



OFFICE OF THE PRIME MINISTER

FOI Reference: PM/22/006IC
OAIC Reference: MR 22/01812

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

Dear BE

Freedom of information request - notice of revised decision under s 55G of the *Freedom of Information Act 1982*

I refer to your application for review to the Office of the Australian Information Commissioner of a decision made on behalf of the Prime Minister on 7 October 2022.

In particular, you requested access to documents held by the Office of the Prime Minister (**the Office**) under the *Freedom of Information Act 1982* (**FOI Act**) on 8 August 2022. You request sought access to the following documents:

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.

On 7 October 2022, I advised you of my decision as follows:

- No documents were identified as falling within the terms of item 1 of your request.
- Two (2) documents were identified as falling within the terms of item 2 of your request. I refused access to these documents on the basis that they were exempt in full under sections 34(1)(c) and 34(3) of the FOI Act.

On 23 June 2023, the Office was informed you had applied for Information Commissioner (IC) review of my decision dated 7 October 2022.

Revised decision

I am authorised to make decisions under section 23 of the FOI Act and I have decided to vary the reviewable decision in accordance with section 55G of the FOI Act. Section 55G(1)(a) relevantly provides that an agency or Minister may vary an access refusal decision in relation to a request at any time during an IC review if the variation would have an effect of giving access to a document in accordance with the request.

For the reasons set out in this decision, I remain satisfied that no further documents have been identified in the Office as falling with the terms of your request. However, I have decided that there are some parts of the two (2) documents that were identified as falling within the scope of item 2 of your request that can be released to you.

Doc No	Description	Reviewable decision	Decision on IC Review
1	Email chain titled 'FW: Re: Brief on abolition of the ABCC'	Exempt in full: ss 34(1)(c) and 34(3)	Release in part: <u>s 22(1)(a)(ii)</u> – staff names and contact details <u>S 34(3)</u> – partial sentence on the bottom of page 1
2	Brief – Abolishing the ABCC	Exempt in full: ss 34(1)(c) and 34(3)	Release in part: <u>s 22(1)(a)(ii)</u> – staff names and contact details <u>s 34(3)</u> – Recommendation 1.b and paragraphs 3 and 4 and the second sentence under the heading 'Resources' in the brief. The second paragraph on page 4 (Attachment A). The entirety of the fourth paragraph and the first sentence of the fifth paragraph on page 5 (Attachment B). <u>s 42</u> – the entirety of the second full paragraph on page 6 (Attachment B).

Enclosed with this decision are copies of the two documents, with redactions, that I have decided can be released to you.

Relevant material

In reaching my revised decision I referred to the following:

- the terms of your request
- the FOI Act;
- the [Guidelines published by the Office of the Information Commissioner under section 93A of the FOI Act](#) (the **FOI Guidelines**) ; and
- advice from officers with responsibility for matters relating to the documents to which you sought access.

Reasons for revised decision

All reasonable steps have been taken to find documents and no others exist

I remain satisfied that the Office does not hold any additional documents falling within the scope of your FOI request, apart from the two documents that were identified in my decision dated 7 October 2022.

Section 24A(1) of the FOI Act provides that an agency or Minister may refuse a request for access 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.*

I note that the FOI Act requires that 'all reasonable steps' be taken to find documents relevant to an FOI request. I understand from the FOI Guidelines that:

1. 'reasonable' has been construed as 'not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose',
2. what constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office, and
3. at a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:
 - a. the subject matter of the documents
 - b. the current and past file management systems and the practice of destruction or removal of documents, and
 - c. the record management systems in place the individuals within an agency or minister's office who may be able to assist with the location of documents, and
 - d. the age of the documents.

Searches undertaken

I confirm that after receiving your FOI request I coordinated a search for the documents the subject of your request.

In particular, in response to your request I arranged for the two advisers in the Office with responsibilities relevant to the subject matter of your request to search their records for responsive documents. The search requests, which were sent by email:

- set out the terms of your request in full (which made clear that the request covered all forms of documents and communications, including 'SMS, Whatsapp messages, iMessage and signal messages')
- requested that the advisers search their emails as well as 'any other storage system you use for work records'
- provided appropriate search parameters, namely the key words 'Australian Building and Construction Commission', 'ABCC' and 'Building Code' over the date range 1 June 2022 to 25 July 2022.

Both advisers responded that they had searched their records as requested and the responsive documents were provided to me. Both advisers confirmed that, apart from the identified documents, they were not aware of any other communication falling within the terms of your request.

I note that all staff in the Office undertake general training about FOI and are advised the Act applies to all types of documents (broadly defined and including emails, documents, phone messages such as text messages, signal, whatsapp as well as photos and videos), wherever those documents are stored.

I am satisfied that the two advisers within the Office who had responsibility for the matters the subject of your request at the relevant time could reasonably be expected to have been involved in, or aware of, any communication the subject of your request if such communications existed.

In all the circumstances, including the subject matter of your request; the fact that it covered very recent events when it was received; and the searches requested of the relevant advisers and their response, I am satisfied that the only documents held by the Office that are responsive to your request are the two documents identified in my decision of 7 October 2022.

Thus, all reasonable steps have been taken to find documents falling within the scope of your request and I am satisfied that no further documents exist.

Section 34(3) - documents disclosing Cabinet deliberation or decision which has not been officially disclosed

Section 34(3) exempts documents to the extent their disclosure would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed.

I am aware that 'deliberation' in this context has been interpreted as active debate in Cabinet, or its weighing up of alternatives, with a view to reaching a decision on a matter (but not necessarily arriving at one). The words 'officially disclosed' are not defined in the FOI Act but a key element is the 'official' character of the disclosure. The FOI Guidelines (at [5.78]) provide some examples of an 'official disclosure', including an oral announcement by a minister or a statement in a consultation paper published on a Departmental website which has been authorised by Cabinet.

I have sought and obtained advice from the Cabinet Division within the Department of the Prime Minister and Cabinet to confirm that the matters referred to in the relevant parts of Documents 1 and 2 I have exempted under s 34(3) of the FOI Act would reveal Cabinet deliberations.

I am satisfied that the relevant material in Documents 1 and 2 has not been officially disclosed by the Prime Minister or otherwise. I have also considered whether the relevant parts of Documents 1 and 2 contain any purely factual material (s 34(6) of the FOI Act). I am satisfied that they do not.

Accordingly, I have decided that the relevant parts of Documents 1 and 2 are exempt under section 34(3) of the FOI Act because disclosure of the material would reveal deliberations of the Cabinet.

Section 42 – documents subject to legal professional privilege

Section 42(1) exempts a document if the document would be privileged from production in legal proceedings on the ground of legal professional privilege.

A document is exempt from production on the ground of legal professional privilege if all of the following apply:

- a. there exists a lawyer-client relationship;
- b. there have been confidential communications which are recorded in the document;
- c. the communications were for the dominant purpose of providing legal advice or in the context of actual or anticipated legal proceedings; and

d. the privilege has not been waived.

I find that disclosure of the second full paragraph of Attachment B (page 6 of Document 2) would involve disclosure of material that would be privileged from production in legal proceedings on the ground of legal professional privilege.

Document 2 Attachment B is a letter from the Minister for Employment and Workplace Relations to the Prime Minister dated 30 June 2022. It contains a paragraph which outlines certain legal advice which was sought and obtained from the Australian Government Solicitor (**AGS**) by the Department of Employment and Workplace Relations. I note that paragraph 5.152 of the FOI Guidelines makes clear:

Records made by officers of an agency summarising communications which are themselves privileged also attract the privilege.

Lawyer-client relationship

I am satisfied that a professional lawyer-client relationship existed between the Department of Employment and Workplace Relations and the AGS in obtaining the advice summarised in the relevant paragraph. Section 55N(1) of the *Judiciary Act 1903* makes clear that AGS's functions include providing legal services to the Commonwealth. I am satisfied that the Australian Government Solicitor was engaged by the Department of Employment and Workplace Relations as its legal advisor to provide legal assistance in relation to the matters discussed in the paragraph and that a lawyer-client relationship was established.

Confidential communications

The document to which the exemption has been applied contains a summary of communications made in the context of a solicitor-client relationship. These communications were made on the understanding that the usual and well-established relationship of confidence between a solicitor and client governed the communication. The communication was not provided outside of that context at the time of communication. The communications were confidential at the time they were made and remain confidential.

Dominant purpose

The communications were made for the dominant purpose of the Department of Employment and Workplace Relations obtaining legal advice for the Commonwealth in connection with the matters discussed in the paragraph. The paragraph over which a section 42 claim is maintained summarises or restates the legal advice provided by AGS.

No waiver

Section 42(2) of the FOI Act provides that:

A document is not exempt because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.

A person who would otherwise be entitled to the benefit of legal professional privilege may waive that privilege, either expressly or by implication. Legal professional privilege is waived if the conduct of the person seeking to rely on the privilege is inconsistent with the maintenance of the privilege. This will depend on the circumstances of the case, including whether the disclosure was for any advantage.

There is no material to indicate that the substance of the advice provided by AGS has been disclosed more broadly, or used in any way that would be inconsistent with maintaining the confidentiality of the communications

Finally, I have considered whether the paragraph in Document 2, Attachment B consists of *operational information* as defined in section 8A of the FOI Act. I am satisfied that it is not. Accordingly, I am satisfied that the paragraph is exempt under section 42.

Section 22 – information excluded from scope

I have removed the names and contact details of individual officers and staff under section 22 of the FOI Act on the basis that this information is not relevant to the scope of your request.

Review rights

Noting that this matter is already before the Information Commissioner, once you have reviewed the material released to you as a result of this decision, I would be grateful if you could please advise this Office and the Office of the Australian Information Commissioner as soon as possible if you wish to proceed with your IC review.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S. Gory', is positioned above the typed name and title.

Simona Gory
Senior Legal Adviser
Office of the Prime Minister

9 August 2023