



Australian Government
Department of Education

Your Ref
Our Ref LEX930

NLXQ

By email: foi+request-11160-c77142cf@righttoknow.org.au

Dear NLXQ

Your Freedom of Information request - decision

I refer to your request, received by the Department of Education (department) on 23 February 2024, for access under the *Freedom of Information Act 1982* (FOI Act) to the following documents:

- "1. Correspondence with The King's School since 1 June 2022 (including any attachments) regarding compliance with federal/state legislative funding requirements.*
- 2. Correspondence with the NSW Government since 1 June 2022 (including any attachments) regarding The King's School's compliance with federal/state legislative funding requirements."*

I note that in accordance with your email dated 17 March 2024, you revised your request to **exclude** the following:

- "- standard correspondence of a routine nature (for example, correspondence of a similar form sent to all non-government schools).*
- documents that are duplicates.*
- draft copies of documents.*
- for email correspondence, any earlier emails in the trail, provided that the latest email in the trail is included.*
- personal information of non-SES officers and individuals external to the department, provided that the job title/position remains included."*

My decision

The department holds 45 documents (totalling 210 pages) that fall within the scope of your request.

I have decided to:

- grant you **access in full** to 5 documents (documents 1, 1AA, 2, 3B and 4)
- grant you **access in part** to 4 documents (documents 1A, 2A, 3, 4A) with some of the content removed, and
- **refuse access** to 36 documents (documents 3A, 3C – 3AB and 5 – 10).

I have decided that certain documents and parts of certain documents that you have requested are exempt under the FOI Act because they contain:

- information, the disclosure of which would or could reasonably be expected to cause damage to relations between the Commonwealth and a State or which would divulge information, or a matter communicated in confidence by or on behalf of a State to the Commonwealth (section 47B(a) and (b) conditional exemptions).
- business information, the disclosure of which would or could reasonably be expected to unreasonably affect a third party and prejudice the future supply of information to the Commonwealth (section 47G(1)(a) and (b) conditional exemptions).

A schedule of the documents and the reasons for my decision are set out at **Attachment A**.

Charge

On 8 March 2024, the department made a preliminary assessment of the charge payable to process your request in the amount of \$557.00.

On 17 March 2024, you contended that the charge for processing your request should not be imposed on the ground of public interest. You also revised the scope of your request, which reduced the number of documents falling within the scope.

Based on the revised scope, the revised estimate of the charge for processing your request was \$439.98. However, I decided on 15 April 2024 to exercise my discretion not to impose the charge.

How we will send your documents

We will send you the documents in accordance with this decision upon the expiration of the review rights of the third parties who were consulted by the department in accordance with the FOI Act and objected to the release of the documents.

You can ask for a review of my decision

If you disagree with any part of the decision, you can ask for a review. There are two ways you can do this. You can ask for an internal review by the department or an external review by the Australian Information Commissioner.

You can find information about your rights of review under the FOI Act, as well as information about how to make a complaint at **Attachment B**.

Further assistance

If you have any questions, please email foi@education.gov.au.

Yours sincerely

Katherine

Katherine
Authorised decision maker
Freedom of Information Team
Department of Education

30 May 2024

SCHEDULE OF DOCUMENTS – NLXQ

Number	Pages	Date	Description	Decision	Exemption	Comments
1.	1	29 June 2022	Email chain	Grant access in full	N/A	Irrelevant material and employee details deleted under section 22
1A.	2 – 4	29 June 2022	Attachment to Document 1	Grant access in part	S 47G(1)(a)	Irrelevant material and employee details deleted under section 22 Business information deleted under section 47G(1)(a)
1AA.	5 – 10	N/A	Attachment to Document 1A	Grant access in full	N/A	N/A
2.	11 – 12	15 July 2022	Email chain	Grant access in full	N/A	Irrelevant material and employee details deleted under section 22
2A.	13 – 14	15 July 2022	Attachment to Document 2	Grant access in part	S 47G(1)(a) and (b)	Irrelevant material and employee details deleted under section 22 Business information deleted under section 47G
3.	15 – 23	29 June – 8 September 2022	Email chain	Grant access in part	S 47G(1)(a)	Irrelevant material and employee details deleted under section 22 Business information deleted under section 47G(1)(a)
3A.	24 – 34	26 August 2022	Attachment to Document 3	Refuse access	S 47B(a)	Information deleted under sections 47B(a) and 47G(1)(a) and (b)

					S 47G(1)(a) and (b)	
3B.	35 – 66	N/A	Attachment to Document 3	Grant access in full	N/A	N/A
3C.	67 – 73	May 2018	Attachment to Document 3	Refuse access	S 47G(1)(a) and (b)	Business information deleted under section 47G(1)(a) and (b)
3D.	74 – 80	11 June 2019	Attachment to Document 3	Refuse access	S 47G(1)(a) and (b)	Business information deleted under section 47G(1)(a) and (b)
3E.	81 – 88	30 March 2022	Attachment to Document 3	Refuse access	S 47G(1)(a) and (b)	Business information deleted under section 47G(1)(a) and (b)
3F.	89	23 June 2022	Attachment to Document 3	Refuse access	S 47G(1)(a) and (b)	Business information deleted under section 47G(1)(a) and (b)
3G.	90	31 March 2022	Attachment to Document 3	Refuse access	S 47G(1)(a) and (b)	Business information deleted under section 47G(1)(a) and (b)
3H.	91	22 May 2021	Attachment to Document 3	Refuse access	S 47G(1)(a) and (b)	Business information deleted under section 47G(1)(a) and (b)
3I.	92	21 October 2021	Attachment to Document 3	Refuse access	S 47G(1)(a) and (b)	Business information deleted under section 47G(1)(a) and (b)
3J.	93 – 95	25 October 2021	Attachment to Document 3	Refuse access	S 47G(1)(a) and (b)	Business information deleted under section 47G(1)(a) and (b)
3K.	96 – 103	15 July 2022	Attachment to Document 3	Refuse access	S 47G(1)(a) and (b)	Business information deleted under section 47G(1)(a) and (b)
3L.	104 – 105	21 July 2022	Attachment to Document 3	Refuse access	S 47G(1)(a) and (b)	Business information deleted under section 47G(1)(a) and (b)
3M.	106 – 112	25 March 2022 – 30 March 2022	Attachment to Document 3	Refuse access	S 47G(1)(a) and (b)	Business information deleted under section 47G(1)(a) and (b)
3N.	113 – 120	30 March 2022	Attachment to Document 3	Refuse access	S 47G(1)(a) and (b)	Business information deleted under section 47G(1)(a) and (b)

3O.	121 – 125	25 March 2022 – 29 March 2022	Attachment to Document 3	Refuse access	S 47G(1)(a) and (b)	Business information deleted under section 47G(1)(a) and (b)
3P.	126 – 128	30 March 2022	Attachment to Document 3	Refuse access	S 47G(1)(a) and (b)	Business information deleted under section 47G(1)(a) and (b)
3Q.	129	30 March 2022	Attachment to Document 3	Refuse access	S 47G(1)(a) and (b)	Business information deleted under section 47G(1)(a) and (b)
3R.	130 – 134	30 March 2022	Attachment to Document 3	Refuse access	S 47G(1)(a) and (b)	Business information deleted under section 47G(1)(a) and (b)
3S.	135 – 149	30 March 2022	Attachment to Document 3	Refuse access	S 47G(1)(a) and (b)	Business information deleted under section 47G(1)(a) and (b)
3T.	150 – 159	31 March 2022	Attachment to Document 3	Refuse access	S 47G(1)(a) and (b)	Business information deleted under section 47G(1)(a) and (b)
3U.	160 – 161	31 March 2022	Attachment to Document 3	Refuse access	S 47G(1)(a) and (b)	Business information deleted under section 47G(1)(a) and (b)
3V.	162	19 July 2022	Attachment to Document 3	Refuse access	S 47G(1)(a) and (b)	Business information deleted under section 47G(1)(a) and (b)
3W.	163	26 July 2022	Attachment to Document 3	Refuse access	S 47G(1)(a) and (b)	Business information deleted under section 47G(1)(a) and (b)
3X.	164	12 July 2022	Attachment to Document 3	Refuse access	S 47G(1)(a) and (b)	Business information deleted under section 47G(1)(a) and (b)
3Y.	165	19 July 2022	Attachment to Document 3	Refuse access	S 47G(1)(a) and (b)	Business information deleted under section 47G(1)(a) and (b)
3Z.	166 – 182	9 August 2022	Attachment to Document 3	Refuse access	S 47G(1)(a) and (b)	Business information deleted under section 47G(1)(a) and (b)
3AA.	183 – 188	20 April 2022	Attachment to Document 3	Refuse access	S 47G(1)(a) and (b)	Business information deleted under section 47G(1)(a) and (b)
3AB.	189	2022	Attachment to Document 3	Refuse access	S 47G(1)(a) and (b)	Business information deleted under section 47G(1)(a) and (b)

4.	190	31 January 2023	Email chain	Grant access in full	N/A	Irrelevant material and employee details deleted under section 22
4A.	191	31 January 2023	Attachment to Document 4	Grant access in part	S 47B(a) and (b)	Irrelevant material and employee details deleted under section 22 Information concerning Commonwealth-State relations deleted under section 47B(a) and (b)
5.	192 – 194	27 October 2023 – 15 January 2024	Email chain	Refuse access	S 47B(a) and (b)	Information concerning Commonwealth-State relations deleted under section 47B(a) and (b)
6.	195	16 August 2023	Email chain	Refuse access	S 47B(a) and (b)	Information concerning Commonwealth-State relations deleted under section 47B(a) and (b)
6A.	196 – 197	3 July 2023	Attachment to Document 6	Refuse access	S 47B(a) and (b) S 47G(1)(a)	Information concerning Commonwealth-State relations deleted under section 47B(a) and (b) Business information deleted under section 47G(1)(a)
6B	198 – 201	N/A	Attachment to Document 6	Refuse access	S 47B(a) and (b) S 47G(1)(a)	Information concerning Commonwealth-State relations deleted under section 47B(a) and (b) Business information deleted under section 47G(1)(a)

6C	202 – 203	10 January 2023	Attachment to Document 6	Refuse access	S 47B(a) and (b) S 47G(1)(a)	Information concerning Commonwealth-State relations deleted under section 47B(a) and (b) Business information deleted under section 47G(1)(a)
7.	204 – 205	14 February 2023	Email chain	Refuse access	S 47B(a) and (b) S 47G(1)(a)	Information concerning Commonwealth-State relations deleted under section 47B(a) and (b) Business information deleted under section 47G(1)(a)
8.	206 – 207	14 and 17 April 2023	Email chain	Refuse access	S 47B(a) and (b) S 47G(1)(a)	Information concerning Commonwealth-State relations deleted under section 47B(a) and (b) Business information deleted under section 47G(1)(a)
9.	208 – 209	28 June 2023	Email chain	Refuse access	S 47B(a) and (b)	Information concerning Commonwealth-State relations deleted under section 47B(a) and (b)
10.	210	16 August 2023	Email chain	Refuse access	S 47B(a) and (b)	Information concerning Commonwealth-State relations deleted under section 47B(a) and (b)

REASONS FOR DECISION

What you requested

On 23 February 2024 you requested the following document:

- “1. Correspondence with The King's School since 1 June 2022 (including any attachments) regarding compliance with federal/state legislative funding requirements.*
- 2. Correspondence with the NSW Government since 1 June 2022 (including any attachments) regarding The King's School's compliance with federal/state legislative funding requirements.”*

On 17 March 2024 you revised your request to **exclude** the following:

- “- standard correspondence of a routine nature (for example, correspondence of a similar form sent to all non-government schools).*
- documents that are duplicates.*
- draft copies of documents.*
- for email correspondence, any earlier emails in the trail, provided that the latest email in the trail is included.*
- personal information of non-SES officers and individuals external to the department, provided that the job title/position remains included.”*

On 6 March 2024 the department advised you that it would treat the names, signatures, position titles and contact details of staff members as irrelevant in accordance with section 22 of the FOI Act unless you advised otherwise. However, you stipulated on 17 March 2024 that the revised scope excludes “personal information of non-SES officers and individuals external to the department, provided that the job title/position remains included”. I have therefore **excluded** personal information about individuals outside of the department and non-SES officers within the department, such as names, signatures and contact details, as irrelevant material falling outside of the scope of your request under section 22 of the FOI Act but **retained** position titles.

On 8 March 2024, in providing you with the preliminary charge decision, the department also advised you that it would consult with certain third parties because some of the

requested documents contain information the third parties might reasonably wish to contend should not be disclosed.

What I took into account

In reaching my decision, I took into account:

- your original request dated 23 February 2024 and your revised request dated 17 March 2024
- other correspondence with you
- the documents that fall within the scope of your request
- consultation with third parties about documents which contain information concerning them
- consultations with departmental officers about the nature of the documents and the operating environment and functions of the department
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines)
- the *Freedom of Information (Charges) Regulations 2019*
- the FOI Act.

Reasons for my decision

I am authorised to make decisions under section 23(1) of the FOI Act.

I have decided that certain documents and/or parts of documents that you requested are exempt under the FOI Act. My findings of fact and reasons for deciding that exemptions apply to those documents are discussed below.

Section 22 of the FOI Act: access to edited copies with irrelevant matter deleted

I have decided that some of the documents falling within the scope of your request contain exempt or irrelevant material. In this regard, sections 22(1) and (2) of the FOI Act provide that:

Scope

(1) This section applies if:

(a) an agency or Minister decides:

(i) to refuse to give access to an exempt document; or

(ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and

(b) it is possible for the agency or Minister to prepare a copy (an edited copy) of the document, modified by deletions, ensuring that:

(i) access to the edited copy would be required to be given under section 11A (access to documents on request); and

(ii) the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and

(c) it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:

(i) the nature and extent of the modification; and

(ii) the resources available to modify the document; and

(d) it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.

Access to edited copy

(2) The agency or Minister must:

(a) prepare the edited copy as mentioned in paragraph (1)(b); and

(b) give the applicant access to the edited copy.

The documents identified in the Schedule of Documents include exempt or irrelevant material.

In accordance with section 22 of the FOI Act, I have deleted exempt and irrelevant material where possible from the pages identified in the Schedule of Documents and have decided to release the remaining material to you.

Section 47B of the FOI Act – Commonwealth-State relations

I have applied the exemption in section 47B to documents 3A, 4A, 5, 6, 6A, 6B, 6C, 7, 8, 9 and 10.

Section 47B of the FOI Act provides:

A document is conditionally exempt if disclosure of the document under this Act:

- (a) would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a state; or*
- (b) would divulge information or matter communicated in confidence by or on behalf of the Government of a State or an authority of a State, to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth...*

Paragraph 6.32 of the FOI Guidelines relevantly provides:

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)). 'Working relations' encompass all interactions of the Commonwealth and the States, 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.

The documents are correspondence between the NSW Government and the department, containing information about the NSW Department of Education's (NSW department) investigation into The King's School. I am satisfied that the material in documents 3A, 4A, 5, 6, 6A, 6B, 6C, 7, 8, 9 and 10, if released, would divulge information that was communicated in confidence by the NSW department to the department (section 47B(b)). I am advised the NSW department provided these documents to the department in recognition of the shared role played by the Commonwealth Government and the NSW Government with respect to the regulation of school funding. I am satisfied the NSW department communicated these documents with the expectation of confidentiality and that they would not be disclosed to any third party without express permission. For completeness, I am satisfied such permission has not been granted in this case.

I am also satisfied that the release of the material in these documents, as well as in document 3A would, or could reasonably be expected to, cause damage to relations between the department and the NSW department if disclosed (section 47B(a)). As noted above, the department and NSW department both play important and complementary roles in regulating the funding of NSW schools and ensuring compliance with relevant legislation in this respect. I am of the view that disclosing the information contained in these documents would, or could reasonably be expected to, have a significant adverse impact on the existing trust and co-operation between the departments. Further, I am satisfied that release of the material would, or could reasonably be expected to, discourage the future

sharing of information between the two departments that would assist in the conduct of investigations and compliance activities. Rather than promoting transparency of compliance and assurance activities, this would damage relations between the departments in a way that would likely discourage co-operation and information sharing, and would therefore hinder future investigations.

On this basis, I have decided that the information included in the abovementioned documents is exempt under section 47B of the FOI Act. I have discussed the public interest considerations below under the heading 'Public interest'.

Section 47G of the FOI Act – business information

I have applied the exemption in section 47G to documents 1A, 2A, 3, 3A, 3C – 3AB, 6A – 6C, 7 and 8. Section 47G(1) of the FOI Act provides:

(1) A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:

(a) would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or

(b) could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.

Paragraph 6.185 of the FOI Guidelines relevantly provides that the business information exemption is intended to protect the interests of third parties dealing with the government. Additionally, paragraph 6.190 of the FOI guidelines relevantly provides:

The AAT has distinguished between 'truly government documents' and other business information collected under statutory authority. The first category includes documents that have been created by government or that form part of a flow of correspondence and other documents between the government and business. The AAT concluded that such documents inclined more to arguments favouring scrutiny of government activities when considering

whether disclosure would be unreasonable. By implication, the exemption is more likely to protect documents obtained from third party businesses.

It should be noted that documents 3A and 3C – 3AB are all business documents that were created by The King's School and other third parties and could not be considered to be 'truly government documents', having regard to the definition set out in the extract from the FOI guidelines above.

Document 3A is an attachment to Document 3. Document 3A is a letter provided by The King's School to the NSW department. Documents 3B – 3AB are provided as attachments via a link contained in Document 3, and are annexures to Document 3A. Documents 3A and 3B – 3AB have been captured within the scope of your request because the terms of your request include 'attachments' to correspondence with The King's School and with the NSW department relating to The King's School's compliance with federal/state legislative funding requirements.

Document 3B is publicly available and is not subject to section 47G(1) of the FOI Act. However, documents 3A and 3C – 3AB contain information concerning the business, commercial or financial affairs of The King's School including minutes of its meetings, financial matters contained in its ledgers, travel arrangements, meeting minutes and internal governance documents. I am satisfied that the release of this material would, or could reasonably be expected to, unreasonably affect The King's School adversely in respect of its lawful business, commercial or financial affairs (section 47G(1)(a)). This is because the release of these documents would reveal internal information about the school's governance, financial management and expenditure (including information that is unrelated to the subject matter of any investigation), and would likely result in further media attention on matters that have already been investigated and finalised. This would have an adverse impact on the school's reputation and may consequently adversely affect its ability to retain staff and students and dissuade parents from sending their children to the school.

Additionally, some of these documents affect the interests of third parties other than The King's School; specifically, a travel agent that assisted with arranging travel for The King's School and other third parties whose services were used in relation to the proposal to develop a plunge pool on the school property. The release of those documents could reasonably be expected to unreasonably affect those third parties adversely in respect of their lawful business, commercial or financial affairs due to potential further media scrutiny relating to these issues. The documents also comprise tax invoices and fees estimates from

these third party businesses. I am satisfied that release of this material could reasonably be expected to adversely affect these third parties, as competitors of these third party businesses could use the information to their competitive advantage by undercutting the costs quoted or charged by these third parties in future procurement activities.

The King's School provided these documents to the NSW department to assist in its investigation, and subsequently voluntarily provided them to the department to be cooperative and for transparency. As such, the disclosure of these documents could also reasonably be expected to prejudice the future supply of information by The King's School to the department on a good faith basis outside of a formal investigation or to assist with preliminary enquiries (section 47G(1)(b)).

Documents 1A, 2A and 3 also contain small amounts of business and financial information about The King's School which, if released, would have an adverse impact on The King's School by revealing details about its governance, funding and expenditure.

Additionally, documents 6A – 6C, 7 and 8 contain information about the operations and financial management of The King's School, as well as the compliance activities undertaken by the NSW department in relation to the school. The release of this information would be highly likely to have a substantial adverse effect on the school for the reasons discussed above. As discussed above, I consider that these documents are also exempt in full under section 47B of the FOI Act.

On this basis, I have decided that the information included in the abovementioned documents are exempt under section 47G of the FOI Act. I have discussed the public interest considerations below under the heading 'Public interest'.

I have deleted the exempt material and released the remaining material to you in accordance with section 22 of the FOI Act.

Public interest

Section 11A(5) of the FOI Act provides:

The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

When weighing the public interest for and against disclosure under section 11A(5) of the FOI Act, I have taken into account relevant factors in favour of disclosure. In particular, I have considered the extent to which disclosure would:

- promote the objects of the FOI Act
- inform debate on a matter of public importance being the compliance by non-government schools with federal and state legislative funding requirements
- promote effective oversight of public expenditure.

I have also considered the relevant factors weighing against disclosure, indicating that access would be contrary to the public interest. In particular, I have considered the extent to which disclosure could reasonably be expected to:

- impede the administration of justice generally, including procedural fairness
- impede the flow of information to the police or another law enforcement or regulatory agency
- prejudice the department's ability to obtain confidential information
- prejudice the department's ability to obtain similar information in the future
- adversely affect or harm the interests of an individual or group of individuals.

Based on these factors, I have decided that, in this instance, the public interest in disclosing the information in the abovementioned documents is outweighed by the public interest against disclosure.

I have not taken into account any of the irrelevant factors set out in section 11B(4) of the FOI Act in making this decision.

Conclusion

In summary, I am satisfied that the documents and parts of documents, as set out in the Schedule of Documents, are conditionally exempt under sections 47B and 47G(1) of the FOI Act. Furthermore, I have decided that, on balance, it would be contrary to the public interest to release this information. Accordingly, I have decided not to release the documents or conditionally exempt parts of the documents to you.

I have deleted the exempt material and released the remaining material to you in accordance with section 22 of the FOI Act.

YOUR RIGHTS OF REVIEW

Asking for a formal review of an FOI decision

If you believe the decision is incorrect, the FOI Act gives you the right to apply for a review of the decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of an FOI decision by:

- an internal review officer in the department and/or
- the Australian Information Commissioner.

There are no fees for applying for a formal review.

Applying for an internal review by an internal review officer

If you apply for internal review, a different decision maker to the decision maker who made the original decision will review your request. The internal review decision maker will consider all aspects of the original decision afresh and decide whether the decision should change.

An application for internal review must be made in writing within 30 days of receiving this letter. You can lodge your application by email to foi@education.gov.au.

Applying for external review by the Australian Information Commissioner

If you do not agree with the original decision or the internal review decision, you can ask the Australian Information Commissioner to review the decision.

You will have 60 days to apply in writing for a review by the Australian Information Commissioner.

You can lodge your application in one of the following ways:

Online:

https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10

Email: foidr@oaic.gov.au

Post: Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

Complaints to the Australian Information Commissioner

Australian Information Commissioner

You may complain to the Australian Information Commissioner about action taken by an agency in the exercise of powers or the performance of functions under the FOI Act.

A complaint to the Australian Information Commissioner must be made in writing and can be lodged in one of the following ways:

Online:

https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA_1

Email: foidr@oaic.gov.au

Post: Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001