



National Education & Care Services
FOI & Privacy Commissioners & Ombudsman

X1 and X2 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: X1 and X2 (pseudonyms)

Respondent: Victorian Education and Care Services Regulatory Authority¹

Other parties: AK (pseudonym)

Decision Date: 3 June 2022

Application number: FOIC 02/2021 in matter of DET FOI 2021-579

Catchwords: Freedom of Information - Whether work involved in processing request would substantially and unreasonably divert the resources of the agency from its other operations — (CTH) *Freedom of Information Act 1982 ss 24, 24AA, 24AB; Education and Care Services National Law Act 2010; Education and Care Services National Regulations 2011.*

Decision

- Under s 55k of the *Freedom of Information Act 1982 (FOI Act (Cth))* I **set aside** the decision of the Regulatory Authority dated 10 November 2021 made under s24(1)(b) of the FOI Act refusing access to the documents on the grounds that a practical refusal reason exists, and I **substitute** my decision that a practical refusal reason does not exist. My reasons for doing so are that I am not satisfied that the Regulatory Authority has discharged its onus under s 55D(1) of the FOI Act (Cth) of establishing that the processing of the applicants' FOI request would unreasonably divert the resources of the Regulatory Authority from its other operations in the circumstances discussed in this Decision.
- The Regulatory Authority must now process the applicants' FOI request dated 16 October 2021 and notify the applicants of its decision no later than 30 days after the date of this decision. The extension of processing time provisions under s 15AA and s 15(6) apply.²

Background

- During 2020 the FOI applicants, X1 and X2 (pseudonyms used for the purpose of this Decision), made complaints to the Victorian Education and Care Services Regulatory Authority about certain matters associated with AK (a pseudonym), a kindergarten attended by their child, X3 (a pseudonym). Those complaints were subsequently investigated by the Regulatory Authority.

¹ The Secretary of the Victorian Department of Education and Training is the Regulatory Authority (*Education and Care Services National Law Act 2010 – s 8*. For further details see [18] to [20] of this Decision.

² In relation to the processing time rules see [126] and [127] of this Decision and footnote reference Fletcher and Prime Minister of Australia [2013] AICmr 11 [33] – [38]

4. The applicants were dissatisfied with a number of aspects of the investigations and raised several issues with the Regulatory Authority.
5. On 21 June 2021 the applicants submitted a FOI request (**first request**) to the Regulatory Authority under s 15 of the FOI Act (Cth) for access to documents associated with their complaints and the investigations. A revised, reduced scope for that request was subsequently negotiated between the parties. On 21 September 2021, the applicants received a decision from the Regulatory Authority. A Varied Decision Notice was subsequently issued by the Regulatory Authority on 10 November 2021 following an investigation into a complaint made by the applicants to the NECS FOI Commissioner in relation to certain matters associated with the decision.
6. The Varied Decision dated 10 November 2021 on the **first request** was the subject of a separate NECS FOI Commissioner Review.³
7. On 16 October 2021, the applicants submitted a FOI request to the Regulatory Authority, (**second request**) under s15 of the FOI Act (Cth) for access to the documents listed below. In making their request to the Regulatory Authority the applicants wrote:⁴

*“Please note, the [documents requested] ...comprise the outstanding balance of documents previously requested (see [5]) before re-scoping and as advised by and agreed with the FOI Unit we are now requesting these documents, that you have previously searched for and obtained, and liaised with us over - minus ones provided already in your previous re-scoped decision. The documents in **red** represent that we just request the outstanding attachments not previously provided of these documents”.*

Correspondence between [AK] and Quality Assessment and Regulation Division (QARD) 2020:

3. All notifications of complaints or allegations the national law/regulations had been breached by the Approved Provider of [AK] to QARD [in 2020]

4. Notifications of closures, change in service times, early closures by [AK] to QARD/Department of Education throughout 2020.

1st Complaint by us to QARD about [AK] 9 November 2020 (finalised December / Jan 2020)

5. All records of the National Quality Agenda IT system (NQAITS) recorded about the complaints to the Kindergarten and the Department of Education (sic) (this relates to the 1st complaint and any previous investigations into complaints raised by the applicant directly with the kindergarten (e.g. they may have been notified to QARD by the kindergarten in August 2020).

6. All, if any, correspondence sent to approved provider [AK] in relation to notifications that are determined “not to meet the threshold for investigation”. (points 6 to 22 are all related to the 1st complaint) Any contemporaneous notes made of phone calls regarding the same.

7. Investigation plan for the complaint.

8. Contemporaneous notes – or any notes – of all the inquiries into the complaint.

9. Investigations records in NQAITS.

11. Investigation plan for the complaint (please note, the duplication of this point is by error, however [X1 and X2] wish to still receive this information) (any duplications going forward are by error, however the applicants still wish to receive this information).

³ Note: both the Varied Decision on the first request, and the Decision on the second request which is the subject of this Review, were dated 10 November 2021.

⁴ Details of the request are transcribed from the FOI application made to the Regulatory Authority dated 16 October 2021 with personal information (names) de-identified. Numbering is as presented in the FOI application. Items 1 and 2 of the application were previously removed as they related to matters that do not fall within the jurisdiction of the FOI Act (Cth).

12. All written communications with approved provider reference the investigation of complaint, including but not limited to any contemporaneous notes of conversations/telephone calls.
13. Copies of all and any evidence gathered for the complaint – including, but not limited to photographs.
14. Notification to [AK's] Staff Members of Subject of the Allegations.
15. Decisions records for the complaint.
16. Witness Statements, if any taken for the investigation.
18. Investigation Findings Letter and investigation report sent to approved provider and or [AK] on or about 31st December 2020 from QARD.
19. Any other content / records in the INVESTIGATION FILE on National Quality Agenda IT System (NQAITS) or, if any, hard copy of investigation file in relation to the complaint or [X1, X2 or X3].
20. All and any correspondence – including emails and notes - between [officer 4] (authorised officer QARD) and [officer 3] (manager QARD) relating to the complaint or [X1, X2 or X3].
21. All and any photographs – including with [child's] face blanked out – of [X3] received, emailed or stored in any manner by QARD / Department of Education (sic).
22. Any other documents relating to the investigation.

Reference 1st December 202[0] – letter from us to Chair of [AK] alleging serious breaches of the health and safety of our child and breaches of the law to the approved provider/ chair and executive committee members of [AK].

23. All Notifications of complaints and or allegations the law had been breached, notified by the Approved Provider (or the committee, staff of the Kinder) of [AK] to QARD in reference to our letter to approved provider/ chair and executive committee members of [AK] of 1 December 2020 withdrawing our child from the service on health and safety grounds and complaining of other issues, including breaches of the law. Please note 23 above may overlap with request '3'.

2nd Complaint to QARD reference about [AK] by us on 2 December 2020:

24. All records of the National Quality Agenda IT System (NQAITS) recorded about the applicants' complaints to the Kindergarten and the Department of Education (sic) (points 24-41 only relate to the 2nd complaint, there is also duplication through these points).
25. All, if any, correspondence sent to approved provider [AK] in relation to notifications that are determined 'not to meet the threshold for investigation'. (points 25 and 26 only relate to the 2nd complaint made on 2 December (this could actually have been 1 December 2020 but same complaint either way) via telephone call with [officer 4] & in writing in part by letter of 3 December 2020 to [officer]).
- Any contemporaneous notes made of phone calls regarding the same.
26. Investigation plan for the complaint.
27. Contemporaneous notes – or any notes – of all the inquiries into the complaint.
28. Investigation records in NQAITS.
29. Recorded decisions/file notes in NQAITS or held otherwise for the complaint.
30. Investigation plan for the complaint.
31. All written communications with approved provider reference the investigation of complaint, including but not limited to any contemporaneous notes of conversations/telephone calls.
32. Copies of all and any evidence gathered for the complaint – including, but not limited to photographs.
33. Notifications to [AK's] Staff members of subject of the allegations.
35. Witness Statements, if any taken for the investigation.
37. Investigation Findings Letter and investigation report sent to approved provider and or [AK] on or about 31st December 2020 from QARD.

38. Any other content / records in the INVESTIGATION FILE on National Quality Agenda IT System (NQAITS) or, if any, hard copy of investigation file in relation to the complaint or [X1, X2 or X3].
39. All and any correspondence – including emails and notes - between [officer 4] (authorised officer QARD) and [officer 3] (manager QARD) relating to the complaint or [X1, X2 or their child].
40. All and any photographs – including with [child's] face blanked out – of [X3] received, email or stored in any manner by QARD/Department of Education (sic).
41. Any other documents relating to the investigation.

**COMPLAINT A to [named officer 1] Executive Director QARD 22 March 2021 (finalised May 2021)
JUST ATTACHMENTS PREVIOUSLY NOT PROVIDED (not all of the below)**

42. All correspondence (email or otherwise) between [named officer 1] & [named officer 2] regarding this complaint (Complaint A) – (relevant for points 42-50).
43. All correspondence (email or otherwise) between [named officer 1], [named officer 3] and [named officer 4] regarding this and previous complaints 1. 2. & A .
44. All correspondence (email or otherwise) between [named officer 2], [named officer 3] and [named officer 4] regarding this complaint or other complaint.
45. All correspondence (email or otherwise) between QARD & [AK] and or the Approved provider of the same in relation to the investigation to this or previous complaints, sent and received since 31st December 2020.
46. All if any notes that [named officer 2] took into her investigation into this complaint, including any contemporaneous notes taken during discussions with relevant people involved
47. Copy of QARD complaints register in reference to this complaint.
48. Witness Statements, if any taken for the investigation as per QARD 'Investigation guidelines'
49. Any other evidence recorded for this complaint or in relation to [X1, X2 or X3].
50. A copy of the correspondence to [AK] (and, or their "peak body") referring them to their "peak body" for assistance in the management of complaint.

Correspondence from QARD to the Early Childhood Improvement Branch

51. Correspondence (emails and any attachments) sent in April 2021 from QARD to the Department of Education's (sic) Early Childhood Improvement Branch referring part of the 1st complaint of the 9 November 2020 to the Early Childhood Improvement Branch.
52. Notes and or emails reference [named officer 2] communication with the Early Childhood Improvement Branch regarding her investigation into complaint A

Other

53. All 'personal information' that QARD or QARD staff holds (including in email, text messages or on private devices used at home, etc.) on [X1, X2 or X3] Including photographs of [X3] save for any correspondence that [X1 and X2] have sent to QARD, and as such will have our own copies of.
54. All documents reference [AK] being granted an 'exceeding NQS' Quality Area 6 – 'Collaborative partnerships with families and communities' (Points from email received 24 June 2021).

Documents [AK]

55. All attendance records for [X3].
56. All and any photographs – including with [child's] face blanked out – of [X3] online (in apps, etc) email or stored in any manner by [AK]/Approved Provider/Staff members (including former staff members) – including, but not limited to any photographs emailed or sent to the Department of Education (sic) or QARD.

57. Staff presence record detailing which members of staff were present onsite/working 30 November 2020 at the kindergarten throughout that day – including non-staff members, i.e. volunteers, etc, if any supervising children.

58. Any emails, text messages between [AK]/staff/approved provider/ [named] director and [named] (secretary of [AK]committee) or vice versa in relation to the two injury incidents – and subsequent complaints – of [X3] on November 2020 (and issues of complaint surrounding that).

59. All other ‘personal information’ that [AK] holds (including in email, text messages or on private devices used at home, etc.) on [X1, X2 or X3].

Save for any correspondence that [X1 and X2] have sent to [AK]/Approved Provider, and as such will have our own copies of or [named child’s] enrolment record or health details which we also have copies of.

8. On 20 October 2021 the Regulatory Authority issued the applicants with a Notice pursuant to s 24AA of the FOI Act, that a practical refusal reason existed in relation to the request on the basis that the work involved in its processing would substantially and unreasonably divert the resources of the agency from its other operations (s 24AA (1)(a)(i)).
9. A request consultation process commenced pursuant to s 24AB of the FOI Act. The process is discussed later in this Decision.
10. On 10 November 2021 the Regulatory Authority provided its Decision Notice to the applicants on this **second request** refusing access to documents pursuant to s 24(1)(b) of the FOI Act.⁵ The decision maker stated that: *We have undertaken further enquiries to determine if your efforts to clarify your request in accordance with the Act have been successful. However, I am not satisfied that your request, as per your various suggested variations, removes the grounds for refusal under section 24AA of the Act. The scopes you have provided will still substantially and unreasonably divert the resources of the agency from its other operations.*
11. On 13 November 2021 the applicants sought a NECS FOI Commissioner Review of the Regulatory Authority’s decision on this second request. The application was not received by the Commissioner’s office due to apparent technical issues associated with the office website which were subsequently addressed by IT contractors. The applicants re-submitted their request on 22 December 2021.
12. In their Review application the applicants disputed the Regulatory Authority’s decision on the following grounds:
 - i. the FOI request to the Regulatory Authority *was a secondary request resulting from a first FOI request on 21 June 2021, that we agreed to reduce the scope of on two occasions and to then make a further request for these outstanding documents afterwards as per the guidance of the FOI unit;*
 - ii. the requirements of the request consultation process under s 24AB were not met;
 - iii. the refusal to process the FOI request did not reflect the objectives of the FOI Act to facilitate public access to Government held information;
 - iv. most of the documents being sought likely comprised personal information of the applicants and their child *and that given the issues surrounding this - including a previous serious breach of privacy of our child ...it is reasonable that we can access all of our personal information and that of our child;*
 - v. that it is implicit in the objectives of the FOI Act that agencies ensure that appropriate resources are allocated to dealing with FOI matters and that *“the Department of Education (sic), given its scale, has extremely large resources at its disposal; and*

⁵ Note: Both the Varied Decision on the first request, and the Decision on the second request which is the subject of this Review, were dated 10 November 2021

- vi. the documents being sought had already been located by the FOI Unit in relation to the previous FOI request discussed at [5].
13. The applicants expressed the view that they had *“onerously and unsuccessfully tried to obtain our personal information by administrative and other means to no avail - including being given misleading information by the Department of Education’s privacy department... and the Department of Education (sic)... seemed on the face of it to be doing everything possible to frustrate and hinder any attempt to obtain our personal information and other documents and draw out the time frame for this for as long as possible.*

Application of the *Freedom of Information Act 1982 (Cth)* to the Regulatory Authority

14. 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)**.
15. 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.
16. 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**.
17. 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
18. 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.
19. The Secretary of the Victorian Department of Education and Training is the Victorian Regulatory Authority (ECS National Law (Vic) - s 8).
20. 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)

21. 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.

Terminology

22. References to the Regulatory Authority throughout this Decision are to officers of the FOI Unit acting under authorisation from the Regulatory Authority unless otherwise identified.
23. In correspondence quoted throughout this Decision both the FOI applicants and the respondent frequently refer to the “Department” (the Department of Education and Training) without distinguishing between the Department as a Victorian government agency, to which the FOI Act (Cth) does not apply, and the respondent – that is the Victorian Education and Care Services Regulatory Authority – to which the Act does apply. These references are clarified as necessary throughout this Decision.
24. In this Decision the term “agency” in quoted sections of the FOI Act (Cth) and the FOI Guidelines means the “Regulatory Authority” as defined at [19] and [20].

Decision Under Review

25. The decision under review is the decision of the Regulatory Authority dated 10 November 2021 to refuse the applicants’ request for access to documents pursuant to s 24(1)(b) of the FOI Act in response to their FOI request dated 16 October 2021.

Issues to be decided

26. The issues to be decided in this Review are:
 - whether the Regulatory Authority complied with the request consultation process in accordance with s 24AB of the FOI Act; and
 - whether a practical refusal exists under s 24AA(1)(a)(i) of the FOI Act (substantial and unreasonable diversion of resources).
27. In making my decision I have had regard to the following:
 - the applicants’ FOI request to the Regulatory Authority and their NECS FOIC Review request
 - correspondence between the parties about the scope of the request during the request consultation process pursuant to s 24AB
 - the Regulatory Authority’s Decision and reasons for the Decision dated 10 November 2021
 - the parties’ submissions
 - 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 24, 24AA, 24AB and 55D
 - the FOI Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard in performing a function or exercising a power under the FOI Act⁶
 - relevant case law

Refusing access for a practical refusal reason (s 24)

28. Section 24 of the FOI Act allows an agency to refuse access to a document if satisfied that a ‘practical

⁶ Parts of the FOI 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 NECSOPIC website at www.necsopic.edu.au

refusal reason' exists in relation to the request following a 'request consultation process'. 'Practical refusal reason' is defined in s 24AA; 'request consultation process' is defined in s 24AB.

29. Relevant to this FOIC Review, s 24AA(1)(a)(i) provides that:
For the purposes of section 24, a practical refusal reason exists in relation to a request for a document if ...the work involved in processing the request ...would substantially and unreasonably divert the resources of the agency from its other operations.
30. Section 24AA(2) of the FOI Act (Cth) requires an agency to have regard to the resources that would be required to process a FOI request when deciding whether a practical refusal reason exists. These are discussed later in this Decision. The agency may also take into consideration other matters as it sees fit.
31. Section 24AA(3) sets out matters an agency must not consider when deciding if a practical refusal reason exists. The agency must not have regard to:
 - (a) any reasons that the applicant gives for requesting access; or
 - (b) the agency's ...belief as to what the applicant's reasons are for requesting access; or
 - (c) any maximum amount, specified in the regulations, payable as a charge for processing a request of that kind.

Was the request consultation process followed?

Was a valid notice given?

32. Section 24AB(2) of the FOI Act sets out the first step in the request consultation process - the issuing of a written notice to the applicants stating the following:
 - (a) *an intention to refuse access to a document in accordance with a request;*
 - (b) *the practical refusal reason;*
 - (c) *the name of an officer of the agency ... (the contact person) with whom the applicant may consult during [the consultation] period;*
 - (d) *details of how the applicant may contact the contact person;*
 - (e) *that...the consultation period... is 14 days after the day the applicant is given the notice.*
33. The request consultation Notice issued by the FOI Unit (acting under authorisation) to the applicants on 20 October 2021 notified them of the Regulatory Authority's intention to refuse them access to the documents requested on the grounds that *"the work involved in processing the request would substantially and unreasonably divert the resources of the agency from its other operations."*
34. The Notice set out details of the grounds on which the Regulatory Authority considered a practical refusal reason existed as:
 - i. The extent of documentation
*"A preliminary assessment of Items 3 to 41, and Items 51 to 59, have [sic] identified **277** pages relevant to your request.... [the FOI Unit also] identified **171 files** related to Items 42 to 50 [and noted that] all of these files will need to be searched to evaluate what is relevant to your...request. It is not known at this time how many further pages will be identified.*
 - ii. Substantial and unreasonable diversion of resources
Due to the significant time that would be required to locate, collate and assess the documents to determine whether to grant or refuse access, or to grant access to edited copies of the documents, and the significant amount of internal and external consultation that is likely to be involved, we have formed the view that processing your request in its current form would substantially and unreasonably divert the resources of the Department [sic] from its other operations.

35. The Notice invited the applicants to re-scope their FOI request so as to remove the grounds for refusal, provided them with the name and contact details of an officer with whom they could consult, and provided them with 14 days for the consultation period.
36. The Notice also included two suggestions the applicants might consider in re-scoping their request in order to remove the grounds for refusal:
- i. by limiting the scope of the search to a specific area of the Department, a specific date range and/or a particular kind of document.
 - ii. by revising the scope of the request to only documents related to Items 3 to 41, and Items 51 to 59 of the applicants' FOI request at [7].
- These suggestions are discussed later in this Decision.

Finding in relation to s 24AB(2)

37. I am satisfied that the Notice issued on the 20 October 2021 by the Regulatory Authority met the prescribed requirements of s 24AB(2) as set out at [32] and was a valid notice.

Did the Regulatory Authority take reasonable steps to assist the applicants?

38. Section 24AB(3) of the FOI Act (Cth) requires an agency to "*take reasonable steps*" to assist an applicant to revise their FOI request so that a practical refusal reason no longer exists. "Reasonable steps" are defined in s 24AB(4) of the FOI Act to include:

(a) giving the applicant a reasonable opportunity to consult with the contact person;

(b) providing the applicant with any information that would assist the applicant to revise the request.

Were the applicants given a reasonable opportunity to consult with the contact person? (s 24AB(4)(a))

39. The applicants have submitted that they were not given a reasonable opportunity to consult with the contact person during the consultation period with respect to re-scoping proposals they made in order to remove the practical refusal reason. They submit that the contact officer only communicated with them for the first two full days of the 14 days consultation period – 21 October and 22 October 2021.
40. There were 8 emails between the parties between 20 October 2021 and 22 October 2021 – four from the contact person, inclusive of the email issuing the Consultation Notice at 3.18pm on 20 October 2021, and four from the applicants.
41. On the 21 October 2021 the applicants suggested reducing the scope of their FOI request by removing from it:
- i. any duplications;
 - ii. any documents they already had access to such as correspondence to or from them;
 - iii. any documents that comprise policy or procedure documents of AK.

The applicants sought advice from the contact officer as to the adequacy of their proposal, writing: "*Let us know if that is sufficient or alternatively if you could suggest further ways to find a mutually acceptable compromise*".

42. On 22 October 2021 at 2.12pm the contact officer advised the applicants that their suggestions did not remove the grounds for refusal, stating that:
- i. *“Removing duplications is of limited assistance when processing an FOI request. We first have to assess documents, then identify any documents that are potentially duplicates. If there is a single variation between two apparently duplicate documents, it ceases to be a duplicate.”*
 - ii. Removing documents that had been sent to or from the applicants *“was of limited assistance in revising the scope of your request. The FOI Unit still has to assess documents, then remove documents that were sent to or from you. Further, it would not exclude documentation that may have been forwarded on within the Department, where you were not the final recipient”*.
 - iii. Removing policy or procedures documents of AK was *“of limited assistance to revising the scope of your request. The FOI Unit still has to assess documents and identify documents from a large collection of documents that fit within this requirement”*.
43. The contact officer also wrote *“the FOI Unit is unaware of what would comprise a mutually agreeable compromise”* and suggested *“you may wish to reconsider our original suggestion (set out at [36(ii)] of this Decision) noting that “this suggestion would encompass a significant number of items in your ...FOI request, that being 44 items”*.
44. The officer concluded stating: *Please note, if any further suggestion does not remove the Department’s (sic) current ground of refusal, or results in other grounds for refusal, this may result in the Department refusing to proceed with your request. If this occurs your request will be refused in accordance with section 24(1)(b) of the Act.*
45. On 22 October 2021 at 2.55pm the applicants wrote to the contact officer, reiterating their proposals discussed at [41] and also proposed the removal of items 54-59 from their request. They ended their email with the words *“we look forward to hearing from you by return”*. In submissions to me the applicants have stated that they *“anticipated a response”* to their proposal. They did not receive a response and there was no further communication from the contact officer until 4 November 2021.
46. On 3 November 2021, the applicants formally submitted their re-scoped request as identified at [45], In submissions to me the applicants have stated they: *“were forced to submit a revised submission on those grounds (i.e. the grounds set out at [45]) - without any assistance or advice from the consultation person – lest [we] default on the date for being able to make a revised response, which was 12 midnight that night when our request would have been automatically deemed withdrawn”*⁷.
47. On 4 November 2021 the Regulatory Authority acknowledged the two emails of 22 October and 3 November 2021 from the applicants and advised that the contents were under consideration. The next correspondence between the parties was on 10 November, when the Regulatory Authority issued its Decision to refuse the applicants’ FOI request.
48. I sought submissions from the Regulatory Authority (the FOI Unit) as to why there had been no further communication from the contact officer following the 22 October 2021 email discussed at [45] prior to the applicants submitting their revised request on 3 November 2021. In reply the contact officer itemised the 8 emails between the parties, referred to the email discussed at [41] as

⁷ Section 24AB(6) of the FOI Act requires an applicant to take one of three actions before the end of the consultation period. They must either withdraw the request, make a revised request, or indicated that they do not want to revise the request. Section 24AB (7) provides that if an applicant fails to take one of these 3 actions, the request is taken to have been withdrawn.

the first re-scope proposal and the email discussed at [45] as the second email proposal and submitted:

- i. *Our reading of the Act, and the FOI guidelines indicate we are not obliged to endlessly consult with the Applicants.*
- ii. *Our reading of the relevant material is that once an applicant submits a revised request in writing, the agency only need to consider that revised request. The agency can then decide: (1) The revised scope removes the ground of refusal, and the revised scope is processed; or (2) The revised scope does not remove that ground of refusal, and decision is made subject to section 24(1)(b) of the Act. [Commissioner emphasis]*
- iii. *However, in an effort to assist the Applicants, and not take a strict black letter approach when conversing with the Applicants, the FOI Unit provided the Applicants another opportunity to revise the scope of their request. They were advised why their suggested rescope did not remove our current ground of refusal. [Commissioner emphasis]*
- iv. *We clearly put the Applicants on notice of the following by email dated 22 October 2021 at 2:12 pm: “if any further suggestion does not remove the Department’s (sic) current ground of refusal, or results in other grounds for refusal, this may result in the Department refusing to proceed with your request. If this occurs your request will be refused in accordance with section 24(1)(b) of the Act.”*
- v. *That the applicants did not seek feedback to their second proposed re-scope of their request discussed at [43].*
- vi. *Due to the overall workload of the FOI Unit, there is a finite amount of consultation we can have with a single Applicant. Considering the FOI Unit decided to not finalise the Applicants request after receiving the first revised scope, we consider we genuinely attempted to assist the Applicants beyond what is required by the Act and guidelines. [Commissioner emphasis]*

49. I agree with the Regulatory Authority that an agency is not required by the FOI Act to consult endlessly with applicants. Section 24AB(9) clearly states that *“To avoid doubt, this section only obliges the agency or Minister to undertake a request consultation process once for any particular request”*.
50. However, as set out at s 24AB(2)(e) *“the period (the **consultation period**) during which the applicant may consult with the contact person is 14 days after the day the applicant is given the notice”*. The wording used in the section means that the request consultation process referred to is to be for 14 days. Once that 14 days period ends, there is no requirement for the agency to either continue consulting (although s 24AB(5) provides that an agency may decide to do so) or to consult again in relation to the particular FOI application.
51. The position of the Regulatory Authority from the wording used at [48(ii)] to [48(iv)] and 48[vi] is that as the applicants had put in writing one suggestion to reduce the scope of their request during the consultation process, the agency could have ended the process there and then. However, it determined not to and gave the applicants *“another opportunity to revise the scope of their request”* at the same time as *“putting them on notice”* of the consequences if they failed to do so, or if any new re-scope proposal did not remove the grounds for refusal.
52. I consider that this interpretation of the consultation process is incorrect in terms of the requirements of the FOI Act (Cth) discussed at [50]. In my view, unless an applicant submits a final re-scoped request during that 14 day consultation period, which was not the case in the matter under consideration, the consultation period remains open for the 14 days.
53. In their email containing their first re-scoping proposal at [41], it is apparent to me that the applicants considered they were in a deliberative consultation process and that their proposal was a

suggestion for consideration, not a final re-scope of the request – evident by their statement “*Let us know if that is sufficient or alternatively if you could suggest further ways to find a mutually acceptable compromise*”.

54. Similarly, I also consider the applicants’ second suggestion to reduce the scope of their request at [45] was put forward for consideration and response by the contact officer, with the email ending as it did with the words “*we look forward to hearing from you by return*”.
55. I consider that the contact officer should have responded before 4 November 2021 to the applicants’ re-scope proposal at [45]. Admittedly, the applicants could have made further suggestions to reduce the scope of their request before the 14 days expired; however it was not unreasonable for the applicants to wait for the agency’s reply to their 22 October email having regard to their concluding sentence. One can reasonably infer that the applicants would await the agency’s response to see whether their suggested reduction in the scope of their request was acceptable. By not responding within a reasonable period to the applicants’ re-scoped proposal at [45], the agency for all practical purposes, appeared to cease consulting and left the applicants in the uncertain state of not knowing whether their rescoped proposal was being considered. In those circumstances, it appears the agency effectively truncated the consultation period before the 14 days expiry.
56. The FOI Guidelines relevantly state:
*Agencies should...ensure that all relevant steps specified in s 24AB are followed when undertaking a request consultation process, including by ensuring that the contact person, as far as possible, is available for the entire consultation period specified in the request consultation notice (s 24AB(2)(e)), and by ensuring that the contact person is aware of their obligation to take all reasonable steps to assist the applicant to revise the scope of the request so that a practical refusal reason no longer exists (s 24AB(3)). Failure to adhere to the requirements under s 24AB would amount to a procedural defect and may invalidate the practical refusal decision.*⁸

Were the applicants provided with information that would assist them to revise their request? (s 24AB(4)(b))

57. The FOI Guidelines⁹ provide examples of reasonable steps a contact officer could take to help an applicant revise their request: “*a contact officer could provide a breakdown of the time estimated for each step of the process, explain the difficulties the agency will have in dealing with the request and suggest what would be a reasonable request in the circumstances*”.

Assistance provided to the applicants as to what would constitute a reasonable request

58. The request consultation Notice issued on 20 October 2021 included two suggestions the applicants might consider in order to remove the grounds for refusal of their FOI request, namely:
- i. by limiting the scope of the search to a specific area of the Department, a specific date range and/or a particular kind of document.
 - ii. by revising the scope of the request to only documents related to Items 3 to 41, and Items 51 to 59 of the request. The decision-maker noted “*this option has been provided to you in an effort to assist you to narrow your FOI request. You may wish to suggest an alternative scope. However, please note that any alternative that does not remove the grounds for refusal, or results in other grounds for refusal, may result in the [Regulatory Authority]*”

⁸ Australian Information Commissioner. FOI Guidelines. Combined version June 2020 [3.130] and footnote: *Maria Jockel and Department of Immigration and Border Protection [2015] AICmr 70 (5 November 2015)*

⁹ FOI Guidelines op. cit. [3.133]

refusing to proceed with your request. Any alternative wording must clearly specify the documents you seek, and sufficiently narrow the efforts required to process your request”.

59. I consider the suggestion at [58(ii)] to be a substantial proposal. It included 44 items of the applicants’ request, or 83 percent of the total items requested.
60. The first suggestion at [58(i)], in my view, is irrelevant to the FOI request. The request is being considered under the FOI Act (Cth). As discussed at [18] the FOI Act (Cth) only applies to the Regulatory Authority. It does not apply to other areas of the Victorian Department of Education and Training. In my view the request as set out in [7] clearly identifies the Quality Assessment and Regulation Division (QARD) as the relevant area of the Department – i.e. the area with delegated authority to undertake the functions and powers of the Regulatory Authority (see [19] and [20]). It also appears to me that the date range and documents requested are already clearly identified in the applicants’ FOI request set out at [7].
61. As discussed at [42] the contact officer provided feedback to the applicants on their first re-scope proposal as to why, in the officer’s view, the proposal would have limited impact on the processing burden of the request.
62. I agree with the officer’s view that the applicants’ proposal to reduce the scope of the request in relation to duplicate documents would likely have a limited impact on the assessment time required as comparisons between documents would need to be made. However, I would expect that the identification of policy and procedure documents of AK, and correspondence to and from the applicants, would be readily identifiable and require considerably less time to assess than the estimated “4 minutes per page assessment time” that was identified by the Regulatory Authority at [66] and discussed later in this Decision.

Estimation of processing time provided to the applicants

63. On the 20 October 2021 the applicants sought the following information from the contact officer:
- i. *A time-scale of how long each of the areas you have listed – that you stated would substantially and unreasonably divert the resources of the Department [sic] from its other operations - would likely take.*
 - ii. *Details of what approximate percentage of the documents, and which range of the documents, comprise the “personal information” of ourselves and our child.*
64. On 21 October 2021 the contact officer initially responded by stating that *“unfortunately we cannot answer those questions “... as to do so “we would have to review and assess the documents. This would defeat the very purpose of s 24AA of the Act, which is meant to avoid agencies diverting substantial and unreasonable amounts of resources to a single FOI request.”*
65. The above response is not consistent with the s 24AB(4)(b) provision of the FOI Act (Cth) regarding the provision of information to assist an applicant to revise their request, or the FOI Guidelines. While acknowledging that whether or not a practical refusal reason exists will be a question of fact in the individual case, bearing in mind the range of matters that must and can be considered, the FOI Guidelines relevantly state: *it is nevertheless expected that an agency ...will provide a breakdown of the time estimated for each stage in the processing of a request¹⁰and It is recommended that agencies examine a sample of the documents to assess the complexity of the material against whether the work involved in processing the request would constitute a substantial and unreasonable diversion of resources from the agency’s other operations. A representative*

¹⁰ FOI Guidelines op. cit. 3.120

sample of between 10 to 15% of the documents within the scope of the request has been considered to be an appropriate sample size for the purposes of calculating processing time when deciding whether a practical refusal reason exists¹¹.

66. The FOI applicants reiterated their request and later on the 21 October 2021 the contact officer provided the following information in relation to the 277 pages already identified in the practical refusal Notice discussed at [34(i)] as being relevant to the request:
- “We estimate that it would take 4 minutes per page to review those pages for release. Accordingly, we estimate it would take an FOI officer 1,108 minutes just to assess those documents. 1,108 minutes equates to 18 hours and 28 minutes, just to assess that limited number of pages related to your request. [The estimate] does not include any other work that would be required to be undertaken, for example:*
- *consultations with individuals other than [the applicants] regarding the release of their personal affairs information;*
 - *making copies, or an edited copy, of the documents; and*
 - *drafting a decision letter for your request.*

Reasons provided to the applicants as to why the Regulatory Authority would have difficulty in dealing with the request

67. In the same correspondence as [66] the contact officer further stated that *“consideration has to [be given to] all the other work required to be undertaken by the FOI Unit at this time, [citing] the processing of 85 other FOI requests, that need to be completed within the applicable statutory timeframe... [and] open matters with the Victorian Information Commissioner and the Victorian Civil and Administrative Tribunal. Accordingly, the ... Unit cannot devote an unreasonable amount of resources solely to processing a single request.*

Relevant Information that was not provided to the applicants but relied on by the Regulatory Authority in submissions to me

68. In response to enquiries from me about the rationale for its re-scoping proposal to the applicants discussed at [58(ii)], the Regulatory Authority (the FOI Unit) submitted that *“the suggested scope was within the 250-300 page limit so it was practical to proceed”*. In response to further enquiries the Regulatory Authority clarified that *“the “250-300 pages is not a strict limit, but more a guide. It can be more or less depending on the document content, the consultation required and our resources at any given time”*. The Regulatory Authority suggested that this practice was common in agencies operating under Victorian FOI legislation and known to the Victorian Information Commissioner.
69. I appreciate that the practical purpose of the “number of pages” guide is to assist officers to manage workloads and competing priorities within available resources, and that the resources available to an agency is a valid matter an agency must take into consideration when determining if a practical refusal reason exists under s 24AA(2) of the FOI Act (Cth).
70. However, the FOI Act (Cth) does not limit the number of documents or pages that a person can request. In my view, FOI applicants cannot be expected to realistically or successfully re-scope a request to remove the practical refusal reason if a pre-determined benchmark they are unaware of has been set.

¹¹ FOI Guidelines op. cit. 3.121

71. I have discussed the issue of page limits with the Victorian Deputy Information Commissioner and I am satisfied that the practice of setting page limits is not one condoned by the Commissioner in relation to similar considerations under Victorian legislation.
72. I sought further information from the Regulatory Authority as to its assessment of the 171 files it identified in relation to Items 42-50 of the applicants' FOI request discussed at [34(i)]. The Regulatory Authority submitted in response that the files comprised:
- i. *"89 PDF's – these documents would need to be reviewed further and assessed. Furthermore, some of the PDF's themselves contain attachments, which need to be identified and also assessed which amount to a significant amount of work.*
 - ii. *attachments to the 62 emails identified (each of the emails previously identified would need to be reviewed to establish if attachments exist for those emails and then these attachments need to be assessed).*
73. The Regulatory Authority further submitted that on examination of those documents they comprised in excess of 520 pages.
74. I consider that this information may have been relevant to the applicants' considerations in rescoping their request and should have been made available to them during the consultation period.
75. I note that, during the practical refusal consultation period in relation to the first FOI request from the applicants to the Regulatory Authority discussed at [5] of this Decision, on 5 August 2021, the FOI Unit provided a breakdown of the number of pages in the files related to Items 42 to 50 of that request. Some of those pages were subsequently provided to the applicants in response to that request. Given that the FOI request that is the subject of this Review is directly related to that first FOI request, the same basic information as to numbers of pages relevant to Items 42 to 50, could have been included in the practical refusal consultation notice – adjusted accordingly to discount the pages previously provided.

Findings in relation to ss 24AB(3) & (4)

76. I consider the Regulatory Authority took some reasonable steps to assist the applicants in that it:
- i. suggested a substantial alternative re-scope of the request as discussed at [58(ii)] and [59] of this FOIC Decision to remove the practical refusal grounds;
 - ii. provided a breakdown of the time estimated to assess the 277 documents it identified as being relevant to the items in its re-scoped request proposal;
 - iii. provided feedback on the applicants' first rescope proposal; and
 - iv. explained the difficulties the agency would have in dealing with the request in its current form in light of other workload commitments.
77. However, I am not satisfied that the Regulatory Authority took sufficient steps as required by ss 24AB(3)&(4) to assist the applicants in that it:
- i. did not sufficiently engage with the applicants by replying within a reasonable period to their re-scoped request of 22 October 2021, and thereby did not give the applicants a reasonable opportunity to consult with the contact person beyond the first 2 out of the 14 days consultation period; and
 - ii. did not provide information to the applicants that, in my view, was essential to them being able to successfully rescope their request to satisfy the requirements of the Regulatory Authority.

Does the practical refusal reason claimed exist – whether processing the request would substantially and unreasonably divert the resources of the Regulatory Authority/

78. In this FOIC review, the Regulatory Authority bears the onus of establishing that processing the applicants' request would substantially and unreasonably divert its resources from its other operations or that I should give a decision adverse to the applicants (s 55D(1)).
79. Section 24AA(1)(a)(i) of the FOI Act (Cth) provides that a 'practical refusal reason' exists if the work involved in processing the request would 'substantially and unreasonably divert the resources of the agency from its other operations'.
80. Both limbs of s 24AA(1)(a)(i) must be met to satisfy the contention that the practical refusal reason exists. The terms substantially and unreasonably are not defined in the FOI Act in relation to the section. I have considered relevant parts of the FOI Guidelines and case law in relation to this matter.
81. While the Guidelines are not legally binding, definitive or determinative, they assist in helping decision makers deal with matters that cannot be resolved by direct reference to the FOI Act itself. They provide a common framework that is drawn from settled Australian Information Commissioner FOI review decisions as well as decisions of the Administrative Appeals Tribunal and relevant courts.
82. The Guidelines¹² relevantly explain:
There may be circumstances where the processing of an applicant's request would have a substantial effect on an agency ... but may not necessarily be unreasonable in the circumstances. For example, an agency that is particularly large may not necessarily find that the processing of a request to be unreasonable, despite the fact that processing the request would have a substantial effect on the agency. Such agencies are likely to have dedicated resources to ensure that it can appropriately handle requests and reduce the impact of the requests on other business areas of the agency through the establishment of a permanent FOI team, as well as assigning additional temporary resources to handle a peak in the number or complexity of requests. and
...where there is significant public interest value in the disclosure of the information contained in the documents, and/or where an individual has been significantly personally affected by decisions of government, the agency may find it difficult to justify that a practical refusal reason exists on the basis that processing the request would have an unreasonable effect on the agency even where the FOI processing burden is substantial.

Substantial diversion of resources

83. In the relatively recent decision of the AATA - Farrell and Services Australia,¹³ Senior Member O'Donovan discussed what constitutes a substantial diversion of resources at [43-51].
84. Senior Member O'Donovan stated the following:
It has long been recognised that the use of the word 'substantial' is both susceptible to ambiguity and is a word 'calculated to conceal a lack of precision'. It is also a term whose meaning can range, depending on context, from requiring that something be 'large weighty or big' or merely indicate that something needs to be 'real or of substance'. Accordingly, a constructional choice needs to be made in relation to the meaning of the word 'substantially' in the context of which it appears. [43]

¹² FOI Guidelines op.cit. [3.112] and [3.113]

¹³ Farrell; Chief Executive Officer, Services Australia and (Freedom of Information) [2020] AATA 2390

The Senior Member pointed out that in *Langer and Telstra Corporation Ltd*¹⁴ Deputy President Forgie concluded that in section 24 of the FOI Act (which in 2002 contained a similar provision to section 24AA) “the substantially” threshold required only that the diversion of resources of the agency be real or of substance rather than large” and concluded that “there are strong contextual reasons favouring this meaning of the term.”[44-45]

Senior Member Donovan further stated: *Before an agency can avail itself of the practical refusal reason for failing to process a request, it must establish that doing so would substantially and unreasonable divert resources. These terms should not be interpreted in isolation from each other. To succeed with this exclusion, an agency must establish both. Accordingly, even if an application would involve the unreasonable diversion of the resources of an agency, if the diversion is not substantial then it is not possible to refuse the request for practical refusal reasons.* [47]

The Senior Member also made the following point “It is unlikely that Parliament was intending to create a regime under which resources which were significant but could not be described as large (either relative to the size of the agency or in absolute terms) were being diverted to the processing of FOI requests which unreasonably diverted public resources.” [49] He concluded, consistent with the views of Deputy President Forgie, “that in the context in which it appears in s 24AA, the word substantially refers not to a large diversion of resources but merely to one of substance [51].

85. It is on the basis of that discussion that I turn now to consideration of whether the FOI request under consideration would substantially divert the resources of the Regulatory Authority from its other operations.
86. Section 24AA(2) of the FOI Act (Cth) requires an agency to have regard to the resources that would have to be used for each of the stages in processing a FOI request when deciding if a practical refusal reason exists. The section provides that an agency must have regard to the resources that would have to be used for the following:
- (a) identifying, locating or collating the documents within the filing system of the agency...;
 - (b) deciding whether to grant, refuse or defer access to a document to which the request relates, or to grant access to an edited copy of such a document, including resources that would have to be used for:
 - (i) examining the document; or
 - (ii) consulting with any person or body in relation to the request;
 - (c) making a copy, or an edited copy, of the document;
 - (d) notifying any interim or final decision on the request.
87. The FOI Guidelines caution agencies against setting ceilings on either processing times or the size of a request stating: *Whether a practical refusal reason exists will be a question of fact in the individual case. Bearing in mind the range of matters that must and can be considered, it is not possible to specify an indicative number of hours of processing time that would constitute a practical refusal reason. Agencies should not adopt a ‘ceiling’ in relation to processing times; ...Rather, each case should be assessed on its own merits...* [3.119]

The fact that a large number of documents lies within the scope of a request may not be determinative if the documents can be easily identified, collated and assessed. [3.115]

¹⁴ *Langer and Telstra Corporation Ltd* [2002] AATA 341

Identifying, locating or collating documents

88. In my view the documents in relation to this FOI request have already been identified, located and collated by the Regulatory Authority. This is evident from:
- i. the Regulatory Authority's submission to me in response to my request for information about the reasons the Authority selected the particular items of the applicants' FOI request for inclusion in their alternative re-scope proposal discussed at [58(ii)]. The Regulatory Authority stated: *These documents were already in the possession of the FOI Unit and as such a further search was not required. As the documents were in the possession of the FOI Unit, the officer was able to open every document in the suggested scope... ;*
 - ii. the Regulatory Authority's submissions to me in response to my request for further information in relation to the 171 files discussed at [72] and [73] that on examination the documents comprised in excess of 520 pages;
 - iii. the fact that the documents had been identified, located and collated in relation to the previous FOI request from the applicants discussed at [75] of this Decision; and
 - iv. the applicants' FOI request itself at [7] which states that the request is for "*documents, that you have previously searched for and obtained, and liaised with us over*".
89. In my view, the need for the Regulatory Authority to "locate and collate" the documents that was stated in the practical refusal notice at [34(ii)] has already been fulfilled. The steps identified in s 24AA(2) (b), (c), & (d) remain.

Processing time

90. As discussed at [66] of this Decision, in response to a request from the applicants, the Regulatory Authority estimated that, in relation to the 277 pages only, it would take 4 minutes to assess each page for release – a total of 1,108 minutes or 18 hours and 28 minutes to make the assessment.
91. The time taken to assess a document will depend on the complexity of the information contained in it, the exemptions or conditional exemptions, if any, that need to be considered, whether the document contains irrelevant material, and whether it would be practical to provide an edited copy of it.
92. In previous Australian Information Commissioner review decisions, it has generally been accepted that between 30 seconds¹⁵ to 5 minutes¹⁶ per page is a reasonable estimate of the time required for an agency to assess and edit documents. It is acknowledged that where documents contain a substantial amount of sensitive information the time may be greater.
93. On the basis of my examination of the documents in the related NECS FOIC Review discussed at [5] and [6] of this Decision, and the fact that the pool of documents identified, located and collated in relation to this request is the same - I consider that the Regulatory Authority's estimate of 4 minutes per page is reasonable with respect to a substantial proportion, but not all, of the documents. I expect, for example, that the pages will likely include copies of correspondence from the applicants themselves, short, repetitive email chains, and progressive drafts of documents of a deliberative nature that would take considerably less time to assess - in some cases as little as 30 seconds.
94. I have applied the Regulatory Authority's assessment time of 4 minutes per page to the 520 pages identified in relation to Items 42-50 of the applicants' FOI request discussed at [72] to [73]. The estimated assessment time for the 520 pages would be 2,080 minutes, or 34 hours and 40 minutes

¹⁵ FF and Australian Taxation Office [2015] AICmr 25 [23]

¹⁶ EU and Department of Human Services [2015] AICmr 15 [52]

of a FOI officer's time. The total estimated assessment time for the full FOI request would therefore amount to in excess of 53 hours, assuming every page took 4 minutes to assess.

95. On the basis of a 37.5 hour working week, this would amount to about 1 week and 2 days assessment time for one full-time FOI officer.
96. Further processing time would be required to consult with any affected third parties, make copies, or edited copies, of the documents, and prepare a schedule and decision notice. The Regulatory Authority has not provided any estimate of the time to undertake these tasks the calculation of which, in my view, relies to a considerable extent on the outcome of the assessment of the documents themselves.

Finding

97. Based on the information before me and the discussion above, I am satisfied that the estimated 53 hours of a FOI officer's time is substantial - that is it is "real" and "of substance" - and therefore meets the threshold of a substantial diversion of resources.

Unreasonable diversion of resources

98. I turn now to the second component of the test set out in s 24AA(1)(a)(i) – namely whether the work involved in processing the FOI request would unreasonably divert the resources of the Regulatory Authority from its other operations.
99. Whether or not the diversion of resources is unreasonable requires a balancing of all legitimate interests involved in the circumstances of the particular FOI request. The FOI Guidelines¹⁷ include a non-exhaustive list of matters that may be taken into consideration when determining if a practical refusal reason exists, drawn from case law.
100. In making my assessment in this case, I consider the matters discussed in the following paragraphs to be the relevant factors for consideration in determining whether the diversion of resources would be unreasonable.

Resources available to the agency and impact on its other operations

101. As discussed at [67], during consultation with the applicants the Regulatory Authority described the various work pressures faced by the FOI Unit at the time of their FOI request stating that: *"consideration has to made regarding all the other work required to be undertaken by the FOI Unit at this time... [and that] accordingly the FOI Unit cannot devote an unreasonable amount of resources solely to processing a single request."*
102. Consistent with the approach taken by the Office of the Victorian Information Commissioner (OVIC) in *A08 and Department of Education and Training*¹⁸ and supported by established case law,¹⁹ I consider that I need to assess whether processing the FOI request as at the time of this FOIC Review would unreasonably divert the Regulatory Authority resources from its other operations under

¹⁷ FOI Guidelines op. cit. [3.117] and footnote

¹⁸ *A08 and Department of Education and Training (Freedom of Information)* [2019] VICmr 134

¹⁹ In footnote to paragraph 16 of the OVIC Decision cites several cases in support of the contention that the general rule that applies to tribunals when conducting administrative law proceedings (by way of a de novo review) is that the factors to be considered and the law to be applied are as at the date of review: *Shi v Migration Agents Registration Authority* [2008] HCA 31, *Victoria Legal Aid v Kuek* [2010] VSCA 29, *Tuitaalili v Minister for Immigration & Citizenship* [2011] FCA 1224, *O'Donnell v Environment Protection Authority* [2010] ACAT"

section 24AA(i)(a)(i), rather than when the Regulatory Authority decided that the practical refusal existed.

103. In response to enquiries from me during this Review, the Regulatory Authority has submitted that:
- i. the FOI Unit has a headcount of 6 officers, 4 of whom are in part-time positions and that while the FOI Unit is able to second additional staff if there is a vacant position it has experienced difficulty in recruiting staff with the requisite specialist skills and knowledge required to process FOI requests in recent years;
 - ii. the current workload of the FOI Unit comprised 84 open FOI requests, 1 complaint about a FOI matter, and 20 reviews or appeals of FOI Decisions with various appeal bodies;
 - iii. in relation to the applicants' FOI request *"it seemed likely that, on top of the unreasonably large search required of QARD, that many of the FOI Unit's officers would be dedicated to exclusively assessing documents for this file for a significant period. As a rough estimate, a full-time FOI officer can generally assess approximately five FOI requests per week. If three FOI officers were required for two weeks to assess this file, then 30 other FOI requests could not be processed during that period. Therefore, we clearly consider a request of that volume to be unreasonable"*;
 - iv. the FOI Unit attempts to address the needs of all applicants – *"we are particularly concerned with fairness to all applicants and seek to rely on unreasonable diversion provisions to narrow requests where it is apparent that one request would effectively prevent other applicants from receiving documents within relevant statutory timeframes"*.
104. In relation to the resources and workload of the FOI Unit at 103(i) and 103(ii) I make the following observations.
105. The FOI Guidelines²⁰ state – *The evident purpose of the practical refusal ground is to ensure that the capacity of agencies and ministers to discharge their normal functions is not undermined by processing FOI requests that are unreasonably burdensome. On the other hand, it is implicit in the objectives of the FOI Act that agencies and ministers must ensure that appropriate resources are allocated to dealing with FOI matters. This may include assigning additional temporary resources to handle a peak in the number or complexity of requests or to overcome inadequate administrative procedures.*
106. As stated at [19], the Secretary to the Department of Education and Training (Vic) is the relevant agency in this matter. The *resources* of the Secretary, as the Regulatory Authority, have been mentioned at [20], which notes that 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 the Department's Freedom of Information Unit are authorised to handle FOI requests on behalf of the Regulatory Authority.
107. Agencies operate within budgetary constraints, and are responsible for allocating appropriate resources to undertake their various operations efficiently. In my view, the responsibility for allocating appropriate resources to the FOI Unit will be based on the unit's workload and responsibilities over a defined period, and may be influenced by the experience of its staff as well as the capacity to engage external staff such as legal services.
108. I note that the FOI Unit is responsible for the administration of both Victorian FOI legislation in relation to the Department of Education and Training, and Commonwealth FOI legislation in relation to the Education and Care Services Regulatory Authority. It is also clear at [103(ii)] that the workload

²⁰ FOI Guidelines op. cit. [3.115]

of the Unit has not been substantially reduced since its workload described during the consultation period discussed at [67].

109. Whilst the Secretary to the Department of Education and Training (Vic) is the relevant agency in this matter (and not the Department), in my view it is appropriate to have regard to the fact that the Department of Education and Training is a large government agency with in excess of 80,800 employees according to its Annual Report 2020/21. Whilst the significant portion of staff are teachers employed in schools, in my view, capacity might reasonably be sourced by the Secretary from within the Department to supplement the FOI Unit's resources if necessary.
110. In relation to the arguments put forward at [103(iii)] I make the following observations:
- i. As already discussed at [88] the documents for the FOI request under consideration have already been identified, located and collated. I do not accept the Regulatory Authority's contention that "*an unreasonably large search of QARD*" would be required.
 - ii. As discussed at [94] and [95], based on the FOI Unit's own estimated processing time of 4 minutes per page, the assessment of the documents would take, at a maximum, a week and two days of a full time officer's time and, likely, less. There is no evidence before me that supports an inference or the implication that the assessment would involve "three FOI officers over two weeks", apparently on a full time basis.
111. In relation to the argument put forward at [103(iv)] I acknowledge the FOI Unit's reasonable assertion that it must attempt to fairly address the needs of all FOI applicants. In doing so however, it is important that it also takes into consideration the particular circumstances of each application, including more voluminous FOI applications. Otherwise, the Unit's attempt at "fairness" will be somewhat narrowly confined to requests that fit into the page limit benchmarks discussed at [68] to [71].
112. As stated at [105], agencies must ensure that appropriate resources are allocated to deal with FOI matters. It is for agencies to allocate those resources having regard to both short and long term requirements. Based on the facts in this matter, I am satisfied that the resources available to the Regulatory Authority for processing FOI requests, in so far as the Authority relies on the FOI Unit, were constrained at the time of the applicants' FOI request. That also appears to be the position several months later.
113. However, on the basis of the discussion above, I am not satisfied that the Regulatory Authority has discharged its onus under s 55D of the FOI Act (Cth) of establishing that its decision to refuse the applicants' FOI request, on the basis that the request would unreasonably divert the resources of the Regulatory Authority, is justified.
114. I turn now to a consideration of the particular circumstances of the FOI request under consideration.

Considerations in relation to the circumstances of FOI request

Applicants personally affected by decisions of the Regulatory Authority

115. The FOI Act (Cth) is disposed to the disclosure of Government held information. As discussed at [82] the FOI Guidelines state that *where an individual has been significantly personally affected by decisions of government, the agency may find it difficult to justify that a practical refusal reason exists on the basis that processing the request would have an unreasonable effect on the agency*

*even where the FOI processing burden is substantial.*²¹

116. The FOI applicants have had prolonged interactions with the Regulatory Authority for over a year and a half in relation to complaints they made about matters associated with their child's kindergarten which were investigated by the Regulatory Authority.
117. The applicants were dissatisfied with the investigations by the Regulatory Authority and have sought access to documents in relation to the investigations since May 2021 through a request for access to their personal information, and that of their child, under the Privacy Act (Cth), their **first** FOI request discussed at [5] of this Decision, and the FOI request that is the subject of this FOIC Review (the **second** FOI request).
118. As implied in the objects of the FOI Act (Cth) itself, in cases where individuals are personally affected by the decisions of Government, they should be entitled to have access to documents and information – to the extent allowable by law – that will enable them to understand those decisions.

Applicants co-operated extensively with re-scoping

119. In respect to the **first** FOI request, I have noted that the applicants co-operated fully with requests from the Regulatory Authority to rescope their request so as to avoid a practical refusal of the request, twice reducing the scope of their request to 4 items of the original request as well as 20 word documents and 62 emails under Items 42-50 of that request.
120. The applicants have submitted to me that they revised their first FOI request on the understanding that they would be able to submit a further request for the balance of the documents requested. This understanding was based on advice provided to them by the contact officer on 22 July 2021 who wrote that “*you may wish to submit a subsequent request at the conclusion of this request to capture documents not provided to you*”.
121. Given the officer's wording and context of the advice (in an email negotiating the rescoping of the first FOI request) it was reasonable for the applicants to have an expectation that their second FOI request would be processed in its entirety.
122. As already discussed at [41] and [45] the applicants have also co-operated with requests to reduce the scope of the FOI request under consideration during the initial two days of the consultation process. However as also discussed at [50] to [55] that consultation process was truncated. I have no evidence from which I could conclude whether or not the applicants would have proposed further reductions to the scope of their request or, indeed, considered the alternative suggestion provided to them by the FOI Unit if the consultation process had run its course.

Finding

123. On the basis of the discussion at [98] to [122] I am not satisfied that in the circumstances, the Regulatory Authority has discharged its onus under s 55D(1) of the FOI Act (Cth) of establishing that its decision to refuse the applicants' FOI request, on the basis that the request would unreasonably divert the resources of the Regulatory Authority, is justified.
124. Section 24AA(1)(a)(i) of the FOI Act (Cth) provides that a 'practical refusal reason' exists if the work involved in processing the request would 'substantially and unreasonably divert the resources of the

²¹ FOI Guidelines op. cit. [3.113]

agency from its other operations'. Both limbs of s 24AA(1)(a)(i) must be met to satisfy the contention that the practical refusal reason exists.

125. While I am satisfied that the processing of the FOI request constitutes a substantial diversion of the resources of the Regulatory Authority (the FOI Unit acting under authorisation) I am not satisfied that the diversion of resources would be unreasonable in the circumstances. The requirements of s 24AA(1)(a)(i) have not been met.
126. The Regulatory Authority must now process the applicants' FOI request dated 16 October 2021. The accepted processing time rules under the FOI Act (Cth) in cases where a practical refusal decision is set aside have been established by case law.²²
127. The processing period referred to in s 15(5)(b) of the FOI Act (Cth) commences afresh from the date my decision is notified to the parties. In the normal course of events this would require the Regulatory Authority to notify a decision to the applicants no later than 30 days after that date, although it could seek the applicant's agreement to an extension of time (s 15AA), or extend the time for a further 30 days to enable consultation with any third parties (s 15(6)).

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).²³ 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 or by telephoning 1300 018 228.

²² Fletcher and Prime Minister of Australia [2013] AICmr 11 [33] – [38]

²³ *Education and Care Services National Law Act 2010* section 7