National Education & Care Services
FOI & Privacy Commissioners & Ombudsman

Butler and New South Wales 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 10-2024**
Applicant:	**Ben Butler**
Respondent:	**New South Wales Education and Care Services Regulatory Authority**[1]
Decision Date:	**27 June 2025**
Catchwords:	**Freedom of Information – Whether work involved in processing the request would substantially and unreasonably divert the resources of the agency from its other operations – Whether it was open to defer provision of access to a document under section 21(1) of the FOI Act – Whether the FOI Commissioner should decide the request for access to documents substantively – (CTH) *Freedom of Information Act 1982* ss 21, 24, 24AA and 24AB – Education and Care Services National Law and *Education and Care Services National Regulations***

DECISION

1. Under section 55K of the *Freedom of Information Act 1982* (**FOI Act**), I set aside the decision of the New South Wales Department of Education (**the Department**) dated 4 December 2024 to refuse the request for access to documents under section 24(1)(b) on the basis of the practical refusal reason that the work involved in processing the request would substantially and unreasonably divert the resources of the Department from its other operations. In substitution, I decide that a practical refusal reason does not exist.

BACKGROUND

2. On 29 October 2024, Mr Ben Butler (**the applicant**) made a request by email to the Department for information.

> *The information I seek relates to enforcement action against childcare operators over the past five years.*
>
> *I request copies of the following documents:*

[1] The Secretary of the New South Wales Department of Education is the Regulatory Authority: see section 9 of the *Children (Education and Care Services National Law Application) Act 2010* (NSW). For further details, see Attachment A to this Decision.

1. *For 2024 to today's date and each of 2020, 2021, 2022 and 2023, every show cause notice issued in relation to childcare.*
2. *For each of the show cause notices above, a document showing the outcome (for example suspension, cancelation* [*sic*]*, prosecution or no further action).*
3. *For 2024 to today's date and each of 2020, 2021, 2022 and 2023, a document showing details of every prosecution related to childcare. This document should include the alleged facts relied upon in the prosecution.*
4. *For 2024 to today's date and each of 2020, 2021, 2022 and 2023, copies of every enforceable undertaking related to childcare.*
5. *For 2024 to today's date and each of 2020, 2021, 2022 and 2023, a document tabulating a) the number of show cause notices issued, b) the number of suspensions, c) the number of cancellations, d) the number of prosecutions, e) the number of no further action decisions taken in relation to childcare centres. For each of categories a) through e), please also provide a breakdown between for-profit and not-for-profit providers for each relevant period.*

3. The applicant stated in his email that:

   This is a request for information your agency is legally allowed to publish under s270(5) of the Education and Care Services National Law …

   However, to the extent that it is necessary, this is also a request for information under the FOI Act and, failing that, under the relevant local legislation.

4. On 6 November 2024, the Department sent the applicant a letter acknowledging receipt of the request and giving notice of the Department's intention to refuse the applicant's request under section 24(1) of the FOI Act on the basis that the work involved in processing the request would substantially and unreasonably divert the resources of the agency from its other operations (**practical refusal reason**). It was estimated that the time to process the request would be 954 hours, including 940 for the Early Childhood Education and Care Regulatory Authority (**Regulatory Authority**) within the Department to search for and extract relevant data. In accordance with section 24AB of the FOI Act, the letter set out how the applicant could engage with the Department in relation to the request (**request consultation process**) and included suggestions for amending the scope.

5. Following discussion between the Department's Right to Access Officer and the applicant, the applicant emailed the Department on 8 November 2024 with a revised scope. For items 1–4, the applicant was no longer requesting information for 2020, 2021, 2022 and 2023, only for 2024 to the date of the request.

6. On 13 November 2024, the Legislative Council of the New South Wales Parliament resolved under Standing Order 52 that certain documents created since 1 January 2021 relating to the early childhood education and care (**ECEC**) sector be produced to the Parliament within 28 days by a range of ministers and entities, including the Department of Education (**Parliamentary Order for Documents**). The specified documents included:

   (a) all documents relating to emergency action notices, prohibition notices, suspension notices, compliance notices, show cause notices or other notices or directions served on or regarding ECEC providers under the Children (Education and Care Services) National Law

(b) all written notices of decisions to cancel, suspend approval or continue approval of a service provider

…

(d) all documents relating to enforceable undertakings regarding early childhood education and care

…

(k) all documents (other than standardised notices or circulars sent to all, or a category, of ECEC providers) sent between the department and representatives or employees of any of the following entities: G8 Education, Guardian Child Care, Affinity Education Group, Busy Bees Early Learning Australia, Edge Early Learning, Green Leaves, Imagine Education, Story House Early Learning, Montessori Academy, Greentown Education, Bright Horizons (also known as Only About Children), Nido Early School, Mayfield, Sparrow Early Learning, Fullshare Holdings, Journey Early Learning, Little Zak's Academy, Eden Academy, Embark Early Education, Stepping Stones, Explore and Develop, Aspire Early Learning, Tallawong Childcare, Tallawong Early Learning and Genuis Childcare.

7. On 14 November 2024, the Department sent the applicant a further request consultation letter based on the applicant's revised scope. It was estimated that the time to process the request would be 63 hours, 3 of which were hours already spent dealing with the application.

8. On 15 November 2024, the applicant emailed the Department with a further revised scope in the following terms:

    1. *For 2024 to today's date, every show cause notice issued for non-compliance in relation to childcare, limited to the following operator or operator groups: Genius Childcare (aka Genius Education), Mayfield Childcare, G8 Education, Affinity Education, Goodstart, Imagine Childcare, Green Leaves, Children First Early Education, Grow Early Education, Premier Early Learning, Edge Early Learning, Guardian Child Care, Busy Bees Early Learning, Only About Children (aka Bright Horizons), Nido Early School, Story House Early Learning, Montessori Academy (aka Greentown Education), Sparrow Early Learning, Journey Early Learning, Little Zak's Academy, Eden Academy, Embark Early Education (fka* [*sic*] *Evolve Education), Young Academics Early Learning, Stepping Stones, Explore and Develop, Aspire Early Learning*

    2. *For each of the show cause notices above, a document showing the outcome (for example suspension, cancelation, prosecution or no further action)*

    3. *Omitted.*

    4. *For 2024 to today's date, copies of every enforceable undertaking related to childcare.*

    5. *For 2024 to today's date and each of 2020, 2021, 2022 and 2023, a document tabulating a) the number of show cause notices issued, b) the number of suspensions, c) the number of cancellations, d) the number of prosecutions, e) the number of no further action decisions taken in relation to childcare centres. For each of categories a) through e), please also provide a breakdown between for-profit and not-for-profit providers for each relevant period.*

9. On 18 March 2025, the Legislative Council passed a further resolution that the documents required under the Parliamentary Order for Documents be produced by 1 April 2025.

10. The orders cover a large volume of documents. The Department has been producing documents responding to the orders in tranches.

The Department's decision

11. On 4 December 2024, the Department notified the applicant that it had decided to:

- refuse to give access to the documents in accordance with the request under subsection 24(1) of the FOI Act as the work involved in processing the request with the further revised scope would still substantially and unreasonably divert the resources of the Department
- defer access to the documents under section 21(1) of the FOI Act as the requested information would become publicly available in the New South Wales Parliament in the near future.

Application for NECS FOI Commissioner review

12. On 4 December 2024, the applicant applied for review of all aspects of the Department's decision. He also requested that I "go on to decide my entire request".

13. During the review, the Department provided initial submissions dated 14 January 2025 and the applicant provided submissions in response on 10 February 2025. Following an invitation from me to address certain matters, the Department provided further submissions on 28 March 2025 and the applicant provided further submissions in response on 16 April 2025.

SCOPE OF THE REVIEW

14. The issues to be decided in this IC review are:

(a) whether the work involved in processing the request would substantially and unreasonably divert the resources of the Department from its other operations
(b) whether it was open to the Department to decide to defer provision of access to a document under section 21(1) of the FOI Act
(c) if I decide that the work involved in processing the request would not substantially and unreasonably divert the resources of the agency from its other operations, whether I should decide the applicant's request substantively.

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

16. 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
- the Department's decision dated 4 December 2024
- the parties' submissions
- the FOI Act, in particular sections 21, 24, 24AA and 24AB
- the FOI Guidelines issued under section 93A of the FOI Act, in particular paragraphs 2.47, 3.101, 3.117. 3,121 and 6.190, and
- relevant case law.

WHETHER THE WORK INVOLVED IN PROCESSING THE REQUEST WOULD SUBSTANTIALLY AND UNREASONABLY DIVERT THE RESOURCES OF THE DEPARTMENT FROM ITS OTHER OPERATIONS

17. Section 24(1) of the FOI Act provides that an agency may refuse to give access to a document in accordance with a request if the agency:

- has undertaken a request consultation process under section 24AB, and
- remains satisfied that a practical refusal reason exists.

A practical refusal reason is defined to include where the work involved in processing the request would substantially and unreasonably divert the resources of the agency from its other operations: section 24AA(1)(a)(i) of the FOI Act.

18. In accordance with section 24AA(2), when deciding whether a practical refusal reason exists, the agency must have regard to the resources that would have to be used for the following:

(a) identifying, locating or collating the documents within the filing system of the agency
(b) deciding whether to grant, refuse or defer access to a document to which the request relates, or to grant access to an edited copy of such a document, including resources that would have to be used for examining the document or consulting with any person or body in relation to the request
(c) making a copy, or an edited copy, of the document, and
(d) notifying any interim or final decision on the request.

19. The FOI Guidelines state that other matters may be relevant, including:

- the staffing resources available to an agency for FOI processing
- whether the processing work requires the specialist attention of a senior officer, or can only be undertaken by one or more specialist officers in an agency who have competing responsibilities
- the impact that processing a request may have on other work in an agency, including FOI processing
- whether an applicant has cooperated in framing a request to reduce the processing workload
- whether there is a significant public interest in the documents requested, and
- other steps taken by an agency to publish information of the kind requested by an applicant.[2]

The parties' submissions

20. In its reasons for decision, the Department stated that the estimated time for processing the request would be 48 hours comprising:

- 3 hours already spent dealing with the application
- 37 hours for the Regulatory Authority to search for and extract relevant data
- 5 hours for examining the documents and preparing them for release, and
- 3 hours for decision-making.

[2] FOI Guidelines, [3.117] Footnotes omitted.

However, the Department also stated that the processing of the documents requested by the Parliament of the New South Wales demonstrated that the time for examining and preparing documents for release would be substantially more than 5 hours and likely to be in excess of 20 hours for the first category of documents requested by the applicant.

21. In the application for review of the Department's decision, the applicant raised the following matters:

- the request is now tightly restricted and the search time quoted in unreasonable: if it is accurate, it is indicative of a Department that is not maintaining the "high quality record system" assumed to be in place in by the FOI Act
- the FOI Guidelines make it clear that agencies cannot make estimates of time based on their failure to maintain good records: this principle was upheld by the Australian Information Commissioner in *Ben Butler and Australian Securities and Investments Commission* [2017] AICmr 18.

22. In its submissions dated 14 January 2025, the Department stated that:

- the Regulatory Authority and the Right to Access team are responsible for responding to the Parliamentary Order for Documents as well as this FOI request
- due to the enormity and complexity of the Order, resources in both the Regulatory Authority and the Right to Access team have had to be diverted to fulfil the Department's obligations to produce the material which will be delivered "in a yet to be determined number of tranches"
- the Right to Access team has 15 officers to deal with requests for information under the FOI Act and the *Government Information (Public Access) Act 2009* (NSW): 4 officers at a time are being seconded to work on the Order with the remaining officers absorbing the work of those officers in relation to information requests
- the Regulatory Authority's data is entered and held in the National Quality Agenda IT System (**NQA IT System**) and needs to be extracted manually and individually: the system is not set up to easily extract that information and the time taken is not due to an inefficiency in the Department's record keeping
- the types of documents requested by the applicant in categories 1, 2 and 4 would contain third party information, both business and personal information, and may also be subject to exemptions due to privilege claims as part of ongoing investigations or legal proceedings: the material, once identified and extracted, is highly sensitive and would take a substantial amount of time to review for decision making purposes
- the Department worked with the applicant to reduce the scope to remove the practical refusal reason, including undertaking 3 separate time estimates, but this has not been feasible despite collaboration and the best efforts of both parties
- there is public interest in the documents requested but the nature of the documents is such that application of the public interest test would unlikely result in access being provided to them
- categories 1 and 2 of the applicant's revised scope of 15 November 2024 fall within the scope of points (b) and (k) of the Order and category 4 of the applicant's request would be encompassed in point (d) of the Order
- processing the request has been demonstrated to be substantial due to the time it would take to identify, extract and examine the requested documents and unreasonable due to the current workload of the relevant areas who are processing the Order "which in essence covers the documents requested by the applicant, and that in the course of that process will become publicly available".

23. In his submissions received on 10 February 2025, the applicant stated that:

- the existence of the Parliamentary Order for Documents is irrelevant to the FOI request save in relation to practicality: whether or not documents are produced in relation to an order for production of documents is a matter for Parliament to decide and not one into which the FOI Commissioner can enquire
- in relation to practicality, if the work needed to produce the documents is already being done, then the request imposes no or negligible additional workload on the Department: there is no need to do the same work twice
- the state of the record keeping remains the responsibility of the Department: its description of the record keeping in the NQA IT System amounts to a position to keep records in a way that makes them difficult to extract and is not an acceptable reason to deny access
- the Department's reliance on the purported need to redact business and personal information fails to engage with the National Law which allows it to publish the names of people and entities against whom it has taken regulatory action
- it is not tenable for the Department to submit that the public interest test would unlikely result in access being provided to the relevant documents: the public interest must be properly weighed in each instance of disclosure and no blanket findings can be made.

24. In its further submissions dated 28 March 2025, the Department stated that:

- the documents sought in the applicant's FOI request are wholly encompassed by the documents to be produced in response to the Parliamentary Order for Documents
- none of these documents had been publicly produced but some would be produced and made publicly available with personal information redacted the next week and others in future tranches
- responding to the 13 November 2024 Order for Documents is not an identical task to responding to the applicant's FOI request
    - categories 1, 2 and 4 are substantially narrower than the corresponding categories of the Order and it will be necessary for different tasks to be undertaken identifying, collating and indexing documents: in addition, category 5 requires the preparation of a document "tabulating" information sourced across various categories of documents for the Order
    - the Department will still be required to review each document responsive to the FOI request to determine whether any exemptions ought to be applied which will be made more complex due to the need to ensure the Department maintains a consistent approach to claims for privilege made as part of responding to the Order
    - the Department is using a separate software and document management system for producing documents under the Order: staff would still need to identify and export documents within the scope of the FOI request from that system to the document management system used for the purposes of preparing and redacting documents under the FOI Act
- progressing the applicant's FOI request would not only divert resources from responding to the Parliamentary Order but the performance of other functions of the Department, including processing other requests for information and carrying out its primary functions of delivering critical services
- the time for examining and preparing the documents for release is likely to far exceed the 5 hours estimated:
    - approximately 1,200 documents have been identified to respond to point (a) of the Parliamentary Order for the entities listed at point (k)

    - show cause notices are between 3–100 pages
    - even if the 1,200 documents had a conservative estimate of 10 pages per notice, at 2 minutes per page the review would be over 400 hours

- a very significant factor in the balancing exercise in deciding whether the practical refusal reason exists is that the documents will largely be released through the Parliamentary Order process subject to claims of privilege: the public interest is already served by the release of the documents through the Parliament of New South Wales
- the fact that the Department has made and may make further privilege claims in relation to documents to be produced under the Parliamentary Order is relevant to the decision under review in the context of "other steps taken by an agency … to publish information of the kind requested by the applicant"
- however, this is not an issue of significance for reasons including that:
    - no privilege claims have been upheld in relation to the first tranche of documents (aside from agreed redactions with the Member of Parliament who moved the Parliamentary Order in relation to the names of children and personal information)
    - if privilege claims are accepted in relation to documents in future tranches that also fall within the scope of the applicant's request, it is unlikely the applicant could access these documents through the FOI process which is more prescriptive and would likely result in more redactions being applied that would be upheld as part of responding to the Parliamentary Order
- to the extent the applicant would contend that there may be documents produced in Parliament over which privilege is successfully claimed but would otherwise be eligible for release under the FOI process, it would be open to the applicant to submit a fresh FOI request at that time seeking those limited number of specific documents without causing a "substantial and unreasonable diversion of resources".

25. In further submissions received on 16 April 2025, the applicant stated that:

- the Department's claim that use of a separate software and document management system to manage the process for responding to the Parliamentary Order for Documents would create additional work for Department staff runs counter to the principle in the FOI Guidelines that calculates time to locate and process documents based on the assumption that the agency maintains a high quality record system
- the Department should be held to its estimate of 48 working hours which is not an unreasonable diversion of resources given the size of the Department.

Findings

26. The applicant does not contend that the Department did not undertake a request consultation process in accordance with section 24AB of the FOI Act. On the information available to me, which includes the communications between the Department and the applicant about the scope of the request, I am satisfied that the consultation requirements were met. Furthermore, the applicant considerably narrowed the scope of his request during the consultation process, including the categories, timeframes and subject matter of the documents sought.

27. In considering whether the work involved in processing the applicant's request would substantially and unreasonably divert the resources of the Department from its other operations, I am required by section 24AA(2) of the FOI Act to have regard to the resources required to undertake the different aspects of processing the request.

28. In relation to the reduced scope of the request that was ultimately agreed with the applicant, the Department estimated that 37 hours would be required to search for and extract relevant data. This was using the NQA IT System which the Department has submitted is not set up to easily extract that information such that it needs to be extracted manually and individually. The Department has advised that the documents within the scope of the applicant's request are entirely covered by the documents required to be produced for the Parliamentary Order for Documents. The evidence indicated that those documents are, or will be, in a document management system and the documents the subject of the FOI request would be exported from that system. The Department did not provide an estimate of the likely time that would be required to do that. It may be assumed, however, that a modern document management system would make this process more efficient than extracting them from the NQA IT System.

29. I accept that, once the documents within scope are identified, they will need to be examined to determine whether they should be released under the FOI Act even if they have been reviewed for production under the Parliamentary Order for Documents. The Department submitted that its original estimate of 5 hours for examining and preparing the documents for release was an underestimate. It submitted instead that:

    - approximately 1,200 documents had been identified to respond to point (a) of the Parliamentary Order for Documents in relation to the entities specified at point (k) which corresponds with the list of entities set out in the applicant's FOI request
    - a conservative estimate of reviewing those records would be over 400 hours.

    However, these 1,200 documents appear to be the total number of documents for the entities falling with the scope of the Parliamentary Order spanning the period from 1 January 2021 to 13 November 2024. The scope of the applicant's request is only 1 January to 29 October 2024.

30. The Department submitted that review of the documents would take a substantial amount of time because they would contain both business and personal information of third parties or may be subject to exemptions due to ongoing investigations or legal proceedings. The Department claimed that this process would be made more complex due to the need to ensure it maintains a consistent approach to any claims for privilege made in responding to the Parliamentary Order for Documents. However, the Department does not appear to have considered whether the review time may be lessened because the documents have been reviewed for similar issues in responding to the Parliamentary Order, particularly if third party information has been, or is to be, published by Parliament. In relation to both the section 47F (personal privacy) and section 47G (business information) conditional exemptions, the fact that information is already in the public domain is a key consideration in determining whether disclosure of the information would be unreasonable or have an unreasonable adverse effect.[3]

31. In relation to category 5 of the applicant's request, the Department states that this will require the preparation of a document tabulating information sourced across various categories of documents. I note there is no requirement under the FOI Act to create a new document in response to an FOI request except in certain circumstances, including where a written document could be produced containing the information by the use of a computer ordinarily available to the agency for retrieving or collating stored information.[4]

[3] See section 47F(2)(c) of the FOI Act and paragraph 6.190 of the FOI Guidelines.
[4] See paragraph 2.47 of the FOI Guidelines and section 17 of the FOI Act.

32. A Department is not required to undertake a detailed assessment of the full set of documents falling within the scope in estimating the processing time. The FOI Guidelines recommend that an agency examine a sample of the documents for this purpose.[5] That does not appear to have been done in this case.

33. The Department has not provided an estimate of the total likely number of documents or pages that are within the scope of the applicant's request, any updated estimate for identifying and collating the documents nor a considered estimate of the time likely to be required to examine those documents in the particular context of this request. Given the scope of the request, I accept that it may well involve a considerable number of pages and take some time to process. However, the likely amount of time required is not clear on the information made available to me.

34. An estimate of processing time is only one of the considerations to be taken into account when deciding whether a practical refusal reason exists.[6]

35. I accept the Department's submission that resources in both the Regulatory Authority and the Right to Access team have had to be diverted to responding to the Parliamentary Order for Documents. To the extent the documents within the scope of the applicant's request are being identified and placed in the separate document management system, the extent to which processing the request would involve Regulatory Authority staff and divert them from their other tasks is not clear. However, processing the request would require the Right to Access team to apply resources that would not be engaged in responding to the Parliamentary Order or dealing with other information access requests. The Department is large and has a considerable number of staff in the Right to Access team but I am satisfied that the requirement to comply with the Parliamentary Order is stretching those resources.

36. The Department accepts that there is a public interest in the documents the applicant has requested although it has not specified its nature. The documents relate to regulatory actions taken by the Regulatory Authority to deal with issues arising in child care services with respect to compliance with the National Law and National Regulations. I consider there is a significant public interest in the documents requested: there is public interest in whether early childhood education and care services are operating appropriately, particularly in relation to the safety of children, and in the effective operation of agencies established to regulate them. Of course, in making a decision on an FOI request where all or part of a document has been found to be conditionally exempt, the factors favouring disclosure and against disclosure must be weighed in determining whether access would, on balance, be contrary to the public interest.

37. The Department contends that the public interest is served by the release of the documents through the Parliament of New South Wales subject to claims for privilege. Limited information has been provided to me, however, in relation to when and how the documents that also fall within the scope of the applicant's request will become publicly available through the Parliament of New South Wales. The extent to which the documents the applicant seeks will be available in full or with redactions and the nature of those redactions is not clear on the material available to me.

[5] See paragraph 3.121 of the FOI Guidelines.
[6] See paragraph 3.121 of the FOI Guidelines.

38. As noted above, the Department bears the onus of establishing that its decision is justified. The Department has not provided a considered estimate of the likely time that will be required to process the applicant's request, the scope of which was significantly reduced during the consultation process. While I have accepted that processing the request will cause resources to be taken away from other information processing work, the extent is not clear. I have also accepted that the documents will be made publicly available in the Parliament of NSW but, on the information given to me by the Department, when, how and the extent to which information contained in those documents will be made available is not clear. In these circumstances, I am not satisfied on the evidence before me that the work involved in processing the request would both substantially and unreasonably divert the resources of the Department from its other operations.

WHETHER IT WAS OPEN TO THE DEPARTMENT TO DECIDE TO DEFER PROVISION OF ACCESS TO A DOCUMENT UNDER SECTION 21(1) OF THE FOI ACT

39. Section 21(1) of the FOI Act provides that an agency which receives a request may defer the provision of access to the document concerned in circumstances including the following:

- if the publication of the document concerned is required by law – until the expiration of the period within which the document is required to be published: section 21(1)(a)
- if the document concerned has been prepared for presentation to Parliament or for the purpose of being made available to a particular person or body or with the intention that it should be so made available – until the expiration of a reasonable period after its preparation for it to be so presented or made available: section 21(1)(b).

The parties' submissions

40. In its reasons for the decision under review, the Department stated that it may defer the provision of access to documents that the applicant requested under section 21 of the FOI Act "as substantially the same or similar documents are being prepared for Parliament and non-privileged documents will be available to the public".

41. In his application for review of the Department's decision and submissions received on 10 February 2025, the applicant contended that section 21 cannot apply for 2 reasons.

- Section 21(1)(b) specifies that it relates to "the document concerned". The decision-maker is required to consider each document responsive to the FOI request and consider whether it is also to be produced under the Parliamentary Order for Documents. This had not been done as the request was refused on practical grounds before advancing to a point where this comparison was possible.
- As the FOI Act is a Commonwealth Act, the reference to "Parliament" is a reference to the Parliament of the Commonwealth of Australia, not a parliament of a state or territory such as the New South Wales Parliament.

42. When I notified the Department of the application for review, I asked it to make submissions setting out the basis on which the Department considered it was open to the Department to make a decision under section 21(1), including in circumstances where it appeared that the Department had not made a decision to grant access to the documents.

43. In its submissions dated 14 January 2025, the Department stated that it did not seek to rely on section 21(1) of the FOI Act as it had made a decision to refuse access to the records.

Findings

44. The Department is no longer seeking to rely on section 21 of the FOI Act in relation to its decision. I consider this concession is an appropriate one for the following reasons.

45. In relation to whether section 21 of the FOI Act can apply to a document prepared for presentation to the New South Wales Parliament, I note that the FOI Act applies as a law of New South Wales for the purposes of the National Quality Framework[7] with certain modifications. These include that a reference to the Parliament is taken to be a reference to the Parliaments of the Commonwealth and the participating jurisdictions: regulation 209(b) of the *Education and Care Services National Regulations*.

46. The effect of this modification is that the reference to Parliament in the FOI Act as it applies to documents relating to early childhood education and care services does include the New South Wales Parliament.

47. While section 21(1)(b) could apply to a document prepared for presentation to the New South Wales Parliament, I am satisfied that it was not open to the Department to apply section 21 of the FOI Act in this case. A decision to defer the provision of access to a document falling within the scope of a request can only apply where a decision has been made to grant access to that document. This is reflected in the opening clause of paragraph 3.101 of the FOI Guidelines. In this case, the Department has not made any decisions about whether or not to grant access to any documents falling within the scope of the request.

WHETHER I SHOULD DECIDE THE APPLICANT'S REQUEST SUBSTANTIVELY

48. The applicant requested in his application for review of the Department's decision that I should decide the entire request. That is, if I were to decide to set aside the Department's decision, I should determine whether or not the applicant should have access to the documents he has requested.

The parties' submissions

49. In its further submissions dated 28 March 2025, the Department stated that:

- the reviewable decision is a decision to refuse the applicant's request for access to documents under section 24(1)(b) of the FOI Act
- the FOI Commissioner has jurisdiction to review that decision pursuant to section 54L(2)(a) of the FOI Act and the scope of the review is to make a decision to affirm, vary or set aside and replace the reviewable decision pursuant to section 55K(1) of the Act
- if the FOI Commissioner is not satisfied that a practical refusal reason exists, the Department will need to process the FOI request by undertaking the work necessary to assess the status of the documents against the provisions of the FOI Act: this would be the result of setting aside the decision under review and substituting a decision that no practical refusal reason exists

[7] The National Quality Framework is the national, uniform regulatory and quality assurance system for early childhood education and care services across Australia which includes the Education and Care Services National Law and the *Education and Care Services National Regulations*. See Attachment A for further details.

- it is well established that this is the appropriate and usual outcome in matters of this nature as evidenced by numerous decisions of the Australian Information Commissioner and the NECS FOI Commissioner.

50. In his further submissions dated 16 April 2025, the applicant stated that:

- it is well established that because the FOI Commissioner is making a decision de novo, standing in the shoes of the original decision maker, the FOI Commissioner has the power to decide the entire application
- *Ben Butler and Australian Securities and Investments Commission* [2017] AICmr 18 is an example of this.

Findings

51. The task of a body or person undertaking merits review of a decision was described in *Frugtniet v Australian Securities and Investments Commission*[8] as follows in relation to the then Administrative Appeals Tribunal (**AAT**):

> *… the jurisdiction conferred on the AAT … is to stand in the shoes of the decision-maker whose decision is under review so as to determine for itself on the material before it the decision which can, and which it considers should, be made in the exercise of the power or powers conferred on the primary decision-maker for the purpose of making the decision under review. The AAT exercises the same power or powers as the primary decision-maker, subject to the same constraints. The primary decision, and the statutory question it answers, marks the boundaries of the AAT's review. The AAT must address the same question the primary decision-maker was required to address, and the question raised by statute for decision by the primary decision-maker determines the considerations that must or must not be taken into account by the AAT in reviewing that decision.*[9]

52. The decision under review is the decision by the Department under section 24(1)(b) of the FOI Act to refuse to give access to the documents requested by the applicant on the basis that it was satisfied that a practical refusal reason existed. A question that arises is whether my jurisdiction is confined to deciding only whether or not a practical refusal exists or, if I decide to set aside that decision, I may also consider more generally whether the applicant is entitled to access the documents he has requested.

53. The applicant has submitted that this is well established. The case cited by the applicant as an example of this was a review of a decision to impose a charge and not waive the charge for processing an FOI request. The Australian Information Commissioner decided to set aside that decision and stated that:

> *ASIC must now process the request without charge and give the applicant access to the documents, subject to ASIC's consideration of any relevant exemptions under the FOI Act.*

The agency was required to complete the processing of the request, including considering whether any of the documents within scope contained exempt matter. The Australian Information Commissioner did not decide this issue.

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[8] [2019] HCA 16.
[9] Per Bell, Gageler, Gordon and Edelmann JJ at [51]. Footnotes omitted.

54. In the end, I have decided I do not need to determine whether or not I have jurisdiction to decide the substantive application. Even if it were open to me to proceed in that manner, I consider that the appropriate course in this case is for the Department to process the applicant's request and make a further decision in relation to what documents or parts of documents the applicant may access.

55. The Department should have the opportunity to undertake this process and make a primary decision. If the applicant is dissatisfied with a decision that is made by the Department, he will have the opportunity to request internal review or apply to the FOI Commissioner for review of the decision. If I were to make the decision and the parties were dissatisfied with that decision, an application would have to be made to the NSW Civil and Administrative Tribunal.

56. The function performed by the FOI Commissioner is to review decisions. If I were to proceed to deal with the request substantively, I would be making the first decision on whether any of the documents contain exempt matter. It is generally desirable that this task is performed by the Department and, if an application is made, for the FOI Commissioner to review that decision.

DECISION

57. Under section 55K(1) of the FOI Act, I set aside the decision of the Department dated 4 December 2024 to refuse the request for access to documents under section 24(1)(b) on the basis that the work involved in processing the request would substantially and unreasonably divert the resources of the Department from its other operations. In substitution, I decide that a practical refusal reason does not exist.

58. The Department must now process the applicant's request.

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 Civil and Administrative Tribunal of New South Wales (**NCAT**) which provides independent merits review of administrative decisions and has the power to affirm, vary or set aside the review decision.

An application to NCAT must be made within 28 days after the day on which a party is given the NECS FOIC review decision. An application fee may be payable when lodging an application for review. Further information is available on NCAT's website (www.ncat.nsw.gov.au) or by telephoning 1300 006 228.

ATTACHMENT A: LEGISLATIVE FRAMEWORK

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

1. Most education and care services across Australia operate under national applied laws legislation. In New South Wales, the *Children (Education and Care Services National Law Application) Act 2010* (NSW) (**ECS National Law Act (NSW)**) applies the Education and Care Services National Law (**ECS National Law**) as a law of New South Wales.

2. Section 5 of the ECS National Law Act (NSW) states that the New South Wales *Government Information (Public Access) Act 2009* does not apply to the ECS National Law or to the instruments made under that law.

3. Section 264 of the 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 Secretary of the New South Wales Department of Education is the New South Wales Regulatory Authority: section 9 of the ECS National Law Act (NSW). The functions and powers of the Regulatory Authority are delegated to the Early Childhood Education and Care Regulatory Authority within the Department to administer and enforce the ECS National Law. Officers in the Department's Right to Access Section 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 sets up a system for the Information Commissioner to review decisions made under the FOI Act. The effect of the ECS National Law is that Part VII of the FOI Act allows the NECS FOI Commissioner to review decisions made under the Act by the ECS Agencies.