

15 December 2021

Greg Tannahill

By email: [foi+request-7908-eb49ab4a@righttoknow.org.au](mailto:foi+request-7908-eb49ab4a@righttoknow.org.au)

Dear Mr Tannahill,

### **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 15 November 2021 for internal review of the decision of the eSafety Commissioner (**eSafety**) of 29 October 2021 to refuse access to documents you requested under the *Freedom of Information Act 1982* (**FOI Act**).

### **Summary**

I, Rebecca Razavi, General Manager, am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to FOI requests.

On 29 September you sought access to:

- ‘Correspondence, including emails, whether internal to the office or between the office and outside parties;
- Diary entries, calendar entries, and notifications of online meetings
- Minutes of meetings
- Discussion of policy, and any draft or final policy papers or proposals where those documents discuss or relate (in whole or in part) to:
  - the proposed involvement of Mastercard, or any individual or entity closely related to Mastercard, in delivering or influencing the delivery of online age verification services in Australia;

covering the period:

- 1 February 2020 to 7 October 2021.’

On 29 October 2021, you were advised of the decision to provide access in part to three documents (documents 3, 4 and 5) with some material redacted from each documents as irrelevant to the request under s 22 of the FOI Act, and to refuse access to two documents (documents 1 and 2).

On 29 October 2021, you asked for an informal administrative review of the decision noting that you were seeking the entirety of documents 3, 4 and 5, as well as a reconsideration of the application of the exemptions to documents 1 and 2, including clarification of the basis on which the decision-maker believed the documents to be exempt, and requesting that further details regarding the documents be provided.

On 12 November 2021, eSafety administratively released further additional information from document 3.

On 15 November 2021, you asked for a formal internal review.

In requesting an internal review, you raised a number of points of objection in relation to the decision of 29 October 2021 which are set out at point 1- 12 of your internal review request. I have considered all of the matters you raised in making this decision. Those matters are, in summary, that you consider

- (1) that you are entitled to a better explanation of why documents 1 and 2 were not provided
- (2) that you were entitled to non-exempt 'metadata' relating to Documents 1 and 2.
- (3) that the explanation of the section 47E exemption for documents 1 and 2 does not appear to be valid as a matter of law
- (4) that the decision to edit documents 3,4 and 5 per section 22 of the FOI Act was invalid
- (5) no other exemption was identified relating to documents 3, 4 and 5.
- (6) that the redaction of documents 3,4 and 5 was excessive
- (7) that you are entitled to metadata relating to documents 3, 4 and 5 (such as dates, sender, receiver, name or position, description of the documents)
- (8) a description should have been given of the evidence taken into account in the making of the decision
- (9) that you are entitled to documents created in the fulfilment of the FOI, including a schedule of documents considered by the agency, and a list of systems, folders, or archives queried to prepare that list
- (10) that the decision does not take into account public interest factors in favour of the release of the documents.

### **Decision on review**

In arriving at my decision, I have taken into account:

- The FOI Act (in particular sections 22, 34, 47C, 47E, 47F, 47G)
- the content of the documents that fall within the scope of your request
- all your correspondence, including your original request for documents, request for informal administrative review, and your application for formal internal review
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**Guidelines**)
- the views of Department of Prime Minister and Cabinet (**PMC**) and the Digital Transformation Agency (**DTA**), who were consulted in relation to this request.

I have decided to release document 1 in full and further material from each of the other documents. I have decided to claim the following exemptions:

- sections 47G(1)(a) and 47E(d) for parts of document 2
- sections 34(3), 47C and 47F for parts of each of documents 3 and 4
- section 47F for parts of document 5.

My reasons for decision are set out below.

In making my decision I have considered your contentions, where relevant.

I note you have raised concerns regarding the searches conducted, and the number of documents returned in response to your request. For the initial decision, all eSafety staff who were reasonably likely to have documents were asked to search their records and identify any relevant documents. We use a centralised document management system that enables documents to be stored and key terms to be searched. Each document was closely reviewed in light of the terms of the request. For this decision, we again considered whether there were additional documents that should be included. I am confident that there are no further documents that meet the terms of the request.

### **Timeframe for processing**

eSafety received your request for internal review on 15 November 2021. This means the 30-day statutory period for processing your request concludes today and we are therefore providing you a response within the statutory timeframe.

### **Decision and reasons for decision**

#### ***Exemption: Section 34 – Cabinet Affairs***

I am satisfied that parts of each of documents 3 and 4 are exempt under s 34(3) of the FOI Act.

Section 34(3) permits the exemption of a document which, if disclosed, would reveal Cabinet deliberations or decision, unless the deliberation or decision has been officially disclosed (s34(3)). In forming my view, I relied upon information provided by PMC (who were consulted in accordance with para 5.57 of the Guidelines). PMC confirmed that parts of documents 3 and 4 would reveal Cabinet deliberations or decisions, where these have not been officially disclosed. On that basis, I am of the view that those parts of documents 3 and 4 are exempt from release under s 34(3) of the FOI Act.

#### ***Conditional exemptions***

Each of the other exemptions I have applied to parts of documents 2-5 are conditional exemptions. Below I explain why I consider the relevant conditional exemption applies.

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.

Further, paragraph [6.27] explains that 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.

For each conditional exemption claim, I explain below the factors favouring and against access I consider to be relevant. In each case, I have considered the mandatory factors in section 11B(3) and have not considered any of the irrelevant factors in section 11B(4) of the FOI Act.

### **Section 47C – Deliberative processes**

Section 47C(1) of the FOI Act permits conditional exemption of a document if its disclosure would disclose deliberative matter. Deliberative matter includes opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the deliberative processes of an agency.

Documents 3 and 4 include information that would reveal deliberative processes of eSafety and DTA with respect to matters of policy development in respect of age verification. I do not believe this information is operational or purely factual information (see section 47C(3)), and am satisfied that discrete parts of each of documents 3 and 4 are conditionally exempt under s 47C.

#### *Public interest factors*

I have identified public interest factors in favour of disclosing the documents, including that disclosure would:

- (a) promote the objects of the Act, particularly in increasing transparency
- (b) facilitate access to the public on matters of interest to some sections of the public.

In relation to the deliberative material in documents 3 and 4, the key public interest factor against disclosure is that disclosure could reasonably be expected to prejudice deliberative processes of government including eSafety and the DTA in respect of the development of public policy relating to age verification, in circumstances where matters are closely connected with deliberations of Cabinet.

On balance, I consider disclosure of the relevant deliberative material at this time would be contrary to the public interest. I do not consider that disclosure of the relevant parts of the documents would significantly advance the public interest in promoting the objects of the FOI Act, nor do I think there is any significant public interest in this information being known. By contrast, there is a significant public interest in the protection of material related to Cabinet processes.

Accordingly, I have decided that the parts of those documents are exempt under section 47C of the FOI Act.

### **Section 47E(d) – Operations of an agency**

Section 47E(d) provides that documents are conditionally exempt if 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.

Documents 2 and 3 include information about third party businesses with whom DTA may engage in age verification trials, as well as information about prototypes used by DTA modelled on business information.

I am of the view that the release of this material would have a substantial adverse effect on the proper and efficient conduct of the DTA as release of the names of the businesses may jeopardise the participation of third party businesses in age verification trials, and therefore impact the successful engagement of those businesses in and implementation of the trials. It may also discourage other businesses from entering into similar discussions with the DTA, where there has been an expectation of confidentiality, and may damage DTAs ability to engage with the commercial sector collaboratively.

I am therefore satisfied that the documents are conditionally exempt under s 47E(d) of the FOI Act.

I note that there are names of some third party businesses released in the documents where the particulars of arrangements are publicly known, or where reference to the businesses is purely speculative.

*Public interest factors*

I have identified public interest factors in favour of disclosing the documents, including that disclosure would:

- (a) promote the objects of the Act, particularly in increasing transparency
- (b) facilitate access to the public on matters of interest to some sections of the public.

I have considered the following factors against disclosure, being that release:

- (a) could reasonably be expected to prejudice DTA's ability to obtain agreement from businesses to engage in age verification trials
- (b) could reasonably be expected to prejudice DTA's ability to obtain confidential information from and maintain the trust of businesses, including prejudice to future activities (as set out above when considering the adverse effect)

I acknowledge and have given weight to the fact that there is a public interest in documents of eSafety being made available to the public for the purpose of promoting the objects of the FOI Act. On balance, I do not consider that disclosure of the relevant parts of the documents would significantly advance these interests, and consider that there is minimal public interest in this information being known. By contrast, disclosure would cause a significant harm if it prejudiced the DTA's ability to obtain confidential information from third party businesses and stakeholders.

I consider that, in the circumstances, and taking into account the above considerations, on balance, disclosure of the information is contrary to the public interest. Accordingly, I have decided that the parts of those documents are exempt under section 47E(d) of the FOI Act.

**Section 47F – Personal privacy**

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 to include information or an opinion about an identified individual, or an individual who is reasonably identifiable. Parts of documents 3, 4 and 5 contain the names and contact details of eSafety and DTA employees, which is clearly personal information.

In considering whether disclosure of this personal information would be unreasonable, s 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 from the nature of the information, from web searches, and from my knowledge and understanding of the personnel management function in eSafety and the DTA, that the names and contact details of the staff identified in these documents are not well known or publicly available. Additionally, eSafety staff undertake work that is highly sensitive and emotive, and there is a strong public interest in not disclosing such information.

Weighing all these things up, I have concluded that disclosure of these individuals' personal information in the documents would be unreasonable. I am therefore satisfied that the documents are conditionally exempt under s 47F of the FOI Act.

The above discussion of the public interest in relation to section 47E is also relevant to section 47F. In relation to this exemption, I have also taken into account:

- (a) in favour of disclosure, the public interest in promoting the objects of the Act, particularly in increasing scrutiny, discussion, comment and review of the Government's activities (s 3(2)(b) FOI Act), and
- (b) against disclosure, the public interest in protecting individuals from unreasonable interferences with their privacy and in particular protecting the privacy of staff not in senior positions, in circumstances where staff may be exposed to harm as a result of disclosure.

I also do not consider that the disclosure of this information would shed light on the workings of eSafety or DTA or enhance accountability or transparency.

Considering these factors, in my view disclosure of the relevant staff names and contact details would, on balance, be contrary to the public interest.

### **Section 47G**

I find that parts of documents 2, 3 and 4 are conditionally exempt under s 47G(1)(a) and (b) for the following reasons.

#### ***Business affairs information***

The relevant parts of the document include the names of businesses with whom the Digital Transformation Agency may participate in age verification trials. The term 'business affairs' has been interpreted to mean 'the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs' (see para 6.192 of the FOI Guidelines). Information about the particularities of arrangements with these companies concerns the 'business affairs' of these entities.

#### *Disclosure could reasonably be expected to have an unreasonable adverse effect*

The names of the businesses who are in discussions with DTA to engage in age verification trials are commercially sensitive. I am advised by the DTA that the arrangements and discussions between DTA and these businesses are confidential, and not publicly known. It is not possible to restrict the further dissemination of material released under the FOI Act, and in this case eSafety's responses are being posted on the Right to Know website, hence this information if disclosed will be available to competitors of these businesses. I consider that release of this commercial intelligence could reasonably be expected to unreasonably affect these businesses in respect of their lawful business or commercial affairs.

As outlined above, I note that there are names of some third party businesses released in the documents where the particulars of arrangements are publicly known, or where reference to the businesses is purely speculative.

#### *Disclosure could reasonably be expected to prejudice supply of information*

Release of the names of these businesses may also jeopardise their participation in such trials, and the successful engagement in and implementation of the trials. It may also discourage other businesses from entering to similar discussions with the DTA.

*Disclosure is contrary to the public interest*

I have identified public interest factors in favour of disclosing the documents, including that disclosure would

- (a) promote the objects of the FOI Act, including promoting transparency
- (b) inform debate on a matter of public importance (the Australian Government's policy position on age verification).

I attribute little weight to these factors. The general public policy is understood, and it is known that DTA will be engaging in age verification trials with various businesses and that if arrangements are entered into, details will be made publicly available.

I consider the public interest factors against disclosure ought to be afforded significant weight in this case. In particular, I am of the view that disclosure would or could reasonably be expected to:

- (a) prejudice the business affairs of the relevant named businesses
- (b) prejudice discussions between DTA and those businesses for the successful establishments and implementation of age verification trials, in pursuit of the development of government policy and initiatives in respect of age and digital identity verification, and which took place on an understanding of confidentiality
- (c) discourage other businesses from participating in discussions with the DTA regarding age verification trials or other proposals.

I am of the view that disclosure of the documents would, on balance, be contrary to the public interest.

**Additional information**

As part of our consultation with the DTA, they noted that the timeline in slide 8 of document 2 is indicative only and suggested this be clarified in the decision to avoid misrepresentation.

**Questions about this decision**

If you wish to discuss this decision, please contact me by emailing [FOI@esafety.gov.au](mailto:FOI@esafety.gov.au).

**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,

Rebecca Razavi  
General Manager  
eSafety Commissioner

## SCHEDULE OF DOCUMENTS

NUMBER	DATE	SIZE	DESCRIPTION	INITIAL DECISION ON ACCESS	INTERNAL REVIEW DECISION ON ACCESS
1	3 August 2021	2 pages	Speaking notes for DTA presentation on age verification and digital identity	Access refused (s47 & 47E)	Release in full.
2	3 August 2021	23 pages	Slides for DTA's presentation on age verification and digital identity	Access refused (47 & 47E)	Exempt in part - s 47G(1)(a)&(b) (business affairs) and s 47E(d) (slides 13-23) (operations of the agency).
3	9 August 2021	2 pages	eSafety meeting note from meeting with DTA	Release	Exempt in part – s 47C (deliberative processes), s 47F (personal privacy of staff names), s 47G(1)(a)&(b), s 34(3) (cabinet affairs)
4	14 September 2021	1 page	eSafety meeting note from meeting with DTA	Release	Exempt in part under s 34(3) (cabinet affairs), s 47C (deliberative processes) & s 47F (personal privacy of staff names)
5	27 September 2021	1 page	Email between eSafety staff on news article relating to DTA and Mastercard	Release	Exempt in part – s 47F (personal privacy of staff names and contact details).