

PRACTICE GUIDE TO OPEN ACCESS INFORMATION – CABINET DECISIONS



FACTSHEET

Intent of this document

This document outlines the practices and procedures for Government agencies to support the Government's compliance with Section 23 of the *Freedom of Information Act 2016* (the FOI Act). This section covers the Open Access information requirement to publish Cabinet decisions.

Background

The Government has been publically releasing a Summary of Cabinet Outcomes since July 2011 under the open government policy. The release of the SOCO was at the discretion of Government and not a legislative requirement.

The *Freedom of Information Act 2016* (the FOI Act) commenced on 1 January 2018. Section 23 of the FOI Act now requires the Chief Minister to make publicly available information about each Cabinet or Cabinet committee decision made after commencement of the Act, including:

- a) a summary of the decision;
- b) the decision reference number;
- c) the date the decision was made; and
- d) the triple bottom line assessment for the decision.

The FOI Act also allows information to be exempted from release if the Chief Minister (as decision maker) is of the view that it is not in the public interest to release the information.

What is covered by the Open Access Information Requirement

All decisions of Cabinet, Cabinet Committees and Cabinet Subcommittees (hence referred to as Cabinet) are in scope of the open access information requirements. The open access information requirements do not extend to items where Cabinet (or a committee) consideration does not amount to a decision. There is no definition of a decision included in the FOI Act, however, directorates should take the following approach:

- items where Cabinet 'agrees' would normally be considered a decision and within the scope of the open access information requirement;
- items where Cabinet 'notes' information does not amount to a decision and is out of scope;
- items where Cabinet 'commences consideration' or other similar language indicating that Cabinet has not yet finalised its position on a matter are not considered decisions.

Who is the decision maker

The Chief Minister is the decision maker and must exercise his own discretion as to whether the information should be published or whether it is contrary to public interest. The Chief Minister's view can be informed by the views of the agency and the Cabinet, but he is not ultimately bound by those views if he is not personally satisfied of the reasoning in respect to the application of the public interest test.

The decision to not publically release Cabinet information under Section 23 is a reviewable decision which any person can apply to review. Were an application for review to be made, it would be the Chief Minister as the decision maker who would have to account for the reasons for the decision.

Timing of the release of decision summaries

The FOI Act does not stipulate a timeframe for the publication of information under the Open Access Information Scheme and the timing of the publication of each Cabinet decision will require its own considerations. Generally, decisions could be expected to be published around 28 days after they are made, with the possibility that publication may take longer for those decisions where additional information is required for the Chief Minister to make a decision on the public interest of release.

Summary of the decisions

Directorates have been developing summaries of cabinet decisions since 2011, however, under the FOI Act, officers must be careful to provide enough information in their draft cabinet summary for it to be useful to the reader, while ensuring not to release any information that might be contrary to the public interest. The draft summary of cabinet decisions must not:

- a) be an exact copy of information submitted to cabinet for its consideration, unless that information is purely factual;
- b) reveal deliberations or discussions;
- c) disclose any information mentioned in Schedule 1 of the FOI Act or information contrary to the public interest.

Triple Bottom Line Assessments

The *Triple Bottom Line (TBL) Assessment Framework* outlines the steps involved in developing a TBL and aims to ensure cabinet is provided with sufficient analysis, in a standardised form, with which to make their analysis.

The TBL Framework has a set of escalating requirements that are proportionate to the significance of a proposal and in certain circumstances exemption may be provided.

Similar to the summary of decision, the release of the TBL assessment must satisfy the public interest test. If your TBL assessment contains information that is contrary to the public interest, it is recommended that you also attached a proposed draft redacted version of the TBL for release.

Cabinet processes

All Cabinet papers (Submissions, Discussion Papers, and Appointments) must be accompanied by a completed Open Access Assessment: Cabinet Decision Summary which contains two parts:

- Part A (must be completed for all Cabinet papers) includes a section for Ministers to propose:
 - a recommendation on whether the matter should be listed on the Summary of Cabinet Outcomes website;
 - a description of the matter for publication in the Open Access Information Release; and
 - the release of any attachments to the Cabinet paper either as part of the Open Access Information Release, or through other channels (such as community consultation processes).
- Part B (must be completed for all Cabinet Decisions where non-release is recommended in Part A) outlines the documents that must be lodged to support the Chief Minister's Decision around the public interest test.

The Open Access Assessment template must be lodged with the Cabinet Office as part of the lodgement of documents for Exposure Draft circulation. The template must be signed by the Directorate information officer.

Approaches for Budget Committee of Cabinet

In the case of decisions of the Budget Committee of Cabinet, agreement to the appropriation bill will be taken to be the only Cabinet Decision for the purposes of the Open Access Information scheme. This approach recognises that:

- a) the formulation of the ACT Budget is a process whereby the Budget Committee of Cabinet considers proposals for funding through a series of interim determinations and that funding proposals previously dealt with may be reconsidered or varied;
- b) these interim determinations of the Budget Committee of Cabinet are not relevantly decisions as defined by its ordinary meaning and as such are not required to be published; and
- c) the only relevant “final or operative” decision on the annual Budget is the decision that are contingent on a final Budget decision which takes the form of agreement to an appropriation bill.

What do I do if I believe a Cabinet decision and TBL should be released

If your directorate believes it is in the public interest to proactively release information under Section 23 (1b) of the FOI Act, then simply complete Part A of the template.

What do I do if I believe a Cabinet decision or TBL should be withheld from release

To withhold the release of information under Section 23 of the FOI Act the directorate must:

- a) complete the Open Access Information Scheme Public Interest Test Tool to determine whether non-release is in the public interest. You should also seek advice from your directorate information officer. If the information officer is satisfied of the justification to withhold release of information under Section 23, then;
- b) complete Part B of the Open Access Assessment: Decision Summary which includes a requirement the directorate must provide a ‘statement of reasons’ in accordance with Section 24(c) of the FOI Act to the Chief Minister, then;
- c) Cabinet members will have an opportunity to note this information and may provide advice supporting or not supporting the position of the directorate, then;
- d) the Chief Minister as decision maker will be provided a brief and draft statement of reasons for consideration. The Chief Minister may agree, not agree or otherwise amend the draft statement of reasons.
 - i. If the Chief Minister does not agree to draft statement of reasons, then a summary of the decision will be prepared and published and Cabinet Office will liaise with the directorate to settle appropriate wording.
 - ii. If the Chief Minister agrees to the draft statement of reasons, then the statement of reasons, exemption claimed, factors favouring disclosure, factors favouring non-disclosure and any other considerations will be released in the open access website.