
FOI INTERNAL REVIEW DECISION

3 June 2016

F16/27-28

Mr Josh Jones

Right to Know website: www.righttoknow.org.au

Dear Mr Jones

Your FOI internal review request – internal email between Steve Croft and Peter Matheson dated Monday 8 February 2016

I refer to your to your posting on the Right to Know website (**Website**) on 8 April 2016 to the Australian Curriculum, Assessment and Reporting Authority (**ACARA**), which ACARA received on 9 April 2016, seeking access to documents under the *Freedom of Information Act 1982* (Commonwealth) (**FOI Act**) and our subsequent correspondence.

1. Your initial internal review request

I confirm that your initial request for internal review, posted on the Website on 8 April 2016, was as follows:

"Dear Australian Curriculum, Assessment and Reporting Authority,

Please pass this on to the person who conducts Freedom of Information reviews.

I am writing to request an internal review of Australian Curriculum, Assessment and Reporting Authority's handling of my FOI request 'ACARA killed a website?'

There's two things. There's nothing about how old were the documents you looked for so maybe there's lots of times you sent emails or letters to say someone has to take something off of a website from before January 2016 and you should have sent it to me. Did you really only ever ask someone to take something off this year? Maybe but I don't think so.

Also you said there's stuff you cut out because it could let people source data from the My School web site. About what you cut out I don't think there's good reasons because anyone can see how to get stuff from My School. It's not like it's this awesome locked iPhone. You can get myschool stuff by every page or maybe get it totally at once.

For totally at once maybe there's an SQL exploit. It's not new. There's hundreds of SQL exploits on the web. So if it's not about a zero-day exploit (why don't you fix it!), why would you blank out the idea in what you sent me. Anyhow that's hacking.

Or else you can do it one page at a time. There's alot of ways you can do it like using webscraping service or else Google "webscraping service" and choose. You don't care how there going to do it. So, if you're not advertising WeScrapeMyschool.com.au ;) why should you chop something about webscraping out in what you sent me. Also you can use your own catpcha bypass or hire one. Obvious. Google captcha defeat and do whatever, so why cut out Captcha Bypass in what you sent me. Or you just look at the

pages and save whatever. It's kinda slow but like really really obvious so why chop that out. If two people share it its half the time. Crowdsourcing 200 people and its less.

Is there anything else? I don't think so so why should you delete it.

A full history of my FOI request and all correspondence is available on the Internet at this address: <https://www.righttoknow.org.au/request/a...>

*Yours faithfully,
Josh Jones"*

2. Practical refusal reason

By way of summary, I confirm that:

- a. On 6 May 2016, I made a decision that a practical refusal reason existed in relation to your internal review request, as the work involved in processing your request would have substantially and unreasonably diverted the resources of ACARA from its other operations: s.24AA(1)(a)(i) of the FOI Act. My decision was posted on the Website on 6 May 2016.
- b. Subsequently, there have been a number of posts on the Website between yourself and a member of my staff to narrow the scope of your request. I understand that a revised request has now been agreed (heading [3]). A summary of the posts since your internal review request is noted under heading [4].

I am satisfied that a practical refusal reason no longer exists in relation to your revised request.

3. Your revised request

Your revised request is for the internal ACARA email from Steve Croft to Peter Matheson dated 8 February 2016 and sent at 12.23pm and with the subject line "Re: Breach of legal rights – Australian Curriculum, Assessment and Reporting Authority – F11/353-25".

4. Correspondence relating to your internal review request

I note that all of the correspondence between yourself and an ACARA staff member in relation to your request for internal review has been uploaded to the Website. For the sake of completeness, I summarise the relevant correspondence in the table below.

Date of posting	To/From	Summary of content
8 April 2016	Your posting on the Website	Your internal review request
6 May 2016	My letter to you, posted on the Website	Advising that a practical refusal reason existed in relation to your internal review request
8 May 2016	Your posting on the Website	Re-stating your internal review request
10 May 2016	Peter Matheson's posting on the Website	Seeking to clarify scope
14 May 2016	Your posting on the Website	Confirming scope
23 May 2016	Peter Matheson's posting on the Website	Advising on timing of internal review decision
25 May 2016	Your posting on the Website	Confirming timing

5. Timing of my decision

In my practical refusal letter of 6 May 2016, I foreshadowed that the 30 day time limit to provide you with my internal review decision will have expired by the time my staff have clarified with you the scope of your request.

The 30 day deadline expired on Monday 9 May 2016. The document in scope was clarified on Saturday 14 May 2016.

I note that Peter Matheson advised you on Monday 23 May 2016 that I would be providing you with my internal review decision by close of business on Friday 3 June 2016. On Wednesday 25 May 2016 you agreed with the timing of release of my decision.

6. My decision

I have identified one (1) document relevant to your amended internal review request, being the internal ACARA email from Steve Croft to Peter Matheson dated 8 February 2016 and sent at 12.23pm and with the subject line "Re: Breach of legal rights – Australian Curriculum, Assessment and Reporting Authority – F11/353-25" (**Email**).

I decide to release the Email in part, and enclose a copy of the redacted Email. My reasons for decision in relation to the redactions (**Email Redactions**) are at **Attachment 1** and document details are at **Attachment 2**.

I note that the Email is contained within a chain of email documents. These other documents are outside the scope of your amended internal review request. I have redacted these other documents on the grounds of relevance, in accordance with your agreement regarding scope. These redactions are detailed in **Attachment 2**.

7. Decision On Charges

The *Freedom of Information (Fees and Charges) Regulations* (**Regulations**) prescribes the charges that can be levied in respect of a request for access to a document or the provision of access to a document. These charges are set out in the Regulations and are for search and retrieval of documents, decision making and provision of access (for example, copying and postage).

Sub-regulation 3(1) of the Regulations provides an agency with a discretion as to whether it will impose any charge. In relation to this request, I have decided **not** to impose a charge.

8. Review by Information Commissioner

You have the option of seeking a merits review by the Information Commissioner. For more information, please refer to [FOI Fact Sheet 12](#), authorised by the Office of the Australian Information Commissioner.

9. Complaints to the Commonwealth Ombudsman

If you are not satisfied with the way a Commonwealth agency has processed your Freedom of Information request, you can complain to the [Commonwealth Ombudsman](#). The Ombudsman cannot review the merits of FOI decisions.

10. Contact person

If you require clarification of any of the matters discussed in this letter, please do not hesitate to contact Peter Matheson, Board Secretary, by email peter.matheson@acara.edu.au or by mobile: 0424 186 545.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'R. Randall', written in a cursive style.

Robert Randall
Chief Executive Officer, ACARA

Attachment 1 - Summary of reasons for my decision

In summary, the reasons for my decision are:

- a. **s.47B(a) of the FOI Act** – I find that the Email Redactions are conditionally exempt under s.47B(a) of the FOI Act (Commonwealth/State relations). I find that:
 - The Email Redactions contain information on how to override measures implemented on the *My School* website (*My School*) to protect the published data. These measures are designed to make it more difficult for members of the public to scrape data from *My School* for the purpose of creating simplistic school league tables.
 - The Education Council has said ‘No’ to the publication of simplistic school league tables on at least six (6) occasions (**heading 6.4**), due to the harms that can be caused to schooling communities, teachers, parents and students, and the concerns raised by principals’ associations and teacher unions, amongst other stakeholders.
 - Release of the Email Redactions would run contrary to the directions of the Education Council to ACARA to take measures to prevent the publication of simplistic school league tables.
 - As part of its functions, ACARA is required to act in accordance with the directions of the Education Council under s.7(1) of the [Australian Curriculum, Assessment and Reporting Authority Act 2008](#) (Cth) (**ACARA Act**).
 - Disclosing the Email Redactions would cause ACARA to breach s.7(1) of the ACARA Act.

I find that release of the Email Redactions under FOI would:

 - adversely affect the continued level of trust or co-operation in inter-jurisdictional relationships; and
 - adversely affect the administration of multiple continuing Commonwealth–State projects being managed by ACARA.
- b. **s.47E(d) of the FOI Act** – The Email Redactions are also conditionally exempt under s.47E(d) of the FOI Act (substantial adverse effect on the proper and efficient conduct of ACARA’s operations). I find that release of the Email Redactions by ACARA, in contravention of the Education Council’s directions, would cause ACARA to breach s.7(1) of the ACARA Act. I find that this would, or could reasonably be expected to, lead to a loss of confidence in ACARA by nine (9) Education Ministers and nine (9) chief executives of education departments and result in ACARA being significantly impeded in carrying out its statutory functions.
- c. **Public interest** – There is some public interest in knowing about the Email Redactions. However I note that release of the Email Redactions would be contrary to the directions of the Education Council. I also note ACARA’s obligation under s.7(1) of the ACARA Act to comply with the directions of the Education Council. In weighing the public interest, I consider that the continued cooperation and collaboration of the Commonwealth, States and Territories to further strategic policy and implement policy in relation to school education outweighs the public interest in disclosing the Email Redactions.
- d. **Irrelevant material** – I find that the document relevant to your internal review request is part of an email chain containing irrelevant material.

The agreed scope comprises only the email from Steve Croft to Peter Matheson dated 8 February 2016 and sent at 12.23pm. I note your posting of 14 May 2016 on the Website in this regard, agreeing scope. I have redacted the other emails that are part of this email chain, on the grounds of relevance. I have noted the redactions in **Attachment 2** and in the released set of documents.

Attachment 1 - Reasons for my decision

1. Material taken into account

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

- the terms of your amended request;
- the documents to which you sought access;
- relevant provisions of the FOI Act;
- advice from ACARA staff with responsibility for matters relating to the documents to which you sought access;
- the [Commissioner's Guidelines, version 1.2, March 2013, Part 6](#) (**Commissioner's Guidelines**).

2. My Decision

I have identified one (1) document relevant to your amended internal review request, being the internal ACARA email from Steve Croft to Peter Matheson dated 8 February 2016 and sent at 12.23pm and with the subject line "Re: Breach of legal rights – Australian Curriculum, Assessment and Reporting Authority – F11/353-25" (**Email**).

I decide to release the Email in part, and enclose a copy of the redacted Email. My reasons for decision in relation to the redactions (**Email Redactions**) are below and document details are at **Attachment 2**.

I note that the Email is contained within a chain of email documents. These other documents are outside the scope of your amended internal review request. I have redacted these other documents on the grounds of relevance, in accordance with your agreement regarding scope. These redactions are detailed in **Attachment 2**.

3. Diamond Decision

I refer to the decision of the Administrative Appeals Tribunal (**AAT**) in the matter of [Mark R Diamond and Chief Executive Officer of the Australian Curriculum, Assessment and Reporting Authority](#) [2014] AATA 707 at (**Diamond Decision**). In my view, the Email Redactions concern the same issue as in the [Diamond Decision](#) (simplistic league tables).

In this case it is **not** about the *My School* database (covered in the [Diamond Decision](#)). Instead, it is about the Email Redactions that contain information on how to override the measures implemented on *My School* to protect the published data.

I find that the fundamental issues concerning the capacity for simplistic league tables to undermine the work that ACARA and school authorities are trying to achieve, which were canvassed in the [Diamond Decision](#), arise also in this matter.

In the [Diamond Decision](#), the AAT affirmed the decision of the Freedom of Information Commissioner to refuse to grant access to the document sought by Dr Diamond in his request (the *My School* database), except for the list of schools. The *Diamond Decision* runs to 88 pages. It is a unanimous decision of Deputy President S.A. Forgie and Ms S. Taglieri, Member. It answers the submissions put by Dr Diamond in that case.

In my view, the Diamond Decision provides clear and cogent reasoning. It is an authoritative decision from the highest merits review body in the Commonwealth system. In making my decision I have had careful regard to the Diamond Decision.

4. ACARA's position regarding school league tables

The issue of the publication of simplistic school league tables is important to us and our stakeholders, for good reason. Many of those reasons were canvassed in the Diamond Decision.

In summary, the former Standing Council on School Education and Early Childhood, now the Education Council, has expressed its opposition to simplistic school league tables on at least six (6) different occasions [**heading 6.4**]. In addition, the Education Council has also directed ACARA on three (3) occasions to report to it on the work that ACARA is doing to prevent the publication of school league tables [**heading 6.6**].

Under s.7(1) of the [Australian Curriculum, Assessment and Reporting Authority Act 2008](#) (Cth) (**ACARA Act**), ACARA is required to:

“perform its functions and exercise its powers in accordance with any directions given to it by the Ministerial Council in writing”.

ACARA's position, put simply, is that we have no option but to put into place strategies to minimise the risk that third parties produce school league tables, and also to do what is necessary to prevent the publication of school league tables, in order to comply with previous directions of the former Standing Council (now Education Council).

5. Contextual factors surrounding the Email Redactions

In January 2016 ACARA discovered that a number of public websites had published data sourced from *My School*. One of the websites was [Figshare](#).

On 20 January 2016 ACARA emailed the Figshare representative advising that publication of this dataset breached ACARA's legal rights (established by the terms of use) and requested that this dataset be removed from the Figshare website.

Figshare did remove this dataset. It then referred the matter to an independent third party for review and decision. To assist ACARA in preparing its response to Figshare, ACARA undertook further analysis of the dataset which had been published. The Email Redactions are part of that analysis, and support ACARA's position that the data had been taken from *My School*.

On 5 April 2016 the Figshare representative emailed ACARA advising that it will not be re-publishing this dataset.

On 8 April 2016, three (3) days later, ACARA received your request for internal review.

6. Contextual factors – directions provided by Education Council

6.1 Who is ACARA

ACARA was established under the ACARA Act. ACARA's functions under section 6 of the ACARA Act include, relevantly (and in summarised form):

- develop and administer a national school curriculum;
- develop and administer national assessments; and
- collect, manage and analyse student assessment data and other data relating to schools and comparative school performance.

The work of ACARA relies on collaboration with a wide range of stakeholders including Commonwealth, State and Territory governments.

6.2 What is a simplistic league table

I advise that a simplistic school league table, in the context of national tests, is a table in hard copy or online format which ranks or sorts schools simply on the basis of performance in tests, without taking into account a range of other contextual factors, such as family background, school location (metropolitan, remote, etc.), and other factors including statistical uncertainty associated with performance indicators.

6.3 What is the Education Council

The Education Council (formerly the Standing Council on School Education and Early Childhood) was launched on 1 July 2014 and is one of eight (8) Councils established under arrangements set by the Council of Australian Governments (**COAG**). The Education Council provides a forum through which strategic policy on early childhood development, school and university education can be coordinated at the national level, and through which, information can be shared and resources used collaboratively towards the achievement of agreed objectives and priorities. For more information, see the [Education Council website](#).

For the purposes of this decision, a reference to the Education Council also includes a reference to the former Standing Council on School Education and Early Childhood and the former Ministerial Council for Education, Early Childhood Development and Youth Affairs.

6.4 Education Council says No to simplistic league tables

I advise that the Education Council has said no to simplistic league tables on at least six (6) separate occasions (see table below).

Item No.	Date	Document and T doc No.	Comments
1.	December 2008	<u>Melbourne Declaration</u> (http://scseec.edu.au/site/DefaultSite/filesystem/documents/Reports%20and%20publications/Publications/National%20goals%20for%20schooling/National_Declaration_on_the_Educational_Goals_for_Young_Australians.pdf)	Page 17: <i>"In providing information on schooling, governments will ensure that school-based information is published responsibly, so that any public comparisons of schools will be fair, contain accurate and verified data, contextual information and a range of indicators. Governments will not themselves devise simplistic league tables or rankings and privacy will be protected".</i>
2.	June 2009	Principles and protocols for	<u>Education Council document.</u>

Item No.	Date	Document and T doc No.	Comments
		reporting on schooling in Australia, (http://scseec.edu.au/site/DefaultSite/filesystem/documents/Reports%20and%20publications/Publications/Measuring%20and%20reporting%20student%20performance/Principles%20and%20protocols%20for%20reporting%20on%20schooling%20in%20Australia.pdf)	<i>"governments will not publish simplistic league tables or rankings, and will put in place strategies to manage the risk that third parties may seek to produce such tables or rankings".</i>
3.	15 April 2011	11th MCEECDYA Meeting, Melbourne, 15 April 2011	Ministers reaffirmed: <i>"their opposition to simplistic league tables as counterproductive and harmful to the educational purpose of schooling".</i>
4.	8 July 2011	Twelfth MCEECDYA meeting communique (www.scseec.edu.au/site/DefaultSite/filesystem/documents/Communique%20and%20Media%20Releases/Previous%20Council%20info%20statements/MCEEC%20DYA%20meeting%20info%20statements/C12_Communique.pdf)	At page 2: <i>"Ministers reiterated their strong opposition to the publication of league tables arising from My School data and discussed with ACARA further actions that could be taken against breaches of the My School terms and conditions of use".</i>
5.	Feb 2012	ACARA's data access protocols (www.acara.edu.au/verve/resources/D12_1573_ACARA_Data_Access_Protocols_2012.pdf)	Endorsed out of session by the Education Council in Feb 2012, Para 36: <i>"Users must act in accordance with the written agreement which limits use of the data to the purpose stated by the applicant, prohibits attempts to identify information (e.g., names of schools) that has been de-identified to a necessary level to prevent identification of an individual student and the publication of rankings of schools (simplistic league tables)".</i>

Item No.	Date	Document and T doc No.	Comments
6.	20 April 2012	SCSEEC Meeting 20th April 2012 (not in communique)	At the Education Council meeting on Friday 20 April 2012, the Education Council: <i>"Affirms its opposition to the publication of simplistic league tables as counterproductive and harmful to the educational purpose of schooling".</i>

6.5 2011 My School release

In March 2011, the following occurred:

March 2011	ACARA published 2010 school data including aggregated school level NAPLAN results on <i>My School</i> (version 2.0) (www.myschool.edu.au/)
March 2011	Media published tables of school comparisons (simplistic league tables) based on 2010 NAPLAN data published on <i>My School</i>

6.6 April 2011 direction provided by the Education Council to ACARA

As an example of the Education Council's further directions to ACARA, on 15 April 2011 the Education Council met in Melbourne. This meeting followed the media publication of league tables in March 2011. At the 15 April 2011 Education Council meeting, the Education Council:

"Requested that ACARA as a matter of urgency provide Ministers by the end of April 2011 with advice on the effectiveness of the protection measures against the construction of league tables contained in My School 2.0; and

Asked that ACARA outline for Ministers by the end of April 2011 what action it intends to take in relation to breaches of the My School website's terms and conditions".

I have taken this quote from my affidavit dated 4 November 2013, at para 24, which was used as evidence in the Diamond Decision.

7. s.47B(a) – Commonwealth/State relations

7.1 s.47B(a) of the FOI Act

s.47B(a) of the FOI Act states "a document is conditionally exempt if disclosure of the document under this Act would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State".

The Commissioner's Guidelines Part 6 at paragraph [6.38] states:

"A decision maker may consider that disclosure would, or could reasonably be expected to damage the **working relations** of the Commonwealth and one or more States (s 47B(a)) (my emphasis). 'Working relations' encompass all interactions of the Commonwealth and the States¹ from formal Commonwealth-State consultation processes such as the Council of Australian Governments through to any working arrangements between agencies undertaken as part of their day to day functions".

¹ See *Arnold (on behalf of Australians for Animals) v Queensland* (1987) 73 ALR 607.

7.2 Diamond Decision

In the Diamond Decision, the AAT found, relevantly, that:

- a. "...there is no requirement that disclosure would, or could reasonably be expected to cause damage to relations between the Commonwealth and all of the States; one State is sufficient": para 106.
- b. The Commonwealth, NSW and South Australia have identical positions. "Although differently expressed, it is clear from all three that there has been an expectation, as well as a firm arrangement, that data supplied to the Commonwealth by means of ACARA would be received, stored and managed by ACARA according to agreed principles and protocols. The arrangements that South Australia has reached with its schools and stakeholders is dependent upon ACARA's continuing to act in accordance with those principles and protocols. Release of the data would, in South Australia's view, have the potential to result in industrial disputes that could see schools withdrawing from the NAPLAN testing regime": para 108.

7.3 Email Redactions

I find that the Email Redactions are conditionally exempt under s.47B(a) of the FOI Act. I find that:

- a. The Email Redactions contain information on how to override the measures implemented on *My School* to protect the published data. These measures are designed to make it more difficult for members of the public to scrape data from *My School* for the purpose of creating simplistic school league tables.
- b. The Education Council has said 'No' to the publication of simplistic school league tables on at least six (6) occasions (**heading 6.4**), due to the harms that can be caused to schooling communities, teachers, parents and students, and the significant concerns expressed by principals' associations and unions, amongst other stakeholders.
- c. In addition, the Education Council has directed ACARA to provide information on "what action it intends to take in relation to breaches of the *My School* website's terms and conditions" (**heading 6.6**).
- d. Release of the Email Redactions would run contrary to the directions of the Education Council.
- e. As part of its functions, ACARA is required to act in accordance with the directions of the Education Council under s.7(1) of the [Australian Curriculum, Assessment and Reporting Authority Act 2008](#) (Cth) (**ACARA Act**).
- f. Releasing the Email Redactions under FOI would cause ACARA to breach s.7(1) of the ACARA Act.
- g. In these circumstances, adopting the reasoning and findings in the Diamond Decision, it is reasonable to expect that such a breach of s.7(1) of the ACARA Act by ACARA would cause Commonwealth-State relations within the context of the Education Council to suffer as a consequence. This could in turn be expected to undermine the willingness of the Education Council and its members to work cooperatively with the Commonwealth (through ACARA or otherwise) on national education initiatives.

I find that release of the Email Redactions under FOI would fundamentally:

- a. adversely affect the continued level of trust or co-operation in inter-jurisdictional relationships; and
- b. adversely affect the administration of multiple continuing Commonwealth-State projects being managed by ACARA.

I am satisfied that this amounts to damage to Commonwealth-State relations.

8. s.47E(d) of the FOI Act - substantial adverse effect on the proper and efficient conduct of ACARA's operations

8.1 s.47E(d) of the FOI Act

s.47E(d) of the FOI Act states:

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

....

(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency".

The Commissioner's Guidelines Part 6 at paragraph [6.110] notes that the AAT has upheld the exemption where it was established that disclosure of the document could prejudice the agency's ability to perform its statutory functions².

8.2 Diamond Decision

In the Diamond Decision, the AAT concluded that s.47E(d) of the FOI Act applied to conditionally exempt the *My School* database, except for the list of schools. In applying this conditional exemption the Tribunal looked at ACARA's functions under section 6 of the ACARA Act. The AAT explores this conditional exemption at paras [112 – 120] of the Diamond Decision. I rely on this reasoning and it is not necessary for me to cover the same ground.

8.3 Applying Diamond Decision

Relevantly for this matter, ACARA's statutory functions include *"publish information relating to school education, including information relating to comparative school performance"*: s.6(e) of the ACARA Act.

The Education Council is not an advisory body but rather a governing body that ACARA is statutorily obliged to follow: s.7(1) of the ACARA Act.

I find that release of the Email Redactions by ACARA, in contravention of the Education Council's directions, would cause ACARA to breach s.7(1) of the ACARA Act. I find that this would, or could reasonably be expected to:

- a. cause a loss of confidence in ACARA by nine (9) Education Ministers and nine (9) chief executives of education departments;
- b. jeopardise existing trust and goodwill in ACARA;
- c. cause unrest among the nine (9) Education Ministers, the nine (9) departmental chief executives, the Secretariat to the Education Council and the Federal Minister's office;
- d. cause a likely loss of future work, funding and/or other vital support; and
- e. significantly impede ACARA in carrying out its statutory functions, including *"publish information relating to school education, including information relating to comparative school performance"*: s.6(e) of the ACARA Act.

² *Re Telstra Australia Limited and Australian Competition and Consumer Commission* [2000] AATA 71.

I also note the findings of the Tribunal members in the Diamond Decision that *“Release of the data would, in South Australia’s view, have the potential to result in industrial disputes that could see schools withdrawing from the NAPLAN testing regime”*: para 108. It is important that schools do **not** withdraw from the NAPLAN tests. It is critical that ACARA continues to report on the performance of students over time, noting that a key benefit of NAPLAN is to maintain the reporting of long-term trends.

It is my judgment that release of the Email Redactions under FOI would, or could reasonably be expected to, prejudice ACARA’s ability to perform its statutory functions. I am satisfied that this amounts to having a “substantial adverse effect on the proper and efficient conduct of the operations” of ACARA.

9. Public interest

It is my decision that the Email Redactions are conditionally exempt under both of s.47B(a) and s.47E(d) of the FOI Act. S.11A(5) of the FOI Act provides that if a document is conditionally exempt, it must be disclosed ‘unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest’.

I have taken into account the following factors in making my decision:

In favour of disclosure:

Of the four (4) factors favouring disclosure set out in s.11B(3) of the FOI Act, one is clearly not relevant (allow a person to access his or her own personal information). The other three (3) factors are considered below:

- a. promoting the objects of the FOI Act (including all the matters set out in sections 3 and 3A) – There is some public interest in knowing about the Email Redactions;
- b. informing debate on a matter of public importance – In my view, this is covered by the point above; and
- c. promoting effective oversight of public expenditure – the Email Redactions do **not** contain any information in relation to ACARA’s expenditure. I place no weight against this item.

Against disclosure:

The FOI Act does not specify any factors against disclosure. However the Guidelines include a non-exhaustive list of such factors³. Of those factors listed in the Guidelines, the relevant factors for this decision are that disclosure:

- “(h) could reasonably be expected to prejudice an agency’s ability to obtain confidential information”.*

I find that release of the Email Redactions would be:

- a. contrary to the directions of the Education Council; and
- b. contrary to ACARA’s obligation under s.7(1) of the ACARA Act to comply with the directions of the Education Council.

³ Guidelines [6.29].

I find that if ACARA discloses the Email Redactions under FOI, the Education Council would be less likely to share papers and other documents in relation to its decisions, all of which are confidential, and which would be of benefit to ACARA.

The work of ACARA relies on collaboration with a wide range of stakeholders including Commonwealth, State and Territory governments. I consider that the continued cooperation and collaboration of the Commonwealth, States and Territories to further strategic policy and implement policy in relation to school education outweighs the public interest in disclosing the Email Redactions.

“(k) could reasonably be expected to harm the interests of an individual or group of individuals”

The publication of league tables creates a strong risk of harm to schools and students. This has been expressed many times before, including, and not limited to, many of ACARA’s FOI decisions uploaded to the Website.

I refer to the affidavit of Dr Jennifer Anne Donovan, General Manager, Strategic Information and Reporting, within the New South Wales Department of Education and Communities, affirmed on 4 November 2013, who was a witness before the AAT in the Diamond Decision (Dr Donovan’s Affidavit). At paragraph 10 of Dr Donovan’s affidavit, Dr Donovan states:

*“10. The NSW Department supported the concept of My School. However, from the outset it was concerned about the delivery and presentation of data published by My School. We were mindful of the risk of harm to schools and students if My School generated tables ranking schools in particular geographical areas using their aggregated NAPLAN scores (**league tables**), or if it labelled schools or student groups as ‘the worst’ or ‘underperforming’. These concerns were largely informed by the experience of the 1996 Year 12 cohort of Mount Druitt High School, which the Daily Telegraph labelled as the “Class We Failed” in an article published on 8 January 1997”.*

It is clear that league tables are undesirable from a public policy perspective. Releasing the Email Redactions under FOI risks encouraging their creation, or diluting the effectiveness of the counter-measures ACARA has taken and might take in the future.

My finding

For all these reasons, I find that the factors against disclosure outweigh the factors in favour of disclosure. I decide to **not** release the Email Redactions under FOI.

10. Irrelevant material


Section 22(1)(a)(ii) of the FOI Act allows an agency to delete irrelevant material from a document which is only partially relevant to an applicant’s FOI request. I find that the document relevant to your internal review request is part of an email chain containing irrelevant material.

The agreed scope comprises only the email from Steve Croft to Peter Matheson dated 8 February 2016 and sent at 12.23pm. I note your posting of 14 May 2016 on the Website in this regard, agreeing scope. I have redacted the other emails that are part of this email chain. I have noted the redactions in **Attachment 2** and in the released set of documents.

Attachment 2

No.	Pgs	Date	Author	Addressee	Title of document	Decision	Exemption section(s)	Grounds for deleting
1	2	8 February 2016	Steve Croft	Peter Matheson	The internal ACARA email from Steve Croft to Peter Matheson dated 8 February 2016 and sent at 12.23pm and with the subject line "Re: Breach of legal rights – Australian Curriculum, Assessment and Reporting Authority – F11/353-25".	Release in part (document marked to indicate exemption claim)	s.47B(a) and s.47E(d)	Damage relations between the Commonwealth and a State; and Substantial adverse effect on the proper and efficient conduct of the operations of an agency.
2	6	5-8 February 2016	Various	Various	Chain of email correspondence titled "Re: FW: Breach of legal rights – Australian Curriculum, Assessment and Reporting Authority – F11/353-25", excluding document No. 1 noted above	Outside scope and irrelevant to request, as agreed by Applicant (document marked to indicate exemption claim)	s. 22(1)(a)(ii)	Outside scope and irrelevant to request, as agreed by Applicant

Redacted: s. 22(1)(a)(ii) 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,

Redacted : s.47B(a) and s.47E(d) FOI Act

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

Steve

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Redacted: s. 22(1)(a)(ii) FOI Act



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