National Education & Care Services Freedom of Information Commissioner Guidelines

Instrument made by the National Education and Care Services Freedom of Information Commissioner adopting the Australian Information Commissioner Freedom of Information Guidelines

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PART 1 - INTRODUCTION

1.1 Context

1.1.1 The National Law applies the FOI Act to the ECS agencies as though it were a law of each participating jurisdiction.

1.1.2 The National Law also creates the office NECS FOI Commissioner and gives the NECS FOI Commissioner the powers of the Information Commissioner under the FOI Act in respect of the ECS agencies.

1.1.3 The NECS FOI Commissioner is an independent, statutory officer appointed by the Council of Australian Governments Education Council under the National Law.

1.1.4 In addition to the NECS FOI Commissioner's primary function of reviewing FOI decisions made by the ECS agencies, and other functions under the FOI Act, the NECS FOI Commissioner is empowered to issue guidelines under the FOI Act.

1.1.5 The Information Commissioner has published, and periodically updates, substantial guidelines under the FOI Act, the AIC FOI Guidelines, to provide information and guidance on the interpretation, operation and administration of the FOI Act. The NECS FOI Commissioner by this instrument, adopts the AIC FOI Guidelines.

1.2 Purpose

1.2.1 The purpose of these guidelines is to:

a. provide information and guidance to ECS agencies exercising their functions under the FOI Act

b. provide information and guidance for members of the public seeking to exercise their rights under the FOI Act

c. ensure consistency in the interpretation and application of the FOI Act

d. remove any uncertainty for ECS agencies or the public as to the expectations of the NECS FOI Commissioner in applying the FOI Act.

1.3 Application of the FOI Act

1.3.1 Section 264 of the National Law provides that the FOI Act applies, with any other modifications made by the National Regulations, as a law of a participating jurisdiction for the purposes of the National Quality Framework.

1.3.2 Division 2 of Part 6.2 of Chapter 6 of the National Regulations sets out the modifications of the FOI Act as it applies as a law of a participating jurisdiction for the purposes of the National Quality Framework.

1.3.3 Pursuant to regulation 208 of the National Regulations, the FOI Act applies as if it were modified so that it applies only to ECS Agencies. This means that the FOI Act (as modified by the National Law and National Regulations) applies to ECS agencies for the purposes of the National Quality Framework.

1.4 Authority

1.4.1 Section 93A(1) of the FOI Act provides that the Information Commissioner may, by instrument in writing, issue guidelines for the purposes of the FOI Act. Section 264 of the National Law provides that the FOI Act applies as if a reference to the Information Commissioner were a reference to the NECS FOI Commissioner.

1.4.2 These guidelines are made under section 93A of the FOI Act (as it applies as a law of a participating jurisdiction for the purposes of the National Quality Framework), read with section 264 of the National Law.

PART 2 - THE GUIDELINES

2.1 ADOPTION OF THE AIC FOI GUIDELINES

2.1.1 This instrument adopts the AIC FOI Guidelines as amended from time to time (see current version at **Freedom of information guidelines | OAIC**) as guidelines for the purposes of the application of the FOI Act to the ECS agencies.

2.2 APPLYING THE AIC FOI GUIDELINES FOR THE PURPOSES OF THE NATIONAL LAW

2.2.1 ECS agencies and the NECS FOI Commissioner must have regard to these guidelines when performing a function or exercising a power under the FOI Act (as modified by the National Law and National Regulations): s 93A(2). This means that these guidelines must be used by ECS agencies in performing their functions and exercising any powers under the FOI Act including when determining FOI access applications and by the NECS FOI Commissioner when undertaking Information Commissioner reviews and other reviews of the performance of functions and exercise of powers under the FOI Act.

2.2.2 As described at part 1.3 above, the National Law and National Regulations modify the FOI Act as it applies as a law of a participating jurisdiction for the purposes of the National Quality Framework. One of the main modifications is that certain references in the FOI Act are taken to be references to something else.

2.2.3 It is important to keep section 264 of the National Law and the modifications made by the National Regulations in mind when reading the AIC FOI Guidelines for the purposes of the ECS agencies, including that:

a. references to the Information Commissioner exercising a power or performing a duty or function generally should be read to mean the NECS FOI Commissioner exercising such a power or performing such a duty or function in relation to ECS agencies; and

b. the FOI Act applies with any other modifications made by the National Regulations. Division 2 of Part 6 of Chapter 6 of the National Regulations sets out what those modifications are and includes, for example:

i. modifications that a reference to the Federal Court should be taken to be a reference to the Supreme Court, or another court of competent jurisdiction, of a participating jurisdiction: regulation 209(d) of the National Regulations

ii. modifications that a reference to the Administrative Appeals Tribunal were a reference to a relevant administrative tribunal and a provision of

the *Administrative Appeals Tribunal Act 1975*[1] did not apply: regulation 209(e) of the National Regulations and that, for the purposes of regulation 209(e) of the National Regulations, a reference to a relevant administrative tribunal is taken to be a reference to the relevant jurisdiction's administrative tribunal and legislation: regulation 210 of the National Regulations

iii. any other modifications that are necessary for the effective administration of the FOI Act for the purposes of the National Quality Framework: regulation 209(k) of the National Regulations.

[1] By operation of s 6 of Schedule 1 to the National Law, these are now taken to be references to the Administrative Review Tribunal and the *Administrative Review Tribunal Act 2024* since the repeal of the *Administrative Appeals Act 1975* and consequent amendment of the FOI Act.

PART 3 - OTHER

3.1 Glossary

3.1.1 The following terms and acronyms are used in this guideline:

ACECQA means the Australian Children's Education and Care Quality Authority.

AIC FOI Guidelines mean the guidelines issued by the Australian Information Commissioner under s93A of the FOI Act.

ECS agency/ies means ACECQA and the Regulatory Authorities of the participating jurisdictions.

FOI Act means the *Freedom of Information Act 1982* (Cth).

Information Commissioner has the meaning given by the *Australian Information Commissioner Act 2010* (Cth).

National Law means the *Education and Care Services National Law* as set out in the following provisions:

In respect of the Australian Capital Territory - the Schedule to *the Education and Care Services National Law Act 2010* (Vic) as adopted by the *Education & Care Services National Law (ACT) Act 2011.*

In respect of New South Wales - the Schedule to the *Education and Care Services National Law Act 2010* (Vic) as adopted by the *Children (Education and Care Services National Law Application) Act 2010 (NSW).*

In respect of the Northern Territory - the Schedule to the *Education and Care Services National Law Act 2010* (Vic) as adopted by the *Education and Care Services (National Uniform Legislation) Act 2011*.

In respect of Queensland - the Schedule to the *Education and Care Services National Law Act 2010* (Vic) as adopted by the *Education and Care Services National Law (Queensland) Act 2011.*

In respect of South Australia – Schedule 1 to the *Education and Early Childhood Services (Registration and Standards) Act 2011*.

In respect of Tasmania - the Schedule to the *Education and Care Services National Law Act 2010* (Vic) as adopted by the *Education and Care Services National Law (Application) Act 2011.*

In respect of Victoria – the Schedule to the *Education and Care Services National Law Act 2010* (Vic).

In respect of Western Australia - the Schedule to the *Education and Care Services National Law (WA) Act 2012.*

National Regulations means the *Education and Care Services National Law Regulations.*

NECS FOI Commissioner means the National Education and Care Services Freedom of Information Commissioner.

Participating jurisdiction means a State or Territory in which:

a. the National Law applies as a law of the state or territory or

b. a law that substantially correspondence to the provisions of the National Law has been enacted.

Regulatory Authority/ies means the state or territory early childhood education and care Regulatory Authority of each participating jurisdiction under the National Law, namely:

In respect of the Australian Capital Territory - the Director-General of the Children's Education and Care Assurance *supported by* Children's Education and Care Assurance, Education and Care Regulation and Support, Education Directorate

In respect of New South Wales - the Executive Director of the Early Childhood Education and Care Regulatory Authority *supported by* the Early Childhood Education and Care Regulatory Authority, Department of Education

In respect of the Northern Territory - the Chief Executive Officer of the Quality Education and Care NT *supported by* Quality Education and Care NT, Department of Education

In respect of Queensland - the Director-General of the Department of Education *supported by* Early Childhood Regulatory Authority, Department of Education

In respect of South Australia - the Chief Executive of the Education Standards Board of South Australia *supported by* the Education Standards Board of South Australia

In respect of Tasmania - the Secretary of the Department for Education, Children and Young People *supported by* the Education and Care Unit, Department for Education, Children and Young People

In respect of Victoria - the Secretary of the Department of Education and Training *supported by* the Quality Assessment and Regulation Division, Department of Education

In respect of Western Australia - the Director General of the Department of Communities *supported by* Education and Care Regulatory Unit, Department of Communities

3.2 Document history

3.2.1 These guidelines are reviewed as necessary and at the latest every 6 months and may, by instrument in writing, be varied, amended, or revoked.

Version 1	October 2021
Version 2	Reviewed and amended June 2022
Version 3	Reviewed June 2023
Version 4	Reviewed and amended February 2026