

3 May 2022

Alex Pentland
By email: foi+request-8637-367f2fe2@righttoknow.org.au

Dear Mr Pentland,

Request for access to documents under the *Freedom of Information Act 1982*

The purpose of this letter is to provide you a decision on your request for documents under the *Freedom of Information Act 1982 (Cth)* (FOI Act) that the eSafety Commissioner (eSafety) received on 22 March 2022.

Summary

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

The scope of your request is as follows:

“Any emails, correspondence, or records of correspondence from the eSafety commissioner or final documents that include the phrase ‘Trusted Digital Identity Bill 2021... [i]n addition, I consent to exclude documents that are out of scope but are captured in our searches due to their attachment to an email or vice versa”

covering the period:

1 January 2020 to 1 January 2022.

As agreed, you do not require the names of public servants and I have therefore redacted them on relevance grounds pursuant to section 22 of the FOI Act.

The background to refining the scope of your request is discussed further below.

Scope of your request

I have identified 17 documents as falling within the scope of your request.

eSafety took all reasonable steps to obtain these documents, including searching our records systems as well as contacting relevant individuals and asking them to provide any documents relating to the matter outlined in your request.

Each document obtained through our searches was closely reviewed in light of the terms of the request.

Background and timeframe for processing

On 22 March 2022, eSafety received your initial request.

On 31 March 2022, eSafety commenced a consultation process with you pursuant to section 24AB of the FOI Act to assist you to revise the scope of your request to ensure a practical refusal reason under section 24AA of the FOI Act did not exist.

On 1 April 2022, you confirmed the scope of your revised request, as outlined above.

On 12 April 2022, eSafety submitted an agency extension request with the Office of the Australian Information Commissioner pursuant to section 15AB of the FOI Act. eSafety requested this extension due to consultation with other Commonwealth government agencies and the public holidays and staff leave that fell within the processing period.

On 20 April 2022, the Office of the Australian Information Commissioner confirmed that it agreed to the extension. On 20 April 2022, eSafety notified you about the extension.

The time period for processing your request therefore concludes on 23 May 2022.

I am providing you a response within the statutory timeframe.

Material taken into account

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

- *the FOI Act, in particular, sections 22, 42, 47C, 47E, 47F*
- *the content of the documents that fall within the scope of your request*
- *our correspondence with you*
- *the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (Guidelines), and*
- *the views of the Digital Transformation Agency (DTA), Attorney General's Department, the Office of Parliamentary Council and the Department of Home Affairs who were consulted in relation to this request.*

Decision

I have identified 17 documents as falling within the scope of your request.

Of the 17 documents, I have decided to:

- Release documents 5 and 10 in full
- Release documents 1, 3, 7, 8, 9, 11, 12, 13, 14, 15, 16 and 17 in part, and
- Refuse access to documents 2, 4 and 6.

The attached schedule of documents provides a description of each document and my decision on access for each one.

My reasons for decision are set out below.

Full access

I have released in full documents 5 and 10.

Partial access

I have released in part documents 1, 3, 7, 8, 9, 11, 12, 13, 14, 15, 16 and 17 in accordance with the exemptions outlined below.

Exempt from Release

I consider that documents 2, 4 and 6 are exempt in their entirety and have refused access in accordance with the exemptions outlined below.

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 2, 3, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, and 17 include information that would reveal deliberative processes of eSafety and the DTA with respect to matters of policy development in respect of digital identity. I do not believe this information is operational or purely factual information (see section 47C(3)) and am satisfied that the whole of documents 2 and 6 and discrete parts of documents 3, 7, 8, 9, 11, 12, 13, 14, 15, 16, and 17 are conditionally exempt under section 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.

I have also considered public interest factors against disclosure.

In relation to the deliberative material in documents 2, 3, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, and 17, the key public interest factor against disclosure is that disclosure could reasonably be expected to prejudice deliberative processes of government, especially in circumstances where an agency is yet to finalise its internal thinking or settle on a policy position in respect of proposed new legislation that has not yet been made publicly available nor undergone Parliamentary scrutiny. The release of such material would, in my view, prejudice public perception of the subject matter of the material before the relevant agency has had an opportunity to deliberate and arrive at a settled policy position on it.

In relation to the deliberative material in document 7, the key public interest factor against disclosure is that disclosure could reasonably be expected to prejudice deliberative processes of government in respect of the development of public policy relating to the Trusted Digital Identity Framework, in circumstances where matters may be closely connected with deliberations of Cabinet revealing deliberative information that would not ordinarily be released into the public domain.

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 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 documents, or 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 public interest in the protection of material (and information about that draft material) that is intended for Parliamentary scrutiny at a later stage; especially where the relevant agency is yet to settle on a policy position in respect of this material.

I consider that, in the circumstances, and taking into account the considerations above, on balance, disclosure of the information is contrary to the public interest. Accordingly, I have decided that documents 2, 3, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, and 17 are exempt under section 47C of the FOI Act either wholly or in part.

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.

Document 11 briefly refers to an organisation that made a submission as part of eSafety's call for evidence for the age verification roadmap process. These submissions were provided to eSafety on the understanding that they were provided in confidence and would 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 provide is confidential to eSafety and will not be made publicly available. Disclosure under the FOI Act would undermine that undertaking and damage the reputation of eSafety. Disclosure may also have the unintended result of persons and organisations no longer providing submissions or drafting any submissions with a view that they consider 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 parties willing to make 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

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 of the elements of document 11 relating to our call for evidence, 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.

The majority of document 11 has been released. On balance, disclosure of the remaining material that references a specific submission is, in my view, 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 document 11 should be partially exempt from disclosure under section 47E(d).

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*).

Document 14 contains the personal information of third parties, including names, employment details and details of discussions related to employment in respect of which there would ordinarily be a reasonable expectation of privacy. Whilst this document is heavily redacted, I note that the information that has not been disclosed does not relate to the search terms of the request, though the document itself is within the scope of the request.

Unreasonable disclosure

1. 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:
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, document 14 contains a variety of personal information.

Some of the personal information is not well known, would only be known to a limited group of people and is not available from publicly available resources. I have also considered other relevant matters that are specific to the personal information contained in the documents.

Public interest factors

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 and can enhance the scrutiny of government decision making. However, I have also considered factors that weigh against disclosure, including that 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 groups of individuals.

In addition, 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 have requested. Having weighed these factors and determined that full release would be contrary to the public interest, I consider relevant material in document 14 is partially exempt from release under section 47F and have therefore granted you partial access to document 14.

Section 42 of the FOI Act – Documents subject to legal professional privilege

Section 42(1) of the FOI Act provides that a document is exempt if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege. Determining whether a communication attracts legal professional privilege requires a consideration of:

- whether a legal adviser-client relationship exists;
- whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation;
- whether the advice given is independent; and
- whether the advice given is confidential.¹

Previous examples of advice to Government which Courts have upheld to be privileged include:

- advice concerning the exercise of a statutory power or the performance of a statutory duty or function;² or
- advice concerning proposed laws and their drafting.³

Documents 1, 3, 9, 13, 14, 15 and 16 are emails prepared by government lawyers for the purpose of giving legal advice to various government agency senior staff. I have determined that this legal advice is exempt from release and I have redacted the advice on this basis, however I have determined that the remaining parts of the documents that are not subject to other exemptions can be released. Therefore documents 3, 9, 13, 14, 15 and 16 are partially exempt under section 42 of the FOI Act.

Document 4 is a letter of advice to the DTA prepared by the DTA's independent legal adviser and marked as privileged. The advice was prepared for the purpose of advising the DTA on proposed laws, including their drafting and effect.

Documents 2 and 6 are legislative documents prepared by government lawyers for the purpose of giving advice on legislation to the DTA.

In relation to documents 2, 4 and 6, I have determined that a legal advisor-client relationship exists. In making this determination, I have considered the definitions of 'legal advice', 'client' and 'lawyer' in the *Evidence Act 1995* (Cth) and have had regard to existing case law around establishing that such a relationship exists. I have also considered the views of the DTA in relation to these documents and have determined that the communication in these documents was for the purpose of giving legal advice and that the advice given was both independent and confidential.

¹ *Grant v Downs* (1976) 135 CLR 674; *Waterford v Commonwealth of Australia* (1987) 163 CLR 54.

² *Waterford v The Commonwealth of Australia* (1987) 163 CLR 54 at [63]-[64], [74]-[75]; *Webb v Commissioner of Taxation* (1993) 44 FCR 312 at 317

³ *WorkCover Authority (NSW), (General Manager) v Law Society of New South Wales* (2006) at [91]

I have therefore determined that the relevant elements of legal professional privilege are met in relation to documents 2, 4 and 64 and it is exempt from disclosure under section 42 of the FOI Act.

In light of the above, I consider that documents 2, 4 and 6 are exempt and documents 1, 3, 9, 13, 14, 15 and 16 are partially exempt.

Final assessment of charges

I have decided that you are not liable to pay a charge in respect of 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. I encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

Under section 54B of the FOI Act, an application for internal review must be made within 30 days of the date that you receive this decision. You can request an internal review of this decision by sending an email to FOI@esafety.gov.au.

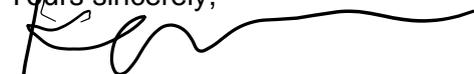
You may also request that the Australian Information Commissioner review this decision under section 54L of the FOI Act. An application for review by the Australian Information Commissioner must be made in writing within 60 days of the date of this letter and be lodged in one of the following ways:

online: <https://forms.business.gov.au/aba/oaic/foi-review/>
email: [FOI @oaic.gov.au](mailto:FOI@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 at www.oaic.gov.au/freedom-of-information/foi-reviews.

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

Yours sincerely,



Kelly Tallon

Office of the eSafety Commissioner

Authorised decision maker pursuant to section 23(1) of the FOI Act

Number	Date	Size (in pages)	Description	Decision on Access	Exemptions of deletions on the grounds of relevance
1.	19/10/21	2	Email regarding draft legislative documents	Released in Part	Section 22 Section 42
2.		17	Attachment to email regarding draft legislative documents	Exempt	Section 42 Section 47C
3.	30/9/21	2	Email regarding Trusted Digital Identity Bill	Released in part	Section 42 Section 47C Section 22
4.	16/9/21	6	Legal Advice on Trusted Digital Identity Bill	Exempt	Section 42
5.	11/11/21	2	Email regarding Trusted Digital Identity Bill - Statement of Compatibility with Human Rights	Released in Full	Section 22
6.		32	Trusted Digital Identity Bill – Draft Statement of Compatibility with Human Rights	Exempt	Section 47C Section 42
7.	October 2021	12	Digital Transformation Agency presentation on Digital Identity Legislation Minimum Age	Released in Part	Section 47C
8.		8	Digital Transformation Agency Background Paper on Trusted Digital Identity Bill	Released in Part	Section 47C
9.	7/10/21	4	Meeting Brief for meeting with the Digital Transformation Agency	Released in part	Section 47C Section 42
10.	11/11/21	2	Email regarding timing of Trusted Digital Identity Bill	Released in Full	Section 22
11.	11/10/21	5	Brief for meeting with Digital Transformation Agency	Released in Part	Section 47C Section 47E(d) Section 22
12.	30/9/21	3	Email from the Digital Transformation Agency on the Trusted Digital Identity Bill	Released in Part	Section 22 Section 47C
13.	30/9/21	2	Email from the Digital Transformation Agency on the Trusted Digital Identity Bill	Released in part	Section 42 Section 22 Section 47C
14.	11/10/21	11	Email regarding Notes from Trusted Digital Identity Bill discussion	Released in part	Section 42 Section 22 Section 47C Section 47F
15.	7/10/21	3	Email regarding Notes from Trusted Identity Bill and Age Limit discussion	Released in part	Section 42 Section 22 Section 47C
16.	18/10/21	5	Email regarding Trusted Digital Identity Bill – Draft Statement of Compatibility with Human Rights	Released in part	Section 42 Section 22 Section 47C
17.	6/10/21	5	Email regarding Trusted Identity Bill and Potential Age Limit	Released in Part	Section 22 Section 47C