



## National Education and Care Services Freedom of Information Commissioner

X and New South Wales Education and Care Services Regulatory Authority:

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

**Review Applicant:** X  
**Respondent:** New South Wales Education and Care Services Regulatory Authority<sup>1</sup>  
**Decision Date:** 15 May 2023  
**Application number:** FOIC 01/2023  
**Catchwords:** Freedom of Information – (CTH) *Freedom of Information Act 1982: Exemption –;*  
*Public interest conditional exemption – certain operations of agencies (s 47E);*  
*Public interest conditional exemption – personal privacy (s 47F); Education and*  
*Care Services National Law Act 2010; Education and Care Services National*  
*Regulations 2011.*

### Decision

1. Under s55k of the Freedom of Information Act 1982 (the FOI Act) I:
  - i. affirm the decision of the Regulatory Authority to redact material from pages 208 to 214;
  - ii. affirm the decision of the Regulatory Authority to redact material at page 4 of the Case Summary report provided following the Authority’s internal review decision;
  - iii. vary the decision of the Regulatory Authority to exempt material on pages 220 and 221 pursuant to s47E to the extent that material on page 220 identified at paragraph 40 of this decision is not conditionally exempt;
  - iv. vary the decision of the Regulatory authority to exempt material on pages 1 to 3, page 188, pages 218 to 219 and page 2 of the Case Summary report pursuant to s47F as the material is not conditionally exempt;
  - v. set aside the decision of the Regulatory Authority that the material discussed at paragraphs 28 to 31 of this decision was not within the scope of the request and determine the material is in scope.

In substitution I find the Regulatory Authority must within 30 days provide the applicant access to the material identified above as not being conditionally exempt or out of scope.

### Background

2. On 22 August 2022, the applicant, (referred to in this decision by the pseudonym X) made an application under the FOI Act to the New South Wales Regulatory Authority. The application sought “Documents that contain my name X (or alternative spelling of X) in relation to my employment with Clarence Childhood Services Association Inc and operation of Clarence family Day Care and Yamba Early Learning Centre”
3. The Authority wrote to X on 21 September 2022 advising that as the sought contained information of a third party it was required to consult with that party and the time frame for processing the FOI

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<sup>1</sup> The Secretary of the New South Wales Department of Education is the Regulatory Authority (*Children Education and Care Services National Law (Application) Act 2010 – s 9*).



request was extended by 30 days. Ultimately the Authority did not consult with the third party.

4. On 7 October 2022 the Authority notified the applicant of its decision (**FOI-23-008**). The Authority had found 221 pages of documents were relevant to the application. The Authority released 203 pages in full, redacted parts of 16 pages and fully exempted 2 pages.
5. On 28 October 2022 the applicant sought internal review of the original decision. The applicant believed that documents relevant to her request had not been provided. In particular she sought copies of documents containing details of complaints she believed had been made about the centre.
6. On 28 November 2022 the Authority issued its internal review decision. The decision varied the original decision by providing an additional 5 pages comprising a case summary report which had not been discovered as part of the original search for documents. Parts of that report were redacted. The decision noted the decision makers view that *“all reasonable steps have been taken to find the copy of the complaint you seek.”*
7. On 12 January 2023 the applicant sought a NECS FOI Commissioner Review of the respondent’s internal review decision.

### The Internal Review decision

8. The FOI Guidelines<sup>2</sup> describe an internal review as follows<sup>3</sup>: **Internal review enables an agency to reconsider in full both the FOI request and the original agency decision on that request.** The internal review officer can exercise all the powers of the original decision maker, including clarifying the scope of the request with the applicant, redoing any work undertaken at the primary decision-making stage and reaching a different view on any aspect of the original decision. The internal review officer should also consider any change in circumstances or new information or evidence that has come to light since the original decision. **Internal review decisions should not merely restate or affirm the original decision without explanation** (emphasis added).
9. In the internal review decision the decision maker states, *“In undertaking the review I have independently reviewed the entire process of the original decision”*. The decision then goes on to quote the applicants reasons for seeking the internal review. In summary the applicant believed she was not given full access to the documents. Specifically, she was seeking a copy of the complaint she was told had been made.
10. The decision then goes on to say *“Accordingly, the purpose of this internal review is to decide whether you should be granted access to the above-mentioned information and if documents cannot be found, do not exist or have not been received.”*
11. As part of the review the decision maker sought confirmation from the relevant part of the department as to whether they held documents relating to the actual complaint. As part of that additional research an additional five pages were identified. The decision then considers only whether any part of those pages was exempt.
12. The FOI Guidelines in addition to the statement set out at [8] state in part<sup>4</sup>;

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<sup>2</sup> *Freedom of Information (FOI) Guidelines*. Australian Information Commissioner. Combined June 2020. Section 93A of the FOI Act requires decision makers to have regard to such Guidelines. The Guidelines have been adopted by the NECS FOIC Commissioner by Instrument 01 as guidelines that apply for the purposes of the Education and Care Services National Law in relation to the Australian Children’s Education and Care Quality Authority (ACECQA) and state and territory Regulatory Authorities in exercising their responsibilities under the FOI Act. The Instrument is published on the NECS office website at [www.necsofic.edu.au](http://www.necsofic.edu.au)

<sup>3</sup> Op cit at 9.2

<sup>4</sup> Ibid at 9.32



*“Internal review is a merit review process (see Part 10 of these Guidelines). The internal review officer can decide all issues raised by an applicant’s FOI request, and exercise all the powers available to the original decision maker. For example, the review officer can decide (contrary to the decision reached by the original decision maker) that a document is not an exempt document under the FOI Act”*

13. I consider that the internal review decision maker was not properly conducting an internal review by reading down the scope of the review because of the reasons the applicant was seeking a review. No reconsideration is given to any of the exemptions applied in the original decision.
14. The applicant has sought NECS FOI Commissioner review of the internal review decision. In my view that extends to the process followed in the internal review as well as the actual decision.

### **Scope of Review**

15. **Attachment A sets** out the application of the Commonwealth FOI Act to the agencies and the jurisdiction of the NECS FOI Commissioner.
16. For the reasons set out at [8] to [14] the decision under review is the internal review decision set out at [6] as well as the original decision set out at [4]. The Authority initially released 206 pages in full, redacted parts of 18 pages and fully exempted 2 pages.
17. The internal review decision varied that by adding an additional 5 pages, 3 of which were released in full and 2 had parts redacted.
18. I have reviewed the documents in question. They comprise emails and attachments including assessment forms, some with handwritten notes on them, assessment evidence summaries, 6 photographs, phone call records, handwritten notes, file notes, a risk assessment tool and a case summary report.
19. The pages of the documents reviewed as part of the original application have been numbered consecutively from 1 through to 221. References to page numbers throughout this FOIC Review Decision are to those consecutive numbers. The additional 6 pages are numbered consecutively from 1 to 6. Reference to these page numbers will identify them as being part of the additional pages.

### **Application by FOI Review Applicant**

20. In her application for NECS FOI Commissioner review the applicant states *“During an Assessment and Rating process some accusations were put to me. These were from an anonymous complaint. What was verbally conveyed to me from a Departmental representative were of a serious nature. However I was not able to read or hear the actual complaint as put to the Department. I have concerns about what was said and/ or what has than (sic) relayed. I am trying to ascertain what was really said as the information provided by the Department is different to what was said to me during the A&R process and after. I have note(sic) been given a recording of the phone conversation (which he(sic) Department does take unless objected to) - there is no mention of this. Also there was (sic) two officers present at A&R and only one officers handwritten notes supplied. There is also a number of pages/information which have been redacted. Complaints shoould(sic)be handled sensitively however that does not mean that any accusations can be made without evidence and anonymous complaints can allow for vexatious and slanderous statements made with no ramifications to the person making these, only to the person/ organisation- which has to deal with the stress and fallout from false accusations. Whistleblowers are required to provide evidence and so should complainants Of ECEC services. Also the complaintant(sic) should be given a copy of the actual complaint so that it is put to them correctly and not with an officers interpretation.*



21. The applicant is seeking *“A copy of the recording of the complaint. Dates/times of when the handwritten notes were actually written by the AO (because they were not written during the times that I spoke to the AO). The hand written notes taken by the other AO present. A copy of the notes and documents in full.*

### **Decision Under Review**

22. For the reasons set out at [8] to [14] the decision under review is the internal review decision set out at [6] as well as the original decision set out at [4].

### **Factors considered in making decision**

23. In making my Decision, I have had regard to the following:
- the original FOI, the internal review and the NECS FOIC Review applications;
  - the documents at issue (the documents);
  - the parties’ submissions;
  - the FOI Act, in particular section 11A, 47E and 47F
  - the FOI Guidelines issued under s93A of the FOI Act and
  - relevant case law.

### **DISCUSSION**

24. As set out at [21] the applicant is seeking four things. These are
- A copy of the recording of the complaint
  - Dates/times of when the handwritten notes were written
  - The handwritten notes taken by the other AO present and
  - Copy of the notes and documents in full.
25. I will deal with the first 3 items before considering the decisions under review.
26. The Australian Information Commissioners FOI Guidelines clearly state that for the purposes of the FOI Act a document includes a sound recording<sup>5</sup>. On 15 March I wrote to the Authority asking whether a recording of the complaint against X had been made. The Authority replied on 29 March<sup>6</sup>. They advised that there was no voice recording.
27. The dates and times when handwritten notes were written is not a request that can be made as part of a request for documents made under the FOI Act.
28. The Authority advised that it did not provide the handwritten notes of the second Authorised Officer as it did not consider the notes came within the scope of the original request<sup>7</sup>. As set out at [3] the applicant’s request was for *“Documents that contain my name X (or alternative spelling of X) in relation to my employment with Clarence Childhood Services Association Inc and operation of Clarence family Day Care and Yamba Early Learning Centre”*.

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<sup>5</sup> Ibid at 2.30

<sup>6</sup> RA12 Email 29032023

<sup>7</sup> Ibid



29. In their response to me the Authority provided me with the handwritten notes from the second AO. The first page of these notes dated 28/6/22 concern a meeting with the applicant and do contain the applicant's name and are in relation to her employment with Clarence Family Day Care. The notes of that meeting finish after the first line on the second page.
30. In their correspondence to me the Authority stated, "It was considered out of scope as the notes do not reference any direct aspects of the complaint and made reference to notes made by AO Ball in relation to the complaint which were supplied in the original request."<sup>8</sup>
31. The FOI Guidelines state that 'A request should be interpreted as extending to any document that might reasonably be taken to be included within the description the applicant has used.'<sup>9</sup> As set out at [2] the two key aspects of the applicant's request were for documents that contained her name and were in relation to her employment. That cannot be read down as the Authority has in so far as they relate to the meeting with the applicant.
32. The handwritten notes of meetings after the first meeting do not contain the applicants name and those pages are outside the scope of the request.
33. I note that the Authority proposed that if the handwritten notes are to be provided some detail should be redacted on the basis of protection of personal privacy. Those redactions are from notes of meetings with people other than the applicant and thus outside the scope of the request, so I do not need to consider this. The Authority has not made a decision in respect of those redactions

#### **Certain Operations of Agencies (s47E)**

34. The Authority found 2 documents to be exempt or partially exempt under s 47E of the FOI Act. The Authority found certain material on pages 220 and 221 and page 4 of the additional document to be exempt pursuant to s47E of the FOI Act
35. A document is conditionally exempt under s 47E if its disclosure would, or could reasonably be expected to, (for the purposes of this FOIC Review) "*have a substantial adverse effect on the proper and efficient conduct of the operations of an agency*" (47E(d)).
36. For the grounds in s 47E(d) to apply, the predicted effect needs to be reasonably expected to occur. There must be more than merely an assumption that damage may occur from the disclosure of the document. As discussed in the FOI Guidelines an agency cannot merely assert that disclosure will have a negative impact - *the particulars of the predicted effect should be identified during the decision-making process including whether the effect could reasonably be expected to occur. Where the conditional exemption is relied upon, the relevant particulars and reasons should form part of the decision makers statement of reasons, if they can include it without disclosing exempt material.*<sup>10</sup>

#### **The documents**

37. I have examined unredacted copies of the 2 documents. The first document at pages 220 and 221 is titled 'Triage Risk Assessment Tool'. In the original decision of 7 October, the decision maker states "*I have concluded that some of the information on pages 220 and 221 reveal investigative processes and information provided by third parties that assist the department in regulating services*".
38. Whilst the decision maker concluded that only some of the information on these pages was exempt, in the documents provided to me as part of the review, and presumably to the applicant, the exemption has been applied to the entirety of these pages.

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<sup>8</sup> Ibid

<sup>9</sup> Op cit at 3.54

<sup>10</sup> Ibid at 6.103



39. The decision of 7 October goes on to state “Confidentiality of records is absolutely essential to the integrity of QARS investigations and to the exercise of QARS functions. The department’s officers need to be able to freely discuss discretely and honestly how to best manage and resolve various sensitive issues affecting the operations of the services. If the records of discussions concerning students or staff, and information received from third parties are released in full, the department’s ability to investigate and regulate services under the Children (Education and Care Services) National Law NSW (‘the National Law’) may be seriously impaired because people will hesitate to make complaints if they think their complaints and personal information will be made public.” (emphasis added)
40. Having examined the document I consider much of the information does not come within the categories of information described above. Much of page 220 is purely factual information. In this category I include;
- title of the document and statement of purpose;
  - the triage officer’s name;
  - the case reference number;
  - the provider’s name;
  - the provider ID;
  - the service name;
  - the service ID;
  - the service type;
  - the date of last visit;
  - the visit type;
  - the case lodged date;
  - the global search result;
  - the name of the recommender;
  - the date of recommendation;
  - the reviewer's name; and
  - the date reviewed.
41. None of this information comes within the description of records of discussion, information received from third parties, complaints or personal information of complainants. As it is factual material it is difficult to see how its release would or could be reasonably expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Regulatory Authority. I consider the material identified in [40] is not conditionally exempt.
42. I have considered the remainder of the information on page 220 and the information on page 221. This material does reveal aspects of how the Regulatory Authority conducts investigations. The release of this material could be reasonably expected to have a substantial adverse effect on the operations of the agency if released. In considering this I have adopted the view that substantial in this context means something that is real or of substance. The material not identified in [40] above on page 220 and the material on page 221 is conditionally exempt pursuant to s47E.
43. As part of the internal review decision the Regulatory Authority found that material on page 4 of the Case Summary report was exempt under 47E.
44. The Regulatory Authority considered that some of the information on page 4 revealed information provided by third parties that assist the department in regulating services. As discussed at [39] the authority considered confidentiality is absolutely essential to the integrity of investigations and the exercise of its functions.



45. I have reviewed the material exempted on page 4. I agree it contains information provided by third parties to the authority as part of an investigation. I also consider its release would have a substantial and adverse impact on the Authority's ability to conduct investigations of services.
46. The material redacted from page 4 of the Case Summary report is conditionally exempt pursuant to s47E.

### **Public Interest Test (s11A(5))**

47. Section 11A(5) of the FOI Act provides that if a document is conditionally exempt, it must be disclosed "unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest".
48. Section 11B(3) of the Act sets out four factors favouring access to a document which must be considered by decision makers, if relevant, when applying the public interest test to conditionally exempt documents. These are whether access to the document would:
  - (a) promote the objects of the Act;
  - (b) inform debate on a matter of public importance;
  - (c) promote effective oversight of public expenditure; or
  - (d) allow a person to access his or her own personal information.
49. The FOI Act also stipulates that an agency must have regard to the FOI Guidelines when deciding whether access to a conditionally exempt document would, on balance, be contrary to the public interest.
50. The Guidelines provide a non-exhaustive list of further public interest factors favouring disclosure and a non-exhaustive list of factors against disclosure<sup>11</sup>.
51. In its original decision the Authority identified two public interest factors in favour of disclosure of the material to be found conditionally exempt under s 47E of the FOI Act:
  - i. disclosure would inform the applicant about investigations relating to her service; and
  - ii. disclosure would assist her to understand the authority's regulatory function.
52. The Authority considered that disclosure would have a substantial adverse effect on the proper and efficient conduct of its regulatory functions, and this outweighed the public interest in disclosure. I consider the factors identified by the Regulatory Authority to be relevant considerations in relation to the material found to be conditionally exempt pursuant to s 47C(1)(a).
53. The Authority is responsible for ensuring that New South Wales education and care services comply with the National Law in the interests of the health, safety and wellbeing of children. It uses a variety of tools to do so including: providing advice, guidance, support and education; undertaking formal assessment and ratings of services against National Quality Standards; and conducting investigations in response to incidents at, or complaints about, services. The Regulatory Authority has powers to apply a range of sanctions, which can, at the extreme, lead, for example, to a service losing its approval to operate or an Approved Provider or service staff being prosecuted in certain circumstances.
54. In order to carry out its compliance functions, the Authority relies on its ability to obtain and hold confidential (and often sensitive) information. Officers need to be in a position to freely discuss and examine options and undertake deliberative processes in the development of informed advice and recommendations.

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<sup>11</sup> Ibid at 6.19 and 6.22





55. I consider that the Regulatory Authority would be significantly constrained in its deliberations if the developmental nature of such deliberations might be exposed to public scrutiny. Frank and honest debate on matters would likely be inhibited. Furthermore, the provision of information to the Authority could be impeded if third parties could not be assured of the confidentiality of their information. The effectiveness of the Regulatory Authority in carrying out its compliance responsibilities would consequently be significantly compromised.
56. Section 11B(4) of the FOI Act sets out four factors that are irrelevant and must not be taken into account when deciding if access to a document would, on balance, be contrary to the public interest. I am satisfied that no irrelevant factors have been considered in this public interest determination.
57. I am satisfied that on balance the public interest factors against disclosure of the material under consideration outweigh the factors in favour of its disclosure.

### Finding

58. Disclosure of the material that I have found to be conditionally exempt pursuant to s 47E of the FOI Act would, on balance, be contrary to the public interest at this time for the purposes of s 11A(5) of the Act.

### Personal Privacy (s47F)

59. The Regulatory Authority found 5 documents to be partially exempt from disclosure pursuant to s47F(1) of the FOI Act. Names have been redacted on pages 1 to 3, page 188, pages 206 to 214 and pages 218 to 219 of the documents originally discovered and page 2 of the additional document provided on internal review.
60. The main requirements of the s 47F public interest conditional exemption are that a document:
  - contains 'personal information'; and
  - that disclosure in response to the applicant's FOI request would be 'unreasonable' (s 47F(1)); and
  - it would be 'contrary to the public interest' to release the material at the time of the decision (s 11A(5)).
61. Under section 4 the FOI Act '**personal information**' has the same meaning as in the Commonwealth *Privacy Act 1988* which provides in section 6 of that Act that:

*Personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable:*

- a. *Whether the information or opinion is true or not; and*
- b. *Whether the information or opinion is recorded in a material form or not.*

**Individual** means a natural person

### The documents

62. I have examined unredacted copies of the 5 documents. The documents under consideration contain personal information that falls into two categories:
  - i. names or initials, position titles or initials denoting positions of staff at, or persons associated, with Clarence Family Day Care;
  - ii. comments about the personal affairs of named or identifiable individuals associated with Clarence Family Day Care.
63. I am satisfied that except where identified below at [64] the material contains information or an opinion about an identified individual, or an individual who could be reasonably identified in the context of the FOI application. I am further satisfied that the information says something about those





individuals. As explained in the FOI Guidelines the information needs to convey or say something about a person, rather than just identify them... where information does not say anything about that person the information would not be personal information.<sup>12</sup>

### Not personal information

64. On page 2 of the Case Summary Report released as part of the internal review decision a number has been redacted. I do not consider this number appearing in isolation is personal information. It does not allow identification of an individual or say anything about an individual.

### Unreasonable disclosure

65. Having found that the documents contain personal information for the purposes of s 47F of the FOI Act I must consider whether disclosure of the documents would involve an “unreasonable” disclosure of personal information.
66. The personal privacy exemption is designed to prevent the unreasonable invasion of third parties’ privacy. The FOI Guidelines discuss that the test of ‘unreasonableness’ under s 47F ‘implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals<sup>13</sup>.
67. In deciding whether disclosure would be unreasonable, s 47F(2) of the FOI Act provides that a decision maker must have regard to:
- a. the extent to which the information is well known;
  - b. whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
  - c. the availability of the information from publicly accessible sources; and
  - d. any other matters that the agency ... considers relevant.
68. In what is considered to be the leading Australian Information Commissioner review decision in relation to the application of the s 47F conditional exemption - *‘FG’ and National Archives or Australia 2015- (FG)* a number of other factors considered to be relevant when deciding whether the disclosure of personal information would be unreasonable are discussed<sup>14</sup>. Of these, I consider factors relevant to this FOIC Review include:
- the nature, age and current relevance of the information;
  - any detriment that disclosure may cause to the person to whom the information relates;
  - any opposition to disclosure expressed or likely to be held by that person;
  - the circumstances of an agency’s collection and use of the information; and
  - the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act
69. The Regulatory Authority exempted and redacted the names and other information concerning individuals in pages 1,2 and 3 of the documents. The Authority determined that disclosure of this personal information would be unreasonable “because the information is not already well known or in the public domain”
70. The document in question is an email from the applicant to the Regulatory Authority. That is the names and information have been provided by the applicant.

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<sup>12</sup> Op cit at 6.136

<sup>13</sup> Ibid at 6.138

<sup>14</sup> See ‘FG’ and National Archives of Australia [2015] AICmr 26 [47]-[48].



71. The FOI Guidelines state, in so far as is relevant<sup>15</sup>;  
*“Deciding whether disclosure of personal information would be unreasonable should not be uniformly approached on the basis that the disclosure be to the ‘world at large’. Examples of situations in which applicants assert an interest in obtaining access that would not be available generally to any member of the public include:*
- an applicant who is seeking access to correspondence they have sent to an agency that contains personal information of other people – that is, personal information in fact provided by the applicant to the agency.
- It would be problematic in each of those instances for an agency to grant access under the FOI Act if it proceeded from the premise that ‘if one person can be granted access to a particular document under the FOI Act, any other person who cares to request it and to pay the relevant fees, can be granted access to it’. It is the Information Commissioner’s view that in instances such as these, an agency can make a practical and risk-based assessment of whether to provide access to a particular applicant.
72. As stated at [68] the leading decision in relation to the 47F conditional exemption is FG and National Archives of Australia. In that matter the then Australian Information Commissioner said
- “The main points in this decision concerning s 47F (the personal privacy exemption) are:
- In deciding whether disclosure of personal information in a document would be unreasonable under s 47F, an agency may take into account any submission an FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use and dissemination of the information.
  - An agency may also take into account that the FOI Act does not limit or restrain the further dissemination of that information by the applicant. However, it is incorrect to proceed from the premise that disclosure under the FOI Act is tantamount to ‘disclosure to the world at large’, or that a document released to an FOI applicant will be available to any person who makes a request for that information in accordance with FOI Act procedures.”
73. The applicant did not provide any submission in support of her original FOI application. However in her application for NECS FOI Commissioner review she submitted
- “During an Assessment and Rating process some accusations were put to me. These were from an anonymous complaint. What was verbally conveyed to me from a Departmental representative were of a serious nature. However I was not able to read or hear the actual complaint as put to the Department. I have concerns about what was said and/ or what has than (sic) relayed. I am trying to ascertain what was really said as the information provided by the Department is different to what was said to me during the A&R process and after.”*
74. In conducting an FOI review I must proceed to make my own decision on the merits having regard to the evidence before me and in doing so I must comply with all applicable administrative law principles. As the decision made on review is a separate decision, I consider I am entitled to consider submissions made by the applicant in seeking a review even if these were not made at the time of the original application.
75. The Regulatory Authority did not consult with the individuals concerned as it considered it could not locate the third parties in a timely and effective manner. As per the decision in *OT and Comcare*<sup>16</sup> I am entitled to consider whether if they had been consulted the individuals would have objected to the release of their names. I do not consider that there is a basis on which I can determine they would object given their names are provided by the applicant.
76. In my view it would not be unreasonable to disclose the names of individuals on pages 1 to 3 to the applicant. The applicant has supplied those names to the Regulatory Authority, they are known to

<sup>15</sup> Op cit at 6.147

<sup>16</sup> *OT and Comcare* (Freedom of Information) [2018] AICmr 47



her and there is nothing to suggest that any detriment would be caused to them by the release. Further the reasons of the applicant in seeking the document do not suggest she would use the material for any purpose other than clearing her own name.

77. The name of a staff member of the service has been redacted on two occasions from page 188 of the documents. The document in question is a record of a phone call made by a staff member of the Regulatory Authority to the service. The record indicates that the person who answered the call said that the applicant was on leave, that she was in and out of the office and recommended she be called on her mobile.
78. As set out at [75] I am entitled to consider whether the individual would have objected to the release of their name. Given the staff member is known to the applicant and the innocuous nature of the material I am not able to form the view the staff member would have objected. I also note that the same information is contained in the additional 6 pages of documents provided to the applicant following the internal review decision. Having considered the matters set out at [67] and [68] and the subsequent release of this information I do not consider the release of this material would be an unreasonable disclosure of personal privacy.
79. The documents contained at pages 206 to 214 are various handwritten notes dated 28 and 29 June detailing meetings held with various members of the family day care operators' staff as part of an assessment of service review. The first set of notes which commence at page 205 and go to halfway down page 207 are from a meeting between two officers of the Regulatory Authority with the applicant.
80. Commencing on page 206 the names and details of 5 family day care providers are redacted. The 5 individuals are family day care operators who were not providing services at that time. The details are the reasons why those individuals were not providing services at that time. Whilst this is information provided by the applicant to the regulatory authority in my opinion it differs from the material discussed at [69] to [76].
81. An initial consideration is that the information is not found in a document provided by the applicant as was the case for the earlier information. The information is a record of what the applicant told the two officers. As such it is not information that the applicant would have ready access to. More importantly the information contains some sensitive personal information of the individuals including references to peoples' health.
82. In my view it is likely that if they had been consulted the individuals would have objected to the release of this personal information. Considering the matters set out at [67] and [68] I consider it would be unreasonable to release this information. The material exempted is conditionally exempt pursuant to s47F of the Act.
83. Further material is redacted at pages 218 and 219. This document is a record of an interview the applicant had with an officer of the Regulatory Authority. The names and some details of two individuals are redacted. One of the individuals is an educator and the material redacted is the same information provided by the applicant to the Regulatory Authority in the documents discussed at [69] to [76] above. However, it is only the name of the individual that is redacted in the earlier documents and not the additional information that is redacted in this document. That is the information that was released in the earlier document is redacted in this document.
84. Considering the matters set out at [67] and [68] I consider it would not be unreasonable to release this information.
85. The material redacted on page 219 is the name of an individual and the fact that she was the nominated supervisor for the service prior to the applicant. I have considered the matters set out at



[67] and [68] and have determined the release of this information would not be unreasonable. In particular the fact that the person was previously the nominated supervisor would have been well known and the release would not be of any detriment to her.

86. In considering the extra document discovered as part of the internal review process the Regulatory Authority exempted material on pages 2 and 4 on the basis of personal privacy. I have already decided at [64] that the information on page 2 is not personal information.
87. The material redacted on page 4 are the names of the complainant and educators and includes in some cases their mobile phone numbers. It also includes information about their roles as educators. I consider that if they had been consulted it is likely that the individuals would have objected to release.
88. Considering the matters set out at [67] and [68] I consider it would be unreasonable to release this information.

### Findings

89. I consider it would not be unreasonable to release the material redacted on pages 1 to 3, page 188 and pages 218 and 219. Accordingly, that material is not conditionally exempt. I find that releasing the material redacted at 206 to 214 and page 4 of the Case Summary report would be unreasonable, and that material is conditionally exempt.

### Public interest test (s 11A(5))

90. In its original decision the Regulatory Authority identified two public interest factors in favour of disclosure of the material to be found conditionally exempt under s 47F of the FOI Act
  - i. disclosure would inform the applicant about investigations relating to her service; and
  - ii. disclosure would assist her to understand the authority's regulatory function.
91. The Regulatory Authority did not provide further discussion on these factors.
92. I agree that the two factors identified by the Regulatory Authority are relevant considerations in this case.
93. The FOI Act does not list public interest factors weighing against disclosure. The FOI Guidelines point out that such factors *will depend on the circumstances. ...the inclusion of exemptions and conditional exemptions in the FOI Act recognizes that harm may result from the disclosure of some types of documents in certain circumstances [and that while] citing the particular harm defined in the applicable conditional exemption is not itself sufficient to conclude that disclosure would be contrary to the public interest...the harm is an important consideration that the decision maker must weigh when seeking to determine where the balance lies*<sup>17</sup>.
94. The Regulatory Authority concluded that disclosure of the material found to be conditionally exempt pursuant to s 47F of the FOI Act would reasonably be expected to prejudice the protection of an individual's right to privacy and this factor outweighed the factors in favour of disclosure.
95. On balance I find that the factors weighing against the release of the material redacted at 206 to 214 and page 4 of the Case Summary report outweigh the factors in favour of release and the material is

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<sup>17</sup> Op cit at 6.20 and 6.21



exempt.

## Finding

96. Disclosure of the material that I have found to be conditionally exempt pursuant to s 47F of the FOI Act would, on balance, be contrary to the public interest at this time for the purposes of s 11A(5) of the Act.

## Disclosure log

97. Since 1 May 2011, agencies and ministers have been required by s 11C of the FOI Act to publish on a website, to the public generally, information that has been released in response to each FOI access request, subject to some exceptions. This publication is known as a 'disclosure log'.
98. One of the exceptions to this requirement to publish is where the documents in question contain 'personal information about any person, if it would be unreasonable to publish the information' (s 11C(1)(a)). Pages 1 to 3, page 188 and pages 218 to 219 of the documents which I have decided are not exempt from disclosure, contain personal information about staff members of the service.
99. It is for the Regulatory Authority to decide whether these names should be published on the disclosure log. The test that the Authority has to apply (whether it would be unreasonable to publish the information on a website to the public generally) is different to the test that I have applied in this review (whether it would be unreasonable to disclose that information to the applicant).

**Alan Grinsell-Jones**

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

## Review rights

If a party to a NECS IC Review is dissatisfied with an IC Review decision they may apply under section 57A of the **FOI Act**, as modified by the *Education and Care Services National Regulations* r209(e) and r210, to have the decision reviewed by the relevant Tribunal. In the case of this IC Review the relevant tribunal is the **NSW Civil and Administrative Tribunal**. The **NSW Civil and Administrative Tribunal** provides independent merits review of administrative decisions and has the power to set aside, vary or affirm a NECS IC review decision.

An application to the **NSW Civil and Administrative Tribunal** must be made within 28 days of the day on which the applicant is given the NECS IC review decision. An application fee may be applicable when lodging an application for review to the **NSW Civil and Administrative Tribunal**. Further information is available on the **NSW Civil and Administrative Tribunal** website [www.ncat.nsw.gov.au](http://www.ncat.nsw.gov.au) or by telephoning 1300 006 228.



## Attachment A

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

1. Most education and care services across Australia operate under **national applied laws** legislation.
2. In New South Wales the national laws are applied through the *Children Education and Care Services National Law Act 2010 (NSW)* - the **ECS National Law (NSW)**.
3. Section 5 of the ECS National Law (NSW) states the *Government Information (Public Access) Act 2009* does not apply to the ECS National Law (NSW) or to the instruments made under that Law.
4. Section 264 of the ECS National Law (NSW) 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**.
5. The National Quality Framework (NQF) is a national, uniform regulatory and quality assurance system for early childhood education and care and outside school hours care services across Australia. It includes National Law and National Regulations, national quality standards, assessment and rating processes, and national learning frameworks. Further information is available at [www.acecqa.gov.au](http://www.acecqa.gov.au)
6. 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.
7. The Secretary of the New South Wales Department of Education is the New South Wales Regulatory Authority (ECS National Law (NSW) - s 9).
8. The functions and powers of the Regulatory Authority are delegated to the Right to Access division 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)

9. Section 264(2)(b) of the ECS National Law (NSW) 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.