermingled and unable to be made the subject of editing.

The deliberative processes exemption does not require a specific harm to result from disclosure. Rather, the relevant consideration is whether the documents include content of a specific type, namely deliberative matter. The documents clearly contain deliberative matter and are therefore conditionally exempt from disclosure in relation to that matter under s 47C of the FOI Act.

Public interest test

The FOI Act requires that access must generally be given to a conditionally exempt document unless (in the circumstances) access to the document at the time would, on balance, be contrary to the public interest: section 11A(5).

In considering whether, on balance, it is in the public interest to release the conditionally exempt portions of these documents, I have considered factors for and against disclosure.

Relevant factors in favour of releasing the documents include:

- a) promoting the objects of the FOI Act, particularly in increasing scrutiny, discussion, comment and review of the agency's activities⁶
- b) informing debate on a matter of public importance, namely the way in which the ABC ensures compliance with its policies, and deals with circumstances where policies may not have been complied with.

Relevant factors against releasing the documents include:

- a) could reasonably be expected to prejudice an agency's ability to deliberate on significant governance, management, financial, operational and or personnel matters
- b) could reasonably be expected to prejudice or limit members of ABC management from engaging in robust and frank discussions and taking appropriate action in examining and taking steps in relation to possible breaches of ABC policy.

⁵ (*Freedom of Information*) [2015] AATA 962, [123]

⁶ s 3(2)(b) of the FOI Act

I have weighed these competing factors, and had regard to what has already been made public to inform debate about, and provide accountability at an organisation level for, the matters at the heart of your FOI request. I have concluded that, on balance at this time, the public interest favours non-disclosure of the material which is conditionally exempt under s 47C.

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 6.103 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 parts of the documents over which an exemption is being claimed under section 47E(c) contain information that if released, would have a substantial adverse effect on the ability of the ABC to manage its employees effectively and efficiently. The ABC undertakes its functions in a highly competitive employment market. The information in the documents comprises the names, identifying information and or opinion, and / or human resources related information of ABC staff.

In determining that certain information is conditionally exempt under s 47E(c), I have taken into account the guidance in the Australian Information Commissioner's policy document: *Disclosure of public servants' name and contact details in response to FOI requests* (my underlining):

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.⁷

The Schedule indicates the documents for which I have applied this exemption. If the information was publicly disclosed under FOI, employees could be exposed to public criticism. The FOI Act places no limit on the dissemination of the information once it is released under FOI. In my view ABC staff have an expectation that material of the kind exempted under s 47E would be managed confidentially by the ABC. If the ABC were to release these documents, this would have an adverse impact on staff, and their willingness to participate fully and frankly in future staff management matters. This would undermine the ABC's staff management function.

⁷ <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/public-servants-names-and-contact-details/> at 20 October 2021

The ABC has a duty of care to protect the wellbeing of its staff, and disclosure of identifying details and or human resources matters could result in a loss of trust by employees in the ability of the ABC to protect their privacy and wellbeing. This in turn may limit the ABC's ability to seek cooperation from these employees in the future. I find such effects to be both adverse and substantial on the operations of the ABC.

The public interest

Section 47E is also subject to the public interest test in s 11A(5). I have balanced the competing factors in the same way as I described in relation to s 47C. I have also taken into account the public interest in maintaining the ABC's capacity to effectively manage staff, and protect them from work health safety risks. Where I have decided to exempt the material, this reflects my judgment that disclosure would, on balance, be contrary to the public interest.

Section 47F – Personal Privacy – conditional exemption

The Guidelines at paragraph 6.123 explain that s 47F defines personal information consistently with the *Privacy Act 1988*, as including “*information about an identified individual or an individual who is reasonably identifiable*” which I take to include a person's name, and other identifying information, including opinions.

The Guidelines, at paragraph 6.133, articulate that the personal privacy exemption is designed to prevent the unreasonable invasion of individuals' 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 determining whether disclosure of the documents in question would involve an unreasonable disclosure of personal information I have considered:

- the nature of the information;
- the circumstances in which the information was obtained;
- the likelihood of the information being information that the person concerned would not wish to have disclosed without consent;
- extent to which the information is well known;
- whether the information has any current relevance.

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:

- 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; and
- the availability of the information from publicly accessible sources.

The s 47F redactions in the documents concern personal information of staff or affected third parties which is private. Those individuals hold a reasonable expectation that this information would not be disclosed under FOI. In some cases it comprises only the direct phone numbers of ABC staff, which in my view are incapable of informing members of the public on any matter of relevance.

In my view, the elements of the exemption in s 47F are clearly met.

Public interest

In weighing the public interest, I have had regard to the factors I described in relation to s 47E as well as the public interest in preserving the privacy of individuals. Where I have exempted material under s 47F, this reflects my judgment that disclosure of that information at this time would, on balance, be contrary to the public interest.

Section 47G – unreasonable adverse effect on the business affairs of an organisation

Section 47G(1)(a) conditionally exempts a document to the extent that it would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, where the disclosure of the information would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs.

I have considered paragraph 6.182 of the Guidelines and the authorities cited⁸ and note that s 47G(4) expressly states that s 47G(1)(a) may apply to an undertaking that is carried on by the Commonwealth (see also the Guidelines at paragraph 6.195).

Some of the documents in issue reflect the commercial and business affairs of the ABC, and also of third parties. Where I have applied s 47G, as indicated in the Schedule, this reflects my judgment that there would be an adverse effect from disclosure, such as placing the ABC or that third party at a competitive disadvantage by revealing details of how those businesses carry on their affairs that could be exploited by a competitor to gain a financial or business advantage. It also reflects my judgment that this adverse effect is unreasonable in the circumstances.

Public interest

I weighed the public interest in relation to this information in the same way I did in relation to s 47E, taking into account also the public interest in allowing businesses to operate on a fair and level playing field. Where I applied this exemption, that reflects my judgment that disclosure would, on balance, be contrary to the public interest at this time.

Review rights

This matter is presently before the Information Commissioner. If you disagree with my decision you can continue your IC review as a review of this decision. The ABC will

⁸ *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236 and *Secretary, Department of Employment, Workplace Relations and Small Business v Staff Development and Training Centre Pty Ltd* (2001) 114 FCR 301.

provide a copy of this decision to the OAIIC.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Ali Edwards', with a stylized flourish at the end.

Ali Edwards
Head of Rights Management & FOI Decision Maker
foi.abc@abc.net.au

Schedule 1 – Document Schedule – FOI 202324031

No.	Date	Description	Page/s	Access grant decision	Exemption section/s
1	Undated	Briefing Paper - Licensing of footage to the Voice	3	Refused	47C, 47E, 47G
2	22 August 2023	Uluru Dialogue - Signed licence agreement	2	Part	47F
2A		Uluru Dialogue - Signed Master Segment Sheet	3	Refused	7(2), 47F, 47G
3	6 September 2023	Email chain RE Media request re: ABC footage in You're the Voice campaign video	2	Part	7(2), 47E(c), 47G
3A	9 June 2023	Email references re licensing to the Voice Referendum campaign.docx	1	Refused	7(2)
4	6 September 2023	Email chain RE: Media request re: ABC footage in You're the Voice campaign video	5	Part	22, 47C, 47F
5	6 September 2023	Email chain RE: Media request re: ABC footage in You're the Voice campaign video	4	Part	22, 47C, 47F
6	6 September 2023 (9:12pm)	Email chain fwd Media request re ABC footage You're the Voice campiagn [sic] video	4	Part	22, 47F
7	6 September 2023	Email chain FW: Media request re: ABC footage in You're the Voice campiagn video	3	Part	22, 47F
8	6 September 2023	Email chain RE: Media request re: ABC footage in You're the Voice campiagn video	4	Part	22
9	7 September 2023	Email chain RE: Signed licence agreement - Uluru Dialogue	2	Part	42, 47F, 47G

No.	Date	Description	Page/s	Access grant decision	Exemption section/s
10	7 September 2023	Email chain RE: Signed licence agreement - Uluru Dialogue	1	Part	22, 42
11	7 September 2023	Email chain RE Terms & Conditions	1	Part	47F
12	7 September 2023	Email chain FW: [External] Re: ABC licensing	3	Part	47F, 47G
13	7 September 2023 (1:51 pm)	Email chain RE: Media request re: ABC footage in You're the Voice campaign video	3	Part	22, 47F
14	7 to 8 September 2023	Email chain RE ABC Library Sales - Updated Licence Agreement - Privileged and Confidential	5	Part	22, 42, 47E, 47F
14A	Undated	ABC Library Sales DRAFT Licence Agreement (ABC Legal revised) - CLEAN_1_2295636.DOCX	2	Full	
14B	Undated	ABC Library Sales DRAFT Licence Agreement (ABC Legal revised) - MARK UP_1_2295602.DOCX	3	Part	42
15	7 to 8 September 2023	Email chain RE ABC Library Sales - Updated Licence Agreement - Privileged and Confidential	4	Refused	22
15A	Undated		2	Full	

No.	Date	Description	Page/s	Access grant decision	Exemption section/s
15B	Undated	ABC Library Sales DRAFT Licence Agreement (ABC Legal revised) - CLEAN_1_2295636 ABC Library Sales DRAFT Licence Agreement (ABC Legal revised) - MARK UP_1_2295602	3	Part	42
16	7 to 11 September 2023	Email chain RE: ABC Library Sales - Updated Licence Agreement - Privileged and Confidential	5	Part	22, 42
17	8 to 11 September 2023	Email chain AB CC Fwd: Draft policy - use of ABC IP for political purposes privileged and confidential	1	Part	42, 47F
17A	6 September 2023	UPDATED DRAFT Procedure for unauthorised use of ABC IP_The Voice_7_2292398	4	Refused	42, 47F
18	7 to 12 September 2023	Email chain RE: ABC Library Sales - Updated Licence Agreement - Privileged and Confidential	5	Part	22, 47E
19	11 September 2023	Email chain AB CCRe: Call?	1	Part	42, 47F
20	11 September 2023	Email chain FW: Correspondence from Minister Rowland regarding the sale of ABC archival footage and audio material	5	Part	42, 47F
20A	11 September 2023	Correspondence from Minister Rowland to Mr Anderson	1	Part	47F
21	11 September 2023	Email chain RE: Correspondence from Minister Rowland regarding the sale of	2	Part	22, 47F

No.	Date	Description	Page/s	Access grant decision	Exemption section/s
		ABC archival footage and audio material			
22	11 to 12 September 2023	Email chain Fwd: Correspondence from Minister Rowland regarding the sale of ABC archival footage and audio material	2	Part	22, 42
23	11 to 12 September 2023	Email chain RE: Daily Telegraph – Fri 8 Sept 2023	2	Part	47E, 47F
23A	8 September 2023	Article: daily telegraph_fri 8 sept 2023		Part	22
24	12 September 2023	Email RE Updated Library Sales FAS Licence Agreement and Access Agreement	1	Part	47F
24A	Undated	TEMPLATE ABC Library Sales FAS Licence Agreement AS OF SEPTEMBER 2023.docx	4	Full	
24B	Undated	TEMPLATE ABC Library Sales FAS Access Agreement AS OF SEPTEMBER 2023.docx	4	Full	
25	12 September 2023	Email chain RE: Estimates – Archives q	2	Part	47F
25A	11 September 2023	Confidential Commercial Archival Footage.docx	2	Part	7(2), 47C
26	12 September 2023	Email chain FWD: Letter to Minister Rowland – Archives	1	Full	
26A		Letter to Minister Rowland - Archives	1	Refused	47C

No.	Date	Description	Page/s	Access grant decision	Exemption section/s
27	12 September 2023	Email MD's office Minister Rowland RE: Correspondence from David Anderson, ABC Managing Director	1	Full	
27A		Letter from ABC MD to Min Michelle Rowland	1	Part	47F
28	7 to 13 September 2023	Email chain re: ABC Library Sales - Updated Licence Agreement – Privileged and Confidential	6	Part	22, 42
28A	Undated	Template Licence Agreement Print Electronic Transcript JC.docx	5	Part	47F, 47G
29	14 September 2023	Email chain RE ACF	2	Part	47E, 47F