



Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

FOI

FOI/2021/021

FREEDOM OF INFORMATION ACT 1982

REQUEST BY: Ley S

DECISION BY: Petra Gartmann
Assistant Secretary
Legal Policy Branch

By email: foi+request-7093-bf11673e@righttoknow.org.au

Dear Ley S

I refer to your email, dated 18 February 2021, in which you made a request to the Department of the Prime Minister and Cabinet (the **Department**) under the *Freedom of Information Act 1982* (Cth) (the **FOI Act**) in the following terms:

under the FOI Act, I seek a copy of any document contained in the sent folder (current or archived) of Phil Gaetjens' email client or Mr Gaetjens' WhatsApp and Signal accounts that contains the word 'Brittany'.

Authorised decision-maker

I am authorised to make this decision in accordance with arrangements approved by the Department's Secretary under section 23 of the FOI Act.

Searches for relevant documents

The Department has identified one document within the scope of your request (the **requested document**).

Decision

I have decided to refuse access, in full, to the requested document, on the basis that it contains information that is conditionally exempt under sections 47C (deliberative matter) and 47F (personal information) of the FOI Act, and its disclosure would, on balance, be contrary to the public interest.

Further information is set out in the Schedule at **Attachment A** to this decision.

In making this decision, I have had regard to the following material:

- the FOI request;
- the requested document;
- the FOI Act;
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the **FOI Guidelines**); and
- *Thomas and Secretary, Department of Defence (Freedom of Information)* [2018] AATA 604 (**Thomas**).

Section 47C of the FOI Act – deliberative material

Section 47C(1) of the FOI Act provides that:

*A document is conditionally exempt if its disclosure under this Act would disclose matter (**deliberative matter**) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:*

- (a) an agency; or*
- (b) a Minister; or*
- (c) the Government of the Commonwealth.*

Paragraph 6.63 of the FOI Guidelines provides that:

‘Deliberative matter’ is a shorthand term for ‘opinion, advice and recommendation’ and ‘consultation and deliberation’ that is recorded or reflected in a document. There is no reason generally to limit the ordinary meanings given to the words ‘opinion, advice or recommendation, consultation or deliberation’.

Paragraph 6.59 of the FOI Guidelines further provides that:

‘Deliberative process’ generally refers to the process of weighing up or evaluating competing arguments or considerations or to thinking processes – the process of reflection, for example, upon the wisdom and expediency or a proposal, a particular decision or a course of action.’

Section 47C(2)(b) of the FOI Act provides that deliberative matter does not include purely factual material.

On purely factual material, paragraphs 6.71 to 6.73 of the FOI Guidelines provide that:

A conclusion involving opinion or judgement is not purely factual material. Similarly, an assertion that something is a fact may be an opinion rather than purely factual material.

Conversely, when a statement is made of an ultimate fact, involving a conclusion based on primary facts which are unstated, such a statement may be a statement of purely factual material.

‘Purely factual material’ does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.¹

¹ FOI Guidelines, [6.71] – [6.73].

I consider that the requested document contains deliberative matter. I also find that the requested document does not contain ‘purely factual material’.

Accordingly, I am satisfied that the requested document is conditionally exempt from release in accordance with section 47C of the FOI Act.

Section 47F Public interest conditional exemption —personal privacy

Section 47F(1) 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).

The term ‘personal information’ has the same meaning as it has in the *Privacy Act 1988* (the Privacy Act). Section 6(1) of the Privacy Act defines ‘personal information’ to mean:

‘... information or an opinion about an identified individual, or an individual who is reasonably identifiable:

(a) whether the information or opinion is true or not;

(b) whether the information or opinion is recorded in a material form or not.’

Paragraph 6.131 of the FOI Guidelines provides that:

What constitutes personal information will vary, depending on whether an individual can be identified or is reasonably identifiable in the particular circumstances. For particular information to be personal information, an individual must be identified or reasonably identifiable.

Section 47F(2) of the FOI Act provides that in determining whether the disclosure of personal information would be unreasonable, an agency must have regard to the following matters:

- the extent to which the information is well known;
- 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;
- the availability of the information from publicly accessible sources; and
- any other matters that the agency considers relevant.

Paragraph 6.142 of the FOI Guidelines states that 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; and
- no public purpose would be achieved through release.

Paragraph 6.143 of the FOI Guidelines also provides other factors that may be relevant to whether disclosure of personal information would be unreasonable under section 47F of the FOI Act, including the following factors:

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

I consider that the requested document contains personal information of an individual.

I also find that disclosure of the requested document would be unreasonable, for the following reasons:

- the author of the document is identifiable;
- the document contains third party personal information;
- the individual concerned is likely to oppose disclosure of their personal information;
- the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act.

I am therefore satisfied that the requested document is also conditionally exempt from release in accordance with section 47F of the FOI Act.

Public Interest

Section 11A(5) of the FOI Act provides that a conditionally exempt document must nevertheless be disclosed to the applicant unless its disclosure would, on balance, be contrary to the public interest.

In determining whether disclosure would be contrary to the public interest, the FOI Act requires a decision-maker to balance the public interest factors in favour of disclosure against the factors against disclosure.

Section 11B(4) of the FOI Act sets out the following factors that the decision-maker must *not* take into account when deciding whether access to the document would be contrary to the public interest:

- a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss in 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 documents was (or is) of high seniority in the agency to which the request for access to the document was made; or
- d) access to the document could result in confusion or unnecessary debate.

I have not taken any of the above factors into account in making my decision.

Factor in favour of disclosure

In my view, the particular factor in favour of disclosure is that disclosure would promote the objects of the FOI Act.

Factors against disclosure

The FOI Act does not provide for any public interest factors weighing against disclosure that decision makers may consider. However, in determining whether disclosure would be contrary to the public interest, I have had regard to the FOI Guidelines. The FOI Guidelines contain a non-exhaustive list of factors that, depending on the circumstances of the case, may be against disclosure.

In *Thomas and Secretary, Department of Defence (Freedom of Information)* [2018] AATA 604 (**Thomas**), the Administrative Appeals Tribunal (**AAT**) considered whether the disclosure of text messages between two senior Defence officials would be in the public interest. The AAT noted it

was common ground that disclosure of the text messages would disclose “deliberative matters”. In applying the public interest test, the AAT emphasised the distinction between what is of interest to the public and the public interest. The AAT held that, whilst the text messages were potentially of interest to the public, providing access to those text messages, on balance, would be contrary to the public interest.

In relation to the application of section 47C of the FOI Act to the requested document, I consider that *Thomas* is analogous to the current matter. The information contained in the requested document may be of interest to the public, but it does not necessarily follow that its disclosure would be in the public interest. Disclosure of the requested document would not disclose any information of a nature that would benefit the wider public interest, nor would it provide information that would inform public debate.

In relation to the application of section 47F of the FOI Act to the requested document, I consider that the factors against disclosure in this matter are that its disclosure:

- a) could reasonably be expected to prejudice the protection of an individual’s right to privacy; and
- b) could reasonably be expected to harm the interests of an individual or group of individuals.

After careful consideration of all relevant factors, I have decided that the public interest factors against disclosure of the requested document outweigh the public interest factors favouring its disclosure. Therefore, I have found the requested document to be exempt, in full, from disclosure.

Processing and access charges

I have decided not to impose charges for the processing of your request.

Review rights

Information about your rights of review under the FOI Act is available at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

Complaint rights

You may make a complaint to the Information Commissioner about the Department’s actions in relation to this decision. Making a complaint about the way the Department has handled an FOI request is a separate process to seeking review of the Department’s decision. Further information about how to make a complaint is available at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint/>.



Petra Gartmann
Assistant Secretary
Legal Policy Branch
9 April 2021



FOI REQUEST: FOI/2021/021

SCHEDULE OF DOCUMENTS

FOI

Document	Description	Decision
1	Electronic message	Exempt from release under s47C and s47F of the FOI Act.