



Education & Care Services Ombudsman,  
National Education & Care Services  
FOI & Privacy Commissioners

## **Annual Report**

1 July 2013 to 30 June 2014

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## **1 Commissioner's Foreword and Overview**

I am pleased to present the Standing Council on School Education and Early Childhood with the 2013/14 Annual Report on the exercise of my functions as the Education and Care Services Ombudsman, National Education and Care Services Freedom of Information and Privacy Commissioners.

In December 2013 Dr Diane Sisely resigned from her position as the Education and Care Services Ombudsman, National Education and Care Services Freedom of Information and Privacy Commissioners. I was appointed to act in these three positions concurrently until 30 June 2014. Subsequently I have accepted a contracted position to fulfil these three roles until December 2015.

During the year my office developed the National Education and Care Services Privacy Manual which now completes the development of all manuals to guide the work of all three functions. The Education and Care Services Privacy Manual was further updated incorporating the changes brought about by the amendments to the Privacy Act which came into effect on 12 March 2014. The National Education and Care Services Privacy Commissioner has power to deal with written complaints made alleging an interference with privacy arising from an alleged breach of the Australian Privacy Principles ("APP's") in the Privacy Act by one or more of:

- (a) the Australian Children's Education and Care Quality Authority (ACECQA); or
- (b) a Regulatory Authority from a participating jurisdiction.<sup>[1]</sup>

Summary information sheets on all three functions have been published for the Education and Care Services Ombudsman, National Education and Care Services FOI and Privacy Commissioners on the website at [www.necsombudsmanprivacy.edu.au](http://www.necsombudsmanprivacy.edu.au)

In the 2012/13 Annual Report Dr Sisely reported that she had provided advice to the Standing Council on School Education and Early Childhood (SCSEEC) on legal advice she had received as to what was required to establish and give effect to the Offices of the National Education and Care Services Freedom of Information and Privacy Commissioners. In November 2013 the Office of the National Education and Care Services Freedom of Information Commissioner was created, while the establishment of the Office of the Privacy Commissioner was deferred pending further consideration by the Council secretariat and the National Education and Care Services Privacy Commissioner.

During the year my office in conjunction with Education Services Australia (ESA) introduced an electronic document management system. This simple system was designed to assist me with managing the creation, storage, retrieval and expiration of information stored as documents. I would like to thank ESA IT staff for their assistance.

In September 2013 I attended Australia's first official National Quality Framework (NQF) Conference. Almost 1000 people from the children's education and care sector across

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<sup>[1]</sup> See combination of s 263, National Law and Reg 199, National Law Regulation.

the country attended the two-day event in Sydney. Organised by the Australian Children's Education and Care Quality Authority (ACECQA), the theme of the conference was 'The NQF Story'. Keynote speakers at the event focused on strategy, change and leadership, showing delegates how to turn their aspirations into achievement. I was encouraged by the genuine interest and enthusiasm shown by the broad range of delegates who attended this excellent conference.

Yours sincerely

A handwritten signature in black ink, appearing to read 'I. D. Pollerd'. The signature is written in a cursive style with a large initial 'I' and a long horizontal stroke.

Ian D Pollerd

## **2 Powers and Responsibilities**

### **2.1 Education and Care Services Ombudsman (ECSO)**

The Education and Care Services Ombudsman, National Education and Care Services Freedom of Information Commissioner and National Education and Care Services Privacy Commissioner receives complaints and assists people who may have been treated unfairly or inappropriately by the Australian Children's Education and Care Quality Authority (ACECQA) or the State and Territory Government Regulatory Authorities. The Regulatory Authorities approve, monitor and quality assess education and care services for children. ACECQA promotes a nationally consistent regulatory approach.

The ECSO has power to deal with matters falling within the description of action taken by a prescribed authority that relates to a matter of administration<sup>1</sup> where the reference to prescribed authority is limited to the ACECQA.<sup>2</sup>

Complaints about how a Regulatory Authority has exercised its powers or functions under the National Law or Regulations (apart from FOI and privacy matters), should be directed to the Ombudsman in the State or Territory in which Regulatory Authority is located. For example, complaints about the Regulatory Authority in Victoria should be made to the Victorian Ombudsman, complaints about the Regulatory Authority in New South Wales should be made to the Ombudsman in New South Wales.

The ECSO has power to deal with matters of administration apart from specific matters relating to freedom of information and privacy. It extends to anything which might be regarded as reasonably incidental to the performance of administrative functions. It does not have to be an allegation of something sufficiently serious to be described as 'maladministration', but merely about any administrative action.

Action taken by ACECQA (or by an officer or employee) that relates to a matter of administration can include:

- making of a decision or recommendation;
- formulation of a proposal;
- failure or refusal to take any action, to make a decision or recommendation

### **2.2 National Education and Care Services Freedom of Information Commissioner (NECSFOIC)**

The NECSFOIC has power to deal with written complaints about the performance of functions, or the exercise of powers, under the FOI Act by ACECQA or a Regulatory Authority from a participating jurisdiction.

From 1 January 2012, the *Freedom of Information Act 1982* (Commonwealth) ("FOI Act") applies as the law of each State and Territory for the purposes of the National Quality Framework. Each State and Territory has for that purpose adopted in its

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<sup>1</sup> Section 5(1)(a) and (b), Ombudsman Act.

<sup>2</sup> See combination of s 282, National Law and Reg 222, National Law Regulation.

jurisdiction the FOI Act as modified by the *Education and Care Services National Regulations*.

This means that the FOI Act (as modified) applies to ACECQA and each Regulatory Authority. Those bodies are bound by and must comply with the requirements of the FOI Act (as modified) when dealing with formal requests for access to documents under freedom of information. Any person has a right to seek from ACECQA or each Regulatory Authority access to documents of those agencies under the FOI Act.

Under the FOI Act that means that from 1 January 2012 ACECQA and each of the Regulatory Authorities must do the following:

- (a) process requests for access to documents in accordance with the FOI Act;
- (b) grant full or partial access to any documents sought under the FOI Act unless they are exempt or contain information that would reasonably be regarded as irrelevant to a request;
- (c) in making any decisions under the FOI Act, properly advising applicants of their review rights in any statement of reasons for decision;
- (d) conduct any internal review of access refusal decisions in accordance with the FOI Act;
- (e) comply with the information publication scheme obligations contained in Part II of the FOI Act;
- (f) process requests for amendment to personal information in accordance with the FOI Act;
- (g) apply and interpret the provisions of the FOI Act consistent with the objects of the FOI Act;
- (h) use their best endeavours to assist the NECSFOIC to make a decision in relation to any review of reviewable decision;
- (i) assist the NECSFOIC with any preliminary inquiries that might be made in determining whether to entertain any review application or a complaint;
- (j) provide an adequate statement of reasons under s 26 of the FOI Act if the NECSFOIC believes that no statement or an inadequate statement of reasons was provided;
- (k) comply with decisions made by the NECS FOI Commissioner (unless review is sought on the merits or an appeal made on a question of law);
- (l) comply with any notice to produce or notice to appear issued by the NECS FOIC under the FOI Act;
- (m) implement any recommendations made by the NECSFOIC as a result of an investigation of a complaint.

## 2.3 National Education and Care Services Privacy Commissioner (NECSPC)

The NECSPC has power to deal with written complaints made alleging an interference with privacy arising from an alleged breach of the Australian Privacy Principles (“APP’s”) in the Privacy Act by one or more of:

- (a) ACECQA; or
- (b) a Regulatory Authority from a participating jurisdiction.<sup>[1]</sup>

The APP’s came into effect on 12 March 2014 following changes made to the Privacy Act 1988 (Commonwealth) (“Privacy Act”) by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012*.

An act or practice is an interference with privacy if it breaches any of the APP’s. A complaint will be within the privacy jurisdiction of the NECSPC if it is in writing and alleges such a breach.

From 1 January 2012, the Privacy Act as it exists at any time applies as the law of each State and Territory for the purposes of the National Quality Framework. Each State and Territory has for that purpose adopted in its jurisdiction the Privacy Act as modified by the *Education and Care Services National Regulations*.

This means that the Privacy Act (as modified) applies to ACECQA and each Regulatory Authority. Those bodies are bound by and must comply with the requirements of the Privacy Act (as modified) when dealing with personal information (including sensitive information).

“Personal information” is defined to mean:

*“information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion”*

“Sensitive information” is defined to mean personal information that is also information or an opinion about particular matters concerning an individual such as their racial or ethnic origin, political opinions, religious beliefs or sexual orientation (among other things).

Under the Privacy Act that means that from 1 January 2012 ACECQA and each of the Regulatory Authorities have been affected by requirements in relation to how they collect, use, store and otherwise handle *personal information* about individuals.

They must comply with 11 of the 13 APP’s set out in the Privacy Act dealing with:

- open and transparent management of personal information
- the manner and purpose of collection of personal information
- the collection and handling of unsolicited personal information

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<sup>[1]</sup> See combination of s 263, National Law and Reg 199, National Law Regulation.

- notification of the collection of personal information
- cross-border disclosure of personal information
- the accuracy of personal information before use;
- secure storage of personal information;
- appropriate use or disclosure of personal information;
- access to and amendment of personal information.

APP's 7 and 9 do not apply to ACECQA and each of the Regulatory Authorities.

They must not do an act or engage in a practice that breaches any of the APP's in relation to personal information about an individual, as that would be an interference with privacy.

In addition, the Privacy Act provides clarification and extension of the law relating to obligations of confidence that might arise in relation to personal information provided to ACECQA or a Regulatory Authority.

Therefore, ACECQA and each Regulatory Authority and their officers and employees must become familiar with the requirements of the Privacy Act and the APP's in their handling of personal information under the National Quality Framework.

### **3 Development of Manuals and Guidelines**

#### **3.1 Manuals**

Throughout the year further work has been undertaken to develop information about the role and functions of my office and guidelines for its work.

My office has now completed the process of finalising the National Education and Care Services Privacy Manual which will complete development of all manuals to guide the work of all three functions.

Summary information sheets on all three functions have been published on the Education and Care Services Ombudsman, National Education and Care Services Freedom of Information and Privacy Commissioners website at [www.necsombudsmanprivacy.edu.au](http://www.necsombudsmanprivacy.edu.au)

#### **3.2 Guidelines**

Refer to attachment 2

#### **3.3 Practice Note**

During the year a one page practice note was circulated to each of the Regulatory Authorities and ACECQA explaining the requirements of a valid request under the Commonwealth FOI Act.

The practice note is provided as part of ECS FOI Commissioner's educative role (refer to Attachment 3).

Authorities and ACECQA should not be processing requests unless those requirements as stated in the practice note are met. This will ensure that agencies only accept validly made requests.

### **Case Study 1**

The applicant made a request to a State agency for access to various documents under the State's freedom of information legislation ("State Act"). The applicant did not receive a decision following the expiration of 30 days from when the Regulatory Authority received the request. The applicant then applied to the Education and Care Services FOI Commissioner ("ECS FOI Commissioner") for review of a decision deemed to have been made by the principal officer of the agency to refuse access to the documents sought.

The ECS FOI Commissioner found the request was not validly made under s 15 of the *Freedom of Information Act 1982* (Cth) (as modified by the Education and Care Services National Regulations) ("Commonwealth FOI Act"). The ECS FOI Commissioner pointed out that s 15(2)(aa) of the Commonwealth FOI Act stipulates a request must state *expressly* that is an application for the purposes of that Act. In this instance, the applicant's request was made expressly under the State's freedom of information legislation. Accordingly, there was no actual or deemed decision that was reviewable by the ECS FOI Commissioner. In an effort to assist the applicant, the ECS FOI Commissioner suggested they submit a fresh request to the Chief Executive Officer ("chief executive") of the agency in the correct form and pursuant to the correct legislation.

The applicant submitted a fresh request to the agency's chief executive under the Commonwealth FOI Act. Again, the applicant did not receive a decision after the expiration of 30 days from when the request was received and applied to the ECS FOI Commissioner for review of a deemed refusal decision. After accepting the review, the ECS FOI Commissioner sought a statement of reasons for the agency's deemed refusal decision under s 55E of the Commonwealth FOI Act.

The agency responded that there was no reviewable decision (deemed or otherwise) because, at the time of the request, no officer was legally able to exercise the power under the Commonwealth FOI Act to make a decision on the request. While the agency acknowledged that state legislation introduced as part of the National Quality Framework ("National Law Adoption Act") defined the agency's "chief executive" as the State Regulatory Authority, it maintained that inconsistencies between the terminology used in the Commonwealth FOI Act and the Education and Care Services National Regulations ("National Regulations") to refer to the chief executive meant the power to make a decision on the request could not be exercised by that individual. This was because r 208(c) of the National Regulations defined the "chief executive" as the "principal executive" rather than the "principal officer" of the Regulatory Authority.<sup>3</sup> As such, the agency argued its chief executive could not respond to the request because he was not its "principal officer" under the Commonwealth FOI Act.

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<sup>3</sup> By the time of the application for ECS FOI Commissioner review, the National Regulations had been amended so that the "chief executive" was defined as the "principal officer" of the Regulatory Authority.

After carefully considering the State's interpretation legislation, the ECS FOI Commissioner confirmed the agency's chief executive was the State Regulatory Authority for the purposes of the National Quality Framework and that there was no basis on which to conclude he could not make a decision on the request. Regarding the agency's finding that the chief executive was not its principal officer under the Commonwealth FOI Act, the ECS FOI Commissioner noted that under r 209(k) of the National Regulations the Commonwealth FOI Act applied as a law of the State with any other modifications necessary for its effective administration in the context of the National Quality Framework. Therefore, even if the reference to "principal executive" in r 208(c) of the National Regulations was an error, it was not intended to impact on the operation of the Commonwealth FOI Act for the purposes of the National Quality Framework and could be read as "principal officer".

For those reasons, the ECS FOI Commissioner determined that:

- there was a decision which was reviewable by the ECS FOI Commissioner under the Commonwealth FOI Act.
- the interests of the administration of the Commonwealth FOI Act (particularly in the context of the National Quality Framework) made it desirable that the reviewable decision be considered by the relevant State Administrative Tribunal.
- if the applicant did not wish to seek review from the relevant State Administrative Tribunal, they could alternatively submit a fresh request to the State Regulatory Authority.

## **Case Study 2**

The applicant made a request to a State Regulatory Authority for access to various documents under the State's freedom of information legislation ("State Act").

The Regulatory Authority explained to the applicant on several occasions that the *Freedom of Information Act 1982* (Cth) (as modified by the Education and Care Services National Regulations) ("Commonwealth FOI Act") applied as a law of the State for the purposes of the National Quality Framework and that the request needed to be made to it under that Act. The applicant remained adamant that the request needed to be made under the State Act and insisted that the Regulatory Authority deal with it under that Act.

In an effort to assist the applicant, the Regulatory Authority purported to deal with the request under the Commonwealth FOI Act and made a decision to refuse access to the documents sought in the request. The applicant applied to the Education and Care Services FOI Commissioner ("ECS FOI Commissioner") for review of the Regulatory Authority's decision to refuse access to the documents sought.

After conducting preliminary inquiries of the parties, the ECS FOI Commissioner noted there was nothing to indicate that the applicant had ever explicitly stated the request to the Regulatory Authority was made under the Commonwealth FOI Act. On the contrary, it was apparent the applicant's request was made expressly under the State Act. In light of his preliminary inquiries, the ECS FOI Commissioner decided not to conduct a review of the Regulatory Authority's decision on the grounds that he did not have jurisdiction to consider it.

The ECS FOI Commissioner determined he did not have jurisdiction to review the Regulatory Authority's decision, for the following reasons:

- it was apparent from correspondence between the parties that the applicant had expressly made the request pursuant to the State Act. The ECS FOI Commissioner noted that State legislation introduced as part of the National Quality Framework expressly excludes the State Act from applying to the Education and Care Services National Law ("National Law").
- the request to the Regulatory Authority did not meet the requirements for a valid request under s 15 of the Commonwealth FOI Act. The ECS FOI Commissioner noted that s 15(2)(aa) of the Commonwealth FOI Act provides a request must state *expressly* that is an application for the purposes of that Act. The ECS FOI Commissioner noted this was not merely a procedural matter, but a substantive legal requirement that had to be complied with in order for a request to be validly made under the Commonwealth FOI Act.
- non-compliance with s 15(2)(aa) of the Commonwealth FOI Act could not be cured by the consent of the parties. That is, the Regulatory Authority could not circumvent the defect in the request by purporting to deal with it under the Commonwealth FOI Act. Accordingly, there had been no jurisdiction for the Regulatory Authority to make a decision on the applicant's request.

The ECS FOI Commissioner's decision not to conduct a review was consistent with his educative role and the fact that he cannot clothe himself with jurisdiction which he does not have. Following the decision, a practice note was prepared for circulation among each of the Regulatory Authorities which explained that requests for access should not be processed unless they meet all of the requirements of s 15 of the Commonwealth FOI Act and that reasonable steps should be taken to ensure those requirements are met in accordance with the duty to assist applicants to make a valid request under s 15(3) of the Commonwealth FOI Act.

#### **4 Complaints**

The complaints received were generally about how ACECQA assessed qualifications and have now been resolved. Attachment 1 provides an overview of the complaint resolution process.

#### **5 Freedom of Information**

The NECS FOI Commissioner is required each financial year to report on the operation of the FOI Act.

The FOI Act requires ACECQA, each Regulatory Authority and relevant administrative tribunal to provide information on the number of requests for access to information. Refer to attachment 4.

During the 2013/14 year ACECQA and Regulatory Authorities received a total of 24 Requests for Access to information of which 5 were granted access in full, 10 granted in part, 4 were refused and 5 were withdrawn. There was only one request made to an administrative tribunal for access for information. My office received one request during this period.

## REQUESTS FOR ACCESS

	July 2013– June 2014
<b>(a) Regulatory Authority</b>	
NSW-Early Childhood Education and Care Services <ul style="list-style-type: none"> <li>Number received during the period</li> <li>Number finalised during the period</li> </ul>	13 13 (4 granted access in full, 4 granted access in part, 3 refused access in full, 2 requests withdrawn by applicants)
VIC – Department of Education and Early Childhood Development <ul style="list-style-type: none"> <li>Number received during the period</li> <li>Number finalised during the period</li> </ul>	5 5 (4 granted access in part, 1 request withdrawn by the applicant)
QLD –Department of Education, Training and Employment <ul style="list-style-type: none"> <li>Number received during the period</li> <li>Number finalised during the period</li> </ul>	5 5 (1 granted access in full, 1 granted access in part, 1 access was refused in full and 2 requests were withdrawn by the applicants)
WA- Department of Local Government and Communities	0
SA- Education and early Childhood Services Registration and Standards Board <ul style="list-style-type: none"> <li>Number received during the period</li> <li>Number finalised during the period</li> </ul>	1 1 (1 granted access in part)
TAS-Department of Education	0
ACT-Children’s Policy and Regulatory Unit Education and Training Directorate	0
NT- Early Childhood Policy and Regulations Department of Education	0
<b>(b) ACECQA</b>	
Number received during the period	0
<b>(c) Administrative Tribunals</b>	
NSW Civil and Administrative Tribunal	0
Victorian Civil and Administrative Tribunal	0
Queensland Civil and Administrative Tribunal	0
State Administrative Tribunal WA	0
Administrative and Disciplinary Division of the District Court of SA	1 Appeal Lodged (decision of Ombudsman affirmed)
Magistrates Court (Administrative Appeals Division) established under the Magistrates Court (Administrative Appeals	0

Division) Act (Tas)	
ACT Civil and Administrative Tribunal	0
Local court established under the Local Court Act of the NT	0
<b>(d) NECSFOIC</b>	
<ul style="list-style-type: none"> <li>• Number received during the period</li> <li>• Number finalised during the period</li> </ul>	<p>1 1</p>

## **6 Financial Statements**

The financial report has been audited by Grant Thornton and the audit statement is found at Attachment 5.

## **7 Budget Implications**

The office will also monitor the need for investigative staff to assist with the expected increase in the number of complaints and requests for Freedom of Information reviews.

## **Attachment 1**

### **COMPLAINT RESOLUTION PROCESS**

The Education and Care Services Ombudsman, National Education and Care Services Privacy Commissioner, and Freedom of Information Commissioner have established a complaint resolution process to streamline the efficient resolution of complaints received under the Education and Care Services National Law (National Law).

#### **Complaint**

An approach may be made by telephone or in writing (fax, email, letter, complaint form, etc). If that approach is not a complaint, but something else like an inquiry or request for services, you will be directed as far as practicable to the person or body who may be able to provide the information or services your seek.

#### **About who and what**

##### Education and Care Services Ombudsman (ECSO)

The ECSO only has power to deal with certain matters relating to ACECQA. It does not have power to deal with matters relating to a Regulatory Authority apart from specific matters relating to freedom of information and privacy.

##### National Education and Care Services Freedom of Information Commissioner (NECSFOIC)

From 1 January 2012, the *Freedom of Information Act 1982* (Commonwealth) (FOI Act) applies as the law of each State and Territory for the purposes of the National Quality Framework. Each State and Territory has for that purpose adopted in its jurisdiction the FOI Act as modified by the *Education and Care Services National Regulations*.

This means that the FOI Act (as modified) applies to ACECQA and each Regulatory Authority. Those bodies are bound by and must comply with the requirements of the FOI Act (as modified) when dealing with formal requests for access to documents under freedom of information.

This means that any person has a right to seek from ACECQA or each Regulatory Authority access to documents of those agencies under the FOI Act.

It should be noted that the NECSFOIC has power to monitor compliance by ACECQA and the Regulatory Authorities with their obligations under the FOI Act including handling review applications (which may reveal systemic or serious problems in the administration of the FOI Act).

##### National Education and Care Services Privacy Commissioner (NECSPC)

From 1 January 2012, the *Privacy Act 1988* (Commonwealth) (Privacy Act) applies as the law of each State and Territory for the purposes of the National Quality Framework. Each State and Territory has for that purpose adopted in its jurisdiction the Privacy Act as modified by the *Education and Care Services National Regulations*.

This means that the Privacy Act (as modified) applies to ACECQA and each Regulatory Authority. Those bodies are bound by and must comply with the requirements of the Privacy Act (as modified) when dealing with personal information.

The NECSPC has power to deal with written complaints made alleging an interference with privacy arising from an alleged breach of the Australian Privacy Principles ("APP's") in the Privacy Act by one or more of:

- (a) ACECQA; or
- (b) a Regulatory Authority from a participating jurisdiction.<sup>[1]</sup>

The APP's came into effect on 12 March 2014 following changes made to the Privacy Act 1988 (Commonwealth) ("Privacy Act") by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012*.

### **In writing**

A complaint must be writing for it to be considered. If it is not made in writing, reasonable assistance will be provided to you to set out the complaint in writing.

### **Preliminary inquiries and assessment**

A preliminary assessment will be undertaken to determine whether or not to entertain or investigate the complaint (or investigate further). For example, discretion can be exercised not to entertain a complaint if:

- no complaint was first made to the relevant agency;
- the events complained about occurred more than 12 months after you became aware of them;
- the complaint is frivolous, vexatious, misconceived, lacking in substance or not made in good faith;
- another remedy is available elsewhere;
- the agency concerned is dealing with the complaint or has not had an adequate opportunity to deal with it.

In order to do this preliminary assessment, preliminary inquiries may be conducted including:

- contacting you to clarify allegations made or information provided, or obtain documentary evidence (including a copy of any complaint to the agency and any response from the agency);
- researching relevant laws and other information available;
- considering similar cases;
- obtaining legal advice;
- deciding whether the complaint or parts will or will not be investigated;
- contacting the agency to obtain it's version of events, additional information or relevant documents;

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<sup>[1]</sup> See combination of s 263, National Law and Reg 199, National Law Regulation.

- identifying disagreements in the facts or about the lawfulness or reasonableness of the agency's actions;
- seek information from others if necessary;
- consider and discuss with the agency possible action;
- try to resolve the matter using conciliation or other methods of dispute resolution.

### **Formal investigation**

If a decision is made to investigate, there are some formal steps which must be taken involving notification of the agency concerned. If an adverse finding is likely, the agency concerned will be given an opportunity to make submissions about it.

Investigations are confidentially conducted, but you will be kept reasonably informed of progress and you may be called on to provide further information or evidence. You should be aware that any time it may be determined to not investigate further. If so, you will be informed of the reasons for doing so.

### **Possible outcomes**

The possible outcomes depend on the nature of the subject matter of the complaint.

### **Privacy**

In privacy related complaints, there will be a strong emphasis on attempting to resolve issues using conciliation and other dispute resolution methods. If no resolution is possible, possible outcomes include:

- dismissing the complaint;
- finding the complaint substantiated and one or more of the following:
  - a determination that no further action be taken;
  - a determination that the agency should stop conduct, or engage in particular conduct;
  - a determination that you be awarded compensation for loss or damage (including for injured feelings or humiliation);
- a declaration that you be reimbursed for reasonable expenses incurred in connection with making the complaint;
- an order that an agency correct or amend information in a record.

### **Freedom of Information**

In freedom of information related complaints, there will be a strong emphasis on attempting to resolve issues using conciliation and other dispute resolution methods. If no resolution is possible, possible outcomes include:

- undertake an investigation;
- make recommendations to the agency in light of the outcome of the investigation;
- issue an implementation to force compliance with any such recommendations;
- report to the Ministerial Council on the conduct of the agency and have that report tabled in Parliament.

## **Other administration**

In other administrative action matters the ECSO can:

- undertake ongoing discussions with the head of the agency to try to resolve a matter;
- bring evidence of breach of duty or misconduct to the head of the agency or Ministerial Council;
- make a finding of undue delays;
- refer specific questions about exercise of power to appropriate tribunals (or recommend the head of the agency does so);
- make a finding that adverse conduct occurred and report it to the agency and Ministerial Council with a recommendation as to what should occur to rectify it.

## **Whether to entertain/investigate complaint**

Assuming a complaint to be within jurisdiction, in writing, and the subject matter of concern has previously been raised with the respondent, there are circumstances where discretion may be exercised to decline to entertain or investigate a complaint (or investigate further). The basis on which a decision to decline to investigate or investigate further depends on the function being performed, namely, privacy function, Ombudsman function or Information Commissioner function (see table below).

### When can decline to investigate/entertain complaint

<b>Privacy function</b>	<b>Ombudsman function</b>	<b>Information Commissioner function</b>
The act or practice complained about is not an interference with privacy of an individual <sup>4</sup>	The complainant has not complained to the respondent <sup>5</sup>	The complainant has or had a right to cause the action to be reviewed by the respondent agency, the Information Commissioner, a court or a tribunal, has not done so and it would have been reasonable to do so. <sup>6</sup>
The complaint was made more than 12 months after the complainant became aware of the act or practice <sup>7</sup>	The ECSO is satisfied the complainant became aware of the [administrative] action more than 12 months before the complaint was made <sup>8</sup>	
The complaint is frivolous, vexatious, misconceived or lacking in substance (see further below) <sup>9</sup>	The ECSO is of the opinion that the complaint is frivolous or vexatious or was not made in good faith (see further below) <sup>10</sup>	The complaint is frivolous, vexatious, misconceived, lacking in substance or not made in good faith. <sup>11</sup>
The act or practice is the subject of an application under another Commonwealth, State or Territory law, and the subject-matter of the complaint has been, or is being, dealt with adequately under that law <sup>12</sup>	The ECSO is of the opinion that the complainant does not have a sufficient interest in the subject matter of the complaint <sup>13</sup>	The complainant does not have a sufficient interest in the subject matter of the complaint. <sup>14</sup>
Another Commonwealth, State or Territory law provides a more	The ECSO is of the opinion that an investigation, or further investigation, of the	

<sup>4</sup> Section 41(1), Privacy Act.

<sup>5</sup> Section 6(1A), Ombudsman Act.

<sup>6</sup> Section 73(b), FOI Act.

<sup>7</sup> Section 41(1), Privacy Act.

<sup>8</sup> Section 6(1), Ombudsman Act.

<sup>9</sup> Section 41(1), Privacy Act. It is important to note that these concepts are not necessarily mutually exclusive.

<sup>10</sup> Section 6(1), Ombudsman Act. It is important to note that these concepts are not necessarily mutually exclusive.

<sup>11</sup> Section 73(e), FOI Act.

<sup>12</sup> Section 41(1), Privacy Act.

<sup>13</sup> Section 6(1), Ombudsman Act.

<sup>14</sup> Section 73(f), FOI Act

appropriate remedy for the act or practice that is the subject of the complaint <sup>15</sup>	action is not warranted having regard to all the circumstances <sup>16</sup>	
The complainant has complained to the respondent about the act or practice and the respondent has dealt, or is dealing, adequately with the complaint <sup>17</sup>	The complainant has complained to the respondent, the ECSO may decide not to investigate the action unless and until the complainant advises that no redress has been granted or that redress has been granted but the redress is not, in the opinion of the complainant, adequate <sup>18</sup>	The complainant has complained to the respondent agency, and the respondent agency has dealt, or is dealing, adequately with the complaint; or has not yet had an adequate opportunity to deal with the complaint. <sup>19</sup>
The complainant has complained to the respondent about the act or practice and the respondent has not yet had an adequate opportunity to deal with the complaint <sup>20</sup>	Where a complainant exercises a right to cause the action complained of to be reviewed by a court or a tribunal constituted under an Act, <sup>21</sup> the ECSO shall not investigate or continue to investigate the action unless of the opinion that there are special reasons justifying investigation. <sup>22</sup>	
An application has been made by the respondent to have a determination that any interference with privacy was in the public interest (s 72, Privacy Act) and the complainant	Where the complainant could have had the matter reviewed by a court or tribunal but has not exercised that right, the ECSO may decide not to investigate the action if of the opinion that, in all the	The complainant has or had a right to cause the action to be reviewed by a court or a tribunal, or to another body, has not done so and it would have been reasonable to do so. <sup>25</sup>

<sup>15</sup> Section 41(1), Privacy Act.

<sup>16</sup> Section 6(1), Ombudsman Act.

<sup>17</sup> Section 41(2), Privacy Act.

<sup>18</sup> Section 6(1B), Ombudsman Act.

<sup>19</sup> Section 73(d), FOI Act.

<sup>20</sup> Section 41(2), Privacy Act.

<sup>21</sup> Some examples of where a court or may review the matter include:

- where a decision to refuse access to some or all or parts of documents under the FOI Act may be reviewed by a relevant court or tribunal;
- where a decision to impose access charges or as to the amount of access charges under the FOI Act may be reviewed by a relevant court or tribunal;
- decisions made about registration of health practitioners including relating to renewal, endorsement, imposition of conditions, ect: s 199, National Law.
- where conduct of one of the respondent bodies may be the subject of judicial review proceedings in a participating jurisdiction.

<sup>22</sup> Section 6(2), Ombudsman Act.

would not be prejudiced by deferring the investigation pending determination of that application. <sup>23</sup>	circumstances, it would be reasonable for the complainant to exercise, or would have been reasonable for the complainant to have exercised, that right <sup>24</sup>	
	Where the ECSO becomes of the opinion that adequate provision is made under an administrative practice for the review of action complained of, the ECS Ombudsman can decide not to investigate if the action has been, is being or is to be reviewed under that practice at the request of the complainant, or it would be reasonable for the complainant to cause it to be <sup>26</sup>	
		The action complained about is not taken by an agency in the performance of the agency's functions or the exercise of the agency's powers under the FOI Act. <sup>27</sup>

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<sup>25</sup> Section 73(b) and (c), FOI Act.

<sup>23</sup> Section 41(3), Privacy Act.

<sup>24</sup> Section 6(3), Ombudsman Act.

<sup>26</sup> Section 6(4), Ombudsman Act.

<sup>27</sup> Section 73(a), FOI Act.

## Attachment 2

### GUIDELINE 1: PART II OBLIGATIONS UNDER THE FOI ACT

Agencies must provide information about various freedom of information matters including

- (a) the number of requests for access received;
- (b) the number of applications for amendment to personal information received and their results;
- (c) total charges collected during the year;
- (d) the number of applications for internal review and their results;

The statistical return spreadsheet details the information required.

#### Name of Agency

To complete the name of your agency, click on the box under the heading "Name of Agency". Click on the drop list at the end of the box. Select your agency's name.

#### Nil Returns

A "Nil Return" must be submitted where there is no activity at all to report for the period covered by the statistical return spreadsheet. It is not enough to just put zeros everywhere. To submit a Nil Return where no FOI requests for access or amendment have been received, click on the box under the heading "Nil Return", click on the drop list on the right and highlight "Yes".

#### Requests for Access

This should only be completed if your agency received during the relevant period requests for access to documents which complied with the requirements of s 15 of the FOI Act. A request is only compliant if it:

- (a) is in writing; and
- (b) states that the request is an application for the purposes of the FOI Act; and
- (c) provides such information as is reasonably necessary to enable identification of the documents requested; and
- (d) gives details on how notices under the FOI Act may be sent to the applicant.

The following are **not** included here:

- A request for internal review of a decision;
- A request for review by the NECS FOI Commissioner;
- A request for review by the appropriate administrative tribunal for your participating jurisdiction.

A request should be treated as having been finalised if a decision to grant full or partial access has been notified to the applicant but the documents have not been released yet as at the end of the relevant period.

### **Processing of requests**

All requests where decisions were made to allow access wholly or partly should be recorded whether or not:

- access was deferred under s 21, FOI Act;
- the applicant sought review of a decision to grant partial access (ie parts of documents or some of documents) or which included a charge for providing access;
- the applicant indicated that given the charges imposed, they no longer sought access.

3B includes decisions to either grant access to only some of the documents sought, or to grant access to an edited copy of documents (s 22).

3C includes where the refusal occurred because:

- the documents were exempt;
- they were not subject to the FOI Act;
- no relevant documents could be found in the agency's possession;
- a practical refusal reason existed (eg processing would substantially and unreasonably divert resources).

3C does not include:

- a deemed refusal which arises due to expiration of a time limit for notifying a decision;
- requests where access was refused in the form sought, but was provided in a different form (that should be an access decision, not refusal).

3D applies where the whole request was transferred to another agency within the National Quality Framework.

3E applies where either the applicant has expressly withdrawn the request, or they have failed to respond to an estimate of charges being sought and the request lapses and is therefore taken to have been withdrawn.

### **Exemptions Claimed**

This should include all categories of exemption claimed for each request that was finalised. However, only record each category of exemption claimed once for each FOI request which was finalised, even if the category was used multiple times in relation to various documents dealt with by the request.

### **Response Times**

This aims to determine how many requests are not decided within the statutory timeframes and how long any delay is. Note that even if a deemed refusal has arisen, the agency must still process the request.

## **Disclosure log**

The NECS FOI Commissioner has an obligation to monitor and report on disclosure log requirements and use by agencies under the FOI Act.

## **Review of Access Decisions**

The FOI Act provides for 3 procedures for review of a decision refusing access in accordance with a request:

- internal review
- review by NECS FOI Commissioner
- review by the relevant administrative tribunal for your participating jurisdiction.

The NECS FOI Commissioner seeks information about internal reviews only as it will at this stage obtain information about any administrative tribunal review directly from the relevant tribunal and will keep its own records of reviews sought from the NECS FOI Commissioner.

In relation to 9B, C and D, in each case the questions should be answered on the basis of review decisions **made and notified** to the applicant during the reporting period. It will not necessarily be the same as the number of applications for review received during the period (9A).

## **Amendment of Personal Records**

This collates information about request made under s 48 of the FOI Act to amend personal records. It is self explanatory.

## Attachment 3

### PRACTICE NOTE NECSFC1

#### REQUIREMENTS FOR A VALID REQUEST UNDER THE *FREEDOM OF INFORMATION ACT 1982*

- 1.1. From 1 January 2012, the *Freedom of Information Act 1982* (Commonwealth) ("FOI Act") applies as a law of each State and Territory for the purposes of the National Quality Framework. Each State and Territory has for that purpose adopted in its jurisdiction the FOI Act as modified by the *Education and Care Services National Regulations*. This means that the FOI Act (as modified) applies to ACECQA and each Regulatory Authority for the purposes of the National Quality Framework.
- 1.2. Section 11 of the FOI Act states that every person has a legally enforceable right to obtain access to documents 'in accordance with this Act'. ACECQA and each Regulatory Authority are therefore bound by and must comply with the requirements of the FOI Act (as modified) as must applicants seeking to make requests for access to documents under freedom of information.
- 1.3. One requirement for applicants is that a request for access *must* adhere to the formal requirements of s 15(2) of the FOI Act for it to be validly made under the FOI Act.

Under s 15(2) of the FOI Act a request for access must:

- (a) be in writing;
  - (b) *explicitly* state it is a request made under the FOI Act;
  - (c) provide sufficient information about the documents sought to enable a responsible officer to identify them; and
  - (d) provide details of how notices under the FOI Act may be sent to the applicant (e.g. by providing an address to which notices can be sent).
- 1.4. Unless a request for access meets all four requirements of s 15(2) of the FOI Act it cannot and should not be processed. Instead, reasonable steps should be taken to assist the applicant to make a request that meets these requirements in accordance with the duty imposed on ACECQA and each Regulatory Authority under s 15(3) of the FOI Act.

## **Attachment 4**

### **GUIDELINE FOR PREPARATION OF FREEDOM OF INFORMATION STATISTICAL RETURN SPREADSHEET: ADMINISTRATIVE TRIBUNALS**

#### **Key points**

- The FOI Act requires an Annual Report to be produced by the National Education and Care Services FOI Commissioner (“NECS FOI Commissioner”) including information about FOI in administrative tribunals.
- The statistical returns provided to those administrative tribunals by the NECS FOI Commissioner must be completed and returned by the due date.
- Even if no FOI requests have been received during the relevant periods, a “Nil Return” must be submitted.
- This guideline assists in the completion of the statistical return.

#### **Why is FOI information required?**

The NECS FOI Commissioner is required each financial year to prepare and submit an annual report to the Standing Council on School Education and Early Childhood. That annual report must include certain information about the operation of the *Freedom of Information Act 1982* (Cth) as amended by the National Law and Regulations (“FOI Act”).

That includes information about FOI matters in administrative tribunals.

#### **Who must complete a return?**

The administrative tribunals from which information is sought are the:

- (a) ACT Civil and Administrative Tribunal;
- (b) Administrative Decisions Tribunal of New South Wales;
- (c) Administrative and Disciplinary Division of the District Court of South Australia;
- (d) Local Court of the Northern Territory;
- (e) Magistrates Court (Administrative Appeals Division) of Tasmania;
- (f) State Administrative Tribunal of Western Australia;
- (g) Victorian Civil and Administrative Tribunal; and
- (h) Queensland Civil and Administrative Tribunal,

under the National Law.

#### **Reporting deadlines**

Administrative Tribunals are requested to complete a return and provide the statistical information sought to the NECS FOI Commissioner. Compliance with this deadline is

essential as it will enable the NECS FOI Commissioner to comply with a statutory deadline to submit the annual report.

### **What information is required?**

Administrative Tribunals should provide information about various freedom of information matters including

- (a) the number of applications received for review of decisions of the NECS FOI Commissioner, and their results;
- (b) the number of applications withdrawn by applicants.

The statistical return spreadsheet details the information required by the NECS FOI Commissioner.

### **Name of Agency**

To complete the name of your administrative tribunal, click on the box under the heading "Administrative Tribunal". Click on the drop list at the end of the box. Select your administrative tribunal's name.

### **Nil Returns**

A "Nil Return" must be submitted where there is no activity at all to report for the period covered by the statistical return spreadsheet. It is not enough to just put zeros everywhere. To submit a Nil Return where no FOI requests for access or amendment have been received, click on the box under the heading "Nil Return", click on the drop list on the right and highlight "Yes".

### **Tribunal Review decisions- access related**

All Tribunal decisions relating to access should be recorded, including where:

- access was deferred under s 21, FOI Act;
- the applicant sought review of a decision to grant partial access (i.e. parts of documents or some documents) or which included a charge for providing access;
- the applicant sought to extend the time for making an internal review application;
- an agency was required to conduct further searches for documents;
- an agency was required to process a request following a practical refusal reason under s 24AA, FOI Act;
- the applicant sought review of a deemed decision.

A decision to grant full or partial access should be treated as having been finalised even if the documents have not been released yet as at the end of the relevant period.

### **Tribunal Review decisions- amendment related**

All Tribunal decisions should be recorded where the applicant sought review of a decision to refuse to amend or annotate a record of personal information.

## **Completed Returns**

Any queries about completion of any part of the return should be directed to the NECS FOI Commissioner:

- by email at: [ian.pollerd@necsombudmanprivacy.edu.au](mailto:ian.pollerd@necsombudmanprivacy.edu.au)
- by telephone to Ian Pollerd on (03) 9654 1077.

Completed returns should be sent as an attachment by email to the NECS FOI Commissioner at: [ian.pollerd@necsombudmanprivacy.edu.au](mailto:ian.pollerd@necsombudmanprivacy.edu.au)

A similar Guideline was sent to the National Authority (ie ACECQA) and each Regulatory Authority requesting agencies under the National Quality Framework to provide information for inclusion in the Annual Report to be produced by the NECS FOI Commissioner.

**Attachment 5**

**AUDITED REPORT**



Education  
Services  
Australia

The provision of office support for the Education and Care Services Obudsman,  
the National Education and Care Services Privacy Commisisoner and the  
National Education and Care Services Freedom of Information Commissioner

Statement of Income and Expenditure for the period 1 July 2013 - 30 June 2014

	Actual \$	Budget \$	Variance \$
<b>Revenue</b>			
Revenue	145,000	145,000	0
<b>Total Revenue</b>	<b>145,000</b>	<b>145,000</b>	<b>0</b>
<b>Expenditure</b>			
Retainer	20,000	20,000	0
Sitting Fees	3,205	15,000	11,795
Legal Fees	42,166	50,000	7,834
Consultants	49,994	25,000	(24,994)
Rent	21,184	30,000	8,816
IT Services	161	7,500	7,339
Other Expenses	7,011	13,083	6,072
<b>Total Expenditure</b>	<b>143,721</b>	<b>160,583</b>	<b>16,862</b>
<b>Balance of Funds from FY 2014</b>	<b>1,279</b>		
<b>Balance Remaining From Prior Years</b>	<b>31,809</b>		
<b>Total Balance of Funds Remaining</b>	<b>33,088</b>		

- Report has been prepared exclusive of GST

For identification purposes only

Grant Thornton Audit Pty Ltd



The provision of office support for the Education and Care Services Obudsman, the National Education and Care Services Privacy Commissoner and the National Education and Care Services Freedom of Information Commissioner

Statement of Financial Position as at 30 June 2014

	30 June 2014
	\$
<b>CURRENT ASSETS</b>	
Cash at bank	33,088
<b>Total Current Assets</b>	<u>33,088</u>
<b>Total Non-Current Assets</b>	<u>0</u>
<b>TOTAL ASSETS</b>	<u>33,088</u>
<b>CURRENT LIABILITIES</b>	
Income received in advance	33,088
<b>Total Current Liabilities</b>	<u>33,088</u>
<b>NON-CURRENT LIABILITIES</b>	
<b>Total Non-Current Liabilities</b>	<u>0</u>
<b>TOTAL LIABILITIES</b>	<u>33,088</u>
<b>NET ASSETS</b>	<u>0</u>

*For identification purposes only*

**Grant Thornton Audit Pty Ltd**

## **Notes to the financial report for the period 1 July 2013 to 30 June 2014**

### **Note 1: Basis of Preparation**

The financial report for the period ended 30 June 2014 are drawn up as special purpose reports to fulfil the requirements consistent with those of the Funding Agreement between the Department of Education, Employment and Workplace Relations and Education Services Australia Limited for the provision of office support for the Education and Care Services Ombudsman, the National Education and Care Services Privacy Commissioner and the National Education and Care Services Freedom of Information Commissioner, dated 21 February 2012 which expired on 1 March 2013 ("Funding Agreement").

#### **Basis of preparation**

The financial statements are presented in accordance with AASB 101 Presentation of Financial Statements (Revised 2007).

The financial statements have been prepared on an accruals basis and are based on historical costs. All amounts are presented in Australian dollars which is the Company's functional and presentation currency, unless otherwise noted.

#### **Significant accounting policies**

The significant accounting policies that have been used in the preparation of these financial statements are summarised below.

##### **(i) Revenue**

Revenue is measured at the fair value of the consideration received or receivable and is recognised by reference to stage of completion.

All revenue is stated net of the amount of goods and services tax (GST).

##### **(ii) Operating expenses**

Operating expenses are recognised in profit or loss upon utilisation of the service or at the date of their origin.

##### **(iii) Cash and Cash Equivalents**

Cash comprises the portion of Education Services Australia Limited's operating bank account balance attributed to this funding agreement that has been received but not yet spent.

##### **(iv) Other liabilities**

At 30 June 2014 amounts shown as Other Liabilities represent the unrecognised revenue for projects invoiced or received in advance. It is possible that on completion of project work, balances that have not been fully expended could be returned to the Department of Education, Employment and Workplace Relations.

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## Independent Auditor's report To the members of Education Services Australia Limited

### Report on the financial report

We have audited the accompanying financial report, being a special purpose financial report, which comprises the statement of financial position as at 30 June 2014, the statement of income and expenditure, for the period 1 July 2013 to 30 June 2014 and notes comprising a summary of significant accounting policies. The financial report relates to activities consistent to the Funding Agreement between the Department of Education, Employment and Workplace Relations and Education Services Australia Limited, dated 21 February 2012 which expired on 1 March 2013, regarding funding for the provision of office support for the Education and Care Services Ombudsman, the National Education and Care Services Privacy Commissioner and the National Education and Care Services Freedom of Information Commissioner ("Funding Agreement").

### Management's responsibility for the financial report

The management of Education Services Australia Limited are responsible for the preparation of the financial report. This responsibility includes establishing and maintaining internal control relevant to the preparation and fair presentation of the financial report in accordance with the Funding Agreement and the Australian Accounting Standards.

### Auditor's responsibility

Our responsibility is to express an opinion on the financial report based on our audit. We conducted our audit in accordance with Australian Auditing Standards. These Auditing Standards require that we comply with relevant ethical requirements relating to audit engagement and plan and perform the audit in order to express an opinion on the preparation and presentation of the financial report to management.

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An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial report. The procedures selected depend on the auditor's judgement, including the assessment of the risks of material misstatement of the financial report, whether due to fraud or error.

In making those risk assessments, the auditor considers internal control relevant to the Education Services Australia Limited's preparation and fair presentation of the financial report in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the Education Services Australia Limited's internal control.

These procedures have been undertaken to form an opinion whether, in all material respects, the financial report is presented fairly in accordance with Australian Accounting Standards. We disclaim any assumption of responsibility for any reliance on this report or on the financial report to which it relates, to any person other than Education Services Australia Limited, or for any purpose other than that for which it was prepared.

We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinion.

#### Independence

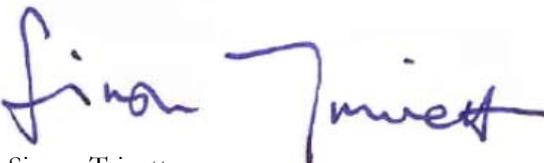
In conducting our review, we have complied with the independence requirements of the Accounting Professional and Ethical Standards Board.

#### Auditor's opinion

In our opinion the attached financial report of Education Services Australia Limited for the period 1 July 2013 to 30 June 2014 for the provision of office support for the Education and Care Services Ombudsman, the National Education and Care Services Privacy Commissioner and the National Education and Care Services Freedom of Information Commissioner is presented fairly, in all material respects, in accordance with the Funding Agreement and Australian Accounting Standards; and the funding was expended in accordance with the Funding Agreement.



GRANT THORNTON AUDIT PTY LTD



Simon Trivett  
Partner – Audit & Assurance

Melbourne, 3 October 2014