



## Interpreting the legislation – *Right to Information Act 2009*

### Cabinet and State budgetary information

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#### 1.0 Overview

The *Right to Information Act 2009*<sup>1</sup> (Qld) (**RTI Act**) gives people the right to access documents in the possession or control of Queensland government agencies<sup>2</sup>. This right of access is subject to some limitations. These limitations include information which is exempt from release under schedule 3 of the RTI Act.

#### 2.0 The Cabinet and State Budgetary exemption

Schedule 3, section 2 of the RTI Act provides that Cabinet matter and information created in the course of the State's budgetary processes is exempt from release.

There are exceptions to this, depending on when the information was created or last considered by Cabinet, and for reports of factual or statistical material.

##### 2.1 *When was the information created or considered?*

The date on which the Cabinet or State Budgetary information was brought into existence or considered by Cabinet will help determine whether it is exempt under this provision.

<sup>1</sup> And the *Information Privacy Act 2009*.

<sup>2</sup> References to an agency include a Minister.



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2.1.1 Is the information Cabinet matter that was created before 1 July 2009?

Schedule 3, section 2 does **not** apply to Cabinet matter created on or before 30 June 2009. Cabinet matter brought into existence before that date must be considered under schedule 3, section 1 of the RTI Act, which refers to section 36(1) of the now repealed *Freedom of Information Act 1992* (FOI Act).

This guideline does not apply; if required, decision makers should consult the FOI Act [Annotated Legislation](#)<sup>3</sup>.

2.1.2 Is the information Cabinet or State Budgetary information created between 1 July 2009 and 2 July 2019?

Cabinet and State Budgetary information created on or after 1 July 2009 is only exempt under schedule 3, section 2 for **10 years** from its relevant date.<sup>4</sup>

**Note**

The ten years is calculated beginning on the day after the relevant date, eg if it has a relevant date of 1 July 2009 it will cease to be exempt under this section on 2 July 2019.

The relevant date<sup>5</sup> is:

- for information considered by Cabinet—the date the information was *most recently* considered by Cabinet.
- for other information—the date information was brought into existence.

Therefore, if it has been **less** than ten years since the relevant date, schedule 3, section 2 will still apply to the information and decision makers should proceed to the next section of the guideline.

If it has been **ten or more** years since the information's relevant date, it is no longer exempt under schedule 3, section 2 and this guideline does not apply.

However, even if the information is no longer exempt under schedule 3, section 2, access to it cannot automatically be granted. Decision makers must still consider the other exempt information provisions and/or public interest factors<sup>6</sup> to decide if it is contrary to the public interest to release.

<sup>3</sup> Available on the OIC website at <https://www.oic.qld.gov.au/annotated-legislation/foi/part-3/division-2/36-cabinet-matter>

<sup>4</sup> As is noted in the [Cabinet Handbook](#) at 4.15.7

<sup>5</sup> Schedule 3, section 2(5) of the RTI Act.

<sup>6</sup> Including schedule 3, part 3, item 1: 'Disclosure of the information could reasonably be expected to prejudice the collective responsibility of Cabinet or the individual responsibility of members to Parliament.'



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An information sheet for Cabinet Legislation and Liaison Officers is attached to assist decision makers where applications capture Cabinet material that has aged out of the Cabinet exemption.

**Consultation**

If a decision maker decides to release formerly exempt Cabinet information, they will likely need to consult with the Cabinet Secretary as a concerned third party.<sup>7</sup> If required, this should be done through the Department of Premier and Cabinet's RTI unit.

**3.0 Cabinet and State Budgetary information matter which is less than ten years old**

If the relevant date of the information's creation was after 1 July 2009 but less than ten years ago, it must be considered under schedule 3, section 2, ie the Cabinet exemption.

**3.1 Information officially published by decision of Cabinet**

Information officially published by decision of Cabinet is not exempt under schedule 3, section 2<sup>8</sup> if the publication was authorised or enabled by a Cabinet decision.<sup>9</sup>

In some circumstances, decision makers may need to view or acquire details of the relevant Cabinet decision, as it may specify that only portions of a Cabinet document were published. The remainder of the document must be considered in the same way as any other Cabinet information.

The [Cabinet documents website](#)<sup>10</sup>, on which some Cabinet material is officially released, may assist decision makers.

**3.2 Cabinet Confidentiality**

Cabinet is the principal decision making body of the government and is responsible for the government's performance. Each Minister acts jointly with and on behalf of Cabinet colleagues in their capacity as Ministers. Cabinet decisions reflect collective conclusions and are binding on all Ministers as government policy. All Ministers are required to give their support in public debate to collective decisions of the Cabinet and the government.

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<sup>7</sup> 4.15.6 of the Cabinet Handbook expresses a clear desire to be consulted if Cabinet material is to be released under the RTI Act. This would generally be sufficient to amount to a reasonable expectation of concern under section 37 of the RTI Act.

<sup>8</sup> Schedule 3, section 2(2)(b) of the RTI Act.

<sup>9</sup> In [Hudson and Department of the Premier, Economic and Trade Development \(1993\) 1 QAR 123 \(Hudson\)](#) decided under the repealed *Freedom of Information Act 1992*.

<sup>10</sup> <http://rti.cabinet.qld.gov.au/cabinet.aspx>



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Cabinet confidentiality supports the notion of collective responsibility by allowing free and frank discussion within the Cabinet room in a way that will not prejudice that collective responsibility.

#### 4.0 Non-exhaustive list of documents which are exempt

Schedule 3, section 2(3) of the RTI Act states that the below is a non-exhaustive list of Cabinet documents which are exempt from release:<sup>11</sup>

- Cabinet submissions
- Cabinet briefing notes
- Cabinet agendas
- notes of discussion in Cabinet
- Cabinet minutes; and
- Cabinet decisions.

Drafts of these documents are also exempt, including any preliminary or working drafts.<sup>12</sup>

#### 5.0 Information brought into existence for the consideration of Cabinet

Information is exempt under schedule 3, section 2(1)(a) of the RTI Act if it was brought into existence for the consideration of Cabinet. This section requires a decision maker to determine *why* the information was created.<sup>13</sup>

The 'genealogy' of the document needs to be established to ascertain the purpose *at the time of creation*. A subsequent decision to give the document to Cabinet cannot go back in time and change the reason why the document was brought into existence, and it will not be sufficient to attest that it was *created* for that purpose.<sup>14</sup>

##### Example

A report brought into existence to assess the efficiency of a new departmental process will not be exempt simply because the officer preparing the report considered that it *might* at some future point be the subject of Cabinet considerations.

However, creating a document for the consideration of Cabinet does not need to be the *sole* purpose of creation for the section to apply. It will be sufficient if one of the reasons for bringing it into existence was for the consideration of Cabinet.<sup>15</sup>

<sup>11</sup> Schedule 3, section 2(3) of the RTI Act.

<sup>12</sup> Schedule 3, section 2(5) of the RTI Act.

<sup>13</sup> *Office of the Leader of the Opposition and Treasury Department* (Unreported, Queensland Information Commissioner, 7 July 2010) at paragraph 31.

<sup>14</sup> *Hudson* at paragraph 26.

<sup>15</sup> *Office of the Leader of the Opposition and Treasury Department* (Unreported, Queensland Information Commissioner, 7 July 2010) at paragraph 45.



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Whether the information was actually considered by Cabinet is irrelevant provided it was brought into existence for Cabinet's consideration.<sup>16</sup>

## 6.0 Information that would reveal considerations of Cabinet

### 6.1 *Would reveal any consideration of Cabinet*

Information will be exempt under schedule 3, section 2(1)(b) if it would reveal any consideration of Cabinet. For this section, it doesn't matter *why* the information was created; what matters is what would be revealed by disclosing it.

The definition of 'consideration'<sup>17</sup> is broad and includes, but is not limited to:

- discussion
- deliberation
- noting (with or without discussion); and
- decision.

When deciding whether or not information would reveal any consideration of Cabinet, it is necessary to consider the contents of the information in question and the effect of its disclosure. If the information would reveal any Cabinet consideration to any person viewing it, the information will be exempt.<sup>18</sup>

### 6.2 *Would otherwise prejudice the confidentiality of Cabinet considerations or operations*

Schedule 3, section 2(1)(b) of the RTI Act also provides that information which—

- was not brought into existence for the consideration of Cabinet, and
- would not reveal any consideration of Cabinet if disclosed

—will still be exempt from release if it would prejudice the confidentiality of Cabinet considerations or operations.

It will be necessary to consider the contents of the information in question and the effect of its disclosure. To satisfy this section, the disclosure would need to have a detrimental effect on Cabinet confidentiality so that the considerations or operations would no longer be confidential.

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<sup>16</sup> Hudson at paragraph 26.

<sup>17</sup> In schedule 3, section 2(5)(b) of the RTI Act.

<sup>18</sup> *Quandamooka Yoolooburrabee Aboriginal Corporation and Department of Natural Resources and Mines; Sibelco Australia Ltd (Third Party)* [2014] QICmr [47] (19 November 2014) (*Quandamooka*) at paragraphs 58-60.



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**Example**

In *Ringland and Department of Housing and Public Works*<sup>19</sup> (Ringland), the Commissioner considered community replies to a discussion paper. Community replies which were used in preparation of the relevant Cabinet submission were found to Cabinet exempt as they would:

- reveal a consideration of Cabinet, by revealing information that was considered by Cabinet; and/or
- allow reliable inferences to be drawn about Cabinet considerations, thereby prejudicing the confidentiality of Cabinet considerations or operations<sup>20</sup>

The community replies not used in the Cabinet submission were not Cabinet exempt—however, they were contrary to the public interest to release.<sup>21</sup>

**7.0 Information brought into existence in the course of the State's budgetary process**

**7.1 The State's budgetary process**

The Queensland Government produces a State Budget annually.<sup>22</sup> The process generally commences with an update of existing revenue and expenditure forward estimates. Compiled on a rolling five year basis, these estimates provide an initial fiscal context from which the Government may consider and prioritise proposed policy initiatives as part of its overall Budget strategy. On finalising these policy deliberations, Treasury liaises with agencies to compile the annual Budget documents.

The specific format of the Budget documents may vary from year to year, however they generally comprise:

- a Budget Speech outlining the Government's strategic directions, priorities and plans
- information on total Government revenues and expenses and financial statements for the Government as a whole
- an overview of the State's recent economic performance and forecasts of key economic aggregates
- information on Budgeted capital outlays
- a summary of policy decisions, made by Government since the previous Budget, that have funding impacts; and
- details of the outputs and activities undertaken within each departmental portfolio.

<sup>19</sup> [2020] QICmr 7 (13 February 2020)

<sup>20</sup> *Ringland*, paragraphs [27]-[28]

<sup>21</sup> *Ringland*, paragraphs [29]-[40]

<sup>22</sup> <https://www.treasury.qld.gov.au/economy-and-budget/queensland-budget/budget-process/>



## 7.2 Information brought into existence 'in the course of'

Schedule 3, section 2(1)(c) of the RTI Act provides that information is exempt if it was brought into existence in the course of the State's budgetary process. When determining if information is exempt under this section a decision maker should consider all the circumstances and facts which are relevant to the information and when and why it was brought into existence.

Satisfying this section requires more than a coincidence of timing between the creation of the information and the State's budgetary processes: the information must have been created in connection with, or as part of, that process.<sup>23</sup>

Information may have been brought into existence 'in the course of' the State's budgetary process if, for example:

- the information fed into, or was created as part of, the preparation of budgetary information, for example agency submissions to Treasury, Treasury analysis of agency bids, and budgetary related briefing material
- the information was created as part of the budgetary process; or
- the information is of a kind regularly brought into existence as part of the budgetary process.

## 8.0 Reports of factual or statistical information attached to a document listed in section 2(3)

Generally, reports of factual or statistical information which are attached to a document of a kind mentioned in schedule 3, section 2(3), will not be exempt under schedule 3, section 2(1) of the RTI Act.<sup>24</sup>

The exceptions are:

- where the disclosure of those reports of factual or statistical information would:
  - reveal any consideration of Cabinet; or
  - would otherwise prejudice the confidentiality of Cabinet considerations or operations
- where the report of statistical or factual information was brought into existence for the consideration of Cabinet
- where the report of statistical or factual information was brought into existence for the State's budgetary processes.

It will be necessary to characterise the information in the report as being of a factual or a statistical nature for the section to apply.

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<sup>23</sup> *Glass Media Pty Ltd and Department of the Premier and Cabinet; Screen Queensland Pty Ltd (Third Party); The Walt Disney Company (Australia) Pty Ltd (Fourth Party)* [2016] QICmr 30 (18 August 2016), paragraph 33.

<sup>24</sup> See schedule 3, section 2(4) of the RTI Act.



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**Note**

When determining if information is of a factual nature (the same considerations apply to determining if information is of a statistical nature) the Information Commissioner has stated:

*...a commonsense approach should be taken to the task of characterising matter as factual matter or otherwise, according to its substance (i.e. its substantive nature or character) rather than merely to semantics (i.e. merely by reference to the particular terms in which it is couched). Material which contains elements of judgement or opinion concerning purely factual matters may still be capable, depending on its context and its purpose in that context, of properly being characterised as merely factual matter.<sup>25</sup>*

The Information Commissioner went on to say:

*...merely factual matter is generally to be distinguished from matter expressing the opinions and recommendations of individual Ministers on policy issues and policy options requiring Cabinet determination. Factual matter which merely provides the factual background, or informs Cabinet of relevant facts, so as to assist its deliberations on policy issues, will generally constitute "merely factual matter".<sup>26</sup>*

Once the report has been established as containing information of a factual or statistical nature, the decision maker should then consider:

- if the report was brought into existence for consideration of Cabinet
- if the release of the report would reveal any consideration of Cabinet or otherwise prejudice the confidentiality of Cabinet considerations or operations
- if the report was brought into existence in the course of the State's budgetary process.

If any of the above apply, then the report will be exempt under schedule 3, section 2(4) of the RTI Act.

For additional information and assistance please refer to the OIC's guidelines or contact the Enquiries Service on 07 3234 7373 or email [enquiries@oic.qld.gov.au](mailto:enquiries@oic.qld.gov.au).

<sup>25</sup> Hudson at paragraph 54.

<sup>26</sup> Hudson at paragraph 61.



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**This guide is introductory only, and deals with issues in a general way. It is not legal advice. Additional factors may be relevant in specific circumstances. For detailed guidance, legal advice should be sought.**

If you have any comments or suggestions on the content of this document, please submit them to [feedback@oic.qld.gov.au](mailto:feedback@oic.qld.gov.au).

***Published 1 July 2009 and Last Updated \*\*\*\****

Changes to legislation after the update date are not included in this document



## Information Sheet for Cabinet Legislation and Liaison Officers

*Right to Information Act 2009*

### Ten-year expiration of the Cabinet exemption beginning from 2 July 2019

The *Right to Information Act 2009 (RTI Act)* creates a right of access to government documents, subject to refusal of access where releasing the documents would be contrary to the public interest.

One of the grounds of refusal is the Cabinet exemption, contained in schedule 3, section 2 of the RTI Act<sup>1</sup>, under which access to Cabinet material is refused.

However, as noted in the Cabinet Handbook<sup>2</sup>, this exemption lapses ten years<sup>3</sup> after the information was created or last considered by Cabinet<sup>4</sup>. The first date that Cabinet material can cease to be subject to the Cabinet exemption is 2 July 2019; each day from that date going forward will move more Cabinet material out of the Cabinet exemption.

This does not mean that the material will be released. Departmental decision makers, delegated by the Director-General to make decisions about documents under the RTI Act, will need to be given the documents so that they can consider them and apply the provisions of the RTI Act.<sup>5</sup> Other exemption grounds may apply or information may be otherwise contrary to the public interest to release. Decision makers may also need to consult with the Cabinet Secretary.<sup>6</sup>

Development of Departmental procedures that maintain appropriate levels of security over Cabinet material that has aged out of the Cabinet exemption but allow decision makers to work with and meet their obligations under the RTI Act are recommended.

For additional information and assistance please refer to the Cabinet Handbook or the OIC's Cabinet and State Budgetary information guideline, or contact the Enquiries Service on 07 3234 7373 or email [enquiries@oic.qld.gov.au](mailto:enquiries@oic.qld.gov.au).

**Published 25 June 2019 and Last Updated 20 May 2019**

Changes to legislation after the update date are not included in this document

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<sup>1</sup> For information created after 1 July 2009; Cabinet matter created before that date falls under schedule 3, section 1, for which there is no expiry.

<sup>2</sup> At 4.15.7.

<sup>3</sup> Schedule 3, section 2(1) of the RTI Act.

<sup>4</sup> Schedule 3, section 5 of the RTI Act, definition of *relevant date*.

<sup>5</sup> As noted in the Cabinet Handbook at 4.15.7.

<sup>6</sup> As noted in the Cabinet handbook at 4.15.5.