

## FOI DECISION LETTER

4A May 2015

F13/567-11

Dr Mark R Diamond

**Right to Know website:**

[https://www.righttoknow.org.au/request/copyright in my school website c#outgoing-2278](https://www.righttoknow.org.au/request/copyright%20in%20my%20school%20website%20c%20outgoing-2278)

Dear Dr Diamond

### Your FOI request

I refer to your to your posting on the Right to Know website on 2 April 2015 to the Australian Curriculum, Assessment and Reporting Authority (**ACARA**), which ACARA received on the same date, seeking access to documents under the Freedom of Information Act 1982 (Commonwealth) (**FOI Act**) and our subsequent correspondence.

#### 1. Your FOI request

I note that your request is, relevantly, as follows:

“(a) the legal advice from the Australian Government Solicitor to ACARA dated 28 April 2011, and (b) an ACARA paper to the Standing Council for School Education and Early Childhood dated 8 July 2011.”

#### 2. Correspondence prior to your FOI request

I note that there has been correspondence between us prior to your current FOI request, all of which has been uploaded to the Right to Know website. For the sake of completeness, I summarise the relevant correspondence in the table below.

Date of posting/letter	To/From	Summary of content
6 February 2015	Your two (2) postings on the Right to Know website	A broad request for documents
26 February 2015	My administrative access decision	Providing information
5 March 2015	Your one (1) posting on the Right to Know website	A broad request for documents
1 April 2015	My administrative access decision	Suggesting ways in which the scope of your request can be narrowed

#### 3. Correspondence relating to your FOI request

I note that there has been correspondence between us in relation to your current FOI request, all of which has been uploaded to the Right to Know website. For the sake of completeness, I summarise the relevant correspondence in the table below.

Date of letter or email	To/From	Summary of content
2 April 2015	Your posting on the Right to Know website	Your FOI request
10 April 2015	My acknowledgement letter	Acknowledging your FOI request

#### 4. My decision

I have identified two (2) documents relevant to your request, being (a) the legal advice from the Australian Government Solicitor to ACARA dated 28 April 2011 and (b) a paper to the Standing Council for School Education and Early Childhood dated 8 July 2011 titled "ACARA advice on action to prevent the publication of league tables" (**Documents**). I have decided to **wholly exempt** the Documents from disclosure. My reasons for decision are at **Attachment 1** and document details are at **Attachment 2**.

#### 5. 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.

#### 6. 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 Peter Matheson. Peter's contact details are set out under **heading [9]** below.

#### 7. Review by Information Commissioner

Alternatively you have the option of seeking a review by the Information Commissioner. For more information, 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>).

#### 8. Complaints to the Commonwealth Ombudsman

As a result of recent administrative changes, you may complain only to the Commonwealth Ombudsman about action taken by ACARA in relation to your request. Details of this change can be found on the home page of the website for the Commonwealth Ombudsman (<http://www.ombudsman.gov.au/>). You can find the contact details for the Commonwealth

Ombudsman, including how to lodge a complaint, at  
(<http://www.ombudsman.gov.au/pages/contact-us/>).

## 9. 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](mailto:peter.matheson@acara.edu.au) or by phone: (61 2) 8098 3116.

Yours sincerely



**Robyn Ziino**  
Director of Communications and Strategic Relations, ACARA

## Attachment 1

### Summary of reasons for my decision

In summary, the reasons for my decision are:

a. **Sub-section 47B(a) of the FOI Act** – The Documents are conditionally exempt under sub-section 47B(a) of the FOI Act (Commonwealth/State relations). In my view, the Documents were:

- 1) drafted in response to a direction by the Education Council, who was concerned with media publishing simplistic league tables in March 2011;
- 2) used to provide advice to the Education Council (nine Ministers) to inform ongoing discussions concerning an issue of particular concern; and
- 3) created on the understanding that they would not be published.

I find that release of the Documents under FOI would fundamentally:

- 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. **Sub-section 47E(d) of the FOI Act** – The Documents are also conditionally exempt under sub-section 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 Documents by ACARA outside the agreed Education Council’s Operating Protocols would reasonably likely lead to a loss of confidence in ACARA by nine (9) Education Ministers and nine (9) Heads of Department, which could reasonably be expected to result in ACARA being significantly impeded in carrying out its statutory functions.

c. **Public interest** – There is clearly some public interest in knowing about the Documents in relation to discussions that were occurring during 2011 in the Education Council regarding simplistic league tables published by the media. However, in weighing the public interest, I consider that the continued cooperation and collaboration of the Commonwealth, States and Territories to further strategic policy in relation to school education outweighs the public interest in disclosing the Documents.

d. **Section 42 of the FOI Act (legal professional privilege)** – I find that the legal advice from the Australian Government Solicitor to ACARA dated 28 April 2011 (**Legal Advice**) is also exempt under section 42 of the FOI Act (legal professional privilege). I note that, apparently, someone leaked the paper to the Standing Council for School Education and Early Childhood dated 8 July 2011 titled “ACARA advice on action to prevent the publication of league tables” (**Education Council Paper**) to *The Australian*, which published an article on 1 August 2011 (<http://www.theaustralian.com.au/national-affairs/my-school-site-warned-off-suing-media/story-fn59niix-1226105578220>). The Education Council Paper does not directly quote from the Legal Advice, and only summarises the conclusions of the Legal Advice. I find that the unauthorised disclosure of the Education Council Paper did **not** amount to ACARA waiving privilege over the Legal Advice nor did it enable the Legal Advice (as opposed to a summary of a few paragraphs) to come into the public domain.



## Reasons for my decision

### 1. Material taken into account

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

- the terms of your 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 1.3, September 2013, Part 5 <http://www.oaic.gov.au/freedom-of-information/applying-the-foi-act/foi-guidelines/part-5-exemptions>; and
- the Commissioner's Guidelines, version 1.2, March 2013, Part 6 [http://www.oaic.gov.au/images/documents/freedom-of-information/applying-the-foi-act/foi-guidelines/part6\\_conditional\\_exemptions\\_v1-2.pdf](http://www.oaic.gov.au/images/documents/freedom-of-information/applying-the-foi-act/foi-guidelines/part6_conditional_exemptions_v1-2.pdf).

### 2. My Decision

I have identified two (2) documents relevant to your request, being (a) the legal advice from the Australian Government Solicitor to ACARA dated 28 April 2011 and (b) a paper to the Standing Council for School Education and Early Childhood dated 8 July 2011 titled "ACARA advice on action to prevent the publication of league tables" (**Documents**). I have decided to **wholly exempt** the Documents from disclosure. My reasons for decision are set out below and document details are at **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 <http://www.austlii.edu.au/au/cases/cth/aat/2014/707.html> (**Diamond Decision**). In my view, the Documents concern the same issue as in the Diamond Decision (simplistic league tables). In this case it is not about the *My School* database. Instead, it is about a paper (and the supporting legal advice) that the Education Council directed ACARA to provide to assist it in determining what action should be taken as a result of media outlets publishing league tables. However, 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, also arise 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 league tables is important to us and our stakeholders, for good reason. Many of those reasons were canvassed in the Diamond Decision. I have set out my general position in my earlier administrative access decision to you dated 26 February 2015 and uploaded to the Right to Know website at ([https://www.righttoknow.org.au/request/copyright\\_in\\_my\\_school\\_website\\_c#incoming-3480](https://www.righttoknow.org.au/request/copyright_in_my_school_website_c#incoming-3480)).

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 [**sub-heading 5.4**]. 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.

Under sub-section 7(1) of the Australian Curriculum, Assessment and Reporting Authority Act 2008 (**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 Standing Council (now Education Council).

#### **5. Contextual factors**

##### **5.1 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.

##### **5.2 What is a simplistic league table**

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.

##### **5.3 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.

#### 5.4 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>  ( <a href="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">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</a> )	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	<u>Principles and protocols for reporting on schooling in Australia</u> ,  ( <a href="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">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</a> )	<u>Education Council document</u> .  <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:

Item No.	Date	Document and T doc No.	Comments
			<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  ( <a href="http://www.scseec.edu.au/site/DefaultSite/filesystem/documents/Communique%20and%20Media%20Releases/Previous%20Council%20info%20statements/MCEECDYA%20meeting%20info%20statements/C12_Communique.pdf">http://www.scseec.edu.au/site/DefaultSite/filesystem/documents/Communique%20and%20Media%20Releases/Previous%20Council%20info%20statements/MCEECDYA%20meeting%20info%20statements/C12_Communique.pdf</a> )	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  ( <a href="http://www.acara.edu.au/verve/resources/D12_1573_ACARA_Data_Access_Protocols_2012.pdf">http://www.acara.edu.au/verve/resources/D12_1573_ACARA_Data_Access_Protocols_2012.pdf</a> )	<b>Endorsed out of session by the Education Council in Feb 2012, Para 36:</b>  <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>
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>



## 5.5 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) ( <a href="http://www.myschool.edu.au/">http://www.myschool.edu.au/</a> )
March 2011	Media published tables of school comparisons (simplistic league tables) based on 2010 NAPLAN data published on <i>My School</i>

## 5.6 April 2011 direction provided by the Education Council 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 the affidavit of Robert William Randall, Chief Executive Officer, ACARA, dated 4 November 2013, at para 24. Mr Randall was a witness before the AAT in the Diamond Decision.

Under sub-section 7(1) of the 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”.

## 5.7 Requested Documents

The Documents were created in response to a written direction from the Education Council to ACARA as a result of media publication of simplistic league tables. In order to inform the paper to the Education Council, legal advice was obtained from the Australian Government Solicitor. The legal advice is dated 28 April 2011, which is after the relevant Education Council meeting held on 15 April 2011. I find that the advice was commissioned by ACARA to inform its advice to the Education Council.

## 6. Sub-section 47B(a) – Commonwealth/State relations

### 6.1 Section 47B(a) of the FOI Act

Sub-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 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

States<sup>1</sup> 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”.

## 6.2 **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.

## 6.3 **Education Council deliberations are confidential**

The Documents were created to inform ongoing discussions within the Education Council regarding various media outlets who published league tables and, more broadly, strategies for countering this including possible changes to the *My School* website. I find that release of the Documents could reasonably be expected to cause damage to relations between the Commonwealth and a State as they were prepared on an assumption of confidence and ongoing discussions. This is reinforced by the Education Council’s Operating Protocols – October 2012

<http://www.scseec.edu.au/site/DefaultSite/filesystem/documents/PDF/SCSEEC%20Operating%20Protocols%20Final.pdf>) at para [5.7] ‘documents prepared for the SCSEEC

(Education Council) should be treated as confidential, unless otherwise agreed by the Council or senior officials, and only distributed on a strict need to know basis’. Both Documents were prepared for the Education Council, in response to a direction by the Education Council to ACARA. Unless otherwise agreed, the Education Council and ACARA would be required to treat the Documents as confidential. If ACARA were to release the documents unilaterally, this would fundamentally undermine the operating protocol of the Education Council. It is reasonable to expect that Commonwealth-State relations within the work of the Education Council would suffer as a consequence if ACARA breached protocols around confidentiality. This could be expected to undermine the willingness of the Education Council and its members to work cooperatively (through ACARA or otherwise) on national education initiatives.

It is my judgement that release of the Documents under FOI would, fundamentally:

- 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.

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

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

## **7. Sub-section 47E(d) of the FOI Act - substantial adverse effect on the proper and efficient conduct of ACARA's operations**

### **7.1 Sub-section 47E(d) of the FOI Act**

Sub-section 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 functions<sup>2</sup>.

### **7.2 Diamond Decision**

In the Diamond Decision, the AAT concluded that sub-section 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.

### **7.3 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*": sub-section 6(e) of the ACARA Act.

#### **Education Council's Operating Protocols**

The Documents were created as a result of a direction by the Education Council. The Education Council is not an advisory body but rather a governing body that ACARA is statutorily obliged to follow: sub-section 7(1) of the ACARA Act. The Education Council's Operating Protocols – October 2012 (<http://www.scseec.edu.au/site/DefaultSite/filesystem/documents/PDF/SCSEEC%20Operating%20Protocols%20Final.pdf>) at para [5.7] require the "documents prepared for the SCSEEC (Education Council) should be treated as confidential". In my view, release of the Documents by ACARA outside the agreed Education Council's Operating Protocols would reasonably likely lead to:

- 1) a loss of confidence in ACARA;
- 2) unrest among the nine (9) Education Ministers, the nine (9) Heads of Department, the Secretariat to the Education Council and the Federal Minister's office;
- 3) a likely loss of future work;
- 4) further losses in funding and other vital support; and

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

- 5) ACARA being significantly impeded in carrying out its statutory functions, including “publish information relating to school education, including information relating to comparative school performance”: sub-section 6(e) of the ACARA Act.

#### NAPLAN online

In addition, on 31 October 2014, the Education Council agreed that NAPLAN online will be implemented from 2017 on an opt-in basis over two to three years (**Education Council Decision**)

(<http://www.scseec.edu.au/site/DefaultSite/filesystem/documents/Communiques%20and%20Media%20Releases/2014%20Communiques/Education%20Council%2031%20October%20Communique.pdf>).

ACARA is in discussion with its funding partners about additional resources for its online assessment work, including question development in 2015/16 and beyond. ACARA does not expect to receive additional funding in the current financial year or the subsequent one, given the current fiscal environment. No funding decision has been made.

Under section 6 of the ACARA Act, ACARA’s functions include, relevantly: “develop and administer national assessments”: sub-section 6(b) of the ACARA Act. I find that delivery of NAPLAN online is part of this statutory function.

If ACARA were required to disclose the Documents under FOI, ACARA would be placed in a very difficult position, as it would breach the Education Council protocols, jeopardising trust and goodwill in ACARA, at a critical time when ACARA is in discussions with its funding partners regarding the move to NAPLAN online.

#### Proliferation of league tables

I also note that the Documents focus on a number of matters, primarily in relation to media organisations, as it was the publication of league tables by the media that led to the direction from the Education Council to ACARA in April 2011. The Legal Advice also focusses primarily on copyright. I am concerned that release of the Documents by ACARA may facilitate the proliferation of league tables (including by companies purporting to be media companies) by indicating:

- what measures ACARA has adopted in relation to the *My School* website to minimise the creation of league tables; and
- the exemptions available to media organisations under various Australian laws.

Any proliferation of league tables would run counter to the position taken by the Education Council [**sub-heading 5.4**]. This would reasonably likely lead to a loss of confidence in ACARA and all the other impacts noted in the second paragraph under this sub-heading.

#### My findings

For all these reasons, it is my judgment that release of the Documents under FOI would 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.

## 8. Public interest

It is my decision that the Documents are conditionally exempt under both of sub-sections 47B(a) and 47E(d) of the FOI Act. Sub-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 four (4) factors favouring disclosure set out in sub-section 11B(3) of the FOI Act, one is clearly not relevant (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 clearly some public interest in knowing about these Documents in relation to discussions that were occurring during 2011 in the Education Council regarding simplistic league tables published by the media;
- 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 Documents 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 factors<sup>3</sup>. Of those factors listed in the Guidelines, relevant factors for this decision is that disclosure:

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

In this case, I find that if ACARA discloses the Documents under FOI, the Education Council is unlikely 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 in relation to school education outweighs the public interest in disclosing the Documents.

*“(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 in 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

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<sup>3</sup> Guidelines [6.29].



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 Documents under FOI risks encouraging their creation, for the reasons outlined under [**sub-heading 7.3**], or diluting the effectiveness of the counter-measures ACARA has taken and might take in the future,

### **Education Council Paper apparently leaked to media outlet**

I note that, apparently, someone leaked the Education Council Paper to *The Australian*, which published an article on 1 August 2011 (<http://www.theaustralian.com.au/national-affairs/my-school-site-warned-off-suing-media/story-fn59niix-1226105578220>). In my analysis, I do not place much weight on the fact that the Education Council Paper was apparently leaked to a media outlet at one time. The Federal Court of Australia has ruled that an unauthorised leak of information does not necessarily prejudice any exemption claimed: *Ascic v Australian Federal Police* [1986] FCA 260 at [12].

### **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 Documents under FOI.

## **9. Section 42 of the FOI Act (legal professional privilege)**

### **9.1 Commissioner's Guidelines, version 1.3, September 2013, Part 5**

I refer to the Commissioner's Guidelines, version 1.3, September 2013, Part 5 (**Commissioner's Guidelines**). In relation to legal professional privilege, the Commissioner's Guidelines provide (relevantly) as follows:

*"The FOI Act does not define LPP for the purposes of the exemption. To determine the application of this exemption, the decision maker needs to turn to common law concepts of privilege....It is important that each aspect discussed below be addressed in the decision maker's statement of reasons": para 5.116.*

*"At common law, determining whether a communication is privileged requires a consideration of:*

- *whether there is a legal adviser-client relationship;*
- *whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation;*
- *whether the advice given is independent;*

- *whether the advice given is confidential*”: para 5.118.

## 9.2 Legal adviser-client relationship

The Commissioner’s Guidelines provide (relevantly) as follows:

*“A legal adviser-client relationship exists where a client retains the services of a solicitor (or barrister) for the purposes of obtaining professional advice. The existence of the relationship is usually straightforward to establish where advice is received from an independent external legal adviser. A typical example in a government context is advice received by an agency from a law firm that is on an authorised list of panel firms (including the Australian Government Solicitor)”*: para 5.119.

I note that the legal advice in this case is from the Australian Government Solicitor. I find that this point is established.

## 9.3 Communication was for the purpose of giving or receiving legal advice

The Commissioner’s Guidelines provide (relevantly) as follows:

*“The High Court has confirmed that the common law requires a dominant purpose test rather than a sole purpose test<sup>4</sup>. The communication may have been brought into existence for more than one purpose but will be privileged if the main purpose of its creation was for giving or receiving legal advice or for use in actual or anticipated litigation”*: par 5.124.

The Legal Advice was drafted in response to a written direction from the Education Council to ACARA as a result of media publication of simplistic league tables. In order to inform the paper to the Education Council, legal advice was obtained from the Australian Government Solicitor. I find that this point is established.

## 9.4 Independent advice

I find that the Legal Advice is independent legal advice, for the reasons covered under [**sub-heading 9.2**].

## 9.5 Waiver of privilege

The Commissioner’s Guidelines provide (relevantly) as follows:

*“LPP is the client’s privilege to assert or waive”*: par 5.129.

In this case, the client is ACARA. Apparently someone leaked the Education Council Paper to *The Australian*, which published an article on 1 August 2011 (<http://www.theaustralian.com.au/national-affairs/my-school-site-warned-off-suing-media/story-fn59niix-1226105578220>). However that publication was not authorised by ACARA. The Education Council Paper does not directly quote from the Legal Advice, and only summarises a few paragraphs providing the conclusions of the Legal Advice. I find that the unauthorised disclosure of the Education Council Paper did **not** amount to ACARA waiving privilege over the Legal Advice.

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<sup>4</sup> *Esso Australia Resources Ltd v Commissioner for Taxation* (1999) 201 CLR 49.

## 9.6 Confidentiality

The Commissioner's Guidelines provide (relevantly) as follows:

*"LPP does not apply to a communication that is not confidential – that is, known only to the client or to a select class with a common interest in the matter": para 5.127.*

*"Whether the disclosure is inconsistent with maintaining confidentiality will depend on the circumstances of the case": para 5.132.*

The Education Council Paper does not directly quote from the Legal Advice, and only summarises a few paragraphs of the Legal Advice. It was necessary to summarise these paragraphs in order to adequately respond to the directions of the Education Council. I do acknowledge that someone leaked the Education Council Paper to *The Australian*. However, I find that this does not change the confidential character of the Legal Advice itself. I find that the content of the Legal Advice was never disclosed publicly.

**Attachment 2**

No.	Title of document	Number of pages (excluding blanks)	Exemption section(s)	Grounds for deleting
1.	Legal advice from the Australian Government Solicitor to ACARA dated 28 April 2011	5	S47B(a)  S 47E(d)  S42	Damage relations between the Commonwealth and a State  Substantial adverse effect on the proper and efficient conduct of the operations of an agency  Legal professional privilege
2.	Paper to the Standing Council for School Education and Early Childhood for meeting on Friday 8 July 2011 titled "ACARA advice on action to prevent the publication of league tables"	6	S47B(a)  S 47E(d)	Damage relations between the Commonwealth and a State  Substantial adverse effect on the proper and efficient conduct of the operations of an agency