

## Disclosure Log – Publication of information disclosed under the *Freedom of Information Act 1982*

### Introduction

The Commonwealth *Freedom of Information Act 1982* as modified by the Education and Care Services National Law and associated National Regulations (referred to throughout this guideline as **the FOI Act**) requires state and territory education and care services' Regulatory Authorities and the Australian Children's Education and Care Quality Authority (ACECQA) (**the ECS agencies**) to publish information disclosed under the FOI Act. The publication of this information is generally referred to as a "Disclosure Log".

### Publication of information in documents accessed under freedom of information

Section 11C of the FOI Act requires ECS agencies to make information in documents that have been released in response to each FOI access request available to the public generally through publication on a website, *subject to certain exceptions*. The requirement reflects the pro-disclosure objects of the FOI Act set out in section 3 of the Act.

Section 11C(3) of the FOI Act requires the information to be published on a website in one of three ways:

- a. by making the information available for downloading from the agency's website;
- b. by providing a link to another website where the information can be downloaded; or
- c. by providing details of how the information may be obtained in another way – for example, by written request or by viewing at the agency's premises.

### Exceptions to the requirement to publish

Section 11C(1) of the FOI Act excepts the following information from publication:

- personal and business information (including commercial, financial, or professional affairs) of any person if it would be unreasonable to publish the information (s11C(1)(a) & (b)); and
- other types of information the NECS FOI Commissioner has determined it would be unreasonable to publish (s11C(1)(c); and

- any information, if it is not reasonably practicable to publish the information because of the extent of the modifications to a document that would be required to delete information that has been determined to be unreasonable to publish under ss11(1) (a) to (c).

### Timeframe for publication on the Disclosure Log

An ECS agency must publish the information on their Disclosure Log within 10 *working* days after the day the agency gives the FOI applicant access to the information (s11C(6)). The ECS agency must ensure that all avenues of appeal have been exhausted before the information is published.

### Deciding what information is published on a Disclosure Log

The decisions to grant access to documents in response to a FOI request and to publish information on a Disclosure Log are two *separate* decisions under the FOI Act

In instances where a decision is made to publish less information on a Disclosure Log than has been released to an FOI applicant due to the exception provisions of s11C(1) of the FOI Act, this should be identified either within the document itself or by an accompanying statement on the Disclosure Log. This situation may arise for example, when a document containing personal and/or business information has been released to a FOI applicant because that information related to the applicant themselves, but it is considered under s11C(a) or (b) of the FOI Act unreasonable to make that information publicly available.

### Advice about disclosure log publication must be provided to parties to a FOI access decision

ECS agencies should ensure that all parties to an FOI access decision are aware that, *subject to the exceptions* under s11C(1) of the FOI Act, any information released in response to a FOI access request will be made publicly available through the Disclosure Log. It is up to the agency to determine how this is done. Examples include:

- routinely advising FOI applicants about Disclosure Log publication requirements as part of the agency's acknowledgment of receipt of their FOI access applications;
- routinely advising any third parties who are consulted on a FOI access application under ss 26A, 27 or 27A at the time of consultation;
- including advice about Disclosure Log publication requirements in the FOI application Decision Notice;
- including information on the agency's website about Disclosure Log publication requirements.

## Format of a Disclosure Log

The FOI Act does not specify a format for a Disclosure Log and ECS agencies can determine their own. The information about the Disclosure Log should be made clearly visible on the agency's website. The NECS FOI Commissioner advises that the Disclosure Log should at a minimum:

- provide information about the requirement under the FOI Act for ECS agencies to publish information released under a FOI request, and the exceptions to that requirement;
- identify how the information on the Disclosure Log may be accessed;
- include sufficient information for each record on the Disclosure Log including a reference number, a brief description of the FOI access request, a short summary of the information made available in response to the request and the date the FOI *applicant* was given access, and an indication if some material has been withheld from publication on the Disclosure Log because of an exception in s 11C(1);
- include details of any charges that will be imposed for accessing the information; and
- identify the retention policy for documents on the Disclosure Log – ie the period of time that documents will remain on the Disclosure Log;

## Charging for access to information on the Disclosure Log

Under section 11C(4) of the FOI Act an ECS agency may only charge a person for accessing Disclosure Log information if the access is *not* through downloading it from a website. If a charge is levied, it must only be to reimburse the agency for a specific reproduction cost, or other specific incidental costs, incurred in giving the person access to the particular information. The agency must publish details of the charges in the same way as the information about the Disclosure Log is published.

## Determinations by NECS FOI Commissioner under s 11C(2) of the FOI Act

Any affected party to a FOI access decision can apply to the NECS FOI Commissioner to make a determination under s 11C(2) of the FOI Act that certain information is not required to be published through a Disclosure Log. The Commissioner can also initiate a determination. A determination may apply to information of a general kind that is held by ACECQA and the Regulatory Authorities or to information of a specific kind held by a particular agency(ies) in a particular case.

Factors the Commissioner will take into consideration in deciding whether to make any determination under s 11C(2) include:

- the reasons set out in the application for the determination;
- the objects of the FOI Act;
- the extent or likelihood of harm which could be caused by publication of the information in question;
- whether there is a reasonable public demand for the information that might outweigh the request not to publish; and
- if relevant, whether the resources needed for an agency to publish the information were so great that they constituted an unreasonable diversion of that agency's resources.

### Making an application for a NECS FOI Commissioner determination

Before making any application for a determination under s11C(2) of the FOI Act an affected party should contact the NECS FOI Commissioner to discuss their application. A determination application must be in writing and should include at least the following information:

- the name and contact details of the affected party applying for a determination;
- a detailed description of the kind of information proposed to be covered by a determination;
- if the applicant is an agency, the reasons why the agency believes it would be unreasonable to publish the information on a website in one of the ways required under s11C(3) of the FOI Act, including details of any technical or resourcing issues (including estimated costs) or sensitivities affecting publication;
- if the affected person is an individual or organisation the reasons why it would be unreasonable to publish the information.

### NECS FOI Commissioner process for making a determination under s11C(2) of the FOI Act

If the NECS FOI Commissioner intends to make a written determination relieving the ECS agency(ies) from the obligation to publish certain information under s11C(1)(c), the Commissioner will prepare a draft determination describing the kind of information that the agency is relieved from publishing and the reasons for this decision,

The Commissioner will consult on the draft determination by:

- publishing the draft on the NECSOPIC website and inviting comment; and/or
- by providing a copy of the draft determination to the applicant and any relevant third parties.

Following consultation, if the Commissioner decides to proceed with making the determination, the Commissioner will make a final written determination, advise all relevant parties, and publish the determination on the NECSOPIC website. Determinations

will be time limited (usually 2 years) and will take effect on the day after the date of publication on the website.

## Active Determinations made by the NECS FOI Commissioner under s11C(2) of the FOI Act

There are no active determinations in place.

## Document Currency

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*The information in this Guide is of a general nature. It is not a substitute for legal advice.*