

ESTIMATES BRIEF

Use of 'apps' to conduct government business

Key messages

- Where WhatsApp (and other 'app'-based) messages exist, can be found and are stored in searchable form, they are accessible under the FOI Act.
- The FOI Act defines the term '[document](#)' broadly and non-exhaustively (s4(1)). Part 2 of the FOI guidelines state that the definition includes:
 - any article on which information has been stored or recorded, either mechanically or electronically
 - information stored on computer tapes, disks, DVDs and portable hard drives and devices
 - information held on or transmitted between computer servers, backup tapes, mobile phones and mobile computing devices ([2.29]–[2.30]).
- Part 3 of the IC Guidelines encourages agencies to develop guidelines and procedures for the efficient storage and retrieval of information held on mobile devices as well as servers, hard disks and portable drives (FOI Guidelines at [3.215]).
- The OAIC's resource: '[Frequently asked questions: What is considered a document under the Freedom of Information Act 1982?](#)' states that 'Text messages and social media such as instant messaging (IM) that support the business of an agency fall within the definition of 'document''.
- This does not mean that the use of WhatsApp and other apps is unproblematic from the perspective of FOI. If the FOI Act is to operate effectively, WhatsApp messages must be filed in such a way that they can readily be searched and retrieved. They must also be preserved consistently with the retention requirements in the *Archives Act 1983* (Cth). However, compliance with obligations under Archives Act (Cth) cannot be considered in Information Commissioner reviews.
- The Information Commissioner's complaints procedures and powers to make recommendations may provide a mechanism to recommend process improvements to promote compliance with Part 3 of the IC Guidelines. This function is exercisable only in relation to Government departments. Recommendations may include the development of departmental guidelines and procedures for the efficient storage and retrieval of information held on mobile devices as well as servers, hard disks and portable drives.

Critical Issues

WhatsApp, Wickr, Signal, and Microsoft Communicator

- **WhatsApp** is an instant messaging service for smart phones and computers. All communications data on the service is end-to-end encrypted. WhatsApp does not automatically destroy messages.
- **Wickr** is an encrypted messaging service that automatically destroys messages (if both users are on the service). Unlike WhatsApp, Wickr also deletes attachment metadata.
- **Signal** is an encrypted messaging service for instant messaging, voice, and video calls.
- **Microsoft Communicator** is an app feature which enables organization-wide messages on Microsoft Teams, sending messages directly to each individual's chat box.

External resources, Inquiries and Reviews

- A number of agencies/reviews in recent years have said that messages on mobile devices, including via apps, should be properly managed as Commonwealth records.
- **National Archives of Australia (NAA)** published guidance about "[Managing information on mobile devices](#)" (no date), explaining that emails, SMS, instant messaging and voicemails captured on mobile devices must be managed as Commonwealth records if the information created or received as part of Australian Government business (**Attachment A**).
- On 12 March 2021, the **Functional and Efficiency Review of the National Archives (the Tune Review)** led by former Department of Finance Secretary David Tune, published its [report](#). It noted that the Archives Act requires modernisation and that its definition of a 'record' needs to more clearly provide for direct captures of records that are susceptible to deletion, such as emails, texts or online messages. On 19 August 2021, the Australian Government published its [Response](#) to the Tune review, agreeing to all 20 recommendations, in full or in principle – however the definition of 'records in the Archives Act has not been changed. . .
- On 15 January 2021, the **Australian Conservation Foundation** [published a report](#) recommending the Information Commissioner develop guidance on the recording of official information in non-official systems, email accounts and devices, discussed below.
- Several **IC review decisions** have considered Wickr, Whatsapp and other social media, as well as an agency's Microsoft Communicator (MOC) messages (**Attachment B**). that the documents cannot be found or do not exist. In others, the respondent made access

refusal decisions in reliance on the practical refusal reason (s 24), and exemptions such as the personal privacy exemption (s 47F).

- Several **media articles** have considered these issues (**Attachment C**). On 8 March 2024, Finn McHugh of Capital Brief reported on a leaked text message from the Prime Minister's office sent on Signal and timed to self-destruct after being read. The article states that:

'the rampant use of encrypted apps by political staffers – particularly when messages are set on timers – poses serious questions about Australia's freedom of information (FOI) system and the ability for the National Archives (NA) to properly record history';

'..public service sources have become increasingly uneasy with the amount of official communications being sent to them on Signal, rather than email. The sources say the practise began in earnest under the former Coalition government, but has accelerated under Labor since it took office in 2022'.

'...if a message was timed to self-destruct five minutes after being read, it's impossible to know whether it ever existed when an FOI request is lodged months later'.

The article quotes an OAIC spokesperson, reporting that they stressed documents should be managed in a way that enables their release in line with legal obligations.

Australian Conservation Foundation report

- The Australian Conservation Foundation (ACF) report noted the increasing use of WhatsApp and other mobile devices by ministers to conduct the business of the state.
- The ACF called for a parliamentary inquiry into transparency laws in Australia, examining the changing nature of information, WhatsApp and phone use, the suitability of compliance options, and FOI Training.
- The ACF examined data in relation to 'environment-related' FOI requests made to federal and state departments and agencies over a 5-year period. The data reported was not for all Australian Government agencies and did not include the 3 agencies that together account for 70% of all FOI request made to Australian Governments (Department of Home Affairs, Services Australia and the Department of Veterans' Affairs). It also appears that the ACF report also only considered non-personal FOI requests, which comprised 19% of all FOI requests in 2019-20.
- The report made 10 recommendations, including a recommendation that the OAIC investigate the actions of ministers and the prime minister's office (recommendation 2). The power to investigate complaints about action taken under the FOI Act is in relation to agencies only; there is no power under Part VIIB of the

FOI Act or s 8 of the Australian Information Commissioner Act 2010 to investigate the actions of ministers.

Possible questions

- ***Can text messages and social media posts be accessed under the FOI Act?***

Yes. Text messages and social media such as instant messaging (IM) that support the business of an agency fall within the definition of 'document' under s 4 of the FOI Act. See also Part 3 of the FOI Guidelines, and agency resources "[What is considered a document under the Freedom of Information Act 1982?](#)", and '[Processing FOI requests: taking all reasonable steps to find documents](#)'

- ***What are your thoughts on the recommendation made by the Australian Conservation Foundation's audit of FOI outcomes, for the Information Commissioner to develop guidance for government on how information in non-official systems, email accounts and devices should be recorded?***

- The OAIC has published relevant guidance on its website, including Part 3 of the FOI Guidelines and other resources - '[What is considered a document under the Freedom of Information Act 1982?](#)' and '[Processing FOI requests: taking all reasonable steps to find documents](#)'.
 - This guidance suggests a broad interpretation of the term 'document' in accordance with s 4(1) of the FOI Act, for example, encouraging agencies to search electronic documents saved on computers, electronic devices such as iPads, smartphones and apps.
 - I will continue to make IC review decisions which provide guidance to Australian Government agencies. We continue to update the FOI Guidelines and continue to publish relevant guidance and resources.
 - I note that the report also recommends that the OAIC investigate the actions of ministers and the prime minister's office (recommendation 2 of 10). My power to investigate complaints about action taken under the FOI Act is in relation to agencies only; I have no power under Part VIIB of the FOI Act or s 8 of the Australian Information Commissioner Act 2010 to investigate the actions of ministers.
- ***Do you have a view on whether the National Archives regime needs to change to allow for retention of encrypted communications relating to government decisions?***
 - Issues relating to record keeping under National Archives legislation are outside the OAIC's jurisdiction and are a matter for the National Archives of Australia. In October 2018, the NAA issued GRA 38, which relates to Ministerial records. In its

[Quick reference guide to GRA 38](#), the NAA states that examples of ministerial records include such as official tweets and WhatsApp messages.

- The issue of access to electronic messages sent and received by Ministers has arisen in some IC reviews (see Attachment B). Amending the Archives Act to capture digital technologies within the definition of a 'record' may assist to highlight obligations in relation to retention, thereby facilitating access to documents.
- The OAIC is of the view that the right of access to documents under the FOI Act is contingent upon proactive information collection and retention of relevant information assets (records, information and data) by Commonwealth agencies and ministers, including information contained on mobile devices and messaging application, and other electronic mediums, where the technology was used to conduct official government business.

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| Update 'Current at' date below following each update | Cleared by: Rocelle Ago | Action officer: Jessica Eslick / Sara Peel |
| Current at: 15/03/24 | Phone number: 02 9942 4205 | Action officer number: JE: 9942 4119 / SP: 9942 4142 |

Attachment A**Extracts from the National Archives of Australia website:****Managing information on mobile devices****Records are created on mobile devices**

Information created or received as part of Australian Government business are Commonwealth records. This includes emails, SMS, instant messaging and voicemails on mobile devices. To be accountable, your agency must also manage these types of records.

Mobile device policy

Your agency should have a policy on the use of mobile devices including information on:

- delineating official use from personal use
- bring your own device (BYOD) protocol
- identifying and capturing information in a records information system or other endorsed business system
- what to keep or delete, in line with records authorities and normal administrative practice
- ensuring the security and privacy of information on mobile devices

The mobile device policy should be linked to, or included in, your agency's information management policy.

The Australian Signals Directorate and the Office of the Australian Information Commissioner have guidance on the security and privacy of information on mobile devices:

- Mobile device management
- Privacy – mobile devices

Policy 8: Sensitive and classified information establishes minimum protections for accessing, storing or communicating sensitive and security classified information on mobile devices.

More information

- Agency Service Centre
- Managing social media and instant messaging
- Managing email
- Cloud computing and information management
- Normal administrative practice (NAP)
- Records authorities

Attachment B

IC reviews relating to use of apps: Wickr, Whatsapp, and other social media

| IC review decision | FOI request | The decision | Status |
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| <p><i>Ben Fairless and Minister for Immigration and Border Protection (Freedom of information)</i> [2017] AICmr 115 (14 November 2017).</p> | <p>Inbound and outbound chats in the 7 days prior to 19 October 2016 that were sent to and from the minister through:</p> <ul style="list-style-type: none"> - Whatsapp - Facebook messenger - Signal - Telegram - Grindr - Scruff - Tinder <p>Email accounts without a .gov.au email address</p> | <p>The Minister refused access under s 24A (requests may be refused if documents cannot be found, do not exist or have not been received) on the basis that the documents cannot be found or do not exist.</p> <p>The former IC decided that the Minister had not discharged his onus in establishing that all reasonable steps have been taken to look for the documents.</p> | <p>Findings summary:</p> <p>Steps taken to locate the documents were not comprehensive or directed to locating official documents in the places where they might be found. Minister did not establish that a decision refusing the applicant's request on the grounds that documents could not be found or did not exist was justified.</p> |
| <p><i>The Australian and Minister for Foreign Affairs (Freedom of information)</i> [2018] AICmr 6 (9 January 2018).</p> | <p>All correspondence between the Foreign Minister, Foreign Minister's office and Kevin Rudd re Rudd's candidacy for the position of Secretary-General of the United Nations</p> | <p>The Minister refused access under s 24A on the basis that the documents cannot be found or do not exist.</p> <p>The former IC decided that the Minister had not discharged her onus in establishing that all reasonable steps have been taken to look for the documents. In</p> | <p>Findings summary:</p> <p>Searches not taken of electronic messaging applications. The Minister did not establish that a decision refusing the applicant's FOI request on the grounds that documents cannot be found or do not exist is justified.</p> <p>The Minister must now conduct further searches</p> |

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| | | particular, he noted that the possibility of documents being located on electronic messaging applications did not appear to have been considered. | and provide a decision on the request. |
| <i>Josh Taylor and Prime Minister of Australia (Freedom of information) [2018] AICmr 42</i> (21 March 2018). | Wickr messages between Prime Minister Malcolm Turnbull and former Prime Minister Kevin Rudd regarding Rudd's nomination for secretary-general of the United Nations. | <p>The Minister refused access under s 24A on the basis that the documents cannot be found or do not exist.</p> <p>The former IC decided the Prime Minister had taken all reasonable steps to locate documents within the scope of the applicant's request and if documents existed, they would have been found.</p> | <p>Findings summary:</p> <p>Given the nature of Wickr, which destroys messages from the sender and recipient's device at intervals of up to 6 days, undertaking searches within the app and any available backups for the documents would constitute all reasonable steps for the purposes of s 24A (requests may be refused if documents cannot be found, do not exist or have not been received). Compliance with obligations under <i>Archives Act 1983</i> (Cth) not relevant to review.</p> |
| <i>Josh Taylor and Minister for Foreign Affairs (Freedom of information) [2021] AICmr 33</i> (30 June 2021) | Whatsapp messages between the Minister for Foreign Affairs, and the Minister for Foreign Affairs of Indonesia, , relating to an announcement by the Australian | <p>The Minister refused access under s 24A on the basis that the documents cannot be found or do not exist.</p> <p>The AIC was satisfied the Minister had taken all reasonable steps to find documents within the scope of the request as she was</p> | <p>Findings summary:</p> <p>The Minister was best placed to conduct searches for the Whatsapp messages in the circumstances of the case, given that she was engaged remotely at the time of the searches and given the nature of the documents sought (an alleged electronic</p> |

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| | Government to recognise West Jerusalem as the capital of Israel | required to do so by s 24A, and that if documents existed, they would have been found. | message exchange with the Minister personally). The AIC agreed with the former IC's finding in <i>Josh Taylor and Prime Minister of Australia</i> that compliance with obligations under <i>Archives Act 1983</i> (Cth) cannot be considered in IC reviews. |
| <i>Tom Swann and Prime Minister of Australia</i> (Freedom of information) [2022] AICmr 43 (31 March 2022) | The applicant sought all correspondence sent by messaging service relating to the Drought Envoy (SMS, Signal, WhatsApp, or other messaging application) between the Member for New England and the Prime Minister. | The Prime Minister refused to process the request on the basis that processing the request would substantially and unreasonably interfere with the performance of the Prime Minister's functions (s 24AA(1)(a)(ii)). Former Acting FOIC Hampton set aside the decision, and substituted a decision that a practical refusal reason did not exist. | Findings summary: The PMO did not provide the OAIC with an estimated number of messages that might fall within the scope of the request, did not advise whether a sampling exercise was undertaken, and did not provide an estimate of the number of third parties that may need to be consulted, or how long any consultation process would take. |
| 'ADN' and the Australian Taxation Office (Freedom of information) [2023] AICmr 44 (5 June 2023) | any communications, written or verbal including those from mobile phones and any internal ATO messaging systems including but not limited to | In the decision under review, the ATO had found that Microsoft Office Communicator (MOC) messages fell within the scope of the request, but could not be found or do not exist. | Findings summary: Former Commissioner Pirani was not persuaded by the ATO's submissions, and found that it would have been reasonable in the circumstances for the ATO to conduct searches of the server on which |

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| | MOC between officers of ATO and any third party in relation to the issuing of a debt and lodgement of a caveat | Former Acting FOIC Pirani decided that the ATO must also take all reasonable steps to find documents within the scope of the request, which involves (a) identifying the scope of the request based on a flexible and common-sense interpretation of its term, and (b), including single MOC messages. | those messages are stored. |
| <i>Paul Farrell and Department of Foreign Affairs and Trade (Freedom of information)</i> [2024] AICmr 28 (12 February 2024) | All email and phone (including SMS, message, Whatsapp, Signal, Wickr and any other message based app) correspondence between Joe Hockey and Liberal Party fundraising chief Andrew Burnes in April and May 2017. | The Department identified 2 documents and found them to be exempt in full under the personal privacy exemption (s 47F) and business affairs exemption (s 47G), and that certain material in the documents was irrelevant to the request (s 22). | Findings summary: The scope of the IC review was limited to the Department's finding that certain material was irrelevant (s 22), and certain material was exempt under the personal privacy exemption (s 47F). Former Acting FOI Commissioner Pirani considered that the certain material was irrelevant (s 22). In relation to whether certain material was exempt under s 47F, Commissioner Pirani acknowledged that 2 third-parties had objected to the |

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| | | | disclosure of their personal information, but considered that the public interest in transparency of Mr Hockey's dealings with Mr Burnes outweighs the privacy of those third-parties, and the material was not conditionally exempt under s 47F. |
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Attachment C

Media articles

Finn McHugh, 8 March 2024, 'Staffers use of Signal, WhatsApp sparks information integrity fears', <Public servants are becoming increasingly uneasy with political staffers using encrypted messaging apps | Capital Brief >

A leaked text message from Prime Minister Anthony Albanese's office last month sparked a flurry of speculation that Australians will head to the polls by Christmas.

The message, from Albanese's chief of staff Tim Gartrell and [reported by news.com.au](#), announced the imminent arrival of his new principal private secretary "as we enter an election year" to his office.

Yet while Labor frontbenchers were forced to tamp down speculation of an early vote, the fact the message was sent on encrypted messaging app Signal, and timed to self-destruct soon after being read, raised eyebrows within the public service.

The rampant use of encrypted apps by political staffers – particularly when messages are set on timers – poses serious questions about Australia's freedom of information (FOI) system and the ability for the National Archives (NA) to properly record history.

'If it's not unlawful, it's improper'

[As Capital Brief reported last month](#), public service sources have become increasingly uneasy with the amount of official communications being sent to them on Signal, rather than email. The sources say the practise began in earnest under the former Coalition government, but has accelerated under Labor since it took office in 2022.

There are legitimate operational security reasons to use encrypted apps, which are less vulnerable to hacking than regular text messaging or email.

But bureaucrats and political staffers are required to retain communications related to official purposes for FOI purposes, including messages sent on encrypted apps. Former independent senator **Rex Patrick**, who has continued to advocate for FOI transparency since leaving parliament in 2022, said there should be a blanket ban on staffers sending messages with self-destruct timers.

Whether or not the FOI process concludes that the message is exempt from release, it is vital that the process can play out, Patrick argued.

"The general principle is that those official messages need to be retained. If it's not unlawful, it's improper for them to be deleted or to self-destruct," he told Capital Brief.

“The government should, if it doesn't have a policy in place, put [one] in place so it's made clear to people what their obligations are.”

But Patrick warned the FOI system faced broader enforcement issues, saying even prime ministers “very rarely ... transfer their material expeditiously”.

The Prime Minister's Office referred Capital Brief to the Department of Prime Minister and Cabinet (PM&C) when asked what guidance had been provided about the use of encrypted messaging apps, or whether it was considering banning messages with a self-destruct timer.

'Blanket of secrecy'

The Office of the Australian Information Commissioner (OAIC), which is tasked with assessing appeals to FOI rejections, stressed documents should be managed in a way that enables their release in line with legal obligations.

“This right of access to information is essential to advancing transparency and a participative democracy,” an OAIC spokesperson.

The spokesperson was not aware of specific cases hampered by the use of messages with self-destruct timers, but noted only a small proportion of rejected FOI applications sent to it on appeal.

And that's the point; if a message was timed to self-destruct five minutes after being read, it's impossible to know whether it ever existed when an FOI request is lodged months later.

Transparency Australia chief executive **Clancy Moore** warned the use of encrypted apps created a “potential blanket of secrecy over important government decision-making and communications”.

“Given the Albanese's government stated commitments to integrity and open government, we'd hope for some clarity in the future over this grey zone to increase accountability and transparency,” he said.

An Australian government spokesperson said technologies used by Commonwealth agencies were under “constant review”, and the government would continue to advise them on the risks posed by mobile apps.

But they stressed all government personnel were responsible for managing their communications in line with FOI requirements.

"There is no issue with officials exchanging messages on applications that use an auto-delete function, provided staff comply with their agency's information management, cyber security policy and other relevant requirements," they said.

In 2021, the National Archives (NA) called for a law change to clarify that social media posts and instant messaging constituted official Commonwealth documents.

David Fricker, then-head of the NA, warned the system was created in the 1970s when the internet, let alone encrypted messaging, could have been conceived of.

Months before the 2022 federal election, a parliamentary inquiry stopped short of calling for a law change, but stressed: "When a record is created for the conduct of official government business – including through social media platforms and (encrypted) messaging apps – it must be duly incorporated into an approved government information management system."

While it made clear encrypted messages were Commonwealth documents, the committee also heard that that made little difference; no such documents had been lodged with the NA, which collects all official documents created by departments and ministers, at that time.

And three years on, a spokesperson for the NA told Capital Brief that it was still yet to receive a single transfer of Commonwealth records from social media or encrypted messaging apps.

"As these are relatively new platforms for government, this is to be expected. National Archives is working to support agencies with the process and requirements in this developing space," they said.

The committee's deputy chair, Labor MP **Julian Hill**, accused the final report of "dancing around that evidence" as it recommended no law change.

Corruption issues

The FOI process is not the only area potentially impacted by Signal.

The newly-minted National Anti-Corruption Commission (NACC) has gained the power to intercept messages on the app – along with Whatsapp – and has put public servants and politicians on notice that unscrupulous conduct will be monitored.

But the NACC, like the NSW's Independent Commission Against Corruption, may not start tapping a target's phone until well after a message has been sent.

Consumer tech outlet Techvocast reported that phone companies [don't provide breakdowns](#) on what a person has been doing on Signal; the only thing that will appear on a phone bill is the amount of data used on the app.

“There’s no info on the phone bill on what you’re doing on Signal. It only shows the amount of data the app used,” it reported.

“If you’re using a Wi-Fi connection, you’ll not see any information about Signal on your phone bill, because you didn’t access Signal with your cellular data.”

Josh Taylor, 2 April 2022, ‘Barnaby Joyce’s drought envoy texts to Scott Morrison should be released, information watchdog rules’, < Barnaby Joyce’s drought envoy texts to Scott Morrison should be released, information watchdog rules | Barnaby Joyce | The Guardian>

It is the second ruling of its type this week after the prime minister’s office also ordered a search for text messages from QAnon supporter Tim Stewart

The prime minister’s office has been ordered to search for text messages from Barnaby Joyce to [Scott Morrison](#) reporting on his work as drought envoy, in the second ruling this week on freedom of information battles involving Morrison’s phone.

On Wednesday, the information watchdog ordered the PMO search Morrison’s phone for text messages from his friend – the [prominent QAnon supporter Tim Stewart](#) – after the PMO refused a request made by Guardian Australia.

The acting information commissioner, Elizabeth Hampton has taken a similar approach to a freedom of information request for text messages from the deputy prime minister while he was in the role of drought envoy.

For nine months between 2018 and 2019, while Joyce was on the backbench, he served as a drought envoy, visiting and reporting back on drought-affected communities, accruing [\\$675,000 in travel costs in that time](#).

After criticism from Labor that no public report on his work was produced, Joyce said he had sent reports via text message.

“If you say a report is a written segment to the prime minister ... then they definitely went to him, I definitely sent them, I sent them by SMS to him and they were read,” Joyce told the ABC in September 2019.

Tom Swann, then Australia Institute senior researcher, and Guardian Australia filed separate freedom of information requests for those text message “reports”.

However, in October 2019, the PMO [refused the requests](#) for the texts between Joyce and Morrison “regarding his work as drought envoy” by claiming it “would substantially and unreasonably interfere with the prime minister’s functions”.

Joyce said publicly he had sent an [“awful lot” of reports](#) via text message to the prime minister’s phone and that he would be “happy” to release the messages, but it was not his call.

Swann appealed against the decision to the Office of the Australian information commissioner, and two and a half years later, the acting commissioner, Elizabeth Hampton, has ordered the prime minister’s office to process the request in 30 days, finding the request could not be practically refused.

Swann argued the messages could be downloaded to avoid affecting the PM’s functions, and as the only record of Joyce’s work as drought envoy, the text messages were official documents of a minister under the freedom of information act.

The PMO erroneously claimed Swann was seeking two years’ worth of text messages, and would not provide the information commissioner with a breakdown of the 50 hours it estimated would take to process the request.

“I am not satisfied that PMO’s estimate of the processing time is reasonable.”

The ruling is near-identical to the decision Hampton made regarding the 2019 text messages [between Morrison and Tim Stewart](#).

The prime minister’s office has until the end of April to provide a decision on both requests, regardless of the upcoming election and when the government enters caretaker mode.

In Senate estimates on Thursday, the finance minister, Simon Birmingham, said he did not believe a decision had been made on whether to appeal against the Guardian Australia ruling to the Administrative Appeals Tribunal. The prime minister’s office has not responded to a request for comment.

However, if there is a change of government before the cases advance, Fol law expert Peter Timmins said that would make it unlikely the text messages would ever be handed over.

“If ... we have a different prime minister there by the time this issue is moved ahead, it’s very unlikely that records of [that kind] will be passed to the new prime minister, which would mean that you’ve run into a dead end,” he said.

Josh Taylor, 31 March 2022, ‘Scott Morrison must reveal any text messages from Qanon friend, information watchdog orders’, < Scott Morrison must reveal any text messages from QAnon friend, information watchdog orders | Scott Morrison | The Guardian>

After two-year freedom of information battle with Guardian Australia, the PM’s office has been told to search for any messages with QAnon proponent Tim Stewart

The prime minister's office has been ordered to search through Scott Morrison's mobile phone for text messages with prominent QAnon conspiracy proponent Tim Stewart after a two-year freedom of information battle against Guardian Australia.

[In October 2019, Guardian Australia broke the news](#) that Stewart – whose QAnon Twitter account, BurnedSpy34, was [permanently suspended](#) for “engaging in coordinated harmful activity” – was a family friend of Morrison, and his wife was on the prime minister's staff. Stewart had claimed in messages on Signal to fellow QAnon supporters that he was passing on letters and information to the prime minister, Crikey and the ABC later reported.

The Four Corners program raised questions as to why Morrison had used the term “ritual sexual abuse” in his apology to survivors of institutional child sexual abuse, revealing messages reportedly sent by Stewart referring to his attempts to get the words “ritual abuse” into the apology.

The term had been prominent in QAnon circles.

A spokesperson for the prime minister had previously said the term “ritual” is “one that the prime minister heard directly from the abuse survivors and the National Apology to Victims and Survivors of Child Sexual Abuse Reference Group he met with in the lead-up to the apology and refers not just to the ritualised way or patterns in which so many crimes were committed but also to the frequency and repetition of them.”

In 2019, Stewart denied to Guardian Australia that he had sought to influence the prime minister on policy, and said that he had not communicated with him about the QAnon conspiracy. At the time the Four Corners program aired, Morrison said [the program was “pretty ordinary”](#) and he did not support the QAnon conspiracy theory.

“I just think it's sort of a bit ordinary to drag other people into, I mean, I'm the prime minister, hold me to account for my views,” he said at the time. “For people who have known me or have been friends with me over the period of time, they're entitled to their privacy regardless of if people don't agree with their views.”

To verify some of the claims made, in October 2019 Guardian Australia filed a freedom of information request for documents held by the prime minister's office, including text messages, related to Stewart. This was later narrowed down to just the text and WhatsApp messages between Stewart and Morrison between September and October 2019, when the story was first reported.

In March 2020, the prime minister's office refused the request, stating: “The prime minister is the head of the national government and your request presents a significant challenge to the day-to-day execution of his duties ... the time that could be spent potentially processing your request would be a substantial and unreasonable diversion with the performance of the minister's functions.”

Two years after Guardian Australia appealed the decision to the Office of the Australian Information Commissioner, the acting commissioner, Elizabeth Hampton, [has ruled](#) the

prime minister's office must process the request on the basis that "a practical refusal reason does not exist".

The PMO sought to argue to the commissioner that it would take 50 hours to process the request, and erroneously claimed what was being sought was two years' worth of text messages that could only be reviewed by a small number of staffers in the PM's office, including his chief of staff.

Guardian Australia had argued in submissions that ruling against the appeal would have set a precedent that would be used by ministers and prime ministers in the future that all text messages and other mobile communications were out of bounds of freedom of information requests due to the time it would take to search their devices.

Hampton said while it was relevant to consider the prime minister has a busy schedule, she said she was not satisfied the estimated processing time was reasonable, given the PMO had mistakenly argued it was two years' worth of text messages, and the prime minister's office had not responded to a request for an itemised breakdown of the processing time.

The overturning of the decision means the PMO must now process the request and search through the prime minister's phone for the relevant messages, unless the ruling is appealed to the administrative appeals tribunal.

The prime minister's office has until 29 April to provide a decision on the request, regardless of the upcoming election and the government entering caretaker mode.

Guardian Australia has asked PMO if an appeal will be sought.

Freedom of information expert Peter Timmins said the upcoming election didn't mean the prime minister's office could stop processing the request, but said under FoI law, if there was a change in government, it's unlikely the new government would have the records.

"The caretaker period doesn't stop the clock ticking. But if for example, we have a different prime minister there by the time this issue is moved ahead, it's very unlikely that records of [that kind] will be passed to the new prime minister, which would mean that you've run into a dead end."

It comes as the Morrison government appointed a separate freedom of information commissioner, Leo Hardiman, and will hire nine additional staff to deal with the backlog in FoI reviews. In the last financial year, the OAIC received over 1,200 review requests, up 15% on the previous year, and 140% compared with 2015-16. As of the end of June 2021, there were 667 reviews that had been open for more than a year.

I hope you appreciated this article. Before you move on, I wonder if you would consider supporting Guardian Australia. **As we look ahead to the challenges of 2024, we're aiming to power more rigorous, independent reporting.**

In 2023, our journalism held the powerful to account and gave a voice to the marginalised. It cut through misinformation to arm Australians with facts about the referendum and

exposed corporate greed amid the cost-of-living crunch. It sparked government inquiries and investigations, and continued to treat the climate crisis with the urgency it deserves. This vital work is made possible because of our unique reader-supported model. With no billionaire owner or shareholders to consider, we are empowered to produce truly independent journalism that serves the public interest, not profit motives.

**Shane Wright, 19 April 2021, 'From pen and paper to Wickr: the battle to save government decisions', Sydney Morning Herald, <
<https://www.smh.com.au/politics/federal/from-pen-and-paper-to-wickr-the-battle-to-save-government-decisions-20210416-p57jqr.html>>**

Laws made for the days of pen and paper could allow the nation's most senior ministers and public servants to avoid scrutiny of their decisions by the voting public, integrity agencies and historians as they use encrypted messaging systems like WhatsApp and Wickr.

As the National Archives warns vital audio-visual records of disappearing Indigenous languages and ASIO surveillance video could disintegrate before being properly stored, it and other agencies are fighting to even get their hands on new forms of information widely used by elected officials to make long-lasting policy decisions.

The National Archives collects all official documents created by departments and ministers, including cabinet papers that are released with a 20-year delay. The papers are heavily mined by historians and analysts to understand key policies.

Documents also come under the Freedom of Information Act, often used by media companies to reveal the inner workings of government, while agencies such as the National Audit Office can access documents created by public servants as it looks to see if government programs are being run efficiently and properly.

But a government-commissioned review of the archives, which found the agency struggling under the weight of long-term funding cuts, warned the very definition of what constituted a government record needed to be updated to reflect the changed way in which ministers and departments go about their business.

"The definition of a record needs to reflect current international standards, be more directly applied to digital technologies, and more clearly provide for direct capture of records that are susceptible to deletion, such as emails, texts or online messages," the Tune review into the archives found.

When ministers leave Parliament they are required to leave official documents with the National Archives. They include communications with other ministers, including the prime minister, relating to their portfolio responsibilities as well as records of "deliberations, decision-making, appointments and terminations".

Ministerial records, including those with public servants, that are created or received using social media, SMS as well as encrypted messaging systems are covered by this requirement.

But archives director David Fricker has revealed despite the collection of documents from retired ministers and prime ministers over recent years, there's no sign that encrypted messages have been handed over as part of a collection of official documents.

"I would be very surprised if we have yet received any transfers of WhatsApp messages or that generation of technology," he told a parliamentary hearing last week.

Mr Fricker said it was clear the technology was being used.

"It's an absolute certainty. I think it's well-known that government officials are communicating with WhatsApp and other platforms similar to that," he said.

While the archives requires the retention of important records there are no penalties if they are not. As some encrypted messaging systems destroy messages, it may be impossible to even track their creation.

Even social media posts, which are being used extensively by Prime Minister Scott Morrison, can prove problematic as they are held by foreign, private companies which in years to come may cease to exist.

The Office of the Australian Information Commissioner said the Freedom of Information Act gave the public the legal right to access documents of an agency or ministers. That included the right to messages on mobile devices and messaging applications.

"The OAIC considers that documents required to be retained should be managed in such a way as to facilitate searching for them in response to an FOI request," a spokesperson for the commissioner said.

Labor MP Julian Hill said the government had to explain why it was taking so long to deal with the issues around encrypted messages.

"There was clear and compelling evidence from the National Archives and the Auditor-General about the need to retain records of encrypted communications that relate to government decisions," he said.

"There's an urgent need to modernise the regime as it relates to the public service."

The Assistant Minister to the Attorney-General, Amanda Stoker, said the government was taking a methodical approach in responding to the review, adding its total recommendations could cost between \$70 million and \$205 million a year.

Senator Stoker said a formal response should be finalised by year's end.

"I'm concerned to make sure the archives of this country are available to us for the long term. It's an important part of our history," she said.

While agencies deal with issues around encrypted messages, the National Archives is also fighting to maintain the records it does hold.

Mr Fricker revealed some irreplaceable documents were already at risk, particularly audio-visual recordings that range from Indigenous culture such as languages and ceremonies to surveillance material collated by ASIO.

“I think this is about engaging and sustaining citizens’ trust in government and defending our democracy, because transparency and accountability are the foundations for people to have trust in their institutions,” he said.

“If we lose records then they are permanently and irretrievably lost.”

Dougle Dingwall, 15 April 2021, ‘WhatsApp conversations with ministers, bureaucrats should be recorded: National Archives boss’, Canberra Times, < WhatsApp conversations with ministers, bureaucrats should be recorded: National Archives boss | The Canberra Times | Canberra, ACT>

Public servants should keep a record of their WhatsApp conversations with ministers - or not use encrypted messages for government business at all, says the National Archives of Australia chief.

But the archives' director-general David Fricker doubts his agency has received any records of WhatsApp conversations from the public service for storage, despite the "absolute certainty" that ministers and their advisers communicate with bureaucrats through the service.

Mr Fricker delivered his frank assessment of record keeping for encrypted messaging among government officials during a parliamentary hearing into the archives' storage of digital material on Wednesday.

It means that crucial conversations about government and policy are likely not being recorded for later scrutiny - and that deliberations and public service advice leading to key decisions will stay off the historical record.

Public servants are required to keep records of official business they conduct on any platform, however the National Archives chief says his agency has no power to compel officials to record their encrypted conversations.

Under the archives act public servants cannot destroy Commonwealth records. But the legislation does not cover encrypted messages - which are property of the messaging services - if a separate record has not been made of them such as a screenshot.

Mr Fricker urged public servants conducting government business on services including WhatsApp, Signal and Telegram to file the conversations into their agencies' records.

He said it was "the clear message" that federal bureaucrats should either record their encrypted conversations about government business, or otherwise not use the services. However it remained to be seen how much that message was getting through to public servants, the archives director said.

Under questioning from Labor MP and public accounts committee deputy chair Julian Hill, Mr Fricker said it was an "absolute certainty" that government officials were conducting government business over WhatsApp.

However the director-general said he would be surprised if the National Archives had received any records of encrypted conversations.

Disappearing messages - a feature of messaging service Signal - were the "digital equivalent of a post-it note" or a phone call, he said, and public servants had a professional responsibility to maintain a record of those communications.

Mr Fricker said outdated archives laws created a "grey area" on keeping records of conversations conducted on platforms not owned by the Commonwealth, such as WhatsApp.

The legislation should be updated to include a "more 21st century definition" of Commonwealth records that included encrypted messages, he said.

"When you create a record, it has to meet those standards such that it is known, it is incorporated into an improved government information management system, be that third party or government-owned," Mr Fricker said.

"It is a pressing issue for us. The increasing use of third party, non-government, non-Australian platforms for the Commonwealth government's business does present a challenge.

"Are we keeping minimum evidence of official conduct that is created when we are using those non-government platforms?"

The National Archives has advised the Attorney-General's office, and is discussing changes to the archives act. A new definition covering Commonwealth records was among the priorities for change, Mr Fricker said.

The national audit office, one of the main federal integrity watchdogs, told MPs its job holding agencies to account would be easier if public servants kept records of their conversations on encrypted services.

**Christopher Knaus, 9 November 2020, 'Australia's government agencies increasingly refusing environment-related FOIs, audit finds', The Guardian, <
<https://www.theguardian.com/australia-news/2020/nov/09/australias-government-agencies-increasingly-refusing-environment-related-fois-audit-finds>>**

Australia's freedom of information system is increasingly hiding documents about climate and other environmental issues from the public, a trend driven by skyrocketing refusal rates, widespread delays and rising costs, an audit has found.

The audit, conducted by the Australian Conservation Foundation (ACF), examined five years of FOI requests for environment-related documents across federal and state departments and agencies.

It found the number of outright refusals for environment-related documents has more than doubled, from 12% to 25%, while the number of requests granted in full has dropped from 26% to 16%.

Delays in processing environment-related FOI requests were widespread, the audit found, with 60% of requests late by more than a month and 39.5% by more than two months.

The cost of processing environment-related FOIs was double the average, and lengthy review processes, which often took more than a year to complete, were becoming "a key tool for denying access to information".

"It appears from our audit that environmental information is even more odiously inaccessible than other information subject to the [Freedom of Information] Act," the ACF's audit said.

ACF's democracy campaigner, Jolene Elberth, said the findings of the audit should be a "wake-up call" to anyone who cares about transparency.

Advertisement

"Serious systemic flaws in our system are frustrating efforts to protect our precious natural ecosystems and tackle the climate crisis," Elberth told the Guardian.

"Australians deserve transparency and accountability of decisions made on our behalf, particularly where they impact on the natural resources we all share and have a responsibility to protect."

The ACF audit mirrors more general data about Australia's FOI system, which appears to show it is deteriorating.

The Office of the Australian Information Commissioner's (OAIC) [latest annual report](#) shows delays, complaints and refusals are all increasing over time.

Complaints about the FOI system increased by 79% in a single year, according to the OAIC's annual report.

Practical refusals – used if a request is deemed to take too much time or effort to process or if documents cannot be found – went up by 71% in 12 months.

Delays are growing more protracted.

Last financial year, about 79% of all FOIs were processed in the time required by law. The year before it was 83% and in 2017-18 it was 85%.

In some government agencies, only 50% of FOI requests are being processed within the lawful timeframe, including the prime minister's office, the office of the environment minister, the Australian Radiation Protection and Nuclear Safety Agency, the Australian Sports Anti-Doping Authority, Sports Australia, the Australian federal police, the Australian Broadcasting Corporation, the office of the infrastructure minister and Norfolk Island Regional Council.

Delays at the Department of Home Affairs, which receives by far the most FOI requests, have also increased.

It only processed 66% of its FOI requests within the statutory timeframe in 2019-20, compared with 74% and 75% in the years prior.

The OAIC received 1,066 requests for reviews of government FOI decisions in 2019-20, an increase of 15% from the year prior. Reviews were taking on average eight months to finalise by the OAIC, which has increased its efficiency despite continued resourcing constraints.

Elberth urged the public to pressure government to improve the system.

"It's time for all Australian governments to step up to their stated commitments to open government and lift the veil of secrecy from information and decisions we all have a stake in," she said.

From: [OAIC - Media](#)
To: s47F
Cc: [OAIC - Media](#)
Subject: RE: Media query [SEC=OFFICIAL]
Date: Tuesday, 27 February 2024 1:02:36 PM
Attachments: [image001.jpg](#)
[image002.jpg](#)
[image004.jpg](#)
[image003.jpg](#)

s47F

Sorry this is a bit after your deadline.

The following can be attributed to an OAIC spokesperson:

The significance of government records is reflected in a number of statutes. Retention requirements are contained in the *Archives Act 1983* and those requirements have a broad application. The *Freedom of Information Act 1982* provides a legal right for every person to obtain access to information of Commonwealth agencies and ministers. This right of access to information is essential to advancing transparency and a participative democracy.

The OAIC considers that documents that are required to be retained by agencies and ministers should be managed in a way that facilitates searching for them and considering either their proactive publication or their release in response to an FOI request.

The OAIC is not specifically aware of any FOI requests being refused because of messages self-destructing after a certain period of time, but notes that only a small percentage of the FOI requests refused by agencies and ministers are appealed to the Information Commissioner.

Below is some additional **background information**.

The Information Commissioner has reviewed FOI decisions relating to encrypted communications (but not specifically one in which the requested messages have self-destructed). In one Information Commissioner review (IC review) [relating to encrypted communications](#), the decision noted: 'Agencies and ministers are responsible for managing and storing records in a way that facilitates finding them for the purposes of an FOI request. The steps taken to search for documents should include the use of existing technology and infrastructure to conduct an electronic search of documents, as well as making enquiries of those who may be able to help locate the documents.'

The National Archives of Australia has developed requirements for keeping or destroying records relating to offices of ministers of state. These are set out in [General Record Authority 38](#) which defines official tweets and WhatsApp messages as being ministerial records that are subject to the *Archives Act 1983*. In the IC review decision referred to in the paragraph above, the Information Commissioner said, 'The question of whether the Prime Minister has breached the *Archives Act 1983* by not retaining Wickr communications or whether Commonwealth records were destroyed is outside the ambit of s 24A of the FOI Act and is not an issue that I am able to consider in this IC review.'

The Information Commissioner has no power to sanction an agency or minister in the circumstances you have outlined.

The Information Commissioner has the power to review FOI decisions made by agencies and ministers and may affirm, vary or set aside the FOI decision. Agencies and ministers are required to comply with decisions made by the Information Commissioner and the Information Commissioner may apply to the Federal Court for an order directing the agency or minister to comply with a decision, if they do not comply with it.

The Information Commissioner has the power to investigate actions taken by agencies under the FOI Act (but has no power to investigate the actions taken by ministers). On completion of an investigation, the Information Commissioner may make recommendations for how the agency can improve their processes (for example, by improving their document retention processes). If an agency fails to implement a recommendation, the Information Commissioner may give a written report to the responsible minister.

Amy



Amy Kiely (she/her)
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Office of the Australian Information Commissioner
Brisbane
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The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.

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From: **s47F**
Sent: Monday, February 26, 2024 3:25 PM
To: OAIC - Media <media@oaic.gov.au>
Subject: Re: Media query [SEC=OFFICIAL]

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Yes, I'm an idiot! Fixed below and thanks for checking -

- Does the OAIC have recourse to sanction someone for sending a message which has been deleted in this way, and therefore inaccessible via an FOI request?

On Mon, 26 Feb 2024 at 16:07, OAIC - Media <media@oaic.gov.au> wrote:

Thanks **s47F** Is some of your second question missing?

Amy Kiely (she/her)
Assistant Director, Strategic Communications
Office of the Australian Information Commissioner



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Sent: Monday, February 26, 2024 2:56 PM
To: OAIC - Media <media@oaic.gov.au>
Subject: Media query

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Hi -

Working to a midday deadline tomorrow.

I'm writing a story on public servants and MP staffers using encrypted messaging apps (like Signal and WhatsApp) as part of their communications at work.

We've heard that some FOI requests / reviews have been hampered because relevant messages were sent as timed messages (ie. self-destruct after a certain time) on these encrypted apps.

- Is the OAIC aware of any freedom of information requests which were hampered due to that?
- Does the OAIC have recourse to sanction someone for sending a message
- Is there anything else you would like to add?

Thanks!

--

s47F

Federal Political Reporter

s47F

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