

Notice of Decision and Reasons for Decision

Applicant:	'ED2'
Agency:	Department of Premier and Cabinet
Decision date:	03 March 2022
Exemptions considered:	Section 29(1)(a)
Citation:	'ED2' and Department of Premier and Cabinet (Freedom of Information) [2022] VICmr 55 (3 March 2022)

FREEDOM OF INFORMATION – National Cabinet – operating principles – terms of reference – agenda – submission – minutes – National Cabinet Reform Committee – disclosure not contrary to the public interest

All reference to legislation in this document is to the *Freedom of Information Act 1982 (Vic)* (**FOI Act**) unless otherwise stated.

Notice of Decision

I conducted a review under section 49F of the Agency's decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision.

I am not satisfied section 29(1)(a) applies to the documents.

The documents are therefore to be released in full.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

03 March 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:

Documents between 9 March 2020 to 31 July 2020 regarding the following:

A) Correspondence between the Department of Premier and Cabinet and the Department of Prime Minister and Cabinet regarding the establishment and protocols of the National Cabinet.

B) Correspondence between Premier of Victoria Dan Andrews and Prime Minister Scott Morrison regarding the establishment and protocols of the National Cabinet.

C) Minutes or meeting notes from the National Cabinet meeting on [date], in the possession of the Department of Premier and Cabinet.

D) Pre-briefing documents from the Federal Government related to the *Environmental Protection and Biodiversity Conservation Act 1999* discussed at National Cabinet on [date] in the possession of the Department of Premier and Cabinet.

2. The Agency identified seven documents falling within the terms of the Applicant's request. It decided to refuse access to the documents in full under section 29(1)(a). The Agency's decision letter sets out the reasons for its decision.

Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have examined copies of the documents subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties.
7. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.
8. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Preliminary view

9. On 19 August 2021, my office put to the Agency my preliminary view that the documents were not exempt under section 29(1)(a).
10. On 1 September 2021, the Agency advised it maintained its view the documents are exempt under section 29(1)(a) for the reasons set out below.

Review of exemptions

Section 29(1)(a) – Documents containing matter communicated by any other state

11. Section 29(1)(a) provides:

- (1) A document is an exempt document if disclosure under this Act would be contrary to the public interest and disclosure—
 - (a) would prejudice relations between the State and the Commonwealth or any other State or Territory; ...

...

12. Section 29(2) provides:

- (2) In deciding whether a document is an exempt document under subsection (1), an agency or Minister, if practicable, must—
 - (a) notify any of the following that are relevant that the agency or Minister has received a request for access to the document—
 - (i) another agency or Minister;
 - (ii) an agency of another country or the Commonwealth or another State or a Territory;
 - (iii) an authority of another country or the Commonwealth or another State or a Territory;and
 - (b) seek the view of that agency, authority or Minister as to whether the document should be disclosed.

Agency submission

13. The Agency has made submissions to my office as to why the Agency considers the documents are exempt under section 29(1)(a). These are outlined below, noting that parts of the submissions have been redacted where disclosure of those parts would reveal the contents of the documents.

14. The Agency submits:

The seven documents identified as relevant to the terms of the request are National Cabinet meeting minutes, a National Cabinet meeting agenda, a National Cabinet submission, and the National Cabinet [redacted].

As required under section 29(2) of the Act, the department consulted with the Department of the Prime Minister and Cabinet (PM&C) in order to seek the views of that department regarding the potential disclosure of the documents.

PM&C advised, as it has consistently regarding matters involving National Cabinet documents, that it considers that the confidentiality of National Cabinet has been fundamental to its success. PM&C also referred to section 47B of the *Freedom of Information Act 1982* (Cth), which is analogous to section 29(1)(a) of the Act, as relevant when considering National Cabinet documents. On this basis, PM&C advised that it considered that disclosure of the documents in the current matter ‘could indeed damage Commonwealth-State relationships’.

[redacted]

For discussions of this nature to be effective, it is important for there to be protection of the uninhibited exchange of views between the governments of Australia, including those between the State of Victoria and the Commonwealth or any other state government. Disclosure of the documents subject to this review,

[redacted], would inhibit this ability of participating governments to engage in a frank and candid manner at National Cabinet meetings. This would have the effect of diminishing National Cabinet's function in facilitating cooperative federalism within Australia.

In the matter of *Millar v Department of Premier and Cabinet* [2011] VCAT 1230, the Tribunal considered the application of the exemption in the context of correspondence from the Premier to the Prime Minister regarding the Federal Government's Carbon Pollution Reduction Scheme or Renewable Energy Target. The Tribunal accepted that the exemption applied to the material, stating:

In summary form those grounds are concerned with protecting the ability of the state, in a Federal setting, enabling it to have sufficient access and, the most appropriate and resource efficient mode of access, to the Commonwealth in order to lobby and perform one-on-one negotiations relating to the detail of relevant federal policy. I consider that to be an important public interest that needs to be protected. That is why the section 29 exemption is in the Act.

DPC considers these considerations to be applicable in the current matter. Disclosure of the documents is likely to damage Victoria's position in engaging with the Commonwealth and other states through National Cabinet.

15. The Agency also referred to the introduction of the COAG Legislation Amendment Bill 2021 to the Commonwealth House of Representatives, that seeks to amend the Commonwealth *Freedom of Information Act 1982* to include 'National Cabinet' within the definition of 'Cabinet'. The Agency submits this demonstrates the confidentiality of National Cabinet documents and that their disclosure would prejudice relations between the Commonwealth and the States. The Agency also submits the introduction of the bill adds weight to the view that disclosure would impede deliberations by muting the free exchange of ideas among the members of National Cabinet.

Would disclosure under this Act be contrary to the public interest?

16. The documents subject to this review are the agenda, minutes, and a submission relating to the National Cabinet meeting of 24 July 2020, as well as a document responding to the first point of the Applicant's request, being for documents 'regarding the establishment and protocols of the National Cabinet'.
17. In deciding whether disclosure would be contrary to the public interest, I have considered *Millar v Department of Premier*¹ where the Victorian Civil and Administrative Tribunal (VCAT) accepted the respondent had established the following grounds on which disclosure would be contrary to the public interest:
 - (a) protecting uninhibited exchanges between the governments of Australia; and
 - (b) encouraging cooperative Federalism within Australia; and
 - (c) protecting processes that contribute to high quality policy development by the governments of Australia; and
 - (d) ensuring the public have access to accurate and reliable information that gives a true indication of the basis for government policy; and
 - (e) protecting against unnecessary confusion and debate by avoiding the premature release of documents that represent a stage in the decision-making process; and
 - (f) ensuring that the Victorian government remains able to meet private undertakings' legitimate expectations of confidentiality; and
 - (g) ensuring that private undertakings remain willing to share information with the State; and

¹ (General) [2011] VCAT 1230 (30 June 2011)

- (h) protecting the State of Victoria's negotiating position in relation to present and future proposals concerning climate change.²

18. I note, however, that a key part of VCAT's consideration (as reproduced by the Agency in its submissions above) was concerned with the ability of a state to be able to 'lobby and perform one-on-one negotiations relating to the detail of relevant federal policy'³. While such lobbying and one-on-one negotiation between individual states and the Commonwealth undoubtedly takes place in relation to the matters considered by National Cabinet, the documents in question in the present matter deal neither with individual lobbying nor with one-on-one negotiation. Instead, by their very nature, the documents deal with multilateral discussions between the Commonwealth and all states and territories.
19. Also relevant to my decision is *Patrick and Secretary, Department of Prime Minister and Cabinet*⁴ as, while it relates to the *Freedom of Information Act 1982* (Cth), that decision involved documents similar to the documents in the present matter. In that decision, Justice White observed:

In my view, when regard is had to the nature of the minutes of the National Cabinet meeting (including the matters which they do not contain), the Prime Minister's public statements concerning the decisions made at the meeting on 29 May 2020, and the apparent expectation of the National Cabinet participants that the Prime Minister would announce publicly the decisions made at the meeting, a finding that disclosure of the formal record of the decisions would cause damage to relations between the Commonwealth and a State would be inappropriate. I emphasise that, in forming that view, I have taken into account that the minutes do not reveal the contribution of any individual participant, any debate which may have occurred regarding each item or the considerations taken into account in relation to each item. In that circumstance, there is no reason to suppose that any participant in the National Cabinet, acting rationally, would feel some inhibition in his or her contributions to the debate at the National Cabinet by reason of the formal disclosure of the minutes of 29 May 2020.⁵

20. I have determined it would not be contrary to the public interest to release the documents for the following reasons:
- (a) National Cabinet is an important and influential body. Its deliberations have a significant impact on members of the Victorian community, in particular during times of crisis. In a liberal democratic system of government, there is an overwhelming public interest in the operations of such a central decision-making body being transparent and accountable.
 - (b) In relation to Document 7, being the Terms of Reference for National Cabinet, the public interest in disclosure is particularly strong. Given the far-reaching consequences of the deliberations and actions of National Cabinet, all members of the public have a right to know about its functions and decision-making processes.
 - (c) The remainder of the documents are brief and factual. They do not contain any detail regarding the nature of the debate or discussion held among the members of National Cabinet or any individual contributions or objections to any decision or agreement. As such, I do not consider disclosure would have any negative impact on the ability of its members to contribute candidly to any future meetings.
 - (d) For similar reasons, I do not consider disclosure would impair the effective collaboration between Victoria and the Commonwealth or other states or territories, or the effectiveness of National Cabinet.

² *Millar v Department of Premier (General)* [2011] VCAT 1230 (30 June 2011) at [62].

³ *Ibid.*, at [63].

⁴ *(Freedom of Information)* [2021] AATA 2719 (5 August 2021).

⁵ *Ibid.*, [267].

- (e) A significant amount of information in the documents, including the key decisions described, were publicly announced by the Prime Minister following the meeting of National Cabinet. Where information is publicly available, I do not consider disclosure would be contrary to the public interest.
- (f) I note the introduction of the COAG Legislation Amendment Bill 2021 to the Commonwealth House of Representatives on 2 September 2021. I also note the Department of Prime Minister and Cabinet objected to disclosure of the documents on the basis disclosure could 'damage Commonwealth-State relationships'. While these factors are relevant in deciding whether disclosure would be contrary to the public interest, they are not determinative. I must make my decision based on the documents before me and in reference to the provisions of section 29(1)(a) of the Victorian FOI Act that disclosure would be contrary to the public interest. In these circumstances, I must consider the specific content of the documents, rather than consideration of the documents as a class. For the reasons described above, I do not consider that the disclosure of the documents would have any negative effect on the ability of National Cabinet to act in the public interest.

21. As I have determined that it would not be contrary to the public interest to disclose the documents, they are not exempt under section 29(1)(a).

Would disclosure prejudice relations between the State and the Commonwealth or any other State or Territory?

- 22. While I do not consider disclosure of the documents would be contrary to the public interest, for completeness I have also considered whether disclosure would prejudice relations between the State and the Commonwealth, or the other states and territories.
- 23. I note the Department of Prime Minister and Cabinet considers disclosure would damage relationships between the states and territories. However, I do not consider there is any information before me to support this view.
- 24. In my view, for similar reasons to those expressed in paragraph 19 and 20, I do not consider disclosure would have such an effect. Where there is a reasonable expectation that the outcome of the meetings will be disclosed, and the documents do not contain any further detail regarding individual member's comments, I do not consider disclosure could have any effect on the ability for the Victorian government to negotiate with other states and territories about matters relating to the COVID-19 pandemic or any other matters.
- 25. The documents are therefore not exempt under section 29(1)(a).

Conclusion

26. On the information available, I am not satisfied the exemption in section 29(1)(a) applies to the documents. The documents are therefore to be released in full.

Review rights

- 27. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁶
- 28. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁷

⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁷ Section 52(5).

29. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁸
30. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
31. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.⁹

When this decision takes effect

32. My decision does not take effect until the Agency's review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁸ Section 52(9).

⁹ Sections 50(3F) and 50(3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1	[date]	National Cabinet agenda	2	Refused in full Section 29(1)(a)	Release in full	Section 29(1)(a): I have decided the document is not exempt under section 29(1)(a) for the reasons described above in my Notice of Decision.
2	[date]	National Cabinet minute: [subject]	1	Refused in full Section 29(1)(a)	Release in full	Section 29(1)(a): See comments for Document 1.
3	[date]	National Cabinet minute: [subject]	2	Refused in full Section 29(1)(a)	Release in full	Section 29(1)(a): See comments for Document 1.
4	[date]	National Cabinet minute: [subject]	1	Refused in full Section 29(1)(a)	Release in full	Section 29(1)(a): See comments for Document 1.
5	[date]	National Cabinet minute: [subject]	2	Refused in full Section 29(1)(a)	Release in full	Section 29(1)(a): See comments for Document 1.
6	Undated	National Cabinet [subject]	7	Refused in full Section 29(1)(a)	Release in full	Section 29(1)(a): See comments for Document 1. Note: The Agency advised it is not in possession of the second attachment to the document.
7	Undated	National Cabinet terms of reference	2	Refused in full Section 29(1)(a)	Release in full	Section 29(1)(a): See comments for Document 1.