



Australian Government
Classification Board

Our reference: FOI 23-228

Ryan J. Austin

By email: foi+request-10135-182763d5@righttoknow.org.au

Dear Mr Austin

Decision on your Freedom of Information Request

I refer to your request of 3 April 2023, to the Classification Board, seeking access to documents under the *Freedom of Information Act 1982* (FOI Act).

1 Your request

You requested access to:

- ESAFETY CONTENT-0001 (File number: T19/0955)
- ESAFETY CONTENT-0002 (File number: T19/0956)
- ESAFETY INV-0002-6448 (File number: T15/2394)
- ESAFETY INV-0002-6449 (File number: T15/2395)
- ESAFETY INV-0002-6390 (File number: T15/2404)
- ESAFETY INV-0002-6445 (File number: T15/2418)
- ESAFETY INV-2020-14666 (File number: T20/2518)
- ESAFETY INV-2020-14667 (File number: T20/2520)

2 Authority to make decision

I am authorised by the Secretary to make decisions in relation to Freedom of Information requests under section 23(1) of the FOI Act.

3 Material taken into consideration

In making my decision, I had regard to the following:

- the terms of your request
- the content of the documents captured by your request
- the provisions of the FOI Act
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the FOI Guidelines).

4 Decision

I have identified eight documents that are relevant to your request. These documents were in the possession of the Board when your request was received.

I have decided to grant partial access to eight documents.

A schedule setting out the documents relevant to your request, with my decision in relation to these documents, is at **ATTACHMENT A**.

My reasons for refusing access to information that is relevant to your request are set out below.

5 Finding of facts and reasons for decision

My findings of fact and reasons for deciding that the exemptions identified in the schedule of documents apply to the parts of documents are set out below.

5.1 Section 33 – Documents affecting national security

Section 33(a)(i) of the FOI Act provides that a document is exempt from disclosure if disclosure of the document would, or could reasonably be expected to, cause damage to the security of the Commonwealth.

Security

Section 4(5) of the FOI Act provides that the expression *security of the Commonwealth*, shall be taken to extend to matters relating to the detection, prevention or suppression of activities, whether within Australia or outside Australia, subversive of, or hostile to, the interests of the Commonwealth or of any country allied or associated with the Commonwealth.

Relevantly section 4 of the *Australian Security Intelligence Organisation Act 1979* defines security as:

- (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
 - (i) espionage;
 - (ii) sabotage;
 - (iii) politically motivated violence;
 - (iv) promotion of communal violence;
 - (v) attacks on Australia's defence system; or
 - (vi) acts of foreign interference;

whether directed from, or committed within, Australia or not; and

- (aa) the protection of Australia's territorial and border integrity from serious threats; and
- (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

Paragraph 5.29 of the FOI Guidelines states that the term 'security of the Commonwealth' is intended to refer to the protection of Australia and its population from activities that are hostile to, or subversive of, the Commonwealth's interests.

Damage

Paragraphs 5.16, 5.17, 5.27 and 5.28 of the FOI Guidelines relevantly provide the following information about the terms 'could reasonably be expected to' and 'damage':

- 5.16 The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document.
- 5.17 The use of the word 'could' in this qualification is less stringent than 'would', and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, be presently occurring, or could occur in the future.
- 5.27 [For] the term 'reasonably expected'... there must be 'real' and 'substantial' grounds for expecting the damage to occur which can be supported by evidence or reasoning.
- 5.28 'Damage' for the purposes of this exemption is not confined to loss of damage in monetary terms. The relevant damage may be intangible... but [should be] determined on the facts of each particular case.

Paragraph 5.25 of the FOI Guidelines states that the context of each document is relevant because, while disclosure of the information in the document may not itself cause harm, in combination with other information, it may contribute to a complete picture which results in damage as specified in section 33(a) of the FOI Act.

Paragraph 5.31 of the FOI Guidelines state that the meaning of *damage* in the context of section 33(a)(i) of the FOI Act has three aspects:

- that of safety, protection or defence from something that is regarded as a danger
- the means that may be employed either to bring about or to protect against that danger, and
- the organisations or personnel providing safety or protection from the danger.

An assessment of whether a document is exempt under section 33(a)(i) of the FOI Act requires consideration of the context and environment that exists at the time the decision is made, and paragraph 5.33 of the FOI Guidelines provides that where there is doubt about the application of section 33, decision makers should favour non-disclosure of the relevant information.


For the reasons set out above, I decided that parts of documents 1 and 2 marked 's33' are exempt from disclosure under section 33(a)(i) of the FOI Act.

5.2 Section 37 - documents affecting enforcement of law and protection of public safety

Section 37(2)(c) of the FOI Act provides that a document is an exempt document if its disclosure would, or could reasonably be expected to prejudice the maintenance or enforcement of lawful methods for the protection of public safety.

Paragraph 5.1116 of the FOI Guidelines states:

- 5.116 The words 'public safety' do not extend beyond safety from violations of the law and breaches of the peace. The AAT has observed that 'public safety' should not be confined to any particular situation, such as civil emergencies (bushfires, floods and the like) or court cases involving the enforcement of the law. The AAT also noted that considerations of public safety and lawful methods will be given much wider scope in times of war than in times of peace.



In relation to the test *would or could reasonably be expected*, paragraphs 5.16-5.18 of the FOI Guidelines state:

- 5.16 The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document.
- 5.17 The use of the word 'could' in this qualification is less stringent than 'would', and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.
- 5.18 The mere risk, possibility or chance of prejudice does not qualify as a reasonable expectation. There must, based on reasonable grounds, be at least a real, significant or material possibility of prejudice.

The Board makes decisions relating to the classification of publications, films and computer games under the *Classification (Publications, Films and computer Games) Act 1995* (the Classification Act), the *National Classification Code* (the Code) and the *Guidelines for the Classification of Films and Computer Games 2005* (the Guidelines).

Paragraph 1 of the Code provides that:

- 1. Classification decisions are to give effect, as far as possible, to the following principles:
 - (a) adults should be able to read, hear, see and play what they want;
 - (b) minors should be protected from material likely to harm or disturb them;
 - (c) everyone should be protected from exposure to unsolicited material that they find offensive;
 - (d) the need to take account of community concerns about:
 - (i) depictions that condone or incite violence, particularly sexual violence; and
 - (ii) the portrayal of persons in a demeaning manner.

Paragraph 3, Item 1 of the Code provides that films that depict, express or otherwise deal with specified matters; describe or depict in a way that is likely to cause offence to a reasonable adult; or promote incite or instruct in matters of crime of violence, should not be classified and be Refused Classification (RC).

Each state and territory has classification enforcement legislation to complement the Classification Act and provides for offences in relation to the exhibition and sale of RC films.

The document contains detailed descriptions of the content of the film being reviewed for classification purposes and reflect the reasons for the Board's decision to not classify the film and for it to be RC.

I am satisfied that disclosure of parts of documents 1 and 2 marked 's37(2)(c)' would, or could reasonably be expected to, prejudice the maintenance or enforcement of lawful methods for the protection of public safety. I am further satisfied that disclosure of this information would result in real, significant or the material possibility of prejudice to the protection of maintenance or enforcement of lawful methods for the protection of public safety.

For the reasons outlined above, I decided that parts of documents 1 and 2 marked 's37(2)(c)' are exempt from disclosure under section 37 of the FOI Act.

5.3 Section 47E - Documents affecting certain operations of agencies

Section 47E of the FOI Act provides that a document is conditionally exempt if its disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Paragraph 6.120 of the FOI Guidelines states:

An agency's operations may not be substantially adversely affected if the disclosure would, or could reasonably be expected to lead to a change in the agency's processes that would enable those processes to be more efficient. For example, in *Re Scholes and Australian Federal Police* [1996] AATA 347, the AAT found that the disclosure of particular documents could enhance the efficiency of the Australian Federal Police as it could lead to an improvement of its investigation process.

Paragraph 6.123 of the FOI Guidelines states that the predicted effect must bear on the Board's 'proper and efficient' operations, that is, the Board is undertaking its expected activities in an expected manner. Where disclosure of the documents reveals unlawful activities or inefficiencies, this element of the conditional exemption will not be met and the conditional exemption will not apply.

The Board is responsible for assessing and making decisions relating to the classification of publications, films and computer games under the Classification Act. Disclosure of the descriptive content of the film that depicts, expresses or otherwise deals with matters specified in the Code; and/or describes or depicts film content in a way that is likely to cause offence to a reasonable adult; or promotes, incites or instructs in matters of crime of violence, would disclose information that the Board has decided should not be classified under the Classification Act and should be Refused Classification (RC). The disclosure of that descriptive content would subvert the classification process by revealing content likely to cause offence to a reasonable adult.

I am satisfied that parts of documents 1 and 2 marked 's47E(d)' contain information which, if disclosed, would or could reasonably be expected to, have a substantial and an unreasonable effect on the Board's proper and efficient operations. These operational activities are being undertaken in an expected and lawful manner, and would not reveal inefficiencies in the way in which the Board conducts those operational activities.

For the reasons outlined above, I decided that parts of documents 1 and 2 marked 's47E' are conditionally exempt from disclosure under section 47E of the FOI Act.

Where information is found to be conditionally exempt, I must give access to that information unless access at this time would, on balance, be contrary to the public interest. I have addressed the public interest considerations below.

5.4 Public interest considerations

Pursuant to section 11A(5) of the FOI Act, I must give access to conditionally exempt information unless access to that information at that time would, on balance, be contrary to the public interest. I have therefore considered whether disclosure of the conditionally exempt information would be contrary to the public interest.

I note that paragraph 6.5 of the FOI Guidelines states that the public interest test is considered to be:

- something that is of serious concern or benefit to the public, not merely of individual interest
- not something of interest to the public, but in the interest of the public
- not a static concept, where it lies in a particular matter will often depend on a balancing of interests
- necessarily broad and non-specific and
- relates to matters of common concern or relevance to all members of the public, or a substantial section of the public.

Factors favouring disclosure

Section 11B of the FOI Act provides that factors favouring access to conditionally exempt information in the public interest include whether access to that information would do any of the following:

- promote the objects of the FOI Act (including all matters set out in sections 3 and 3A)
- inform debate on a matter of public importance
- promote effective oversight of public expenditure
- allow a person to access his or her own personal information.

Having regard to the above, I consider that disclosure of the conditionally exempt information at this time:

- would provide access to documents held by an agency of the Commonwealth which would promote the objects of the FOI Act by providing the Australian community with access to information held by the Australian Government.
- would not inform debate on a matter of public importance
- would not promote effective oversight of public expenditure
- would not allow you access to your own personal information.

Factors weighing against disclosure

I consider that the following factors weigh against disclosure of the conditionally exempt information at this time, on the basis that disclosure:

- could reasonably be expected to prejudice security, law enforcement, public health or public safety
- could reasonably be expected to prejudice the Board's responsibilities relating to the assessment of publications, films and computer games under the Classification Act, with disclosure of the conditionally exempt material undermining the decision made to refuse classification to the film
- would subvert the purpose for which this film was refused classification by revealing content likely to cause offence to a reasonable adult; or promote, incite or instruct in matters of crimes of violence

In making my decision, I have not taken into account any of the irrelevant factors set out in section 11B(4) of the FOI Act, which are:

- (a) access to the conditionally exempt information could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government
- (b) access to the conditionally exempt information could result in any person misinterpreting or misunderstanding that information
- (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made
- (d) access to the conditionally exempt information could result in confusion or unnecessary debate.

Conclusion – disclosure is not in the public interest

For the reasons set out above, after weighing all public interest factors for and against disclosure, I decided that, on balance, disclosure of the conditionally exempt information would be contrary to the public interest. I am satisfied that the benefit to the public resulting from disclosure of the conditionally exempt information is outweighed by the benefit to the public of withholding that information.

5.5 Section 22 – deletion of irrelevant and/or exempt material

Section 22 of the FOI Act applies to documents containing irrelevant and/or exempt material and allows an agency to delete such material from a document.

I decided that the documents captured by your request contain material which can reasonably be regarded as irrelevant to your request. The documents contain personal identifiers of public servants. When your request was acknowledged, we notified you that personal information of public servants below the SES level and all email addresses, signatures and direct telephone numbers would be considered irrelevant to the scope of your request unless you told us that you were expressly seeking access to that information. On the basis that you did not notify us otherwise, an edited copy of those documents has been prepared in accordance with section 22(1)(a)(ii) of the FOI Act. This information is marked 's22' in the documents released to you.

In addition, as I decided that some information you have requested is exempt from disclosure, I have prepared an edited copy of those documents released by deleting the exempt information under section 22(1)(a)(i) of the FOI Act.

6 Legislative provisions

The FOI Act, including the provisions referred to in my decision, are available on the Federal Register of Legislation website: www.legislation.gov.au/Series/C2004A02562.

7 Your review rights

Your review rights in relation to this decision are set out at **ATTACHMENT B**.

8 Publication of material released under the FOI Act

Where I have decided to release documents to you, the Board may also publish the released material on its Disclosure Log. The Board will not publish personal or business affairs information where it would be unreasonable to do so.

For your reference the Disclosure Log can be found here: www.infrastructure.gov.au/about-us/freedom-information/freedom-information-disclosure-log.

Further information

The Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the Department) provide administrative assistance to the Board in relation to the processing of FOI requests. If you require further information regarding this decision, please contact the Department's FOI Section at FOI@infrastructure.gov.au.

Yours sincerely



Fiona Jolly
Director
Classification Board

SCHEDULE OF DOCUMENTS FOI 23-228

Doc No.	Date of document	Description of document	Num of Pages	Decision on access	Provision of FOI Act
1.	12/4/2023	ESAFETY CONTENT-0001 (File number: T19/0955)	5	Partial access	33(a)(i) 37(2)(c) 47E(d) 22
2.	12/4/2023	ESAFETY CONTENT-0002 (File number: T19/0956)	5	Partial access	33(a)(i) 37(2)(c) 47E(d) 22
3.	12/4/2023	ESAFETY INV-0002-6448 (File number: T15/2394)	4	Partial access	s22
4.	12/4/2023	ESAFETY INV-0002-6449 (File number: T15/2395)	3	Partial access	s22
5.	12/4/2023	ESAFETY INV-0002-6390 (File number: T15/2404)	4	Partial access	s22
6.	12/4/2023	ESAFETY INV-0002-6445 (File number: T15/2418)	3	Partial access	s22
7.	12/4/2023	ESAFETY INV-2020-14666 (File number: T20/2518)	4	Partial access	s22
8.	12/4/2023	ESAFETY INV-2020-14667 (File number: T20/2520)	4	Partial access	s22

YOUR REVIEW RIGHTS

If you are dissatisfied with my decision, you may apply for a review of it.

Information Commissioner review or complaint

You have the right to seek a review by the Information Commissioner of this decision.

An application for IC review must be made in writing to the Office of the Australian Information Commissioner (OAIC) within 60 days of the decision.

If you are not satisfied with the way we have handled your FOI request, you can lodge a complaint with the OAIC. However, the OAIC suggests that complaints are made to the agency in the first instance.

While there is no particular form required to make a complaint to the OAIC, the complaint should be in writing and set out the reasons for why you are dissatisfied with the way your request was processed. It should also identify the Classification Board as the agency about which you are complaining.

You can make an IC review application or make an FOI complaint in one of the following ways:

- online at www.oaic.gov.au/freedom-of-information/reviews-and-complaints/
- via email to foidr@oaic.gov.au
- by mail to GPO Box 5218 Sydney NSW 2001, or
- by fax to 02 9284 9666.

More information about the Information Commissioner reviews and complaints is available on the OAIC website here: www.oaic.gov.au/freedom-of-information/foi-review-process.