

28 January 2022

Nathan

By email: foi+request-8020-33acf94f@righttoknow.org.au

Dear Nathan

DECISION – FOI REQUEST REF. NO. 202021-033 – ABCs Buyout Review

I refer to your email sent Tuesday 26 October 2021 requesting access under the *Freedom of Information Act 1982* (the **FOI Act**) to:

[1] All advice and reports to the FWO made pursuant to clause 115 of the ABC's Enforceable Undertaking with the FWO made in relation to buyouts for ABC employees and [2] any correspondence between the FWO and ABC relating to the ABC's Buyout Review of 2021 or 2022.

A decision on your request was due by Thursday 25 November 2021. On 22 November 2021, we notified you by email that the timeframe for processing your request was extended for the purposes of consultation with third parties. Accordingly, a decision on your request was due on Wednesday 29 December 2021.

On 24 December 2021, we notified you by email that the request concerned a large number of pages and required more time to complete consultation when stakeholders were available. We sought your agreement to an extension under s 15AA of the FOI Act such that the decision would be due on Friday 28 January 2022. To date, we have not received a response from you.

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

I have identified 36 documents that answer the scope of your request. These documents are described in **Schedule 1**, attached.

I have granted access to 36 documents in part.

No documents were found to exist in relation to part one of the request, being “[a]ll advice and reports to the FWO made pursuant to clause 115 of the ABC's Enforceable Undertaking with the FWO made in relation to buyouts for ABC employees...”. Under s 24A of the FOI Act, access is considered to be refused.

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 a third party.

Locating and identifying documents

The search for documents included approaching the People and Culture team of the ABC, who were responsible for coordinating the buyout review. I consider that all reasonable steps were taken to identify and locate all relevant documents that answer your request.

In order to make the processing of your request more manageable, I have excluded documents that are exact duplicates of other documents that have otherwise been included once or more as part of another document. Where practicable, I have also excluded discrete parts of email chains that are included in other, longer email chains. I have made a decision on every document relevant to your request, but only with respect to one copy of each document.

Reasons for decision

s 47(1)(b) – commercially valuable – unconditional exemption

Section 47(1)(b) provides that a document is an exempt document if its disclosure under the FOI Act would disclose information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

To be exempt under s 47(1)(b) a document must satisfy two criteria:

- must contain information that has a commercial value either to an agency or to another person or body; and
- the commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed.

The Guidelines, at paragraph 5.205, provide that it is a question of fact whether information has commercial value, and whether disclosure would destroy or diminish that value, and can include information relating to the profitability or viability of a continuing business operation or commercial activity in which an agency or person is involved.

Information does not necessarily require 'exchange' value in order for it to be commercially valuable. However, the information must have some inherent value to an organisation that can properly be characterised as commercial in character.

The parts of the documents, or the entirety of certain documents as attachments to emails, over which an exemption is being claimed under s 47(1)(b) contain information which it is understood has commercial value to

PricewaterhouseCoopers (**PwC**). PwC is a private firm providing audit, assurance, consulting and tax services to companies and public sector entities. PwC competed for that work, including the buyout review, in a highly competitive market environment.

For the information redacted under s 47, PwC contended that this information is commercially valuable to it, and its value could be diminished if it became available to its competitors. I agree with this contention from both the perspective of PwC as supplier and the ABC as receiving the services the commercially valuable information pertains to. I find that the commercial value in that information would be, or is reasonably be expected to be, destroyed or diminished if it were disclosed.

Those documents contain details of the methodology used by PwC in undertaking the review as part of its role as consultant to the ABC. If made available to competitors, the information would lose its value as a way to gain a market advantage or competitive edge. A competitor could substantially replicate the business model or particular product offering, diminishing the value of PwC's product as embodied in these documents.

I have therefore found that these documents are unconditionally exempt as they contain commercially valuable information. Schedule 1 specifies which documents this applies to.

s 47E(c) – management of personnel - conditional exemption

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.

Paragraph 6.114 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 s 47E(c) contain information which, if released, would have both a substantial and adverse effect following disclosure on the ability of the ABC to manage its employees effectively and efficiently. ABC staff have a reasonable expectation that the specific details of the review process will be kept confidential, in the same way that other entitlements and employment information is kept confidential between employer and employee.

A number of documents contain specific personal information of staff, including summary tables of their entitlements, and example contracts of employment. I consider disclosure of these documents would be inconsistent with staff's expectations of the manner in which employment records are held and maintained

by the ABC (in consideration of contractual arrangements and the *Privacy Act (Cth)* 1988). Failing to manage those documents and confidential information consistent with staff expectations would, in my view, undermine the ABC's ability to effectively manage those staff by eroding the relationship of trust between the ABC and its staff.

The documents over which s 47E(c) is claimed also contain human resources information of a sensitive nature that is critical to the review being carried out. Disclosure of information in these documents would publicly expose how the review process would affect individual staff members. The FOI Act places no limit on the dissemination of the information once it is released under FOI. The ABC has a duty of care to protect the wellbeing of its staff, and disclosure of information in these documents in this context could result in a loss of trust by employees in the ability of the ABC to protect their interests and wellbeing. I find such effects to be both adverse and substantial on the operations of the ABC if there was premature disclosure of incomplete review information.

Further, information detailing aspects of the ABC's approach and strategy concerning the review process, as well as the methods behind the review, is only known to a select number of people. The review is being conducted in conjunction with an external expert and may be subject to refinement as it progresses.

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 (section 11A(5) of the FOI Act).

I have considered the factors favouring access in s 11B(3) of the FOI Act. In balancing the public interest in this case, I have considered the following relevant factors.

Factors in favour of disclosure

I have considered the following factors in favour of disclosure:

- a) promoting the objects of the Act, particularly in increasing scrutiny, discussion, comment and review of the Government's activities (s 3(2)(b) of the FOI Act)
- b) informing debate on a matter of public importance, namely compensation 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, and
- 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 will 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 the obligation of the ABC to look after the wellbeing of its employees, and maintain privacy over their employee entitlements, 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 **Documents 1** in full.

I am satisfied that granting access to the conditionally exempt information in the documents would, under s 47E(c) of the FOI Act, on balance, be contrary to the public interest.

s 47F – Personal Privacy – conditionally exempt

The Guidelines at paragraph 6.120 define personal information 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.

Section 47F of the FOI Act has been applied in circumstances where I have decided disclosure includes information about an identified individual.

The Guidelines, at paragraph 6.138, articulate that 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 determining whether disclosure would involve an unreasonable disclosure of personal information I have had consideration of the following factors:

- 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 an current relevance

The parts of the documents over which a s 47F exemption is being claimed include third party information (including that of ABC staff) which are private and those staff hold a reasonable expectation that this information would not be disclosed under FOI. That information is employment entitlements and conditions which should be kept confidential by ABC as an employer of staff. This information, while relevant to the review process being undertaken, is otherwise of little relevance in promoting public understanding of the ABC’s response to the buyout review. In particular, it is specific to those individuals rather than speaking to the ABC’s overall position in

relation to, and response to, the buyout review. Considering the volume of information which I have decided to release relevant to assisting the public to understand the ABC's general position and approach, I do not consider there to be additional public benefit in disclosing the specific personal information of individual staff members. Accordingly, I find its disclosure would be unreasonable, and this information is conditionally exempt.

I have also exempted identifying information about staff of third party agencies (eg. the Fair Work Ombudsman) on a similar basis, having regard to the nature of the duties performed by those agencies and the desirability of protecting the privacy of officials performing duties of that kind.

I am satisfied that granting access to the conditionally exempt material in the documents would, on balance, be contrary to the public interest.

s 47G – Business Information – conditional exemption

Section 47G conditionally exempts documents where disclosure would disclose information concerning the business, commercial or financial affairs of the ABC or a third party business, where disclosure of the information would, or could reasonably be expected to, unreasonably affect the ABC or that third party business in respect of its lawful business, commercial or financial affairs.

The term 'business affairs' has been interpreted to mean 'the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs' (*Re Mangan and The Treasury* [2005] AATA 898, citing *Cockcroft and Attorney-General's Department and Australian Iron and Steel Pty Ltd* (party joined) (1985) 12 ALD 462).

In this case, I have explained above (pages 2 – 3) why certain information about the services provided by PwC is unconditionally exempt under s 47(1)(b) FOI Act. In the event that s 47(1)(b) did not apply, I would, for the same reasons, have applied s 47G to exempt that information.

In addition, certain information concerning the ABC's commercial operations (particularly in relation to engagement of staff) is revealed by the documents in question. While I have decided to release aspects of this information where it is aggregated or general, certain specific information would, if revealed, provide a substantial insight into particular terms of engagement with staff. The ABC competes with other media services providers for talent in a competitive employment market. Other media companies may derive a significant advantage in seeing the precise terms on which the ABC engages certain categories of staff, in order to improve their own employment terms relative to the ABC and thereby attract (or 'poach') staff. This would have a serious adverse effect on the ABC's conduct of its business, and in my view would be unreasonable in circumstances where most media outlets with whom the ABC competes are not subject to the FOI Act.

The public interest test

Section 11A(5) of the FOI Act requires the ABC to provide access to a conditionally exempt document unless, in the circumstances, access to that document at that time would, on balance, be contrary to the public interest.

I have had regard to the factors set out in s 11B of the FOI Act which favour disclosure, specifically, whether disclosure would promote the objects of the FOI Act, inform debate on a matter of public importance or promote effective oversight of public expenditure. I accept there is some public interest in accountability concerning the ABC's staffing practices, although in this case the value of disclosing the documents in issue must be assessed against the information already available to the public on this issue.

The FOI Act does not list any factors against disclosure, however a non-exhaustive list of factors against disclosure is provided by paragraph 6.22 of the Guidelines. In my view, the public interest in disclosure is outweighed by the following relevant factors against disclosure:

- the public interest in avoiding prejudice to the competitive commercial activities of the ABC, noting it is a publicly funded body
- the public interest in avoiding unfair prejudice to the competitive commercial activities of a third party, namely PwC
- the public interest in upholding reasonably held expectations of privacy and confidentiality, in this case those held by ABC staff regarding the details of their entitlements, conditions and terms of employment
- the public interest in avoiding prejudice to the management function of the ABC, as that prejudice could affect the proper and efficient conduct of ABC operations and ultimately the quality of service that the ABC can provide to the public.

I am satisfied that granting access to the conditionally exempt material in the documents would, on balance, be contrary to the public interest.

Section 22 – Irrelevant information

The FOI Act, and the Guidelines, provide that agencies may provide access to edited versions of documents by deleting irrelevant information that would reasonably be regarded as irrelevant to the request, or where an agency refuses access to an exempt document. I am satisfied that the material deleted under s 22 is irrelevant to the scope of the request or exempt. Accordingly, I have deleted these parts under s 22(1) of the FOI Act and prepared an edited copy for you regarding the relevant wording, where access was granted, as it was reasonably practical to do so.

Review rights

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

Yours sincerely

A handwritten signature in black ink, appearing to read 'P Longstaff', enclosed in a light gray rectangular border.

Pamela Longstaff
Head of Corporate Governance & FOI Decision Maker
foi.abc@abc.net.au

Schedule 1

Document Schedule - FOI 202122-033

No.	Date	Description	Page/s	Access decision	Exemption/s
1	18 October 2021	Email: ABC Band 1 and Buyouts Review – clarification regrading information provided	1-2	Granted in part	s47F – personal privacy s 47E(c) – management of personnel
2	11 October 2021	Email: RE: Information request – ABC Band 1 and Buyouts Review	1-4	Granted in part	s 22(1) – irrelevant material s47F – personal privacy s 47(1)(b) – commercial value
3	11 October 2021	Email: FW: Follow up email – info request	1-2	Granted in part	s47F – personal privacy s 47(1)(b) – commercial value s 47E(c) – management of personnel
4	11 October 2021	Email: RE: Information request – ABC Band 1 and Buyouts Review, with 2 attachments: 1. Exempt document	1-2	Granted in part	s47F – personal privacy

No.	Date	Description	Page/s	Access decision	Exemption/s
		2. Exempt document			s 47(1)(b) – commercial value s47E(c) – management of personnel s 22 – irrelevant material
5	14 September 2021	Email: RE: Fair Work Ombudsman	1-2	Granted in part	s47F – personal privacy
6	5 August 2021	Email: Fair Work Ombudsman – MAT – 13416-N7M7, with 1 attachment: 1. 20210805_FW O Request for further information	1-5	Granted in part	s47F – personal privacy s 47(1)(b) – commercial value s 47G – business affairs
7	21 July 2021	Email: ABC Band 1 and Buyouts Review Update – Copy of presentation slides, with 1 attachment: 1. 2021 – Project Uncle – FWO Meeting – Read Only.pdf	1-12	Granted in part	s47F – personal privacy s 47(1)(b) – commercial value
8	6 July 2021	Email: RE: Update on ABC Review of Buyouts and Band 1 Classifications	1-6	Granted in part	s47F – personal privacy s 47(1)(b) – commercial value

No.	Date	Description	Page/s	Access decision	Exemption/s
9	28 June 2021	Email: RE: Update on ABC Review of Buyouts and Band 1 Classifications, with 2 attachments: 1. Letter to FWO 31 May 2021 2. FAQs – Employee Time Recording – March 2021	1-11	Granted in part	s47F – personal privacy s 47(1)(b) – commercial value
10	12 November 2021	Email: Fw: ABC’s Band 1 and Buyout Review, with 1 attachment: 1. Exempt document	1-3	Granted in part	s 47(1)(b) – commercial value s 47F – personal privacy s 47G – business affairs s 22 – irrelevant material
11	4 January 2021	Email: RE: Update on ABC Review into Buyouts and Band 1 Classifications	1-2	Granted in part	s47F – personal privacy
12	23 December 2020	Email: Update on ABC Review into Buyouts and Band 1 Classifications, with 1 attachment: 1. Letter to FWO 23 Dec 2020	1-3	Granted in part	s 47(1)(b) – commercial value s47F – personal privacy

No.	Date	Description	Page/s	Access decision	Exemption/s
13	11 August 2020	Email: RE: correspondence from Rebekah Donaldson	1-2	Granted in part	s47F – personal privacy
14	11 August 2020	Email: correspondence from Rebekah Donaldson, with 2 attachments: <ul style="list-style-type: none"> 1. Letter to FWO re buyout and band 1 proposal – 7 August 2020 2. Exempt document 	1-3	Granted in part	s 47(1)(b) – commercial value s47E(c) – management of personnel s 47G – business affairs s47F – personal privacy s 22 – irrelevant material
15	1 September 2021	Email: RE: Confidential with 2 attachments: <ul style="list-style-type: none"> 1. ABC Letter to FWO – 31 August 2021 (including annexures) 2. ABC Annexures 	1-20	Granted in part	s 47(1)(b) – commercial value s47E(c) – management of personnel s47F – personal privacy s47G – business affairs
16	31 August 2021	Email: Confidential – ABC Response to FWO request for further information, with 2 attachments:	1-22	Granted in part	s 47(1)(b) – commercial value s47E(c) – management of personnel

No.	Date	Description	Page/s	Access decision	Exemption/s
		<ol style="list-style-type: none"> 1. ABC Letter to FWO – 31 August 2021 2. ABC Annexures (as above) 			<p>s47F – personal privacy</p> <p>s47G – business affairs</p>
17	30 August 2021	Email: RE: Update on the ABC Review into Buyouts and Band 1 Classifications August 2021	1-8	Granted in part	s47F – personal privacy
18	1 June 2021	Email: RE: Update on the ABC Review into Buyouts and Band 1 Classifications	1-2	Granted in part	s47F – personal privacy
19	31 May 2021	<p>Email: Update on the ABC Review into Buyouts and Band 1 Classifications, with 2 attachments:</p> <ol style="list-style-type: none"> 1. Letter to FWO 31 May 2021 (incl. annexures) 2. FAQs – Employee Time Recording – March 2021 	1 - 9	Granted in part	<p>s 47(1)(b) – commercial value</p> <p>s47F – personal privacy</p>
20	10 May 2021	Email: RE: Fair Work Ombudsman – MAT-13416-N7M7	1-2	Granted in part	s47F – personal privacy
21	19 April 2021	Email: RE: Fair Work Ombudsman – MAT-13416-N7M7	1-2	Granted in part	s47F – personal privacy

No.	Date	Description	Page/s	Access decision	Exemption/s
22	16 April 2021	Email: Fair Work Ombudsman – MAT-13416-N7M7, with 1 attachment: 1. FWO to ABC 16 April 2021	1-4	Granted in part	s47F – personal privacy s 47(1)(b) – commercial value
23	7 January 2021	Email: Query regarding recent ABC correspondence, with 2 attachments: 1. Exempt document 2. Letter to FWO re buyout and band 1 proposal	1-4	Granted in part	s47E(c) – management of personnel s47F – personal privacy s 47(1)(b) – commercial value s 22 – irrelevant material
24	11 January 2021	Email: RE: Query regarding recent ABC correspondence, with 2 attachments: 1. ABC review into Buyouts and Band 1 classifications – 2. FAQs – ABC Review into buyouts and Band 1 classifications	1-10	Granted in part	s47F – personal privacy
25	3 November 2021	Email: RE: ABC Band 1 and Buyouts Review – Employee comms sent 15 October 2021	1-6	Granted in part	s47F – personal privacy

No.	Date	Description	Page/s	Access decision	Exemption/s
26	3 November 2021	Email: RE: ABC Band 1 and Buyouts Review – Employee comms sent 15 October 2021, with 1 attachment: 1. Exempt document	1-6	Granted in part	s47E(c) – management of personnel s47F – personal privacy s 22 – irrelevant material
27	29 October 2021	Email: RE: ABC Band 1 and Buyouts Review – market allowance agreement	1-4	Granted in part	s47F – personal privacy s 47G – business affairs
28	<i>duplicate</i>	<i>no document</i>			
29	5 October 2021	Email: Follow up email – info request	1	Granted in part	s47F – personal privacy s 47E(c) – management of personnel
30	5 October 2021	Email: Information request – ABC Band 1 and Buyouts Review, with 2 attachments: 1. Exempt document 2. Exempt document	1-2	Granted in part	s47E(c) – management of personnel s47F – personal privacy s 47(1)(b) – commercial value s 47G – business affairs s 22 - irrelevant material

No.	Date	Description	Page/s	Access decision	Exemption/s
31	4 October 2021	Email: RE: Band 1 and Buyouts Review – Outcome letters and Media Statement	1-2	Granted in part	s47F – personal privacy
32	1 October 2021	Email: RE: Fair Work Ombudsman	1-7	Granted in part	s47F – personal privacy
33	30 September 2021	<p>Email: Band 1 and Buyouts Review – Outcome letters and Media Statement, with 8 attachments:</p> <ol style="list-style-type: none"> 1. AFQs – Back payments 2. FAQs – Band 1 review outcome 3. FAQs – Buyout review outcome 4. FAQs – Meal Allowance Compensation review outcome 5. Band 1 – outcome letters – not underpaid 6. Buyout – outcome letter – not overpaid 7. Buyout – outcome letter – underpaid 8. Band 1 – outcome letter – underpaid 	1-39	Granted in part	s47F – personal privacy

No.	Date	Description	Page/s	Access decision	Exemption/s
34	15 July 2020	Email: RE: correspondence from Rebekah Donaldson	1-2	Granted in part	s47F – personal privacy
35	14 January 2021	Email: RE: Query regarding recent ABC correspondence	1-5	Granted in part	s 47(1)(b) – commercial value s47F – personal privacy
36	15 October 2021	Email: RE ABC’s Band 1 and Buyout Review	1-3	Granted in part	s 47(1)(b) – commercial value s47F – personal privacy
37	15 October 2021	Email: RE ABC’s Band 1 and Buyout Review, with 1 attachment: 1. Exempt document	1-11	Granted in part	s 47(1)(b) – commercial value s 47G(1)(a) – business affairs s47F – personal privacy s 22 – irrelevant material

There are 36 documents labelled 1-27, and 29-37. There is no document 28.

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

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 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