

Administrative Access Response

26 February 2015

Our ref: F13/567-3

Dr Mark R Diamond

Right to Know website:

[https://www.righttoknow.org.au/request/copyright in my school website c](https://www.righttoknow.org.au/request/copyright%20in%20my%20school%20website%20c)

Your Request

I refer to your two (2) postings on the Right to Know website (both posted on 6 February 2015) to the Australian Curriculum, Assessment and Reporting Authority (ACARA), which ACARA received on the same date, seeking access to documents either under ACARA's administrative access arrangements or under the *Freedom of Information Act 1982* (Commonwealth) (FOI Act).

1. Your request

I confirm that your amended request, as it currently stands, is for:

"In an article titled "My School warned off Copyright" in The Australian newspaper of 1 August 2011, Justine Ferrari (the national education correspondent) wrote: "The agency behind the My School website has conceded legal action to prevent the media publishing league tables ranking schools is likely to fail. Legal advice provided to the Australian Curriculum Assessment and Reporting Authority says the grounds for suing media organisations for breaching copyright are tenuous. In a briefing to education ministers, ACARA says it does not have sufficient grounds to take legal action against any newspaper at this stage, ..."

Request

My request is for documents relating to the copyright issue described in that newspaper article.

I am most interested in any document or documents that might show the current ACARA position with regard to copyright, whether that position is the same as the one about which education ministers were allegedly briefed, or a more recently adopted position. I am also interested in the legal reasons for adopting that position. I'm NOT interested here in the more general issue of the Terms of Use of the website.

Naturally I am not seeking a copy of the actual legal advice but I might seek a copy of a document that contains a brief summary of the legal position to either education ministers or board members. Alternatively, it might be obvious how The Australian obtained the information in the article, and to seek a copy of any relevant document to which they obtained access.

While I anticipate that there is likely to be a specific series of ACARA files relating to copyright and the MySchool website, I am unsure how to frame my request to keep search and retrieval time, and ultimately the decision time, within manageable bounds.

Would it be helpful, for example, to frame it in terms of keywords or words that a document must contain (useful if ACARA uses a system like TRIM but potentially useless otherwise)? And would that be sufficient with a time range from 2010 to now, or would it still be too expansive.

If it is convenient for you to do so, please treat this as a request for access under administrative arrangements, at least until we can sort out how I should frame the request better! With that in mind, I would appreciate any advice you can offer. If you feel that it is necessary to treat this as a formal request under the FOI Act from the start, please do so”.

2. Administrative access

I have decided to treat your request under administrative arrangements, rather than under FOI. This will enable me to provide you with some information that you would otherwise not obtain under FOI. I hope that you find this approach helpful.

3. Interpretation of your request

Your request is broad, and can be interpreted in a number of ways, including, for example:

- any documents (excluding legal advice) which demonstrate a change in position from the one outlined in the article published in *The Australian*;
- any documents (excluding legal advice) which demonstrate ACARA’s position generally regarding copyright in relation to the publication by others of detailed tables ranking schools; or
- any documents (excluding legal advice) which summarise ACARA’s causes of action in relation to the publication by others of detailed tables ranking schools.

I note that the article published in *The Australian* is concerned with media outlets. It is also unclear whether your request is limited to media outlets or whether it concerns other commercial enterprises. This is important because exemptions apply under various laws to organisations which report the news.

4. ACARA’s position regarding school league tables

As you are aware, 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.

As you might be aware, the Standing Council on School Education and Early Childhood (**SCSEEC**), now the Education Council, has expressed its opposition to simplistic school league tables on at least six (6) different occasions. 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.

Under sub-section 7(1) of the Australian Curriculum, Assessment and Reporting Authority Act (**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 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 SCSEEC (now Education Council).

5. The Australian article

I make two (2) comments in relation to the article that you refer to in *The Australian* (<http://www.theaustralian.com.au/national-affairs/my-school-site-warned-off-suing-media/story-fn59niix-1226105578220>):

- it focusses on media organisations; and
- it focusses on copyright.

Under various Australian laws, media organisations have exemptions for, broadly, the reporting of news. For example, in the Copyright Act 1968 (Cth) a fair dealing for literary work (such as a database compilation) does **not** constitute an infringement of copyright if, broadly, it is for the purpose of reporting the news. Similarly, there is a specific exemption from liability under the Australian Consumer Law which would appear to apply to media outlets in their publication of league tables.

6. Commercial organisations

ACARA has successfully shut down various commercial operators who have, in the past, published school league tables. In some instances ACARA has relied, in part, on the *My School* terms of use, which contractually prevent the use of *My School* data by commercial outlets to publish league tables. In other instances, ACARA has relied on other legal grounds, including the Copyright Act 1968 (Cth) and the Australian Consumer Law. ACARA will continue to evaluate, on a case by case basis, instances where third parties publish league tables based on NAPLAN data, and take action as appropriate to support the Education Council's policy position against league tables.

7. FOI request

If you would like to formalise an FOI request, you will need to be more specific by specifying a category of documents that you seek access to.

8. Contact

If you require clarification of any of the matters discussed in this letter, or have any queries, please contact Peter Matheson, Board Secretary, by email peter.matheson@acara.edu.au or phone 02 8098 3116.

Yours sincerely



Robyn Ziino
Director of Communications and Strategic Relations, ACARA