

30 June 2021

Justin Law

E) j.law@fwca.org.au

Dear Mr Law

FOI REQUEST – REFERENCE NUMBER 202021-050

I refer to your request dated 31 May 2021 for access to documents under the *Freedom of Information Act 1982* (FOI Act). Your request was for:

[Documents containing:]

All correspondence between Michael Slezak and academics Prof David Lindenmayer and Dr Chris Taylor for the period between 31 May 2020 and 31 May 2021, including:

- 1. All email correspondence between Michael Slezak's ABC email address and Prof David Lindenmayer*
- 2. All email correspondence between Michael Slezak's ABC email address and Dr Chris Taylor*
- 3. All email correspondence between Michael Slezak's ABC email address and Leslie White*
- 4. All SMS messages between Michael Slezak and Prof David Lindenmayer*
- 5. All SMS messages between Michael Slezak and Dr Chris Taylor*
- 6. All SMS messages between Michael Slezak and Leslie White*
- 7. All Twitter messages between Michael Slezak and Prof David Lindenmayer*
- 8. All Twitter messages between Michael Slezak and Dr Chris Taylor*
- 9. All Twitter messages between Michael Slezak and Leslie White*
- 10. All Facebook Messenger correspondence between Michael Slezak and Prof David Lindenmayer*
- 11. All Facebook Messenger correspondence between Michael Slezak and Dr Chris Taylor*
- 12. All Facebook Messenger correspondence between Michael Slezak and Leslie White*
- 13. All WhatsApp Chat correspondence between Michael Slezak and Prof David Lindenmayer*

14. *All WhatsApp Chat correspondence between Michael Slezak and Dr Chris Taylor*
15. *All WhatsApp Chat correspondence between Michael Slezak and Leslie White*
16. *Any other correspondence between Michael Slezak and Prof David Lindenmayer and/or Dr Chris Taylor and/or Leslie White.*

Authorisation

I am authorised by the Managing Director under section 23 of the FOI Act to make decisions in respect of requests made under that Act.

Material taken into account

In making my decision, I have had regard to:

- the terms of your request;
- the content of the documents identified as relevant to your request;
- the FOI Act;
- guidelines issued by the Office of the Australian Information Commissioner (**OAIC**) under section 93A of the FOI Act (**Guidelines**).

Decision

The ABC has conducted searches for the requested information and received emails, SMS, and WhatsApp Chat correspondence within the date you specified.

Access is refused in full to the requested documents.

My reasons for refusal of access are provided below.

Reasons for decision

The documents within the scope of your request relate to the ABC national science, technology and environment reporter, Michael Slezak.

I have not released any documents in response to your FOI request because the ABC is exempt from the FOI Act in relation to its program material. As further explained below, the exemption applies not only to program material itself (for example, a recording of a program) but also to documents relating to program material; *Australian Broadcasting Corporation v The University of Technology, Sydney* [2006] FCA 964.

I find that the correspondence relates to program material, specifically ABC news articles, and that the ABC is therefore exempt from the operation of the FOI Act in relation to the matter.

Program material

'Program material' is not defined in the FOI Act, however it has been the subject of judicial consideration.

The Guidelines point to *Herald and Weekly Times Pty Ltd and Australian Broadcasting Corporation* [2012] AICmr 7 (*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 section 7(2) exclusion in *Australian Broadcasting Corporation v The University of Technology, Sydney* [2006] FCA 964 (*ABC v UTS*) and held that the exemption also applies to 'any document that relates to program material' provided the relationship is not 'indirect, remote or tenuous' (*ABC and HWT*).

The documents you have requested are directly related to program material as they concern the production of articles on ABC News. These documents either qualify as program material as they were created for the purpose of production and publication of an article, whether or not they were incorporated into the completed article: (*ABC and HWT*) or the documents satisfy the requirements of documents with a reasonably direct relationship to program material (*ABC v UTS*). Specifically, the documents are emails, text messages and WhatsApp correspondence created as part of the research process involved in the articles' production.

As the documents satisfy the criteria of qualifying as 'program material' or relating to 'program material', they fall under section 7(2) of the FOI Act. Therefore, the ABC is exempt from the operation of the FOI Act in relation to the document, and on that basis, the ABC is not required to take any further action.

Review rights

You have rights in relation to this decision. Those rights are set out at **Annexure A**.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'P Longstaff', written in a cursive style.

Pamela Longstaff
Company Secretary and Head of Corporate Governance
foi.abc@abc.net.au

Annexure A – Review rights

If you are dissatisfied with this decision you can apply for Internal 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 make an application for 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 completely fresh decision on the merits of the case.

You must apply in writing for a review of the decision within 30 days of receipt of this letter. No particular form is required to apply for review, although it would help if you set out the reasons for review in your application.

Application for a review of the decision should be addressed to:

The FOI Coordinator
ABC
Level 13
700 Harris Street
ULTIMO NSW 2007

Or sent to: foi.abc@abc.net.au

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)
- include a copy of the decision for which a review sought.

You should be aware that 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>

Application for a review of the decision by the Information Commissioner should be addressed to:

Director of FOI Dispute Resolution
GPO Box 5218
Sydney NSW 2001

Or sent to: enquiries@oaic.gov.au

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 should be made in writing to the following address:

Office of the Australian Information Commissioner

GPO Box 5218

Sydney NSW 2001