

14 June 2022

CONFIDENTIAL

Mr Paul Swain

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

Dear Mr Swain

REVIEW OF FOI DECISION – REFERENCE NO. 202122-063

I refer to your correspondence dated 12 May 2022 requesting an internal review of the decision in respect to your information request, Reference No. 202122-063.

Background

Your information request dated 21 April 2022 seeks access to:

- “...the promo... on Radio National... just before the 6 pm news in Sydney.”

A decision in relation to your information request was made by the ABC’s Head of Rights Management & FOI Decision Maker, Ali Edwards, who has authority to make decisions in respect of requests made under the *Freedom of Information Act 1982* (Cth) (FOI Act).

In correspondence to you dated 9 May 2022, Ms Edwards identified the document within the scope of your request (**Document**) and determined that the ABC was not required to release the Document because it is program material, and the ABC is exempt from the operation of the FOI Act in relation to program material (**Original Decision**).

In your email dated 12 May 2022, you requested an internal review of the Decision.

I am authorised by the Managing Director under s23 of the FOI Act to make decisions on requests for internal review.

I have reviewed your request in accordance with s54C of the FOI Act.

In undertaking my review, I have reviewed the Document, relevant sections of the FOI Act, relevant case law and the FOI Guidelines published by the Office of the Australian Information Commissioner ([FOI Guidelines](#)).

Decision

Having reviewed your request, I have decided to affirm the Original Decision that the ABC is not required to take any further action in relation to the Document because the ABC is exempt from the operation of the FOI Act in relation to program material.

My reasons are set out in further detail below.

Reasons

My starting point is the general right of access set out in s11(1) of the FOI Act that:

- (1) *Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to:*
- (a) *a document of an agency, other than an exempt document...*

I have then considered whether the FOI Act applies to the Document. Section 7(2) states:

- (2) *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.*

Division 1 of Part II of Schedule 2 states:

Part II – Agencies exempt in respect of particular documents

Division 1

...

Australian Broadcasting Corporation, in relation to its program material and its datacasting content

I do not consider your request to be in relation to “datacasting content” and have not considered this particular exemption further. However, I do consider the program material exemption relevant to your request.

The meaning of “program material” has been considered by courts and tribunals and it is well accepted that the term is broadly defined.

In *Australian Broadcasting Corporation and Herald and Weekly Times Pty Limited and Anor [2012] AATA 914*, the Administrative Appeals Tribunal interpreted “program material” to mean:

the 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 completed program...it would include a document created after a program is broadcast. Such documents might include transcripts of radio programs, podcasts, internet pages and documents produced by the ABC or incorporated in its records directly concerning the substantive content of the broadcast program. (at [57])

The Document you are seeking to access was a broadcast of the program of Radio National. I am of the view that the Document is program material and thus s7(2) of the FOI is applicable. That is, 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 in relation to the Document.

Response to your specific contentions

In your email of 12 May 2022, you referred to paragraph 2.16 of the FOI Guidelines and state:

I believe that this shows that the exemption is not absolute and should not be applied just because something has been broadcast. I therefore believe that it is unreasonable that the ABC should be able to advertise its services, and make claims about those services, but then make it unreasonably difficult for listeners to hold it to account for the claims that it has made by claiming that the promotional material is programme material and therefore exempt.

I note your argument that the ABC should release the Document to you because you believe that program material exemption is not absolute, and you feel it is unreasonable for the ABC to cite the program material exemption in refusing your information request. However, the program material exemption has been well considered by the courts and tribunals and the broadcast of material clearly brings that material within the meaning of program material. It is not unreasonable for the ABC to apply the FOI Act as it is intended in circumstances where it is exempt from the operation of the FOI Act.

I note also that any approach directly to Radio National in relation to the promo or any complaint about the promo sits outside of the FOI process and it is not appropriate for me to consider such matters further in this internal review.

Right of review

If you are dissatisfied with this decision, you can apply for review by the Australian Information Commissioner, whose contact details are:

Office of the Australian Information Commissioner
GPO Box 5218 Sydney NSW 2001
Tel: 1300 363 992 Fax 02 9284 9666
Email: enquiries@oaic.gov.au
Website: www.oaic.gov.au

In making your application to the Information Commissioner, you need to provide an address for notices to be sent (this can be an email address) and a copy of this decision. You may also wish to inform the Information Commissioner of the reasons for seeking review.

Yours sincerely



Dharma Chandran
Chief People Officer
FOI Internal Reviewer, authorised pursuant to s 23 FOI Act
Australian Broadcasting Corporation