

Final decision letter

21 August 2013

Our ref: F13/565-5

Red

[Anonymous request made through the right to know website]

By email: foi+request-283-cad7d8de@righttoknow.org.au

Dear Sir/Madam

Your Freedom of Information Request

I refer to your initial email of Friday, 5 July 2013 to the Australian Curriculum, Assessment and Reporting Authority (ACARA) seeking access to documents under the *Freedom of Information Act 1982* (Commonwealth) (FOI Act). I also refer to my initial decision letter to you dated 2 August 2013 and subsequent emails with members of my staff.

1. Your initial request

I note that your initial request of 5 July 2013 sought the following:

"In the Ministerial Council for Education, Early Childhood, Development and Youth Affairs April 2012 Communiqué the following was reported:

'Ministers discussed concerns over practices such as excessive test preparation and the potential narrowing of the curriculum as a result of the publication of NAPLAN data on My School. Ministers requested that ACARA provide the Standing Council with an assessment of these matters.'

See more at: <http://newmatilda.com/2013/07/04/school-testers-deny-naplan-side-effects#sthash.ntTFLV9J.dpufUnder>

FOI

On the basis of this statement, under the provisions of the FOI Act I request copies of all documentation in ACARA's possession that provide information on action taken by ACARA or other bodies/persons in response to this directive, including the assessment provided to the Standing Council".

2. Practical refusal reason

By way of summary, I confirm that:

- I made an initial decision by letter to you dated 2 August 2013 (**Initial Decision**) that a practical refusal reason exists in relation to your initial request, as the work involved in processing your request would

substantially and unreasonably divert the resources of ACARA from its other operations: s24AA(1)(a)(i) of the FOI Act.

- Subsequently, you agreed by email of 6 August 2013 to narrow the scope of your request. I am advised that a revised request has now been agreed (heading [3]). A summary of the key communications is noted under heading [4].

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

3. Revised request

I confirm that your revised request is as follows:

“Accordingly (and the context for this request is identical to the context of the original request), under the provisions of the FOI Act I simplify my request to be a request only for a copy of the assessment provided to the Standing Council by ACARA as a result of the directive by the Ministers to provide such an assessment” (**Revised Request**).

As noted in my Initial Decision, the document that you are requesting is the paper that ACARA presented the Standing Council on School Education and Early Childhood (**Standing Council**) dated May 2013 headed “Statement on unintended impacts as a result of uses of NAPLAN data” (**Standing Council Paper**).

4. Correspondence since your request

I note that there has been a number of communications between you and various ACARA staff in relation to your request. I summarise the relevant communications in the table below.

Date of letter or email	To/From	Summary of content
5 July 2013	An email from you to ACARA	Your FOI request
19 July 2013	An email from Peter Verey to you	Attaching my acknowledgement letter to you
2 August 2013	An email from Peter Matheson to you	Attaching my Initial Decision letter
6 August 2013	An email from you to Peter Matheson	Requesting reduced scope
12 Aug 2013	An email from Peter Matheson to you	Requesting additional time to provide final decision letter

5. My decision

I have identified one (1) document relevant to your Revised Request. I have decided to **wholly exempt** this document from disclosure. My reasons for decision are set out at **Attachment 1**. I provide details of this document at **Attachment 2**.

6. 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 documents. 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).

Under sub-section 29(4) of the FOI Act I have the discretion to reduce or not impose a charge. In relation to this request, I have decided **not** to impose a charge.

7. Internal Review

If you are dissatisfied with this decision, you have certain rights of review available to you. Under section 54 of the FOI Act, you may apply for an internal review of the decision. You must apply in writing for an internal review of the decision within 30 days of receiving this notice. There is no fee to make a request for an internal review.

If you make an application for internal review, it will be conducted by another officer of ACARA. That person will make a fresh decision on the merits of the case. 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 review of the decision should be addressed to:

Mr Peter Matheson
Board Secretary
ACARA
Level 10, 255 Pitt Street
Sydney NSW 2000

8. Review by Information Commissioner

Alternatively, you have the option of seeking a review by the Information Commissioner. For more information on this review, please refer to FOI Fact Sheet 12, authorised by the Office of the Australian Information Commissioner (<http://www.oaic.gov.au/freedom-of-information/foi-resources/freedom-of-information-fact-sheets/foi-factsheet-12-your-review-rights>).

9. Complaints to the Commonwealth Ombudsman or Information Commissioner

You may complain to either the Commonwealth Ombudsman or the Australian Information Commissioner about action taken by ACARA in relation to your request. The Ombudsman will consult with the Information Commissioner before investigating a complaint about the handling of an FOI request.

Your enquiries to the Ombudsman can be directed to:

Phone: 1300 362 072 (Not a toll-free number).

Email: ombudsman@ombudsman.gov.au

Webform: <https://forms.business.gov.au/aba/ombudsman/ombudsman-complaint-form->

Your enquiries to the Information Commissioner can be directed to:

Phone: 1300 363 992 (local call charge)

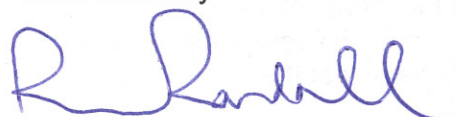
Email: enquiries@oaic.gov.au

FOI complaint form: <https://forms.business.gov.au/aba/oaic/foi-complaint-/>

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 phone: (61 2) 8098 3116.

Yours sincerely



Robert Randall
Chief Executive Officer

Attachment 1 – Reasons for Decision

1. Material taken into account

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

- The terms of your Revised Request;
- The document to which you sought access;
- Relevant provisions of the FOI Act;
- Advice from ACARA staff with responsibility for matters relating to the document to which you sought access;
- Comments from the Standing Council Secretariat; and
- The Australian Information Commissioner's guidelines on FOI, version 1.2, March 2013, Part 6 - <http://www.oaic.gov.au/freedom-of-information/applying-the-foi-act/foi-guidelines/part-6-conditional-exemptions> - (**Commissioner's Guidelines**).

2. My Decision

I have identified one (1) document relevant to your Revised Request. I have decided to **wholly exempt** this document from disclosure. My reasons for decision are set out below. I provide details of this document at **Attachment 2**.

3. Contextual Information

3.1 Standing Council request

As noted in your initial request, the Standing Council, at its meeting on 20 April 2012, requested that ACARA provide the Standing Council with an assessment regarding concerns:

“over practices such as excessive test preparation and the potential narrowing of the curriculum as a result of the publication of NAPLAN data on *My School*”.

The relevant Standing Council communique can be found at:

http://www.mceecdya.edu.au/verve/resources/SCSEEC_20_APRIL_communique.pdf

ACARA presented the Standing Council with the Standing Council Paper out-of-session in May 2013. This paper was the culmination of work which commenced after the April 2012 Standing Council meeting.

3.2 Senate inquiry

On 15 May 2013 the Senate referred the following matter to the Senate Education, Employment and Workplace Relations Committee (**Senate Committee**) for inquiry and report:

“The effectiveness of the National Assessment Program - Literacy and Numeracy (NAPLAN), with specific reference to:

- a) whether the evidence suggests that NAPLAN is achieving its stated objectives;
- b) unintended consequences of NAPLAN's introduction;
- c) NAPLAN's impact on teaching and student learning practices;
- d) the impact on teaching and student learning practices of publishing NAPLAN test results on the *My School* website;
- e) potential improvements to the program, to improve student learning and assessment;
- f) international best practice for standardised testing, and international case studies about the introduction of standardised testing; and
- g) other relevant matters”.

On 27 June 2013, the Senate Committee tabled its interim report (http://www.aph.gov.au/parliamentary_business/committees/senate_committees?url=eet_ctte/naplan_2013/index.htm) (**Senate Committee Interim Report**).

Following the federal election on 7 September 2013, it may be that the Senate re-adopts this inquiry in the next Parliament.

3.3 School funding review

As at the date of my decision, the Australian Government's *National Education Reform Agreement* has formally been signed by some, but not all, States and Territories.

4. No consultation with the States under section 26A of the FOI Act

I note in passing that, in making my decision, I have not formally consulted with the States under section 26A of the FOI Act. I am informed by my staff that one of the pre-conditions for the operation of this section is not satisfied. That is, the Standing Council Paper does **not** contain any sufficiently identifiable information originating with, or received from, a State or an authority of a State.

5. FOI Exemption – section 47B(a) – Damage to relations between the Commonwealth and a State

5.1 FOI Act and Commissioner's Guidelines

Section 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 at paragraphs [6.38 to 6.40] state:

“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-

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

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.

Disclosure of the document may cause damage by, for example:

- interrupting or creating difficulty in negotiations or discussions that are underway, including in the development of joint or parallel policy²
- adversely affecting the administration of a continuing Commonwealth-State project
- substantially impairing (but not merely modifying) Commonwealth-State programs³
- adversely affecting the continued level of trust or co-operation in existing inter-office relationships⁴
- impairing or prejudicing the flow of information to and from the Commonwealth.⁵

Decision makers may also need to consider future working relationships where disclosure may, for example [relevantly]:

- impair or prejudice the future flow of information
- [point not relevant]
- adversely affect the development of future Commonwealth-State projects”.

5.2 Damage to working relations

The Standing Council is a forum in which Commonwealth, State and Territory Education Ministers come together in an environment of mutual trust and confidence to work through issues that can further significant education and early childhood development reform in Australia. Trust is a crucial element in this forum. Membership of the Standing Council includes State, Territory, Australian Government and New Zealand Ministers with portfolio responsibilities in either: school education, early childhood development, and/or youth affairs, as nominated by their respective First Ministers, with Papua New Guinea, Norfolk Island and East Timor being formally invited to be observers at the Standing Council.

It is my decision that disclosure of the Standing Council Paper, would, or could reasonably be expected to, damage **current** working relations between the Commonwealth and a State in the following ways:

1.	Interrupting or creating difficulty in negotiations or discussions that are underway, including in the development of joint or parallel policy	There are ongoing discussions in the Standing Council regarding the National Assessment Program – Literacy and Numeracy (NAPLAN). These discussions are informed by: <ul style="list-style-type: none"> • the Standing Council Paper; and • the Senate Committee Interim Report.
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² See *Arnold (on behalf of Australians for Animals) v Queensland* (1987) 73 ALR 607.

³ See *Re Cosco Holdings Pty Limited and Department of Treasury* [1998] AATA 124

⁴ See *Arnold (on behalf of Australians for Animals) v Queensland* (1987) 73 ALR 607.

⁵ See *Re Shopping Centre Council and Australian Competition and Consumer Commission* [2004] AATA 119.

		<p>As an example of matters that may be under discussion, the Standing Council request to ACARA was focussed on reporting NAPLAN data on <i>My School</i>. This point was also canvassed in the Senate Committee Interim Report at page 11: "...strong criticism was reserved for the publication of individual school data on the <i>My School</i> website".</p> <p>These discussions will no doubt continue after the federal election, with a view to negotiating an agreed policy position. Disclosing the Standing Council Paper could reasonably be expected to create difficulty in settling this position, particularly as both sides of politics are represented in the governing parties of the States and Territories. The recent school funding negotiations illustrates the difficulties involved in reaching a joint policy position in a federal system.</p>
2.	Adversely affecting the administration of a continuing Commonwealth-State project	<p>NAPLAN is a joint Commonwealth-State project. ACARA relies on the continued agreement from each State and Territory to administer NAPLAN. The States and Territories are responsible for administering the tests, marking the tests and providing the results of the tests to ACARA. In addition, to be fully effective as a national testing program, ACARA relies on agreements made with the Catholic and Independent school sectors.</p> <p>In light of the points made in [1] above, disclosing the Standing Council Paper could reasonably be expected to impede the flow of NAPLAN-related information from the States and Territories to ACARA, particularly around sensitive test incident information. This would adversely affect the administration of this continuing Commonwealth-State project, as ACARA is responsible for the central management of NAPLAN, including drafting and publishing a public report on NAPLAN test incidents for each year of NAPLAN.</p>
3.	Substantially impairing a Commonwealth-State program	For the same reasons as set out in point [2] above.
4.	Adversely affecting the continued level of trust or co-operation in existing inter-office relationships	Half of ACARA's core funding is provided by the Federal government and the balance from the States and Territories. The Standing Council makes policy decisions affecting ACARA's work program and ACARA implements those decisions. It is essential to ACARA's work that the level of trust and co-operation between ACARA and the Standing Council is maintained, as well as between members of the Standing Council. If ACARA disclosed this document this would adversely affect the level of trust and co-operation between the Standing

		Council and ACARA and between members of the Standing Council.
5.	Impairing or prejudicing the flow of information to and from the Commonwealth	If the trust is eroded, as set out in point [4] above, then this could affect the flow of NAPLAN-related information and other information provided from the States to the Commonwealth and from the Commonwealth to ACARA.

In addition, it is my decision that disclosure of the Standing Council Paper would, or could reasonably be expected to, damage **future** working relations between the Commonwealth and a State in the following ways:

6.	Impair or prejudice the future flow of information	For similar reasons to those set out under point [5] above.
7.	Adversely affect the development of future Commonwealth-State projects	ACARA's forward work plan includes: <ul style="list-style-type: none"> • initial research informing the move to implement NAPLAN online; and • the preparation of papers modelling the future development of the National Assessment Program. Both these projects could be adversely affected by the disclosure of the Standing Council Paper.

5.3 Recent decision of the Freedom of Information Commissioner – Dr Diamond

I have read the recent decision by the Freedom of Information Commissioner (**Commissioner**) in *Diamond and Australian Curriculum, Assessment and Reporting Authority* [2013] AICmr 57 (22 May 2013). This decision relates to data (including school NAPLAN data) published on the *My School* website (a public website). The Commissioner decided that “the documents sought are exempt except for the list of schools for which results were reported on *My School* in each of 2008, 2009 and 2010” [para 60].

Relevantly, the Commissioner based his decision on section 47B(a) of the FOI Act. In his reaching his decision, the Commissioner decided that disclosure would cause damage to working relations between the Commonwealth and the States in the ways listed at points [2 to 5] in the table under heading [5.2].

The Diamond decision relates to data which has already been made publicly available, albeit in a restricted way. The damage to Commonwealth-State working relations was evidenced by the fact that disclosure would breach protocols agreed by all members of the Standing Council. As further evidence to support this view, ten affected parties applied, under s55A(2) of the FOI Act, to be joined as review parties. All 10 – the Department of Education, Employment and Workplace Relations, the education departments of five (5) states and both Territories, the Independent Schools Council of Australia and the National Catholic Education Commission – were joined as review parties under section 55A(3) of the FOI Act.

Following the decision of the Commissioner, it is my decision that section 47B(a) of the FOI Act clearly applies in this matter, as the Standing Council paper has never been made public, and disclosure would negatively impact ongoing discussions regarding the future of NAPLAN and the continued administration of the NAPLAN tests. My decision is:

- consistent with the decision of the Commissioner in the Diamond matter; and
- relates to a document which quite clearly would, or could reasonably be expected to, damage working relations between the Commonwealth and a State.

6. Public interest

It is my decision that the Standing Council Paper is conditionally exempt under section 47B(a) of the FOI Act. Section 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 factors favouring disclosure set out in section 11B(3), three (3) are relevant to this decision:

- a. promoting the objects of the FOI Act;
- b. informing debate on a matter of public importance; and
- c. promoting effective oversight of public expenditure.

Against disclosure:

The FOI Act does not specify any factors against disclosure. However the Guidelines include a non-exhaustive list of such factors⁶. Of those factors listed in the Guidelines, the ones relevant to this decision are that disclosure:

- a. could reasonably be expected to prejudice an agency's ability to obtain confidential information;
- b. could reasonably be expected to prejudice an agency's ability to obtain similar information in the future; and
- c. could reasonably be expected to prejudice the effectiveness of testing or auditing procedures.

If the conditional exempt document is disclosed, this will undermine ACARA's relationships with its key stakeholders, and put its working relations with the Standing Council at risk. If the conditional exempt document is disclosed, there is a real risk that ACARA is unlikely to obtain:

⁶ Guidelines [6.29].

- future confidential information from the Standing Council; and
- future Standing Council papers presented by other educational bodies.

In addition, if the conditional exempt document is disclosed, there is a real risk that this could prejudice the effectiveness of NAPLAN, particularly in light of the Senate Committee Interim Report and the uncertainty of what will happen with this inquiry following the federal election on 7 September 2013.

In weighing the public interest, I decide that the continued cooperation of the Standing Council in providing support to ACARA and making policy decisions critical to enabling ACARA to deliver on its forward work plan outweighs the public interest in the document being provided.

Attachment 2

Doc No.	Date	Title of document	Authored by	Pages	Decision	Exempt parts	Exemption section	Grounds for deleting
1.	May 2013	"Statement on unintended impacts as a result of uses of NAPLAN data"	ACARA	16	Exempt in full	Entire document	s.47B(a)	Damage to Commonwealth/State relations