

9 May 2022

Mr Paul Swain

By email: foi+request-8707-6b01abf3@righttoknow.org.au

Dear Mr Swain

DECISION – FOI REQUEST REF. NO. 202122-063

I refer to your email sent Thursday 21 April 2022 seeking access under the *Freedom of Information Act 1982* (the **FOI Act**) to:

...the promo ... [you heard], on Radio National, today [21 April 2022], just before the 6 pm news in Sydney.

You indicated that the promo:

featured Andy Park, Norman Swan and at least one other person.

A decision on your request is due by Monday **23 May 2022**.

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

The ABC as an agency is exempt from the operation of the FOI Act in relation to its program material, under s 7(2), Schedule 2, Part II also refers. The radio promo (**document**) that answers your request is program material and is not subject to FOI.

Material taken into account

In making my decision I have considered:

- the scope of your request
- the content of the document requested
- the FOI Act
- the guidelines issued by the Office of the Australian Information Commissioner under section 93A of the FOI Act (**the Guidelines**)
- relevant case law

Reasons for decision

Program Material

Section 7(2) of the FOI Act provides that:

“The persons, bodies and Departments specified in Part II of Schedule 2 are exempt from the operation of this Act in relation to the documents referred to in that Schedule in relation to them.”

The ABC is listed in Part II of Schedule 2 of the FOI Act “...in relation to its program material and datacasting content”. Although 'program material' is not defined in the FOI Act, it has been the subject of judicial consideration.

The Guidelines¹ point to *Australian Broadcasting Corporation and Herald and Weekly Times Pty Limited (ABC and HWT)* where the Administrative Appeals Tribunal “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” (my underlining).

Accordingly, the promo is exempt from the operation of the FOI Act as a document that formed “part of [a] program, any transmission broadcast” and was “created for the purpose of creating [a] program”.

The promo was broadcast on ABC’s Radio National (**RN**). It is a 30 second promo that promotes RN as a source of information for its audience. The broadcast of the promo on RN satisfies the requirement that it is ‘program material’. It is directly related to, and part of, ABC programming. It has a clear direct relationship with RN, the station that was both playing the promo and promoting its programming via the promo.

When it comes to defining documents ‘in relation’ program material, the Guidelines adopt the ‘reasonably direct relationship’ test from ABC and HWT, which is to be contrasted with a connection that is ‘indirect, remote or tenuous’. In my view, there is nothing about audio that is broadcast on air, including a promo, that is ‘indirect, remote or tenuous’ in its connection with program material. Quite the opposite, it has an indisputable direct relationship to RN program material.

The ABC is exempt from the operation of the FOI Act in relation to its ‘program material’ and is not required to take any further action under the FOI Act in relation to your request for a promo played on RN (the document).

The ABC’s FOI Advisor provided you² with the direct contact details of the RN team. Any contact with them regarding the possibility for administrative release of a promo outside of the FOI Act, or a complaint you may wish to make about the promo, has no bearing on a formal request under FOI for an exempt document.

Review rights

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

¹ The Guidelines issued by the Australian Information Commissioner, refer para 2.16.

² Refer emails to you of 14 and 20 April 2022

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Ali Edwards'.

Ali Edwards
Head of Rights Management & FOI Decision Maker
foi.abc@abc.net.au

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