



CDPP

Australia's Federal Prosecution Service

**Commonwealth Director of
Public Prosecutions**

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www.cdpp.gov.au

Your Reference:

Our Reference: 2024FI00009

24 June 2024

Mr Jeremy Malcolm

By email only: jeremy@malcolm.id.au

Dear Mr Malcolm

NOTICE OF DECISION UNDER THE FREEDOM OF INFORMATION (FOI) ACT 1982

1. I refer to your request for access to information relating to child abuse material prosecutions under the *Freedom of Information Act 1982* (FOI Act).
2. On 15 May 2024, you sent an email to the Office of Director of Public Prosecutions (Cth) (CDPP) in the following terms:

I am writing to request information under the Freedom of Information Act 1982 (FOI Act) regarding the proportion of prosecutions involving fictional/fantasy child abuse materials, such as drawings, cartoons, computer generated images, chats, or stories, instituted by the Commonwealth Director of Public Prosecutions [sic] (DPP).

Specifically, I am seeking the following information:

- 1. The number of prosecutions initiated by the DPP for child exploitation offences for the past five years, broken down by year.*
- 2. Among the prosecutions initiated, the proportion that involved non-realistic fictional child abuse materials, such as drawings or stories, for the past five years, broken down by year.*
- 3. Any relevant policies, guidelines, or procedures employed by the DPP in addressing cases involving non-realistic fictional child abuse materials.*

I understand that certain details may need to be redacted to protect privacy or ongoing investigations. However, I am requesting as much information as possible to understand the trends and efforts of law enforcement agencies in combatting this form of child exploitation.

Please consider this request under the FOI Act, and if possible, provide the information in electronic format to the email address provided above. If there are any fees associated with processing this request, please inform me in advance.

3. On 23 May 2024, I sent you an email seeking clarification of your request, including the following:

I am seeking to clarify the boundaries of years you have referred to.

Given it is near the end of the financial year and our reports are often financial year based, would you be agreeable to define "the past five years, broken down by year" as the financial years:

- 1. 2019/20*
- 2. 2020/21*
- 3. 2021/22*
- 4. 2022/23 and*
- 5. July 2023/ **31 May 2024***

4. On 23 May 2024, you responded by email, stating, "Yes that would be acceptable thank you".

5. On 23 May 2024, I sent you an email thanking you for your confirmation.

6. I confirm that as a result the emails referred to above, your FOI request is as follows:

I am writing to request information under the Freedom of Information Act 1982 (FOI Act) regarding the proportion of prosecutions involving fictional/fantasy child abuse materials, such as drawings, cartoons, computer generated images, chats, or stories, instituted by the Commonwealth Director of Public Prosecutions [sic](DPP).

Specifically, I am seeking the following information:

- 1. The number of prosecutions initiated by the DPP for child exploitation offences for the past five years, broken down by year*.*
- 2. Among the prosecutions initiated, the proportion that involved non-realistic fictional child abuse materials, such as drawings or stories, for the past five years, broken down by year*.*
- 3. Any relevant policies, guidelines, or procedures employed by the DPP in addressing cases involving non-realistic fictional child abuse materials.*

I understand that certain details may need to be redacted to protect privacy or ongoing investigations. However, I am requesting as much information as possible to understand the trends and efforts of law enforcement agencies in combatting this form of child exploitation.

Please consider this request under the FOI Act, and if possible, provide the information in electronic format to the email address provided above. If there are any fees associated with processing this request, please inform me in advance.

**Where "broken down by year" means the financial years 2019/20, 2020/21, 2021/22, 2022/23 and the period 1 July 2023 to 31 May 2024.*

7. The FOI Act provides access to **documents**, not information. I am interpreting your FOI request to be for documents, not information.

Authorisation

8. I am a person authorised by the Director of Public Prosecutions to make a decision on requests for access to documents under the FOI Act. My name and position are:

Megan Hickton

Senior Federal Prosecutor

SUMMARY OF DECISION

Paragraph 1 of your request (Paragraph 1)

9. The CDPP does not hold an existing document containing the information you have requested in Paragraph 1. The CDPP has considered whether it can extract the information in accordance with section 17(1) of the FOI Act.
10. In accordance with section 17 of the FOI Act the CDPP has used its computer system to produce a document which contains the information that falls within the scope of your request under Paragraph 1.
11. I have made a decision to create and grant full access to one document within the scope of your request (**The Schedule**). The Schedule is **attached** to this decision.

Paragraph 2 of your request (Paragraph 2)

12. The CDPP does not hold an existing document containing the information you have requested in Paragraph 2.
13. The CDPP has considered whether it can extract the information you have requested in Paragraph 2 in accordance with section 17(1) of the FOI Act and is unable to do so. Accordingly, I am refusing your request in Paragraph 2.

Paragraph 3 of your request (Paragraph 3)

14. I have identified two documents which fall within the scope of Paragraph 3.
15. With regard to the two documents you requested (described below), I have decided to refuse access on the grounds of legal professional privilege, pursuant to section 42 of the FOI Act.
16. More information, including my reasons for my decision, is set out below.

RELEVANT MATERIAL

17. In reaching my decision I referred to the following:

- the terms of your request
- the documents relevant to the request
- the FOI Act

- Guidelines published by the Office of the Information Commissioner under section 93A of the FOI Act (The FOI Guidelines)
- the *Criminal Code* (Cth)
- the *Crimes Act 1914* (Cth)
- advice from CDPP officers with responsibility for matters relating to the documents to which you sought access
- the availability of information relevant to your request, insofar as it determines the practicality and ease in which the CDPP can create a document under section 17 of the FOI Act.

DECISION AND REASONS FOR DECISION

18. In Paragraphs 1 and 2 of your FOI request you have used the terms “child exploitation” and “child abuse” when referring to the offences and prosecutions that you are interested in. I have interpreted your use of the terms “child exploitation” and “child abuse” to mean *Commonwealth child sex offences* and the prosecution of *Commonwealth child sex offences*. I have identified Commonwealth child sex offence provisions in the tables below (the offence provisions). The offence provisions were used in the extraction of information from the CDPP’s computer systems to create the document which has been released to you as The Schedule. The information contained in The Schedule contains data as at 4 June 2024, having been extracted on 5 June 2024.
19. The CDPP does not “initiate” prosecutions and your request in Paragraph 1 is taken to be for the number of prosecutions “commenced”. There are complexities involved in the extraction of data at the time each charge is commenced. The table in The Schedule represents the number of defendants charged with at least one Commonwealth child sex offence.

Paragraph 1

20. As stated above, I am interpreting your use of the term “child exploitation offences” in Paragraph 1 to mean Commonwealth child sex offences.
21. I have identified the following offence provisions as being relevant to your request:

Criminal Code (Cth)		Crimes Act 1914 (Cth)	Customs Act*
• 271A.1	• 471.16	• 50BA	• 233BAB(5)
• 272.8	• 471.17	• 50BB	
• 272.9	• 471.19	• 50BC	
• 272.10	• 471.20	• 50BD	
• 272.11	• 471.22	• 50DA	
• 272.12	• 471.24	• 50DB	
• 272.13	• 471.25		
• 272.14	• 474.25A		
• 272.15	• 474.25B		
• 272.15A	• 474.25C		
• 272.18	• 474.26		
• 272.19	• 474.27		
• 272.20	• 474.27AA		
• 273.5	• 474.27A		
• 273.6			

- 273.7
- 273A.1

Criminal Code (Cth)

Extensions of Criminal Liability

Any of the offences listed committed with the following extensions of criminal liability

- 11.1
- 11.2
- 11.2A
- 11.3
- 11.4
- 11.5

22. The CDPP does not hold an existing document containing the information you have requested and has considered whether it can extract the data in accordance with section 17(1) of the FOI Act.
23. In accordance with section 17 of the FOI Act, the CDPP has used its computer system to produce a document that contains information that falls within the scope of your request. The data produced in the document existed in the possession of the CDPP on 4 June 2024, the data was extracted from the CDPP databases on 5 June 2024.
24. I have made a decision to create and grant full access to one document within the scope of your request, The Schedule.

Paragraph 2

25. The CDPP does not hold an existing document that contains the information that you have requested in Paragraph 2. The CDPP has considered whether it can produce a written document containing the information you are seeking in accordance with section 17(1) and is unable to do so. Accordingly, I am satisfied that the document you are seeking in Paragraph 2 of your request does not exist and I am refusing your request pursuant to section 24A(1) of the FOI Act.

Paragraph 3

26. The *Prosecution Policy of the Commonwealth* underpins all of the decision made by the CDPP throughout the prosecution process, including for prosecutions of Commonwealth child sex offences. The Prosecution Policy is a publicly available document and you can access a copy at www.cdpp.gov.au/prosecution-process/prosecution-policy.
27. I identified two documents within Paragraph 3 of your request (**the two documents**):

Document 1	January 2024	National Offence Guide – Criminal Code (Cth) – Section 474.22A (NOG) (22 pages)
Document 2	22.02.2011	“Written and drawn child pornography material” – guide (4 pages)

28. The two documents provide internal legal guidance to CDPP prosecutors.
29. The two documents are exempt under section 42 of the FOI Act and I have decided to refuse your request for access to these documents.

Documents subject to legal professional privilege

30. A document is an exempt document under section 42 of the FOI Act if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.
31. I am satisfied that the two documents attract legal professional privilege.
32. I am satisfied that each of the following criteria has been met:
 - a. that a solicitor/ client relationship exists between the Director of the CDPP and CDPP lawyers, between CDPP lawyers or between CDPP lawyers and partner agencies who refer matters to the CDPP for potential prosecution
 - b. that the dominant purpose of the two documents is for the provision of legal advice
 - c. that the advice is given in confidence
 - d. that there is anticipated litigation
 - e. that there has been no waiver of privilege either express or implied

Lawyer-client relationship

33. Legal professional privilege is capable of attaching to communications between an in-house legal adviser and their employer, provided that the legal adviser is consulted in a professional capacity in relation to a professional matter and the communications are made in confidence and arise from the relationship of lawyer and client (*Waterford v Commonwealth* (1987) 163 CLR 54).
34. The Office of the CDPP is established by the *Director of Public Prosecutions Act 1983* (DPP Act) and consists of the Director and the members of the staff of the Office who are legal practitioners.
35. Section 16 of the DPP Act provides that the Director or member of the staff of the Office who is a legal practitioner is in his or her official capacity entitled to practice as a barrister, solicitor or barrister and solicitor in a Federal Court or in a Court of a State or Territory.
36. The relationship between the Director and the solicitors employed within the Office of the CDPP is sufficient for the CDPP to be regarded as the 'client for the purposes of legal advice provided by her staff or by a Crown Prosecutor' (*CDPP v Kinghorn* [2020] NSWCCA 48). The CDPP and its legal practitioners are also in a lawyer-client relationship with partner agencies and investigators in these agencies and legal advice is provided in relation to actual or anticipated litigation.

Legal advice

37. The concept of 'legal advice' has been interpreted widely. It can extend to advice as to what should prudently or sensibly be done in the relevant legal context (*Australian Wheat Board v Cole* (No 5) [2006] FCA 1234). I find that the two documents were created for the dominant purpose of providing legal advice in relation to the prosecution of s474.22A Criminal Code offences and child pornography offences respectively.

38. Document 1 is a legal resource prepared by CDPP legal practitioners on behalf of the Director. It is a resource for CDPP legal practitioners and the partner agencies which investigate and refer briefs of evidence to the CDPP for assessment and prosecution in accordance with the *Prosecution Policy of the Commonwealth*. Document 1 is itself legal advice and also contains a summary of legal advice provided to officers of the CDPP. Limited portions of Document 1 are relevant to your request.
39. Document 2 is also legal resource prepared by a CDPP legal practitioner on behalf of the Director. Document 2 is itself legal advice and also contains a summary of legal advice provided to officers of the CDPP.

Confidential communication and dominant purpose

40. The two documents were prepared on the understanding that the usual and well established relationship of confidence between a lawyers and client governed the communication. The legal advice contained in the two documents was prepared and held on a confidential basis for the dominant purpose to give legal and procedural advice on matters concerning prosecuting s474.22A Criminal Code offences and child pornography offences.
41. The communications were confidential at the time they were made and remain confidential.

No Waiver

42. Section 42(2) of the FOI Act provides that a document is not an exempt document if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.
43. A person who would otherwise be entitled to the benefit of legal professional privilege may waive that privilege, either expressly or by implication. Legal professional privilege is waived if the conduct of the person seeking to rely on the privilege is inconsistent with the maintenance of the privilege.
44. Document 1 is available to CDPP partner agencies on a confidential basis, who are advised that privilege attaches to the guideline. This limited disclosure is not inconsistent with maintaining confidentiality of the communications where the disclosure is to partner agencies for the directly limited purpose directly related to the prosecution of section 474.22A Criminal Code offences. Accordingly, I am satisfied that there has been no waiver.
45. Document 2 is an internal guide for the use of CDPP prosecutors. I am satisfied that there has been no waiver.
46. Section 93A of the FOI Act required me to have regard to any guidelines by the Information Commissioner. *Guideline Part 5 – Exemptions* requires me to consider whether 'real harm' would result from releasing the guideline. I consider that disclosure of the guideline would result in substantial prejudice to the CDPP in the on-going course of prosecutions or potential prosecutions. It would undermine and inhibit the full and frank provision of legal advice by the CDPP in the course of anticipated or actual litigation by the CDPP between officers of the CDPP, and the CDPP and partner agencies.
47. The parts of the two documents that are privileged cannot be separated from those parts which are not. The entirety of the two documents are exempt under section 42 of the FOI Act and is not appropriate to grant access to the document with deletions pursuant to section

22(1) of the FOI Act.

Rights of review

48. Under section 26 of the FOI Act I am required to inform you of your rights of review.
49. Section 54 of the FOI Act gives you the right to apply for an internal review of the decision refusing your request. An application for internal review of the decision must be made in writing within 30 days of receipt of this letter. No particular form is required but it is desirable to set out in the application the grounds on which you consider that the decision should be reviewed. An application may be sent to foi@CDPP.gov.au or to the following postal address:

FOI Coordinator
Commonwealth DPP
PO Box 3104
CANBERRA ACT 2617

50. If the decision on internal review goes against you, you are entitled to seek a review of the decision by the Information Commissioner. Alternatively, you are entitled to bypass the internal review process and make an application directly with the Office of the Australian Information Commissioner pursuant to section 54L of the FOI Act.
51. An application to the Information Commissioner may be made in writing and should be made online using the Information Commissioner Review Application form available on the OAIC website.
52. Where it is not possible for an application to be made online, applications may be sent to the OAIC by:
- a. email to foidr@oaic.gov.au
 - b. mail to FOI Regulatory Group, GPO Box 5228, Sydney NSW 2001.

Yours faithfully



Megan Hickton
Senior Federal Prosecutor
Legal Capability and Performance

Encl:

- 1. The Schedule**

The Schedule

Number of Commonwealth child sex offences ¹ commenced (by financial year)	
Total number of Defendants by year prosecution commenced ²	
Year prosecution commenced	Number of Defendants ³
2019/2020	365
2020/2021	402
2021/2022	402
2022/2023	417
2023 – 4/6/2024	417
Total	2023

¹ Defined as any of the following offence provisions:

Criminal Code (Cth)	Crimes Act 1914 (Cth)	Customs Act*
• 271A.1 • 272.8 • 272.9 • 272.10 • 272.11 • 272.12 • 272.13 • 272.14 • 272.15 • 272.15A • 272.18 • 272.19 • 272.20 • 273.5 • 273.6 • 273.7 • 273A.1	• 471.16 • 471.17 • 471.19 • 471.20 • 471.22 • 471.24 • 471.25 • 474.25A • 474.25B • 474.25C • 474.26 • 474.27 • 474.27AA • 474.27A	• 50BA • 50BB • 50BC • 50BD • 50DA • 50DB • 233BAB(5)

Criminal Code (Cth)

Extensions of Criminal Liability

Any of the offences listed committed with the following extensions of criminal liability: 11.1, 11.2, 11.2A, 11.3, 11.4 and 11.5.

² The table contains the total number of matters where a prosecution was commenced against a defendant where at least one relevant offence was charged. There are complexities associated with data extraction at the time each charge is commenced and rules have been applied in the extraction for consistency.

³ As at 4 June 2024, report generated 5 June 2024.

