



Australian Government

Department of the Prime Minister and Cabinet

FOI GUIDANCE NOTES

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Introduction

1. These notes are designed to provide practical assistance for Ministers and agencies on the use of certain exemptions under the *Freedom of Information Act 1982* (FOI Act) in light of the new framework under the recent FOI reforms. These notes are intended to assist agencies when considering, in particular, the Cabinet and deliberative document exemptions. Agencies must have regard to the guidelines issued by the Australian Information Commissioner¹ which cover all of the exemptions available under the FOI Act.
2. The FOI Act provides that a person has a legally enforceable right to obtain access to a document of an agency or an official document of a Minister unless that document falls within one of the exemptions set out in the FOI Act².
3. However, „there will always be some documents, the disclosure of which is not in the public interest, and which should properly be exempt under the FOI Act“³. It is essential that agencies consider carefully the application of exemptions to ensure the legitimate protection of government documents consistent with the application of the FOI Act.
4. The exemptions are in Part IV of the FOI Act. They include Cabinet documents⁴, national security⁵, law enforcement⁶, secrecy provisions⁷, material obtained in confidence⁸, trade secrets⁹, Commonwealth-State relations¹⁰, deliberative processes¹¹, Commonwealth“s financial/property interests¹² and certain operations of agencies¹³.

¹ <http://www.oaic.gov.au/publications/guidelines.html>.

² Section 11.

³ Senator Faulkner, in his „Open Government and Freedom of Information“ letter to agency heads of 30 April 2009.

⁴ Section 34.

⁵ Section 33.

⁶ Section 37.

⁷ Section 38.

⁸ Section 45.

⁹ Section 47.

¹⁰ Section 47B.

¹¹ Section 47C.

¹² Section 47D.

¹³ Section 47E.

These Guidance Notes focus on the exemptions relating to Cabinet documents¹⁴ and deliberative documents¹⁵ and take account of changes made to these exemptions by the Government's FOI reforms passed in 2010¹⁶. These notes may be supplemented by additional material on the operation of other exemptions if required.

Cabinet documents

5. A strong Cabinet system is fundamental to well-informed decision making and policy development by the Government. The convention of the collective responsibility of Ministers for government decisions is central to the Cabinet system of government. This requires that Cabinet deliberations are treated confidentially so that Cabinet is a forum in which ministers, while working towards a collective position, are able to discuss proposals, options and views with complete freedom. Maintaining the confidentiality of Cabinet deliberations is the foundation for the proper functioning of the Cabinet process. The Australian legal system, and the English legal system on which it is based, recognised the confidentiality of Cabinet deliberations for many years before the advent of FOI legislation.
6. Accordingly, the FOI Act has always provided that Cabinet documents are exempt from disclosure. Given the importance of Cabinet confidentiality FOI decision makers should make use of the Cabinet exemption whenever it is properly available.
7. Under section 34 a document will be exempt from disclosure if it has been submitted to Cabinet, or is a document that a Minister proposed to take to Cabinet, **and** the document was brought into existence for the *dominant* purpose of submission for consideration by Cabinet¹⁷. Submissions that went to Cabinet are covered by this exemption, as are Cabinet submissions which were prepared but not taken to Cabinet. The inclusion of a dominant purpose test makes it clear that the exemption does not extend to documents merely because they have been marked „Cabinet-in-Confidence“ or to documents simply because they have been attached to a Cabinet submission¹⁸.

¹⁴ Section 34.

¹⁵ Section 47C.

¹⁶ *Freedom of Information Amendment (Reform) Act 2010, Australian Information Commissioner Act 2010.*

¹⁷ Section 34(1)(a). Cabinet is defined in section 4(1) to include Cabinet Committees.

¹⁸ See also section 34(4). However, such documents may be subject to other exemptions.

8. Official records of Cabinet are exempt¹⁹. This category includes Cabinet Minutes and Business Lists.
9. The Cabinet exemption now extends to documents that were brought into existence for the dominant purpose of briefing a Minister about a Cabinet submission²⁰. Documents prepared to assist a Minister with a submission they are taking to Cabinet, and documents prepared to assist a Minister to consider submissions by other Ministers to Cabinet, both fall within this concept of briefing a Minister. Such preparatory documents include, for example, „talking points“ or analysis about the contents of an upcoming submission. Factors to consider include whether an item has been requested by the Minister, the usual practice in relation to preparation and consideration of submissions by the Minister, and the proximity to Cabinet consideration.
10. Similarly, agencies should consider whether economic modelling data and output has been prepared for briefing for upcoming Cabinet deliberations.
11. Where a large amount of data is generated in the process of confirming the final data for Cabinet consideration, this material may also come within the Cabinet exemption.
12. The exemption also applies to drafts of Cabinet submissions, briefings and records²¹.
13. In addition, a document is also exempt to the extent that it contains information which if disclosed would reveal Cabinet deliberations or decisions, unless the deliberations or decisions have been officially disclosed²². This provision covers parts of documents which refer directly to Cabinet decisions or the fact or timing of Cabinet’s active consideration of particular matters. A document may also canvass options or information in the context that they may later be put to Cabinet for consideration or canvass views which a Minister may raise in Cabinet for consideration. This is particularly relevant in the case where such documents would allow a correct inference to be made about the content of later Cabinet consideration. Where the document or information is closely related to subsequent Cabinet consideration or a

¹⁹ Section 34(1)(b).

²⁰ Section 34(1)(c).

²¹ Section 34(1)(d).

²² Section 34(3).

subsequent Cabinet decision on particular issues, whether or not the document was eventually submitted to the Cabinet, it will be relevant for the decision maker to consider if the release of the document or information may reveal Cabinet deliberations within the meaning of section 34(3).

14. Reflecting the overriding need for protection of Cabinet confidentiality, the Cabinet exemption is not subject to a public interest test. Once a document falls within one of the available categories, the document is exempt and the FOI decision maker is not required to apply any public interest test before claiming the exemption.

Identifying Cabinet material

15. In order to assist FOI decision makers, all agencies should ensure that they have appropriate and robust procedures in place to ensure that Cabinet documents, documents prepared to inform or assist the deliberations of Cabinet and other documents that may reveal the nature of Cabinet deliberations are properly identified and classified.
16. In particular, when developing policy proposals, agencies should at the outset consider whether the matter is one that should be referred to Cabinet for its consideration. The Cabinet Handbook and Drafter's Guide should be consulted to assist agencies in determining whether a particular matter should be referred to Cabinet. In addition, the Cabinet Secretariat of the Department of the Prime Minister and Cabinet (PM&C) can provide guidance when an agency is uncertain whether a particular matter is appropriate to be taken to Cabinet.
17. Any major initiatives or other major policy being developed by a Minister should be referred to Cabinet for consideration. Where Ministers are requesting policy advice on issues that are potentially matters for Cabinet, the possibility or likelihood of a Cabinet connection should clearly be drawn to the attention of the relevant policy officers.
18. Similarly, given the likelihood that major initiatives or major policy will be considered by Cabinet, agencies preparing work on these matters should take steps to make reference to possible future Cabinet consideration in significant working documents so that an FOI decision maker is later able to assess the dominant purpose

for which the document was brought into existence, and therefore whether the Cabinet exemption applies. (The use of the deliberative exemption in relation to the development of policy options is also relevant and is discussed below in paragraphs 27-46.)

19. Where a document is being prepared with the intention of informing a subsequent Cabinet discussion or where it is being prepared at the request of Cabinet for further consideration by Cabinet, agencies should state expressly in the body of the document that it relates to work that has been requested by Cabinet or that the document will subsequently be considered by Cabinet. One or two sentences clearly explaining the connection to Cabinet deliberations may save an FOI decision maker from spending considerable time inquiring into the purpose of a document. It is not sufficient to simply mark the document as “Cabinet-in-Confidence”, although this practice should be followed for all Cabinet and Cabinet-related documents.

Procedures for dealing with FOI requests involving Cabinet or Cabinet-related documents

20. In making a decision on an FOI request, agencies and Ministers must have regard to the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act²³.
21. These guidelines note the requirements in the Cabinet Handbook that requests for access to Cabinet documents and Cabinet-related material under the FOI Act must be handled in consultation with PM&C. PM&C should be notified through its FOI area as soon as it is apparent that Cabinet or Cabinet-related material may come within the scope of an FOI request.
22. Agencies are responsible in the first instance for identifying Cabinet or Cabinet Committee material before consulting PM&C. Where possible agencies should inform PM&C whether or not a matter was considered by Cabinet or Cabinet Committee, the dates of such consideration, relevant submission numbers, any authority to take a matter to Cabinet and any other relevant identifying information.

²³ <http://www.oaic.gov.au/publications/guidelines.html>.

23. The Cabinet Secretariat needs sufficient time to properly examine and advise on possible Cabinet material and appropriate exemptions. In general, the Cabinet Secretariat will not be able to undertake the necessary examination in only a few business days. Although the Cabinet Secretariat will seek to process a referral within seven working days, this will depend on the nature of the request, the volume of documents and competing work priorities. Additionally, further information may need to be sought from the referring agency to establish Cabinet connections, and this need may become apparent only after examination has begun. The Cabinet Secretariat will advise if the seven day processing timeframe cannot be met as soon as that becomes apparent. Where the Cabinet Secretariat has advised that the timeframes cannot be met, agencies should seek an extension of time under the FOI Act from the applicant²⁴ or from the Information Commissioner²⁵. The consequence if the 30 day processing period is not met and no extension has been granted is that there is a deemed refusal of the request and an agency or Minister cannot impose a charge for providing access.
24. Decisions on Cabinet material should not be made, or documents released or exempted, until advice has been received from PM&C.
25. Agencies should consider conducting early consultation with the office of the relevant agency's Minister as the Cabinet or deliberative implications of a document may not be fully evident to the decision maker from an examination of the document, particularly with the passage of time and turnover of line area staff.
26. More generally, agencies should also give adequate notice to their Minister's office if they are intending to release potentially sensitive documents and also, where appropriate, to other portfolios so that other relevant Ministers have the opportunity to be briefed on the proposed release.

²⁴ Section 15AA.

²⁵ Section 15AB allows for the seeking of an extension of time if the agency or Minister considers the statutory period is insufficient to deal adequately with a request because the request is complex or voluminous. While the OAIC guidelines do not address what might be a complex or voluminous request it is arguable that the complexity of ascertaining the Cabinet related status of documents would often satisfy this requirement.

Deliberative documents

27. The FOI Act also includes provision to protect documents that are involved in the Government's broader decision-making or deliberative processes. A deliberative document is one which would disclose 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 an agency, a Minister, the Government of the Commonwealth or the Government of Norfolk Island²⁶. Deliberative matters do not include operational information²⁷ or purely factual material²⁸. Documents such as Ministerial briefs, background papers and internal working papers potentially come within this exemption.
28. Under section 47C a deliberative document will be exempt from disclosure where the decision maker forms the opinion that releasing the document would on balance be contrary to the public interest at that particular time²⁹.
29. Where a document has a close connection with Cabinet but may not necessarily be covered by the Cabinet exemption, the potential application of section 47C should be considered. Similarly, while drafts of Cabinet documents are exempt³⁰, this exemption may not extend to other earlier documents which inform the preparation of drafts or other preliminary documents in the Cabinet process. Again the potential application of section 47C to such preliminary documents should be considered.
30. Decision makers should also consider the relationship a document has to a Cabinet process when considering the public interest test for exemptions under section 47C. For example, when considering claiming an exemption under section 47C, an agency can have regard to the proximity of the development of the document in question to the subsequent Cabinet consideration of the same or related issues and the closeness of the ideas being canvassed in the document to those which eventually are included in a Cabinet decision. A document may deal with sensitive issues and be closely connected with a document that was submitted to or considered by Cabinet, or

²⁶ Section 47C(1).

²⁷ Section 47C(2(a)), section 8A.

²⁸ Section 47C(2(b)).

²⁹ Section 11A(5).

³⁰ Section 34(1)(d).

proposed to be submitted, and the disclosure of the document would tend to disclose the nature of relevant Cabinet deliberations. In these circumstances the FOI decision maker should consider claiming the exemption under section 47C on the basis that disclosure would be contrary to the public interest because it could impair the confidentiality of Cabinet processes. Release of the document may also inhibit the full canvassing of issues in the development of Cabinet material. Decision makers should in these circumstances consider the application of exemptions under section 34 or section 47C and determine which exemption is appropriate. The Cabinet Secretariat may also be able to assist in advising on appropriate exemptions.

31. While purely factual material is not considered to be deliberative matter, where a document contains factual material that is related to the provision of policy advice and elaborates its context or likely impact it may potentially come within the deliberative document exemption.
32. Section 11B of the FOI Act sets out the factors for the decision maker to consider in assessing where the public interest lies. The factors in favour of access include, but are not confined to, whether disclosure of the document would:
 - a) promote the objects of the Act
 - b) inform debate on a matter of public importance
 - c) promote effective oversight of public expenditure
 - d) allow a person to access their own personal information.
33. In considering whether release of the document would be contrary to the public interest the FOI Act precludes the decision maker considering:
 - a) whether release of the document would embarrass the Government or cause a loss of confidence in the government
 - b) whether any person might misinterpret or misunderstand the document
 - c) the seniority of the author of the document
 - d) whether release of the document could result in confusion or unnecessary debate.
34. Factors in favour of release must be considered on a case by case basis. FOI decision makers need to consider whether, weighing these factors against factors that favour

maintaining confidentiality, the release of a document would be contrary to the public interest at the time of the FOI request.

35. It is open to a decision maker to conclude that release of a particular deliberative document will be detrimental to the public interest, and that this outweighs factors in favour of access.
36. The Australian Information Commissioner's guidelines do not currently list any factors that might be relevant in deciding against release. There are nevertheless factors relevant to non-disclosure that are available. In relying on any such factors a decision maker should seek to make direct linkage to the particular facts and circumstances of the issue under consideration.
37. A document may be part of a process in the development of sensitive policy on which the Government has not reached a final policy position. Development of a policy position is often an iterative process between a Department and a Minister. This is particularly so where the Minister or the Cabinet has requested a department to develop a significant or innovative policy position that will ultimately be taken to the Cabinet. The FOI decision maker could determine that the document should remain confidential while the policy development process is continuing. The decision maker can take into account the public interest in appropriately maintaining a confidential relationship between ministers and agencies so as to allow agencies and ministers the scope to explore and develop sensitive policy issues.
38. For example, a decision maker may consider that the release of a particular document, in certain instances, at a particular point in time may significantly reduce the quality, clarity or frankness of written advice going to Ministers and that this detriment to the public interest of release of the document outweighs the factors in favour of access. In these types of circumstances, the decision maker may have regard to the potential detrimental impact of a loss of frankness and candour in the provision of advice which could result if sensitive briefing documents are not properly protected. The premature disclosure of the document may not therefore be conducive to the proper workings of government.
39. In this or future like policy processes, the public interest may lie in maintaining the confidentiality of the document.

40. There may also be circumstances in which disclosure might inhibit agencies using innovative processes for policy development. Officials, for example, working on issues which are price or market sensitive may need to test hypotheses against a range of scenarios some of which may be extreme but are still needed to inform the policy development process. Decision makers may want to assess the impact the release of a particular document may have on an agency's capacity to continue to undertake this type of policy development process into the future.
41. Put another way, while the FOI Act promotes access to government information, it still allows for decision makers to recognise the importance of the Government having „thinking space“ in the development of policy, during which release of certain documents may be premature and not in the public interest. As noted below there may be instances where this „thinking space“ is of an enduring nature.
42. The balance of the public interest needs to be considered at the time the decision maker is considering the FOI request. The release of a document may be contrary to the public interest at a particular time. It does not follow however that the document will always be exempt at different times and in different circumstances. A corollary of this is that the release of a similar document on a previous occasion does not establish any binding precedent or guide to release in future cases.
43. Another consideration is whether the Government is involved in negotiations with other parties. In such cases it may be open to the decision maker to conclude that premature release of documents could impair the Government's negotiating position or the trust between parties to the negotiation.
44. Of course there may be some deliberative documents where a public interest case can be made that the documents require protection for a considerable period of time. In addition to the example in paragraph 40 above, in a number of circumstances advice may be provided on fundamental policy and other issues that are of an enduring or recurring nature. The decision maker may need to assess the potential that the release of a document may impair future advice on such issues, including the provision of the full range of strategic options. Again this will need to be assessed on a case by case basis.

45. The guidelines issued by the Australian Information Commissioner³¹ indicate that assertions that release of a document would inhibit frankness and candour, are not, in those terms (emphasis added), consistent with the objects of the FOI Act³² and the list of public interest factors favouring disclosure³³. While this suggests that simply claiming inhibition of frankness and candour is not sufficient to justify a conclusion that the balance of the public interest lies in non-disclosure of a particular document, it is still open to the decision maker to consider the effect of disclosure of the document on frankness and candour in future advice. However, the decision maker needs to demonstrate in each case, having regard to the document under consideration, why release of the particular document will inhibit frankness and candour in a way that will impair the public interest.

Resource issues

46. Some FOI requests may be framed in a way that potentially encompasses a wide range of documents or requires extensive consultation.

47. Where a request requires extensive consultation, especially with the Cabinet Secretariat, which cannot be completed within the statutory time frame, agencies should seek an extension of time from the Information Commissioner or from the applicant. The OAIC has issued guidance on requesting extensions of time³⁴. This guidance emphasises the importance of giving early consideration to the possible need of seeking an extension of time and considering the scope of the request and other measures, such as consultation with the applicant, to refine the request.

48. In deciding whether to apply charges agencies should have regard to the OAIC guidelines³⁵ which note that charges should reflect the work involved rather than being used to discourage an applicant from seeking access. Nevertheless, agencies routinely can underestimate the cost of requests, particularly those that are wide in scope or broad in terminology. Agencies should assess resource costs early, and consider any decision in relation to charges in this light.

³¹ <http://www.oaic.gov.au/publications/guidelines.html>.

³² Section 3.

³³ Section 11B(3).

³⁴ http://www.oaic.gov.au/publications/guidelines/notifying_requesting_extension_foi_processing_time.pdf.

³⁵ <http://www.oaic.gov.au/publications/guidelines.html>.

49. Sections 24 and 24AA of the FOI Act allow for FOI requests to be refused where the work involved in processing the request would substantially and unreasonably divert the resources of the agency from its other operations. In most cases it would be appropriate for agencies to initially discuss the request with the applicant to seek to narrow the scope of the request.
50. The agency is required to have regard to the resources that would need to be used for³⁶:
- a) identifying, locating and collating the documents
 - b) deciding whether to grant access to a document, including examining the document or consulting with anyone in relation to the document
 - c) copying or editing the document
 - d) notifying of decision in relation to the FOI request.
51. The agency must not take into account³⁷:
- a) the applicant's reasons for requesting access
 - b) the agency's belief about the applicant's reasons for requesting access
 - c) the maximum charge payable for processing a request of that kind.
52. The FOI Act requires the agency in these circumstances to give the applicant the opportunity to revise their FOI request³⁸.

³⁶ Section 24AA(2).

³⁷ Section 24AA(3).

³⁸ Section 24AB.