

13 January 2022

Ms Eliza Sorensen

By email: [foi+request-7871-d1f3ecbc@righttoknow.org.au](mailto:foi+request-7871-d1f3ecbc@righttoknow.org.au)

Dear Ms Sorensen

**Internal review request under the *Freedom of Information Act 1982***

I refer to your request of 14 December 2021 seeking internal review of the decision of the eSafety Commissioner (**eSafety**) made on 16 November 2021 under the *Freedom of Information Act 1982 (FOI Act)*.

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

**Decision under review**

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!"

On 24 September 2021, you clarified that the scope of the request was limited to documents dated from 13 August to 24 September 2021.

On 8 October 2021, we sent you a letter by email to the Right to Know email address: [request-7871-d1f3ecbc@righttoknow.org.au](mailto:request-7871-d1f3ecbc@righttoknow.org.au) to advise you of the requirement to consult third parties and the statutory time period for processing your request would be extended for an additional 30 days to 17 November 2021.

Unfortunately, the email address omitted parts of the email and, as you have confirmed, it was not received by you. We were not notified the email was not received and it did not come to our attention that you had not received it until receipt of your request for internal review. We apologise for the error. As you sought a request for internal review, we think it is appropriate to provide you with a decision on your request. It remains open to you to seek Information Commissioner (IC) review of my decision or to complain to the IC about how your request was handled. Contact details for the Office of the Australian Information Commissioner are included below under 'Your review Rights' and 'FOI complaints'.

On 16 November 2021, you were provided with a decision on your request. A total of 19 documents had been found to fall within the scope of your request.

In making my internal review decision, I have considered:

- the FOI Act
- the content of the documents that fall within the scope of your request
- your internal review request
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines).

### **Decision on review**

I have decided to release additional information in documents 4, 6, and 13 as described in the enclosed schedule of documents.

I have otherwise decided to affirm the decision of the original decision maker in relation to the remaining documents with some changes in the exemptions that I have relied on. The exemptions are detailed in the enclosed schedule of documents.

### **Searches for documents**

eSafety uses a centralised document management system that enables documents to be stored and key terms searched. Searches for relevant documents were conducted across the document management system using keywords taken from your request. Physical checks for documents were also made and staff who could potentially have documents were asked to conduct searches. I am satisfied there are no additional documents and that all reasonable searches were undertaken.

### **Reasons for decision**

My decision in relation to each document is described in the schedule of documents enclosed with this decision. Any references to documents in this decision includes a reference to parts of documents.

### **Irrelevant information – s 22**

As described in the schedule of documents, the documents contain information that is not about the subject matters described in your request and not otherwise within the scope of your request. The information concerns unrelated topics that appear in a document that contains otherwise relevant material.

That information has been redacted in accordance with s 22(1)(a)(i) and (b)(ii) on the grounds that it would disclose information that would reasonably be regarded as irrelevant to the terms of your request.

***Damage international relations – s 33(a)(iii)***

Section 33(a)(iii) of the FOI states provides that a document is an exempt document if disclosure of the document would, or could, reasonably be expected to cause damage to the international relations of the Commonwealth.

‘International relations’ means the ability of the Australian Government to maintain good working relations with other governments and international organisations and to protect the flow of confidential information between them. The exemption is not confined to relations at the formal diplomatic or ministerial level. It also covers relations between Australian Government agencies and agencies of other countries.

This principle ensures that Governments can be confident in communicating openly and frankly about matters, which is necessary to be able to properly understand and address issues that have relevance and concern at an international level. This expectation of confidentiality means that countries can be confident that collaborations and discussion undertaken on an understanding of confidentiality will be protected and kept confidential. Information will be subject to confidentiality even if the information later becomes public. It is the understanding that the communication was conducted in confidence that is relevant, not the underlying confidentiality of the information.

For these reasons, eSafety maintains a longstanding practice of not publicly disclosing its confidential discussions with its international counterparts. The documents contain deliberations with international governments and organisations around the international response to CSAM and Apple’s initiative to stop its plan to detect child sexual abuse images. Avoiding disclosures that diminish the confidence which a foreign government or authority would have in Australia as a reliable recipient of confidential information is a well-recognised basis for invoking s 33(a)(iii).

I consider disclosure of the documents would reasonably be expected to:

- undermine the confidence that international governments and organisations have in eSafety’s ability to protect the confidentiality of communications
- more generally, lead to other countries concluding that eSafety could not be relied upon to maintain the confidentiality of communications
- as a result, disclosure would, or could, reasonably be expected to, cause damage to Australia’s international relationships with other countries.

Accordingly, I find the documents are exempt under s 33(a)(iii) of the FOI Act.

***eSafety staff and third party names and contact details – s 47F***

Section 47F conditionally exempts a document to the extent that its disclosure would, or could, involve the unreasonable disclosure of personal information about any person. The documents contain names and contact details of staff members and other third parties. I am satisfied that information is personal information about them.

If information is personal information, it will be conditionally exempt if disclosure would be 'unreasonable'. In considering whether disclosure would be unreasonable, section 47F(2) of the FOI Act requires me to take into account:

- 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 matter relevant information.

I am satisfied that the names and contact details are not well known or publicly available. I have decided to conditionally exempt names of staff, other than the eSafety Commissioner, who have an expectation that their personal information will not be made publically available.

In relation to third parties, I have taken into account that they communicated with eSafety, or were contained in a confidential communication with eSafety, and also have an expectation that their personal information would not be made publically available.

There is no requirement under the FOI Act to replace titles with generic descriptions. Where they appear in the documents, job titles have been disclosed.

I do not consider that the disclosure of the names and contact details of staff and other third parties would shed light on the workings of eSafety or enhance accountability or transparency of its operations. Relevant to this assessment is that none of the staff or third parties were decision makers in relation to a particular matter of public interest or were involved in a matter or decision concerning you. However, I find disclosure would disproportionately interfere with an individual's personal privacy. The information is not publically known and the individuals have an expectation their personal information will not be made publically available.

On that basis, I have concluded that disclosure of the information would be unreasonable and the information is conditionally exempt under section 47F.

I must give access to the documents unless, in the circumstances, access at this time would on balance be contrary to the public interest (subsection 11A(5) of the FOI Act).

Conditionally exempt matter must be released unless, in the circumstances, access to it at this time would, on balance, be contrary to the public interest (section 11A(5) of the FOI Act).

The FOI Guidelines provide at paragraph [6.5] 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
- related to matters of common concern or relevance to all members of the public, or a substantial section of the public.

To find that, on balance, disclosure of a document would be contrary to the public interest requires determining that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information (see paragraph [6.27] of the FOI Guidelines).

In weighing up the public interest, I have taken into account the mandatory factors in section 11B(3) in favour of disclosure. I have not taken into account the irrelevant factors in section 11B(4) of the FOI Act.

I consider disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy and reduce the level of trust staff members and third parties have in eSafety to look after and protect from public disclosure their personal information. I consider disclosure of the names and contacts details would have a negligible impact on transparency and accountability of the way eSafety carries out its statutory functions. I consider that there is minimal public interest in this information being disclosed.

On balance, I have concluded that disclosure would be contrary to the public interest and the information is exempt under section 47F.

#### **Recommendations about eSafety decision making – s 47C**

Section 47C provides that a document is conditionally exempt if it would disclose deliberative matter in the nature of opinion, advice or recommendation, consultation or deliberation in the course of the deliberative processes of an agency.

I consider information in the documents contains matter of opinion, advice, consideration and recommendation about matters relevant to the functions of eSafety regarding its strategy and approach around child sexual abuse material (**CSAM**) and related issues.

Some of the deliberations involve international organisations and government counterparts who engaged with eSafety on the understanding that deliberations were conducted in confidence and would not be made publically available.

Other deliberations concern internal assessments of online products that eSafety does not disclose to the public. These include about limitations, suggested next steps and proposed questions to the relevant entity. The deliberations include frank assessments of products, some of which could be considered critical of the efficacy of the product. eSafety is entitled to conduct its internal consideration of strategy and approach in relation to its statutory functions without undue public oversight and scrutiny until such time as it determines it is appropriate to make public announcements or disclosures. This process ensures that eSafety is able to deliberate and make assessments and decisions without needing to explain every step in its consideration to the public.

I find the information is deliberative in nature and conditionally exempt under section 47C.

I acknowledge that there are public interest factors in favour of disclosing this material, including that disclosure would promote the objects of the FOI Act by increasing scrutiny of eSafety's handling of an issue of concern and interest and, to some extent, promote public debate about the activities of eSafety and CSAM more generally.

eSafety regularly liaises and collaborates with international regulators and other government bodies in undertaking its activities. The nature of these exchanges is often confidential, as was the case in relation to the documents in issue. In this case, eSafety was consulted on the basis of its good standing, leadership and strong reputation on the international stage in relation to combating online abuse. I would be very concerned that disclosure of the deliberations would damage the current strong standing and reputation of eSafety including its international relationships. It is vital that eSafety be able to maintain its strong international standing and relationships with its international counterparts so that it can continue to work with international governments and organisations to combat online harm and abuse.

There are a number of public interest factors that weigh against disclosure, including:

- the public interest in eSafety's ability to confidentially assess and critique online products for internal purposes openly and frankly
- the public interest in international organisations continuing to openly and freely engage with eSafety on topics and areas of mutual interest and concern
- the public interest in eSafety's ability to engage with international counterparts in relation to its development of its CSAM strategy and its strategy regarding its approach to its regulatory functions more generally
- the public interest in eSafety maintaining its strong international reputation and as a leader in combating online abuse
- the public interest in maintaining confidentiality when collaborating and communicating with international counterparts about matters of mutual interest and concern.

I do not consider that disclosure would make a significant contribution to promoting the objects of the FOI Act. While disclosure may shed some insight into the way eSafety conducts its international collaborations, I am concerned disclosure would significantly damage eSafety's capacity to collaborate with international counterparts in the future.

On balance, I have concluded that disclosure of the documents is contrary to the public interest and the documents are exempt from disclosure under section 47C.

### **Damage agency operations – s 47E(d)**

Section 47E(d) conditionally exempts a document if its disclosure would, or could, have a substantial adverse effect on the proper and efficient conduct of agency operations.

Document 10 is a submission provided to eSafety on the understanding it was provided in confidence and would not be made publically available. The submission was provided in response to the request for evidence regarding a proposed age verification system to limit access to online pornography to minors. Relevantly, the eSafety's submission form states that any submissions provided will only be used for internal purposes to help shape the public consultation process and that it will not be made publically available. Even though the submission also refers to the potential for disclosure under the FOI Act, any disclosure would only be made with the agreement of the submitter.

On the basis of this undertaking, persons and organisations provide open and frank submissions in the knowledge that the information they provide is confidential to eSafety and will not be made publically available without their agreement. I would be very concerned that disclosure under the FOI Act would undermine that undertaking and damage the reputation of eSafety. I would also be very concerned that disclosure would mean persons and organisations would no longer provide submissions, or would confine or draft submissions with a view that they may be made publically available, resulting in less candid and valuable information being made available to inform the strategy and consultation processes of eSafety. I find these consequences to be real and substantial.

I believe disclosure would limit the level and value of information provided in submissions in the future, thereby impacting the ability of eSafety to properly and effectively carry out its consultation and regulatory functions. I consider disclosure would have a substantial adverse effect on the operations of eSafety and the information is conditionally exempt under section 47E(d).

Other documents as described in the Schedule of Documents also contain deliberations and communications with an international government and organisations around the international response to CSAM and Apple's initiative to stop its plan to detect child sexual abuse images. Those discussions and deliberations were conducted on the understanding they were confidential and would not be made publically available.

On the basis of this undertaking, international governments and organisations engage openly and frankly with eSafety in the knowledge that the information they provide is confidential and will not be made publically available. I would be very concerned that disclosure under the FOI Act would undermine that understanding and damage the reputation of eSafety for the same reasons I give in relation to the s 33(a)(iii) exemption discussed above. I find these consequences to be real and substantial.

I believe disclosure would limit the level and value of information provided in submissions and discussions in the future, thereby adversely impacting the ability of eSafety to properly and effectively carry out its consultation, international cooperation and regulatory functions. I consider disclosure would have a substantial adverse effect on the operations of eSafety and the information is conditionally exempt under section 47E(d).

Public interest factors in favour of disclosing this material include that disclosure would promote the objects of the FOI Act by increasing scrutiny and public debate in relation to eSafety's functions and activities.

I consider the public interest factors considered under s 47C above are also relevant here.

In addition, there are a number of other public interest factors against disclosure, including:

- disclosure could reasonably be expected to prejudice eSafety's reputation and consultation processes, including at an international level
- the public interest in the ability of eSafety to be able to conduct its functions effectively and efficiently.

I do not consider that disclosure would make a significant contribution to promoting the objects of the FOI Act. Disclosure would contribute to some degree to public oversight and debate about the way eSafety conducts its activities. However I am concerned disclosure would significantly damage eSafety's capacity to effectively conduct its consultation and regulatory functions, both within Australia and internationally.

On balance, I have concluded disclosure of the documents is contrary to the public interest and the documents are exempt from disclosure under section 47E(d).

### **Your review rights**

If you are dissatisfied with my decision, you may apply to the Australian Information Commissioner for review. 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/smartforms/servlet/SmartForm.html?formCode=ICR\\_10](https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10)

email: [foidr@oaic.gov.au](mailto:foidr@oaic.gov.au)

post: GPO Box 5218 Sydney NSW 2001

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

## FOI Complaints

If you are unhappy with the way we have handled your FOI request, please let us know what we could have done better. We may be able to rectify the problem. If you are not satisfied with our response, you can make a complaint to the Australian Information Commissioner. A complaint to the Information Commissioner must be made in writing. Complaints can be lodged in one of the following ways:

online:

[https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA\\_1](https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA_1)

email: [foidr@oaic.gov.au](mailto:foidr@oaic.gov.au)

post: GPO Box 5218 Sydney 2001

More information about complaints is available on the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint/>.

If you are not sure whether to lodge an Information Commissioner review or an Information Commissioner complaint, the Office of the Australian Information Commissioner has more information at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/>.

Yours sincerely

**SHARON TROTTER**

## SCHEDULE OF DOCUMENTS

	Date	No. of Pages	Description	Decision	Exemptions
1.	19 Aug 2021	4	Briefing note for meeting between eSafety and AFP	Release in part	Section 47F Section 22 - information not relevant to keywords in request and outside scope of the terms of the request Partially irrelevant to scope of request
2.	17 Aug 2021	19	Briefing for discussion regarding the Future of Tech Commission	Release in part	Section 47F Section 22 – information not relevant to keywords in request and outside scope of the terms of the request Partially irrelevant to scope of request
3.	23 Aug 2021	4	Meeting Brief with Korean Communications Standards Commission	Exempt in full	Section 33(a)(iii) Section 22 – information not relevant to keywords in request and outside scope of the terms of the request. Partially irrelevant to scope of request
4.	14 Sept 2021	7	Briefing for Global Coalition for Digital Safety	Release in part Additional text on page 5, 6 and 7 released	Section 47F Section 22 – information not relevant to keywords in request and outside scope of the terms of the request. Partially irrelevant to scope of request
5.	8 Sept 2021	4	Email chain with internal government and organisations regarding Apple's initiative to scan to find matches of CSAM	Exempt in full	Section 33(a)(iii) and S 47C
6.	8 Sept 2021	4	Email regarding NetSmartz NCMEC series and Thorn for Parents	Release in part Attachment to email is document 14	Section 47F and s 47C Section 22 Partially irrelevant to scope of request

	Date	No. of Pages	Description	Decision	Exemptions
				Additional text on page one released	
7.	8 Sept 2021	8	Email chain with internal government and organisations regarding Apple's initiative to scan to find matches of CSAM  Part duplicate of document 5, 7, 17 and 18	Exempt in full  Partially irrelevant to scope of request	Section 33(a)(iii) and s 47C
8.	25 Aug	15	Internal email discussing digital platforms	Release in part	Section 47F  Section 22 Partially irrelevant to scope of request
9.	7 Sept 2021	5	Email chain with internal government and organisations regarding Apple's initiative to scan to find matches of CSAM	Exempt in full  Part duplicate of documents 5, 7, 17 and 18	Section 33(a)(iii) and s 47C  Section 22 Partially irrelevant to scope of request
10.	N/A	3	Submission in response to the Age Verification Roadmap Consultation	Exempt in full	Section 47E(d)
11.	24 Sept 2021	10	eSafety Commissioner's INHOPE Speech	Released in full in the primary decision	
12.	3 Sept 2021	3	Briefing on Twitch for Media Interview	Release in part  Partially irrelevant to scope of request	Section 22 Partially irrelevant to scope of request
13.	24 Sept 2021	11	Covering email and Agenda for meeting with Apple	Release in part  Partially irrelevant to scope of request	Section 47F  Section 22 Partially irrelevant to scope of request

	Date	No. of Pages	Description	Decision	Exemptions
				Additional email released	
14.	24 Aug 2021	31	Product Update Briefing	Release in part  Partially irrelevant to scope of request  Attachment to document 6	Section 47C  Section 22 Partially irrelevant to scope of request
15.	24 Sept 2021	5	Email with international stakeholder regarding an event	Exempt in full	Section 33(a)(iii) and s 47C  Section 47F  Section 22 Partially irrelevant to scope of request
16.	2 Sept 2021	2	Email correspondence with a digital platform	Exempt in full	Section 33(a)(iii)  Section 47F  Section 22 Partially irrelevant to scope of request
17.	20 Sept 2021	11	Email chain with internal government and organisations regarding Apple's initiative to scan to find matches of CSAM	Exempt in full  Part duplicate of documents 5, 7, 9 and 18  Partially irrelevant to scope of request	Section 33(a)(iii) and s 47C  Section 47F  Section 22 Partially irrelevant to scope of request
18.	14 Sept 2021	11	Email chain with internal government and organisations regarding Apple's initiative to scan to find matches of CSAM	Exempt in full  Part duplicate of documents 5, 7, 9 and 17  Partially irrelevant to scope of request	Section 33(a)(iii) and s 47C  Section 22 Partially irrelevant to scope of request
18 a			Draft response to Apple's New Policy  Attachment to document 18	Exempt in full	Section 33(a)(iii) and s 47C

	<b>Date</b>	<b>No. of Pages</b>	<b>Description</b>	<b>Decision</b>	<b>Exemptions</b>
19.	23 Sept 2021	2	Email correspondence with Thorn	Release in part	Section 47F  Section 22 Partially irrelevant to scope of request