



National Education & Care Services
FOI & Privacy Commissioners & Ombudsman

National Education and Care Services FOI Commissioner (NECS IC)

Mr Chiang Lim, CEO Australian Childcare Alliance NSW and NSW Education and Care Services Regulatory Authority

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

Review Applicant: Mr Chiang Lim, CEO, Australian Childcare Alliance NSW (FOI Review Applicant)

Respondent: NSW Education and Care Services Regulatory Authority, Department of Education¹ (the Regulatory Authority)

Decision Date: 31 July 2019

Application number: FOIC 01/2019

Catchwords: Freedom of Information - (CTH) *Freedom of Information Act 1982 – Public interest conditional exemptions-business (s 47G); – Children (Education and Care Services National Law Application) Act 2010 (NSW); Children (Education and Care Services) National Law (NSW); Education and Care Services National Regulations.*

Decision

1. Under s55k of the *Freedom of Information Act 1982* (the FOI Act) I vary the decision of the NSW Regulatory Authority to provide partial access to 6 pages of documents pursuant to s47G of the FOI Act and require the Regulatory Authority to inform the Review Applicant, in writing within 14 days of this decision, of the 20 records published on the Department of Education's website identified at paragraph 40 of this decision that correspond to the records in the documents provided to the Review Applicant.

Scope of the Review

2. By correspondence dated 10 January 2019, Mr Chiang Lim (the Review Applicant), CEO of the NSW Branch of Australian Childcare Alliance, applied to the Regulatory Authority under the FOI Act for access to:
... a complete listing of all enforcement actions against childcare approved providers [that] have been completed by the Department including details of which actions were successful and which were unsuccessful.
3. On 31 January 2019 following correspondence from the Regulatory Authority to Mr Lim indicating that there were grounds for a practical refusal of the FOI application under s 24 of the FOI Act due to insufficient detail, the applicant submitted an amended scope for the FOI application. This was subsequently confirmed as:

¹ The Secretary of the NSW Department of Education is the Regulatory Authority. *NSW Children (Education and Care Services National Law Application) Act 2010 - s 9*

“For the period 1 January 2012 to 31 December 2018 ... a complete listing of all completed enforcement actions taken by the Department against any approved childcare providers ... [including] details of which actions were successful, and which were unsuccessful. [The listing is to include]:

- a) Provider or individual name*
- b) Service name*
- c) Date of action*
- d) Action taken*
- e) Date first posted*
- f) Was the enforcement action successful or unsuccessful”*

4. The due date for the Regulatory Authority’s decision was extended under s15AA of the FOI Act with the agreement of the FOI applicant, to allow for further processing of the request. The final decision was provided on 21 March 2019.
5. The Regulatory Authority found 6 pages of documents containing details of 82 enforcement actions that it considered fell within the scope of the FOI application. The documents were drawn from information held in an electronic database and all actions related to prosecutions.²
6. The Regulatory Authority determined that the documents contained information relating to the business interests of identified education and care providers, services and individuals.
7. Section 27 of the FOI Act provides for consultation with affected third parties before the disclosure of business information, if it appears to the Regulatory Authority that the third party might reasonably wish to make an exemption contention, and it is reasonably practicable to give the third party a reasonable opportunity to do so. Under s 27(1)(b) a person, organisation or proprietor of an undertaking is able to make an exemption contention that the document is exempt from disclosure on the following grounds:
 - (a) the document is *“exempt under s 47 – Documents disclosing trade secrets or commercially valuable information”* or
 - (b) the document is *“conditionally exempt under section 47G – Business information”* and access to the document would be contrary to the public interest.

Whilst s27(4) of the FOI Act states that the Regulatory Authority must not decide to give access to such documents unless the third party is given a reasonable opportunity to make submissions in relation to the exemption contention, and the Regulatory Authority has regard to any such submissions, subsection (5) states that subsection (4) only applies if it is reasonably practicable to give the third party the opportunity to do so, having regard to all the circumstances including the time line for processing the FOI request.

8. In its Decision Notice the Regulatory Authority advised that given the *“large number of childcare centres it was not practicable to consult them to ascertain whether they had any objection to the disclosure of some or all of their information”*.
9. On 21 March 2019 the Regulatory Authority advised the FOI Review Applicant of its Decision. The Regulatory Authority determined to give the Review Applicant partial access to the 82 identified enforcement actions pursuant to s 47G of the FOI Act – *Public interest - conditional exemptions –*

² Other enforcement actions available to the Regulatory Authority under the National Law include enforceable undertakings, compliance notices or directions, suspension or cancellation of services, and prohibition notices.

business information. Only partial access was given because certain information contained in the documents was found by the Regulatory Authority to be exempt information, and it therefore redacted information contained in the documents that identified education and care services providers, services and individuals.

10. The Regulatory Authority provided the information in an excel spreadsheet, as requested by the Review Applicant, that numerically listed each of the 82 enforcement action records under the following headings:
 - date of action;
 - type of enforcement action;
 - outcome of enforcement action [whether successful, partially successful, unsuccessful]; and
 - details [the number of offences, the number of convictions and findings of not guilty, the total amounts of any fines, and the outcomes of any Appeals].
11. Of the 82 enforcement action records listed in the document provided to the FOI applicant, actions numbered 1 to 37 and 80 to 82 occurred outside the agreed scope dates of 1 January 2012 to 31 December 2018 for the FOI Application. In response to a query from my office about the reasons for the inclusion of the out of scope records, the Regulatory Authority advised that the inclusion of the additional information was intended to provide a fulsome response to the Review Applicant.

Application by FOI Review Applicant

12. On 15 May 2019 the Review Applicant requested a NECS Freedom of Information Commissioner Review of the Regulatory Authority's decision under s 54L of the FOI Act. The Australian Childcare Alliance (ACA) NSW is a peak body representing the privately-owned childcare sector and states that it serves 1,600 childcare services, primarily across New South Wales.
13. In his application, the Review Applicant stated: *“the documents received do not contain the information we had sought under the FOI [Act] and indeed, they barely contain any information at all. Despite our request, we have received no information regarding the provider or individuals name; the service name or the action taken. Even the information posted on the Department’s website provides more information than that which has been provided to us ... We ask you review their decision and advise whether it is correct or whether we are entitled to obtain the documentation we seek.”*

Decision Under Review

14. The decision under review is the decision of the Regulatory Authority dated 21 March 2019 referred to at paragraphs 9 to 11 above. The enforcement action records referred to at paragraph 11 - actions 1 to 37 and 80 to 82 - that fall outside the scope of the FOI Application are not considered in this FOIC Review. The other 43 enforcement action records are within the scope of this review – namely actions numbered 38 to 79³ located on pages 3 to 6 of the document provided to the Review Applicant.
15. In making my Decision, I have had regard to the following:
 - a. the original FOI, and the NECS IC Review, applications;
 - b. the documents at issue;
 - c. the parties’ submissions;
 - d. the FOI Act, particularly sections 11A, 27, and 47G;
 - e. the FOI Guidelines issued under s 93A of the FOI Act⁴;

³ Two separate enforcement action records are listed against number 67

⁴ *Freedom of Information Guidelines*. Australian Information Commissioner. Combined January 2019

- f. the *Children (Education and Care Services National Law Application) Act 2010*; *(NSW) Children (Education and Care Services) National Law (NSW)*; *Education and Care Services National Regulations*
- g. information about enforcement actions taken by the Regulatory Authority that it publishes on the NSW Department of Education's website; and
- h. relevant case law.

Section 47G Public Interest Conditional Exemption - Business

16. In its Decision Notice dated 21 March 2019, the Regulatory Authority found that the documents identified as being relevant to the FOI application contained business information that was conditionally exempt under s 47G of the FOI Act. The Regulatory Authority concluded that the release of education and care providers, individuals or services' names *could prejudice and harm [their] business affairs 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 to the detriment of the services who have been prosecuted under the National Law*"
17. Section 47G(1)(a) of the FOI Act provides that a document is conditionally exempt if its disclosure passes two tests - namely that it:
- *"would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking..."* and
 - the disclosure of the information *"would or could reasonably be expected to unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs."*
18. I have examined the 43 enforcement action records that are within the scope of this review – namely actions numbered 38 to 79⁵ located on pages 3 to 6 of the documents identified by the Regulatory Authority as being relevant to the FOI application. The information in the documents relates to enforcement actions against providers or individuals for offences that occurred when operating their business or carrying out their professional duties. The information includes the names of providers, services, and/or individuals and service addresses. I am satisfied that this information satisfies the first limb of s 47G (1).
19. The second limb of the test in s 47G(1)(a) is met where an "unreasonable" adverse effect from disclosure of the documents "would or could reasonably be expected to" occur to the relevant providers or individuals.
20. As set out in the FOI Guidelines⁶ and decided cases⁷, 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 further state at paragraph 6.187 that "the presence of "unreasonably" in s 47G(1)(a) 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*

⁵ Two separate enforcement action records are listed against number 67

⁶ FOI Guidelines Combined January 2019 paras 6.186, and 5.15 to 5.18

⁷ Cited at paragraph 6.186 of the FOI Guidelines Combined January 2019

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 determining whether disclosure of the information in the documents that was redacted by the Regulatory Authority would or could reasonably be expected to unreasonably affect the childcare services referred to, I have paid particular attention to the following matters:
- the capacity for the information to be made more broadly known beyond the FOI Applicant;
 - the competitive nature of the childcare sector;
 - the childcare providers, services and individuals identified in the documents in question have not been consulted about the release of the information; and
 - the currency of the information and the absence of contextual explanation.

I expand on these matters in the following paragraphs.

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 precedents that support the view that an agency may take into account an applicant's reasons for seeking access, or an applicant's intended or likely use and dissemination of the information, in assessing unreasonableness or the public interest. The decision of the Australian Information Commissioner in *"FG and National Archives of Australia"*⁸ considers this issue in some detail.
24. In considering the FOI Applicant's likely use and dissemination of the information, I note that the FOI Applicant represents a significant number of childcare providers. It is therefore reasonable to expect that the content of the documents in question could become public in some way that may lead to the identified childcare services 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 its business.
25. As discussed at paragraph 8 the identified childcare providers, services and individuals have not been consulted by the Department in consideration of the FOI application. They are therefore not able to prepare for any public disclosure of their business or personal information or to put in place strategies to mitigate the potential harm that may be caused by such disclosure.
26. The identified enforcement actions that are within the scope of the FOI application and this review relate to events that occurred between 2012 and 2018. As such they may not accurately reflect the current situation of the identified childcare providers, services and individuals. The named services may have changed hands and individuals may no longer be employed by the services or working within the childcare industry at all.
27. On the basis of the matters discussed in paragraphs 22 to 26, I am satisfied that the release of the information could reasonably be expected to unreasonably affect the childcare services referred to, and as such both limbs of s47(G)(1)(a) are met and the documents are conditionally exempt pursuant to s 47G.

⁸ *FG and National Archives of Australia [2015] AICmr26 (13 April 2015)*

Public Interest Test

28. 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. Section 11(5) provides that an 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.*”
29. Section 11B(3) of the FOI Act sets out four factors favouring access to documents which must be considered, if relevant, when applying the public interest test to conditionally exempt documents. The FOI Guidelines⁹ amplify these factors.
30. Drawing on the FOI Act and the FOI Guidelines, the Regulatory Authority identified the following public interest factors as favouring disclosure. The disclosure:
- would promote the objects of the FOI Act
 - may inform debate on a matter of public importance such as the health and safety of children in education and care services;
 - may allow or assist inquiry into possible deficiencies in the conduct or administration of the department’s regulation of education and care services in accordance with the National Law; and
 - may inform the community of the department’s operations, particularly the regulation of education and care services in NSW.
31. I agree that these factors identified by the Regulatory Authority favouring disclosure of the documents are relevant in this case. Disclosure would promote the objects of the FOI Act, particularly in providing the right of access to documents and increasing scrutiny, discussion and review of a Government agency’s activities – in this case the Regulatory Authority.
32. Most importantly, in my opinion, I find that the information may inform public debate on the health and safety of children while in education and care services and both inform, and reassure, the community about the Government’s regulation of education and care services.
33. The FOI Act does not list public interest factors weighing against disclosure. The FOI Guidelines¹⁰ 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*”. The FOI Guidelines provide a non-exhaustive list of factors against disclosure at paragraph 6.22
34. The Regulatory Authority identified the applicable public interest factor against disclosure of the information as being that such disclosure could reasonably be expected to unreasonably prejudice and harm the business affairs of education and care services, including their competitive commercial activities. As discussed in paragraphs 22 to 26, I find the factor identified by the Department against disclosure to be relevant in this case. The protection of business interests is, in itself, a significant

⁹ Op.Cit para 6.19

¹⁰ Op.cit paras 6.20-6.21

public interest factor and it requires some countervailing public interest argument – that is argument of equal weight - to override this protection.

35. In its Decision Notice the Regulatory Authority concluded that the public interest factor against disclosure outweighed the public interest factors in favour of disclosure without further discussion of the reasoning which led to its conclusion. Greater discussion might have assisted the FOI Applicant to better understand the Decision and would be consistent with established principles of good decision making.¹¹
36. In weighing up the public interest factors against disclosure of the redacted information in the documents in question discussed in paragraphs 30 to 35, I have also considered the following matters:
- the Regulatory Authority has a process for the disclosure of enforcement actions undertaken by it through publication on the Department’s website;
 - the importance of the principle of procedural fairness; and
 - the need for the Regulatory Authority to carry out its functions fairly and effectively, and in keeping with good regulatory principles.

I expand on these matters in the following paragraphs.

37. The Regulatory Authority has an established process for making public the outcomes of some enforcement actions it has taken. Section 270(5)¹² of the National Law provides that the Regulatory Authority may publish the prescribed information about enforcement actions taken under the National Law. Relevant to this FOIC Review, Regulation 227(3) of the *National Education and Care Services Regulations* sets out the prescribed information that may be published about a prosecution for an offence against the National Law or National Regulations leading to a conviction or finding of guilt or a plea of guilt. This information includes:
- the name and provider approval number of the approved provider subject to the enforcement action;
 - information that identifies a person with management or control of an education and care service if the Regulatory Authority is satisfied that it is in the public interest to do so;
 - the name and address of services (in the case of family day care service the address may not be published if it is family home)
 - the provision of the National Law or Regulations that the person was convicted, or found guilty of, or pleaded guilty to breaching
 - the date of the conviction, the finding, or the plea of guilt for the offence
 - any penalty imposed for the offence
38. In accordance with the provisions under the National Law and National Regulations discussed in paragraph 38, the Department publishes details of some enforcement actions leading to prosecutions on its website at: <https://education.nsw.gov.au/early-childhood-education/investigation-feedback-and-complaints/published-enforcement-and-decision-actions> under the heading “*Published enforcement and decision actions*”.

¹¹ See for examples Administrative Review Council *Best Practice Guides – Guide No.4 Decision-making: Reasons 2007* at <https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/ARCBestPracticeGuide4Reasons.aspx>;

¹² Section 270(5) of the National Law states: *The Regulatory Authority may publish the prescribed information about: (a) enforcement actions taken under this Law, including information about compliance notices, prosecutions, enforceable undertakings, suspension or cancellation of approvals.*

39. The website provides details of providers (and their relevant services) and nominated supervisors who have been convicted of offences under early childhood education and care legislation and have had that conviction recorded. The published information includes links to summaries of the enforcement actions that include: the names of providers, services, and/or individuals; the dates and places of the convictions; and details of proven offences and sentences.
40. As at the dates of both the original FOI application to the Department (10 January 2019) and the FOI Review Application (21 May 2019) the website contained 20 records of enforcement actions taken by the Department, with the dates of actions posted being between 8 April 2013 and 19 December 2017. The website stated that it was last updated on 8 February 2018.
41. The website information should have been identified by the Department in its Decision Notice as being documents that fall within the scope of the original FOI Application. I note that the Review Applicant was aware of this website. In his application for a FOIC Review of the Department's Decision (discussed at paragraph 13) the Review Applicant stated that "*Even the information posted on the Department's website provides more information than that which has been provided to us.*"
42. I note however that the applicant was seeking documents within a broader time period than those listed on the website at the time of the FOI application.
43. I am satisfied that the process adopted by the Regulatory Authority for making the outcomes of serious enforcement actions leading to prosecution publicly known through the Department's website fulfils the factors identified in paragraphs 30 to 32 favouring disclosure of such information. It provides access to government held information, informs the community about the regulation of education and care services in NSW, and most importantly provides assurances that the health and safety of children in education and care services is being effectively regulated.
44. Importantly it also ensures that the protections afforded to individuals and businesses by law and through procedural fairness are upheld. The Regulatory Authority makes it clear that *information is included on the Enforcement Actions list after all court, tribunal or administrative action is finalised and any appeal processes have been concluded.*" The release of the information is undertaken in an orderly manner, in consideration of all factors, allowing for the affected parties to be advised of the release, and the information to be placed within context and made available publicly in a consistent way and time.
45. As discussed at paragraph 8 and 25 the education and care providers, services and individuals named in the documents in question were not consulted by the Regulatory Authority in consideration of the information being released to the FOI Applicant due to it being impractical for the Regulatory Authority to do so. In my opinion the release of information in the circumstances under consideration would be contrary to the principles of natural justice, specifically to the "hearing rule". The Australian Information Commissioner in the FOI Guidelines¹³ relevantly states: *The hearing rule requires that a person who could be adversely affected by a decision be notified that a decision may be made and is given an opportunity to express their views before that occurs... a person should be given sufficient information and a reasonable opportunity to comment to ensure that procedural fairness is upheld.*"

¹³ Op.Cit paragraph 3.17 and see also Administrative Review Council *Best Practice Guides - Guide No 2 Decision-making: Natural Justice* at www.arc.gov.au/Publications/Reports/Pages/Downloads/ARCBestPracticeGuide2NaturalJustice.aspx

46. Furthermore, the disclosure of the information in the manner proposed would undermine the trust of education and care providers and services necessary for the Regulatory Authority to effectively carry out its responsibilities consistent with good regulatory principles articulated in the Guide to the National Quality Framework¹⁴ which guides the work of State and Territory Regulatory Authorities and ACECQA.
47. In consideration of all matters I have concluded, on balance, that the public interest factors against disclosure of the redacted information in the documents to the FOI Applicant outweigh the public interest factors in favour of disclosure in the circumstances and I affirm the Department's decision.
48. I have noted the Review Applicant's submission in his Review Application that *the information posted on the Department's website provides more information than that which has been provided to us.*" As discussed at paragraphs 41, the 20 records published on the Department's website identified in paragraphs 40 should have been included by the Regulatory Authority in its discovery of documents in relation to the FOI Application. I require the Regulatory Authority to identify for the Review Applicant the 20 records published on the Department of Education's website that correspond to the records in the documents provided to the Review Applicant.
49. For the sake of completeness, I note that the Department's website was updated on 19 July 2019 and a further 26 enforcement action records have been added to it.

Decision

50. Under s55k of the *Freedom of Information Act 1982* (the FOI Act) I vary the decision of the NSW Regulatory Authority to provide partial access to 6 pages of documents pursuant to s47G of the FOI Act and require the Regulatory Authority to inform the Review Applicant, in writing within 14 days of this decision, of the 20 records published on the Department of Education's website identified in paragraph 40 of this decision that correspond to the records in the documents provided to the Review 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

¹⁴ *Guide to the NQF – Good Regulatory Practice* ACECQA