

14 March 2016

Our ref: F16/27-3

Mr Josh Jones

Right to know website:

https://www.righttoknow.org.au/request/acara_killed_a_website?nocache=outgoing-3161#outgoing-3161

Dear Mr Jones

Your Freedom of Information Request of 11 February 2016

I refer to your posting on the Right to Know website of Thursday 11 February 2016 seeking access under the *Freedom of Information Act 1982* (the FOI Act) to:

- “a. if ACARA has discussed with anyone (staff?) if you should tell a global data repository to take something down;
- b. any letter, email, etc. telling someone to take something off a website; and
- c. anything (email, internal memo) about checking the content is the same as My School”.

This letter sets out my decision on your request for access

I am an authorised decision-maker under section 23 of the FOI Act.

Timeframe for processing your request

Your request was received by the Australian Curriculum, Assessment and Reporting Authority (**ACARA**) on 12 February 2016. The statutory period for processing your request is 30 days.

Accordingly, the time frame for processing your request expires on 14 March 2016.

Attachment A is a schedule which describes each of the relevant documents and my decision about each of them. In summary I identified 3 documents relevant to your request in whole or in part. I have decided to release 1 document in full and 2 in part.

Detailed reasons for my decision are set out at **Attachment B**.

Relevant material

In reaching my decision I considered the following:

- the terms of your request
- the documents¹ relevant to the request;
- the FOI Act;
- Guidelines published by the Office of the Information Commissioner under section 93A of the FOI Act (the Guidelines);
- advice from external legal advisers.

A copy of the provisions of the FOI Act relevant to your request are at **Attachment C**.

Charges

As previously advised, no charges have been imposed for the processing of this request.

Review Rights

You are entitled to seek review of this decision. **Attachment D** sets out your rights to apply for review if you are dissatisfied with my decision.

Contacts

If you have any queries about this notice, please do not hesitate to contact Peter Matheson, Board Secretary, by email: peter.matheson@acara.edu.au or phone 0424 186 545.

Yours sincerely



Robyn Ziino
Director of Communications and Strategic Relations, ACARA

¹ The term 'document' in this notice refers to both full documents and relevant parts of documents

Attachment A

Schedule of documents

Freedom of Information Request made by Josh Jones

Doc No.	Pgs	Date	Author	Addressee	Description	Decision	Exemption
1	4	20 January 2016	various	various	Chain of email correspondence titled 'School database'	Release in part (release all but the words between 'Draft email follows' and 'Cheers Peter' in email of 4:57 pm)	s 42
2	2	20 January 2016	Peter Matheson	Figshare Support	Email correspondence between Peter Matheson and Figshare Support	Release in full	N/A
3	5	5 – 8 February 2016	Peter Matheson, John Fairbairn, Zeina Milicevic, Steve Croft	Figshare support, Peter Matheson, John Fairbairn	Chain of email correspondence titled 'RE: FW: Breach of legal rights – Australian Curriculum Assessment and Reporting Authority – F11/353-25'	Release in part (document marked to indicate exemption claims)	s 42 s 47E(d) s 22(1)(a)(ii)

ATTACHMENT B - REASONS FOR DECISION

Any reference to 'documents' should be read as including parts of documents relevant to the particular exemption which is discussed.

For the reasons set out below I have exempted certain documents in part or in full under sections 42 and 47E(d) of the FOI Act.

Details of the precise parts of the documents exempted are set out in the schedule at **Attachment A**.

Findings of fact and reasons for decision

Where the schedule of documents indicates an exemption claim has been applied to a document or part of document, my findings of fact and reasons for deciding that the exemption provision applies to that document or part of document are set out below.

Section 42 – documents subject to legal professional privilege

Section 42(1) exempts a document if the document would be privileged from production in legal proceedings on the ground of legal professional privilege.

The Guidelines explain (at [5.115] and following) that a document is privileged from production on the ground of legal professional privilege if all of the following apply:

- i) there exists a lawyer-client relationship;
- ii) there have been confidential communications which are recorded in the document;
- iii) the communications were for the dominant purpose of providing legal advice or in the context of actual or anticipated legal proceedings; and
- iv) the privilege has not been waived.

I find that disclosure of the documents exempted under section 42(1) would involve disclosure of documents that would be exempt from production in legal proceedings on the ground of legal professional privilege.

Lawyer-client relationship

A professional lawyer-client relationship existed between ACARA and Minter Ellison in connection with an issue relevant to your request. I am satisfied that Minter Ellison was employed by ACARA as its legal advisor to provide legal assistance in relation to this matter and that a lawyer-client relationship was established.

It is clear from the subject matter and content of the advices themselves that a lawyer-client relationship existed in respect of the communications.

Confidential communications

The documents to which the exemption has been applied contain communications made in the context of the solicitor-client relationship. They were made on the understanding that the usual and well-established relationship of confidence between a solicitor and a client governed the communication. The communication was not provided outside of that context

at the time of communication. The communications were confidential at the time they were made and remain confidential.

Dominant purpose

The communications were made for the dominant purpose of providing legal advice. They comprise emails contemplating making a request for legal advice, requesting and receiving legal advice from Minter Ellison, and consideration of that advice.

No waiver

Section 42(2) of the FOI Act provides that:

A document is not exempt because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.

A person who would otherwise be entitled to the benefit of legal professional privilege may waive that privilege, either expressly or by implication. Legal professional privilege is waived if the conduct of the person seeking to rely on the privilege is inconsistent with the maintenance of the privilege. This will depend on the circumstances of the case, including whether the disclosure was for any advantage.

There is no evidence to indicate that the substance of the communications has been disclosed more broadly, or used in any way that would be inconsistent with the maintaining the confidentiality of the communications.

Accordingly, I am satisfied that the documents are exempt under section 42.

I have considered whether any of the documents consist of *operational information* referred to in s 8A, containing material used or to be used for the purpose of making decisions or recommendations of the kind referred to in section 8A(1) of the FOI Act. To the extent that they are, no claim for exemption is made under section 42.

Section 47E(d) - substantial adverse effect on the proper and efficient conduct of the operations of an agency

Section 47E(d) provides that documents are conditionally exempt if disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

I have considered whether the information is conditionally exempt on the basis that disclosure would result in a substantial adverse effect on the proper and efficient conduct on the operations of ACARA under section 47E(d) of the FOI Act.

ACARA's functions include the collection, management and analysis of student assessment data, and the facilitation of information sharing arrangements for such data among Australian government bodies. The *My School* database and website are an integral part of this aspect of ACARA's operations.

Disclosure of certain information in the documents would enable people to source data from the *My School* website in breach of the Terms of Use, and use the data in a way contrary to ACARA's principles and protocols.

This could compromise the willingness of other Australian government bodies to provide or disclose data to ACARA, and therefore could reasonably be expected to adversely affect ACARA's operations.

I find this adverse effect to be serious and not insubstantial. I find that these documents are conditionally exempt in part under section 47E(d) of the FOI Act.

The public interest

Conditionally exempt matter must be released unless, in the circumstances, access to that document at this time would, on balance, be contrary to the public interest (section 11A(5) of the FOI Act). As the Guidelines state at paragraphs 6.8 - 6.9:

The term 'public interest' is necessarily broad and non-specific because what constitutes the public interest depends on the particular facts of the matter and the context in which it is being considered.

To conclude that, on balance, disclosure of a document would be contrary to the public interest is to conclude that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information. The decision maker must analyse, in each case, where on balance the public interest lies, based on the particular facts of the matter at the time the decision is made.

I have considered the factors favouring access and have not considered factors that are irrelevant in subsections 11B(3) and (4) respectively. In balancing the public interest in this case, I have considered the following factors for and against disclosure:

Factors in favour of disclosure:

- i) promoting the objects of the Act, particularly in increasing scrutiny, discussion, comment and review of the Government's activities (section 3(2)(b) of the FOI Act)
- ii) facilitating access to information to members of the public that allows them to be satisfied that proper processes have been followed by the agency.

Factors against disclosure:

I have considered the following factors against disclosure:

- i) protecting the integrity of ACARA's functions, including maintenance of the *My School* website
- ii) protecting the agency's ability to obtain similar information in the future.

Taking into account the above matters, on balance, I consider that disclosure of the information in the documents is contrary to the public interest. In particular, while I acknowledge there is a public interest in revealing and scrutinising the steps ACARA takes to protect *My School* data from perceived misuse, that public interest is overwhelmed in a circumstance where the disclosure of information could facilitate that misuse. Accordingly, I have decided that the documents are exempt in part under section 47E(d) of the FOI Act.

Section 22(1)(a)(ii) - material irrelevant to the request

Section 22(1)(a)(ii) allows an agency to delete irrelevant material from a document which is only partially relevant to an applicant's FOI request. I find that some of the documents relevant to your request contain material which is irrelevant to your FOI request. I have

withheld or deleted that material accordingly. These deletions are detailed in the document schedule at **Attachment A**.

The irrelevant material relates to emails that concern matters other than telling someone to take something off a website. While I have taken a generous view of relevance, the material removed under s 22(1)(a)(ii) cannot properly be described as coming within any of the 3 limbs of your request.

ATTACHMENT C - RELEVANT LEGISLATION

42 Documents subject to legal professional privilege

(1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

(2) A document is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.

(3) A document is not an exempt document under subsection (1) by reason only that:

- (a) the document contains information that would (apart from this subsection) cause the document to be exempt under subsection (1); and
- (b) the information is operational information of an agency.

47E Public interest conditional exemptions—certain operations of agencies

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

- (a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;
- (b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency;
- (c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth, by Norfolk Island or by an agency;
- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

22 Access to edited copies with exempt or irrelevant matter deleted

Scope

(1) This section applies if:

-
- (a) an agency or Minister decides:
 - (i) to refuse to give access to an exempt document; or
 - (ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and
 - (b) it is possible for the agency or Minister to prepare a copy (an edited copy) of the document, modified by deletions, ensuring that:
 - (i) access to the edited copy would be required to be given under section 11A (access to documents on request); and
 - (ii) the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and
 - (c) it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:
 - (i) the nature and extent of the modification; and
 - (ii) the resources available to modify the document; and
 - (d) it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.

Access to edited copy

- (2) The agency or Minister must:
 - (a) prepare the edited copy as mentioned in paragraph (1)(b); and
 - (b) give the applicant access to the edited copy.

Notice to applicant

- (3) The agency or Minister must give the applicant notice in writing:
 - (a) that the edited copy has been prepared; and
 - (b) of the grounds for the deletions; and
 - (c) if any matter deleted is exempt matter—that the matter deleted is exempt matter because of a specified provision of this Act.
- (4) Section 26 (reasons for decision) does not apply to the decision to refuse access to the whole document unless the applicant requests the agency or Minister to give the applicant a notice in writing in accordance with that section.

ATTACHMENT D - REVIEW RIGHTS

If you are dissatisfied with this decision, you have certain rights of review available to you.

Firstly, under section 54 of the FOI Act, you may apply for an internal review of the decision. Your application must be made by whichever date is the later between:

- 30 days of you receiving this notice; or
- 15 days of you receiving the documents to which you have been granted access

An internal review will be conducted by a different officer from the original decision-maker. No particular form is required to apply for review although it will assist your case to set out in the application the grounds on which you believe that the original decision should be overturned. An application for a review of the decision should be addressed to:

Mr Peter Matheson, Board Secretary, ACARA

Email: peter.matheson@acara.edu.au

Post: Level 10 | 255 Pitt Street | SYDNEY | NSW | 2000

If you choose to seek an internal review, you will subsequently have a right to apply to the Australian Information Commissioner for a review of the internal review decision.

Review by the Australian Information Commissioner

Alternatively, under section 54L of the FOI Act, you may seek review of this decision by the Australian Information Commissioner without first going to internal review. Your application must be made within 60 days of you receiving this notice.

The Australian Information Commissioner is an independent office holder who may review decisions of agencies and Ministers under the FOI Act. More information is available on the Australian Information Commissioner's website www.oaic.gov.au.

You can contact the Information Commissioner to request a review of a decision online or by writing to the Information Commission at:

GPO Box 2999
Canberra ACT 2601

Complaints to Ombudsman

You may complain to either the Commonwealth Ombudsman or the Australian Information Commissioner about action taken by ACARA in relation to your request. The Commissioner will likely refer the complaint to the Ombudsman under arrangements between those offices.

Your enquiries to the Ombudsman can be directed to:

Phone 1300 362 072 (local call charge)
Email ombudsman@ombudsman.gov.au

Your enquiries to the Australian Information Commissioner can be directed to:

- Phone 1300 363 992 (local call charge)
Email enquiries@oaic.gov.au

There is no particular form required to make a complaint to the Ombudsman or the Australian Information Commissioner. The request should be in writing and should set out the grounds on which it is considered that the action taken in relation to the request should be investigated and identify ACARA as the relevant agency.

From: Matheson, Peter (ACARA)
To: Rabinowitz, Dr Stanley; Ziino, Robyn
Cc: Croft, Steve
Subject: RE: School database

Hi Stanley

Draft email follows. *Redaction - section 42 FOI Act*

Cheers
Peter

Draft

Dear colleagues

ACARA was notified this afternoon by a stakeholder that the majority of the *My School* database (2008 to 2014) has been published online by a third party under an open licence. The data includes NAPLAN results and school demographic information but excludes school comments. The key link to the information was from the Australian Policy Online website. Following contact by ACARA, the Australian Policy Online website has removed this link (<http://apo.org.au/resource/open-data-release-aggregated-australian-school-level-information>).

However, the company's website on which the data have been released – Figshare LLP – is based in London. Figshare LLP is a company with the purpose of hosting research outputs in one place while allowing it to be discovered by the academic community. The individual who posted the data on www.figshare.com appears to be using a false name and is not associated with any other published data sets.

ACARA is establishing its legal position and will shortly write to Figshare to request that the data be removed from its website.

I will provide a further update when we understand Figshare's position in relation to the take-down request.

Regards
Stanley

From: Rabinowitz, Dr Stanley
Sent: Wednesday, 20 January 2016 3:48 PM
To: Ziino, Robyn

Cc: Matheson, Peter; Croft, Steve

Subject: FW: School database

Robyn,

See email stream below re: My School data base possible breach...

I'm having Peter draft me a short email to Board, Dept and MO and want you aware in case anything goes public

May be worth a quick chat

Stanley

From: Matheson, Peter

Sent: Wednesday, 20 January 2016 3:38 PM

To: Rabinowitz, Dr Stanley <stanley.rabinowitz@acara.edu.au>; Croft, Steve <Steve.Croft@acara.edu.au>

Subject: RE: School database

Hi Stanley

Possibly worth advising the Board/Dept and MO. I'll continue drafting up a nasty email to figshare (hosting the data). I can do a short briefing note after that.

There's no breach of criminal law, regrettably ;)

Cheers

Peter

From: Rabinowitz, Dr Stanley

Sent: Wednesday, 20 January 2016 3:35 PM

To: Croft, Steve

Cc: Matheson, Peter

Subject: RE: School database

Thanks Steve and Peter

Should we be informing anyone of this breach at this point:

Bd Chair?

MO?

Dept?

Police?

Other?

Stanley

From: Croft, Steve

Sent: Wednesday, 20 January 2016 3:32 PM

To: Rabinowitz, Dr Stanley <stanley.rabinowitz@acara.edu.au>

Cc: Matheson, Peter <Peter.Matheson@acara.edu.au>

Subject: FW: School database

Hi Stanley,

As discussed, Peter has dealt with APO verbally and the site has now been taken down.
Kind regards
Steve

From: Matheson, Peter
Sent: Wednesday, 20 January 2016 3:22 PM
To: Bradburn, Damien; Croft, Steve
Subject: RE: School database

Thanks, Damien

And please pass on thanks to Caroline for alerting us.

I spoke to Andrew from Australian Policy Online (APO) and advised that ACARA has legal issues with the database being released, particularly under Creative Commons. I advised that Cth, state and territory ministers have directed us to take all reasonable measures to mitigate risk of league tables – release of this information in database form obviously increases risk of league tables being produced. I requested that they pull down the database and advised that the alternative position is that our lawyers will be writing to them.

APO have pulled down the link, but advised that they did not publish the database. I'm now writing to the website that hosts the database.

Cheers
Peter

From: Bradburn, Damien
Sent: Wednesday, 20 January 2016 2:06 PM
To: Croft, Steve; Matheson, Peter
Subject: FW: School database

Dear Peter and Steve

Caroline from ISCA has emailed me whilst I was on lunch break a dataset, publically available which on my initial observations is a disguised version of the standard product for the My School dataset from 2008-2014.

I am informing you of this in the event you are unaware and may need to investigate and perhaps take further action.

Please see Caroline's email with link below.

Kind regards
Damien

From: Caroline Miller [<mailto:Caroline.Miller@isca.edu.au>]
Sent: Wednesday, 20 January 2016 1:17 PM
To: Bradburn, Damien
Cc: jessie.bice
Subject: School database

Hi Damien

Someone sent me the link below asking if it was My School data and after a quick look it certainly looks like My School data. You may already be aware of this but if not I thought ACARA might be interested.

<http://apo.org.au/resource/open-data-release-aggregated-australian-school-level-information>

Cheers

Caroline Miller

Director, Policy and Research

Independent Schools Council of Australia

The peak national body for the independent schools sector

12 Thesiger Court Deakin ACT 2600

PO Box 324 Deakin West ACT 2600

Telephone: 02 6282 3488

Mobile: 0402 068 701

Facsimile: 02 6285 2926

Email: jsca@isca.edu.au

Website: www.isca.edu.au

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Verey, Peter

From: Matheson, Peter <Peter.Matheson@acara.edu.au>
Sent: Wednesday, 20 January 2016 5:01 PM
Subject: Breach of legal rights - Australian Curriculum, Assessment and Reporting Authority
- F11/353-25

To whom it may concern

The Figshare website has recently published data sourced from the Australian Curriculum, Assessment and Reporting Authority's (ACARA) website, *My School* (www.myschool.edu.au). Refer https://figshare.com/articles/Open_data_release_of_aggregated_Australian_school_level_information_Edit/on_2016_1/2063433

Publication of these data breaches ACARA's legal rights and is contrary to the position taken by the nine Australian Governments, represented by its nine (9) education ministers. In the first instance I request that this dataset be removed from the Figshare website. Failure to cooperate will lead to legal action from ACARA.

Information about ACARA and relevant context follows.

I look forward to a quick resolution of this matter, and request advice as soon as possible as to Figshare's position.

Kind regards
Peter

Peter Matheson

Board Secretary, Office of the CEO

Australian Curriculum, Assessment and Reporting Authority
Level 10 | 255 Pitt Street | SYDNEY | NSW | 2000

Phone: +612 8098 3116

Mobile: 0424 186 545

Email: peter.matheson@acara.edu.au

Please consider the environment before printing this email

acara AUSTRALIAN CURRICULUM,
ASSESSMENT AND
REPORTING AUTHORITY

ACARA is established as a body corporate by section 5 of the Australian Curriculum, Assessment and Reporting Authority Act 2008.

ACARA is responsible for the development of a national curriculum, a national assessment program and a national data collection and reporting program, and carries out its work out in collaboration with a wide range of stakeholders including State and Territory education authorities. It is directed by Commonwealth, state and territory ministers for education.

ACARA is responsible for the *My School* website (*My School*), which allows users to search the profiles of almost 9500 Australian schools.

Users of *My School* can quickly locate statistical and contextual information about schools in the Australian community and compare them with statistically similar schools across the country. Users of *My School* can obtain information about a school having searched by school, suburb, town or postcode. Users can also compare information for a specified school against

information for similar schools. But *My School* does not provide lists of comparative performance. And users are required to agree to *My School's* terms of use.

ACARA has been directed by Commonwealth, state and territory ministers for education to act to mitigate the risk of publication of simplistic league tables using national school performance data.

Redaction: s42 FOI Act

From: Croft, Steve

Sent: Monday, 8 February 2016 12:23 PM

To: Matheson, Peter

Subject: RE: Breach of legal rights - Australian Curriculum, Assessment and Reporting Authority - F11/353-25

Hi Peter,

With respect to the question about the source of the data, the extract suggests that the vast majority has been sourced direct from the *My School* website itself.

In the *My School* dataset provided to the jurisdictions (and cut down versions provided through the Data Access program), the sector code is Government/Catholic/Independent, whereas on *My School*, the sector is Government/Non-Government which is what can be found in the data I downloaded through the Australian Policy Online website.

Similarly, all of the data is structured in the way it is presented on the *My School* site. There are also NO student counts for any of the NAPLAN and other data which are not carried on the *My School* site.

Also, the Australian's Your School does not carry much data at all – and certainly not things like VETis, Post-School Destinations and detailed Finance data.

In my mind, there is no doubt that the data was sourced from the *My School* site

Redaction : s 47E (d) FOI Act.

This does suggest we do have a breach of contract case.

Steve

Redaction : s 42 FOI Act

Redaction = 42 FOI Act.

Redaction section 42 FOI Act

Redaction - section 42 FOI Act

Redaction - sub-paragraph s 22(1)(a)(ii) FOI Act

Redaction - s 22(1)(a) (ii) FOI Act