

2019

THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY

National Education and Care Services Freedom of Information Commissioner,  
Privacy Commissioner and Ombudsman Annual Report  
1 July 2018 to 30 June 2019

Presented by Yvette Berry, MLA  
Education and Early Childhood Development  
October 2019



National Education & Care Services  
FOI & Privacy Commissioners & Ombudsman

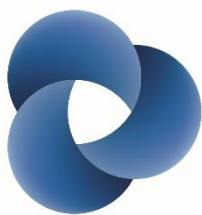
NATIONAL EDUCATION AND CARE  
SERVICES FREEDOM OF INFORMATION  
COMMISSIONER, PRIVACY  
COMMISSIONER & OMBUDSMAN

ANNUAL REPORT

1 July 2018 to 30 June 2019

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## National Education & Care Services FOI & Privacy Commissioners & Ombudsman

### Letter of Transmittal

Chair  
COAG Education Council  
PO Box 202  
CARLTON SOUTH VIC 3053

Dear Minister

In accordance with Regulations 198, 207 and 221 of the *Education and Care Services National Law Regulations* (the ECS Regulations) I am pleased to present to the COAG Education Council the National Education and Care Services Freedom of Information Commissioner, National Education and Care Services Privacy Commissioner, and Education and Care Services Ombudsman (the ECS Commissioners), Annual Report for the period 1 July 2018 to 30 June 2019.

The Annual Report is the eighth such report from the office of the ECS Commissioners since its establishment in January 2012.

The Annual Report has been prepared in accordance with the requirements of the ECS Regulations. I am satisfied that the ECS Commissioners' Office has financial and governance procedures and processes in place that meet the specific needs of the Office and that comply with the ECS Regulations applying to the Office.

Regulations 198, 207 and 221 of the ECS Regulations require the Ministerial Council to make arrangements for the tabling of this Annual Report in the State, Territory and Commonwealth Parliaments.

Yours sincerely

**Lesley Foster**

National Education and Care Services Freedom of Information & Privacy Commissioners & Ombudsman

# 1 Commissioners' Foreword and Overview

The National Education and Care Services Freedom of Information Commissioner, the National Education and Care Services Privacy Commissioner and the Education and Care Services Ombudsman (the ECS Commissioners) are independent statutory officers established under national applied laws legislation – the *Education and Care Services National Law Act 2010* (the National Law) and the associated *Education and Care Service National Regulations* (ECS Regulations).

The two Commissioners' and the Ombudsman's positions are established and operate independently of each other for the purposes of the National Law. The Council of Australian Governments (COAG) Education Council is responsible for appointments to the positions and has determined to appoint one person to undertake the three roles.

The positions were established in 2012 as part of reforms by COAG to create a national, uniform regulatory and quality assurance system for early childhood education and care and outside school hours care services across Australia. The system is referred to as the National Quality Framework for Early Childhood Education and Care (the NQF). The NQF applies to most long day care, family day care, outside school hours care, and preschool/kindergarten services in Australia.

To implement the system, the National Law established the Australian Children's Education and Care Quality Authority (ACECQA) and early childhood education and care Regulatory Authorities in each of the 8 Australian states and territories. ACECQA oversees the implementation of the National Quality Framework. State and territory Regulatory Authorities are responsible for granting education and care provider and service approvals, undertaking quality assessment and rating of services, and ensuring services meet the requirements of the National Law and National Regulations.

## Legislative Framework

The ECS Commissioners operate within a complex legislative framework. Victoria passed the *Education and Care Services National Law Act, 2010* and, except for Western Australia, each State and Territory passed legislation applying the National Law, with some variations to accommodate local requirements. Western Australia enacted corresponding legislation. *The Education and Care Services National Regulations 2011* amplify the National Law.

The National Law confers specified jurisdiction on the ECS Commissioners that is derived from the following Commonwealth Acts as in force from time to time: *Ombudsman Act 1976*, *Freedom of Information Act 1982* and *Privacy Act 1988*

These Commonwealth Acts are modified by Part 6.2 Divisions 1, 2, and 4 of the National Regulations to apply in participating states and territories and to ACECQA for the purposes of the National Quality Framework for Early Childhood Education and Care.

The Ombudsman provides services with respect to administrative actions taken by ACECQA and the Commissioners provide freedom of information and privacy complaint and review services in relation to

actions taken in these areas by each of the state and territory early childhood education and care Regulatory Authorities and ACECQA.

The Ombudsman and Commissioners also play an important role in promoting public and service provider confidence in the integrity of the administration of the regulation of early childhood education and care.

This is my fourth Annual Report as the Ombudsman and Commissioners since my appointment to the positions and I continue to find the roles to be interesting, challenging and rewarding.

## 1.1 Achievements

In addition to carrying out legislative responsibilities related to complaints, reviews and investigations, key activities for the reporting period have included:

- assessment of the effectiveness of the ECS Commissioners' website ([www.necsopic.edu.au](http://www.necsopic.edu.au)) based on website data analytics, enquiries to the office, and analysis of other relevant sites to inform a website upgrade in the year ahead;
- update of the office Service Charter (Attachment 1);
- update of the office Strategic Plan (Attachment 2);
- ongoing stakeholder engagement about the roles of the ECS Commissioners;
- provision of guidance material and advice to Regulatory Authorities on relevant matters, including guidance on the application processing provisions of the *Freedom of Information Act 1982*; (Attachment 3); and
- the provision of advice and/or referrals to other relevant bodies to members of the public on a range of matters.

## 1.2 The year ahead

The focus for the coming year includes:

- upgrade of the office website based on the outcomes of this year's analysis including content review and updates, additional resource materials, links to other complaint handling bodies, and the incorporation of feedback mechanisms;
- ongoing stakeholder engagement;
- work with ACECQA and Regulatory Authorities as necessary to assist them to meet their obligations under the Commonwealth *Freedom of Information 1982* and *Privacy Act 1988* including a review of the Information Publication Scheme and Disclosure Log requirements of the FOI Act; and
- further identification and resolution of gaps in policy documents and support material provided by the office with a focus on the requirements of the *Privacy Act 1988*.

## 1.3 Workload

The ECS Commissioners are appointed on a 0.2EFT basis. Access to the Commissioners is provided for customers via the new online complaint and review request facilities, email, and telephone, and in face to face meetings (by appointment only). Online requests, emails and telephone messages are monitored daily and an acknowledgement response is usually provided within 24 hours of receipt. The Commissioners also undertake the administrative work of the Office as the workload does not warrant the past practice of engaging an office manager. Financial services are purchased from the education Ministers' company,

Education Services Australia Ltd, and some administrative support is provided by the Education Council Secretariat.

However, as advised in previous years, these arrangements do constrain the amount of resource materials that can be produced by the office for ACECQA, the Regulatory Authorities and the public. This situation continues to be mitigated to some extent by referencing material produced by the Office of the Australian Information Commissioner.

The receipt of 4 coincident requests for Freedom of Information Commissioner Reviews in late May 2019 meant that these Reviews had to be conducted concurrently in order to provide as timely responses as possible to the Review Applicants. Such reviews are detailed, complex and are subject to scrutiny by relevant administrative appeal Tribunals.

## 2 About the ECS Commissioners

### 2.1 Education and Care Services Ombudsman

The Education and Care Services Ombudsman has the power to investigate, either in response to a complaint received or on the Ombudsman's own motion, administrative actions taken by an employee, agent, staff member or contractor of the Australian Children's Education and Care Quality Authority (ACECQA). Administrative actions are any action taken, or not taken, in relation to ACECQA's duties, functions or powers.

The Ombudsman may make findings and recommendations for actions to be taken or decisions to be made by ACECQA but may not override the decisions of ACECQA. The Ombudsman cannot compel ACECQA to comply with her recommendations nor change the law. However, having concluded an investigation and reported on findings and recommendations, the Ombudsman may forward the report to the nominated member of the Ministerial Council responsible for overseeing the National Law. In addition, if the appropriate action is not taken and it would be appropriate in all the circumstances, the Ombudsman may also formally report to the Parliaments of the Commonwealth and the States and Territories.

The Ombudsman does not have powers in relation to how state and territory Regulatory Authorities exercise their powers or functions under the National Law or Regulations. Complaints about Regulatory Authorities are directed to the Ombudsman in the state or territory in which the Regulatory Authority is located.

This continues to prove a source of confusion both for complainants approaching the Education and Care Services Ombudsman for services and the respective state/territory Ombudsman offices. Advice included on the Office website and targeted communication to state/territory Ombudsman offices aims to mitigate this confusion.

### 2.2 National Education and Care Services Freedom of Information Commissioner

The National Education and Care Services Freedom of Information Commissioner has powers to enquire into and investigate written complaints, and undertake own motion investigations, about the performance of functions, or the exercise of powers, under the Commonwealth *Freedom of Information Act 1982* (FOI Act), by ACECQA or a state or territory Regulatory Authority.

The Commissioner also has the power to review the Freedom of Information decisions made by these agencies. The Commissioner may affirm, vary or set aside and substitute a decision of an agency.

ACECQA and each Regulatory Authority are bound by, and must comply with, the requirements of the FOI Act (as modified by the *Education and Care Services National Regulations*) when dealing with formal requests for access to documents under freedom of information.

### 2.3 National Education and Care Services Privacy Commissioner

The National Education and Care Services Privacy Commissioner has the power to investigate complaints alleging an interference with privacy arising from an alleged breach of the Australian Privacy Principles by ACECQA or a state or territory Regulatory Authority under the Commonwealth *Privacy Act 1988*. The Commissioner may also conduct own motion investigations into whether these agencies are complying with their obligations under the *Privacy Act*. The Commissioner may make various enforceable determinations resulting from investigations.

ACECQA and each of the State and Territory Regulatory Authorities are bound by, and must comply with, the requirements of the Privacy Act (as modified by the *Education and Care Services National Regulations*) in relation to how they collect, use, store and otherwise handle personal information about individuals.

## 3 Complaints and Enquiries

During the 2018/19 reporting period only 4 complaints were received by the office of the Education and Care Services Ombudsman in relation to ACECQA and all related to the process or outcomes of the assessment of overseas qualifications by ACECQA. This is a sharp decline from previous years and appears to reflect the continued improvement by ACECQA in its handling of qualification assessments and communication with applicants. The complaints were resolved through:

- further clarification of the reasons for the assessment outcome by ACECQA to the complainant;
- seeking additional information and further consideration of the application by ACECQA; and
- the provision of advice by ACECQA and/or the Ombudsman to the complainant about opportunities for further study and applying for Recognition of Prior Learning.

No complaints were received with respect to the actions of ACECQA or the state or territory Regulatory Authorities in carrying out their legislated responsibilities under the *Privacy Act 1988* or the *Freedom of Information Act 1982*. Four requests for Freedom of Information Commissioner Reviews were received which are dealt with in Section 4 below.

Some complaints or enquiries received by the Office continue to be related to matters that do not fall within the jurisdiction of the Ombudsman or Commissioners. These included complaints and enquiries about: the administrative actions of state or territory Regulatory Authorities; childcare fees; the collection and handling of personal information by education and care services and by schools; childcare workers' rights; the health and safety of children in particular childcare services; family court related matters; and parent disputes with schools. In all cases complainants were redirected to relevant bodies.

## 4 Freedom of Information (FOI)

The National Education and Care Services Freedom of Information Commissioner is required each financial year to report on the operation of the Commonwealth *Freedom of Information Act 1982* as modified by the *Education and Care Services National Law Act 2010* and its associated regulations (the FOI Act).

ACECQA and each state and territory Regulatory Authority are required to report to the Commissioner on a number of freedom of information matters including: the number of FOI requests for access to documents received; the number of applications received for amendment to personal information and their result; the total charges collected during the year; and the number of applications for internal review of FOI decisions and their results.

There was a small (1.5) percent decrease in the total number of new FOI applications received by ACECQA and the state and territory Regulatory Authorities compared to the last reporting period. Data by jurisdiction for the 2018/2019 reporting period is provided in **Table 1, Attachment 4**. In summary, three jurisdictions - the Northern Territory, Tasmania, and Western Australia - reported they received no FOI applications for the period. The remaining 6 agencies received a total of 62 applications and had a further 8 applications in hand from the previous reporting year – a total of 70 applications. Fifty-five applications, or 78.57 percent, were finalised by 30 June 2019. Of the those finalised 10 (18%) were granted access in full, 29 (53%) were granted partial access, 9 (16%) were refused access in full, 6 (11%) applications were withdrawn by applicants, and 1(2%) application was dealt with administratively. Two jurisdictions charged fees and collected a total of \$3,342. No applications for amendment to personal information were received during the period. One application was received for an internal review of an FOI decision.

Discounting the 6 applications that were withdrawn and the one application dealt with administratively, 48 of the FOI applications received had a decision made by 30 June 2019. 87 percent of these decisions were made within the statutory time of 30 days, 11 percent were up to 30 days overdue, and 2 percent were 31 to 60 days overdue.

### *Exemptions and Conditional Exemptions*

Section 11A of the FOI Act requires access to be given to a document unless the document at the time of the request is an exempt document. An exempt document includes documents that meet the criteria for an exemption provision under Part IV of the FOI Act. Divisions 2 and 3 of the Act set out the Exemptions and Conditional Exemptions provisions which can be applied by a decision maker when considering a Freedom of Information request. The Act sets out ten Exemptions provisions and eight Conditional Exemptions provisions. If a requested document meets the criteria of one of the Exemptions provisions an agency can refuse to release it. If a document meets the criteria of a Conditional Exemption provision the decision maker must apply “a public interest test” to determine if giving access to the document would be contrary to the public interest. Access cannot be refused simply because a document falls within a conditional exemption provision. It must also be contrary to the public interest to release the document otherwise access must be granted. The FOI Act is weighted towards disclosure of information and redactions may be applied to parts of a document to enable its partial release.

During the reporting period ACECQA and the Regulatory Authorities applied Exemptions or Conditional Exemptions provisions to FOI requested documents a total of 74 times. **Table 2, Attachment 4** details the

Exemptions/Conditional Exemptions provisions that were applied and the frequency of their use. Note that more than one Exemption/Conditional Exemption may be applied to a document.

Overall 5 Exemption provisions and 5 Conditional Exemption provisions were applied by the agencies. Of these, the most frequently applied Exemption provision related to “legal professional privilege” (8.1 percent of the total). Section 42 of the FOI Act exempts documents from disclosure if they are of such a nature that they would be privileged from production in legal proceedings on the grounds of legal professional privilege. The protection provided by legal professional privilege does not apply to all communications between legal advisers and clients. It is the purpose of the communication, between a lawyer and their client, not the information itself that is determinative. The document must have been made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.

The second most frequently applied Exemption provision related to “documents affecting law enforcement or the protection of public safety”. (6.8 percent of the total). Section 37 of the FOI Act applies to documents which, if released, would or could reasonably be expected to affect law enforcement or public safety in any of a number of circumstances that are listed in the Section. These include: prejudice the conduct of an investigation of a breach, or possible breach, of the law; prejudice the enforcement, or the proper administration, of the law in a particular instance; endanger the life or physical safety of any person; and prejudice the maintenance or enforcement of lawful methods for the protection of public safety

The Section 37 exemption applies where an agency has a function connected with investigating breaches of the law, its enforcement or administration. To be exempt under the Section a document should have a connection with the criminal law or the processes of upholding or enforcing civil law or administering a law. This includes the work of agencies in administering legislative schemes and requirements, monitoring compliance, and investigating breaches. The exemption does not depend on the nature of the document or the purpose for which it was brought into existence. A document will be exempt if its disclosure would or could reasonably be expected to have one or more of the consequences set out in the Section

The most frequently applied Conditional Exemption provision related to “personal privacy” (41.9 percent of the total). Section 47F of the FOI Act conditionally exempts documents where disclosure would involve the unreasonable disclosure of personal information of any person (including a deceased person). This exemption is intended to protect the personal privacy of individuals. Personal information means information or an opinion about an identified individual or an individual who is reasonably identifiable. The definition applies whether the information or opinion is true or not, and whether the information or opinion is recorded in a material form or not.

The second most frequently applied Conditional Exemption provision related to documents relating to the business affairs of an individual or organisation (12.2 percent of the total). Section 47G of the FOI Act conditionally exempts documents from disclosure where disclosure “*would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking...*” and the disclosure of the information “*would or could reasonably be expected to unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs.*” or “*could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or an agency...*”

### *Volume of FOI applications and outcomes over three years*

Table 3 in Attachment 4 provides a snapshot of FOI applications over the three years from 2016/17 to 2018/19. From a base of 48 new applications received in 2016/17, the *total* number of FOI applications across the agencies has remained relatively steady for the subsequent 2 years at 63 (2017/18) and 62 (2018/19). As would be expected the bulk of applications are received by the larger jurisdictions – NSW, Queensland and Victoria. NSW has experienced an 82 percent increase in applications over the three year period.

## 4.1 National Education and Care Services Freedom of Information Commissioner Reviews

The National Education and Care Services Freedom of Information Commissioner has the power to review Freedom of Information decisions that have been made by ACECQA or a state or territory Regulatory Authority with respect to either access to documents or decisions regarding amendment of, or annotation to, personal records. If the applicant is dissatisfied with the Commissioner's subsequent decision, they have the right to appeal to the relevant Administrative Tribunal.

During the reporting period the Commissioner received four applications for FOI Commissioner reviews of freedom of information application decisions made by the NSW (2 applications) and Queensland (2 applications) Regulatory Authorities. The Commissioner's Decisions were finalised in June/July 2019. Parties to a review have the right to appeal the Commissioner's decision at the relevant administrative appeals Tribunal. At the time of preparing this Annual Report these appeal rights had not been exhausted. Therefore, details of the Decisions cannot be discussed here.

Each state and territory relevant Administrative Appeals Tribunal (as listed in Regulation 210 of the *Education and Care Services National Regulations*) is required to provide information to the Commissioner on: the number of applications received for review of "access to documents" decisions made by the Commissioner and their results; the number of applications received for review of "requests to amend/annotate personal records" decisions made by the Commissioner and their results; and the number of applications withdrawn by applicants.

No applications had been made to the relevant Administrative Appeals Tribunal to review the decisions of the Commissioner at the time of finalising this report.

Once all appeal rights have been exhausted, the full Commissioner Review Decisions will be published on the ECS Commissioners' website at [www.necsoptic.edu.au](http://www.necsoptic.edu.au) as required under Section 55K(8) of the *Commonwealth Freedom of Information Act 1982*.

## 5 Audited Financial Report

The financial report has been audited by Grant Thornton Audit Pty Ltd and the audit statement is found at **Attachment 5**.

## 6 Budget Outlook

The Commissioners and Ombudsman continue to maintain a small budget surplus built up over the past years. Some of this surplus will be used to upgrade the office website and, consistent with past practice, the

remainder will be held as contingency funds to address complex or multiple case investigations which require the engagement of additional investigations staff or legal support.

The budget formation for 2019/20 reflects the forward priorities for the office. Costs associated with stakeholder engagement, document and support material development, and enhancements to the website will be met from within existing resources.

## ATTACHMENTS

Attachment 1: Service Charter

Attachment 2: Strategic Plan 2019-2021

Attachment 3: FOI Processing Timeframes

Attachment 4: Freedom of Information Statistical Data

Attachment 5: Audited Financial Report



National Education & Care Services  
FOI & Privacy Commissioners & Ombudsman

# SERVICE CHARTER

Updated June 2019

# Service Charter

This Service Charter sets out the standards of service that you can expect in dealing with the National Education and Care Services Ombudsman, Privacy Commissioner and Freedom of Information Commissioner (the **NECSOPIC**).

## Our Role

Commonwealth, state and territory governments established a national quality assurance framework for early childhood education and care services across Australia through the *Education and Care Services National Law* and the *Education and Care Services National Regulations*. For the purpose of implementing this scheme, the National Law established the Australian Children's Education and Care Quality Authority (ACECQA) and education and care services Regulatory Authorities in each of the states and territories. The responsibilities of the state and territory Regulatory Authorities are conducted by:

ACT	Children's Education and Care Assurance, Education Directorate.
NSW	Early Childhood Education and Care Directorate, Department of Education
NT	Quality Education and Care NT, Department of Education
QLD	Regulation, Assessment and Service Quality, Department of Education and Training
SA	Education and Early Childhood Services Registration and Standards Board
TAS	Education and Care Unit, Department of Education
VIC	Quality Assessment and Regulation Division, Department of Education and Training
WA	Education & Care Regulatory Unit, Department of Communities

The National Law established the NECSOPIC as impartial integrity bodies. The Ombudsman and Commissioners respectively operate under the Commonwealth *Ombudsman Act 1976*, *Privacy Act 1988* and *Freedom of Information Act 1982* as modified by the National Regulations.

## What we do

The National Education and Care Services Ombudsman, Privacy Commissioner, and Freedom of Information Commissioner seek to resolve complaints about, or review certain actions of, ACECQA and the Regulatory Authorities and assist them to improve the integrity and effectiveness of their services where necessary through investigation, review and advice.

The Education and Care Services Ombudsman investigates complaints made about administrative actions taken by the Australian Children's Education and Care Quality Authority (ACECQA). Administrative actions are any action taken or not taken by ACECQA (including its contractors) in relation to ACECQA's duties, functions or powers.

The National Education and Care Services Freedom of Information Commissioner conducts reviews of Freedom of Information decisions made by ACECQA or a State or Territory Regulatory Authority and investigates complaints about how those agencies are carrying out their responsibilities under the Commonwealth *Freedom of Information Act 1982*

The National Education and Care Services Privacy Commissioner investigates complaints about interferences with privacy by ACECQA or a state or territory Regulatory Authority.

An investigation may occur as a result of receiving a complaint by a member of the public, including education and care services and providers, or as a result of the Ombudsman, Privacy Commissioner or Freedom of Information Commissioner deciding to investigate an action on their own motion. Our

**Attachment 1:** National Education and Care Services Freedom of Information & Privacy Commissioners & Ombudsman Annual Report 2018-2019

investigations seek to determine whether the relevant action was lawful and reasonable, whether due process has been followed and whether all relevant considerations were taken into account.

## Our vision

We aim to provide independent and accessible complaint-handling and advisory services to ensure that the administration of the national regulatory and quality assurance framework for early childhood education and care is accountable, responsive and fair.

We seek to work collaboratively with ACECQA and the State and Territory Regulatory Authorities to ensure their conduct and decision-making is lawful, reasonable and transparent.

We aim for excellence in providing a professional service to the public and strive to produce timely and high quality work.

## Our values

We are committed to the following core values:

### Fairness and Impartiality

We are independent and impartial. We respond to complaints without bias and we give everyone the chance to have their say. We do not act as an advocate for either the complainants or ACECQA or the Regulatory Authorities

### Integrity and Respect

We are open, honest and transparent in our actions and decisions. We take actions and make decisions based on our independent assessment of the facts, the law and the public interest. We maintain high professional standards when delivering our services and we treat complainants and agencies with dignity and respect.

### Accessibility and Responsiveness

We are responsive, and adapt our approaches to meet people's individual needs. Our services are free, and we strive to ensure everyone can access and use our information and services. We respond to complaints quickly. If we can't help we explain why and try to suggest alternative actions. We are committed to making our written material easy to read and understand, and to developing simple processes that are easy to navigate. We will help people to clarify the details of their complaints to enable a speedy resolution.

### Proportionality and Value-adding

We establish processes and seek resolutions that are appropriate to the complaint and ensure complainants are given realistic expectations about what can be achieved. We aim to identify practical solutions to problems, resolve issues by mediation and conciliation wherever possible, and bring about improvements in the processes of the agencies where necessary.

### Accountability

We keep individuals and entities within our jurisdiction informed about actions and outcomes through regular communication. The Ombudsman and Commissioners are formally accountable to the COAG Education Council and submit reports as required to the senior officials' group of the Council. Information about the performance of our office is also publicly available in our annual report which is tabled in each of the Commonwealth, State and Territory Parliaments. The Ombudsman and Commissioners are responsible for ensuring that any third parties (such as consultants and contractors) who are engaged to carry out work on behalf of the office seek to act in accordance with this service charter.

## Our Service Guarantee

When you contact our Office you can expect to be treated in a courteous and respectful way.

You can expect that we will:

- give careful attention to your concerns to ensure that we understand your complaint;
- help people who need assistance to formulate their complaints and questions;
- communicate in a clear way about how we can assist you and what we require from you to proceed with a matter;
- refer you to the most appropriate alternative complaint-handling body if we are unable to assist you with your complaint or propose some other strategy;
- keep you regularly updated about the progress of your complaint;
- promptly assess all the information provided by you, the agency you complained about, and any other relevant third parties, in a fair and impartial way;
- explain to you what we can and cannot do about your complaint and provide reasons for our decisions; and
- maintain confidentiality where appropriate and possible.

## Timeliness Benchmarks

We aim to:

- Acknowledge receipt of your complaint within three working days;
- Decide whether your complaint is in the jurisdiction of the office within 5 working days; and
- Finalise your complaint within three months where it does not involve consideration of legislative change in order to be addressed.

While your matter is open with this office, we aim to:

- Provide you with fortnightly updates on progress, unless there are circumstances when it is not practical or appropriate to do so;
- Return any telephone calls from you within three working days; and
- Respond to written communication from you within 5 working days unless the matter is complex or requires legal consideration.

## Complaints

### Making a complaint

We receive complaints, requests for review and enquiries by mail, email, telephone or in person (by appointment only). We generally ask that complaints be put in writing either via our complaint forms (available on our website in either online or document form) or otherwise so that we have sufficient information to assess the complaint.

**Mailing address:** NECSOPIC, PO Box 202, Carlton South, Victoria, 3053

**Street Address:** Level 3, 15-31 Pelham Street, Carlton, Victoria (by appointment only)

**Email address:** [enquiry@necsopic.edu.au](mailto:enquiry@necsopic.edu.au)

**Telephone enquiries:** 03 9654 1077 or 0419 380 607. A voicemail service is available if we are unavailable to accept your call.

**Attachment 1:** National Education and Care Services Freedom of Information & Privacy Commissioners & Ombudsman Annual Report 2018-2019

## What we can do

At the conclusion of an investigation, the Education and Care Services Ombudsman, Privacy Commissioner or Freedom of Information Commissioner may undertake a range of actions including (but not limited to) where relevant:

- determine that the actions taken by ACECQA or a Regulatory Authority were reasonable in all circumstances and take no further action;
- provide (or recommend that the relevant agency provides) a better explanation of the relevant decision or process to the complainant;
- expedite delayed action;
- in the cases of review of the Freedom of Information Decisions made by agencies, affirm, vary or set aside an agency's decision and substitute a different decision;
- in cases about an interference with privacy, make a declaration that the affected person is entitled to compensation for any loss or damage suffered;
- recommend that a decision be reconsidered;
- recommend that an apology be offered to an affected person;
- recommend that processes or policies be reviewed or changed; and
- advise the Education Council about possible legislative deficiencies or ambiguities.

## What we cannot do

In general, we cannot:

- act outside the parameters of the relevant legislation;
- provide legal advice or act as an advocate for anyone;
- recommend or order that compensation be paid (except if the complaint is about an interference with privacy - see above);
- force the release of a document determined to be exempt under the *Freedom of Information Act 1982*; or
- recommend that action be taken that is not legally available to the relevant body under the *Education and Care Services National Law* as in force in participating States and Territories.

## What we need from you

You can make it easier and quicker for the Office to assist you if you:

- raise your concerns directly with the agency - i.e. ACECQA or a state or territory Regulatory Authority - that you are dissatisfied with *before* lodging a complaint with our office;
- provide us with accurate information and respond to our requests for information in a timely manner;
- tell us if you have special requirements, such as requiring assistance from an interpreter;
- inform us as soon as possible if you need to correct or update any information you have provided to the office, including if you wish to withdraw your complaint; and
- be polite and willing to listen.

## Review of our decisions

Criticisms and compliments are important ways of gaining feedback about our service and your views are always welcome. If you are dissatisfied with the way our services were delivered to you, you should raise your concerns with us.

You may seek a review of our decisions in certain circumstances. You will always be advised of your review rights when we inform you of the outcomes of our investigations of your complaint or Freedom of Information Review request. In circumstances where you have the right to appeal to a “relevant Tribunal or Court” the Office will provide you with the details of the Tribunal or Court. Details of the relevant Tribunals and Courts are also listed on our website under “Useful Links”.

## **Review of National Education & Care Services Freedom of Information Commissioner Review Decisions**

If a party to a NECS FOI Commissioner Review is dissatisfied with the outcome of the review they may apply under section 57A of the *Freedom of Information Act 1982* to have the merits of the decision reviewed by the relevant Tribunal. The relevant Tribunals are listed on our website at [www.necsopic.edu.au](http://www.necsopic.edu.au). The Tribunal provides independent merits review of administrative decisions and has the power to set aside, vary or affirm a NECS FOI Review Decision.

You have 28 days from the date on which you were given the NECS FOI Review Decision to apply for a Tribunal Review. An application fee may be applicable when lodging an application for review with a Tribunal although it can be waived in some circumstances. For more information about Tribunal review processes and applicable fees visit the relevant Tribunal website.

A party to a NECS FOI review may also appeal against the NECS FOI Commissioner Review Decision on a question of law to a relevant Court. A list of the relevant Courts is available on our website at [www.necsopic.edu.au](http://www.necsopic.edu.au)

## **Direct review of ACECQA or State/Territory Regulatory Authorities Freedom of Information Decisions by a Tribunal**

In normal circumstances, you cannot appeal directly to a Tribunal for a review of a FOI decision made by ACECQA or a State or Territory Regulatory Authority without first applying for a NECS FOI Commissioner review. The exception is if the Commissioner decides that it would be in the interests of the administration of the *FOI Act* for the Tribunal to consider the matter. You will be advised by the NECS FOI Commissioner if this is the case.

You also cannot apply for a Tribunal review if the Commissioner has decided not to undertake or continue a FOI review.

## **Review of National Education and Care Services Privacy Commissioner Determinations**

A party to a NECS Privacy Commissioner Privacy Determination may apply under s 96 of the *Privacy Act 1988* to have a decision made under s52(1) or (1A) of the Act to make a Determination reviewed by the relevant Tribunal. The Tribunal provides independent merits review of administrative decisions and has the power to set aside, vary, or affirm a privacy determination. An application to the Tribunal must be made within 28 calendar days after the day on which the person is given the privacy determination. An application fee may be payable to the Tribunal when lodging an application.

You can also apply to the relevant Court for a review of a decision or determination by the NECS Privacy Commissioner if you think that:

- a decision by the Commissioner not to investigate, or not to further investigate, your complaint under the *Privacy Act 1988* is not legally correct; or
- a determination by the Commissioner under section 52 of the *Privacy Act 1988* following the investigation of your complaint, is not legally correct.

You can make this application under section 5 of the *Administrative Decisions (Judicial Review) Act 1977*.

The Court will not review the merits of your case but it may refer the matter back to the NECS Privacy Commissioner for further consideration if it finds the decision or determination was wrong in law or the Commissioner's powers were not exercised properly.

An application for review must be made to the Court **within 28 calendar days** of the NECS Privacy Commissioner sending the decision or determination to you. You may wish to seek legal advice as the process can involve fees and costs.

## Review of Education and Care Services Ombudsman Decisions

If you disagree with the final decision of the Ombudsman and you believe that we have not taken into consideration all your evidence or you have additional information you can ask us to consider the matter further. Such a request must be made in writing within 28 days of being told of our decision and must set out the reasons why you believe we failed to consider your evidence adequately or, if you have additional information, details of that information and why this was not provided to us initially. We will endeavor to complete our further consideration of your matter within thirty days and we will advise you of the outcome. We will only further consider a matter once.

Complainants and ACECQA may seek judicial review to a Supreme Court of the Ombudsman's decision alleging such things as an error of law, failure to take into account relevant matters, bias or some other grounds upon which a judicial review could be sought, such as the Ombudsman exceeded their jurisdiction.

## Service Charter review

We regularly monitor the performance of our Office against the standards in this Service Charter to assess ways to make further improvements. The Service Charter is reviewed annually by 30 June.

<b>Last update</b>	June 2019
<b>Next schedule review date</b>	June 2020



National Education & Care Services  
FOI & Privacy Commissioners & Ombudsman

## Strategic Plan 2019-2021

The Strategic Plan is the second plan for the office and covers the period January 2019 – January 2021. It presents a 2year outlook and identifies key challenges, proposed responses and measures of success for the period. The powers, functions and jurisdiction of the Commissioners and Ombudsman are well defined by legislation; the roles are part-time. The objectives of the office and many of the strategies remain constant over the years. The focus is on quality, timely service delivery and support for agencies and the public.

### Setting

The Education and Care Services Ombudsman and the National Education and Care Services Freedom of Information and Privacy Commissioners are independent, statutory officers appointed by the Council of Australian Governments (COAG) Education Council under national applied laws legislation – the *Education and Care Services National Law*. The Ombudsman and Commissioner positions are established and operate independently of each other for the purposes of the National Law. One person has been appointed to the three roles.

The roles were established in 2012 as part of reforms by COAG to create a national uniform regulatory and quality assurance system for education and care services across Australia under the National Quality Framework for Early Childhood Education and Care (the NQF). In order to implement the system, the National Law established the Australian Children's Education and Care Quality Authority (ACECQA) and early childhood education and care Regulatory Authorities in each of the 8 Australian states and territories.

ACECQA oversees the implementation of the NQF. State and territory Regulatory Authorities are responsible for granting education and care service and provider approvals, carrying out the quality assessment and rating of services, and ensuring services meet the requirements of the National Law and National Regulations.

The role of the office is to provide ombudsman, privacy and freedom of information oversight of the education and care services regulation and quality assurance system. Ombudsman services are provided with respect to administrative actions taken by ACECQA, and freedom of information and privacy complaint, review and investigation services are provided in relation to actions taken in these areas by each of the state and territory Regulatory Authorities and ACECQA. The Ombudsman and Commissioners also play an important role in promoting public and service provider confidence in the integrity of the public administration and regulation of early childhood education and care in Australia.

### Legislative Framework

The Office operates within a complex legislative framework. Victoria passed the *Education and Care Services National Law Act 2010*, and, except for Western Australia, each State and Territory passed legislation applying the National Law, with some variations to accommodate local requirements. Western Australia enacted corresponding legislation. *The Education and Care Services National Regulations 2011* amplify the National Law.

The National Law confers specified jurisdiction on the Education and Care Services Ombudsman, the National Education and Care Services Freedom of Information Commissioner, and the National Education and Care Services Privacy Commissioner that is derived from the following Commonwealth Acts as in force from time to time: *Ombudsman Act 1976*, *Freedom of Information Act 1982*, and *Privacy Act 1988*. These Commonwealth Acts are modified by the *Education and Care Services National Regulations 2011* to apply in participating states and territories and to ACECQA.

## Vision

Public confidence in the accountability and fairness of the administration of the national regulatory and quality assurance system for early childhood education and care in Australia.

## Purpose

To provide independent, fair and accessible complaint-handling, review, investigation and advisory services and to work with ACECQA and the state and territory Regulatory Authorities to support their decision making and practices where necessary.

## Values

### Fairness and Impartiality

We are independent and impartial. We respond to complaints respectfully and without bias and we give everyone the chance to have their say. We do not act as an advocate for an party.

### Integrity and Respect

We are open, honest and transparent in our actions and decisions. We take actions and make decisions based on our independent assessment of the facts, the law and the public interest. We maintain high professional standards when delivering our services and we treat complainants and agencies with dignity and respect.

### Accessibility and Responsiveness

We are responsive and adapt our approaches to meet people's individual needs. Our services are free, and we strive to ensure everyone can access and use our information and services. We respond to complaints quickly. If we are unable to assist, we explain why and try to suggest alternative actions. We are committed to making our written material easy to read and understand, and to developing simple processes that are easy to navigate. We will help people to clarify the details of their complaints to enable a speedy resolution.

### Proportionality and Value-adding

We establish processes and seek resolutions that are appropriate to the complaint and ensure complainants are given realistic expectations about what can be achieved. We aim to identify practical solutions to problems, resolve issues by mediation and conciliation wherever possible, and bring about improvements in the processes of the agencies where necessary.

## Key challenges for the period

Key challenges facing the office during the period are:

- Establishing stronger relationships with both the agencies and with other complaint handling bodies to ensure sharing of information and consistency of practice where appropriate.
- Ensuring the role of the office is known, understood and valued by stakeholders and the public.
- Developing resources to support agencies in their responsibilities under the FOI and Privacy Acts.
- Ensuring effective policies, procedures and systems are in place to support the work of the office.

## Objectives\*

\* The objectives, strategies and performance indicators refer to each of the Commissioners' and Ombudsman's roles unless otherwise identified. The term "Agencies" refers to ACECQA and state and territory Regulatory Authorities, and the term "legislation" refers collectively to the legislation identified under *Legislative Framework* above.

<p><b>1. Independent, fair and timely complaint handling and review services are provided</b></p> <p><b>Outcome</b></p> <p>Independent and accessible complaint, review and investigation that is recognised as fair and reasonable by those involved.</p> <p><b>Strategies</b></p> <p>Provide timely and effective assessment and investigation of complaints and requests for FOI Decision Review.</p> <p>Establish comprehensive case and knowledge management systems to support timely, accurate decision-making.</p> <p>Resolve complaints using flexible approaches.</p> <p>Engage with agencies to support their understanding of their responsibilities under the legislation and the role and investigation and review processes of the office.</p> <p><b>Key performance indicators</b></p> <p>Percentage of receipt of complaints/review requests acknowledged within 3 working days (100%).</p> <p>Percentage of preliminary assessments of complaints/review requests completed within 10 days (100%).</p> <p>Percentage of verbal/email progress reports provided to clients fortnightly (100%).</p> <p>Percentage of complaints finalised within 1 months (98%).</p> <p>Percentage of FOI Reviews finalised within 3 months.</p> <p>Percentage of complaints open after 12 months from lodgement (0%).</p> <p>Percentage of Commissioners' and Ombudsman decisions upheld following any Tribunal or Court review (100%).</p>	<p><b>2. Individuals are empowered to resolve complaints with the agencies and through the Commissioners' and Ombudsman's office.</b></p> <p><b>Outcome</b></p> <p>Individuals have the support, advice and information necessary to manage their complaints with the agencies and through the office.</p> <p><b>Strategies</b></p> <p>Identify, and provide information to, key early childhood education and care stakeholders about the role and jurisdiction of the office and the obligations of agencies under the legislation.</p> <p>Provide information and assistance to the community and agencies through authoritative online resources on the Office website and enquiry service advice.</p> <p>Support agencies to provide clear information about the rights of clients to seek review of their decisions.</p> <p>Redirect premature complaints made to the office back to the agencies in the first instance when appropriate.</p> <p>Refer complaints not within the jurisdiction of the office to other relevant bodies.</p> <p><b>Key performance indicators</b></p> <p>Number of new resources developed and made publicly available.</p> <p>Level of stakeholder awareness of the role and jurisdiction of the office (<i>benchmark to be established</i>)</p> <p>Level of client satisfaction with online resources.</p>
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### 3. Agencies are supported in exercising their responsibilities under the legislation.

#### Outcome

The office's investigations and advisory services and materials help the agencies to meet their legislated obligations.

#### Strategies

Develop or identify resources and guidance material to assist agencies to fulfil their obligations under the Acts.

Conduct as necessary Commissioner initiated assessments of ACECQA and Regulatory Authority compliance with requirements under the FOI and Privacy Acts.

Work with the agencies to rectify any identified systemic weaknesses in decision-making, processes or practices.

#### Key performance indicators

Number of resources and guidance material provided to agencies over the period

Number of assessments of ACECQA and Regulatory compliance under the FOI and Privacy legislation

Level of agency satisfaction with resources and assistance provided by the office

### 4. Appropriate policies, processes and systems are in place to support the work of the office of the Commissioners and Ombudsman.

#### Outcome

Robust case and document management systems, up to date policies, and comprehensive quality information and guidance materials available to the public and the agencies.

#### Strategies

Upgrade the Office website at [www.necopic.edu.au](http://www.necopic.edu.au) following its first 2 years of operation including content review and updates, additional resource materials, links to other complaint handling bodies, and the incorporation of feedback mechanisms.

Maintain and refine the complaints and document management systems.

Identify and fill gaps in office policies and resource material.

Develop client satisfaction measurement tools.

#### Key performance indicators

Website upgrade completed by March 2020.

Complaints and document management systems updated as necessary

Office policies updated and new policies developed where gaps identified.

## Success

We are successful when we:

- ❖ Undertake our responsibilities in an efficient and timely manner
- ❖ Provide individuals with information and support to enable them to confidently pursue a complaint through the office or with the agencies, or to seek a FOI Decision Review
- ❖ Provide authoritative resources and support to assist agencies to fulfil their obligations under the legislation and encourage sound practice
- ❖ Settle complaints informally through advice, consultation and mediation wherever possible

- ❖ Support public trust and confidence in the integrity of the administration of the education and care services regulatory and quality assurance system through our actions
- ❖ Establish and maintain positive relationships with key stakeholders
- ❖ Establish and maintain effective relationship with other complaint-handling bodies, in particular the Commonwealth Ombudsman's Office and Australian Information Commissioner to ensure sharing of information and consistency of practice where appropriate.
- ❖ Provide an effective referral system for general enquiries.

## Accountability

The Ombudsman and Commissioners are formally accountable to the COAG Education Council and submit reports as necessary to the senior officials' group of the Council. Information about the performance of the office is also publicly available in our annual reports which are available on our website and tabled in each of the Commonwealth, State and Territory Parliaments.

The Freedom of Information Commissioner is required to make public NECS FOI Commissioner Review decisions and the Privacy Commissioner is required to keep a register of any Commissioner Determinations and make it publicly available. In both cases these will be published on the office website.

We aim to keep individuals and agencies within our jurisdiction informed about actions and outcomes through appropriate communication

## Strategic Plan Review

Progress against the Strategic Plan will be monitored during the period and the Plan will be revised in June 2021.



## National Education and Care Services Freedom of Information Commissioner

### NECS FOI Information Sheet - Agencies

April 2019

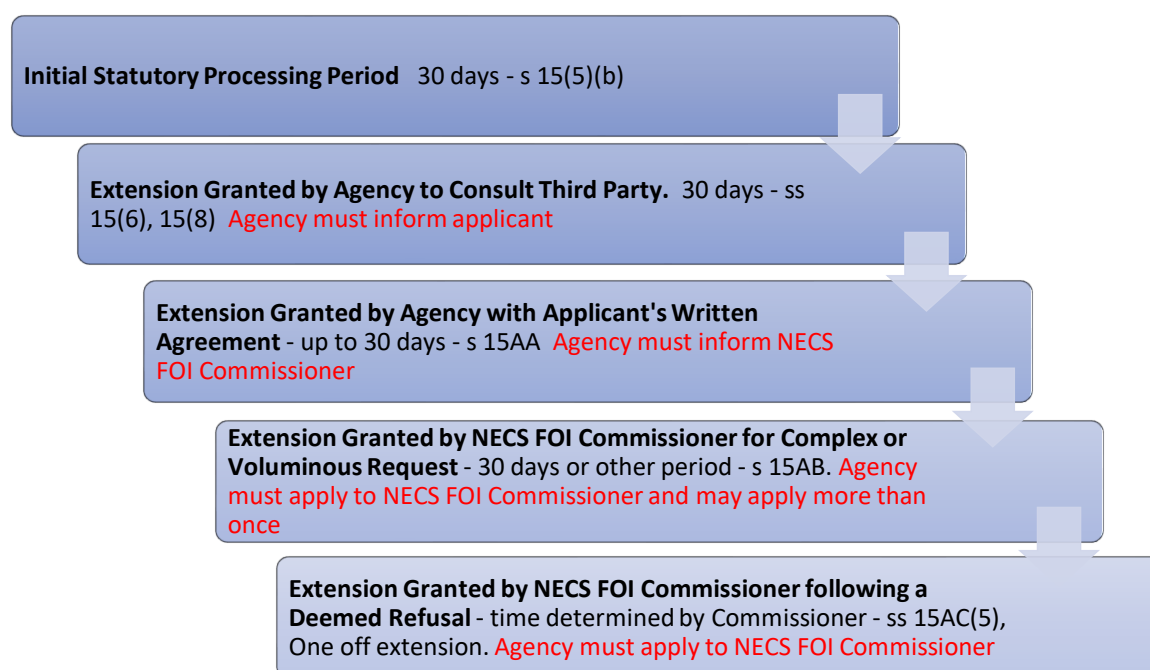
## FOI requests: processing times and extensions

*The Commonwealth Freedom of Information Act 1982 (FOI Act), as modified by the Education and Care Services National Law and associated National Regulations, requires State and Territory education and care services Regulatory Authorities and the Australian Children's Education and Care Quality Authority (ACECQA) – the **Agencies** – to comply with timeframes in processing FOI requests. In some circumstances the timeframe may be extended. This Information Sheet includes an overview of the extension of time (EOT) provisions of the FOI Act, explains when and how the NECS FOI Commissioner must be involved in an EOT, and provides templates for applying to the Commissioner for EOTs.*

### Extensions of time provisions under the FOI Act

Figure 1 provides an overview of the extension of time provisions under the FOI Act. Each extension type is explained further below. *Note: Statutory sections referred to throughout relate to the FOI Act unless otherwise indicated.*

**Figure 1**



## Initial Period for Processing Request for Access

The obligation for an Agency to notify an FOI applicant that their request has been received, and notify a decision within the statutory time frame, commences on receipt of a request that meets the formal application requirements in s 15(2) and s 15(2A). In cases where an application does not meet the formal requirements an Agency should assist the applicant to ensure it does - s 15(3).

An agency must take all reasonable steps to notify an applicant of **receipt** of a request within 14 days of the request's receipt - s 15(5)(a).

An agency must take all reasonable steps to notify an applicant of a **decision** on the request no later than 30 days after receiving the request – s 15(5)(b) – unless one or more of the extensions of time to the processing period outlined in Figure 1 have been granted.

### Commencement of the 30 days processing period

Section 15(5)(b) provides that the 30 days processing period **commences on the day after the day** the Agency receives a request that meets the formal requirements in s 15(2) and s 15(2A).

The date of receipt depends on the mode of delivery chosen under s 15(2A). See Table 1

Table 1

Mode of delivery	Time of receipt
Pre-paid post to an address specified by agency	The date the letter is delivered in the ordinary course of post <sup>1</sup>
Delivery to a central or regional office	The date of delivery
Electronic communication to a specified email or fax address	The date the communication is capable of being retrieved at the address <sup>2</sup> . This is assumed to be the time it reaches the addressee's nominated electronic address.

The processing period refers to **calendar days**, not business (working) days. This will include any public holidays that fall within the processing period. Electronic applications may therefore be received on a Saturday - in which case the processing period commences on the Sunday - or on a public holiday, in which case the processing period commences the next day, irrespective of whether it too is a public holiday.

The 30 days processing period **does not** include:

- the time an agency may take in a request consultation process to decide if a practical refusal reason exists - s 24AB(8)) or
- the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge or a deposit, or the Agency varying the decision that a charge is payable. - s 31.

### End of the 30 days processing period

The processing period ends on either the 30<sup>th</sup> day after commencement under s 15(5)(b), or on the final date of any extension granted under the extension provisions of the FOI Act discussed below.

However, if the *final date* for notification of a decision to the applicant under s 15(5)(b) (or as extended) falls on a Saturday, Sunday or public holiday, the timeframe for notification will expire on the first business day following that day.<sup>3</sup>

### Public holidays/known peak staff leave periods

Agencies are advised to plan well in advance of public holidays and periods where there will be known reduced staff numbers and discuss any likely impact with the FOI applicant. For example, consideration might be given to seeking a s 15AA agreement (discussed below) with the applicant to extend the notification date for a decision if the due date falls within such a period. At the very least, if the due date falls on a Saturday, Sunday or public holiday, the Agency should advise the applicant that they will receive the decision on the next working day.

<sup>1</sup> Acts Interpretation Act 1901 s29

<sup>2</sup> Electronic Transactions Act 1999 s14A

<sup>3</sup> Acts Interpretation Act 1901 s36(2)

### Extension of Time to Allow Consultation with a Third Party - s 15(6)

An Agency may extend the processing period by 30 days under s 15(6) of the FOI Act if it needs to consult an affected third party under s 26A (Commonwealth/State Relations), s 27 (Business), and/or s 27A (personal privacy) of the Act. A similar extension is allowed under s 15(8) of the FOI Act for consultation with a foreign entity to determine if national security or international relations exemptions apply - s 33A(iii) or s 33(b)).

The decision to extend the processing period to allow for consultation must be in writing and the FOI applicant must be notified as soon as practicable about the extension of time. The Agency **does not** need to inform the NECS FOI Commissioner.

### Extension of Time with Applicant's Agreement – s 15AA

An Agency may extend the processing period by **up to** 30 days if the FOI applicant agrees in writing to the extension. This EOT can be *in addition* to either the initial processing period of 30 days under s 15(5)(b) or that initial period as extended for consultation under s 15(6) or s 15(8). This could have the cumulative effect of extending the processing period up to 90 days.

The EOT made under s 15AA must be with the agreement of the applicant in writing and the **Agency must give written notice to the NECS FOI Commissioner** as soon as practicable after the agreement is made. If the Agency does not inform the Commissioner, the EOT may be deemed to be unlawful.

A s 15AA agreement cannot be made once an FOI request has become a deemed refusal under s 15AC.

### Extension of Time for Complex or Voluminous Requests - s 15AB

An Agency may apply to the NECS FOI Commissioner under s 15AB for an extension of the initial 30 days processing period allowed under s 15(5)(b) if the Agency considers the period is insufficient to deal with the FOI request due to it being complex or voluminous. The application to the Commissioner must be in writing and must explain why the FOI

request is considered complex or voluminous including, at least, details about:

- the scope of the FOI request and the range, nature and number of documents covered
- any consultation the Agency has had with the applicant to narrow the scope
- whether a schedule of documents has been developed and whether it is possible to identify some documents for early staged release
- any factors slowing the processing
- whether other parties have an interest in the request
- work already undertaken in processing the request and an estimate of the work and time required to finalise the request
- measures that would be taken to ensure a decision on the request would be made within the extended period and
- measures to keep the applicant informed about progress

**An application to the Commissioner under s 15AB must be made *before* the expiration of the initial 30 days processing period referred to in s 15(5)(b).**

The Commissioner may extend the processing period by another 30 days or a longer or shorter period as appropriate.

The Commissioner must inform both the Agency and the FOI applicant of the extension of time granted.

An Agency may apply to the NECS FOI Commissioner to extend the timeframe again under s 15AB if an earlier extension granted by the Commissioner proves to be insufficient. However, the Agency must explain why a further extension is justified.

### Extension of Time Following a Deemed Refusal - s 15AC

Where there has been a deemed refusal decision (that is the decision has not been made within the 30 days period under s 15(5)(b) or that period as extended) an Agency may apply to the NECS FOI Commissioner for further time to process the request under s 15AC. **An extension of time in these circumstances can only be made once and, once granted, cannot be extended further.**

The application to the Commissioner must be in writing and the Agency must justify why an extension is appropriate including, at least, details about:

- the scope and complexity of the request
- the reasons for the delay in making the initial decision
- the extension sought and the estimated processing time
- whether there have been discussions with the FOI applicant about the application for an extension of time and their views.

The Commissioner may seek the views of the applicant directly and, when granting an extension of time, may impose conditions on the Agency.

If a decision is made by the Agency within the extended time allowed and any conditions imposed are met, the deemed refusal decision no longer applies and is taken never to have applied - s 15AC (7).

If the decision is not made within the extended timeframe or any imposed conditions are not met, the deemed refusal decision continues to apply - s 15AC (8).

*Note: Similar provisions apply to a deemed refusal to amend or annotate personal information under s 51DA and a deemed refusal following an application for an internal review of an FOI decision under s 54D*

The FOI applicant can seek a NECS FOI Commissioner review of the deemed refusal decision.

### Imposing an FOI Access Charge

An Agency may impose a charge if a decision is made to grant access during an extension period arranged by the agency for third party consultation under s 15(6), agreed to by the applicant under s 15AA, or granted by the NECS FOI Commissioner for complex or voluminous requests under s 15AB. An FOI charge cannot be imposed after a deemed refusal decision, even if an extension of time has been granted by the Commissioner under s 15AC.<sup>4</sup>

### Timeframe when transferring FOI requests to another Agency

Section 16 of the FOI Act provides for the whole or partial transfer of an FOI request between Agencies in certain circumstances.

A transferred request is deemed to have been received by the receiving Agency at the time it was received by the transferring Agency - s 16(5)(b) – ie the 30 days initial processing period commences when the request was originally received and **the receiving Agency is *not* given any extra time.**

Agencies should aim to quickly consider whether a request should be transferred and consult with the receiving Agency. The transferring Agency must inform the FOI applicant of the transfer - s16(4). The receiving Agency may wish to consider seeking an extension of processing time by agreement with the FOI applicant under s 15AA.

### Extensions of time and transfers

In cases where an Agency has sought an extension of time to process a request from the NECS FOI Commissioner, or has notified the Commissioner of an agreed extension under s 15AA, and later determines that all or part of the request should be transferred to another Agency under s 16, the extension of time continues to apply to that request. In transferring the request, the Agency should notify the receiving Agency of any extensions of time that apply to the request and also notify the NECS FOI Commissioner of the transfer.

If the request is out of time the transferring Agency should leave it to the receiving Agency to apply for an extension time to the NECS FOI Commissioner under s 15AC

### What happens if you don't meet the statutory timeframe?

Agencies must continue to process a FOI request even when the statutory timeframe has expired and an extension of time has not been sought or has been refused. The expiry of the timeframe gives the applicant the right to apply for review of a deemed refusal decision. An Agency's obligation only ceases when the NECS FOI Commissioner commences a review of the deemed decision. At that point the provisions of the FOI Act relating to a Commissioner

<sup>4</sup> Freedom of Information (Charges) Regulations 2019

review apply (including an Agency's power to vary an access refusal decision under s 55G of the FOI Act).

### How to make notifications and applications for extensions of time to the NECS FOI Commissioner

Applications and notifications for extensions of time must be emailed to the NECS FOI Commissioner at: [enquiry@necsopic.edu.au](mailto:enquiry@necsopic.edu.au)

Sample extension of time notification/request emails are attached. It is not mandatory to use them. However, they do provide a guide to the required information. Agencies may adapt them to fit their own purposes.

The sample emails to the NECS FOI Commissioner cover:

- s 15AA extension of time with applicant's agreement notice
- s 15AB extension of time application for complex or voluminous requests

- s 15AC extension of time application following a deemed refusal
- notification of an inter-Agency transfer of an FOI request that has an existing extension of time

#### For Further Information

Telephone (03) 9654 1077

Email: [enquiry@necsopic.edu.au](mailto:enquiry@necsopic.edu.au)

Write: PO Box 202 Carlton South VIC 3053

### Acknowledgement

*To ensure consistent practice under the Commonwealth Freedom of Information Act 1982 the information provided in this Information Sheet has been modified from material provided by the Commonwealth Office of the Australian Information Commissioner to reflect the specific jurisdiction and circumstances of the NECS FOI Commissioner.*

*The information is of a general nature. It is not a substitute for legal advice.*

## Sample Extension of Time Notification

### Notice to the NECS FOI Commissioner of an extension of time with applicant's agreement under s 15AA

To: [enquiry@necsopic.edu.au](mailto:enquiry@necsopic.edu.au)

Subject: Section 15AA notification- *[insert agency name and agency reference number]*

#### Body text

Dear NECS FOI Commissioner

I am writing to notify you of a s 15AA extension of *[insert number]* days agreed to in writing by FOI applicant *[insert name]* on *[insert date]*.

The FOI applicant lodged their completed FOI access request with us on *[insert date]*.

Our Agency was due to make a decision on the applicant's request by *[insert date]*. **[Only insert if relevant- This date includes extensions made to the processing period to enable us to consult with a third party under s15(6) or s15(8)/carry out a request consultation process/apply a charge (insert whichever of these actions is relevant)].**

With the agreed *[insert number]* days extension under s15AA we must now make our decision by *[insert date]*.

Yours sincerely

*[Insert name and contact details]*

## Sample Extension of Time Request

Applying to the NECS FOI Commissioner for an extension of time to process a complex or voluminous FOI request under s 15AB (or seek a further extension under this Section)

To: [enquiry@necsopic.edu.au](mailto:enquiry@necsopic.edu.au)

Subject: Section 15AB request - *[insert agency name and agency FOI request reference number]*

Dear NECS FOI Commissioner

I am writing to request a s 15AB extension for an FOI request made by FOI applicant *[insert name]* on *[insert date]*. The FOI applicant is contactable at *[insert email and/or telephone contact details for the applicant]*.

### Details of the access request

The FOI applicant lodged their completed FOI access request with us on *[insert date]*. **[insert only if any elements below are relevant]** *Taking into account extensions of time already made to the processing time for this application*

- *to consult with a third party under s15(6) or s15(8)*
- *to carry out a request consultation process*
- *to apply a charge*
- *already granted by the NECS FOI Commissioner under s15AB*

our decision on this FOI application is due by *[insert date]*

**Choose one** Period of s 15AB extension sought **or** Variation of period of s 15AB sought

*Choose one:*

Our agency requests *[insert number]* days extension under s15AB. This would make the new due date for a decision *[insert date]* OR

On *[insert date]* the NECS FOI Commissioner granted our agency a *[insert number]* days extension under s 15AB. We request a variation to increase the extension to a further *[insert number]* days. This would make the new due date for a decision *[insert date]*.

### Reasons for request

Insert:

- *Your reasons for seeking an extension/varying a previously granted extension and your reasons why the request is justified*
- *An explanation as to why the FOI application is considered complex or voluminous*
- *Other relevant information including, for example, details of work already undertaken to process the request, details of the work required to finalise the request, any consultation with the applicant about the length of processing time, or with other agencies or interested third parties and issues raised by them*
- *Measures you would take to ensure a decision is made within the extended period and to keep the applicant informed of you progress.*

Yours sincerely

*[Insert name and contact details]*

## Sample Extension of Time Request

Applying to the NECS FOI Commissioner for an extension of time following a deemed decision under s15AC

To: [enquiry@necsopic.edu.au](mailto:enquiry@necsopic.edu.au)

Subject: Section 15AC request - *[insert agency name and agency FOI request reference number]*

Dear NECS FOI Commissioner

I am writing to request a s 15AC extension for an FOI request made by FOI applicant *[insert name]* on *[insert date]*. The FOI applicant is contactable at *[insert email and/or telephone contact details for the applicant]*.

### Details of the access request

The FOI applicant lodged their completed FOI access request with us on *[insert date]*.

Taking into account extensions of time already made to the processing time for this application **[insert any or all elements that are relevant]**

- *to consult with a third party under s15(6) or s15(8)*
- *to carry out a request consultation process*
- *to apply a charge*
- *agreed to by the applicant under s 15AA*
- *granted by the NECS FOI Commissioner under s15AB*

our decision on this FOI application was due by *[insert date]*.

We have not met this deadline and the decision on the request is now deemed refused.

### *[Insert if applicable]* Period of s15AA extension agreed to/refused

If a s 15AA extension was agreed to by the applicant insert details of the date the agreement was made, the number of days agreed and the date the NECS FOI Commissioner was notified of the agreement.

If agreement to a s 15AA extension was sought by the agency from the applicant and the applicant refused, explain why the applicant refused the request

### *[Insert if applicable]* Period of s 15AB extension(s) granted by NECS FOI Commissioner

On *[insert date/s]* the NECS FOI Commissioner granted our agency *[insert number]* days extension of time to process the FOI application under s 15AB. This extension is encompassed in the decision due date above.

### Period of s 15AC extension sought

We request *[insert number]* days extension of time to process the FOI application under s 15AC. This would make the new due date for a decision *[insert date]*.

### Reasons for request

*[Insert]*

- *Your reasons for requesting an extension and your view as to why the request is justified*
- *Any changes in circumstances with the processing of the request and how these have affected timeframes*

- *Other relevant information including, for example, details of work already undertaken to process the request, including work undertaken following any earlier extensions granted by the NECS FOI Commissioner under s 15AB, details of the work required to finalise the request, any consultation with the applicant about the length of processing time, or with other agencies or interested third parties, and issues raised by them*
- *Measures you would take to ensure a decision is made within the extended period and to keep the applicant informed of you progress.*

A breakdown of how our agency would use the extended processing time to complete our decision on the FOI application is attached.

Yours sincerely

*[Insert name and contact details]*

## Sample Transfer of FOI Application Notification

Notice to the NECS FOI Commissioner of transfer of a FOI request to another agency under s 16 (required ONLY in cases **when a notification under s 15AA has been made or an extension of time under s 15AB has been granted**)

To: [enquiry@necsopic.edu.au](mailto:enquiry@necsopic.edu.au)

Subject: Notification of transfer of a FOI application under s16 - **[insert agency name and agency reference number]**

### Body text

Dear NECS FOI Commissioner

I am writing to notify you of a transfer of FOI application **[insert agency reference number]** under s 16 of the FOI Act from our agency to **[insert name of receiving agency]**.

The FOI applicant lodged their completed FOI access request with us on **[insert date]**.

Taking into account extensions made to the processing time for this application **[insert whichever elements are relevant]**

- *to consult with a third party under s15(6) or s15(8)*
- *to carry out a request consultation process*
- *to apply a charge*
- *agreed to by the applicant under s 15AA*
- *granted by the NECS FOI Commissioner under s15AB*

our decision on this FOI application is due by **[insert date]**.

**[Insert if applicable] Period of s15AA extension agreed to**

If a s 15AA extension was agreed to by the applicant insert details of the date the agreement was made, the number of days agreed and the date the NECS FOI Commissioner was notified of the agreement.

**[Insert if applicable] Period of s 15AB extension(s) granted by NECS FOI Commissioner**

If a s 15AB extension was granted by the NECS FOI Commissioner insert details of the date the extension was granted and the number of days granted.

In undertaking further work on the FOI request we have determined that it is appropriate to transfer the request to **[insert name of receiving agency]** under s 16 of the FOI Act. We have informed **[insert name of receiving agency]** of the application history and the due date for the decision.

Yours sincerely

**[Insert name and contact details]**

## Attachment 4

## Freedom of Information Statistical Data 1 July 2018 to 30 June 2019

Table 1 provides details of Freedom of Information applications for access to information and amendment to personal information made to each of the state and territory Regulatory Authorities and ACECQA for the period 1 July 2018 - 30 June 2019.

**Table 1 FOI ACCESS REQUESTS AND OUTCOMES: 1 July 2018 - 30 June 2019**

Jurisdiction	No. in hand from 2017/18	No. received	No. Finalised*	Access granted (full)	Access granted (partial)	Access refused in full	Requests withdrawn by applicant	Request dealt with administratively	Internal Review	Fees Collected \$	Amendments to personal records sought
ACECQA	0	7	3	0	0	0	2	1	0	0	0
ACT	0	3	3	0	3	0	0	0	0	0	0
NSW	4	27	22	8	7	5	2	0	0	123	0
NT	0	0	0	0	0	0	0	0	0	0	0
QLD	2	13	15	2	9	3	1	0	1	3,219	0
SA	0	1	1	0	1	0	0	0	0	0	0
TAS	0	0	0	0	0	0	0	0	0	0	0
VIC	2	11	11	0	9	1	1	0	1	0	0
WA	0	0	0	0	0	0	0	0	0	0	0
<b>TOTAL</b>	<b>8</b>	<b>62</b>	<b>55</b>	<b>10</b>	<b>29</b>	<b>9</b>	<b>6</b>	<b>1</b>	<b>2</b>	<b>3,342</b>	<b>0</b>

**Note:** \* Number finalised includes those requests that were subsequently withdrawn or dealt with administratively.

**Table 2 Exemptions and Conditional Exemptions Claimed by ACECQA and the Regulatory Authorities and Frequency**

Table 2 provides details of the numbers of times an exemption or conditional exemption allowable under Divisions 2 and 3, Part IV of the *Freedom of Information Act 1982* was applied by ACECQA and the State/Territory Regulatory Authorities and the percentage of total claims.

Section of the FOI Act	Exemption/Conditional Exemption Claimed	Number of FOI requests to which the exemption/conditional exemption was applied	Percent of total claims
<b>Exempt documents under Division 2, Part IV of the FOI Act</b>			
S37	Documents affecting law enforcement or protection of public safety	5	6.8
S38	Documents to which secrecy provisions of enactments apply	1	1.3
S42	Legal professional privilege	6	8.1
S45	Material obtained in confidence	4	5.4
S47	Documents disclosing trade secrets or commercially valuable information	3	4.0
<b>Conditionally exempt documents under Division 3, Part IV of the FOI Act</b>			
S47B	Commonwealth/State Relations	2	2.7
S47C	Deliberative processes	5	6.8
S47E	Certain operations of agencies	8	10.8
S47F	Personal Privacy	31	41.9
S47G	Business (other than documents to which s47 applies)	9	12.2
<b>TOTAL</b>		<b>74</b>	<b>100%</b>

**Table 3 Volume of Freedom of Information Applications received by ACECQA and Regulatory Authorities by Year 15/16 to 18/19**

Year	ACECQA	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
<b>2016/17</b>									
<i>Number*</i>	3	5	17	1	17	2	0	10	2
<i>No. finalised#</i>	3	0	14	1	15	2	0	9	2
<i>Access granted in full</i>	0	0	3	1	1	0	0	2	0
<i>Partial access granted</i>	1	0	9	0	10	1	0	6	2
<i>Access refused in full</i>	0	0	0	0	1	1	0	1	0
<i>Requests withdrawn</i>	2	0	2	0	3	0	0	0	0
<b>2017/18</b>									
<i>Number*</i>	4	9	31	0	17	0	0	11	2
<i>No. finalised#</i>	4	9	28	0	15	0	0	9	2
<i>Access granted in full</i>	0	0	5	0	1	0	0	0	0
<i>Partial access granted</i>	2	9	5	0	13	0	0	7	2
<i>Access refused in Full</i>	0	0	4	0	0	0	0	1	0
<i>Requests withdrawn</i>	2	0	14		1	0	0	1	0
<b>2018/19</b>									
<i>Number*</i>	#7	3	31	0	15	1	0	13	0
<i>No. finalised#</i>	3	3	22	0	15	1	0	11	0
<i>Access granted in full</i>	0	0	8	0	2	0	0	0	0
<i>Partial access granted</i>	0	3	7	0	9	1	0	9	0
<i>Access refused in full</i>	0	0	5	0	3	0	0	1	0
<i>Requests withdrawn</i>	2	0	2	0	1	0	0	1	0

**Notes**

\* Number = requests not finalised from the previous reporting year **plus** requests received during the reporting year.

# Number finalised includes requests that were subsequently withdrawn or dealt with administratively.



**Annual Financial Statements for the Education and Care Services Ombudsman,  
the National Education and Care Services Privacy Commissioner and the  
National Education and Care Services Freedom of Information Commissioner**

**Statement of Funding and Expenditure for the period 1 July 2018 - 30 June 2019**

	<b>Actual \$</b>	<b>Budget \$</b>	<b>Variance \$</b>
<b>Funding</b>			
FY18-19 Funding	145,000	145,000	0
	<b>145,000</b>	<b>145,000</b>	<b>0</b>
<b>Expenditure</b>			
Domestic Travel account for Projects	0	3,500	3,500
Investigation Contingency	6	0	-6
Website Development & Hosting Cost	823	8,000	7,177
Retainer	20,000	20,000	0
Rent - Ombudsman	20,000	20,000	0
Sundry	5,106	10,000	4,894
Project Legal fees	21,500	29,000	7,500
Salary & On Costs	63,516	54,500	-9,016
	<b>130,951</b>	<b>145,000</b>	<b>14,049</b>
Surplus/(Deficit)	14,049		
Prior years unspent funding	100,455		
<b>Total Balance of funds remaining</b>	<b>114,504</b>		

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**Annual financial statements for the Education and Care Services Ombudsman,  
the National Education and Care Services Privacy Commissioner and the  
National Education and Care Services Freedom of Information Commissioner**

**Statement of Financial Position as at 30 June 2019**

<b>CURRENT ASSETS</b>	<b>\$</b>
Cash at bank	114,504
<b>Total Current Assets</b>	<u>114,504</u>
<b>Total Non-Current Assets</b>	<u>0</u>
<b>TOTAL ASSETS</b>	<u><u>114,504</u></u>
<b>CURRENT LIABILITIES</b>	
Income received in advance	114,504
<b>Total Current Liabilities</b>	<u>114,504</u>
<b>NON-CURRENT LIABILITIES</b>	
<b>Total Non-Current Liabilities</b>	<u>0</u>
<b>TOTAL LIABILITIES</b>	<u><u>114,504</u></u>
<b>NET ASSETS</b>	<u><u>0</u></u>

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## Notes to the annual financial statements for the year 1 July 2018 to 30 June 2019

### Note 1: Basis of Preparation

The financial statements for the year ended 30 June 2019 is drawn up as a special purpose report to fulfil the requirements of regulations 198, 207 and 221 of the Education and Care Services National Regulations under the Education and Care Services National Law.

#### Basis of preparation

The financial statements have been prepared on an accruals basis and are based on historical costs. All amounts are presented in Australian dollars which is the Company's functional and presentation currency, unless otherwise noted.

#### Significant accounting policies

The significant accounting policies that have been used in the preparation of these financial statements are summarised below.

##### (i) Funding

Funding is measured at the fair value of the consideration received or receivable and is recognised as it becomes due for payment. All amounts are stated net of any applicable goods and services tax (GST).

##### (ii) Operating expenses

Operating expenses are recognised upon utilisation of the service or at the date of their origin. All amounts are stated net of any applicable goods and services tax (GST).

##### (iii) Cash and Cash Equivalents

Cash comprises the portion of Education Services Australia Limited's operating bank account balance attributed to this funding agreement that has been received but not yet spent.

##### (iv) Other liabilities

At 30 June 2019, amounts shown as Other Liabilities represent the un-spent portion of all Funding received or receivable. It is possible that on completion of project work, balances that have not been fully expended could be returned to the Department of Education.

For identification purposes only

Grant Thornton Audit Pty Ltd

# Independent Auditor's Report

## To the Members of Education Services Australia Limited

### Report on the audit of the financial report

#### Opinion

We have audited the accompanying financial report, being a special purpose financial report, which comprises the Statement of Financial Position as at 30 June 2019 and Statement of Funding and Expenditure for the year then ended and noted to the financial statements, including a summary of significant accounting policies.

The financial report related to activities detailed in the Education and Care Services National Law and Education and Care Services National Regulations (collectively the "National Law") for the Education and Care Services Ombudsman, the National Education and Care Services Privacy Commissioner and the National Education and Care Services Freedom of Information Commissioner.

In our opinion the attached financial report of Education Services Australia Limited (the "Company") for the year ended 30 June 2019 for the Education and Care Services Ombudsman, the National Education and Care Services Privacy Commissioner and the National Education and Care Services Freedom of Information Commissioner is presented fairly, in all material respects, in accordance with the National Law and Australian Accounting Standards and the funding was expended in accordance with the National Law.

#### Basis for Auditor's opinion

We conducted our audit in accordance with Australian Auditing Standards. Our responsibilities under those standards are further described in the Auditor's Responsibilities section of our report. We are independent of the Company in accordance with the ethical requirements of the Accounting Professional and Ethical Standards Board's APES 110 Code of Ethics for Professional Accountants (the Code) that are relevant to our audit of the financial report in Australia. We have also fulfilled our other ethical responsibilities in accordance with the Code.

We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinion.

**Management's responsibility for the financial report**

The management of Education Services Australia Limited are responsible for the preparation of the financial report. This responsibility includes establishing and maintaining internal control relevant to the preparation and fair presentation of the financial report in accordance with the National Law and Australian Accounting Standards.

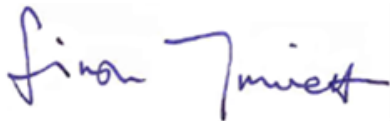
**Auditor's responsibility**

Our objectives are to obtain reasonable assurance about whether the financial report as a whole is free from material misstatement, whether due to fraud or error, and to issue an auditor's report that includes our opinion. Reasonable assurance is a high level of assurance, but is not a guarantee that an audit conducted in accordance with the Australian Auditing Standards will always detect a material misstatement when it exists. Misstatements can arise from fraud or error and are considered material if, individually or in the aggregate, they could reasonably be expected to influence the economic decisions of users taken on the basis of this financial report.

A further description of our responsibilities for the audit of the financial report is located at the Auditing and Assurance Standards Board website at: [http://www.auasb.gov.au/auditors\\_responsibilities/ar4.pdf](http://www.auasb.gov.au/auditors_responsibilities/ar4.pdf).

This description forms part of our auditor's report.

Grant Thornton Audit Pty Ltd  
Chartered Accountants



S C Trivett  
Partner - Audit & Assurance

Melbourne, 18 July 2019