



Australian Government

Department of Health and Aged Care

FOI reference: FOI 4621

Mr Rob Cawthorne

By email: foi+request-10555-780664ef@righttoknow.org.au

Dear Mr Cawthorne

Decision on your Freedom of Information Request

I refer to your request of 12 August 2023, to the Department of Health and Aged Care (the department), seeking access under the *Freedom of Information Act 1982 (Cth)* (FOI Act) to:

... copies of communications between the Department of Health and the Department of Climate Change, Energy, the Environment and Water with regard to the certification, approval and advertisement of British American Tobacco or any other Tobacco manufacturers certified under the Climate Active Carbon Neutral certification program.

Clarification/Modification of scope of request

On 22 August 2023, following consultation with you, you further clarified your request with:

The information I am seeking would exist between 1st August 2022 and 31 July 2023.

I am authorised under subsection 23(1) of the FOI Act to make decisions in relation to Freedom of Information requests. I am writing to notify you of my decision on your request.

On 4 October 2023, pursuant to section 15AB of the FOI Act, the Office of the Australian Information Commissioner (OAIC) granted the department an extension of time to process your request until 11 October 2023.

FOI decision

I have identified 7 documents that are relevant to your request. These documents were in the possession of the department when your request was received.

I have decided to:

- give access to 2 documents in full, and
- give access to 5 documents in part, subject to the deletion of exempt and irrelevant material.

A schedule setting out the documents relevant to your request, with my decision in relation to those documents, is at **ATTACHMENT A**.

My reasons for not providing access to material that has been deleted from the documents are set out in **ATTACHMENT B**.

Legislative provisions

The FOI Act, including the provisions referred to in my decision, are available on the Federal Register of Legislation website: www.legislation.gov.au/Series/C2004A02562.

The *Privacy Act 1988* (Cth) (Privacy Act), can also be accessed from the Federal Register of Legislation website here: www.legislation.gov.au/Series/C2004A03712.

Your review rights

I have set out your review rights at **ATTACHMENT C**.

Publication

Where I have decided to release documents to you, the department may also publish the released material on its Disclosure Log. The department will not publish personal or business affairs information where it would be unreasonable to do so.

For your reference the department's Disclosure Log can be found at: www.health.gov.au/resources/foi-disclosure-log.

Contacts

If you require clarification of any matters discussed in this letter you can contact the FOI Section on (02) 6289 1666 or at FOI@health.gov.au.

Yours sincerely



Karlie Brown

Acting co-Assistant Secretary
Tobacco and E-Cigarette Control Branch
11 October 2023

ATTACHMENT A.

SCHEDULE OF DOCUMENTS
FOI 4621

Document	Pages	Date	Description	Decision on access ¹	Relevant provision/s of FOI Act
1	1-4	4 Aug 2022	Email: Climate Active Endorse British American Tobacco	RE, RI	s22 s47F
2	5-7	9 Aug 2022	Email: British American Tobacco - WHO Framework Convention on Tobacco Control	RE, RI	s22 s47F
3	8-18	13 Sep 2022	Email: British American Tobacco - WHO Framework Convention on Tobacco Control - Attaching: IMG_6779 IMG_6778, Climate Active and Climate Active 2	RE, RI	s22 s42 s47F
4	19	13 Sep 2022	Attachment to email: IMG_6778 - Certification of BATA	R	N/A
5	20	13 Sep 2022	Attachment to email: IMG_6779 - Certification of BATA	R	N/A
6	21-32	29 Sep 2022	Email: British American Tobacco - WHO Framework Convention on Tobacco Control	RE, RI	s22 s42 s47F
7	33-34	3 Nov 2022	Email: Termination of BATA's Climate Active certification	RE, RI	s22 s47F

¹ R = Release in full, RE = Release with exempt information deleted, RI = Release with irrelevant information deleted.

ATTACHMENT B.

**REASONS FOR DECISION
FOI 4621**

1. Material taken into account

In making my decision, I had regard to the following:

- the FOI Act
- guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines)
- the terms of your FOI request as outlined above
- consultation with another government agency, the Department of Climate Change, Energy, the Environment and Water
- the content of the documents sought, and
- advice from departmental officers with responsibility for matters relating to the documents sought.

2. Finding of facts and reasons for decision

My findings of fact and reasons for deciding that the exemption identified in the schedule of documents applies to the relevant parts of documents are set out below.

Section 42 - Documents subject to legal professional privilege

Section 42 of the FOI Act provides that a document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

The FOI Guidelines state:

5.127 The FOI Act does not define LPP for the purposes of the exemption. To determine the application of this exemption, the decision maker needs to turn to common law concepts of LPP.

5.129 At common law, determining whether a communication is privileged requires a consideration of:

- whether there is a legal adviser-client relationship
- 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
- whether the advice given is confidential

I am satisfied that the parts of the documents marked 's42' consist of information that is subject to legal professional privilege. I am satisfied that:

- the necessary legal adviser-client relationship exists; the legal adviser was acting in their capacity as a professional legal adviser and the giving of the advice was attended by the necessary degree of independence
- the communication was brought into existence for the dominant purpose of giving or receiving legal advice
- the advice was provided independently, and
- the advice provided was confidential.

For the reasons outlined above, I have decided that the parts of the documents marked 's42' are exempt from disclosure under section 42 of the FOI Act.

Section 47F - Documents affecting 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 about any person (including a deceased person).

Personal Information

Personal information has the same meaning as in the Privacy Act. Specifically, section 6 of the Privacy Act provides that *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.

Paragraph 6.131 of the FOI Guidelines states that for particular information to be personal information, an individual must be identified or reasonably identifiable.

Paragraph 6.130 of the FOI Guidelines states that personal information can include a person's name, address, telephone number, date of birth, medical records, bank account details, taxation information and signature.

An individual is a natural person rather than a corporation, trust, body politic or incorporated association.

This provision of the FOI Act specifically extends to the personal information of deceased persons.

I am satisfied that parts of the documents marked 's47F' contain personal information, being the names and contact details of staff of another Commonwealth Agency.

Unreasonable Disclosure of Personal Information

Subsection 47F(2) of the FOI Act provides that in determining whether the disclosure would involve the unreasonable disclosure of personal information, I must have regard to the following matters:

- (a) the extent to which the information is well known
- (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document
- (c) the availability of the information from publicly accessible sources
- (d) any other matters that the agency or Minister considers relevant.

Paragraph 6.138 of the FOI Guidelines states that:

The personal privacy exemption is designed to prevent the unreasonable invasion of third parties' privacy. The test of 'unreasonableness' implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals. The test does not, however, amount to the public interest test of s 11A(5), which follows later in the decision making process. It is possible that the decision maker may need to consider one or more factors twice, once to determine if a projected effect is unreasonable and again when assessing the public interest balance.

I note that the AAT, in *Re Chandra and Minister for Immigration and Ethnic Affairs [1984] AATA 437* at paragraph 259, stated that:

... whether a disclosure is 'unreasonable' requires ... a consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance ... it is also necessary in my view to take into consideration the public interest recognised by the Act in the disclosure of information ... and to weigh that interest in the balance against the public interest in protecting the personal privacy of a third party ...

Paragraphs 6.142 and 6.143 of the FOI Guidelines state:

6.142 Key factors for determining whether disclosure is unreasonable include:

- the author of the document is identifiable
- the documents contain third party personal information
- release of the documents would cause stress on the third party
- no public purpose would be achieved through release.

6.143 As discussed in the leading s 47F IC review decision of 'FG' and National Archives of Australia [2015] AICmr 26, other factors considered to be relevant include:

- the nature, age and current relevance of the information
- any detriment that disclosure may cause to the person to whom the information relates
- any opposition to disclosure expressed or likely to be held by that person
- the circumstances of an agency's collection and use of the information
- the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act
- any submission an FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information, and

- whether disclosure of the information might advance the public interest in government transparency and integrity.

The documents contain the personal information of Australian Public Service (APS) staff who are not in the Senior Executive Service (SES).

However, I note that in *Chief Executive Officer, Services Australia and Justin Warren* [2020] AATA 4557 (*Warren*), at paragraph 83, Deputy President S A Forgie noted:

The whole of the FOI Act is a finely tuned balance between two interests. In one side of the balance is the facilitation and promotion of access to a national resource that is information held by Government, which enables increased public participation in Government processes and increased scrutiny, discussion, comment, and review of the Government's activities. In the other is the protection of the national interest, the essential operation of government and the privacy of those who deal with government. It is most important, therefore, that its provisions be read very carefully and that presumptions should not be introduced that are not expressed, or necessarily implicit, in the words Parliament has chosen to achieve the balance that it wants. Those words should be the starting point of any consideration rather than any presumption that agencies and ministers should start from the position that the inclusion of the full names of staff in documents increases transparency and increases the objects of the FOI Act.

I am satisfied that the disclosure of personal information contained within the documents would, in the circumstances, constitute an unreasonable disclosure of personal information for the following reasons:

- the individuals whose personal information is contained in the documents are identifiable
- release of this information would cause anxiety to the individuals concerned
- no further public purpose would be achieved through the release of the personal information, noting that the personal information is included in the document as a result of their employment circumstance
- the information is current and has not lost its sensitivity through the passage of time
- the placing of the personal information of individuals who work for a government department into the public domain has the potential to place those individuals at risk of harassment, abuse, threats and intimidation. This would be detrimental to the individuals concerned, and potentially also their families. Mitigating this risk is even more important with the prevalence of social media and technology allowing individuals to be more easily identifiable and contactable in online environments
- the individuals would not expect the information to be placed in the public domain, have not otherwise provided the department with authority to disclose their personal information, and detriment may be caused to the individuals to whom the information relates, and

- the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act.

In making my decision, I have also taken into account the views of the other Commonwealth agency, which objected to the disclosure of the names and contact details of its staff.

For the reasons outlined above, I have decided that the parts of the documents marked 's47F' are conditionally exempt from disclosure under section 47F of the FOI Act.

Where a document is found to be conditionally exempt, the department must give access to that document unless access to the document at this time would, on balance, be contrary to the public interest. I have addressed the public interest considerations below.

Disclosure is not in the public interest

Pursuant to subsection 11A(5) of the FOI Act, the department must give access to conditionally exempt documents unless access to the documents at that time would, on balance, be contrary to the public interest. I have therefore considered whether disclosure of the parts of the documents conditionally exempt under section 47F would be contrary to the public interest.

Paragraph 6.5 of the FOI Guidelines states:

The public interest test is considered to be:

- something that is of serious concern or benefit to the public, not merely of individual interest
- not something of interest to the public, but in the interest of the public
- not a static concept, where it lies in a particular matter will often depend on a balancing of interests
- necessarily broad and non-specific and
- relates to matters of common concern or relevance to all members of the public, or a substantial section of the public.

Factors favouring disclosure

Section 11B of the FOI Act provides that factors favouring access to documents in the public interest include whether access to the documents would do any of the following:

- promote the objects of the FOI Act (including all matters set out in sections 3 and 3A)
- inform debate on a matter of public importance
- promote effective oversight of public expenditure, or
- allow a person to access his or her own personal information.

Having regard to the above, I consider that disclosure of the conditionally exempt information at this time would promote the objects of the FOI Act.

Factors weighing against disclosure

I consider that the following public interest factors weigh against disclosure of the conditionally exempt information at this time, on the basis that disclosure:

- could reasonably be expected to prejudice the protection of the relevant individuals' right to personal privacy, noting that the substance of the documents has been released to you and disclosure of the personal information would not provide any further insight into the workings of government
- would not achieve any public purpose and, on balance, would harm the individuals' right to personal privacy, and
- would prejudice a Commonwealth agency's ability to meet its statutory obligations and responsibilities in relation to the work health and safety of its employees.

In making my decision, I have not taken into account any of the irrelevant factors set out in subsection 11B(4) of the FOI Act, which are:

- (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
- (b) access to the document could result in any person misinterpreting or misunderstanding the document;
- (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
- (d) access to the document could result in confusion or unnecessary debate.

Conclusion

For the reasons set out above, after weighing all public interest factors for and against disclosure, I have decided that, on balance, disclosure of the conditionally exemption information would be contrary to the public interest. I am satisfied that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information.

Section 22 – deletion of irrelevant material

Section 22 of the FOI Act applies to documents containing irrelevant information (subparagraph 22(1)(a)(ii)) and allows an agency to delete such material from a document.

I have deleted material in the documents which can reasonably be regarded as irrelevant to your request and prepared an edited copy for release, including parts of email chains that solely relate to administrative matters such as the organisation of

meeting times. This information has been marked 's22' in the documents released to you.

The documents also contain the names and telephone numbers of departmental employees. When your request was acknowledged, we notified you that this material would be considered irrelevant to the scope of your request unless you told us that you were seeking access to that material. On the basis that you did not notify us otherwise, this information has been deleted under section 22 of the FOI Act as outlined above.

You have made a request on a website where the documents as released can be viewed by the public. Pages 4, 16 and 30 contain a mobile number and address that although would be known you, may not already be in the public domain. I have deleted this material under section 22 of the FOI Act.

In addition, as I have decided that some of the information in the documents released to you is exempt from disclosure, I have prepared an edited copy of the documents by deleting the exempt information from the documents under section 22 of the FOI Act as outlined above.

ATTACHMENT C.

YOUR REVIEW RIGHTS

If you are dissatisfied with my decision, you may apply for a review.

Internal review

You can request internal review within 30 days of you receiving this decision. An internal review will be conducted by a different officer from the original decision-maker.

No particular form is required to apply for review although it will assist your case to set out the grounds on which you believe that the original decision should be changed.

Applications for internal review can be made by:

- Email: FOI@health.gov.au
- Mail: FOI Unit (MDP 516)
Department of Health
GPO Box 9848
CANBERRA ACT 2601

If you choose to seek an internal review, you will also have a right to apply for Information Commissioner review (IC review) of the internal review decision once it has been provided to you.

Information Commissioner review or complaint

You also have the right to seek IC review of this decision. For FOI applicants, an application for IC review must be made in writing within 60 days of the decision. For third parties who object to disclosure of their information, an application for IC review must be made in writing within 30 days of the decision.

If you are not satisfied with the way we have handled your FOI request, you can lodge a complaint with the OAIC. However, the OAIC suggests that complaints are made to the agency in the first instance.

While there is no particular form required to make a complaint to the OAIC, the complaint should be in writing and set out the reasons for why you are dissatisfied with the way your request was processed. It should also identify the Department of Health and Aged Care as the agency about which you are complaining.

You can make an IC review application or make an FOI complaint in one of the following ways:

- online at www.oaic.gov.au/freedom-of-information/reviews-and-complaints/
- via email to foidr@oaic.gov.au
- by mail to GPO Box 5218 Sydney NSW 2001, or

- by fax to 02 9284 9666.

More information about the Information Commissioner reviews and complaints is available on the OAIC website here: www.oaic.gov.au/freedom-of-information/foi-review-process.

Complaint

If you are dissatisfied with action taken by the department, you may also make a complaint directly to the department.

Complaints to the department are covered by the department's privacy policy. A form for lodging a complaint directly to the department is available on the department's website here: www.health.gov.au/about-us/contact-us/complaints