



National Education and Care Services FOI Commissioner (NECS IC)

“CC1” and New South Wales Department of Education

Decision and Reasons for Decision of the National Education and Care Services Freedom of Information Commissioner. (NECS IC)

Review Applicant:	“CC1”
Respondent:	NSW Department of Education
Other parties:	Seven Network (FOI Applicant)
Decision Date:	31 January 2017
Application number:	FOI 001/2016
Catchwords:	Freedom of Information – Public interest conditional exemption - business - whether disclosure could harm the business, commercial or financial affairs of an organisation – (CTH) <i>Freedom of Information Act 1982 s47G</i>

Contents

Summary

1. Under s55k of the Freedom of Information Act (the **FOI Act**) I **affirm** the decision of the NSW Department of Education (the **Department**) of 29 August 2016 to release documents related to a serious incident report made by **CC1**, modified by deletions but including the names of the Approved Provider and Approved Service, (the **redacted documents**) to the **FOI Applicant**.

Background

2. By letter dated 22 March 2016, which was subsequently settled on 6 April 2016, Seven Network (the **FOI Applicant**) applied to the **Department** under the **FOI Act** for access to:
*“Documents since the 1 January 2013, specifically incident reports, photos and CCTV/video footage, relating to sharp/syringe finds and injuries at NSW child care centres.
Please exclude duplicates, media reports/articles/statements and correspondence with the media.
I consent to copies of documents/video/photos being provided with exempt material redacted/pixelated. However I don’t believe the names of child care centres are exempt and will exercise my review rights if they are removed”.*
3. In conversations and emails between the **FOI Applicant** and the **Department** the “incident reports” were clarified to mean notifications of serious incidents made via the National Quality Agenda Information System (NQAITS) hosted and managed by the Australian Children’s Education and Care Quality Authority (ACECQA). The NSW Department of Education’s Early Childhood Directorate manages reported incidents occurring in NSW early childhood education and care services.

4. The original decision date for this FOI application was 30 May 2016. It was extended twice by the **Department** to accommodate the charging of a processing fee under s15(6) of the **FOI Act**, and to allow for consultation with affected third parties. The final decision date was the 29 August 2016.
5. Relevant to this NECS IC review the documents located were determined by the **Department** to include information relating to the business interests of identified child care services. Section 27 of the **FOI Act** provides for consultation with affected third parties before the disclosure of business documents. Under s27(1)(b) a person, organisation or proprietor of an undertaking can contend that a “document is conditionally exempt” from disclosure “under s47G (business information)” of the **FOI Act** “and access to the document would, on balance be contrary to the public interest for the purposes of subsection 11A(5)”. As required under s27(4) the **Department** consulted with the affected services, inviting them to make submissions in support of any exemption contentions.
6. One of the affected services (in this Decision referred to as **CC1** to protect its identity pending any further review or appeal) subsequently provided a submission to the **Department** dated 22 August 2016 objecting to the release of a serious incident report made by their service on 27 May 2013 on the grounds that release:
 - a) would affect a child’s best interests and infringe on a child’s right to privacy and wellbeing;
 - b) could prejudice full reporting of incidents under the *Education and Care Services National Law Act 2010* and thereby compromise the Department’s regulation of education and care services;
 - c) could unreasonably affect the business interests of the service;
 - d) may subject the service to subsequent media attention; and
 - e) including identifying information about the service did not appear to be part of the FOI Applicant’s request.
7. The Department found the documents to be conditionally exempt under Division 3 sections 47E – certain operations of agencies, 47F –personal privacy, and 47G – business, of the **FOI Act**. Section 11A(5) of the **FOI Act** provides that *if a document is conditionally exempt at a particular time it must be disclosed unless in the circumstances access to the document at that time would, on balance, be contrary to the public interest.*
8. Following consideration of submissions from affected third parties together with public interest considerations the Department determined to release the documents in part, redacting personal and/or health information of children, individuals and staff employed at the child care services and some business information related to the services. The **redacted documents** proposed for release retain some identifying business information – specifically, the names of the Approved Provider and Approved Service.
9. In letters dated 29 August 2016 the **Department** advised the **FOI Applicant** and the affected child care services, including **CC1**, of its decision. Copies of the **redacted documents** in the format proposed to be released by the Department were provided to **CC1** under cover of the letter to **CC1**. All parties were advised of their review rights. The information regarding review rights however unintentionally directed applicants to the Office of the Australian Information Commissioner (**AIC**) if they wished to seek a review of the Department’s decision.
10. **CC1** subsequently requested a review of the **Department’s** decision by the **AIC**. They were advised by the Office of the AIC that the **AIC** did not have jurisdiction in the matter and were inadvertently directed to the NSW Information Privacy Commissioner before being correctly directed to my Office. These delays resulted in **CC1’s** application for review to my office being well outside the 30 days

timeframe for requesting a review. Given the delay was not the fault of **CC1**, I accepted and granted an application from **CC1** under s54T of the **FOI Act** on 5 December 2016 for an extension of time to apply, as an affected third party, for a NECS IC review.

11. Pursuant to s54Z(b) of the **FOI Act** the **FOI Applicant** was informed of the review and advised they could request to be joined as a Party to the review which they subsequently did. They advised they did not want to make any submission.
12. On 12 December 2016 **CC1** provided a written application for a NECS IC review under s54N of the **FOI Act**. This application requested that in addition to the information in the application "*all documents in our previous correspondence are to be considered as part of the review. However we note that our previous arguments have been maintained and expanded as part of these submissions*". I have therefore included the letter from **CC1** to the **AIC** dated 28 September 2016 as part of the correspondence to be considered.

Decision Under Review

13. The decision under review is the decision of the **Department** dated 29 August 2016 to release documents related to a serious incident report made by **CC1**, modified by deletions but including the names of the Approved Provider and Approved Service, (the **redacted documents**) to the **FOI Applicant**.

Onus of proof

14. Section 55D(2) of the **FOI Act** provides that the review applicant as the affected third party (in this case **CC1**) bears the onus of establishing that a decision refusing the FOI request is justified or that the NECS IC should give a decision adverse to the person who made the request.

Application by Review Applicant (CC1)

15. In their application to me dated 12 December 2016 **CC1** seeks a decision by me to either *overturn* the decision made by the Department to grant access to the **redacted documents** or to *vary* the decision by the Department to require that any references within the document that reveal the identity, location or logo of CC1 be redacted.
16. In support of their application **CC1** made the following submissions:
 - (i) The release of documents with the current redactions will unreasonably affect the business of CC1 as described in section 47G(1) of the FOI Act.
 - (ii) The identity and location of CC1 is not required to satisfy the application by the FOI Applicant and does not hinder the public interest matters referred to in the reasons for decision by the Department.
 - (iii) The release of business information may encourage similar businesses to under-report or avoid reporting to protect their reputation which is contrary to the public interest as described in s11A(5) of the FOI Act.
 - (iv) CC1 is a responsible and reputable child care centre that has not engaged in any negligent or reckless behaviour. Disclosure of the documents would raise unnecessary alarm and cause parents to needlessly worry about the safety of their children.

Section 47G – Conditional Exemptions - Business

17. Section 47G (1) of the **FOI Act** relevantly states that a document is conditionally exempt if its disclosure passes two tests - namely that it *“would disclose information ...concerning the business, commercial or financial affairs of an organisation...”* and the disclosure of the information *“would or could reasonably be expected to unreasonably affect ...that organisation [adversely]... in respect of its business activities”*. *[(s47G (1)(a))]*
18. The information in the **redacted documents** proposed for release relates to an incident that occurred on **CC1’s** premises in the course of its business activities. I am therefore satisfied that the incident concerns **CC1’s** business affairs and the first limb of *s47G(1)* is satisfied.
19. The second limb of the test in *s47G(1)(a)* is met where an “unreasonable” adverse effect from disclosure of the documents “would or could reasonably be expected to” occur.
20. The AIC has issued **Guidelines**¹ under s93A of the **FOI Act**. The **Guidelines** at paragraph 6.186 explain that the phrase “could reasonably be expected” *“refers to an expectation that is based on reason. Mere assertion or speculative possibility is not enough”*.
21. The **Guidelines** state at paragraph 6.187 that “the presence of “unreasonably” in *s47G(1)* requires that:
“A decision maker must balance the public and private interest factors to decide whether disclosure is unreasonable for the purposes of s 47G(1)(a); but this does not amount to the public interest test of s11A(5) which follows later in the decision process. It is possible that the decision maker may need to consider one or more factors twice, once to determine if a projected effect is unreasonable and again in assessing the public interest balance”. The **Guidelines** further clarify at paragraph 6.188 that *“The test of reasonableness applies not to the claim of harm but to the objective assessment of the expected adverse effect”*.
22. In its determination that the documents were conditionally exempt under *s47G(1)(a)* the **Department** in a letter to the **FOI Applicant** dated 29 December 2016 concluded that *“release of the education and care services names could prejudice and harm the business affairs of education and care services, including their competitive commercial activities. The information could allow competitors of education and care services to use the information to their own advantage to increase the attendance at their own centres knowing that there have been sharp finds or sharp injuries at these named education and care services”*.
23. Section 11(2) of the **FOI Act** provides that a person’s right of access is not to be affected by: *“any reason the person gives for seeking access or the agency’s...belief as to what are his or her reasons for seeking access”*. However, there are case precedents that support the view that it is relevant to consider the interests and identity of the **FOI applicant** in deciding either an unreasonable disclosure or a balance of public interest. The decision of the Australian Information Commissioner in *“FG and National Archives of Australia”* considers this issue in some detail ².

¹ S93A FOI Guidelines Part 6 v1.3(sic) December 2016. AIC

² *FG and National Archives of Australia [2015] AICmr26 13 April 2015*

24. Given the **FOI Applicant** is a media organisation it is reasonable to expect that the content of the **redacted documents** would be made public in some way that may lead to **CC1** becoming the subject of speculation and debate. The education and care sector is a competitive business environment with services vying for parents seeking childcare. Depending on supply variables it is reasonable to expect that any such speculation and debate regarding a service may impact negatively on parents choosing the service for their child. I am therefore satisfied that an adverse effect on the business affairs of **CC1**, as described by the **Department** and **CC1**, could occur as a result of the release of the **redacted documents**.
25. In considering whether such an adverse effect might be “unreasonable” in the circumstances I consider the following two factors to be relevant here:
- CC1** was complying effectively with reporting requirements under the **National Law** and was not accused of, or found to be doing, anything wrong; and
 - there has been a lapse of three and a half years since the reported incident in the redacted documents occurred, and therefore the incident report cannot reflect any strategies **CC1** might have put in place subsequently to ensure a similar incident cannot occur again.
26. In further consideration of the application of the conditional exemption test in s47G1(a) I have noted the use of the words “*would or could reasonably be expected*” within section. The AIC **Guidelines**,³ drawing from decided cases at paragraph 5.16 state: *The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document* and at paragraph 5.17 *The use of the word ‘could’ in this qualification is less stringent than ‘would’, and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring.*
27. In this context I have considered that the following factors might mitigate to some extent the certainty of the unreasonable adverse effect described in paragraphs 24 and 25 above from occurring
- the three and a half years lapse since the reported incident and the absence of subsequent similar incidents reported at **CC1**;
 - the fact that parents take into consideration a range of factors when selecting an education and care service for their children. **CC1** has been rated as Meeting the National Quality Standard (NQS) under the National Assessment and Rating system for education and care services. The rating system measures the quality of a service in seven quality areas. The NQS is very well known by parents and as **CC1** itself pointed out in its applications dated 12 December 2016 “*this is likely the first point [accessed by parents] in deciding whether a child-care centre is acceptable for their children*”. **CC1**’s NQS rating is publicly available on the National Register published online by the Australian Children’s Education and Care Authority (ACECQA), and on Australian Government’s *Mychild* website and it is also displayed at the service; and
 - in providing notification of the incident with the sharp **CC1** was acting properly in accordance with the **National Law**, was not found to be doing anything unlawful or derelict and demonstrated compliance and openness about its operations.
28. Having regard to all these matters I am satisfied that disclosure of the **redacted documents** *could* (but not necessarily would) reasonably be expected to unreasonably affect **CC1** adversely in respect of its business affairs. I am therefore satisfied that both the first and second limbs of the

³ S93A FOI Guidelines Part 5 v1.4 December 2016

“conditional exemption test – business” under s 47(1) and 47G(1)(a) are met on the basis of the less stringent “could”.

Public Interest factors favouring disclosure

29. Section 11(5) provides that *“the agency...must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.”*
30. Drawing on the **FOI Act** and the AIC **Guidelines** the **Department** in its letter dated 29 August 2016 to the **FOI Applicant** concluded that public interest factors in favour of disclosure of the **redacted documents** are:
- a) disclosure would promote the objects of the FOI Act (s11B(3)(a));
 - b) release may inform debate on a matter of public importance (s11B(3)(b));
 - c) the information may inform the community of the Department’s operations including in particular the regulation of education and care services in NSW; and
 - d) it may allow or assist inquiry into possible deficiencies in the conduct or administration of the Department’s regulation of education and care services under the **National Law**.
31. The **Department** similarly cited the factors identified in paragraph 30 b, c and d favouring release in its letter dated 29 August 2016 to **CC1**.
32. I find that the factors identified by the **Department** favouring disclosure of the **redacted documents** are relevant in this case. Disclosure would promote the objects of the **FOI Act**, in particular in providing the right of access to documents and increasing scrutiny, discussion and review of a Government agency’s activities. The information may inform debate on the health and safety of children while in the care of education and care services, inform the community on the Government’s regulatory framework of education and care services, and ensure a broad range of views are available in any consideration of possible deficiencies in the administration of the Department’s regulation of education and care services under the National Law.
33. I furthermore find importantly that the information would help to inform current and prospective parents of children attending **CC1** of its compliance with the **National Law** and its capacity to deal effectively with a serious incident.

Public interest factors against disclosure

34. In its letter dated 29 August 2016 to the **FOI Applicant** the Department identified public interest factors against disclosure of the documents as being such disclosure could reasonably be expected to:
- a) prejudice the protection of an individual’s right to privacy, including that of a person’s child and disclosure of the information is reasonably considered not to be in the child’s best interests;
 - b) prejudice the competitive commercial activities of an education and care service; and
 - c) prejudice the agency’s ability to obtain similar information in the future.
35. **CC1’s** response dated 22 August 2016 to the consultation request from the **Department** outlined in paragraph 6 above dealt with the factor of disclosure of private information. In the **redacted documents** proposed to be released the **Department** has effectively acknowledged privacy concerns

and redacted all personal information. The factor identified in paragraph 34(a) is therefore not a factor relevant to this NECS IC review.

CC1 submission and NECS IC response

36. CCI's submission to this review addresses the public interest factors identified in paragraph 34(b) and 34(c) above. **CC1** contends that its business will be harmed by negative media commentary as a consequence of a release of **the redacted documents**. CCI contends that *"any threat to a child's safety would cause a parent to reconsider the use of a certain centre's services over another provider that has not had incident information released under the FOI Act."*
37. **CC1** further argues that any media coverage relating to the incident at **CC1** could give rise to *"unjust and baseless negative criticism"* despite any countervailing evidence such as a positive National Quality Standard rating of the service. **CC1** points out that media coverage would be circulated on social media and identifies the important role social media platforms such as parent discussion groups play in facilitating the exchange of information amongst parents.
38. **CC1** cites, as evidence to support its contention of harm to its business, one example of an article published in the Sydney Morning Herald in 2011 where it was revealed two children left a childcare centre unnoticed for two hours. **CC1** points to evidence that within a year the childcare centre in question was rebranded and concludes that this was a result of the negative media publicity.
39. I find that the arguments made by **CC1** address the potential business impact of the release of the **redacted documents** rather than addressing any public interest factors against disclosure of the documents.
40. I acknowledge **CC1's** points that parents are alert to any potential threat to their children's safety and that the role of social media and informal groups in helping to inform parental choices are relevant. I note however that parents consider many factors when choosing a child care service including, as acknowledged by **CC1**, a service's NQS rating and the outcomes of their preliminary visits to the service, as well as the education and care program of the service and its convenience in terms of location and operating hours. I am not satisfied that sufficient evidence has been provided to persuade me that the one incident of the nature described, that occurred over three and a half years ago, would be the determining factor in whether or not a parent decided to send their child to, or remove their child from, the child care service.
41. While I acknowledge that a disruption to the supply of an education and care service may have public interest ramifications, I find the conclusion drawn by **CC1** in paragraph 38 to be speculative, and the evidence of one example of negative media publicity that occurred 6 years ago to be insufficient to persuade me that this would be the outcome for **CC1** of the release of the **redacted documents**.
42. **CC1** further submits that disclosure of the **redacted documents** *"would raise unnecessary alarm and cause needless worry"*. **CC1** submits that *"non-disclosure will prevent parents from questioning the safety of their children as a result of negative publicity, public discussion and opinion"*. While I concluded for reasons stated in paragraphs 24-25 that the release of the **redacted documents** could result in an unreasonable adverse effect on **CC1**, I am not satisfied that **CC1** has provided adequate evidence that disclosure would raise unnecessary alarm or needless worry from a public interest perspective and I therefore reject this argument. I further find that on balance it is in the public

interest (in this case parents) to be alert to potential safety factors in relation not only to their children but also to other children.

43. **CC1** submits that in its decision of the 29 August 2016 the **Department** failed to adequately establish why the identification of **CC1** is required to meet the objectives of the public interest factors favouring disclosure as identified in paragraph 30 above. I agree that the Department's decision does not explicitly address this issue.
44. I am mindful however that the **FOI Applicant** in their settled application of 6 April 2016 was explicit in their request for documents that the names of child care centres were to be included (paragraph 2 above). As stated in paragraph 29 above s11(5) of the **FOI Act** provides that access to conditionally exempt documents must be given as requested unless the public interest factors against disclosure outweigh the public interest factors in favour of disclosure.

Section 47G1(b)

45. **CC1** further argues in its submission that identification of the service risks future reporting of incidents by this or other centres. Section 47G (1)(b) of the **FOI Act** provides for documents to be conditionally exempt from disclosure if disclosure *could reasonably be expected to prejudice the future supply of information to ...an agency for the purpose of the administration of... matters administered by the agency.*
46. The AIC **Guidelines** at paragraph 6.200 in relation to this section state that *Where the business information in question can be obtained compulsorily ... no claim of prejudice can be claimed...* Furthermore at least three Administrative Appeal Tribunal cases have held that a relevant factor in considering whether it is reasonable to expect that the future supply of information will be prejudiced, is whether the information may be compulsorily required, including whether the person is under an obligation to provide the information.⁴
47. The cases establish that if the person supplying the information was under a legal obligation to do so, it is unlikely that the disclosure of the information will prejudice the future supply of the information. There are a number of reasons for forming this conclusion, including that the person will continue to be under a legal obligation to supply the information, and in most cases it will be a requirement for continuing licensing or permission, a breach of which may jeopardize that person's licence.
48. Notifications of serious incidents are required under s174(2) and Regulation 176(2) of the **National Law**. Substantial sanctions apply for failure to comply (\$4,000 for individuals and \$20,000 in any other cases). I have therefore given little weight to the argument put by **CC1** in this instance that identifying the child care service risks future reporting of incidents by this or other services.

Findings

49. **CC1** has sought a decision by me to either *overturn* the decision made by the Department on 29 August 2016 to grant access to the **redacted documents** or to *vary* the decision by the Department to require that any references within the document that reveal the identity, location or logo of **CC1**

⁴*Public Interest Advocacy Centre and Ors [1991] AATA 188; Organon (Australia) Pty Ltd and Department of Community Services and Health and Public Interest Advocacy Centre [1987] AATA 396; and Vasta and Anor and Civil Aviation Safety Authority [2010] AATA 499.*

be redacted. A decision by me to overturn the Department's decision would involve refusal to grant access at all to the redacted documents.

50. I do not find that **CC1** has provided sufficient evidence to satisfy me that the release of the **redacted documents** would on balance be contrary to the public interest under *s11(5)* of the **FOI Act**. **CC1's** submission, with the exception of the factors discussed and dismissed in paragraphs 42 and 45 to 48 above, addresses the potential impact on the service of the release of identifying information, matters that I took into account in concluding that the documents were conditionally exempt under *s47G1(a)* of the **FOI Act**.
51. For the purposes of *s11(5)* I find the public interest factors in favour of disclosing the **redacted documents** detailed in paragraphs 29 to 33 above outweigh the public interest factors (or indeed any private interest factors if they were relevant) identified by **CC1** in its submission for withholding them.
52. As discussed in paragraph 42 above, the public interest factors in favour of disclosing the **redacted documents** importantly include the public's right (in particular present and prospective parents of children attending **CC1**) to be fully informed about a child care service and for parents to be alert to potential safety factors in relation not only to their children but also to other children. The onus for the safety of children lies jointly with both parents and the education and care service their child attends.
53. I make the further observation that the factors identified in paragraph 27 above might be used effectively by **CC1** to mitigate any negative publicity that might arise from the release of the **redacted documents**.

Decision

54. Under *s55k* of the Freedom of Information Act (the **FOI Act**) I **affirm** the decision of the NSW Department of Education (the **Department**) of 29 August 2016 to release documents related to a serious incident report made by **CC1**, modified by deletions but including the names of the Approved Provider and Approved Service, (the **redacted documents**) to the **FOI Applicant**

Lesley Foster

National Education and Care Services Freedom of Information Commissioner

Review rights

If a party to a NECS IC Review is dissatisfied with an IC Review decision they may apply under section 57A of the **FOI Act**, as modified by the *Education and Care Services National Regulations* r209(e) and r210, to have the decision reviewed by the relevant Tribunal. In the case of this IC Review the relevant tribunal is the NSW Civil and Administrative Tribunal (NCAT). The NCAT provides independent merits review of administrative decisions and has the power to set aside, vary or affirm a NECS IC review decision.

An application to the NCAT must be made within 28 days of the day on which the applicant is given the NECS IC review decision. An application fee may be applicable when lodging an application for review to the NCAT. Further information is available on the NCAT website www.ncat.nsw.gov.au or by telephoning 1300 006 228