



# National Education and Care Services Freedom of Information Commissioner

NECS FOI Commissioner Instrument 01

## Instrument adopting parts of the Australian Information Commissioner Freedom of Information Guidelines

### Terms

The following terms and acronyms are used in this Instrument:

**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 *Freedom of Information Act 1982* (Cth).

**ECS Agency/ies** means ACECQA and/or the state and territory Regulatory Authorities of the participating jurisdictions.

**ECSNL** 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*.

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

**FOI Act** means the Commonwealth *Freedom of Information Act 1982*.

**Information Commissioner** as defined in the FOI Act and the *Australian Information Commissioner Act 2010 (Cth)* means the Australian Information Commissioner.

**Instrument** as defined by clause 12 of Schedule 1 of the ECSNL includes a statutory instrument.

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

**Regulatory Authority** means the state or territory early childhood education and care Regulatory Authority of each participating jurisdiction under the Education and Care Services National Law.

**Statutory Instrument** as defined by clause 12 of Schedule 1 of the ECSNL means an instrument (including a regulation) made or in force under or for the purposes of this Law, and includes an instrument made or in force under any such instrument.

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## Preamble

Section 264 of the *Education and Care Services National Law* applies the Commonwealth *Freedom of Information Act 1982* (with modifications) as a law of a participating jurisdiction for the purposes of the National Quality Framework. Section 264(2)(b) of the ECSNL modifies the FOI Act so that a reference to the *Information Commissioner* is to be construed as a reference to the *National Education and Care Services Freedom of Information Commissioner*. Section 264(2)(c) of the ECSNL provides that the FOI Act applies with any other modifications made by the *Education and Care Services National Law Regulations*. Regulation 208 of the ECSNL Regulations provides that the FOI Act only applies to the National Authority (which is the Australian Children’s Education and Care Quality Authority) and to the education and care Regulatory Authority of each participating jurisdiction.

In this Instrument, ACECEQA and the Regulatory Authorities are referred to collectively as the ECS Agencies.

Section 93A (1) of the Commonwealth *Freedom of Information Act 1982* (as modified by the ECSNL) enables the NECS FOI Commissioner, by instrument in writing, to issue guidelines for the purposes of the FOI Act. The same section provides that ECS Agencies must have regard to any such guidelines when exercising their functions or powers under the FOI Act.

Clauses 24 (1) & (2) of Schedule 1 of the ECSNL allows a statutory instrument made under that Law to apply, adopt or incorporate (with or without modification) the provisions of another document (whether of the same or a different kind) as in force at a particular time, or as in force from time to time.

The Australian Information Commissioner administers the FOI Act in respect to Commonwealth Government agencies. Under s 93A of the FOI Act the Australian Information Commissioner has issued guidelines that provide information and guidance on the interpretation, operation, and administration of the FOI Act. A copy of the Guidelines is at <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/> The AIC FOI Guidelines have traditionally been referenced by the ECS

Agencies in determining FOI access applications and by the NECS FOI Commissioner when undertaking Commissioner Reviews.

## Purposes of this Instrument

The purposes of this Instrument are to:

- (i) provide clarification as to the guidelines that apply for the purposes of the ECSNL in relation to ECS Agencies exercising their functions under the Commonwealth *Freedom of Information Act 1982* in respect of freedom of information requests received by the Agencies;
- (ii) ensure consistency in the interpretation and application of the Commonwealth *Freedom of Information Act 1982*; and
- (iii) remove any uncertainty for agencies or the public as to the expectations of the Office of the NECS FOI Commissioner in the application of the Commonwealth *Freedom of Information Act 1982*.

## Adoption of Parts of the Australian Information Commissioner FOI Guidelines

Pursuant to section 93A of the FOI Act (as modified by the ECSNL) I hereby make this Instrument adopting the following Parts of the AIC FOI Guidelines:

Part 1	Introduction
Part 2	Scope of application of the FOI Act
Part 3	Processing and deciding on requests for access
Part 4	Charges for providing access
Part 5	Exemptions
Part 6	Conditional exemptions
Part 7	Amendment and annotation of personal records
Part 9	Internal Agency review of decisions
Part 12	Vexatious applicant declarations
Glossary	To the extent of references to terms used in the abovementioned Parts.

ECS Agencies should note that the above parts of the AIC FOI Guidelines are hereby adopted *as in force from time to time*. This is effected pursuant to clause 24(2) of Schedule 1 of the ECSNL, which provides that if a statutory instrument applies, adopts or incorporates the provisions of a document, the statutory instrument applies, adopts or incorporates the provisions *as in force from time to time*, unless the statutory instrument otherwise expressly provides.

In adopting the above parts of the AIC FOI Guidelines, references in the Guidelines to the Australian Information Commissioner exercising a power or performing a duty or function generally should be read to mean the NECS FOI Commissioner exercising such power or performing such a duty or function in relation to the ECS Agencies.

In applying the above Guidelines, ECS Agencies will need to be mindful of the modifications made to the FOI Act by the ECSNL Regulations, and in particular regulations 209 and 210. For example, page

43 of Part 3 of the above Guidelines refer to third party applications to the AAT or the Federal Court. The modifications made by the ECSNL regulation 209(d) require the reference to the Federal Court to mean the relevant jurisdiction's Supreme Court, and ECSNL regulation 210 requires the reference to the AAT to mean the relevant jurisdiction's administrative tribunal.

ECS Agencies must have regard to the above parts of the AIC FOI Guidelines when exercising their responsibilities under the FOI Act.

**Lesley Foster**

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

### **Document History**

This Instrument is reviewed as necessary and at the latest every 6 months and may, by instrument in writing, be varied, amended, or revoked.

This version	Current from October 2021
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