



Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

FOI

FREEDOM OF INFORMATION ACT 1982

DECISION BY: Mr Paul Hupalo
Assistant Secretary
Cabinet Secretariat

I refer to your email of 1 June 2020 in which you made a request under the *Freedom of Information Act 1982* (the **FOI Act**) to the Department of the Prime Minister and Cabinet (the **Department**) in the following relevant terms (the **FOI request**):

Under the Freedom of Information Act 1982, I request the following documents and information.

All minutes from meetings of the National Cabinet from the 1-04-2020 through until the 1-05-2020.

On 15 June 2020, the Department acknowledged receipt of your FOI request and advised you the Department's policy regarding exclusion of officers' names and contact details as follows:

For documents that fall within scope of the request, it is the Department's policy to withhold:

- *any person's signature;*
- *the names and contact details of Australian Public Service officers not in the Senior Executive Service (SES);*
- *the mobile or direct numbers of SES officers;*
- *the names and contact details of Ministerial staff at a level below Chief of Staff.*

The names and other details of SES officers will not be withheld unless there is some reason for that information to be exempt from release. If you require signatures, the names and contact details of non-SES officers or Ministerial staff below the level of Chief of Staff, or the mobile or direct numbers of SES officers please let us know at foi@pmc.gov.au so the decision-maker may consider; otherwise we will take it that you

agree to that information being excluded from the scope of your request (that is, the information will be treated as irrelevant and redacted from any documents for release).

On 16 June 2020, you responded as follows:

Thank you for your reply. I do request that you do not withhold the following:

- *the names and contact details of Australian Public Service officers not in the Senior Executive Service (SES);*
- *the mobile or direct numbers of SES officers;*
- *the names and contact details of Ministerial staff at a level below Chief of Staff.*

On 19 June 2020, the Department advised you as follows:

We write to advise you of the expected outcome of your FOI request and to seek your advice as to whether you wish to continue with your FOI request.

In brief, we expect the documents you are seeking to access will be exempt from release, as explained below.

You have requested access to 'All minutes from meetings of the National Cabinet from the 1-04-2020 through until the 1-05-2020'.

The National Cabinet is a committee of the Cabinet.

Under section 4(1) of the FOI Act, 'Cabinet' is defined to include 'a committee of the Cabinet'.

Section 34(1)(b) of the FOI Act provides that a document is exempt if 'it is an official record of the Cabinet.'

The FOI Guidelines published by the Office of the Australian Information Commissioner, in relation to section 34(1)(b), relevantly provide as follows (at paragraph 5.68):

The term 'official record of the Cabinet' in s 34(1)(b) is not defined. The document must be an official record of the Cabinet itself, such as a Cabinet Minute. A document must relate, tell or set down matters concerning Cabinet and its functions in a form that is meant to preserve that relating, telling or setting down for an appreciable time.

Because the documents you are seeking to access are official records of Cabinet, it is likely that they would be exempt from release.

In light of the above, we seek your advice about whether you wish to continue with your FOI request.

If you do wish to continue with your FOI request, and the Department decides to exempt the documents from release to you, then you will be notified of the decision with reasons and your rights of review.

We would be grateful for your response by 24 June 2020.

You are welcome to contact us anytime.

On 22 June 2020, you responded as follows:

Thank you kindly for your correspondence. I do not wish to withdraw my request.

On 23 June 2020, you advised the Department as follows:

Further to my email yesterday, I note that the National Cabinet did not exist until 2020, and the FOI Act was written in 1982. Any reference to the Cabinet including committees within the Act is a reference to the Cabinet of Australia https://en.wikipedia.org/wiki/Cabinet_of_Australia.

This can be viewed by reading the Hansard in relation to the FOI Act. The National Cabinet was not formed until March 2020 and I believe you are failing to act within the spirit of the Act by looking for ways not to answer. May I enquire, when you look for ways not to serve the Australian public, are you operating under your code of conduct or contrary to it? Is it not so there would need to be an amendment to the FOI Act after March 2020 to include the National Cabinet?

*I look forward to you acting within the spirit of the Act and not failing to interpret the term 'Cabinet' correctly by answering the request by the due date.
Thank you for taking the time to serve and attend to my request as per the Freedom of Information Act 1982.*

Steps taken to find the documents

Having regard to the terms of your FOI request, the Department has searched the official records of the Cabinet.

The Department has identified eleven documents relevant to your FOI request (the **requested documents**).

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.

Decision

I have decided to refuse access in full to the requested documents under section 34(1)(b) of the FOI Act.

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

- the FOI request;
- the requested documents;
- the FOI Act;

- the ‘Guidelines issued by the Australian Information Commissioner under s 93A of the *Freedom of Information Act 1982*’¹ (the **FOI Guidelines**);
- the Department’s correspondence of 15 and 19 June 2020; and
- your correspondence of 16, 19, 22 and 23 June 2020.

Reasons

Section 34 Cabinet documents

Section 34 of the FOI Act relevantly provides as follows:

(1) A document is an exempt document if:

...

(b) it is an official record of the Cabinet;

...

(6) Information in a document to which subsection (1), (2) or (3) applies is not exempt matter because of this section if the information consists of purely factual material, unless:

(a) the disclosure of the information would reveal a Cabinet deliberation or decision; and

(b) the existence of the deliberation or decision has not been officially disclosed.

Section 4(1) of the FOI Act defines ‘Cabinet’ to include ‘a committee of the Cabinet.’

In relation to the application of section 34(1)(b) of the FOI Act, the FOI Guidelines relevantly provide as follows:

The term ‘official record of the Cabinet’ in s 34(1)(b) is not defined. The document must be an official record of the Cabinet itself, such as a Cabinet Minute. A document must relate, tell or set down matters concerning Cabinet and its functions in a form that is meant to preserve that relating, telling or setting down for an appreciable time.²

In relation to the application of section 34(6) of the FOI Act, the FOI Guidelines provide as follows:

Section 34(6) provides that, in a document to which ss 34(1), 34(2) or 34(3) applies, information is not exempt if it is purely factual material unless:

a. the disclosure of the information would reveal any deliberation or decision of the Cabinet, and

b. the fact of that deliberation or decision has not been officially disclosed.

¹ FOI Guidelines combined June 2020 published on the web site of the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>.

² FOI Guidelines, [5.68] (footnotes omitted).

*Purely factual material includes material such as statistical data, surveys and factual studies. A conclusion involving opinion or judgement is not purely factual material. For example, a projection or prediction of a future event would not usually be considered purely factual.*³

In relation to ‘purely factual material’, the FOI Guidelines further relevantly provide as follows:

A conclusion involving opinion or judgement is not purely factual material. Similarly, an assertion that something is a fact may be an opinion rather than purely factual material.

Conversely, when a statement is made of an ultimate fact, involving a conclusion based on primary facts which are unstated, such a statement may be a statement of purely factual material.

‘Purely factual material’ does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.

*Where a decision maker finds it difficult to separate the purely factual material from the deliberative matter, both the elements may be exempt. If the two elements can be separated, the decision maker should consider giving the applicant a copy with deletions under s 22 to provide access to the purely factual material.*⁴

The National Cabinet is a committee of the Cabinet.

I am satisfied that each of the requested documents, being minutes of a committee of the Cabinet, are official records of the Cabinet.

I am further satisfied that the requested documents do not contain ‘purely factual material’.

I am therefore satisfied that the requested documents are exempt in full under section 34(1)(b) of the FOI Act.

Processing and access charges

I have decided not to impose processing charges in respect of your request.

Review rights

Information about your rights of review is available at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

Complaint rights

You may make a complaint to the Information Commissioner about the Department’s actions in relation to this request. Making a complaint about the way the Department has handled an FOI request is a separate process to seeking review of the Department’s decision. Further

³ FOI Guidelines, [5.76] – [5.77] (footnotes omitted).

⁴ FOI Guidelines, [6.71] – [6.74] (footnotes omitted).

information about how to make a complaint is available at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint/>.

Yours sincerely

A handwritten signature in grey ink that reads "Paul Hupalo". The signature is written in a cursive style with a large initial 'P'.

Paul Hupalo
Assistant Secretary
Cabinet Secretariat

1 July 2020