



National Education & Care Services
FOI & Privacy Commissioners & Ombudsman

AC and AD 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: AC and AD (pseudonyms)

Respondent: Victorian Education and Care Services Regulatory Authority¹

Decision Date: 19 October 2022

Application number: FOIC 03/2022 in matter of DET FOI 2022-317

Catchwords: Freedom of Information – refusal to grant extension of time to submit an application for internal review of FOI Decision— (Cth) *Freedom of Information Act 1982* ss 54, 54B, 54L, 55D; *Education and Care Services National Law Act 2010*; *Education and Care Services National Regulations 2011*.

Decision

1. Under s 55k of the *Freedom of Information Act 1982 (FOI Act (Cth))* I **set aside** the decision of the respondent dated 2 September 2022 to refuse to grant an extension of time for the applicants to submit an application for Internal Review of the FOI Decision reference 2022-317. I substitute my decision that the respondent must now grant such an extension of time. My reason for doing so is that I am not satisfied that the respondent has discharged its onus under s 55D(1) of the FOI Act (Cth) of establishing that an extension of time to submit an application for Internal Review of the agency's FOI Decision should not be granted.
2. The respondent must now allow the applicants to make a submission for Internal Review of FOI Decision 2022-317 within 10 days from the date of this Decision.

Background

3. On 16 October 2021, the applicants AC and AD (pseudonyms) submitted a FOI request to the Victorian Education and Care Services Regulatory Authority (the respondent) under s15 of the FOI Act (Cth) *for access to documents that comprised the outstanding balance of documents previously requested 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.*²

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 [15] to [21] of this Decision.

² The applicants had submitted a FOI request to the respondent dated 20 June 2021 & 3 July 2021. The request comprised 57 items. That request was subsequently processed with a reduced scope and a decision was provided to the applicants by the respondent dated 10 November 2021 – (**Decision reference 2021-306**)

4. On 10 November 2021 the respondent provided its Decision Notice to the applicants refusing access to the documents pursuant to s 24(1)(b) of the FOI Act³ - that the work involved in processing the request would substantially and unreasonably divert the resources of the agency from its other operations - (**Decision reference 2021-579.**)
5. On 13 November 2021 the applicants sought a NECS FOI Commissioner Review of the respondent's decision. 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.
6. On 3 June 2022 the Commissioner provided her FOIC Review Decision. The Decision set aside the respondent's Decision of 10 November 2021 and required the respondent to process the applicants' FOI request dated 16 October 2021 within 30 days after the date of the Decision, subject to any granting of extension of time under the provisions of the FOI Act.
7. On 29 June 2022, at the request of the respondent, the NECS FOI Commissioner granted an extension of time of 30 days to process the request pursuant to s 15AB of the FOI Act, making the due date for the Decision the 3 August 2022.
8. On 31 July 2022 the respondent provided its Decision Notice and documents in relation to the request to the applicants – (**Decision reference 2022-317**)
9. On 1 August 2022 the applicants sought, from the respondent, more legible copies of 9 documents that had been released to them on 31 July 2022. Parts of the documents had been cut off. The respondent refused to provide such copies and referred the applicants to the terms of their FOI request as described at [3].
10. The respondent stated: *We advise you should revisit the terms of your FOI request for FOI 2021-579...We advise the documents we assessed for FOI 2022-317 were the documents searched for and obtained during FOI 2021-306.* The respondent further stated that *"FOI requests were limited to the exact terms of the written request"*, that the FOI Unit had processed the request accordingly, and advised the applicants *"if you intended, or intend, your request to be wider in scope than the exact terms of FOI 2021-579 you should consider submitting a new FOI request to the [respondent]"*.
11. On 3 August 2022 the applicants made a complaint to the FOI Commissioner pursuant to s 70 of the FOI Act about matters associated with the respondent's processing of the FOI request. The complaint covered 3 matters:
 - i. the refusal of the respondent to provide more legible copies of the 9 documents,
 - ii. clarification as to whether the initial search for documents had been comprehensive due to an apparent error in transcription of the request by the respondent, and
 - iii. allegations that documents had been withheld.
12. The FOI Commissioner addressed some aspects of the complaint, including requiring the respondent to provide legible copies of the 9 documents, (these were provided on 25 August 2022) and advised that the remainder of the matters would be more appropriately dealt with through internal and/or FOI Commissioner review pursuant to s 73 of the FOI Act. The Commissioner's advice was provided

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

initially on 13 September 2022 with further advice provided on 17 October following further correspondence from the applicants in relation to the matters raised.

13. On 29 August 2022 the applicants applied to the respondent for an extension of time to submit a request for Internal Review of the respondent's 31 July 2022 Decision (reference 2022-317) pending the outcomes of the NECS FOI Commissioner's investigation of their complaint.
14. On 29 August 2022, an officer of the respondent authorised to make the decision refused the applicants' request for an extension of time to apply for an Internal Review. Following appeal by the applicants, the refusal was confirmed by a senior officer of the respondent on 2 September 2022.
15. On 5 September 2022 the applicants submitted a request to the NECS FOI Commissioner for a review of the respondent's refusal pursuant to s 54L(2)(c) of the FOI Act – a decision refusing to allow a further period for making an application for internal review of an access refusal decision.

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

16. 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)**.
17. 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.
18. 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**.
19. 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
20. 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.
21. The Secretary of the Victorian Department of Education and Training is the Victorian Regulatory Authority (ECS National Law (Vic) - s 8).
22. 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)

23. 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.
24. References to the FOI Act throughout this Decision are references to that Act as modified by the ECS National Law and ECS Regulations.

Decision Under Review

25. The decision under review is the decision of the respondent dated 2 September 2022 to refuse the applicants' request for an extension of time to apply for internal review of the respondent's FOI Decision dated 31 July 2022 – reference 2022-317.
26. In making my decision I have had regard to the following:
 - the applicants' request to the respondent for an extension of time
 - correspondence between the parties about the request
 - the parties' communications with the Commissioner in relation to the request
 - 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 3, 54, 54B, 54L, 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 Act⁴

Discussion

Relevant provisions of the FOI Act

27. Section 54(2) of the FOI Act provides that an applicant in relation to an FOI access refusal decision made by an agency may apply for a review (the **internal review**) of the access refusal decision.
28. Section 54B(1)(a) provides that the application must be made in writing and *made within 30 days, or such further period as the agency allows, after the day the decision is notified to the applicant for internal review (the **internal review applicant**)*. (Commissioner emphasis)
29. Section 54(2) provides that a decision by an agency to allow a further period for making an application may be made whether or not the time for making such an application has already expired.
30. Section 54(3) provides that the agency's power to allow a further period for making an application may be exercised by an officer of the agency who is:
 - (a) acting within the scope of authority exercisable by him or her; and

⁴ 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

(b) acting in accordance with arrangements approved by the responsible Minister or principal officer of the agency.

31. Section 54L (1) and (2)(c) of the FOI Act (as modified - see [22-23]) provides that an application may be made to the NECS FOI Commissioner *for a review of a decision refusing to allow a further period for making an application for internal review of an access refusal decision (under section 54B)*.
32. The applications to both the respondent and the FOI Commissioner have been made correctly in accordance with the provisions of the Act.

Reasons provided by the applicants for requesting an extension of time to submit a request for internal review

33. In their application to the respondent for an extension of time the applicants wrote:

On 29 August 2022 to the senior FOI officer: *We are writing to request an extension of time for an internal review regarding FOI 2022-317, pending the outcome of the NECS FOI Commissioner's investigations into this matter.*

On 2 September 2022 to the Manager of the FOI Unit: *We acknowledge the previous reply [from the FOI officer] and would respectfully ask that you might kindly reconsider this matter. We think it reasonable, given that there is an open NECS FOI Commissioner investigation that an extension of time is given until that investigation has been completed as we don't want to have to apply for a further Commissioner review of this matter when it could be resolved informally.*

34. In their correspondence to the FOI Commissioner the applicants reiterated their view that the outcome of the FOI Commissioner's consideration of their complaint dated 3 August 2022 was relevant to informing any decision as to whether or not to submit a request for an internal review of the respondent's FOI decision dated 31 July 2022 – reference 2022-317.

Reasons provided by respondent for refusing to grant an extension of time.

35. In their response to the applicants' request for an extension of time in which to submit a request for internal review the respondent wrote:

On 29 August from the FOI officer: *I have reviewed the file and deem that 30 days is sufficient for the submission of an application for internal review of the decision made in 2022-317.*

I note, paragraphs 45 and 46 of the Notice of Decision, dated 31 July 2022, state:

45. "Under section 54 of the Act, you may apply in writing to the department for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter".

46. "Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days".

I consider you were correctly advised of your internal review rights to the department [sic].

I consider matters currently before National Education and Care Services Freedom of Information Commissioner (NECS FOIC) are matters for the NECS FOIC. I consider they are of no relevance to the grant of an extension of time if you chose to apply for an internal review.

Further, I have also considered section 54B of the Freedom of Information Act 1982 (Cth). After considering the above, I do not grant an extension of time to seek an internal review for FOI 2022-317.

On 2 September 2022 the FOI Manager: confirmed that the FOI officer *is authorised to make decisions in relation to an extension of time and has done so in accordance with his obligations under the Freedom of Information Act 1982 (Cth). Please be advised, your request for an extension of time for an internal review has been finalised.*

36. Following enquires from me the respondent made the further relevant points:
- i. *the applicants were provided with more legible versions of the documents on 25 August 2022. At this point they still had until 30 August 2022 to decide if they wanted to seek an internal review. The further, more legible documents provided to the complainants only amounted to nine pages. I consider the remaining five-day period ample time to review nine pages and decide if they wanted to seek an internal review.*
 - ii. *that the matters raised by the applicants with the Commissioner's office "could have been dealt with through an internal review which is conducted de novo by a different decision maker and that, as discussed in the Australian information Commissioner FOI Guidelines at paragraph 9.34 "if there is a doubt as to the adequacy of ...earlier record searches ... the review officer may repeat those tasks, partially or in full, to reach a correct and preferable decision on the FOI request"*.
 - iii. repeated the view that the complaints to the Commissioner's office were an irrelevant consideration for seeking an internal review of the FOI Decision.
37. I agree with the point made at 36(i) that the applicants had adequate time to lodge a request for internal review if the only matter they raised related to the legibility of the documents. However, I note both that the documents provided on 25 August were the subject of requests for further clarity, and the matters raised by the applicants in their complaint to the Commissioner were not limited to the legibility of documents. The respondent was aware of this fact from correspondence from the Commissioner dated 9 August 2022 seeking a response from the respondent in relation to the matters raised by the applicants with the Commissioner, and subsequent correspondence in relation to ongoing issues regarding the legibility of the documents in question.
38. While I concur with the view of the respondent that the matters raised by the applicants with the Commissioner's office could have been dealt with through internal review, I do not consider it to be unreasonable or irrelevant for the applicants not to have done so in the circumstances.
39. The matters raised were directly related to the FOI 2022-317 Decision and documents. In applying to the FOI Unit for an extension of time to submit a request for internal review the correspondence from the complainants to the FOI Unit dated 2 September 2022 identified that the outcome of my investigation could influence their decision as to whether or not to apply for internal review.
40. I also consider that the response from the FOI Unit in relation to the initial request from the applicants to the FOI Unit for more legible copies of the documents as discussed at paragraph 10 - that *"if you intended, or intend, your request to be wider in scope than the exact terms of FOI 2021-579 you should consider submitting a new FOI request to the [respondent] to be at odds with the reasons provided by the respondent at 36(ii) in support of their refusal to grant an extension of time to submit a request for internal review.*

41. In my view the initial response at [10] was both unhelpful and may have galvanised the applicants to make their complaint to me. I consider it to be reasonable to expect that when providing documents in response to a FOI request, agencies will provide clear and legible copies of the said documents if they are available. I do not consider that advice to make a further FOI submission to obtain more legible copies of documents to be appropriate.
42. I note the Australian Information Commissioner FOI guidelines at paragraph 9.21 state that, when determining whether or not to grant an extension of time for an applicant to submit a request for internal review: *The FOI Act does not specify any criteria that an agency must consider [when determining whether to grant an extension of time]. Agencies are encouraged to adopt a liberal approach and grant an extension unless there is a special reason not to do so.*
43. I do not consider that the respondent has provided evidence of “a special reason” that it relied on in making its decision to refuse to grant an extension of time for the applicants to submit a request for internal review of the respondent’s FOI Decision - reference 2022-317

Finding

44. On the basis of the discussion at [33] to [43] I am not satisfied that in the circumstances, the respondent has discharged its onus under s 55D(1) of the FOI Act (Cth) of establishing that its decision to refuse to grant the applicants’ request for an extension of time to submit an application for internal review is justified.

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).⁵ 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.

⁵ *Education and Care Services National Law Act 2010* section 7