

Notice under s.24AB(2) of the Freedom of Information Act 1982
(Commonwealth)

In accordance with s.24AB(2) of the ***Freedom of Information Act 1982*** (Commonwealth), I provide the following written notice:

- a. I intend to refuse access to all the documents covered by your request;
- b. I am satisfied that a practical refusal reason exists in relation to your request, as the work involved in processing your request would substantially and unreasonably divert the resources of ACARA from its other operations;
- c. The person whom you may consult with is Peter Matheson, Board Secretary, who can be contacted by email peter.matheson@acara.edu.au or mobile: 0424 186 545; and
- d. The consultation period during which you may consult with Peter Matheson is 14 days after the date that you receive this notice: s.24AB(2)(e).

For further information regarding my decision, please refer to the attached letter.

Dated: 6 May 2016

Signed: _____



Robert Randall, Chief Executive Officer, ACARA

FOI INITIAL DECISION LETTER – PRACTICAL REFUSAL

6 May 2016

Our ref: F16/27-28

Mr Josh Jones

Right to Know website:

(https://www.righttoknow.org.au/request/acara_killed_a_website#outgoing-3527)

Dear Mr Jones

Your Freedom of Information Internal Review Request

I refer to your posting on the [Right to Know website](#) dated 8 April 2016 to the Australian Curriculum, Assessment and Reporting Authority (ACARA) seeking an internal review of [ACARA's Freedom of Information decision dated 14 March 2016](#) made under the *Freedom of Information Act 1982* (Commonwealth) (FOI Act).

1. Your request

I advise that an internal review is a fresh decision based on the terms of your request. To undertake this decision I need to look at your request taken as a whole, not just respond to the comments that you have made in your request for internal review.

Your [initial FOI request](#) (posted on the Right to Know website on 11 February 2016) is as follows:

"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 of a website; and

c. anything (email, internal memo) about checking the content is the same as My School".

In the [FOI decision dated 14 March 2016](#) made by Ms Robyn Ziino, Ms Ziino interpreted your request as being limited to documents and correspondence related to the [Figshare website](#) (in my view a reasonable interpretation in the circumstances). In your internal review request, it appears that you are asking for each of paragraphs a), b) and c) to be unlimited. That is, any global data repository ever, any website ever, and any written document checking that content is the same as *My School* ever. I am interpreting your request on this basis.

2. Practical refusal reason

I am satisfied that a practical refusal reason exists in relation to your request, as the work involved in processing your request would substantially and unreasonably divert the resources of ACARA from its other operations: s.24AA(1)(a)(i) of the FOI Act. My reasons for this initial decision are set out at **Attachment 1**.

In accordance with s.24AB(2) of the FOI Act, I provide written notice of my decision, attached as a separate document at the front of this letter.

3. Request consultation process

I advise that the FOI Act sets out a process in cases where a practical refusal reason exists. The purpose of this process is to allow you the opportunity to revise your request. Peter Matheson, Board Secretary, ACARA will be able to assist you in narrowing your request. For more information, please refer to the attached notice.

4. Charges

I advise that ACARA may decide that you are liable to pay a charge in respect of a request for access to documents. These charges are levied as prescribed by the *Freedom of Information (Charges) Regulations 1982* and are for search and retrieval of documents, decision making and provision of access (for example, copying and postage). I will be making a decision regarding whether to impose a charge once your revised request has been agreed.

5. Timeframe for providing you with our decision

Normally, the statutory timeframe for processing an internal review request is 30 days after the day on which the request is received. I note that the 30 day time limit expires on **Monday 9 May 2016**. Now that we are in a request consultation process, s.24AB(2)(e) requires me to provide you with a 14 day consultation period. This means that the 30 day time limit will expire during the consultation period.

Once your revised request is agreed, Peter Matheson will negotiate additional time with you to provide you with my final decision letter and relevant documents.

6. Contact

If you require clarification of any of the matters discussed in this letter, or have any queries throughout the process, please contact Peter Matheson, Board Secretary, by email peter.matheson@acara.edu.au or mobile: 0424 186 545.

Yours sincerely



Robert Randall
Chief Executive Officer, ACARA

Attachment 1 – Reasons for initial practical refusal decision

1. Material taken into account

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

- a. the terms of your request;
- b. the documents to which you have sought access;
- c. relevant provisions of the FOI Act;
- d. advice from ACARA staff with responsibility for matters relating to the documents to which you sought access; and
- e. [The Australian Information Commissioner's guidelines on FOI, version 1.5, October 2014, Part 3 \(Commissioner's Guidelines\)](#).

2. My interpretation of your FOI request

I advise that, based on the reasons you have provided in requesting an internal review, I am interpreting your request as covering the following categories of documents:

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

3. Practical refusal reason

I find that a practical refusal reason exists in relation to your request, as the work involved in processing your request would substantially and unreasonably divert the resources of ACARA from its other operations: s.24AA(1)(a)(i) of the FOI Act.

4. Mandatory resource factors

Relevantly, s.24AA(2) of the FOI Act provides, broadly, that without limiting the matters to which I may have regard in deciding whether a practical refusal reason exists, I must have regard to the resources that would have to be used for the following:

- a. identifying, locating and collating the documents within the filing system of ACARA;
- b. deciding whether to grant, refuse or defer access to a document to which the request relates;
- c. making a copy, or an edited copy, of the document; and
- d. notifying any interim or final decision on the request.

5. Commissioner's Guidelines

I note that under s.93A of the FOI Act I must have regard to the Commissioner's Guidelines in making my decision. The Commissioner's Guidelines (paras 3.102 - 3.103) provide further detail regarding factors that I must take into account and other matters that may be relevant in deciding if a practical refusal reason exists. Relevantly, the Commissioner's Guidelines state:

“3.102 In deciding if a practical refusal reason exists, an agency or minister must have regard to the resources required to perform the following activities specified in s 24AA(2):

- identifying, locating or collating documents within the filing system of the agency or minister
- examining the documents
- deciding whether to grant, refuse or defer access
- consulting with other parties
- redacting exempt material from the documents
- making copies of documents
- notifying an interim or final decision to the applicant.

3.103 Other matters that may be relevant in deciding if a practical refusal reason exists include [relevantly]:

- the staffing resources available to an agency or minister for FOI processing
- whether the processing work requires the specialist attention of a minister or senior officer, or can only be undertaken by one or more specialist officers in an agency who have competing responsibilities
- the impact that processing a request may have on other work in an agency or minister's office, including FOI processing
- whether an applicant has cooperated in framing a request to reduce the processing workload [and other points]".

I have had regard to these factors in making my decision.

6. Documents covered by your request

I note that your request is framed broadly, and covers any global data repository ever, any website ever, and any written document checking that content is the same as *My School* ever. I advise that your request comprises the following categories of documents, extending from at least the date that ACARA started operations (May 2009) (and possibly earlier, as ACARA holds documents kept by the former Interim National Curriculum Board):

- Emails and other written correspondence between staff in the Reporting business unit, including archived emails belonging to former staff;
- Emails and other written correspondence between staff in the Board Secretariat and between the Board Secretariat and Reporting staff, including archived emails belonging to former staff;
- Emails and other written correspondence between the Board Secretariat team and ACARA's external legal advisers;
- Emails and other written correspondence between the Board Secretariat team and external third parties;
- Drafts of written correspondence between the Board Secretariat team and external third parties;
- Emails and other written correspondence between staff in the Reporting and Board Secretariat teams and ACARA executives, including archived emails belonging to former staff;
- Emails and other correspondence between Reporting staff and staff employed at one or more of the nine (9) federal and state departments of education and various state statutory authorities responsible for test administration; and
- Other briefing documents prepared to inform ACARA's responses.

7. Application of mandatory resource factors

7.1 Identifying, locating and collating the documents in scope

A. Scope

As your request is framed broadly, the scope of your request covers not just data, but also a number of intellectual property matters, including (without limitation) the National Assessment Program – Literacy and Numeracy tests, ACARA's trademarks, the processing of third party copyright requests, ACARA's website URLs and domain names.

Identifying all relevant documents, under the broad categories listed above, and covering all documents listed at heading [6], is a very large scope.

B. Relevant IT systems and software programs

I advise that identifying documents falling within this significant scope is made more difficult, as:

- some documents are located on archived network drives;
- some documents are located on ACARA's document management system (TRIM); and
- some emails between staff in various business units and between ACARA staff and third parties only sit in Microsoft Outlook, and many of these emails are archived, including emails belonging to former staff members.

7.2 Deciding whether to grant, refuse or defer access

A. Identifying whether the documents are in scope and whether any exemptions or conditional exemptions apply

This involves significant work, due to the large number of documents in scope. Each document will need to be reviewed, and decisions made on the following:

- whether I need to consult with third party persons or organisations concerning, broadly, information about the business or commercial affairs of the person or organisation (refer heading B. below);
- whether relevant FOI exemptions or conditional exemptions apply (refer below);
- whether each document contains information that would reasonably be regarded as irrelevant to the request: s.22(1)(a)(ii) of the FOI Act.

Relevant exemptions and conditional exemptions in the FOI Act that may apply include:

- exemption under s.42 of the FOI Act (legal professional privilege) – this may apply, for example, to email correspondence between the Board Secretariat team and ACARA's external legal advisers;
- conditional exemption under s.47E(d) of the FOI Act (substantial adverse effect on the proper and efficient conduct of the operations of an agency) – this may apply, for example, to any comments in the documents that could result in the creation of comparative school league tables;
- conditional exemption under s.47F of the FOI Act (personal privacy) – this may apply, for example, to information concerning third parties; and
- conditional exemption under s.47G of the FOI Act (broadly, business, commercial or financial affairs of a person or organisation) – this may apply, for example, to unauthorised use by a third party of ACARA's trademarks or copyright materials.

B. Consulting with third parties

If it appears that a person or organisation might reasonably wish to make a contention that a document is conditionally exempt under s.47G of the FOI Act (broadly, business, commercial or financial affairs of a person or organisation), I must decide if it is reasonably practicable to give the person or organisation concerned a reasonable opportunity to make submissions in support of the exemption contention: s.27 FOI Act. If I decide to consult, I must give regard to any submissions that are made, in making my decision: s.27(4)(b) of the FOI Act.

If I decide to release a document (against the wishes of a person or organisation), then:

- I must give notice to both the third party and yourself; and
- I must not give you access to the document unless after all opportunities of the person or organisation concerned for review or appeal have run out, the decision to give access still stands: s.27(6) and (7) of the FOI Act.

7.3 Making a copy or edited copy of the documents

Where a decision is made to provide part of a document, and third party consultation arrangements have been satisfied, ACARA must make an edited copy of the document. This requires a legal officer to make redactions in the document, ensuring that only the relevant text is redacted. The Board Secretary, and myself review the edited copies. Once approved, copies of these edited documents are printed and collated. This involves significant work, due to the broad scope of your request.

7.4 Notifying you of my final decision

A. Drafting the decision letter

Drafting the decision letter also involves significant work, due to the broad scope of your request. It includes the following steps:

- reading each relevant document again;
- identifying the parts that require redaction;
- reading the FOI Commissioner's guidelines; and
- drafting the decision.

The decision letter includes a table that identifies, for each redaction, the relevant exemption or conditional exemption that applies. This is a time consuming process to complete, as each redaction in all the relevant documents is cross-referenced in this table.

B. Uploading to the Right to Know website

I note that this step, of itself, is unlikely to involve substantial work. However, it is a step that I am required to have regard to under the FOI Act. I would arrange for one of my staff to upload the final FOI decision letter together with relevant documents (with possible redactions) to the Right to Know website.

7.5 Estimated total number of hours involved

I estimate that the work involved in completing the mandatory steps [7.1] to [7.4] well exceeds 60 working hours.

8. Application of other relevant factors

Whilst the mandatory factors listed above, by themselves, support a finding that a practical refusal reason exists in relation to your request, for completeness, I also briefly consider some additional factors listed in the Commissioner's Guidelines.

8.1 The staffing resources available to an agency for FOI processing

The work outlined under heading [7] would be performed by two (2) members of ACARA staff in the Board Secretariat team. Peter Verey is a legal officer in the Board Secretariat team, whose role includes FOI, Privacy and Intellectual Property and who reports to Peter Matheson. Peter Matheson is Board Secretary, whose role involves managing staff with responsibility for Board papers, Audit and Risk Committee papers, coordination of policy advice to senior education officials and Education Council, parliamentary matters, and providing strategic advice to the Chief Executive Officer.

8.2 The processing work requires the specialist attention of two ACARA staff who have competing responsibilities

I advise that there is no one else in ACARA that can complete the work outlined under heading [7]. Peter Verey and Peter Matheson are the only staff that can complete this work and, as set out above, each has other, and competing, responsibilities.

8.3 The impact that processing a request may have on other work in ACARA, including FOI processing

I note that your request, as it currently stands, would involve a significant amount of work by Peter Matheson and Peter Verey. I find that performing this work would jeopardise the Board Secretariat's other operations, due to the fact that each of these staff have other, and competing, responsibilities.
