

14 August 2024

Office of the Australian Information Commissioner

**Attention:** FOIDR

OAIC ref: MR24 / **00294**

ABC ref: ABC FOI 202324-**062**

**Open submissions**

We write in relation to this IC review. This matter concerns an FOI request by 'CR', originally made on 19 January 2024. In broad terms the FOI request relates to a former ABC employee. This matter has garnered media attention, including related court matters.

The IC reviewable decision is a deemed refusal, the effect of which was to refuse access to all documents relevant to the request.

On 23 July 2024, the ABC indicated by letter its intention to make a decision under s 55G of the FOI Act. However, on further consultation internally, the ABC does not consider such a decision to be appropriate. The ABC considers that the correct decision at this time is that the documents are exempt in full.

In accordance with the OAIC's *Direction as to certain procedures to be followed by agencies and ministers in Information Commissioner reviews*, Annexure A1 [3.2(c)] and the s 55(2) direction of 13 March 2024, this letter instead provides:

- the FOI request and any correspondence that modifies its scope – **Annexure 1**
- submissions in support of the access refusal – **Annexure 2**
- confirmation that affected third parties were not consulted under ss 27 or 27A

The ABC is compiling the documents identified within scope of the FOI, and will provide those to shortly (clean, unapplied redactions, applied redactions folders).

The ABC considers all documents to be exempt. It has therefore not informed the affected third party of the IC review as it maintains its position that all documents remain exempt and as such consultation would not have been enlivened under ss 27 or 27A. If the OAIC has a different view regarding a s 54P notification at this time, please let us know and the ABC will action.

The contact for this matter is the ABC FOI team via [abc.foi@abc.net.au](mailto:abc.foi@abc.net.au), ph. 02 8333 3312.

The ABC would be happy to provide further submissions or clarifying information.

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**  
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## Open submissions

### Annexure 2 – submissions in support of exemption decision

#### **Summary**

The ABC contends that all documents relevant to the request are exempt from disclosure at this time pursuant to ss 47E(c) and 47E(d) of the FOI Act. If these exemptions were not available in full, the ABC is of the view that some parts of the documents would also be exempt under ss 47C and or 47F.

#### **Context**

The applicant agreed to a revised scope as on 17 February 2024.

The FOI request, in its final form, sought the following:

1. Letters received by the ABC calling for [employee's] dismissal, [redacted].
2. Complaints regarding [employee] from the Executive Council of Australian Jewry (ECAJ) from [redacted].
3. Complaints regarding [employee] from any other lobby groups from [redacted].
4. Documents that contain the discussion and decision-making process related to the dismissal of [employee] from [redacted].

Information about the context of this FOI request is available from public sources. Proceedings are currently ongoing in the Federal Court of Australia.

#### **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 s 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.

In this content, the disclosure of identifying details, opinions, and human resources matters adversely impacts reasonably held expectations of confidentiality and trust that commonly exist between employees and the ABC. This in turn may limit the ABC's ability to seek cooperation or trust from these employees in the future. I find such effects to be both adverse and substantial on the operations of the ABC. To release information under FOI would be to undermine the ABC's ability to manage and engage with its staff, including past and former employees and managers.

### *Names, position titles and or contact details of 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*:

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.<sup>1</sup>

I consider these comments are relevant to ABC staff. The FOI Act places no limit on the dissemination of the information once it is released under FOI. The staff member/s who are mentioned in these documents have not consented to the public distribution of their identity or involvement in matters described in the documents and did not reasonably expect that this information would be shared through FOI when they engaged in the communications.

For these reasons, I find that a limited part of the document is conditionally exempt under s 47E(c) of the FOI Act.

### **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 (s 11A(5) of the FOI Act). I have considered the factors favouring access in s 11B(3) of the FOI Act and I have not taken into account factors that are irrelevant in s 11B(4).

In balancing the public interest in this case, I have considered the following factors:

#### *Factors in favour of disclosure*

I have considered the following factors in favour of disclosure:

- a) promoting the objects of the Act;
- b) informing debate on a matter, namely opinions and decisions of 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.

#### *Factors against disclosure*

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,

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<sup>1</sup> <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/public-servants-names-and-contact-details/> at 8 August 2024

- 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 would make a limited contribution to those factors that favour disclosure. However, the factors against disclosure are, in my view, 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 or employment, 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 part of the document is exempt under s 47E(c) of the FOI Act.

### **Section 47E(d) – substantial adverse effect on the proper and efficient conduct of the operations of the agency**

Section 47E(d) conditionally exempts a document from disclosure under the FOI Act if disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

The OAIC Guidelines elaborate on the meaning of ‘substantial adverse effect’ at [6.18], as follows:

The term ‘substantial adverse effect’ broadly means ‘an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person’. The word ‘substantial’, in the context of substantial loss or damage, has been interpreted as including ‘loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal’.

What constitutes an agency’s operations is quite broad. It extends to the manner in which the agency in question discharges or performs any of its functions.<sup>2</sup>

In *Rex Patrick and Department of Foreign Affairs and Trade (Freedom of information)* [2024] AICmr 150 the FOI Commissioner considered an FOI request for documents pertaining to oil and gas processing options for the Greater Sunrise oil and gas field: [4]. The Department claimed a range of exemptions, including s 47E(d). It identified, amongst the relevant issues, that its functions include being ‘able to participate effectively in dispute resolution’: [71]. The FOI Commissioner upheld a number of the s 47E(d) claims, including through identifying a public interest against disclosure ‘whereby disclosure could reasonably be expected to...reduce the quantity and quality of the information able to be elicited by the Australian Government in confidential settings such as negotiations and dispute resolution processes’.

### ***The documents are conditionally exempt***

The ABC is presently discharging the function of defending litigation brought by a former employee.

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<sup>2</sup> See the discussion in *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269, [218].

The subject matter of that litigation, and the subject matter of the FOI request, are closely connected. Documents in the scope of the request go to the circumstances of the employment matter and an ongoing dispute being contested in the Court.

There is a reasonable basis for believing that the disclosure of the documents sought could impact on the ABC's conduct of the litigation in a way that may cause a substantial adverse effect to the ABC and its operations. Litigation is a form of dispute resolution subject to court rules and process which can include or involve mediation, conciliation, or negotiation, with confidential elements in order to assist, and for the benefit of, the parties in the dispute. It also includes mechanisms through the courts for the parties to access documents relevant to the resolution of the proceeding. It contains specific procedural fairness processes for the ventilation of relevant issues and the making of findings of fact.

Given the above, the impact of releasing information under FOI before a matter has finalised via a formal legal process would significantly impact the ABC's future decision making in related situations, and impact its ability to freely engage in court proceedings and related processes. This would not be consistent with the objects of the FOI Act.

Release would be to the world at large with no influence over dissemination once release under FOI.

The ABC contends that the public disclosure of documents going to the substance of ongoing matters between the ABC and Ms Lattouf is reasonably likely and probable, to interfere with the performance of the ABC's function of defending litigation brought by the former employee. This is reasonably likely to occur in one of the following ways:

- By placing in the public domain material that would not otherwise form part of the proper court processes, potentially leading to delays or disruption to the orderly conduct of the litigation dispute process, and the misuse or misunderstanding of information through public reporting. The ABC submits this is not in the best interest of the ABC or the former employee, and that the FOI process would undermine important legal process going beyond the intentions of the FOI Act.
- By requiring the ABC to potentially engage in public dialogue or explanation of its decisions outside of the court process to combat misinformation in media stories, detracting from its ability to focus on the litigation and from other responsibilities of the public broadcaster, thereby substantially interfering with the proper and efficient performance of the function as an employer.

### ***Public interest test***

Section 11A(5) of the FOI Act provides that a conditionally exempt document must still be disclosed unless disclosure at that time would, on balance, be contrary to the public interest.

The OAIC Guidelines state:

[6.238] To conclude that, on balance, disclosure of a document would be contrary to the public interest is to conclude that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information. The decision maker must analyse, in each case, where on balance the public interest lies based on the particular facts at the time the decision is made.

Section 11B(3) sets out factors that ought to be taken into account in weighing the public interest, when they are relevant. Section 11B(4) sets out irrelevant factors that must not be taken into account.

***Disclosure would be contrary to the public interest at this time***

Disclosure of documents relating to the matter would to some extent further some of the public interest factors in favour of disclosure in s 11B(3). In particular, it may increase the information available to the public to consider and discuss the ABC's decision-making concerning an individual journalist's engagement with the ABC.

The ABC contends that while there is media interest and public discussion surrounding Ms Lattouf's dismissal, as noted above the matter is an active legal proceeding between the individual and the ABC, and it is not in the public interest to act in a manner that may interfere with that process. It is not akin to matters of greater public interest in disclosure such as government decisions on tax policy, climate change policy, and the like. This is relevant to the weight to be given to the public interest factors in favour of disclosure.

In favour of its s 47E(d) claim, there is a strong public interest in the timely and efficient running of litigation, conducted fairly within the appropriate parameters and rules associated with court process, including those that encourage resolution. Disclosures that could be expected to interfere with the ordinary conduct of litigation and the administration of justice is not in the public interest. This is likely to increase demands on the ABC's resources. This is recognised in the OAIC Guidelines, which lists this as a factor in favour of exemption at [6.233(d)].

In addition, there is a public interest in the ABC being able to conduct its overall operations as efficiently as possible. This supports the ability of the ABC to provide the public with the services it is mandated to perform. It is not in the public interest for the ABC's participation in the litigation process to be frustrated or delayed by disclosures which have the potential to increase the work outside of the formal court processes which exist to ensure the dispute is determined fairly and properly.

The ABC contends that, at this time, the public interest in the proper conduct of litigation and disputes and the proper administration of justice, as well as the efficient discharge of the ABC's functions, substantially outweighs the factors in favour of disclosure, and the documents are exempt under s 47E(d) as a result.

***ABC reserves its position on further exemptions***

The ABC's submission deals with the present circumstances, which include live litigation. Other exemptions may apply, or not apply, depending on the development and path of the litigation. The ABC would wish to make further submissions later in time as this IC review progresses towards finality, in order to take into account any change in circumstances.