National Education & Care Services
FOI & Privacy Commissioners & Ombudsman

X1 and X2 and Victorian Education and Care Services Regulatory Authority

DECISION AND REASONS FOR DECISION OF NATIONAL EDUCATION AND CARE SERVICES FREEDOM OF INFORMATION COMMISSIONER (NECS FOIC)

Review Applicant:	**X1 and X2**
Respondent:	**Victorian Education and Care Services Regulatory Authority**[1]
Other parties:	**XK**
Decision Date:	**11 October 2023**
Application number:	**FOIC 04/2022**
Catchwords:	**Freedom of Information – (CTH) *Freedom of Information Act 1982*: Exemption – legal professional privilege (s 42); Exemption – material obtained in confidence (s 45); Public interest conditional exemption – deliberative processes (s 47C); Public interest conditional exemption – certain operations of agencies (s 47E); Public interest conditional exemption – personal privacy (s 47F); *Education and Care Services National Law Act 2010*; *Education and Care Services National Regulations 2011.***

[Note: The reference in square brackets in paragraph [192] is information that has been omitted from this decision and replaced with generic information in accordance with a direction made under section 55(2)(e) of the *Freedom of Information Act 1982*.]

DECISION

1. Under s55k of the *Freedom of Information Act 1982* (the FOI Act) I:

   i. affirm the decision of the Regulatory Authority to redact material as not relevant pursuant to section 22 of the FOI Act.
   ii. vary the decision of the Regulatory Authority to exempt material pursuant to section 42 of the FOI Act as being subject to legal professional privilege so that only the content of the email referred to in [36] and [38] of this decision is exempt.
   iii. vary the decision of the Regulatory Authority to the extent that the material exempted from document 73 on page 184 of Part A as discussed at [62] and the material exempted from document 154 at pages 10 and 11 of Part B as discussed at [56] is not exempt from disclosure pursuant to s45(1) of the FOI Act.
   iv. vary the decision of the Regulatory Authority to the extent that material exempted from document 16 at pages 37 and 38, and document 63 at pages 159 to 160 of part A as discussed at [98] to [101], document 121 at page 332 of part A as discussed at [108], document 174 at pages 104 to 109 of part B as discussed at [109]to [111] , and documents 181, 199 and 217 as discussed at [115] to [119] is not conditionally exempt pursuant to s 47C(1) of the FOI Act.

v. vary the decision of the Regulatory Authority to the extent that material exempted from document 3 at pages 8 and 9 of part A as discussed at [146] to [148], document 6 at page 15 of part A as discussed at [149], document 43 at pages 111 and 112 as discussed at [150] to [151], document 90 at pages 233 and 234 of part A as discussed at [152], document 99 at page 50 of part A as discussed at [152] document 56 at page 144 of part A as discussed at [153], document 99 at page 248 of part A as discussed at [154], document 148 at page 442 of part A as discussed at [158], document 150 at page 450 of part A as discussed at [159], document 149 at page 446 of part A as discussed at [160], document 151 at page 452 of part A as discussed at [161], document 153 at page 456 of part A as discussed at [162], document154 at page 12 of part B as discussed at [163], document 220 at page 375 of part B as discussed at [165], document 221 at page 381 of part B, document 222 at page 387 of part B and document 232 at page 431 of part B all as discussed at [167] is not conditionally exempt pursuant to s47E(d) of the FOI Act.

vi. vary the decision of the Regulatory Authority to the extent that material exempted from document 1 at page 6 of part A as discussed at [188], document 8 at page 19 of part A as discussed at [189], document 43 at page 111 of part A, document 90 at page 233 of part A, document 99 at page 249 of part A all as discussed at [190], document 154 at page 11 of part B as discussed at [191], document 169 at page 55 of part B, document 171 at page 61 of part B document 275 at page 600 of part B all as discussed at [192] is not conditionally exempt pursuant to s47F(1).

vii. vary the decision of the Regulatory Authority to the extent that material exempted from document 1 at pages 1,2,3 ,5 and 6 of part A as discussed at [209] to [213], document 1 at page 1 of part A as discussed at [215] to [217], document 3 at page 9 of part A as discussed at [218], document 16 at page 37 of part A, document 43 at pages 109 to 111 of part A, document 63 at page 159 of part A, document 90 at pages 231 to 234 of part A, document 99 at pages 248 to 251 of part A, document 173 at at page 83 of part B, document 174 at at page 100, 108 and 109 of part B, document 179 at pages 137 to 138 of part B, document 180 at page 140 and 142 of part B, document 181 at pages 143 to 144 of part B, document 183 at page 146 of part B, document 183 at pages 148 to 149 of part B, document 184 at page 154 of part B, document 185 at pages 167 to 168 of part B, document 199 at at pages 259 to 260 of part B, document 200 at page 262 of part B, document 212 at page 349 of part B, document 213 at page 350 of part B, document 214 at pages 351 to 353 of part B, document 215 at pages 356 to 357 of part B, document 216 at page 359 of part B, document 217 at pages 361 to 362 of part B, document 218 at pages 363 to 367 of part B, document 219 at page 369 and pages 371 to 372 of part B, document 220 at pages 374 to 377 of part B, document 221 at pages 381 to 383 of part B document 222 at pages 387 to 389 of part B, document 223 at pages 393 to 394 of part B, document 224 at pages 399 to 400 of part B, document 225 at pages 402 to 403 of part B, document 226 at page 405 of part B, document 227 at page 409 of part B, document 228 at pages 414 to 416 of part B, document 230 at pages 426 to 427 of part B, document 231 at page 429 of part B, document 232 at pages 430 to 433 of part B, document 241 at page 464 of part B, document 242 at page 467 of part B, document 242 at pages 470 to 473 of part B, document 243 at pages 470 to 473 of part B, document 244 at page 475 of part B, document 245 at page 478 of part B, document 260 at page 558 of part B, document 261 at page 559 of part B, document 262 at page 572 of part B, document 263 at page 573 of part B, document 264 at page 575 of part B, document 282 at pages 627 to 628 of part B, document 33 at pages 790 to 791 of part B, document 331 at pages 792 to 793 of part B, all as discussed at [219] to [221] and document 56 at page 44 of part A as discussed at [222] is not conditionally exempt pursuant to s47F(1).

viii. vary the decision of the Regulatory Authority to the extent that material exempted from document 161 at page 30 of part B as discussed at [227] and [228], document 174 at page 100 of part B as discussed at [229], document 98 at page 244 of part A as discussed at [230] and document 153 at pages 456 and 457 of part A as discussed at [230] and [232] is not conditionally exempt pursuant to s47F(1).

ix. otherwise affirm the decision of the Regulatory Authority.

The Regulatory Authority must provide the applicants with copies of the documents referred to in 1.ii to 1.viii above as varied by this decision within 28 days of the date of this decision.

BACKGROUND

2. During 2020 the FOI applicants (referred to in this decision by pseudonyms X1 and X2) made a number of complaints about certain matters at XK (also referred to in this decision by pseudonym) which were subsequently investigated by the Victorian Education and Care Services Regulatory Authority (the respondent). XK is a kindergarten that was attended by the FOI applicants' child (X3).

3. This FOIC 04 2022 request follows from a FOI request made by the applicants to the respondent in July 2021 for access to 59 items (each with multiple pages) in relation to matters that occurred at their child's kindergarten during 2020 and the subsequent investigations by the respondent.

4. 4.On 11 August 2021 the scope of that request was reduced by negotiation between the parties to items 10, 17, 34 and 36 and emails (without attachments) and with 20 Microsoft Word documents in relation to items 42-50 of the request.

5. The respondent provided its Decision on **21 September 2021.** Following a complaint from the applicants to the NECS FOI Commissioner in relation to the respondent's handling of the FOI request, the respondent issued a varied Decision on **10 November 2021** – **RA Decision ref FOI 2021-306**

6. On 5 January 2022 the applicants sought an FOI Commissioner Review of the varied Decision dated 10 November 2021.

7. 7.The FOIC Review Decision was issued on 10 March 2022 – **FOIC Ref FOIC Review 01/2022.** The review varied some parts of the Regulatory Authority's Decision and upheld the remainder.

8. On 16 October 2021 the applicants sought from the respondent the balance of their original FOI request *for access to documents that comprised the outstanding balance of documents previously requested before re-scoping and as advised by and agreed with the FOI Unit were now requesting these documents, that you have previously searched for and obtained, and liaised with us over – minus ones provided already in your previous re-scoped decision*.

9. On 10 November 2021 the respondent provided its Decision to the applicants refusing access to the documents pursuant to s 24(1)(b) of the FOI Act that the work involved in processing the request would substantially and unreasonably divert the resources of the agency from its other operations – **(RA Decision reference 2021-579**.)

10. On 22 December 2021 the applicants sought a NECS FOI Commissioner Review of the respondent's decision.

11. The FOIC Review Decision (**ref FOIC Review 02/2021)** was issued on 3 June 2022. The Decision set aside the respondent's Decision of 10 November 2021 and required the respondent to process the applicants' FOI request dated 16 October 2021 within 30 days after the date of the Decision, subject to any granting of extension of time under the provisions of the FOI Act.

12. On 29 June 2022 at the request of the respondent the NECS FOI Commissioner granted an extension of time of 30 days for the respondent to process the request pursuant to s 15AB of the FOI Act.

13. On 31 July 2022 the respondent provided its Decision Notice and documents in relation to the request to the applicants – (**RA reference FOI 2022-317**)

14. On 29 August 2022, the respondent refused a request from the applicants for an extension of time to apply for an Internal Review of the RA Decision 2022-317. Following appeal by the applicants, the refusal was confirmed by a senior officer of the respondent on 2 September 2022.

15. On 5 September 2022 the applicants submitted a request to the NECS FOIC for a review of the refusal pursuant to s 54L(2)(c) of the FOI Act – a decision refusing to allow a further period for making an application for internal review of an access refusal decision.

16. On 19 October the NECS FOIC set aside the refusal and required the RA to allow 10 days for the applicants to submit an application for internal review. (**FOIC Review Decision** 03/2022)

17. The applicants made a submission on 28 October 2022 which was acknowledged by the respondent on 29 October 2022. The due date for a decision was 29 November.

18. The respondent did not provide a response to the request for internal review within the required 30 days and did not exercise its right to seek an extension of time from the NECS FOIC pursuant to s 54D of the FOI Act. Therefore, the decision referred to in paragraph [13] **(FOI 2022-317**) is deemed to have been affirmed by the principal officer of the respondent.

19. The applicants have now requested a FOIC review of the respondent's decision **FOI 2022-317.**

INTERIM ORDER

20. On 5 December 2022 the former Commissioner[1] wrote to the respondent advising she was conducting this review and requested the respondent to advise her whether there are any affected third parties to this review and, if so, provide her with their name and contact email address. The letter also said that if there were third parties involved, the respondent was to notify them that the office was conducting this review and to provide her with a copy of the notification.

21. In their reply the respondent stated that it did not deem it reasonable or practicable to consult with any third parties in relation to this matter. Instead, the FOI Unit of the respondent relied upon consultation in an earlier matter in order to avoid causing kindergarten staff undue stress and anxiety by requesting further consultation.

22. On 20 January I wrote to the respondent advising that if they did not believe it was appropriate to notify a third party, they would need to make an application under s54Q of the Act for order to that effect. On 27 January the respondent made such an application. After considering submissions from the parties, I made an order that it would not be appropriate for the respondent to notify third parties external to it of the application for review.

SCOPE OF REVIEW

23. The respondent found 331 documents totalling 1,252 pages which it considered to be within the scope of the FOI application. I have examined the documents. They comprise emails or series of emails, word or pdf documents, typed records of telephone database, and 4 photographs of a bathroom. The documents generally range in size between 1 to 25 pages each with 1 document containing 65 pages.

[1] The term of office of the Commissioner who commenced this review expired on 31 December 2022. I was appointed to the office with effect from 1 January 2023 and reappointed with effect from 1 July 2023.

24. The respondent prepared a schedule of the documents which provided each document with a consecutive number. The schedule identified the date of the document, the number of pages in each document, a description of the document the decision on access and where appropriate the exemption that had been applied. The pages of the documents have been numbered consecutively from 1 through to 457 in what I will call Part A of the documents and 1 to 795 in what I will call Part B. Part A contains documents 1 to 157 and part B the rest. Where necessary references to page numbers throughout this FOIC Review Decision are to those consecutive numbers.

25. In its Decision Notice dated 31 July 2022, the respondent:

    i. provided access to 192 documents in full;
    ii. refused access to 39 documents in full on the basis that they were exempt under ss 45, 47E and 47F of the FOI Act;
    iii. provided partial access to 100 documents pursuant to one or more of ss 42, 45, 47C, 47E and 47F of the FOI Act;
    iv. redacted some material as being "not relevant" in 13 of the documents pursuant to s 22 of the FOI Act.

26. The issues to be decided in this FOIC review are whether, in relation to the 152 documents identified at paragraphs 25(ii) ,25(iii) and 25(iv):

    i. the material that the respondent found to be exempt under ss 42 and 45 of the FOI Act is exempt under those provisions;
    ii. the material that the respondent found to be conditionally exempt under ss 47C 47E or 47F of the FOI Act is conditionally exempt under those provisions and, if so, whether giving the applicants access to conditionally exempt material at this time would, on balance, be contrary to the public interest (s 11A(5).
    iii. the material that the respondent found to be "not relevant" pursuant to s 22 of the FOI Act is not relevant to the request.

27. In making my Decision, I have had regard to the following:

    i. the FOI application to the Regulatory Authority and the NECS FOIC Review application;
    ii. the documents identified at paragraph 25(ii), 23(iii) and 25(iv) as being at issue in this FOIC Review;
    iii. the FOI Act in particular ss 11A(5), 22, 27A, 42, 45, 47C, 47E, and 47F;
    iv. the Education and Care Services National Law Act 2010 and the Education and Care Services National Regulations 2011[9];
    v. the FOI Guidelines issued under s 93A of the FOI Act by the Australian
    vi. Information Commissioner;[10]
    vii. relevant case law; and
    viii. the parties' submissions made to the FOI Unit during the consultation process.

28. In a NECS FOIC Review of an access refusal decision, the agency bears the onus of establishing that its decision to refuse access to documents is justified or that I should make a decision adverse to the Review applicant (s 55D(1) of the FOI Act).

IRRELEVANT MATERIAL – (S 22)

29. Section 22 of the FOI Act provides that an agency may prepare an edited copy of a document by deleting information "that would reasonably be regarded as irrelevant to the request for access" (s 22(1)(a)(ii)).

30. The respondent has deleted material as being "Not relevant" from 13 documents pursuant to the s22(1)(a)(ii) provisions.
31. I have examined unredacted copies of the documents. The redacted material consists of the name of a FOI officer who printed the documents situated in the top left-hand corner of the initial page of documents that are email chains.

Finding

32. I am satisfied that the material marked as 'Not relevant" is irrelevant to the FOI request pursuant to s22(1)(a)(ii) of the FOI Act.

DISCUSSION

MATERIAL SUBJECT TO LEGAL PROFESSIONAL PRIVILEGE EXEMPTION (S 42)

33. The respondent found material in one document (161) to be exempt from disclosure under s 42(1) of the FOI Act.

34. Section 42 of the FOI Act exempts a document from disclosure if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

35. Legal professional privilege (LPP) is not defined in the FOI Act. To determine the application of this exemption the decision maker must turn to common law concepts of LPP. The protection provided by LPP does not apply to all communications between legal advisers and clients. It is the purpose of the communication, between a lawyer and their client, not the information itself that is determinative.

36. I wrote to the respondent on 29 March 2023 asking it whether it wished to reconsider this exemption as I considered the redacted material did not contain anything which would attract LPP.

37. The respondent replied on 24 April. In their response the respondent acknowledged that most of the material it had redacted was not subject to LPP. That material consisted of an email from the applicants to the respondent. However, it maintained LPP over the first email in the chain which was a request directed to the respondent's internal lawyers seeking advice.

38. At common law, determining whether a communication is privileged requires, amongst others, a consideration of whether there is a legal adviser-client relationship and whether the communication was for the purpose of giving or receiving legal advice. The email is directed to a senior lawyer within the department and was for the purpose of receiving legal advice.

39. There is authority at common law that LPP does not extend to disclosure of the client's identity nor to the fact that legal advice was sought. It is the content of the first email that attracts LPP.

Finding

40. I am satisfied that the content of the first email in document 161 sent to an internal lawyer seeking legal advice is subject to LPP and is exempt from disclosure.

MATERIAL OBTAINED IN CONFIDENCE (S45)

41. The respondent determined that material found in 44 documents was either fully or partially exempt on the basis disclosure of the material would find an action for breach of confidence (s45(1)). 36 documents were fully exempt and the remaining 12 partially exempt.

42. 42.Section 45(1) of the FOI Act exempts a document from disclosure *"if its disclosure under this Act would found an action, by a person… for breach of confidence"*. In other words, the exemption is available where a person who provided the confidential information would be able to bring an action under the general law for breach of confidence to prevent disclosure, or to seek compensation for loss or damages arising from disclosure.

43. As discussed in the FOI Guidelines and Australian Information Commissioner review cases the main requirement of the s 45 exemption is that disclosure would found an action for breach of confidence.

44. The FOI Guidelines explain that for the s 45 exemption to apply five criteria must be satisfied in relation to the information:

    a. it must be specifically identified;
    b. it must have the necessary quality of confidentiality;
    c. it must have been communicated and received on the basis of a mutual understanding of confidence;
    d. it must have been disclosed or threatened to be disclosed, without authority; and
    e. unauthorised disclosure of the information has or will cause detriment.

45. I turn now to discussion of each of these criteria in relation to the material in the documents under consideration.

Specifically identified

46. The FOI Guidelines explain that confidential information must be specifically identified. It is not sufficient for the alleged confidential information to be described in global terms.

47. I have examined unredacted copies of the documents. The fully exempted documents consist of 19 documents that are described as witness statement or statements, 12 copies of a text message and 1 email chain. The partially exempt documents consist of 11 emails or email chains and 1 set of handwritten notes.

48. 48 The witness statements are statements from 4 persons connected with XK. The 4 statements are found in multiple documents which replicate each other. The statement of one person is found at documents 10, 51, 58, 109, 195, 297 and as an attachment to document 185 starting at page 187 of part B. The statement of a second person is found at documents 57, 110, 127, 298 and as an attachment to document 185 starting at page 197. The statement of a third person is found at documents 55, 113, 129, 284, 302, as an attachment to document 184 starting at page 155 and as an attachment to document 185 starting at page 206 while the final persons statement is found at documents 112, 120, 128 and 301.

49. The copies of the same text message are found at documents 38, 40, 50, 85, 87, 97, 106, 194, 233, 252, 294, 316 and as an attachment to document 185 staring at page 186. The email chain that is fully exempt is found at document 73.

50. The material from partially exempt documents is found in documents numbered as Part A at page 109 in document 43, page 183 in document 90, page 248 in document 99, page 253 in document 100, page 316 in document 116 and page 318 in document 117.

51. Part B of the documents identifies material found at pages 10 to 12 of document 154, pages 155 to 158 of document 184, pages 167, 170, 186 to 190, 197 to 201, and 206 to 209 of document 185, page 234 of document 186 and page 646 of document 288.

52. The schedule referred to in [24] above states that material has been redacted from document 245 pursuant to s 45(1). This document is a 23-page email with attachments dated 31 March 2021. Material has been redacted from this email pursuant to ss 47F(1) and 47E(d). However, I have examined this document and can find no material that has been redacted pursuant to s45.

53. I am satisfied that the confidential information under consideration has been specifically identified.

Quality of confidentiality

54. The FOI Guidelines explain that for the information to have the quality of confidentiality required to meet the s 45 exemption it must be secret or only known to a limited group. Information that is common knowledge or in the public domain will not have the quality of confidentiality.

55. Based on my examination of the documents under consideration, and in the absence of any evidence before me that the information contained in the documents has been disseminated beyond relevant officers of the respondent, I am satisfied that the relevant information, apart from that discussed below. has the quality of confidentiality.

56. The respondent found material contained in document 154 at pages 10 and 11 of part B to be exempt. These are written notes. The parts exempted are remarks about the distress caused to the applicants, other parents and staff arising from incidents at XK. I consider this information to be common knowledge and thus does not have the quality of confidentiality.

57. I note these comments have also been redacted pursuant to 47E and47F and I will consider them in those contexts later in this decision.

Mutual understanding of confidence

58. The FOI Guidelines explain that the information must have been communicated and received on the basis of a mutual understanding of confidentiality. The nature of the mutual understanding may be explicit or implied.

59. I note that in its Decision Notice dated 31 July 202, the decision maker states in support of the application of the s 45 exemption to parts of the documents under consideration that the documents *"contain material obtained in confidence from individuals for the purpose of an investigation and the Department's regulatory functions under the National Law."* No further evidence in support of the use of the exemption has been provided.

60. On examination of the material in the witness statements identified at [48] I am satisfied that the information has been provided to the Regulatory Authority by named persons in relation to its investigations and that there was a mutual understanding of confidentiality in relation to the information.

61. In relation to the text message that appears in the documents identified in [49] that message is a communication from a member of the staff of XK to management of XK. I am satisfied that there was

a mutual understanding of confidentiality in relation to the information.

62. Document 73 is an email chain of 2 pages containing 3 emails. The first email appearing on the second page (184) is from an authorised officer of the respondent addressed to the Service Provider seeking documents in relation to a complaint it was investigating. The second email which appears in the middle of the second page is an email forwarding the original email to another person at XK. I am not satisfied that there was a mutual understanding of confidentiality in relation to the information in these two emails.

63. The final email on the first page of document 73 is a response from XK providing the information sought. That response does contain some information provided to the respondent as part of the investigation process. I am satisfied that there was a mutual understanding of confidentiality in relation to the information in this email.

64. In relation to the partially exempt documents found in part A as set out in [50] the material at pages 109, 183 and 248 that has been exempted are the titles of attached witness statements. I consider these should be treated the same as the witness statements themselves and attract the same mutual understanding of confidentiality.

65. In relation to pages 253, 316 and 318 the material is information provided to the Authority for the purpose of its investigation. Whilst not sworn as witness statements the nature of the material is identical to that contained in the sworn witness statements. I am satisfied that there was a mutual understanding of confidentiality in relation to the information

66. Whilst I have determined that the material exempted from document 1 on pages 10 and 11 of the written notes in Part B does not have the quality of confidentiality the material exempted on page 12 is a description of the contents of the witness statements. I consider this has the same quality of confidentiality as the witness statements themselves.

67. The material exempted in document 184 at pages 155 to 158 of Part B is one of the witness statements attached to an email. As discussed at [58] there is a mutual understanding of confidentiality about the statement.

68. The attachment to document 185 at page 167 is the title of an attached witness statement. This is discussed at [64].

69. The material exempted from document 185 at page 170 is the same material discussed at [63] whilst the material exempted at page 186 is the text message discussed at [61].

70. The material exempted from document 185 at pages 186 to 190, 197 to 201 and 206 to 209 are witness statements attached to an email.

71. The material exempted from pages 234 of document 186 and page 646 of document 288 are the same material discussed at [65].

Unauthorised disclosure or threatened disclosure

72. The FOI Guidelines state that "the information must have been, or been threatened to be, disclosed without authority. The scope of the confidential relationship will often need to be considered to ascertain whether disclosure is authorised".

73. As discussed at [21] the respondent stated that it did not deem it reasonable or practicable to consult with any third parties in relation to this matter. Instead, the FOI Unit of the respondent relied upon

consultation in an earlier matter in order to avoid causing kindergarten staff undue stress and anxiety by requesting further consultation.

74. In her decision in that earlier matter the former Commissioner noted in particular the comment from XK in response to the consultation request that "staff in particular feel that their personal witness statements … that were forwarded onto the [Regulatory Authority], were done so in confidence and the [Regulatory Authority] advised that they were not providing them to the Applicants… For these reasons I do not give permission for the Applicants to have access to [XK's] personal affairs..."

75. I have no contrary evidence before me to suggest that the persons providing the information under consideration have consented to its release beyond relevant officers within the respondent. I am therefore satisfied that disclosure of the information in response to the FOI application would be unauthorised.

Unauthorised disclosure will cause detriment

76. The FOI Guidelines explain the fifth element for a breach of confidence action under section 45 is that unauthorised disclosure of the information has, or will, cause detriment to the person who provided the confidential information.

77. Detriment can be defined in many forms. These might include tangible detriment such as financial loss or threat to health or safety, or emotional or reputational detriment such as embarrassment, exposure to ridicule, bullying, intimidation, or public criticism.

78. The FOI Guidelines explain that this element has been applied in numerous cases of the Administrative Appeals Tribunal (AAT), but whether it must be established is uncertain. The uncertainty arises because of an argument that an equitable breach of confidence operates upon the conscience, to respect the confidence, not on the basis of damage caused. The Guidelines state that *"despite the uncertainty, it would be prudent to assume that establishing detriment is necessary".*

79. In its decision the respondent did not specifically refer to detriment in its discussion on the application of the s 45 exemption to the documents under consideration.

80. I have considered the content of the documents in question and the response of the third party to the Regulatory Authority's consultation request in an earlier matter in relation to this element. I am satisfied that, on balance, the disclosure of the material in the documents could reasonably be expected to cause detriment to the health and wellbeing of the individuals who provided the information.

Finding

81. I do not consider the material exempted from document 73 on page 184 of Part A and the material exempted from document 154 at pages 10 and 11 of Part B is exempt from disclosure pursuant to s 45(1) of the FOI Act.

82. I am satisfied that the material identified in the other documents under consideration is exempt from disclosure pursuant to s 45(1) of the FOI Act.

DELIBERATIVE PROCESSES OF AGENCIES CONDITIONAL EXEMPTION (S 47C)

83. The respondent found 41 documents to be fully or partially exempt pursuant to s 47C (1)(a) of the FOI Act.

84. Section 47C conditionally exempts documents containing deliberative matter from disclosure. Deliberative matter is identified under s 47C(1) as *content in the nature of, or relating to* either:
- *an opinion, advice or recommendations obtained, prepared or recorded, or*
- *consultation or deliberation that has taken place,*

in the course of, or for the purpose of, the deliberative processes involved in the functions of [for the purposes of this FOIC Review] *an agency* (47C(1)(a)).

85. Deliberative matter does not include operational information or purely factual material (s 47C(2)).

86. Section 47C(3) also excludes certain other types of material from the application of this conditional exemption. I am satisfied that none of the material under consideration is the type of material covered by this exclusion.

Meaning of terms

87. The FOI Act does not define "deliberative matter" or "deliberative process" beyond the wording of s47C itself. Discussion of the terms in relevant case law is well referenced in the FOI Guidelines.

88. Deliberative matter is a shorthand term for 'opinion, advice and recommendation' and 'consultation and deliberation' that is recorded or reflected in a document. There is no reason within the FOI Act to limit the ordinary meanings given to these words.

89. In the Administrative Appeals Tribunal decision of *Wood; Secretary, Department of Prime Minister and Cabinet,* Deputy President Forgie explains that the words "opinion", "advice", and "recommendation" all involve consideration, followed by the formation of a view either about a certain subject or about a course of action and the subsequent transmission of that view. Consultation also involves the notion of consideration.

90. The FOI Guidelines summarise the "deliberative process" as being the exercise of judgement, of weighing up or evaluating competing arguments or considerations. *"In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection… upon the wisdom and expediency of a proposal, a particular decision or a course of action"*.

91. "Operational information" is defined in s 8A of the FOI Act and is information that assists an agency to perform or exercise its functions or powers in making decisions or recommendations that affect the public – for example an agency's rules, guidelines, practices or precedents relating to its decision making.

92. There is no reason given in the FOI Act to limit the ordinary meaning given to the words "purely factual material". The term is discussed in the FOI Guidelines. The Guidelines state that the intention of the exclusion of "purely factual material" from the application of the s 47C conditional exemption *"is intended to allow the disclosure of material that has been used in the deliberative process"*. However, "*purely factual material does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is so embedded in or intertwined with the deliberative content such that it is impracticable to excise it".*

The documents

93. I have examined unedited copies of the 41 documents under consideration.

94. The material in the 41 documents, to which the s 47C conditional exemption has been applied, can be broadly categorised as:

    i. versions of draft correspondence from the Regulatory Authority to X1 and X2 or to XK;
    ii. email exchanges between officers of the Regulatory Authority and between those officers and other persons in relation to the investigation into the complaints from X1 and X2;
    iii. information provided to the Regulatory Authority by third parties in response to its investigations; and
    iv. iv. records of, and reflections on, meetings or discussions between Regulatory Authority officers and other areas of the Department or XK.

95. Some of the material is replicated across documents – frequently the result of different parts of overlapping email chains although in many cases, as appears from the discussion that follows, the material is found in identical documents placed on file multiple times**.**

96. The matters to be determined in relation to the documents under consideration are that:
    - the material contains or relates to "deliberative matter" (s 47C(1));
    - the material was prepared for a "deliberative purpose" of an agency (s 47C(1)&(1)(a));
    - the material is not purely factual or operational information (s 47C(2)); and
    - it would be contrary to the public interest to give access to the document at this time.(s 11A(5))

97. In its Decision Notice the respondent found that the documents under consideration *"contain deliberative material consistent with section 47C(1) as the documents are consultative and contain advice, judgement, evaluation, reasoning, and recommendations obtained in exercising the [Regulatory Authority's] regulatory functions pursuant to the National Law".* The decision maker did not provide further discussion on the details of the documents.

98. I have examined the documents thoroughly. The first exemption is applied in document 16 at pages 37 and 38 of Part A. This is an email exchange between officers of the Authority. Whilst the whole of the exchange has bee redacted the material redacted mainly consists of 3 paragraphs. It includes a summary of an update from X1 and X2 on the events associated with XK, and some other matter. This update is purely factual.

99. The material in paragraph 2 is information obtained from XK. It does meet the description of consultation that has taken place in the course of a deliberative process.

100. The same 3 paragraphs appear in document 63 at pages 159 to 160.

101. I am not satisfied that the material in paragraphs 1 and 3 of documents 16 and 63 meets the conditional exemption requirements of s 47C(1)(a). I am satisfied that the material in paragraph 2 of the 2 documents meets the conditional exemption requirements of s 47C(1)(a).

102. The next exemption is applied to document 26 at pages 61 and 62 of Part A. That material is an email exchange between officers of the respondent and the chair of XK seeking the provision of certain documents and the reply providing the documents. The same email chain is found in document 73 at pages 183 and 184 of Part A.

103. I note that I have already considered the material found in document 73 at paragraphs [62] and [63] above. This was in the context of whether it was an exempt document pursuant to s45 being material

obtained in confidence. I did not consider document 26 in that discussion as the Authority did not apply that exemption to document 26, notwithstanding the 2 documents are identical

104. It is clear that this exchange occurred in the course of the deliberative process of conducting an investigation. I am satisfied the material is a record of consultation that has taken place during that process and is deliberative matter. It is conditionally exempt pursuant to s47C(1).

105. Material is exempted pursuant to s47C(1) on pages 109 and 110 of document 43. That document is an email exchange between staff members of the respondent. The material exempted is a series of questions posed and answers given in the course of the investigation of the applicant's complaints.

106. The same material is exempted from document 90 at pages 231 and 232 and document 99 at pages 248 and 249.

107. Again It is clear that this exchange occurred in the course of the deliberative process of conducting an investigation. I am satisfied the material is a record of consultation that has taken place during that process and is deliberative matter. It is conditionally exempt pursuant to s47C(1).

108. Two sentences have been redacted from document 121 at page 332. The document is a record of the complaint received. The 2 sentences are neither opinion, advice or a recommendation nor do they record any consultation or deliberation that has taken place. I consider this material is not deliberative matter

109. Material has been redacted from document 174. This is an 18 page email including attachments commencing at page 100 of Part B. The redactions made pursuant to s 47C(1) commence at page 101 and include the entirety of the following 8 pages.

110. The material commencing on page 102 in an email sent on 14 April 2021 at 9.05 and continuing across pages 102 and 103 can all properly be categorised as deliberative material as it is a record of consultations that have taken place. However, across pages 104 to 109 redactions have been applied to material such as names, titles and contact details which are not in the nature of deliberative material. I note that some of these have been exempted on other grounds that will be considered later in this decision.

111. Redactions have also been applied to dates of emails and acknowledgement of traditional owners of country. Neither of these can be considered deliberative material.

112. A draft of correspondence from the respondent to the applicants has been redacted from document 180 at pages 141 and 142 of part B. Other drafts of the same correspondence have been redacted from document 183 at pages 151 to 153, from document 184 at pages 163 to 165, from document 261 at pages 561 to 563, from document 282 at pages 631 to 633 and from documents 287 and 327.

113. The drafts of correspondence reflect the deliberative processes of the respondent in seeking advice, opinion, confirmation of details of events and actions, analysis, the weighing up of evidence in addressing the matters raised in the complaints by the applicants, and the settling of final correspondence and actions.

114. I note that the draft correspondence from the respondent to the applicants is material that was subsequently finalised and provided to the applicants.

115. Material has been redacted from document 181 commencing on page 143 of Part B. This is an email chain between officers of the respondent discussing a meeting between one of them and representatives of XK.

116. The first redaction appears in an email sent on 13 May 2021 at 5.02pm. The material that has been redacted is a comment on the nature of the meeting when it commenced. It is not a record of the consultation that occurred. I do not consider this to be deliberative matter.

117. The remainder of the material that has been redacted is a record of the meeting itself and is deliberative material.

118. The same email chain is found in documents 199 and 217. The conclusions I have reached above apply to these 2 documents.

Findings

119. With the exceptions of the material found to not be conditionally exempt at [101], [108], [110], [111], [116] and [118] the material redacted by the Authority pursuant to s47C is conditionally exempt.

Public interest test (s 11A(5))

120. Section 11A(5) of the FOI Act provides that if a document is conditionally exempt, it must be disclosed "unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest".

121. Section 11B(3) of the Act sets out four factors favouring access to a document which must be considered by decision makers, if relevant, when applying the public interest test to conditionally exempt documents. These are whether access to the document would:

    a. promote the objects of the Act;
    b. inform debate on a matter of public importance;
    c. promote effective oversight of public expenditure; or
    d. allow a person to access his or her own personal information.

122. The FOI Act also stipulates that an agency must have regard to the FOI Guidelines when deciding whether access to a conditionally exempt document would, on balance, be contrary to the public interest. The Guidelines provide a non-exhaustive list of further public interest factors favouring disclosure and a non-exhaustive list of factors against disclosure.

123. In its decision the respondent identified two public interest factors in favour of disclosure of the material to be found conditionally exempt under s 47C1(a) of the FOI Act:

    i. disclosure would promote the objects of the FOI Act; and
    ii. disclosure would allow a person to access his or her personal information.

124. The respondent did not provide further discussion on these factors.

125. I agree that the two factors identified by the respondent are relevant considerations in this case. Disclosure would promote the objects of the FOI Act with respect to providing access to Government held information – in this case by a government agency, the Regulatory Authority. Disclosure may also increase scrutiny and discussion of the Regulatory Authority's operations and processes. Disclosure may also enable the applicants to access some of their personal information.

126. The FOI Act does not list public interest factors weighing against disclosure. The FOI Guidelines point out that such factors will depend on the circumstances. …the inclusion of exemptions and conditional exemptions in the FOI Act recognizes that harm may result from the disclosure of some types of documents in certain circumstances [and that while] citing the particular harm defined in the

applicable conditional exemption is not itself sufficient to conclude that disclosure would be contrary to the public interest…the harm is an important consideration that the decision maker must weigh when seeking to determine where the balance lies".

127. The respondent identified four public interest factors against disclosure of the material found to be conditionally exempt pursuant to s 47C(1)(a) of the FOI Act:

    i. disclosure would reasonably be expected to prejudice the effectiveness of the agency's regulatory functions;

    x. disclosure would reasonably be expected to prejudice the protection of an individual's right to privacy;
    xi. disclosure would reasonably be expected to impede the flow of information to the
    xii. Department as a regulatory agency; and iv. disclosure would reasonably be expected to prejudice an agency's ability to obtain similar information in the future.

128. The respondent did not provide further discussion on these factors.

129. I consider the factors identified by the respondent to be relevant considerations in relation to the material found to be conditionally exempt pursuant to s47C(1)(a).

130. The Regulatory Authority is responsible for ensuring that Victorian education and care services comply with the National Law in the interests of the health, safety and wellbeing of children. It uses a variety of tools to do so including: providing advice, guidance, support and education; undertaking formal assessment and ratings of services against National Quality Standards; and conducting investigations in response to incidents at, or complaints about, services. The Regulatory Authority has powers to apply a range of sanctions, which can, at the extreme, lead, for example, to a service losing its approval to operate or an Approved Provider or service staff being prosecuted in certain circumstances.

131. In order to carry out its compliance functions, the Regulatory Authority relies on its ability to obtain and hold confidential (and often sensitive) information. Officers need to be in a position to freely discuss and examine options and undertake deliberative processes in the development of informed advice and recommendations.

132. I consider that the Regulatory Authority would be significantly constrained in its deliberations if the developmental nature of such deliberations might be exposed to public scrutiny. Frank and honest debate on matters would likely be inhibited. Furthermore, the provision of information to the Authority could be impeded if third parties could not be assured of the confidentiality of their information. The effectiveness of the Regulatory Authority in carrying out its compliance responsibilities would consequently be significantly compromised.

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

134. I am satisfied that on balance the public interest factors against disclosure of the material under consideration outweigh the factors in favour of its disclosure.

Finding

135. Disclosure of the material that I have found to be conditionally exempt pursuant to s 47C(1)(a) of the FOI Act would, on balance, be contrary to the public interest at this time for the purposes of s 11A(5) of the Act.

CERTAIN OPERATIONS OF AGENCIES CONDITIONAL EXEMPTION (S 47E)

136. The respondent found 72 documents to be exempt or partially exempt under s 47E(d) of the FOI Act.

137. A document is conditionally exempt under s 47E if its disclosure would, or could reasonably be expected to, (for the purposes of this FOIC Review) *"have a substantial adverse effect on the proper and efficient conduct of the operations of an agency "*(47E(d)).

138. For the grounds in s 47E(d) to apply, the predicted effect needs to be reasonably expected to occur. There must be more than merely an assumption that damage may occur from the disclosure of the document. As discussed in the FOI Guidelines an agency cannot merely assert that disclosure will have a negative impact – *the particulars of the predicted effect should be identified during the decision-making process including whether the effect could reasonably be expected to occur. Where the conditional exemption is relied upon, the relevant particulars and reasons should form part of the decision makers statement of reasons, if they can include it without disclosing exempt material.*

The documents

139. I have examined unredacted copies of the 72 documents.

140. In the Decision Notice, the decision maker states in relation to the documents considered under s 47E(d): *I am satisfied that these documents contain information provided by a child care service provider to the* [Regulatory Authority] *to enable it to perform a range of its statutory functions pursuant to the National Law.* I agree that this description covers most of the material being considered in relation to the s 47E(d) conditional exemption. However the exemption has been applied to questions asked internally, internal notes, hand written notes of an officer of the respondent and information that was supplied by the applicants.

141. I have already found some material in many of the documents to be exempt pursuant to s 45 and s47C of the FOI Act. As the decision maker also found that material to be conditionally exempt pursuant to s 47E(d), for the sake of completeness I have also considered it again in relation to the s 47E conditional exemption.

142. All of the witness's statements identified at [48] above which were exempted pursuant to s45 have also been exempted pursuant to 47E(d). This is material that was provided to the Regulatory Authority on an implicit or explicit understanding that it was not for distribution beyond relevant officers of the Authority.

143. I am satisfied that the disclosure of the material in the witness statements would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Regulatory Authority. I consider that such disclosure could undermine the Authority's capacity for open communication with education and care services, impede the flow of information to the Authority, and compromise the Regulatory Authority in its attempts to both educate and support education and care services to improve the quality of their services.

144. Similarly all of the text messages identified at [49] above which were exempted pursuant to s45 have also been exempted pursuant to 47E(d). This material that was provided to the respondent on an

implicit or explicit understanding that it was not for distribution beyond relevant officers of the respondent.

145. I am satisfied that the disclosure of this material would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Regulatory Authority. I consider that such disclosure could undermine the Authority's capacity for open communication with education and care services, impede the flow of information to the Authority, and compromise the Regulatory Authority in its attempts to both educate and support education and care services to improve the quality of their services.

146. Material has been redacted from document 3 at pages 8 and 9. This document is a letter from the Authority to XK in relation to an investigation. The material redacted comes under 3 sub-headings. The first of these is "Progress of the Investigation". The material set out is purely factual and does not reveal any matter relating to the investigative process. I do not consider release of this material would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Regulatory Authority.

147. The second sub-heading is "Responsibilities" and sets out the conditions under which a services approval is granted and the services obligation to operate in a way that meets those conditions. I do not consider release of this material would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Regulatory Authority.

148. The third sub-heading is "Next steps". This does reveal the Authority's procedures and its release would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Regulatory Authority.

149. Three lines have been redacted from document 6 at page 15. The document is a record a complaint lodged by the applicants. The material redacted is under the heading of "next steps" and sets out the actions the service provider is required to take. I do not consider release of this material would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Regulatory Authority.

150. Material is redacted from document 43 commencing on page 111 and continuing on page 112. The document is a 4 page email chain between officers of the Authority. The material redacted on page 111 is from an email sent on April 8 2021 at 5.11 pm and can properly be described as commentary from one officer to another on the status and progress of the investigation. That paragraph does not reveal any step in the investigative process. I do not consider release of this material would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Regulatory Authority.

151. After this material appears the sub-heading of "Other information required" . The material redacted following this on page 112 sets out a series of questions to be followed up as part of the investigation. I consider release of this material would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Regulatory Authority.

152. The same email appears in a chain of emails found in document 90 commencing on page 233 and continuing to page 234 and in document 99 at page 250. The conclusions I have reached above in relation to document 43 applies equally to these 2 documents.

153. Further material is redacted from document 56 at page 144. This document is described as a timeline. The material redacted consists of a record of a letter being sent to the service and a note that a phone call to applicant X1 was not required. I do not consider release of this material would or

could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Regulatory Authority.

154. Material is redacted from document 99 at page 248. This is an email chain. The initial redactions in this document pursuant to 47E(d) are the titles of two attachments to the email chain. The first of these is a reference to an attached text message being the text message discussed at [47] and [59]. I have already determined that the text message is exempt pursuant to s45. The second title of an attachment redacted is the title of a witness statement. I have already determined at [62] that this is exempt pursuant to s45.

155. I do not consider that release of these two attachment titles would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Regulatory Authority particularly when they appear alongside a range of other attachment titles which have been released.

156. I note that the decision maker has not applied a s45 exemption to the title of the text message attachment. At [62] I considered that the title of the attached witness statement referred to above attracted the same protection as the witness statement itself. I consider the same reasoning applies to the text message title and it is exempt pursuant to s45.

157. The body of the email contains material that was exempted pursuant to both s45 and 47E(d). The release of this material would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Regulatory Authority. I consider that the material exempted in the body of the email is conditionally exempt pursuant to s47E9(d).

158. Material is redacted from document 148 at page 442. That document is an email chain of 4 pages. The material that has been redacted appears in the second email in the chain and was sent on 3 December 2020 at 11.01 am. This is an email from the kindergarten to an officer of the respondent. The material that has been redacted is a statement that the email contains further documents supplied by the applicants to the kindergarten's email address. I do not consider release of this material would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Regulatory Authority.

159. The same email with the same redaction appears in document 150 at page 450.

160. Material is redacted from document 149 at page 446. That document is an email chain. The material that is redacted is from an email sent from the kindergarten to the respondent on 3 December at 11.06 am advising that the applicants funding request had been attended to. I do not consider release of this material would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Regulatory Authority.

161. The same email has been redacted from document 151 at page 452.

162. Material has been redacted from document 153 at page 456. That document is a record of a phone call made by one of the applicants to the Authority. Two sentences have been redacted from the middle of that record. I can see nothing in the redactions which could reasonably be seen to have a substantial adverse effect on the proper and efficient conduct of the operations of the Authority. The first sentence is a purely factual statement and the second is a comment from the person making the record.

163. Material has been redacted from document 154 at page 12 of Part B of the documents. I have already found this material to be exempt pursuant to s 45 of the FOI Act. As the decision maker also found

that material to be conditionally exempt pursuant to s 47E(d), for the sake of completeness I have also considered it again in relation to the s 47E conditional exemption.

164. The material here redacted is an observation by a person in handwritten notes as to the content of witness statements. I do not consider release of this material would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Regulatory Authority and it is not conditionally exempt pursuant to s47E(d).

165. Material has been reacted from document 220 at page 375 of Part B. I have already found this material to be exempt pursuant to s 47C of the FOI Act. As the decision maker also found that material to be conditionally exempt pursuant to s 47E(d), for the sake of completeness I have also considered it again in relation to the s 47E conditional exemption.

166. The material deleted is in an email chain. The email in question was sent internally within the respondent on 30 April 2021 at 9.36 am. It contains information recorded by an officer of the respondent of the reasons why a person was not attending a meeting. I do not consider release of this material would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Regulatory Authority and it is not conditionally exempt pursuant to s47E(d).

167. The same email appears in document 221 at page 381, in document 222 at page 387, in document 228 at page 414 and in document 232 at page 431.

168. I am satisfied that the material identified in the other documents under consideration is conditionally exempt from disclosure pursuant to s 47E(d) of the FOI Act.

Findings

169. With the exception of the material found to not be conditionally exempt at [146], [147], [149], [150], [152], [153], [155], [158], [159], [160], [161], [162], [164], [166], and [167], the material redacted by the Authority pursuant to s47E is conditionally exempt.

Public Interest test (s11A(5)

170. As discussed previously, having found material in the documents to be to be conditionally exempt, an applicant is to be given access to the conditionally exempt material "unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest".

171. In its decision, the respondent identified two public interest factors in favour of disclosure of the material to be found conditionally exempt under s 47E(d) of the FOI Act:

    i. disclosure would promote the objects of the FOI Act; and
    ii. disclosure would allow a person to access his or her personal information.

172. The respondent did not offer further discussion on these factors.

173. I agree that the two factors identified by the respondent are relevant considerations in this case. Disclosure would promote the objects of the FOI Act with respect to providing access to government held information – in this case by a government agency, the Regulatory Authority. Disclosure may also increase scrutiny and discussion of the Regulatory Authority's operations and processes. Disclosure may also enable the applicants to access some of their personal information.

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

i. disclosure would reasonably be expected to prejudice the effectiveness of the agency's regulatory functions;
ii. disclosure would reasonably be expected to prejudice the protection of an individual's right to privacy;

xiii. disclosure would reasonably be expected to impede the flow of information to the Department as a regulatory agency; and
xiv. disclosure would reasonably be expected to prejudice an agency's ability to obtain similar information in the future.

175. The respondent did not offer further comment on these factors.

176. I consider the four factors identified by the respondent to be relevant considerations.

177. I have already outlined the compliance functions and approaches taken by the Regulatory Authority at paragraphs [130] and[131] of this Decision. They are a relevant contextual consideration here also. In order to carry out its compliance functions, the Regulatory Authority relies on its ability to obtain and hold confidential information. The disclosure of material that has been provided on either an implied or explicit understanding of confidentiality, would damage the Regulatory Authority's standing, and credibility and prejudice its ability to obtain similar information in the future.

178. The disclosure of discussions held at meetings between the Regulatory Authority and an individual education and care service would, or could reasonably be expected to, undermine the Authority's capacity for open communication with services and compromise its ability to both educate and support services to improve the quality of their services.

179. On balance I am satisfied that, in this case, the public interest factors against the disclosure of the material under consideration outweigh the public interest factors in favour of its disclosure.

Findings

180. Pursuant to s 11B(4) of the FOI Act I am satisfied that no irrelevant factors have been considered in determining whether access to the material under consideration would be contrary to the public interest.

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

PERSONAL PRIVACY CONDITIONAL EXEMPTION (S47F)

182. The respondent found 133 documents to be partially exempt from disclosure pursuant to s47F(1) of the FOI Act.

183. The main requirements of the s 47F public interest conditional exemption are that a document:
- contains 'personal information'; and
- that disclosure in response to the applicant's FOI request would be 'unreasonable' (s 47F(1)); and

- it would be 'contrary to the public interest' to release the material at the time of the decision (s 11A(5)).

184. Under section 4 of the FOI Act '**personal information'** has the same meaning as in the Commonwealth *Privacy Act 1988* which provides in section 6 of that Act that:

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

a. Whether the information or opinion is true or not; and
b. Whether the information or opinion is recorded in a material form or not. **Individual** means a natural person

The documents

185. I have examined unredacted copies of the 133 documents.

186. The documents under consideration contain personal information that falls into three categories:

i. names or initials, position titles, work email addresses and/or phone numbers of public servants;
ii. names or initials, position titles or initials denoting positions of staff at, or persons associated with, XK;
iii. comments about the personal affairs of named or identifiable individuals associated with XK.

187. I am not satisfied that in each case the material contains information or an opinion about an identified individual, or an individual who could be reasonably identified in the context of the FOI application.

188. Material has been redacted from document 1 on page 6. The material noted to be redacted pursuant to s47F is a list of topics discussed at a meeting. No person is named or able to be identified. It is possible this is an error as the material could have been redacted pursuant to s 47C as it is a record of consultation that has taken place.

189. Material has been redacted from document 8 at page 19. This document is a notification of incident form completed by XK. The material contains information as to how families responded to a question concerning their intentions. A small number are stated to have responded in a manner different to the majority. I am not satisfied that the material that is redacted would allow an individual to be identified. It appears there are 57 families with children attending XK and it is not possible from the material redacted to identify who the families referred to are.

190. Material has been redacted from document 43. The document is an email chain. The relevant material redacted is a single line of 2 sentences appearing at the top of page 3 of the chain at page 111.The same 2 sentences are redacted in document 90 at page 233 and document 99 at page 249. The material consists of a reference to an event and a question. I do not consider this to be information or an opinion about a person.

191. Material has been redacted from document 154 at page 11 of part B These are handwritten notes with some comments about stress and anxiety being felt by all parties. I have already considered this redaction in the context of s45 above. I have concluded that it is not exempt pursuant to that section. I also consider it is not exempt pursuant to 47F. The comments are general in nature and are not information or opinion about a person.

192. Two paragraphs have been redacted from documents 169 at page 55 of part B, 171 at page 61 of part B , and 275 at page 600 of part B. These are the same document. The document is a message from XK to parents. I wrote to the Authority pointing out that "[Class name]" was not a person's name but the title of a class at XK. The Authority responded that it no longer wished to redact the two paragraphs. I consider the two paragraphs, excluding the first name of an individual that appears in one of them, do not contain personal information. I note that the name of the individual was not, and has not been sought to be redacted by the Authority.

193. I am satisfied that in every other case the material contains information or an opinion about an identified individual, or an individual who could be reasonably identified in the context of the FOI application. I am further satisfied that the information says something about those individuals. As explained in the FOI Guidelines *the information needs to convey or say something about a person, rather than just identify them… where information does not say anything about that person the information would not be personal information*.

194. Except as discussed at paragraphs [188] to [192] the documents which have had redactions made pursuant to 47F do contain personal information. Having found that the documents contain personal information for the purposes of s 47F of the FOI Act I must consider whether disclosure of the documents would involve an "unreasonable" disclosure of personal information**.**

195. The personal privacy exemption is designed to prevent the unreasonable invasion of third parties' privacy. The FOI Guidelines discuss that the test of 'unreasonableness' under s 47F 'implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals.

196. In deciding whether disclosure would be unreasonable, s 47F(2) of the FOI Act provides that a decision maker must have regard to:

    a. the extent to which the information is well known;
    b. whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
    c. the availability of the information from publicly accessible sources; and
    d. any other matters that the agency … considers relevant.

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

    i. the nature, age and current relevance of the information;
    ii. any detriment that disclosure may cause to the person to whom the information relates;
    iii. any opposition to disclosure expressed or likely to be held by that person;
    iv. the circumstances of an agency's collection and use of the information; and
    v. the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act

198. The FOI Guidelines discuss the matter of disclosure of public servants' personal information. The Guidelines state that "*where public servants' personal information is included in a document because of their usual duties or responsibilities, it would not be unreasonable to disclose unless special circumstances existed. This is because the information would reveal only that the public servant was performing their public duties.*[45]

199. The decision maker did not provide discussion in their Decision Notice as to their reasons for the redaction of the names and work contact details of public servants. On 29 March I wrote to the respondent seeking its submissions generally on the release of staff names. I also asked for submissions in relation to 10 named individuals who in various documents had their name redacted and in other documents had their name released. Each of these identified individuals were known to the applicants either through directly dealing with them or being provided with their names and contact details by the respondent.

200. It is possible that a person's name can be released in one document and redacted in another if the second document contains information about the person which would make it unreasonable and contrary to the public interest that the person's identity be disclosed.

201. The respondent replied on 24 April. In that response the respondent said *"that whilst the Applicants:*
- *may be aware of the identity of certain individual(s) within the department;*
- *have interacted with certain individuals previously; or*
- *have received documentation containing staff personal affairs information in other documents*

it is not reasonable to automatically provide the Applicants with the personal affairs information of these same staff contained in documents that were never originally provided to the Applicants".

202. The respondent also submitted '*The Applicants, whether by design or accident, are causing undue concern and distress to departmental staff due to the unrelenting nature of their ongoing actions and correspondence*

203. I note that the applicants have had prolonged and frequent interactions with the respondent and other officers within the Department of Education and Training in seeking to have their complaints about XK addressed and expressing their concerns about how the respondent and other areas of the Department have handled their complaints.

204. In an earlier matter involving the same parties the former Commissioner concluded that given the ongoing and complex contact between the applicants and the Regulatory Authority and the broader Department, more junior officers do not have the authority to respond to these matters. She found the disclosure of the personal information of such officers may result in contact from the applicants, waste the time of both the applicants and the officers on matters they cannot address, and cause unnecessary stress to both parties.

205. She also considered the following factor to be a relevant consideration in the disclosure of the personal information of Regulatory Authority officers. One of the key functions of the Authority is to investigate complaints about early childhood education and care services. There are 4,435 such services in Victoria. In order to ensure these complaints are captured and dealt with expeditiously, the Regulatory Authority has established centralised online, email and telephone options for lodging complaints. The disclosure of individual officers' contact details risks complaints not being dealt with systematically and efficiently.

206. She concluded that taking into consideration all matters she was satisfied that the disclosure of the personal information of the public servants in question would be unreasonable in the circumstances.

207. She was also satisfied that it would be unreasonable to disclose the names of other public servants identified in the documents. These are the names of:

    i. officers external to the Regulatory Authority who were not involved in the investigation of the complaints under the *Education and Care Services National Law Act 2010* and whose roles do not fall within the jurisdiction of that Act; and

ii. administrative support staff operating in transactional roles with no involvement in the investigation of the complaints.

208. I am prepared to adopt these conclusions as a general proposition. However as indicated above in [199] 10 individuals have had their name redacted in some cases but not in others. I will now consider these.

209. The name of one individual who is an officer of the respondent has been redacted five times in document 1 at pages 1,2,3,5 and 6. However, the name of that person has not been redacted where it appears a second time at the foot of page 6 of this document. It is possible that the failure to redact the name on this page was an error given it has been redacted each other time it appears in document 1 and would be consistent with the respondent's approach as set out above. Nevertheless, it is a matter of fact that the name was released to the applicants.

210. The document is a letter from the Regulatory Authority to the XK attaching a compliance report following a visit to the kindergarten by an authorised officer. Where the name is not redacted on page 6, it appears in the context of this person being the authorised officer. On 4 other occasions, on pages 1,3 5 and 6 of the document, the name appears beside the words "authorised officer".

211. Given the document as released to the applicants identified this individual as the authorised officer, I consider the release of this personal information alongside the words "authorised officer" would not be unreasonable.

212. The other 2 redactions of this person's name from document 1 are on page 2 at the end of the covering letter to the kindergarten. The first redaction is a reference to this person being the person the kindergarten should telephone if it has any queries. The telephone number, on which this person can be contacted is a 1300 number, not a direct number for the individual. I note the number is not redacted. I consider the release of the person's name in this context would not be unreasonable.

213. Another redaction is a redaction of this person's name from an email address. This individual is an officer of the Authority the applicants have specifically addressed correspondence about their complaint to. I do not consider the release of the name in this email address would be unreasonable.

214. I have examined unredacted copies of all the other documents in which this person's name appears. With the exception of documents provided by the applicants and with one other exception the person's name has been redacted consistently with the reasons set out at [201] to [208]. The other exception is the release of the person's name in the subject title of an email. In some cases the material has already been exempted pursuant to another section of the FOI Act. I am satisfied the release of the person's name other than I have determined above would be unreasonable.

215. The person who signed the letter on behalf of the Authority dated 8 October 2020 that is part of document 1 has had their name redacted from that letter at page 2. However, that person also wrote a letter to XK dated 19 August 2020, which is document 2, and her name has not been redacted from that letter. This same letter without redaction of the writer's name appears 5 more times in the documents

216. The person holds a senior position with the Authority being an area manager, so the conclusion reached by the former Commissioner as set out in [204] is not relevant. The person's name is disclosed to the applicants in document 2 which is not a document originally supplied to the applicants, so the position of the respondent as set out in [201] is not applicable.

217. The letter dated 8 October 2020 is a letter to XK setting out the findings of a compliance visit whilst the letter to XK dated 19 August 2020 is a notification of the complaint which had been received. The

decision maker has provided no explanation as to why release of the writer's name is unreasonable in one case and not in the other. I consider both the letters are examples of the person performing their day-to-day functions as a senior officer of the Authority. I do not consider the release of the writer's name would be unreasonable.

218. There is a third letter written by the same person to XK dated18 December 2020 at document 3. The writer's name has been redacted from this letter. The letter is advising of the progress of the investigation which is the subject of the letter dated 19 August 2020. For the reasons set out above, and the fact that this letter is a direct follow on from the 19 August letter, I do not consider release of the writer's name would be unreasonable.

219. The officer's name has been redacted in a further 49 documents being emails or email chains in which the officer is either the sender, a recipient or has her name mentioned in the body of an email. Where the person is the sender their name and that part of their email address that is their name has been redacted. Where the person is the sender their name, job title, direct phone number, mobile number and that part of their email address that is their name has been redacted. Where the person's name appears in the body of the email it is generally only their first name and that has been redacted.

220. A substantive amount of material in the emails has been redacted pursuant to ss 47C and 47E of the Act. As discussed above I have agreed with these redactions. What remains is material in the nature of comments, questions, references to attachments and other statements made between officers of the respondent in the course of conducting the investigation of the complaints made by X1 and X2.

221. This officer has spoken by telephone to X1 and X2 and written to them about their complaints. In the letter she states her job title and gives the applicants her direct phone number. I do not consider the release of this person's name, job title, email address and direct phone number in emails would be unreasonable. I consider it would be unreasonable to release her mobile phone number.

222. The person's name has also been redacted twice from document 56 which is described as a timeline. The material simply states that X1's concerns and a letter from him had been forwarded to her. I do not consider the release of her name in this context would be unreasonable.

223. A second officers name has been redacted from document 56. The paragraph in which the person's name appears has been redacted in its entirety pursuant to s 47E, a decision I have confirmed above. However, for the sake of completeness I will consider the redaction of the name pursuant to 47F.

224. The material in question confirms a letter was sent to XK by this person. I do not consider this release would be unreasonable. However, the release of the person's name would be a release of material I have found to be exempt in the context of a s47(e) consideration.

225. This person's name has not been redacted anywhere else in the documents.

226. In an earlier matter between the same two parties the former Commissioner noted that the decision maker had submitted that the names and contact details of the two senior officers who are responsible for the oversight of the investigation into these complaints, and the ultimate decisions in relation to them, have been disclosed to the applicants in the documents. These officers are senior officers of the Regulatory Authority.

227. These two officers name appear in many documents where they have not been redacted. There are 2 exceptions to this. The first is in document 161 appearing at page 30 of part B of the documents. This is an email seeking legal advice. I have already determined that the content of this email is subject to

LPP at [37] above. However as noted at [38] LPP does not extend to the identity of the person seeking the advice.

228. The names of 4 people have been redacted from the email pursuant to 47F. The name of the person who sent the email and the second named person who was copied into the email are the names of the 2 senior officers referred to above. I do not consider the release of these names in this email would be unreasonable.

229. The second exception is in document 174 at page 100 of part B. This is the first email in a chain of emails. It is an email from an officer of the respondent to one of the senior officers. The email has itself no content. It merely attaches a number of other documents. I do not consider the release of the name of the person to whom the email has been sent would be unreasonable.

230. The first name of another officer of the Authority has been redacted from document 98 at page 244 of part A. That document described as a typed note is a record of a phone call made by X1 to the respondent. In it X1 states that he will be sending a letter to the respondent marked to the attention of this person. As this name was provided by X1 in this phone call I do not consider its release would be unreasonable.

231. The same officers full name is redacted twice and her first name once in document 153 at pages 456 and 457. This is a record of a phone call made by X1 to the officer in question. The material merely indicates she was the person who received the call and that documents from X1 would be marked to her attention. I do not consider the release of her name in this document would be unreasonable.

232. The other names of the people being part of the 10 described at [199] are the names of people employed at or connected with XK. The redactions are consistent with the approach of the Authority set out at [201]. For the reasons set out at [203] to [208] I consider the release of these names would be unreasonable.

    Also for the reasons set out at [203] to [208] I consider that the release of all the other names that have been redacted would be unreasonable.

Findings

233. Except as discussed at [188] to [192] and at [211] to [213], [217] to [218], [221] to [222], [224], at [228] to [229] and at [230] to [231] the redactions made pursuant to s47F are conditionally exempt.

Public Interest Test

234. As discussed previously, in finding that the material in the documents under discussion is conditionally exempt, section 11A(5) of the FOI Act requires consideration of whether it would be contrary to the public interest to give the applicants access to conditionally exempt documents at this time.

235. In its decision, the respondent identified two public interest factors in favour of disclosure of the material to be found conditionally exempt under s 47F(1) of the FOI Act, namely that disclosure: *would promote the objects of the Act (set out in s 3 of the Act); and would allow a person to access his or her personal information.*

236. The respondent did not provide further discussion on these factors.

237. I agree that disclosure of the material would promote the objects of the FOI Act in that it would disclose government-held information. I do not, however, consider that disclosure of either the personal information of third parties or of public servants, in this instance, would assist in either an increase in public participation in Government processes or increase scrutiny, discussion, comment and review of a government agency – the Regulatory Authority.

238. I agree that disclosure of some of the material may allow the applicants to access their personal information. The material in question has been provided by third parties. In my view, any personal information of the applicants contained in it is so entwined with the personal information of other parties that it is impractical to extract it. The FOI Guidelines relevantly state at paragraph 6.150 *Where it is not possible to separate an applicant's personal information from a third party's personal information, the exemption may be claimed if it is unreasonable to release the information*. I am satisfied it would be unreasonable to release the material.

239. In its decision, the respondent identified four public interest factors against disclosure of the material found to be conditionally exempt under s 47F)1) of the FOI Act:

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

240. I agree that these are relevant factors against disclosure of the conditionally exempt material under consideration. As discussed previously the disclosure of third-party personal information against the express wishes of those parties would cause distress and stress and would likely affect the wellbeing of the individuals in question. Disclosure would prejudice the protection of those persons rights to privacy.

241. Furthermore, the unauthorized disclosure of the personal information of third parties by the respondent, if it became known, would erode trust in the agency, likely prejudice its ability to obtain information and have frank and open discussions when undertaking investigations, and compromise its overall effectiveness.

242. In weighing up the public interest factors for and against disclosure I also consider that individual personal privacy is in itself a significant public interest matter and, in my opinion, it requires some countervailing public interest argument – that is argument of equal weight – to override the protection of personal privacy which I cannot find in this case.

243. On balance I am satisfied that, in this case, the public interest factors against the disclosure of the material outweigh the public interest factors in favour of its disclosure.

DISCLOSURE LOG

244. Since 1 May 2011, agencies and ministers have been required by s 11C of the FOI Act to publish on a website, to the public generally, information that has been released in response to each FOI access request, subject to some exceptions. This publication is known as a 'disclosure log'.

245. One of the exceptions to this requirement to publish is where the documents in question contain 'personal information about any person, if it would be unreasonable to publish the information' (s 11C(1)(a)).

246. 246.It is for the Regulatory Authority to decide whether these names should be published on the disclosure log. The test that the Authority has to apply (whether it would be unreasonable to publish the information on a website to the public generally) is different to the test that I have applied in this review (whether it would be unreasonable to disclose that information to the applicant).

MISSING RECORDS

247. In their application for NECS FOI Commissioner review the applicants said they were advised by an officer of the respondent that their child's attendance records were held by the respondent. These records would have come within the scope of the FOI request but were not provided. This was a matter thar the former Commissioner pursued with the respondent.
248. As part of her handover to me the former Commissioner advised me that she made inquiries of the officer the applicants said made the statement. That officer could not recall making the statement and explained she had not requested attendance records from XK as the complaints were not date specific.
249. Finally the former Commissioner advised that she could not find evidence that the attendance records were obtained or held by the Regulatory Authority. In so far as it is necessary I adopt the former commissioner's findings.

Alan Grinsell-Jones
National Education and Care Services Freedom of Information Commissioner

REVIEW RIGHTS

If a party to a NECS IC Review is dissatisfied with an IC Review decision they may apply under section 57A of the **FOI Act**, as modified by the *Education and Care Services National Regulations* r209(e) and r210, to have the decision reviewed by the relevant Tribunal. In the case of this IC Review the relevant tribunal is the **Victorian Civil and Administrative Tribunal**. The **Victorian Civil and Administrative Tribunal** provides independent merits review of administrative decisions and has the power to set aside, vary or affirm a NECS IC review decision.
An application to the **Victorian Civil and Administrative Tribunal** must be made within 28 days of the day on which the applicant is given the NECS IC review decision. An application fee may be applicable when lodging an application for review to the **Victorian Civil and Administrative Tribunal.** Further information is available on the **Victorian Civil and Administrative Tribunal** website **https://www.vcat.vic.gov.au** or by telephoning **1300 01 8228**.

Attachment A

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

1. Most education and care services across Australia operate under **national applied laws** legislation. In Victoria the national laws are applied through the *Education and Care Services National Law Act 2010 (Vic)* – the **ECS National Law (Vic).**

2. Section 5 of the ECS National Law (Vic) states the Victorian *Freedom of Information Act 1982* does not apply to the ECS National Law (Vic) or to the instruments made under that Law.

3. Section 264 of the ECS National Law (Vic) applies the Commonwealth *Freedom of Information Act 1982* (FOI Act (Cth)) as a law of a participating jurisdiction for the purposes of the **National Quality Framework**.

4. The National Quality Framework (NQF) is a national, uniform regulatory and quality assurance system for early childhood education and care and outside school hours care services across Australia. It includes National Law and National Regulations, national quality standards, assessment and rating processes, and national learning frameworks. Further information is available at www.acecqa.gov.au

5. Regulation 208 of the *Education and Care Services National Regulations 2011* (the **ECS Regulations**) applies the FOI Act (Cth) as if it were modified so that it **applies only to agencies** and those agencies are the National Authority (the Australian Children's Education and Care Quality Authority – ACECQA) and the Regulatory Authority of each participating jurisdiction.

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

7. The functions and powers of the Regulatory Authority are delegated to the Quality Assessment and Regulation Division (QARD) of the Department to administer and enforce the National Law. Officers in its Freedom of Information Unit are authorised to handle FOI requests on behalf of the Regulatory Authority.

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

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