



**Australian Government**

**Office of the Australian Information Commissioner**

# **Senate Finance and Public Administration Legislation Committee inquiry - COAG Legislation Amendment Bill 2021**

Submission by the Office of the Australian Information Commissioner

Supported by State and Territory Information Commissioners and Ombudsmen



OAIC

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## Introduction

The Office of the Australian Information Commissioner (OAIC) welcomes the opportunity to provide a submission to the Senate Finance and Public Administration Legislation Committee's inquiry into the COAG Legislation Amendment Bill 2021 (the COAG Bill).

The OAIC is an independent Commonwealth regulator established to bring together three functions: privacy functions (protecting the privacy of individuals under the *Privacy Act 1988* (Cth) and other legislation), freedom of information functions (access to information held by the Commonwealth Government in accordance with the *Freedom of Information Act 1982* (Cth) (FOI Act)), and information management functions (as set out in the *Australian Information Commissioner Act 2010* (Cth)). The OAIC's strategic priorities include upholding information access rights under the FOI Act and supporting the proactive release of government-held information.

We consider that the existing provisions in the FOI Act provide an adequate framework to balance the need in appropriate circumstances to maintain the confidentiality of opinions, advice, recommendations and deliberations that occur as part of government decision making – including by National Cabinet – with the public's interest in and right to access government-held information.

The expansion of the Cabinet exemption in s 34 of the FOI Act to National Cabinet and its committees would remove public access to all National Cabinet documents falling within that exemption until the open access periods in the *Archives Act 1983* have elapsed, without consideration of the public interest in access to those documents. In addition, there are likely to be practical challenges to the application of the exemption in s 34 to the National Cabinet arising from its derogation from existing Cabinet conventions.

If – contrary to our submission – Parliament considers that a non-conditional exemption for documents relating to National Cabinet and its committees is necessary<sup>1</sup>, we suggest a separate provision is considered that overcomes the issues raised in this submission in relation to the application of s 34 to National Cabinet and includes a legislative requirement to publish specific National Cabinet documents in a timely way.

State and territory information commissioners and ombudsmen who perform similar information access functions anticipate that if the Bill is passed in its current form, similar legislative reforms may be considered by the states and territories. Accordingly, state and territory information commissioners and ombudsmen have considered the issues raised by the Bill and concur with this submission of the OAIC:

- Information Commissioner, Information and Privacy Commission, New South Wales
- Information Commissioner, Office of the Victorian Information Commissioner
- Information Commissioner, Office of the Information Commissioner, Queensland
- Information Commissioner, Office of the Information Commissioner, Western Australia

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<sup>1</sup> As set out in the Parliament Joint Committee on Human Rights (2015) *Guide to Human Rights*, Australian Government, reasonableness, necessity and proportionality are key concepts when determining whether limitations on non-absolute human rights are justifiable (see also [Permissible limitations: Public sector guidance sheet](#), Attorney-General's Department website, accessed 20 September 2021).

- Ombudsman, South Australia
- Ombudsman, Tasmania
- Ombudsman, Australian Capital Territory
- Information Commissioner, Northern Territory.

## Interaction between the COAG Bill and the Commonwealth FOI Act

Access to information regimes operate at the national level and in each of the states and territories.<sup>2</sup> At the national level, the FOI Act provides the legislative basis for accessing information in documents held by Australian Government agencies and ministers. The FOI Act recognises in its objects<sup>3</sup> that information held by government is a national resource and is to be managed for public purposes. Comprehensive coverage of agencies and ministers under the FOI Act supports a key object of the FOI Act, which is to increase scrutiny, discussion, comment and review of government activities.

Reforms to the FOI Act in 2009 and 2010<sup>4</sup> further supported these disclosure goals and required agencies to proactively release information in certain circumstances.

The OAIC notes that the COAG Bill:

- makes clear that where Commonwealth legislation has existing provisions to protect from disclosure the deliberations and decisions of the Cabinet and its committees, the same protections apply to the deliberations and decisions of the National Cabinet and its committees (Schedule 3)<sup>5</sup>
- expands the existing definition of ‘Cabinet’ in s 4 of the FOI Act to include the committee known as the National Cabinet and a committee (however described) of the National Cabinet (Item 14)

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<sup>2</sup> *Freedom of Information Act 2016 (ACT)*, *Government Information (Public Access) Act 2009 (NSW)*, *Information Act 2003 (NT)*, *Right to Information Act 2009 (QLD)*, *Freedom of Information Act 1991 (SA)*, *Right to Information Act 2009 (TAS)*, *Freedom of Information Act 1982 (VIC)* and *Freedom of Information Act 1992 (WA)*

<sup>3</sup> Section 3 of the FOI Act provides that the objects of the Act include ‘to promote Australia’s representative democracy by contributing towards the following:

- (a) increasing public participation in Government processes, with a view to promoting better-informed decision-making;
- (b) increasing scrutiny, discussion, comment and review of the Government’s activities.

The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource (s 3(3)).

The Parliament also intends that functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost (s 3(4)).’

<sup>4</sup> These included: (1) the removal of conclusive certificates for all exemption claims under the FOI Act in 2009, allowing full merits review of any exemption claims; and (2) the introduction of the Information Publication Scheme which expanded the range of information an agency is required to publish, and invited agencies to publish additional information that will be of public interest; added the requirement to publish on an agency’s disclosure log; and introduced exemptions and conditional exemptions.

<sup>5</sup> COAG Legislation Amendment Bill 2021, Explanatory Memorandum

- amends s 34(1)(a)(i) of the FOI Act so that the Cabinet exemption applies to documents submitted, or proposed to be submitted, by a minister, including a minister of a state, to the National Cabinet (Item 15)
- amends s 34(1)(c) of the FOI Act so that the Cabinet exemption applies to documents that are brought into existence for the dominant purpose of briefing a minister, including a minister of a state, on a document submitted or proposed to be submitted to the National Cabinet (Item 16).

## Issues for consideration

### Current application of the FOI Act

Consistent with the objects of the FOI Act, the starting point for an agency or minister dealing with an FOI request is that the applicant has a right to obtain the requested material (s 11 FOI Act). However the FOI Act includes a number of exemptions and conditional exemptions to that right of access, balancing the objective of providing access to government information with legitimate claims for protection.

Under previous arrangements, the former Council of Australian Governments (COAG)<sup>6</sup> and its committees were not subject to a specific exemption in the FOI Act. In some cases, agencies have applied existing exemptions and conditional exemptions in the FOI Act to exempt COAG documents from disclosure.<sup>7</sup>

Existing exemptions and conditional exemptions in the FOI Act may similarly apply, where appropriate, to documents relating to the National Cabinet. Where a document is an exempt document<sup>8</sup> access to the document is not required to be given. Examples of exemptions include:

- documents affecting national security, defence or international relations (s 33)
- documents affecting enforcement of law and protection of public safety (s 37)
- documents to which secrecy provisions of enactments apply (s 38)
- documents subject to legal professional privilege (s 42)
- documents containing material obtained in confidence (s 45).

Where a document is a conditionally exempt document<sup>9</sup>, access to the document is required to be given unless it would be contrary to the public interest. Examples of conditional exemptions include:

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<sup>6</sup> On 2 June 2020, the Prime Minister [announced](#) that a new National Federation Reform Council (NFRC) would replace COAG meetings, with National Cabinet to remain at the centre of the NFRC

<sup>7</sup> See *Humane Society International Inc. and Department of the Environment [2016] AICmr 57* (1 September 2016), where former Acting Information Commissioner Pilgrim found that documents relating to bilateral discussions agreed to by COAG were conditionally exempt under s 47B(a) and giving access to the documents at that time would be contrary to the public interest, as they were obtained in confidence in the course of ongoing discussions and related to ongoing bilateral discussions prior to disclosure to NSW officials.

<sup>8</sup> Under Division 2 (exemptions) or under paragraph (b) or (c) of the definition of exempt document in subsection 4(1).

<sup>9</sup> Under Division 3 (public interest conditional exemptions)

- Commonwealth-State relations (s 47B)
- deliberative processes (s 47C)
- financial or property interests of the Commonwealth (s 47D)
- certain operations of agencies (s 47E)
- personal privacy (s 47F)
- business (s 47G)
- research (s 47H)
- the economy (s 47J).

The OAIC notes that the existing conditional exemptions in s 47B and s 47C of the FOI Act may apply to exempt certain National Cabinet documents from disclosure where appropriate.

#### Section 47B – Public interest conditional exemption for Commonwealth-State relations

A conditional exemption may apply if disclosure of a document:

- would, or could reasonably be expected to cause damage to relations between the Commonwealth and a State (s 47B(a)), or
- would divulge information or matter communicated in confidence by or on behalf of a State Government or State authority, to the Commonwealth (s 47B(b)).

Section 47B of the FOI Act encompasses all interactions of the Commonwealth and the states, from formal Commonwealth-State consultation processes (such as COAG or the National Cabinet) through to working arrangements between agencies undertaken as part of their day-to-day functions.<sup>10</sup>

#### Section 47C – Public interest conditional exemption for deliberative processes

Section 47C of the FOI Act conditionally exempts documents containing deliberative matter. This may include a document that relates to Cabinet but is not exempt under the Cabinet exemption in s 34.

Deliberative matter is content that is in the nature of, or relating to either:

- an opinion, advice or recommendation that has been obtained, prepared or recorded, or
- a consultation or deliberation that has taken place, in the course of, or for the purposes of, a deliberative process of the government, an agency or minister (s 47C(1)).<sup>11</sup>

#### Public interest test

The application of conditional exemptions requires the agency or minister to consider whether disclosing a document would be contrary to the public interest.

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<sup>10</sup> [OAIC FOI Guidelines](#), paragraphs 6.29-6.51

<sup>11</sup> [OAIC FOI Guidelines](#), paragraphs 6.52-6.88

The FOI Act contains factors favouring access to the document in the public interest including whether access would promote the objects of the Act, inform debate on a matter of public importance, promote effective oversight of public expenditure or allow a person access to their own personal information.<sup>12</sup>

The FOI Guidelines and cases provide that considering the public interest involves considering factors such as whether:

- it is desirable to allow scrutiny of government activities<sup>13</sup>
- disclosure would have a positive or neutral effect on Commonwealth-State relations.<sup>14</sup>
- the document contains deliberative, but otherwise non-sensitive matter, about a policy development process that has been finalised<sup>15</sup>
- the government has announced its decision on the issue<sup>16</sup>
- disclosure would inhibit the government's future deliberation of the issue<sup>17</sup>
- it is public knowledge that the government considered or is considering the issue.<sup>18</sup>

The public interest test is considered at the time a decision is made and gives effect to the objects of the FOI Act while allowing decision makers to balance any countervailing harm that may result from giving access. It enables each document to be assessed on a case-by-case basis at a point in time, and recognises that the passage of time may reduce the likely harm resulting from disclosure in some circumstances.

The proposed amendments provide that documents relating to the National Cabinet would be exempt from disclosure without consideration of public interest factors. National Cabinet documents would be exempt from disclosure for either 20 or 30 years and not accessible by the public until they reach the open access period under the Archives Act.<sup>19</sup> In circumstances where there are grounds for a temporary exemption from disclosure in relation to certain documents of the National Cabinet, perceived harm may diminish over time. The proposed changes do not accommodate any such diminution or allow for consideration of public interest test considerations at a particular point in time.

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<sup>12</sup> FOI Act, s 11B

<sup>13</sup> [OAIC FOI guidelines](#), paragraph 6.50

<sup>14</sup> [OAIC FOI Guidelines](#), paragraph 6.51

<sup>15</sup> [OAIC FOI Guidelines](#), paragraph 6.86

<sup>16</sup> [OAIC FOI Guidelines](#), paragraph 6.86

<sup>17</sup> [OAIC FOI Guidelines](#), paragraph 6.87

<sup>18</sup> [OAIC FOI Guidelines](#), paragraph 6.87

<sup>19</sup> Further information about the open access period is on the National Archives of Australia website: <https://www.naa.gov.au/help-your-research/using-collection/access-records-under-archives-act>.

The proposed changes also do not consider existing provisions within the FOI Act which allow for access to documents to be deferred if the premature release of the document concerned would be contrary to the public interest.<sup>20</sup>

We consider that the existing provisions in the FOI Act provide an adequate framework to balance the need in appropriate circumstances to maintain the confidentiality of opinions, advice, recommendations and deliberations that occur as part of government decision making – including by National Cabinet – with the public’s interest in and right to access government-held information.

### Section 34 of the FOI Act

Section 34 is one of the non-conditional exemptions described above, and therefore consideration of the public interest is not a factor in decision making about the release of documents. The purpose of s 34 of the FOI Act is to protect the confidentiality of the Cabinet process and to ensure that the principle of collective ministerial responsibility, fundamental to the Cabinet system, is not undermined.<sup>21</sup> The proper implementation of strong, accepted conventions around confidentiality and collective responsibility is also dependent on a commitment to the operational values of consultation, confidentiality, respect for the primacy of Cabinet decisions and ministerial responsibility.<sup>22</sup> Those principles and conventions underpin the policy basis for the existing Cabinet confidentiality exemption in the FOI Act.

The proposed amendments extend the existing Cabinet exemption in s 34 of the FOI Act to a different construct which does not adhere to the Cabinet principles and conventions described above. The proposal would also extend the existing Cabinet exemption beyond the National Cabinet to ‘a committee of the National Cabinet, however described’.<sup>23</sup> The proposal is a significant extension of the exemption which would result in a corresponding reduction in the public’s right to access information held by governments.

The Statement of compatibility of human rights<sup>24</sup> notes that Schedule 3 of the Bill limits the right to seek, receive and impart information in Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) and contends that the limitations are permissible as they will be provided by law and are necessary for the protection of public order; namely, in order to maintain the confidentiality of the deliberations of decisions of the National Cabinet and its committees. However, noting the existing exemptions and conditional exemptions already contained in the FOI Act, the case

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<sup>20</sup> Paragraph 21(1)(c) of the FOI Act provides that an agency which, or a Minister who, receives a request may defer the provision of access to the document concerned if the premature release of the document concerned would be contrary to the public interest—until the occurrence of any event after which or the expiration of any period of time beyond which the release of the document would not be contrary to the public interest.

<sup>21</sup> Department of the Prime Minister and Cabinet, [Cabinet Handbook](#) (14<sup>th</sup> edition); OAIC FOI Guidelines, [paragraph 5.55](#)

<sup>22</sup> Department of the Prime Minister and Cabinet, [Cabinet Handbook](#) (14<sup>th</sup> edition)

<sup>23</sup> Explanatory Memorandum, COAG Legislation Amendment Bill 2021, Schedule 3:

**Item 14 Subsection 4(1) (definition of Cabinet)**

*The existing definition of ‘Cabinet’ in the Freedom of Information Act specifies that the Cabinet includes a committee of the Cabinet. The purpose of the proposed amendment is to make clear that the National Cabinet is a committee of the Cabinet, and that a committee of the National Cabinet, however described, is also included in the definition of Cabinet. The amendment will have application to the existing exemption in section 34 of the Freedom of Information Act for Cabinet documents.*

<sup>24</sup> Statement of compatibility with human rights, Explanatory Memorandum, COAG Legislation Amendment Bill 2021, p 29ff



is not made as to how the impact on information access rights is necessary, reasonable and proportionate.<sup>25</sup>

Further, the OAIC's regulatory experience suggests that the extension of the existing exemption to National Cabinet may give rise to practical difficulties in its application, such as evidentiary issues regarding the extent to which the existence of the deliberation or decision has been officially disclosed (s 34(3)) by the independent membership of the National Cabinet across all Australian jurisdictions. Similarly, the question of whether and when a document has been 'officially published' (s 34(5)) where there are a number of autonomous and independent leaders making up the National Cabinet may also give rise to uncertainty in the application of the provision.

If Parliament decides, contrary to this submission, that the existing exemptions and conditional exemptions in the FOI Act are insufficient and that a specific exemption for National Cabinet documents is required, the OAIC suggests a separate provision is considered that overcomes the issues raised in this submission in relation to the application of s 34 to National Cabinet and that any such amendments are accompanied by a legislative requirement to release categories of specific information about the National Cabinet as described below.

### **Proactive publication**

As noted above, one of the consequences of the proposed amendments to the FOI Act is that National Cabinet documents will be unable to be accessed by the public for either 20 or 30 years. In that event, the OAIC recommends that consideration be given to additional legislative measures to require the proactive release of some National Cabinet information within that period. This could include a legislative commitment to proactively publishing National Cabinet and Cabinet information, such as agendas, a summary of meeting outcomes and key documents, without revealing the substance of confidential deliberations. This could be achieved through amendments to Part II of the FOI Act in relation to the Information Publication Scheme.

Proactive publication promotes transparency, accountability and trust in government which is particularly important during a pandemic. Disclosure of government information can support public trust and confidence in, and ultimately the success of, public health initiatives.

In June 2021, the International Conference of Information Commissioners (ICIC) endorsed a resolution and joint statement put forward by the OAIC and supported by other Australian state members to support the proactive publication of information relating to the COVID-19 pandemic. The resolution recognises that public authorities make significant decisions that affect public health, civil liberties and economic participation, and emphasises the importance of access to information in the context of the ongoing global pandemic. It promotes the proactive disclosure of information held by government or public institutions, wherever this is appropriate.<sup>26</sup>

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<sup>25</sup> As set out in the Parliament Joint Committee on Human Rights (2015) *Guide to Human Rights*, Australian Government, reasonableness, necessity and proportionality are key concepts when determining whether limitations on non-absolute human rights are justifiable (see also *Permissible limitations: Public sector guidance sheet*, Attorney-General's Department website, accessed 20 September 2021).

<sup>26</sup> [ICIC endorses OAIC resolution on proactive publication; ICIC Statement: Proactive publication of information relating to the COVID-19 pandemic](#)

The OAIC is aware of proactive publication schemes available in other jurisdictions such as New Zealand and Canada. For example:

- The New Zealand Government has recently agreed to a new policy to proactively release Cabinet papers as part of its commitment to Open Government. The policy applies to the proactive release of all Cabinet and Cabinet committee papers (excluding Appointments and Honours papers) lodged from 1 January 2019 subject to certain considerations.<sup>27</sup>
- Canada proactively publishes government information on contracts, briefing packages (including for ministers and Executive) and other reports, to promote transparency and accountability.<sup>28</sup>

## Conclusion

The OAIC considers that the existing provisions in the FOI Act provide an adequate framework to balance the need, in appropriate circumstances, to maintain the confidentiality of opinions, advice, recommendations and deliberations that occur as part of government decision making – including by National Cabinet – with the public’s interest in and right to access government-held information.

If – contrary to our submission – Parliament considers that a non-conditional exemption for documents relating to National Cabinet and its committees is necessary, we suggest a separate provision is considered that overcomes the issues raised in this submission in relation to the application of s 34 to National Cabinet and includes a legislative requirement to publish specific National Cabinet documents in a timely way.

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<sup>27</sup> [Official information on proactive release](#): They are to be released and published online, with the approval of the relevant portfolio Minister, no later than 30 business days after final Cabinet decisions have been made unless there is good reason not to publish all or part of the material, or to delay the release. The normal assessments for releasing official information, and a due diligence process to consider potential liability that might arise from publication, must occur prior to proactive release.

<sup>28</sup> <https://open.canada.ca/en/proactive-disclosure>