



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, ACA NSW (FOI Review Applicant)
Respondent:	NSW Education and Care Services Regulatory Authority, Department of Education¹ (the Regulatory Authority)
Other Parties	COAG Education Council (through the Secretariat)²
Decision Date:	31 July 2019
Application number:	FOIC 02/2019
Catchwords:	Freedom of Information - (CTH) <i>Freedom of Information Act 1982</i> – Public interest conditional exemptions: - s47B - Commonwealth-State Relations; s47C– deliberative processes; – <i>Children (Education and Care Services National Law Application) Act 2010 (NSW)</i>; <i>Children (Education and Care Services) National Law (NSW)</i>; <i>Education and Care Services National Regulations</i>.

Decision

1. Under s55k of the *Freedom of Information Act 1982* (the FOI Act) I:
 - i. affirm the decision of the NSW Regulatory Authority to refuse access to three documents (identified as Documents 1, 2 and 3 at paragraph 3 of this Review Decision) pursuant to section 47C of the FOI Act - Public interest conditional exemption – deliberative processes;
 - ii. affirm the decision of the NSW Regulatory Authority to refuse access to the document (identified as Document 3 at paragraph 3 of this Review Decision) pursuant to section 47B(a) and (b) of the FOI Act - Public interest conditional exemption- 47B -Commonwealth-State Relations; and
 - iii. vary the decision of the decision of the NSW Regulatory Authority by finding that access to two documents (identified as Documents 1 and 2 at paragraph 3 of this Review Decision) should be refused pursuant to section 47B(a) and (b) of the FOI Act - Public interest conditional exemption- 47B - Commonwealth-State Relations.

Scope of the Review

2. By correspondence dated 4 February 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

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

² The COAG Education Council comprises state, territory, Australian Government and New Zealand Ministers with portfolio responsibility for school education, early childhood and/or higher education. The Council is established by the Council of Australian Governments (COAG).

documents in relation to the 2019 Review of the National Quality Framework (2019 NQF Review)³. Mr Lim requested copies of documents “*that outline:*

a) the process;

b) the timeline;

c) the requirements for consultation; and

d) the agreement between the Education Council and the NSW Government to lead the review in 2019.

Should the above requested information pose a breach of privacy, then we ask you remove only enough information from our request so as to comply with relevant privacy obligations”.

3. The Regulatory Authority found 3 documents totalling 48 pages that it considered fell within the scope of the FOI application. The documents were listed in a Schedule of Documents included in the Regulatory Authority’s Decision dated 17 April 2019. For the purposes of this Decision they are identified as follows:
 - Document 1 2019 NQF Review - Key Milestones – Draft;
 - Document 2 2019 NQF Review Engagement Strategy – Draft; and
 - Document 3 Education Council paper 14 December 2018.

4. The Regulatory Authority determined that all three documents contained information relating to the business affairs of the COAG Education Council⁴. 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 might reasonably wish to contend that a “*document is exempt under section 47 – Documents disclosing trade secrets etc*” or “*conditionally exempt under section 47G – Business information*” from disclosure.

5. On 5 March 2019 the Regulatory Authority advised the FOI Applicant that the period for processing the request was extended by 30 days to undertake consultation with the Education Council as permitted by s15(6) of the FOI Act and that the processing period for considering the FOI application would end on 18 April 2019

6. On 15 March 2019, following a request from the Regulatory Authority, the Education Council Secretariat undertook a consultation process⁵ with members of the Education Council seeking their views on disclosure of the identified documents. Jurisdictions opposed the disclosure of the documents. Their submissions are discussed later in this Decision.

7. On 17 April 2019 the Regulatory Authority advised the FOI Review Applicant of its Decision. The Regulatory Authority:
 - i. refused access to Documents 1 and 2 identified in the “Schedule of documents” included in its Decision Notice pursuant to s47C of the FOI Act – *Public interest conditional exemption – deliberative processes*; and

³ The National Quality Framework (NQF) provides a national approach to quality improvement, regulation and assessment for early childhood education and care and outside school hours care services across Australia.

⁴ The COAG Education Council is a forum for intergovernmental collaboration and decision-making on matters of national significance in the education sector. It consists of Commonwealth, State and Territory Ministers with responsibility for early childhood education, school education and higher education.

⁵ As the Review Applicant had also made application under the FOI Act to the Commonwealth Department of Education the consultation process undertaken by the Education Council related to both applications.

- ii. refused access to Document 3 identified in the “Schedule of documents” included in its Decision Notice pursuant to three sections of the FOI Act: s47B *Public interest conditional exemption- Commonwealth-State relations*; s47C – *Public interest conditional exemption – deliberative processes*; and s47G of the FOI Act – *Public interest - conditional exemption – business information*.

Application by FOI Review Applicant

8. On 15 May 2019 the Review Applicant requested a NECS Freedom of Information Commissioner Review (FOIC Review) of the Department’s decision. 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.
9. As the Review Application did not meet the requirements of s 54N of the FOI Act and contained matters outside my jurisdiction, I wrote to the Review Applicant on 17 May 2019 seeking clarification on matters related to their application.
10. On 29 May 2019 the Review Applicant submitted a complete application for NECS FOIC Review of the Regulatory Authority’s Decision. In their application the Review Applicant wrote:

“We note that a number of documents were identified by the NSW Department of Education [the Regulatory Authority] to fall within the scope of our request- namely, a draft of key milestones, a draft of engagement strategy and an Education Council paper. Although the Department advised that SOME of the relevant documents were identified as being conditionally exempt, ALL of the documents were refused IN FULL on the grounds that it was against public interest. Given that the Review of the NQF is now underway and details are available regarding the process, timelines and consultations, we do not understand how the Department of Education could advise, in April 2019, that disclosing the information we sought, was against public interest. Nor do we accept that details of the agreement between the Education Council and the NSW Government should not be disclosed on a similar basis and why this agreement should not be publicly available with full transparency”.
11. In accordance with s54V of the FOI Act, I conducted preliminary enquiries prior to determining whether to conduct a Review in this matter. As part of this process, I made the following enquiries to the Review Applicant:
 - i. Whether he was aware that the documents referred to in my paragraphs 2a, b, and c, were, at the time of his application to the Regulatory Authority, draft documents. I made that enquiry to ensure that his request was not misconceived. The Review Applicant confirmed by email dated 12 June 2019 that at the time of the application to the Department he was *“really after ANY documents outlining the process and requirements for consultation as [he was] trying to understand the process for the proposed NQF] Review. Upon receipt of a response from the Commonwealth Department of Education and Training we were given to understand that all such documentation was in fact still in draft form and we indicated our willingness to accept copies of the draft documentation”.*
 - ii. Whether he was aware that the information he sought with respect to the documents referred to in my paragraphs 2a, b, and c, was now finalised and publicly available. He subsequently confirmed that he was aware.
12. By letter dated 28 June 2019 the Review Applicant sought my advice on how *“the essence of [his FOI] request can produce results whereby documents in the public interest, that are not articulated in the 2019 NQF Review Issues Paper and the Terms of Reference thereof, can be shared”.* I indicated I would address this matter in the context of this Review Decision.

Decision Under Review

13. The decision under review is the decision of the Regulatory Authority dated 17 April 2019 referred to in paragraph 7.
14. In making my Decision, I have had regard to the following:
 - a. the original FOI, and the NECS IC Review, applications;
 - b. the documents falling within the scope of the request;
 - c. the parties' submissions;
 - d. the FOI Act, particularly sections 11A, 27, 47 B, 47C and 47G;
 - e. the FOI Guidelines issued under s 93A of the FOI Act⁶;
 - f. the *Children (Education and Care Services National Law Application) Act 2010 (NSW)*; the *Children (Education and Care Services) National Law (NSW)*; and the *Education and Care Services National Regulations*;
 - g. Guidance on COAG Councils⁷;
 - h. the COAG Education Council Terms of Reference⁸; and
 - i. relevant case law.

The documents

15. **Document 1** consists of 5 pages detailing the key milestones relating to the 2019 NQF Review. It is clearly marked "draft". **Document 2** consists of 36 pages detailing a proposed stakeholder engagement strategy related to the 2019 NQF Review. It is also clearly marked draft.

I am advised by the Regulatory Authority that the documents were prepared to be included as attachments to a Council in Confidence Education Council paper to assist Ministers' decision-making in finalising processes associated with the 2019 NQF Review.

16. **Document 3** consists of 7 pages. It is an Education Council paper from a meeting on 14 December 2018 relating to the 2019 NQF Review.

Document 3 - s47B Public Interest Conditional Exemption – Commonwealth-State Relations

17. The Regulatory Authority found Document 3 to be conditionally exempt under s 47B of the FOI Act on the basis that *"information contained in the Education Council paper refers to confidential information provided by the State and Commonwealth governments. If released it is reasonably likely to undermine the full and frank discussion that occurs between jurisdictions as well as the future supply of confidential information."*
18. Sections 47B(a) and (b) relevantly provide that a document is conditionally exempt if disclosure of the document under Act:
 - (a) *would or could reasonably be expected to cause damage to relations between the Commonwealth and a state; or*
 - (b) *would divulge information or matter communicated in confidence by or on behalf of the Government of a state to the Government of the Commonwealth.*
19. For the purposes of the following discussion, it is important to note that s264 of the Education and Care Services National Law modifies the Commonwealth FOI Act so that the FOI Act applies as a law of a participating jurisdiction for the purposes of the National Quality Framework. All States and Territories are currently participating jurisdictions through applied legislation. Also regulation 209 of the Education and Care Service National Regulations makes the following relevant modifications to the FOI Act:

⁶ *Freedom of Information Guidelines*. Australian Information Commissioner. Combined January 2019

⁷ *Guidance on COAG Councils* Commonwealth-State Relations Branch Department of the Prime Minister and Cabinet August 2016

⁸ *Education Council Terms of Reference* www.educationcouncil.edu.au/Council/EC-Terms-of-Reference.aspx

- i regulation 209(a) modifies the FOI Act so that it applies as if *a reference to the Commonwealth were a reference to a participating jurisdiction or the Government of a participating jurisdiction*; and
- ii regulation 209(c) modifies the FOI Act so that it applies *“as if a reference to relations, arrangements or communications between the Commonwealth and a State included a reference to relations, arrangements or communications between States”*.

The modification made by regulation 209(c) requires that s47B(a) of the FOI Act be modified so that a document is conditionally exempt if its disclosure would or could reasonably be expected to cause damage to *relations* between the Commonwealth and a State or between the States.

The modification made by regulation 209(a) requires that s47B(b) of the FOI Act be modified so that a document is conditionally exempt if its disclosure would divulge information or matter communicated in confidence by or on behalf of *the Government of a State to the Government of a participating jurisdiction including the Commonwealth*.

Document 3 - s47B(a) – damage to relations

20. The reference to “relations” in s 47B(a) is discussed by the Australian Information Commissioner, drawing from case law, at paragraph 6.32 of the FOI Guidelines, as being - *“working relations encompass all interactions of the Commonwealth and states from formal Commonwealth -State consultation processes such as the Council of Australian Governments through to any working arrangements between agencies undertaken as part of their day to day functions.”* In applying the modification made by regulation 209(c), this guideline should also include *relations* between the States.
21. Paragraph 6.33 of the FOI Guidelines contains a non-exhaustive list of damage that might be caused from disclosure of information. In my opinion relevant to the matters under Review are that disclosure may:
 - interrupt or create difficulty in negotiations or discussions that are underway;
 - adversely affect the administration of a continuing Commonwealth-State project; and
 - adversely affect the continued level of trust or co-operation in inter-office relationships.
22. It is important to note that the potential damage to be caused from disclosure of information need not be quantified but the effect on relations arising from disclosure must be adverse.

Document 3 - s47B(b) – information communicated in confidence

23. Section 47B(b) requires an assessment of whether a document was *communicated in confidence*. No further test is required in assessing whether a document satisfies that conditional exemption. The test is whether the document was considered to be confidential at the time of the communication and the circumstances of the communication such as, relevant to this discussion, *“whether there were any existing, implied or assumed arrangements or understandings between the Commonwealth and/or States concerning the exchange or supply of information”*.⁹

Document 3 - s47B(a) damage to relations - and – s47B(b) information communicated in confidence

24. I have examined Document 3 within the context of s47B(a) and (b). It was prepared for consideration at a meeting of the COAG Education Council in December 2018. It contains information to support the Education Council’s deliberations on a review of the National Quality Framework to be carried out in 2019. The document required Ministers to consider recommendations and make decisions. As such it might or might not reflect the final, agreed outcomes of the meeting in respect to the matter under discussion. The document is clearly marked “council in confidence”.

⁹ FOI Guidelines op.cit. para 6.41

25. The National Quality Framework, the subject of the document under discussion, underpins a significant national reform initiative of Commonwealth, State and Territory governments through the Council of Australian Government introduced in 2012. The 2019 Review of the NQF is important in ensuring the NQF remains relevant and effective in all jurisdictions. As such, discussion and agreement by the Education Council is critical to progressing the review.
26. The Education Council is an important forum for intergovernmental collaboration and decision-making on matters of national significance in the education sector. Its members represent different political agendas, constituencies and priorities. The effective operation of the Council depends on its members being confident that it provides a forum for full and frank discussion.
27. The Council of Australian Governments¹⁰ has issued guidance for COAG Councils on their operations. The guidance relevantly states: *“Documents prepared for councils... should be treated as sensitive, unless otherwise agreed {by the council} and only distributed on a strict need to know basis. Where there is an expectation that a document will be made public (for example, communiqués or public records of meetings), all members should be advised early in the preparation of the document. If a member receives a request for a document to be made public...all members of the council should be consulted regarding release of the document”*. I am advised that the Education Council operational protocols reflect this guidance.
28. It is clear that Document 3 was prepared for a “formal consultation process” between Commonwealth and State Governments as discussed in paragraph 20.
29. Due to the nature of the Education Council described in paragraph 26, it is reasonable to infer that the disclosure of the document might: create difficulty in negotiations or discussions between Ministers in relation to the 2019 Review of the NQF, adversely affect the administration of a continuing Commonwealth-State project - the NQF and adversely affect the continued level of trust or co-operation required between members of the Education Council – damage factors identified in paragraph 21.
30. In forming the above view, I have also considered the submissions made by jurisdictions through the consultation process in relation to the documents (discussed at paragraphs 4 to 6). Relevant to the discussion in paragraph 29 three jurisdictions made the following submissions:
“Release of the documents would divulge information communicated in confidence between ...governments and may adversely affect the ongoing ability of jurisdictions to engage in open discussion on substantial and sensitive policy matters.”
*“The release of these documents has the potential to undermine the full and frank discussion that occurs between jurisdictions...”*and
“While some of the information in the requested document will be publicly released shortly, prematurely disclosing information about the NQF Review could undermine the review process and discourage similar inter-jurisdictional work...”
31. The document in question is clearly marked Council in Confidence and both the COAG guidance material and the Education Council’s own protocols establish an expectation of confidentiality for the reasons already discussed.
32. In consideration of all matters, I am satisfied the release of Document 3 could reasonably be expected to cause damage to *relations* between the Commonwealth and/or states and divulge *confidential information* that has been communicated in confidence. Accordingly, I find Document 3 to be conditionally exempt under sections 47B(a) and 47B(b) of the FOI Act.

¹⁰ *Guidance on COAG Councils*. Department of Prime Minister and Cabinet August 2016. paras 5.2.4.2 to 5.2.4.4

Documents 1 to 3 - s47C Public Interest Conditional Exemption – Deliberative processes

33. The Regulatory Authority found Documents 1, 2, and 3 to be conditionally exempt under s 47C of the FOI Act on the basis that: *“Information in the two draft NQF Review documents and the Education Council paper refers to deliberations between the state and Commonwealth governments. If released it is reasonably likely to prejudice the ability of jurisdictions to engage in open discussion on substantial and sensitive policy matters. Release could disrupt the existing consultation process for the NQF Review.”*
34. Section 47C of the FOI Act provides that:
- (1) a document is conditionally exempt if its disclosure under the Act would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendations obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of or for the purpose of the deliberative process involved in the functions of*
- (a) an agency; or*
- (b) a Minister; or*
- (c) the Government of the Commonwealth¹¹*
- Exceptions*
- (2) Deliberative matter does not include any of the following:*
- (a) operational information;*
- (b) purely factual material.*
35. The deliberative processes conditional exemption does not require an assessment of whether harm would result from disclosure. The only consideration is whether the document includes deliberative matter.
36. Drawing on referenced case law, the FOI Guidelines¹² summarise the “deliberative process” as referring to *“the process of weighing up or evaluating competing arguments or considerations or thinking processes... A deliberative process may include the recording or exchange of: opinion; advice; recommendations; a collection of facts or opinions; Interim decisions or recommendations.”*
37. Document 3 has already been described at paragraph 24. Document 1 is a clearly marked draft outlining key milestones for the 2019 NQF Review. Document 2 is a clearly marked draft document outlining a detailed Engagement Strategy for the 2019 NQF Review. Documents 1 and 2 are clearly point in time drafts.
38. Documents 1 and 2 contain opinions, facts and interim deliberations with respect to timeframes; milestones and engagement strategies for the 2019 NQF Review. I am advised by the Regulatory Authority that they were prepared as attachments to a confidential Education Council paper to be provided to Ministers for decision. Document 3 contains opinions, advice, facts and recommendations in relation to the proposed (at the date of the paper) 2019 NQF Review scope and Terms of Reference.
39. I am satisfied that the 3 documents contain deliberative matter for the purposes of the deliberation of Commonwealth, State and Territory Ministers and fulfil the conditional exemption requirements of s 47C.
40. I also consider Documents 1 and 2 also meet the conditional exemption requirements of s47B (a) and 47(b) for the same reasons discussed in paragraphs 25 to 32 in relation to Document 3.

¹¹ Regulation 209(a) of the Education and Care Services Regulations modifies the FOI Act so that 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. See also para 19 for explanation of participating jurisdiction.

¹² FOI Guidelines op. cit paras 6.59 and 6.61

Public Interest Considerations for documents 1 to 3

41. In finding that the 3 documents are conditionally exempt under s 47B(a) and (b) and under 47C, I am required by s11A(5) of the FOI Act to consider whether it would be contrary to the public interest to give the FOI applicant access to such documents. Under s 11(5) access to conditionally exempt documents must be given unless, on balance, it would be contrary to the public interest to do so.
42. In considering the public interest factors favouring and against disclosure of the documents, I emphasize that this consideration relates not to whether the public may be interested in a document, but whether it is, on balance, in the interest of the public, weighing up all factors, to provide access to the documents in question at the time and under the circumstances of the particular situation.
43. 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 Guidelines¹³ amplify these factors.
44. Drawing on the FOI Act and the FOI Guidelines, the Regulatory Authority identified the public interest factors favouring disclosure of the documents as being that such disclosure:
- a) would promote the objects in section 3 of the FOI Act;
 - b) may inform debate on a matter of public importance;
 - c) could reveal the reason for a government decision and any background or contextual information that informed the decision;
 - d) could enhance the scrutiny of government decision making; and
 - e) 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.
45. I agree that factors (a) to (d) in paragraph 44 identified by the Regulatory Authority are relevant in this case. Disclosure would promote the objects of the FOI Act with respect to access to government held information, particularly in providing access to documents and increasing scrutiny, discussion and review of Government decisions. It would also inform public debate on a matter of importance (the NQF) although the draft status of two of the documents would likely militate against just how effective this would be.
46. I do not find that the documents in question would 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, although I acknowledge that the outcomes of the 2019 NQF Review itself is likely to do so.
47. The FOI Act does not list public interest factors weighing against disclosure. The FOI Guidelines¹⁴ 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
48. The Regulatory Authority identified the applicable public interest factors against disclosure of the information as being that such disclosure could:

¹³ Op.Cit para 6.19

¹⁴ Op.cit paras 6.20-6.21

- a) prejudice an agency's ability to obtain confidential information;
 - b) prejudice an agency's ability to obtain similar information in the future; and
 - c) disclose a deliberation.
49. I agree with the Regulatory Authority that disclosure of the documents could affect the free flow of confidential information between agencies, particularly with respect to the preparation of material for consideration by Ministers, and thus, by extension, impair the flow of information between the Commonwealth and State governments, or between State Governments. As already discussed in paragraphs 26 to 30 the ability for jurisdictions to discuss and share information on a confidential basis and in a full and frank manner is central to the effective operations of the Education Council. The fact that disclosure would disclose deliberative material has already been established.
50. Furthermore, I find the following additional factors against disclosure of the documents to be relevant:
- a) It is undoubtedly in the public interest that governments continue to work cooperatively on implementing, reviewing and refining the NQF. The NQF underpins the regulation of the quality of education and care services for children across Australia. The premature release of documents before they are agreed by all governments in relation to the 2019 NQF Review could significantly undermine the effectiveness of the Review and the commitment of all governments.
 - b) It is also in the public interest that a consistent and even-handed approach is taken to the release of documentation and information about the NQF Review to education and care stakeholders and the public in general. Premature release of draft material to some parties may at best provide an unfair advantage to some stakeholders and at worst, result in misinformation that needlessly wastes the time and resources of all interested parties.
51. In weighing up all factors I have decided that in the circumstances of this particular matter the public interest factors in favour of disclosing the information are outweighed by the public interest factors against disclosure.
52. I am therefore satisfied that the 3 documents are conditionally exempt under sections 47B(a) and 47B(b) of the FOI Act and under s47(C) of the FOI Act and it is contrary to the public interest to release them to the Review Applicant.
53. I note that in its Decision the Regulatory Authority also considered Document 3 in relation to section 47G of the FOI Act - public interest conditional exemption – business. I have not considered the Regulatory Authority's decision in relation to this section of the FOI Act. As I have found Document 3 to be exempt for the reasons already discussed under sections 47B and 47C, it is unnecessary for me to consider this other ground of exemption as there would be no material difference in the outcome of such consideration for the Review Applicant.
54. As discussed at paragraph 12 the Review Applicant sought my advice as to how *"the essence of [his FOI] request can produce results whereby documents in the public interest, that are not articulated in the 2019 NQF Review Issues Paper and the Terms of Reference thereof, can be shared"*. I have addressed this matter in the discussion in paragraphs 41 to 51 and found that in the particular circumstances the public interest factors against disclosure of the documents outweighs the public interest factors favouring disclosure.
55. In his Review Application, the applicant made the point that *"although the Department advised that SOME of the relevant documents were identified as being conditionally exempt, ALL of the documents were refused IN FULL..."*. I am of the view that the Department should have been more precise in the

wording of this part of its Decision, but I am satisfied for the reasons discussed in this Review that the decision to refuse access in full to the documents is correct.

56. The Review Applicant also made the point in his application that *“given that the Review of the NQF is now underway and details are available regarding the process, timelines and consultations, we do not understand how the Department of Education could advise, in April 2019, that disclosing the information we sought, was against public interest. Nor do we accept that details of the agreement between the Education Council and the NSW Government should not be disclosed on a similar basis and why this agreement, should not be publicly available with full transparency”*.
57. As discussed in this Review, the documents under consideration were draft documents and Education Council papers prepared for the purpose of informing the deliberations of Ministers in deciding on the final shape of the 2019 NQF Review. For the reasons already discussed, those papers have been found to be exempt documents under the FOI Act. The agreed terms of reference, timelines, milestones, and consultation processes (the outcomes of Ministerial considerations of those papers) have been made public on the website dedicated to the 2019 NQF Review at www.nqfreview.com.au. It may have assisted the Review Applicant if the Department had advised him of this at the time of their Decision.
58. In respect to the Review Applicant’s comments in relation to the agreement between the Education Council and the NSW Government to lead the Review, I note that the documents in question do not discuss this matter.

Decision

59. Under s55k of the *Freedom of Information Act 1982* (the FOI Act) I:
- i. affirm the decision of the NSW Regulatory Authority to refuse access to three documents (identified as Documents 1, 2 and 3 at paragraph 3 of this Review Decision) pursuant to section 47C of the FOI Act - Public interest conditional exemption – deliberative processes;
 - ii. affirm the decision of the NSW Regulatory Authority to also refuse access to the document (identified as Documents 3 at paragraph 3 of this Review Decision) pursuant to section 47B(a) and (b) of the FOI Act - Public interest conditional exemption- 47B -Commonwealth-State Relations; and
 - iii. vary the decision of the decision of the NSW Regulatory Authority by finding that access to two documents (identified as Documents 1 and 2 at paragraph 3 of this Review Decision) should be refused pursuant to section 47B(a) and (b) of the FOI Act - Public interest conditional exemption- 47B - Commonwealth-State Relations.

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