



National Education & Care Services  
FOI & Privacy Commissioners & Ombudsman

## National Education and Care Services FOI Commissioner (NECS FOIC)

Australian Broadcasting Corporation and NSW Education and Care Services Regulatory Authority

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

<b>Review Applicant:</b>	<b>Mr Kevin Nguyen, Australian Broadcasting Corporation (FOIC Review applicant)</b>
<b>Respondent:</b>	<b>NSW Education and Care Services Regulatory Authority, Department of Education<sup>1</sup> (the Regulatory Authority)</b>
<b>Decision Date:</b>	<b>23 December 2019</b>
<b>Application number:</b>	<b>FOIC 05/2019</b>
<b>Catchwords:</b>	<b>Freedom of Information - <i>Freedom of Information Act 1982 (Cth)</i> – s47F Public interest conditional exemptions – Personal Privacy; s24A - whether the Regulatory Authority took all reasonable step to find documents within the scope of the access request; – <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>.</b>

### Decision

1. Under s55k of the *Freedom of Information Act 1982 (Cth)* (FOI Act) I:
  - i. affirm the decision of the Regulatory Authority of 26 September 2019, as varied on 20 December 2019, to provide partial access to 264 documents pursuant to s 47F - Public interest conditional exemption - Personal Privacy of the FOI Act; and
  - ii. set aside the decision of the Regulatory Authority made under s24A. Under s55V of the FOI Act I require the Regulatory Authority to undertake a further search for the documents referred to as item (IV) of the applicant’s FOI request in my paragraph 2, in accordance with the interpretations set out in my paragraph 73(iii). I require the Regulatory Authority to communicate its decision on the results of that further search to the FOI applicant within 30 days (with that period to commence on 6 January 2020 to take into account the holiday period) plus any further period permitted under the FOI Act before making the decision.

### Background

2. By correspondence dated 22 July 2019, Mr Kevin Nguyen, reporter for the Australian Broadcasting Corporation News (the FOIC Review applicant) applied to the Regulatory Authority under “any relevant Freedom of Information Law” for access to the following:

---

<sup>1</sup> 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*

- I. *“Number of serious incidents (as defined under Regulation 12 of the Education and Care Services National Regulations)<sup>2</sup> which occurred in NSW Family Day Care Centres since 1 January 2019 to the date of receipt of the application in the following categories:*
    - i. *12(a) death of a child*
    - ii. *12(b(c)) Injury/Trauma/Illness*
    - iii. *12(d) Emergency services attended*
    - iv. *12(e) Child locked in/out, taken away or unaccounted for.*
  - II. *Copies of reports outlining Serious Incidents (as defined under Regulation 12 of the Education and Care Services National Regulations) which occurred in NSW Family Day Care centres since 1 January 2019 and are categorised under Regulation 12(a), 12(b) and 12(c) of the Education and Care Services National Regulations.*
  - III. *Incoming Minister folder or any similar document prepared by your department for NSW Minister for Education and Early Childhood, Sarah Mitchell, as well as any briefs prepared for Member for Port Stephens, Katie Washington – between 18 February and 15 April 2019.*
  - IV. *Documents and briefings related to reportable incidents under the Education and Care Services National Regulations.” [The time period for such documents was confirmed by a subsequent email dated 9 September 2019 from the FOI applicant to a Regulatory Authority Information Access Officer to be “18 February 2019 to 15 April 2019].*
3. The Regulatory Authority clarified the application as being made in accordance with the Commonwealth *Freedom of Information Act 1982*<sup>3</sup> (the FOI Act). It also sought agreement from the applicant under s15AA of the FOI Act to extend the processing time for consideration of the application by 30 days, with the due date being 30 September 2019. The applicant agreed to the extension.
  4. The Regulatory Authority found 591 documents, each consisting of one page, that it considered fell within the scope of the FOI application.
  5. On 26 September 2019 the Regulatory Authority advised the FOI Review Applicant of its Decision. The Regulatory Authority:
    - i. granted partial access to 264 documents pursuant to s 47F of the FOI Act – *Public interest conditional exemption – personal privacy*;
    - ii. refused access to 327 documents pursuant to s 34 of the FOI Act – *Exemptions- Cabinet documents*; and
    - iii. advised that it had taken all reasonable steps to locate documents with respect to point 4 of the applicant’s request [cited at paragraph 2(IV) of this Decision] and determined under s24A(1)(a) and (b)(ii) of the FOI Act that such documents did not exist.
  6. In the course of this FOIC Review, on the 20 December 2019 the Regulatory Authority, under s55G<sup>4</sup> of the FOI Act, varied its decision with respect to Document 1 of the 264 documents identified at 5(i) and

<sup>2</sup> Regulation 12 of the *Education and Care Services National Regulations* defines the meaning of “serious incident” for the purposes of s5(1) of the Education and Care Services National Law. It identifies 5 categories of serious incidents.

<sup>3</sup> Section 264(1) of the *NSW Children (Education and Care Services National Law Application) Act 2010* applies the Commonwealth *Freedom of Information Act 1982* as a law in NSW for the purposes of the National Quality Framework. The NQF is defined in s5 of the National Law as meaning the national education and care services quality framework which in turn is defined as comprising the national law, the national regulations, the national quality standards and the prescribed rating system.

<sup>4</sup> S55G(1) provides that an agency may “vary or (set aside and substitute) an access refusal decision in relation to a request...at any time during an [FOIC] review of the access refusal decision if... [this]...would have the effect of giving access to a document in accordance with the request...s55G(2) provides that in this circumstance the FOIC “must deal with the IC

granted access to a further part of that document, giving as its reason that the information was “well known and in the public domain”.

### Application by FOIC Review Applicant

7. By letter dated 2 October 2019 the FOIC Review applicant requested a NECS Freedom of Information Commissioner Review (FOIC Review) of the Regulatory Authority’s decision. As the review application did not meet the requirements of s 54N of the FOI Act I sought clarification from the applicant. The application was settled on 30 October 2019.
8. In his application the FOIC Review applicant requested that I review the Regulatory Authority’s *“decision to refuse access to information through redactions - including non-personal information around the specific number of incidents, and non-personal information like dates and circumstances of significant events...in ... childcare centres”*.
9. The Review Applicant contended that the Regulatory Authority had been “heavy-handed in the use of redactions” and that he *questioned whether other redactions made ... such as removal of some identifiers (such as business and suburb names) and details of incidents were warranted in the public interest”*.
10. In relation to that part of his FOI application cited at paragraph 2(IV) of this Decision, the Review Applicant also sought what he termed a “sufficiency review” of the Regulatory Authority’s search for documents, *“to ensure that no other relevant information captured within the scope of [his] request has been excluded...”*

### Scope of the FOIC Review

11. In his application for Review the applicant stated he *“did not dispute in any way the parts of the [Regulatory Authority’s] decision which relate to documents exempt under Cabinet processes”*. I will not, therefore, give consideration in this FOIC Review to the Regulatory Authority’s decision (cited at paragraph 5(ii) of this Decision) to refuse access to 327 documents pursuant to s 34 of the FOI Act.
12. “Sufficiency review’ or “sufficiency of search review” are not terms used in either the FOI Act or associated Guidelines developed by the Australian Information Commissioner, although I note they are used in relation to some State jurisdictions’ freedom of information laws. However, s 24A of the FOI Act relevantly enables an agency to refuse a request under the FOI Act if all reasonable steps have been taken to find a document and the agency is satisfied that the document does not exist.
13. Section 54L(2)(a) of the FOI Act enables an application to be made to me in respect of an access refusal decision – which is defined in s53A to include a decision refusing access to a document in accordance with a request, or not giving access to all documents to which the request relates. It is on this basis that I intend to address the Review Applicant’s “sufficiency of search request” which for my purposes has the same intent and meaning as ensuring “all reasonable steps have been taken”.<sup>5</sup>
14. On examining documents 2 to 264 of the documents provided by the Regulatory Authority to the Review Applicant I found documents that do not fall within the scope of the initial FOI application set out in paragraph 2(II) of this Decision. In that part of the application, the FOI applicant sought reports for *three*

---

*review application for review of the original decision as if it were an IC review application for the review of the varied or substituted decision...”*

<sup>5</sup> A number of Australian information Commissioner, AAT and Federal Court decisions that have reviewed s24A decisions including: *PX and Australian Federal Police* [2109] AICmr8 (27 February 2019); *Chu and Telstra Corporation Limited* [2004] AATA 1127 (28 October 2004); *Nicholls and Commissioner of Taxation* [2012] AATA 328 (31 May 2012); *Chu v Telstra Corporation Limited* [2005] FCA 1730 (1 December 2005). Furthermore s 57A of the FOI Act (modified by the *Education ad Care Services National Regulations*) gives the relevant Tribunal the right to review decisions made under s55K on an FOIC review, and s58A(2) states on hearing a review in respect of s24A, the relevant Tribunal may require the agency or minister concerned to conduct further searches for documents.

categories of serious incident as defined under sub-regulations 12a, 12b and 12c of Regulation 12 of the *Education and Care Services National Regulations*; however, the Regulatory Authority provided copies of reports (with redactions) that fall into each of the *five* categories of serious incident defined by Regulation 12. That Regulation is discussed in detail at paragraph 19 of this Decision.

15. Having regard to the definition of an *access refusal decision*, which is summarised in paragraph 13 of this Decision, and refers to decisions which refuse access *in accordance with a request*, or not giving access to all documents *to which a request relates*, my jurisdiction in reviewing an access refusal decision is limited by the terms of the FOI request. I therefore cannot consider the Regulatory Authority's decision with respect to documents it disclosed that are outside the FOI request, namely documents that fall within the categories of serious incident defined by sub-regulations 12(d) and 12(e). All future references to documents 2 to 264 throughout this Decision therefore only relate to those documents that fall within the scope of the initial FOI application.

16. Accordingly, the issues to be decided in this FOIC review are whether:

- (i) the material that the Regulatory Authority found to be conditionally exempt under s 47F of the FOI Act, in those of the 264 documents that fall within the scope of the application made by the FOI applicant, is conditionally exempt under those provisions and, if so, whether giving the applicant access to conditionally exempt material would on balance be contrary to the public interest (s11A(5)); and
- (ii) the Regulatory Authority has taken all reasonable steps to find documents within the scope of the FOI request before determining their non-existence under s24A(1)(b)(ii) of the FOI Act

17. In making my Decision, I have had regard to the following:

- the Regulatory Authority's decision and reasons for the decision of 26 September 2019;
- the Regulatory Authority's decision as varied on 20 December 2019 and reasons for the variation;
- the original FOI request, and the NECS FOIC Review application;
- the documents falling within the scope of the request;
- the parties' submissions;
- the *Freedom of Information Act 1982*, particularly sections 11A(5), 11(B), 24A, and 47F;
- the *Freedom of Information Guidelines* issued under s 93A of the FOI Act<sup>6</sup>;
- the *Privacy Act 1988*;
- the Australian Privacy Principle Guidelines<sup>7</sup>;
- the *Children (Education and Care Services National Law Application) Act 2010 (NSW)*; and the *Education and Care Services National Regulations*; and
- relevant case law.

## The documents

18. I have examined the full copies of those of the 264 documents provided to the Review Applicant (in redacted form) by the Regulatory Authority that fall within the scope of this Review.

19. Education and care services are required by law to notify their Regulatory Authority of serious incidents occurring at their services.<sup>8</sup> Serious incidents are defined under Regulation 12 of the *Education and Care Services Regulations* as incidents that occurred when a child was being educated and cared for by a service that fall within any of the following 5 sub-regulation categories (my paraphrasing):

<sup>6</sup> *Freedom of Information Guidelines*. Australian Information Commissioner. Combined November 2019

<sup>7</sup> *APP Guidelines* Australian Information Commissioner v1.3 July 2019. The cornerstone of the Privacy Act's privacy protection framework is the Australian Privacy Principles (APPs), a set of legally binding principles that have been applied to education and care services Regulatory Authorities through the *Education and Care Services National Law*.

<sup>8</sup> *Education and Care Services National Law Act 2010* s174(2)

- 12(a) death of a child
  - 12(b) incident involving serious injury or trauma to a child;
  - 12(c) incident involving serious illness of a child for which the child attended or ought to have attended hospital;
  - 12(d) any emergency for which emergency services attended;
  - 12(e) circumstances where a child appears to be missing or unaccounted for, or taken or removed from the service, or mistakenly locked in or out of any part of the service premises.
20. Document 1 contains a table constructed by the Regulatory Authority titled “*Number of serious incidents in NSW family day care services from 1/1/2019 to 30/7/2019*”<sup>9</sup>. The Table lists the number of incidents that occurred against 5 headings in the following order: Child missing or unaccounted for; Death of a child; Emergency services attended or ought to have attended; Illness; Injury/Trauma. A sixth line provides for the total number of incidents. The 5 headings are consistent with the serious incident categories of Regulation 12 (although they are not set out in the order of that regulation) described in paragraph 19 of this Decision.
21. Documents 2 to 264 consist of “Incident Summary Reports” drawn from the National Quality Agenda IT System (NQAITs)<sup>10</sup> about the serious incidents. Each report contains system reporting headings and is between 2 to 5 pages in length. Standard information included in each report includes details of an incident and persons involved, the type of incident as defined by sub-regulations 12a, 12b, and 12c of Regulation 12, and the subsequent initial actions taken.

#### **Section 47F Public Interest Conditional Exemption - Personal Privacy**

22. The Regulatory Authority found some material in documents numbered 1 to 264 to be exempt under s47F of the FOI Act and accordingly redacted this information from the copies of the documents provided to the FOI applicant.
23. The main requirements of the s47F - public interest conditional exemption - are that a document contains ‘personal information’; that disclosure in response to the applicant’s FOI request would be ‘unreasonable’ (s 47F(1)); and it would be ‘contrary to the public interest’ to release the material at the time of the decision (s 11A(5)). Section 47F(1) specifically extends to the personal information of deceased persons.

#### *Personal Information*

24. Under s 4(1) of the FOI Act ‘**personal information**’ has the same meaning as the *Privacy Act 1988* which contains the following definition in s 6 of that Act:
- Personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable:*
- a. Whether the information or opinion is true or not; and
  - b. Whether the information or opinion is recorded in a material form or not.

#### **Individual** means a natural person

25. For the purposes of s47F of the FOI Act personal information is information about an identified individual or an individual who is reasonably identifiable (who may be deceased), that may be opinion, may be true or untrue, and may be recorded in material form or not. The information also needs to convey or say something about a person, rather than just identify them<sup>11</sup>. The mere mention of a person’s name, for

<sup>9</sup> S17(1)(c) of the FOI Act allows an agency to produce a written document (new record) by retrieving or collating the requested information from computer or other equipment containing the relevant data.

<sup>10</sup> NQAITs is an online business tool for communication and transaction of regulatory activity between education and care service providers, some staff in education and care services, and regulatory authorities. Services lodge their notifications of serious incidents directly into NQAITs.

<sup>11</sup> Re *Veale and Town of Bassendean* [1994] WAICmr 4 and *FOI Guidelines* op.cit 6.136

example, may not in itself constitute personal information; however, the context in which it is used may do so.

26. In its Decision of the 26 September 2019, and varied on 20 December 2019, the Regulatory Authority redacted the following information from Documents 1 to 264 provided to the FOI applicant pursuant to s47F of the FOI Act:
- i. Document 1 – the number of incidents under the first heading in the Table – “*Child missing or unaccounted for*” - plus the total number of incidents.
  - ii. Documents 2-264 – for those documents that fall within the scope of this review, the names, ages, addresses, gender and medical information of children, the names, contact details and, in some cases, medical information, in relation to parents and educators obtained or provided as part of the mandatory notification system, the Family Day Care service names and identification numbers at which the incidents occurred, and, in some cases the incident date and category..
27. On examination of the documents I am satisfied that the information referred to in paragraph 26(ii) - which identifies children, educators and parents by name, includes parents (and in some case educators) addresses and contact details, and contains medical information - says something about these individuals lives within the context of the incidents. It is clearly information about identified individuals and is therefore “personal information” for the purposes of the FOI Act.

#### *Reasonably identifiable*

28. I was not initially satisfied that the following redacted information was information about *identified* individuals:
- i. the number of incidents under the first heading in the Table (child missing or unaccounted for) referred to in paragraph 26(i) and the total number of incidents in that Table;
  - ii. the service identification numbers and names; and
  - iii. the incident categories and dates in documents where they were omitted.
29. I therefore needed to consider whether the redacted information constituted information about an *individual who was reasonably identifiable*. In considering this issue I have been assisted by the FOI Guidelines and the Privacy Guidelines issued by the Australian Information Commissioner, and relevant case law.
30. In discussion of whether a person might be reasonably identifiable, the FOI Guidelines<sup>12</sup> relevantly include the following points:
- what constitutes personal information will vary, depending on whether an individual...is reasonably identifiable *in the particular circumstances* (my emphasis);
  - an agency should not seek information from the applicant about what other information they have or could obtain;
  - if it is technically possible to identify an individual from information, but it is so impractical that there is *almost no likelihood* of it occurring, the information is not personal information.
31. The Privacy Guidelines<sup>13</sup> make similar points and offer two further considerations I regard as relevant in this case:
- if the information is publicly released, whether a reasonable member of the public who accesses that information would be able to identify the individual; and

<sup>12</sup> FOI Guidelines op.cit 6.131-6.135

<sup>13</sup> APP Privacy Guidelines op.cit B91-94

- where it is *unclear* whether an individual is ‘reasonably identifiable’, an APP entity *should err on the side of caution* and treat the information as personal information.

32. In *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission*<sup>14</sup> AATA Deputy President S A Forgie made some relevant and important observations concerning the approach to be taken for the purposes of deciding whether an individual would be *reasonably identifiable* by the disclosure of information.

33. The AATA’s decision in *Utopia* included an examination of whether s47F of the FOI Act applied to information concerning ASIC staff. In his judgement when applying s47F, the Deputy President stated the following:

*...the definition of “personal information” requires [that] the question of whether the person who is the subject of information is reasonably identifiable should be determined by reference to knowledge **that any person would have or could reasonably obtain** [my emphasis] as well as the knowledge that the particular person making the request could reasonably have access to. (Para 233).*

*...it seems to me that the issue whether the person is known to be associated with the matters in the document sought is also assessed by reference to the public generally. (Para 237).*

*The existence or nature of the information cannot be a matter of conjecture or speculation for, just as the definition of “personal information” requires that the individual be reasonably identifiable, that individual must also be reasonably identifiable from any information, which is available from outside sources and which may be married with the personal information in the document sought. The word ‘reasonably’ effectively eliminates conjecture or speculation. (Para 241).*

34. Shortly after the AATA’s decision in *Utopia* the Australian Information Commissioner (AIC) handed down a decision involving s47F in the matter of *Paul Kaszyckj and Australian Taxation Office*.<sup>15</sup> The relevant sections of the case relate to whether the information about candidates’ education and careers, including involvement in specific projects, career highlights and perceived strengths, would lead to the reasonable identification of the candidates if their names were redacted.

35. The AIC referred to the AATA *Utopia* decision discussed above and went on to state:

*It is apparent that the documents contain detailed information regarding the candidates’ education and employment history, covering relevant timeframes, locations, roles and responsibilities. It is also apparent that the information is unique to each respective candidate. In this case, I consider that **such information could enable re-identification of the candidates, even if their names were removed from the documents.** [my emphasis]. (Para 19).*

*With this information, I am satisfied that the identity of the candidates **could reasonably be identifiable to persons with some knowledge of, or association with, the respective candidates, their education or their current or previous employment.** (Para 20).*

36. In another recent decision involving s47F, *Julian Knight and Commonwealth Ombudsman*,<sup>16</sup> the AIC again applied the AATA’s decision in the *Utopia* case, and his decision included the following statements in relation to the consideration of the question of whether an individual is reasonably identifiable:

*Relevantly [the Deputy President] discusses: ... the question of whether the person who is the subject of information is reasonably identifiable should be determined by reference to knowledge that any person*

<sup>14</sup> *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission*<sup>14</sup> (Freedom of information) [2017] AATA 269 (28 February 2017)]

<sup>15</sup> *Paul Kaszyckj and Australian Taxation Office*<sup>15</sup> (No. 2) (Freedom of information) [2017] AIC 110 (7 November 2017)

<sup>16</sup> *Julian Knight and Commonwealth Ombudsman*<sup>16</sup> (Freedom of information) [2017] AICmr 94 (4 October 2017)

would have or could reasonably obtain as well as the knowledge that the particular person making the request could reasonably have access to. Once access is given to a document ... the Minister or agency granting that access has no control over the use that is made of it. (Para 39).

In this IC review, the complaints include descriptions of the alleged incidents, where they took place and the impacts on the complainants. Given that there are only two complainants and the documents record the alleged abuse in specific detail, I am satisfied here that the complainants could reasonably be identifiable to persons with some knowledge of, or connection with, the recorded events. (Para 43)

37. In my view, the deliberations outlined in paragraphs 32 to 36 support the following interpretation of s47F of the FOI Act. If *any* person, with some knowledge of, or connection with the information to be disclosed in the document, could identify the individual to whom that information relates, then the person who is the subject of the information is reasonably identifiable within the definition of personal information, as applied in s47F of the FOI Act. The number of people that fall within the concept of any person does not appear to be limited.
38. In applying this view, I have concluded that, within the context of this particular case, it is reasonably possible that the material discussed at paragraph 29 could lead to children, (and in some cases educators or parents) being identifiable to persons with some knowledge of, or associated with, a service and/or the incidents recorded in the Table and described in the Incident Summary Reports. While I cannot assess the degree of *likelihood* of this occurring, I have formed the view that it is greater than the “*almost no likelihood*” referred to in the FOI Guidelines at paragraph 28. In reaching this conclusion I have taken into account the fact that the Review applicant is a media organisation and it is reasonable to conclude that the information, if released, could become broadly known which in turn could assist “persons with knowledge” to identify the individuals concerned.
39. In reaching this conclusion I also make the following observation. In its Decision of 26 September 2019 in relation to its redaction of the number of children missing or unaccounted for in the Table at Document 1, the Regulatory Authority stated that “*it is [Regulatory Authority] practice to remove statistics where the number is below 5 as these children would be reasonably identifiable*”. There is nothing in the FOI Act that refers to an agency’s *practice* as being a relevant consideration. However, the *reason* for that practice (namely that children might be reasonably identifiable) is a relevant consideration. In this instance I am persuaded that there is a reasonable likelihood of children being identified in this case.
40. I am therefore satisfied that documents within scope of this FOIC Review contain information that identifies or could lead to the identification of individuals for the purposes of s 47F of the FOI Act.

#### *Unreasonable disclosure of personal information*

41. Having determined that the documents contain personal information I am next required under s47F to consider whether disclosure of that information would be “unreasonable”.
42. The FOI Guidelines<sup>17</sup> explain that the test of ‘*unreasonableness*’ under s 47F ‘*implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals*’, although this is not the public interest test of s(11A)(5) that comes later in the decision-making process. As the FOI Guidelines point out, *it is possible the decision-maker may need to consider one or more factors twice, once to determine if a projected effect is unreasonable and again when assessing the public interest balance*”.

---

<sup>17</sup> FOI Guidelines op.cit.6.138

43. In determining whether disclosure of personal information would be unreasonable, s47F(2) of the FOI Act provides that a decision maker must have regard to:
- a. *the extent to which the information is well known;*
  - b. *whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;*
  - c. *the availability of the information from publicly accessible sources; and*
  - d. *any other matters that the agency or Minister consider relevant.*
44. In *'FG' and National Archives of Australia 2015*<sup>18</sup> a range of other factors considered to be relevant in deciding whether disclosure of personal information would be "unreasonable" are discussed. Identified factors that I consider relevant to this FOIC Review are:
- the nature, age and current relevance of the information;
  - any detriment that disclosure may cause to the person to whom the information relates;
  - any opposition to disclosure expressed or likely to be held by that person;
  - the circumstances of an agency's collection and use of the information; and
  - the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act; and
  - whether the disclosure of the information might advance the public interest in government transparency and integrity.
45. I have considered the factors listed at paragraphs 43 and 44 in determining whether disclosure of the personal information would be unreasonable.
46. In consideration of the extent to which the information is known, and whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the documents (ss 47F(a) &(b)), I have concluded that neither the information nor the individuals concerned would be known beyond relevant Regulatory Authority officers, the education and care services in question, and persons with "some knowledge" of the incidents concerned as discussed in paragraphs 37 to 39. I have therefore formed the view that the "world at large" would not be aware of the information in the documents.
47. In consideration of "whether the information is available from publicly accessible sources" (s47F(2)(c)) I have taken into account the submission of the FOI applicant. He submitted that he considered that the information provided by the Regulatory Authority in a response to a Question on Notice arising from a Budget Estimates Hearing 2019 for the Minister for Education and Early Childhood was "*identical to redacted information sought under our application*". The information is published on the NSW Parliamentary website and provides statistical details presented in table format of "Serious Incident Notifications for all Service Types 1 July 2018-30 June 2019". The categories of serious incidents in the Budget Estimates table reflect the categories identified under Regulation 12 (discussed at paragraph 19) which were also used in the table in Document 1 of this FOIC Review. It appears that the NSW Department of Education prepared the Budget Estimates table at or around the same time as the Regulatory Authority was assessing the applicant's FOI request.
48. I agree with the FOI applicant's submission concerning the similarities between the two tables. There are, however, important differences between them and the circumstances in which they were produced that are relevant considerations. The information in the Budget Estimates table:

---

<sup>18</sup> *FG and National Archives of Australia* [2015] AICmr 26 (13 April 2015) at 47- defined in the FOI Guidelines at paragraph 43 as the "leading s 47F Information Commissioner decision",

- was not released under the FOI Act and therefore was not subject to its personal information exemption provisions;
- was required to be provided to a Question on Notice arising from a Budget Estimates Hearing under resolutions made by the NSW Legislative Council. There is no provision for an agency to limit the information provided in these circumstances;
- is not accompanied by any other information such as Incident Summary Reports, which could assist in the disclosure of the identity of individuals;
- is unlikely to lead to the identification of the relevant children because the number of children missing/unaccounted for in the Budget Estimates table is for a greater number of children than in the Document 1 table; and
- includes data from both a greater timespan (the 2018/19 financial year compared to six months) and a broader range of education and care service types<sup>19</sup>, making re-identification of the data more difficult, if not impossible.

49. In consideration of the relevant factors identified in paragraph 44 I make the following observations. The information contained in the documents is relatively new (less than 12 months old) and contains sensitive personal information, the release of which, particularly if it became public, could reasonably be expected to distress the individuals whose personal information was released.
50. Furthermore, the individuals concerned have not had an opportunity to submit that their personal information should not be disclosed. Section 27A of the FOI Act provides that an agency that is considering a request for access to personal information should, *if it is reasonably practicable to do so*, give the individuals concerned a reasonable opportunity to make a submission that the information should be exempt from disclosure before making a decision to give access. The Regulatory Authority did not undertake a consultation as it formed the view that it would not release the personal information and it was therefore unnecessary to consult further.
51. The Regulatory Authority collects and uses the information contained in the documents in question for the purposes of the monitoring and investigation of services against the requirements of the National Law. Services are required to notify serious incidents under s 174(2) of the *Education and Care Services National Law Act 2010* and penalties apply for any failure to do so. There is a reasonable expectation that the information will only be used for the express purposes of the National Law. Section 273(1) imposes a duty of confidentiality about another person's "protected information" although some exceptions are identified.
52. The FOI Act does not control or restrict any subsequent use or dissemination of information released under the Act. In *FG and the National Archives of Australia*<sup>20</sup> the then Australian Information Commissioner (AIC), in considering whether disclosure of information would be unreasonable or in the public interest, examined relevant case law, and discussed at length whether disclosure of information to one person under the FOI Act should be considered as disclosure to the world at large, given this lack of restriction under the Act, and whether the identity and motives of an applicant are relevant considerations.

---

<sup>19</sup> Education and care services are defined in the *Education and Care Services National Law* at s 5 as services providing or intended to provide education and care on a regular basis to children under 13 years of age (with some exceptions). They can be categorised into two groups - "centre-based services" and family day care services. Centre based services comprise preschools/kindergartens, long day care and outside school hours care. In the latest available figures for NSW there were 5,323 approved centre-based services and 177 Family Day Care services

<sup>20</sup> *FG and National Archives of Australia* [2105] AICmr 26 (13 April 2015) [19-44]

53. In summary, the conclusions drawn from the AIC's analysis were that in deciding whether disclosure of personal information would be unreasonable, a decision-maker should not work from the *premise* that disclosure of information to an FOI applicant would be disclosure to the world at large as a matter of course. The decision-maker should make a practical and risk-based assessment of whether to provide access to a particular applicant taking into consideration all the circumstances of the particular application. In doing so however, the decision-maker may consider the intended or likely use or dissemination of the information.
54. Whether the identity and motives of the applicant are relevant when considering unreasonableness is not settled.<sup>21</sup> The FOI Act at s11(2) provides that a person's right of access is not affected by any reason the person gives for seeking access or an agency's belief as to what those reasons are. However, the Act also provides for considerations of whether access would be unreasonable or in the public interest, and s47(2)(d) provides for consideration of "any other factors which the agency considers relevant". Having regard to those matters, I consider it reasonable to infer that there are circumstances where the identity and reasons of an applicant seeking information might be relevant considerations when considering whether disclosure would be unreasonable. Such consideration needs to be approached objectively with a balancing of public interest and private harm.
55. The FOI applicant is from a media organisation and has already published an article in relation to the death of a child in a family day care centre. In his FOI application to the Regulatory Authority, the applicant requested that the Regulatory Authority delay placing any information disclosed to him on its disclosure log "*as this will assist the ABC in the preparation of any material for broadcast or publication ...*" It is therefore reasonable to conclude that it is likely that the information will be disseminated widely.
56. Based on the discussions in paragraphs 46 to 55, and weighing all considerations, I am satisfied that the disclosure of the personal information would be unreasonable for the following reasons:
- it contains children's, parents' and educators' personal information, including health and medical details and the individuals concerned have not been consulted about any release of their personal information;
  - it attributes remarks and actions to children, parents and educators which they might reasonably consider were made and taken within the sole context of their use of the service or in carrying out their work responsibilities;
  - the information collected was to fulfil a legal reporting requirement between the services in question and the NSW Regulatory Authority. Such reports are not, as a matter of course, public documents and there is a justifiable expectation of confidentiality about the personal information documented;
  - the information is not available from publicly accessible sources;
  - the applicant is a media organisation and it is reasonable to conclude that it is likely that the information in the documents may be released broadly, without context and without opportunity for comment by the individuals whose personal information is disclosed.
57. I am therefore satisfied that the conditional exemption provisions of s47F(1) of the FOI Act are met. However s11A(5) requires that access to material which is conditionally exempt at a particular time must be given unless access, at the time, would on balance be contrary to the public interest. Accordingly, I now consider the public interest test.

#### *Public Interest Test*

---

<sup>21</sup> *FOI Guidelines* op.cit. 6.146

58. S11B(3) of the FOI Act sets out some of the factors which must be taken into account in applying the public interest test to conditionally exempt documents. The FOI Guidelines<sup>22</sup> provide a non-exhaustive list of other factors favouring disclosure.
59. In its Decision of the 26 September 2019 the Regulatory Authority identified the following factors favouring disclosure:
- it would promote the objects in section 3 of the FOI Act (s11B(3)(a));
  - it may inform debate on a matter of public importance (s11B(3)(b) - such as the health and safety of children while in the care of education and care services;
  - it may allow or assist inquiry into possible deficiencies in the conduct or administration of the [Regulatory Authority's] regulation of education and care services in accordance with the National Law; and
  - the information may inform the community of the [Regulatory Authority's] operations .... in the regulation of education and care services in NSW.
60. I agree that the public interest factors identified by the Regulatory Authority in favour of disclosing the information in documents 1 to 264 are relevant.
61. The FOI Act does not list public interest factors weighing against disclosure. The FOI Guidelines<sup>23</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*".
62. The FOI Guidelines cite a non-exhaustive list of public interest factors against disclosure<sup>24</sup> one of which the Regulatory Authority has drawn on in making its decision - *that disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy*. I agree that this is the relevant factor.
63. In weighing up these public interest factors for and against disclosure of the personal information I have also taken into consideration the comments of the FOIC Review applicant. In his application Mr Nguyen argued that the safety of children and staff in childcare centres *"is a high order public interest issue...there is a strong and over-riding public interest consideration around the release of further information about the operations of childcare centres, the safety of children in care and more detail around the types of incidents and dangers reported to authorities....Simple information about the numbers of deaths and missing children is unquestionably in the public interest*.
64. I agree with the Review Applicant's submission that the safety of children and staff in childcare centres is a high order public interest issue. There are both individual and broad societal interests in ensuring the health, safety and wellbeing of children in our society. Regulation of the operations of education and care services must be effective and be seen to be effective.
65. In weighing up factors for and against disclosure of the documents in the public interest I have formed the following view:

---

<sup>22</sup> FOI Guidelines. Op cit para 6.19

<sup>23</sup> FOI Guidelines. Op.cit paras 6.20-6.21

<sup>24</sup> FOI Guidelines Op.cit para 6.22

- the inclusion of the personal information as described in this Decision is not necessary to achieve the factors favouring disclosure of information identified in paragraphs 59, 63 and 64. The disclosure of the documents, redacted of such personal information, in my view still achieves these outcomes;
- while there may be some interest by members of the public in knowing the personal details of individuals in the services in question there is no public interest served by revealing those details<sup>25</sup>. The documents provide clear evidence of effective reporting and investigation systems of serious incidents by services and the Regulatory Authority. The information also informs the public of the incidents that can occur in family day care services.
- in providing notification of the serious incidents, the services were acting in accordance with the requirements of the *Education and Care Services National Law* and demonstrating important safeguards under the regulatory framework governing education and care services
- individual personal privacy is in itself a significant public interest matter, and, in my opinion, it requires some countervailing public interest argument – that is argument of equal weight - to override the protection of personal privacy which I cannot find in this case.

66. On balance I have concluded that it would be contrary to the public interest to release the personal information discussed in paragraph 26 of this Decision and I affirm the Regulatory Authority's decision to redact the identified information from documents 1 to 264.

#### **Whether reasonable steps taken to find documents (s 24A)**

67. Section 24A of the FOI Act relevantly enables an agency to refuse a request under the FOI Act if all reasonable steps have been taken to locate a document and the agency is satisfied that the document does not exist.
68. The FOI Act is silent on what constitutes "all reasonable steps". The FOI Guidelines<sup>26</sup> drawing from case law state that *"the meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose."*
69. The Guidelines further explain that 9with my underlining) "agencies ...should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment... At a minimum, an agency...should take comprehensive steps to locate documents, having regard to:
- the subject matter of the documents;
  - the current and past file management systems and the practice of destruction or removal of documents;
  - the record management systems in place;
  - the individuals within an agency or minister's office who may be able to assist with the location of documents, and
  - the age of the documents.
70. In its Decision dated 26 September 2019 in reference to point IV of the FOI applicant's request for *"documents and briefings related to reportable incidents under the Education and Care Services National*

<sup>25</sup> In *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429, Heerey J considered that *"...if the information disclosure were of no demonstrable relevance to the affairs of government and was likely to do no more than excite or satisfy the curiosity of people about the person whose personal affairs were disclosed...disclosure would be unreasonable"*

<sup>26</sup> FOI Guidelines Op.cit para 3.88-3.89

*Regulations*” the Regulatory Authority stated that “reasonable steps have been taken to locate the documents and there were no records within the scope of point 4 of your request”. The Regulatory Authority did not provide further information as to its document search.

71. In response to a request from me for information about their search, the Regulatory Authority provided a signed FOI Search Officer Declaration Form which sets out details of the databases searched, and the time taken in the search. In a teleconference meeting with relevant officers of the Regulatory Authority I sought further information about the definitions the Regulatory Authority had applied to the search.
72. The FOI request was for “documents and briefings related to reportable incidents under the Education and Care Services National Regulations” for the period 18 February 2019 to 15 April 2019. The Regulatory Authority advised me that it had considered that this part of the request referred to documents and briefings that dealt with reportable incidents “generally and collectively”, not to individual reportable incidents and its search parameters reflected this interpretation. However, the Regulatory Authority did not confirm its interpretation of the meaning of the request with the FOI applicant.
73. For the following reasons, I am not satisfied that the Regulatory Authority's interpretation of the applicant's FOI request was correct.
- i. Item 1 of the applicant's FOI request sought information concerning the **number** of serious incidents under Regulation 12 of the relevant regulations. Item 2 of the applicant's FOI request sought copies of reports **outlining** serious incidents under Regulation 12 of the relevant regulations. The word outlining means to draw, trace or defined the outer edge or shape of. Item 3 of the applicant's FOI request is not relevant for present purposes. Item 4 of the applicant's FOI request (which is the relevant request for the purposes of this part of my Decision) sought **documents and briefings related to reportable incidents**.
  - ii. As stated at paragraph 3.89 of the FOI Guidelines, “Agencies and ministers should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request.” (my underlining).
  - iii. The FOI request sought *documents and briefings related to reportable incidents*. In my view, those words mean that the applicant is seeking *any document and any briefing relating to any reportable incident*. The term *reportable incidents* would include any number of incidents, including a single incident. The word *documents* would normally mean one or more documents, and the word *briefings* would normally mean one or more briefings.
  - iv. I am unable to discern from all the items in the FOI request, or from the terms of item IV of the FOI request, support for the Agency's interpretation, namely that item IV only refers to documents and briefings that dealt with reportable incidents “generally and collectively”.
  - v. Finally, as stated earlier, the Regulatory Authority did not confirm its interpretation of the meaning of the request with the FOI applicant
74. Having regard to the matters listed in my paragraph 73, I am not satisfied that the Regulatory Authority has taken all reasonable steps as required under section 24A of the FOI Act.

### Decision

75. Under s55k of the *Freedom of Information Act 1982* (Cth) (FOI Act) I:
- i. affirm the decision of the Regulatory Authority of 26 September 2019, as varied on 20 December 2019, to provide partial access to 264 documents pursuant to s 47F - Public interest conditional exemption - Personal Privacy of the FOI Act; and
  - ii. set aside the decision of the Regulatory Authority made under s24A. Under s55V of the FOI Act I require the Regulatory Authority to undertake a further search for the documents referred to as item

(IV) of the applicant's FOI request in my paragraph 2, in accordance with the interpretations set out in my paragraph 73(iii). I require the Regulatory Authority to communicate its decision on the results of that further search to the FOI applicant within 30 days (with that period to commence on 6 January 2020 to take into account the holiday period) plus any further period permitted under the FOI Act before making the decision.

**Lesley Foster**

**National Education and Care Services Information Commissioner Decision**

**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](http://www.ncat.nsw.gov.au) or by telephoning 1300 006 228