

2 July 2024

Greg Tannahill

eSafety ref: FOI 24140

By email: foi+request-11474-4570e18b@righttoknow.org.au

Dear Mr Tannahill

Decision on your freedom of information request

I refer to your request to the eSafety Commissioner for access to documents under the *Freedom of Information Act 1982 (Cth)* (FOI Act).

On 3 June 2024, you sought access to the following:

** Any documents relating to professional qualifications to make classifications or deemed classifications of media:*

- where those qualifications are held by the eSafety Commissioner;*
- or held by people delegated by her to make decisions as to classifications or deemed classifications of media;*
- or held by people otherwise employed by the Office who hold powers to classify media under the Online Safety Act.*

By "qualifications", I specifically mean:

- * Past employment which evidences work relating to classification decisions;*
- * Formal training or education of any sort relating to classification decisions;*
- * Completion of any "approved training" of the sort referred to in sections 17AA(1), 22M(3)(a) or 22S of the Classification (Publications, Films and Computer Games) Act 1995, or otherwise of any training formally approved under that Act.*

The list of people who this applies to can be interpreted to include anyone currently holding a delegation, or anyone who has made a classification decision under a delegation within the last 24 months.

(request).

Decision

I am authorised under section 23 of the FOI Act to make decisions under that Act.

I have decided to refuse your request for access to documents under s 24A of the FOI Act on the basis that there are no documents that fall within the scope of your request.

Searches for documents

The FOI Act requires that all reasonable steps must be taken to find documents relevant to an FOI request.

Searches for documents were undertaken by the Investigations branch and Commissioner's Office, across eSafety's various document management systems, including SharePoint, and Microsoft Outlook.

I am advised that eSafety's systems do not hold any documents that fall within scope of your request.

Accordingly, I am satisfied that all reasonable steps were taken to find documents relevant to your request.

Note on classifications and powers under the *Online Safety Act 2021 (Cth)*

Your request has been made on the premise that the Commissioner and their delegates make decisions as to the classification or deemed classification of media under the *Classifications (Publications, Films and Computer Games) Act 1995 (Cth)* (Classifications Act). Respectfully, this is not accurate.

The Online Content Scheme in Part 9 of the *Online Safety Act 2021 (Cth)* (OSA) is the only regulatory scheme administered by eSafety that operates by reference to the Classifications Act and associated legislative instruments. Relevant provisions in Part 9 of the OSA refer to 'Class 1 material' and 'Class 2 material', defined in sections 106 and 107, respectively. These classes of material are defined as material that has been classified by the Classifications Board with a certain rating under the Classifications Act, or if not already classified, that would be *likely* to be classified with a certain rating under that Act. Sections 106 and 107 of the OSA, therefore, expressly do not require decision makers to predict what outcome the Classifications Board would have reached with total accuracy.

Accordingly, the OSA does not require eSafety personnel to make decisions as to classifications or deemed classifications under the Classifications Act. In determining whether a relevant statutory power under the OSA has been enlivened with respect to material that has not already been classified by the Classifications Board, the Commissioner and their delegates must consider whether a certain classification would be *likely* for certain material. While this requires familiarity and an understanding of the classifications regime and its features, it is not equivalent to making a decision on the classification or deemed classification of relevant material under the Classifications Act.

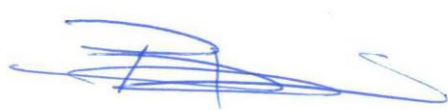
For completeness, I also note that powers with respect to material depicting abhorrent violent conduct contained in Part 8 of the OSA draw on definitions from Division 474, Subdivision H of the Commonwealth Criminal Code and turn on whether the Commissioner (or their delegate) is 'satisfied' that relevant material falls within the relevant definitions. Again, this is not equivalent to making a decision on the classification or deemed classification of relevant material under the Classifications Act.

Note on mandatory qualifications and experience

Separately, the OSA does not set any minimum qualification or experience requirements for the Commissioner or for authorised delegates exercising the Commissioner's statutory powers under the OSA. eSafety personnel come from a wide range of professional backgrounds and bring a wide range of experiences and qualifications to their work.

If you have any questions regarding this decision, please contact me at FOI@esafety.gov.au. A statement of your rights of review is attached.

Yours faithfully



Bryan Downie
Executive Manager, Investigations

Attachments

1. Rights of review