



9 December 2024

Oliver Smith

**BY EMAIL:** [foi+request-12233-7ae568a8@righttoknow.org.au](mailto:foi+request-12233-7ae568a8@righttoknow.org.au)

**In reply please quote:**

FOI Request: FA 24/10/01739

File Number: FA24/10/01739

Dear Oliver Smith

**Freedom of Information (FOI) request – Decision**

On 28 October 2024, the Department of Home Affairs (the Department) received a request for access to document 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.

**1 Scope of request**

You have requested access to the following document:

*Under the FOI Act, I seek a copy of the Ministerial Brief provided to the office of Home Affairs Minister Tony Burke on 1/8/24 with the PDR No. MS24-001413.*

**2 Authority to make decision**

I am an officer authorised under section 23 of the FOI Act to make decisions in respect of requests to access document or to amend or annotate records.

**3 Relevant material**

In reaching my decision I referred to the following:

- the terms of your request
- the document relevant to the request
- the FOI Act
- Guidelines published by the Office of the Information Commissioner under section 93A of the FOI Act (the FOI Guidelines)
- advice from Departmental officers with responsibility for matters relating to the document to which you sought access
- advice from other Commonwealth Departments

## **4 Document in scope of request**

The Department has identified one document as falling within the scope of your request. This document was in the possession of the Department on 28 October 2024 when your request was received.

**Attachment A** is a schedule which describes the relevant document and sets out my decision in relation to each of them.

## **5 Decision**

The decision in relation to the document in the possession of the Department which falls within the scope of your request is as follows:

- Exempt one document in full from disclosure

## **6 Reasons for Decision**

My findings of fact and reasons for deciding that the exemption provision applies to that information are set out below.

### **6.1 Section 34 – Cabinet documents**

Section 34(1)(a) of the FOI Act permits exemption of a document if both of the following are satisfied:

- (i) the document has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted, and
- (ii) it was brought into existence for the dominant purpose of submission for consideration by the Cabinet

The document that falls within the scope of this request is Document 1 – ‘Submission to the Minister’ with two attachments (Attachments A and B).

The Attachments A and B of Document 1 exempt under section 34(1)(a) have been submitted to Cabinet for its consideration or are proposed to be so submitted. The attachments were brought into existence for the dominant purpose of being submitted to Cabinet.

Section 34(1)(c) of the FOI Act permits exemption of a document if it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies.

Document 1, the submission to the Minister, is exempt in full under section 34(1)(c). At the time the document was created, the document was brought into existence for the dominant purpose of briefing the Minister for Home Affairs, Minister for Immigration and Multicultural Affairs on a submission to Cabinet.

I have sought advice from the Department of Prime Minister and Cabinet on both exemptions and note the advice contained within the Cabinet Handbook. The Department of Prime Minister and Cabinet has confirmed the status of the document remains "Cabinet-In-Confidence". The paragraphs below detail considerations to be taken into account when handling cabinet documents, with particular focus on the 'Confidentiality' aspect of all Cabinet proceedings and documentation.

*28. All attendees are responsible for ensuring that what is considered by the Cabinet, when and how it does so, and the decision Cabinet reaches on particular matters remains confidential. Ministers and officials should not disclose proposals likely to be considered at forthcoming meetings outside Cabinet-approved consultation procedures. Nor should they disclose the nature or content of the discussions or the views of individual ministers expressed at the meeting itself.*

*29. Obviously general information about what has been decided by the Cabinet is, on occasions, released into the public domain by persons authorised to do so. But this does not detract from the importance of allowing the Prime Minister or the Cabinet itself to decide what is disclosed publicly about any decision they have reached.*

*30. Effective Cabinet confidentiality requires the protection of Cabinet deliberations not only at the time an issue was current but also in the future. Ministers in successive governments have relied on the convention that their views, either written or spoken will remain confidential well into the future. It is only with the confidence in this convention that ministers can enjoy freedom to explore all policy options without the need to temper their comments or views.*

A strong Cabinet system is fundamental to well-informed decision making and policy development by the Government. The convention of the collective responsibility of Ministers for government decisions is central to the Cabinet system of Government. Cabinet is a forum in which Ministers, while working towards a collective position, are able to discuss proposals, options, and views with complete freedom. This requires that Cabinet deliberations are treated confidentially.

The current handbook was updated in 2022 as the 15th edition and covers 'confidentiality' as:

*21. The principle of collective responsibility requires that ministers should be able to express their views frankly in Cabinet meetings in the expectation that they can argue freely in private while maintaining a united front in public when decisions have been reached. This in turn requires that opinions expressed in the Cabinet and Cabinet Committees, including in documents and any correspondence, are treated as confidential.*

*22. All attendees are responsible for ensuring that discussions at Cabinet and Cabinet Committee meetings remain confidential. Ministers and officials should not disclose proposals likely to be considered at forthcoming meetings outside Cabinet-approved consultation procedures. Nor should they disclose the nature or content of the discussions or the views of individual ministers or officials expressed at the meeting itself. The detail of discussion at Cabinet and Cabinet Committee meetings is not recorded in the Cabinet minutes (see Annex F – Decisions of the Cabinet). 8*

*23. The vital importance of confidentiality in relation to the deliberations of Cabinet is recognised in legislation and under the common law. The Freedom of Information Act 1982 (the Act), for example, recognises the special nature of Cabinet deliberations in the exemption it provides for certain Cabinet documents from disclosure under the Act (subject*

*to limited exceptions). Cabinet confidentiality is also a well-established ground for not producing documents or information on a public interest immunity basis to courts, royal commissions or legislatures.*

The document contains information which, if disclosed, would reveal Cabinet deliberations and information that has not, to date, been officially disclosed.

Accordingly, I have decided that the information marked 34(1)(a) and 34(1)(c) is exempt under the FOI Act.

## **7 Legislation**

A copy of the FOI Act is available at <https://www.legislation.gov.au/Series/C2004A02562>. If you are unable to access the legislation through this website, please contact our office for a copy.

## **8 Your review rights**

### ***Internal review***

You do not have the right to seek an internal review of this decision. This is because section 54E(b) of the FOI Act provides that, when an agency is deemed to have refused an FOI request under section 15AC of the FOI Act, the applicant does not have the right to seek an internal review of the deemed decision.

The Department was deemed to have refused your request under section 15AC of the FOI Act because it did not make this decision within the statutory timeframes for the request.

While the Department has now made a substantive decision on your request, section 15AC of the FOI Act continues to apply to your request, which means that any request you make for internal review will be invalid.

### ***Information Commissioner review***

You can instead request the Australian Information Commissioner to review this decision. If you want to request an Information Commissioner review, you must make your request to the Office of the Australian Information Commissioner (OAIC) within 60 days of being notified of this decision.

You can apply for an Information Commissioner review at: [Information Commissioner review application form on the OAIC website](#).

If you have already applied for an Information Commissioner review, there is no need to make a new review request. The OAIC will contact you shortly to give you an opportunity to advise whether you wish the review to continue, and to provide your reasons for continuing the review.

You can find more information about Information Commissioner reviews [on the OAIC website](#).

## **9 Making a complaint**

You may make a complaint to the Australian Information Commissioner if you have concerns about how the Department has handled your request under the FOI Act. This is a separate process to the process of requesting a review of the decision as indicated above.

You can make an FOI complaint to the Office of the Australian Information Commissioner (OAIC) at: [FOI Complaint Form on the OAIC website](#).

## **10 Contacting the FOI Section**

Should you wish to discuss this decision, please do not hesitate to contact the FOI Section at [foi@homeaffairs.gov.au](mailto:foi@homeaffairs.gov.au).

Yours sincerely

*[Electronically signed]*

**Brendan**

**Position No. 60151577**

Authorised Decision Maker

Department of Home Affairs

**ATTACHMENT A**

**SCHEDULE OF DOCUMENTS  
REQUEST UNDER *FREEDOM OF INFORMATION ACT 1982***

**FOI request:** FA 24/10/01739

**File Number:** FA24/10/01739

<b>No</b>	<b>Date of document</b>	<b>No. of pages</b>	<b>Description</b>	<b>Decision on release</b>	
1.	-	-	MS24-001413	Exempt in full	s.34(1)(c)
1.2	-	-	Attachment A	Exempt in full	s.34(1)(a)
1.3	-	-	Attachment B	Exempt in full	s.34(1)(a)