



OFFICIAL

## Freedom of Information (FOI) request

### Notice of Decision

Reference: FOI/2022/202IR

To: Alex Pentland

[foi+request-9138-80c44cbf@righttoknow.org.au](mailto:foi+request-9138-80c44cbf@righttoknow.org.au)

Dear Mr Pentland

I refer to your email dated 12 September 2022, seeking an internal review under the Freedom of Information Act 1982 (the FOI Act), of the decision made on the same day (the primary decision) by the Department of the Prime Minister and Cabinet (the Department).

You set out your request for internal review, as follows (extract):

*In the case of Patrick and Secretary, Department of Prime Minister and Cabinet, White J, a Judge of the Federal Court of Australia, found that beyond National Cabinet not being a committee of the Cabinet, rejected the claim of minutes of specific meetings being conditionally exempt under section 47B..*

*Furthermore, the reliance on "The Importance of Confidentiality to Relationships between the Commonwealth, States and Territories" statement is, in my view, dubious, given the statement has subsequently been removed from public access, and no statutory legislation could be provided showing such views being enshrined in law...*

*Given the nature of the information I have outlined from AAT decisions and legal opinions, I am indicating that I am not satisfied with the rationale that forms the basis of this rejection.*

*I seek an internal review with this in mind, seeking for a review into both the total exception under 47B, and the partial redaction under 47C.*

Under section 54(2) of the FOI Act, an applicant is entitled to apply for a review of a decision refusing to give access to a document in accordance with a request

### Authorised decision-maker

Section 54C(2) of the FOI Act provides that an agency must arrange for a person (other than the person who made the original decision) to undertake a review of that decision.

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

## Internal review decision

I have decided to affirm the primary decision so far as it relates to the application of section 47B(a) (damage to Commonwealth-state relations) of the FOI Act over the requested documents. After additional consideration, I have decided to vary the decision so far as it relates to the application of section 47C (deliberative processes) the conditionally exempt material.

Therefore my decision is to refuse access to the requested document, with material exempted under sections 47B(a) of the FOI Act.

In reaching my decision, I have had regard to:

- the terms of your request of 12 September 2022
- the primary decision
- the views of third parties consulted by the Department under section 26A of the FOI Act
- your request for internal review
- the FOI Act, and
- the 'Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act' (the FOI Guidelines).

## Background

On 16 July 2022, you made a request under the FOI Act in the following terms (extract):

*The agenda, minutes, and recordings of decisions for the National Cabinet Meeting held on 16 July 2022.*

You have requested an internal review of the primary decision. The primary decision for your request was to refuse access to two documents in full, under section 47B(a) of the FOI Act. The primary decision maker also determined that parts of the requested documents were exempt under section 47C(1)(c) of the FOI Act.

## Reasons for Internal Review decision

My findings of fact and reasons for decision are set out below.

### Section 47B – Damage to Commonwealth-state relations

As outlined in the primary decision, the requested documents are the agenda, and record of meeting for the National Cabinet meeting held on 16 July 2022.

I have considered the views of all eight jurisdictions consulted under section 26A of the FOI Act and the *Joint Statement on the Importance of Confidentiality to Relationships between the Commonwealth and the States and Territories* (Joint Statement) and agree with the reasons for the primary decision.

Specifically, I am satisfied that disclosure of the requested documents has the potential to erode the principles of trust, confidence and collaboration which underpin the National Cabinet, a confidential forum. I agree that disclosure would, or could, have an inhibiting effect on the open flow of information between members of the National Cabinet.

I have also had regard to the terms of your request for internal review, in which you reference the following extract of a decision of Administrative Appeals Tribunal (AAT) Deputy President (Justice) White in Patrick and Secretary, Department of Prime Minister and Cabinet [2021] AATA 2719 (Patrick):

*"I conclude therefore that s 47B(a) of the FOI Act does not have the effect that the minutes of the National Cabinet made on 29 May 2020 are conditionally exempt"*

I note that the AAT decision in Patrick is not considered to have precedential force beyond the facts and documents before the AAT in that specific matter. I am aware that there is additional evidence available to Departmental delegates making decisions on requests for access to documents of the National Cabinet, which was not available to Justice White when he made his decision.

Additionally, I note that after every National Cabinet meeting the Prime Minister subsequently publishes a statement regarding the outcomes of the meeting. These statements (including historical statements) are made available at [federation.gov.au](https://www.federation.gov.au).<sup>1</sup> The release of these statements are the process by which outcomes of each National Cabinet meeting are officially disclosed and disclosure other than as agreed by the National Cabinet could cause damage to relations between the Commonwealth and the States and Territories.

For the above reasons, and having regard to consultation comments received from States and Territories, I remain satisfied that the requested documents are conditionally exempt under section 47B(a) of the FOI Act, as they contain information which, if disclosed would, or could reasonably be expected to, cause damage to relations between the Commonwealth and the States and Territories by adversely affecting the trust and cooperation that underpins the National Cabinet and impairing future sharing of information between jurisdictions.

Accordingly, I affirm the primary decision to exempt this material under section 47B(a) of the FOI Act.

#### Section 47C – Deliberative matter

As noted in the primary decision, information is conditionally exempt under section 47C(1)(c) of the FOI Act if its disclosure 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 the Government of the Commonwealth. Such material is described as 'deliberative matter'.

I am satisfied that parts of the documents contained deliberative matter at the point in time at which you were notified of the primary decision on 8 September 2022. However I am of the view that this

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<sup>1</sup> <https://www.federation.gov.au/national-cabinet/media-statements>

information no longer constitutes deliberative matter due to the passage of time, which has seen the completion of certain discussions since the 16 July 2022 meeting.

As such, I have decided to vary the primary decision so far as it relates to the application of section 47C to the conditionally exempt material.

#### Public Interest

In relation to the document that I have found to be conditionally exempt under section 47B of the FOI Act, I considered the public interest factors as outlined in the primary decision and I am satisfied that, on balance, the factors against disclosure outweigh those favouring disclosure.

#### Other information

I note that in your request for internal review you assert that reliance by the primary decision maker on the Joint Statement is "dubious, given the statement has subsequently been removed from public access, and no statutory legislation could be provided showing such views being enshrined in law".

I can confirm that the Joint Statement has not been removed from public access and you are able to access it at the bottom of the media statement from the 17 September 2021 National Cabinet meeting, available [here](#).<sup>2</sup> This change in accessing National Cabinet statements online is due to the change of government after the May 2022 Federal Election. For your reference, the former Prime Minister's media releases and statements are now archived on [PM Transcripts](#)<sup>3</sup> – a web archive of transcripts from Australian Prime Ministers dating from the early 1940's to the most recent Prime Minister, the Hon Scott Morrison MP. We apologise for any inconvenience caused and trust this information assists.

In relation to your statements about legislation, I note that all members of the National Cabinet maintain that the confidentiality of discussions and decisions of the forum allows for the sharing of sensitive information and judgements. In my experience with intergovernmental relations over many years, it is my view that legislation is not always required to demonstrate a commitment by governments and therefore a commitment by the National Cabinet would not necessarily be diminished by the absence of legislation.

I would also note that the draft legislation you reference (the COAG Legislation Amendment Bill 2021) lapsed at the dissolution of the 46<sup>th</sup> Parliament of Australia on 11 April 2022.

### **Review rights**

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days after the date of this letter.

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<sup>2</sup> <https://pmtranscripts.pmc.gov.au/release/transcript-44111>

<sup>3</sup> <https://pmtranscripts.pmc.gov.au/>

More information about Information Commissioner review is available at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>

## FOI Complaints

If you are unhappy with the way we have handled your FOI request, please let us know what we could have done better. We may be able to rectify the problem. If you are not satisfied with our response, you can make a complaint to the Australian Information Commissioner. A complaint to the Information Commissioner must be made in writing.

More information about complaints is available on the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint/>.

If you wish to discuss any aspect of your request, you can contact the FOI Section by email at [foi@pmc.gov.au](mailto:foi@pmc.gov.au).

Yours sincerely



Lee Steel  
First Assistant Secretary  
Intergovernmental Relations and Reform Division  
Department of the Prime Minister and Cabinet

10 October 2022