



Cabinet exemption

Information Act Guideline

Exemption in brief

- Section 45(1)(a) covers —
 - 7 different types of information relating to Cabinet and Executive Council processes, including some associated ministerial communications;
 - drafts of that information;
 - committees of Cabinet and Executive Council.
- There is no separate public interest test.
- It does not cover —
 - information that came into existence over 10 years ago;
 - purely statistical, technical, scientific or factual information, unless its disclosure would disclose a deliberation or decision of Cabinet, Executive Council or a committee.

Background to exemption

All Australian freedom of information (FOI) legislation provides for exemption from disclosure for information related to Cabinet and Executive Council processes. The exemption recognises the long-established **convention of collective ministerial responsibility**.

The convention preserves the confidentiality of the processes leading up to executive body decisions. It allows for full and frank debate between ministers in the course of deliberations of the executive body, while preserving unanimity in respect of the executive body's ultimate decision. In brief terms, the convention provides that "*Cabinet meets in secret and speaks with one voice*" [australianpolitics.com].

The Victorian Parliament's Legal and Constitutional Review Committee has explained the benefits of the convention as follows:

The convention serves several important constitutional purposes. It secures the responsibility of Cabinet to the Parliament and, through the Parliament, to the electorate. The coherence of government exercises pressure on the opposition to unite in the presentation of alternative policies and ministries. The convention assists in the maintenance of government control of legislation and public expenditure. It acts as a strong incentive towards the co-ordination of departmental policies and actions. More practically, Cabinet unanimity conforms with the expectations of the electorate which, in general, disapproves of divisiveness in its government ... [Report upon Freedom of Information in Victoria, 1989, see pages 70-72]

Interpreting FOI legislation

FOI legislation has been recognised by the courts as beneficial or remedial legislation. That means that, if the legislation is ambiguous, it should be interpreted in a way that would further, rather than hinder, free access to information. However, it does not justify an interpretation leaning in favour of disclosure if the meaning of the legislation is clear.

(See *Victorian Public Service Board v Wright* (1986) 160 CLR 145, 153; *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111, 115; *Queensland Law Society v Albietz* (1996) 2 Qd R 580, 585.)

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Seven types of exempt information

There are 7 types of exempt information set out in paragraphs (i) to (vii) of s.45(1)(a). If information falls into any one of those paragraphs, it will qualify for exemption from disclosure, unless it is excluded from exemption under s.45(2) or (3).

Information can be exempt under one or more of the paragraphs. Different parts of a document may be exempt under different exemptions. Even if part of a document is exempt, parts that are not exempt must be disclosed.

A decision based on s.45(1)(a) should clearly identify the paragraph or paragraphs that are relied on. If different paragraphs are relied on for different parts of a document, the paragraphs relied on should be specified in each case. The reasons for decision should explain how the individual paragraph applies in each case.

If a document is a copy, it is not enough to refer to s.45(1)(a)(viii). The substantive paragraph should be specified and the basis for exemption explained.

Note

The s.45(1)(a) exemptions do not cover every aspect of policy or legislative development within public sector organisations. Many prospective policy and legislative developments may be discussed within public sector organisations. Preliminary work may be done to explore the merits of particular proposals. Research or studies may be carried out as part of the day to day functions of the organisation. The mere fact that, in order to be implemented, a proposal would ultimately need approval by an executive body, does not justify exemption of all related documents under s.45(1)(a). The exemption is aimed at protecting the executive body process, not initial preparatory work within organisations.

The 7 exemptions

The text of each exemption is set out in italics, followed by a discussion of the exemption.

(i) Brought into existence for submission and consideration

... brought into existence for submission to and consideration by an Executive body, whether or not it has been submitted to or considered by the Executive body;

Why was the record created?

The exemption requires a decision-maker to consider why information was brought into existence. That question must be judged according to the circumstances at the time the information was created. The exemption will not extend to records that have been prepared for another purpose, merely because it is subsequently decided to provide a copy to an Executive body.

Markings or notations on a record, such as “*Cabinet Submission*” or “*Prepared for consideration of Cabinet*” may provide evidence of the reason for creation of information but will not necessarily be sufficient or conclusive evidence.

Whose intention?

Because a minister will almost invariably be the person who is in a position to bring information before Cabinet or Executive Council, evidence of intention would usually be based on the intention of the minister.

That evidence could be given by the minister or by officers who have had discussions with, or received instructions from, the minister. Evidence of an intention to require creation of a particular record would not necessarily be required. It may be sufficient to establish that the information in question was prepared as a consequence of an indication from the minister that a particular issue should be dealt with at the Executive body level.

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Interpreting the exemption as requiring a ministerial intention would accord with the underlying rationale for the exemption, which is the protection of the Cabinet and Executive Council process, and the convention of collective ministerial responsibility that underpins it. If a minister has not formed the requisite intention, disclosure of a mere proposal from an officer of an agency will arguably not impact on the Cabinet or Executive Council process. However, it is open to an organisation to argue that the intention may be formed by an officer of an organisation.

Submission and consideration

The evidence of intention must be twofold. Not only must there be an intention that the information be submitted to the Executive body. There must be an intention that it be considered by that body. The *Australian Concise Oxford Dictionary* (3rd ed)¹ defines **consideration** as “the act of considering; careful thought”. A decision-maker will need to be satisfied that the reason for creation of the information was to submit it to an Executive body in order for the Executive body to give it “careful thought”.

No need for actual submission or consideration

The exemption will extend to information that is prepared with the requisite intention but which is not ultimately submitted to an Executive body.

The sort of documents covered by this exemption might include Cabinet submissions, and comments that are intended for submission to and consideration by Cabinet.

(ii) Ministerial briefing about matter to be considered

... brought into existence to brief a minister in relation to a matter to be considered by an Executive body;

As with paragraph (i), this exemption requires a decision-maker to consider why information was brought into existence. Again, the

question must be judged according to the circumstances at the time the document was created. The relevant intention would be that of the author of the information or whoever has directed its creation.

The words “a matter to be considered” suggest that there must be evidence of an Executive body process either on foot, or perhaps reasonably anticipated, before the exemption can come into play. It would not appear to include a briefing created after an Executive body process has concluded.

The word “considered” should be interpreted in corresponding terms to “consideration” in paragraph (i), so that the matter must be one for “careful thought” by the Executive body.

(iii) Considered by an Executive body

... considered by an Executive body;

The word “considered” should be interpreted in corresponding terms to “consideration” in paragraph (i), so that the matter must be one for “careful thought” by the Executive body. It is not enough that documents have merely been present in the Cabinet room. There must have been active consideration.

This exemption can apply not only to records prepared especially for consideration by an Executive body, but also to records that were created for another purpose but have been subsequently considered by an Executive body.

(iv) Record of deliberations or decisions

... an agenda, minute or other record of the deliberations or decisions of an Executive body;

This exemption will apply to formal records of the course of discussion and debate in Executive bodies, and to formal records of decisions. It is arguable whether it would apply to incidental references to deliberations and decisions, for example, a mention in a letter from one department to another that Cabinet has made a particular decision. However, those references are likely to qualify for exemption under paragraph (v) in any event.

¹ All quoted definitions in this guideline are taken from this source.

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The word 'deliberation' has been interpreted to connote what was 'actively discussed' or given 'careful consideration' by the Executive body. It would not appear to extend to a report or submission received by an Executive body.

(see *Re Porter and Department of Community Services and Health* (1988) 14 ALD 403, 407; *Re Birrell and Department of the Premier and Cabinet (No. 1)* (1986) 1 VAR 230, 239; *Re Hudson*², paragraphs 36-47.)

(v) Disclose deliberations or decisions

would disclose information about the deliberations or decisions of an Executive body, other than information that has been published in accordance with a decision of the Executive body;

This exemption will apply to any information that will directly or indirectly disclose information about deliberations or decisions of an Executive body. The meaning of 'deliberation' is discussed in paragraph (iv). The exemption will be limited to information about active discussions within the Executive body and decisions.

The exemption will not apply to information that has already been published in accordance with a decision of the Executive body. Publication includes public disclosure and disclosure in a situation where there is no requirement to keep the information confidential.

For a discussion of a similar exception, see *Re Hudson*, at paragraphs 69-73.

(vi) Communication between ministers about decision or policy

would disclose a communication between ministers about the making of a decision or the formulation of a policy if the decision or policy is of a kind generally made or endorsed by an Executive body;

This exemption is limited to communications between ministers. It would not appear to extend to communications between ministerial staff.

The exemption does not require that the decision or policy has been, or will go, to an Executive body. It requires characterisation of the decision or policy as being of a certain kind, and a decision as to whether decisions or policies of that kind are generally made or endorsed by an Executive body.

Given the beneficial nature of FOI legislation, it is appropriate not to adopt an overly-broad characterisation of decisions and policies. Evidence will be required to establish that decisions or policies of the type in question are generally made or endorsed by an Executive body.

(vii) Ministerial briefing about decision or policy subject to consultation between ministers

... brought into existence to brief a minister in relation to a matter the subject of consultation between ministers about the making of a decision or the formulation of a policy if the decision or policy is of a kind generally made or endorsed by an Executive body;

As with paragraphs (i) and (ii), this exemption requires a decision-maker to consider why information was brought into existence. Again, the question must be judged according to the circumstances at the time the document was created. The relevant intention would be that of the author of the information or whoever has directed its creation.

This exemption is limited to briefings to ministers. It will not extend to documents created for other purposes merely because a copy of the document is attached to a ministerial briefing.

It would appear to arise only if, at the time it was brought into existence, there were ongoing consultations between ministers about decisions or policies of a kind generally made or endorsed by an Executive body.

² If full citation is not given for a case, it appears at the end of this guideline.

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Drafts

A draft of information falling within one of paragraphs (i) to (vii) will qualify for exemption. The form and content of a draft may vary considerably from the final document. However, where intent is necessary to establish exemption, the intent should relate back to the time of creation of the draft.

Two or more reasons for creation

Paragraphs (i), (ii) and (vii) require the decision-maker to be satisfied as to why information was “brought into existence”. Sometimes, there may be a number of reasons for bringing information into existence, not all of which qualify for exemption under s.45(1)(a). For example, a document may be created to brief a Minister but also to brief a number of senior officials within an organisation. Or, a document may be created to brief insurers on an accident with the intention that the Minister also be given a copy.

There are several possible approaches in such a case. One approach would be to accept that, as long as one reason for creation of the document qualifies for exemption, it is exempt information. On the other hand, it could be argued that the provision is ambiguous in such a situation and that, given the beneficial nature of FOI provisions, any ambiguity should be resolved in favour of disclosure — so that information should only qualify for exemption if the sole reason for creation qualifies under s.45(1)(a).

A middle ground, which has been adopted by the Queensland Information Commissioner, is to establish whether the ‘dominant purpose’ for creation is a purpose that qualifies the information for exemption (see *Re Little*, at paras 30-34, and *Re Ryman*, at paras 14-17). While the issue is open to argument, that approach has much to commend it.

No public interest test

If information satisfies s.45(1)(a), it will be exempt information even if there are public interest factors that favour disclosure.

Limitations on exemption

Does not apply to information over 10 years old

The s.45(1)(a) exemptions do not cover information that is over 10 years old. The time period is calculated from the time the information came into existence. This may differ from the time a document was considered by an Executive body, particularly in the case of a document that was prepared for another purpose, and was only subsequently considered by Cabinet.

Purely factual, statistical, technical, or scientific information

The exemptions do not cover purely factual, statistical, technical or scientific information, unless its disclosure would involve the disclosure of a deliberation or decision of an Executive body.

As is the case when one considers the application of exemptions, the application of this exception does not simply involve characterisation of a document as a whole. It may be possible to disclose significant parts of a document which are purely factual, statistical, technical or scientific information, while finding that other parts of the document qualify for exemption under s.45(1)(a).

For a discussion of the background to the exception, see *Re Hudson*, at paras 31-35.

When is information purely factual, statistical, technical, or scientific?

In some cases, factual, statistical, technical or scientific information will be inextricably interwoven with information that qualifies for exemption, so that it is impracticable to disclose the factual, statistical, technical or scientific information without also disclosing the exempt information.

In those cases, the information is not purely factual, statistical, technical or scientific information, so the exception does not apply.

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However, even in those cases, it may be appropriate to consider whether the information (or similar information) can be disclosed in a different form in order to satisfy the needs of the applicant.

Factual information

'Fact' is defined as "*a thing known to have occurred, to exist, or to be true*".

Factual information is usually distinguished from opinion or advice. There is no need to investigate whether information stated as fact is accurate. It may not extend to projections or predictions about the future.

For a detailed discussion of 'factual' information, see *Re Hudson*, paragraphs 48-61. See also *Re Eccleston*, at paragraphs 83-88.

Statistical information

'Statistics' is defined as "*the science of collecting and analysing numerical data, especially in or for large quantities, and usually inferring proportions in a whole from proportions in a representative sample*".

This would extend to current estimates based on survey or sample data. It may not extend to projections or predictions about the future.

Scientific information

"Scientific" is defined as "*according to rules laid down in exact science for performing observations and testing the soundness of conclusions*".

It would extend to scientific projections or predictions about the future.

Technical information

"Technical" is defined as "*of or involving or concerned with the mechanical arts and applied sciences*".

It would extend to technical projections or predictions about the future.

When does information disclose a deliberation or decision of an executive body?

The exception will not apply if disclosure of the information would involve disclosure of a deliberation or decision of an executive body. This will include both the detail of a deliberation or decision and the fact that a deliberation or decision has taken place.

For example, a section of a Cabinet submission that records the history of previous (unpublished) Cabinet decisions made in relation to a particular issue may, on its face, be a purely factual record. However, it would disclose decisions of Cabinet, so the exception would not apply.

As noted in the discussion of paragraph (iv) above, 'deliberation' has been interpreted to connote what was 'actively discussed' or given 'careful consideration' by the Executive body. Purely factual, statistical, technical or scientific information can only be exempt to the extent that it would disclose the fact or detail of such active discussion or decisions.

Information will not 'disclose' a deliberation or decision that has already been made public. If the fact that Cabinet has deliberated or made a decision on an matter has been made public, the exemption can only apply in relation to purely factual, statistical, technical or scientific information, to the extent (if any) that disclosure of the information would disclose details of the deliberation or decision that have not been made public.

For a discussion on this point, see *Re Hudson*, paragraphs 62-68.

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Cases from other jurisdictions

General discussions of the Executive bodies exemption

- *Hudson and Department of the Premier, Economic and Trade Development*, (1993) 1 QAR 123, at paragraphs 32-73; Austlii website [1993] QICmr 4; QIC website (13 August 1993)
- Exemptions Memorandum Cth A-G No.98 [http://www.ag.gov.au/www/securitylawhome.nsf/Web+Pages/178EFE0E2AC838ACCA256D3B001430E3]
- *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60; Austlii website [1993] QICmr 2; QIC website (30 June 1993)

Examples of application of the Executive bodies exemption

- *Woodyatt and Minister for Corrective Services* (1995) 2 QAR 383; Austlii website [1995] QICmr 1; QIC website (13 February 1995)
- *Lindbergh and Department of Families, Youth and Community Care* (1997) 4 QAR 14; Austlii website [1997] QICmr 8; QIC website (30 May 1997)
- *Little and Department of Natural Resources* (1996) 3 QAR 170; Austlii website [1996] QICmr 2; QIC website (22 March 1996)



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