National Education & Care Services
FOI & Privacy Commissioners & Ombudsman

A1 and A2 and the Victorian Education and Care Services Regulatory Authority

Decision and Reasons for Decision of the National Education and Care Services Privacy Commissioner (NECS Privacy Commissioner)

Complainants	A1 and A2 (pseudonyms)
Respondent:	Victorian Education and Care Services Regulatory Authority[1]
Date:	17 April 2023
Application number:	PC Inv 02/2021
Catchwords:	Privacy — *Privacy Act 1988* (Cth) — Australian Privacy Principles — APP 1 - open and transparent management of information; APP 12 – access to personal information; compensation for non-economic damages.

Determination

1. This is a determination of a privacy complaint lodged under s 36 of the *Privacy Act 1988* (Cth) (the **Privacy Act**) by the complainants on 14 December 2021 about actions of the Victorian Education and Care Services Regulatory Authority (respondent).

2. I find that the respondent interfered with the complainants' privacy as defined in the Privacy Act by breaching Australian Privacy Principle (APP) 1 and Australian Privacy Principle (APP) 12.

Declarations

3. I declare, under s 52(1)(b) of the Privacy Act the respondent:

   (1) has engaged in conduct constituting an interference with the privacy of the complainants by:

   i. failing to implement practices, procedures and systems relating to the respondent's functions or activities that ensured the respondent complied with the Australian Privacy Principle 12 and enabled the respondent to deal effectively with enquiries about access to personal information in breach of APP 1.2 (a)&(b);

   ii. failing to have an APP Privacy Policy about the management of personal information that included information set out in APP1.4, in breach of APP 1.3;

   iii. failing to provide a written notice that sets out the mechanism available to the complainants to complain about the refusal, in breach of APP 12.9(b);

[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)*.

iv. refusing to give the complainant access to the requested information on grounds that were not authorised under the FOI Act (Cth) and, as a consequence, did not constitute an exemption under APP 12.2(b)(i) as discussed at [15to 172] of this Determination, in breach of APP 12.1.

v. failing to consider whether there were (and if so take) any steps that may have been reasonable in the circumstances to give access in a way that meets the needs of the entity and the individuals as discussed at [173-175] of this Determination, in breach of APP 12.5(a).

(2) must not repeat or continue the acts or practices referred to in paragraphs 1(i) to (v) above as being the failures to comply with the said APPs;

(3) must, within 60 days of the date of this Determination, process the complainants' request for access to their personal information without relying on the "substantial and unreasonable diversion of resources" exemption claimed under APP 12.2(b)(i).

(4) must, within 90 days of the date of this Determination, if it has not already done so, develop an APP Privacy Policy that includes the information required under APP 1.4. This policy may be integrated with the broader Information Privacy Policy of the Department of Education and Training provided the requirements of APP 1.4 are met.

(5) must, as soon as practicable, ensure that relevant officers in the Department of Education and Training receive training and information about how the Privacy Act and the Australian Privacy Principles apply to the respondent (the education and care services Regulatory Authority) to enable such officers to deal correctly with requests for access to personal information made under Australian Privacy Principle 12, and to ensure compliance with the APPs generally.

(6) must pay the complainants $5,000 for loss caused by interference with the complainants' privacy within **30** days of receipt of this determination. This amount is comprised of

a. $4,000 for non-economic loss incurred by complainant A1, and
B. $1,000 for non-economic loss incurred by complainant A2.

Findings and Reasons

Background

4. This is a complaint made under s 36(1) of the *Privacy Act 1988* (Cth) (the **Privacy Act**). The complainants are identified by pseudonym. The complaint was made jointly by A1 and A2, collectively referred to throughout this Determination as the complainants.[2]

5. The complainants' grievance relates to a request they made to the respondent under Australian Privacy Principle 12 (APP 12) for access to their personal information held by the respondent and the respondent's alleged failure to both properly process their request in accordance with the requirements of the Australian Privacy Principles (APPs) and to provide access.

6. During 2020 the complainants made complaints to the respondent about matters associated with a Kindergarten attended by their child. Those complaints were subsequently investigated by the respondent.

7. The complainants were dissatisfied with a number of aspects of the investigations and raised several issues with the respondent.

[2] In correspondence to the respondent and in relation to this investigation A1 and A2 refer to acting on behalf of their child, identified by pseudonym as A3, and as a "family unit".

8. On 26 May 2021[3] the complainants sought advice from the respondent about how to access their personal information held by the respondent. Correspondence ensued between the two parties over the following months. Relevant details of this correspondence are included later in this Determination.

9. On 16 October 2021[4] the complainants submitted a formal request to the respondent for "access to *all personal information under the relevant privacy act and privacy principles that the Department of Education [sic] holds on* [the complainants] …" On 18 October 2021 [5] the complainants subsequently clarified that the personal information they were seeking was "from the Regulatory Authority/Quality Assessment and Regulation Division" to which they understood the Commonwealth Privacy Act applied.

10. The reference to the relevant privacy act in the complainants' request reflects the fact that the Department of Education and Training is responsible for the administration of two sets of privacy legislation in relation to its activities – the Victorian *Privacy and Data Protection Act 2014* as a Victorian Government agency, and the *Privacy Act 1988* (Cth) in relation to the Secretary's role as the Victorian Education and Care Services Regulatory Authority. This is discussed further in this Determination.

11. On 14 December 2021[6] the complainants submitted a complaint to the former Commissioner[7] about the actions of the respondent in handling their privacy request and sought the following outcomes:
    i. *To determine if our privacy rights have been breached or interfered with under the Privacy Act and APPs, notably but not limited to APP 12.*
    ii. *For the privacy department [sic] to immediately process our privacy request from QARD* [Quality Assessment and Regulation Division of the Department of Education and Training].
    iii. *For the privacy department to provide a written apology.*
    iv. *Anything else that the NECS Privacy Commissioner deems appropriate in the circumstances.*

12. At the time of their complaint to the former Commissioner, there was ongoing communication between the respondent and the complainants in relation to the scope of their privacy request. The former Commissioner considered the request to be open and advised the complainants that they should continue to engage with the respondent. The former Commissioner also advised she would undertake preliminary enquiries into the related matters raised in their complaint to her.

13. On 23 December 2021 the complainants advised that they wanted to add to the outcomes they sought from their 14 December 2021 complaint to the former Commissioner *"financial compensation, including for aggravated damages given the actions of the DOE [sic] and their continued onerous and unreasonable requests and conduct.*" The request was added to their complaint.

14. On 27 January 2022 the complainants received a "Freedom of Information Decision Notice"[8] from the respondent in response to their 16 October 2021 request that was made under the Privacy Act, refusing them access to their personal information under s 24(1)(b) of the *Freedom of Information Act 1982(Cth)*.

[3] C.01 Email chain dated 26 May 2021 to 22 October 2021
[4] C.01 Op Cit
[5] C.01 Op Cit
[6] C.02 Website submission complaint to NECS PC
[7] The appointment of the Commissioner who opened the complaint finished on 32 December 2022. I was appointed to the NECS Privacy Commissioner office effective from 1 January 2023
[8] R.01 Decision Notice dated 27 January 2022

15. By email dated 28 January 2022[9] the complainants forwarded a copy of the Decision Notice to the former Commissioner and wrote:
The DOE [sic] have once again refused - via their FOI Unit - our privacy request that please note they refer to as an FOI request, presumably as they have chosen to process it under the FOI grounds….We note in their letter:
    i. That they didn't respond to us within 30 days and this matter has been outstanding for several months.
    ii. They have seemingly provided - once again - us with completely inaccurate information about our rights to a review of their decision regarding our privacy request (according to the OAIC guidelines which can't be reviewed under the FOI act as it was a privacy request).
We are wholly unsurprised but still extremely disappointed by their ongoing attempts to circumvent the Privacy legislation at will, create maximum confusion and filibuster any attempts by us to obtain our personal information and that of our child whilst providing erroneous information and making onerous and disingenuous requests of us.

16. The former Commissioner determined to add this matter to the complaint. The complainants and the respondent were respectively advised on 31 January and 14 February 2022 of her intention.

17. The complainants raised the matter of the Decision Notice with the former Commissioner without first raising it with the respondent. Section 40(1A) of the Privacy Act provides that the Commissioner must not investigate a complaint made under s 36 of the Act if the complainant did not first complain to the respondent. Section 40(1A) further provides that: "*However, the Commissioner may decide to investigate the complaint if he or she considers that it was not appropriate for the complainant to complain to the respondent*".

18. Based on evidence the former Commissioner had before her of prolonged correspondence between the complainants and the respondent in relation to the privacy request under discussion, a separate request for correction of personal information, and two FOI requests made by the complainants, as well as other matters that are not within her jurisdiction, she considered that it was not appropriate for the complainants to complain to the respondent further and that she would add the matter to her investigation. For the same reasons the former Commissioner also concluded that the complaint could not be conciliated successfully prior to the conduct of this investigation.

19. Following her preliminary enquiries conducted under s 42 of the Privacy Act the former Commissioner opened the investigation into the complaint under s 40(1) of the Act on 28 February 2022, and the respondent was duly informed as required by s43(1) of the Privacy Act

20. The parties have had opportunities to make submissions and comment on the relevant parts of each other's submissions. The parties have also had the opportunity to comment on a preliminary view of this Determination by correcting or updating facts or providing further facts.

21. Insofar as it is necessary for me to do so, I agree with and adopt all the former Commissioner's decisions and actions referred to in the previous paragraphs 11 to 20.

The Law

22. Full details of the law relevant to this complaint are set out in **Attachment A**.

23. All references to provisions in this determination are to those contained in the Commonwealth *Privacy Act 1988* (the **Privacy Act**) as modified by the Education and Care Services National Law, except where indicated otherwise.

[9] C.03 Email dated 28 January 2022

24. Section 6(1) of the Privacy Act defines 'personal information' as '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'

25. Section 36 of the Act allows an individual to complain to the Privacy Commissioner about an act or practice by an APP entity that may be an interference with their privacy.

26. Section 42 of the Act provides that the Commissioner may make preliminary inquiries in relation to a complaint. Section 40(1) provides that the Commissioner may investigate an act or practice that may be a breach of privacy if a complaint has been made under s 36 of the Act.

27. Section 52 of the Act provides that, after investigating a complaint, the Commissioner may make a determination either dismissing the complaint, or finding the complaint substantiated and making one or more declarations.

28. The Australian Privacy Principles (APPs) which are set out in Schedule 1 to the Privacy Act, regulate the collection, use, disclosure and security of personal information held by **APP entities**. For the purposes of this NECS Privacy Commissioner investigation the relevant entity is the Victorian Education and Care Services Regulatory Authority.

29. Under s 13 of the Privacy Act, an act or practice of an APP entity is an interference with the privacy of an individual if the act or practice breaches an APP in relation to personal information about an individual. Section 15 of the Act prohibits an APP entity from breaching an APP.

30. The Australian Privacy Principles relevant to this case are APP1 – open and transparent management of personal information, and APP 12 – access to personal information.

Respondent as an APP Entity

31. 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).**

32. Section 5 of the ECS National Law (Vic) states the Victorian *Privacy and Data Protection Act 2014* does not apply to the ECS National Law (Vic) or to the instruments made under that Law.

33. Section 263 of the ECS National Law (Vic) applies the Privacy Act as a law of a participating jurisdiction for the purposes of the **National Quality Framework**.

34. 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

35. Regulation 199 of the *Education and Care Services National Regulations 2011* (the ECS Regulations) applies the Privacy 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.

36. The Secretary of the Victorian Department of Education and Training is the Victorian Regulatory Authority (ECS National Law (Vic) - s 8).

37. The functions and powers of the Regulatory Authority are delegated to officers of the Quality Assessment and Regulation Division (QARD) of the Department to administer and enforce the National Law. Department privacy officers and officers in its Freedom of Information Unit are authorised to handle privacy and FOI requests on behalf of the Regulatory Authority. Other senior officers within the Department are authorised to respond to some matters referred to throughout this Determination.

Jurisdiction of National Education and Care Services Privacy Commissioner (NECS Privacy Commissioner)

38. Section 263(2)(b) of the ECS National Law (Vic) modifies the Privacy Act to require all references to the Commonwealth Privacy Commissioner in the Privacy Act to be read as referring to the NECS Privacy Commissioner. The *Education and Care Services National Regulations 2011* at r 195 to r 203 set out further modifications to the Privacy Act in its application under the ECS National Law.

Nomenclature

39. References to the respondent throughout this Determination are to officers acting under delegation or authorisation from the Regulatory Authority, or the Secretary, as identified.

40. `In correspondence quoted throughout this Determination, both the complainants 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 Privacy Act (Cth) does not apply, and the respondent – that is the Victorian Education and Care Services Regulatory Authority – to which the Privacy Act does apply. These references are clarified as necessary throughout this Determination.

Material Considered

41. In making this Determination I have had regard to:
    - information and submissions provided by the complainants and the respondent
    - the *Privacy Act 1988 (Cth)* and the Australian Privacy Principles (**APPs**), in particular APP1, and APP12
    - the *Australian Privacy Principles Guidelines* issued by the Australian Information Commissioner [10]
    - the *Education and Care Services National Law Act 2010* (Vic) and the *Education and Care Services National Regulations 2011*
    - the *Freedom of Information Act 1982 (Cth)* (the FOI Act (Cth)) and the associated Freedom of Information Guidelines issued by the Australian Information Commissioner
    - the Victorian *Privacy and Data Protection Act 2014* and the *Guidelines to the Victorian Information Privacy Principles*[11] issued by the Victorian Privacy Commissioner
    - relevant case law, and
    - The draft determination of the former Commissioner.

Complainants' Claims

[10] Australian Information Commissioner. *Australian Privacy Principles Guidelines.* Combined July 2019. The Guidelines have been adopted by the NECS Privacy Commissioner 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 Privacy Act. The adopting instrument is published on the NECS office website at www.necsopic.edu.au

[11] Office of Victorian Information Commissioner. Guidelines to the Information Privacy Principles. See www.ovic.vic.gov.au/privacy/guidelines-to-the-information-privacy-principles/

42. In summary the complainants make the following claims in relation to the acts and practices of the respondent in handling their request made under Australian Privacy Principle 12 (APP 12) for access to their personal information held by the respondent and ask me to determine if these acts and practices constitute a breach of any of the APPs:

Claim 1: between May 2021 and October 2021 the respondent provided incorrect advice about how the complainants could access their personal information held by the Regulatory Authority under the Privacy Act and APPs, specifically APP 12, and adopted incorrect processes in relation to the processing of their request, up to the final issuing of a decision in January 2022, that were contrary to the provisions of the Privacy Act and the Australian Privacy Principles.

Claim 2: the respondent has denied the complainants access to their personal information, failed to properly comply with requirements under APP 12 – access to personal information – in its access refusal Decision Notice dated 27 January 2022, and failed to respond to the complainants' privacy request within the prescribed timelines.

Claim 3:

3.1 On 12 November 2021 the respondent unnecessarily required identification documentation from the complainants that had already been provided; refused the complainants' privacy request on tenuous grounds, and then denied the refusal; and provided conflicting reasons for seeking to clarify the privacy request.
3.2 Requests to clarify the complainants' privacy request on 12 November 2021 and 15 December 2021, and re-scope the request on 4 January 2022, were deliberate attempts to hinder and frustrate the complainants' attempts to access their personal information.

Claim 4: "Financial compensation, including for aggravated damages given the actions of the DOE [sic] and their continued onerous and unreasonable requests and conduct."

Respondent's Response

43. In summary, in submissions in relation to Claims 1-3 the respondent:
    i. acknowledges that it initially provided incorrect advice to the complainants about how to access their personal information, and requested documentation that had already been provided, but maintains that these matters do not constitute a breach of any of the APPs;
    ii. acknowledges it provided incorrect information in a Decision Notice issued to the complainants on 27 January 2022;
    iii. maintains it has acted in accordance with the APPs in all other respects;
    iv. maintains that it repeatedly engaged with the complainants in attempts to both clarify and re-scope their request to enable the respondent to process it.

44. I now deal with each claim, including the more detailed responses relevant to each of them.

Claim 1: between May 2021 and October 2021 the respondent provided incorrect advice about how the complainants could access their personal information held by the Regulatory Authority under the Privacy Act and APPs, specifically APP 12, and adopted incorrect processes in relation to the processing of their request, up to the final issuing of a decision in January 2022, that were contrary to the provisions of the Privacy Act and the Australian Privacy Principles.

45. These alleged acts raise an alleged breach of APP 1 - open and transparent management of personal information.

The Facts: Key correspondence between the parties relevant to discussion on Claim 1

46. By email dated 26 May 2021[12] the complainants sought advice from the respondent (the Department's privacy team) as to how to "*make a privacy request to the Department…under the PDP act* [Victorian *Privacy and Data Protection Act 2014*] *regarding personal information pertaining to us".* They also sought advice on whether the privacy team was responsible for privacy matters in relation to kindergartens.

47. On 28 May 2021[13] the respondent (a privacy officer) replied that the FOI process "might be appropriate" and referred the complainants to the "Licensed Childcare/Children's Services" help line in the first instance - *"They will assist you with any matters, including privacy".* On the same day the complainants reiterated their request for advice on how to make "*a privacy request*" *to the Department itself"*.

48. On 31 May 2021[14] the respondent referred the complainants to the Department's "Freedom of information requests" web page and advised they could *"access documents held by the Department by submitting a request under the Freedom of Information Act* [VIC]" to the FOI Unit.

49. On the same day the complainants wrote that they were seeking to make a request for documents *in a less formal manner than a FOI request as in through a request under the Privacy Acts (sic)* and sought advice on the process. The complainants have indicated there was also a telephone conversation between the officer and one of the complainants. Later the same day the complainants advised the respondent that they had engaged with the FOI Unit[15].

50. By email dated 16 October 2021[16] the complainants advised the respondent that, on the basis of advice from the Australian Information Commissioner, they considered the advice provided to them in May was "*likely incorrect and we could…have made a Privacy request through you".* The complainants submitted "*a formal request*" for "*all personal information under the **relevant** privacy act and privacy principles* [former Commissioner emphasis] *that the Department of Education [sic] holds on* [A1, A2 and A3]*. Except for any personal information held relating to [A3's] current school or [A2's] previous school* or *any personal information… that we would have previously received and have copies of or any of the personal information already provided to us by the FOI Unit* [through the FOI request discussed at footnote to [49]]*. We trust you can liaise with the FOI unit regarding the latter*.

51. The request was made by A1 on behalf of himself, A2 and A3. On the same day the complainants submitted proof of identity documents, including a certified birth certificate for A3.

52. By two emails dated 18 October 2021[17] the respondent replied that *"the correct avenue for seeking your information is through the Freedom of Information (FOI) process"*. The respondent detailed processes that reflected relevant Victorian legislation, with no reference to Commonwealth legislation, writing:
"As a Victorian Government agency, we are governed by the [Victorian] Privacy and Data Protection Act 2014 (PDP Act) … The Information Privacy Principles (IPPs) contained within Schedule 1 of the PDP Act apply to information held by the Department. IPP 6 - Access and Correction governs an

[12] C.01 op. cit.
[13] R.02 Email chain 26 May 2021 to 18 October 2021
[14] R.02 Op Cit
[15] Relevant to later discussion, the complainants subsequently submitted a FOI request on 20 June and 3 July 2021. That request was for a wide range of documents related to matters within the jurisdiction of the Regulatory Authority, and included, but was not limited to, a request for the complainants' personal information held by the Quality Assessment and Regulation Division (QARD). It was correctly processed in accordance with the *Freedom of Information Act 1982*(Cth) following an agreed reduction in its scope. On 16 October 2021 the applicants then submitted a second FOI request for the balance of documents which was subsequently refused on practical refusal grounds.
[16] C.01 Op Cit
[17] R.02 Op Cit

individual's access to personal information held by the Department. *As set out in the* [Office of the Victorian Information Commissioner] *Guidelines to the IPPs, the* [Victorian] *FOI Act is the primary mechanism for access to and correction of information held by Victorian government agencies. IPP 6 only applies where the FOI Act does not. The application of IPP 6 is described in the Explanatory Memorandum to the PDP Act:*
"Principle 6 provides individuals with a right to access their information and make corrections to it, where necessary. In Victoria, the Freedom of Information Act already provides a right of access to documents held by Government. The Bill does not propose to disrupt the established systems of access under this scheme by supplanting them or creating a concurrent system".
You indicated that you have already made an FOI request, which has been finalised. Please seek advice from the FOI team as to the review process if you are not satisfied.

53. By two emails dated 18 October 2021[18] the complainants pressed their claim that the Privacy Act applied to their request and sought confirmation that it would be processed as such. They clarified that they wanted to obtain their personal information from the "regulatory authority/ Quality Assessment and Regulation Division (QARD) area of the Department", to which they believed the Privacy Act applied given they had already been advised by the FOI Unit that the *Freedom of Information Act 1982* (Cth) applied in relation to FOI requests related to the Regulatory Authority.

54. By email dated 22 October 2021[19] the respondent replied: *"Apologies for the error. Freedom of Information (FOI) is not our area of expertise, and I wasn't privy to the intricacies of your particular request. In the case that the Privacy Act 1988 applies to the information you are seeking*, *the Australian Privacy Principles (APPs) apply. APP 12 'access to personal information' is the relevant principle. <u>It does not replace the FOI procedure.</u> The Freedom of Information Act 1982* [Cth] *... provides a right of access to information held by agencies. Section 11 of the FOI Act contains that 'right to access' information*. *As such, the appropriate avenue to obtain your information, is via the FOI process… you indicated you have already made an FOI request"*. [former Commissioner emphasis]

55. Subsequent correspondence ensued between the parties, relevant parts of which are considered in discussions in relation to Claims 2-3. The complainants' request made under APP 12 for access to their personal information held by the respondent was processed as a FOI request under the FOI Act (Cth).

56. On 27 January 2022[20] the respondent issued a Decision Notice in response to the complainants' privacy request. The Decision Notice was issued as a numbered and titled "Freedom of Information Decision Notice" made pursuant to the *Freedom of Information Act 1982* (Cth).

57. The respondent refused the complainants' request for access to their personal information by relying on the grounds that it would substantially and unreasonably divert the resources of the respondent from its other operations.

Submissions from the respondent relevant to Claim 1[21]

58. The respondent has submitted:
    i. It accepts that incorrect information was provided to the complainants regarding the relevant legislation under which they could make a privacy request stating: *"While this error is unfortunate, it does not amount to a breach of any Privacy Principle under the Privacy Act*.
    ii. *The Department (sic) was correct in advising [the complainants] that the principles of the FOI Act apply to [their] administrative request … APP 12.2 allows the Department to process*

[18] C. 01 Op Cit
[19] R 02 Email dated 22 October 2021
[20] R.01 Op Cit
[21] R.03 Submission dated 25 January 2022

information requests under the same conditions as the FOI Act. In this regard, APP 12.2 explicitly acts as an exception to the requirements to provide personal information under APP 12.1 and any request must satisfy the requirements of the FOI Act".

iii. *There is no obligation for the respondent's privacy team to be responsible for handling administrative requests lodged under the APPs. It is appropriate that the Department(sic) organises its internal business units as it sees fit to ensure appropriate and efficient delivery of its public service functions. This includes designating the Department's FOI Unit to handle requests such as [the complainants]*.

Claim 1: Discussion and Findings

59. I have drawn the following conclusions from the correspondence between the parties detailed at [46] to [57] and the respondent's submissions at [58]:
    i. The respondent incorrectly processed the complainants' request made under the Privacy Act, specifically APP 12, for access to their personal information held by the respondent as a FOI request under the FOI Act (Cth).
    ii. The respondent did not initially provide accurate information to the complainants about how they could access their personal information in accordance with the Privacy Act and APPs
    iii. Once the respondent acknowledged that the complainants' request was made under the Privacy Act and APPs on 22 October 2021, it continued to incorrectly process the request as a Freedom of Information request up to, and including, the issuing of the Decision Notice on 27 January 2022;
    iv. In doing so, the respondent seems to have applied the processes that are applicable to the Department of Education and Training's administration of Victorian privacy and freedom of information legislation to its processing of the privacy request explicitly made under the Commonwealth Privacy Act.
    v. The respondent appears to have extended the APP 12.2 provision beyond its intended scope in its statement at [58(ii)].
    vi. The respondent has incorrectly characterised the privacy request as an administrative request at [58(ii)&58(iii)].
    vii. The respondent has concluded that the complainants' ongoing demand for confirmation that their privacy request was being processed under the Privacy Act and APPs as a demand for particular officers/areas in the Department to process the request. The complainants have denied this was the case.

60. These matters are considered further in the discussions that follow.

61. In my view there are two interrelated causal factors that have resulted in Claim 1. The first is deficiencies in the respondent's compliance with APP 1 – open and transparent management of personal information. The second relates to the challenges of administering two different sets of Privacy and Freedom of Information legislation.

Australian Privacy Principle 1 – Open and transparent management of personal information

62. Relevant to this discussion:

    i. APP 1.2 requires an APP entity to *take such steps as are reasonable in the circumstances to implement practices, procedures, and systems related to the entity's functions or activities that*
    (a) will ensure the entity complies with the Australian Privacy Principles…
    (b) will enable the entity to deal with inquiries or complaints from individuals about the entity's compliance with the Australian Privacy Principles…

ii. APP 1.3 requires an APP entity to *have a clearly expressed and up to date policy (the APP Privacy Policy) about the management of personal information by the entity*.

iii. APP 1.4 sets out seven matters that must be included in the APP Privacy Policy.

APP Privacy Policy

63. APP 1.3 requires an APP entity to have a clearly expressed and up to date APP Privacy Policy that sets out how it manages personal information.

64. Without limiting APP 1.3, APP 1.4 sets out information that an APP entity must include in an APP Policy. APP 1.4(d) states that the Policy must include information about how an individual may access personal information about the individual that is held by the entity and seek the correction of such information.

65. In December 2021, when the former Commissioner made preliminary enquires in relation to the complaint before her, she sought advice from the respondent as to how it made information about the application of the Privacy Act to the Regulatory Authority available to the public. A search of the respondent's website only revealed information in relation to the application of the relevant Victorian legislation and no evidence of an APP Privacy Policy or reference to the Privacy Act (Cth) and its application to the respondent.

66. In reply the respondent stated that: "*the Department's Privacy Policy is being updated to specifically reference the Department's functions as the Victorian Education and Care Services Regulatory Authority"* and offered to provide a copy when it was completed.[22]

67. In submissions to the former Commissioner the complainants confirmed that *no such APP privacy policy has ever been …provided [to them] nor was one available on the Department's website*[23].

68. During its engagement with the complainants, the respondent did not have the APP Policy required by APP 1.3. At May 2022 there was still no apparent evidence on the Department's website of an APP Privacy Policy or reference to the application of the Privacy Act to the respondent. In July 2022 in response to the circulation of the Preliminary View draft Decision the respondent confirmed that it did not have an APP Privacy Policy in place.

69. In the absence of an APP Privacy Policy that met the requirements of APP 1.4(d), specific information about how the complainants could access their personal information held by the respondent under the Privacy Act and APP 12 was not publicly available.

Provision of incorrect advice by the respondent to the complainants on how to access their personal information

70. It is apparent from the correspondence between the parties at [46] to [57] that relevant officers of the respondent did not provide the correct information in response to the complainants' enquiries as to how to access their personal information in May 2021 and in October 2021.

71. In relation to the initial enquiry from the complainant dated 26 May 2021 at [46], I note that the complainants specifically referenced only the Victorian privacy legislation – the *Privacy and Data Protection Act 2014* – and that the respondent initially replied accordingly within the context of that

[22] R.03 Op Cit
[23] C.04 Submission dated 07042022

legislation. I consider this may be an understandable response based on the content of the email correspondence.

72. I note that by the email dated 31 May 2021, the complainants were referring to Privacy Acts (plural), and the correspondence between the parties to that date also referred to children's services. In my view, this might have prompted the respondent to consider whether the Commonwealth Privacy Act applied to the request if the officer was alert to the respondent's obligations under that legislation.

73. In my view it is clear from the responses to the complainants' formal request for access to their personal information dated 16 October 2021 at [51] and the ensuing correspondence up to and including the email dated 22 October 2021 at [53], that the respondent did not initially consider, and when they did do so, did not understand, how the Privacy Act was to be applied in relation to the Regulatory Authority.

74. The response from the respondent at [52] detailed processes applicable to requests for access to personal information made under Victorian legislation. The response detailed at [54], while apologising for the provision of incorrect information, and acknowledging that the Commonwealth Privacy Act applied to the complainants' request, continued to advise, incorrectly, that the request must be handled as an FOI request under the FOI Act (Cth).

75. As set out at [55] and [56], the provision of incorrect information to the complainants continued in the processing of their privacy request up to, and including, the issuing of the decision notice on 27 January 2022 under the *Freedom of Information Act 1982* (Cth). These matters are considered in later discussions in this Determination.

Differences between Victorian and Commonwealth legislative approaches.

76. The Department of Education and Training is responsible for administering two different sets of privacy and freedom of information legislation:
    i. the Victorian *Freedom of Information Act 1982* and the *Privacy and Data Protection Act 2014* (PDP Act (Vic)) in relation to its activities as a Victorian Government agency – these apply to the vast majority of the Department's responsibilities and functions; and
    ii. the Commonwealth *Freedom of Information Act 1982* and *Privacy Act 1988* as applied by the *Education and Care Service National Law Act 2010* and associated regulations in relation to the respondent's responsibilities as the Victorian Education and Care Services Regulatory Authority.

77. As set out by the respondent at [52] it is clear that the intention in drafting the Victorian *Privacy and Data Protection* legislation was <u>not to create a dual system</u> by which a person might seek to access, or correct, their personal information held by a Victorian Government agency.

78. Schedule 1 to the PDP Act (Vic) sets out 10 Information Privacy Principles (IPPs). Section 14(1) of the Act exempts IPP 6 – access to and correction of personal information – *from applying to a document containing personal information, or to the personal information contained in a document, if*
    a) the document is that of an agency within the meaning of the *Freedom of Information Act 1982* (Vic), and
    b) access can only be granted to the document or information, or the information can only be corrected, in accordance with that Act.

79. The *Guidelines to the Victorian Information Privacy Principles* issued by the Office of the Victorian Information Commissioner provide guidance about which documents are subject to the Victorian Information Privacy Principle 6 (IPP 6) and which are subject to the FOI Act (Vic). In relation to Victorian government agencies, which include departments, the guidelines state:

"A document in the possession of a Victorian government agency is subject to the FOI Act [Vic]*, under ss 13 and 39 of the FOI Act. Section 5 of the FOI Act defines 'agency' to include departments, councils and 'prescribed authorities'. As documents in the possession of these agencies are subject to the FOI Act, IPP 6 does not apply to those documents*[24]. [Commissioner emphasis].

80. No such distinction is made in relation to the application of the Commonwealth legislation. Applicants may apply for access to, and correction of, their personal information under either the Commonwealth Freedom of Information Act or the Privacy Act, and the requests must be processed and the decisions provided in accordance with the legislation under which the request was made.

81. In relation to the Commonwealth legislation, the Australian Privacy Principles Guidelines relevantly state that *agencies are not required to advise individuals to request personal information under the FOI Act rather than under an administrative arrangement or by relying on APP 12".*[25]

82. The Guidelines also relevantly state: "*If an APP entity wishes an individual to follow a particular procedure in requesting access to their personal information, the entity could publish that procedure and draw attention to it, for example, by providing a link in the entity's APP Privacy Policy and on the entity's website homepage to the access procedure... However, an entity cannot require an individual to follow a particular procedure, use a designated form or explain the reason for making the request"*[26].

83. In the context of Commonwealth legislation there are three ways in which a person can seek to access their personal information, namely by requesting it under the FOI Act (Cth), by requesting it under the Privacy Act – APP 12, or by asking the agency for it (administrative access).[27]

84. In the correspondence from the respondent to the complainants dated 22 October 2021 at [54], the officer stated, incorrectly, that APP 12 - access to personal information – *"does not replace the FOI procedure.* [mommissioner emphasis]. *The Freedom of Information Act 1982* [Cth] *... provides a right of access to information held by agencies. Section 11 of the FOI Act contains that 'right to access' information*. *As such, the appropriate avenue to obtain your information, is via the FOI process…*

85. In my view, by treating the complainants' request for access to their personal information under APP 12 as a FOI request under the FOI Act (Cth), the respondent has, in effect, transferred the processes relevant to responding to such requests under Victorian legislation to the Commonwealth legislation, whether intentionally or not.

86. I consider that a contributory factor to this outcome lies in what, in my view, appears to be an interpretation by the respondent of the APP 12.2(b)(i) provision beyond its intended meaning.

Interpretation of APP 12.2(b)(i) – exceptions to 12.1

87. In submissions at [58(ii)] the respondent states "*The Department (sic) was correct in advising [the complainants] that the principles of the FOI Act apply to [their] administrative request … APP 12.2 allows the Department to process information requests under the same conditions as the FOI Act. In this regard, APP 12.2 explicitly acts as an exception to the requirements to provide personal information under APP 12.1 and any request must satisfy the requirements of the FOI Act*.

[24] Office of Victorian Information Commissioner. Guidelines to the Information Privacy Principles. P.3, [6.4] See www.ovic.vic.gov.au/privacy/guidelines-to-the-information-privacy-principles/
[25] For discussion see APP Guidelines [12.22-12.24]
[26] APP Guidelines op cit [12.21]
[27] For discussion on administrative access arrangements in relation to both the Privacy Act (Cth) and the FOI Act (Cth) see OAIC website at https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/administrative-access

(Commissioner emphasis).

88. In respect to the underlined phrases at [87], it appears to me that this interpretation of the APP 12.2 provision is incorrect. APP 12.2(b)(i) provides that if an APP agency *"is required or authorised to refuse to give the individual access to the personal information by, or under, the Freedom of Information Act [Cth]… then, despite APP 12.1, the [agency] is not required to give access to the extent that [it] is required or authorised to refuse to give access*."

89. APP 12.2(b)(i) allows an agency to refuse a request for access to personal information made under APP 12 on the grounds for refusal that are required or authorised by the FOI Act (Cth).

90. APP 12.2(b)(i) does not, however, extend to applying the processes of the FOI Act (Cth) to the request made under the Privacy Act. It does not extend to meaning that *"any request must satisfy the requirements of the FOI Act"*. This point was made clear by the Australian Information Commissioner in his report on an own motion investigation in the matter of *Department of Human Services: Own motion investigation report [2014]*. The Commissioner relevantly stated:
Some of the procedural features of the FOI Act that enable agencies to regulate the processing burden of FOI requests are either not contained in the Privacy Act or not expressly stated. For example, there is no mechanism for extending the statutory time frame for processing a request, and there is no request consultation process for requests that may be refused on practical refusal grounds.[28]

91. Similarly, the Australian Information Commissioner's APP Guidelines relevantly state: *The FOI Act specifies consultation processes that may apply to requests made under that Act, for example, where a 'practical refusal reason' may apply (FOI Act, s 24) to the request, or where a requested document contains a third party's personal or business information (FOI Act, ss 27, 27A). An agency is not required to undertake any of those consultation processes before refusing access on any of those grounds under APP 12. This is required only if the person decides to make a request under the FOI Act*[29].

92. While under APP12.2(b)(i) an agency may rely on the grounds provided by the FOI Act (Cth) for refusing access to documents, the APP does not have the effect of substituting the FOI Act in place of APP 12, where a request for access is made under APP 12.

93. As explained in the APP Guidelines:[30] *a decision to refuse access under APP 12.2(b)(i) (on one of the FOI grounds…) is a decision made under the Privacy Act, not the FOI Act. As required by APP 12.9, the agency must provide the individual with a written notice that sets out the reasons for the refusal and the complaint mechanisms available to the individual…The individual may have a right to complain to the* [NECS Privacy Commissioner] *under the Privacy Act. After investigation, the Commissioner may make a determination that the agency has failed to comply with APP 12 and require, for example, that the agency give access (Privacy Act, s 52). However, the individual will not have a right to seek internal review or Information Commissioner review under the FOI Act.* [Commissioner emphasis].

94. In my view the apparent broader, incorrect interpretation of APP 12.2(b)(i) by the respondent helps to explain, although not justify, the transfer of processes applicable to processing requests for access to personal information made under Victorian legislation to such requests made under Commonwealth legislation.

Findings - Claim 1

[28] Department of Human Services: Own motion investigation report [2014] AICmrCN6 (2 December 2014)
[29] APP Guidelines op.ci. at [12.29]
[30] APP Guidelines op. cit. at [12.30]

95. The application of Commonwealth law to state and territory government agencies provides a challenge for the public servants responsible for administering that law – particularly in situations where they are seldom in the position of having to do so, as is the present case. Nevertheless, the onus is on these agencies to understand and correctly apply the legislation they are responsible for.

96. If the respondent had effectively considered and set out how it would comply with APP 1.2, APP 1.3 and APP 1.4(d) in relation to the functions and responsibilities of the respondent, I consider that many of the issues that led to this complaint would not have arisen.

97. APP 1.2 requires an APP entity to take "reasonable steps" to implement internal practices, procedures, and systems that will enable it to comply with the APPs and deal with inquiries or complaints from individuals in relation to the APPs. The reasonable steps it takes will depend on the circumstances, including the nature of the entity. The APP Guidelines[31] offer further discussion and include examples of the practices, procedures and systems an APP entity should consider.

98. Relevant to this discussion, I would expect to see clearly defined processes for handling requests made under APP 12 for access to personal information held by the respondent that reflected the application of the Commonwealth legislation to the respondent in the context of ECS National Law.

99. On the basis of the discussion at [62] to [94] I find that the respondent has breached:

    i. APP 1.3 by failing to have an APP Privacy Policy about the management of personal information by the agency that includes the information required under APP 1.4; and

    ii. APP 1.2(b) by failing to implement practices, procedures and systems related to its functions or activities as the Victorian education and care services Regulatory Authority that enabled it to deal with a request for access to personal information under APP 12.

100. I make the observation also that the absence of a privacy policy that contains the information required by APP 1.4 raises the potential for a breach of APP 5 – notification of collection of personal information – to occur.

101. Under APP 5.1, if an APP entity collects personal information about an individual, the entity is required to "*take such steps (if any) as are reasonable in the circumstances"* to either notify the individual about a number of matters listed at APP 5.2, or otherwise ensure that the individual is aware of such matters. The matters include the provisions that are required for inclusion in the APP policy by APP 1.4(d) - access to and correction of personal information, and APP 1.4(e) – how to complain about breaches of the APPs.

Other matters in relation to Claim 1 that do not raise any APP breach

Was "who" was responsible for processing the complainants' privacy request in contention?

102. At [58(iii)] I noted that the respondent submitted that it is not obliged to have its privacy team handle requests lodged under the APPs and that it may organise its internal business units as it sees fit.

103. In submissions to the former Commissioner in relation to the respondent's statement set out at [58(iii)], the complainants have stated *"The inference in this is deliberately misleading. [We] have never suggested who was responsible for handling [our] privacy request was ever at issue. [We] have asserted our right to have [our] privacy request actioned under the Privacy Act and APPs in the face of irrefutable denial of that right by the Department (sic)*". [32]

[31] APP Guidelines op.cit. at [1.5-1.7]
[32] C.04 Op Cit

104. I note that in their complaint to the former Commissioner dated 14 December 2021 one of the outcomes the complainants have sought is for "the privacy department(sic) to immediately process" their request. However, it is clear to me from both the correspondence and submissions, that the complainants' main concern was that their request for access to their personal information was recognised and processed by the respondent as a request made under the Privacy Act, specifically APP 12.

105. I agree with the respondent that it does not matter how the respondent arranges its resources to respond to either FOI or Privacy requests. The respondent's decision to channel such requests through officers in the FOI Unit is entirely up to it to determine and does not, by itself, constitute a breach of the APPs

106. However, the respondent must ensure that the staff who respond to the requests have sufficient knowledge of the application of the Privacy Act in relation to the Regulatory Authority, and that the processes that are put in place to handle such requests accurately reflect the provisions of that legislation. As demonstrated in this Determination, this did not occur in this case.

Characterisation of request as an "administrative request"

107. In submissions noted at [58(ii)&58(iii)], the respondent has referred to the complainant's privacy request made under APP 12 as an administrative request. It is not; it is a request made in accordance with the provisions of the Privacy Act, specifically APP 12. It is not clear to me why the respondent has made this characterisation in its submissions. As far as I can determine, such characterisation is not apparent in the respondent's correspondence with the complainants in relation to their request for access to their personal information under APP 12.

108. Administrative access to information held by an agency means release of information, in response to a specific request, outside of the legislative requirements. Administrative access schemes may be put in place by an agency for requests for access to personal information made under either the FOI Act (Cth) or the Privacy Act (Cth), but applicants must be advised that their request will be treated as an administrative access request, they must agree to it, and they must be informed of the implications.

109. If an agency does establish administrative access arrangements for access to personal information, those arrangement must still comply with the minimum requirements of the APP 12.[33]

110. As already discussed at [83], under Commonwealth arrangements, there are three ways a person may access their personal information, two of which are legislative and one of which is through administrative access. The respondent's characterisation of the request as an administrative request is incorrect and confusing given the request was then treated as a legislative request, albeit under the FOI Act (Cth).

Claim 2: the respondent has denied the complainants access to their personal information, failed to properly comply with requirements under APP 12 – access to personal information – in its access refusal Decision Notice dated 27 January 2022, and failed to respond to the privacy request within the prescribed timelines

111. This claim raises an alleged breach of APP 12 and APP 1.2

[33] For discussion see APP Guidelines op. cit. [12.3 and 12.19]

Australian Privacy Principle 12 – access to personal information; Australian Privacy Principle 1 – open and transparent management of personal information

112. Relevant to this discussion:

i. APP 12.1 provides that if an APP entity holds the personal information of an individual, the entity must, on request by the individual, give the individual access to the information.

ii. APP 12.2(b)(i), as discussed at [87] and [88], provides exceptions to the requirements for an agency to comply with APP 12.1, stating: if an APP entity *"is required or authorised to refuse to give the individual access to the personal information by, or under, the Freedom of Information Act 1982 [Cth]… then, despite APP 12.1, the entity is not required to give access to the extent that [it] is required or authorised to refuse to give access*."

iii. APP 12.4(a) requires an agency to respond to a request for personal information within 30 days of the request.

iv. APP 12.5(a) provides that if an APP entity refuses to give access because of APP 12.2 … the entity must take such steps (if any) as are reasonable in the circumstances to give access in a way that meets the needs of the entity and the individual.

v. APP 12.9 provides that if an APP entity refuses to give access to the personal information because of APP 12.2, the entity must give the individual a written notice that sets out:
   a. the reasons for the refusal except to the extent that, having regard to the grounds for the refusal, it would be unreasonable to do so; and
   b. the mechanisms available to complain about the refusal.[34]

vi. APP 1.2 requires an APP entity to take reasonable steps to implement practices, procedures, and systems related to the entity's functions or activities that will ensure that the agency complies with the Australian Privacy Principles and enables the agency to deal with inquiries or complaints from individuals about the agency's compliance with the APPs.

113. On 27 January 2022[35] the respondent issued a Decision Notice refusing the complainants' request for their personal information that they had made under the Privacy Act (Cth), APP 12 - access to personal information. The Decision Notice:

i. was issued as a numbered and titled "Freedom of Information Decision Notice" stating: *I refer to your request received by the Department of Education and Training (the Department) for documents under the Commonwealth Freedom of Information Act 1982 (the Act);*
ii. refused the request for access to personal information under s 24(1)(b) of the FOI Act (Cth); and
iii. advised the applicants that they could seek an internal Department review of the Decision under s 54 of the FOI Act (Cth) and seek an external review of the Decision by the NECS Freedom of Information Commissioner.

114. The Decision Notice states:

[34] Note: APP 12.9(c) also requires the inclusion of *"any other matters prescribed by the [privacy]regulations"*. The Education and Care Services National Regulations at r 203 exclude the Privacy Regulations from applying to the education and care services agencies.
[35] R.01 Op Cit

On 4 January 2022, you were provided with a notice under section 24AB of the [FOI] Act[36]*,* [**the practical refusal reason consultation notice**][37] *stating that a practical refusal reason existed pursuant to section 24AA of the Act and that the Department intended to refuse access to documents in accordance with the request. You were invited to consult with my office to revise the request so that the practical refusal reason no longer existed by 25 January 2022.*
On 5 January 2022, you wrote to the FOI Unit stating that you did not wish to revise your request.
I am an officer authorised by the Secretary of the Department under section 23(1) of the Act to make decisions in relation to FOI requests on behalf of the Department.
I have taken the following material into account in making my decision:

- *the nature of your request*
- *the notice issued to you under section 24AB of the Act and your response to the notice*
- *the Act (specifically sections 4, 11, 11A, 11B, 24, 24AA and 24AB.*

*I have decided to **refuse access to documents** under section 24(1)(b) of the Act.*

115. The Decision Notice needs to be read in conjunction with the aforementioned consultation notice issued under s 24AB of the FOI Act (Cth) on 4 January 2022 – the practical refusal reason consultation notice – to ascertain the details of the reason for the refusal.

116. The consultation notice states that "*we* [the respondent, an FOI officer] *are writing to provide you with this notice under section 24AA of the Commonwealth Freedom of Information Act 1982, stating that <u>the work involved in processing</u>* [your] *<u>request would substantially and unreasonably divert the resources of the agency from its other operations</u>".* The reasons set out in support of the respondent's position can be summarised as:

i. the FOI Unit has "*hundreds of pages of documents in relation to [a previously processed FOI request from the complainants] that did not fall within the revised terms of that request. As a first step in relation to your new request, it would be necessary to review each document to determine if it meets the above parameters. We estimate this to take 1-2 days for officers in the FOI Unit to complete;*
ii. searches would be required of the 6 named areas of the Department and 13 named officers[38] that *it estimated would take departmental officers more than 20 hours to compl*ete.
iii. documents identified as meeting the terms of the request would need to be assessed, third parties consulted and a decision on access prepared and finalised;
iv. "significant time" 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;
v. the FOI Unit currently has extremely limited resources with most staff on annual leave and a high volume of existing requests to be processed.

Respondent's submissions relevant to Claim 2

117. In relation to the former Commissioner's enquiries as to the reasons the respondent issued a Decision Notice under the *Freedom of Information Act 1982*(Cth) in response to the complainants' request for access to their personal information that was made under the Privacy Act, specifically APP 12, the respondent submitted: "*The department [sic] receives requests for access to documents under Australian Privacy Principle 12 very infrequently. We acknowledge the incorrect references to*

[36] Section 24(1)(b) of the FOI Act (Cth) allows an agency to refuse access to a document if satisfied that a 'practical 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. Relevantly 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.*
[37] R.04 Consultation Notice dated 4 January 2022
[38] On 15 December 2021 the respondent had sought further clarification of the scope of the complainants' privacy request through a series of questions including asking what areas of the Department the complainants had corresponded with, and the names of officers they had spoken to/corresponded with.

the Freedom of Information Act 1982 (Cth) and that the department provided the correspondent with review rights that did not apply in the circumstances. This was regrettable, and later corrected". [39]

118. Subsequent enquiries by the former Commissioner confirmed that the "correction" referred to consisted of advice being given to relevant officers in the FOI Unit about the error. No correction was issued to, or discussed with, the complainants.

Claim 2: Discussion and Findings

119. The Decision Notice discussed at [113 &114] had no legal effect in terms of the *Freedom of Information Act 1982* (Cth).

120. As already determined, the request for access to personal information that falls within the jurisdiction of the Commonwealth legislation and this Determination was made by the complainants under the Privacy Act, specifically APP 12, and was referenced as such by the respondent on 22 October 2021 and in subsequent correspondence, including on 12 November 2021, 22 November 2021 and 15 December 2021.

121. For a request to be a valid request under the FOI Act (Cth) it needs to comply with the requirements of s 15 of that Act. Included in those requirements is that the request must state that it is a request for the purposes of the FOI Act (s 15(2)(aa)). No such request was made by the complainants.

122. The question that remains is whether the Decision Notice can be construed as a valid response to the request made by the complainants under APP 12.

APP 12.9 - notice of refusal

123. APP 12.9 requires that if a request for access to personal information made under APP 12 is refused, a notice must be given in writing setting out the reasons for the refusal and the mechanism available to the applicant to complain about the refusal.

Form of the refusal notice

124. APP 12.9 does not prescribe the form in which the notice must be given other than it must be in writing. However, I do not consider that a notice that:

i. is identified as a "Freedom of Information Decision Notice;"
ii. specifies – incorrectly – that it is provided in response to a request made under the FOI Act (Cth);
iii. states that it is made by an officer "*authorised by the Secretary of the Department under section 23(1) of the* [FOI] *Act to make decisions in relation to FOI requests on behalf of the Department;*" and
iv. cites relevant provisions of the FOI Act (Cth).

could be construed as being an appropriate response in terms of form, type or content in relation to the Privacy Act and APP 12.

125. As discussed at [93] "*a decision to refuse access under APP 12.2(b)(i) (on one of the FOI grounds…) is a decision made under the Privacy Act, not the FOI Act*.[40]

Finding

[39] R.05 Letter dated 13 April 2022
[40] APP Guidelines op. cit. at [12.30]

126. I find that in issuing the Decision Notice pursuant to the provisions of the FOI Act (Cth) the agency did not have the practices, procedures and systems in place related to its functions or activities to enable it to comply correctly with a request made under APP 12. This constitutes a breach of APP 1.2(a)

Reasons cited for the refusal – APP 12.9(a)

127. APP 12.9(a) states that if an APP entity "*refuses to give access to personal information because of subclause 12.2 or 12.3*", the agency must give the applicant a written notice that sets out *"the reasons for the refusal except to the extent that, having regard to the grounds for the refusal, it would be unreasonable to do so*". In order to satisfy the requirements of APP 12.9, in my view where an APP entity is an agency its written notice to an applicant must provide sufficient information to enable the applicant (as well as any review authority) to accurately identify the relevant grounds under the APP 12.2(b)(i) exception on which the agency relies to deny access

128. As already discussed at [88] and [89], APP 12.2(b)(i) allows an agency to refuse access to information on any of the grounds that are required or authorised by the FOI Act (Cth). The FOI Act provides several grounds for refusal[41].

129. As discussed at [114] to [116] the reason given by the respondent for refusing the complainants' request for access to their personal information was that the work involved in processing the request "would substantially and unreasonably divert the resources of the agency from its other obligations". This is one of the grounds for refusal of a request for access to personal information that is authorised by the FOI Act (Cth) (at **s24AA(1)(a)(i)** of that Act) and is therefore an allowable exception under APP 12.2(b)(i).

130. This ground for refusal to provide access can only be ascertained by reading the consultation notice at [116]. In the Decision Notice itself at [114], after referring to the consultation notice, the decision maker states that: *"I have decided to refuse access to documents under s 24(1)(b) of the [FOI] Act".*

131. In submissions[42] to the former Commissioner the complainants have correctly pointed out that reliance on s 24(1)(b) of the FOI Act can only occur after a practical refusal consultation process has occurred. Section 24 provides that:
(1) If an agency …is satisfied when dealing with a request for a document that a practical refusal reason exists in relation to the request (see s 24AA) the agency:
(a) must undertake a request consultation process; and
(b) if, after the request consultation process the agency… is satisfied that a practical refusal reason still exists the agency …may refuse to give access to the document…

132. The complainants further submitted that there was *"a breach of APP 12.2(i) (sic) as the respondents were only authorised to rely on section 24(1)(b) of the FOI* [Act] ***after*** *a request consultation process that was never required or held - and the complainants didn't engage in – even though the respondents incorrectly sought one"*.

133. I agree with the complainants' comments at [131] and [132] only to the extent that s 24(1)(b) of the FOI Act can only come into effect after a request consultation process has been held.[43]

---

[41] For a non-exhaustive list of grounds for refusal set out in the FOI Act see APP Guidelines op. cit. at [12.28]

[42] C.05 Op Cit

[43] While not relevant to these considerations under the Privacy Act, for the sake of accuracy I note that, in relation to the complainant's submission at [131] a request consultation process was sought and set in motion by the request consultation notice dated 4 January 2022 discussed at [115]. By email dated 5 January 2022 the complainants advised the respondent that they did *"not wish to revise our formal privacy request of 16 October*". The fact that the complainants decided not to participate does not mean the process was not offered as required under the FOI Act.

134. As has already been discussed at [90] and [91] there is no requirement to conduct a practical refusal consultation process under the Privacy Act. While the section of the FOI Act cited in the respondent's Decision Notice as the basis for issuing its refusal is correct for a FOI request that has been made and processed under the FOI Act, it is not the correct section of that Act that can be relied upon as an authorised ground for refusal under APP 12.2(b)(i).

135. On the other hand, as stated at [129], and discussed at [114] to [116] the reason given by the agency for refusing the complainants' request for access to their personal information was that the work involved in processing the request "would substantially and unreasonably divert the resources of the agency from its other obligations". Notwithstanding that this ground for refusal can only be ascertained by reading the consultation notice at [116], those quoted words are from section 24AA of the FOI Act, and in my view would have provided the applicant with sufficient information to enable the applicant to accurately identify the relevant grounds of APP 12.2 on which the agency relied to deny access.

Finding

136. The Decision Notice, as written, does not reflect the authorised grounds for the refusal of the request for access to personal information that are recognised under APP 12.2(b)(i) of the Privacy Act. The grounds for refusal are found at s 24AA(1)(a)(i) as identified in the consultation notice at [116].

137. However, for the reasons stated at [135] I consider the Decision Notice needs to be interpreted and applied in the context of the agency's other communications on the subject. In so doing, I consider the agency's Decision Notice provided sufficient information to enable the complainant (as well as any review authority) to accurately identify the relevant grounds under the FOI Act (Cth) on which the agency has relied under the APP 12.2(b)(i) exception provision to deny the complainants' access to their personal information.

Mechanisms available to complain about the refusal – APP 12.9(b)

138. APP 12.9(b) requires the refusal notice to set out the mechanism available to an individual to complain about a refusal to give access to their personal information.

139. The Decision Notice dated 27 January 2022 advised the complainants that they could:
   i. apply in writing within 30 days of the date of the Decision Notice for an internal review by the Department of the refusal decision under s 54 of the FOI Act (Cth); and
   ii. seek a National Education and Care Services FOI Commissioner Review of the Decision within 60 days of the date of the Decision Notice.

140. The complaint mechanisms, as advised by the respondent, are incorrect. As discussed, the request was not a FOI request; it was a request made under the Privacy Act, specifically APP 12. It cannot be reviewed internally under s 54 of the FOI Act (Cth) and the NECS FOI Commissioner cannot conduct a review of the Decision.

141. As explained in the APP Guidelines[44], the description of the complaint mechanisms available to an individual should explain the internal and external complaint options, and the steps that should be followed. In particular, the individual should be advised that:
   - a complaint should first be made in writing to the APP entity (Privacy Act s 40(1A));
   - the entity should be given a reasonable time (usually 30 days) to respond; and
   - a complaint may be made to the NECS Privacy Commissioner (Privacy Act s 36)

Finding

[44] APP Guidelines op. cit. at [12.87]

142. The Decision Notice does not meet the requirements of APP 12.9(b). This constitutes a breach of APP 12.9(b).

Have the grounds relied on by the respondent under s 24AA (1)(a)(i) of the FOI Act (Cth), as an allowable exception under APP 12.2(b)(i), to refuse the complainants' request for access to their personal information been substantiated by the evidence provided?

143. If the request by the complainants had been a FOI request made in accordance with the requirements of the FOI Act (Cth), the complainants would have had the right to seek a review of the respondent's Decision by the NECS FOI Commissioner.

144. In the case of the refusal grounds set out in the Decision Notice at [114-116] – that processing the request would substantially and unreasonably divert the resources of the agency from its other operations – a review by the NECS FOI Commissioner would have:
- involved consideration by the Commissioner as to whether the practical refusal consultation requirements at s 24AB of FOI Act (Cth) had been met;
- required the agency to prove its decision that processing the request constituted a substantial and unreasonable diversion of resources (s 55D, FOI Act (Cth)); and
- allowed the Commissioner to affirm, vary, or set aside and substitute, the Decision (s 55K(1), FOI Act (Cth).

145. These provisions of the FOI Act (Cth) do not apply to a request made for access to personal information under APP 12 and no commensurate provisions are specified in the Privacy Act.

146. As discussed at [90] and [91] and elsewhere in this Determination there is no requirement for an agency to conduct a practical refusal consultation process when the agency is considering relying on the practical refusal grounds provided by s 24AA of the FOI Act (Cth) to refuse the request for access to personal information under APP 12.2(b)(i),

147. As discussed at [115] and [116] the respondent did in fact seek to conduct a practical refusal consultation process in accordance with the requirements of the FOI Act.

148. In submissions[45] to the former Commissioner the complainants have suggested that this practical refusal consultation process, and earlier requests from the respondent to clarify or re-scope their privacy request, were deliberate obstacles placed to hinder the complainants' attempts to access their personal information.

149. I do not have evidence before me that satisfies me that the respondent was being deliberately obstructive in seeking to conduct a practical refusal consultation process in this instance. As the respondent was processing the complainants' privacy request as a FOI request, albeit incorrectly, it was following the processes set out in the FOI Act (Cth).

150. In order to determine whether the respondent's reason for its refusal of the complainants' request for access to their personal information was authorised on the grounds the respondent relied upon – that is the substantial and unreasonable diversion of resources of the agency – I have considered the reasons the respondent set out in its consultation notice at [116]. If the complainants' request for access to their personal information had been considered in accordance with the requirements of the Privacy Act, I would have expected to see these reasons included in the respondent's written notice of refusal under APP 12.9 discussed at [127] to [137]

Grounds for refusal

[45] C.05 Op. Cit

151. The grounds in the FOI Act (Cth) on which the respondent has relied under APP 12.2(b)(i) to refuse the complainants' access to their personal information are set out in s 24AA(1)(a)(i) of the FOI Act. That section 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'.

152. Both limbs of s 24AA(1)(a)(i) must be met to satisfy the grounds for refusal. The Australian Information Commissioner FOI Guidelines[46] 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"… and
"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…processing burden is substantial"

Evidence provided by the respondent in support of the practical refusal reason at [116]

153. The former Commissioner concluded that on the basis of the evidence provided by the respondent at [116] she was unable to determine that the processing of the privacy request would constitute both a substantial and an unreasonable diversion of the resources of the respondent from its other operations. Her reasons are set out in the following paragraphs.

154. In relation to the reason at 116(i) she was aware of the pages referred to having, in her capacity as NECS FOI Commissioner, conducted a review of an access refusal decision made in response to a FOI request by the complainants to the respondent on 16 October 2021 under the FOI Act (Cth).[47] The pages purportedly amount to around 800.

155. That FOI request was not confined to a request for the personal information of the complainants. Some of the identified pages would not therefore fall within the parameters of the APP 12 privacy request which is only for personal information. There was no evidence before her of any assessment of the documents to ascertain the likely number or percentage of pages that might be excluded from the request and she therefore was unable to assess the likely impact on the respondent's resources.

156. The 6 areas and the 13 officers referred to at 116(ii) were identified by the complainants in correspondence dated 22 December 2021 [48]in response to a request from the respondent dated 15 December 2021 to identify areas and officers within the Department of Education and Training the complainants had corresponded with. The complainants have had extensive correspondence with the Department on multiple matters for more than a year.

157. As discussed at [33-37] of this Determination, the Privacy Act only applies to the Education and Care Services Regulatory Authority for the purposes of the National Quality Framework. The Regulatory Authority is the Secretary of the Department of Education and Training who has delegated her functions and powers to officers of the Quality Assessment and Regulation Division (QARD).

158. It is possible (but she expressed no view as to its probability) that 4 out of the 6 areas identified and a number of the officers identified did not fall within the jurisdiction of Commonwealth legislation as

[46] Australian Information Commissioner. Freedom of Information Guidelines. Combine version February 2022 at [3.112] and [3.113]
[47] Department of Education and Training reference FOI 2021-579
[48] C.06 Email dated 22 December 2022

they are not the Regulatory Authority. This is the case irrespective of whether the request was processed in accordance with the FOI Act (Cth) or the Privacy Act (Cth).

159. A request for access to personal information held by other areas of the Department would need to be made in accordance with the relevant Victorian legislation. She therefore discounted the reasons put forward by the respondent at 116(ii) in relation to the request made under APP 12 as she was not able to determine the extent to which the removal of the need to consult with some of the areas and officers identified would reduce the work involved in processing the request.

160. Paragraph 116(iii) notes the respondent's reference to the need to consult third parties. As discussed at [91] the third party consultation requirements of the FOI Act (Cth) do not apply to requests made under APP 12 and the respondent could determine that those consultations are not required. That said, the respondent would need to take care to avoid releasing other people's personal information which would raise a breach of APP 6 – use or disclosure of personal information. She accepted that good administrative practice supports the view that consultation might be both necessary and desirable.

161. The reference to "significant time" at 116(iv) is vague and requires further details before it is sufficiently informative to assist in an assessment of whether processing the request would constitute a substantial and unreasonable diversion of resources.

162. In relation to staffing constraints in the FOI Unit identified at 115(v), she was aware, from reviews she had conducted in her capacity as the NECS FOI Commissioner that the Unit has staffing pressure that it needs to manage. From her observations over a number of months, these staffing pressures appear to be ongoing and not contained to holiday periods. She considered that given the size of the Department of Education and Training, it is incumbent upon the agency to ensure it has sufficient resources to meet its statutory obligations.

163. As discussed, the request under consideration is a request for personal information made under the Privacy Act (Cth). It might be reasonable, for example, for the respondent to consider whether it could engage privacy officers of the Department to assist with the processing of the request - at least in the identification of potential personal information and the assessment of whether that information meets the s 6(1) definition of personal information under the Privacy Act (set out at [24] of this Determination).

A further consideration

164. As discussed at [49, footnote & 154] on 16 October 2021, the complainants made a FOI request to the respondent under the FOI Act (Cth) for a wide range of documents related to matters within the jurisdiction of the Regulatory Authority. The FOI request included, but was not limited to, a request for the complainants' personal information held by the Quality Assessment and Regulation Division (QARD). A practical refusal consultation process was also conducted in relation to that request on the grounds that processing the request would substantially and unreasonably divert the resources of the agency from its other operations

165. That FOI request was ultimately refused by the respondent. However, during that consultation process, on 20 October 2021 the respondent suggested a re-scoping of the FOI request for consideration by the complainants in order to remove the practical refusal reason.

166. The former Commissioner noted that the re-scoped proposal from the respondent (the FOI Unit) included Item 53 of the complainants' FOI request. Item 53 requested *"all personal information that QARD [the Quality Assessment and Regulation Division] or QARD staff holds (including email, text messages or on private devices used at home, etc) on [the complainants]*." It appeared to the former Commissioner that the re-scoped proposal (that did not proceed) provided by the FOI Unit - in so far

as it included the aforementioned Item 53 - would encompass a significant proportion of the complainants' privacy request under discussion in this Determination.

167. As the FOI Unit considered it would be able to process such a request (together with several other items) in October 2021 in her view it would be able to do so in respect of the privacy request under discussion.

168. Insofar as it is necessary for me to do so, I accept and adopt all the former Commissioner's considerations and findings referred to in the previous paragraphs 154 to 167.

Findings

169. It has been determined in case law that the "substantially" threshold required by the practical refusal reason relied on by the respondent requires that the diversion of resources of the agency be "real or of substance" rather than large[49]. I am satisfied that the complainants' request for their personal information held by the respondent would involve a diversion of resources to process it that is both real and of substance.

170. In my view it is axiomatic that the identification of the personal information of the complainants that accords with the definition of personal information under s 6(1) of the Privacy Act, from unspecified documents, and the possibly significant editing of documents that may be required to remove exempt material, would substantially divert resources of the agency to the task. The first limb of the practical refusal reason at s24AA(1)(a)(i) is satisfied.

171. For the reasons discussed at [154 to 167] there is, however, insufficient evidence provided by the respondent to enable me to determine that the processing of the request would constitute an unreasonable diversion of resources in the circumstances. Taking onto account also the matters discussed at [164 to 167] I cannot find that the second limb of the practical refusal reason at s24AA(1)(a)(i) – that the diversion of resources would be unreasonable – is satisfied.

172. On the basis that **both** limbs of s 24AA(1)(a)(i) must be satisfied before the practical refusal reason may be relied upon, I cannot find that the respondent was authorised to refuse the complainants access to their personal information under the FOI Act (Cth) and, as a consequence, was not authorised to refuse access under APP 12.2(b)(i). This constitutes a breach of APP 12.1.

APP 12.5 - reasonable steps

173. APP 12.5(a) provides that if an APP entity refuses to give access because of APP 12.2 the entity *must take such steps (if any) as are reasonable in the circumstances to give access in a way that meets the needs of the entity and the individual*.

174. The complainants have submitted that the respondent has *"not communicated in any manner with the complainants regarding their privacy request* [since the issuing of the Decision Notice] *or attempted to take any reasonable steps whatsoever …"*.[50] Given the request was processed as an FOI request this may be understandable, but it is incorrect and constitutes a breach of APP 12.5.

175. Given that:

- by its own admission (at 116(i)) much of the likely relevant documents containing the personal information requested had already been located as a result of an earlier FOI request; and

[49] For discussion see Farrell; Chief Executive Officer, Services Australia and (Freedom of Information) [2020] AATA 2390; Langer and Telstra Corporation Ltd [2002] AATA 341

[50] C.05 Op Cit

- the respondent considered it was able to process a substantial part of the request as discussed at [167],

I consider that a reasonable step for the respondent to take in the circumstances under APP 12.5(a) could have been to consider the privacy request in the light of these facts.

Were timelines met?

176. APP 12.4(a)(i) requires that an agency responds to a request within 30 days of the application.

177. As discussed in Knowles v Secretary, Department of Defence in the Federal Court of Australia,[51] the obligation in APP 12.4(a) to 'respond' to the access request within a reasonable period is not to make an access decision on the provision of the personal information but to acknowledge the request:
The requirement in APP 12 is not that access to requested personal information must be granted within 30 days; it is that the request must be responded to within that timeframe. *The terms of APP 12 reinforce that bifurcation. Paragraph 12.4 is headed "Dealing with requests for access". It mandates two measures by which an APP Entity must deal with requests for access to information under APP 12: first, by the provision of a response to the request; and, second, by the provision of access to the information as requested (subject to notions of reasonableness and practicality) ... The instrument draws a distinction between "dealing with" a request by responding to it and "dealing with" a request by granting access to what is requested. The 30-day deadline applies only in respect of the former*.

178. The APP Guidelines at 12.66 relevantly state that *if there is a justifiable need to clarify the scope of an individual's request…the agency is expected to contact the individual to explain the delay and provide an expected timeframe for finalising the request.*

179. The complainants made their formal access request on 16 October 2021, clarified by them on 18 October 2021 as discussed at [50] and [52]. The respondent acknowledged the request by email dated 18 October 2021. From that point onwards, a number of email interactions occurred between the complainant and the respondent in relation to both the relevant legislation in relation to the request (discussed at Claim 1) and the scope of the request.

180. Requests to clarify the request were made:
   i. by email dated 12 November 2021[52] in which the respondent ostensibly refused the privacy request but also sought clarification about what information was being sought through a series of questions. In subsequent correspondence dated 22 November 2021 the respondent denied that the request had been refused. This correspondence is discussed further under Claim 3;
   ii. by email dated 15 December 2021[53] – following an email dated 24 November 2021[54] from the complainants clarifying their request (although not answering the specific questions posed on 12 November 2021) – in which the respondent again sought clarification of the request through the same questions posed on 12 November 2021 and invited the complainants to rescope and resubmit their request to the FOI Team. The complainants provided the requested information on 22 December 2021; and
   iii. by email dated 4 January 2022 in which the respondent issued the request consultation notice discussed at [116][55].

[51] Knowles v Secretary, Department of Defence [2020] FCA 1328 [66]-[67] and upheld by the Full Court of the Federal Court of Australia in Knowles v Secretary, Department of Defence [2021] FCAFC 215 [52]
[52] R.06 Email Dated 12 November 2021
[53] R.07 Email dated 15 December 2021
[54] C.07 Email dated 24 November 2021
[55] R. 04 Op Cit

181. Clearly a **decision** on the request was not provided within 30 days. However, I note that a **response** was provided within 30 days, and the respondent continued to engage with the complainants to clarify the scope of the request, as allowed under APP 12, in order to avoid a refusal of the request under APP 12.2

182. The complainants consider this ongoing correspondence in relation to the request constituted a deliberate hindrance of their attempts to obtain access to their personal information. The matter is discussed further under Claim 3.

Finding on 12.4(a)

183. In the circumstances, I do not find a breach of APP 12.4(a).

Claim 3:

3.1 On 12 November 2021 the respondent unnecessarily required identification documentation from the complainants that had already been provided; refused the complainants' privacy request on tenuous grounds, and then denied the refusal; and provided conflicting reasons for seeking to clarify the privacy request.

3.2 Requests to clarify the complainants' privacy request on 12 November 2021 and 15 December 2021, and re-scope the request on 4 January 2022, were deliberate attempts to hinder and frustrate the complainants' attempts to access their personal information.

184. In their complaints to the former Commissioner the complainants have submitted that:

A. by email dated 12 November 2021[56]:
   i. the respondent (a privacy officer) sought identification/authorisation documentation that had already been provided or was unnecessary in the circumstances;
   ii. the respondent refused their privacy request on "very tenuous" grounds and subsequently by letter dated 22 October 2021 denied that it had been refused; and

B. by letter dated 22 November 2021[57] the respondent (the Regulatory Authority) provided contrary reasons for the "refusal "of the request to those provided in the 12 November 2021 email which foreshadowed the ultimate grounds for refusal of the request on 27 January 2022.

185. In response to the respondent's submissions to the former Commissioner, the complainants have also alleged that the Department's requests to clarify or re-scope their privacy request *"was part of an ongoing attempt to hinder and frustrate the complainants"* in their attempts to access their personal information.

Submissions from the respondent relevant to Claim 3

186. In response to the former Commissioner's enquiries to the respondent in relation to these elements of the complaint, the respondent[58]:

i. submitted that the grounds for refusing to process the complainants' request as it was made were not tenuous but were an attempt to have the complainants revise their request in order to avoid a "practical refusal reason" under the FOI Act;
ii. acknowledged that it requested a copy of A3's birth certificate when one had already been provided stating - "*This was an oversight and was corrected"*.

[56] R 06 Op Cit
[57] R.08 Letter dated 22 November 2021
[58] R.03 Op Cit and R.09 letter dated 5 May 2022

iii. submitted that in order to grant a request under APP 12, it must be satisfied that a request for personal information is made by the individual concerned, or by another person who is authorised to make a request on their behalf. "*Given the nature of correspondence from A1, the Department (sic) was not satisfied from merely an email alone purporting to be A2 that sufficient authority has been given"*.

iv. submitted that its response in the letter dated 22 November 2021 *"was not a pre-conceived plan to frustrate the privacy request of the [complainants]. Rather the respondent was clarifying the department's (sic) approach to the [complainants] request for documents …given the broad scope of the request"*.

v. submitted that its requests for clarification or rescoping of the privacy request were intended to assist the complainants to avoid their request being refused on a practical refusal reason.

The Facts: 12 November 2021 email and associated correspondence between the parties

187. On 12 November 2021[59] the respondent acknowledged that A1 was *making a request under APP 12.1 of the Privacy Act 1988 (Cth) for access to all personal information held by the Department of Education and Training [sic] in relation to* [A1, A2] *and their child,* [A3].

188. The respondent further advised that it was refusing A1's request for the personal information of A2 and A3 as it was not satisfied that A1 had authorisation to make the request on their behalf. The respondent advised that A2 could apply for her own personal information or A1 could provide documentation which demonstrated he had authorisation to make a request on A2's behalf.

189. In relation to the request for the personal information of A3, the respondent stated that "*we will accept you have authorisation to request [A3's] personal information if you provide a certified copy of [A3's] birth certificate; and A2 provides a statutory declaration to the Department [sic] authorising [A1] to receive the personal information of [A3]*."

190. In relation to the personal information of A1 the respondent advised "*that the Department (sic) has determined that your privacy request is invalid under APP 12.2 of the Privacy Act 1998 (Cth). APP 12.2 allows the Department to process your privacy request under the same conditions as the FOI Act. In our view, it is not clear what information you are seeking*. The respondent sought further clarificatory information from A1 about the scope of the request and stated that *"once we receive clarification from you, your request will be handled by the FOI Team, as the team responsible for handling information requests."*[Commissioner emphasis]

191. By email on 12 November 2021 the complainants sought clarification as to:
- why they were being asked to provide a birth certificate of A3, when a certified copy had already been provided in conjunction with their request for access to their personal information on 16 October 2021; (see [51] of this Determination) and
- why A2 was required to provide a statutory declaration, when the correspondence from the complainants to the Privacy Officer on 16 October 2021 with the attached birth certificate was from both of A1 and A2 and "*the preceding email request on that date was signed by A1 'for and on behalf of [A2] and [A3]*".

192. The complainants did not receive a response to their emailed questions and on 15 November 2021, they wrote directly to the respondent (the Secretary) reiterating both the points made in their 12 November email and querying why their privacy request was deemed to be invalid on the basis that

[59] R.06 Op Cit

it was not clear what personal information they were requesting when they had made it clear in their request dated 16 October 2021.

193. By letter dated 22 November 2021[60] to the complainants the respondent confirmed that: "*The Department [sic] has not refused your request to access your own personal information and that of members of your family. On 12 November the Department acknowledged your request for personal information under Australian Privacy Principle (APP) 12 and asked that you rescope your request. This was because in its current form the Department cannot reply as to do so would substantially or (sic) unreasonably divert resources to accommodate the request. …You were also informed… that you must provide relevant documentation to show that you have authority to make this request on behalf of your spouse and child."* [Commissioner emphasis].

194. By email dated 24 November 2021[61], A2 confirmed that the request was made jointly by A1 and A2 and their child, drew attention to already provided certified identity documents for the complainants and reiterated the scope of the request writing: *In terms of the scope of our privacy request I can confirm that it applies to absolutely all personal information held by the regulatory authority, QARD - and any other areas of the Department of Education that are covered by the Commonwealth Privacy Act and principles - since 1 July 2020, save for any detailed as being not required in our formal privacy request to you of 16 October 2021.*

195. By email dated 15 December 2021[62] the respondent acknowledged the request was made under APP 12, stated that APP 12 *"allows the Department to process requests under the same conditions as the FOI Act"*, and again sought clarification of the scope of the request on the basis that "*it lacked specificity to allow an FOI officer to identify all relevant documents in the possession of the Department".* The respondent sought the same clarificatory information it had sought on 12 November 2021, namely:
    - the areas of the Department and names of officers the complainants had corresponded with
    - what documents were being sought that the complainants *"believe hold your personal affairs information"*
    - the approximate date range for the documents
    - any particular topic/subjects about which the complainants had corresponded with the Department.

196. By email dated 22 December 2021[63] the complainants provided the information sought, at the same time pointing out that much of it had already been provided or that the respondent would already be aware of it.

197. On 4 January 2022 the respondent issued the request consultation notice discussed under Claim 2.

Claim 3: Discussion and Findings

198. I note that the 12 November 2021 email from the respondent reflects the broadly worded scope of the complainants' formal email dated 16 October 2021 at [50] for "all personal information held by the Department of Education and Training" - without incorporating the complainants' subsequent clarification on 18 October 2021 at [53] that limited the request to information held by the Regulatory Authority.

[60] R.08 Op Cit
[61] C.07 Op Cit
[62] R.07 Op Cit
[63] C.06 Op Cit

199. This distinction should have been made. As already discussed, the Commonwealth legislation – whether it be the FOI Act or the Privacy Act – only applies to the Regulatory Authority - ie the Secretary and, by delegation, QARD.

Were the grounds for "refusal" in the 12 November 2021 email tenuous as claimed by the complainants

200. The wording of the email is ambiguous and could reasonably be considered by the complainants to be a refusal of their privacy request.

201. While I consider that the email should have been worded differently so as to avoid the confusion that ensued, in my view it constitutes a refusal to process the request in its current form and that, subject to the provision of identification/authorisation documentation from the applicants and further clarification in regard to the scope of the request, processing would continue. In my view this is clearly evident in the content and framing of the email at [1898190].

202. The term used by the respondent of an "invalid" request at [190] is not a term used in the Privacy Act. As explained in the APP Guidelines[64]: *APP 12 does not stipulate formal requirements for making a request, or require that a request be made in writing, or require the individual to state that it is an APP 12 request…* and *An entity cannot require an individual to follow a particular procedure, use a designated form or explain the reason for making the request*.

203. This differs from the formal requirements relating to requests for access to documents under the FOI Act (Cth) which at s 15 stipulates requirements for a FOI application that must be met for the request to be a valid request. One such requirement is that the request "*must provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency …to identify it*".[65]

204. As discussed elsewhere in this Determination, an agency is not required to give access under APP 12.2(b)(i) to the extent that the agency is required or authorised to refuse to give the individual access to the personal information by or under the FOI Act (Cth).

205. Section 24 of the FOI Act (Cth) authorises an agency to refuse access to a document if it is satisfied that a 'practical refusal reason' exists in relation to the request. A practical refusal reason exists if either or both of the following applies:
    i. the work involved in processing the request would substantially and unreasonably divert the resources of the agency from its other operations; (s 24AA (1)(a)(i)) or
    ii. the request does not satisfy the requirement in s 15(2)(b) (identification of documents) (s 24AA(1)(b))

206. I consider the respondent has relied on the grounds set out at [205(ii)]. It is my view that the reliance on these grounds – that is the identification of the information sought – is lawful and not "tenuous"- when processing a request under the FOI Act (Cth). I note also that it is one of the grounds authorised by the FOI Act (Cth) on which an agency may refuse a privacy request under APP 12.2(b)(i).

207. However, in my view the request for clarification of the information being sought was wholly unnecessary in the circumstances of the request made by the complainants under APP 12 for access to their personal information.

[64] APP Guidelines op. cit. at [12.18] and [12.21]
[65](Cth) *Freedom of Information Act 1982* s 15(2)(b)

208. As set out at [50] and [53] the complainants, in my view, clearly identified the information they were seeking access to under APP 12 – that is their personal information held by the respondent. Whether the respondent was processing the complainants request under the FOI Act (Cth) or the Privacy Act, the definition of personal information is the same namely:
information or 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[66]

209. By email dated 24 November 2022 set out at [194] the complainants repeated their request and included a date range for the information sought.

210. In submissions to the former Commissioner the complainants have stated: [67]
There was no onus on the complainants to clarify their scope to the extent demanded, when it was already clarified as being for all personal information… and … it goes without saying that given the definition of personal information, that the complainants would not likely be aware of all the personal information that the Regulatory Authority had created or holds and therefore could not possibly identify or clarify it all as was demanded of them as a precondition to processing their request.

211. I agree with the point made by the complainants.

Identification/authorisation documentation sought that had already been provided by the complainants or was unnecessary

212. The emailed privacy request dated 16 October 2021 was signed by A1 *"for and on behalf of [A2] and A3."* In a subsequent separate email on the same day, A2 forwarded the complainants' proof of identification documentation including a certified copy of the birth certificate of their child, A3.

213. In the email dated 12 November 2021 the respondent sought a certified copy of A3's birth certificate. This is clearly a request for identification documentation of the child that had already been provided. This has been acknowledged by the respondent. It was poor administrative practice.

214. In both submissions to the former Commissioner and correspondence to the respondent the complainants have consistently made the point that the respondent "*would have had full knowledge that we were communicating as a family".*

215. In submissions in response to the Preliminary View Draft Decision, the complainants identified that *in the 6 months up until 22 November 2021 the respondent corresponded with the complainants by sending 39 emails, including letters of correspondence often comprising sensitive information, to A1's email address… carbon copied to A2's email address, addressing A1 and A2 collectively. An equal number of emails were also sent from the complainants to the respondent on the same basis.*[68]

216. On the basis of extensive documentation that had been provided by both the complainants and the respondent over the past several months in relation to both FOI and Privacy requests from the complainants, I agree that it is apparent that the complainants have been operating as a family unit in their interactions with the respondent and the respondent has communicated with them as such.

217. Under both the Privacy Act and the FOI Act (Cth) agencies are required to satisfy themselves about both the identity of an applicant who is seeking his or her personal information and, in this case, that an applicant is properly authorised to seek access to the personal information of other people.

---

[66] Privacy Act 1988 s 6(i) and Freedom of Information Act 1982 s 4
[67] C.05 Op Cit
[68] C.05 Op Cit

218. The APP Guidelines[69] relevantly state
An APP entity must be satisfied that a request for personal information under APP 12 is made by the individual concerned, or by another person who is authorised to make a request on their behalf [my emphasis] *…. If an entity gives access to the personal information of another person, this could constitute a disclosure, which may not comply with APP 6.*
The steps appropriate to verify an individual's identity will depend on the circumstances. In particular, whether the individual is already known to or readily identifiable by the APP entity…The minimum amount of personal information needed to establish an individual's identity should be sought.

219. Despite the respondent's long history of interactions with the complainants operating as a family unit, the respondent has nevertheless stated, in its submission at [186(iii)], that it considered it needed to ensure that A2 had authorised access by A1 to her personal information and that of the child. The respondent did not identify its reasons as to why it considered this necessary.

220. While in my view the process seems unnecessarily cumbersome in the circumstances, the respondent was acting both within its rights and in accordance with the law, in seeking assurance that the proper authorisations were in place before considering the release of personal information and it has not breached any APP in doing so.

Contrary reasons provided

221. I have noted the difference in the wording of the reasons given to the complainants for seeking clarification of their privacy request between the 12 November 2021 email at [190] and the 22 November 2021 letter from the respondent at [193].

222. The respondent's email of 12 November states "*the request is invalid under APP 12.2 of the Privacy Act... In our view, it is not clear what information you are seeking".* The letter from the Regulatory Authority on the other hand claims the request to the complainants to rescope the request was "*because, in its current form the Department cannot reply as to do so would substantially or (sic) unreasonably divert resources to accommodate the request".*

223. The complainants consider that this is evidence that the respondent had clearly pre-determined the outcome of its decision in relation to their request by 22 October 2021. In submissions to the former Commissioner, in relation to the 22 November letter, the complainants state: *"absolutely no rescoping request had been made or suggestion that it would substantially and unreasonably divert resources* [in the 12 November letter]. *It seems the [*respondent*] already knew the planned obstacles to be put in [*our*] way in frustrating [*our*] privacy request and the contrived reason some months before the refusal on those grounds was actually made".*

224. The former Commissioner sought a response from the respondent in relation to the view expressed by the complainants at [223]. The respondent made the submission set out at [186(iv)] and stated further that: *There were no planned obstacles being put in place to prevent* [the complainants] *request but rather the department (sic) was seeking to assist* [the complainants] to make their application in an appropriate manner …to allow it to be considered in a manner that would *not unreasonably divert department resources".*[70]

225. I make the following observations:
   i. The differences in wording in the correspondence have contributed to the confusion and lack of trust for the complainants and should not have occurred.
   ii. I do not agree with the complainants' statement that "no rescoping request was made". While the exact terminology was not used, the 12 November 2021 request for clarification of

[69] APP Guidelines op. cit. {12.15] and [12.17]
[70] R.09 Op Cit

the information being sought would commonly be referred to as a rescoping request.

iii. As discussed at [205], both the "identification of documents" and the "substantial and unreasonable diversion of resources" are reasons for a "practical refusal" of a request under s 24AA of the FOI Act (Cth). The application of either one of those reasons to the request would have had the same result.

226. Having regard to the above matters, I am not satisfied there is sufficient evidence to satisfy me on the balance of probabilities, that the correspondence dated 22 October 2021 was proof of a predetermined outcome of the privacy request.

Were the clarification/re-scoping requests deliberately obstructive

227. The complainants allege that the clarification/rescoping requests from the respondent were "*part of an ongoing attempt to hinder and frustrate the complainants"* in their attempts to access their personal information. The respondent submits that the requests were attempts to assist the complainants to frame their request so as to avoid it being refused under the practical refusal provisions of the FOI Act (Cth).

228. I am not satisfied on the balance of probabilities that these requests were designed to be deliberately obstructive. The two requests for clarification of the information being sought by the complainants in the correspondence dated 12 November 2021 and 15 December 2021 may be considered to be consistent with the expectations under the FOI Act (Cth) for agencies to assist applicants to clarify their FOI requests. As has been determined, the complainants' request for access to their personal information under APP 12 was being processed, albeit incorrectly, as a FOI request. The officers of the respondent appear to have been following processes applicable to their processing of FOI requests.

229. However, it must be asked whether these processes were necessary, or even appropriate in the circumstances. In my view they were not.

230. As has already been discussed at [207] to [211] in the 16 October 2021 email, and clarified on 18 October 2021, and subsequently, the complainants made a clear request under the Privacy Act – specifically APP 12 for access to their personal information held by the Regulatory Authority/QARD – that is information as defined at s 6(1) of the Privacy Act.

231. The Commonwealth legislation – be it the Privacy Act or the FOI Act – applies only to the Regulatory Authority/QARD. The clarificatory questions set out in the 12 November 2021 email, and repeated in the 15 December 2021 email, sought information from the complainants in relation to areas and officers of the Department of Education and Training, that were outside the jurisdiction of the Commonwealth legislation. This issue was discussed more broadly under Claim 2 at [156 to 159]

232. The complainants had a long history of corresponding with the Department which was well known by the FOI Unit who were clearly involved in processing the complainants' privacy request. By its own admission the FOI Unit had located "hundreds of pages" in relation to a FOI request made by the complainants as has already been discussed under Claim 2.

233. Rather than embark on the process of seeking unnecessary information through the 12 November and 15 December requests, I consider that, in the circumstances of this privacy request, a more appropriate and productive way to start would have been to commence consideration of these documents in hand.

Further matters raised by the complainants

234. In submissions[71] in response to the Preliminary View Draft Decision, the complainants raised two further complaints. These complaints have not been put directly to the respondent by the complainant before raising them with me as is required under the Privacy Act.

235. However, I have considered that one of the complaints was directly related to the complaint under consideration in this Determination in so far as it raises issues in relation to the respondent's handling of correspondence discussed under Claim 3, and the respondent would be familiar with the matter. I therefore make the following observations in relation to it.

236. The complainants have alleged "a further breach of APP 1.2" on the basis that their complaints to the respondent about how their privacy requests were being handled "have for the most part not been responded to at all, or in any discernible manner to date."

237. The complainants wrote:
The complainants have complained to the Department of Education (sic) numerous times in writing about how their privacy requests were being mishandled, and / or requesting an explanation as to the obstructionary [sic] requests for information already provided or not legally required. For example, in [Commissioner numbering and notes]:

i. *Email to Privacy Officer, carbon copied to the Secretary / Regulatory Authority Nov 12, 2021, 2:41 PM* [discussed at [191] of this Determination]
ii. *Email to Secretary on Oct 29, 2021, 11:16 AM* [the letter sought confirmation that the privacy request under APP 12 and a second privacy request made under APP 13 were being processed]
iii. *Letter to Secretary on Nov 15, 2021, 11:07 AM* [discussed at [192] of this Determination]
iv. *Email to* [senior officer] *Wed, Dec 22, 2021, 7:02 AM* [this email reiterated the questions asked in the email at point (i)

238. I note that points (i) to (iv) are "examples" with the implication that there are other instances to be raised. In relation to the examples given, I note that by letter dated 22 November 2021 (and discussed at [193]) the respondent did reply to the correspondence at points (i) to (iii) stating *"I refer to your correspondence to the Department of Education and Training (the Department) dated 22 and 29 October, and 15 November 2021…"* There is no apparent direct response to the email at point (iv) although as noted, it reiterated the questions in (i).

239. I note that in the complainants' view the response they received did not adequately address the issues they raised. I do not consider that to be sufficient grounds to find a breach of APP 1.2. Neither do I find that the absence of a response to correspondence in every instance would necessarily constitute a breach of APP 1.2. In my view if there had been no correspondence at all in relation to the complainants' request for access to their personal information a breach of APP 1.2 would be considered. However, as is evident throughout this Determination, there was significant correspondence.

240. The second complaint relates to APP 5 – notification of personal information and APP 11 – security of personal information.

241. APP 5.1 provides that if an APP entity collects personal information about an individual, the entity must take such steps (if any) as are reasonable in the circumstances to notify the individual about certain matters set out in APP 5.2.

242. APP 11 provides that if an APP entity holds personal information, the entity must take such steps as are reasonable in the circumstances to protect the information:
(a) from misuse, interference and loss; and

[71] C.05 Op Cit

(b) from unauthorised access, modification or disclosure

243. In their submission, the complainants point out the notification requirements of APP 5 and state that "to this date" the respondent has not provided any such notification. The complainants further submit that they *"remain concerned about how their personal information has been stored and whether their certified copies of their child's birth certificate and their identity documents have been destroyed etc"*. The issue raised relates to APP 11.

244. These complaints do not fall within the ambit of the current APP 12 considerations. If the complainants wish to pursue their complaint the must do so by first raising it with the respondent and providing the respondent with an opportunity to reply.

Concluding Remarks

245. In submissions and correspondence the complainants have variously alleged deliberate actions by, and/or complicity amongst "Department" officers to prevent the complainants from accessing their personal information. In support of their contention that the respondent was not genuine in processing their request for access to their personal information they have pointed out a number of factors they consider to be relevant including:

- the considerable legal and other resources available to the respondent,
- the seniority and qualifications of staff with whom they have engaged,
- the many times they advised the respondent that the Privacy Act applied in relation to their request,
- that the respondent appeared to demonstrate "in depth knowledge" of relevant case law associated with the Privacy Act in relation to a second privacy request made by the complainants under APP 13 for the correction of personal information.

246. The complainants contend that these factors suggest that the respondent should have been able to correctly process their request in accordance with the Privacy Act and APP 12 and that inferences can be drawn that the respondent was being deliberately obstructive in its actions in relation to their privacy request under APP12.

247. I can understand why the complainants have expressed the above views. However, I cannot be reasonably satisfied, on the balance of probabilities, that there has been a deliberate attempt to obstruct the complainants' access to their personal information in relation to this complaint. In addition, the complainants' contentions involve serious allegations and I must have regard to the Briginshaw[72] test (in the extract below) in applying the relevant standard of proof:

"reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer.... In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.'[73]

248. For the reasons discussed throughout this Determination, in my view there has been insufficient understanding of the application of the provisions of the Australian Privacy Principles (APPs) displayed by officers of the respondent in relation to this request, an apparent lack of knowledge of, and/or any attention to, the Australian Privacy Principle Guidelines in relation to APP 12 that would have assisted officers to process the request correctly, and evidence of poor administrative practices.

[72] Briginshaw v Briginshaw (1936) 60 CLR 335

[73] Ibid Sir Owen Dixon J at 362

249. In my view if active consideration had been given to the development of a clearly stated APP Privacy Policy and associated procedures under APP 1 some of the grievances that have arisen in this case might well have been avoided. Relevant officers would have been properly aware of the processes and the detailed requirements of the Privacy Act and Australian Privacy Principles in handling the complainants' access request. The incorrect handling of the complainants' Privacy request in accordance with the processes required under the FOI Act (Cth) and the ensuing complexities of this Determination would have been avoided.

250. This case has highlighted the challenges for a State government agency in having to apply the Commonwealth legislation of the Privacy Act to limited aspects of their operations. Whilst those challenges may sometimes cause difficulties, the Commonwealth legislation provides a consistent framework in which the same privacy principles and legislation apply to the different jurisdictions when operating in the context of the Education and Care Services National Laws.

251. The Privacy Act provides individuals with the right to access their personal information held by an APP entity, and the expectation is that the entity will be able to assist such individuals to do so to the extent allowable under the law.

Claim 4 Compensation

Findings of Breach

252. I have found the respondent has engaged in conduct constituting an interference with the privacy of the complainants by:

1. failing to implement practices procedures and systems relating to the respondent's functions or activities that ensured the respondent complied with the Australian Privacy Principle 12 and enabled the respondent to deal effectively with enquiries about access to personal information in breach of APP 1.2(a)&(b);
2. failing to have an APP Privacy Policy about the management of personal information that included information set out in APP 1.4, in breach of APP 1.3;
3. failing to provide a written notice that sets out the mechanism available to the complainants to complain about the refusal, in breach of APP 12.9(b);
4. refusing to give the complainants access to the requested information on grounds that were not authorised under the FOI Act (Cth) and, as a consequence, did not constitute an exemption under APP 12.2(b)(i) in breach of APP 12.1;
5. failing to consider whether there were (and if so take) any steps that may have been reasonable in the circumstances to give access in a way that meets the needs of the entity and the individuals in breach of APP 12.5(a).

The Legislation

253. Section 52 of the *Privacy Act 1988 (Cth)* provides, in so far as is relevant;

(1) *After investigating a complaint, the Commissioner may:*

(b) find the complaint substantiated and make a determination that includes one or more of the following:

(iii) a declaration that the complainant is entitled to a specified amount by way of compensation for any loss or damage suffered by reason of the act or practice the subject of the complaint;

(1AB) The loss or damage referred to in paragraph (1)(b) or subsection (1A) includes:

(a) injury to the feelings of the complainant or individual; and

(b) humiliation suffered by the complainant or individual.

(2) The Commissioner shall, in a determination, state any findings of fact upon which the determination is based.

(3) In a determination under paragraph (1)(a) or (b) (other than a determination made on a representative complaint), the Commissioner may include a declaration that the complainant is entitled to a specified amount to reimburse the complainant for expenses reasonably incurred by the complainant in connection with the making of the complaint and the investigation of the complaint.

Claims

254. The complainant has claimed damages for losses under three headings;

i. Non-economic loss

ii. Economic loss, including but not limited to reasonable expenses incurred in making complaints, and

Iii. Aggravated damages

255. The claims are made in respect of the two complainants and their child and total $116,529.00. More details on the calculation by the applicants in respect of each head of compensation claimed are set out below.

256. The parties were provided with the opportunity to make submissions on the specific issue of compensation[74].

Complainants' Submissions

257. The first complainant has claimed for non-economic loss alleging that the breaches have, at least in part, contributed to him suffering a general anxiety disorder. The claims have been made in respect of four separate specified periods of his dealings with the respondent. He has also claimed he has at least in some of the periods suffered from flare-ups of a pre-existing auto-immune condition, namely psoriasis.

258. The second complainant alleges that the breaches have caused her to suffer injuries to her feelings as per some ongoing moderate stress and anxiety. She claims the breaches have directly caused her to suffer migraines, sleeplessness and anxiety.

259. The complainants have also claimed compensation for their child on the basis that he has suffered from loss of enjoyment of life although, except in respect of a family holiday which it is claimed was ruined by the breaches, no specification of the loss is made. It is also noted that the child was not a party to the complaint.

260. In quantifying the amount of non-economic loss, the complainants have relied upon the decision of the Office of the Australian Information Commissioner (**OAIC)** in **'***WP' and Secretary of the Department of Home Affairs* (**WP***)*[75]**.** In that matter, which was a class action, the OAIC, having found breaches of the Privacy Act, set out in a table, levels of compensation in respect of non-economic loss which then could be applied in assessing compensation in respect of individual members of the class.

261. In relation to economic loss the complainants have sought compensation for the time and expenses of having to deal with the matter, make FOI requests and engage in a more onerous process in an

[74] C08 email 30012022 Applicant's submissions re compensation and R10 22122022 respondeent's submissions re compensation.
[75] [2021] AICmr (11 January 2021)

attempt to access their personal information from the respondent. They have also claimed some medical expenses.

262. The complainants are seeking aggravated damages on the basis the respondent has demonstrated a complete disregard for the complainants' privacy rights and their privacy obligations and an indifference to the effect that this conduct had upon the complainants.

263. Both complainants provided statutory declarations in support of their claims although no direct medical evidence was provided[76].

Respondent's submissions.

264. The respondent has submitted that no compensation is payable because

i. The preconditions for awarding compensation for non-economic loss are not satisfied because there is insufficient particularisation and evidence of the requisite causal link between the relevant act or practice constituting an unlawful interference of privacy and the claimed stress and anxiety.

ii. There is insufficient particularisation and evidence of any detrimental change in position such that money is properly payable by way of compensation.

iii. Comparable determinations made in the context of access refusal breaches support the submission that it is appropriate for no damages to be awarded particularly where measures already taken by the respondent mean that the Commissioner may be satisfied that breaches of this nature will not occur again.

iv. Economic loss is not payable because no money loss has actually been incurred by the complainants in connection with the making of the complaint and the investigation of the complaint nor is there sufficient evidence of compensable diversion of income earning time.

v. Aggravated damages are not payable as there is no factual basis upon which the Commissioner could be satisfied that 'an element of aggravation' has been involved in the respondent's conduct.

265. In support of its submission at [264] iii. the respondent claims it has granted access to all the personal information the subject of the relevant request and the respondent has advanced and is now finalising its APP policy and all FOI and privacy staff are aware of the different legislative requirements for processing requests for information. The complainants deny that all documents have been provided.

Principles for assessing compensation

266. Under s52(1)(b)(iii) of the Privacy Act, I am empowered to award compensation where a complainant has established that they, individually, have suffered loss or damage by reason of the respondent's interference with their privacy such that they are entitled to monetary compensation.

267. This is apparent from the wording of s52(1)(b)(iii) itself, where a declaration that a complainant is entitled to compensation must be in respect of loss or damage suffered by reason of the act or practice the subject of the complaint.

268. The principles for awarding compensation under the Privacy Act were summarised by the Administrative Appeals Tribunal (**AAT**) in *Rummery and Federal Privacy Commissioner and Department of Justice and Community Safety* (**Rummery**)[77]:

[76] op cit 256
[77] [2004] AATA 1221

- where a complaint is substantiated and loss or damage is suffered, the legislation contemplates some form of redress in the ordinary course;
- awards should be restrained but not minimal;
- in measuring compensation the principles of damages applied in tort law will assist although the ultimate guide is the words of the statute;
- in an appropriate case, aggravated damages may be awarded and,
- compensation should be assessed having regard to the complainant's reaction and not to the perceived reaction of the majority of the community or of a reasonable person in similar circumstances.

269. I am also empowered under s52(3) to award a specified amount to cover reasonable expenses reasonably incurred by the complainants in the making and investigation of a complaint.

Consideration of claims for Non-Economic loss

270. Complainant A1 has claimed a total of $48,002 for non-economic loss. This consists of an amount of $20,000 for the period between 26 May 2021 and 15 October 2021, $4,000 for the period between 1 October 2021 and onwards, $12,001 for the period 16 October 2021 to 31 December 2021 and $12,001 for the period between January 2022 onwards.

271. Complainant A2 has claimed a total of $32,000 consisting of amounts of $8,000, $4,000, $12,000 and $8,000 in respect of each of the periods specified above,

272. The complainants have claimed an amount of $12,000 for their child in respect of the entire period from May 2021 onwards.

273. The claims are based upon breaches of various provisions of the Act in respect of each period. The first period bases the claim on a breach of APP1, the second period on a breach of APP1.3, the third period on a breach of APP1 and the final period on a breach of APP12 and APP1.

274. In determining whether to award compensation I must first be satisfied that the loss or damage has been suffered by reason of the act or practice the subject of the complaint. I am only able to award compensation that is limited to damage as a result of the act or practice.

275. In their submission the complainants acknowledge that the breaches of the Privacy Act only contributed in part to the conditions they are allegedly suffering from. Over the period of time that the complainants were dealing with the respondent they had numerous other interactions in different matters with the respondent. Some of these are referred to in [18] of this Determination.

276. In their submissions the complainants cited general remarks from the High Court of Australia in the matter of *I&L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*[78] to the effect that to pursue the single cause of an event is to pursue an illusion. Whilst those remarks were made in the context of considering a specific provision for compensation under the Trade Practices Act (as it then was) they are supportive of a general proposition that damage to a person can have multiple causes.

277. There is no doubt that the complainants have been wrongly required to pursue other avenues to obtain their personal information notwithstanding them advising the respondent of the correct legislation to apply. It is clear this would have caused some frustration to the complainants, particularly A1, who took the lead in dealings with the respondent on behalf of his family. Although no direct medical evidence has been supplied there is no reason to doubt the statements made in the applicants' statutory declarations notwithstanding that they could be said to overstate the situation they confronted.

[78] (2002) 210 CLTR 109

278. I consider I am entitled to determine on a balance of probabilities that the breaches by the respondent of the Privacy Act were in part at least the cause of the damages suffered by the applicants.

Consideration of claim for economic loss

279. The complainants are seeking compensation for the time and expenses of having to deal with the matter. The complainants submit that reasonable expenses should have their ordinary business / taxation meaning and include home office costs and time incurred as a direct result of the breaches of the APPs and interference with their privacy and having to make complaints about them.

280. I do not consider it appropriate to adopt a so-called business/taxation meaning. In that context expenses are offset against other matters.

281. The words in the Privacy Act are clear. I am entitled to award compensation for "*a specified amount to reimburse the complainant for expenses reasonably incurred in connection with the making of the complaint and the investigation of the complaint*"

282. I do not consider the Privacy Act allows a complainant to be compensated for time spent in dealing with their complaint. That does not come within the concept of loss or damages as required under s52(1)(b)(iii) of the Act nor is it a reimbursement of reasonable expenses as required under s52(3).

283. In respect of economic loss, the complainants have also claimed $100 for each of them for medical expenses including extra medication. As they state this is a nominal amount. I do not consider that the complainants are entitled to reimbursement of these medical expenses as economic loss as they cannot be categorised as being expenses reasonably incurred *"in connection with the making of a complaint".* These expenses are properly to be considered as part of the loss or damage under the consideration of non-economic loss.

Consideration of claim for aggravated damages

284. The complainants have claimed $18,000 for aggravated damages being $6,000 for each of them and $6,000 for their child.

285. The complainants have cited the case of *HW and Freelancer International Pty Ltd*[79] in support of their claim. In that matter it was stated that "*Aggravated damages are given to compensate a person where the harm suffered was aggravated by the manner in which the act was done. In this, they are different from exemplary damages, which are intended to punish a wrongdoer and deliver a measure of moral retribution or deterrence*. The decision went on to state

> *" Aggravated damages may be awarded where:*
>
> *(i) the respondent behaved 'high-handedly, maliciously, insultingly or oppressively*
>
> *(ii) the manner in which a defendant conducts his or her case exacerbates the hurt and injury suffered by the plaintiff"*

286. I have found that the respondents were not being deliberatively obstructive in their dealings with the applicants ([149] and [228]). Nor do I consider that the actions of the respondent, although misguided, can be described as behaving in a manner that is high-handed, malicious, insulting or oppressive.

287. I do not consider this is a matter that warrants an award of aggravated damages.

Quantification of Damage

[79] [2015] AICmr 86

288. In quantifying the damage suffered as a result of the breaches by the respondent the applicants have claimed damages in respect of different breaches at different points of time. Whilst I have found multiple breaches the initial issue is whether damages can be awarded in respect of each of those breaches or whether the damage or loss must be assessed against the totality of the respondent's actions.

289. The Privacy Act provides that I may determine that the applicants are "*entitled to a specified amount by way of compensation for any loss or damage suffered by reason of the act or practice the subject of the complaint".* It is the act or practice that entitles a complainant to compensation, not each breach that the act or practice complained of may result in.

290. Further the compensation is not a penalty to be applied in respect of each breach. It is compensation for the damage suffered by the individual.

291. I consider that the respondent's actions in dealing with the applicants request for their personal information under the Privacy Act comprise a single course of conduct occurring over all the periods specified by the complainants. As such any compensation for damages must be assessed as a single amount albeit taking into account the period over which the damage has been suffered.

292. The complainants have relied upon the table set out in **WP**. In that case it was determined that an amount between 12,001 and $20,000 was appropriate for an individual who developed or exacerbated a mental health condition resulting in a referral to a mental health specialist for treatment. Prima face complainant A1 would fall within this category. However the nature of the breach in **WP** must be considered.

293. In that matter the Commonwealth Department of Home Affairs published on its website personal information about individuals in immigration detention. The information published was the full names, gender, citizenship, date of birth, period of immigration detention, location, boat arrival details and reasons why the individual had been considered an unlawful non-citizen. Whilst it is the impact of the breach upon the individual which has to be considered clearly the nature of the information released in **WP** would have had a greater impact upon the individuals particularly given their already fragile mental states.

294. If **WP** was to be applied, I consider A1 would be entitled to damages at the lower end of the scale. However, I think a better guide is to be found in the matter of *WZ and CEO of Services Australia* (**WZ**)[80] and the cases cited therein. In **WZ** the complainant experienced pain and suffering arising from the disclosure. The complainant had pre-existing mental health conditions and her symptoms re-emerged as a result of the disclosure of her address. In determining to award compensation of $10,000 the OAIC considered that the non-economic damage, including the reactivation of the complainant's psychological symptoms and her distress, to be of a nature and degree comparable to that of the complainant in *'SD' and 'SE' and Northside Clinic* (**SD&SE**)[81].

295. In that matter a psychologist diagnosed the first complainant with adjustment disorder with anxiety and depression in relation to the disclosure of his personal information and referred to this as a 'debilitating reaction to a stressful event or situation.' The first complainant 'experienced depressive thoughts around suicide ideation, insecure attachments with others, abandonment, loss of human connection, and a fear of failure both socially and vocationally' resulting in the first complainant 'having great difficulty feeling safe and trusting that people will care, nurture and respect him.' The psychologist noted the first complainant had contemplated suicide as a result of 'his current circumstances directly relating to the privacy breach'.

296. In both these matters the breaches involved disclosure of personal information to the public whilst this matter does not. However, I consider that to be immaterial as it is the damage that the individual suffers and not the nature of the breach that has to be considered. This is clear from the

[80] [2021] AICmr 12
[81] [2020] AICmr 21

principle set out in **Rummery** that compensation should be assessed having regard to the complainant's reaction.

297. I consider the damage to A1 to be less than that suffered by the first complainant in **SD and SE** as described above at [295]. I consider an appropriate award of damages to be $6,000. However, this figure needs to be reduced to take account of the fact that the privacy breach was only partly responsible for the damage suffered by A1. Whilst it is not possible to precisely apportion how much each of the complainants' dealings with the respondent contributed to his general anxiety disorder and other conditions, some account of there being other contributors must be made as it is only the privacy breaches which can be compensated. I consider an amount of $4,000 should be paid to A1 for the breaches I have found. This figure includes the medical expenses claimed as economic loss.

298. In respect of A2 it is clear that she has suffered much lesser damage than A1. Taking into account the factors mentioned above I consider she is entitled to compensation for the amount of $1,000.

299. There is simply no evidence to support any award of compensation for the child of the complainants. Therefore I do not have to consider the implications of him not being one of the complainants.

Alan Grinsell-Jones

National Education and Care Services Privacy Commissioner

Review rights

A party may apply under s 96 of the Privacy Act (Cth), as modified by the *Education and Care Services National Regulations 2011* r 201(e) and r 202(g) to have a decision under s 52(1) or (1A) to make a determination reviewed by the relevant Tribunal. In the case of this NECS Privacy Commissioner determination, the relevant Tribunal is the Victorian Civil and Administrative Tribunal (VCAT). VCAT provides independent merits review of administrative decisions and has the power to set aside, vary, or affirm a privacy determination. 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.

A party may also have rights to seek a judicial or other review of this decision under the legislation applying in the relevant State or Territory, in addition to the rights of the parties under s96 of the *Privacy Act 1988* to appeal to the Supreme Court of the relevant jurisdiction on a question of law.

Charter of Human Rights and Responsibilities

In making this Determination I have also considered s13 of the Charter of Human Rights and Responsibilities (Vic) 2006.

ATTACHMENT A: RELEVANT LAW

Privacy Act 1988 (Cth)

Section 52 – Determination of Commissioner

(1) After investigating a complaint, the Commissioner may:
(a) make a determination dismissing the complaint; or
(b) find the complaint substantiated and make a determination that includes one or more of the following:
(i) a declaration:
(A) where the principal executive of an agency is the respondent—that the agency has engaged in conduct constituting an interference with the privacy of an individual and must not repeat or continue such conduct; or

(B) in any other case—that the respondent has engaged in conduct constituting an interference with the privacy of an individual and must not repeat or continue such conduct;

(ia) a declaration that the respondent must take specified steps within a specified period to ensure that such conduct is not repeated or continued;
(ii) a declaration that the respondent must perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant;
(iii) a declaration that the complainant is entitled to a specified amount by way of compensation for any loss or damage suffered by reason of the act or practice the subject of the complaint;
(iv) a declaration that it would be inappropriate for any further action to be taken in the matter.

Section 6 Interpretation - APP Entity

An agency or organisation

Section 6 Interpretation – Personal Information

Means information or 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.

Section 13 Interference with privacy

APP entities
(1) An act or practice of an APP entity is an ***interference with the privacy of an individual*** if:
(a) the act or practice breaches an Australian Privacy Principle in relation to personal information about the individual; or
(b) the act or practice breaches a registered APP code that binds the entity in relation to personal information about the individual.

Section 15 APP entities must comply with Australian Privacy Principles

An APP entity must not do an act, or engage in a practice, that breaches an Australian Privacy Principle.

Australian Privacy Principles

APP 1 Australian Privacy Principle 1 — open and transparent management of personal information

Compliance with the Australian Privacy Principles etc.

1.2 An APP entity must take such steps as are reasonable in the circumstances to implement practices, procedures and systems relating to the entity's functions or activities that:

(a) will ensure that the entity complies with the Australian Privacy Principles and a registered APP code (if any) that binds the entity; and

(b) will enable the entity to deal with inquiries or complaints from individuals about the entity's compliance with the Australian Privacy Principles or such a code

APP privacy policy

1.3 An APP entity must have a clearly expressed and up to date policy (the ***APP privacy policy***) about the management of personal information by the entity.

1.4 Without limiting subclause 1.3, the APP privacy policy of the APP entity must contain the following information:

(a) the kinds of personal information that the entity collects and holds

(b) how the entity collects and holds personal information

(c) the purposes for which the entity collects, holds, uses and discloses personal information

(d) how an individual may access personal information about the individual that is held by the entity and seek the correction of such information

(e) how an individual may complain about a breach of the Australian Privacy Principles, or a registered APP code (if any) that binds the entity, and how the entity will deal with such a complaint

(f) whether the entity is likely to disclose personal information to overseas recipients

(g) if the entity is likely to disclose personal information to overseas recipients—the countries in which such recipients are likely to be located if it is practicable to specify those countries in the policy

Australian Privacy Principle 12 – access to personal information

Access

12.1 If an APP entity holds personal information about an individual, the entity must, on request by the individual, give the individual access to the information.

Exception to access — agency

12.2 If:

(a) the APP entity is an agency; and

(b) the entity is required or authorised to refuse to give the individual access to the personal information by or under:

(i) the Freedom of Information Act; or

(ii) any other Act of the Commonwealth, or a Norfolk Island enactment, that provides for access by persons to documents

then, despite subclause 12.1, the entity is not required to give access to the extent that the entity is required or authorised to refuse to give access.

Dealing with requests for access

12.4 The APP entity must:

(a) respond to the request for access to the personal information:

(i) if the entity is an agency — within 30 days after the request is made; or

(ii) if the entity is an organisation — within a reasonable period after the request is made; and

(b) give access to the information in the manner requested by the individual, if it is reasonable and practicable to do so

Other means of access

12.5 If the APP entity refuses:
(a) to give access to the personal information because of subclause 12.2 or 12.3; or
(b) to give access in the manner requested by the individual
the entity must take such steps (if any) as are reasonable in the circumstances to give access in a way that meets the needs of the entity and the individual.

Refusal to give access
12.9 If the APP entity refuses to give access to the personal information because of subclause 12.2 or 12.3, or to give access in the manner requested by the individual, the entity must give the individual a written notice that sets out:
(a) the reasons for the refusal except to the extent that, having regard to the grounds for the refusal, it would be unreasonable to do so and
(b) the mechanisms available to complain about the refusal;

Freedom of Information Act 1982 (Cth)

Section 24 - Power to refuse request - diversion of resources etc.

(1) If an agency or Minister is satisfied, when dealing with a request for a document, that a practical refusal reason exists in relation to the request (see section 24AA), the agency or Minister:
(a) must undertake a request consultation process (see section 24AB); and
(b) if, after the request consultation process, the agency or Minister is satisfied that the practical refusal reason still exists—the agency or Minister may refuse to give access to the document in accordance with the request.

Section 24AA - When does a *practical refusal reason* exist?

(1) For the purposes of section 24, a ***practical refusal reason*** exists in relation to a request for a document if either (or both) of the following applies:
(a) the work involved in processing the request:
(i) in the case of an agency—would substantially and unreasonably divert the resources of the agency from its other operations; or
(ii) in the case of a Minister—would substantially and unreasonably interfere with the performance of the Minister's functions;
(b) the request does not satisfy the requirement in paragraph 15(2)(b) (identification of documents).

(2) Subject to subsection (3), but without limiting the matters to which the agency or Minister may have regard, in deciding whether a practical refusal reason exists, the agency or Minister 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, or the office of the Minister;
(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.

(3) in deciding whether a practical refusal reason exists, an agency or Minister must not have regard to:

(a) any reasons that the applicant gives for requesting access; or
(b) the agency's or Minister'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.

Section 24AB - What is a request consultation process?

Scope

(1) This section sets out what is a request consultation process for the purposes of section 24.

Requirement to notify

(2) The agency or Minister must give the applicant a written notice 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 or member of staff of the Minister (the ***contact person***) with whom the applicant may consult during a period;
(d) details of how the applicant may contact the contact person;
(e) that 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.

Assistance to revise request

(3) If the applicant contacts the contact person during the consultation period in accordance with the notice, the agency or Minister must take reasonable steps to assist the applicant to revise the request so that the practical refusal reason no longer exists.

(4) For the purposes of subsection (3), ***reasonable steps*** includes the following:
(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.

Extension of consultation period

(5) The contact person may, with the applicant's agreement, extend the consultation period by written notice to the applicant.

Outcome of request consultation process

(6) The applicant must, before the end of the consultation period, do one of the following, by written notice to the agency or Minister:
(a) withdraw the request;
(b) make a revised request;
(c) indicate that the applicant does not wish to revise the request.

(7) The request is taken to have been withdrawn under subsection (6) at the end of the consultation period if:
(a) the applicant does not consult the contact person during the consultation period in accordance with the notice; or
(b) the applicant does not do one of the things mentioned in subsection (6) before the end of the consultation period.

No more than one request consultation process required

(9) To avoid doubt, this section only obliges the agency or Minister to undertake a request consultation process once for any particular request.

Education and Care Services National Law Act 2010 (VIC)

Section 5 Exclusion of legislation of this jurisdiction

(1) The following Acts of this jurisdiction do not apply to the Education and Care Services National Law (Victoria) or to the instruments made under that Law—

(a) the Freedom of Information Act 1982…

(ca) the Privacy and Data Protection Act 2014;

Section 8 Regulatory Authority

For the purposes of the definition of ***Regulatory Authority*** in section 5 of the Education and Care Services National Law (Victoria), the Secretary of the Department of Education and Early Childhood Development is declared to be the Regulatory Authority for this jurisdiction for the purposes of that Law.

Section 263 Application of Commonwealth Privacy Act

(1) The Privacy Act applies as a law of a participating jurisdiction for the purposes of the National Quality Framework.

(2) For the purposes of subsection (1), the Privacy Act applies—

(a) as if a reference to the Office of the Privacy Commissioner were a reference to the Office of the National Education and Care Services Privacy Commissioner; and

(b) as if a reference to the Privacy Commissioner were a reference to the National Education and Care Services Privacy Commissioner; …

Education and Care Services National Regulations 2011

Regulation 199 - Modifications relating to National Authority and Regulatory Authorities

The Privacy Act applies as if it were modified so that—

(a) it applies only to agencies; and

(b) the agencies it applies to are—

(i) the National Authority; and

(ii) each Regulatory Authority of a participating jurisdiction;

Regulation 201 - Miscellaneous modifications

The Privacy Act applies …

(e) as if a reference to the Administrative Appeals Tribunal were a reference to a relevant administrative tribunal; and

(f) as if a reference to the Federal Court were a reference to the Supreme Court, or another court of competent jurisdiction, of a participating jurisdiction;

Regulation 202 - Relevant administrative tribunal

For the purposes of regulation 201(e), a reference in the Privacy Act to a ***relevant administrative tribunal*** is taken to be a reference to [in this case]…

(g) the Victorian Civil and Administrative Tribunal established under the *Victorian Civil and Administrative Tribunal Act 1998* of Victoria