



Government of South Australia

GPO Box 2343
Adelaide SA 5001
Tel (+61 8) 8204 8786
Fax (+61 8) 8204 8777 DX:336
FOI@sa.gov.au
www.archives.sa.gov.au



Cabinet Documents Exemption

Guideline

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Purpose

The purpose of this guideline is to provide general advice on the use of the Cabinet documents exemption in clause 1 of Schedule 1 to the *Freedom of Information Act 1991* (FOI Act).

This guideline includes information about the following:

- discussion of all parts of the exemption;
- the kinds of documents that may not be captured by the Cabinet documents exemption;
- ministerial certification that Cabinet has approved a Cabinet document for release under FOI; and
- Department of the Premier & Cabinet Circular *PC031 – Disclosure of Cabinet Documents 10 Years or Older policy*.

Some of the following information can also be found in Cabinet Guide Number 6 published by the Cabinet Office for the purpose of advising government agencies about the Cabinet process.

Introduction

The objects of the FOI Act are to promote openness and accountability and to facilitate effective participation by members of the public in the making and administration of laws and policies. The Act extends to every person the right to seek, and where possible obtain, access to information held by government, and to ensure that records concerning personal affairs are not incomplete, incorrect, out of date or misleading.

However it is recognised that for government to function effectively, maintaining the confidentiality of Cabinet documents, including Cabinet submissions, Cabinet committee papers and briefing papers, is sometimes necessary.

Under the FOI Act *exempt document* means a document that is an exempt document by virtue of Schedule 1.

Schedule 1 to the FOI Act contains 19 exemption clauses that are designed to provide a balance between the rights of the applicants to be given access to documents held by government and the need to protect the legitimate interests of government and third parties who deal with government.

The first of the exemptions in Schedule 1 is clause 1 which relates to Cabinet documents. The term ‘Cabinet document’ is not defined in the FOI Act, but the kinds of documents that may be captured by the Cabinet documents exemption include:

- documents specifically prepared for submission to Cabinet including any preliminary drafts and extracts of these documents;

- documents which will disclose any deliberation or decision of Cabinet, including Cabinet note books, minutes of meetings or decisions of Cabinet or a committee;
- documents in which the deliberations or decision of Cabinet are discussed or mentioned; and
- briefings to the Minister used to inform Cabinet deliberations.

Discussion

Clause 1 Exemption

Clause 1 as taken from Schedule 1 to the FOI Act is as follows:

1 - Cabinet documents

(1) A document is an exempt document –

(a) If it is a document that has been specifically prepared for submission to Cabinet (whether or not it has been so submitted); or

(b) If it is a preliminary draft of a document referred to in paragraph (a); or

(c) If it is a document that is a copy of or part of, or contains an extract from, a document referred to in paragraph (a) or (b); or

(e) If it contains matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet; or

(f) If it is a briefing paper specifically prepared for the use of a Minister in relation to a matter submitted, or proposed to be submitted to Cabinet.

(2) A document is not an exempt document by virtue of this clause –

(a) If it merely consists of factual or statistical material (including public opinion polling) that does not-

(i) Disclose information concerning any deliberation or decision of Cabinet; or

(ii) Relate directly to a contract or other commercial transaction that is still being negotiated; or

(ab) merely because it was attached to a document described in subclause (1); or

(b) If 20 years have passed since the end of the calendar year in which the document came into existence.

(2a) A document is not an exempt document by virtue of this clause if –

(a) The document has been submitted to Cabinet by a Minister; and

(b) A Minister has certified that Cabinet have approved the document as a document to which access may be given under this Act.

(3) In this clause, a reference to Cabinet includes a reference to a committee of Cabinet and to a subcommittee of a committee of Cabinet.

The Cabinet documents exemption is an absolute exemption. This means that provided the document satisfies one or more of the elements of clause 1, then it is exempt from release. It is not appropriate for an Accredited FOI Officer to exercise their discretion to release documents that have been determined exempt under clause 1 because the confidentiality being protected is that of Cabinet and not of the agency the accredited FOI officer represents.

Pre-decisional documents

Clause 1(1)(a) applies to a document that has been specifically prepared for submission to Cabinet whether or not it has in fact been submitted. In addition, preliminary drafts of documents that meet the requirements of clause 1(1)(a) and copies of, or extracts from, parts of those documents can be exempted under clause 1(1)(b) and 1(1)(c).

Clause 1(1)(f) may be claimed where a document is a briefing paper specifically prepared for the use of a Minister in relation to a matter submitted, or proposed to be submitted to Cabinet.

Whether or not a document has been prepared for submission to Cabinet will depend on the circumstances surrounding the creation of the document, which includes the reasons the document was created. The most common identifier for such documents is the use of 'Sensitive: SA Cabinet' in the footer. Therefore it follows that if the document was created for some other purpose and then later used to assist in preparing a submission to Cabinet, then the exemption will not apply.

With these types of 'pre-decisional' documents, the content of the document is irrelevant as long as the document fits one of the above elements of clause 1.

Deliberations of Cabinet

The deliberations of Cabinet refer to the thinking processes that reflect the substance of material debated in Cabinet or the weighing up of alternatives in order for a decision to be reached. The document itself need never have been prepared for submission to Cabinet and may have been created before or after Cabinet has considered the matter. Such documents would include Cabinet note books, minutes of meetings or decisions of Cabinet or a committee, documents in which the deliberations or decisions of Cabinet are discussed or mentioned and briefings to the Minister which are used to inform Cabinet deliberations.

If the document contains the substance of a Cabinet decision, it is not necessary that the decision or deliberation of Cabinet be quoted verbatim in order for this exemption to apply.

Exclusions

Clause 1(2)(a) provides that a document is not exempt under clause 1 if it merely consists of factual or statistical material that does not disclose any deliberation or decision of Cabinet or relate directly to contract or other commercial negotiations.

Clause 1(2)(ab) operates to exclude from exemption under clause 1(1), a document that was created for some other purpose and subsequently attached to a Cabinet submission since that document cannot be said to have been specifically prepared for Cabinet.

Clause 1(2)(b) is effectively a sunset clause that provides once 20 years have passed since the end of the calendar year in which the document came into existence, the Cabinet exemption can no longer be applied and only the remaining exemption clauses can be considered.

Disclosure of Cabinet Documents 10 Years or Older

From the 1 October 2009, the South Australian Government introduced a policy to allow access to Cabinet documents between 10 and 20 years old through the FOI process. The policy has been issued as *Premier and Cabinet Circular 31: Disclosure of Cabinet Documents 10 Years or Older*. Access to Cabinet documents older than 20 years can be sought through a regular FOI request if not already open through the archives.

This policy requires the Department of the Premier and Cabinet (DPC) to process FOI applications seeking access to Cabinet documents held by Cabinet Office. If another agency receives an FOI application that falls under this policy, the agency should transfer the application to DPC.

The *Disclosure of Cabinet Documents 10 Years or Older* policy:

- means that the Cabinet document exemption cannot be claimed for a document where ten years have passed since the end of the calendar year in which the document came into existence;
- means that all other exemptions and requirements under the FOI Act continue to apply to Cabinet documents where appropriate; and
- does not apply to documents of Executive Council.

A copy of the policy (PC031) is available through the Department of Premier and Cabinet Circulars at <http://www.dpc.sa.gov.au/premier-and-cabinet-circulars>

Ministerial Certification that access may be given under FOI Act

Clause 1(2a) of the Cabinet documents exemption in Schedule 1 allows the responsible Minister to certify that Cabinet approves a document (that has been submitted to Cabinet) as a document to which access may be given under the FOI Act.

The certification process works in the following way.

- If the Minister considers that access may be given under the FOI Act to the documents they propose to submit to Cabinet, the following words should be used as the standard form of recommendation.

“That Cabinet: ...approves this document as a document to which access may be given under the Freedom of Information Act 1991.”

- If Cabinet accepts a recommendation, Cabinet and Policy Coordination will ensure that the page of the document recording Cabinet's acceptance of the recommendation also includes a certificate signed by a Minister in the following form:

“Certified as a document approved by Cabinet on ...(date to be inserted)..... as a document to which access may be given under the Freedom of Information Act 1991
Signature of Minister.....
Portfolio.....”

- The stamp recording Cabinet’s acceptance of the recommendation will be available at each Cabinet meeting. Therefore the question of whether Cabinet has approved access to a Cabinet document can be ascertained by looking at the original of the document.

More information in relation to the certification process can be found in the Cabinet Guide 6 – Guide to Cabinet Processes.

For more information

Please contact State Records if you require more information about the FOI Cabinet Document Exemption by email foi@sa.gov.au or by telephone (08) 8204 8786.