

30 October 2024

Mr Tim Ballard

By email: [foi+request-12100-83fce1ab@righttoknow.org.au](mailto:foi+request-12100-83fce1ab@righttoknow.org.au)

Dear Mr Ballard

## DECISION – ABC FOI 202425-044

I refer to your email sent Monday 30 September 2024 seeking access under the *Freedom of Information Act 1982* (the **FOI Act**) to:

... a copy of the audio transmission referred to in this report: [article linked]<sup>1</sup> which was aired on JJJ Breakfast with Tom and Alex sometime in the week beginning August 6, 2012.

A decision on your request is due by Wednesday **30 October** 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

Under s 7(2) of the FOI Act, Schedule 2 Part II refers, the ABC as an agency, is exempt from the operation of the FOI Act in relation to its program material. All documents located in response to your revised scope were program material. The ABC is not required to take any action in relation to these documents under FOI (refer pages 2 to 3 of this letter).

### 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 s 93A of the FOI Act (**the Guidelines**)
- relevant case law

### Locating and identifying documents

The search for documents included approaching the triple j team.

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<sup>1</sup> [Radio host, broadcaster apologize for Hitler-oven game | The Times of Israel](#) published 12 August 2012

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.

## Reasons for decision

### Program material s 7(2) – exempt agencies in respect of particular documents

The document in scope is part of a breakfast radio show that was broadcast in 2012 on the ABC's national youth station, triple j (the **Document**).

The Document is the ABC's program material and is exempt under s 7(2) of the FOI Act. The ABC is not required to take action under FOI in respect of this type of document.

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

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.

Part II of Schedule 2 lists the ABC in "*...in relation to its program material and datacasting content*". 'Program material' is not defined in the FOI Act, however it has been the subject of judicial consideration.

The Guidelines point to *Australian Broadcasting Corporation and Herald and Weekly Times Pty Limited (ABC and HWT)*<sup>2</sup>, where "the AAT 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'". This clearly applies to the Document that answers your request.

### Reasonably direct relationship to program material

When it comes to documents 'in relation to' program material, the Guidelines<sup>3</sup> adopt the 'reasonably direct relationship' test in ABC and HWT, i.e. that the ABC exemption applies to documents comprising program material in the sense described above, as well as documents which have a reasonably direct relationship with that program material. The Guidelines contrast 'reasonably direct' with a connection that is "indirect, remote or tenuous".

The document relating to this request directly relates to program material and is exempt from the operation of the FOI Act under s 7(2) whether in part or full. On that basis, the ABC is not required to take any further action in relation to these documents. These documents are clearly exempt as they are directly related to the ABC's journalism and program making, being information relating to online articles (or a broadcast segment).

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<sup>2</sup> [2012] AATA 914

<sup>3</sup> Paragraph 2.16

### 'In relation to' program material

The Federal Court of Australia considered the scope of the s 7(2) exclusion in *Australian Broadcasting Corporation v The University of Technology, Sydney (ABC v UTS)*<sup>4</sup> and held that the exemption also applies to 'any document that relates to program material'. In that case, the documents sought were documents relating to complaints made to the ABC, including "internal files and correspondence, board minutes, investigation files and reports and documents in relation to the complaints".

*'ER' and Special Broadcasting Service* [2015]<sup>5</sup> found that documents relating to the cost of programs (including emails and contractual agreements) are exempt under s 7(2) of the FOI Act as they were created for the purpose of creating a program.

### Post-broadcast material

ABC and HWT [57] says program material "...would include a document created after a program is broadcast. Such documents might include...internet pages and documents produced by the ABC or incorporated in its records directly concerning the substantive content of the broadcast program".

### Documents available for purchase

In some cases, the ABC provides publicly broadcast material to be purchased via its Community Access service. The FOI team emailed you to say it was looking into whether there may be a possibility to purchase this audio which is a decision subject to the ABC's discretion. In this instance, given the nature of the content that was broadcast, the ABC is unable to make it available for purchase via this service.

### **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](mailto:foi.abc@abc.net.au)

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<sup>4</sup> [2006] FCA 964

<sup>5</sup> AICmr 12

## **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 BY THE ABC**

Optional step. 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, a delegate who is not the person who made the initial decision will undertake 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 helps if you set out the reasons for review in your application and include the decision under review..

Application for a review of the original decision should be emailed to: [foi.abc@abc.net.au](mailto:foi.abc@abc.net.au)

or posted to: **FOI Team**  
ABC Legal  
GPO Box 9994  
SYDNEY NSW 2001

### **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 (the original decision or the internal review decision, or a deemed refusal decision);
- give details of how notices may be sent to you (for instance, an email address); and
- include a copy of the decision for which a review sought.

Please refer to the OAIC website the IC review process page for further information including the online form for applying for IC review:

<https://www.oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/freedom-of-information-reviews>

Alternatively, an application for IC Review can be emailed to: [FOIDR@oaic.gov.au](mailto:FOIDR@oaic.gov.au) or

posted to: Director of FOI Dispute Resolution  
GPO Box 5218  
Sydney NSW 2001

The Information Commissioner has a discretion not to undertake a review.

### **COMPLAINTS TO THE INFORMATION COMMISSIONER**

You may complain to the Information Commissioner about 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