



Tuesday 28 February 2023

Senator Karen Grogan
Chair of Environment and Communications Legislation Committee
Senate
Parliament House
Canberra NSW 2600
c/- senator.grogan@aph.gov.au

Dear Senator Grogan,

2022-23 BUDGET ESTIMATES: ABC PUBLIC INTEREST IMMUNITY CLAIM RE QUESTION ON NOTICE SQ22-000798

I refer to the above matter and to your letter of 10 February 2023.

By your letter, the Senate Environment and Communications Legislation Committee (the committee) seeks the following further information in respect of the public interest immunity claim made in the ABC's letter of 17 January 2023:

1. Elaboration of the specific harm that would arise from disclosure of the documents sought under question on notice SQ22-000798; and
2. Whether the ABC can provide the documents sought, with appropriate redactions if necessary.

SQ22-000798 specifically seeks the disclosure of an individual's employee records in relation to a code of conduct matter.

In response to the request by the Committee, the ABC has grouped this submission by reference to the two points above, as well as relevant categories. There is, however, clear cross-over between the matters raised. On that basis, we respectfully suggest to the committee that it is the totality of the response which should be considered, as opposed to each element in isolation.

To point 1 above, the ABC makes the following submissions.

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Privacy and confidentiality

We note the advice to the committee from the Clerk of the Senate, 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 “...it is entirely a matter for the committee how to assess the material put before it here.”

The ABC treats employee records, which include those relevant to the performance or conduct of an employee, confidentially and therefore limits the disclosure of information about employees at an individual level (aside from the information that is required to be published for Key Management Personnel and Board members in the ABC's annual report).

We understand this to be consistent with the Commonwealth Fair Work Ombudsman, who has published a best practice guide on workplace privacy for use by employers. That guide specifically notes the importance of protecting employee records.

The ABC endeavours to be a best practice employer in as many areas as possible. Factors beyond financial elements of employment that reflect community expectations – such as employee welfare, privacy and confidentiality, diversity and inclusion – differentiate the ABC in the employment market, in turn assisting it to retain (and obtain) a high performing workforce.

As set out in the ABC's letter of 17 January 2023, the documents sought include employee personal information and confidential and private information about personnel management. Accordingly, disclosure of the documents would disclose personal and confidential information about an individual and their employment.

The disclosure of information about employees, such as their personal information and other details about their employment, that they would not reasonably expect to be made available to other parties, would have a substantial adverse effect on the ABC's ability to manage, and also attract, personnel.

Employees are entitled to expect that, within the employment relationship, an employer will not disclose documents that will interfere with their privacy or undermine their expectations of confidence and trust in their employer.

Disclosure could also inhibit the candour of managers and staff in the course of internal processes and may dissuade individuals from full and frank participation in workplace investigations if they believe their participation will be the subject of disclosure to third parties.

It is not in the public interest for the disclosure of private and confidential documents to damage the employment relationships between agency employers and their employees. Entities, including the ABC, must be able to effectively and efficiently

manage their employees with the trust and confidence required of the employment relationship.

In this instance, an aspect of the harm is the damage to the ability of the ABC to manage its personnel effectively and in accordance with the reasonable expectations of its employees regarding privacy, trust and confidence. This harm could also extend more broadly in respect of other Commonwealth entities.

Further, while this particular request relates to one employee, a decision to allow access to employee records of this kind is likely to embolden requests for employment records for past, current and future employees of the ABC, likely to raise identical concerns as those raised here.

Work health and safety

Under the *Work Health and Safety Act 2011* (Cth), the ABC has a primary duty to ensure, so far as reasonably practicable, the health and safety of workers that it engages when they are at work. This includes managing risks posed by hazards in the workplace, including psychosocial hazards.

The psychosocial hazard of third party abuse, threats and aggression towards workers is recognised by both Comcare (the Commonwealth WHS regulator) and Safe Work Australia (the WHS national policy body). Harmful behaviours that can result in a psychosocial hazard include aggression and harassment from external sources such as members of the public.

As set out in our earlier correspondence, ABC employees already experience abuse and harassment on a regular basis which poses a psychosocial hazard. The ABC takes steps to mitigate this risk and support staff in this area.

Disclosure of the documents could exacerbate what is unacceptable harassment or abuse (including online) and is likely to interfere with the ABC's obligations to mitigate the risk of psychosocial hazards. This specific harm could arise from disclosure of the documents. In our view, it is not in the public interest to require an employer to disclose documents that may undermine its work on health and safety risk management and may directly harm its employee(s) and contribute to harassment or abuse.

Commercial interests

The ABC does not assert that the documents sought contain commercially sensitive information. Rather, the ABC submits that the disclosure of the documents may have an adverse impact on the ABC's commercial interests.

As alluded to above, the ABC competes with the private sector for employees, and it is critical for the ABC to differentiate itself. That includes seeking to be a best practice employer in multiple areas, including in relation to employee welfare,

privacy, diversity and inclusion. In this instance, the release of documents may create a market expectation that any employee record can be requested and obtained, regardless of the circumstances, and made public.

The disclosure of personal and confidential employee information like that contained in the documents is likely to dissuade individuals from joining the ABC and discourage current employees from remaining with the ABC.

This will undermine the ABC's ability to compete for staff in an already competitive market, and in turn inhibit its ability to fulfil its charter commitments at a high level, which is not in the public interest.

Redacting the documents

To point 2 above, the ABC makes the following submissions.

As the subject of the question on notice is already in the public domain, redacting identifying information from the documents would not be effective in deidentifying the private and confidential information contained in the documents. Further, the documents are fundamentally about the management of personnel and cannot be meaningfully redacted to protect against the specific harms outlined above. Accordingly, the ABC does not believe it is possible to redact the documents in a way that would enable them to be disclosed.

Finally, although the documents might be of interest to members of the public, the ABC contends that disclosure of the documents is not in the public interest, especially in circumstances where the outcome of the code of conduct matter is already on the public record. Disclosure of the documents would not further elucidate the issue but may expose the individual to harm which the ABC as an employer has a duty to protect against.

We hope this is of assistance to the committee and thank you again for the opportunity to outline the concerns of the ABC.

Yours sincerely

David Anderson
Managing Director