

Correspondence from A/g Australian Information Commissioner, OAIC to the Director-General, NAA - Disapp...



OAIC - Executive Assistant  
To [simon.froude@naa.gov.au](mailto:simon.froude@naa.gov.au)  
Cc Donna Peat

Reply Reply All Forward

Mon 20/05/2024 5:33 PM

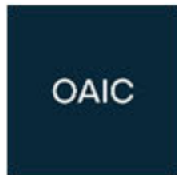
OFFICIAL

Correspondence from Ag Information Commissioner to NAA - Disappearing messages.pdf  
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Dear Director-General

Please find **attached** correspondence from the A/g Australian Information Commissioner and Freedom of Information Commissioner, Ms Elizabeth Tydd.

Kind regards



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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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Australian Government

Office of the Australian Information Commissioner

Our reference: [D2024/011733](#)

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## Use of encrypted applications and good record keeping

Dear Director-General

I write in relation to Australian parliamentarians' alleged use of disappearing messages on online applications as reported in recent media articles,<sup>1</sup> and the implications of this practice for information policy matters in Australia.

The *Freedom of Information Act 1982* (the FOI Act) provides a right to request access to documents held by government. As you may be aware, messages on applications such as WhatsApp and other app-based services may fall within the definition of a 'document' under the FOI Act.<sup>2</sup> The effective operation of the FOI Act is contingent on the management of app-based messages in such a way that they can be searched, retrieved and preserved consistently with the retention requirements in relevant Commonwealth legislation, such as the *Archives Act 1983* (Cth).

I note that compliance with the Archives Act is outside the scope of an OAIC Information Commissioner review.<sup>3</sup> I also note that while the OAIC's FOI Guidelines encourage agencies to develop procedures for the efficient storage and retrieval of information, the FOI Act does not impose a positive duty to create or maintain

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<sup>1</sup> See, e.g., Finn McHugh, 15 April 2024: 'Old Turnbull and Rudd spat surfaces in encrypted app controversy', <<https://www.capitalbrief.com/article/old-turnbull-and-rudd-spat-surfaces-in-encrypted-app-controversy-3138f27d-488c-4f72-b783-d846ef7e7766/preview/>>, Capital Brief.

<sup>2</sup> That is, where the messages can be found and are stored in searchable form. See s 4 of the FOI Act.

<sup>3</sup> See the OAIC's *Freedom of Information Guidelines*, Part 10: Review by the Information Commissioner, [https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/foi-guidelines/part-10-review-by-the-information-commissioner#:~:text=10.4The%20Information%20Commissioner%20may.record%20\(s%2051DA\)\)%2C%20or.](https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/foi-guidelines/part-10-review-by-the-information-commissioner#:~:text=10.4The%20Information%20Commissioner%20may.record%20(s%2051DA))%2C%20or.)

documents in a particular way.<sup>4</sup> Nevertheless, in the OAIC's view, use of such messaging functions has the potential to undermine the operation of the FOI Act and its underlying objectives of giving the Australian community access to information held by government, and promoting Australia's representative democracy by contributing to increased public participation in government processes and increased scrutiny of government activities.<sup>5</sup> In addition, from a broader information policy perspective, use of such messaging functions do not align with best practice in relation to the collection, use, disclosure, management, administration, and storage of, or accessibility to, information held by government.<sup>6</sup>

As you will be aware, the use of encrypted apps by parliamentarians and political staffers may also affect their ability to comply with record keeping obligations in the Archives Act. In this regard, I am aware that the National Archives of Australia has in recent years noted that messages on mobile devices, including those sent via apps, should be properly managed as Commonwealth records.<sup>7</sup> The guidance outlines that SMS, instant messaging and voicemails captured on mobile devices must be managed as Commonwealth records. I also note that WhatsApp messages fall within the definition of a ministerial record subject to the Archives Act.<sup>8</sup>

### **Next steps**

I would welcome further discussion on the above matters and would be glad to meet with you with a view to developing some common messaging on good information management and record keeping practices. I consider it would be timely for our agencies to jointly engage with public servants, Ministers and parliamentarians in relation to best practice record keeping and its importance to Australian democracy.

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<sup>4</sup> See the OAIC's FOI Guidelines at [3.215].

<sup>5</sup> See, e.g., s 3 of the FOI Act.

<sup>6</sup> See, e.g., s 7 of the *Australian Information Commissioner Act 2010* (Cth).

<sup>7</sup> See, e.g., *Managing information on mobile devices*, <https://www.naa.gov.au/information-management/managing-information-assets/types-information/managing-information-mobile-devices>, National Archives of Australia.

<sup>8</sup> See *General Records Authority 38*, <https://www.naa.gov.au/information-management/records-authorities/types-records-authorities/general-records-authority-38>, National Archives of Australia.

If your team would like to discuss this initiative, and options for progressing, please email our Strategic Communications team at [corporate@oaic.gov.au](mailto:corporate@oaic.gov.au).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Elizabeth Tydd'.

Elizabeth Tydd  
Australian Information Commissioner (A/g)  
Freedom of Information Commissioner

20 May 2024