



Australian Government
Classification Board

Our reference: CB 24-248

CR

By email: foi+request-11011-f7adef1b@righttoknow.org.au

Dear CR

Decision on your Freedom of Information Request

I refer to your request of 9 January 2024 to the Classification Board (the Board), seeking access to documents under the *Freedom of Information Act 1982* (FOI Act).

1 Your request

You requested access to:

1. Documents relating to the classification of the game 'Fortnite':
[A] - 27 June 2017 (File number: T17/2291) (Classification number: 275113)
[B] - 19 December 2023 (Classification number: CLAS-295371)

2 Authority to make decision

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

3 Decision

I have identified 8 documents that are relevant to Part A of your request. These documents were in the possession of the Board when your request was received. I have decided to:

- grant access in full to 5 of these documents, and
- grant partial access to 3 documents

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

With regard to Part B of your request, the right of access under the FOI Act is limited to a document in the possession of the Board.

Section 24A of the FOI Act provides that the Board may refuse a request for access to a document if:

- (a) all reasonable steps have been taken to find the document, and
- (b) the agency or Minister is satisfied that the document:
 - (i) is in the agency's or Minister's possession but cannot be found, or
 - (ii) does not exist.

The Board has conducted searches of their information holdings and no documents matching the description in part B of your request were identified as being in the possession of the Board.

I am satisfied that all reasonable steps have been taken to find documents which would be relevant to part B of your request and that the documents do not exist in the possession of the Board.

I have decided to refuse part B of your request in accordance with section 24A of the FOI Act, on the basis that the Board does not hold a document in its possession that meets the terms of that part of your request.

4 Finding of facts and reasons for decision

My findings of fact and reasons for deciding that exemptions apply to parts of documents relevant to your request are set out below.

4.1 Section 47 - Documents disclosing commercially valuable information

Section 47(1)(b) of the FOI Act provides that a document is an exempt document if its disclosure 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.

Paragraphs 5.204 and 5.205 of the FOI Guidelines state:

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

- 5.205 It is a question of fact whether information has commercial value, and whether disclosure would destroy or diminish that value. The commercial value may relate, for example, to the profitability or viability of a continuing business operation or commercial activity in which an agency or person is involved. The information need not necessarily have 'exchange value', in the sense that it can be sold as a trade secret or intellectual property. The following factors may assist in deciding in a particular case whether information has commercial value:
 - whether the information is known only to the agency or person for whom it has value or, if it is known to others, to what extent that detracts from its intrinsic commercial value
 - whether the information confers a competitive advantage on the agency or person to whom it relates — for example, if it lowers the cost of production or allows access to markets not available to competitors
 - whether a genuine "arm's-length" buyer would be prepared to pay to obtain that information
 - whether the information is still current or out of date (out of date information may no longer have any value), and
 - whether disclosing the information would reduce the value of a business operation or commercial activity — reflected, perhaps, in a lower share price

I am satisfied that the relevant information contained in the documents:

- is only known to the Board and the affected third party for whom it has value
- is not known to others, and disclosure of the information would detract from its intrinsic commercial value
- confers a competitive advantage on the affected third party, and provides the affected third party with access to markets not available to its competitors
- is something that a genuine “arm’s length’ buyer would be prepared to pay to obtain
- is still current, and retains its intrinsic value to the affected third party
- would reduce in value to the business operations or commercial activities of the affected third party if disclosed.

As notified to you on 6 February 2024, in accordance with the obligations under section 27 of the FOI Act, the Board has consulted with an affected third party. In making my decision on access to the relevant documents, I have taken into consideration the exemption submissions made during that consultation process.

For the reasons outlined above, I decided that parts of the documents marked ‘s47’ are exempt from disclosure under section 47(1)(b) of the FOI Act.

4.2 Section 47F – Documents affecting personal privacy

Section 47F of the FOI Act provides that a document is conditionally exempt if its disclosure would involve the unreasonable disclosure of personal information about any person (including a deceased person).

Personal Information

Personal information has the same meaning as in the Privacy Act. Specifically, section 6 of the Privacy Act provides that *personal information* means information or an opinion about an identified individual, or an individual who is reasonably identifiable whether the information or opinion is true or not; and whether the information or opinion is recorded in a material form or not.

Paragraph 6.131 of the FOI Guidelines states that for particular information to be personal information, an individual must be identified or reasonably identifiable.

Paragraph 6.130 of the FOI Guidelines states that personal information can include a person’s name, address, telephone number, date of birth, medical records, bank account details, taxation information and signature.

An individual is a natural person rather than a corporation, trust, body politic or incorporated association.

I am satisfied that parts of the documents marked ‘s47F’ includes personal information about an individual.

Unreasonable Disclosure of Personal Information

Section 47F(2) of the FOI Act provides that, in determining whether the disclosure would involve the unreasonable disclosure of personal information, I must have regard to the following matters:

- (a) the extent to which the information is well known
- (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document
- (c) the availability of the information from publicly accessible sources
- (d) any other matters that the agency or Minister considers relevant.

Paragraph 6.138 of the FOI Guidelines states that:

The personal privacy exemption is designed to prevent the unreasonable invasion of third parties' privacy. The test of 'unreasonableness' implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals. The test does not, however, amount to the public interest test of s 11A(5), which follows later in the decision making process. It is possible that the decision maker may need to consider one or more factors twice, once to determine if a projected effect is unreasonable and again when assessing the public interest balance.

I note that the AAT, in *Re Chandra and Minister for Immigration and Ethnic Affairs [1984]* AATA 437 at paragraph 259, stated that:

... whether a disclosure is 'unreasonable' requires ... a consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance ... it is also necessary in my view to take into consideration the public interest recognised by the Act in the disclosure of information ... and to weigh that interest in the balance against the public interest in protecting the personal privacy of a third party ...

Paragraphs 6.142 and 6.143 of the FOI Guidelines state:

6.142 Key factors for determining whether disclosure is unreasonable include:

- the author of the document is identifiable
- the documents contain third party personal information
- release of the documents would cause stress on the third party
- no public purpose would be achieved through release

6.143 As discussed in the leading s 47F IC review decision of *'FG' and National Archives of Australia [2015]* AICmr 26, other factors considered to be relevant include:

- the nature, age and current relevance of the information
- any detriment that disclosure may cause to the person to whom the information relates
- any opposition to disclosure expressed or likely to be held by that person
- the circumstances of an agency's collection and use of the information
- the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act
- any submission an FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information, and
- whether disclosure of the information might advance the public interest in government transparency and integrity

I am satisfied that the disclosure of personal information contained within the documents would, in the circumstances, constitute an unreasonable disclosure of personal information for the following reasons:

- the conditionally exempt personal information is not well known
- the person to whom the personal information relates is not known to be (or to have been) associated with the matters dealt with in the document
- the conditionally exempt personal information is not available from publicly accessible sources
- the individual whose personal information is contained in the document is identifiable

- release of this information would cause stress to the individual concerned
- no further public purpose would be achieved through the release of the personal information noting that the personal information is included in the document as a result of their employment circumstance
- the information is current and has not lost its sensitivity through the passage of time
- the individual would not expect the information to be placed in the public domain, and detriment may be caused to the individual to whom the information relates, and
- the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act.

I have consulted with affected third parties regarding the disclosure of their personal information, and I have considered any concerns raised by those individuals during the course of making my decision.

For the reasons outlined above, I decided that the parts of the documents marked 's47F' are conditionally exempt from disclosure under section 47F 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.

4.3 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, I decided this information is irrelevant to your request. As such, 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 the documents being released by deleting the exempt information under section 22(1)(a)(i) of the FOI Act.

5 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)
- advice from officers with responsibility for the subject matter contained in the documents captured by your request

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, we may also publish the released material on our Disclosure Log. The Board will not publish personal or business affairs information where it is unreasonable to do so.

For your reference the Board's 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) provides administrative assistance to the Classification Board in relation to FOI matters. If you require further information regarding this decision, please contact the Department's FOI Section at FOI@infrastructure.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Tristan Sharp', written over a horizontal line.

Tristan Sharp
Acting Director
Classification Board

8 March 2024

SCHEDULE OF DOCUMENTS CB 24-248

Doc No.	Date of document	Description of document	Number of Pages	Decision on access	Provision of FOI Act
1.	undated	Instruction sheet for accessing test play of game and game instructions	5	Partial access granted	s47
2.	undated	Instruction sheet for accessing cinematics and gameplay	1	Partial access granted	s47
3.	undated	Application for classification of a computer game	2	Partial access granted	s47F
4.	undated	Pertinent dialogue and humour	11	Access granted in full	
5.	undated	Attachment two – contentious material statement	2	Access granted in full	
6.	undated	Attachment one – detailed written description of gameplay	7	Access granted in full	
7.	Undated	Attachment three – online interactivity	2	Access granted in full	
8.	26 June 2017	Decision Report	4	Access granted to relevant information	s22(1)(a)(ii)

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.

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.