Information Access Guideline 9: Cabinet Information

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Information Access Guideline 9: Cabinet Information

The object of the *Government Information (Public Access) Act 2009* (GIPA Act) is to open government information to the public to maintain and advance a system of responsible and representative democratic government.

The GIPA Act places various obligations on agencies within NSW in respect of the release of the information that they create and hold. The GIPA Act also gives the public an enforceable right to apply for access to government information.

The Information Commissioner is empowered under section 17(d) of the GIPA Act to issue guidelines to assist agencies in connection with their functions under this Act.

This Guideline is intended to be a helpful aid for agencies to understand how the GIPA Act operates with respect to 'Cabinet information', including how to identify which information may be captured by clause 2 of Schedule 1. Schedule 1 provides the conclusive presumption for classes of information to which there is an overriding public interest consideration against disclosure. When agencies deal with access requests to information which they consider to be subject to clause 2, they are required to provide the reasons to support their claim to Cabinet information.

Case examples are used throughout the Guideline to identify the types of documents that are captured by the conclusive presumption under clause 2 of Schedule 1 and illustrate the approach taken by the NSW Civil and Administrative Tribunal (the Tribunal) in conducting administrative reviews of decisions involving Cabinet information.

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Introduction

Public access to Cabinet information differs widely in democratic societies. The New Zealand approach could be characterised as access to Cabinet decisions by default. However, all Australian information access jurisdictions provide for exemptions or limitations in the disclosure of information relating to the Cabinet. This is in recognition of the long established convention of collective ministerial responsibility; this convention preserves the confidentiality of processes leading up to the decisions of the executive arm of government. The convention allows for the full and frank debate between Ministers in the course of deliberations, while preserving the unanimity of the ultimate decisions of the executive.

The Premier's Memorandum, *M2006-08 Maintaining Confidentiality of Cabinet Documents and Other Cabinet Conventions* describes Cabinet as:

> "... the central and highest decision-making institution in government. Its workings are governed by long established practice and convention.
>
> … a convention at the core of the Cabinet system of government is the collective responsibility of Ministers for government decisions…
>
> The unauthorised and / or premature disclosure of Cabinet documents, including draft Cabinet documents (such as draft Cabinet minutes), undermines collective ministerial responsibility. It also undermines the convention of Cabinet confidentiality. It is accordingly essential that the confidentiality of Cabinet documents, including draft Cabinet documents, is maintained to enable full and frank discussions to be had prior to Cabinet making its decision.
>
> It is inappropriate to provide copies of, or access to, final or draft Cabinet documents to sources external to Government. It may, however, sometimes be necessary to consult with external sources in relation to matters which are the subject of proposed or current Cabinet consideration to ensure that Cabinet is fully apprised of the relevant information required for it to make an informed decision. A Minister's actual or proposed position should never be disclosed, and high-level judgement needs to be exercised in deciding what information, if any, to disclose. Guidance should be obtained from The Cabinet Office.
>
> As is the case with Cabinet documents, draft Cabinet documents should be marked as confidential, stored securely, and access should be on a need to know basis".

In the context of the GIPA Act, the Tribunal has commented that the special value that the legislature places on maintaining the confidentiality of Cabinet processes is reflected in the conclusive presumption for which the GIPA Act provides (see, SM Dinnen in *McKay v Transport for NSW* [2017] NSWCATAD 212 at [32]; *Snelling v Commissioner of Police (NSW)* at [21])).

The defined categories of Cabinet Information under clause 2(1) of Schedule 1 reflect the scope of material to which the long-standing convention of confidentiality applies: *Snelling* at [22]).

This Guideline is intended to assist agencies to understand the conclusive presumption of an overriding public interest against disclosure (CPOPIAD) as it applies to 'Cabinet information'. It examines each of the subclauses in clause 2(1) of Schedule 1 to the GIPA Act with reference to relevant Tribunal decisions. The Guideline also highlights the Tribunal's review function in respect of claims of Cabinet information under section 106 of the GIPA Act.

GIPA Act provisions dealing with Cabinet Information

Three provisions of the GIPA Act operate in respect of Cabinet information: section 14(1), clause 2 of Schedule 1, and section 106. These provisions are attached at Appendix 1.

What is Cabinet?

1. The *Cabinet Practice Manual March 2017* outlines the key aspects of Cabinet[1]:

Cabinet

Cabinet is the forum of NSW Government Ministers who deliberate upon and decide major policy for the Government. Executives and officers of NSW Government agencies play an essential role in supporting the Cabinet system – to deliver quality advice to Cabinet Ministers, operating in a culture of integrity and confidentiality. These are some key features of the NSW Cabinet system:

- *All Ministers are members of Cabinet.*
- *Cabinet is not established by legislation. It is based on convention. The most significant Cabinet conventions are:*
  - *collective responsibility for decisions of Cabinet*
  - *confidentiality of Cabinet deliberations.*
- *The Premier:*
  - *sets the Cabinet agenda*
  - *chairs the Cabinet meetings*
  - *establishes Cabinet Committees and appoints Ministers as chairs and members.*
- *The Secretary of the Department of Premier and Cabinet (DPC) is the Cabinet Secretary and advises the Premier on the flow of Cabinet business, attends Cabinet meetings and records its decisions.*
- *The Cabinet Secretary also approves any variation to consultation or distribution requirements for Cabinet submissions.*

Matters for Cabinet

Cabinet should determine all significant matters that affect the government as a whole. This includes:

- *new policy proposals and significant or sensitive variations to existing policies. These may arise in Government issues papers, discussion papers and position papers that propose new policies*
- *proposals that require legislation*
- *proposed responses to recommendations in reports of Parliamentary committees, inquiries and other significant reports that establish or vary policy*

[1] Cabinet practice manual March 2017.

- *intergovernmental agreements, matters likely to significantly impact intergovernmental relations and significant issues for COAG Councils*
- *significant or high-level appointments needing Ministerial approval or endorsement*
- *significant portfolio policy announcements*
- *matters likely to significantly impact parts of the community*
- *proposals to refer matters to Parliamentary committees*
- *matters that may be contentious.*

Cabinet Committees

Cabinet Committees derive their powers from the Cabinet and also follow Cabinet conventions. Committees support Cabinet in various ways, for example, by considering some matters in detail before they proceed to Cabinet for broader policy consideration.

…

Legislative approach

2. When considering any request for access to government information, agencies should consider the object of the GIPA Act; the Act's presumption, including open access requirements and considerations favouring disclosure; as well as the overriding considerations against disclosure of information.
3. The object of the GIPA Act is to open government information to the public by the proactive public release of government information by agencies; and giving members of the public an enforceable right to access government information. Access to information is only restricted when there is an overriding public interest against disclosure.[2]
4. There is a presumption in favour of the disclosure of government information unless there is an overriding public interest against disclosure.[3]
5. There is a general public interest in favour of the disclosure of government information.[4] However, this presumption is subject to provisions which expressly exclude particular categories of information.
6. Section 14(1) provides that it is to be conclusively presumed that there is an overriding public interest consideration against the disclosure of any of the government information described in Schedule 1.[5] Schedule 1 of the GIPA Act sets out the classes of information to which this conclusive presumption applies, including 'Cabinet information' under clause 2.
7. Clause 2(1) of Schedule 1 to the GIPA Act outlines the six types of information contained in documents that are 'Cabinet information'.

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[2] GIPA Act, section 3(1).

[3] GIPA Act, section 5.

[4] GIPA Act, section 12.

[5] GIPA Act, section 14(1).

8. Committees and subcommittees of Cabinet are included in the definition of Cabinet in clause 2 of Schedule 1 to the GIPA Act. [6]

Information contained in documents

9. The GIPA Act applies to 'government information' which is defined in section 4 as 'information contained in a record held by an agency'.

10. In *Richards v Commissioner, Department of Corrective Services* [2011] NSWADT 98 at [40], the Tribunal noted the changes introduced by the GIPA Act, whereby the definitions of 'government information', 'personal information', and 'reveal' operate on information alone, not, with respect to 'documents', as was the case under the *Freedom of Information Act 1989* (FOI Act). In *Richards*, the Tribunal was considering the specific issue of public disclosure and observed that:

    The issue for consideration is not whether the document has been publicly disclosed, but whether the information they contain has been publicly disclosed.

11. However, the Cabinet CPOPIAD in clause 2(1) of Schedule 2 provides for Cabinet information contained in a *document*. In *Robinson v Transport for NSW* [2017] NSWCATAD 353 at [79][7], the Tribunal observed that while the GIPA Act generally applies to 'information', the Cabinet information consideration in clause 2(1) is different:

    "It applies to information contained in a document meeting the description of any of the paragraphs (a) to (f) of cl 2(1). Thus, if the document meets such a description, all the information in the document is subject to an overriding public interest against disclosure".

12. In *Lock the Gate Alliance v Department of Planning and Environment & Department of Premier and Cabinet* [2019] NSWCATAD 6 at [27], the Tribunal stated that:

    "… if a document contains government information that is Cabinet information and government information that is not, the document cannot be redacted so that access is given to the information that is not Cabinet information".

13. When agencies are dealing with documents captured by one or more definitions in clauses 2(1)(a)-(f), they should therefore consider that:

    - if the document contains government information that is Cabinet information and government information that is not, the document **cannot be redacted** so that access is given to the information that is not Cabinet information: *Lock the Gate Alliance* at [27]);
    - the GIPA Act does not permit the Tribunal, when conducting a review, to make a decision that an applicant be given **access to some information** in a document meeting the description of a paragraph in clause 2(1), and that the applicant be denied access to the remainder of the information: *Bellamy v Transport for NSW* [2019] NSWCATAD 54, citing *Robinson* at [81],

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[6] GIPA Act, Schedule 1, clause 2(5).

[7] The Tribunal considered this in *Lock the Gate Alliance v Department of Planning and Environment & Department of Premier and Cabinet* [2019] NSWCATAD 6 at [27].

14. In *D'Adam v New South Wales Treasury and Premier of New South Wales* [2015] NSWCATAP 61, the Appeal Panel was asked to consider whether documents in the form of "Roadmaps", or the information contained within them, was submitted to Cabinet (at [20]). Although the Appeal Panel was considering whether the dominant purpose test in clause 2(1)(b) had been met, at [33] it extracted the findings by the Tribunal which provide some useful comments about the GIPA Act's focus on 'information':

    "… The changed wording of clause 2(1) of Schedule 2 cannot be treated as a mere stylistic variation. It is repeated several times in section 3, the object section of the Act[8] …"

    "… It is not essential to identify whether a particular document is the source of information contained in documents prepared for Cabinet. The question is whether information is contained in a document prepared for submission to Cabinet, not whether there is a relationship of source and end-product between the two documents[9]."

15. When considering whether an access request seeks Cabinet information, agencies should think of general conditions for the operation of the Cabinet CPOPIAD:

    1. There is information
    2. The information is contained in a document
    3. That information is contained in any of the documents described in clause 2(1) of Schedule 1.

Claims of Cabinet information

16. A claim of Cabinet information is a two stage process whereby agencies can ask the following questions:

    (a) Does the information fall within any of the descriptions of Cabinet information in clauses 2(1)(a) to 2(1)(f) of Schedule 1?

    If the answer is yes, then the next question is:

    (b) Is the information captured by clauses 2(2), 2(3) or 2(4) of Schedule 1?
    If the answer is no, then a claim of Cabinet information may be made.

17. Clauses 2(1)(a) to (f) of Schedule 1 of the GIPA Act describe six types of documents which contain Cabinet information that is subject to the CPOPIAD. These are:

    (a) a document that contains an official record of Cabinet,
    (b) a document prepared for the dominant purpose of its being submitted to Cabinet for Cabinet's consideration (whether or not the document is actually submitted to Cabinet),
    (c) a document prepared for the purpose of its being submitted to Cabinet for Cabinet's approval for the document to be used for the dominant purpose for which it was prepared (whether or not the document is actually submitted to Cabinet and whether or not the approval is actually given),

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[8] *D'Adam v New South Wales Treasury* [2014] NSWCATAD 68 at [55].

[9] *D'Adam v New South Wales Treasury* [2014] NSWCATAD 68 at [57].

(d) a document prepared after Cabinet's deliberation or decision on a matter that would reveal or tend to reveal information concerning any of those deliberations or decisions,

(e) a document prepared before or after Cabinet's deliberation or decision on a matter that reveals or tends to reveal the position that a particular Minister has taken, is taking, will take, is considering taking, or has been recommended to take, on the matter in Cabinet,

(f) a document that is a preliminary draft of, or a copy of or part of, or contains an extract from, a document referred to in paragraphs (a)–(e).

18. Information may fall within one or more of the descriptions, for example, there may be preliminary and final versions of documents prepared for the dominant purpose of their submission to Cabinet; or may identify the position a Minister may take (clause 2(1)(f) of Schedule 1 to the GIPA Act).

19. When dealing with an access request for information that falls within more than one description of documents in clause 2(1), the agency should identify each relevant subclause that it claims will apply to the information requested.

Official record of Cabinet (clause 2(1)(a))

20. A document that contains an **official record** of Cabinet is not defined in the GIPA Act.

21. The meaning of an official record of Cabinet has been subject to consideration in the Commonwealth context in the case of *Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors* (2003)78 ALD 645 which considered the equivalent of clause 2(1)(a) within the Commonwealth *Freedom of Information Act 1982.* Forgie DP at [74] considered that an official record of Cabinet must have the following three qualities:

    - It must record certain matters, in the sense of relate or tell or set down those certain matters;
    - It must do so in a form that is meant to preserve that relating, telling or setting down for an appreciable time. This can be a paper document or may be maintained on a computer or in some other medium that preserves it; and
    - The certain matters that are related told or set down must relate to Cabinet and its functions and not to matters extraneous to those functions.

22. In the NSW context, Cabinet minutes and official records of Cabinet deliberations were found to fall within clause 2(1)(a) of Schedule 1 to the GIPA Act in *Cooper v NSW Ministry of Health* [2018] NSWCATAD 37 at [30].

23. In summary, if an agency can show that a document falls within the above description, it will meet the first stage in establishing that the agency has reasonable grounds for the claim of Cabinet information. An agency will then need to consider whether the information is captured by either clause 2(2), 2(3), or 2(4) of Schedule 1.

The dominant purpose of submission to Cabinet (clause 2(1)(b))

24. Under the conclusive presumption in clause 2(1)(b), the document must be prepared for the **dominant purpose** of its being submitted to Cabinet.

25. Clause 2(1)(b) was considered by the Appeal Panel in *D'Adam v New South Wales Treasury and the Premier of New South Wales* [2015] NSWCATAP 61. In this case, the Respondents argued that the focus on information in the GIPA regime meant the conclusive presumption must focus on the *information* being prepared for the dominant purpose of submission to Cabinet. The Tribunal (at [62]) considered that:

    "… this change [in the regime] when properly understood, was intended to focus on the broad range of information that may be available, such as electronic or digital data, not just documents. In our view, the clear meaning of cl 2(1)(b) is that the information is contained in a document prepared for the purpose of ***the document*** *being submitted to Cabinet, not* ***the information*** *being submitted to Cabinet [emphasis added]. To interpret cl 2(1)(b) otherwise would be to strain the ordinary meaning of the phrase".*

26. In the matter of *McKay v Transport for NSW* [2017] NSWCATAD 212 at [34] to [35], the Tribunal referred to three conditions for the operation of clause 2(1)(b) which were identified in *D'Adam v New South Wales Treasury [2014] NSWCATAD 68:*

    - There is "information";
    - The information is "contained in a document"; and
    - That document must have been prepared for the dominant purpose of being submitted to Cabinet for Cabinet's consideration.[10]

27. Clause 2(1)(b) of Schedule 1 stipulates that a document prepared for the dominant purpose of its being submitted to Cabinet will be captured by this clause whether or not the document is actually submitted to Cabinet.

28. In *D'Adam v New South Wales Treasury* [2014] NSWCATAD 68 at [51] the Tribunal observed:

    "[A]…condition for the operation of cl 2(1)(b) is that the relevant documents, in this instance the Roadmaps, and by extension the two sets of quarterly reports, are prepared for the dominant purpose of being submitted to Cabinet for Cabinet's consideration. All parties in this case accept that the words "dominant purpose" have the same meaning as in ss 118 and 119 of the Evidence Act 1995. The purpose in question must be "causative in the sense that, but for its presence" the information would not have been prepared: Secretary to the Department of Treasury and Finance v Dalla Vella [2007] VSCA 11, [13], [24]."

29. Although the purpose test described above may indicate that a purpose is dominant, the Tribunal stated that it is important not to substitute this test for the words of the statute (that is, the GIPA Act); and there may be instances where there are two purposes which are causative: *Mookhey v Infrastructure NSW* [2017] NSWCATAD 345 at [38]. The Tribunal in *Mookhey* also observed that the 'but for' test does not always indicate which of two purposes is dominant.

30. In *Mookhey*, the Tribunal considered several business cases that were prepared in the context of compliance requirements with Guidelines for preparing business cases for resource allocation decisions. The Tribunal accepted that one of the purposes for which the business case documents was prepared was for submission to Cabinet, but found this was not the dominant purpose.

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[10] *D'Adam v New South Wales Treasury* [2014] NSWCATAD 68 at [49] – [51].

31. When considering the purpose for which a document was prepared, the relevant purpose is that which applied at the time that the document was brought into existence.
32. If it is not contemplated at the time that a document is created that it will be submitted to Cabinet, then it cannot be said that the document was prepared for the 'dominant purpose of submission to Cabinet', even if it is subsequently submitted to Cabinet: see discussion in *Fisse v Department of Treasury* [2008] FCAFC 188 at [4] per Stone J, considering a provision of the *Freedom of Information Act 1982* (Cth) in similar terms.
33. In *McKay,* the Tribunal found reasonable grounds to support a claim that documents created from the agency's engagement with consultants, were prepared for the dominant purpose of submission to Cabinet for its consideration. The Tribunal considered that the truncated timing of the consultation with the service providers supported the evidence that the purpose of their engagement was to provide additional information to Cabinet, and the emails produced under summons provided further support of this by references to timeframes dictated by Cabinet, preparation of Cabinet Minutes and Cabinet Submissions; and a request to include 'Cabinet in Confidence' on documents (at [40]-[43]).
34. The Tribunal's decision in *Searle v Transport for NSW* [2017] NSWCATAD 256 provides a useful interpretation of when a document is created for the purpose of its being submitted to Cabinet. The Tribunal observed that in 'considering whether the respondent has reasonable grounds for its claim that the documents were prepared for the dominant purpose of their being submitted to Cabinet, it is helpful to consider whose purpose is relevant' (at [46]).
35. In *Searle*, the respondent agency presented evidence in the form of expert reports to establish reasonable grounds for a claim that the information was Cabinet information under clause 2(1)(b) of Schedule 1. The Tribunal at [47] – [48] observed:

    "*The Documents were prepared by a team of experts, engaged by Infrastructure NSW. Each of those experts presumably had a purpose in preparing the reports, but that is not necessarily the purpose for which they were created. If, as it would appear from the evidence, the experts had either an exclusive or the primary role in the preparation of the Documents, evidence of each expert's subjective purpose in doing so would not necessarily be helpful in establishing the dominant purpose for which the Documents were prepared. This is because the purpose of preparation is best ascertained by reference to the corporate or governmental purpose underlying the commissioning of the reports.*

    Some of the best evidence of the purpose for which the reports were prepared is documentary evidence, because this best reflects "corporate" or group purposes."

36. In summary, if an agency can show that a document falls within the above description, it will meet the first stage in establishing that the agency has reasonable grounds for the claim of Cabinet information. An agency will then need to consider whether the information is captured by clause 2(2), 2(3), or 2(4) of Schedule 1.

Submission to Cabinet for approval for the document to be used for the dominant purpose for which it was prepared (clause 2(1)(c))

37. Cabinet can be required to deliberate upon, or consider or approve policies, models, costings or other significant documents. Clause 2(1)(c) of Schedule 1 appears to protect a document submitted to Cabinet for its approval, or an earlier draft or extract from such a document (as set out in clause 2(f)).

38. A document will be captured by clause 2(1)(c) if the document was prepared for submission to Cabinet for Cabinet's approval for the document to be used for the dominant purpose for which it was prepared. The clause also applies whether or not the document is actually submitted to Cabinet, and whether or not approval is actually given.

39. In *Robinson v Transport for NSW; Robinson v Roads and Maritime Services* [2017] NSWCATAD 353 at [93], the Tribunal found that although there was "no evidence that a Discussion Paper was submitted to Cabinet, it is the purpose of preparing the document which is important for clause 2(1)(c), not whether the document ultimately went to Cabinet".

40. Some examples of the Tribunal's consideration of agency claims to Cabinet information under clause 2(1)(c) are provided below:

    - *Robinson* at [94] considered whether draft documents of a 'Coastal Boundaries Reform Discussion Paper' prepared by an Interagency Working Group were captured by clause 2(1)(c) (and clause 2(1)(f), being drafts of documents):
        - The Tribunal accepted as evidence, a Working Group representative's understanding as part of the "known facts, circumstances and considerations which may bear rationally upon the issue" (*McKinnon* at 430 [11]) in determining the question of whether the agency had 'reasonable grounds" for its claim (at [94]).
    - *Snelling v Commissioner of Police (NSW)* [2017] NSWCATAD 147 concerned reports on a review of the NSW firearms registry:
        - The Tribunal accepted the evidence of the agency's witness that she was directly responsible for all firearms matters, including the development of Cabinet submissions;
        - The Tribunal accepted her evidence and found that the reports constituted information, contained in a document, which was prepared for the dominant purpose of generating the reports to submit them to Cabinet for its consideration (at [32] – [35]).
    - *Primrose v NSW Department of Premier and Cabinet* [2017] NSWCATAD 366 concerned a consultant's report on local government mergers and considered whether a Business Case document submitted to an ERC meeting would be captured by clause 2(1)(c):
        - The Tribunal accepted the agency's evidence (by affidavit of a senior executive of the agency who had reviewed and inspected the Business Case document) that the substance of the Business Case document was consistent with it having been prepared for the dominant purpose of submission to Cabinet for consideration (at [50]);
        - The Tribunal also commented on the application of Clause 2(5) of Schedule 1 of the GIPA Act to include a committee and a subcommittee of a committee of Cabinet, and was satisfied that the Business Case document was Cabinet information because it was prepared for the dominant purpose of it being submitted to the ERC for approval (at [57]).

41. In summary, if an agency can show that a document falls within the above description, it will meet the first stage in establishing that the agency has reasonable grounds for the claim of Cabinet information. An agency will then need to consider whether the information is captured by clause 2(2), 2(3), or 2(4) of Schedule 1.

Prepared after Cabinet deliberation or decision that would reveal or tend to reveal information concerning those deliberations or decisions (clause 2(1)(d))

42. Clause 2(1)(d) is intended to uphold the principle of collective ministerial responsibility, to preserve the confidentiality of the deliberations and decisions of Cabinet. It applies to documents prepared **after** these deliberations.

43. This clause has broad scope to give effect to the importance of preserving collective Cabinet responsibility. It is not necessary for a document to be an official record of Cabinet deliberations or decisions for clause 2(1)(d) to apply.

44. The meaning of 'deliberation' or 'decision' in the equivalent Commonwealth provision was given its ordinary meaning: *Re Toomer* at [87]. In *Lock the Gate Alliance*, the Tribunal confirmed that it has adopted the analysis in *Re Toomer* in the context of clause 2(1)(d) and at [30] noted:

    "… clause 2(1)(d) is expansive, as it refers not only to documents which "would reveal" information concerning Cabinet deliberations or decisions, but also to those that would "tend to reveal" such information (see, for example, Mookhey v Infrastructure NSW [2017] NSWCATAD 345 and Cooper v NSW Ministry of Health [2018] NSWCATAD 37)".

45. The Tribunal went on to say at [43] that:*"…Re Toomer* is not authority for the proposition that Sch 1 cl 2(1)(d) requires the document in question to contain a summary or discussion of considerations or resolutions of Cabinet …The language in clause 2(1)(d) is very broad and applies to "a document prepared after Cabinet's deliberation or decision on a matter that would reveal or tend to reveal *information concerning* any of those deliberations or decisions". There is no requirement that the document reveal, or tend to reveal, Cabinet's deliberations or decisions themselves."

46. In *Lock the Gate Alliance*, the Tribunal considered the claim against clause 2(1)(d) with respect to documents that were mining leases and statutory approvals which might be public documents. However, the Tribunal found (at [34]) that:

    "… Cabinet routinely deliberates upon, and makes decisions about, documents, matters and things that relate to statutory processes and which might be described as "public" in some sense. That does not of itself, however, render Cabinet's decisions or deliberations public".

47. In *Cooper v NSW Ministry of Health* [2018] NSWCATAD 37 at [31], the Tribunal determined that the words "tend to" and "any information" indicate that documents which are closely connected with, but separate from the Cabinet processes, may be included in this category. However, the Tribunal noted that clause 2(1)(d) is limited temporally to documents prepared *after* Cabinet's deliberation or decision.[11]

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[11] *Cooper v Ministry of Health* [2018] NSWCATAD 37 at [31].

48. In summary, if an agency can show that a document falls within the above description, it will meet the first stage in establishing that the agency has reasonable grounds for the claim of Cabinet information. An agency will then need to consider whether the information is captured by either clause 2(2), 2(3), or 2(4) of Schedule 1.

Reveal the position that a particular Minister is taking, will take or has taken (clause 2(1)(e))

49. Like clause 2(1)(d), this provision is intended to preserve the confidentiality of the deliberations of Cabinet. However, clause 2(1)(e) applies to documents prepared **before as well as after** these deliberations or decisions on a matter.

50. Clause 2(1)(e) provides a broader scope temporally than clause 2(1)(d) as it covers documents created both before and after Cabinet's deliberations.[12] However, clause 2(1)(e) is narrower in scope in the subject matter, in the sense that it requires the document to reveal 'the position' that a Minister has taken, is taking, or will take, or is considering or has been recommended to take on a matter in Cabinet: *Cooper v NSW Ministry of Health* [2018] NSWCATAD 37 at [32].

51. In *Lock the Gate Alliance* at [60]), the Tribunal stated that 'a defined position' could be read as referring to a single position, as was the view of the Tribunal in *Cooper v Ministry of Health* [2018] NSWCATAD 37 at [32]. However, the Tribunal in *Lock the Gate Alliance* rejected this view because:

    "… to do so would be to ignore the practical reality of the Cabinet process. Ministers routinely consider more than one position and their departments often recommend several options for consideration. On occasions, Cabinet itself requires Ministers to bring forward a range of options for its consideration" (at [60]).

    "… If the GIPA Act only protected from disclosure one position on a particular matter, this would have a chilling effect on Cabinet deliberations and negatively impact decision-making and policy development within Cabinet" (at [61]).

52. The Appeal Panel in *Transport for NSW & Ors v Robinson* [2018] NSWCATAP 123 at [24] clarified that the provision for Cabinet information provided for by clause 2(1)(e) does not require that Cabinet had actually deliberated or made a decision on the matters referred to in the document[13]. The fact that the Minister considered taking the position, or had been recommended to take it is sufficient.[14]

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[12] Ibid at [32].

[13] Ibid at [24].

[14] *Lock the Gate Alliance* at [53].

53. The Appeal Panel identified that a plain reading of the provision makes clear that three steps are involved:[15]

    - There must be a document prepared either before or after Cabinet's deliberation or decision on a matter;
    - It must reveal or tend to reveal a defined position; and
    - The defined position is one that a particular Minister has taken, is taking or will take, is considering taking or has been recommended to take on the matter in Cabinet.

54. The Appeal Panel[16] considered that it is clear that a particular Minister's view, whether actually expressed, or planned to be expressed, or recommended on their behalf to be expressed, are all protected by clause 2(1)(e).

55. In *Bennison v NSW Department of Premier and Cabinet* [2016] NSWCATAD 101, the agency relied on clause 2(1)(e) in its decision to not release documents concerning potential local government reforms known as 'Options Analysis'. The Tribunal considered affidavit and oral evidence by the agency's General Counsel but considered it was not apparent from this evidence whether any or all of the Options Analysis documents had been provided to the Minister (at [59]). The witness was recalled to give further evidence and indicated that since his earlier evidence he had spoken to an advisor to the Minister who informed him that the Options Analysis documents had been provided to the Minister, who had looked at the Options Analysis documents, discussed them with the Premier, and decided what would go to Cabinet. Following this further evidence, which was consistent with the witnesses' earlier evidence, the Tribunal accepted that:

    "… the Minister probably considered the Options Analysis documents in the context of 'the position that a particular Minister has taken, is taking, will take, is considering taking, or has been recommended to take, on the matter in Cabinet'.

    I accept that it is probable that the options had been provided to KPMG and that KPMG produced the Options Analysis documents in response. The Minister then considered the Options Analysis documents. In those circumstances the information would fall within the scope of Clause 2(1)(e). In my view, there are reasonable grounds for the Respondent's claim that [the Options Analysis documents] contain information that the Minister was considering taking on the matter in Cabinet." (at [64]-[65]).

56. In summary, if an agency can show that a document falls within the above description, it will meet the first stage in establishing that the agency has reasonable grounds for the claim of Cabinet information. An agency will then need to consider whether the information is captured by either clause 2(2), 2(3), or 2(4) of Schedule 1.

Preliminary drafts or copies of documents (clause 2(1)(f))

57. Clause 2(1)(f) applies to documents that are preliminary drafts, copies or part of documents; or contain extracts from documents that are captured by clauses 2(1)(a) to (e).

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[15] *Transport for NSW & Ors v Robinson* [2018] NSWCATAP 123 at [19].

[16] *Transport for NSW & Ors v Robinson* [2018] NSWCATAP 123 at [23].

58. The form and content of preliminary drafts may vary considerably from the final document. However, where an intention or purpose is necessary to establish that it is Cabinet information, such as for example, submitted for the dominant purpose of submitting to Cabinet,[17] then the intention or purpose should relate to the time that the preliminary draft was created.

59. The Tribunal in *Robinson v Transport for NSW; Robinson v Roads and Maritime Services* [2017] NSWCATAD 353 found that there were reasonable grounds for a claim that drafts of a discussion paper were captured by clause 2(1)(f) as they were drafts of a document to which clause 2(1)(c) would apply. The Tribunal determined that there is a conclusive presumption of an overriding public interest against disclosure of the information contained in those documents.[18]

What is not Cabinet information?

60. Clauses 2(2), 2(3) and 2(4) of Schedule 1 identify when information is not considered to be Cabinet information captured by clause 2(1).

60.1 Information contained in a document that has been publicly released (clause 2(2))

Under Under clause 2(2), information contained in a document is not Cabinet information if:

(a) public disclosure of the document has been approved by the Premier or Cabinet, or

(b) the document containing the public information was created more than ten years ago.

In *Lock the Gate Alliance* (at [37]), the Tribunal explains:

"Clause 2(2)(a) specifically refers to public disclosure of 'the document' which contains the information having been approved by the Premier or Cabinet. On a plain reading of the text, it is the document itself which must have been approved for public release, not information contained in that document".

By example, agreeing to announce a Cabinet decision by way of a media release would not have the effect that a formal record of that Cabinet decision would not be Cabinet information by application of clause 2(1)(a).

For clause 2(2)(a) to apply, the agency will have to consider whether the document itself was approved by Cabinet or the Premier for public release.

In *Lock the Gate Alliance* (at [37] – [38]), the Tribunal found no evidence to support a finding that a document entitled 'Ministerial Briefing' was approved for public release, even though it was provided with evidence which indicated that information about the agency's dealings with the company were released to the public through statements made by the Premier and Ministers (at [35]). The Tribunal noted the evidence given by the Department that the Ministerial Brief referenced and

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[17] GIPA Act, Schedule 1, clause 2(1)(b).

[18] *Robinson v Transport for NSW; Robinson v Roads and Maritime Services* [2017] NSWCATAD 353 at [95].

summarised a number of Cabinet decisions, and the Department could identify which decisions or parts thereof had not been made public (at [38]).

60.2 Information in documents attached to Cabinet information is not Cabinet information merely because it is attached to Cabinet information (clause 2(3))[19]

A document will not be classified 'Cabinet information' just because it is an attachment to a document which is captured by clause 2(1). An agency must consider each attachment independently, and ascertain whether it is a document falling within the categories of documents that would be captured by the meaning of Cabinet information in clause 2(1) of Schedule 1 of the GIPA Act.

In *Robinson* (at [84] – [87]), the Tribunal considered a document that was prepared for the sole purpose of it being attached to the Cabinet submission concerning a Discussion Paper for Cabinet consideration. In considering the document that was an attachment, the Tribunal stated (at [86]):

"I do not agree with Mr Robinson that the Tribunal may determine the purpose of preparing a document simply by examining it; the GIPA Act clearly contemplates that the Tribunal may take into account affidavit evidence to determine whether there are reasonable grounds for a claim that cl 2(1) applies (GIPA Act, s 106(2))".

60.3 Information that consists solely of factual material (clause 2(4))

Information is not Cabinet information to the extent that it consists solely of factual material, unless the information is contained in a document that would – *either entirely or in part* [Emphasis added]:

(a) reveal or tend to reveal information concerning any Cabinet decision or determination;[20] or

(b) reveal or tend to reveal the position a particular Minister has taken, is taking, or will take on a matter in Cabinet.[21]

In *Re Toomer* (at [105]-[106]), Forgie DP stated that factual material may be "material which is known to have happened" or "material which is concerned with that which is said to be true or is supposed to have happened".

The Tribunal has considered the type of information that may be considered 'solely factual material'. For example, the Tribunal in *D'Adam* [2014] was required to consider information in the form of Roadmaps and its attachments which largely consisted of numerical targets, projections and estimates. The Tribunal stated (at [71]):

[19] GIPA Act, Schedule 1, clause 2(3).

[20] GIPA Act, Schedule 1, clause 2(4)(a).

[21] GIPA Act, Schedule 1, clause 2(4)(b).

"While the setting of targets and the making of projections and estimates is in one sense a fact, the information itself consists also of opinions or recommendations about the desirability, likelihood and attainability of certain outcomes. It is not solely factual material. Nor does it lose that character because of the largely in numerical form. The same would be true of the budget documents themselves".

Prior to the 2018 amendments to the GIPA Act, clause 2(4) did not qualify whether its provisions applied to a document which either in whole, or in part, revealed the Cabinet decision or Ministerial position.

Prior to the 2018 amendments, the Tribunal identified the statutory test as whether the information consists solely of factual material, not whether it contains factual material as well as other material of a non-factual nature (*D'Adam* [2014] at [71]). It was not sufficient that the information contained in the record was only partly factual material: *Bennison v NSW Department of Premier and Cabinet* [2016] NSWCATAD 101 at [42].

Before the amendments in 2018, the Tribunal had commented on the lack of clarity of clause 2(4). In *Robinson,* the Tribunal was required to consider whether documents could be released in redacted form where only some of the information contained in the document was Cabinet information. The Tribunal commented (at [80]-[81]) that:

"… to the extent that [information] consists solely of factual material, it is not Cabinet information, unless specified circumstances apply (GIPA Act, Sch 1, cl 2(4)). It is unclear whether cl 2(4) is intended to allow for the provision of access to solely factual material in documents meeting a description in cl 2(1), or whether cl 2(4) applies where an entire document (for example one submitted to Cabinet) consists solely of factual material.

For these reasons, subject to the possible qualification referred to above, I do not consider that the GIPA Act permits the Tribunal, when conducting a review, to make a decision that an applicant be given access to some of the information in a document meeting the description of a paragraph in cl 2(1), and that the applicant be denied access to the remainder of the information. Rather, once the information is found to be contained in a document meeting the description of a paragraph in cl 2(1), the effect of cl 2(1) is that there is an overriding public interest against disclosure of that information."

The GIPA Act now clarifies that under clause 2(4), a Cabinet document containing a combination of factual and non-factual information falls within the definition of 'Cabinet information'.

If an agency is satisfied that a document contains advice or recommendations to Cabinet, and was prepared for Cabinet (or otherwise falls within clauses 2(1)(a)-(f) of Schedule 1), it will fall within the definition of 'Cabinet information'. In those circumstances, agencies are required to characterise each document as consisting solely of factual material (or not).

60.4 Checklist for factual information attached to Cabinet information

	Y	N
Is the information contained in a document listed in clause 2(1) of Schedule 1? Documents described in clause 2(1) are: (a) A document that contains an official record of Cabinet (b) A document prepared for the dominant purpose of its being submitted to Cabinet for Cabinet's consideration (whether or not the document is actually submitted to Cabinet) (c) A document prepared for the purpose of its being submitted to Cabinet for Cabinet's approval for the document to be used for the dominant purpose for which it was prepared (whether or not the document is actually submitted to Cabinet and whether or not approval is actually given) (d) A document prepared after Cabinet's deliberation or decision on a matter that would reveal or tend to reveal information concerning any of those deliberations or decisions (e) A document prepared before or after Cabinet's deliberation or decision on a matter that reveals or tends to reveal the position that a particular Minister has taken, is taking, will take, is considering taking, or has been recommended to take, on the matter in Cabinet (f) A document that is a preliminary draft of, or a copy of or a part of, or contains an extract from, a document referred to in paragraphs (a) – (e).		

If **no** then the information is not Cabinet information (pursuant to clause 2(3) of Schedule 1) and the conclusive presumption against disclosure does not apply.

If **yes**, then the agency must ask the following questions to determine whether Clause 2(4) applies to the information:

	Y	N
Does the information consist solely of factual material?		

If **yes**, ask the following questions:

	Y	N
Is the information contained in a document that either entirely, or in part, reveals or tends to reveal information concerning any Cabinet decision or determination?		
Is the information contained in a document that either entirely, or in part, reveals or tends to reveal the position that a particular Minister has taken, is taking, or will take on a matter in Cabinet?		

If the answer to both of these questions is **no**, then Clause 2(4) of Schedule 1 will apply to determine that the information is not Cabinet information.

What does the Information Commissioner expect to see in a notice of decision?

61. Where an agency decides that some or all of the information requested is Cabinet information that is captured by the conclusive presumption against disclosure under clause 2 of Schedule 1, the agency needs to clearly identify:

    61.1 that there is information

    61.2 that the information is contained in a document

    61.3 that the document can be categorised under one or more of the descriptions in clause 2(1)(a) to (f) of Schedule 1 to the GIPA Act

    61.4 that it has considered the provisions under clauses 2(2), 2(3) and 2(4) and determined whether or not any of these applies.

Approach of the Tribunal to claims of Cabinet information

62. Section 106 of the GIPA Act prescribes the process to be undertaken by the Tribunal when it is required to review a claim of Cabinet information. Section 106 is at Appendix 1.

63. Section 106 limits the Tribunal's jurisdiction in reviewing claims of Cabinet information under clause 2 of Schedule 1 to determining whether it is satisfied that there are 'reasonable grounds' for the claim. The Tribunal is not authorised to make a decision as to the correct and preferable decision on the matter.[22]

64. In *D'Adam v New South Wales Treasury* [2014] NSWCATAD 68 at [45] the Tribunal considered its task under section 106 was more analogous to a court undertaking judicial review, and it was not to investigate the claim de novo or to engage in its normal merits review.

65. Section 106 sets out the following process for the Tribunal when making a decision about Cabinet information:

    65.1 The Tribunal is firstly required to consider if there are reasonable grounds for the agency's claim that the information is Cabinet information, and this may be conducted by considering the evidence by way of affidavit or otherwise.

    65.2 At this initial stage, an agency need not provide the information over which the claim of Cabinet information has been made.

    65.3 If the Tribunal is not satisfied that there are reasonable grounds for the claim on the basis of the agency's evidence, the Tribunal may require the information to be produced to it in evidence at the next stage of the hearing.[23]

    65.4 If the Tribunal remains dissatisfied that there are reasonable grounds for the claim of Cabinet information, the Tribunal will then proceed to make a decision as to the correct and preferable decision on the matter.[24]

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[22] GIPA Act, section 106(1).

[23] GIPA Act, section 106(2).

65.5 Prior to rejecting the claim of Cabinet information, the Tribunal must give the Premier a reasonable opportunity to appear and be heard.[25]

66. The meaning of 'reasonable grounds' has been considered across information access regimes. In *Robinson v Transport for NSW; Roads and Maritime Services* [2017] NSW at [69] the Tribunal referred to Commonwealth case authority in interpreting the meaning of 'reasonable grounds' in the context of a claim under the Commonwealth FOI Act:

> *"The words 'reasonable ground' are to be given their ordinary meaning and paraphrases and adaptations of the phrase (such as 'not irrational, absurd or ridiculous') should be avoided (McKinnon v Secretary, Department of Treasury (2006) 228 CLR 423 (McKinnon), Hayne J at 445 [60], Callinan and Heydon JJ at 468 [131]). As Gleeson CJ and Kirby J observed in McKinnon, a determination of whether there were reasonable grounds for a claim "involves an evaluation of the known facts, circumstances and considerations which may bear rationally upon the issue" (McKinnon, at 430 [11]). Their Honours held (at 431 [13]) that, the reference in the provision in the Freedom of Information Act 1982 (Cth) to "reasonable grounds for the claim that the disclosure of the document would be contrary to the public interest":*
>
> > *"raises the question whether, having regard to all the relevant considerations available to the [Administrative Appeals] Tribunal, there are matters that are sufficient to induce in a reasonable person a state of satisfaction that disclosure of a document would be contrary to the public interest. The expression "reasonable grounds for the claim" means reasonable grounds for contending that the Minister should be so satisfied. That is the nature of the claim."*

67. In *Lock the Gate Alliance*, the Tribunal referred to the interpretation of 'reasonable grounds' given by the Commonwealth case of *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423, and stated (at [26]):

> *"The words "reasonable grounds" are to be given their ordinary meaning and it will usually not be helpful to paraphrase the term. A determination of whether there were reasonable grounds for a claim "involves an evaluation of the known facts, circumstances and considerations which may bear rationally upon the issue" (McKinnon, at 430)".*

68. In the context of a claim of Cabinet information under the GIPA Act, the Tribunal in *Robinson* noted that the statutory phrase, 'reasonable grounds' (within section 106(1)):

> *"… is not concerned with reasonable grounds for a belief, but rather with reasonable grounds for a claim (as in* McKinnon*). Nevertheless, reasonable grounds for a claim may entail facts and circumstances sufficient to induce in the mind of a reasonable person a positive inclination towards acceptance of the claim" at [71].*

69. In *Searle v Transport for NSW*, the agency relied on clause 2(1)(b) dominant purpose for its claim of Cabinet information, however, the Tribunal found that the agency did not establish, but for this purpose, the documents would not have been prepared (at [57]). The Tribunal found that the agency:

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[24] GIPA Act, section 106(3).

[25] GIPA Act, section 106(4).

> *"… has not discharged its onus of establishing that there are reasonable grounds for its claim that there is a conclusive presumption of an overriding public interest against disclosure of the information contained in the Documents on the basis that it is Cabinet information (GIPA Act, s 14(1), Sch 1, cl 2).*
>
> *It remains to consider the other public interest considerations against disclosure relied upon by the respondent"* (at [59]-[60]).

70. The respondent agency in *Searle* had not presented by way of affidavit or in oral evidence that the dominant purpose of preparation was their being submitted to Cabinet. Rather, the oral evidence was that the report (of which extracts would be attached to documents) were provided in case Cabinet wanted to see them, but that the full documents did not usually go to Cabinet (at [58]).

71. In *Searle* at [32], the Tribunal confirmed that it is not limited to consideration of the original reasons for the decision upon which the decision-maker relied:

> *"… It is clear from the terms of section 106(2) of the GIPA Act that the Tribunal is entitled to consider affidavit evidence (which would not have been before the decision maker) … There is nothing in section 106 to indicate that this evidence must be relevant only to the grounds upon which the decision-maker relied. I do not accept that section 106 discloses a legislative intention to limit an agency to its original reasons … So long as there were "reasonable grounds" for the claim at the time the decision-maker made his or her decision, the agency may raise these grounds in an administrative review, even if they were not relied upon by the decision-maker. So long as there were reasonable grounds for the claim at the time the decision-maker made his or her decision, the agency may raise these grounds on administrative review."*

72. The Tribunal explained the construction of section 106(1) and its power under section 106(3) at [62]:

> *"On its proper construction, the word "claim" in section 106(1) of the GIPA Act refers to the claim that the information is Cabinet or Executive Cabinet information. It does not extend to a claim that there is a different category of a public interest against disclosure of that information. Subsection 106(3) of the GIPA Act permits the Tribunal to make the "correct and preferable" decision on the matter, if it is not satisfied that there were reasonable grounds for the agency's claim that information is Cabinet or Executive Cabinet information. This authorises the Tribunal to consider any other claims made by the respondent and to determine them in the usual way."*

Summary

73. The importance of Cabinet confidentiality as a well-established convention of executive government has been discussed in various courts and jurisdictions as a matter of public interest.

74. In the NSW jurisdiction under the GIPA Act, the Tribunal has set out how the Act reconciles its key objective to promote access to information with considerations of protecting Cabinet confidentiality (see, particularly, *D'Adam v New South Wales Treasury* [2014] NSWCATAD 68 at [42]-[44]; *Snelling v Commissioner of Police, NSW Police* [2017] NSWCATAD 147 including in paragraphs [20] to [24]; and *McKay v Transport for NSW* [2017] NSWCATAD 212 including in paragraphs [31] to [35]).

75. The jurisdiction under the GIPA Act emphasises (and promotes) 'information' access. With respect to 'Cabinet information', the Act operates to consider the 'document' by determining whether information is *contained in* any of the documents to which the conclusive presumption that there is an overriding public interest against disclosure may apply.
76. The Tribunal decisions cited above, as well as the other Tribunal matters referred to throughout this Guideline, have examined how the Tribunal has applied the 'test' for whether information falls within the conclusive presumption for 'Cabinet information'.
77. Agencies should understand and approach this test as a two-stage process, by reference to all of the subclauses under clause 2 of Schedule 1. Firstly, agencies should consider whether the information falls within any of the descriptions of documents listed in clause 2(1)(a) to 2(1)(f) of Schedule 1. If an agency is satisfied on reasonable grounds that the information is contained in one (or more) of these types of documents, then the agency may be able to make a claim of Cabinet information.
78. This is subject to the second stage of the test for establishing Cabinet information, which requires the agency to determine whether the information is captured by any of the provisions set out under clauses 2(2), 2(3) or 2(4) of Schedule 1.
79. Both stages of the Cabinet information analysis require consideration of the document type, based on the nature and content of the document, as well as an assessment of the information in the document. This ensures that both stages of the test contemplated in Schedule 1 to the GIPA Act are met.
80. The Tribunal will decide an agency's claim to Cabinet information if it is satisfied that there were reasonable grounds at the time of making the claim. The onus is on the agency to establish that it had reasonable grounds for the claim. The Tribunal is subject to particular decision-making requirements under section 106 of the GIPA Act, which applies to decisions about Cabinet information (clause 2 of Schedule 1) as well as Executive Council information (clause 3 of Schedule 1).
81. Agencies should also note that the GIPA Act was amended in November 2018, with some particular amendments to clarify the application of clause 2(4) of Schedule 1. This was discussed at paragraph 60.3 of this Guideline.
82. The IPC acknowledges and thanks the Office of the Information Commissioner Queensland in the production of this resource, as well as the NSW Department of Premier and Cabinet.[26]

[26] Office of the Information Commissioner Queensland: https://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/decision-making/exempt-information-provisions/cabinet-information-created-on-or-after-1-july-2009

Appendix 1

Government Information (Public Access) Act 2009

14 Public interest considerations against disclosure

1. It is to be conclusively presumed that there is an overriding public interest against disclosure of any of the government information described in Schedule 1.

Schedule 1 Information for which there is conclusive presumption of overriding public interest against disclosure

2 Cabinet information

1. It is to be conclusively presumed that there is an overriding public interest against disclosure of information (referred to in this Act as Cabinet information) contained in any of the following documents:

   (a) a document that contains an official record of Cabinet,

   (b) a document prepared for the dominant purpose of its being submitted to Cabinet for Cabinet's consideration (whether or not the document is actually submitted to Cabinet),

   (c) a document prepared for the purpose of its being submitted to Cabinet for Cabinet's approval for the document to be used for the dominant purpose for which it was prepared (whether or not the document is actually submitted to Cabinet and whether or not the approval is actually given),

   (d) a document prepared after Cabinet's deliberation or decision on a matter that would reveal or tend to reveal information concerning any of those deliberations or decisions,

   (e) a document prepared before or after Cabinet's deliberation or decision on a matter that reveals or tends to reveal the position that a particular Minister has taken, is taking, will take, is considering taking, or has been recommended to take, on the matter in Cabinet,

   (f) a document that is a preliminary draft of, or a copy of or part of, or contains an extract from, a document referred to in paragraphs (a)–(e).

2. Information contained in a document is not Cabinet information if:

   (a) public disclosure of the document has been approved by the Premier or Cabinet, or

   (b) 10 years have passed since the end of the calendar year in which the document came into existence.

3. Information is not Cabinet information merely because it is contained in a document attached to a document referred to in subclause (1).

4. Information is not Cabinet information to the extent that it consists solely of factual material unless the information is contained in a document that, either entirely or in part, would:

(a) reveal or tend to reveal information concerning any Cabinet decision or determination, or

(b) reveal or tend to reveal the position that a particular Minister has taken is taking or will take on a matter in Cabinet.

5. In this clause, ***Cabinet*** includes a committee of Cabinet and a subcommittee of a committee of Cabinet.

106 Decisions about Cabinet and Executive Council information

1. On an NCAT administrative review of a decision by an agency that there is an overriding public interest against disclosure of information because the information is claimed to be Cabinet or Executive Council information (as described in Schedule 1), NCAT is limited to deciding whether there were reasonable grounds for the agency's claim and is not authorised to make a decision as to the correct and preferable decision on the matter.
2. If NCAT is not satisfied, by evidence on affidavit or otherwise, that there were reasonable grounds for the claim, it may require the information to be produced in evidence before it.
3. If NCAT is still not satisfied after considering the evidence produced that there were reasonable grounds for the claim, NCAT is to reject the claim when determining the review application and may then proceed to make a decision as to the correct and preferable decision on the matter.
4. NCAT is not to reject the claim unless it has given the Premier a reasonable opportunity to appear and be heard in relation to the matter.
5. The Premier is a party to any proceedings on an application under this section.

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