



OFFICIAL

## Freedom of Information (FOI) request

Notice of Decision

Reference: FOI/2022/257

To: H

Email: [foi+request-9329-b39dc32c@righttoknow.org.au](mailto:foi+request-9329-b39dc32c@righttoknow.org.au)

Dear H,

I refer to your email of 30 August 2022 to the Department of the Prime Minister and Cabinet (the Department) requesting access to documents under the *Freedom of Information Act 1982* (the FOI Act).

The purpose of this letter is to provide you with a decision on your request for access under the FOI Act.

### Scope of request

You set out your request in the following terms:

*I request a copy of the agenda and any papers for the National Cabinet meetings held on 16 July 2022 and 4 August 2022.*

### 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.

### Material taken into account

In reaching my decision I referred to the following:

- the terms of your request
- searches undertaken by the Department

- the documents identified as relevant to your request
- the FOI Act
- the Guidelines issued by the Information Commissioner<sup>1</sup> (the FOI Guidelines)
- the views of third parties consulted by the Department under section 26A of the FOI Act

## Documents in scope of request

The Department has identified two documents that fall within the scope of your request. The documents identified are the agendas for the National Cabinet meetings of 16 July 2022 and 4 August 2022.

## Consultation

The Department has consulted with 11 third parties potentially affected by the release of the documents.

## Decision

I have decided to refuse access to the documents on the grounds that the documents identified are exempt in full under section 47B(a) of the FOI Act.

## Reason for decision

My findings of fact and reasons for deciding that certain information is exempt are set out below.

### Section 47B – Commonwealth-State Relations

A document is conditionally exempt under section 47B of the FOI Act if its disclosure:

- (a) would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State; or
- (b) would divulge information or matter communicated in confidence by or on behalf of the government of a State to the government of the Commonwealth.

The FOI Act defines 'State' to include the Australian Capital Territory and the Northern Territory.

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<sup>1</sup> s 93A of the FOI Act

### *Cause damage to Commonwealth-State relations*

The FOI Guidelines note that, for the purposes of section 47B(a), 'working relations' encompass all interactions of the Commonwealth and the States, from formal Commonwealth-State consultation processes such as intergovernmental ministerial meetings, through to any working arrangements between agencies undertaken as part of their day to day functions.

Further, the FOI Guidelines list examples where disclosure of a document may cause damage, such as:

- adversely affecting the continued level of trust or co-operation in existing inter-office relationships, or
- impairing or prejudicing the flow of information to and from the Commonwealth.

The documents in scope are the agendas for National Cabinet meetings. The National Cabinet comprises First Ministers from each jurisdiction and is chaired by the Prime Minister, the Hon Anthony Albanese MP. All members of the National Cabinet have agreed the National Cabinet was established as a forum for confidential discussions and decisions on complex and fast moving intergovernmental policy challenges.

The 17 September 2021 Statement from the Prime Minister, Premiers and Chief Ministers on *The Importance of Confidentiality to Relationships between the Commonwealth and the States and Territories* noted that confidentiality of information and decision-making has been invaluable to the National Cabinet. The sharing of sensitive information and judgments in a forum that provides for the ability for confidential discussions has been of great significance to effective decision making by the States, Territories, and the Commonwealth in the public interest throughout the course of the COVID-19 pandemic.

Releasing documents or information derived from the National Cabinet has the potential to erode the principles of trust, confidence and collaboration which underpin this confidential forum. Disclosure would, or could have an inhibiting effect on the open flow of information between members of the National Cabinet.

The outcomes of National Cabinet meetings are officially disclosed through statements released by the Prime Minister as agreed to by the National Cabinet. Published statements regarding the outcomes of the National Cabinet meetings on 16 July 2022<sup>2</sup> ([www.pm.gov.au/media/meeting-national-cabinet](http://www.pm.gov.au/media/meeting-national-cabinet)) and 4 August 2022<sup>3</sup> ([www.pm.gov.au/media/meeting-national-cabinet-040822](http://www.pm.gov.au/media/meeting-national-cabinet-040822)) are available on the Prime Minister's website. Disclosure of National Cabinet documents other than in

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<sup>2</sup> [Meeting of National Cabinet | Prime Minister of Australia \(pm.gov.au\)](http://www.pm.gov.au/media/meeting-national-cabinet)

<sup>3</sup> [Meeting of National Cabinet | Prime Minister of Australia \(pm.gov.au\)](http://www.pm.gov.au/media/meeting-national-cabinet-040822)

accordance with the principles agreed to by National Cabinet would, or could reasonably be expected to, undermine its effective operation and damage relations between the Commonwealth and the States and Territories.

For the above reasons, and having regard to comments received from States and Territories, I am 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.

#### *Public interest*

The FOI Act provides that a conditionally exempt document must nevertheless be disclosed unless its disclosure would, on balance, be contrary to the public interest.<sup>4</sup> In determining whether its disclosure would be contrary to the public interest, the FOI Act requires a decision-maker to balance the public interest factors.

Having decided that the documents are conditionally exempt I am now required to consider the public interest factors. In doing so I have not taken into account the irrelevant factors as set out in s 11B(4) of the FOI Act:

- 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*
- d) access to the document could result in confusion or unnecessary debate*

In considering the public interest, I have noted the objects of the FOI Act<sup>5</sup> and the factors favouring access as listed in s 11B(3) of the FOI Act. Having regard to the material before me and the circumstances of the document found to be conditionally exempt I am satisfied of the following:

- access would promote the objects of the FOI Act<sup>6</sup>
- access may inform debate on a matter of public importance

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<sup>4</sup> s 15(a) of the FOI Act

<sup>5</sup> s 3 of the FOI Act

<sup>6</sup> s 11B(3)(a) of the FOI Act

- the subject matter within the conditionally exempt document does not offer any insights into public expenditure; and
- I am satisfied that your personal information is not contained within the conditionally exempt document and therefore s 11B(3)(d) is not a relevant factor to favour access.

The FOI Act does not set out any public interest factors against disclosure and requires that agencies have regard to the FOI Guidelines to determine if disclosure would, on balance, be contrary to the public interest<sup>7</sup>. The FOI Guidelines contain a non-exhaustive list of factors that, depending on the circumstances of the documents found to be conditionally exempt, may weigh against disclosure.

I have determined the main factor against disclosure in this case is that disclosure of the requested documents would, or could reasonably be expected to, cause damage to Commonwealth-State relations by adversely affecting the trust and cooperation that underpins the National Cabinet, and in particular the ability to freely raise and discuss agenda items pending final decisions by its members.

Disclosing the requested documents would, or could reasonably be expected to inhibit the ability of First Ministers to conduct robust deliberations and discussions with their counterparts and to make decisions on critical intergovernmental policy issues. This would, or could lead to poorer outcomes and adversely affect all governments' abilities to consider and respond urgently to issues of national interest, and would undermine the key decisions needed to deliver outcomes in the public interest. Further, I note public interest is already served through the official disclosure of the outcomes of each National Cabinet meeting. The statement of the 16 July National Cabinet meeting is available at [Meeting of National Cabinet | Prime Minister of Australia \(pm.gov.au\)](https://www.pm.gov.au/news/press-releases/2020/07/16-july-national-cabinet-meeting-statement).

After careful consideration of all relevant factors, and the comments of States and Territories, I have decided that, on balance, the factors against disclosure outweigh those favouring disclosure. Accordingly, I am of the view that disclosure of the requested documents would be contrary to the public interest.

## Review rights

If you disagree with my decision, you may apply for internal review or Information Commissioner review of the decision.

### Internal review

Under section 54 of the FOI Act, you may apply in writing to the Department for an internal review of my decision. The internal review application must be made within 30 days after the date of this letter.

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<sup>7</sup> s 11B(5) of the FOI Act

Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days from the date it is received.

Applications for review should be sent to [foi@pmc.gov.au](mailto:foi@pmc.gov.au).

### Information Commissioner review

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.

More information about Information Commissioner review is available [here](#).<sup>8</sup>

### 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. 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 [here](#).<sup>9</sup>

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

Yours sincerely



Julie McKenzie  
Acting Assistant Secretary  
Commonwealth-State Relations Branch  
Department of the Prime Minister and Cabinet  
2 November 2022

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<sup>8</sup> <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review>

<sup>9</sup> <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>