



National Education & Care Services  
FOI & Privacy Commissioners & Ombudsman

## ED and Victorian Education and Care Services Regulatory Authority:

### Decision and reasons for decision of National Education and Care Services Freedom of Information Commissioner (NECS FOIC)

**Review Applicants:** ED (pseudonym)

**Respondent:** Victorian Education and Care Services Regulatory Authority<sup>1</sup>

**Decision Date:** 10 August 2022

**Application number:** FOIC 02/2022 in matter of DET FOI 2022-280

**Catchwords:** Freedom of Information – (CTH) *Freedom of Information Act 1982*: Exemption – documents affecting enforcement of law and protection of public safety (s 37); Public interest conditional exemption – certain operations of agencies (s 47E); Public interest conditional exemption – personal privacy (s 47F); *Education and Care Services National Law Act 2010*; *Education and Care Services National Regulations 2011*.

### Decision

1. Under s 55k of the Commonwealth *Freedom of Information Act 1982* (the **FOI Act**) I affirm the decision of the Victorian Education and Care Services Regulatory Authority dated 16 June 2022 to refuse access to documents pursuant to sections 37, 47E and 47F of the FOI Act.

### Background

2. On 20 May 2022 ED (a pseudonym) applied to the respondent for access to video footage taken at a childcare centre from which their child had exited unsupervised.
3. The FOI request was made pursuant to the Victorian *Freedom of Information Act 1982*. The respondent correctly advised the applicant that the request fell within the jurisdiction of the *Commonwealth Freedom of Information Act 1982* (the FOI Act) and would be considered in accordance with that Act. Details of the application of the Commonwealth FOI Act in this matter are at **Attachment A**.
4. On 16 June 2022 the respondent provided its Decision on the applicant's FOI request. It refused to provide access to a document pursuant to sections 37, 47E and 47F of the FOI Act.
5. On the same day (16 June 2022) the applicant applied for a NECS FOI Commissioner (FOIC) Review of the respondent's Decision pursuant to s 54N of the FOI Act.

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<sup>1</sup> The Secretary of the Victorian Department of Education and Training is the Regulatory Authority (*Education and Care Services National Law Act 2010 – s 8*.) **The functions and powers of the Regulatory Authority are delegated to the Quality Assessment and Regulation Division (QARD)** of the Department to administer and enforce the National Law. For further details see Attachment A to this Decision

6. Under s 54 of the FOI Act the applicant has the right to first seek an internal review by the respondent of its decision which must be completed in 30 days. The applicant was advised of that right and the likely longer timeframe associated with a FOIC review. The applicant confirmed they wished to proceed with the FOIC review.
7. In their application for a FOIC review the applicant set out their reasons for seeking a review of the respondent's decision. It is not necessary to disclose those reasons for the purposes of this FOIC review.
8. There is a current and on ongoing investigation being conducted by the respondent (the Quality Assessment and Regulation Division (**QARD**)) in relation to the child under care leaving the childcare centre unsupervised and potentially being exposed to various hazards.

### Scope of NECS IC Review

9. The decision under review is the decision of the Regulatory Authority set out at [4].
10. The respondent identified what it describes as **one** document which comprises 4 segments of CCTV video footage in relation to the applicant's FOI request. The document was in the possession of the respondent as part of the ongoing investigation. I have considered the document.
11. The FOI Act provides a right of access to "documents". The definition of "document" under section 4 of the FOI Act encompasses CCTV video footage. The identification of a "document" in which information relevant to an access request is found, is determined by reference to its own characteristics, including its content and its interrelationship with other information. A document may comprise various parts. I am satisfied that the 4 segments of CCTV video footage of the document in question must be viewed together and as a whole in the circumstances and therefore can reasonably be described and considered as one document<sup>2</sup>.
12. The issues to be decided in this Review are whether the document the respondent found to be exempt from disclosure in accordance with the following three sections of the FOI Act is so exempt:
  - Section 37 – documents affecting enforcement of law and protection of public safety;
  - Section 47E – certain operations of agencies; and
  - Section 47F – unreasonable disclosure of personal information.
13. In making my decision I have had regard to the following:
  - the applicant's FOI request to the respondent and their NECS FOIC Review application
  - the Regulatory Authority's Decision and reasons for the Decision dated 16 June 2022
  - the content and nature of the document that falls within the scope of the request
  - the fact that there is an active investigation in relation to matters associated with the document
  - the *Education and Care Services National Law Act 2010* (Vic) and *Education and Care Services National Regulations 2011*
  - the *Freedom of Information Act 1982* (Cth), in particular ss 4, 11, 11A, 11B, 37, 47E, 47F and 55D
  - the Australian Information Commissioner *Freedom of Information Guidelines* (Combined version February 2022). The Guidelines have been adopted by the NECS FOIC Commissioner by Instrument 01 as guidelines that apply for the purposes of the Education and Care Services National Law in relation to the Australian Children's Education and Care Quality Authority (ACECQA) and state and territory Regulatory Authorities in exercising their responsibilities under the FOI Act. The Instrument is published on the NECS office website at [www.necsopic.edu.au](http://www.necsopic.edu.au)

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<sup>2</sup> See *Diamond and Chief Executive Officer of the Australian Curriculum, Assessment and Reporting Authority* [2014] AATA 707 (29 September 2014) at paragraph 72 for discussion of "document"

## Section 37 – Documents affecting enforcement of law and protection of public safety.

14. While the FOI Act is predisposed to the disclosure of documents held by government, it recognises that harm may arise from unfettered disclosure and consequently exempts outright some documents from disclosure, and conditionally exempts other types of documents from disclosure if it would not be in the public interest to disclose them.
15. Section 37(1)(a) of the FOI Act provides that a document is exempt from disclosure if such disclosure “*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*”.
16. Section 37(1)(a) applies to documents only where there is a current or pending investigation and release of the document would, or could reasonably be expected to, prejudice the conduct of that investigation. Because of the phrase ‘in a particular instance’, it is not sufficient that prejudice will occur to other or future investigations: it must relate to the particular investigation at hand.<sup>3</sup>
17. The document in question in this Review came into the possession of the respondent (specifically officers of the QARD, after the QARD’s investigation team exercised powers pursuant to section 199 of the *Education and Care Services National Law Act 2010 (the National Law)*). Section 199 permits an authorised officer to enter an education and care service and take or copy certain items if the officer reasonably suspects that an offence may have been committed against the National Law.
18. The respondent has advised that the document relates to an ongoing investigation and its disclosure could prejudice the conduct of an investigation of a breach, or possible breach, of the National Law.
19. Once a document is released under Freedom of Information there is no limitation as to how it might be used or disseminated. It potentially can be disseminated to the world at large.
20. The release of confidential evidence to an FOI applicant prior to an investigation being finalised and any avenues of appeal in relation to the outcomes of that investigation being exhausted, undermines the effectiveness of that evidence and compromises legal processes.
21. As discussed in the FOI Guidelines<sup>4</sup> a ‘document’ includes any part of a document that is relevant to the terms of the FOI request. Consequently, the decision maker should consider whether it is practicable to delete exempt material and provide the balance to the applicant. If it is practicable to delete the exempt material and prepare a meaningful non-exempt edited copy to provide to the applicant, an agency must do so. Given the nature of the document in question – 4 CCTV video files – which comprise a single integrated piece of evidence, I am satisfied that it is not practicable in the circumstances to prepare a meaningful non-exempt edited copy.

### **Finding**

22. I am satisfied that the document in question is exempt from disclosure at this time pursuant to s 37(1)(a) of the FOI Act (Cth).

<sup>3</sup> Australian Information Commissioner. FOI Guidelines. Combined version. February 2022 at paragraph 5.86 and footnote.

<sup>4</sup> FOI Guidelines. Op. Cit. paragraph 5.2

## Section 47E – Public interest conditional exemptions – certain operations of an agency

23. The FOI Act contains 8 categories of documents that are “conditionally exempt” from disclosure. An agency cannot rely on these categories to refuse access to a document without first applying a “public interest test” under s 11A(5) of the FOI Act.
24. Section 47E(d) exempts a document from disclosure if its disclosure under the FOI Act would, or could reasonably be expected to, *“have a substantial adverse effect on the proper and efficient conduct of the operations of an agency”*.
25. For the grounds in s 47E(d) to apply, the predicted effect needs to be reasonably expected to occur. There must be more than merely an assumption that damage may occur from the disclosure of the document. As discussed in the FOI Guidelines an agency cannot merely assert that disclosure will have a negative impact - *the particulars of the predicted effect should be identified during the decision-making process including whether the effect could reasonably be expected to occur. Where the conditional exemption is relied upon, the relevant particulars and reasons should form part of the decision makers statement of reasons, if they can include it without disclosing exempt material.*<sup>5</sup>
26. I am satisfied that the disclosure of the document under consideration, at this time, would have a substantial adverse effect on the proper and efficient conduct of an investigation by the Regulatory Authority into a breach or possible breach of the National Law and compromise its capacity to undertake its statutory responsibilities.
27. It would reveal untested evidence and compromise the Regulatory Authority’s ability to conduct its investigation fairly and without prejudice.
28. The document is conditionally exempt.

### Public Interest Test

29. Section 11A(5) of the FOI Act provides that an agency must give a person access to a conditionally exempt document, unless access to the document at that time would, on balance, be contrary to the public interest. This is referred to as the “public interest test.”
30. Section 11B(3) of the Act sets out four factors favouring access to a document which must be considered by decision makers, if relevant, when applying the public interest test to conditionally exempt documents. These are whether access to the document would:
  - (a) promote the objects of the Act;
  - (b) inform debate on a matter of public importance;
  - (c) promote effective oversight of public expenditure; or
  - (d) allow a person to access his or her own personal information.
31. The FOI Act does not list public interest factors weighing against disclosure. The FOI Guidelines point out that such factors *will depend on the circumstances. ...the inclusion of exemptions and conditional exemptions in the FOI Act recognizes that harm may result from the disclosure of some types of documents in certain circumstances [and that while] citing the particular harm defined in the applicable conditional exemption is not itself sufficient to conclude that disclosure would be contrary to the public interest...the harm is an important consideration that the decision maker must weigh when seeking to determine where the balance lies*<sup>6</sup>.

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<sup>5</sup> FOI Guidelines [6.103]

<sup>6</sup> FOI Guidelines. Op Cit. 6.20 and 6.21

32. The FOI Act stipulates that an agency must have regard to the FOI Guidelines when deciding whether access to a conditionally exempt document would, on balance, be contrary to the public interest<sup>7</sup>. The Guidelines provide a non-exhaustive list of further public interest factors favouring disclosure<sup>8</sup> and a non-exhaustive list of factors against disclosure<sup>9</sup>.
33. In the Decision Notice dated 16 June 2022, the decision maker identified one public interest factor in favour of disclosure of the material to be found conditionally exempt under s 47E(d) of the FOI Act:
- i. disclosure would promote the objects of the FOI Act
34. I agree that the factor identified by the decision maker is a relevant consideration in this case. Disclosure would promote the objects of the FOI Act with respect to providing access to government held information – in this case by a government agency, the Regulatory Authority.
35. The decision maker identified four public interest factors against disclosure of the material found to be conditionally exempt under s 47E(d) of the FOI Act:
- i. disclosure would reasonably be expected to prejudice the effectiveness of the agency's regulatory functions;
  - ii. disclosure would reasonably be expected to prejudice the protection of an individual's right to privacy;
  - iii. disclosure would reasonably be expected to impede the flow of information to the Department as a regulatory agency; and
  - iv. disclosure would reasonably be expected to prejudice an agency's ability to obtain similar information in the future.
36. The decision maker did not offer further comment on these factors.
37. I consider the four factors identified by the decision maker to be relevant considerations, although I place greater significance on (i-iii) in the circumstances.
38. As discussed at [26-27] disclosure of the document at this time could reasonably be expected to prejudice the effectiveness of the Regulatory Authority's investigation and compliance functions in this case.
39. Disclosure could also reasonably be expected to prejudice the protection of a person's right to privacy if they are unknowingly captured on the video footage in these circumstances.
40. Disclosure of a document that is related to an active investigation could also reasonably be expected to result in some child care providers and services and individuals being less inclined to cooperate with the Regulatory Authority in the provision of information if they believe the information they provide may be disclosed more broadly.
41. In relation to factor (iv) I consider that while the Regulatory Authority may experience additional resistance when seeking to obtain similar information, I note that ultimately the Authority has considerable enforcement powers under the Education and Care Services National Law that might counter that resistance.

### **Finding**

42. In weighing up all factors I am satisfied that disclosure of the document that I have found to be

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<sup>7</sup> FOI Act s11B(5)

<sup>8</sup> FOI Guidelines [6.19]

<sup>9</sup> FOI Guidelines [6.22]

conditionally exempt pursuant to s 47E(d) would, on balance, be contrary to the public interest at this time for the purposes of s 11A(5) of the FOI Act.

43. Section 11B(4) of the FOI Act sets out four factors that are irrelevant and must not be taken into account when deciding if access to a document would, on balance, be contrary to the public interest<sup>10</sup>. I am satisfied that no irrelevant factors have been considered in this public interest consideration.

#### **Section 47F – Conditional exemption personal privacy (s 47F)**

44. Section 47F of the FOI Act provides that a document is conditionally exempt if its disclosure under the FOI Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).
45. Section 4 the FOI Act defines ‘personal information’ as has having the same meaning as in the Commonwealth *Privacy Act 1988* at section 6 of that Act:  
*Personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable:*  
*a. Whether the information or opinion is true or not; and*  
*b. Whether the information or opinion is recorded in a material form or not.*  
**Individual means a natural person**
46. I am satisfied that the document under consideration contains personal information consistent with the requirements of s 47F. I am further satisfied that the information says something about a person. As explained in the FOI Guidelines *the information needs to convey or say something about a person, rather than just identify them... where information does not say anything about that person the information would not be personal information.*<sup>11</sup>

#### **Unreasonable disclosure**

47. Having found that the document contains personal information for the purposes of s 47F of the FOI Act I must consider whether disclosure of the documents would involve an “unreasonable” disclosure of personal information.
48. The personal privacy exemption is designed to prevent the unreasonable invasion of third parties’ privacy. The FOI Guidelines discuss that the test of ‘unreasonableness’ under s 47F ‘implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals.’<sup>12</sup>
49. In deciding whether disclosure would be unreasonable, s 47F(2) of the FOI Act provides that a decision maker must have regard to:
- a. the extent to which the information is well known;
  - b. whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
  - c. the availability of the information from publicly accessible sources; and

<sup>10</sup> Section 11B(4) irrelevant factors are: (a) access to the document could result in embarrassment to or loss of confidence in the government of a participating jurisdiction; (b) access to the document could result in any person misinterpreting or misunderstanding the document; (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made; and (d) access to the document could result in confusion or unnecessary debate.

<sup>11</sup> FOI Guidelines [6.136 including footnotes]

<sup>12</sup>See FOI Guidelines [6.137]; and *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 at 259.

d. any other matters that the agency ... considers relevant.

50. In what is considered to be the leading Australian Information Commissioner review decision in relation to the application of the s 47F conditional exemption - *'FG' and National Archives or Australia 2015*<sup>13</sup>- a number of other factors considered to be relevant when deciding whether the disclosure of personal information would be unreasonable are discussed. Of these, I consider factors relevant to this FOIC Review include:

- any opposition to disclosure expressed or likely to be held by that person;
- the circumstances of an agency's collection and use of the information; and
- the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act.

51. In respect to the personal information in the document under consideration I am satisfied that disclosure of the personal information would be unreasonable. The information has been collected by the agency through CCTV footage unknown to, and unsanctioned by, any person whose personal information may be disclosed in the document. The information is not publicly available and is not well known.

52. I am satisfied that in the circumstances disclosure of the personal information would be unreasonable.

#### **Public Interest Test**

53. As discussed at paragraphs 29 to 32, section 11A(5) of the FOI Act provides that an agency must give a person access to a conditionally exempt document, unless access to the document at that time would, on balance, be contrary to the public interest.

54. In the Decision Notice dated 16 June 2022, the decision maker identified one public interest factor in favour of disclosure of the material to be found conditionally exempt under s 47E(d) of the FOI Act:

- i. disclosure would promote the objects of the FOI Act

55. I agree that the factor identified by the decision maker is a relevant consideration in this case. Disclosure would promote the objects of the FOI Act with respect to providing access to government held information – in this case by a government agency, the Regulatory Authority.

56. The decision maker identified four public interest factors against disclosure of the material found to be conditionally exempt under s 47E(d) of the FOI Act:

- i. disclosure would reasonably be expected to prejudice the effectiveness of the agency's regulatory functions;
- ii. disclosure would reasonably be expected to prejudice the protection of an individual's right to privacy;
- iii. disclosure would reasonably be expected to impede the flow of information to the Department as a regulatory agency; and
- iv. disclosure would reasonably be expected to prejudice an agency's ability to obtain similar information in the future.

57. These factors have already been discussed in relation to the document at paragraph 37 to 41 and my comments are also relevant here. In particular, in this instance, I place considerable weight on the factor at 56(ii).

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<sup>13</sup> See *'FG' and National Archives of Australia* [2015] AICmr 26 [47]-[48].

### **Finding**

58. In weighing up all factors I am satisfied that disclosure of the document that I have found to be conditionally exempt pursuant to s 47F would, on balance, be contrary to the public interest at this time for the purposes of s 11A(5) of the FOI Act.
59. Pursuant to section 11B(4) of the FOI Act I am satisfied that no irrelevant factors have been considered in this public interest consideration.

### **Decision**

60. Under s 55k of the Commonwealth *Freedom of Information Act 1982* (the **FOI Act**) I **affirm** the decision of the Victorian Education and Care Services Regulatory Authority dated 16 June 2022 to refuse access to a document pursuant to sections 37, 47E and 47F of the Commonwealth *Freedom of Information Act 1982*

**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**, as modified by the *Education and Care Services National Regulations* r 209(e) and r 210, to have the decision reviewed by the relevant Tribunal. In the case of this FOIC Review the relevant tribunal is the Victorian Civil and Administrative Tribunal (VCAT).<sup>14</sup> The VCAT provides independent merits review of administrative decisions. An application to the VCAT 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 VCAT. Further information is available on the VCAT website at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au) or by telephoning 1300 018 228.

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<sup>14</sup> *Education and Care Services National Law Act 2010* section 7



## Attachment A

### Application of the *Freedom of Information Act 1982 (Cth)* to the Victorian Education and Care Services Regulatory Authority

1. Most education and care services across Australia operate under **national applied laws** legislation. In Victoria the national laws are applied through the *Education and Care Services National Law Act 2010 (Vic)* - the **ECS National Law (Vic)**.
2. Section 5 of the ECS National Law (Vic) states the Victorian *Freedom of Information Act 1982* does not apply to the ECS National Law (Vic) or to the instruments made under that Law.
3. Section 264 of the ECS National Law (Vic) applies the Commonwealth *Freedom of Information Act 1982 (FOI Act (Cth))* as a law of a participating jurisdiction for the purposes of the **National Quality Framework**.
4. The National Quality Framework (NQF) is a national, uniform regulatory and quality assurance system for early childhood education and care and outside school hours care services across Australia. It includes National Law and National Regulations, national quality standards, assessment and rating processes, and national learning frameworks. Further information is available at [www.acecqa.gov.au](http://www.acecqa.gov.au)
5. Regulation 208 of the *Education and Care Services National Regulations 2011* (the **ECS Regulations**) applies the FOI Act (Cth) as if it were modified so that it **applies only to agencies** and those agencies are the National Authority (the Australian Children's Education and Care Quality Authority - ACECQA) and the Regulatory Authority of each participating jurisdiction.
6. The Secretary of the Victorian Department of Education and Training is the Victorian Regulatory Authority (ECS National Law (Vic) - s 8).
7. The functions and powers of the Regulatory Authority are delegated to the Quality Assessment and Regulation Division (QARD) of the Department to administer and enforce the National Law. Officers in its Freedom of Information Unit are authorised to handle FOI requests on behalf of the Regulatory Authority.

### Jurisdiction of the National Education and Care Services Freedom of Information Commissioner (NECS FOI Commissioner)

8. Section 264(2)(b) of the ECS National Law (Vic) modifies the FOI Act (Cth) to require all references to the Australian Information Commissioner in the FOI Act (Cth) to be read as referring to the NECS FOI Commissioner. The ECS Regulations at r 204 to r 211 set out further modifications to the FOI Act (Cth) in its application under the ECS National Law.