



Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT  
BARTON

FOI/2020/178

***FREEDOM OF INFORMATION ACT 1982***

**REQUEST BY:** Mr Reason

**DECISION BY:** Alistair Campbell  
Assistant Secretary  
Priorities and Delivery Unit

**By email:** [foi+request-6567-55cb53bd@righttoknow.org.au](mailto:foi+request-6567-55cb53bd@righttoknow.org.au)

Dear Mr Reason

On 3 August 2020, you wrote to the Department of the Prime Minister and Cabinet (**the Department**) seeking access under the *Freedom of Information Act 1982* (Cth) (the **FOI Act**) in the following terms:

*Government public discourse regarding COVID 19 is nearly entirely framed by public health.*

*It's reasonable that Government health officials, private health professionals, and some academics offer Government advice in matters related to public health but COVID's impacts demonstrably extend beyond public health and therefore outside the scope of public health advice.*

*COVID management strategies are profoundly impacting the economy and future generation's fiscal welfare. Most commercial industries are severely impacted, there may be serious impacts to Australia's means for food production, water and energy security. National sovereignty may be challenged by external actors.*

*It's reasonable that Commonwealth Government will have undertaken a multidisciplinary cost benefit analysis and/or risk assessment to examine the non-public health impacts of current COVID management strategies.*

*We would like to ask for a copy of these documents for public review.*

**[initial request]**

## Practical refusal consultation

On 24 August 2020, in accordance with section 24AB of the FOI Act, the Department issued you with a Practical Refusal Consultation Notice, on the basis that the work involved in processing the request would substantially and unreasonably divert the resources of the Department from its other operations. In that correspondence, you were invited to consider revising the request.

On 31 August 2020, you amended the scope of your request in the following terms:

*Can we amend the request based on your advice?*

*Can we request the document listing the 200 documents the Department identified that may be related to the Freedom of Information request for the multidisciplinary cost benefit analysis and/or risk assessment to examine the non-public health impacts of current COVID management strategies.*

*Can we request only the Department's most recent version of the multidisciplinary cost benefit analysis and/or risk assessment?*

On 1 September 2020, the Department wrote to you seeking clarification regarding the second part of your request, namely “*the Department's most recent version of the multidisciplinary cost benefit analysis and/or risk assessment*”.

On 7 September 2020, you provided the following clarification:

*The Department of Prime Minister and Cabinet will have undertaken a cost benefit analysis of the COVID lock-down strategies. The COVID lock-down strategies are informed by risk assessments.*

*Can we have a copy of the most recent risk assessments and CBA for the COVID lock-down strategies.*

Accordingly, your revised request is in the following terms:

*Can we request the document listing the 200 documents the Department identified that may be related to the Freedom of Information request for the multidisciplinary cost benefit analysis and/or risk assessment to examine the non-public health impacts of current COVID management strategies.*

*Can we have a copy of the most recent risk assessments and CBA for the COVID lock-down strategies.*

### **[revised request]**

I am satisfied that the Department has fulfilled its obligations under section 24AB of the FOI Act.

### **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.

### **Relevant documents**

In accordance with section 17 of the FOI Act, the Department has created a document that contains the information you have requested in the first part of your request (**Document 1**).

The Department has identified one document relevant to the second part of your request (**Document 2**).

### **Decision**

I have decided to refuse access to:

- Document 1:
  - in part, on the basis that it contains information that is exempt under section 34(3) (Cabinet process) and conditionally exempt under section 47G (business, commercial or professional affairs) of the FOI Act, and its disclosure would be contrary to the public interest; and
  - in full, on the basis that it contains information that is conditionally exempt under section 47E(d) (operations of an agency) of the FOI Act, and its disclosure would be contrary to the public interest; and
- Document 2, on the basis that it contains information that is exempt under section 34(1)(a) (Cabinet documents) and conditionally exempt under section 47B (Commonwealth-State relations) and section 47E(d) of the FOI Act, and its disclosure would be contrary to the public interest.

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

- your initial request;
- your revised request;
- the requested documents (Document 1 and Document 2);
- advice from the Department's Cabinet Division;
- responses received from third parties that were consulted;
- the FOI Act; and
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**FOI Guidelines**).

My reasons for this decision are set out below.



## **Reasons**

### **Document 1**

#### ***Section 17 - Request involving use of computers***

Section 17(1) of the FOI Act provides as follows:

(1) *Where:*

- (a) *a request (including a request in relation to which a practical refusal reason exists) is made in accordance with the requirements of subsection 15(2) to an agency;*
- (b) *it appears from the request that the desire of the applicant is for information that is not available in discrete form in written documents of the agency;*  
*and*
- (ba) *it does not appear from the request that the applicant wishes to be provided with a computer tape or computer disk on which the information is recorded; and*
- (c) *the agency could produce a written document containing the information in discrete form by:*
  - (i) *the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or*
  - (ii) *the making of a transcript from a sound recording held in the agency;*

*the agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.*

Paragraph 2.33 of the FOI Act relevantly provides as follows:

*The right of access under the FOI Act is to existing documents, rather than to information. The FOI Act does not require an agency or minister to create a new document in response to a request for access, except in limited circumstances where the applicant seeks access in a different format or where the information is stored in an agency computer system rather than in discrete form.*

In accordance with section 17 of the FOI Act, the Department has created Document 1 which contains the information you have requested in the first part of your request.

#### ***Section 34 - Cabinet documents***

Section 34(3) of the FOI Act provides as follows:

- (3) *A document is an exempt document to the extent that it contains information the disclosure of which would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed.*

I am satisfied that parts of Document 1 meet the requirements of section 34(3) of the FOI Act, on the basis that those parts contain information which, if disclosed, would reveal a Cabinet decision or deliberations that have not been officially disclosed.

I am therefore satisfied that those parts of Document 1 are exempt under section 34(3) of the FOI Act.

***Section 47G - business, commercial or professional affairs***

Section 47G(1) of the FOI Act provides as follows:

- (1) *A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:*
  - (a) *would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs;*
  - (b) *could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.*

Parts of Document 1 contain information concerning one or more persons or organisations in respect of their business, professional or commercial affairs.

One of the third parties advised that the release of material would be prejudicial to its commercial interests and adversely affect its business and financial affairs. This is because parts of Document 1 contain consideration of matters relating to the third party's business, professional, commercial and financial affairs, which the third party strives to main as confidential and do not customarily release in the public domain.

That third party also expressed that disclosure would likely negatively impact its willingness to provide services in the public sector in the future, which would diminish the services available to the Commonwealth.

I am satisfied that disclosure of parts of Document 1 would, or could reasonably be expected to, unreasonably affect those persons and organisations in respect of their lawful business, professional and commercial affairs.

I am also satisfied that parts of Document 1 contain information which, if disclosed, could reasonably be expected to prejudice the future supply of information to the Commonwealth for the purpose of the administration of matters administered by the Department.

Accordingly, I am satisfied that those parts of Document 1 are conditionally exempt under section 47G of the FOI Act.

### ***Section 47E(d) - certain operations of agencies***

Section 47E(d) of the FOI Act provides as follows:

*A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:*

...

*(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

I am satisfied that the entirety of Document 1, if disclosed, would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Department.

I consider the release of material of this nature could reasonably be expected to have a substantial adverse effect on the Department's ability to conduct effective cost-benefit analysis and/or risk assessments, by providing details of sensitive factors and confidential inputs that were considered in the course of performing its core advisory functions.

Accordingly, I am satisfied that Document 1 is conditionally exempt under section 47E(d) of the FOI Act.

### **Document 2**

#### ***Section 34 - Cabinet documents***

Section 34(1) of the FOI Act provides as follows:

*(1) A document is an exempt document if:*

*(a) both of the following are satisfied:*

- (i) it has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted;*
- (ii) it was brought into existence for the dominant purpose of submission for consideration by the Cabinet; or*

Paragraphs 5.64, 5.66, and 5.67 of the FOI Guidelines relevantly provide as follows:

*To be exempt under s 34(1)(a), a document must have been created for the dominant purpose of being submitted for Cabinet's consideration and must have actually been submitted or have been proposed by a sponsoring minister to be submitted. Documents in this class may be Cabinet submissions or attachments to Cabinet submissions.*

...

*The use of the word 'consideration' rather than 'deliberation' in s 34(1)(a) indicates that the Cabinet exemption extends to a document prepared simply to inform Cabinet, the contents of which are intended merely to be noted by Cabinet.*



*Whether a document has been prepared for the dominant purpose of submission to Cabinet is a question of fact. The relevant time for determining the purpose is the time the document was created.*

Document 2 is a document which was produced for, and submitted to, the National Cabinet for consideration.

Section 4(1) of the FOI Act defines 'Cabinet' to include 'a committee of the Cabinet.' The National Cabinet is a committee of the Cabinet.

I am satisfied that Document 2 is a document which was submitted to Cabinet for consideration, and was brought into existence for the dominant purpose of submission for consideration by Cabinet.

I am therefore satisfied that Document 2 is exempt in full under section 34(1)(a) of the FOI Act.

#### ***Section 47B - Commonwealth-State relations***

Section 47B(a) of the FOI Act provides as follows:

*A document is conditionally exempt if disclosure of the document under this Act:*

*(a) would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State;*

Section 4 of the FOI Act defines 'State' to include the Australian Capital Territory and the Northern Territory.

Document 2 contains material communicated as part of National Cabinet processes. I am satisfied that disclosure of Document 2 would, or could reasonably be expected to cause damage to relations between the Commonwealth and the States.

Accordingly, I am satisfied that Document 2 is also conditionally exempt under section 47B of the FOI Act.

#### ***Section 47E(d) - certain operations of agencies***

I am also satisfied that Document 2 contains information which, if disclosed, would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Department.

Accordingly, I am satisfied that Document 2 is conditionally exempt under section 47E(d) of the FOI Act.

#### **Public Interest Test**

In relation to the conditionally exempt material in Documents 1 and 2, 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.

#### *Factors in favour of disclosure*

The particular factor in favour of disclosure in this case is, in my view 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 may, depending on the circumstances of the case, be against disclosure.

In relation to the material I have found conditionally exempt under section 47G of the FOI Act, I consider the following factors favour non-disclosure of that material:

- disclosure could reasonably be expected to harm the personal and/or lawful business interests of an individual or organisation;
- disclosure could reasonably be expected to prejudice or restrict the Department's ability to obtain similar information in the future from third parties; and
- disclosure of the proposed, anticipated or actual involvement of individuals, or organisations, could reasonably be expected to discourage some individuals or organisations in providing assistance or support to the Department and the government more generally; and
- disclosure would, or could reasonably be expected to, restrict the ability of the Department to fully engage with, and harness the expertise and resources of, the business and broader Australian community.

In relation to the material I have found conditionally exempt under sections 47B and 47E(d) of the FOI Act, I consider the following factors favour non-disclosure of that material:

- disclosure could reasonably adversely impact the States' response to matters relating to COVID-19;



- disclosure could reasonably adversely impact the National Cabinet process and may prejudice the process and issues being raised in the future due to a lack of maintaining confidence;
- disclosure could reasonably be expected to prejudice the Commonwealth's ability to obtain confidential information or similar information, from a State, in the future; and
- disclosure could reasonably be expected to prejudice the proper and efficient conduct of cost, benefit and risk assessments by the Department that are critical to its advisory functions.

After careful consideration of all relevant factors, I have decided that the factors in favour of disclosure are outweighed by the factors against disclosure.

Accordingly, I am of the view that disclosure of the conditionally exempt material in Documents 1 and 2 would be contrary to the public interest.

### **Processing and access charges**

I have decided not to impose charges to process this 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/>.

### **Complaint rights**

You may make a complaint to the Information Commissioner about the Department's actions in relation to a request. 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/>.

Yours sincerely



Alistair Campbell  
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Priorities and Delivery Unit

19 October 2020