National Education & Care Services
FOI & Privacy Commissioners & Ombudsman

AB and Victorian Education and Care Services Regulatory Authority

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

Complainant	**AB (AB is a pseudonym)**
Respondent:	**Victorian Education and Care Services Regulatory Authority**[1]
Decision Date:	**24 February 2023**
Application number:	**PC Inv 01/2021**
Catchwords:	**Privacy — Privacy Act 1988 (Cth) — Australian Privacy Principle 13 — Correction of personal information; whether information is personal information in accordance with the Privacy Act; whether APP 13 subclauses apply.**

Determination

1. I find that the Victorian Education and Care Services Regulatory Authority (the **respondent**) did not interfere with the complainant's privacy as defined in the *Privacy Act 1988* (Privacy Act) in relation to a request to correct personal information under Australian Privacy Principle (APP) 13.

2. Accordingly, under s 52(1)(a) of the Privacy Act the complainant's privacy complaint against the respondent in relation to APP 13 is dismissed.

Findings and Reasons

Background

3. This is a complaint made under s 36(1) of the Commonwealth Privacy Act 1988 (the **Privacy Act**). The complainant is identified by pseudonym AB.

4. The complainant's grievance relates to a request he made to the respondent under the Privacy Act, Australian Privacy Principle 13 (APP 13), to correct what he considers to be his personal information that was included in a letter dated 31 December 2020. The complainant alleges that the respondent failed to both comply with his request, and to observe the minimum procedural requirements under APP 13 in relation to his request.

5. During 2020 the complainant and his wife made complaints to a kindergarten (K1 - a pseudonym) attended by their child about matters associated with the kindergarten, including a breach of their child's privacy by K1. They also sought copies of documents related to their child from K1.

[1] The Secretary of the Victorian Department of Education and Training is the Regulatory Authority (*Education and Care Services National Law Act 2010 – s 8)*.

6. Dissatisfied with responses from K1, the complainants raised their complaints with the respondent on 9 November 2020. Those complaints about K1 were subsequently investigated by the respondent.

7. The complainants were dissatisfied with aspects of the investigations and raised several issues with the respondent. Correspondence ensued between the parties over the following months.

8. Relevant to this Determination, in correspondence to the respondent dated 5 August 2021[2], AB requested that the respondent correct what he alleged to be personal information contained in a letter dated 31 December 2020 pursuant to APP 13 and the Privacy Act.

9. The complainant wrote:

   i. at point (e) of the letter: *Provide a written retraction to the provably erroneous claim – which names [AB] in her correspondence of 31 / 12 / 2020 - by* [named respondent officer] *that the Kindergarten had fully responded to a privacy request, when they irrefutably hadn't. Please note the context this is being used, by the Approved provider, could be construed as defamatory as it suggests we are lying about this matter*.

   ii. at point (f) of the letter: *"Under Australian Privacy Principle 13 and the Privacy Act kindly correct the above* [ie in point (f)] *false and misleading claim – by removing it – by* [named respondent officer] *in relation to her correspondence to the approved provider of* [K1] *dated 31/12/2020 that comprises personal information regarding* [AB].

   iii. at paragraph 22 and point (g) of the letter:
   "We are not aware that we ever gave written permission to QARD[3] to release our personal details which we understand from your website cannot be disclosed. The complainant continued with a quote from the website:
   'All notifications to the Department are treated confidentially. Your identity cannot be disclosed unless you give written consent or a Court grants leave for this to occur.'" (paragraph 22)
   "Kindly clarify why contrary to the [respondent's] published advice, QARD published [AB's] name in the above correspondence…of 31//12/2020." (point g)

10. The letter dated 31 December 2020[4] was from an officer of the Regulatory Authority to the Approved Provider of K1 setting out the findings of the Regulatory Authority's investigations into the complaints about K1. The letter included the following paragraph:
"A direct complaint received by the Department [sic] on 9 November 2020 related to the service posting a photograph of a child on a curriculum application, Storypark and the request for child documents to be returned to the family. The service has reflected on the error made to post a photograph of a child without parent consent, removed the photograph and has reviewed the service policy on 'confidentiality of records' to ensure the policy is followed by staff. In addition, the Department acknowledges that the approved provider, in a letter dated 13 November 2020, has responded to AB *and provided the requested child documents".* (Commissioner emphasis added; AB was identified by name in the letter).

11. The basis for the complainant's request was that he had not been provided with all the "child

[2] C.1 Letter dated 5 August 2021 AB to respondent. The letter also raised several matters not relevant to this Determination.

[3] QARD is the Quality Assessment and Regulation Division of the Department of Education and. See also [40] of this Determination. Training

[4] R.1 Letter dated 31 December 2020 respondent to approved provider of K1 – outcomes of investigation. An Approved Provider is an individual, body corporate, eligible association, partnership or prescribed entity which holds an approval granted by the Education and Care Services Regulatory Authority under Part 2 of the Education and Care Services National Law to operate education and care services.

documents" he and his wife had sought and that the underlined information in the letter was therefore misleading. In the letter dated the 5 August 2021 he stated:

"in July 2021 it came to our [AB and his wife] *attention – via a complaint* [made by them] *to the Office of the Australian Information Commissioner regarding the breach of privacy of our child by* [K1], *and their failure to fully comply with a privacy request – that the approved provider of* [K1] *is seeking to rely, as a response to that complaint, on the false and misleading claim by* [the respondent] *in correspondence to him that the kindergarten had fully complied with a privacy request and provided …the said documents* [to AB]. *…This is categorically untrue as [a named officer] and other QARD staff had been made fully aware of on numerous occasions, including in writing*.[5] {Commissioner emphasis added]

12. A senior officer of the respondent replied to AB by letter dated 1 September 2021[6]. The response did not explicitly reference the letter of 31 December 2020, the Privacy Act or APP 13, or the complaints set out at [9].

13. The response dated 1 September 2021 did refer to another letter dated 6 January 2021[7] from an officer of the respondent to the complainant advising him of the outcomes of the investigations into his complaint about K1. The letter dated 6 January 2021 contained a similar statement to the one contained in the letter of 31 December 2020 - viz: *"In regard to your request for your child's documents, I understand these have now been provided to you on 13 November 2020".* In the 1 September letter the respondent stated that: *"That statement reflected the Department's [sic] understanding at that time, which was based on the information available to it at that time. That is the Department was not aware that attendance records had been requested by you".* (Commissioner emphasis]

14. On 22 October 2021[8] the complainant wrote to the respondent (the Secretary) in relation to his complaints. Relevant to this Determination, he sought advice as to why the *"formal privacy request under the Privacy Act and the Australian Privacy Principle (APP) 13* [had] *not been addressed or even responded to* [in the 1 September 2021 correspondence].

15. On 22 November 2021[9], the respondent (the Secretary) replied stating, in relation to the complainant's request to amend personal information under APP13: *The substance of your request has already been addressed on more than one occasion in previous Department [sic] responses to you. Namely, the request is that you would like the amendment because you disagree with the outcome of the QARD investigation into your concerns…Should you wish to make a further specific request for your personal information to be amended or updated under APP13, you may do so by emailing* [address supplied]. (Commissioner emphasis added)

16. On the 25 November 2021[10] the complainant submitted a complaint to the former Commissioner about the actions of the respondent in handling his privacy request. As part of that complaint, the complainant disputed the respondent's characterisation of the reasons for his request under APP 13 to correct his personal information (underlined at [15]) and stated that he had not been provided with details of the grounds for the refusal of his request or any complaint mechanisms. He sought the following outcomes:

[5] These occasions were summarised in a letter dated 13 July 2021 to an officer of the respondent.

[6] R.2 Letter dated 1 September 2021 Respondent to complainant

[7] R.3 Letter dated 6 January 2021 Respondent to complainant-outcomes of investigation

[8] C.2 Letter dated 22 October 2021 Complainant to respondent

[9] R.4 Letter dated 22 November 2021 respondent to complainant

[10] C.3 Submission dated 25 November 2021 Complainant's privacy complaint to NECS Privacy Commissioner

i. *To find that the* [respondent] *has failed to take reasonable steps to correct personal information or to comply with the minimum procedural requirements and for them to take immediate steps to address this and comply with the Privacy Act.*
ii. *A written apology from the regulatory authority for the above.*

17. The former Commissioner commenced preliminary inquiries into the matters raised under s 42 of the Privacy Act and sought submissions from the respondent in relation to the complaint.

18. By email dated 23 December 2021[11] the complainant advised that he wanted to add to the outcomes he sought from his 25 November 2021 complaint to the former Commissioner *"financial compensation, including for aggravated damages given the actions of the DOE [sic] and their continued onerous and unreasonable requests and conduct.*" The request was added to the complaint.

19. Following the former Commissioner's preliminary enquiries, she opened an investigation into the complaint under s 40(1) of the Privacy Act on 28 February 2022.

20. The parties have had opportunities to make submissions and comment on the relevant parts of each other's submissions. The parties have also had the opportunity to comment on two preliminary views of this Determination.

21. Following the circulation of the former Commissioner's first Preliminary View Draft Determination the complainant submitted that she had not addressed a second part of his complaint – namely his request for the removal of his name from the letter dated 31 December 2020 – and he subsequently sought a Hearing pursuant to section 43 of the Privacy Act in relation to her draft Determination.

22. After consideration of submissions from both Parties, the former Commissioner determined not to proceed to a Hearing.

23. The matter raised in respect to the removal of AB's name has been addressed in the subsequent draft of the former Commissioner's Determination under Claim 1B.

24. Insofar as it is necessary for me to do so, I agree with and adopt all the former Commissioner's decisions and actions referred to in the previous paragraphs 3 to 23.

The Law

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

26. All references to legislative provisions in this Determination are to those contained in the Commonwealth *Privacy Act 1988* (the Privacy Act) except when indicated otherwise.

27. Section 6(1) of the Privacy Act defines 'personal information' as 'information or an opinion about an identified individual, or an individual who is reasonably identifiable:

a. whether the information or opinion is true or not, and
b. whether the information or opinion is recorded in a material form or not'

28. Section 36 of the Privacy Act allows an individual to complain to the National Education and Care Services Privacy Commissioner about an act or practice that may be an interference with their privacy.

[11] C.4 Email dated 23 December 2021 Complainant to NECS PC seeking damages

29. Section 42 of the Privacy Act provides that the Commissioner may make preliminary inquiries

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

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

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

33. The Australian Privacy Principle relevant to this case is APP 13 - correction of personal information. APP 13.1 provides that an APP entity must take reasonable steps to correct personal information that it holds about an individual, to ensure it is accurate, up-to-date, complete, relevant, and not misleading having regard to the purposes for which it is held.

34. APP 13 also sets out other minimum procedural requirements in relation to correcting personal information about an individual including that an entity must:

- give a written notice to an individual when a correction request is refused, including reasons for the refusal and the complaint mechanisms available to the complainant (APP 13.3);
- respond in a timely manner to an individual's request to correct personal information (APP 13.5(a))

Respondent as an APP Entity

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

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

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

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

39. Regulation 199 of the *Education and Care Services National Regulations 2011* (the ECS Regulations) applies the Privacy Act as if it were modified so that it **applies only to agencies** and those agencies are the National Authority (the Australian Children's Education and Care Quality Authority - ACECQA) and the Regulatory Authority of each participating jurisdiction.

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

41. The functions and powers of the Regulatory Authority are delegated to officers of the Quality Assessment and Regulation Division (QARD) of the Department to administer and enforce the

National Law. Other senior officers within the Department are authorised to respond to some matters referred to throughout this Determination.

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

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

Nomenclature

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

44. In correspondence quoted throughout this Determination, both the complainants and the respondent frequently refer to the "Department" (the Department of Education and Training) without distinguishing between the Department as a Victorian government agency, to which the Privacy Act does not apply, and the respondent – that is the Victorian Education and Care Services Regulatory Authority – to which the Privacy Act does apply. These references are clarified as necessary throughout this Determination.

Material Considered

45. In making this Determination I have had regard to:

- information and submissions made by the complainant and the respondent
- the *Privacy Act 1988 (Cth)* including the Australian Privacy Principles at Schedule 1
- the Education and *Care Services National Law Act 2010* and the *Education and Care Services National Regulations 2011*
- the *Australian Privacy Principles Guidelines* issued by the Australian Information Commissioner[12]
- draft determinations of the previous Commissioner and
- relevant case law

Complainant's Claims

46. In summary the complainant makes the following claims about the acts and practices of the respondent in relation to his request made under Australian Privacy Principle 13 (APP 13) for the correction of what he contends to be his personal information:

Claim 1A: The respondent has failed to take reasonable steps to correct what the complainant alleges to be his personal information contained in a letter dated 31 December 2020 in which the respondent acknowledges certain actions taken by the Approved Provider of a Kindergarten.

Claim 1B: The respondent has failed to take reasonable steps to correct the complainant's personal information by failing to remove his name from the letter dated 31 December 2020 and by acting contrary to the respondent's complaints privacy policy.

[12] *Australian Privacy Principles Guidelines.* Australian Information Commissioner. Combined June 2020. The Guidelines have been adopted by the NECS Privacy Commissioner as guidelines that apply for the purposes of the Education and Care Services National Law in relation to the Australian Children's Education and Care Quality Authority (ACECQA) and state and territory Regulatory Authorities in exercising their responsibilities under the Privacy Act. The adopting instrument is published on the NECS office website at www.necsopic.edu.au

Claim 2: The respondent has failed to comply with the minimum procedural requirements under APP 13 in relation to the complainant's requests.

Claim 3: The complainant has sought *"Financial compensation, including for aggravated damages given the actions of the DOE [sic] and their continued onerous and unreasonable requests and conduct."*

Respondent's response

47. In summary in relation to Claims 1A and 2 the respondent submitted[13] that it has not breached APP 13 for the following reasons:

    i. the complainant has not made a request about his personal information as the information in question is not about the complainant;
    ii. the request does not therefore relate to any record of personal information held by the respondent; and
    iii. given the request by the complainant was not a request to correct his personal information as the information in question was not about the complainant, the respondent was not required to respond to, or comply with, the provisions of APP 13.

48. In summary in relation to Claim 1B the respondent submitted[14] that:

    i. AB did not request anonymity in an interview with investigating officers in relation to his complaints about the kindergarten,
    ii. the nature of AB's complaint (which involved his child) meant that the matters could not be investigated without revealing his identity to the Approved Provider, and
    iii. AB had himself raised complaints with the Approved Provider.

49. The claims, including the more detailed submissions from the parties, are discussed in the following paragraphs.

Claim 1A - Failure to take reasonable steps to correct the complainant's alleged personal information contained in a letter dated 31 December 2020.

50. The Claim alleges a breach of APP 13.1

51. Under APP 13.1 *If:*

    a. an APP entity holds personal information about an individual; and
    b. either:
        i. the entity is satisfied that, having regard to a purpose for which the information is held, the information is inaccurate, out of date, incomplete, irrelevant or misleading; or
        ii. the individual requests the entity to correct the information

    the entity must take such steps (if any) as are reasonable in the circumstances to correct that information to ensure that, having regard to the purpose for which it is held, the information is accurate, up to date, complete, relevant and not misleading.

52. Relevant to Claim 1A, as set out at [11] the information the complainant alleges is personal information that he is seeking to have corrected is contained in a letter dated 31 December 2020 – the information is the sentence: *In addition, the Department [sic] acknowledges that the approved provider in a letter dated the 13 November 2020 has responded to [AB] and provided the requested child documents*.

[13] R.5 Submission dated 25 January 2022 from respondent to NECS PC p 2-4

[14] R.6 Letter dated 29 June 2022 from respondent to NECS PC

53. For APP 13.1 to apply, the APP entity – in this case the Regulatory Authority – must first determine under APP 13.1(a) both that the information in question fulfils the definitional requirements of personal information pursuant to s 6(1) of the Privacy Act, and that the entity holds that information.

Does the information in question fulfil the definitional requirements of "personal Information"?

54. Section 6 of the Privacy Act defines personal information as *"information or an opinion **about** an identified individual, or an individual who is reasonably identifiable:*
    a. whether the information or opinion is true or not; and
    b. whether the information or opinion is recorded in a material form or not".
55. The complainant is clearly identified by name in the letter in question. That is not in dispute by the respondent. The respondent contends, however, that the information contained in the letter that the complainant is seeking to have removed does not fulfil the requirement that it is **about** AB and therefore does not constitute personal information for the purposes of the Privacy Act.

Respondent's submission

56. The respondent has submitted that: *Whether information is <u>about</u> an individual requires an evaluative conclusion and must consider <u>whether an individual is the subject matter of the information</u>. The information which forms the basis of [AB's] complaint is a written statement from an employee of the Department [sic] that the approved provider had provided him with certain information, which he contends is untrue. This does not meet the test of being "personal information" as the information is not about [AB], or indeed about any person. This is because the information that [AB] requests be changed is a statement made by the [respondent] about its own understanding of the provision of documents. As such, AB is not the subject matter of the information. Rather, the subject matter of the statement are the documents said to be provided. That AB was the recipient of the documents is not sufficient to make him the subject matter of the information. A similar conclusion was reached by the Full Court of Appeal [sic] of the Federal Court in Telstra[15]. It was found that the colour of a complainant's mobile phone and his network type was not personal information about him, even though it related to his property.*[16]

57. I make the observation at this point that the position expressed by the respondent in their submission to the former Commissioner was not put to the complainant at any time during the course of the correspondence between the parties during 2021.

Complainant's submission

58. In response to the points made by the respondent in [56], the complainant has submitted[17] that:
    i. the respondent's contention that the information in question is not about the complainant is unfounded *"not the least [because] … it named [AB] personally*;
    ii. that information and opinions can have multiple subject matters as discussed in the Federal Court of Australia case - Privacy Commissioner v Telstra[18];
    iii. that *taking the standard dictionary/grammatical definition of "subject matter" and "about" it is clear the personal information is indeed about [AB]. For example, in such a passive sentence he would be, and indeed is in this context, the "subject" of receiving his child's documents";*
    iv. the child documents are in reference to AB's son and AB is also readily identifiable in the document by his name;
    v. a comparison with the colour of someone's mobile phone vis a vis AB's full name and son's documents as personal information is tenuous;

---

[15] *Privacy Commissioner v Telstra Corporation Limited* [2017] FCAFC 4 (19 January 2017) (***Telstra***) [62]-[64]. The correct name of this court is the Federal Court of Australia Full Court, not Full Court of Appeal of the Federal Court.

[16] R.5 Submission dated 25 January 2022 from respondent to NECS PC

[17] C.5 Submission dated 6 April 2022 from complainant to NECS PC and c.8 Submission dated 23 January 2022.

[18] Op. cit. [63]

vi. the respondent *"has – after the event– attempted to offer "convoluted legal arguments to the Commissioner as to why it didn't have to respond to AB's request… As the reasons were never communicated to* [AB] *in response to his request for correction they should be disregarded as not being genuine reasons at the time as to why his request has never been responded to nor actioned compliant with APP 13. Had these been the reasons why his request was never responded to nor actioned [the respondent] could have and would have surely mentioned them at the time".*

59. I turn now to consideration of the case relied on by the respondent in its submission to the former Commissioner in support of its position and other relevant case law for discussion.

Federal Court of Australia Full Court - Privacy Commissioner v Telstra

60. The Telstra case cited by the respondent at [56] and the complainant at [58] is the decision of the Full Court of the Federal Court of Australia (FCAFC) in relation to an appeal on an Administrative Appeal Tribunal of Australia (AATA) decision.

61. In summary, the facts in the Telstra case were that on 15 June 2013 Mr Ben Grubb requested access under the Privacy Act to all metadata information held by Telstra Corporation Limited regarding his mobile phone service on the basis that it was his personal information. Telstra provided him with some information but refused to give him access to its mobile network data. On 8 August 2013, Mr Grubb lodged a complaint with the Australian Privacy Commissioner complaining that Telstra had breached his privacy by refusing him access to his personal information. On 1 May 2015 the Privacy Commissioner held that Telstra's refusal was a breach of National Privacy Principle 6.1[19] and that the mobile network data was "personal information" as that term is defined in the Privacy Act and that Mr Grubb should be given access, with some exceptions, to the information requested.

62. The matter was appealed by Telstra to the AATA. The AATA[20] determined that Telstra's mobile network data was **not** information about an individual, and so was not personal information. The reason for this conclusion was that the information was not **"about an individual"** (ie Mr Grubb) as required by the definition of personal information at s 6(1) of the Privacy Act.

63. The matter was then appealed by the Australian Privacy Commissioner to the Federal Court of Australia Full Court (FCAFC). The appeal to the FCAFC was, in the words of the Court, *"argued at a high* level *of generality concerning whether the AATA was correct to give content to the words 'about an individual'"*[21] in the definition of personal information. The FCAFC concluded that *"those statutory words have content*" and the appeal was dismissed.

64. The relevance of the AATA and FCAFC cases to matters under discussion in this Determination is that they address the question of statutory construction concerning the meaning of the words "about an individual" in the definition of personal information under the Privacy Act. They find that the words "have meaning and cannot be ignored" and that the threshold question in determining whether information is personal information is to first ask the question whether the information is **about** an individual. The following extracts from the FCAFC decision are relevant.

65. At paragraph 62 of the FCAFC decision, their Honors Kenny and Edelman (with whom his Honor Dowsett J agreed) write about the submission made to the court by the then Australian Privacy Commissioner in relation to the case: *The* [Australian] *Privacy Commissioner submitted that if there is information from which an individual's identity could reasonably be ascertained, and that information*

---

[19] The Australian Privacy Commissioner, AATA and FCAFC cases referred to were considered under the version of the Privacy Act that was in force at the time of the events under discussion occurred - that is 2013 when Mr Grubb first sought access to personal information from Telstra. Following the passage of the *Privacy Amendment (Enhancing Privacy Protection Act) 2012,* from 12 March 2014, the Australian Privacy Principles (APPs) replaced the National Privacy Principles (NPP) and the Information Privacy Principles. The APP equivalent to NPP 6.1 is APP12 – access to personal information. The NPP equivalent to APP 13 – correction of personal information – is equivalent to NPP 6.5.

[20] *Telstra Corporation Limited and Privacy Commissioner [2015] AATA 991*

[21] Op. cit at [65]

is held by the organisation, then it will always be the case that the information is about the individual. In other words, the words "about an individual" … "do no work" and have no substantive operation.

66. Their Honors continue at paragraph 62: *"We do not accept this submission. Even if the words "about an individual" could be ignored in the definition so that the definition of "personal information" was concerned only with "information or an opinion ... from which a person's identity is apparent ...", the words are repeated separately in the remainder of National Privacy Principle 6.1. The repetition of the words means that they cannot be ignored"*.

67. At paragraph 63 of the FCAFC decision their Honors continue: *The words "about an individual" direct attention to the need for the individual to be a subject matter of the information or opinion. This requirement might not be difficult to satisfy. Information and opinions can have multiple subject matters. Further, on the assumption that the information refers to the totality of the information requested, then even if a single piece of information is not "about an individual" it might be about the individual when combined with other information. However, in every case it is necessary to consider whether each item of personal information requested, individually or in combination with other items, is about an individual. This will require an evaluative conclusion, depending upon the facts of any individual case, just as a determination of whether the identity can reasonably be ascertained will require an evaluative conclusion…*

68. I make the following observations from the extracts in [65 to 67]:

    i. The words "about an individual" need to be satisfied when deciding whether information is personal information.
    ii. Not all information that an agency holds that identifies an individual will be personal information. The decisionmaker still needs to determine whether the information is about the individual.
    iii. The individual needs to be the, or a, subject matter of the information or opinion;
    iv. Information can have multiple subjects.
    v. Even if a single piece of information is not about an individual, it might be about the individual when combined with other information.

69. I note that at paragraph 64 of the FCAFC decision their Honors also make reference to the matter of the colour of Mr Grubb's mobile phone and network that were referred to in the respondent's submissions at [56] of this Determination. For the sake of completeness, I have included the details here. Their Honors state that - *In some instances the evaluative conclusion* [as to subject matter] *will not be difficult. For example, although information was provided to Mr Grubb about the colour of his mobile phone and his network type (3G), we do not consider that that information, by itself or together with other information, was about him. In other instances, the conclusion might be more difficult.*

70. Whether or not the colour of Mr Grubb's phone or his network type constituted personal information was not in dispute or even under discussion in the FCAFC decisions. As discussed at [65] the FCAFC case addressed the question of statutory construction concerning whether the word "about" had meaning in the definition of personal information. In my view the reference by the court is illustrative.

Administrative Appeals Tribunal - Telstra Corporation and Privacy Commissioner

71. I have also considered the AATA[22] decision which was the subject of the appeal to the abovementioned FCAFC decision. I consider paragraphs 95 to 101 of that decision to be particularly relevant.

72. As in the FCAFC decision, the AATA decision discusses the threshold question – the starting point in determining whether information or opinion is personal information – is to first ask whether the

[22] *Telstra Corporation Limited and Privacy Commissioner [2015] AATA 991*

information or opinion is **about** an **individual**. If the information is not about an individual but about something else that is the end of the matter; consideration as to whether an individual is identified or is reasonably identifiable does not proceed. Such consideration is secondary although it may be almost contemporaneous with the first.

73. At paragraphs 97 to 99 of the AATA case, Deputy President Forgie discusses the meaning of information or opinion "about an individual". *The relevant meaning among the ordinary meanings of the word "about" is: "concerning or relating to someone or something;* ***on the subject of them*** *or it."*

74. The Deputy President continues: *Whether information or opinion is about an individual requires an analysis of the subject matter of that information or opinion. It is clear from the Explanatory Memorandum accompanying the Privacy Bill when it was introduced in the House of Representatives on 1 November 1988 that the range of what was considered to be personal information, and so necessarily about an individual, was"... infinite and would include, for example, information relating to the person's physical description, residence, place of work, business and business activities, employment, occupation, investments and property holdings, relationship to other persons, recreational interests and political, philosophical or religious beliefs. ..."*

75. At paragraph 99 – *These are all matters that can be said* ***to concern or to relate to*** *an individual or to* ***be on the subject of them****. There is a* ***connection*** *between an individual and the information that means that it is "about" that individual.*

76. In the AATA description of the meaning of "***about"***, the words *concerning or relating to* appear very wide although further discussion in paragraph 99 of the AATA decision and illustrative anecdotes appear to limit the meaning.

77. In paragraph 99, the Deputy President continues: *"Just how strong need that connection be between [the individual and the information] for it to be about that individual? Putting the issue another way, how tenuous can the link be before information or opinion is not about an individual or about something else or, if still about an individual not about a particular individual but another?* A hypothetical anecdote follows at paragraphs 100 to 101 about a road accident involving a number of people and subsequent matters that follow and discusses the point at which the connection between information and an individual becomes too tenuous.

78. At paragraph 95 of the AATA decision, Deputy President Forgie also presents an anecdote about taking her car to be serviced and the various matters that were addressed by the mechanics in relation to the car and included in the service records. She concludes that the information in the service records was not information about her, *"even if the service records referred to the registration of my car and even my name"*.

79. The conclusions I draw from the discussion and anecdotes is that not all information concerning or relating to an individual will be characterised as being about an individual, even when an individual is named, and the link between the individual and the information that concerns or relates to them may be so tenuous that it should not be characterised as being about the individual.

80. I turn now to one further case I have considered to be relevant to my considerations in this Determination.

AIN v Medical Council of New South Wales

81. The case of *AIN v Medical Council of New South Wales*[23] is a decision of the Civil and Administrative Tribunal of NSW.

[23] *AIN v Medical Council of New South Wales* [2017] NSWCATAP 23

82. The case involved an alleged contravention of s 16 of the *Privacy and Personal Information Protection Act 1998* (NSW) (the PPIP Act). That section states: *A public sector agency that **holds personal information** must not use the information without taking such steps as are reasonable in the circumstances to ensure that, having regard to the purpose for which the information is proposed to be used, the information is relevant, accurate, up to date, complete and not misleading.* This provision is similar in purpose to APP13.

83. Personal information is defined in s 4 of the PPIP Act as *"information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion"*. Relevantly, the definition of personal information includes the same requirement as in the Commonwealth Privacy Act, namely that the information must be **about** an individual.

84. The case generally concerned the publication, on 17 January 2011, by the Medical Council, on its website, of documents relating to orders made by the Medical Tribunal on 19 October 2010 in connection with AIN's (a pseudonym) appeal against her conditions of registration (the Contravening Publication).

85. Relevant to the discussion in this Determination, in summary, AIN made the following claims[24]:

a. the provision of incorrect information in a letter from a member of the Medical Council to AIN's solicitor was a contravention of s 16 of the PPIP Act because it falsely stated that the decision of the Medical Tribunal had been removed from the Medical Council's website; (emphasis added)

b. the provision of incorrect information in the letter from the Medical Council to AIN's solicitor was a contravention of s 16 of the PPIP Act because it included untruthful statements that the Contravening Publication had been immediately removed from the Medical Council's website in response to the letter from AIN's solicitor; (emphasis added)

c. the apology to AIN in the letter "for any actions or omissions on the part of the Council that may have contributed to the situation" was a contravention of s16 of the PPIP Act because it was misleading, including because it did not acknowledge that actions or omissions of staff of the Medical Council had, in fact, contributed to the situation.

86. In its decision in respect to the above matters, the NCAT Appeal Panel considered whether letters written by another containing information on the applicant, were the applicant's personal information. At paragraph 112 of its decision, the Appeal Panel stated the following: *... we agree with the Medical Council that none of the information referred to is personal information within the meaning of the PPIP Act. The information supplied in the first two categories consisted of contentions by the Medical Council as to what it had done in response to AIN's complaint about the Contravening Publication and as to its responsibility for what had occurred. The apology, the third category of information relied upon, was information about the Medical Council's stance in relation to AIN's complaint. All of that information was information about the Medical Council's response and stance in relation to AIN's complaint. Clearly, AIN was very interested in this reaction from the Medical Council, but it was not information 'about' AIN.* (Commissioner emphasis added)

87. This decision is an example of how information in a letter might be relevant to, and have an impact on, an individual, but may not be information *about* the individual. In the above case, the Appeal Panel categorised the information in the letter from the medical council as being *about what it had done* in response to the individual's complaint, *and its responsibility for what had occurred*, and about the *response and stance* of the medical council. This appears to me to be, in some respects, analogous to the matter under consideration in this Determination.

[24] Ibid [87]

Findings in relation to Claim 1A

88. Having considered both the case law discussed and the parties' submissions, I have formed the view that the information in the letter dated 31 December 2020 that the complainant is seeking to have corrected by its removal does not constitute his personal information for the purposes of the Privacy Act.

89. In my view the information in the letter from the respondent to the Approved Provider that the complainant is seeking to correct is about, or on the subject of, the respondent's "acknowledgement" (which I interpret to mean affirmation, understanding, recognition) of actions taken by the Approved Provider in relation to a request for child documents.

90. The fact that the Approved Provider apparently did not provide all the requested child documents and that therefore the respondent's acknowledgement of the actions of the Approved Provider might have been premature and misleading, do not however allow for correction of that information through the avenue of the Privacy Act. The information is not personal information about the complainant.

91. One might suggest that as the information in the letter infers (it does not explicitly state, although it makes no difference to my point) that the complainant was the recipient of the documents, then the information is his personal information. I would not agree. The information in the sentence he is seeking to correct is the respondent's "acknowledgement" of an "action" taken by the Approved Provider. The correction required to address the concerns of the complainant would be to qualify either the respondent's "acknowledgement" in some way, or the "action" of the Approved Provider; either way that qualification would not be a correction of the complainant's personal information.

92. The fact that the complainant is named in the letter is not sufficient for the information in the letter that is the subject of discussion to be personal information about him. As discussed, the inclusion of an individual's name does not automatically mean that the information is personal information. The fact that the documents referred to relate to the complainant's child also does not make the information personal information about the complainant.

93. I note and agree with the complainant's submission at [58(ii)] drawn from the FCAFC[25] case that information and opinions can have multiple subjects. However, I do not consider that the complainant is a subject of the information he seeking to have corrected as it stands.

94. As set out at [58(vi)] of this Determination, in submissions the complainant made the point that the respondent *"has – after the event – attempted to offer convoluted legal arguments to the Commissioner as to why it didn't have to respond to AB's request… As the reasons were never communicated to* [AB] *in response to his request for correction they should be disregarded as not being genuine reasons at the time as to why his request has never been responded to nor actioned compliant with APP 13. Had these been the reasons why his request was never responded to nor actioned* [the respondent] *could have and would have surely mentioned them at the time"*.

95. In terms of good administrative practice alone, I agree with the complainant's view that the reasons relied on by the respondent should have been conveyed to him in response to his request. However, in determining whether there has been a breach of the APPs I am required to make the correct decision based on all the available information before me and in accordance with the provisions of the Privacy Act and decided case law.

[25] *Privacy Commissioner v Telstra Corporation Limited* [2017] FCAFC 4 (19 January 2017

96. I make it clear, however, that I am of the view and expectation that if agencies intend to rely on information in relation to their actions or decisions when they are facing a review by my office they should, to the extent allowable by law and the particular circumstances, have first communicated their reasoning to a complainant and afforded the complainant the right of reply. Presenting a post hoc argument is not satisfactory.

Is the information the complainant is seeking to correct held by the respondent?

97. Having determined that the information in question does not satisfy the requirements of the definition of personal information in accordance with s 6(1) of the Privacy Act, it is possible to end the matter there. However, in its submissions[26] to me the respondent has addressed the matter of whether it "holds" the personal information of AB in relation to his complaint. I consider this matter is relevant to the discussion under Claim 1B, and I now address that matter.

98. APP 13 applies to a request for correction of personal information if an entity **holds** that personal information.

99. Under s 6(1) of the Privacy Act an APP entity "holds" personal information if that entity has possession or control of a record that contains the personal information. The term "record" is defined in s 6(1) and includes a document or an electronic or other device.

100. As explained in the Australian Privacy Principles Guidelines[27], the term "holds" extends beyond physical possession of a record to include a record the entity has the right or power to deal with.

101. In its submissions, the respondent wrote that *the only personal information the [respondent] "holds" regarding [AB's] complaint [to the Commissioner] is the correspondence sent by the [respondent] to AB which it holds in its records. In this regard, the information held by the [respondent] is accurate and not out of date, as it is an accurate reflection of the correspondence sent by the [respondent] held as a record of the correspondence. The [respondent] cannot reasonably "correct" these records without doctoring the accurate history of communications between the parties"*.

102. The correspondence referred to in [101] is the letter from the respondent to the complainant dated 6 January 2021 referred to at [13] of this Determination. It is not the subject of the complainant's privacy complaint to me and not the subject of this Determination. As previously noted, the subject of this Determination is the letter dated 31 December 2020.

103. In reply to the respondent's submission set out at [101] the complainant submitted that the claim by the respondent that it does not hold the personal information *"is unfounded as the department (sic) created and does hold the document comprising the personal information* [the 31 December 2020 letter], *not the least as it is in their possession, as is required, on its National Quality Agenda IT System(NQAITS) as part of an investigation outcome, and also on email servers and/or files of the person who created it. And they have the right and power to deal with it*".[28]

104. I agree that the letter dated 31 December 2020 is clearly held by the respondent within the meaning of the word "holds" under s 6(1) of the Privacy Act. However, given it has been contended by the respondent – and found in this Determination – that the relevant information in that letter that has been discussed at [88 to 94] does not meet the definitional requirements of personal information under the Privacy Act, the respondent is correct, in relation to Claim 1A, in its assertion that it does not hold the "personal information" asserted by the complainant.

---

[26] R.5 Submission dated 25 January 2022 from respondent to NECS PC

[27] APP Guidelines [13.11]

[28] C.5 Submission dated 6 April 2022 from complainant to NECS PC

Claim 2 in relation to Claim 1A: Failure to comply with the minimum procedural requirements under APP 13 in relation to AB's request.

105. The "minimal procedural requirements" of APP 13, once APP 13.1 has been satisfied, are set out in APP subclauses 13.2 to 13.5 (set out in Attachment A). These procedural requirements are contingent upon the requirements of APP 13.1 first being fulfilled as discussed under Claim 1. Namely:
    - the information in question must be personal information about the individual;
    - an entity must hold the said personal information; and
    - the individual requests the entity to correct the information.

106. If, as discussed at [88-94] and [104], the entity does not hold the "personal information" requested to be corrected because the said information does not fulfil the definitional requirements of the Privacy Act as being "personal information about an individual," then APP 13.1 does not apply and consequentially APP subclauses 13.2 to 13.5 also do not apply. I have set out my reasons in the following paragraphs.

107. APP 13.2 applies if the agency corrects personal information about an individual. It is not relevant for the purposes of this discussion but the following comments on the meaning of the word about will also apply to this principle.

108. APPs 13.3 and 13.4 are expressed slightly differently to APP 13.1, and they apply if an agency *"refuses to correct the personal information as requested by the individual*". In considering APPs 13.3 and 13.4, the term personal information is defined in s6 of the Privacy Act as follows: *"personal information means information or an opinion about an identified individual …*

109. As the word "about" is also used in the s (6) definition, it should logically follow that APPs 13.3 and 13.4 should be interpreted together with the definition of personal information, so that the word *about* should also be used in APP's 13.3 and 13.4. In other words, APPs 13.3 and 13.4 should be interpreted to read as follows: *If an agency refuses to correct the personal information (ie personal information about an identified individual…) as requested by the individual …."*

110. APPs 13.3 and 13.4 also use the word ***if***, which (similar to the case for APP 13.1) operates as a precondition to the APPs applying unless the rest of the APP is satisfied, and in particular the meaning of the word *about*.

111. In summary, and having regard to the use of the word ***if*** and the definition of personal information, I consider APPs 13.1 to 13.4 should all be interpreted to mean personal information *about* an individual. The following approaches would be used when applying this interpretation:

    a. APP 13.1 only applies ***if*** the agency holds personal information *about* an individual. ***If*** the relevant information held by the agency is *not about* an individual, then APP 13.1 does not apply.
    b. APP 13.2 only applies ***if*** the agency corrects personal information *about* an individual.
    c. APP 13.3 only applies ***if*** the agency refuses to correct the personal information (ie *personal information **about** an identified individual)* as requested by the individual. ***If*** the individual's request does not seek to correct personal information ***about*** an individual, then APP 13.3 does not apply. As it has been found in paragraphs [88-93] of this Determination that the information in relation to Claim 1A is not personal information about the complainant, the APP does not apply.
    d. APP 13.4 only applies ***if*** the agency refuses to correct the personal information (ie *personal information **about** an identified individual)* as requested by the individual. If the individual's request does not seek to correct personal information ***about*** that individual, then APP 13.4 does not apply.

112. APP 13.5 is expressed to apply if a request is made under subclause 13.1 or 13.4. The rest of the APP requires the agency to respond to the request within 30 days.[29]

113. In applying APP 13.5 for the purpose of APP 13.1, the issue that needs to be decided is whether the word 'request' means:

    a. a request under APP 13.1 to correct information, where the request satisfies the test that it is from an individual to correct information that is found to be personal information about that individual, or
    b. a request under APP 13.1 to correct information, but the request does not need to first satisfy the test that it is from an individual to correct information that is found to be personal information about that individual.

114. The case cited at footnote to [112] of Knowles v Secretary, Department of Defence appears to give some guidance on this issue. In that case the Federal Court found that an email sent by Mr Knowles to the Department should not be characterised as a request for the correction of personal information under APP 13 and that "*given the conclusion reached as to the correct characterisation of the email* [as something other than a request for correction of personal information] *it is not necessary to consider whether the Department's absence of correction required the communication of a refusal to Mr Knowles."*[30] I interpret this to mean that the requirements of APP 13.5 did not apply.

115. In AIT18 v Australian Information Commissioner,[31] the Full Court of the Federal Court made the following comments on the proper construction of the Privacy Act:

    a. *It may be accepted that the Privacy Act is remedial or beneficial legislation and should, in general, be construed liberally but with close attention to the relevant statutory terms which require interpretation*.
    b. *It is well established that remedial or beneficial legislation should be accorded a "fair, large and liberal interpretation", as opposed to one which is literal or technical', (see, for example, IW v City of Perth [1997] HCA 30; 191 CLR 1 at 12).*[32]
    c. *Subsequent case law has properly emphasised the need for caution in applying this canon of construction*[33].
    d. *For example, in New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act*[34] *the High Court emphasised the importance of understanding the particular issue to which the task of statutory construction relates in any individual case. Their Honours drew a distinction between a situation where a Court is asked to construe a statute where there are choices available in the statute's construction, in which case the choice can be guided by taking a broader approach on the basis of the beneficial purpose of the statute, as opposed to a case where the exercise of statutory construction is focused on the meaning of specific words.* (Commissioner's emphasis)

116. I conclude from the above extracts that generally speaking, as remedial or beneficial legislation, the Privacy Act should be given a "fair, large and liberal interpretation", as opposed to one which is literal or technical. The general approach should be used with caution however. If there are choices available in the statute's construction, then the choice can be guided by taking a broader approach on the basis of the beneficial purpose of the statute, as opposed to a case where the exercise of statutory construction is focused on the meaning of specific words.

---

[29] See Knowles V Secretary Department of Defence [2021] FCAFC 215 at [52] The Full Court of the Federal Court of Australia determined that a comparison of APP 13.1, 13.4 and 13.5 disclosed *a dichotomy between responding to a request and actioning it*. It held that a *response is different to consequential action*, and that it would be permissible to give an indication of the consequential action in the response, but the 30 day period governs the response under APP 13.5, and not the action under APP 13.1 or APP 13.4.

[30] For details see Knowles v Secretary Department of Defence. Op.cit in particular paragraphs 71 to 74

[31] *AIT18 v Australian Information Commissioner* [2018] FCAFC 192

[32] Ibid at para 76

[33] Ibid at para 77

[34] *New South Wales Aboriginal Land Council v Minister Administering The Crown Lands Act* [2016] HCA 50; 260 CLR 232

117. As discussed at [113] the case under consideration in this Determination involves deciding the meaning of the word "request" in APP 13.5.

118. There are no decided cases on the specific issue. I can appreciate that a possible approach may be to consider that there are choices available in the interpretation of the word *request* under APP 13.5 as set out at [113], that the choice can be guided by taking a broader approach on the basis of the beneficial purpose of the Privacy Act, and therefore lead to the view that the word *request* under APP 13.1 need not satisfy the test that it is from an individual to correct information that is found to be personal information *about* that individual.

119. In my opinion the correct view is as follows:

    a. Clause 13.5 states – ***If*** *a request is made under subclause 13.1 …*
    b. The word *if*, introduces a condition, namely the request must be made under APP 13.1.
    c. The word *under* introduces another requirement. That word has been defined in a number of cases, with the following as illustrations.
        i. In considering bankruptcy legislation, the Federal Court[35] has held that *"the word under means "in accordance with" or "authorised, warranted, or attested by": The Macquarie Concise Dictionary, 2ed 1098.* The court concluded that the proceedings before it were not proceedings under that Act.
        ii. In relation to arbitration proceedings, the Victorian Supreme Court[36] has held *that the word "under" means "governed, controlled, or bound by; in accordance with"*.
        iii. In relation to Medical Board proceedings, the Queensland Supreme Court[37] has held that – *The meaning of a phrase such as "under this Act" (or Part or Section) has been considered from time to time,…..most recently in connection with the phrase "under an enactment" in the Administration Decisions (Judicial Review) Act 1977 (Cth.) and the Judicial Review Act 1991; the accepted view is that, in that context, "under" means "in pursuance of" or "under the authority of", or, in other words, that the Act is the source of the material power*.

120. Having regard to the decided cases on the meaning of the word "under", in my opinion APP 13.5 when referring to a request *under* APP 13.1, means a request that complies with the requirements of APP 13.1, namely the request must satisfy the test that it is from an individual seeking to correct the personal information that the agency holds about that individual.

121. As has already been discussed the information that has been considered in relation to Claim 1A of this Determination does not satisfy the definitional requirements of personal information under the Privacy Act as being information about the complainant and therefore does not comply with the requirements of APP 13.1. APP 13.5 therefore does not apply.

Finding in relation to Claim 2 with respect to Claim 1A

122. On the basis of the discussion in paragraphs 105 to 121 I find that the respondent has not breached the procedural requirements of APP 13. Claim 2 is not substantiated in relation to Claim 1A.

Claim 1B: The respondent has failed to take reasonable steps to correct the complainant's personal information by failing to remove his name from the letter dated 31 December 2020.

[35] *Rothmore Farms Pty Ltd (in liq) v Belgravia Pty Ltd* [1999] FCA 598

[36] *BTR Engineering (Aust) Ltd & Ors v Dana Corporation & Ors*. [2000] VSC 246. Per warren J.

[37] *Eckersley v Medical Board of Qld* [1996] QCA 528

123. In response to the first Preliminary draft of this Determination, by email dated 23 July 2022[38] the complainant stated that the former Commissioner had not addressed a second part of his complaint to her. He wrote:

My complaint/request for correction of personal information involved two matters, that is:

(1) That the letter of 31 December 2020 contained false and misleading information that I was the subject of that I wanted corrected/removed. This has been addressed in the preliminary view.

(2) That the letter of 31 December 2020 contained my name when it should never have been released/used pursuant to the QARD's complaints privacy policy (which I provided you a copy of in my submissions of 6 April 2022)[39] and I wanted it corrected/removed. This hasn't been addressed in the preliminary view. [Commissioner emphasis]

124. In his previous submission to the former Commissioner dated 6 April 2022, the complainant relevantly made three references to the inclusion of his name in the letter dated 31 December 2020. These are set out below (Commissioner underlining):

i. *"AB was personally named in the letter to the approved provider despite this being contrary to the DOE[sic] privacy policy…When AB discovered he was named in this letter …he requested that the [respondent] corrected the personal information about him by formal letter to them of 5 August 2021."* (6 April submission: paragraphs 6 & 7, "Background", Commissioner emphasis);
ii. In response to the respondent's claim that the complainant's request wasn't about personal information the complainant wrote *"the request was about AB's personal information not least as it named him personally"* (6 April submission: numbered point 24); and
iii. *"The letter dated 31 December 2020 should never have had AB personally named or identified in it. This is a breach of the Department's[sic] own complaints privacy policy …and despite raising this serious breach [with the respondent] in the letter dated 5 August 2021 at point 22 and g of the letter [the respondent] never responded to it.* (6 April submission: numbered point 36).

125. The complainant's submissions in his letter dated 6 April 2022 fall under the following 2 points:
a. first, that the inclusion of his name in the letter dated 31 December 2020 was contrary to the Department's complaints privacy policy; and
b. secondly, the complainant's name in the letter dated 31 December 2020 was personal information.

126. The complainant's second point in his email to the former Commissioner dated 23 July 2022 was that under *QARD's s privacy policy* his name should not have been used in the letter dated 31 December 2020.

127. In my view, both pieces of correspondence from the complainant can be said to make the two points set out in [124].

128. I initially considered the inclusion of the complainant's name in the letter of 31 December 2020 within the context of the relevant information that he was seeking to have corrected – set out in [9(i) and 9(ii)] of this Determination – in discussion under Claim 1A. That information has been found not to be the complainant's personal information. As noted at [52] the *relevant information* is that "*the Department [sic] acknowledges that the approved provider in a letter dated the 13 November 2020 has responded to [AB] and provided the requested child documents*. As set out at paragraph [92] and referenced to case law at [79] the inclusion of AB's name in that letter did not make the information he was seeking to correct his personal information.

[38] C.6 Email dated 23 July 2022 Complainant to Commissioner re First Preliminary View Draft Determination

[39] C.5 Submission dated 6 April 2022 from complainant to NECS PC

129. The former Commissioner responded to the points being made in the complainant's correspondence of 6 April 2022 and 23 July 2022 set out at [123 to 125] in separate correspondence to him dated 28 July 2022[40]. In that correspondence she advised that:

    i. She considered that she did not have jurisdiction to investigate the respondent's administrative actions in relation to its own internal complaints privacy policy – (Commissioner Note: the policy is not an APP policy as required under the Privacy Act; it is an internal policy covering complaints made in relation to children's services regulated under both the Education and Care Services National Law and Victorian legislation).

    ii. She nevertheless had sought advice from the respondent in relation to the matters raised to which the respondent had replied by letter dated 29 June 2022[41].

    iii. In respect to the inclusion of AB's name in the letter dated 31 December 2020 the respondent advised that:
        a. at the time of raising his complaint, AB spoke with 2 authorised officers where it was communicated that the regulatory authority would investigate his concerns, which would involve discussing the nature of his complaint with the provider, and that AB had already raised the matter with the provider previously.
        b. a contemporaneous record of the complaint by authorised officers shows AB did not indicate he wished to remain anonymous[42]
        c. that the nature of the complaint – about the childcare service's actions relating to a specific child - meant it would not be possible for the respondent to raise the matter and investigate it without the provider being aware of AB's identity, that the provider had previously received a complaint from AB on the same issue which identified both himself and his child, and the provider had informed the respondent about AB's complaint.

130. The former Commissioner also advised that she had considered the matters raised by the complainant in relation to Australian Privacy Principle 6 – Use and disclosure of personal information as she considered this APP may be relevant.

131. Under APP 6.1 an APP entity that holds personal information about an individual can only use or disclose the information for a particular purpose for which it was collected (known as the 'primary purpose' of collection) unless an exception applies.

132. If AB's name was personal information the use and disclosure of his name was for the primary purpose of investigating a complaint made by him in relation to his son's kindergarten and the information was used and disclosed for that primary purpose.

133. The former Commissioner considered the reasons provided by the respondent as to why the complainant's name was included in the letter dated 31 December 2020 to be reasonable in the circumstances. The former Commissioner advised the complainant that while she considered it may not have been necessary for the respondent to include his name in the letter dated 31 December 2020, that is, it would have been possible to refer to him in a de-identified way, she was satisfied that in the circumstances as described in [129(iii)] the inclusion of his name (if it was personal information) was not in breach of APP 6.

134. The former Commissioner considered her response addressed the complaint from AB in relation to the inclusion of his name in the letter dated 31 December 2020 as it had been expressed in his correspondence to her of 6 April 2022 and 23 July 2022 and to the respondent.

---

[40] C.7 Letter dated 28 July 2022 NECS PC to AB

[41] R.6 Letter dated 29 June 2022 Respondent to NECS PC

[42] The record referred to has been sighted by me. The record requires a box to be checked if anonymity is requested. The box has not been checked.

135. However, by letter dated 29 July 2022[43] the complainant made the following further points (Commissioner underlining):

    i. that in relation to the inclusion of his name in the letter dated 31 December 2020 he was not asking if the respondent or the Commissioner agreed if his name should have been in the letter or not when it was a ground for 'correction' he sought under APP 13;
    ii. that he is the subject matter of his own personal name and that it constitutes his personal information
    iii. that *if the respondent wanted to rely on those grounds [set out in [129(iii)] for not acceding to my request under APP 13 for a correction they could have responded to my request of 5 August 2021 - or my complaint to the Secretary of 22 October 2021 - and put those reasons to me pursuant to APP 13 and followed the procedural requirements of APP 13 as they were required to do. As such, I could perhaps for example have asked for a statement to be attached to the information*
    iv. that the respondent's claims that AB's name should have been in the letter did not relieve them of their obligations to comply with APP 13.

136. In my view, the complainant's letter dated 29 July 2022 now submits the following:

    a. the complainant is not submitting that his name should or should not have been in the letter of 31 December 2020;
    b. the complainant submits that his name is personal information; and
    c. under APP13, his name should be corrected/removed from the letter dated 31 December 2020.

137. I therefore now consider the complainant's above submissions for the correction/removal of his name (as distinct from the information already discussed under Claim 1A) from the letter dated 31 December 2020 under APP 13 in light of the further points raised by him and summarised at paragraph 135.

138. First, insofar as the complainant is submitting that his name should be removed/corrected from the letter of 31 December 2020 because of the respondent's internal complaints privacy policy, I have dealt with that matter earlier at 129(i). In that paragraph, I have stated the former Commissioner was of the view that she did not have jurisdiction to investigate the respondent's administrative actions in relation to its own internal complaints privacy policy.

139. Secondly, I consider this part of the complaint to be misconceived or lacking in substance. My reasons are as follows:

    a. APP 13 deals with the *correction* of personal information.
    b. In this Claim 1B, the personal information which the complainant alleges should be *corrected* is *his name*
    c. Insofar as the submissions relates *only to his name*, I find that if the complainant's name is personal information, then it is correctly expressed and recorded in the letter dated 31 December 2020, and there is no substance to this complaint. Put simply, there is nothing to *correct* in respect of the complainant's *name* in the letter of 31 December 2020.
    d. If the submission relates to the complainant's name in the context of the information in the letter dated 31 December 2020 discussed under Claim 1A, I have previously found at [92], that the *relevant information* in that letter was not personal information ***about*** the complainant. As noted earlier, the *relevant information* is that "*the Department [sic] acknowledges that the approved provider in a letter dated the 13 November 2020 has responded to [AB] and provided the requested child documents*.

140. Thirdly, as discussed at [105 to 111] APP 13 only applies to requests from an individual seeking to correct the personal information the agency holds ***about*** that individual. The issue as to whether a person's name can be considered as personal information has been considered in a number of cases,

[43] C.8 Letter dated 29 July 2022 complainant to NECS PC

including the FCAFC case relevantly discussed at [64 to 67] of this Determination. The following are further examples:

a. In Tucker v State of Victoria [2021] VSCA 120, the Full Court of the Supreme Court of Victoria made the following statement at para 321 in respect of the Victorian Privacy Act:

> *Section 3 of the Privacy Act defines 'personal information' as information '**about**' an identifiable individual. Where a witness gives evidence to an investigator about what he or she heard or observed a work colleague say or do, **neither the identity** of the witness nor his or her evidence **is 'about' the witness.** Accordingly, redaction of the evidence would not be appropriate on privacy grounds.*

b. In Leda Manorstead Pty Ltd and Department of the Environment[44] the Privacy Commissioner stated the following at paragraph 41 (Commissioner underlining and bolding):

> *As explained in the Guidelines, **personal information can include a person's name. However,** for information to constitute personal information it needs to convey or say something **about** a person**, rather than just identify them**. The mere mention of a person's name may, however, reveal personal information **about them** depending on the context.[45]*

141. I have made the following findings in [92] concerning the context in which the complainant's name appeared in the letter of 31 December 2020:

a. the fact that the complainant is named in the letter is not sufficient for the information in the letter that is the subject of discussion to be personal information ***about*** the complainant; and
b. the fact that the documents referred to relate to the complainant's child also does not make the information personal information ***about*** the complainant.

142. The combined effect of paragraph 140 (namely that a **name alone** does not constitute personal information ***about*** an individual), and paragraph 141 which summarises paragraph 92 (namely that the information in the letter of 31 December 2020 combined with the complainant's name did not constitute personal information ***about*** the complainant) is sufficient for me to conclude that the complainant's name in the context of the letter of 31 December 2020 does not constitute personal information ***about*** him. I therefore find that APP 13 did not apply, and the respondent did not breach APP 13.

Finding in relation to Claim 1B

143. I find this part of the complaint to be misconceived or lacking in substance. I also find that the complainant's name in the letter of 31 December 2020 was not personal information about the complainant for the purposes of APP 13 and that the respondent did not breach APP 13.

Claim 2 in relation to Claim 1B – Failure to comply with the minimal procedural requirements under APP 13 in relation to the complainant's request.

144. The claimant alleged that the respondent was obliged to comply with the procedural requirements of APP 13 in relation to the complainant's request to remove his name from the letter dated 31 December 2020.

Finding: Claim 2 in relation to Claim 1B

145. My decisions and findings in [105] to [121] of this Determination also deal with this claim.

---

[44] Leda Manorstead Pty Ltd and Department of the Environment [2014] AICmr 26,

[45] Statements to the same effect were made by the AATA in Wegner and National Registration Authority for Agricultural and Veterinary Chemicals [2002] AATA 36, and in Janette Maree Cook and Comcare [1996] AATA 95.

Claim 3: *"Financial compensation, including for aggravated damages given the actions of the DOE [sic] and their continued onerous and unreasonable requests and conduct*

146. As a breach of APP 13 has not been found Claim 3 is dismissed.

Concluding remarks

147. The respondent has been able to clearly articulate its reasons for not responding directly to the complainant's requests in its responses to my enquiries. While I have found that the respondent has not breached APP 13 in this case, I consider that the respondent should have informed the complainant much earlier of those same reasons. The reasons were not given until January 2022 and June 2022, well after its initial responses to the complainant in September and November 2021 in replies to the complainant's requests set out at [9].

148. In my view, the delay in providing those reasons did not meet the standards of good administrative practice. Those standards are also referred to in s7 of the *Public Administration Act 2004* (Vic), which includes the *public sector value* of "providing high quality services to the Victorian community"**.**

Alan Grinsell-Jones
National Education and Care Services Privacy Commissioner

Review rights

A party may apply under s 96 of the Privacy Act, as modified by the *Education and Care Services National Regulations 2011* r 201(e) and r 202(g) to have a decision under s 52(1) or (1A) to make a determination reviewed by the relevant Tribunal. In the case of this NECS Privacy Commissioner determination, the relevant Tribunal is the Victorian Civil and Administrative Tribunal (VCAT). VCAT provides independent merits review of administrative decisions and has the power to set aside, vary, or affirm a privacy determination. An application to the VCAT must be made within 28 days after the day on which the person is given the privacy determination. An application fee may be applicable when lodging an application for review to the VCAT. Further information is available on the VCAT website at www.vcat.vic.gov.au or by telephoning 1300 018 228

ATTACHMENT A

Privacy Act 1988 (Cth)

Section 52 – Determination of Commissioner

1. After investigating a complaint, the Commissioner may:
   a. make a determination dismissing the complaint; or
   b. find the complaint substantiated and make a determination that includes one or more of the following:
      i. a declaration:
         A. where the principal executive of an agency is the respondent—that the agency has engaged in conduct constituting an interference with the privacy of an individual and must not repeat or continue such conduct; or
         B. in any other case—that the respondent has engaged in conduct constituting an interference with the privacy of an individual and must not repeat or continue such conduct;
      (ia) a declaration that the respondent must take specified steps within a specified period to ensure that such conduct is not repeated or continued;
      ii. a declaration that the respondent must perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant;
      iii. a declaration that the complainant is entitled to a specified amount by way of compensation for any loss or damage suffered by reason of the act or practice the subject of the complaint;
      iv. a declaration that it would be inappropriate for any further action to be taken in the matter.

Section 6 Interpretation - APP Entity

An agency or organisation

Section 6 Interpretation – Personal Information

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

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

Section 13 Interference with privacy

APP entities

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

Section 15 APP entities must comply with Australian Privacy Principles

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

Australian Privacy Principles

Australian Privacy Principle 13 – correction of personal information

Correction

13.1 If:

a. an APP entity holds personal information about an individual; and

b. either:
   i. the entity is satisfied that, having regard to a purpose for which the information is held, the information is inaccurate, out of date, incomplete, irrelevant or misleading; or
   ii. the individual requests the entity to correct the information

the entity must take such steps (if any) as are reasonable in the circumstances to correct that information to ensure that, having regard to the purpose for which it is held, the information is accurate, up to date, complete, relevant and not misleading.

Notification of correction to third parties

13.2 If:

a. the APP entity corrects personal information about an individual that the entity previously disclosed to another APP entity; and

b. the individual requests the entity to notify the other APP entity of the correction

the entity must take such steps (if any) as are reasonable in the circumstances to give that notification unless it is impracticable or unlawful to do so.

Refusal to correct information

13.3 If the APP entity refuses to correct the personal information as requested by the individual, the entity must give the individual a written notice that sets out:

a. the reasons for the refusal except to the extent that it would be unreasonable to do so; and

b. the mechanisms available to complain about the refusal; and

c. any other matter prescribed by the regulations

Request to associate a statement

13.4 If:

a. the APP entity refuses to correct the personal information as requested by the individual; and

b. the individual requests the entity to associate with the information a statement that the information is inaccurate, out-of-date, incomplete, irrelevant or misleading

the entity must take such steps as are reasonable in the circumstances to associate the statement in such a way that will make the statement apparent to users of the information.

Dealing with requests

13.5 If a request is made under subclause 13.1 or 13.4, the APP entity:

a. must respond to the request:
   i. if the entity is an agency – within 30 days after the request is made; or
   ii. if the entity is an organisation – within a reasonable period after the request is made; and
b. must not charge the individual for the making of the request, for correcting the personal information or for associating the statement with the personal information (as the case may be)

Education and Care Services National Law Act 2010 (VIC)

Section 5 Exclusion of legislation of this jurisdiction

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

   (ca) the Privacy and Data Protection Act 2014

Section 8 Regulatory Authority

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

Section 263 Application of Commonwealth Privacy Act

1. The Privacy Act applies as a law of a participating jurisdiction for the purposes of the National Quality Framework.
2. For the purposes of subsection (1), the Privacy Act applies –
   a. as if a reference to the Office of the Privacy Commissioner were a reference to the Office of the National Education and Care Services Privacy Commissioner; and
   b. as if a reference to the Privacy Commissioner were a reference to the National Education and Care Services Privacy Commissioner; …

Education and Care Services National Regulations 2011

Regulation 199 - Modifications relating to National Authority and Regulatory Authorities

The Privacy Act applies as if it were modified so that –
a. it applies only to agencies; and
b. the agencies it applies to are –
   i. the National Authority; and
   ii. each Regulatory Authority of a participating jurisdiction;

Regulation 201 - Miscellaneous modifications

The Privacy Act applies …
e. as if a reference to the Administrative Appeals Tribunal were a reference to a relevant administrative tribunal; and
f. as if a reference to the Federal Court were a reference to the Supreme Court, or another court of competent jurisdiction, of a participating jurisdiction;

Regulation 202 - Relevant administrative tribunal

For the purposes of regulation 201(e), a reference in the Privacy Act to a ***relevant administrative tribunal*** is taken to be a reference to [in this case]: (g) the Victorian Civil and Administrative Tribunal established under the *Victorian Civil and Administrative Tribunal Act 1998.*