



National Education & Care Services
FOI & Privacy Commissioners & Ombudsman

National Education and Care Services FOI Commissioner (NECS IC)

Seven Network and Queensland Department of Education and Training

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

Review Applicant:	Seven Network (FOI Review Applicant)
Respondent:	Queensland Department of Education and Training (the Department)
Other parties:	Childcare Provider 1 (CC1); Childcare Provider 2 (CC2); Childcare Provider 3 (CC3)
Decision Date:	6 March 2018
Application number:	FOI 001/2017
Catchwords:	Freedom of Information - (CTH) <i>Freedom of Information Act 1982</i> – Public interest conditional exemption personal privacy (s47F) – Exemption Cabinet documents (s34(1)(a)(ii) and s34(3)) – Exemption documents disclosing commercially valuable information (s47(1)(b)); Education and Care Services National Law (Queensland) Act 2011; Education and Care Services National Regulations.

Decision

1. Under s55k of the *Freedom of Information Act 1982* (the FOI Act) I:
 - I. affirm the decision of the Queensland Department of Education and Training (the Department) of 8 September 2017 to provide partial access to 15 documents pursuant to s47F of the FOI Act;
 - II. vary the decision of the Department of 8 September 2017 to refuse access to 35 documents pursuant to s34 (1)(a)(ii) by deciding that the documents are instead exempt pursuant to s34(3) of the FOI Act; and
 - III. affirm the decision of the Department of 8 September 2017 to refuse access to 367 documents pursuant to s47(1)(b) of the FOI Act.

Scope of the Review

2. By correspondence dated 14 June 2017, Seven Network (the FOI Review Applicant) applied to the Department under the FOI Act for access to:

“Documents since 1 January 2014, specifically reports, Ministerial/departmental briefings and attachments, photos and CCTV/video footage, relating to fire safety issues and

protocols/procedures at high rise child care centres, ie any child care centre that isn't on the ground floor".

In the correspondence the FOI Review Applicant also consented *"to copies of documents/video/photos being provided with exempt material redacted/pixilated"*. The FOI Applicant stated that *"as has been tested under FOI laws in the past, the names of child care centres are not exempt and should they be redacted [the Applicant] will refer the matter to the OAIC."*

3. On 28 June 2017 following discussion and emails between the FOI Review Applicant and the Department regarding what was to be captured by the scope of the application, the scope was amended and confirmed as follows:

"The following documents created or received between 1 January 2014 and 14 June 2017 in relation to multi storey child care centres:*

1. *Any incident and/or investigation reports relating to a fire related incident that has occurred in the Metropolitan or South East Regions;*
2. *All evacuation plans held in relation to multi storey child care centres within the Brisbane CBD;*
3. *Any Ministerial or Departmental Briefing Notes (including attachments) that concern or relate to any fire related issues/incidents.*

Also any photos/CCTV footage that relate or are attached to any documents captured by the 3 above points.

**For the purposes of this application multi storey child care centre is defined as any centre that is either located on two or more levels of a building, or in a building that has more than one level. It does not include any Family Day Care Centres."*

4. The Department was initially required to make its decision on this FOI application by 14 July 2017. The due date was extended twice by the Department to allow for consultation with affected third parties under s15(6) of the FOI Act and to allow for further processing of the request under section 15AA(b). The final decision was provided on 8 September 2017.
5. The Department found 458 documents which fitted the agreed scope of the FOI application as set out in paragraph 3. I note that for the purposes of counting or listing documents, the Department identifies each page as a separate document whether or not each page in question is part of a larger written work. All documents identified were written in nature.
6. For ease of reference the Department collated the documents into 8 files identified as Files A to H inclusive. This referencing is used throughout this Decision.
7. Documents in Files C-G inclusive were determined by the Department to include information relating to the business interests of three identified child care providers and some of their services. The documents related to evacuation plans. Section 27 of the FOI Act provides for consultation with affected third parties before the disclosure of business information if it is reasonably practicable to do so. Under s27(1)(b) a person, organisation or proprietor of an undertaking might reasonably wish to contend that a *"document is exempt under s47(1) – Documents disclosing trade secrets or commercially valuable information"* or *"conditionally exempt under section 47G – Business information"* from disclosure.

8. On 22 August 2017 the Department accordingly invited consultation submissions from the three child care providers. Two of the affected providers, in this Decision referred to as CC1 and CC2, subsequently provided submissions to the Department dated 1 September 2017 and 31 August 2017 respectively objecting to the release of documents in File C, (CC1) and Files E and F (CC2). Their reasons are discussed later in my Decision. The third child care provider, whose documents were the subject of File G, did not provide a response.
9. Following consideration of all matters, on the 8 September 2017 the Department advised the FOI Review Applicant that it had identified 458 documents falling within the scope of the request. The Department determined to:
 - a. give the FOI Review Applicant access to 41 documents in full;
 - b. give the FOI Review Applicant partial access to 15 documents, pursuant to section 47F of the FOI Act – Public interest conditional exemptions - personal privacy;¹
 - c. refuse access to 35 documents pursuant to section 34(1)(a)(ii) of the FOI Act as the documents were brought into existence for the dominant purpose of submission for consideration by Cabinet;² and
 - d. refuse access to 367 documents pursuant to section 47(1)(b) of the FOI Act as disclosure would reveal commercially valuable information³.

Application by FOI Review Applicant

10. On 2 October 2017 the Seven Network requested a NECS Freedom of Information Commissioner review of the Department's decision under s54L of the FOI Act. The FOI Review Applicant requested that I *"assess all documents that were blocked to ensure any exemption was applied correctly"*. The FOI Review Applicant argued that it would have expected at least partial access to documents relating to fire safety for children and that there is *"a great public interest in ensuring [child care centres] aren't a fire hazard"*. The FOI Review Applicant also queried whether the exemption provisions of the FOI Act in relation to Cabinet document applied to the Queensland Cabinet.

Decision Under Review

11. The decision under review is the decision of the Department dated 8 September 2017 outlined in paragraph 9 above, specifically paragraphs 9b, 9c and 9d - partial grant of access to documents or refusal to grant access. The granting of full access to the 41 documents identified in paragraph 9a is irrelevant to this Review.
12. In making my Decision, I have had regard to the following:
 - the original FOI, and the NECS IC Review, applications;
 - the documents at issue (the documents);
 - the parties' submissions;
 - the FOI Act, in particular 11A(5), 27, 27A, 34(1), 34(3), 47(1), and 47F;
 - the FOI Guidelines issued under s93A of the FOI Act and the Privacy Guidelines issued under the *Privacy Act 1988* by the Australian Information Commissioner;⁴ and
 - relevant case law.

¹ Documents 1,2,6,7,& 9 from File A, and documents 1-4 and 7-12 from File B.

² All documents in File H

³ All documents in Files C, E and F

⁴ *Freedom of Information Guidelines* V1.3 December 2016; *Australian Privacy Principles (APP) Guidelines* v1.2 March 2015

Section 47F Public Interest Conditional Exemption - Personal Privacy

13. The Department found some material on documents in Files A and B to be exempt under s47F of the FOI Act. Each File contains a notification of a fire-related incident at an education and care service. The services and incidents are unrelated to each other. Education and care services are required by law to notify their Regulatory Authority of complaints and incidents occurring at their services.⁵
14. The main requirements of the s47F public interest conditional exemption are that a document contains ‘personal information’; that disclosure in response to the applicant’s FOI request would be ‘unreasonable’ (s 47F(1)); and it would be ‘contrary to the public interest’ to release the material at the time of the decision (s 11A(5)).
15. Under s4 the FOI Act ‘**personal information**’ has the same meaning as the *Privacy Act 1988* which provides in s6 of that Act:
Personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable:
- a. *Whether the information or opinion is true or not; and*
 - b. *Whether the information or opinion is recorded in a material form or not.*
- Individual** means a natural person
16. In its Decision of the 8 September 2017 the Department identified two categories of personal information which it redacted from the documents in Files A and B:
- i. *“identifying information of individuals [educators] directly involved in the incidents detailed in the documents, including names and contact details; and*
 - ii. *information relating to the incidents detailed in the documents, the disclosure of which could reasonably be expected to lead to the identity of the individuals involved becoming known, including details of the child care service and the buildings the centre is located in”.*
17. On examination of the documents I am satisfied that the information referred to in paragraph 16(i), which directly identifies educators by name and provides telephone and email contact details, is clearly “personal information” for the purposes of the FOI Act.
18. On examination of the documents in relation to information referred to in paragraph 16(ii)) I found that the documents included the following relevant information: the Service Provider Names and Provider Numbers; Service Trading Names and Approval Numbers; the position titles of educators referred to in paragraph 17; and, in the case of File B, the name of a security company which included part of the name of the service provider. I therefore need to consider whether this constituted information about an individual who was *reasonably identifiable*.

⁵ *Education and Care Services National Law Act 2010* s174; *Education and Care Services National Regulations* Reg 175

19. In this consideration I have been assisted by the FOI Guidelines and the Privacy Guidelines issued by the Australian Information Commissioner, and relevant case law.
20. Relevant to my considerations in this case the FOI Guidelines state:
- a) An agency or minister should not, seek information from the applicant about what other information they have or could obtain. (Guideline 6.132).
 - b) If it is technically possible to identify an individual from information, but it is so impractical that there is *almost no likelihood* of it occurring, the information is not personal information (Guideline 6.133).
 - c) Whether or not the individual is *reasonably identifiable* depends on the **practicability** of linking pieces of information to identify the individual (Guideline 6.135).
21. Relevant Privacy Guidelines state:
- a) An individual may not be reasonably identifiable if the steps required to do so are **excessively time-consuming or costly in all** the circumstances. (Guideline B93).
 - b) Where it is **unclear** whether an individual is ‘reasonably identifiable’, an APP entity *should err on the side of caution* and treat the information as personal information. (Guideline B.94).
22. After the issuing of the 2015 and 2016 Guidelines referred to above, the AATA in *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission* (Freedom of information) [2017] AATA 269 (28 February 2017)] made some relevant and important observations concerning the approach to be taken for the purposes of deciding whether personal information about an individual would be *reasonably identifiable* by the disclosure of information.
23. The AATA’s decision in Utopia included an examination of whether s47F of the FOI Act applied to information concerning ASIC staff. In his judgement when applying s47F, the Deputy President stated the following:
- a) *...the definition of “personal information” requires [that] the question of whether the person who is the subject of information is reasonably identifiable should be determined by reference to knowledge **that any person would have or could reasonably obtain** [my emphasis] as well as the knowledge that the particular person making the request could reasonably have access to. (Para 233).*
 - b) *I do not think that s 47F requires or permits consideration of what would amount to unreasonable disclosure by reference only to the identity of the person requesting access to the document. it seems to me that the issue whether the person is known to be associated with the matters in the document sought is also assessed by reference to the public generally. It is not assessed by reference to the person requesting access to the document. (Para 237).*
 - c) *The existence or nature of the information cannot be a matter of conjecture or speculation for, just as the definition of “personal information” requires that the individual be **reasonably identifiable**, that individual must also be reasonably identifiable from any information, which is available from outside sources and which may be married with the personal information in the document sought. The word ‘reasonably’ effectively eliminates conjecture or speculation. (Para 241).*

24. Shortly after the AATA's decision in *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission*, the Australian Information Commissioner (AIC) handed down a decision involving s47F in the matter of *Paul Kaszyckj and Australian Taxation Office (No. 2)* (Freedom of information) [2017] AIC 110 (7 November 2017). The relevant sections of the case relate to whether the information about candidates' education and careers, including involvement in specific projects, career highlights and perceived strengths, would lead to the reasonable identification of the candidates if their names were redacted.
25. The AIC referred to the AATA Utopia decision referred to in paragraph 23(a) above and went on to state:
- a) *It is apparent that the documents contain detailed information regarding the candidates' education and employment history, covering relevant timeframes, locations, roles and responsibilities. It is also apparent that the information is unique to each respective candidate. In this case, I consider that **such information could enable re-identification of the candidates, even if their names were removed from the documents.** [my emphasis]. (Para 19).*
 - b) *With this information, I am satisfied that the identity of the candidates **could reasonably be identifiable to persons with some knowledge of, or association with, the respective candidates, their education or their current or previous employment.** (Para 20).*
26. *Julian Knight and Commonwealth Ombudsman* (Freedom of information) [2017] AICmr 94 (4 October 2017) was another recent decision of the Australian Information Commissioner involving s47F. In that decision, the AIC again applied the AATA's decision in the Utopia case, and his decision included the following statements in relation to the consideration of the question of whether an individual is reasonably identifiable:
- a) *Relevantly [the Deputy President] discusses: ... the question of whether the person who is the subject of information is reasonably identifiable should be determined by reference to knowledge that any person would have or could reasonably obtain as well as the knowledge that the particular person making the request could reasonably have access to. Once access is given to a document ... the Minister or agency granting that access has no control over the use that is made of it. (Para 39).*
 - b) *In this IC review, the complaints include descriptions of the alleged incidents, where they took place and the impacts on the complainants. Given that there are only two complainants and the documents record the alleged abuse in specific detail, I am satisfied here that the complainants could reasonably be identifiable to persons with some knowledge of, or connection with, the recorded events. (Para 43)*
27. In my view, the deliberations outlined in the above paragraphs support the following interpretation of s47F of the FOI Act. If *any* person, with some knowledge of, or connection with the information to be disclosed in the document, could identify the individual to whom that information relates, then the person who is the subject of the information is reasonably identifiable within the definition of personal information, as applied in s47F of the FOI Act.
28. The number of people that fall within the concept of any person, does not appear to be limited.
29. In my view the Service Trading Names of the services in Files A and B *coupled with* the position titles of the educators could lead to educators being identifiable to persons with some knowledge of, or associated with, the educators. In relation to File B, as the Provider Name is also partially included in both the Service Trading Name and security company

name for the service, it is my view that these two names could similarly lead to the identification of individuals.

30. In relation to File A I considered whether the disclosure of the Provider (CC3) name passed the conditional exemption test requirements of s47F of the FOI Act as CC3 is a large provider with multiple services across Australia. This process involved considering whether there was therefore a reduced risk that the disclosure of the Provider (CC3) name could lead to the identification of individuals.
31. As the Department advised me that it did not consult CC3 with respect to the material in File A during its processing of the initial FOI request from the Review Applicant, and I was giving consideration to the matters in paragraph 30, I formed the view that CC3 might reasonably wish to make an exemption contention under sections 27A (Personal Privacy) or 27 (Business matters) of the FOI Act.
32. Before proceeding to consult CC3 I also sought confirmation from the Review Applicant that it continued to wish to pursue the name of the Provider in this instance, which it provided.
33. CC3 subsequently made a submission raising exemption contentions under s47F (Personal privacy) and S47G(1) (a) (Business matters) of the FOI Act.⁶ With respect to personal privacy, CC3 contended that the release of the Provider name, coupled with the inclusion of photographs and the location of the Regulatory Authority's regional office staff in File A, could lead to the identification of the service.
34. Having regard to the above matters I have determined that, in the circumstances, there is a reasonable possibility that the release of the Provider name, in conjunction with the photographic evidence and regional office location details, significantly increases the possibility of the child care Service being identified. This could in turn lead to the identification of individuals in the manner outlined in paragraph 29 above.
35. I am therefore satisfied that Files A and B contain personal information which both directly identifies an individual, as described in paragraph 17, or could reasonably lead to the identification of an individual in the manner referred to in paragraphs 29 to 34, for the purposes of s47F of the FOI Act.
36. Having decided that the documents contain personal information for the purposes of s47F of the FOI Act I must now consider whether disclosure of the documents would involve an "unreasonable" disclosure of personal information. S47F(2) provides that a decision maker must have regard to:
 - the extent to which the information is well known
 - whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document
 - the availability of the information from publicly accessible sources
 - any other matters that the agency or Minister consider relevant.

⁶ I note the conditional exemption submissions also made by CC3 with respect to S47G(1)(a) of the FOI Act but I have not considered them further given I was satisfied that the conditional exemption provisions of S47F had been met.

37. In *'FG' and National Archives of Australia 2015*⁷ the former Australian Information Commissioner points to the range of additional matters that can potentially be considered in deciding whether disclosure of personal information would be “unreasonable” drawing on case law, the Guidelines, and s47(2) of the FOI Act. Identified factors relevant to this FOI Decision include:
- a. any detriment that disclosure may cause to the person to whom the information relates;
 - b. any opposition to disclosure expressed or likely to be held by that person;
 - c. the circumstances of an agency’s collection and use of the information;
 - d. the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act;
 - e. any submission an FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information; and
 - f. whether disclosure of the information might advance the public interest in government transparency and integrity.
38. The FOI Guidelines explain that the test of ‘unreasonableness’ under s 47F ‘implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals.’
39. Following consideration of these factors, I am satisfied that the disclosure of the personal information would be unreasonable for the following reasons:
- it relates to educators’ personal affairs - their contact details, where they work and the positions they hold;
 - it attributes remarks and actions to educators which they might reasonably consider were made and taken within the sole context of carrying out their work responsibilities. The information collected in Files A and B was to fulfil a legal reporting requirement between the services in question and the Queensland Regulatory Authority. Such reports are not as a matter of course public documents;
 - the consent from educators for the release of their personal information was not sought; and
 - the information is not available in full or in part from publicly-accessible sources, for example the websites of the child care services under consideration do not include the details of the names or positions of individual educators working at the centres, except the name of the centre manager in File A.
40. I am therefore satisfied that the conditional exemption provisions of s47F(1) of the FOI Act are met. In finding that there is material in the documents that is conditionally exempt, s11A(5) of the FOI Act requires consideration of whether it would be contrary to the public interest to give the applicant access to conditionally exempt documents. S11A(5) requires that access to material which is conditionally exempt at a particular time must be given unless access, at the time, would on balance be contrary to the public interest.

⁷ *FG and National Archives of Australia* [2015] AICmr 26 (13 April 2015) at 47

41. S11B(3) of the FOI Act sets out some of the factors which must be taken into account in applying the public interest test to conditionally exempt documents. The FOI Guidelines⁸ amplify these factors.
42. In its Decision of 8 September 2017 the Department identified the one factor favouring disclosure being that it would promote the objects of the Act by giving access to information held by government (s11B(3)(a)).
43. I agree with the Department that this is a relevant public interest factor in favour of disclosing the documents in Files A and B and I would add that a further factor in favour of disclosure is that the documents provide information about the operations of government, in this case the administration and regulation of education and care services.
44. The FOI Act does not list public interest factors weighing against disclosure. The FOI Guidelines⁹ point out that such factors *will depend on the circumstances. ...the inclusion of exemptions and conditional exemptions in the FOI Act recognizes that harm may result from the disclosure of some types of documents in certain circumstances [and that while] citing the particular harm defined in the applicable conditional exemption is not itself sufficient to conclude that disclosure would be contrary to the public interest...the harm is an important consideration that the decision maker must weigh when seeking to determine where the balance lies*".
45. The FOI Guidelines cite a non-exhaustive list of public interest factors against disclosure one of which the Department has drawn on in making its decision - *that disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy*. I agree that this is the relevant factor.
46. In weighing up the public interest factors for and against disclosure I have noted that:
- i. the inclusion of personal information, or information that could lead to the identification of person(s), in the documents in Files A and B is not necessary to achieve the factors favouring disclosure identified in paragraph 42 and 43 above. The disclosure of the documents, redacted of such personal information, still achieves these outcomes.
 - ii. while there may be some interest by members of the public in knowing the personal details of individuals in the two childcare centres in question there is no public interest served by revealing those details. No wrong has been attributed to the actions of the educators and the documents suggest they effectively and efficiently dealt with the fire-related incidents described and put into place some mitigating strategies to prevent any similar incident from occurring;
 - iii. individual personal privacy is in itself a significant public interest matter and, in my opinion, it requires some countervailing public interest argument – that is argument of equal weight - to override the protection of personal privacy which I cannot find in this case.

⁸ *Freedom of Information Guidelines*. Australian Information Commissioner V1.3 December 2016 par 6.19

⁹ Op.cit paras 6.20-6.21

47. On balance I have concluded that it would be contrary to the public interest to release the personal information described in paragraphs 16-18 above and I affirm the Department's decision to redact the identified information from Files A and B.
48. I have also considered the FOI Review Applicant's argument in its letter dated 14 June 2017 that the names of child care centres were to be included in documents provided on the basis that "names of child care centre are not exempt *as has been tested under FOI laws in the past*". In my view it is not possible to conclude that the names of child care centres in all cases are not exempt. Whether or not names of child care centres are exempt from disclosure will be determined by the particular circumstances of each case and the exemption or conditional exemption sections of the FOI Act that are relevant to the particular enquiry.
49. Drawing on case law the Australian Information Commissioner Paragraph 6.28 of the FOI Guidelines relevantly states:
... an agency cannot rely on a class claim contention when withholding a document under a conditional exemption. Rather agencies...must administer each request individually with regard to the contents of a document and apply the public interest test to the particular document to decide whether an exemption claim should be upheld at that time.
50. Given the explicit request from the FOI Review Applicant I also considered whether it would be possible to release the names of the two childcare centres without compromising personal privacy. As discussed in paragraphs 29 to 35 above I am satisfied that the release of the centre names, *coupled with* the position titles of the educators at the centres and other matters mentioned, could lead to the unreasonable disclosure of personal information. I therefore also considered the option of redacting the position titles of the educators in favour of disclosing the child care centre names. However, as the Department advised me it had already released the redacted copies of Files A and B, exclusive of personal information and service and provider details, but inclusive of educators' position titles, to the FOI Review Applicant, this is not an option as the two sets of information could easily be put together.

Section 34 Exemption - Cabinet Documents

51. In its application the FOI Review Applicant sought clarification as to whether the s34 exemptions from disclosure for Cabinet documents in the FOI Act applied to Queensland Cabinet documents.
52. The regulation of education and care services in Australia is administered under national applied laws legislation. S4 of the *Education and Care Services National Law (Queensland) Act 2011* applies the Education and Care Services National Law as set out in Schedule 1 of the *Education and Care Services National Law Act 2010* of Victoria as a law of Queensland (the National Law).
53. S264 (1) of the National Law applies the Commonwealth FOI Act "*as a law of a participating jurisdiction for the purposes of the National Quality Framework*". S264(2) provides for modifications to be made to the FOI Act by the *Education and Care Services National Regulations*.

54. Regulation 209(a) of the *Education and Care Services National Regulations* provides that the FOI Act applies “*as if a reference to the Commonwealth or the Government of the Commonwealth.....were a reference to a participating jurisdiction or the Government of a participating jurisdiction*” and r209(b) provides that the FOI Act applies *as if a reference to any other Commonwealth office holder or body...were a reference to the equivalent officer or body of a participating jurisdiction*”. It is therefore clear that s34 of the FOI Act applies to Queensland Cabinet documents under the national applied laws legislation.
55. In its Decision letter of 8 September 2017 the Department found the documents in File H “to be exempt under s34(1)(a)(ii)” of the FOI Act.
56. Section 34(1(a)) of the FOI Act provides that:
- (1) *a document is an exempt document if:*
- (a) *both of the following are satisfied:*
- (i) *it has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted;*
- (ii) *it was brought into existence for the dominant purpose of submission for consideration by the Cabinet.*
57. It is important to note that *both* limbs of s34(1)(a) must be found for the exemption to apply.
58. Relevant also to this discussion is s34(1)(c) which provides that a document is an exempt document if “*it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph 1(a) applies*”.
59. For definitional purposes “Cabinet” includes a committee of the Cabinet under the FOI Act (s4 FOI Act).
60. S55T(5(b)) of the FOI Act prohibits me from disclosing the contents of File H. However, I have examined the documents and I am satisfied that they are various drafts of briefing notes on the one matter for use by a Minister or Ministers in the context of Cabinet Budget Review Committee deliberations.
61. Given the nature of the documents as apparent briefing notes I sought further clarification from the Department that the documents in question were intended for *submission* to the Cabinet Budget Review Committee and were created for the dominant purpose of being submitted to the Cabinet Committee – thereby satisfying both limbs of s34(1)(a).
62. In its response the Department advised that the documents *were not documents submitted or proposed to be submitted to Cabinet. They were prepared to assist the Minister for participation in the Cabinet Budget Review Committee.*
63. I therefore am not satisfied that the exemption requirements of s34(1)(a) have been met. Furthermore as the documents are not briefing notes relating to a Cabinet submission they do not fall within the exemption of s34(1)(c) cited in paragraph 58 above.

64. I subsequently considered whether any other s34 exemptions might apply to the documents. s34(3) provides that *“a document is an exempt document to the extent that it contains information the disclosure of which would reveal a Cabinet deliberation or decision unless the existence of the deliberation or decision has been officially disclosed”*.
65. As discussed in the FOI Guidelines and in IC review cases¹⁰, a document is exempt under s34(3) if it contains information which, if disclosed, would reveal a Cabinet deliberation or decision, unless the deliberation or decision has been officially disclosed.
66. The term ‘deliberation’ has been interpreted as an active debate in Cabinet, or its weighing up of alternatives, with a view to reaching a decision on a matter, but not necessarily arriving at one.¹¹
67. For the exemption under s 34(3) to apply to documents, there is no requirement that the documents be considered directly by Cabinet, or that they be prepared for the dominant purpose of submission to Cabinet or a committee of Cabinet. The factor that needs to be determined is whether the documents contain a deliberation or decision of the Cabinet, and whether disclosure of the documents would reveal that deliberation or decision.
68. I am satisfied that the documents have been prepared for briefing a Minister or Ministers for the deliberations of the Cabinet Budget Review Committee and that they contain material the disclosure of any of which would reveal deliberations of that Committee. I am therefore satisfied that the documents are exempt documents under s34(3) of the FOI Act.
69. I therefore vary the decision of the Department of 8 September 2017 to find that the documents are not exempt documents under s34(1)(a)(ii) of the FOI Act but are exempt documents under s34(3) and the release of any part of those documents would reveal a Cabinet Committee deliberation. The Act does not require the application of a public interest test to exempt documents.

Section 47(1) documents disclosing commercially valuable information

70. Documents in Files C, D, E, F and G contain emergency and evacuation plans, submitted to the Queensland Regulatory Authority as part of the service approval process, for three child care providers operating services in multi-storey buildings within Brisbane’s CBD.
71. As discussed in paragraphs 7 and 8 the Department sought consultation submissions under s27(1)(b) of the FOI Act from the three child care providers whose services were the subject of the documents. The consultation letter specifically invited submissions in relation to s47(1) – documents disclosing trade secrets or commercially valuable information, and s47G – business information, of the FOI Act. CC1 raised objections to the disclosure of documents in File C and CC2 raised objections to the disclosure of documents in Files E and F. The third provider did not respond to the invitation.

¹⁰ FOI Guidelines [5.74-5.75]

¹¹ *Dan Conifer and Department of the Prime Minister and Cabinet* (No. 3) (Freedom of information [2017] AICmr 132 (7 December 2017))

72. In their consultation submission CC1 put forward arguments in support of exemption from disclosure of documents in File C specifically relying on section 47(1)(a) &(b) – trade secrets and commercially valuable information of the FOI Act and referenced relevant case law - *Cordova and Australian Electoral Commission [2015] AATA 956*¹² - in support of their arguments.
73. In summary CC1 contended that the documents were trade secrets on the basis that: the information in the documents is not well known outside the organization; and the documents took significant time, effort and resources to develop including the engagement of third party consultants.
74. CC1 further contended that the documents contained commercially valuable information whose value may be destroyed or diminished on the basis that: the documents contain a detailed plan of how to safely evacuate children from a childcare centre located in a multi-storey building which would be of tangible benefit to persons engaged in the childcare industry in so far as it provides a roadmap for developing a similar plan; a third party, especially a prospective child care provider, would be prepared to pay for the documents as they have intrinsic value which could not be duplicated without either access to the documents or the cost of engaging third party consultants; and the child care centre to which the documents relate is popular and likely to attract interest from competitor providers who, if unscrupulous, could use the documents to their competitive advantage thereby diminishing the commercial value of the documents to CC1.
75. In their consultation submission to the Department CC2 also put forward arguments in support of exemption from disclosure of documents in Files E and F relying on s47(1)(a) &(b) of the FOI Act. It is important to acknowledge that CC2 also mounted arguments against disclosure of the documents in relation to s47G(1) – conditional exemption business; 37(1)(c) - documents affecting ...protection of public safety; and 47F -conditional exemption personal privacy.
76. In relation to s47(1)(a) &(b) CC2 contended that the documents were trade secrets on the basis that: the documents were created as part of the accreditation process for the child care services as required under regulations 24, 97 and 168 of *the Education and Care Services National Regulations* requiring child care services to have emergency and evacuation procedures; the information contained in the documents is not readily publicly available and is not known outside the Provider's organisation; the risk of direct competitors replicating the information and putting it to their commercial advantage is high; and the documents are copyright by the contractor who developed the emergency plans and the release of the information may infringe the contractor's intellectual property rights or disclose its trade secrets, including the manner in which it prepares emergency plans and the content of those plans.
77. CC2 further contended that the documents contained commercially valuable information: on the basis that: the content of the documents is of a specialised, complex and comprehensive nature such that the services of an appropriately qualified contractor were required to develop them in conjunction with CC2 staff; the total expense incurred by CC2

¹² *Cordova and Australian Electoral Commission [2015] AATA 956 paras 27-32*

was \$48,000 (excl of GST); the information is known only to the Provider's staff, the contractor, and accreditation bodies to whom it has been submitted; and the information is up to date and in compliance with current regulations.

78. After taking all matters into account, including the submissions from CC1 and CC2, the Department found the documents in Files C, E and F to be exempt documents under s47(1)(b) of the FOI Act. The Department argued that in the context of the highly competitive and growing childcare industry, the documents had a commercial value to the providers of the childcare services in question, which would be diminished if the information could be accessed and adapted for use by competitor providers. I turn now to consideration of the Department's decision.
79. S47(1) provides that *a document is an exempt document if its disclosure under this Act would disclose:*
- a) trade secrets; or*
 - b) any other information having commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.*
80. The Department's decision does not contain consideration of the documents in relation to the trade secrets exemption (s47(1)(a)).
81. As discussed in the FOI Guidelines and relevant case law to be exempt under s 47(1)(b) a document must satisfy two criteria:
- the document must contain information that has a commercial value either to an agency or to another person or body, and
 - the commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed.
82. It is a question of fact whether documents have a commercial value. The commercial value may relate, for example, to the profitability or viability of a continuing business operation or commercial activity in which an agency or person is involved. The information need not necessarily have "exchange value" in the sense that it can be sold as a trade secret or intellectual property.¹³
83. The FOI Guidelines provide a list of factors that may assist in determining whether information has a commercial value. These are:
- whether the information is known only to the agency or person for whom it has value or, if known to others, to what extent that detracts from its intrinsic value;
 - whether the information confers a competitive advantage on the agency or person to whom to whom it relates;
 - whether a genuine "arm's length" buyer would be prepared to pay for the information;
 - whether the information is current or out of date;
 - whether the disclosure of the information would reduce the value of a business operation or commercial activity.

¹³ FOI Guidelines para 5.203 drawing from *Re Mangan and The Treasury* [2005] AATA 898; *Re Metcalf Pty Ltd and Western Power Corporation* [1996] WAICmr23; and *Mckinnon and Department of Immigration and Citizenship* [2012] AICmr34[42]

84. I have read the documents in question. While I note that at times they contain some duplication of information and minor editorial or typographical errors I am nevertheless satisfied that the documents contain comprehensive, tailored, professionally developed evacuation and emergency plans for the child care centres in question. I am further satisfied that the information is current and its intrinsic value is not diminished by any of the minor typographical or editorial errors referred to.
85. I note that as a condition of both initial service approval and ongoing operations, childcare providers are required to develop emergency and evacuation plans.¹⁴ Penalties apply in each case of failure to comply with the relevant parts of the legislation cited in footnote 14 and approved providers can ultimately have their service approval withdrawn in serious cases of non-compliance. These plans therefore have intrinsic commercial value to the childcare provider as without them they could not commence operation of their service or continue to operate. I consider that the information therefore confers a competitive advantage on the child care centres in question in relation to prospective entrants to the child care industry.
86. I note that the documents are of a comprehensive nature that would have taken time and resources to complete and are evident of the engagement of third party consultants in their development. CC2 cited the total financial cost of preparation of the emergency and evacuation plans for its two childcare centres as being \$48,000.
87. I am mindful that the time and money invested in generating information will not necessarily mean that it has intrinsic commercial value.¹⁵ However I am satisfied that the financial cost of producing the information in this case has a bearing on deciding whether an at arms-length buyer, such as a competitor child care provider, would be prepared to pay for the information at a reduced cost rather than incur the full cost of producing their own emergency and evacuation plans from scratch.
88. I am satisfied that in this case the documents provide a roadmap for the development of emergency and evacuation plans which could be adapted to the specific circumstances of competitor education and care providers and as such have intrinsic commercial value to CC1 and CC2.
89. I note that the information contained in the documents is of a specialist nature and is not widely known. I acknowledge that in their consultation submissions both CC1 and CC2 identified that there were significant additional complexities involved in developing effective

¹⁴ In summary: s44 of the *Education and Care Services National Law Act 2010* sets out the form of an application for service approval. s44(1)(e) requires the application to include prescribed information; r24 of the *Education and Care Services National Regulations* sets out the information that **must** be included in an application for a centre-based service approval; r24(j) requires a statement that the applicant has prepared the policies and procedures referred to in r168; r168(2)(e) requires policies and procedures in relation to emergency and evacuation including the matters set out in r97; r97(1)&(2) set out some matters that must be included in the emergency and evacuation plans; r97(3) requires documented three monthly rehearsals of emergency and evacuation plans; and r97(4) requires the service to ensure that a copy of the emergency and evacuation floor plan and instructions are displayed in a prominent position near each exit at the education and care service premises.

¹⁵ *FOI Guidelines* [5.204] drawing on *Re Hassell and Department of Health Western Australia* [1994] WAICmr 25

emergency and evacuation procedures for child care services located within, and not on the ground level of, multi-storey buildings. The documents are available to the Regulatory Authority and the staff of the child care centres in question. They are not published on any website or distributed as a matter of course to members of the public.

90. For the reasons discussed in paragraphs 82-89 I therefore find that the first requirement of s47(1)(b) of the FOI Act is satisfied. I turn now to the second requirement of the section – whether the commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed.
91. In *Cordova*¹⁶ the AATA, referencing settled principles in case law, concluded that, when considering whether the disclosure of information could reasonably be expected to destroy or diminish its commercial value, the decision maker is not required to be satisfied there is a high probability or even a likely probability of this occurring. Rather it is sufficient the likelihood of it occurring is something less than a probability but more than just an intangible possibility.
92. Child care is a lucrative, competitive growth industry.¹⁷ Government subsidies, currently¹⁸ in the form of Child Care Benefit (CCB) and Child Care Rebate payments, have made child care more affordable for families and, in the case of the CCB¹⁹, also of benefit to child care services. The value of quality early childhood education and care, both in terms of child development and the economy, is now well documented around the world. Both the changing nature and hours of work and the increased density of city living have placed increasing demands for flexible child care options to which child care providers are responding. The growth of child care services located in central city and multi-storey buildings is a manifestation of this.
93. The child care sector is also highly regulated under aforementioned education and care services national law together with other applicable laws including those relating to planning, buildings, health and safety, and emergency services. Consequently entry into the industry is resource intensive and time consuming for prospective child care service providers and ongoing viability within the industry is dependent upon continuing compliance with legislation, including, in the matter under consideration, maintaining, practicing and documenting the outcomes of the practice of, emergency and evacuation plans
94. In this context of strong incentives to enter the education and care industry, coupled with the complex legislative requirements and associated costs of doing so, I am satisfied that the disclosure of the detailed emergency and evacuation plans of CC1 and CC2 could reasonably be expected to be diminish their commercial value. The documents confer a commercial advantage to CC1 and CC2 in terms of both the viability and profitability of their continuing business operations.

¹⁶ *Cordova op cit* [42-52]

¹⁷ According to economic market analysts Bankwest and IBIS the industry in 2015/16 was worth \$10.6bn, in revenue, estimated to rise to \$14.3bn by 2020/21

¹⁸ On 2 July 2018 new child care subsidy arrangements come into effect.

¹⁹ CCB payments are means tested and usually paid directly to child care services in return for reduced fees to the relevant users of the service.

95. I therefore affirm the Department's decision that the documents in Files C, E and F are exempt documents under s47(1)(b) of the FOI Act.

96. As I have affirmed the Department's decision that the documents are exempt under s47(1) of the FOI Act it is unnecessary for me to consider here the other exemption contentions referred to in paragraph 75 above. However, in doing so, this should not be construed that I am dismissing the arguments put forward by CC2 in relation to these sections of the FOI Act nor am I making any inferences as to their merit.

Decision

97. Under s55k of the *Freedom of Information Act 1982*(the FOI Act) I:

- i. affirm the decision of the Queensland Department of Education and Training (the Department) of 8 September 2017 to provide partial access to 15 documents pursuant to s47F of the FOI Act;
- ii. vary the decision of the Department of 8 September 2017 to refuse access to 35 documents pursuant to s34 (1)(a)(ii) by deciding that the documents are instead exempt pursuant to s34(3) of the FOI Act; and
- iii. affirm the decision of the Department of 8 September 2017 to refuse access to 367 documents pursuant to s47(1)(b) of the FOI Act.

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 Queensland Civil and Administrative Tribunal (QCAT).²⁰ The QCAT 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 QCAT 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 QCAT. Further information is available on the QCAT website www.qcat.qld.gov.au or by telephoning 1300 753 228

²⁰ S40 *Education and Care Services National Law (Queensland) Act 2011*