



D23/14551

9 March 2023

Senator Sarah Henderson
Suite SG.61
Parliament House

By return email

Dear Senator Henderson

ABC – Public Interest Immunity claim – Code of conduct determination

You have sought advice about a further response from the Managing Director of the Australian Broadcasting Corporation (ABC), David Anderson, in relation to matters you raised in an estimates hearing of the Environment and Communications Legislation Committee on 29 November 2022. Mr Anderson's evidence to the committee was that there 'was a breach of the ABC's code of conduct when it comes to personal use of social media' [by Ms Milligan]. In response, you asked for 'the determination that the ABC made in relation to this matter, including all relevant correspondence, e-mails, briefing documents and messages.'

My previous advice dealt with the two main grounds on which Mr Anderson has made public interest claims, privacy and damage to commercial interests. I noted that the claims amounted to an argument that a generic category of documents identified as 'employee records' should not be disclosed, rather than addressing the apprehended harm to the public interest in providing the particular documents sought. The reason to identify that difference is because the Senate does not accept an approach based on the categorisation of documents but seeks to identify the public interest on a case-by-case basis.

The first claim argued that 'disclosure of the requested documents would clearly identify an individual'. It is difficult to see how an appeal to privacy could be made on this basis, given that Mr Anderson had already identified in evidence that Ms Milligan had been determined to have breached the relevant code of conduct. That perhaps sums up the disjuncture between the initial PII claims and the information sought. The contention is not whether information should be provided or not. It is about what further information ought to be provided (on top of the information volunteered by Mr Anderson at the hearing) to enable the committee to examine the particular matter in question.

In any case, I suggested that the committee might require additional information to determine the claims. The committee subsequently sought further information, which has led to this further response. As requested by the committee, Mr Anderson has elaborated on the ABC's claims, particularly in relation to the ABC's motivations in protecting its relationship with its employees. In

relation to the committee's query about the possibility of providing documents with redactions, the response argues that the redaction of documents would not be effective in 'deidentifying the private and confidential material' they contain. Whether this additional information justifies the documents being withheld remains a question for the committee.

In your request for advice you identified concerns you have with the ABC's further response. These include your assessment:

- that the information sought is broader than private information ordinarily contained in 'employment records'
- that the request involves a matter of acute public interest, given that it involves Ms Milligan receiving a substantial benefit
- that providing information in estimates that Ms Milligan breached the ABC's social media code is inconsistent with the claim that your questions concern Ms Milligan's private employment records and
- that the ABC's position here is inconsistent with the ABC's decision to publish details about breaches of editorial or social media codes by other ABC staff, under which circumstances concerns about the privacy of 'employment records' were not raised.

No doubt you will bring those assessments to the committee in its consideration of the matter.

Mr Anderson has noted two elements of my advice: that 'there are sound reasons for agencies appearing at estimates to be circumspect about the level of detail they provide in respect of code of conduct investigations and findings involving their employees, in order to protect their privacy', and that 'it is entirely a matter for the committee how to assess the material put before it here'. In many ways, these two statements define the committee's task here.

As you know, it is not a matter for me to advise on how the committee should balance the competing interests involved. It is for the committee to determine whether to accept the PII claim as elaborated by the further response or to press for additional information. I expect that all members of the committee will bring their judgement and experience to that matter.

Yours sincerely,

(Richard Pye)