



National Education & Care Services  
FOI & Privacy Commissioners & Ombudsman

## National Education and Care Services Freedom of Information Commissioner

Brisbane Child Care Pty Ltd and Queensland Education and Care Services Regulatory Authority

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

Review Applicant:	Mr Chris Buck, Director, Brisbane City Child Care Pty Ltd
Respondent:	Queensland Education and Care Services Regulatory Authority, Qld Department of Education <sup>1</sup>
Other parties:	RED Fire Engineers Pty Ltd (RED)
Decision Date:	15 July 2019
Application number:	FOIC 03/2019
Catchwords:	Freedom of Information - (CTH) <i>Freedom of Information Act 1982</i> : Exemption - Documents subject to legal professional privilege (s 42); Exemption - Documents disclosing commercially valuable information (s 47((1)); Public interest conditional exemption - business (s 47G(1)(a); <i>Education and Care Services National Law (Queensland) Act 2011</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 Department's decision to refuse access to 67 documents pursuant to s 47 of the FOI Act – *Documents disclosing commercially valuable information*, because the information contained in the documents is exempt information;
  - ii. affirm the Department's decision to give partial access to 48 documents pursuant to s 47 of the FOI Act – *Documents disclosing commercially valuable information* - because certain information contained in the documents is exempt information;
  - iii. affirm the Department's decision to refuse access to 38 documents pursuant to s 47G of the FOI Act – *Public interest - conditional exemptions – business information* -because certain information contained in the documents is exempt information;
  - iv. affirm the Department's decision to give partial access to 14 documents pursuant to s 47G of the FOI Act – *Public interest - conditional exemptions – business information* - because certain information contained in the documents is exempt information;
  - v. vary the Department's decision to give partial access to 4 documents pursuant to s 42 of the FOI Act – *Documents subject to legal professional privilege* - and require the Department to provide access to the documents referred to in paragraph 26, and
  - vi. affirm the remainder of the Department's decision.

<sup>1</sup> The Director General, Queensland Department of Education is the Regulatory Authority (*Education and Care Services National Law (Queensland) Act 2011 – s 14*).

## Scope of the Review

2. By correspondence dated 18 October 2018 Thomson Geer Lawyers, acting on behalf of Mr Chris Buck, Director of Brisbane City Child Care Pty Ltd (the Review Applicant) applied to the Queensland Department of Education (the Department) under the *Commonwealth Freedom of Information Act 1982* (the FOI Act) for access to:

*"... copies of all documents held by, originating from, or otherwise in the possession or control of the Queensland Regulatory Authority for the period between 1 June 2016 and [18 October 2018] that in any way relate to information as to fire safety issues in relation to childcare services including:*

- *the procurement and engagement of and dealings with RED by the Queensland Regulatory Authority in relation to any matter including (without limitation) Brisbane City Child Care Pty Ltd);*
- *the designation and/or qualifications of RED personnel involved in RED's engagement by the Queensland Regulatory Authority;*
- *the role of that person within RED;*
- *any proposal for services by RED to the Queensland Regulatory Authority;*
- *any brief for services provided to RED;*
- *any contract for services signed or entered into by RED;*
- *any information about the Company provided to RED;*
- *any RED correspondence or other documents in relation to the Company;*
- *any document which records any proposal by RED to assist an Authorised Officer or the Queensland Regulatory Authority to carry out an inspection or proposed inspection of the Company's premises; and*
- *any communications between RED and the Queensland Regulatory Authority including, without limitation, draft or final reports by RED whether or not in relation to the Company's approved service, any other approved service or any other matter, including, without limitation, documents (whether or not electronic documents) containing communications in relation to:*
  - i. Mr Chris Buck and/or the Company;*
  - ii. internal communications within the Queensland Regulatory Authority;*
  - iii. any Ministerial communications with the Queensland Regulatory Authority and vice versa; and*
  - iv. communications between the Queensland Regulatory Authority and any parents or guardians of infants and/or children, fire experts, private certifiers, Local Authorities, other regulators or like bodies in Australia or New Zealand, other organs of Government or like bodies in Australia or New Zealand, any stakeholders or any approved service providers or their owners."*

3. On 13 November 2018 the Department issued the FOI Review Applicant with a Notice of Practical Refusal to deal with the application under s 24 of the FOI Act on the basis that processing the request in its current form would have substantially and unreasonably diverted the resources of the Department from its other operations due to the large number of documents captured by the request and the time required to respond to it. The Department commenced a request consultation process with the Review Applicant.

4. Following subsequent negotiation between the FOI Applicant and the Department a revised scope for the FOI application was agreed on 17 December 2018. The revised FOI application sought access to documents concerning or relating to RED Fire Engineers Pty Ltd (RED) for the period 1 May 2017 to 18 October 2018, specifically:

- *all documents relating to the engagement of RED by the Queensland Education Department;*
- *all documents relating to RED's involvement with BCCC; and*
- *the inspection summary letters or similar reports prepared/issued by RED in relation to other child care services, but excluding the appendices to the letters .....and further narrowing the scope to include only reports or documents draft or otherwise between RED and the Department first exchanged from RED following each of the six or (five) first RED inspection visits.*

5. The due date for the Department's decision was extended twice by the Department with the agreement of the FOI applicant to allow for further processing of the request under section 15AA(b) of the FOI Act. The final decision was provided on 22 February 2019.
6. The Department found 867 documents which fitted the agreed scope of the FOI application as set out in paragraph 4. All documents identified were written in nature. I note that for the purposes of counting or listing documents, the Department identifies each page as a separate document. The documents were organised into four files labelled A, B, C and D. These are referred to in the Department's Decision Notice and in this Review Decision.
7. 155 documents were determined by the Department to include information relating to the business interests of RED Fire Engineers Pty Ltd (RED). The documents were arranged into 3 categories:
  - Category A - 71 pages consisting of 3 Fee Proposals prepared by RED dated 18 April 2018, 24 April 2018 and 1 May 2018;
  - Category B - 17 pages of email correspondence between RED and the Department; and
  - Category C - 67 pages of Fire Risk Assessment reports prepared by RED in relation Child Care Services other than the FOI Review Applicant, BCCC.
8. RED is a privately-owned consulting firm specialising in providing safety and risk engineering services to various industries. It is engaged by the Regulatory Authority to undertake fire risk assessments of early childhood services in multi-storey buildings.
9. 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 s 27(1)(b) a person, organisation or proprietor of an undertaking might reasonably wish to contend that a "*document is exempt under s 47(1) – Documents disclosing trade secrets or commercially valuable information*" or "*conditionally exempt under section 47G – Business information*" from disclosure.
10. On 15 February 2019 the Department accordingly invited a consultation submission from RED. RED subsequently provided a submission to the Department dated 19 February 2019 objecting to the release of 138 out of the 155 documents identified that fall within Category A (fee proposals to the Department of Education) and Category C (Fire Risk Assessment reports related to 5 childcare centres, other than BCCC) arguing that the documents contained commercially valuable and sensitive information.
11. Following consideration of all matters, on 22 February 2019 the Department advised the FOI Review Applicant of its Decision. Of the 867<sup>2</sup> documents identified the Department decided to:
  - a) give full access to **524** documents;
  - b) refuse access to **67** documents pursuant to section 47 of the FOI Act – *Documents disclosing commercially valuable information*, because the Information contained in the documents is exempt information;
  - c) refuse access to **38** documents pursuant to section 47G of the FOI Act – *Public interest conditional exemptions – business information*, because the information contained in the documents is exempt information;
  - d) give partial access to **48** documents pursuant to section 47 of the FOI Act – *Documents disclosing commercially valuable information*, because certain information contained in the documents is exempt information;
  - e) give partial access to **4** documents pursuant to section 42 of the FOI Act *Documents subject to legal professional privilege*, because certain information contained in the documents is exempt information;

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<sup>2</sup> Note that some documents fall into more than one category

- f) give partial access to **14** documents pursuant to section 47G of the FOI Act – *Public interest conditional exemptions – business information*, because certain information contained in the documents is exempt information; and
- g) give partial access to **179** documents pursuant to section 47F of the FOI Act - *Public interest conditional exemptions – personal privacy*, because certain information contained in the documents is exempt information.

12. The Department deferred giving access to 142 documents identified in File B of the “*Schedule of documents containing information to which access was refused in full or part*” that was attached to the Department’s Decision Notice. These documents had been the subject of consultation with the affected third party (RED) as referred to in paragraphs 8 to 10. Section 27(7) of the FOI Act provides that access must not be given to the documents until all review rights of the affected third party have been exhausted. Access to these documents was finally provided to the FOI applicant on 9 May 2019.

### Application by FOI Review Applicant

13. On 22 May 2019 Thomson Geer Lawyers acting on behalf of Mr Chris Buck and Brisbane City Child Care Pty Ltd requested a NECS Freedom of Information Commissioner Review of the Department’s decision under s 54L of the FOI Act. I note, and have accepted, that the date of application was delayed until such time as all documents were released to the Review Applicant under the Department’s Decision as discussed in paragraph 12.
14. The FOI Review Applicant requested that I review ... “*the decision of the [Department] as set out in the letter dated 22 February 2019 and the documents redacted to determine if the exemptions claimed are appropriate and lawful pursuant to the FOI Act*”. The submissions put forward by the FOI Review Applicant to support the application are included in the discussion below.
15. The FOI Review Applicant did not seek a review of the Department's decisions in respect of the following matters:
- (a) the Department's decision listed at paragraph 11(g), giving partial access to 179 documents. In respect of this matter, the Review Applicant stated in the review application that “*as only phone numbers and photos of faces have been redacted under this category, I do not take issue with these redactions as I am not seeking personal information*”; and
  - (b) the Department's decision listed at paragraph 11(a), giving full access to **524** documents.

Whilst the above two matters are not relevant to this review, I have at the outset in paragraph 1(vi) affirmed the Department's decisions in respect of these matters to avoid any doubt and for the sake of completeness.

### Decision Under Review

16. The decision under review is the decision of the Department dated 22 February 2019 outlined in paragraph 11 above, **specifically paragraphs 11(b) to 11 (f)** – refusal to grant access or the granting of partial access to documents.
17. 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, including the views of the consulted third party;
  - the FOI Act, in particular s 11A (5), s 27, s 27A, s 42, s 47(1); and s 47G(1);
  - the Education and Care Services National Law (Queensland) Act 2011 and the Education and Care Services National Regulation;
  - the FOI Guidelines issued under s 93A of the FOI Act by the Australian Information Commissioner;<sup>3</sup> and

<sup>3</sup> *Freedom of Information Guidelines*. Australian Information Commissioner. Combined January 2019

- previous decisions and relevant case law.

#### Section 42 Exemption - Documents subject to Legal Professional Privilege

18. Section 42 of the FOI Act exempts a document from disclosure if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.
19. In its Decision, the Department found some information contained in 4 documents to be exempt under s 42. I have examined the documents in question. They can be divided into two sets, each of which contains two identical documents. The duplication arises from the documents being included variously in separate Files (see paragraph 6). These 2 sets of documents are referred to as Set A and Set B in the discussion below.
20. Legal professional privilege (LPP) is not defined in the FOI Act. To determine the application of this exemption the decision maker must turn to common law concepts of LPP. The protection provided by LPP does not apply to all communications between legal advisers and clients. It is the purpose of the communication, between a lawyer and their client, not the information itself that is determinative.
21. The High Court of Australia has summarised the general principles of legal professional privilege (also referred to in the Department's Decision letter): *It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the **dominant** purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings<sup>4</sup>*. I note in particular that the **dominant** purpose test must be satisfied as part of the overall test.
22. In the FOI Guidelines<sup>5</sup> the Australian Information Commissioner summarizes the considerations in determining whether a communication is privileged, drawing on relevant case law. These are:
- whether there is a legal adviser-client relationship
  - whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation (in respect of which the Commissioner at 5.131 notes that the dominant purpose test must be satisfied)
  - whether the advice given is independent
  - whether the advice given is confidential<sup>6</sup>
23. In respect to the Decision in paragraph 11(g) the FOI Review Applicant contested the accuracy of the application of the legal professional privilege exemption under s 42 of the FOI Act four times in relation to two documents, stating that *"neither of these documents appear to relate to the seeking or giving of legal advice, or are in connection with anticipated or pending litigation. As such they fail to meet the requisite test for a proper claim exemption on the grounds of legal professional privilege"*.
24. The redacted information in the documents referred to in Set A (documents 1 and 197 of File B in the Schedule of documents attached to the Department's Decision Notice) is part of a Department internal Briefing. On examination of the identical documents in Set A I am satisfied that the redacted information in question:
- relates to a legal adviser-client relationship between an independent, external legal firm and the Regulatory Authority;
  - contains a brief summary of information that was obtained for the dominant purpose of the giving and receiving of legal advice; and

<sup>4</sup> *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commissioner (2002) 213 CLR 543 at 522*

<sup>5</sup> Op.cit para 5.129

<sup>6</sup> *Grant v Downs (1976) 135 CLR 674; Waterford V Commonwealth of Australia (1967) 163 CLR 54*

- (c) contains a brief summary of confidential information to the Regulatory Authority on which it has relied in carrying out its regulatory responsibilities.

25. In reaching this conclusion I have also considered the judgement of Lockhart J in *Trade Practices Commission v Sterling*<sup>7</sup> concerning the circumstances in which legal professional privilege can arise. His Honour stated: *Legal professional privilege extends to various classes of documents including... Notes, memoranda, minutes or other documents made by the client or officers of the client or the legal adviser of the client of communications, which are themselves privileged, or containing a record of those communications.*
26. The redacted information in Set B (documents 160 of File C and 215 in File D in the Schedule of documents attached to the Department's Decision Notice) consists of a brief email exchange between two Department officers responding to an email request from RED for BCCC staff child ratios. The email exchange refers to possible discussion with a third person.
27. In respect of those documents 160 and 215, I am not satisfied that either the redacted sections themselves, or those sections if considered within the context of the remainder of the documents to which access was given, satisfy the exemption requirements of s42 of the FOI Act.

#### **Section 47 Exemption - Documents disclosing commercially valuable information**

28. Section 47(1) of the FOI Act 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.*
29. The Department's Decision Notice does not contain consideration of the documents in relation to s 47(1)(a) - the trade secrets exemption. The Department found 67 documents located in File A in the Schedule of documents attached to the Department's Decision Notice to be fully exempt and 48 documents located in File B to be partially exempt from disclosure pursuant to s 47(1)(b) of the FOI Act.
30. I have examined the documents found to be exempt by the Department. The 67 documents in File A contain fire risk assessment reports of 5 childcare centres located in multi-storey buildings that have been conducted by RED Fire Engineers Pty Ltd. The 48 documents in File B contain Project/Fee proposals submitted by RED to the Regulatory Authority to undertake the fire risk assessments, as well as Departmental briefings regarding the engagement of RED which include references to RED's fees/costs. I note that there are duplicates of some documents within File B.
31. The five Fire Risk Assessment Reports in File A contain:
- information on a range of building fire risk, safety and evacuation matters particular to the circumstances of each childcare centre;
  - the systems, techniques and processes used by RED when conducting assessments concerning a range of building fire safety matters; and
  - conclusions and recommendations based on the evidence gathered, research undertaken and the extensive knowledge and experience of RED.
32. The redacted information in the Project/Fee proposal documents submitted by RED to the Department relates to:
- the systems, techniques and processes proposed to be used by RED when conducting the assessments;
  - RED's fees and charges;
  - the assumptions and exclusions on which the fee proposal is based; and

<sup>7</sup> *Lockhart, J in Trade Practices Commissioner v Sterling [1979] FCA 33; (1979) 36 FLR 244 at 245-6*

- the terms and conditions under which RED would engage to undertake the assessments.
33. The redacted information in the Departmental briefings relate to the cost of engaging RED.
34. In support of the application for a FOI Commissioner Review of the Department's Decision, the Review Applicant acknowledged that it was appropriate to redact information identifying other childcare services and RED's fees. The Review Applicant questioned, however, *"whether the information concerning the fire risk assessments undertaken by RED, their systems, techniques, processes and conclusions satisfy the requirements of [s 47] ...to such an extent that pages 1-67 of File A need to be redacted in full"*.
35. 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.
36. 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.<sup>8</sup>
37. The FOI Guidelines provide a list of factors that may assist in determining whether information has a commercial value. Relevant to this Review these include:
- whether the information confers a competitive advantage on the agency or person 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; and
  - whether the disclosure of the information would reduce the value of a business operation or commercial activity.
38. In its consultation submission to the Department RED argued that the *"information is RED Fire Engineers' Intellectual Property which we have developed over many years for commercial reasons. If obtained by our competitors, this information could damage our commercial interests"*.
39. After examining the information contained within the abovementioned documents, I am satisfied that the information clearly has a commercial value to RED and potentially to any of RED's competitors. The information clearly reflects accrued industry technical knowledge and expertise, includes details of systems and processes particular to RED, and fees and charges. As such it provides a competitive advantage to RED in the conduct of its business.
40. I note also that the documents are of a comprehensive nature that have taken time and resources to develop. I am mindful that the time and money invested in generating information will not necessarily mean that it has intrinsic commercial value.<sup>9</sup> 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, would be prepared to pay for the information at a reduced cost rather than incur the full cost of producing their own fire risk assessments from scratch.

<sup>8</sup> 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]

<sup>9</sup> FOI Guidelines [5.204] drawing on *Re Hassell and Department of Health Western Australia* [1994] WAICmr 25

41. I am satisfied that in this case the documents provide a roadmap for the development of fire risk assessments which could be adapted to the specific circumstances of competitor assessors and as such have intrinsic commercial value to RED.
42. I note also that the information contained in the documents is of a specialist nature and is not widely known. The documents are available to the Regulatory Authority and the staff of the childcare centres in question. They are not published on any website or distributed as a matter of course to members of the public.
43. Having regard to the matters discussed in paragraphs 38 to 42, I 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.
44. In *Cordova*<sup>10</sup> 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 to determine that the likelihood of it occurring is something less than a probability but more than just an intangible possibility.
45. In determining whether I am satisfied that the disclosure of the exempt material would or could reasonably be expected to destroy or diminish its commercial value I have considered three factors in particular:
- the significantly heightened awareness of fire risk issues associated with multi-storey buildings, driven by recent incidents both in Australia and internationally and widely reported in the media;
  - the fact that childcare is a lucrative, competitive growth industry driven by increasing demands for flexible childcare options that has resulted in growth of childcare services located in central city and multi-storey buildings; and
  - the highly regulated nature of the childcare sector under education and care services national law together with other applicable laws including those relating to planning, buildings, health and safety, and emergency services.
46. I consider these three factors to be key drivers in maintaining demand for fire risk assessment and building safety services. It is in this context that I am satisfied that the disclosure of RED’s commercially valuable information could reasonably be expected to diminish its value. The documents confer a commercial advantage on the viability and profitability of RED’s continuing business operations.
47. In relation to the FOI Review applicant’s submission cited at paragraph 34, I do not consider it is possible to extract sufficient, or any information, from the fully redacted documents in File A (documents 1-67) that would be both comprehensible and yet not diminish its commercial value to RED as discussed above.

#### **Section 47G Public Interest Conditional Exemption – Business**

48. Section 47G (1)(a) of the FOI Act relevantly 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

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<sup>10</sup> *Cordova and Australian Electoral Commission [2015] AATA 956 paras 42-52*

- 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.”*

49. The Department found 38 documents located in File B in the Schedule of documents attached to the Department’s Decision letter to be fully exempt, and 14 documents located across Files B, C and D to be partially exempt, from disclosure pursuant to s 47G(1)(a) of the FOI Act.
50. In the application for a FOI Commissioner Review of the Department’s Decision, the Review Applicant questioned whether the Department had properly considered the relevant criteria relating to the exemption under s 47G. The Review Applicant stated that the Department found that the information considered to be exempt under the section *“relates only to details of childcare centres”* and applied the public interest test on disclosure on that basis only. The Review Applicant stated that *“the determination is incomplete as the Department redacted information that does not just relate to the details of childcare centres.”* The applicant cites in support of their argument a redaction of details of a meeting location (File C - **document 28**) as not relating to the business interests of childcare centres. The applicant further questions how the redaction of the scope of services in RED’s fee proposals to the Department (File B - **document 7**) could concern REDs business, commercial or financial affairs. As a consequence the Review Applicant queries whether the Department *“has properly balanced the public interest (being the promotion and enhancement of the Department’s accountability and decision transparency and arguably the impact that not disclosing the information may have on BCCC and [Mr Buck]) against any adverse impact on RED and childcare centres.”*
51. I have considered the two documents referred to in the Review Applicant’s submission. I note that document 7 in File B was found by the Department to be partially exempt under s 47 of the FOI Act (set out in the Schedule of documents to the Department’s Decision Notice) and is therefore mis-referenced by the Review Applicant and, as such, is not relevant to this discussion on s 47G. The matter was discussed earlier in paragraphs 28 to 47.
52. I further note that the redaction in document 28 in File C of the location of a meeting, identified a childcare service as the location and as such is relevant to this discussion. I also note that document 39 in File C and documents 1, 7, and 229 in File D are identical to document 28.
53. I have examined the documents under review. The 38 documents located in File B for which access was refused in full provide details:
- a) in table format, of 14 childcare services subject to further monitoring by the Regulatory Authority including their service name, approval date, description of the premises, any conditions of the service approval, the last visit date, and specific details regarding fire and emergency evacuation procedures, including observations by Regulatory Authority Authorised Officers; and
  - b) in narrative format for each of the services, what appears to be a checklist of information associated with fire and evacuation procedures and proposed outcomes from visits by officers of the Regulatory Authority.
54. The 14 documents to which partial access was provided pursuant to s 47G(1)(a) contain, variously, brief details of, and references to childcare centres. I note that 6 of the documents are duplicates. In addition to the documents mentioned in paragraph 51, documents 198 and 2 in File B are duplicates.
55. I find that the information in the documents clearly relates to the business affairs of the identified childcare services and I am therefore satisfied that the first limb of s 47G(1) is satisfied.
56. 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.

57. As set out in the FOI Guidelines<sup>11</sup> and decided cases, the phrase “could reasonably be expected” refers to an expectation that is based on reason. Mere assertion or speculative possibility is not enough.
58. The Guidelines further state at paragraph 6.187 that “the presence of “unreasonably” in s 47G(1) requires that: *“A decision maker must balance the public and private interest factors to decide whether disclosure is unreasonable for the purposes of s 47G(1)(a); but this does not amount to the public interest test of s11A(5) which follows later in the decision process. It is possible that the decision maker may need to consider one or more factors twice, once to determine if a projected effect is unreasonable and again in assessing the public interest balance”*. The Guidelines further clarify at paragraph 6.188 that *“The test of reasonableness applies not to the claim of harm but to the objective assessment of the expected adverse effect”*.
59. In determining whether disclosure of the documents would or could reasonably be expected to unreasonably affect the childcare services referred to, I have paid particular attention to the following matters:
- the FOI Applicant is a competitor childcare provider;
  - the competitive nature of the childcare sector;
  - the childcare services in question have not been consulted about the release of the information in the documents; and
  - the nature and context of the information in the documents.
- I expand on these matters in the following paragraphs.
60. 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 it is relevant to consider the interests and identity of the FOI applicant in deciding either an unreasonable disclosure or a balance of public interest. The decision of the Australian Information Commissioner in *“FG and National Archives of Australia”*<sup>12</sup> considers this issue in some detail.
61. Given the FOI Applicant is a competitor childcare provider it is 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 the service when parents consider the service for their child.
62. The childcare services identified in the documents are the subject of increased monitoring by the Regulatory Authority due to their locations in multi-storey premises. The increased monitoring is part of the Regulatory Authority’s due diligence in ensuring it is effectively carrying out its responsibilities under the National Law. The information in the documents is designed for use by the services and the Regulatory Authority in ensuring the safety of children and compliance with the National Law. It does not provide for explanation or elaboration within the broader context of the childcare services. The services in question have not been consulted by the Department in consideration of the FOI application.

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<sup>11</sup> FOI Guidelines Combined January 2019 paras 6.186, and 5.15 to 5.18

<sup>12</sup> FG and National Archives of Australia [2015] AICmr26 13 April 2015

63. I note that the documents mentioned in paragraph 52 only reference the name of a childcare centre. However, the mention is within the context of email discussions between RED and the Department to which the Review Applicant has been given access.
64. On the basis of the matters discussed in paragraphs 59 to 63, 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 the s 47(G)1(a) are satisfied.

#### *Public Interest Test*

65. Section 11(5) provides that *“the agency...must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.”*
66. Section 11B(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 Guidelines<sup>13</sup> amplify these factors.

#### *Public Interest Factors favouring disclosure*

67. Drawing on the FOI Act and the Guidelines the Department, in its Decision Notice, concluded that, in favour of disclosure of the information, there is *“a general public interest which favours disclosure of information held by government agencies which in turn promotes the objects of the FOI Act in relation to departmental accountability and transparency”*.
68. I agree that the factor identified by the Department favouring disclosure of the documents is 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.
69. Importantly, in addition I find that the information may inform public debate on the health and safety of children while in education and care services and help inform the community about the Government’s regulation of education and care services.

#### *Public interest factors against disclosure*

70. The FOI Act does not list public interest factors weighing against disclosure. The FOI Guidelines<sup>14</sup> 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”*.
71. In its Decision Notice the Department identified the applicable factor against disclosure of the information as being that such disclosure could reasonably be expected to unreasonably adversely affect the identified education and care services business, commercial or financial affairs. I find the factor identified by the Department against disclosure to be relevant in this case.
72. I furthermore find that disclosure of the information in the manner proposed (that is without consultation with the education and care services whose business information would be made public and in isolation of

<sup>13</sup> Op.Cit par 6.19

<sup>14</sup> Op.cit paras 6.20-6.21

the details of the Regulatory Authority's monitoring framework for multi-storey education and care services) may compromise the effectiveness of the Regulatory Authority in carrying out its responsibilities.

73. In weighing factors for and against disclosure of the information the Department in its Decision Notice concluded that the information already provided to the FOI Applicant under the Decision sufficiently satisfied the public interest factor of ensuring the accountability and transparency of the Regulatory Authority and therefore attributed only moderate weight to the public interest factor favouring disclosure on that basis.
74. I agree that it is the case that the FOI Applicant has been given full or partial access to a substantial number of documents, although I note too that the FOI Act does not (and realistically could not) quantify the degree of information necessary to fulfil the objects of the Act. Ultimately it is a matter of judgment by the decision maker, taking into consideration the particular circumstances of each FOI application, as to whether the public interest factors have been fulfilled.
75. The Department conversely placed significant weight on the public interest factor against disclosure. The Department found that there is a clear public interest in ensuring that disclosure of information about a business does not unreasonably adversely affect the *lawful* business interests of that organisation. The Department further noted that *"organisations are entitled to a legitimate expectation that information which concerns their business affairs is afforded protection against unreasonable disclosure... and that the disclosure of the information under the FOI Act does not cause an unreasonable degree of detriment to their business."*
76. Having regard to the matters discussed in paragraphs 59-63, I am satisfied that disclosure of the information in the documents could unreasonably have an adverse effect on the education and care services in question. I can also see no evidence in the documents that the services are not carrying out their businesses lawfully.
77. In my consideration of the Department's Decision I placed considerable weight on the public interest factor favouring disclosure that lies in ensuring the safety and wellbeing of children discussed in paragraph 69.
78. In deciding whether this factor outweighs the public interest factor against disclosure identified by the Department, I have considered the following factors:
- as a condition of both initial service approval and ongoing operations, childcare providers are required to develop emergency and evacuation plans.<sup>15</sup> Penalties apply in each case of failure to comply with the relevant parts of the legislation cited in footnote 15 and approved providers can ultimately have their service approval withdrawn in serious cases of non-compliance. These requirements are publicly known and available;
  - as evidenced in the documents, the Regulatory Authority has an enhanced monitoring regime for services located in multi-storey buildings and imposes additional conditions on those services approval to operate;

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<sup>15</sup> 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.

- section 172 of the Education and Care Services National Law Act creates an offence for education and care service providers and services to fail to display prescribed information. Regulation 173 1(b) (iii) of the Education and Care Services National Regulations requires a service to display any conditions on its service approval;
- the education and care services in question have not been consulted about the release of the information contained in the documents;
- most of the information in the documents is not current.

79. In consideration of all the above matters, I have concluded that there are mechanisms in place whereby the public can inform itself of matters associated with the safety of children in particular education and care services such that the information contained in the documents is not necessary to fulfil this public interest factor.

80. I have further concluded that the absence of consultation with the education and care services in question and the fact that the information contained in the documents may not accurately reflect the services as they currently operate, impose an unacceptable adverse impact on the businesses concerned and outweigh the public interest factors favouring disclosure.

## Decision

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

- affirm the Department's decision to refuse access to 67 documents pursuant to s 47 of the FOI Act – *Documents disclosing commercially valuable information* - because the information contained in the documents is exempt information;
- affirm the Department's decision to give partial access to 48 documents pursuant to s 47 of the FOI Act – *Documents disclosing commercially valuable information* - because certain information contained in the documents is exempt information;
- affirm the Department's decision to refuse access to 38 documents pursuant to s 47G of the FOI Act – *Public interest -conditional exemptions – business information* - because certain information contained in the documents is exempt information;
- affirm the Department's decision to give partial access to 14 documents pursuant to s 47G of the FOI Act – *Public interest - conditional exemptions – business information* - because certain information contained in the documents is exempt information;
- vary the Department's decision to give partial access to 4 documents pursuant to s 42 of the FOI Act - *Documents subject to legal professional privilege* - and require the Department to provide access to the documents referred to in paragraph 26; and
- affirm the remainder of the Department's decision.

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).<sup>16</sup> The QCAT provides independent merits review of administrative decisions and has the power to set aside, vary or affirm a NECS IC review decision.

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<sup>16</sup> S40 *Education and Care Services National Law (Queensland) Act 2011*

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](http://www.qcat.qld.gov.au) or by telephoning 1300 753 228