



National Education & Care Services  
FOI & Privacy Commissioners & Ombudsman

## National Education and Care Services Freedom of Information Commissioner

### G8 Education Limited and ACT Education and Care Services Regulatory Authority Decision of the National Education and Care Services Freedom of Information Commissioner (NECS IC)

<b>Review Applicant:</b>	<b>G8 Education Limited (FOIC Review applicant)</b>
<b>Respondent:</b>	<b>ACT Regulatory Authority, Children's Education and Care Assurance, Education Directorate<sup>1</sup></b>
<b>Other parties:</b>	<b>FOI Applicant (FA1)</b>
<b>Decision Date:</b>	<b>22 June 2020</b>
<b>Application number:</b>	<b>FOIC 02/2020</b>
<b>Catchwords:</b>	<b>Freedom of Information - <i>Freedom of Information Act 1982 (Cth)</i>: Public interest conditional exemption - personal privacy (s 47F); Public interest conditional exemption - business (s 47G(1)(a)); <i>Education and Care Services National Law (ACT) Act 2011</i>; <i>Education and Care Services National Law (ACT)</i>; <i>Education and Care Services National Regulations 2011</i>.</b>

### Decision

1. Under s55k of the *Freedom of Information Act 1982 (Cth)* in respect to the Regulatory Authority's Decision dated 21 February 2020 and affirmed by Internal Review dated 7 April 2020, I:
  - i. affirm the Regulatory Authority's decision that the *Freedom of Information Act 1982 (Cth)* applies in relation to the FOI application;
  - ii. vary the decision of the Regulatory Authority to give partial access to 34 documents pursuant to s47F of the FOI Act (Cth) – *Public Interest conditional exemption - personal privacy* - and require the Regulatory Authority to redact the position titles of all G8 Education Limited staff, in accordance with paragraph 24 of this Decision, on the basis that the position titles are not within the scope of the FOI Application;
  - iii. vary the decision of the Regulatory Authority to give partial access to 34 documents pursuant to s47G of the FOI Act (Cth) – *Public Interest conditional exemption - business* – and require the Regulatory Authority to redact the information in paragraphs 1 and 4 on page 4, and in paragraphs 4 and 5 on page 5, of Document 22, that refers to other G8 Education Limited services, in accordance with paragraph 23 of this Decision, on the basis that the information is not within the scope of the FOI Application;
  - iv. affirm the remainder of the decision of the Regulatory Authority to give partial access to information in the 34 documents pursuant to s47F - *Public Interest conditional exemption - personal privacy* - and s 47G - *Public interest conditional exemption – business* - of the FOI Act (Cth).

---

<sup>1</sup> The Chief Executive, (now referred to as the Director-General) of the ACT Education Directorate is the Regulatory Authority (*Education and Care Services National Law (ACT) Act 2011 – s 10 and s 186 of ACT Legislation Act 2001*). The Children's Education and Care Assurance (CECA) within the Education Directorate conducts the administrative responsibilities of the Regulatory Authority. Officers in the Governance and Community Liaison Branch of the ACT Education Directorate are delegated authority under section 23 of the FOI Act (Cth) to handle FOI applications on behalf of the Regulatory Authority.

## Scope of the Review

2. By email dated 5 December 2019 the FOI Applicant (FA1)) applied to the ACT Regulatory Authority, under s15 of the Commonwealth *Freedom of Information Act 1982* (the FOI Act (Cth)) for access to:
  - 1) *Documentation and/or information relating to any CECA<sup>2</sup> investigation(s) performed in the lead up to the initial closure of Deakin Early Education Centre on Wednesday 6<sup>th</sup> November 2019;*
  - 2) *Communications and/or information sent/received by CECA which prompted the temporary and/or permanent closure of Deakin Early Education Centre and dates surrounding those events;*
  - 3) *Documentation and/or information of CECA audits and/or inspections of maintenance work conducted at Deakin Early Education Centre from 6/11/2019 to date;*
  - 4) *CECA reports, audits and/or investigations of Deakin Early Education Centre which indicate that person(s) at the centre may have been exposed to any chemical, biological, hazardous or carcinogenic materials or substance(s).*
  
3. A decision on the FOI application by the Regulatory Authority<sup>3</sup> was due on 6 January 2020 – (ref. s15(5)(b) of the FOI Act (Cth). The due date was extended by 30 days under s15(6) of the Act to allow for consultation with an affected third party and by a further 17 days by agreement with the FOI applicant under s15AA to enable external advice to be sought on a matter arising from the consultation.
  
4. The Regulatory Authority found 34 documents which it considered to be within the scope of the FOI application. I have examined the documents. They are written in nature or contain photographic records of information described in the written text. The documents range in size between 1 to 35 pages each and can be generally described as:
  - documents related to regulatory compliance matters associated with Deakin Early Education Centre prepared by the Regulatory Authority;
  - evidence of compliance action taken by G8 Education Limited (G8);
  - email exchanges between various persons including Regulatory Authority officers, G8 Education staff, Deakin staff and others;
  - records/notes of meetings;
  - formal statements made by Authorised Officers of the Regulatory Authority; and
  - communications with families using the Deakin Early Education Centre.
  
5. The Regulatory Authority determined that the documents contained information relating to the business affairs of an affected third party, namely G8. Section 27 of the FOI Act (Cth) requires the Regulatory Authority to consult with affected third parties before the disclosure of business information, if it appears to the Regulatory Authority that the third party might reasonably wish to make an exemption contention, and it is reasonably practicable to give the third party an opportunity to do so. Under s27(1)(b) a person, organisation or proprietor of an undertaking might reasonably wish to contend that a document is exempt from disclosure under s47(1) – documents disclosing trade secrets or commercially valuable information, or conditionally exempt from disclosure under s47G – business information.
  
6. By letter dated 10 January 2020 the Regulatory Authority invited G8, under s27 of the FOI Act (Cth), to provide its views on the potential release of the information contained in the documents. In providing the documents to G8 for consultation, the Regulatory Authority identified sections of the documents it had already determined to redact prior to any release of the documents in accordance with s47F *Public interest conditional exemption – personal privacy* and s47G *Public interest conditional exemption – business* of the FOI Act (Cth).

---

<sup>2</sup> See footnote 1

<sup>3</sup> See footnote 1 References to the Regulatory Authority throughout this Decision refer to officers acting under delegation.

7. Section 47F conditionally exempts documents (subject to a public interest test) from disclosure if disclosure would involve the unreasonable disclosure of personal information about any person. Section 47G relevantly conditionally exempts documents (subject to a public interest test) from disclosure where disclosure would disclose information concerning the business or professional affairs of an individual, or concerning the business, commercial or financial affairs of an organisation, and such disclosure 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 in respect of its lawful business, commercial or financial affairs.
8. G8 replied by letters dated 17 January 2020 and 3 February 2020 and advised that *“it objects to the disclosure of any of the 34 documents, or any of the information contained in those documents”*. In summary G8 submitted that:
- i. The FOI Act (Cth) did not apply to the ACT Education Directorate as it was not a Commonwealth Government agency and that if an FOI application had been made under that Act *“the request was not a valid request.”* G8 submitted that the ACT *Freedom of Information Act 2016* (the ACT FOI Act) may apply and that the balance of its correspondence was offered as if a valid request had been made under that Act.
  - ii. As the identity of the FOI applicant was not disclosed and the purpose for which the information was being sought was not given, *“in the circumstances, it is not possible for G8 Education to surmise what such purpose could be, and G8 Education is therefore concerned that the request may have been made for an improper purpose and/or with ill will towards G8 Education”*. G8 requested that the applicant’s identity and the reason for the request be sought and provided to G8 to enable them to provide a considered response.
  - iii. Disclosure would prejudice an investigation by the ACT Ombudsman as all 34 documents were documents relevant to an investigation being carried out by the Ombudsman.
  - iv. Disclosure would prejudice and negatively impact on the reputation and future financial value of G8. G8 stated that *“each of the documents contains an allegation or insinuation of misconduct on the part of G8 Education ... which in the form proposed for disclosure...are disputed by G8 Education... Such allegations have not been and are not able to be subjected to review by G8 Education and are, if disclosed publicly, likely to create significant and unwarranted harm to G8 Education’s reputation and prejudice the rights of G8 Education”*.
  - v. The redactions proposed by the Regulatory Authority to protect personal privacy were inadequate. G8 stated that *“To the extent that an individual’s name is proposed for redaction, but their position title is disclosed, such individuals remain readily identifiable. This is particularly so in the case of those positions where only one individual within G8 Education’s organisational structure has such a title...”*
  - vi. Disclosure of the documents under the ACT FOI Act would expressly be deemed to be not in the public interest. G8 argued that *“even if the FOI Act [Cth] applies, which is not conceded, this express deeming by the legislature of the Australian Capital Territory should be considered a persuasive factor in favour of disclosure being contrary to public interest”*. The expressed deeming which G8 referred to appears in s1.12 of Schedule 1 of the ACT FOI Act which, in summary, provides that it is contrary to the public interest to disclose information in the possession of the Ombudsman that has been obtained in relation to an Ombudsman review or investigation.
9. G8 made further extensive submissions that disclosure of the information in the documents would be contrary to the public interest citing factors listed in Schedules 1 and 2 of the ACT FOI Act. Schedule 1 of the ACT FOI Act details *“information the disclosure of which would be contrary to the public interest”*. Schedule 2 of the Act identifies *“factors to be considered when deciding the public interest”*. Section 2.2 identifies factors favouring non-disclosure of information.

10. As discussed later in this Decision at paragraphs 25 to 33 the provisions of the ACT FOI Act do not apply to the FOI application, the decisions made by the Regulatory Authority with respect to that application, or to my Review of those decisions.
11. By letter dated 30 January 2020 the Regulatory Authority responded to G8. It confirmed the jurisdiction of the FOI Act (Cth); refused to reveal the identity of the FOI applicant on privacy grounds; advised that the FOI Act (Cth) did not require an FOI applicant to disclose the purpose of their FOI application or the use that might be made of any documents released to them; and invited G8 to provide more details on how disclosure of the documents would prejudice and negatively impact the reputation and future financial value of G8 and why disclosure would, on balance, be contrary to the public interest.
12. By letter dated 12 February 2020 the Regulatory Authority also invited G8 to provide any further information in relation to its claim that an investigation by the ACT Ombudsman was relevant to the FOI application considerations. By letter dated the same day, G8 provided details about a matter it understood was under consideration by the ACT Ombudsman.
13. Following consideration of all matters, on 21 February 2020 the Regulatory Authority advised G8 of its decision (the FOI Application Decision) made under the FOI Act (Cth). The Regulatory Authority:
  - i. agreed to grant access to 34 documents to the FOI applicant with redactions applied under: s47F - conditional exemption - personal privacy, including redactions of the names, ages, gender, contact details, and medical details of children and/or staff at the child care centre, and the names and contact details of G8 staff, but with the position titles of G8 staff disclosed; and s47G - conditional exemption - business – including the redaction of a G8 policy document and references to other unrelated businesses;
  - ii. affirmed the jurisdiction of the Commonwealth *Freedom of Information Act 1982* in respect of the FOI application;
  - iii. affirmed that there was no obligation to disclose, or seek the disclosure of, the identity of the FOI applicant to a third party; and
  - iv. affirmed that the release of the documents would not materially prejudice the conduct of an investigation into a breach or alleged breach of law conducted by the ACT Ombudsman.
14. Under Section 54A of the FOI Act (Cth) an affected third party may apply for an Internal Review of an access grant decision by an agency. The agency must make a decision within 30 days of the application and a person other than the person who made the original decision must conduct the review.
15. On 23 March 2020, G8 sought an Internal Review of the FOI Application Decision. On the 7 April 2020 the Regulatory Authority advised G8 that it had conducted an Internal Review and that the outcome was to uphold the FOI Application Decision of the 21 February 2020; it also advised G8 of their right to seek a National Education & Care Services FOI Commissioner Review (NECS FOIC Review) of the Regulatory Authority's decision.

#### **Application for a NECS FOIC Review**

16. By online submission dated 21 April 2020, G8 requested a NECS FOIC Review of the Regulatory Authority's decision. In support of their submission G8 attached copies of correspondence between G8 and the Regulatory Authority dated between 17 January 2020 and 23 March 2020 *"as supporting information to summarise the reasons why [they] considered the decision wrong"* and raised three further objections. G8:
  - i. submitted that the decision of the Regulatory Authority not to seek the consent of the FOI applicant for their identity to be notified to G8 *"is both unreasonable and is a deliberate action of the authority to limit or prevented the ability of G8 to make relevant submissions on the adverse effects which are likely to arise from disclosure"*;

- ii. submitted that *“there is or has been a relevant investigation by the ACT Ombudsman, and the refusal of the authority to consider that investigation is wrong”*; and
  - iii. disputed the Regulatory Authority’s argument in support of its decision to disclose the position titles of G8 staff, that *“the names of people holding those positions is not public information”*. G8 submitted that *“this is wrong as a matter of fact, and the names of individuals holding the relevant position titles are identifiable by a simple google search”*.
17. As the correspondence provided by G8 revealed they had repeatedly contested the jurisdiction of the FOI Act (Cth) in relation to the FOI application, by letter to G8 dated 4 May 2020 I set out the reasons why the FOI Act (Cth) applied and sought G8’s confirmation that they understand both the jurisdiction of the FOI Act (Cth) in this matter and that their application was made under section 54M of that Act as an affected third party to an access grant decision.
18. By email dated 4 May 2020, G8 confirmed their understanding of the jurisdiction of the FOI Act (Cth) but indicated that the jurisdictional objections they had related to whether the documents under consideration are *“instruments made under the Education and Care Services National Law (ACT) for the purposes of s.7(1)(b) of the Education and Care Services National Law (ACT) Act 2011.”* G8 further stated that *“whilst reserving its rights, G8 Education agrees to treat the documents under consideration as instruments made under the Education and Care Services National Law (ACT) for the purposes of this review.”*
19. By letter dated 12 May 2020 I responded to G8’s statement that they *“agree to treat the documents under consideration as instruments made under the Education and Care Services National Law (ACT) for the purposes of this review”*. I indicated that I was not requiring or seeking any such agreement from G8 and that it would in fact be incorrect to do so. I set out further details as to the reasons why this is the case. The matter of jurisdiction of the FOI Act (Cth) is discussed further at paragraphs 25 to 33 below.

### Decision Under Review

20. The decision under review is the decision of the Regulatory Authority dated 21 February 2020, and affirmed at internal review by decision dated 7 April 2020, discussed in paragraph 15 of my Decision
21. In making my Decision, I have had regard to the following:
- the original FOI application, the Internal Review application, and the NECS FOIC Review application
  - the documents at issue (the documents)
  - the parties’ submissions
  - advice from the office of the ACT Ombudsman
  - the FOI Act (Cth), in particular ss 27, 37, 47F, 47G , s55D
  - the *Privacy Act 1988* (Cth)
  - the *Education and Care Services National Law (ACT) Act 2011*, the *Education and Care Services National Law ACT* and the *Education and Care Services National Regulations 2011*
  - the FOI Guidelines issued under s 93A of the FOI Act (Cth) by the Australian Information Commissioner<sup>4</sup>
  - relevant case law.

### Onus of proof

22. Section 55D(2) of the FOI Act (Cth) provides that the NECS FOIC review applicant as the affected third party (in this case G8) bears the onus of establishing that a decision refusing the FOI request is justified or that the NECS FOIC should give a decision adverse to the person who made the request.

---

<sup>4</sup> *Freedom of Information (FOI) Guidelines*. Australian Information Commissioner. Combined November 2019. S 9A of the FOI Act (Cth) requires decision makers to have regard to such Guidelines.

## Matters for consideration

### Out of scope material

23. Document 22 of the 34 documents under consideration contains brief comments in relation to other G8 services in the ACT at page 4, paragraphs 1 and 4, and page 5 paragraphs 4 and 5. These references are not within the scope of the FOI application, which relates only to Deakin Early Education Centre, and I require the Regulatory Authority to redact the comments before the documents are released.
24. Some of the documents proposed for release reveal the position titles of G8 staff. In submissions to both the Regulatory Authority and to me, G8 has objected to the disclosure of the position titles of its staff on the grounds that the titles may lead to the identification of individuals in situations where other identifying information (such as names and contact details) has been redacted. Before proceeding to any further consideration of this matter, I consulted the FOI Applicant as to whether they were seeking position titles of people associated with the childcare service and they confirmed that they were not. I have therefore formed the view that the position titles are not within the scope of the FOI Application and that no further consideration of them is required. I now require the Regulatory Authority to redact the G8 staff position titles from the documents identified in the footnote to this paragraph, plus the name of a member of G8 staff in the salutation in an email on page 1 of Document 12, before release to the FOI applicant<sup>5</sup>.

### Application of the FOI Act (Cth)

25. As discussed at paragraphs 8(l) and 17-19 above, G8 has repeatedly raised their doubts about the jurisdiction of the FOI Act (Cth) in relation to the FOI application. The Regulatory Authority maintained the position in its correspondence with G8 that the FOI Act (Cth) applied to the FOI application. In my view, and for the reasons stated in paragraphs 26 and 27 below, the Regulatory Authority's position is correct.
26. Most education and care services across Australia operate under national applied laws legislation. In the Australian Capital Territory, the national laws are applied in the following way:
  - i. Section 6 of the *Education and Care Services National Law (ACT) Act 2011* states that the Education and Care Services National Law as set out in the schedule to the Victorian Act, applies as a Territory law, and may be referred to as the Education and Care Services National Law (ACT) (ECS National Law ACT)
  - ii. The "Victorian Act" is defined in the Dictionary at the end of the *Education and Care Services National Law (ACT) Act 2011* as meaning the *Education and Care Services National Law Act 2010 (Vic)*.
  - iii. Section 7(1) of the *Education and Care Services National Law (ACT) Act 2011* states the ACT *Freedom of Information Act 2016* (ACT FOI Act) **does not apply** to the ECS National Law ACT or to the instruments made under that Law.
  - iv. Section 264 of the ECS National Law ACT applies the Commonwealth *Freedom of Information Act 1982* (the FOI Act (Cth)) as a law of a participating jurisdiction for the purposes of the National Quality Framework. The National Quality Framework is defined in s5 of the ECS National Law ACT to mean the national education and care services quality framework. The same s5 defines the national education and care services quality framework to mean—
    - (a) this Law; and
    - (b) the national regulations; and
    - (c) the National Quality Standard; and
    - (d) the prescribed rating system.

<sup>5</sup> Doc 12: p.1(name in salutation), p.2; Doc 15: p.1; Doc 16: p.1; Doc 18: p.4; Doc 22: p.3; Doc 23: p.2, p.3; Doc 24: p1, p2, p4, p.7, p.8; Doc 25:p.2, p.13. p.14, p.15, p.17, p.18, p.19; Doc 27: p.1; Doc 30: p.1, p.2; Doc31: p.2, p.3; Doc 33: p.1, p.3, p.4; Doc 34: p.1, p.3, p.5.

The operations of the ACT Regulatory Authority, G8 Education Limited as an approved childcare provider, and Deakin Early Education Centre, all fall within the above provisions.

- v. Section 264(2)(b) of the ECS National Law ACT modifies the FOI Act (Cth) to require all references to the Information Commissioner in the FOI Act (Cth) to be read as referring to the NECS FOI Commissioner.
  - vi. Regulation 208 of the *Education and Care Services National Regulations 2011* (the ECS Regulations) states that the FOI Act (Cth) **applies** as if it were modified so that it applies only to **agencies** and the agencies it applies to are the **National Authority**; and **each Regulatory Authority** of each participating jurisdiction.
  - vii. The FOI Act (Cth) contains the following relevant provisions:
    - a. s11 gives a person a right of access to documents of **the agency**
    - b. other provisions dealing with the rights of access, exemptions, reviews et al
27. In summary, ECS National Regulation 208 **applies** the FOI Act (Cth) to the ACT Regulatory Authority as an agency operating under the ECS National Law ACT, and the FOI Act (Cth) gives the public a right of access to the documents of the ACT Regulatory Authority in respect of its operations under the ECS National Law ACT (ie in relation to early childhood education and care services).
28. As a separate matter, in their application to the Regulatory Authority dated 23 March 2020 for an internal review of the authority's FOI Application Decision, G8 referred to the following statement made by the Regulatory Authority in that decision - *"In accordance with section 7 of the Education and Care Services National Law (ACT) Act 2011 (ACT) and section 264 of the National Law, the Freedom of Information Act 1982 (Cth) applies as a law of the ACT for the purposes of the National Quality Framework (NQF)"*. G8 made the following submission in response to the above statement:
- "We note that s.7(1) of the Education and Care Services National Law (ACT) Act 2011 provides that the Freedom of Information Act 2016 (ACT) does not apply to "the Education and Care Services National Law (ACT) or to the **instruments made under that Law**". [G8 emphasis]*
- "It is the submission of G8 Education that not every document held by the ACT Education Directorate is an instrument under the Education and Care Services National Law, and that any information held by the ACT Education Directorate which is not either the Education and Care Services National Law itself or an instrument under the Education and Care Services National Law is information which is not excluded from and is subject to the operation of the Freedom of Information Act 2016 (ACT).*
- Further, it is the submission of G8 Education that all or substantially all of the 34 documents which are proposed to be disclosed are not instruments under the Education and Care Services National Law."*
29. I consider G8's observations to be an incorrect interpretation of s7(1) of the *Education and Care Services National Law (ACT) Act 2011*. Section 7(1) excludes the ACT FOI Act from applying to the Education and Care Services National Law (and consequently to the provisions of that Law) and to the instruments made under that law. The exclusion of the ACT FOI Act from applying is not dependent upon documents being instruments made under the law for that exclusion to apply. I agree with G8 that the documents are not all instruments made under the ECS National Law, but that is irrelevant. They may be, but do not have to be, instruments for the disallowance of the application of the ACT FOI Act, and for the FOI Act (Cth) to apply, in this matter.
30. G8 also referred to provisions of the ACT FOI Act in its submissions as to why the 34 documents under consideration should not be released. In paragraph 8(vi) of my Decision I noted submissions by G8 that disclosure of the documents under the ACT FOI Act would expressly be deemed to be not in the public interest. Specifically, s1.12 of Schedule 1 of the ACT FOI Act in summary provides that it is contrary to the public interest to disclose information in the possession of the Ombudsman that has been obtained in relation to an Ombudsman review or investigation. G8 argued that *"even if the FOI Act [Cth] applies, which is*

*not conceded, this express deeming by the legislature of the Australian Capital Territory should be considered a persuasive factor in favour of disclosure being contrary to public interest" (my underlining).*

31. G8's submissions raise the following two issues:
- a. the first is whether the provisions of the ACT FOI Act are a relevant consideration for the purposes of assessing the public interest test under the relevant provisions of the FOI Act (Cth); and
  - b. the second is whether documents in the possession of, or an investigation to be conducted by, the ACT Ombudsman are a relevant consideration for the purposes of assessing the public interest test under the relevant provisions of the FOI Act (Cth).
32. In respect of the matter listed in paragraph 31(a) above, for the following reasons I consider the provisions of the ACT FOI Act to be *irrelevant* in assessing the *public interest* under the FOI Act (Cth):
- i. The FOI Act (Cth) does not contain a provision like s1.12 of Schedule 1 of the ACT FOI Act. Section 37 of the FOI Act (Cth) is a provision dealing with documents affecting the enforcement of laws and protection of public safety, but it is different to the said ACT provision. I deal separately with s37 later in paragraphs 33 to 38 of this decision.
  - ii. It is a fundamental principle, that in coming to a decision, a decision maker must have regard to relevant matters and disregard irrelevant matters.
  - iii. There is no express provision in either the ECS National Law or the FOI Act (Cth) which requires the decision maker to have regard to the ACT FOI Act when making a decision under the FOI Act (Cth).
  - iv. In *Minister for Aboriginal Affairs v Peko Walsend Ltd*<sup>6</sup>, the High Court held that a decision maker is not bound to take a particular matter into account, unless an implication that he/she is bound to do so is found in the **subject matter, scope and purpose** of the Act.
  - v. A similar approach was stated recently by the NSW Court of appeal in *Lo v Chief Commissioner of State Revenue*<sup>7</sup>, where the Court referred to the following 3 types of considerations:
    - a. Mandatory considerations – being matters that the decision maker *is bound* to take into account, and are derived from the terms of the specific statutory power, or implied from the *subject matter, scope or purpose* of the power;
    - b. Irrelevant considerations – being matters which are *prohibited* from being considered; and
    - c. Permissible considerations – being often a wide range of matters which lie between mandatory and prohibited considerations, namely factors *which the decision maker may weigh or disregard without committing an error of law*.
  - vi. In applying the approach referred to in the above cases, in my view the relevant Act, when assessing the *subject matter, scope and purpose* of the Act, is the FOI Act (Cth) as applied in the context of ECS National Law.
  - vii. As stated above, s7(1) of the *Education and Care Services National Law (ACT) Act 2011* states the ACT FOI Act 2016 **does not apply** to the ECS National Law ACT. That section appears to be an express statement by the ACT Legislature that the provisions of the ACT FOI Act 2016 are not to be applied in implementing the ECS National Law ACT. That provision is consistent with ECS National Law legislation passed by other jurisdictions. For example, s5 of the *Education and Care Services National Law Act 2010 (Vic)* states that the Freedom of Information Act 1982 (Vic) does not apply to the *Education and Care Services National Law Act 2010 (Vic)*; similarly, s5 of the *Children (Education and Care Services National Law Application) Act 2010 (NSW)* states that the *Government Information (Public Access) Act 2009* does not apply to the Children's Education and Care Services National Law (NSW).
  - viii. The ECS National Law has been adopted by all the States and Territories. The ECS National Law applies a consistent regulatory regime throughout Australia for the regulation of early childhood education and care services. The aim of consistency is also evidenced by the following provisions:

<sup>6</sup> 1986 162 CLR 24, per Mason J with Gibbs and Dawson JJ agreeing.

<sup>7</sup> 2012 NSWCA 180, per Basten JA with Beazley P agreeing.

- (a) the schedule to the ECS National Legislation containing its own specific interpretation of legislation provisions, rather than adopting the interpretation of legislation provisions of the various States or Territories;
  - (b) the adoption of the Commonwealth's FOI Act, Privacy Act and Ombudsman Act<sup>8</sup> for the purposes of the ECS National Law, with modifications made to those Acts by the ECS National Law and ECS National Regulations<sup>9</sup>.
- ix. As stated above, the FOI Act (Cth) applies to all the States and Territories as part of a consistent national regulatory regime for the purposes of early childhood education and care. In my view, it would be inconsistent with that National regime for the FOI Acts of each State and Territory to be relevant in interpreting or implementing the FOI Act (Cth) - in particular, as in our case, where the provisions of the ACT FOI Act are different to the FOI Act (Cth).
- x. The FOI legislation of each State or Territory also contain differences, which if applied to the ECS National regime, would result in different FOI outcomes under the ECS National Law. For example:
- (a) The FOI Acts of Victoria<sup>10</sup>, NSW<sup>11</sup>, Western Australia<sup>12</sup>, Tasmania<sup>13</sup>, exempt documents affecting the enforcement of laws and protection of public safety, but do not contain a provision like s1.12 of Schedule 1 of the ACT FOI Act.
  - (b) The Queensland FOI Act<sup>14</sup> contains a provision which lists, as a factor favouring nondisclosure, *if the information could reasonably be expected to prejudice the conduct of investigations, audits or reviews by the Ombudsman*.
  - (c) The FOI Act of the Northern Territory<sup>15</sup> contains a provision like s1.12 of Schedule 1 of the ACT FOI Act.

Having regard to those sections would not only create differences in FOI outcomes between the Commonwealth FOI Act and State and Territory FOI Acts, but also differences in outcomes between State and Territory FOI Acts.

33. Having regard to all the above matters, and having regard to the *subject matter, scope and purpose* of the FOI Act (Cth) when applied in the context of the ECS National Law ACT, in my view the ACT FOI Act 2016 is irrelevant in interpreting or applying the ECS National Law ACT, and it would be inappropriate for me to consider or apply the ACT FOI Act in this review in interpreting or applying the FOI Act (Cth).

#### Potential investigation by ACT Ombudsman

34. This paragraph and paragraphs 35 to 40 deal with the issue raised in paragraph 31(b) above, namely whether documents in the possession of, or an investigation to be conducted by, the ACT Ombudsman are a relevant consideration for the purposes of assessing the public interest test under the relevant provisions of the FOI Act (Cth).
35. In its consultation submission to the Regulatory Authority dated 17 January 2020, G8 maintained that the ACT Ombudsman was conducting an investigation into matters related to the subject of the 34 documents. In response to a request from the Regulatory Authority for further information in relation to their submission about a relevant ACT Ombudsman investigation, G8 provided further details by letter dated 12 February 2020

<sup>8</sup> See s191, 264 and 282 of the *Education and Care Services National Law Act 2010* (Vic)

<sup>9</sup> ECS National Law Regulations 204 to 211

<sup>10</sup> s31 of the *FOI Act 1982* (Vic)

<sup>11</sup> Item 7 of Schedule 1 to the *Government Information (Public Access) Act 2009* (NSW)

<sup>12</sup> *FOI Act 1992* (WA), item 5 of Schedule 1

<sup>13</sup>Section 30, *Right to Information Act 2009* (Tas)

<sup>14</sup> Item 10 Schedule 3, *Right to Information Act 2009* (Qld)

<sup>15</sup> *S49C Information Act 2002* (NT)

36. In their application for a NECS FOIC Commissioner Review G8 drew my attention to what they considered to be inconsistencies in the Regulatory Authority's advice in respect to contact the authority had with the ACT Ombudsman. G8 advised that:
- i. In their FOI Decision letter dated 21 February 2020, the authority wrote that: *"On contact, the ACT Ombudsman stated it cannot confirm or deny whether an investigation is underway and advised that the FOI request should be progressed in accordance with legislative requirements."*
  - ii. In the Internal Review decision dated 7 April 2020 the authority stated that: *"the Ombudsman explicitly advised that there was no impediment to proceeding with the FOI request."*
- G8 submitted that: *"These statements are inconsistent, and as a matter of fact there is or has been a relevant investigation of the ACT Ombudsman, and the refusal of the authority to consider that investigation is wrong."*
37. I agree with G8's contention that an investigation by the ACT Ombudsman could have been relevant in applying s37(1)(a) of the FOI Act (Cth). That section provides that: *A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to prejudice the conduct of an investigation of a breach, or possible breach, of the law, ... or prejudice the enforcement or proper administration of the law in a particular instance...*
38. However, the Regulatory Authority has provided evidence to me that, as a consequence of the matters raised by G8, they:
- a. sought advice from the ACT Ombudsman as to whether there was any impediment to them progressing their consideration of the FOI application on the basis that a relevant investigation was being conducted; and
  - b. received advice that satisfied them there was no impediment to them proceeding.
39. I have also sought further advice from the ACT Ombudsman in the context of s37 of the FOI Act (Cth) in relation to my Review. I am satisfied that there is not, and was not, any impediment to the FOI application being progressed and I am further satisfied that the Regulatory Authority acted appropriately on advice provided by the Ombudsman's office.
40. In respect to the submission by G8 described at paragraph 36 I note the inconsistency in wording between the two decisions but I consider they accurately reflect the advice provided to the Regulatory Authority and that there is no material difference as to their meaning.

#### **Reasons for FOI request and Identity of FOI applicant**

41. In their consultation submission dated 17 January 2020, G8 expressed their concern that as the identity of the FOI applicant was not disclosed, and the purpose for which the information was being sought was not given, *"in the circumstances, it is not possible for G8 Education to surmise what such purpose could be, and G8 Education is therefore concerned that the request may have been made for an improper purpose and/or with ill will towards G8 Education"*. G8 requested that the applicant's identity and the reason for the request be provided to them to assist them to provide their views for consideration.
42. In a further submission dated 3 February 2020, G8 contended that being unaware of the identity of the FOI applicant *"prevented [G8] from making relevant submissions on the adverse effects that are likely to arise from disclosure"* G8 requested that the Regulatory Authority seek the consent of the FOI applicant to reveal their identity. A similar request was made in G8's application for internal review dated 23 March 2020.
43. In their application for this NECS FOIC Review, G8 submitted that in the Internal Review Decision dated 7 April 2020 in response to G8's request that the Regulatory Authority seek the agreement of the FOI Applicant to reveal their identity, the authority advised that *"it was incumbent upon G8 to consider all possible parties that may be interested in the information, that the information may be made public via the media, and to present their objections accordingly"*. G8 submitted to me that *"it is not possible for G8 to consider all possible parties that may be interested in information, and that the decision of the authority to*

*not request consent of the applicant for their identity to be notified to G8 is both unreasonable and is deliberate action of the authority to limit or prevented the ability of G8 to make relevant submissions on the adverse effects which are likely to arise from disclosure.”*

44. Section 11(2) of the FOI Act (Cth) provides that a person’s right of access is not affected by any reasons the person gives for seeking access, or the agency’s belief as to what those reasons are. In the established case law of *FG and National Archives of Australia*<sup>16</sup> the Australian Information Commissioner concluded in relation to these provisions that: *“In my view, this is to be read as meaning that a person’s right of access is not to be adversely affected (or diminished) by their stated or assumed reasons. It is implicit in s 11(2) that a person may have explained why they are seeking access to particular documents; and s 11(2) is to be read in context with s 11(1) which declares a universal right of access (‘every person has a legally enforceable right to obtain access’)”*. This decision is reflected in the Commissioner’s FOI Guidelines for agencies issued under s93A of the FOI Act (Cth).<sup>17</sup>
45. In *FG and National Archives* the Commissioner further concluded, however, that an applicant’s reasons for requesting the information may be a relevant consideration for the purposes of considering whether disclosure would be unreasonable where required under an exemption, or contrary to the public interest. The Commissioner stated: *in deciding whether disclosure of personal information in a document would be unreasonable or contrary to the public interest...an agency may take into account any submission the FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use and dissemination of the information. An agency may also take into account that the FOI Act does not limit or restrain further dissemination of that information by the applicant. The agency may decide what weight to give to those and other considerations, including any view expressed by the person to whom the information relates. These considerations may also be relevant to the application of other FOI Act exemptions that require an agency to consider whether disclosure would be contrary to the public interest.*<sup>18</sup>
46. I note that G8 drew the discussion in *FG and the National Archives* to the attention of the Regulatory Authority in support of its submission of 3 February 2020.
47. The FOI Act (Cth) does not require an applicant who is a natural person to disclose or provide proof of their identity. The Act also does not prevent a person from using a pseudonym – consistent with Australian Privacy Principle 2 set out in the Schedule 1 to the *Privacy Act 1988* (Cth)<sup>19</sup>
48. The FOI Guidelines at paragraph 3.40 state that *“an applicant’s identity should not be provided to any third party without prior consultation and agreement by the applicant. This also applies if there is a request consultation process under... ss 27 or 27A [of the FOI Act (Cth)] ... Nevertheless, knowing an applicant’s identity may help a third party decide more easily whether to object to disclosure and to frame any specific objections and this issue can be raised with an applicant in consultation.”*<sup>20</sup>
49. In responses to G8’s requests that the Regulatory Authority disclose or seek permission to disclose the identity of the FOI Applicant, the authority advised that:
- the FOI Act (Cth) does not require an applicant’s identity, or the reasons for an application, to be disclosed either at the time of application or for the purposes of third party consultation;
  - it could not disclose the applicant’s identity on privacy grounds; and
  - it was incumbent upon G8 to consider all possible parties that may be interested in the information, that the information may be made public via the media, and to present their objections accordingly

<sup>16</sup> *FG and Australian Archives* [2015] AICmr 26 [40]

<sup>17</sup> FOI Guidelines op cit [3.35]

<sup>18</sup> *FG and Australian Archives* [44]

<sup>19</sup> Section 263 of the Education and Care National Law (ACT) and Regulation 199 of the *Education and Care Services Regulations 2011* apply the Commonwealth *Privacy Act 1988* to the ACT Regulatory Authority

<sup>20</sup> FOI Guidelines [3.40]

50. I note that in their consultation request letter to G8 dated 10 January 2020, the Regulatory Authority clearly explained that should the documents under consideration be released to the FOI Applicant, they would be published on a website as required under s11C of the FOI Act (Cth), subject to some exceptions related to personal and business information. I therefore consider it would have been clear to G8 that they should be framing any submissions objecting to the release of the documents within the context of potential wide exposure if the documents were to be released.
51. On the basis of the discussions above I am satisfied that the Regulatory Authority acted in accordance with the law in refusing to reveal the identity of the FOI applicant to G8. However, in light of the established case law discussed at paragraph 45 and the FOI Guidelines discussed at paragraph 48, I consider that it would have been reasonable for the Regulatory Authority to agree to seek advice from the FOI applicant as to whether the applicant would be prepared to have his/her identity revealed to G8.
52. As part of this FOIC Review, I sought advice from the FOI applicant as to whether he/she was prepared to have his/her identity revealed. The applicant has confirmed that he/she wished to retain their anonymity throughout. While therefore there would have been no material difference in outcome for G8 if the Regulatory Authority themselves had, in fact, sought such advice, confirmation of the FOI applicant's position might have obviated the need for ongoing discussion about this matter between G8 and the authority.
53. I have noted G8's contention discussed at paragraph 43 that the Regulatory Authority's refusal to seek the consent of the FOI applicant to have his/her identity revealed was a "*deliberate action of the authority to limit or prevent the ability of G8 to make relevant submissions on the adverse effects which are likely to arise from disclosure*". G8 has not provided, and I do not find, any evidence to support this contention.

#### **Section 47G Public interest conditional exemption – business**

54. Section 47G (1)(a) of the FOI Act provides that a document is conditionally exempt if its disclosure satisfies two tests - namely that it:
- "*would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking...*" and
  - the disclosure of the information "*would or could reasonably be expected to unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs.*"
55. As discussed at paragraph 4, the 34 documents contain details of investigations and enforcement actions taken by the Regulatory Authority in relation to the childcare service - Deakin Early Education Centre – of which G8 Education Limited is the Approved Provider.
56. I find that the information in the documents clearly relates to the business affairs of G8 as the Approved Provider for the service and I am therefore satisfied that the first limb of s 47G(1) is satisfied.
57. The second limb of the test in s 47G(1)(a) is met where an "unreasonable" adverse effect from disclosure of the documents "would or could reasonably be expected to" occur to G8.
58. As discussed in the FOI Guidelines<sup>21</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. The mere risk, possibility or chance of prejudice does not qualify as a reasonable expectation. There must, based on reasonable grounds, be at least a real, significant or material possibility of prejudice.

---

<sup>21</sup> FOI Guidelines Combined January 2019 paras 6.186, and 5.15 to 5.18

59. 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”*.
60. In their FOIC Review application discussed at paragraph 16, G8 did not make submissions to me in relation to the provisions of s47G of the FOI Act (Cth). As discussed at paragraph 22, s 55D(2) of the FOI Act (Cth) provides that in a FOIC Review of an access grant decision, an affected third party for the documents in relation to which the decision was made (in this case G8) has the onus of establishing that a decision refusing the request is justified or that the NECS FOIC should give a decision adverse to the person making the FOI request. By letter dated 4 May 2020 I drew G8’s attention to this requirement and invited any additional submissions from them in support of their objection to the release of the documents. No further submissions were provided.
61. I have therefore considered the consultation submissions G8 made to the Regulatory Authority in response to the authority’s consultation invitation under s27 of the FOI Act (Cth) to determine G8’s objections to the release of the documents under s47G.
62. In their consultation submission dated 17 January 2020, G8 maintained that *“disclosure of the information contained in the 34 documents is reasonably likely to prejudice and negatively impact the reputation and future financial value of G8 Education”* without further elaboration.
63. The Regulatory Authority invited further information from G8 as to:
- i. how disclosure of the documents would prejudice and negatively impact the reputation and future financial value of G8 Education; and
  - ii. why disclosure of the documents would on balance be contrary to the public interest.
64. In response, by letter dated 3 February G8 submitted that:  
*“This reputational damage will arise as each of the documents contains an allegation or insinuation of misconduct or serious misconduct on the part of G8 Education, including characterisations by officers of the [Regulatory Authority] describing conditions at Deakin Early [Education] Centre as “toxic mould”, “whole place dirty and unhygienic,” “filthy”. Such allegations, which [sic] in the form proposed for disclosure by the [Regulatory Authority] are disputed by G8 Education. However, such claims have not been and are not able to be subjected to review by G8 Education and are, if disclosed publicly, likely to create significant and unwarranted harm to G8 Education’s reputation and prejudice the rights of G8 Education”*.
65. In support of its contention that disclosure of the documents would be contrary to the public interest, G8 referred to discussion in the FOI Guidelines which state that for disclosure to be considered in the public interest it must be *“something that is of serious concern or benefit to the public, not merely of individual interest”*. G8 submitted that disclosure of the documents *“does not relate to something of serious concern or benefit to the public, but is clearly a matter of individual interest...”*
66. G8 further submitted that *“disclosure will be expressly deemed to be not in the public interest to the extent the ACT FOI Act applies. Even if the FOI Act [Cth] applies, which is not conceded, this express deeming by the legislature of the Australian Capital Territory should be considered a persuasive factor in favour of disclosure being contrary to public interest”*.

67. In determining whether disclosure of the documents would or could reasonably be expected to unreasonably affect G8, I have had regard to the following matters:
- i. The health, safety, and wellbeing of children in our communities is of paramount importance. A high order of public scrutiny of services providing education and care to children is warranted, and should be expected, by those who provide such services. The Education and Care Services National Law (ACT) and the *Education and Care Services National Regulations 2011* clearly set out, in considerable detail, the standards required for education and care services.<sup>22</sup> G8 is by its own admission a large provider of education and care services with more than 400 services located across Australia. It is experienced in the provision of childcare services and it is reasonable to conclude that it would be well aware of the compliance requirements of the National Law. Services are monitored and quality assessed against these standards. They are publicly available and both Approved Providers and services are expected to understand and apply them if they want to provide, or continue to provide, education and care services. There are provisions in the National Law for penalties to apply to breaches of the Law and for details of such breaches to be made publicly available.<sup>23</sup> In this context it seems to be reasonable to conclude that an Approved Provider could or should expect that their business information of the type described in the documents might become public.
  - ii. In relation to G8's objections set out in paragraph 64, I agree that the documents, through both text and photographic evidence, reveal conditions at Deakin Early Education Centre as described. However, I cannot agree that the allegations "*have not been and are not able to be subjected to review by G8*". The documents reveal, very clearly, discussions held by the Regulatory Authority with G8 representatives in relation to breaches of the Education and Care Services National Law ACT by the childcare service and the concerns held by the Regulatory Authority in relation to the health, safety and wellbeing of children at the service. The documents demonstrate that opportunities were provided to G8 to respond to the allegations and to rectify the breaches and that G8 did in fact attempt to do so. The language used to describe the conditions at the childcare service are not spurious or mischievous and the allegations as described are not specious but are substantiated in many cases by photographic evidence. They include formal statements provided by Authorised Officers of the Regulatory Authority made with the explicit acknowledgement that such statements could be used in a court of law.
  - iii. The documents reveal a willingness on the part of G8 to cooperate with the Regulatory Authority, including it voluntarily and temporarily closing the service in an attempt to address the issues raised. The documents also reveal that G8 provided support to families affected by the temporary closure. These are countervailing factors to the negative information disclosed by the documents that I consider could be used by G8 to mitigate any reputational damage that might arise from disclosure of the documents.
  - iii. G8 has surrendered its service approval for Deakin Early Education Centre. The service is no longer operating which in my view lessens the likelihood of intense public scrutiny.

---

<sup>22</sup> Of particular relevance *Education and Care Services National Law ACT* Part 3, Division 4; *Education and Care Services National Regulations 2011* Chapter 4: Operational Requirements- sets out the requirements for operating an education and care service aligned to the National Quality Standard.

<sup>23</sup> Section 270(5) of the *Education and Care Services National Law ACT* provides that a Regulatory Authority may publish prescribed information about enforcement actions taken under the law. Regulation 227 of the *Education and Care Services National Regulations 2011* sets out the information that may be published.

- iv. The *Canberra Times* newspaper has published an article in relation to the closure.<sup>24</sup> While the newspaper did not have access to the documents under consideration, the article does make it clear that the service was found by the Regulatory Authority to be not operating to the standards required by law and voices some criticism of G8 by a parent in relation to closure of the service. G8 is aware of this article as it contains quotes from a G8 spokesperson. G8 has not discussed in its submissions any unreasonable impact on the reputation or financial value of their company arising from this publicity.
- v. As discussed at paragraph 59 in considering the test of unreasonableness it is necessary to determine the public and private interest factors to decide whether disclosure is unreasonable for the purposes of s47G(1) of the FOI Act (Cth) (although this does not amount to the public interest test required by s11A(5) of the Act). I have carefully considered G8's submissions summarized in paragraph 65 but I do not, in this instance, accept their contention that as the matters in the documents concern only one service they are only of individual interest and not broader public interest. I am of the view that there is a compelling public interest in parents and prospective parents being well informed about: the legal requirements of services that are entrusted with the education and care of their children; how these requirements are monitored and enforced; and what can go wrong in a childcare service. The documents under consideration clearly demonstrate all three of these factors and as such contain information that is of serious concern to the public and not merely of individual interest. In respect to paragraph 66, as discussed previously I do not find the provisions of the ACT FOI Act to be relevant to my discussion in this case.

68. Having regard to all the matters in paragraph 67 I am not satisfied that G8 has demonstrated, as required under s55D of the FOI Act (Cth), that the disclosure of the information would or could have an unreasonable impact on the business affairs of G8 and the test for the second limb of s47G is therefore not met. Both limbs of the s47G requirements must be met for the conditional exemption to apply. Having found the conditional exemption does not apply, I do not need to proceed to consideration of the public interest test required under s11B of the FOI Act (Cth).

#### Parameters of consultation under Section 27

- 69. In its Decision dated 21 February 2020, and upheld in its Internal Review decision dated 7 April 2020, the Regulatory Authority determined to redact the names and contact details of G8 staff from the documents for release pursuant to s47F - conditional exemption - personal privacy - of the FOI Act (Cth), but to disclose the position titles of such staff. As discussed at paragraph 24, I consider this information is not within the scope of the FOI application and must be redacted. However, it raises an important issue that I consider requires discussion.
- 70. In their submissions to both the Regulatory Authority and to me in their application for a FOIC Review, G8 raised specific objection to the release of the position titles of G8 staff on the basis that this was **personal information** that could lead to the identification of individuals.
- 71. As discussed at paragraph 5, G8 was consulted with respect to the disclosure of the 34 documents under s27 of the FOI Act (Cth). In their consultation invitation to G8 dated 10 January 2020 the Regulatory Authority decision maker stated that: *"I have determined that information identified as relevant to this [FOI] request concerns G8 Education and under section 27 of the Act [FOI Act (Cth)] I am seeking your views on its potential release"*. There was no information included in the letter as to the parameters of a s 27 consultation.

---

<sup>24</sup> *Canberra Times*. November 28 2019. Article by Megan Doherty

72. Section 27 provides specifically for consultation with affected third parties before the disclosure of **business** information if it is reasonably practicable to do so. Under s27(1)(b) a person, organisation or proprietor of an undertaking might reasonably wish to contend that a document is exempt from disclosure under s47(1) – documents disclosing trade secrets or commercially valuable information, or conditionally exempt from disclosure under s47G – business information.
73. In my view it is critically important that all parties understand that: *“An affected third party who is consulted under s 27 may contend that exemptions under ss 47 or 47G should apply. Where the third party contends that exemptions other than ss 47 or 47G should apply, it is open to an agency ... to rely on those exemptions in its decision. However, should the agency ... decide to grant access to the documents, the third party does not have a right to seek review of that decision on grounds other than those specified in s27”*.<sup>25</sup>[my emphasis]
74. It is evident from the Decisions of the Regulatory Authority that the authority clearly considered G8’s contentions in regard to disclosure of the position titles of G8 staff pursuant to s47F of the FOI Act (Cth) but determined to grant access to the information. Consistent with the FOI Guidelines discussed at paragraph 73, G8 does not have the right to seek a review of that decision; its grounds to seek a review are confined to the basis on which it was consulted under s27.
75. I consider that agencies should ensure that the parameters of s27 consultations are made clear to parties being consulted under this provision.

## Decision

76. Under s55k of the *Freedom of Information Act 1982* (Cth) in respect to the Regulatory Authority’s Decision dated 21 February 2020 and affirmed by Internal Review dated 7 April 2020, I:
- i. affirm the Regulatory Authority’s decision that the *Freedom of Information Act 1982* (Cth) applies in relation to the FOI application;
  - ii. vary the decision of the Regulatory Authority to give partial access to 34 documents pursuant to s47F of the FOI Act (Cth) – *Public Interest conditional exemption - personal privacy* - and require the Regulatory Authority to redact the position titles of all G8 Education Limited staff, in accordance with paragraph 24 of this Decision, on the basis that the position titles are not within the scope of the FOI Application;
  - iii. vary the decision of the Regulatory Authority to give partial access to 34 documents pursuant to s47G of the FOI Act (Cth) – *Public Interest conditional exemption - business* – and require the Regulatory Authority to redact the information in paragraphs 1 and 4 on page 4, and in paragraphs 4 and 5 on page 5, of Document 22, that refers to other G8 Education Limited services, in accordance with paragraph 23 of this Decision, on the basis that the information is not within the scope of the FOI Application;
  - iv. affirm the remainder of the decision of the Regulatory Authority to give partial access to information in the 34 documents pursuant to s47F - *Public Interest conditional exemption - personal privacy* - and s 47G - *Public interest conditional exemption – business* - of the FOI Act (Cth);

## Lesley Foster

### National Education and Care Services Freedom of Information Commissioner

#### Review rights

If a party to a NECS FOIC Review is dissatisfied with an FOIC Review decision they may apply under section 57A of the **FOI Act (Cth)**, as modified by the *Education and Care Services National Regulations* r209(e) and r210, to have the

<sup>25</sup> FOI Guidelines op cit [6.209] and its references to *Australian Broadcasting Corporation and Civil Aviation Safety Authority* [2015] AICmr 21 [5] and ss 27(1)(b),

decision reviewed by the relevant Tribunal. In the case of this FOIC Review the relevant tribunal is the ACT Civil and Administrative Tribunal (ACAT).<sup>26</sup> The ACAT provides independent merits review of administrative decisions and has the power to set aside, vary or affirm a NECS FOIC review decision.

An application to the ACAT must be made within 28 days of the day on which the applicant is given the NECS FOIC review decision. An application fee may be applicable when lodging an application for review to the ACAT. Further information is available on the ACAT website [www.acat.act.gov.au](http://www.acat.act.gov.au) or by telephoning (02) 6207 1740

---

<sup>26</sup> Section 9(b) *Education and Care Services National Law (ACT) Act 2011*