



OFFICIAL

Freedom of Information (FOI) request

Notice of Decision

Reference: FOI/2022/202

To: Alex Pentland

foi+request-9138-80c44cbf@righttoknow.org.au

Dear Mr Pentland,

I refer to your email of 16 July 2022 in which you made a request to the Department of the Prime Minister and Cabinet (the Department), for 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:

The agenda, minutes and recordings of decisions for the National Cabinet Meeting held on 16 July 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 Commissioner¹ (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; being the agenda and record of meeting for the National Cabinet meeting of 16 July 2022.

Consultation

During the processing of your request the Department has consulted with eight 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 within the scope of your request are subject to an exemption.

My decision is to exempt the documents in full under section 47B(a) of the FOI Act. I have also determined that documents are exempt in part under section 47C(1)(c) 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.

¹ s 93A of the FOI Act

Cause damage to Commonwealth-State relations

As outlined in the FOI Guidelines, 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 requested documents are the agenda, and record of meeting for the National Cabinet meeting held on 16 July 2022. The National Cabinet comprises First Ministers from each jurisdiction, with the Prime Minister, the Hon Anthony Albanese MP, as Chair. As agreed by all members, 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*, recognised that the 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.

On 16 July 2022 the National Cabinet met, and the Prime Minister subsequently published a statement regarding the outcomes of the meeting.² The release of this statement was the process by which outcomes of the 16 July 2022 National Cabinet meeting were officially disclosed. Disclosure of National Cabinet documents and discussions other than via methods agreed 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.

² [Meeting of National Cabinet | Prime Minister of Australia \(pm.gov.au\)](https://www.pm.gov.au/news/press-statements/2022/07/16-national-cabinet-meeting)

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.

Section 47C – Deliberative processes

A document is conditionally exempt under section 47C(1)(c) of the FOI Act if its disclosure would disclose matter in the nature of, or relating to, opinion, advice, or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place in the course of, or for the purposes of the deliberative processes involved in the functions of the Government of the Commonwealth. Such material is described as 'deliberative matter'.

Deliberative matter

Portions of the requested documents contain material which, if disclosed, would reveal deliberative matter. I am satisfied that the identified portions of the documents are not operational information, or purely factual material, and that the content is deliberative in nature.

Disclosure of the relevant portions of the documents would, or could reasonably be expected to inhibit the ability of attendees of the National Cabinet meetings to conduct confidential deliberations and discussions on matters of public importance.

I am satisfied that identified portions of the requested documents are conditionally exempt under section 47C(1) of the FOI Act, as disclosure would release deliberative matter.

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.³ 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.

As I have decided that the document is 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. This includes:

³ s 15(a) 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 Act⁴ 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;⁵
- access may inform debate on a matter of public importance;
- 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 interest⁶. 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.

In addition, I have determined that release of the documents, including deliberative matter contained within the documents, would be contrary to the public interest, as release would, or could reasonably

⁴ s 3 of the FOI Act

⁵ s 11B(3)(a) of the FOI Act

⁶ s 11B(5) of the FOI Act

be expected to undermine the trust between the Commonwealth and the States and Territories and prevent full and frank discussions that achieve the best outcomes for the Australian public. In turn 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-national-cabinet-meeting).

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. 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.

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](#).⁷

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

⁷ <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review>

Australian Information Commissioner. A complaint to the Information Commissioner must be made in writing. More information about complaints is available [here](#).⁸

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

Yours sincerely



Lauren Le Cerf
Assistant Secretary
Commonwealth-State Relations Branch
Department of the Prime Minister and Cabinet

8 September 2022

⁸ <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>