

10 January 2022

Ms Eliza Sorenson

By email: foi+request-7891-af9b6eb4@righttoknow.org.au

Dear Ms Sorenson,

Internal review request under the Freedom of Information Act 1982

The purpose of this letter is to advise you of my decision following your request of 10 December 2021 for internal review of the decision of the eSafety Commissioner (**eSafety**) of 22 November 2021 to refuse access to documents you requested under the Freedom of Information Act 1982 (FOI Act).

I, **Sharon Trotter, Executive Manager (Acting)**, am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to FOI requests.

Decision under review

On 24 September, you sought access to:

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

“NCOSE”, “Morality in Media”, “Ending Sexploitation Podcast”, “The National Center on Sexual Exploitation”.’

eSafety received your request on 24 September 2021. On 21 October 2021, eSafety advised you that it was undertaking third-party consultations and the statutory time period for the processing of your request would be extended for an additional 30 days.

On 22 November 2021, you were advised that 6 documents had been found to fall within the scope of your request. Of these:

- Document 1 was released in full
- Documents 2, 3, 4, and 5 were released with redactions
- Document 6 was found to be wholly exempt

Your internal review request

On 10 December 2021, you requested an internal review of that decision.

In your detailed review request, you made a number of contentions, including:

- the extension of time to undertake third-party consultations was invalid;
- eSafety's reliance on s 47F of the FOI Act is invalid due to a lack of evidence and sufficient reasoning;
- where s 47F redactions are valid, they should be replaced by appropriate metadata and individuals' signature blocks should be disclosed;
- eSafety failed to sufficiently consider the public interest in assessing whether the conditional exemptions were made out;
- eSafety's reliance on s 45(1) of the FOI Act to exempt Document 6 is invalid due to a lack of evidence and reasoning;
- eSafety's reasons supporting its reliance on s 47E(d) of the FOI Act to exempt portions of Document 4 are invalid as the decision-maker made an error of law; and
- document searches and the documents identified as falling within the scope of the request were insufficiently described.

In making my internal review decision, I have considered:

- the FOI Act (in particular sections 22, 47C, 47E(c) and (d) and 47(F))
- the content of the documents that fall within the scope of your request
- what you have said in your internal review request, and
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines).

I have considered your contentions regarding the application of exemptions in reaching my decision. I do not agree that the extension of time for third party consultation allowed when the initial decision was made was invalid. In relation to your concerns regarding search information, eSafety use a centralised document management system that enables documents to be stored and key terms searched, and staff who could potentially have documents were asked to check. This is how the 6 documents were identified. I am satisfied there are no additional documents. The schedule of documents the initial decision maker provided is in the same form as the sample schedule you identified in your internal review request and in my view provides a sufficient description. I have provided a similar schedule.

Decision on review

I have decided to release each of documents 1-5 with redactions and wholly exempt document 6. For documents 1, 2 and 4, the redactions are the same as in decision under review. For documents 3 and 5 I have decided to release more text.

Reasons for decision

eSafety staff names and contact details – s 22

The names, email addresses and telephone numbers of eSafety staff (and the telephone numbers only of the eSafety Commissioner) have been withheld where

they appear in documents 1 to 5. I understand you do not seek this information so I have relied on s 22 of the FOI Act for these redactions (information that is reasonably regarded as irrelevant to the request).

In your internal review request you asked for staff job titles to be inserted in place of names. Where such information is contained in the documents it has been released (see for example the title 'Senior Executive Assistant to Julie Inman Grant, Commissioner' in document 3). However, altering the documents to insert information would take some time and is not required by the FOI Act. I can however confirm that in each of the cases where the name of the sender or recipient of an email is fully withheld (such as the redactions beside 'From' in the emails of 22 September 2021 at 5.28PM in document 1 and 23 September 2021 at 10.49AM in document 2) this is because '@eSafety.gov.au' did not appear in the email and in each case the sender or recipient is an eSafety staff member.

eSafety staff names and contact details – s 47F

Even if you did seek access to names and contact details, I also find the names, email addresses and telephone numbers of eSafety staff are conditionally exempt under section 47F.

Section 47F conditionally exempts a document to the extent that its disclosure would involve the unreasonable disclosure of personal information about any person. The documents contain names and contact details of staff members. 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 I consider relevant.

I am satisfied that the names and contact details are not well known or publicly available.

I do not consider that the disclosure of this information would shed light on the workings of eSafety or enhance accountability or transparency. Further, I find disclosure would disproportionately interfere with an individual's personal privacy.

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

I find that these parts of documents are conditionally exempt in part under section 47F of the FOI Act.

Nonetheless 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.

I am also conscious that:

- I must consider the mandatory factors in section 11B(3) in favour of disclosure and must not consider any of the irrelevant factors in section 11B(4) of the FOI Act, and
- concluding 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).

I consider disclosure of staff names and contacts details would have a negligible impact on public accountability. On the other hand, I consider disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy. 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

Page one in document 2 contains a recommendation about media strategy separate to the content of the email. It forms part of the overall eSafety's online media strategy.

The second paragraph on page one of document 4 contains information about eSafety's internal strategy about online issues that remains under development and is not publicly available.

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

Public interest factors in favour of disclosing this material include that disclosure would promote the objects of the FOI Act including by increasing scrutiny and promoting public debate.

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

- release could reasonably be expected to prejudice eSafety's continued development of its online media strategy and its strategy regarding its approach to its regulatory functions
- the public interest in the ability of eSafety to be able to continue to develop its online media strategies to effectively conduct its regulatory functions.

On balance, in my view disclosure of this material is contrary to the public interest. I do not consider that its disclosure would make a significant contribution to promoting the objects of the FOI Act. However I am concerned its disclosure would significantly harm eSafety's capacity to manage and develop its online media strategy and regulatory strategy.

Accordingly, I have decided that this material is exempt from disclosure under section 47C.

Direct email contact addresses of NCOSE staff – s 47F

While the names of all NCOSE staff in the documents have been released, I have decided to continue to withhold the first part of their email address (but not '@ncose.com').

Section 47F of the FOI Act provides that a document is conditionally exempt from disclosure to the extent that it contains personal information, the disclosure of which would be unreasonable. 'Personal information' has the same meaning as in the *Privacy Act 1988*, where it is broadly defined, and direct email contact information is personal information. I have considered the matters set out in s 47F(2) in deciding whether this direct contact information would be unreasonable. While the fact one of the individuals is well known (and is publicised on the NCOSE website), I have no evidence that their direct email contact addresses are, as you have suggested, 'a matter of public record'.

In my view it would be unreasonable to release these contact details under the FOI Act and I am satisfied that this material is conditionally exempt. I acknowledge and have given weight to the fact that there is a public interest in material in eSafety documents being made available to the public for the purpose of promoting the objects of the FOI Act. However, I do not consider that disclosure of the direct contact details of individuals corresponding with eSafety would significantly advance these interests or shed light on the workings of eSafety, and consider that there is minimal public interest in this information being disclosed. By contrast, I consider there is a strong public interest in the protection of personal privacy.

On the basis I am not aware these direct contact details are publicly available, on balance I consider disclosure of this information is contrary to the public interest and it is exempt from release under section 47F.

Certain material in document 4 - s 47E(c)

Section 47E(c) provides that documents are conditionally exempt if disclosure would, or could reasonably be expected to, have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency.

Document 4 includes, in the first paragraph of the 22 September 2021 3.18PM email from the eSafety Commissioner to a staff member and in the final paragraph of the reply email from that staff member of 22 September 2021 at 3.45PM, a separate exchange relating to a staff matter.

It is apparent this exchange was incidental to the subject of the emails. The information concerns a staff matter separate to the topic of the emails. In my view, the disclosure of this exchange under the FOI Act could undermine confidence of staff that personal information about them will be kept confidential and inhibit candour in performance discussions in eSafety in the future. On that basis, I consider that the release of this material would have a substantial adverse effect on the management or assessment of personnel by eSafety and that it is conditionally exempt under s 47E(c).

Public interest factors in favour of disclosing this material include that disclosure would promote the objects of the FOI Act including by increasing scrutiny.

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

- release could reasonably be expected to prejudice eSafety's staff management function, and
- the public interest in the protection of personal privacy in relation to performance issues.

On balance, in my view disclosure of this material is contrary to the public interest. I do not consider that its disclosure would make a significant contribution to promoting the objects of the FOI Act, however I am concerned its disclosure would significantly harm eSafety's capacity to manage staff effectively and prejudice individuals' right to privacy. Accordingly, I have decided that this material is exempt from disclosure under section 47E(c).

Damage agency operations – s 47E(d)

Document 6 is a submission provided to eSafety on the understanding it was provided in confidence and would not be made publicly 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, 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 publicly available.

On the basis of this undertaking, persons and organisations provide open and frank submissions in the knowledge that the information they provided is confidential to

eSafety and will not be made publicly available. 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 the submissions with a view that they may be made publicly 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).

Public interest factors in favour of disclosing this material include that disclosure would promote the objects of the FOI Act including by increasing scrutiny and public debate.

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

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

On balance, in my view disclosure of this material is contrary to the public interest. I do not consider that its disclosure would make a significant contribution to promoting the objects of the FOI Act, however I am concerned its disclosure would significantly damage eSafety's capacity to effectively conduct its consultation and regulatory functions. Accordingly, I have decided that this material is exempt from disclosure under section 47E(d).

Damage to business affairs – s 47G

Page 12 of document 3 contains business information of the National Centre of Sexual Exploitation (NCOSE). The information constitutes the business information of NCOSE. Disclosure to the public under the FOI Act would or could enable the public to access information for which access would not ordinarily be available.

On this basis I am satisfied disclosure would reasonably be expected to unreasonably affect NCOSE in respect of its financial and commercial affairs. I find the information is conditionally exempt under section 47G(1)(a) of the FOI Act.

Public interest factors in favour of disclosing this material include that disclosure would promote the objects of the FOI Act including by increasing scrutiny.

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

- release could reasonably be expected to prejudice the business affairs of a third party, and
- the public interest in the protection of confidential and valuable business information about a third party.

On balance, in my view disclosure of this material is contrary to the public interest. I do not consider that its disclosure would make a significant contribution to promoting the objects of the FOI Act, however I am concerned its disclosure would significantly harm the business affairs of a third party. Accordingly, I have decided that this material is exempt from disclosure under section 47G(1)(a).

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

email: 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

email: 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

NUMBER	DATE	SIZE	DESCRIPTION	INITIAL DECISION ON ACCESS	INTERNAL REVIEW DECISION ON ACCESS
1	22 September 2021	3 pages	Emails between eSafety Staff	Released in full – s 22	Release in part – s 22, s47F
2	23 September 2021	28 pages	Emails between eSafety staff	Released in part – ss 22, 47C	Release in part – s 22, s47F s 47C - two sentences on page one
3	22 June – 16 July 2021	17 pages	Emails between NCOSE and eSafety	Released in part – ss 22, 47C	Release in part – ss 22, 47F s 47G – page 12 Additional information released on page 3, 4, 5, 7, 8, and 14
4	22 June – 16 July 2021	5 pages	Emails between eSafety staff	Released in part – s 22, 47E(c), 47E(d)	Release in part – s 22, s47F S 47E(d) – second paragraph on page 1 s 47E(c) – 4 sentences on pages 4 and 5
5	22 September 2021	1 page	Emails between NCOSE and eSafety	Released in part – ss 22, 47C	Release in part – s 22, 47F Additional information released on page one (link)
6	September 2021	9 pages	Submission by organisation on eSafety's age verification for online pornography roadmap	Wholly exempt – s 22, 45	Exempt in full – s 47E(d)