National Education & Care Services
FOI & Privacy Commissioners & Ombudsman

Sideris and Western Australian Education and Care Services Regulatory Authority

DECISION AND REASONS FOR DECISION OF THE NATIONAL EDUCATION AND CARE SERVICES FREEDOM OF INFORMATION COMMISSIONER

Application number:	**FOIC Review 04-2023**
Applicant:	**Mitchell Sideris**
Respondent:	**Western Australian Education and Care Services Regulatory Authority**[1]
Decision Date:	**4 February 2025**
Catchwords:	**Freedom of Information – Scope of the request – Whether reasonable searches undertaken – Whether documents fall within the scope of the request – *Freedom of Information Act 1982* (Cth) s 22 – Education and Care Services National Law and *Education and Care Services National Regulations***

DECISION

1. Under subsection 55K(1) of the *Freedom of Information Act 1982* (Cth) (**FOI Act**), I vary the internal review decision made by the Western Australian Department of Communities (**the Department**) dated 6 October 2023 as varied on 12 April 2024. I find that:

   (a) the Department has taken reasonable steps to locate documents that fall within the scope of the applicant's access request
   (b) documents that are referred to as 'In scope' in the column titled 'FOI Review Decision' in Attachment B also fall within the scope of the applicant's request
   (c) information in documents that may identify any person, organisation or undertaking is irrelevant to the request (other than the name of or position held by an officer of the Department).

2. My decision is summarised at Attachment B.

3. Within 28 days after the date of this decision, the Department must give the applicant a copy of the additional documents I have found to be within the scope of the request, edited under section 22 of the FOI Act only to the extent necessary to delete irrelevant material.

[1] The Director General of the Western Australian Department of Communities is the Regulatory Authority: see section 8 of the *Education and Care Services National Law (WA) Act 2012* (WA). For further details, see Attachment A to this Decision.

BACKGROUND

4. On 5 August 2023, Mr Mitchell Sideris (**the applicant**) applied for access to information on a form made available by the Department for applications under the *Freedom of Information Act 1992* (WA) in the following terms:

> *Time Frame 1st January 2022 to Current 2023*
>
> *A copy of all Education and Care Regulatory Unit Western Australia Policies, Standard Operating Procedures, Guidelines, including assessment, review, penalty, actions and enforcement, etc.*

5. On 9 August 2023, an FOI Officer emailed the applicant and requested that the applicant review the information on the webpage for the Education and Care Regulatory Unit (**ECRU**)[2] against another state's published policies and advise which specific policies he wished to access. The applicant responded the same day stating that the documents on the webpage:

> *are generic and not specific to actual ECRU operational procedures in detail. For example there is no Check sheets, work plans, detail assessment criteria etc as actually undertaken in their operations in this State.*

6. On 29 August 2023, the FOI Officer emailed the applicant stating that the request would comprise a large volume of documents. It was noted that:

- the scope as worded would technically encompass all policy that ECRU is bound by, including all Department of Communities policies relating to its employees
- there is a very large amount of ECRU-specific policy
- the scope needs to be reduced to a workable level and the Department cannot process the request as it stands.

7. On 31 August 2023, the applicant responded stating that the scope:

> *is as described - limited to Education and Care Regulatory Unit Western Australia, and is not seeking information of the whole Department of Communities ... It is specific in its request - Policies, Standard Operating Procedures, Guidelines, … that controls and directs the operations and internal decision making of this specific Unit in the areas as stated in the scope.*

8. Following a telephone conversation with the applicant on 1 September, the FOI Officer emailed the applicant to confirm an amended scope for the request in the following terms:

> *A copy of all Education and Care Regulatory Unit Western Australia Policies, Standard Operating Procedures, Guidelines, relating to assessment, review, penalty, actions and enforcement in force between 1 January 2022 to present.*

The FOI Officer also stated:

> *The only change has been to narrow the scope to policies/guidelines/standard operating procedures to those relating to ECRU's assessment, review, penalty, actions and enforcement, and will exclude the policies for the wider department, and those that relate to more administrative matters such as COVID-19 policy, and applications from new service providers.*

The applicant responded with an email the same day stating "Thanks".

[2] This is the unit in the Department responsible for administering the Education and Care Services National Law.

Primary decision

9. On 13 September 2023, the Department emailed the applicant a notice of its decision made that day together with a document schedule and a set of released documents. The decision-maker noted in the statement of reasons that:

    - the ECRU was requested to identify and locate documents within the scope and a large number of documents were provided to the FOI Unit and viewed
    - 36 documents described as Internal Policy, Internal Guidelines and Process Quick References were found to be relevant to the scope and were released in full.

Internal review

10. On 14 September 2023, the applicant applied for internal review of the Department's decision. Matters raised by the applicant included:

    - it was not clear if the released documents reflected all the documents provided by the ECRU which they considered satisfied the request to identify and locate documents within the scope
    - a review of the released documents showed a significant shortfall in the documents that had been provided, namely all standard operational procedures and all operational guidelines: the applicant gave some examples.

11. On 6 October 2023, the Department affirmed the primary decision. In the statement of reasons:

    - the decision-maker explained that ECRU had been asked to identify all documents relevant to the applicant's initial access application, not the scope agreed with the applicant on 1 September 2023: only those documents originally provided by ECRU that fell within the refined scope and were not publicly available were considered in the primary decision
    - the decision-maker acknowledged that the applicant considered there were further documents that should be released but noted that the applicant had not provided any further information to assist in identifying the documents he considered were missing.
    - the decision-maker stated that it was satisfied reasonable searches had been undertaken to locate the requested documents and no further documents were identified.

Application for NECS FOI Commissioner review

12. On 9 October 2023, the applicant applied for review of the Department's internal review decision. He raised that the Department's approach to the scope of the request was at odds with the revised scope that had been agreed on 1 September 2023. The applicant also raised some other matters relating to the handling of the request but these do not fall within the scope of the issues to be determined on a merits review of the Department's decision.

13. On 12 April 2024, the Department made a decision under section 55G of the FOI Act varying the decision under review. The Department released a further 8 documents described as Process Quick References and Work Practices following its review of documents that were referred to in the documents already released.

14. During the review, I requested that the Department give me documents recording the searches conducted in relation to the FOI request as well as certain documents considered to be out of scope for inspection. I also made a number of further requests for information about particular documents as well as for submissions in support of the Department's decision, including whether the Department wished to claim that any of the documents said to be out of scope contain exempt matter. In submissions dated 25 September 2024, the Department claimed that certain of these documents contain information that is conditionally exempt under section 47F and 47G of the FOI Act and disclosure would be contrary to the public interest: namely, a photo of a Departmental officer and information identifying particular education and care services, service providers and other individuals associated with them. No other exemption claims were made.

15. The applicant provided a number of submissions in response to the Department's submissions. In submissions dated 4 and 12 November 2024, the applicant confirmed that he is not seeking access to the information the Department claimed is exempt under section 47F and 47G of the FOI Act. As a result, this information can be considered to be outside the scope of the FOI request and therefore irrelevant. To the extent it appears in documents that I have determined fall within the scope of the request, it may be deleted in accordance with section 22 of the FOI Act.

SCOPE OF THE REVIEW

16. The Department has given the applicant 44 documents in full. The applicant contends that the Department has not given him access to all documents that fall within the scope of the request.

17. The issues to be decided in this review are:

- what is the scope of the request that was made by the applicant
- whether reasonable searches have been undertaken
- whether certain documents do or do not fall within the scope of the request.

18. The Department bears the onus of establishing that its decision is justified, or that I should make a decision adverse to the review applicant: section 55D(1) of the FOI Act.

19. In making my decision, I have had regard to the following:

- the original FOI request and other documents held by the Department relating to the handling of the request, including searches undertaken
- the Department's internal review decision made on 6 October 2023 as varied by the decision made under section 55G on 12 April 2024
- other documents held by the Department that were considered during the course of dealing with the request
- the parties' submissions
- the FOI Act, in particular section 22
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (which have been adopted by the National Education and Care Services Freedom of Information Commissioner), in particular paragraphs 3.54, 3.72, 3.89, 3.110, 3.128, 3.133 and 13.116.

THE SCOPE OF THE APPLICANT'S FOI REQUEST

20. The FOI Guidelines contain the following guidance for agencies in relation to interpreting the scope of a request:

- a request should be interpreted as extending to any document that might reasonably be taken to be included within the description the applicant has used[3]
- a request can be described quite broadly and must be read fairly by an agency, being mindful not to take a narrow or pedantic approach to its construction.[4]

The parties' submissions

21. In submissions dated 12 April 2024, the Department stated that there was agreement to refine the applicant's initial request "to records in force between 1 January 2022 to present (being 10 August 2023)" and "in an effort to exclude records that are used Department-wide … by replacing the word 'including' to 'relating to' (thereby refining the scope to those records solely related to ECRU)".

22. The Department also stated that, as the applicant had specifically requested records relating to assessment, review, penalty, actions and enforcements:

> *it was considered the applicant was seeking records in the context of an investigation for current service providers. Accordingly, records relating to 'assessment' in terms of an initial/new application to be a service provider were deemed to be outside of the scope of the request.*

23. In relation to the categories of documents the applicant had requested, the Department stated that they relied on the following Oxford Dictionary definitions:

> *Policy – "a course or principle of action adopted or proposed by an organisation or individual"*
>
> *Standard Operating Procedure – "a set of instructions on how to perform a routine business activity"*
>
> *Guideline – "a general rule, principle, or piece of advice".*

The submissions stated that the Department's FOI Officer worked on the understanding that checklists, forms, tracking sheets, templates and other tools do not fall within the scope.

24. The applicant's submissions received on 26 May 2024 included the following matters.

- The applicant did not accept that the documents given to him by the Department satisfy the requirements of the scope of the request. The Department had never identified that it considered he was seeking records in the context of an investigation for current service providers. By seeking to exclude documents relating to initial/new applications, the Department was disregarding the key word "all" in the agreed scope. This could not be further amended without written agreement.
- It was difficult to comprehend why the Department was now introducing the fact that it referred to the Oxford English Dictionary when it should have referred to the Office of the Australian Information Commissioner's guidelines, including *Processing FOI requests: taking all reasonable steps to find documents*.

[3] FOI Guidelines, [3.54]. Footnote omitted.
[4] FOI Guidelines, [3.110]. Footnote omitted.

25. In a further submission received on 5 June 2024, the applicant stated that:

- documents relating to applications from new services providers would comfortably fit within the scope of the request
- he understood the term "all" in the request to embrace documents in all forms and, in this instance, includes check sheets and PowerPoint presentations.

Findings in relation to scope of the request

26. The scope set out in the applicant's original FOI request was refined through engagement with the applicant with the final scope as set out in paragraph [8] above. When the Department wrote to the applicant on 1 September 2023, the FOI Officer set out their understanding of the changes made to the scope, including what was excluded:

- policies relating to applications from new service providers
- policies for the wider department, and
- policies relating to more administrative matters.

The applicant did not disagree with the stated scope or explanation of the changes set out by the Department.

27. On the basis of the evidence, I find that the final scope agreed between the Department and the applicant excluded the matters specified in the paragraph above. While the FOI Officer referred specifically to "policies" in describing the exclusions, I consider it reasonable in the context to read this as extending to any of the requested categories of documents: that is, policies, guidelines or standard operating procedures. I am satisfied that the agreed scope excluded any documents relating to initial/new applications to be a service provider. In its submissions dated 12 April 2024, the Department raised the applicant's purported motivation for seeking the documents but I note that this is not a relevant factor in considering the scope.

28. In relation to the approach taken by the Department to determine what types of documents fell within the scope of the request, I consider the definitions relied on by the Department for policies, guidelines and standard operating procedures were reasonable. There is a distinction between these types of documents and other types of documents such as decisions templates, model letters, training packages and checklists that an agency may use to assist it in carrying out its work.[5] While such materials may be attached to or form part of policies, guidelines and procedures, I am satisfied, with one exception, that the scope of the request did not include standalone documents of this kind. In his email to the Department dated 9 August 2023, the applicant indicated that he considered check sheets were among the categories of documents he was seeking. On this basis, I consider that checklists may fall within the scope of the request.

29. I also note that the form of a document or what it is called is not determinative of whether it may reasonably be considered to be a policy, guideline or standard operating procedure. Whether particular documents that were identified by the Department fall within one or more of these categories is discussed in more detail below.

[5] See FOI Guidelines, [13.116].

WHETHER REASONABLE STEPS TAKEN TO FIND DOCUMENTS

30. The FOI Guidelines contain the following guidance for agencies in relation to searching for documents within the scope of a request:

> *Agencies … should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment … At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:*
>
> - *the subject matter of the documents*
> - *the current and past file management systems and the practice of destruction or removal of documents*
> - *the record management systems in place*
> - *the individuals within an agency … who may be able to assist with the location of documents, and*
> - *the age of the documents.*[6]

Searches conducted by the Department

31. After some initial liaison about the request, the FOI Officer emailed the ECRU on 10 August 2023 and asked that documents falling within the ambit of the applicant's original scope be sent to the FOI Unit. On 16 August 2023, the ECRU emailed the FOI Unit a list of documents with links to some 60 internal documents and some public-facing websites. It was noted in the email that the list "included policies as opposed to detailed processes".

32. Following the engagement with the applicant about the scope of the request, the list of internal documents was reviewed by the FOI Unit to identify which were considered to fall within the amended scope. These were the documents released in the primary decision.

33. After receiving the applicant's internal review request, the FOI Unit emailed the ECRU noting that the applicant believes more documents should exist and seeking guidance as to whether or not any further policies, guidelines or operating procedures exist. The FOI Unit also sent the ECRU the applicant's request for internal review and drew their attention to certain specific documents referred to by the applicant in the internal review request. The ECRU provided comments on these documents and sent 3 of them to the FOI Unit. No further documents falling within the scope of the FOI request were identified.

34. On 7 March 2024, I asked the Department to make submissions explaining the basis for deciding that certain documents referred to in the documents already released to the applicant, including process quick reference guides, checklists and templates, were not within the scope of the FOI request. I set out a non-exclusive list of these documents in the request.

35. In its submissions dated 12 April 2024, the Department stated that the ECRU had been asked to carry out additional searches to locate the specific records listed in my request. They were reviewed and considered for release. As noted above at [13], 8 further documents were released in the revised decision made under section 55G of the FOI Act.

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[6] FOI Guidelines, [3.89] Footnotes omitted.

The parties' submissions

36. In its submissions dated 12 April 2024, the Department stated that, while an agency must take reasonable steps to identify documents within the scope of the request, the term 'reasonable' is not defined. Prior to receipt of my letter of 7 March 2024, the Department did not undertake a forensic search of each document that was released to the applicant to identify documents referenced within them as this was not considered reasonable.

37. In his submissions received on 26 May 2024, the applicant stated that he did not accept that the documents he had received satisfied the scope. The applicant indicated that he considered the Department should undertake a forensic search of the released documents.

Finding relating to searches

38. From the search records provided to me by the Department, it appears from reviewing the initial list of documents that was given to the FOI Officer that the initial focus was on locating documents referred to as policies and guidelines rather than documents that may set out more detailed procedures or processes. Only 2 documents of this kind were identified. As noted in their submissions, the Department did not review the policies and guidelines compiled to identify whether they referred to other documents that may fall within the scope.

39. While the initial search led to the identification of a reasonable proportion of the documents ultimately released to the applicant, I do not consider it would have been adequate on its own. However, further searches have been undertaken during the review process which has led to the identification of further documents considered to be within scope and released to the applicant and others which I have decided for the reasons set out below are within scope. As a result of the additional searches, I consider that the Department has now taken reasonable steps to find documents within the scope of the applicant's request.

WHETHER ANY FURTHER DOCUMENTS ARE WITHIN THE SCOPE OF THE REQUEST

The parties' submissions

40. In its submissions dated 12 April 2024, the Department set out:

- a list of documents numbered 1 to 25 that were included in the original list compiled by the ECRU that the Department considers are out of scope (apart from one document already released to the applicant) with its reasons for this view in relation to each document (referred to as **Table 1 documents**)
- a list of the documents that I requested be examined which sets out information about which documents had subsequently been released to the applicant, and, for those not released, why the Department considered each document to be out of scope (referred to as **Table 2 documents**).

41. In his submissions dated 5 June 2024, the applicant stated that, in relation to the Table 1 documents, Document Nos 1, 3, 4, 21, 22, 23, 24 and 25 are outside the agreed scope. In relation to all of the other documents referred to in the Department's submissions, he considered they are within scope.

Findings relating to whether further documents are within scope

42. In Attachment B to these reasons for decision, I have listed the documents that remain in contention and have recorded my conclusion as to whether or not they are in scope. My reasons for certain categories of documents and particular documents are set out below. The list at Attachment B does not include any of the documents that the applicant agrees are out of scope but does note those that have already been released to the applicant.

Whether documents relate to initial/new applications from service providers

43. The Department submitted that 3 documents (Table 1 – Document Nos 13, 14 and 17) are not within scope because they relate to initial or new applications to become a service provider.

44. As set out at paragraph [27] above, I have found that documents relating to initial or new applications to be a service provider were excluded from the scope. I reviewed the 3 documents claimed to be out of scope on this basis and agree that they relate only to applications to become a service provider.

45. I am also satisfied that the policy relating to use of the Document Verification System (Table 1 – Document No. 9) is not within scope on this basis. Having reviewed this document, I find that the procedures are only relevant to applications for initial approval of a service provider.

Whether documents relate to assessment, review, penalty, actions and enforcement

46. The Department submitted that 12 documents (Table 1 – Document Nos 5, 6, 7, 8, 9, 11, 12, 15, 19 and 20 and documents referred to at Table 2 – 4 and 19) are not in scope because they do not contain information specific to or relevant to ECRU assessment, review, penalty, actions and enforcement. For the purposes of determining whether these documents are within scope, the questions for me to consider are:

    - whether the documents are policies, guidelines or standard operating procedures that relate to assessment, review, penalty, actions and enforcement, and
    - whether they are otherwise not within scope because they fall within the other agreed exclusions (wider departmental documents or documents that relate to administrative matters).

    I note that Table 1 – Document No. 9 has been dealt with in the previous section.

47. As noted at paragraph [20] above, the FOI Guidelines state that a request should be interpreted as extending to any document that might reasonably be taken to be included and a narrow or pedantic approach should be avoided. I consider that the words "relating to" are broad in nature and denote some connection between 2 things, whether direct or indirect.

48. In relation to Table 1 – Document Nos 5, 6 and 12, the Department submitted that these policies relate, respectively, to auditing for practice development within ECRU, the steps for dealing with a suspected data breach in ECRU and guidelines for processing payments and refunds. Based on the information provided by the Department, I am satisfied that these policies do not relate to assessment, review, penalty, action or enforcement in relation to services. As such, they do not fall within the plain meaning of the words of the scope. Arguably, they are also policies that relate to more administrative matters and therefore fall within the agreed exclusions.

49. Table 1 – Document No 7 provides guidance to staff when responding to requests from service providers about their compliance history. Table 1 – Document No 8 provides guidance to staff about the sharing of information about services over the phone and includes a reference to sharing information about investigations. While neither policy is directly about the assessment or review of a service or the taking of enforcement or other action in relation to a service, having reviewed both policies, I consider they contain content guiding staff in relation to dealing with matters concerning these matters. I am satisfied that they are sufficiently related to assessment, review, penalty, actions or enforcement so as to be within scope.

50. The title of Table 1 – Document No 11 is Compliance Compendium Regulation and Quality March 2023. Its purpose is described in the Overview as being "to establish clear, consistent, and transparent procedures governing the conduct of compliance activities and investigations into breaches of relevant legislation" administered by the various regulatory units within the Department of Communities' Regulation and Quality Directorate. ECRU is one of the regulatory units in the Directorate. While this document sets out procedures of a general nature that ECRU must follow when undertaking activities in relation to action or enforcement, it is not an ECRU-specific set of procedures. As such, I consider the document falls outside the plain words of the scope that was agreed. It is also a wider departmental document and therefore falls within the agreed exclusions.

51. Table 1 – Document No 15 outlines a procedure for contacting approved providers who are no longer operating and the steps that may be taken to cancel the provider approval. The document referred to at Table 2 – 4 is a process guide that contains information about rescheduling visits to existing services, including for assessment and rating purposes. Having reviewed the documents, I am satisfied that they both relate directly to assessment, review, penalty, actions or enforcement in relation to services.

52. The Department stated in its submissions that Table 1 – Document Nos 19 and 20 are a policy and procedures relating to workplace health and safety for the former Department of Local Government and Communities. Based on the information provided by the Department, I am satisfied that these do not fall within the scope of the request both on the basis that they do not relate to assessment, review, penalty, action or enforcement in relation to services and they are wider departmental documents.

53. The document referred to at Table 2 – 19 sets out instructions for how to add, review and deactivate service alerts on the National Quality Agenda IT System (**NQA IT System**), an online system maintained by the Australian Children's Education and Care Quality Authority (**ACECQA**) to support the regulation of early childhood education and care services. It is used by all state and territory Regulatory Authorities. I have reviewed the document and it includes a reference that alerts may include information about a service such as matters to check on the next visit. I am satisfied that the document is a standard operating procedure that is sufficiently related to assessment, review, penalty, actions or enforcement that it falls within the scope of the request.

Documents that are not policies, guidelines or standard operating procedures

54. The Department submitted that certain documents (Table 1 – Document Nos 2 and 10 and Table 2 – Documents referred to at 2, 3(a), 5, 12(a), 12(b), 12(c), 13, 15(b), 20(a), 20(b), 23, 24(a), 24(b), 26(a), 28(a), 28(b), 28(c) and 28(d)) are not in scope because they are not policies, guidelines or standard operating procedures.

55. In relation to Table 1 – Document No 2 (ECRU Policy Manual Index), the Department stated in its submissions that this is only an index. I am satisfied on this information that the document is not within scope as it is not a substantive policy, guideline or standard operating procedure.

56. In relation to the documents referred to at Table 2 – 2 and 5, the Department stated the following in its internal review decision:

- a moderation spreadsheet (Table 2 – 2) captures the schedule for all assessment and ratings being undertaken over a period time, and
- the priority rating system (Table 2 – 5) is a report that can be generated through the NQA IT System to show the date of a service's last assessment and rating visit.

In its submissions, the Department stated that both documents are used as working tools to capture or keep track of service providers' status. I have reviewed an extract of the moderation spreadsheet. From my review of this spreadsheet and the Department's explanation of the priority rating system, I am satisfied that neither document is a policy, guideline or standard operating procedure. They are working documents recording information about services.

57. The Department submitted that a number of documents were checklists, forms or templates and fell outside of the definitions of policy, guideline and standard operating procedures relied on by the Department. The documents referred to as checklists include:

- the Disclosure of Information Under S38(2) Child Care Services Act 2007 CHECKLIST (Table 1 – Document No 10)
- the First Tier Review Justifications Workbook (Table 2 – 3(a))
- the OSHC – Pre-approval/Amendment (preschool age or under) checklist (Table 2 – 12(a))
- Visit checklists (Table 2 – 13) which comprise 10 separate checklists
- NQA IT System checklists (Table 2 – 20(a))
- ECRU Self-Assessment Checklist (Table 2 – 23).

As outlined in paragraph [28], I have found that the scope may include checklists that can be completed by officers when performing certain tasks. They will be in scope to the extent they relate to assessment, review, penalty, actions or enforcement and are not otherwise excluded.

58. Table 1 – Document No 10 (which is the same as the document referred to at Table 2 – 33) is a checklist that an officer completes in relation to the disclosure of information under section 38(2) of the *Child Care Services Act 2007* (WA) which can include information relevant to the performance of a function under the Education and Care Services National Law. The checklist is referred to in the *Policy – Disclosure of Information under S38(2) Child Care Services Act 2007* which was released to the applicant with the original decision. The First Tier Review Justifications Workbook (Table 2 – 3(a)) and OSHC – Pre-approval/ Amendment (Preschool age or under) Checklist (Table 2 – 12(a)) are checklists referred to respectively in the *Policy – First Tier Reviews – March 2021* and the *Internal Guidelines – Preschool age or under (pre-kindy) attending OSHC services – June 2019* which were also released to the applicant with the original decision. I am satisfied that each of these checklists falls within the scope of the request on the basis that the Department was satisfied the associated policies and guidelines fell within the scope.

59. I have reviewed the 10 checklists that are referred to as Visit checklists (Table 2 – 13) and which are listed at Attachment B below. They are forms that an officer completes when visiting a service or proposed service in relation to whether the service is meeting various aspects of the NQF. Except to the extent that any of the checklists may be used exclusively in relation to applications from new service providers, they form part of standard operating procedures relating to assessment and review of education and care services. I am satisfied they fall within the scope of the request.

60. In relation to the NQA IT System Checklists (Table 2 – 20(a)), the Department advised that these are screens within that System that officers complete as part of the process. As the NQA IT System is maintained by ACECQA, I am satisfied that these are not ECRU procedures and so fall outside the scope of the request.

61. In relation to the ECRU Self-Assessment Checklist (Table 2 – 23), this is a document available on the ECRU website. The applicant confirmed on 31 May 2024 that he was not seeking access to documents that are otherwise publicly available. It is not within the scope of the request.

62. In relation to the documents referred to at Table 2 – 12(c) (SA03 Amendment Approval – Preschool age or under and SA03 Amendment Refusal – Preschool age or under), I have reviewed the documents and they are template letters for notifying services of certain decisions. While they are referred to in policies and guidelines that have been released, for the reasons outlined at paragraph [28] above, they do not form part of those documents and are therefore not within the scope of the request.

63. The Department submitted that a number of documents containing instructions for entering data on the NQA IT System were not within scope (Table 2 – 12(b), 15(b), 20(b), 24(a), 24(b), 28(a), 28(b) and 28(c)).

64. In relation to the documents referred to at Table 2 – 12(b) (Process – Adding and Deactivating Additional Conditions to NQA ITS – May 2019), 15(b) (Process – Additional Conditions – May 2017) and 20(b) (Process – Adding, Deactivating and Reviewing Additional Service Approval Conditions to NQA ITS – March 2021), the Department submitted on 4 September 2024 that the documents referred to at 12(b) and 15(b) are earlier versions of the document referred to at 20(b) which is the document that was in force for the period from 1 January 2022. Having reviewed the documents, I am satisfied that this is the case. The documents referred to at Table 2 – 12(b) and 15(b) do not fall within the scope of the request as they were not current in the relevant period.

65. In relation to the document referred to at Table 2 – 28(c) (Process – Monthly Assessment Reports – September 2022), the Department advised on 25 September 2024 there was also an earlier version of this document dated December 2020 which was in force during the period from 1 January 2022. I have considered whether or not both documents are within scope.

66. The Department submitted that these documents relevant to entering data into the NQA IT System (including the document at Table 2 – 19 referred to above) were developed as training resources for use by staff authorised to use the system and are relevant to an old version of the NQA IT System which was upgraded in April 2024. Having reviewed the documents, I am satisfied that:

- they are standard operating procedures as they set out instructions for how to perform the routine activity of making and updating records in the relevant IT system relating to service alerts, additional service approval conditions, waivers of operating requirements, complaints, incidents and investigations and monitoring reports
- while they primarily contain instructions for using the NQA IT System, they also include some general instructions for how matters are to be handled.

I consider that the subject matter of each of the documents referred to at Table 2 – 20(b), 24(a), 24(b), 28(a), 28(b) and 28(c) relates to review, actions or enforcement. That the documents may have been developed as training resources or relate to a version of the system that is no longer current does not affect whether they fall within the scope of the request.

67. In relation to the document referred to as 'Internal Policy – Monthly Assessment Team Reports – September 2022' (Table 2 – 28(d)), the Department advised on 16 September 2024 that there is no September 2022 version of this policy. The only version is dated December 2020 and that document was released to the applicant with the primary decision as Document 32. I accept this explanation and am satisfied there is no document entitled 'Internal Policy – Monthly Assessment Team Reports – September 2022'. It appears the reference to 'September 2022' in Document 28 released to the applicant with the primary decision (Internal Policy – Recording First Action Taken – Cases – September 2022) was a typographical error.

68. In relation to the document entitled 'How to Issue Compliance Notices – A Guide for Assessment and Rating Officers' (Table 2 – 26(a)), the Department submitted that this is a PowerPoint training tool. Based on the information provided by the Department and for the reasons outlined in paragraph [28], I am satisfied that this document is a training document and not within the scope of the request.

DECISION

69. Under subsection 55K(1) of the *Freedom of Information Act 1982* (the FOI Act), I vary the internal review decision made by the Department dated 6 October 2023 as varied on 12 April 2024. I find that:

(a) the Department has taken reasonable steps to locate documents that fall within the scope of the applicant's access request
(b) documents that are referred to as 'In scope' in the column titled 'FOI Review Decision' in Attachment B also fall within the scope of the applicant's request
(c) information in documents that may identify any person, organisation or undertaking is irrelevant to the request (other than the name of or position held by an officer of the Department).

[Signed]

Christopher Matthies

National Education and Care Services Freedom of Information Commissioner

REVIEW RIGHTS

If a party to a review conducted by the National Education and Care Services Freedom of Information Commissioner is dissatisfied with the decision, they may apply to the relevant administrative tribunal for review of the decision: section 57A of the FOI Act as modified by regulations 209(e) and 210 of the *Education and Care Services National Regulations*. For this review, the relevant administrative tribunal is the State Administrative Tribunal of Western Australia which provides independent merits review of administrative decisions and has the power to affirm, vary or set aside the review decision.

An application to the State Administrative Tribunal must be made within 28 days after the day on which a party is given the review decision. An application fee may be payable when lodging an application for review. Further information is available on the State Administrative Tribunal's website (https://sat.justice.wa.gov.au) or by telephoning (08) 9219 3111 or 1300 306 017.

ATTACHMENT A: LEGISLATIVE FRAMEWORK

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

1. Most education and care services across Australia operate under national applied laws legislation. In Western Australia, the *Education and Care Services National Law (WA) Act 2012* (WA) (**ECS National Law Act (WA)**) applies the Education and Care Services National Law (**ECS National Law**) as a law of Western Australia.

2. Section 5(1)(a) of the ECS National Law Act (WA) states that the Western Australian *Freedom of Information Act 1992* does not apply to the ECS National Law or to the instruments made under that law.

3. Section 264 of the ECS National Law applies the Commonwealth *Freedom of Information Act 1982* (**FOI Act (Cth)**) as a law of each participating state or territory for the purposes of the National Quality Framework. The National Quality Framework is a national, uniform regulatory and quality assurance system for early childhood education and care services across Australia. It includes the ECS National Law, the *Education and Care Services National Regulations* (**ECS National Regulations**) and the National Quality Standard and quality assessment and rating system set out in the ECS National Regulations. Further information is available at www.acecqa.gov.au.

4. Regulation 208 of the ECS National Regulations applies the FOI Act (Cth) as if it were modified so that it applies to the following agencies: the National Authority (the Australian Children's Education and Care Quality Authority) and the Regulatory Authority of each participating state or territory (**ECS Agencies**).

5. The Director General of the Western Australian Department of Communities is the Western Australian Regulatory Authority: section 8 of the ECS National Law Act (WA). The functions and powers of the Regulatory Authority are delegated to the Education and Care Regulatory Unit of the Department to administer and enforce the ECS National Law. Officers in the Department's 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)

6. The ECS National Law modifies the FOI Act (Cth) to require that all references to the Information Commissioner in the FOI Act (Cth) are to be read as referring to the NECS FOI Commissioner: section 264(2)(b) of the ECS National Law. The ECS National Regulations set out further modifications to the FOI Act (Cth) in its application under the ECS National Law: see regulations 204 to 211.

7. Part VII of the FOI Act (Cth) sets up a system for the Information Commissioner to review decisions made under that Act. The effect of the ECS National Law is that Part VII of the FOI Act (Cth) allows the NECS FOI Commissioner to review decisions made under the Act by the ECS Agencies.

ATTACHMENT B: SCHEDULE OF DOCUMENTS

Document No.	Description	Agency reason	FOI review decision
Table 1 – No. 2	ECRU Policy Manual Index	Index only – not a policy, guideline or standard operating procedure	Not in scope: see paragraph [55].
Table 1 – No. 5	Internal Policy – Internal audits – October 2020	Relates to auditing for practice development within ECRU – does not contain information specific to ECRU assessment, review, penalty, actions and enforcement	Not in scope: see paragraph [48]
Table 1 – No. 6	Internal Policy – Notifiable data breaches scheme – April 2018	Outlines steps required for suspected data breach in ECRU – does not contain information specific to ECRU assessment, review, penalty, actions and enforcement	Not in scope: see paragraph [48]
Table 1 – No. 7	Internal Policy – Providers requesting service compliance history – May 2020	Provides guidance to staff when responding to requests from service providers – does not contain information specific to ECRU assessment, review, penalty, actions and enforcement	In scope: see paragraph [49]
Table 1 – No. 8	Internal Policy – Providing information via telephone – November 2019	Provides guidance to staff as to the type of information that may be shared over the telephone – does not contain information specific to ECRU assessment, review, penalty, actions and enforcement	In scope: see paragraph [49]
Table 1 – No. 9	Internal Policy – Use of the Document Verification System – April 2017	Provides guidance to staff on using the Document Verification Service – does not contain information specific to ECRU assessment, review, penalty, actions and enforcement	Not in scope: see paragraph [45]
Table 1 – No. 10	Internal Policy – Disclosure of information under s38(2) Child Care Services Act 2007-2022 CHECKLIST	Checklist only – not a policy, guideline or standard operating procedure	In scope: see paragraph [58]
Table 1 – No. 11	Compliance Compendium – Regulation and Quality March 2023	Relevant to the Regulation and Quality Directorate of which ECRU is one business unit – does not contain information specific to ECRU assessment, review, penalty, actions and enforcement	Not in scope: see paragraph [50]

Document No.	Description	Agency reason	FOI review decision
Table 1 – No. 12	Internal Manual – ECRU Financial Functions – April 2023	Provides guidelines to ensure consistent process of payments and refunds – does not contain information specific to ECRU assessment, review, penalty, actions and enforcement	Not in scope: see paragraph [48]
Table 1 – No. 13	Internal Policy – Assessment of Provider Fitness and Propriety – June 2021	Relates to initial/new service provider applications – not specific to assessment, review, penalty, actions and enforcement	Not in scope: see paragraph [44]
Table 1 – No. 14	Internal Policy – Provider approval applications – March 2021	Relates to initial service provider applications – not specific to assessment, review, penalty, actions and enforcement	Not in scope: see paragraph [44]
Table 1 – No. 15	Internal Policy – Status of Provider Approval – April 2022	Outlines the procedure when contacting approved providers who are no longer operating – does not contain information specific to ECRU assessment, review, penalty, actions and enforcement	In scope: see paragraph [51]
Table 1 – No. 16	Transfer of Service Approval – August 2022	Already released to the applicant with the primary decision	
Table 1 – No. 17	Protocols – Assessment of Provider Fitness and Propriety – September 2021	Relates to initial/new service provider applications – not specific to assessment, review, penalty, actions and enforcement	Not in scope: see paragraph [44]
Table 1 – No. 18	Regulation and Quality Compliance Compendium	Duplicate of document referred to as Table 1 – No. 11 above	
Table 1 – No. 19	Injury Management and Workers' Compensation Procedures – February 2016	Relates to workplace health and safety for the former Department of Local Government and Communities – does not contain information specific to ECRU assessment, review, penalty, actions and enforcement	Not in scope: see paragraph [52]
Table 1 – No. 20	Injury Management Policy – February 2016	Relates to workplace health and safety for the former Department of Local Government and Communities – does not contain information specific to ECRU assessment, review, penalty, actions and enforcement	Not in scope: see paragraph [52]
Table 2 – 2	Moderation spreadsheet / moderation list	Spreadsheet used as a working tool to keep track of service providers status – not a policy,	Not in scope: see paragraph [56]

Document No.	Description	Agency reason	FOI review decision
		guideline or standard operating procedure	
Table 2 – 3(a)	First Tier Review Justifications Workbook	Spreadsheet/template – not a policy, guideline or standard operating procedure	In scope: see paragraph [58]
Table 2 – 3(b)	Process Quick Reference – First Tier Review – August 2020	Already released to the applicant with section 55G decision	
Table 2 – 4	Flexible Schedule Changes – Work processes	Contains information about rescheduling visits to services – does not contain information regarding assessment, review, penalty, actions or enforcement	In scope: see paragraph [51]
Table 2 – 5	Priority rating system	Spreadsheet used as a working tool to keep track of service providers status – not a policy, guideline or standard operating procedure	Not in scope: see paragraph [56]
Table 2 – 8	ECRU Work Practices – Transfer Application SA04, SA05 Process Quick Reference– Transfer of service approval, September 2022	Already released to the applicant with section 55G decision	
Table 2 – 12(a)	OSHC – Pre-approval / Amendment (Preschool age or under) Checklist	Checklist – not a policy, guideline or standard operating procedure	In scope: see paragraph [58]
Table 2 – 12(b)	Process – Adding and Deactivating Additional Conditions to NQA IT System – May 2019	Instructions for entering data on the National Quality Agenda IT System (NQA IT System) – not a policy, guideline or standard operating procedure	Not in scope: see paragraph [64]
Table 2 – 12(c)	SA03 Amendment Approval – Preschool age or under SA03 Amendment Refusal – Preschool age or under	Templates – not a policy, guideline or standard operating procedure	Not in scope: see paragraph [62]
Table 2 – 13	Visit checklists: • Centre Based Services Checklist – Pre-Approval – April 2022 • Centre Based Services Checklist – Pro-Active Building – April 2022 • Centre Based Services Checklist – Pro-Active Programming – April 2022 • Centre Based Services Checklist – Pro-Active Safety – May 2021	Checklists – not a policy, guideline or standard operating procedure	In scope unless used exclusively in relation to applications from new service providers: see paragraph [59]

Document No.	Description	Agency reason	FOI review decision
	• Centre Based Service Plans Assessment (including OSHC) • Family Day Care Checklist – Educators Pre-Approval – May 2021 • Family Day Care Checklist – Pro-Active Educators – September 2020 • Family Day Care Checklist – Pro-Active Service – May 2021 • Family Day Care Checklist – Service Pre-Approval – May 2021 • Family Day Care Service Checklist – Venue – September 2020		
Table 2 – 15(a)	Process Quick Reference – Amendment process – August 2016 ECRU Work Practices - Amendment Service Approval SA03 Process Quick Reference – Service Approval Process, November 2016 ECRU Work Practices – Application for Service Approval – SA01, SA02	Already released to the applicant with section 55G decision	
Table 2 – 15(b)	Process – Additional Conditions – May 2017	Instructions for entering data on the National Quality Agenda IT System (NQA IT System) – not a policy, guideline or standard operating procedure	Not in scope: see paragraph [64]
Table 2 – 19	Process – Adding, Reviewing and Deactivating Service Alerts on NQA IT System – July 2021	Relates to the alerts from service providers – not relevant to assessment, review, penalty, actions and enforcements	In scope: see paragraph [53]
Table 2 – 20(a)	NQA IT System Checklists	Checklist – not a policy, guideline or standard operating procedure	Not in scope: see paragraph [60]
Table 2 – 20(b)	Process – Adding, Deactivating and Reviewing Additional Service Approval Conditions on NQA IT System – March 2021	Instructions for entering data on the National Quality Agenda IT System (NQA IT System) – not a policy, guideline or standard operating procedure	In scope: see paragraph [66]
Table 2 – 22	Process Quick Reference– Transfer of service approval, September 2022	Duplicate of document referred to as Table 2 – 8 above	

Document No.	Description	Agency reason	FOI review decision
Table 2 – 23	ECRU Self-Assessment Checklist – June 2022	Checklist – not a policy, guideline or standard operating procedure Document also publicly available	Not in scope: see paragraph [61]
Table 2 – 24(a)	Waivers – Adding waiver conditions on NQA IT System	Instructions for entering data on the National Quality Agenda IT System (NQA IT System) – not a policy, guideline or standard operating procedure	In scope: see paragraph [66]
Table 2 – 24(b)	Process – Temporary waiver on NQA IT System – Assessment Teams	Instructions for entering data on the National Quality Agenda IT System (NQA IT System) – not a policy, guideline or standard operating procedure	In scope: see paragraph [66]
Table 2 – 26(a)	How to Issue Compliance Notices – a guide for Assessment and Rating Officers	PowerPoint training tool – not a policy, guideline or standard operating procedure	Not in scope: see paragraph [68]
Table 2 – 26(b)	Process – Investigations	Already released to the applicant with section 55G decision	
Table 2 – 28(a)	Process – Cases on NQA IT System – Assessment Teams – July 2022	Instructions for entering data on the National Quality Agenda IT System (NQA IT System) – not a policy, guideline or standard operating procedure	In scope: see paragraph [66]
Table 2 – 28(b)	Process – Cases on NQA IT System – Assessment Teams – August 2020	Instructions for entering data on the National Quality Agenda IT System (NQA IT System) – not a policy, guideline or standard operating procedure	In scope: see paragraph [66]
Table 2 – 28(c)	Process – Monthly Assessment Reports – December 2020 Process – Monthly Assessment Reports – September 2022	Instructions for entering data on the National Quality Agenda IT System (NQA IT System) – not a policy, guideline or standard operating procedure	In scope: see paragraph [66]
Table 2 – 28(d)	Internal Policy – Monthly Assessment Team Reports – September 2022	Already released to the applicant with the primary decision	No document exists: see paragraph [67]
Table 2 – 29	How to Issue Compliance Notices – a guide for Assessment and Rating Officers	Duplicate of document referred to as Table 2 – 26(a) above	
Table 2 – 33	Section 38 CCS Act Release of Information Checklist	Checklist – Not a policy, guideline or standard operating procedure	This appears to be a duplicate of the document at Table 1 – No. 10