

17 March 2023

Mr Rex Banner

By email: foi+request-9797-a2f4ca8f@righttoknow.org.au

Dear Mr Banner

DECISION – FOI REQUEST REF. NO. 202223-038 – PIA 20144(1)

I refer to your email sent Monday 16 January 2023 seeking access under the *Freedom of Information Act 1982* (the **FOI Act**) to:

[a copy of] PIA Reference Number: 20144 (1)
Project Name: Personalised Audience Experience

As notified to you by email on 13 February 2023, the ABC was required to consult with third parties, such that a decision on your request is due by Friday **17 March 2023**, under s 15(6) of the FOI Act.

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

I have identified 2 documents that answer the scope of your request - **Documents 1 and 1A**. These documents are described in **Schedule 1**, attached.

I have refused access to **Documents 1 and 1A** (together **the documents**).

Material taken into account

In making my decision I have considered:

- the scope of your request
- the content of the documents requested
- the FOI Act
- the guidelines issued by the Office of the Australian Information Commissioner under section 93A of the FOI Act (**the Guidelines**)
- responses to consultation undertaken with a third party.

Locating and identifying documents

The search for documents included approaching ABC Legal.

I consider all reasonable steps were taken to identify and locate relevant documents that answer your request. I am satisfied that the searches conducted were thorough and all reasonable steps have been taken to locate the documents relevant to your request. I find that the ABC is not in possession of further documents.

Background

On 21 December 2022, you requested Privacy Impact Assessment 20144(2) which pertains to the ABC's iView platform. The ABC provided access to a copy of this document on 21 December 2022, outside of FOI, as it was published in full on our website.

Between 23 December 2022 and 27 January 2023, the ABC confirmed by email that you had been given access to the final version of PIA 20144(2) and resupplied it to you as a PDF on 27 January 2023.

PIA 20144(1) relates to PIA 20144(2).

Reasons for decision

Third Party Consultation

The ABC consulted with the third party, an external law firm, to seek their views on the release of the documents they had authored under freedom of information (FOI).

I have taken the third party's submissions into consideration, and deal with them below. Two possible exemptions were provided, in the alternative to cover the whole of the documents. I have not accepted the submission that s 47(1)(a) applies to the documents, but I am of the view that s 47(1)(b) of the FOI Act applies.

s 47 – Commercially valuable information – unconditionally exempt

Section 47(1)(b) provides that a document is an exempt document if its disclosure under the FOI Act would disclose information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

To be exempt under s 47(1)(b), a document must satisfy two criteria:

- it must contain information that has a commercial value either to an agency or to another person or body; and
- the commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed.

The Guidelines, at paragraph 5.205, provide that it is a question of fact whether information has commercial value, and whether disclosure would destroy or diminish that value, and can include information relating to the profitability or viability of a continuing business operation or commercial activity in which an agency or person is involved.

Information does not necessarily require 'exchange' value for it to be commercially valuable. However, the information must have some inherent value to an organisation that can properly be characterised as commercial in character.

I am of the view that both documents contain information which has commercial value to the ABC and the third party. The ABC is in the process of implementing elements of the PIA over a multi-year timeframe which requires flexibility. Releasing information at this stage could reasonably be expected to destroy or diminish the

value of the information to the ABC and the third party who was engaged to prepare the advice and information to facilitate stages of the PIA.

If this information became freely available to competitors of the ABC or the third party, via the FOI process, the commercial value in that information would be, or would reasonably be expected to be, destroyed or diminished.

I accept the third party's submission that the documents would lose their inherent value to them if they were released under FOI. Reasons include that the documents include methodologies that are integral to the business of the third party, the information was exchanged with an expectation of confidence, and their value in the market as experts in privacy matters would likely be diminished if their work was released publicly without their consent.

Providing the documents under FOI could reasonably be expected to undermine the third party's ability to provide this service competitively to other parties in the future, and may diminish or destroy the value of the documents at issue to the ABC and the third party.

I have therefore found the whole of **Documents 1 and 1A** are unconditionally exempt under s 47(1)(b) of the FOI Act, as the information is commercially valuable.

Other considerations

As I have found the information to be commercially valuable, I have not considered an alternate conditional exemption claim of s 47G(1)(a), although in my view it would have applied, with the public interest test being against disclosure of the information on balance.

In addition, there is an expectation of confidence between lawyers and their clients. In this case, the ABC was the client, and the documents contain legal advice. The ABC has not waived any expectations of confidence or legal privilege over the advice in the documents.

In my view, the ABC has been transparent with its audience by voluntarily publishing the related part of the PIA, in full, of which you have a copy (PIA 20144(2)). Providing the second part of the PIA is consistent with the objects of the FOI Act, with the first part being exempt information.

Review rights

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

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

Schedule 1 – Document Schedule – FOI 202223-038

No.	Date	Description	Page/s	Access decision	Exemption section/s
1	April 2020	ABC Privacy Impact Assessment – Personalised Audience Experience	21	Refused	47 – commercially valuable
1A		Annexure to Document 1	30		

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: FOI coordinator
 ABC Legal
 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