



OFFICE OF THE PRIME MINISTER

FOI Reference: PM/22/006

To BE
Right to Know
Email: foi+request-9247-ca9d8b4d@righttoknow.org.au

Dear BE

Thank you for your email dated 8 August 2022 regarding a request to access documents under the *Freedom of Information Act 1982* (the FOI Act).

Terms of FOI request

You set out your FOI request in the following terms:

I seek access to the following documents under the FOI Act 1982:

- 1. Communication between the Prime Minister's Office and any office holder, official or employee of the AWU, CFMMEU or ACTU during the period 1 June 2022 to 25 July 2022 in relation to the Australian Building and Construction Commission (ABCC), the Code for the Tendering and Performance of Building Work 2016 (Building Code) or the Code for the Tendering and Performance of Building Work Amendment Instrument (Amended Building Code).*
- 2. Internal communications between members of the Prime Minister's office (including the Prime Minister) during the period 1 June 2022 to 25 July 2022 in relation to the Australian Building and Construction Commission (ABCC), the Building Code or the Amended Building Code.*

In this request a reference to the Prime Minister's Office includes the Prime Minister.

For the avoidance of doubt, the request includes all forms of communication including emails (including attachments), memorandums or notes, electronic communications such as SMS, WhatsApp messages, iMessages and Signal messages.

Authorised decision-maker

I am authorised to make a decision in this matter on the Prime Minister's behalf.

Material taken into account

In reaching my decision I had regard to:

- the terms of your request
- the FOI Act
- the Guidelines issued by the Information Commissioner, under section 93A of the Act (Guidelines)

Documents in scope

No documents were identified that fall within the terms of part 1 of your request.

The Office has identified two (2) documents that fall within the terms of part 2 of your request. The documents are a Departmental briefing and attachments (signed) and an email chain between the Department and the Office attaching the briefing (unsigned).

Decision

I have decided to refuse access to the documents subject to part 1 of your request on the basis that documents do not exist, and to refuse access to documents subject to part 2 of your request under section 34 (Cabinet documents) of the FOI Act.

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

Reasons for decision

Section 24A(1) of the FOI Act provides that:

- (1) An agency or Minister may refuse a request for access to a document if:*
- (a) all reasonable steps have been taken to find the document; and*
 - (b) the agency or Minister is satisfied that the document:*
 - (i) is in the agency's or Minister's possession but cannot be found; or*
 - (ii) does not exist.*

No documents were identified following reasonable searches of relevant file management systems for any records that would meet the terms of part 1 of your request. I am therefore satisfied that the Office does not hold the documents you have requested. Accordingly, I am refusing your request for access as the documents do not exist.

Subsection 34(1) of the FOI Act provides that:

- (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*
 - (b) it is an official record of the Cabinet; or*

- (c) it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies; or
- (d) it is a draft of a document to which paragraph (a), (b) or (c) applies.

I note that for the purposes of this exemption, the definition of Cabinet at section 4 of the FOI Act includes a committee of Cabinet.

The documents identified as falling within part 2 of your request are a Departmental briefing and attachments, and email chain, created for the purpose of briefing the Acting Prime Minister on matters considered by the Cabinet or a Committee of Cabinet. Accordingly, I am satisfied that the documents are exempt in full under section 34(1)(c).

Sub-section 34(3) of the FOI Act further provides that:

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.

The Departmental briefing and attachments, as well as the email chain, also contain information that, if released, would reveal deliberations of Cabinet or a Committee of Cabinet that have not been officially disclosed. I am therefore satisfied that the documents are exempt in full under section 34(3).

Review rights

If you disagree with the decision you may apply for an Information Commissioner review within 60 days from the date of this letter. The FOI Act does not provide for internal review of a decision by Minister.

More information about review rights and how to apply is available at:
www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review

Yours sincerely



Simona Gory
Senior Legal Adviser
7 October 2022