

16 November 2021

Ms Eliza Sorensen
By email: foi+request-7871-d1f3ecbc@righttoknow.org.au

Dear Ms Sorensen,

Decision on access to documents under the *Freedom of Information Act 1982*

The purpose of this letter is to give you a decision about access to documents that you requested from the eSafety Commissioner (eSafety) under the *Freedom of Information Act 1982* (FOI Act).

I, Maria Vassiliadis, am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to requests under the Act.

Background

On 17 September 2021, you requested access to:

'Any emails and correspondence from the eSafety Commissioner or final documents that contain the following phrases:

"Apple CSAM", "CSAM detection", "Child abuse scanner", "On-device matching", "On-device matching process", "NCMEC", "Thorn", "Regulation, here we come!"

Following receipt of your request, eSafety advised you that pursuant to section 24 of the FOI Act, we wanted to commence a consultation process with you to revise the time period of your request to ensure a practical refusal reason under section 24AA of the FOI Act did not exist. As a result, the specified time period for your request was confirmed to be 13 August 2021 to 24 September 2021.

On 8 October 2021, eSafety wrote to you advising that we were required to undertake third party consultation. Specifically, eSafety advised that we would be writing to relevant individuals in relation to the documents that contain their personal information and/or information concerning their business or professional affairs.

To enable this third party consultation, the statutory time period for processing your request was extended by an additional 30 days in accordance with subsection 15(6) of the FOI Act.

The time period for processing your request concludes on 17 November 2021.

We are providing you a response within the statutory timeframe.

Scope of your request

I understand the following in relation to the scope of your request:

- your reference to 'emails or correspondence from the eSafety Commissioner' to be emails or correspondence sent by the eSafety Commissioner, Julie Inman Grant, and
- your request does not include news articles, complaints data, draft versions of documents or publicly available information.

I have identified 19 documents which fall within the scope of your request.

Material taken into account

I have taken the following material into account in making my decision on access:

- the FOI Act, specifically sections 11, 11A, 11B, 22, 24, 26, 27, 27A, 33, 45, 47C, 47F and 47G
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (Guidelines)
- the content of the documents that fall within the scope of your request, and
- the views of third parties consulted by eSafety under sections 27 and 27A.

Decision and Reasons for Decision

I have decided that of the 19 documents identified as relevant to your request:

- 4 are released in full
- 6 are released in part, and
- 9 are wholly exempt from release.

Pursuant to section 22 of the FOI Act, I have also redacted information that is irrelevant to the scope of your request. Given the broad nature of your request, a number of documents are heavily redacted because the majority of the content is not within the scope of your request. We have also redacted information we assume you do not require, including the names of public servants.

The attached schedule of documents provides a description of each document and my decision on access for each one. The reasons for my decisions are outlined below.

Although certain documents have been refused access on the basis of certain exemptions, I have also referenced section 22 of the FOI Act in the schedule, to indicate some parts of their content is either not relevant or out of scope of your application.

Exemption – Section 33 of the FOI Act – Documents affecting national security, defence or international relations

Section 33(a) of the FOI Act provides that a document is exempt if its disclosure would, or could reasonably be expected to, cause damage to:

- i) the security of the Commonwealth
- ii) the defence of the Commonwealth, or
- iii) the international relations of the Commonwealth.

Some of the documents relevant to your request contain information that, if disclosed, could impede the ability of the Australian Government to maintain good working relations with other governments and international organisations. Such a disclosure could restrict the flow of confidential information between these parties and the Australian Government. I have considered what is reasonable in all the circumstances, having regard to the nature of the information, the circumstances in which it was communicated and the nature and extent of the relationships.

In these circumstances, I consider relevant material in the below documents is wholly exempt from release, under section 33(a)(iii):

Documents 3, 7, 9, 15, 17, 18, 19

Exemption – Section 45 of the FOI Act – Documents containing material obtained in confidence

Section 45(1) provides that a document is an exempt document if its disclosure under the FOI Act would found an action, by a person (other than an agency or the Commonwealth), for breach of confidence.

Section 45(1) applies to information that was communicated in circumstances giving rise to an obligation of confidence, which was mutually understood and accepted by both parties. I have considered that release of certain information contained in some of the documents within the scope of your application would threaten to breach this confidence, contrary to the objectives of the FOI Act.

In these circumstances, I consider relevant material in the below documents is exempt from release, either wholly or in part, under section 45(1):

Documents 10, 12, 15

Public interest conditional exemption – Section 47C of the FOI Act – Deliberative Processes

Section 47C(1) provides that a document is conditionally exempt if its release would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:

- (a) an agency
- (b) a Minister, or
- (c) the Government of the Commonwealth.

Some of the documents relevant to your request contain information of deliberative matter, including deliberative processes, relating to the regulatory functions, governance, administration and stakeholder relations of eSafety.

Public interest

Under section 11A of the FOI Act, access to a document covered by a conditional exemption must be given unless it would be contrary to the public interest.

In considering whether to exempt the documents, I have considered and weighed factors for and against disclosure, as outlined in the Guidelines and section 11B of the FOI Act. I have considered that disclosure is generally considered to promote the objects of the FOI Act, can enhance the scrutiny of government decision making and can inform debate on matters of public importance. I have also considered that disclosure of the information may impede the ability for eSafety to evolve thoughts, deliberate and evaluate policy options and perform powers and functions conferred on it by the *Enhancing Online Safety Act 2015* (Cth). This may affect the ability of eSafety to operate as effectively and efficiently as possible. The disclosure may also disclose information relating to eSafety's management of regulatory and compliance matters. Therefore, in combination with the inability to operate effectively and efficiently, this interest outweighs the public interest in disclosure.

Having weighed these factors and determined that release at this time would be contrary to the public interest, I consider relevant material in the below documents is exempt from release, either wholly or in part, under section 47C:

Documents 5, 6, 7, 8, 13, 14, 16, 19

Public interest conditional exemption – Section 47F of the FOI Act – 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 of any person.

Personal information

'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 (see section 4 of the FOI Act and section 6 of the *Privacy Act 1988*).

Some of the documents relevant to your request contain the personal information of third parties, including names, contact details and employment details.

Unreasonable disclosure

The FOI Act states that, when deciding whether the disclosure of personal information would be 'unreasonable', I must have regard to four factors set out in section 47F(2) of the FOI Act:

1. The extent to which the information is well known
2. 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
3. The availability of the information from publicly available resources, and
4. Any other matters that I consider relevant.

I have therefore considered each of the above four factors.

Overall, the documents contain a variety of personal information. Some of the information is private and sensitive. Some of the personal information is not well known and would only be known to a limited group of people.

In these circumstances, and in the absence of the consent of the relevant individuals, which it would not be practicable to obtain, I consider that disclosure of their personal information would be unreasonable.

Public interest

Under section 11A of the FOI Act, access to a document covered by a conditional exemption must be given unless it would be contrary to the public interest.

In considering whether to exempt the documents, I have considered and weighed factors for and against disclosure, as outlined in the Guidelines and section 11B of the FOI Act. I have considered that disclosure is generally considered to promote the objects of the FOI Act, can enhance the scrutiny of government decision making and can inform debate on matters of public importance. However, I do not consider that release of personal information in these circumstances is material to the scope of your request or would materially enhance your understanding of the documents you've requested. Further, disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy and to harm the interests of an individual or group of individuals.

Having weighed these factors and determined that release would be contrary to the public interest, I consider relevant material in the below documents is exempt from release, either wholly or in part, under section 47F:

Documents 6, 8, 12, 13, 19

Public interest conditional exemption – Section 47G of the FOI Act – Business

Section 47G(1) of the FOI Act provides that a document is conditionally exempt if its disclosure would disclose information concerning business or professional affairs, or the business, commercial or financial affairs of an organisation, in a case in which the disclosure:

- a) would, or could reasonably be expected to, unreasonably affect a business in respect of its lawful business, commercial or financial affairs, or
- b) could reasonably be expected to prejudice the future supply of information to eSafety.

Some of the documents relevant to your request contain information about the business or professional affairs of a person or organisation.

I find that disclosure of this information would, or could reasonably be expected to, adversely affect those third parties in respect of their lawful business affairs. I further find that this would be unreasonable. The businesses who would be affected work in the complex field of online safety and deal with sensitive, technical, confidential and/or law enforcement information. I have consulted with the relevant third parties and taken their consultation responses into account in coming to this view.

Furthermore, I consider that release of this information could reasonably be expected to prejudice the future supply of information to the Australian Government, as it may dissuade businesses from engaging with eSafety.

Public interest

Under section 11A of the FOI Act, access to a document covered by a conditional exemption must be given unless it would be contrary to the public interest.

In considering whether to exempt the documents, I have considered and weighed factors for and against disclosure, as outlined in the Guidelines and section 11B of the FOI Act.

I have considered that disclosure is generally considered to promote the objects of the FOI Act, can enhance the scrutiny of government decision making and can inform debate on matters of public importance. However, in my view, the factors against disclosure of the document outweigh the factors in favour of disclosure, as the release of business information that is not otherwise readily available to the public could reasonably be expected to have an adverse effect on the businesses concerned and prejudice eSafety's ability to obtain similar information in the future. eSafety relies on good working relationships with businesses and the sharing of business information. The inability to receive this information would then impact the capacity of eSafety to effectively fulfil its legislative remit by receiving appropriate information.

Having weighed these factors and determined that release at this time would be contrary to the public interest, I consider relevant material in the below documents is exempt from release, either wholly or in part, under section 47G:

Documents 6, 16

Final assessment of charges

Although your request has taken some time to process, I have decided not to impose a charge for processing your request.

Your rights of review

If you are dissatisfied with my decision, you may apply for internal review or Information Commissioner review of the decision. We encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

Under section 54 of the FOI Act, you may apply in writing to FOI@esafety.gov.au for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter. Where possible, please attach reasons why you believe review of the decision is necessary. The internal review will be carried out within 30 days.

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

online: <https://forms.business.gov.au/aba/oaic/foi-review/>

email: enquiries@oaic.gov.au

post: GPO Box 2999, Canberra ACT 2601

in person: Level 3, 175 Pitt Street, Sydney NSW

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Relevant information in this regard is available at www.oaic.gov.au/freedom-of-information/foi-reviews.

If you have any questions in this regard, please contact me on 1800 880 176 or at enquiries@esafety.gov.au.

Yours sincerely,

Maria Vassiliadis
eSafety Commissioner
Authorised decision maker pursuant to section 23(1) of the FOI Act

Attachments

1. Schedule of documents

SCHEDULE OF DOCUMENTS

| Number | Date | Size | Description | Decision on Access | Exemptions of deletions on the grounds of relevance |
|---------------|-------------------|-------------|---|---------------------------|--|
| 1. | 19 August 2021 | 4 pages | Briefing note for meeting between eSafety and AFP | Released in full | Section 22 |
| 2. | 17 August 2021 | 19 pages | Briefing for discussion regarding the Future of Tech Commission | Released in full | Section 22 |
| 3. | 23 August 2021 | 4 pages | Meeting Brief | Exempt from release | Section 33 Section 22 |
| 4. | 14 September 2021 | 7 pages | Briefing for Global Coalition for Digital Safety | Released in full | Section 22 |
| 5. | 8 September 2021 | 4 pages | Email with organisations regarding letter | Exempt from release | Section 47C Section 22 |
| 6. | 8 September 2021 | 4 pages | Email regarding NetSmartz NCMEC series and Thorn for Parents | Released in part | Section 47G Section 47C Section 47F |
| 7. | 8 September 2021 | 8 pages | Email with organisations regarding letter | Exempt from release | Section 33 Section 47C |
| 8. | 25 August | 15 pages | Internal email discussing digital platforms | Released in part | Section 47C Section 47F Section 22 |
| 9. | 7 September 2021 | 5 pages | Email with international organisation | Exempt from release | Section 33 Section 22 |
| 10. | N/A | 3 pages | Submission into the Age Verification Roadmap Consultation | Exempt from release | Section 45 |
| 11. | 24 September 2021 | 10 pages | eSafety Commissioner's INHOPE Speech | Released in full | |
| 12. | 3 September 2021 | 3 pages | Briefing on Twitch for Media Interview | Released in part | Section 22 Section 45 Section 47F |
| 13. | 24 September 2021 | 11 pages | Agenda for meeting with Apple | Released in part | Section 47C Section 47F Section 22 |
| 14. | 24 August 2021 | 31 pages | Product Update Briefing | Released in part | Section 22 Section 47C |
| 15. | 24 September 2021 | 5 pages | Email with international stakeholder regarding an event | Exempt from release | Section 45 Section 33 Section 22 |
| 16. | 2 September 2021 | 2 pages | Email correspondence with a digital platform | Exempt from release | Section 47G Section 47C Section 22 |
| 17. | 20 September 2021 | 11 pages | Email with organisations regarding letter | Exempt from release | Section 33 Section 47C Section 22 |
| 18. | 14 September 2021 | 11 pages | Email with organisations regarding letter | Exempt from release | Section 33 Section 47C Section 22 |
| 19. | 23 September 2021 | 2 pages | Email correspondence with Thorn | Released in part | Section 47F Section 47C Section 33 |