



Australian Government

Department of Finance

Reference: FOI 22/117
Contact: FOI Team
e-mail: foi@finance.gov.au

NRP
Right to Know

By email only: foi+request-9629-4296830d@righttoknow.org.au

Dear NRP,

Freedom of Information Request – FOI 22/117

On 28 November 2022, the Department of Finance (Finance) received your request under the *Freedom of Information Act 1982* (FOI Act):

I refer to a letter tabled in the Senate by the Minister for Finance on Monday 28 November, relating to the Order for the Production of Documents of the Budget Process Operational Rules (BPORs).

Consistent with the Freedom of Information Act, I am seeking the documents outlined in clause b of that letter:

"any briefings, minutes or advice provided to the Minister for Finance by the Department of Finance relating to the BPORs and amendments to the BPORs since 22 May 2022"

I am not seeking any drafts of these documents.

The purpose of this letter is to provide you with notice of my decision under the FOI Act.

Authorised decision-maker

I am authorised by the Secretary of Finance to grant or refuse access to documents.

Decision

Finance has identified ten (10) documents (the Documents) that fall within the scope of your request. The Documents are identified in the Schedule at **Attachment A**.

I have decided to refuse to release the Documents as they contain material that would reveal Cabinet deliberations, and they contain matter that would adversely affect Finance's operations, which would not be in the public interest to disclose.

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

- the terms of your FOI request;
- the content of the Documents that fall within the scope of your request;
- the relevant provisions of the FOI Act;
- the FOI Guidelines issued by the Office of the Australian Information Commissioner (FOI Guidelines).

Cabinet – section 34

Section 34 of the FOI Act provides:

- (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 dominate purpose of submission for consideration by the Cabinet;
 - (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.
- ...
- (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.

The Documents contain material that was brought into existence for the dominant purpose of submission for consideration by Cabinet, and which was, or proposed to be, submitted to Cabinet for its consideration.

The Documents contain material that if released would reveal a Cabinet deliberation or decision. The existence of the deliberation or decision has not been officially disclosed.

I consider that the Documents are exempt in full under section 34 of the FOI Act.

Adversely affect Finance's operations – section 47E

Section 47E of the FOI Act provides:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to ... (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

The Documents contain information and briefings about the Budget Process Operational Rules (BPOR's) which detail processes that support Cabinet decisions.

The disclosure of these documents would have a substantial adverse effect on the proper and efficient conduct of Finance to perform the function of supporting the Budget process, which is required for the Government to shape and deliver its fiscal and policy objectives. Further, the maintenance of the principle of collective ministerial responsibility is vital to maintaining the confidentiality of Cabinet decision making, and the processes that support those decisions. I therefore consider that the release of the Document would, or could reasonably be expected to, have a substantial adverse effect on Finance's proper and efficient conduct of operations. I am therefore satisfied that the documents are exempt in full under subsection 47E(d) of the FOI Act.

Public interest test

Having formed the view that all documents are conditionally exempt under section 47E of the FOI Act, I am required to consider the public interest test for the purposes of determining whether giving access to the conditionally exempt documents would, on balance, be contrary to the public interest.

Subsection 11A of the FOI Act provides:

- (5) The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Factors favouring release

Section 11B of the FOI Act provides:

- (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
 - (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
 - (b) inform debate on a matter of public importance;
 - (c) promote effective oversight of public expenditure;
 - (d) allow a person to access his or her own personal information.

The FOI Guidelines provide a non-exhaustive list of factors that may favour disclosure at paragraph 6.19.

I consider the following factors in favour of release are relevant and attribute moderate weight to them:

- promote the objects of the FOI Act by providing access to documents held by the Government
- inform public debate on the administrative and operational arrangements for managing the Australian Government Budget process.

Factors against release

The FOI Guidelines provide a non-exhaustive list of factors that weigh against disclosure at paragraph 6.22. One of those relevant factors being that disclosure could reasonably be expected to prejudice the management function of an agency.

I attribute significant weight to protecting the management function of Finance, specifically in its primary role of supporting the Government to shape and deliver its fiscal and policy objectives through the Budget process.

Irrelevant factors

Section 11B of the FOI Act provides:

- (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
 - (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of 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 document 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.

I have not taken into account any of the irrelevant factors listed above.

Balancing public interest factors

The FOI Guidelines provide:

To conclude that, on balance, disclosure of a document would be contrary to the public interest is to conclude that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information. The decision maker must analyse, in each case, where on balance the public interest lies based on the particular facts of the matter at the time the decision is made.

I acknowledge the public interest in providing access to the BPORs to inform public debate on the administrative and operational arrangements for managing the Australian Government Budget process. However, I attribute significant weight to protecting the management function of Finance, specifically in its primary role of supporting the Government to shape and deliver its fiscal and policy objectives through the Budget process.

I am satisfied that the public interest factors against disclosure outweigh the public interest factors in favour of disclosure. Giving access to the Documents would be contrary to the public interest.

Third party consultation

Finance undertook consultation with the Department of the Prime Minister and Cabinet (PMC) in relation to the Documents and the application of the section 34 Cabinet exemption. At the time of the decision, Finance has not received a response from PMC.

Charges

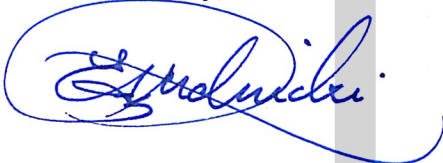
I have decided that a charge is not payable in this matter.

Review and appeal rights

You are entitled to request an internal review or an external review by the Office of the Australian Information Commissioner (OAIC) of my decision. The process for review and appeal rights is set out at **Attachment B**.

If you have any questions in regards to this request, please contact the FOI Team on the above contact details.

Yours sincerely,



Elicia Rudnicki
Assistant Secretary
Budget Analysis and Policy | Budget Policy and Coordination
Department of Finance
21 December 2022

SCHEDULE OF DOCUMENTS RELEVANT TO FOI 22/117

| Document No. | Date of Document | No. of Pages | Description of Document | Decision |
|--------------|------------------|--------------|------------------------------------|--|
| 1 | June 2022 | 42 | Attachment to a Cabinet Submission | Exempt in full from release under sections 34 and 47F of the <i>Freedom of Information Act 1982</i> (FOI Act). |
| 2 | 02 June 2022 | 3 | Brief to Finance Minister | |
| 3 | 02 June 2022 | 2 | Attachment to a Cabinet Submission | |
| 4 | June 2022 | 11 | Draft Cabinet Submission | |
| 5 | June 2022 | 12 | Draft Cabinet Submission | |
| 6 | 31 May 2022 | 2 | Ministerial Submission | |
| 7 | June 2022 | 7 | Draft Cabinet Submission | |
| 8 | 10 June 2022 | 8 | Finance Green Brief | |
| 9 | 25 November 2022 | 3 | Ministerial Submission | |
| 10 | 06 December 2022 | 3 | Brief to Finance Minister | |



Australian Government

Department of Finance

Freedom of Information – Your Review Rights

If you disagree with a decision made by the Department of Finance (Finance) or the Minister for Finance (Minister) under the *Freedom of Information Act 1982* (the FOI Act) you can have the decision reviewed. You may want to seek review if you sought certain documents and were not given full access, if you have been informed that there will be a charge for processing your request, if you have made a contention against the release of the documents that has not been agreed to by Finance or the Minister, or if your application to have your personal information amended was not accepted. There are two ways you can seek a review of our decision: an internal review (IR) by Finance or the Minister, or an external review (ER) by the Australian Information Commissioner (IC).

Internal Review (IR)

If, Finance or the Minister (we/our), makes a Freedom of Information (FOI) decision that you disagree with, you can seek a review of the original decision. The review will be carried out by a different decision maker, usually someone at a more senior level.

You must apply for an IR within 30 calendar days of being notified of the decision or charge, unless we agree to extend your time. You should contact us if you wish to seek an extension.

We are required to make an IR decision within 30 calendar days of receiving your application. If we do not make an IR decision within this timeframe, then the original decision stands.

Review by the Australian Information Commissioner (IC)

The Office of the Australian Information Commissioner (OAIC) is an independent office who can undertake an ER of our decision under the FOI Act. The IC can review access refusal decisions, access grant decisions, refusals to extend the period for applying for an IR, and IR decisions.

If you are objecting to a decision to refuse access to a document, impose a charge, or a refusal to amend personal information, you must apply in writing to the IC within 60 calendar days of receiving our decision.

Third parties

If you are a third party objecting to a decision to grant someone else access to your information, you must apply to the IC within 30 calendar days of being notified of our decision to release your information. Further assistance is located [here](#).

Do I have to go through the internal review process?

No. You may apply directly to the OAIC for an ER by the IC.

If I apply for an internal review, do I lose the opportunity to apply for an external review?

No. You have the same ER rights of our IR decision as you do with our original decision. This means you can apply for an ER of the original decision or of the IR decision.

Do I have to pay for an internal review or external review?

No. Both the IR and ER are free.

How do I apply?

Internal review

To apply for an IR of the decision of either Finance or the Minister, you must send your review in writing. We both use the same contact details, and you must send your review request in writing.

In your written correspondence, please include the following:

- a statement that you are seeking a review of our decision;
- attach a copy of the decision you are seeking a review of; and
- state the reasons why you consider the original decision maker made the wrong decision.

Email: foi@finance.gov.au

Post: The FOI Coordinator
Legal and Assurance Branch
Department of Finance
One Canberra Avenue
FORREST ACT 2603

External review (Information Commissioner Review)

For an ER, you must apply to the OAIC in writing. The OAIC ask that you commence a review by completing their online form [here](#).

Your application must include a copy of the notice of our decision that you are objecting to, and your contact details. You should also set out why you are objecting to the decision.

Email: FOIDR@oaic.gov.au

Post: Office of the Australian Information Commissioner
GPO Box 5218
Sydney NSW 2001

The IC's enquiries phone line is 1300 363 992.

Can I appeal the Information Commissioner's external review decision?

Yes. You can appeal the Information Commissioner's ER decision to the Administrative Appeals Tribunal (AAT).

There is a fee for lodging an AAT application (as at 12 October 2022 it is \$1,011).

Further information is accessible [here](#).

The AAT's number is 1800 228 333.

Complaints

Making a complaint to the Office of the Australian Information Commissioner

You may make a written complaint to the OAIC about actions taken by us in relation to your application.

Further information on lodging a complaint is accessible [here](#).

Investigation by the Commonwealth Ombudsman

The Ombudsman can also investigate complaints about action taken by agencies under the FOI Act. However, if the issue complained about either could be, or has been, investigated by the IC, the Ombudsman will consult with the IC to avoid the same matter being investigated twice. If the Ombudsman decides not to investigate the complaint, then they are to transfer all relevant documents and information to the IC.

The IC can also transfer a complaint to the Ombudsman where appropriate. This could occur where the FOI complaint is only one part of a wider grievance about an agency's actions. You will be notified in writing if your complaint is transferred.

Complaints to the Ombudsman should be made online [here](#).

The Ombudsman's number is 1300 362 072.