

2 September 2024

Mr Daniel M

By email: foi+request-11568-a4120184@righttoknow.org.au

Dear Daniel

DECISION – REF. NO ABC FOI 202324-090

I refer to your email sent Wednesday 26 June 2024 seeking access under the *Freedom of Information Act 1982* (the **FOI Act**) to:

...1. Any document pertaining to the advertising revenue that the ABC has earned via Google AdSense or the YouTube Partner Program from the ABC's YouTube channel operations for the month of January 2024, for the following channels:

- i. The "ABC News (Australia)" channel, available at [https://urldefense.com/v3/https://www.youtube.com/@abcnewsaustralia_!!FvZmfVE!E1RjhHYeXFDQ2EM4xPvXS9pGuy8uWKjXkZ20KzrKJOEvd_qLByjGxSUOQbY_jUFH1pFaEKerz220jzBIZVDTpzNZyQW06pCaW5Y\\$](https://urldefense.com/v3/https://www.youtube.com/@abcnewsaustralia_!!FvZmfVE!E1RjhHYeXFDQ2EM4xPvXS9pGuy8uWKjXkZ20KzrKJOEvd_qLByjGxSUOQbY_jUFH1pFaEKerz220jzBIZVDTpzNZyQW06pCaW5Y$)
- ii. The "ABC News In-depth" channel, available at [https://urldefense.com/v3/https://www.youtube.com/@ABCNewsIndepth_!!FvZmfVE!E1RjhHYeXFDQ2EM4xPvXS9pGuy8uWKjXkZ20KzrKJOEvd_qLByjGxSUOQbY_jUFH1pFaEKerz220jzBIZVDTpzNZyQW0IGaChzY\\$](https://urldefense.com/v3/https://www.youtube.com/@ABCNewsIndepth_!!FvZmfVE!E1RjhHYeXFDQ2EM4xPvXS9pGuy8uWKjXkZ20KzrKJOEvd_qLByjGxSUOQbY_jUFH1pFaEKerz220jzBIZVDTpzNZyQW0IGaChzY$)
- iii. The "triple j" channel, available at [https://urldefense.com/v3/https://www.youtube.com/@triplej_!!FvZmfVE!E1RjhHYeXFDQ2EM4xPvXS9pGuy8uWKjXkZ20KzrKJOEvd_qLByjGxSUOQbY_jUFH1pFaEKerz220jzBIZVDTpzNZyQW0ccV5KKc\\$](https://urldefense.com/v3/https://www.youtube.com/@triplej_!!FvZmfVE!E1RjhHYeXFDQ2EM4xPvXS9pGuy8uWKjXkZ20KzrKJOEvd_qLByjGxSUOQbY_jUFH1pFaEKerz220jzBIZVDTpzNZyQW0ccV5KKc$)
- iv. The "ABC Australia" channel, available at [https://urldefense.com/v3/https://www.youtube.com/abcaustralia_!!FvZmfVE!E1RjhHYeXFDQ2EM4xPvXS9pGuy8uWKjXkZ20KzrKJOEvd_qLByjGxSUOQbY_jUFH1pFaEKerz220jzBIZVDTpzNZyQW0IwlcVcC\\$](https://urldefense.com/v3/https://www.youtube.com/abcaustralia_!!FvZmfVE!E1RjhHYeXFDQ2EM4xPvXS9pGuy8uWKjXkZ20KzrKJOEvd_qLByjGxSUOQbY_jUFH1pFaEKerz220jzBIZVDTpzNZyQW0IwlcVcC$)

As the ABC may have multiple documents which satisfy this request, I am happy to limit the request to the first document identified/located which outlines the revenue earned for the above YouTube channels. Alternatively, I am happy for a document to be created which contains this information.

In the event of a public interest test being required, my case for release being in the public interest is as follows:

- a) The ABC regards the absence of advertisements as being a distinctive feature of its domestic TV/radio services (although permitted by law to augment public funding through advertisement for certain activities), and regards its independence and integrity in this regard as "paramount" [<https://www.abc.net.au/edpols/11-advertising-and-sponsorship-restrictions/13644014>];

- b) Under the ABC Charter, independence is "enshrined as a foundational principle";
- c) The ABC regards impartiality as a "fundamental standard to the ABC" [<https://www.abc.net.au/edpols/impartiality/13645770>];
- d) The ABC receives (or may be receiving) funding in the form of advertising revenue from a foreign organisation or a local subsidiary of such [[https://urldefense.com/v3/__https://www.smh.com.au/business/companies/no-advertising-on-the-abc-just-head-to-youtube-20180918-p504kj.html__!!FvZmfVE!E1RjhHYeXFDQ2EM4xPvXS9pGuy8uWKjXkZ20KzrKJOEvd_qLB yjGxSUOQbY_jUFH1pFaEKerz22OjzBIZVDTpzNZyQW03WpAWco\\$](https://urldefense.com/v3/__https://www.smh.com.au/business/companies/no-advertising-on-the-abc-just-head-to-youtube-20180918-p504kj.html__!!FvZmfVE!E1RjhHYeXFDQ2EM4xPvXS9pGuy8uWKjXkZ20KzrKJOEvd_qLB yjGxSUOQbY_jUFH1pFaEKerz22OjzBIZVDTpzNZyQW03WpAWco$)];
- e) There is a reasonable expectation that the receipt of funds from commercial activities could have an impact on the public's view of the ABC's impartiality and independence;
- f) The ABC already outlines its revenue via commercial endeavours in its Annual Reports, however it does not go into detail as to the particular sources of said commercial funding - the revenue that the ABC receives from a particular organisation via commercial activities is relevant, as a reasonable person would expect that the ABC may be more influenced by a \$100,000 contribution than a \$100 contribution.

As notified to you by email on 23 July 2024, the ABC was required to consult with an affected third party, such that a decision on your request was due by Thursday 26 August 2023, under s 15(6) of the FOI Act.

On 19 August 2024, by email the timeframe for processing your request was extended by agreement under s 15AA of the FOI Act. Accordingly, a decision on your request is due on Friday **6 September 2024**.

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 one document that answers the scope of your request - Document 1, as described in **Schedule 1**, attached. I have refused access to **Document 1**.

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 s 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 the ABC's Finance team and Legal

Team. The ABC considers 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.

Reasons for decision

Third Party Consultation

The ABC consulted with the affected third party to seek their views on the release of the information in **Document 1** under freedom of information (FOI).

The affected third party made contentions that the information was commercially valuable to it under s 47 of the FOI Act and was therefore exempt from release.

I have agreed with their contentions as detailed below.

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 5.235, 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 the document contains information which has commercial value to the ABC and the third party. The ABC operates in a highly competitive media landscape, in local and international markets, on limited funding as a public agency. It has limited commercial arrangements in place where it also generates revenue in order to provide the services contemplated by the *Australian Broadcasting Corporation Act 1983 (Cth)* and the *Broadcasting Services Act 1982 (Cth)*.

Releasing information that is protected by confidentiality arrangements between the parties could reasonably be expected to destroy or diminish the value of the arrangement to the ABC and the third party.

The affected third party operates an online platform known as YouTube and is able to sell advertising to individuals, agencies and organisations across the globe. The third party is required to negotiate similar agreements with other media organisations in the future. Providing information that may give insight into the commercial terms agreed in confidence could reasonably be expected to undermine the third party's ability to negotiate with other parties in the future. Further, placing confidentially negotiated terms in the public domain would unfairly advantage competitors of the affected third party or the ABC when negotiating similar services in the future. This could reasonably be expected to destroy or diminish the value of the information to both parties.

For the information refused under s 47, I am of the view it is commercially valuable to the third party and the ABC, and its value could be destroyed or diminished if it was disclosed under FOI. This includes aggregated revenue which would give an indication as to commercial rates for the services provided. If this information became freely available to competitors of the parties, 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 agreed rates would lose their inherent value if they were released under FOI, particularly as the agreement is protected by confidentiality arrangements such that the information was derived with an expectation of confidence, and disclosure would breach the terms of a contract executed by the parties.

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

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

s 45 – Material obtained in confidence – unconditional exemption

Information in **Document 1** is also exempt on the basis that disclosure of that information under FOI would found an action for breach of confidence.

The Guidelines provide at paragraph 5.189 that to found an action for breach of confidence, and for s 45 to apply, the following five criteria must be satisfied in relation to the information:

- it must be specifically identified;
- it must have the necessary quality of confidentiality;
- it must have been communicated and received on the basis of a mutual understanding of confidence;
- it must have been disclosed or threatened to be disclosed, without authority; and
- unauthorised disclosure of the information has or will cause detriment.

I have considered each of these criteria and I am satisfied that they are met in relation to the document.

Document 1 is confidential based on the confidentiality clause within the related agreement between the parties. Without the consent of the parties to release the information under FOI, the confidentiality clause means the document is exempt from disclosure under FOI.

I have found that the information has the necessary quality of confidentiality. It is known to a limited group of people, and it is not common knowledge or known in the public domain.¹ The information was communicated and received on the basis of a mutual understanding that it would be treated by the ABC as confidential.

Document 1 contains an ongoing mutual obligation of confidence that if breached would reasonably be expected to cause detriment to the other party to the contract, and or to the ABC including a potential liability for the ABC to pay damages for breach of contract.

For the reasons set out above, I am satisfied that release of **Document 1** would found an action for a breach of confidence, and accordingly it is exempt under s 45 of the FOI Act.

Review rights

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

Yours sincerely



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

¹The Guidelines [5.162]

Schedule 1 – Document Schedule – FOI 202324-090

No.	Date	Description	Page/s	Access decision	Exemption section/s
01	July 2024	Table	1	Refused	45 – material obtained in confidence 47 – commercially valuable

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