



LEGISLATIVE COUNCIL

PRIVILEGES COMMITTEE

**Consideration of disputed claims of  
privilege as referred by the Clerk under  
standing order 54  
(March 2025)**



Report 99

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Privileges Committee

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Consideration of disputed claims of privilege as referred by the Clerk under standing order 54 (March 2025)

Chair: The Honourable Stephen Lawrence, MLC



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## Role of the Privileges Committee

- 1.1** Standing order 52 regulates the operation of the Legislative Council's power to order the production of documents concerning the administration of the state from the Executive, government agencies and other statutory bodies. This includes the operation of a dispute process, under which an Independent Legal Arbiter is appointed to evaluate and report on the validity of any claims of privilege or personal information that are made over documents returned to an order, and which are disputed by members. It is then open to the House to order the publication of the Arbiter's report and any disputed document.
- 1.2** Under standing order 54, in instances where the Independent Legal Arbiter provides a report to the Clerk and it is more than three weeks before the next sitting of the House, the House has delegated its authority to publish reports, and any disputed documents, to the Privileges Committee.
- 1.3** Standing order 54, states:
- In instances where a report of the Independent Legal Arbiter appointed under standing order 52 is received by the Clerk more than three weeks before the next sitting of the House:
- (a) the Clerk is to refer the report to the Privileges Committee for consideration,
  - (b) the Privileges Committee is authorised to undertake the role usually performed by the House in deciding whether the report of the Independent Legal Arbiter and any documents the subject of the dispute are to be published,
  - (c) any document authorised to be published by the committee under this standing order is deemed to have been presented to the House and published by the authority of the House, and
  - (d) on the next sitting day, the committee is to report to the House what action, if any, it has taken under this resolution.<sup>1</sup>
- 1.4** Information regarding orders for papers, including returned documents, is accessible via the NSW Parliament website, [www.parliament.nsw.gov.au](http://www.parliament.nsw.gov.au) at: Legislative Council / Orders for Papers.

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<sup>1</sup> Standing order 54.

## Committee details

### Committee members

<b>Hon Stephen Lawrence MLC</b>	Australian Labor Party	(Chair)
<b>Hon Natasha Maclaren-Jones MLC</b>	Liberal Party	(Deputy Chair)
<b>Hon Wes Fang MLC</b>	The Nationals	
<b>Ms Sue Higginson MLC</b>	The Greens	
<b>Hon Cameron Murphy MLC</b>	Australian Labor Party	
<b>Hon Bob Nanva MLC</b>	Australian Labor Party	
<b>Hon Peter Primrose MLC</b>	Australian Labor Party	
<b>Hon Rod Roberts MLC</b>	Independent	

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## Chair's foreword

I am pleased to present this report of the Privileges Committee on the exercise of the committee's power under standing order 54 to consider disputed claims of privilege. The purpose of the standing order is to delegate to the committee the role the House normally undertakes in relation to disputes of privilege under standing order 52 when the House is not sitting for a period of greater than three weeks. In this instance a report of the Independent Legal Arbiter was referred to the committee on Tuesday 25 February 2025, with the House not due to sit until 18 March 2025.

I would like to thank the members of the committee for their work on fulfilling their delegated role, which again occurred during a busy period of Budget Estimates hearings. I would also like to thank the secretariat for assisting the committee and compiling this report.



Hon Stephen Lawrence MLC  
**Committee Chair**



# Chapter 1 Disputed claims of privilege and reports of the Independent Legal Arbiter

As required by standing order 54, this report documents the actions taken by the Privileges Committee in relation to a disputed claim of privilege over documents returned to an order for papers regarding the early childhood education and care sector.

## Early childhood education and care sector

- 1.1 On Friday 20 December 2024, Ms Boyd disputed the validity of a claim of privilege on certain documents returned on Wednesday 11 December 2024 to an order for papers regarding the early childhood education and care sector.
- 1.2 According to standing order 52, the Honourable Keith Mason AC KC was appointed as Independent Legal Arbiter to evaluate and report as to the validity of the claim of privilege, and the disputed documents were released to Mr Mason, who requested additional submissions from relevant agencies and convened a meeting with the member and relevant agencies to discuss the scope of the dispute and the claim of privilege.
- 1.3 Following the meeting, further additional submissions were requested by Mr Mason.
- 1.4 According to standing order 54, on Tuesday 25 February 2025 the interim report of the Independent Legal Arbiter entitled "Disputed Claim of Privilege—Early childhood education and care sector", dated Monday 24 February 2025, together with submissions, was referred to the committee.
- 1.5 On Thursday 6 March 2025, the committee met to consider the report and submissions.
- 1.6 At this meeting the committee noted that it had consistently adopted a two-step process, as established in the House, to first consider the Arbiter's report, and then meet a second time to consider the publication of documents considered by the Arbiter not to be privileged.
- 1.7 The committee resolved to publish the report and submissions. According to standing order, the report and submissions were deemed to have been presented to the House, and were made publicly available (see Appendix 1).
- 1.8 In his interim report, Mr Mason evaluated a sample of 18 documents returned on Wednesday 11 December 2024, which were specifically selected as representative of the types of documents subject to the dispute. Mr Mason noted there was general consensus over the redaction of names and other personal and identifying information of minors. Mr Mason also noted certain documents contained personal information which under standing order 52 (7)(e) should not be made public. Mr Mason noted there may be further opportunity for consensus over the publication of certain information, and called for additional submissions from the parties to the dispute. (see Appendix 1).
- 1.9 Given that the dispute is ongoing, the committee did not meet to consider the publication of any documents. The committee notes the next sitting of the House on Tuesday 18 March 2025.



# Appendix 1 Interim Report of the Independent Legal Arbitrator

## INTERIM REPORT UNDER STANDING ORDER 52 ON DISPUTED CLAIM OF PRIVILEGE

### Early Childhood Education and Care Sector

The Hon Keith Mason AC KC

24 February 2025

On 13 November 2025 the House called for papers created since 1 January 2021 on a very wide range of matters touching the early childhood and education sector. Ms Abigail Boyd MLC, who moved the resolution, referred to reported instances of harm to children at centres and she spoke of concerns about 'neglect, short staffing, widespread breaches of regulation and cutting of corners, particularly by the profit-taking larger players that dominate this sector'. In such a largely privatised industry, regulation, monitoring and enforcement are very important. The Member accused the Regulatory Authority in this State of being 'asleep at the wheel'.

The motion was opposed, not by way of belittling the issue, but due to the massive volume of documents that would be swept up by the proposed resolution. Concerns were also raised that some documents would reveal information about individual children and/or about ongoing criminal proceedings, as well as aspects of the Regulatory Authority's investigation methodology. It was also pointed out that the NSW Police Force will be actively involved in collecting some of the documents and assessing claims of privilege touching the administration of justice.

The documents are being released in tranches. The first tranche includes over 270 documents subject to claims based on privilege and personal information raised by the Department of Education. These were framed in global terms and partial redactions were not proposed in the original submission. The Member disputed the claims, again in fairly global terms, while conceding non-objection to some categories of redaction. The President then appointed me to assess and report.

There is no dispute relating to the second tranche delivered on 18 December 2024. Other contemplated tranches are presently on hold, due in part to the volume of papers involved and the issues of privilege and confidentiality they will doubtless involve. On 29 January 2025 I convened a meeting of Departmental representatives (headed by Ms Sarah Hargens, General Counsel, Legal Services) and the Member. We briefly discussed a hopefully representative group of 18 disputed documents taken from the first tranche. The Department undertook to reconsider its position in relation to them with the Member responding within an agreed timetable. This has produced submissions from Ms Hargens dated 12 February 2025 and 21 February 2025 which are to be read together with her earlier submissions dated 6 December 2024; and submissions from the Member dated 17 February 2025 which are to be read with her earlier letter of 20 December 2024 that generated the dispute.

The 18 'sample' documents are listed in an email dated 29 January 2025 from Ms Allison Stowe, Principal Council Officer who has been assisting me in this matter.

The Department has withdrawn its claim of privilege regarding 5 of the documents, maintaining it over 13. For some of them the scope of the dispute has been significantly narrowed (identified by

recently redacted versions of the documents). For all of them the Department has restated its grounds of asserted privilege.

I have decided to issue this Interim Report touching those 13 documents. If published by authority of the House it should allow the Department and the Member to consider their respective positions regarding the entirety of the disputed documents in the first tranche. If I have proceeded on any false basis in this Report I will have no objection to revisiting it. This Interim Report may also guide action taken with respect to the outstanding tranches which the Member is anxious to progress.

*1. Disputed document DOE.001.0000904*

This is a detailed point of time Desktop Audit Analysis relating to a particular Long Day Care Centre. The claim of privilege over the entire document is maintained by the Department because (as submitted by Ms Hargens) it 'relates to a current open matter where a Show Cause Notice has been issued and the Department is awaiting response from the subject of the investigation'. It 'includes information, and regulatory opinions about several individuals whose identities are apparent or can reasonably be established by members of the community'. It also 'contains methodology used by the Regulator to conduct investigations'. The document is dated 26 November 2024 and it 'contains information that has been superseded by updated drafts, as the matter has progressed over time, since production'.

I shall provide some additional information about the document in order to explain my reasoning, but in such a way as to remain sensitive to the issues being raised in the continuing defence of and challenge to the claim of 'PII – Responsible and Effective Government, Personal Information' privilege.

There is no suggestion of any contemplated or pending criminal process; or even of some civil proceedings that could possibly be compromised by concurrent parliamentary oversight. But there is much detail about incidents in 2023 and 2024 that have obviously raised the Regulating Authority's concerns. No parent or child is identified by name. Many specific incidents, variously classified as Administrative or Statutory, are recorded in some detail. The recipients of breach letters, caution letters or 'discussion' from the Regulating Authority are sometimes identified by name. All but four of the matters are recorded as having the Status of 'Resolved' – on the bases of 'Caution letter issued' or 'Compliance direction/Emergency action notice issued'. The details of 'Action Taken' show in considerable detail the Regulating Authority's responses to the various incidents. All of this detail is obviously relevant to parliamentary oversight of that Authority, consideration of legislative amendment, and resourcing issues.

Four 'In Progress' matters are addressed at page 1 of the document. They too are detailed and specific and patently relevant to the matters that the Member wishes to raise before the House. The 'Case Summary' relating to the fourth and most serious of the incidents sets out specific information about actions taken to the date of the document and a relevant 'risk' assessment as at November 2024. Further information about the Authority's responses appears in the next three disputed documents addressed in this Report.

I see no reason why either the Member or representatives of the Government should be limited in debate about the Regulatory Authority's assessment of the seriousness of the incidents and its response to them. If the Desktop Analysis has been superseded by an 'updated draft' that offers no reason for limiting access to the instant document by the Parliament. The sheer volume of detailed

information supports the conclusion that investigation and debate by Members and those assisting them would be hampered by restricting disclosure to Members only. So long as the names of particular children or parents are not revealed I do not favour suppression of the information in this or related documents, or similar types of document.

I note that the Department has invoked 'Personal Information' as a species of public interest immunity (PII). However, there appears to be no 'personal information' within the five presumptive categories cited in Standing Order 52 (7). And I do not accept the Department's submission that information becomes privileged when it includes 'identifying information that can be used contextually to identify individuals that may be witnesses or otherwise attendees of ECEC services'.

The document states its authors' assessment of the level of 'risk' of the service. In the member's letter of 20 December 2024 she states that:

'It is important that the public can be satisfied that money is spent on operators who uphold child safety and spend funds in an appropriate manner. It is important that providers who have engaged in misconduct, improper or unlawful conduct and who also receive government funding or continue to receive government funding, should be accountable including being monitored and having any breaches remedied....

Allowing relevant documents to be disclosed with appropriate redaction of personal information would allow scrutiny to inform the public about the operations of the regulator, in particular the way it is dealing with members of the public (particularly around complaints and concerns about child safety) as well as responding to notifications which early childhood operators and workers are required to do under the law. Further it would promote open discussion of current concerns about the adequacy of oversight of the early childhood sector, leading to the enhancement of government accountability and contributing to positive and informed debate on issues of public importance.'

In my assessment, these matters offer a strong case for rebutting the claims of privilege asserted for this document. Or, to put the matter more correctly, for supporting the conclusion that the arguments for blanket suppression ought not to prevail.

But before doing so, I return to a couple of the matters raised by the Department. The document does disclose aspects of the Regulator's system. But Parliament has its own claim to examine and critique that system and we are not dealing with some sophisticated and particular aspect of police detective science. If this or any other operator were to scrutinise the document it may well be encouraged to lift its game rather than to plot future evasive action. The fact that further regulatory action remains 'open' or that the information may not be entirely up to date does not establish a relevant public interest immunity in my evaluation.

Past and ongoing regulatory action is not immunised from parliamentary scrutiny. This will often involve revelation of the identity of individual actors, including those who are the subject of such administrative process. Nor does revealing the identity of actors automatically engage the 'personal information' redaction regime now embodied in Standing Order 52 (7). See generally the Reports on *Local and Community Grants* dated 27 November 2023 and on *Department Liaison Officers in the office of the Minister for Transport* dated 13 November 2023.

I do not accept Ms Hargens' 12 February 2025 submission that s 271 of the *Education and Care Services National Law* operates to generate a presently relevant privilege over documents already produced to the House under the Standing Order.

## 2. Disputed Document DOE.001.0000900

This is an Investigation Report relating to an incident in July 2024 at the same centre. It shows details of what the Investigator discovered, including the actions taken by the approved provider and the Department. Various recommendations for regulatory action are considered at different levels of the Department; and ultimately approved in September 2024. These appear already to have been put into effect in the several other of the disputed documents, including the one next addressed.

The Department's submission of 12 February 2024 raises several speculative spectres that I find unpersuasive when raised in opposition to unhampered parliamentary review. We are considering access to information already collected and recorded, as well as administrative action put into effect by the Department with no indication that civil or criminal litigation is in contemplation or even disputed by the service provider. It is difficult to understand why the Department regards this matter as 'open' except on the basis that it will continue to monitor the provider's compliance both in the particular and more generally. No potentially threatened or retaliated witnesses are pointed to, but if they exist in actuality steps including further redactions are still open to be taken.

Once again, as accepted by the member, material identifying the child involved should be redacted, but this does not, in my evaluation, justify an ongoing and potentially permanent suppression of the core material in this and the associated documents flowing from the incident.

## 3. Disputed Document DOE.0000988

This is a Compliance Direction dated 24 September 2024 addressed to a provider identified in the Schedule of Documents. It is action authorised by s 176 of the *Children (Education and Care Services) National Law (NSW) 2010* and it required the taking of specified steps prior to 25 October 2024. There was an incident that led to an investigation. The conduct is detailed in the Direction which is addressed to a senior person in the provider corporation. The addressee is informed of its rights to seek internal review. The staff member identified is said to be 'former'.

Privilege is maintained over the whole document on the basis that it 'relates to a current open matter' Release is said to be 'reasonably likely to prejudice the investigation, being a function of the Department'. I presume that the Member does not object to redacting the identity of the child involved. But save as to this, I cannot see a basis for upholding the privilege claim. The Department's approach to the incident is detailed, as are the steps called to be taken by the approved provider. Parliament is entitled to explore what has and has not been done to date and I entirely fail to see how this would impede any future action by the Department.

## 4. Disputed Document DOE.0001005

This is a Breach Letter dated 15 October 2024 issued to a person identified in the Schedule of Privileged Documents. It contains details of an alleged incident involving identified children at an identified centre. It relates to what the Department says is a currently open matter. It is a non-statutory action, in similar terms to a compliance direction, but without the penalties attached for non-compliance.

It is an aspect of the matter 'In Progress' addressed in Disputed Document DOE. 001.0000904 discussed above.

For reasons that are not apparent to me, the Department submits that its release 'would prejudice current and future investigations'. Perhaps the Department is suggesting that a hypothetical third person might track a course of future misconduct if aware of the particular response to this particular incident involving this particular employee. If so, I would not uphold the asserted privilege on this basis. Nor on the basis of 'regulatory methodology' (my words).

There will need to be redaction of the names and birth dates of the children referred to. But otherwise, I would not uphold the claim of privilege, for reasons stated above re DOE.001.0000904.

*5. Disputed Document DOE.001.0000429*

This is an Undertaking offered pursuant to s 179A of the said Act. The Department no longer asserts privilege over the entire document and it has proffered a redacted version. The redactions involve the name, address, signature and witness signature of the employee concerned as well as a statement of facts identifying the place and details of the alleged contravention, including the name of one (unharmful) child. These proposed redactions appear to be acceptable to the Member although I may be wrong as regards the non-identification of the particular service. If there is an outstanding issue I will naturally revisit the matter if requested to do so.

Subject to these remarks, the redacted document is not privileged in my evaluation.

*6. Disputed Document DOE.001.0000996*

This is an Emergency Action Notice issued pursuant to s 179 of the said Act. The Department maintains the claim that it is privileged in its entirety under the rubrics of 'Responsible and Effective Government, Personal Information'. The identity of the corporate recipient and the centre involved are disclosed in the original Schedule of Documents. The stipulated times for compliance of the mandated action (19-20 September 2024) are well past. The incident has the recorded status of 'Resolved' in DOE.001.0000904.

Whether or not this is truly categorised as an 'current open matter' and whether or not the matters that came to the Department's attention have been remedied to date, I fail to see why this information should be held back from uninhibited use in the Parliament in the present context. There is, of course, a *risk* of damage to the commercial interests of the service provider matter, but that will ultimately turn upon the facts of the matter, and how the debate in Parliament proceeds and is reported. To elevate such a commercial interest into a basis for public interest immunity would seem to negate the high constitutional principles upheld and demonstrated in *Egan v Willis*.

I am not aware of any children being identified other than as a generic class of persons present at the centre at the relevant time.

The document is not privileged in my evaluation.

*7. Disputed Document DOE.001.0000910*

This is a Visit Summary. The Department no longer presses its 'PII – Responsible and Effective Government, Personal Information' privilege claim except as to a handful of proposed redactions.

For all I know, the Member may have no objection to them given that nothing adverse seems to be suggested against the service employees named, nor is their identification necessary to understand to full import of the document.

I advise that the document is not privileged in my evaluation.

*8. Disputed Document DOE.001.0000907*

This is a Staffing Matrix for a particular centre with details as to the number and qualifications of staff there at a point of time.

Noting that nothing adverse seems to be suggested as regards the service employees named whose names are proposed for redaction I propose that the document be treated the same as the previous one.

*9. Disputed Document DOE.0000259*

This document (illegible in hard copy) is described as 'Round 2 – Assessment Panel Report – the Fund Board'. According to the later submission from the Department it contains 'confidential assessment methodology and raw scores for applicants'. Disclosure would, it is contended, 'prejudice the commercial interests of applicants, and the functions of the agency in assessing grants in the future'. Privilege is invoked under the rubrics of 'Responsible and Effective Government, Commercial in Confidence'.

The information in this document is highly relevant to oversight of funding decisions and processes, matters of direct concern to the Parliament. The entities involved are corporations. Unless the Member were to agree to some voluntary redaction, I cannot see that the document is privileged.

*10. Disputed Document DOE.001.0000610*

Privilege was initially asserted over the entire document under the rubrics of 'PII – Commercial in Confidence, Personal Information'. The document is dated 1 October 2024. The Department has now proffered a redacted version which masks the particular centre involved (but not the entity involved in 'the business sale agreement which has not yet been settled').

It is submitted that 'the Department considers that the third-party business would object to release of such information as it may affect their commercial interests in relation to those negotiations. That is supposition and the date is now long past. I note too that the centre involved is identified in the Schedule of Documents.

I would not uphold the privilege claim, even in relation to the proposed redacted version – at least if the Member still maintains her objection.

*11. Disputed Document DOE.001.0000810*

The privileged status of this Funding Agreement is no longer contended for. Minor redactions proposed for page 2 are entirely consistent with the direction of Standing Order 52 (7).



12. *Disputed Documents DOE.002.0000079 and DOE.002.0000080*

The first is a consultant's Evaluation of a 2023 Joint Monitoring and Data Sharing Pilot involving the Department and federal authorities – described as 'a great success'. The second is the Department's own assessment of 'Achievements, Lessons Learned and Opportunities for Improvement'. Privilege is asserted and maintained *in toto* under the rubrics of 'Responsible and Effective Government, Personal Information, Commercial in Confidence'. The first report was commissioned by the Australian Government.

Ms Hargens' submissions dated 12 February 2025 raise some significant issues that I would like more time to consider. I would be assisted by information as to the publication of the Report to date and the actual, as distinct from presumed, attitude of the Australian Government. Considerably discounting as I do, the assertion that inter-governmental co-operation will be impeded by the outcome of the present dispute, I would also be assisted to learn if there are portions of the documents that are of particular interest to the Member, and whether there may be acceptable redactions that might alleviate some of Ms Hargens' concerns.

13. *Disputed Documents DOE.001.0000874 and DOE.001.0000875*

Each is called a 'Large Provider Analysis Report – Infinity' in the Schedule of Documents. The Department's recent submission describes it as a 'point-in-time snapshot of the provider and their performance. It shows that the Department conducts deep analysis of providers that run many services. The Department now considers it is in the public interest to disclose general information about provider noncompliance in this document'. 'PII – Personal Information' privilege is no longer pressed save as regards identifying certain individuals.

Very minor redactions are now sought, as per the attachments to Ms Hargens' latest submissions. I doubt their true status as 'personal information', especially as regards masking the particular centres in the Affinity Group involved. Incidents are described which give help explain the action taken but may possibly allow identification of unnamed children. Unless the Member indicates otherwise I am content with them. Otherwise the document is not privileged in my estimation.



The Hon Keith Mason AC KC

**From:** [Legislative Council Returns to Order](#)  
**To:** [keith.mason.2@gmail.com](mailto:keith.mason.2@gmail.com); [David Blunt](#)  
**Cc:** [Legislative Council Returns to Order](#)  
**Subject:** S052 Dispute - Early childhood education and care sector  
**Date:** Wednesday, 29 January 2025 4:39:54 PM  
**Attachments:** [image001.jpg](#)

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Mr Mason, please find below the document numbers which were discussed at today's meeting regarding the Early childhood education and care sector dispute.

As discussed, the department has undertaken to provide redacted documents, along with a further submission detailing their claim of privilege specific to each document, by Wednesday 12 February. Ms Boyd will consider and respond by Monday 17 February, ready for your consideration on Tuesday 18 February.

Documents ending in:

- 0904: desktop summary
- 272: subject to CIC claim
- 429: enforceable undertaking
- 910: visit summary
- 907: staffing details form
- 283: regarding flexible initiative trial
- 259: document is illegible
- 1005: breach letter
- 610: funding memo
- 291: regarding building early learning places program
- 0988: compliance direction
- 900: investigation report
- 0996: emergency notice
- 0810: funding agreement
- 0254: program guidelines
- 875: provider analysis
- 079 and 080: consultant reports
- 874 and 483: department aggregate data doc

Kind regards,

Allison

**Allison Stowe**

**Principal Council Officer**

Procedure

Legislative Council

**P** 9230 3783



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**PRIVILEGE SUBMISSIONS FOR RETURN TO ORDER:  
Early Childhood Education and Care Sector**

This submission has been prepared in support of the claims for privilege made, pursuant to Standing Order 52(6), by the Office of the Deputy Premier (the office) over documents responsive to the Order of the Legislative Council of 13 November 2024.

The office's claims for privilege are not raised as a basis to resist production of the documents identified. The claims are made to identify those documents over which privilege may be claimed in order to allow the Legislative Council to consider the claims, in support of an application that it is in the public interest that the documents not be made publicly available.

It is not in the public interest to publish the documents over which privilege claims are made for the reasons outlined below. These submissions should also be read in conjunction with the specified indexes.

It should be noted that where a document has been identified as privileged, the whole "family" has been placed in the privileged bundle. That is, if only an email or any of its attachments are privileged, all documents in that email have been kept together. Similarly, where only PII-PI is claimed on a document, the whole family will appear in the PII-PI bundle with the attachments marked as non-privileged in the index. It is further noted that non-privileged information is included in the non-privileged bundle of documents.

Claims of privilege over the information contained in the documents are made on the grounds of:

1. Public Interest Immunity (PII).

The documents in respect of which privilege is claimed are detailed in the Index of Privileged Items (Index). The office understands that the consequence of claiming privilege in relation to the documents listed in the Index is that, if successful, the documents will only be available for inspection by Members of the Legislative Council and not disclosed to the public. However, the office understands that this Submission will be published on the NSW Parliamentary website with the Indexes accompanying the Return. For this reason, details of the privileged information are referred to at a high level so as not to inadvertently waive privilege.

As an overarching principle, the office notes that it is difficult to provide detailed public submissions in relation to the sensitive information contained in the documents, and the reasons why this information should not be disclosed, without disclosing, to some extent, the very information that our assertion of privilege seeks to protect. In the event that there is any dispute in relation to the claim of privilege and the matter is referred to an Independent Arbiter pursuant to SO52, the office requests the opportunity to provide further detailed submissions to the Independent Arbiter via the NSW Legislative Council to consider the bases for any claims of privilege.

Claims of privilege over the documents that are outlined in this Submission are made on the basis of PII. However, before addressing each ground of privilege in turn, the office

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submits that the sensitive information in the documents would ordinarily be protected from public disclosure under the common law or pursuant to the *Government Information (Public Access) Act 2009* (NSW) (GIPA Act). Whilst the office recognises that differing tests apply to certain information being withheld pursuant to the GIPA Act compared to information being withheld on the basis of PII, both involve weighing the release of information against the public interest in knowing the information. Therefore, the office contends that case law related to the GIPA Act can be helpful in determining whether information should be disclosed.

**Public interest immunity**

It is submitted that the documents identified as privileged in the Index should not be made public on one or more grounds of PII. Each document in this category contains information the disclosure of which would be contrary to the public interest. The office therefore asserts PII over this information.

PII is a well-established common law principle that requires the balancing of conflicting interests to determine whether it would be "injurious to the public interest to disclose" the impugned material. The categories of PII are not closed and should be considered in the context of the circumstances.

Public interest immunity applies to papers wherein the harm to the public interest of publication of those papers outweighs the countervailing public interest in publication. This is, as with other claims for privilege under SO52, distinct from the production of documents to the House. There is a legitimate interest of the House, in exercising its constitutional role of superintendence of the executive, which can be expressed through a call for papers under SO52. Sometimes that legitimate interest of the House might extend to the publication of papers and not only the production of those papers to the House, and in that case, there can be said to be a public interest in publication. However, in some cases that public interest in the publication of papers may be outweighed by the public interest in not publishing the papers. In those cases, it is appropriate to recognise that public interest privilege should apply.

In Parliamentary proceedings, a balance must be struck between the significance of the information to Parliament against the public harm that would flow from its public disclosure.

The office submits that the public interest in the public disclosure of the information in these documents does not outweigh the public interest in preserving the confidentiality of the information contained within the documents.

The Department asserts PII on the grounds that disclosure of the documents would:

- a) prejudice the proper functioning of government; and
- b) reveal personal information.

Before addressing each ground of privilege in turn, the office submits that the sensitive information in the documents would ordinarily be protected from public disclosure under the common law or pursuant to the public interest considerations against disclosure raised in section 14 and schedule 1 of the GIPA Act.

**PII: Prejudice the proper functioning of government**

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In relation to index documents for which there is a claim of public interest immunity the office considers that the release of these documents would prejudice the proper functions of the Department of Education (the department) in its ability to regulate early childhood education centres, and the office in its ability to receive information on regulation of early childhood education centres.

Investigating and regulating centres is a highly confidential process needed to ensure procedural fairness. This confidentiality extends to the information provided by the complainant, the person the subject of the complaint and any person who can give information relevant to the complaint. If the confidential information is released, it is reasonably likely to mean that it will be much more difficult for the department or the office to obtain such information from any individual in the future, as they will be concerned that confidential information has been disclosed in contradiction to the assurances provided by the department's policies and procedures.

The office benefits from individuals supplying information to management, particularly in relation to complaints. If the office infringes upon this confidential process by releasing the information, it is reasonably likely to prejudice the supply to the office and the department of confidential information in future from these individuals and other people and prejudice the integrity of investigations. This would have a serious adverse effect on the department's functions on many levels.

Many of the documents returned in the office's Privileged submission contain personal information. Should privilege be challenged on these documents, the office requests the opportunity to redact the personal information.

**PII: Personal information**

The office considers that documents identified in the Index contain personal information. Each document in this category contains documents which, if disclosed, would involve the disclosure of personal information of identifiable private individuals, including individuals who work at or attend ECEC services, including parents and children.

Personal information subject to this category includes, but is not limited to individuals:

- a) names;
- b) signatures;
- c) telephone numbers;
- d) email addresses; and/or
- e) other identifying information that can be used contextually to identify individuals that may be witnesses or otherwise attendees of ECEC services.

The office has made a claim for privilege on the basis of privacy in respect of a number of documents where the disclosure of these documents would result in the disclosure of personal information.

We note that Documents (f)1, (f)4 and (f)5 contain personal information and are not subject to other claims of privilege. Standing Order 52(7) applies in circumstances where a document: *"is subject to a claim that it contains personal information that should not be made public but is not otherwise subject to a claim of privilege"*.

The personal information is information where children's identities can also reasonably be ascertained. The publication of such information is not in the public interest and reveals information about a particular incident.

OFFICIAL

OFFICIAL

Yours sincerely

Joanne Matthews  
**Chief of Staff**  
**Office of the Deputy Premier**  
**Minister for Education and Early Learning**  
**Minister for Western Sydney**

6 December 2024

OFFICIAL



**Education**

**PRIVILEGE SUBMISSIONS FOR RETURN TO ORDER:  
Early Childhood Education and Care Sector**

This submission has been prepared in support of the claims for privilege made, pursuant to Standing Order 52(6), by the Department of Education (the Department) over documents responsive to the Order of the Legislative Council of 13 November 2024.

The department's claims for privilege are not raised as a basis to resist production of the documents identified. The claims are made to identify those documents over which privilege may be claimed in order to allow the Legislative Council to consider the claims, in support of an application that it is in the public interest that the documents not be made publicly available.

It is not in the public interest to publish the documents over which privilege claims are made for the reasons outlined below. These submissions should also be read in conjunction with the specified indexes.

It should be noted that where a document has been identified as privileged, the whole "family" has been placed in the privileged bundle. That is, if only an email or any of its attachments are privileged, all documents in that email have been kept together. Similarly, where only PII-PI is claimed on a document, the whole family will appear in the PII-PI bundle with the attachments marked as non-privileged in the index. It is further noted that non-privileged information is included in the non-privileged bundle of documents.

Claims of privilege over the information contained in the documents are made on the grounds of:

1. Legal Professional Privilege (LPP); and
2. Public Interest Immunity (PII).

The documents in respect of which privilege is claimed are detailed in the Index of Privileged Items (Index). The Department understands that the consequence of claiming privilege in relation to the documents listed in the Index is that, if successful, the documents will only be available for inspection by Members of the Legislative Council and not disclosed to the public. However, the Department understands that this Submission will be published on the NSW Parliamentary website with the Indexes accompanying the Return. For this reason, details of the privileged information are referred to at a high level so as not to inadvertently waive privilege.

As an overarching principle, the Department notes that it is difficult to provide detailed public submissions in relation to the sensitive information contained in the documents, and the reasons why this information should not be disclosed, without disclosing, to some extent, the very information that our assertion of

privilege seeks to protect. In the event that there is any dispute in relation to the claim of privilege and the matter is referred to an Independent Arbiter pursuant to SO52, the Department requests the opportunity to provide further detailed submissions to the Independent Arbiter via the NSW Legislative Council to consider the bases for any claims of privilege.

Claims of privilege over the documents that are outlined in this Submission are made on the basis of LPP and PII. However, before addressing each ground of privilege in turn, the Department submits that the sensitive information in the documents would ordinarily be protected from public disclosure under the common law or pursuant to the *Government Information (Public Access) Act 2009* (NSW) (GIPA Act). Whilst the Department recognises that differing tests apply to certain information being withheld pursuant to the GIPA Act compared to information being withheld on the basis of PII, both involve weighing the release of information against the public interest in knowing the information. Therefore, the Department contends that case law related to the GIPA Act can be helpful in determining whether information should be disclosed.

### **Legal Professional Privilege**

It is submitted that 38 of the documents identified as privileged in the Index should not be made public on one or more of the available grounds of the common law principle of legal professional privilege and/or client legal privilege under the *Evidence Act 1995* (NSW).

In particular, it is submitted that the documents over which LPP is claimed are privileged because:

- a) they were brought into existence for the purpose of:
  - i. enabling the client to obtain, or its legal advisers to give, legal advice; or
  - ii. for use in actual litigation or litigation reasonably contemplated by the client and in respect of which privilege has not been waived; and/or
- b) they are confidential communications between the client or its legal advisers and persons with whom the client shares or shared a common interest in relation to the subject matter of the advice received by one of them.

Each Document over which LPP is claimed is a confidential document which was:

1. prepared by the Department or its external lawyers; or
2. contains or records a confidential communication between the Department (or another person) and its lawyers, that was made for the purpose of its lawyers providing legal advice to the Department.

Documents over which LPP is claimed also includes the draft responses, amendments, and legal advice which would not be in the public interest to disclose. A claim of legal professional privilege is made on the basis that these

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documents were created for the dominant purpose of the provision of legal advice.

It is not in the public interest to publish these documents because doing so could prejudice the ability of State to obtain legal advice. Indeed, there is a conclusive presumption of an overriding public interest against disclosure of documents to which legal professional privilege applies in the *Government Information (Public Access) Act 2009* (see s. 14(1) and cl. 5 Schedule 1). This reflects the fact that legal professional privilege is a fundamental common law right in relation to legal advice and litigation. It allows people (including legal persons such as the Crown in the right of NSW) to be able to conduct their affairs with the assistance of competent legal advice provided in a relationship of full and frank disclosure of relevant matters, and so underpins the rule of law.

In relation to the documents for which legal professional privilege is claimed, these documents are not in the public domain and were created on a confidential basis. Therefore, legal professional privilege has not been waived.

#### **Public interest immunity**

It is submitted that 303 of the documents identified as privileged in the Index should not be made public on one or more grounds of PII. Each document in this category contains information the disclosure of which would be contrary to the public interest. The Department therefore asserts PII over this information.

PII is a well-established common law principle that requires the balancing of conflicting interests to determine whether it would be "injurious to the public interest to disclose" the impugned material. The categories of PII are not closed and should be considered in the context of the circumstances.

Public interest immunity applies to papers wherein the harm to the public interest of publication of those papers outweighs the countervailing public interest in publication. This is, as with other claims for privilege under S052, distinct from the production of documents to the House. There is a legitimate interest of the House, in exercising its constitutional role of superintendence of the executive, which can be expressed through a call for papers under S052. Sometimes that legitimate interest of the House might extend to the publication of papers and not only the production of those papers to the House, and in that case, there can be said to be a public interest in publication. However, in some cases that public interest in the publication of papers may be outweighed by the public interest in not publishing the papers. In those cases, it is appropriate to recognise that public interest privilege should apply.

In Parliamentary proceedings, a balance must be struck between the significance of the information to Parliament against the public harm that would flow from its public disclosure.

The Department submits that the public interest in the public disclosure of the information in these documents does not outweigh the public interest in preserving the confidentiality of the information contained within the documents.

The Department asserts PII on the grounds that disclosure of the documents would:

- a) reveal commercial-in-confidence information, the release of which is likely to result in the Department and third party businesses suffering commercial harm;
- b) prejudice the proper functioning of government; and
- c) reveal personal information.

Before addressing each ground of privilege in turn, the Department submits that the sensitive information in the documents would ordinarily be protected from public disclosure under the common law or pursuant to the public interest considerations against disclosure raised in section 14 and schedule 1 of the GIPA Act.

#### **PII: Commercial in confidence**

A claim of public interest immunity is made on the basis that the information is commercial in confidence. Publication of these documents would not be in the public interest because disclosure is likely to cause damage to the business' commercial activity.

Investigation and compliance material is highly sensitive and if released could prejudice third party business interests, particularly for unfounded accusations or incomplete current investigations. The public may see allegations made and decide not to enrol their children in the future, affecting businesses. While the Department understands it is in the public interest for such information to be public to ensure child safety, the Department submits such information should only be made public after proper investigation, and once decisions have been finalised and prosecutions have been completed.

In relation to tender evaluation reports, this commercial in confidence information is not currently in the public domain, though it may be in the future, and this information was provided on a confidential basis. If released the department may be perceived as incapable of handling confidential information in the future.

In relation to these documents, a claim of public interest immunity is made on the basis that the information is commercial in confidence. Claims of commercial-in-confidence may apply where the disclosure of the matter is likely to cause damage to specified commercial activity, such that publication would not be in the public interest.

#### **PII: Prejudice the proper functioning of government**

In relation to index documents for which there is a claim of public interest immunity the department considers that the release of these documents would

prejudice the proper functions of the department in its ability to regulate early childhood education centres and fairly process grant applications.

Investigating and regulating centres is a highly confidential process needed to ensure procedural fairness. This confidentiality extends to the information provided by the complainant, the person the subject of the complaint and any person who can give information relevant to the complaint. If the confidential information is released, it is reasonably likely to mean that it will be much more difficult for the department to obtain such information from any individual in the future, as they will be concerned that confidential information has been disclosed in contradiction to the assurances provided by the department's policies and procedures.

The department benefits from individuals supplying information to management, particularly in relation to complaints. If the department infringes upon this confidential process by releasing the information, it is reasonably likely to prejudice the supply to the department of confidential information in future from these individuals and other people and prejudice the integrity of investigations. This would have a serious adverse effect on the department's functions on many levels.

These documents also include information regarding grants approvals and releasing information about the mechanics of those approvals may provide an unfair advantage to future applicants.

Index documents from DOE.001.00006 through to DOE.001.000054, and among others in this category, include the signed undertakings in compliance with the Children (Education and Care Services) National Law (NSW) No 104a Section 180 (1).

#### **PII: Personal information**

The Department considers that 197 documents contain personal information. Each document in this category contains documents which, if disclosed, would involve the disclosure of personal information of identifiable private individuals, including individuals who work at or attend ECEC services, including parents and children. Personal information subject to this category includes, but is not limited to individuals:

- a) names;
- b) signatures;
- c) telephone numbers;
- d) email addresses; and/or
- e) other identifying information that can be used contextually to identify individuals that may be witnesses or otherwise attendees of ECEC services.

The Department has made a claim for privilege on the basis of privacy in respect of a number of documents where the disclosure of these documents would result in the disclosure of personal information.

We note that 26 of the 197 Documents which contain personal information are not subject to other claims of privilege. Standing Order 52(7) applies in circumstances where a document: *"is subject to a claim that it contains personal information that should not be made public but is not otherwise subject to a claim of privilege"*.

The personal information is information where children's identities can also reasonably be ascertained. For example, index document DOE.001.0000512 reveals the outcome of an investigation where personal information in the documents could lead to the identification of a child. The publication of such information is not in the public interest and reveals information about a particular incident.

Due to the volume of documents and the time provided to produce, the department has claimed privilege on the documents in their entirety, rather than individual redactions, and where the privileged information is only claimed as personal information, it is indexed as personal information in a separate index.

Yours sincerely



Sarah Hargans  
**General Counsel**  
**Legal Services**

6 December 2024



**ABIGAIL BOYD MLC**

**MEMBER OF THE NSW LEGISLATIVE COUNCIL**

David Blunt  
Clerk of the Legislative Council  
NSW Parliament

20 December 2024

**RE: Dispute of claim of privilege - SO52 Early Childhood Education and Care Sector**

I am writing to challenge the privilege claims made by the Executive in relation to this return to order. I submit that the claims of privilege over all documents in the return should not be upheld.

On their December privilege submissions regarding the return to order for “Early Childhood Education and Care Sector”, General Counsel Legal Services, Sarah Hargans and Chief of Staff to Minister Car, Joanne Matthews, claim legal professional privilege and public interest immunity over many documents returned so far, with further tranches of documents due to be delivered in January 2025.

I note that fundamental to the obligation to release information is the overarching presumption in favour of the disclosure of information (GIPA Act section 5). Factors for and against disclosure of each piece of information need to be taken into account. A balance must be struck between the significance of the information against the public harm that would flow from its public disclosure.

**1. Relevant public interest considerations in favour of disclosure**

The Call for Papers is in relation to the regulation of the early childhood sector in NSW. The matters being regulated are very serious as the regulator is responsible for an extremely vulnerable population and the ramifications of a failure of adequate regulation are profound and could result in physical harm, abuse or even death of a child under the care of a provider.

The public needs to know if the regulator is adequately resourced and also undertaking its functions properly in reacting to complaints, including serious incidents, show cause notices, visitations and assessments in a timely and effective manner, to ensure the system is working in the best possible way.

Recent newspaper articles regarding child harm such as child abuse including the arrest, charging and jailing of childcare worker Ashley Griffith, and some NCAT

cases that are published, show there are clear inadequacies with regulation. It is in the public interest to have this scrutinised to better understand the issues so we can restore trust in the sector and protect vulnerable children from potential harm.

Allowing relevant documents to be disclosed with appropriate redaction of personal information would allow scrutiny to inform the public about the operations of the regulator, in particular the way it is dealing with members of the public (particularly around complaints and concerns about child safety) as well as responding to notifications which early childhood operators and workers are required to do under the law. Further it would promote open discussion of current concerns about the adequacy of oversight of the early childhood sector, leading to the enhancement of government accountability and contributing to positive and informed debate on issues of public importance.

The documents disclosed should not reveal names of children or personal information. However, allowing scrutiny of how the regulator and relevant Government agencies deal with complaints and respond and investigate them in a timely and effective manner is vital to understanding whether one of our most vulnerable populations are being adequately protected against harm.

## **2. Claims for legal privilege**

It is correct when the Department of Education privilege submission written by General Counsel Legal Services, Sarah Hargans states that matters currently under investigation should be legally privileged. However, where there have been judgements on matters which are often also covered in the media, documents should be made available. This has been the case in other SO52s for matters that have been finalised before the courts.

## **3. Claims for public interest immunity**

The department argues that it would be 'injurious to the public interest to disclose' the vast majority of documents in the Call for Papers on the basis they

- a) reveal commercial in-confidence information, the release of which is likely to result in the Department and third party businesses suffering commercial harm;
- b) prejudice the proper functioning of government; and
- c) reveal personal information.

Each of these matters are dealt with below:

### **a) *Reveal commercial in confidence information:***

In terms of revealing commercial in confidence information which would "result in the Department and third party businesses suffering commercial harm", we note that a

primary consideration in a public interest test is ensuring the effective oversight of the expenditure of public funds. The overall expenditure of ECEC by the NSW government is significant with the Start Strong for Long day care funding for 2024 approved for \$339 million.

It is important that the public can be satisfied that money is spent on operators who uphold child safety and spend funds in an appropriate manner. It is important that providers who have engaged in misconduct, improper or unlawful conduct and also receive government funding or continue to receive government funding, should be accountable including being monitored and having any breaches remedied.

Further, it is standard practice for government grants to include requirements for standards of regulatory compliance, which is the case for the Start Strong grants. As such, it is appropriate that the public have access to documentation indicating whether the recipient of grants have been delivering “a quality early childhood education program” in accordance with grant criteria.

We note the Department in the non-privileged documents has already included all the names of the recipients of Start Strong funding along with a breakdown of the funding allocation to each centre. We question why any further claim for privilege is necessary and note that including the names of providers when disclosing funding is important for accountability and is in the public interest.

***b) Prejudice the proper functioning of government:***

In her letter of 6 December Ms Matthews notes that “investigating and regulating centres is a highly confidential process needed to ensure procedural fairness”. She argues this confidentiality extends to:

- The information provided by the complainant
- The person the subject of the complaint
- Any person who can give information relevant to the complaint.

Ms Matthews argues that “if the confidential information is released, it is reasonably likely to mean that it will be much more difficult for the department to obtain such information from any individual in the future”. The Department argues it would not be able to function because the supply of information to the office would be curtailed.

This is contestable on three grounds:

Firstly, under the law, childcare workers are required to report incidents and breaches of the National Law. This is a legal requirement and not negotiable and so there is no reasonable likelihood that publishing information will stop them from obeying the law. Childcare workers and providers are entitled to the presumption that they will generally behave in accordance with the law and that means reporting

incidents to the relevant authorities will not be hampered and therefore won't prejudice the proper functioning of government.

In relation to complaints from parents it is unlikely that information being made public will stop them from disclosing in the future.

We note too that the GIPA Act requires that in applying the public interest test agencies are not to take into account the fact that disclosure of information might be misinterpreted or misunderstood by any person. (GIPA Act section 15 (c)-(d))

Secondly, many of the names of the centres and individuals have already been disclosed by being published on the Department's own enforcement page, by court or tribunal or media coverage of the incident and also in the index of the SO52. For instance, 3 Bears is covered in the media and an NCAT judgment:

<https://www.caselaw.nsw.gov.au/decision/190de348523b8cc6ae2f0e45>

Some cases appear in the media, with no follow-up of what happened, which is less than ideal for building trust in the sector. Eg:

<https://www.news.com.au/lifestyle/parenting/kids/serious-questions-childs-close-call-with-truck-after-leaving-childcare-group-caught-on-video/news-story/75bb186c1c549ba84a7c56affe6ed6e3>

In other cases of show cause and cancellations, cancellations are shown on the Dept of Education's own website, including names of providers and individuals:

<https://education.nsw.gov.au/early-childhood-education/regulation-and-compliance/published-enforcement-and-decision-actions/cancellations-and-suspensions>

There are also prosecutions where the provider is named.

<https://education.nsw.gov.au/early-childhood-education/regulation-and-compliance/published-enforcement-and-decision-actions/prosecutions>

Secondly, there appears to have been a failure to consider the publication provisions of the National Childcare Law: s270(5) gives the state authority wide powers to publish information including information about "enforcement actions taken under this Law, including information about compliance notices, prosecutions, enforceable undertakings, suspension or cancellation of approvals".

This carve-out doesn't seem to have been taken into account when Ms Hargans talks about commercial-in-confidence information, personally identifying information and material supposedly received in confidence in general. This failure to read s270 also seems odd given that there is a reference in the privilege claim to s104 of the same law, which deals with Enforceable Undertakings – material that certainly can be released under the national law.

Finally, redaction of personal information would remedy this issue. The focus is not on the particular names of people who have disclosed or been affected but on



whether the government is behaving in a responsible manner in the timeliness of their responses and the effectiveness of the regulation.

***c) Reveal personal information:***

Ms Matthews notes that “many of the documents returned in the office's Privileged submission contain personal information. Should privilege be challenged on these documents, the office requests the opportunity to redact the personal information.”

Identification of a child or parents reporting incidents should of course be redacted. However, as noted above, it is important that the public, particularly parents of young children, are satisfied that incidents are thoroughly investigated in a timely manner and the outcomes of these investigations lead to appropriate responses. Redaction of personal names in documents means regulatory actions can be assessed in the public interest without harming individuals.

**A sample of other states**

Failure to consider the publication provisions of the National Childcare Law: s270(5) gives the state authority wide powers to publish information including information about “enforcement actions taken under this Law, including information about compliance notices, prosecutions, enforceable undertakings, suspension or cancellation of approvals”.

In Queensland for instance certain types of serious enforcement action information, such as prosecutions and suspensions, are published on the serious enforcement action page. It says “Information is published to ensure parents and carers, the community and the early childhood sector can access information about individuals and organisations that have presented a risk to children’s safety, health and wellbeing when providing education and care”

(<https://earlychildhood.qld.gov.au/regulation/compliance-and-enforcement/serious-enforcement-actions>).

In Victoria enforcement actions are published with the provider name and breach. It also gives a list of all the centres and provider names that have a significant improvement rating:

<https://www.vic.gov.au/enforcement-action-regulatory-authority#enforcement-action-information-that-may-be-published>

Western Australia has a searchable databases, which brings up every action in reverse chronological order:

<https://www.wa.gov.au/government/document-collections/education-and-care-regulatory-unit-enforcement-actions>.

**Wholesale privilege of documents**

Finally we note that the Department and Ministerial office state that “Due to the volume of documents and the time provided to produce, the department has claimed privilege on the documents in their entirety, rather than individual redactions”

This approach is incorrect and unfair. The Department needs to be specific about what exactly they claim privilege over – blanket claims aren’t valid and should be rejected. The department here acknowledges that parts of the documents aren’t privileged but asserts privilege anyway – this is not in the public interest and not in the spirit of what privilege should be used for.

Mr Hargans says: “...and where the privileged information is only claimed as personal information, it is indexed as personal information in a separate index.”

This suggests the privilege is only over personal information, not the whole of the document. This is not specific enough and doesn’t explain why the entire document has been suppressed. The argument falls down by the fact that the names are in the index and made public, which the dept would have redacted if it was serious. Further to that, a redaction of personal information can be addressed in the document.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'A Boyd', with a stylized flourish at the end.

Abigail Boyd MLC

**From:** Sarah Hargans <sarah.hargans@det.nsw.edu.au>  
**Sent:** Wednesday, 12 February 2025 7:16 PM  
**To:** Legislative Council Returns to Order; LC Clerk  
**Cc:** claire.schwager; Simone Nokes; Alex Morrison (Alex Morrison); Madeleine Abbott  
**Subject:** SO52-24-05 - Privilege Dispute Submissions  
**Attachments:** SO52-24-05 - Privilege Dispute Submissions - SH - 12 February 2025 - FINAL.pdf

OFFICIAL Sensitive - Legal

Dear Mr Blunt AM,

Please find attached submissions from the Department of Education in relation to the privilege dispute raised by Ms Boyd, MP on 20 December 2024.

In accordance with the approach agreed with the Independent Arbiter, the Department has considered our claims for privilege against 18 documents. As part of that consideration we have determined that privilege is no longer claimed on four documents, and redactions have been made to six documents where privilege is still claimed. Those ten documents can be accessed through the following link:

- [SO52-24-05 - Privilege Dispute - Non Privileged and redacted documents.pdf](#)

The Department continues to claim privilege over the entirety of the remaining eight documents, and therefore those documents have not been attached to this email or the submissions.

Please let me know if there are any issues accessing the submission or documents.

Kind regards

**Sarah Hargans | General Counsel**

☎: (02) 7814 1127 | 0438 364 791 | ✉: [sarah.hargans@det.nsw.edu.au](mailto:sarah.hargans@det.nsw.edu.au)

Darug Country | Level 5, 105 Phillip Street PARRAMATTA NSW 2150

Exec Support: Sharon Mingramm - 0499 420 814



*I acknowledge the homelands of all Aboriginal people and pay my respects to Country*

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\*\*\* This message is intended for the addressee named and may contain privileged information or confidential information or both. If you are not the intended recipient please notify the sender and delete the message. \*\*\*



**FURTHER PRIVILEGE SUBMISSIONS FOR RETURN TO ORDER:  
Early Childhood Education and Care Sector**

On 6 December 2024, claims for privilege were made, pursuant to Standing Order 52(6), by the Department of Education (the Department) over documents responsive to the Order of the Legislative Council of 13 November 2024.

The privilege claimed by the Department was disputed by Ms Abigail Boyd, MP on 20 December 2024 (the dispute). These submissions are in response to that dispute, and focus on 18 documents provided by the Department in its initial return on 6 December 2024. These 18 documents are set out across the three tables in Annexure A. This sample set of documents was requested by The Honourable Keith Mason AC KC (Arbiter) to consider the Department's claims for privilege further.

The Department's claims for privilege are not raised as a basis to resist production of the documents identified. The claims are made to identify those documents over which privilege may be claimed in order to allow the Arbiter to consider the claims, in support of an application that it is in the public interest that the documents not be made publicly available.

It is not in the public interest to publish the documents over which privilege claims are made for the reasons outlined below.

The Department understands that the consequence of claiming privilege in relation to the documents the subject of these claims, if successful, the documents will only be available for inspection by Members of the Legislative Council and not disclosed to the public. However, the Department understands that this Submission will be published on the NSW Parliamentary website with the Indexes accompanying the Return. For this reason, details of the privileged information are referred to at a high level so as not to inadvertently waive privilege.

As an overarching principle, the Department notes that it is difficult to provide detailed public submissions in relation to the sensitive information contained in the subject documents, and the reasons why this information should not be disclosed, without disclosing, to some extent, the very information that the Department's assertion of privilege seeks to protect.

Claims of privilege over the subject documents are made on the basis of public interest immunity (PII). However, before addressing each ground of privilege in turn, the Department submits that the sensitive information in the documents would ordinarily be protected from public disclosure under the common law or pursuant to the *Freedom of Information Act 1982 (Cth)* (FOI Act). Similar information held by the Department would also be protected under the

*Government Information (Public Access) Act 2009 (NSW)* (GIPA Act). Whilst the Department recognises that differing tests apply to certain information being withheld pursuant to the FOI Act and GIPA Act compared to information being withheld on the basis of PII, each involve weighing the release of information against the public interest in knowing the information. Therefore, the Department contends that case law related to the FOI Act and GIPA Act is analogous in determining whether information should be disclosed.

Section 264(1) of the *Children (Education and Care Services) National Law 2010 (NSW)* (National Law) states that “the FOI Act applies as a law of a participating jurisdiction for the purposes of the National Quality Framework”. Therefore, records relating to the regulation of Early Childhood Education and Care Services are governed by the FOI Act instead of the GIPA Act. However, the Department submits that similar principles apply and any release of information governed under the FOI Act would affect any future release of information held under the GIPA Act.

Due to the volume of documents and the time provided to produce, the Department has previously claimed privilege over the documents in their entirety, rather than applying redactions to relevant sections. With the benefit of further time to review the 18 documents the subject of this claim, the Department considers that some information can be made public, and individual redactions have been made on relevant documents to show the types of information that it seeks to withhold for the privilege reasons outlined below.

Table (a) in Annexure A sets out those documents where privilege has been waived and the Department is of the view the document can now be released in full. Those documents are submitted with this submission.

Table (b) in Annexure A sets out the documents where privilege is still claimed, but the Department has been able to apply redactions to the documents. Those redacted documents are also submitted with this submission.

Table (c) in Annexure A sets out the documents where privilege is still claimed over the entirety of the document. Those documents have not been submitted as a separate set with this submission.

For some of the documents in the broader return (outside the 18 sample documents), if the matter has been finalised, the Department considers that, if requested, a redacted copy, removing personal and confidential information, could be released. However, in cases where the investigation is current, the Department maintains that the whole document should be considered privileged.

#### **Public interest immunity as a general proposition**

It is submitted that 14 of the 18 documents previously identified as privileged should not be made public in their entirety on one or more grounds of PII. Each document in this category contains information the disclosure of which would be

contrary to the public interest. The Department therefore asserts PII over this information, but has provided a redacted version of the document where possible.

PII is a well-established common law principle that requires the balancing of conflicting interests to determine whether it would be "injurious to the public interest to disclose" the impugned material. The categories of PII are not closed and should be considered in the context of the circumstances.

PII applies to papers wherein the harm to the public interest of publication of those papers outweighs the countervailing public interest in publication. This is, as with other claims for privilege under SO52, distinct from the production of documents to the House. There is a legitimate interest of the House, in exercising its constitutional role of superintendence of the executive, which can be expressed through a call for papers under SO52. Sometimes that legitimate interest of the House might extend to the publication of papers and not only the production of those papers to the House, and in that case, there can be said to be a public interest in publication. However, in some cases that public interest in the publication of papers may be outweighed by the public interest in not publishing the papers. In those cases, it is appropriate to recognise that public interest privilege should apply.

In Parliamentary proceedings, a balance must be struck between the significance of the information to Parliament against the public harm that would flow from its public disclosure.

The Department submits that the public interest in the public disclosure of the entirety of the information in 14 of these documents does not outweigh the public interest in preserving the confidentiality of the information contained within the documents.

The Department asserts PII on 14 of the documents, on the grounds that disclosure would:

- a) reveal commercial-in-confidence information, the release of which is likely to result in the Department and third-party businesses suffering commercial harm;
- b) prejudice the proper functioning of government; and/or
- c) reveal personal information.

Before addressing each ground of privilege in turn and specifically addressing the 18 sample documents, the Department submits that the sensitive information in the documents would ordinarily be protected from public disclosure under the common law or pursuant to the public interest conditional exemptions raised in sections 47C, 47E, 47F, 47G of the FOI Act. Further details relating to these submissions are outlined below.

#### **PII: Commercial in confidence**

A claim of public interest immunity is made on the basis that certain information is commercial in confidence. Publication of this information would not be in the

public interest because disclosure is likely to cause damage to business' commercial activity.

Commercial information is also protected under the FOI Act in s47G which states:

- (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.*

Investigation and compliance material (eg DOE.001.0000996) is highly sensitive and if released could prejudice third party business interests, particularly for unfounded accusations or incomplete current investigations. The public may see allegations made without knowing whether these allegations are substantiated and decide not to enrol their children in the future, thereby affecting businesses. While the Department understands it is in the public interest for such information to be public to ensure child safety, the Department submits such information should only be made public after proper investigation, and once decisions have been finalised and prosecutions have been completed.

In relation to tender evaluation reports (eg DOE.001.0000259), this commercial in confidence information is not currently in the public domain, though it may be in the future, and this information was provided by tenderers on a confidential basis for the purpose of consideration by the Department, not for sharing for others in the same market. If released, it may provide insights into confidential business dealings of these businesses and may prejudice the confidence of other businesses participating in the future given the perception that the Department did not handle confidential information appropriately in the past.

One of the documents (DOE.001.0000610), references current business sale negotiations that have not yet been settled. The Department considers the third-party business may object to release of such information as it may affect their commercial interests in relation to those negotiations.

Information contained in DOE.002.0000079 was received from the Australian Government who commissioned this report. The Department is a party to the Joint Monitoring and Data Sharing Project. This report contains commercial-in-confidence information in relation to the methodology used by the third-party consultants to conduct the report. Release may prejudice third party interests as their methodology may be used by their competitors for similar reporting and

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would jeopardise department relationships with consultants and the Australian Government for not upholding confidentiality.

In relation to these documents, a claim of public interest immunity is made on the basis that the information is commercial in confidence. Claims of commercial-in-confidence may apply where the disclosure of the matter is likely to cause damage to specified commercial activity, such that publication would not be in the public interest.

#### **PII: Prejudice the proper functioning of government / Responsible and Effective Government**

In relation to the index documents for which there is a claim of public interest immunity the Department considers that the release of these documents would prejudice the proper functions of the Department in its ability to regulate early childhood education centres and fairly process grant applications. S47E 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.*

Investigating and regulating centres is a highly confidential process needed to ensure procedural fairness. This confidentiality extends to the information provided by the complainant, the person the subject of the complaint and any person who can give information relevant to the complaint and also extends to any information that could be reasonably used to decipher these matters. If the confidential information is released, it is likely to mean that complainants are less likely to come forward, as they will be concerned that confidential information will be disclosed in contradiction to the assurances provided by the Department's policies and procedures, referred to below.

#### **'MA' and Department of Veterans' Affairs (Freedom of information) [\[2017\] AICmr 72](#) (26 July 2017)**

S47E has been considered in the above case regarding documents relating to a complaint investigation undertaken by the Department of Veterans' Affairs in relation to the Veterans' Review Board (VRB).

Paragraphs [85]-[95] discusses why giving access to complaints made by veterans and advocates:

*"would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of the VRB by affecting the willingness of members and staff to participate or provide comments in response to complaints made. I find that release of this material could, in turn, hinder one of the activities or operations of the VRB: the consideration or resolution of complaints by veterans or their advocates appearing before it." [90]*

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'HJ' and Australian Federal Police [\[2015\] AICmr 71](#)

In this case, s47E was considered in relation to:

*"material concerning concluded investigations into complaints complaint made against AFP officers. The material comprises summaries with various details of the complaints and alleged conduct as well as certain parts of a professional standards document showing the information considered and the process undertaken in relation to a complaint. I find that the documents relate to the management and assessment of personnel. [17]"*

Importantly, the Acting Australian Information Commissioner found the following:

*"I find that the release of the information would have a substantial adverse effect on the management or assessment of personnel by the AFP. I accept that the release of the material, which could reveal sources, the input of staff into complaints or unsubstantiated allegations relating to highly sensitive material, could have a substantial adverse effect on the ability of the AFP to undertake these investigations into its personnel in the future." [20]*

*"On the basis that the documents relate to highly sensitive matters, I accept that individuals could be more reluctant to make complaints of this nature or to cooperate with investigations if they fear disclosure to a person unrelated to the matter. This could reasonably also extend to persons accused of improper or illegal conduct." [21]*

*"I accept that the context of confidentiality of complaints and investigations of this nature, even after the investigations have been concluded, supports the management or assessment of personnel functions of the AFP in dealing with alleged misconduct by officers, principally by encouraging candour and protecting sources' privacy." [22]*

And after weighing the above with the public interest to release information, the Acting Australian Information Commissioner found:

*"In balancing the factors for and against disclosure I give the greatest weight to the factors against disclosure. In particular, I give weight to the potential for the documents to prejudice the fair treatment of the individuals to whom the complaints relate and the potential for reputational harm or distress." [27]*

While the above case relates to investigations of the agency's internal staff, the Department submits that the principles would still apply to investigations of ECE centres and their staff, and the case shows the significant importance of maintaining confidence of information received in the course of investigations from informants and witnesses.

The Regulatory Authority and the broader Department benefits from individuals supplying information to management, particularly in relation to complaints. If the Department infringes upon this confidential process by releasing the information, it is likely to prejudice the supply to the Department of confidential information in future from these individuals and other people and prejudice the integrity of investigations. This would have a serious adverse effect on the Department's functions on many levels and also on the Regulators ability to obtain information that needs investigating to consider the safety of children in the sector.

Some of these documents also include information regarding grants approvals. Releasing information about the mechanics of those approvals may provide an unfair advantage to future applicants.

The dispute raised by Ms Boyd states that "allowing scrutiny of how the regulator and relevant Government agencies deal with complaints and respond and investigate them in a timely and effective manner is vital to understanding whether one of our most vulnerable populations are being adequately protected against harm."

The Department agrees that scrutiny is encouraged to ensure proper regulation which in turn provides protection of children. However, it is submitted that releasing the very methodology used to investigate, to the public, would completely undermine and compromise the Department's ability to regulate and investigate in the future.

The Department has developed a methodology to profile risk and monitor services. Transparency over the methodology and how it is calculated, is reasonably likely to lead to services and approved providers with perverse incentives or motives to intentionally manipulate and hide their service practice and adverse outcomes. It could be used by the very people the Department seeks to remove from the sector to circumvent the system and remain undetected, thus compromising the safety and/or quality of Early Childhood Education and Care (ECEC) services to the detriment of children and families. This, in turn, could lead to a misleading and understated "risk classification" of a service, reducing the amount of regulatory attention and intervention they receive. Minimal regulatory oversight over an unknowingly higher-risk service could lead to a child or multiple children being exposed to harm and have negative outcomes for their health, safety and well-being.

Further, the dispute agrees that names of children and personal information should not be disclosed. However, the Department submits that the opinions, identifying information and information obtained confidentially is all considered "personal information" under the FOI Act and the National Law, and that such information, if released publicly, would:

- also prejudice the functions of the Department, in its ability to obtain such information in the future, and adequately investigate and regulate centres; and

- may found an action against the Department for breach of its duty of confidentiality under Section 273 of the National Law and in accordance with s45 of the FOI Act.

### **National Law**

#### **Section 273 Duty of confidentiality**

- 1) *An individual who is, or who has been, a person exercising functions under this Law must not disclose to another person protected information. Penalty: \$5700.*
- 2) *However, subsection (1) does not apply if—*
  - (a) *the information is disclosed in the exercise of a function under, or for the purposes of, or in accordance with, this Law; or*
  - (b) *the disclosure is authorised or required by any law of a participating jurisdiction, or is otherwise required or permitted by law; or*
  - (c) *the disclosure is with the agreement of the person to whom the information relates; or*
  - (d) *the information relates to proceedings before a court or tribunal and the proceedings are or were open to the public; or*
  - (e) *the information is, or has been accessible to the public, including because it was published for the purposes of, or in accordance with, this Law; or*
  - (f) *the disclosure is otherwise authorised by the Ministerial Council.*
- 3) *In this section—*

**protected information** means information—

  - (a) *that is personal to a particular individual and that identifies or could lead to the identification of the individual; and*
  - (b) *that comes to a person's knowledge in the course of, or because of, the person exercising functions under this Law.*

### **FOI Act**

#### **Section 4**

**"personal information"** has the same meaning as in the Privacy Act 1988.

#### **Privacy Act 1988 Section 6**

**"personal information"** means information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- (a) *whether the information or opinion is true or not; and*
- (b) *whether the information or opinion is recorded in a material form or not.*

#### **Section 45**

##### **Documents containing material obtained in confidence**

- (1) *A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency or the Commonwealth), for breach of confidence.*
- (2) *Subsection (1) does not apply to a document to which subsection 47C(1) (deliberative processes) applies (or would apply, but for subsection 47C(2) or*
- (3) *that is prepared by a Minister, a member of the staff of a Minister, or an officer or employee of an agency, in the course of his or her duties, or by a*

*prescribed authority or Norfolk Island authority in the performance of its functions, for purposes relating to the affairs of an agency or a Department of State unless the disclosure of the document would constitute a breach of confidence owed to a person or body other than:*

- a. a person in the capacity of Minister, member of the staff of a Minister or officer of an agency; or*
- b. an agency or the Commonwealth.*

### **National Law**

#### **Section 270 Publication of information**

- 5) The Regulatory Authority may publish the prescribed information about—
  - (a) enforcement actions taken under this Law, including information about compliance notices, prosecutions, enforceable undertakings, suspension or cancellation of approvals; and*
  - (b) any prescribed matters.**
- 6) Information published under this section must not include information that could identify or lead to the identification of an individual other than—
  - (a) an approved provider or nominated supervisor; or*
  - (b) a person who is being prosecuted for an offence against this Law; or*
  - (c) if the Regulatory Authority is satisfied that it is in the public interest to do so, a person with management or control of an education and care service.**

While section 270 of the National Law states that the Department *may* publish information about enforcement actions and the names of approved providers, nominated supervisors and people being prosecuted, the Department must still be satisfied that it is in the public interest to do so, and released information must not include information that identifies any other individual. The Department submits this includes any informants, witnesses, students and parents which would be identifiable by the facts raised in a complaint, incident or investigation. The Department submits that this would outweigh the public interest in releasing the information.

### **National Law**

#### **271 Disclosure of information to other authorities**

- 2) The Regulatory Authority may disclose information in respect of an education and care service for a purpose listed in subsection (4), to—
  - (a) a relevant Commonwealth Government Department; or*
  - (b) any State or Territory Government Department; or*
  - (c) any Commonwealth, State or Territory public authority; or*
  - (d) any State or Territory local authority; or*
  - (e) a Regulatory Authority of another participating jurisdiction.**
- 4) The purposes for disclosure of information under this section are—
  - (a) the disclosure is reasonably necessary to promote the objectives of the national education and care services quality framework; or**

- (b) the disclosure is for the purposes of enabling or assisting the other entity to perform or exercise any of its functions or powers under this Law; or
- (c) the disclosure is for the purposes of research or the development of National, State or Territory policy with respect to education and care services; or
- (d) the disclosure is for a purpose relating to the funding of education and care services; or
- (e) the disclosure is for a purpose relating to the payment of benefits or allowances to persons using education and care services, provided the disclosure of information is not otherwise prohibited by law.

The Department submits that section 271 of the National Law would not allow disclosure of the information, because the parliament is not a relevant body to whom information can be disclosed, and the purpose of the disclosure, being under a Standing Order 52, would not be for a purpose outlined in section 271(4).

The Department conducts investigations in accordance with its NSW Early Childhood Education and Care Regulatory Authority Complaint Handling Policy which can be read here:

<https://education.nsw.gov.au/content/dam/main-education/early-childhood-education/operating-an-early-childhood-education-service/media/documents/policies/complaint-handling-policy.pdf>

Information on the Investigation process is also published on our website here:

<https://education.nsw.gov.au/early-childhood-education/regulation-and-compliance/investigation-process>

The above policy at 5.1.2 provides informants and witnesses with the assertion that any information provided will be kept confidential, except:

- to provide the general nature of the complaint to the person/entity being complained about so they have sufficient information to respond to the allegations against them; or
- to other agencies where the reporting of a risk of significant harm to a child is mandatory; or
- when required to disclose information regarding a complaint, the complaint review, or information around the overall complaint handling process if a request for information is lodged under the *Freedom of Information Act 1982* (Cth) or the *Government Information (Public Access) Act 2009* (NSW).

The Department submits that this includes all information provided by individuals but specifically, this includes:

- the dates of incidents (and in turn the dates of investigations as contextually this may identify an incident, and therefore an individual, to those in the centre's community);
- a description of the incident or complaint;
- a description of any of the people involved in a complaint or incident;
- information relating to previous breaches that may be used in conjunction with further breaches to consider any patterns of behaviour;

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- outcomes or recommendations noted in investigation reports or notices that are awaiting responses from the subjects of current complaints.

The Department relies on individuals, such as centre staff to provide information about their colleagues, managers and employers. If their confidentiality is breached, they will lose faith in the Department's ability to handle sensitive information and informants will be fearful for their safety, potential retribution from subjects of complaints, as well as possible negative impacts on future employment if viewed as a complainer, troublemaker or whistle blower by others in the sector.

While individuals are mandatorily required to report incidents to the Department, and other agencies, the Department and NSW Police in particular are already concerned about the potential failure to report in the sector. Jeopardising the ability to maintain confidentiality will likely significantly reduce the level of candour provided by informants.

Similarly, parents of victims or children at risk of harm provide confidential information that could identify their children. Significant weight should be given to the protection of information they provide under the same confidential process so that they can be confident in having frank conversations without risking their and their children's injuries, risk of harm or other identifying information being publicly disclosed. They are also likely to have the same concerns about retribution from subjects of complaints, as well as possible negative impacts on future enrolment of their children if viewed as a complainer, troublemaker or whistle blower by others in the sector.

The dispute questions if information about an incident is in the media, then shouldn't the surrounding investigation material should also be made public for matters that have been finalised before the courts.

The Department strongly disagrees with this position. While it is in the public interest for the public to be confident that the Department is sufficiently and proactively regulating the sector, this should not be at the expense of revealing private information obtained confidentially or that would prejudice the future supply of such information, which would prejudice the ability for the agency to exercise its functions, which ultimately is for the protection of children.

Section 37 of the FOI Act further identifies the importance of maintaining confidentiality of confidential sources for current matters, and may be relevant to the broader documents produced on 11 December 2024:

***FOI Act***

***Section 37 - Documents affecting enforcement of law and protection of public safety***

- (1) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:*
- a. prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a*

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- law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance;*
- b. disclose, or enable a person to ascertain, the existence or identity of a confidential source of information, or the non - existence of a confidential source of information, in relation to the enforcement or administration of the law; or*
  - c. endanger the life or physical safety of any person.*
- (2) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:*
- a. prejudice the fair trial of a person or the impartial adjudication of a particular case;*
  - b. disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or*
  - c. prejudice the maintenance or enforcement of lawful methods for the protection of public safety.*
- (2A) For the purposes of [paragraph \(1\)\(b\)](#), a person is taken to be a confidential source of information in relation to the enforcement or administration of the law if the person is receiving, or has received, protection under a program conducted under the auspices of the Australian Federal Police, or the police force of a State or Territory, for the protection of:*
- a. witnesses; or*
  - b. people who, because of their relationship to, or association with, a witness need, or may need, such protection; or*
  - c. any other people who, for any other reason, need or may need, such protection.*
- (3) In this section, law means law of the Commonwealth or of a State or Territory.*

**'PD' and Australian Skills Quality Authority (Freedom of information) [\[2018\] AICmr 57](#) (25 June 2018)**

In the above case, the Applicant requested access to documents relating to a previous FOI request made by the Applicant. The previous FOI request related to complaint information held by the agency.

At [10]-[21] it discusses confidentiality and the possibility of identifying the complainant.

In particular, at [12] in relation to s 37(1)(b):

*"This exemption is intended to protect the identity of a confidential source of information connected with the administration or the enforcement of the law. This 'extends to the work of agencies in administering legislative schemes and requirements, monitoring compliance, and investigating breaches."*

This was upheld by the Acting Australian Information Commissioner.

Ms Boyd's dispute also raises the fact that NSW Civil and Administrative Tribunal outcomes, cancelled or suspended providers and enforcement prosecutions are published on the Department's website and as such is a contestable ground for release of confidential information related to those cases. The Department submits that while it may publish this information, this does not extend to releasing the supporting documentation that was used to investigate and prosecute these matters, which contextually would identify the individual victims or children at risk, informants and witnesses. The information that is published both in NSW and other states does not provide specific descriptions of incidents that could identify individuals, and generally only provides the breached sections of the regulations. Further, information is published once matters are completed as opposed to current or ongoing investigations of allegations.

#### PII: Personal information

The Department considers that 12 of the 18 sample documents contain personal information. Each document in this category contains documents which, if disclosed, would involve the disclosure of personal information of identifiable private individuals, including individuals who work at or attend ECEC services, including parents and children. Personal information subject to this category includes, but is not limited to individuals:

- a) names;
- b) signatures;
- c) telephone numbers;
- d) email addresses; and/or
- e) other identifying information that can be used contextually to identify individuals that may be witnesses or otherwise attendees of ECEC services.

The Department has made a claim for privilege on the basis of privacy in respect of a number of documents where the disclosure of these documents would result in the disclosure of personal information.

Personal information is further protected under section 47F of the FOI Act, which states:

- (4) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).*
- (5) In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:*
  - d. the extent to which the information is well known;*
  - e. whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;*

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- f. the availability of the information from publicly accessible sources;*  
*g. any other matters that the agency or Minister considers relevant.*

***WW' and Australian Sports Commission*** [\[2021\] AICmr 11](#) (9 April 2021)

This case relates to complaints about two individuals made to the Australian Sports Commission.

In section 47F discussions, at [70]-[84] confidentiality in the context of individuals is considered, where they have provided submissions and complaints information. Generally, the Information Commissioner affirmed the use of s47F.

The dispute also notes “The argument falls down by the fact that the names are in the index and made public, which the dept would have redacted if it was serious.” The Department notes that the index provided on 10 December 2024 was provided in error and included unredacted personal information. The Clerk has been made aware of this issue by The Cabinet Office and the index has since been replaced with the correct version. This error was not intended to waive the Department’s ability to claim privilege over this information.

The 18 sample documents are addressed individually below.

Document no:	Original privilege claim	Reconsidered privilege claim
DOE.001.0000904	Y - PII - Responsible and Effective Government, Personal Information	Y - PII - Responsible and Effective Government, Personal Information  Maintain whole document as privileged.

This document relates to a current open matter where a Show Cause Notice has been issued and the Department is awaiting response from the subject of the investigation. Release of the whole document is reasonably likely to prejudice the investigation, being a function of the Department. Therefore, the Department maintains that the whole document is privileged.

The Department notes that it would have considered if redaction was possible, had the document related to a finalised matter.

This document includes information, and regulatory opinions about several individuals whose identities are apparent or can reasonably be established by members of the community.

The document also contains methodology used by the Regulator to conduct investigations. Releasing this methodology could prejudice current and future investigations as it could be used to circumvent the system and remain undetected thus compromising the safety and/or quality of ECEC services to the detriment of children and families.

The document also contains information that has been superseded by updated drafts, as the matter has progressed over time, since production.

Document no:	Original privilege claim	Reconsidered privilege claim
DOE.001.0000272	Y - PII - Commercial in Confidence	Release in full

Upon further consideration, the Department does not press the privilege claim over this document. The information will be made public via the NSW Grants Finder website 45 days after funding agreements are signed pursuant to NSW Grant Administration Guide.

[www.nsw.gov.au/grants-and-funding](http://www.nsw.gov.au/grants-and-funding)

Document no:	Original privilege claim	Reconsidered privilege claim
DOE.001.0000429	Y - PII - Responsible and Effective Government, Personal Information	Y - PII - Personal Information Changed to part release.

This document includes information and regulatory opinion about an individual whose identity is apparent or can reasonably be ascertained by members of the community.

However, the Department considers it is in the public interest to disclose Enforceable Undertakings against educators and providers who have contravened the laws and regulations. Enforceable Undertakings are generally used when the noncompliance posed too great a risk to children for the individual to self-remedy, but not so great a risk to exclude or prohibit.

The document shows that the Regulator has taken appropriate action. If personal information is redacted, the Department would not object to withdrawing the Responsible and Effective Government privilege claim.

The document contains both the identity of the subject of the matter, and a child and we consider that releasing the identity of the subject of the matter may lead to identification of the child to people in that community. Release of the remaining parts of the document will allow the public to see the actions taken.

Document no:	Original privilege claim	Reconsidered privilege claim
DOE.001.0000910	Y - PII - Responsible and Effective Government, Personal Information	Y - PII - Personal Information Changed to part release.

This document is a point-in-time snapshot of the service and its performance, including unconfirmed breaches. However, the Department considers it is in the public interest to disclose most of the document, except for the parts that contain personal information for the reasons outlined above.

Document no:	Original privilege claim	Reconsidered privilege claim
DOE.001.0000907	Y - PII - Responsible and Effective Government, Personal Information	Y - PII - Personal Information

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	Changed to part release.
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This document contains the personal information of ECEC centre staff including their names, qualifications and types of training they have completed. While it is important the public know that this information is checked, the Department submits that the information in relation to individuals is their personal information and should remain privileged. The personal information has therefore been redacted and the remaining information can be released.

Document no:	Original privilege claim	Reconsidered privilege claim
DOE.001.0000283	Y - PII - Responsible and Effective Government	Release in full

Upon further consideration, the Department does not press the privilege claim over this document.

Document no:	Original privilege claim	Reconsidered privilege claim
DOE.001.0000259	Y - PII - Responsible and Effective Government, Commercial in Confidence	Y - PII - Responsible and Effective Government, Commercial in Confidence  Maintain whole document as privileged.

This document contains confidential assessment methodology and raw scores for applicants. The department maintains that the whole document should remain privileged as it would prejudice the commercial interests of applicants, and the functions of the agency in assessing grants in future.

Document no:	Original privilege claim	Reconsidered privilege claim
DOE.001.0001005	Y - PII - Responsible and Effective Government, Personal Information	Y - PII - Responsible and Effective Government, Personal Information  Maintain whole document as privileged.

This document relates to a current open matter. Release of the whole document is reasonably likely to prejudice the investigation, being a function of the Department. Therefore, the Department maintains that the whole document is privileged.

This document includes information, and regulatory opinions about several individuals whose identities are apparent or can reasonably be established by members of the community.

The document also contains methodology used by the Regulator to conduct investigations. Releasing this methodology could prejudice current and future investigations as it could be used to circumvent the system and remain

undetected thus compromising the safety and/or quality of ECEC services to the detriment of children and families.

The National Law allows the Regulator to publish information about a compliance notice, but not a compliance direction. A breach letter is a non-statutory action, in similar terms to a compliance direction, but without the penalties attached for non-compliance. The Department does not consider releasing this document is in the public interest, given the reasonable likelihood it would prejudice current and future investigations and would breach the personal privacy of individuals involved, including the identities of children.

Document no:	Original privilege claim	Reconsidered privilege claim
DOE.001.0000610	Y - PII - Commercial in Confidence, Personal Information	Y - PII - Commercial in Confidence, Personal Information Changed to part release.

This document contains personal information of third parties, and commercial information about a business sale agreement which has not yet been settled. The Department considers the third-party business would object to release of such information as it may affect their commercial interests in relation to those negotiations.

The Department now considers that parts of the document can be released, with the information considered to be commercial in confidence and personal redacted.

Document no:	Original privilege claim	Reconsidered privilege claim
DOE.001.0000291	Y - PII - Responsible and Effective Government	Changed to release in full

These program guidelines have since been published so information contained in this document is largely in the public domain. The Department no longer presses the privilege claim in this document.

Document no:	Original privilege claim	Reconsidered privilege claim
DOE.001.0000988	Y - PII - Responsible and Effective Government, Personal Information	Y - PII - Responsible and Effective Government, Personal Information Maintain whole document as privileged.

This document relates to a current open matter. Release of the whole document is reasonably likely to prejudice the investigation, being a function of the Department. Therefore, the Department maintains that the whole document is privileged in relation to Responsible and Effective Government.

This document includes information and regulatory opinion about individuals whose identity is apparent or can reasonably be ascertained by members of the community.

NSW Department of Education – Legal Services

Level 5, 105 Phillip Street, Parramatta NSW 2150 GPO Box 33 Sydney NSW 2001 T 7814 3896

E [legal@det.nsw.edu.au](mailto:legal@det.nsw.edu.au)

Compliance directions are intended to give the approved provider and the subject of the direction an opportunity to remedy noncompliant conduct or environments. Disclosure of compliance directions will not be in the public interest because it will unfairly identify an individual for behavior that can be remedied.

A Compliance direction is not an enforcement action that can be published under the National Law.

Document no:	Original privilege claim	Reconsidered privilege claim
DOE.001.0000900	Y - PII - Responsible and Effective Government, Personal Information	Y - PII - Responsible and Effective Government, Personal Information  Maintain whole document as privileged.

This document relates to a current open matter. Release of the whole document is reasonably likely to prejudice the investigation, being a function of the Department. Therefore, the Department maintains that the whole document is privileged.

This document includes information, pictures, and regulatory opinion about several individuals whose identity is apparent or can reasonably be ascertained by members of the community.

Disclosure will significantly adversely impact the Department and its ability to regulate effectively. It is not in the public interest to reveal the Department's inner workings and methods of investigating and resolving high-risk cases.

Disclosure of the detail contained in the documentation has the potential to seriously prejudice the investigation of a contravention by the Regulator of provisions in the National Law relating to the safety, health and well-being of children in education and care. Lawful methods or procedures for preventing, detecting, investigating or dealing with such contravention (or possible contravention) of the National Law, would also be compromised and evidential collection would be as critically impacted.

Disclosing personal or identifying information could put witnesses at risk of harm, threats, or retaliation. In early childhood investigations, this is especially important, as witnesses may already fear speaking up. If their identities are revealed, they may be too afraid to report concerns in the future, allowing potential risks to children to go unreported. Protecting confidentiality ensures that people feel safe coming forward, which is critical to identifying and preventing harm to children. Removing this protection would weaken trust in the system and could compromise current and future investigations.

Document no:	Original privilege claim	Reconsidered privilege claim
DOE.001.0000996	Y - PII - Responsible and Effective Government, Personal Information	Y - PII - Responsible and Effective Government, Personal Information Commercial in Confidence

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E [legal@det.nsw.edu.au](mailto:legal@det.nsw.edu.au)

		Maintain whole document as privileged.
--	--	--

This document relates to a current open matter. Release of the whole document is reasonably likely to prejudice the investigation, being a function of the Department and contains information that may prejudice the commercial interests of the centre. Therefore, the Department maintains that the whole document is privileged.

This document includes information and regulatory opinion about individuals whose identity is apparent or can reasonably be ascertained by members of the community.

Emergency actions notices (EANs) are intended to give the approved provider and the subject of the direction an urgent and immediate opportunity to remedy more serious noncompliant conduct or environments.

Full disclosure of EANs is not in the public interest because it may unfairly identify an individual for behaviour that can be – and in most cases, have been – remedied.

Disclosure is reasonably likely to damage the commercial interests of the service by creating disproportionate reputational perception of the service – families may perceive the service to be bad because of an incident that can be rectified.

Document no:	Original privilege claim	Reconsidered privilege claim
DOE.001.0000810	Y - LPP and PII - Commercial in Confidence, Personal Information	Y - PII - Personal Information Changed to part release.

While the Department maintains that this document relates to legal advice sought and provided over whether the funding agreement had been executed correctly, it does not press the legal privilege in this instance only.

The Department submits that if the personal information on page 2 is redacted, the remaining information can be released.

Document no:	Original privilege claim	Reconsidered privilege claim
DOE.001.0000254	Y - PII - Responsible and Effective Government	Changed to release in full

The Department no longer presses the privilege claim in this document.

Document no:	Original privilege claim	Reconsidered privilege claim
DOE.002.0000079	Y - PII - Responsible and Effective Government, Personal Information	Y - PII - Responsible and Effective Government, Personal Information, Commercial in Confidence

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		Maintain privilege over whole document
--	--	--

The Australian Government commissioned this report. The Department is a party to the Joint Monitoring and Data Sharing Project. Release may prejudice relationships with other agencies and the supply of future information if the Department is viewed as incapable of maintaining confidentiality over shared documents.

This contains commercial-in-confidence information in relation to the methodology used by the third-party consultants to conduct the report. Further, the report evaluates specific methodologies and regulatory campaigns used by cross-jurisdictional departments, agencies, and regulators to identify wrongdoing. Release of those methods and tools will compromise future investigations, thus prejudicing the functions of those agencies. The Department submits that financial crime and other harms to children are reasonably likely to increase if fraudulent or nefarious providers use this information to circumvent detection.

Disclosure will significantly adversely impact the Department and its ability to regulate effectively. It is not in the public interest to reveal the Department's inner workings and methods of investigating and resolving high-risk matters.

Therefore, the Department seeks to maintain its privilege claim over the whole document.

Document no:	Original privilege claim	Reconsidered privilege claim
DOE.002.0000080	Y - PII - Responsible and Effective Government	Y - PII - Responsible and Effective Government  Maintain privilege claim over whole document.

Similarly to the above document (DOE.002.0000079) this document is a NSW specific summary of the Joint Monitoring and Data Sharing Project, and contains information about the Department's internal process, strategies and methodologies as well as lessons learnt from specific cases.

Disclosure would prejudice proper functioning of the Department's functions. It would impede the ability to apply detective and analytical methods to identify and regulate high risk providers. Fraudulent or nefarious providers are reasonably likely to use the information in this report to circumvent rules, apply evasive methods, and any other actions to defraud the government or commit other crimes - including harms to children. Disclosure may also damage relations between NSW and the Commonwealth, and interagency relationships for the reasons stated above.

The Department therefore maintains its privilege claim over the whole document for Responsible and Effective Government.

**NSW Department of Education – Legal Services**

Level 5, 105 Phillip Street, Parramatta NSW 2150 GPO Box 33 Sydney NSW 2001 T 7814 3896

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Document no:	Original privilege claim	Reconsidered privilege claim
DOE.001.0000875	Y - PII - Responsible and Effective Government	Y - PII - Personal information Changed to part release, but for personal information.

This report is a point-in-time snapshot of the provider and their performance. It shows that the Department conducts deep analysis of providers that run many services. The Department now considers it is in the public interest to disclose general information about provider noncompliance in this document.

However, this document includes personal information about individuals whose identity is apparent or can reasonably be ascertained by members of the community. Therefore, Department submits that the personal information should remain as privileged information.

The Department notes however that for some large providers, disclosure of similar reports could damage the commercial interests of the specific services referenced in the report. The Department may wish to withhold the service names in the broader range of documents for similar information.

Yours sincerely



Sarah Hargans  
General Counsel  
Legal Services

12 February 2024







## Annexure A

(a) Table of non-privileged documents – no privilege claimed, records submitted with this submission

Document No.	Item/Category	Document	Date of Creation	Author	Original Privilege Claim Y/N?	Reconsidered privilege claim
DOE.001.0000272	Category M	20241116 - Brief - DGS noting of Round 2 outcomes overview of applicants-FIT.pdf	16/11/2024	Department of Education	Y - PII - Commercial in Confidence	Changed to release in full
DOE.001.0000283	Category M	20242310-Brief Tab - Round 2 Program Logic-FIT.pdf	23/10/2024	Department of Education	Y - PII - Responsible and Effective Government	Changed to release in full
DOE.001.0000291	Category M	Building Early Learning Places Program - Guidelines 2024.docx	1/10/2024	Department of Education	Y - PII - Responsible and Effective Government	Changed to release in full
DOE.001.0000254	Category M	20240817-Briefing Paper - ECEC FIT Program Guidelines.pdf	17/08/2024	Department of Education	Y - PII - Responsible and Effective Government	Changed to release in full

(b) Table of privileged documents – privilege still claimed, redacted records submitted with this submission

Document No.	Item/Category	Document	Date of Creation	Author	Original Privilege Claim Y/N?	Reconsidered privilege claim
DOE.001.0000429	Category D	D.37 - CAS-00314091 - Enforceable Undertaking - 28102024.PDF	29/10/2024	Department of Education	Y - PII - Responsible and Effective Government, Personal Information	Y - PII - Personal Information Changed to part release.
DOE.001.0000910	Category K	K(4d) - VISIT-00243817 - ECEC Service - Visit Summary - 241024.docx	24/10/2024	Department of Education	Y - PII - Responsible and Effective Government, Personal Information	Y - PII - Personal Information Changed to part release.
DOE.001.0000907	Category K	K(4c) - VISIT-00243817 - ECEC Service - Staffing Matrix - 241024.xlsx	24/10/2024	Department of Education	Y - PII - Responsible and Effective Government, Personal Information	Y - PII - Personal Information Changed to part release.
DOE.001.0000610	Category K	RE: Subject: ECEC Service - Confidential	1/10/2024	Department of Education	Y - PII - Commercial in Confidence, Personal Information	Y - PII - Commercial in Confidence, Personal Information

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DOE.001.0000810	Category M	ECEC Service - Funding Agreement.pdf	9/09/2024	Department of Education	Y - LPP and PII - Commercial in Confidence, Personal Information	Changed to part release. Y - PII - Personal Information
DOE.001.0000875	Category K	K(1d) - Large Provider Analysis Report - Affinity - March 2022.PDF	1/03/2022	Department of Education	Y - PII - Responsible and Effective Government	Changed to part release. Y - PII - Personal information  Changed to part release, but for personal information.

(c) Table of privileged documents – privilege still claimed, documents not submitted with this submission

Document No.	Item/Category	Document	Date of Creation	Author	Original Privilege Claim Y/N?	Reconsidered privilege claim
DOE.001.0000904	Category K	K(3f) - Compliance Desktop Audit - 25112024.pdf	26/11/2024	NQAITS	Y - PII - Responsible and Effective Government, Personal Information	Y - PII - Responsible and Effective Government, Personal Information  Maintain whole document as privileged.
DOE.001.0000259	Category M	20241023 - TAB 1 - Round 2 - Assessment Panel Report - the Fund Board (1).pdf	23/10/2024	Department of Education	Y - PII - Responsible and Effective Government, Commercial in Confidence	Y - PII - Responsible and Effective Government, Commercial in Confidence  Maintain whole document as privileged.
DOE.001.0001005	Category L	L7. CA-00074434 - Breach Letter - 15102024.pdf	15/10/2024	Department of Education	Y - PII - Responsible and Effective Government, Personal Information	Y - PII - Responsible and Effective Government, Personal Information  Maintain whole document as privileged.

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Document No.	Item/ Category	Document	Date of Creation	Author	Original Privilege Claim Y/N?	Reconsidered privilege claim
DOE.001.0000988	Category L	L11. CAS-00307898 - Compliance Direction ECEC Service - 24092024.PDF	24/09/2024	Department of Education	Y - PII - Responsible and Effective Government, Personal Information	Y - PII - Responsible and Effective Government, Personal Information  Maintain whole document as privileged.
DOE.001.0000900	Category K	K(3b) - CAS-00307898 ECEC Service Final Investigation Report.pdf	23/09/2024	Department of Education	Y - PII - Responsible and Effective Government, Personal Information	Y - PII - Responsible and Effective Government, Personal Information  Maintain whole document as privileged.
DOE.001.0000996	Category L	L19. CA-00073864 - ECEC Service - 18092024.pdf	18/09/2024	Department of Education	Y - PII - Responsible and Effective Government, Personal Information	Y - PII - Responsible and Effective Government, Personal Information, Commercial in Confidence  Maintain whole document as privileged.
DOE.002.0000079	Category H	H.8 ARTD Joint Monitoring and Data Sharing Project Final Report March23.PDF	1/03/2023	Department of Education	Y - PII - Responsible and Effective Government, Personal Information	Y - PII - Responsible and Effective Government, Personal Information, Commercial in Confidence  Maintain privilege over whole document
DOE.002.0000080	Category H	H.9 Joint Compliance Element Evaluation Report (Jan to 8 December 2022).PDF	8/12/2022	Department of Education	Y - PII - Responsible and Effective Government	Y - PII - Responsible and Effective Government  Maintain privilege claim over whole document.



David Blunt  
Clerk of the Legislative Council  
NSW Parliament

17 February 2025

**RE: Dispute of claim of privilege - SO52 Early Childhood Education and Care Sector**

I am writing to respond to the further privilege submissions of the Department of Education for return to order 'Early Childhood Education and Care Sector', dated 12 February 2025.

Despite what I felt was a productive and educative meeting with the Arbiter, the Department's response indicates a continued unwillingness to allow critical information about the ECEC sector and the Regulatory Authority's conduct to be released for public scrutiny. I note that from the date on which I gave notice of the relevant Standing Order 52 motion, the Department has sought on numerous occasions to resist disclosure of these documents. I have more than once compromised in terms of the scope and timing of the return of documents, but note that the Department is still technically in breach of the order for documents, having delivered only a small portion of the documents ordered by the House to be produced.

Accordingly, I wish to press my privilege dispute over all documents returned in Tranche 1 of this return to order, with the exception only of children's names and any photographs of children being redacted.

**1. The Department's approach to the proposed redaction of personal information**

In the Department's further privilege submission, there is a continuation of what I submit to be a misinterpretation of what personal information is for these purposes. Pursuant to Standing Order 52(7), the Legislative Council has determined that "for the purposes of standing order 52, personal information which should not be made public unless it is in the public interest to do so includes: (i) mobile telephone numbers, (ii) private email addresses, (iii) home addresses, (iv) bank account details, (v) signatures, (vi) tax file numbers". The mere naming of a person is not considered to be personal information for these purposes.



It is worth noting that the Department has made reference to section 273 of the National Law, implying that it supports their assertion against the release of certain information. However, while acknowledging confidentiality obligations over certain personal information, section 273(2) makes it clear that there are exceptions to those confidentiality obligations. For example, the Regulatory Authority may disclose the information:

- “in the exercise of a function under, or for the purposes of, or in accordance with, this Law” (section 73(2)(a)) - as noted previously, the objectives of the National Law include “to improve public knowledge, and access to information, about the quality of education and care service” and New South Wales discloses far less information voluntarily in relation to the services it regulates than other States,
- “the disclosure is authorised or required by any law of a participating jurisdiction, or is otherwise required or permitted by law” (section 73(2)(b)) - arguably this would include the parliament’s exercise of its power to call for papers, and
- “the information relates to proceedings before a court or tribunal and the proceedings are or were open to the public” or “the information is or has been accessible to the public...” (section 73(2)(d) and (e)) - as noted in my initial submission, much of the information provided under privilege is information of this kind.

The Department has also argued that section 271 of the National Law precludes disclosure of this information. However, I would argue that this section actually supports disclosure of the information. Section 271(4) - “the disclosure is reasonably necessary to promote the objectives of the national education and care services quality framework” - gives support to disclosure in order to promote the objective of improving public knowledge and access to information, and section 271(b) relating to enabling or assisting another entity to perform any of its functions or powers under the National Law supports disclosure in order to enable the NSW Parliament to perform its function of scrutinising the Executive and holding the Government to account.

The Department’s approach to the proposed redacting of material renders the information of no public use, as is evidenced by the redacted notice of undertaking now released (DOE.001.0000429). Unlike the type of information regularly disclosed in other States, with redactions this document does not now disclose the name of the relevant service or what actions led to the undertaking being required. This leaves the public in the dark when it comes to knowing whether there is a systemic issue at a particular service, whether they have further information that may be relevant to that service and which they might otherwise bring to the Regulatory Authority’s attention, and whether the Regulatory Authority’s response was adequate in those circumstances.

## **2. Information concerning the Regulatory Authority's investigations**

### ***(a) Prejudice to the Regulatory Authority's operations***

There are a number of concerning statements put forward by the Department asserting that disclosure of this information will prejudice the effectiveness of the Regulatory Authority's operations. For example, on page 5 of the Department's submission, it is stated that if information is released "it is likely to mean that complainants are less likely to come forward". Reference is then made to cases involving the Veterans' Review Board and the Australian Federal Police, in relation to wholly different types of investigations - these were investigations of internal issues and were also, more significantly, highly reliant on informants coming forward in order for misconduct to be discovered.

It is difficult to see the relevance of these cases to the operations of the Regulatory Authority, which has a statutory duty to proactively investigate services and where individuals within those services and others have a legal duty to report incidents on which the Regulatory Authority is required to act. I would also assert that, in circumstances where the safety of children are at risk, a would-be reporter of misconduct to a regulatory body would have a higher threshold for discouragement than an internal participant or informant to the VRB or the AFP in the circumstances outlined in the cases cited. As such, the fact that information given to the Regulatory Authority may be disclosed in the course of parliament attempting to hold the Regulatory Authority to account is quite unlikely to act as the discouragement the Department is asserting it would.

The second argument used by the Department to assert the potential for prejudice to the Regulatory Authority's operations by disclosure of this information to the public is that it would make public "the very methodology used to investigate" and "would completely undermine and compromise the Department's ability to regulate and investigate in the future" (page 7). The Department then goes on to argue that the disclosure would be "reasonably likely to lead to services and approved providers with perverse incentives or motives to intentionally manipulate and hide their service practice and adverse outcomes" and "[i]t could be used by the very people the Department seeks to remove from the sector to circumvent the system and remain undetected, thus compromising the safety and/or quality of Early Childhood Education and Care (ECEC) services to the detriment of children and families" (page 7).

Having read the documents which are the subject of the privilege claim, and understanding the requirements on the Regulatory Authority and processes prescribed under the National Law, it is unclear to me what possible insight or advantage a would-be manipulative service provider would have from reading these documents. On the other hand, the documents provide valuable insight for the public

into how the Regulatory Authority is operating and whether or not it is acting in line with its statutory obligations and the public's expectations.

It is also worth saying that, if we accept the Department's argument that disclosure would compromise the Regulatory Authority's functions, this could encourage the same argument to be used for all government departments undertaking investigative functions. Those functions of the government would then effectively gain some sort of immunity from interrogation by the Parliament and the public, with accountability over their operations forsaken. That would clearly not be in the public interest. A far more reasonable approach would be to work from a principle of transparent and accountable government, and apply exceptions to disclosure only in very limited circumstances where there is a genuine risk to the results of a currently live investigation.

***(b) The risk of reputational harm to the Department and providers***

One ground on which the Department is asserting privilege is that the disclosure would "reveal commercial in-confidence information, the release of which is likely to result in *the Department and third-party businesses suffering commercial harm*" (emphasis added, page 3 of the Department's further submission).

This is a particularly concerning ground on which to argue against public disclosure of documents similar to the document now partially released (DOE.001.0000875), on the basis that "disclosure of similar reports could damage the commercial interests of the specific services referenced in the report". I note that there are no references in the National Law's objectives or guiding principles that require the Department or the Regulatory Authority to take into account the commercial interests of private operators in these circumstances. Rather, the entire commercialised nature of the ECEC sector in Australia was facilitated by governments that recognised that such a system could only flourish and provide adequate care and education for children if there were sufficiently strong regulators and adequate public information provided about service providers.

I respectfully submit that the Department has not made a case for why the presumption in favour of public disclosure of this information should be overridden in these circumstances.

Yours sincerely,



Abigail Boyd MLC

---

**From:** Alex Morrison (Alex Morrison) <alexandra.morrison3@det.nsw.edu.au>  
**Sent:** Wednesday, 19 February 2025 9:21 AM  
**To:** Legislative Council Returns to Order; Standing Order 52  
**Cc:** claire.schwager; Simone Nokes; LC Clerk; David Blunt; Sarah Hargans  
**Subject:** RE: Dispute - ECEC - Request from Arbiter  
**Attachments:** DOE.001.0000259.pdf

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Good Morning

To assist the Arbiter, please find attached the electronic copy of the document DOE.001.0000259 which can be zoomed in.

Please let us know if you require anything further.

**Kind Regards**

**Alex Morrison (she/her)**

**Manager | Right to Access | Legal Services**

(02) 7814 1105 | [alexandra.morrison3@det.nsw.edu.au](mailto:alexandra.morrison3@det.nsw.edu.au) | [education.nsw.gov.au](http://education.nsw.gov.au)

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---

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**From:** Legislative Council Returns to Order  
**Sent:** Tuesday, 18 February 2025 4:19 PM  
**To:** Standing Order 52  
**Cc:** claire.schwager ; Simone Nokes ; Alex Morrison (Alex Morrison) ; Legislative Council Returns to Order ; LC Clerk ; David Blunt ; Sarah Hargans  
**Subject:** Dispute - ECEC - Request from Arbiter

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Dear Sarah

As you are aware, Mr Mason is evaluating the claims of privilege regarding the Early childhood education and care sector return.

Mr Mason has requested a legible version of document no. DOE.001.0000259 as soon as possible. The document is listed on page 33 of the index: [Early childhood education and care sector - 11 December 2024.pdf](#)

The text in the version provided in the return is too small to read.

Kind regards  
Rhia



**Rhia Victorino**  
**Director**  
Procedure Office  
Legislative Council  
P 61 2 9230 3680 M 61 420 966 463  
E [rhia.victorino@parliament.nsw.gov.au](mailto:rhia.victorino@parliament.nsw.gov.au)  
Parliament of New South Wales, 6 Macquarie St, Sydney NSW 2000, Australia



**Acknowledgement of Country** The Department of the Legislative Council acknowledges and respects the traditional lands of all Aboriginal people, and pays respects to all Elders past and present. We acknowledge the Gadigal people of the Eora Nation as the traditional custodians of the land on which the Parliament of New South Wales stands.

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**From:** [Alex Morrison \(Alex Morrison\)](#)  
**To:** [Legislative Council Returns to Order; Standing Order 52](#)  
**Cc:** [Claire Schwager](#); [LC Clerk](#); [David Blunt](#); [Sarah Hargans](#); [Standingorder52](#); [Simone Nokes](#); [Madeleine Abbott](#)  
**Subject:** RE: Dispute - ECEC - Further Request from Arbitrator  
**Date:** Friday, 21 February 2025 3:17:39 PM  
**Attachments:** [image001.png](#)  
[image005.jpg](#)  
[image006.jpg](#)  
[image010.jpg](#)  
[image012.png](#)  
[image013.png](#)  
[image014.png](#)  
[image002.jpg](#)  
[SOS2-24-05 - Further Privilege Dispute Submissions - 21 February 2025.pdf](#)  
[r\\_DOE.001.0000874 - Non-Privileged.pdf](#)  
[DOE.001.0000483 - Non-Privileged.pdf](#)

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Good afternoon

Please find attached the Department's further privilege dispute submissions relating to the two additional documents.

I also attach the redacted copy of DOE.001.0000874 and a clean copy of the now non-privileged DOE.001.0000483.

Please let us know if you require anything further.

**Kind Regards**

**Alex Morrison (she/her)**

**Manager | Right to Access | Legal Services**

(02) 7814 1105 | [alexandra.morrison3@det.nsw.edu.au](mailto:alexandra.morrison3@det.nsw.edu.au) | [education.nsw.gov.au](http://education.nsw.gov.au)

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**From:** Legislative Council Returns to Order

**Sent:** Thursday, 20 February 2025 4:25 PM

**To:** Alex Morrison (Alex Morrison); Simone Nokes; Legislative Council Returns to Order; Standing Order 52

**Cc:** [Claire Schwager](#); [LC Clerk](#); [David Blunt](#); [Sarah Hargans](#)

**Subject:** RE: Dispute - ECEC - Further Request from Arbitrator

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Thank you for the update Alex, we will advise the Arbitrator accordingly.

Kind regards,  
Allison  
**Allison Stowe**  
**Principal Council Officer**  
Procedure  
Legislative Council  
P 9230 3783



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**From:** Alex Morrison (Alex Morrison) <[alexandra.morrison3@det.nsw.edu.au](mailto:alexandra.morrison3@det.nsw.edu.au)>  
**Sent:** Thursday, February 20, 2025 4:11 PM  
**To:** Simone Nokes <[Simone.Nokes1@det.nsw.edu.au](mailto:Simone.Nokes1@det.nsw.edu.au)>; Legislative Council Returns to Order <[LC.ReturnstoOrder@parliament.nsw.gov.au](mailto:LC.ReturnstoOrder@parliament.nsw.gov.au)>; Standing Order 52 <[StandingOrder52@tco.nsw.gov.au](mailto:StandingOrder52@tco.nsw.gov.au)>  
**Cc:** claire.schwager <[claire.schwager@tco.nsw.gov.au](mailto:claire.schwager@tco.nsw.gov.au)>; LC Clerk <[LC.Clerk@parliament.nsw.gov.au](mailto:LC.Clerk@parliament.nsw.gov.au)>; David Blunt <[David.Blunt@parliament.nsw.gov.au](mailto:David.Blunt@parliament.nsw.gov.au)>; Sarah Hargans <[sarah.hargans@det.nsw.edu.au](mailto:sarah.hargans@det.nsw.edu.au)>  
**Subject:** RE: Dispute - ECEC - Further Request from Arbitrator

OFFICIAL Sensitive - Legal

Dear Rhia  
We are still considering the documents and are aiming to provide our response tomorrow.  
**Kind Regards**

**Alex Morrison (she/her)**  
**Manager | Right to Access | Legal Services**  
(02) 7814 1105 | [alexandra.morrison3@det.nsw.edu.au](mailto:alexandra.morrison3@det.nsw.edu.au) | [education.nsw.gov.au](http://education.nsw.gov.au)  
Level 5, 105 Phillip Street, Parramatta, NSW 2150

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We recognise the Ongoing Custodians of the lands and waterways where we work and live. We pay respect to Elders past and present as ongoing teachers of knowledge, songlines and stories. We strive to ensure every Aboriginal and Torres Strait Islander learner in NSW achieves their potential through education.

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**From:** Simone Nokes <[Simone.Nokes1@det.nsw.edu.au](mailto:Simone.Nokes1@det.nsw.edu.au)>  
**Sent:** Thursday, 20 February 2025 8:36 AM  
**To:** Legislative Council Returns to Order <[LC.ReturnstoOrder@parliament.nsw.gov.au](mailto:LC.ReturnstoOrder@parliament.nsw.gov.au)>; Standing Order 52 <[StandingOrder52@tco.nsw.gov.au](mailto:StandingOrder52@tco.nsw.gov.au)>  
**Cc:** claire.schwager <[claire.schwager@tco.nsw.gov.au](mailto:claire.schwager@tco.nsw.gov.au)>; Alex Morrison (Alex Morrison) <[alexandra.morrison3@det.nsw.edu.au](mailto:alexandra.morrison3@det.nsw.edu.au)>; LC Clerk <[LC.Clerk@parliament.nsw.gov.au](mailto:LC.Clerk@parliament.nsw.gov.au)>; David Blunt <[David.Blunt@parliament.nsw.gov.au](mailto:David.Blunt@parliament.nsw.gov.au)>; Sarah Hargans <[sarah.hargans@det.nsw.edu.au](mailto:sarah.hargans@det.nsw.edu.au)>

**Subject:** RE: Dispute - ECEC - Further Request from Arbiter

OFFICIAL Sensitive - Legal

Dear Rhia

We are looking at these and will provide further submissions as soon as possible.

Kind regards

Simone

**Deputy General Counsel | Legal Services**

0499 634 045 | [simone.nokes1@det.nsw.edu.au](mailto:simone.nokes1@det.nsw.edu.au) | [education.nsw.gov.au](http://education.nsw.gov.au)



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**From:** Legislative Council Returns to Order <[LC.ReturnstoOrder@parliament.nsw.gov.au](mailto:LC.ReturnstoOrder@parliament.nsw.gov.au)>

**Sent:** Wednesday, 19 February 2025 5:50 PM

**To:** Standing Order 52 <[StandingOrder52@tco.nsw.gov.au](mailto:StandingOrder52@tco.nsw.gov.au)>

**Cc:** [claire.schwager](mailto:claire.schwager@tco.nsw.gov.au) <[claire.schwager@tco.nsw.gov.au](mailto:claire.schwager@tco.nsw.gov.au)>; Simone Nokes

<[Simone.Nokes1@det.nsw.edu.au](mailto:Simone.Nokes1@det.nsw.edu.au)>; Alex Morrison (Alex Morrison)

<[alexandra.morrison3@det.nsw.edu.au](mailto:alexandra.morrison3@det.nsw.edu.au)>; LC Clerk <[LC.Clerk@parliament.nsw.gov.au](mailto:LC.Clerk@parliament.nsw.gov.au)>; David Blunt

<[David.Blunt@parliament.nsw.gov.au](mailto:David.Blunt@parliament.nsw.gov.au)>; Sarah Hargans <[sarah.hargans@det.nsw.edu.au](mailto:sarah.hargans@det.nsw.edu.au)>

**Subject:** Dispute - ECEC - Further Request from Arbiter

OFFICIAL Sensitive - Legal

[External Email] This email was sent from outside the NSW Department of Education. Be cautious, particularly with links and attachments.

Dear Sarah

Thank you for facilitating the prompt response to Mr Mason's request.

Mr Mason has a further request regarding the Early childhood education and care sector return.

During the meeting, document nos DOE.001.0000874 and DOE.001.0000483 were discussed for inclusion in the additional submission, however, the additional submission does not appear to specifically address these two documents.

Mr Mason has requested a further submission regarding document nos DOE.001.0000874 and DOE.001.0000483 as soon as possible.

Kind regards

Rhia

**Rhia Victorino**

**Director**

Procedure Office

Legislative Council

P 61 2 9230 3680 M 61 420 966 463

[E rhia.victorino@parliament.nsw.gov.au](mailto:rhia.victorino@parliament.nsw.gov.au)

Parliament of New South Wales, 6 Macquarie St, Sydney NSW 2000, Australia



**Acknowledgement of Country** The Department of the Legislative Council acknowledges and respects the traditional lands of all Aboriginal people, and pays respects to all Elders past and present. We acknowledge the Gadigal people of the Eora Nation as the traditional custodians of the land on which the Parliament of New South Wales stands.

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**FURTHER PRIVILEGE DISPUTE SUBMISSIONS FOR RETURN TO ORDER:  
Early Childhood Education and Care Sector**

On 6 December 2024, claims for privilege were made, pursuant to Standing Order 52(6), by the Department of Education (the Department) over documents responsive to the Order of the Legislative Council of 13 November 2024.

The privilege claimed by the Department was disputed by Ms Abigail Boyd, MP on 20 December 2024 (the dispute). Submissions were made by the Department on 12 February 2025 in relation to 18 documents provided by the Department in its initial return on 6 December 2024.

These further submissions are also in response to that dispute, and focus on two additional documents provided by the Department in its initial return on 6 December 2024. These two documents are set out in Annexure A. This sample set of documents was requested by The Honourable Keith Mason AC KC (Arbiter) to consider the Department's claims for privilege further.

The Department advises that the arguments set forth in our submissions of 12 February 2025 also apply to these two additional documents. However, for the sake of brevity, we have not restated those submissions, but focussed on the two additional documents, which are addressed individually below.

Document no:	Original privilege claim	Reconsidered privilege claim
DOE.001.0000483	Y - PII - Responsible and Effective Government, Commercial in Confidence	Changed to release in full.

The Department still considers that DOE.001.0000483 contains information that may prejudice the functions of the Department, and that contains commercial information.

However, with the benefit of further time to review, the Department considers that the public interest in releasing the document outweighs the commercial and information affecting agency functions objections contained in these records.

The Department no longer presses the privilege claim over this document.

A full copy of that document is attached to this submission.

Document no:	Original privilege claim	Reconsidered privilege claim
DOE.001.0000874	Y - PII - Responsible and Effective Government	Y - PII - Responsible and Effective Government, Personal information, Commercial in Confidence Changed to part release.

This document contains identifying personal information of children, and commercial information about a business which is still subject to investigation.

The Department submits that releasing the identifying information of both the centre names and descriptions of incidents would identify children in the centre communities.

The Department further submits that the third-party business would object to release of information relating to a current investigation as it may affect their commercial interests in relation to those allegations. The Department further considers that release would prejudice the current investigation.

However, the Department now considers that parts of the document can be released, with the redaction of the information considered to be commercial in confidence, personal information and information affecting agency functions.

A redacted copy of the document is attached to this submission.

Yours sincerely



Sarah Hargans  
General Counsel  
Legal Services

21 February 2024







## Annexure A

Document No.	Item/Category	Document	Date of Creation	Author	Original Privilege Claim Y/N? incl. nature of claim (optional)	Reconsidered privilege claim
DOE.001.0000483	Category K	K(1b) - Affinity Data Snapshot 2021.PDF	30/06/2021	NQAITS	Y - PII - Responsible and Effective Government, Commercial in Confidence	Changed to release in full.
DOE.001.0000874	Category K	K(1c) - Large Provider Analysis Report - Affinity - July 2021.PDF	1/07/2021	Department of Education	Y - PII - Responsible and Effective Government	Y - PII - Responsible and Effective Government, Personal information, Commercial in Confidence  Changed to part release.

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**From:** Legislative Council Returns to Order  
**Sent:** Monday, 3 March 2025 10:41 AM  
**To:** Legislative Council Returns to Order  
**Subject:** FW: ECEC S052 - interim Arbiter's report

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**From:** Abigail Boyd <[A.Boyd@parliament.nsw.gov.au](mailto:A.Boyd@parliament.nsw.gov.au)>  
**Sent:** Friday, February 28, 2025 12:18 pm  
**To:** David Blunt <[David.Blunt@parliament.nsw.gov.au](mailto:David.Blunt@parliament.nsw.gov.au)>  
**Subject:** ECEC S052 - interim Arbiter's report

Hi David,

For the purposes of any decisions to be made by the Privileges Committee around release of the interim Arbiter's report for the ECEC S052, please note the following.

The Arbiter mentions he is unsure as to whether or not I accept the redaction of DOE.001.0000429 as presented by the Department. To clarify, I do not accept all of the redactions to that document. Instead, I am asking for the agreed facts leading to the giving of that undertaking, and the name of the service provider, to not be redacted. My submission is that only the name and signature of the person giving the undertaking should be privileged, along with any names of children and their birth dates.

Warm regards,

Abigail

## Appendix 2 Minutes

### Minutes no. 21

6 March 2025, 1.01 pm  
Room 1043 and via videoconference (Microsoft Teams)

#### 1. Members

Mr Lawrence (Chair)  
Mrs Maclaren-Jones (Deputy Chair)  
Mr Fang (via videoconference)  
Mr Nanva (via videoconference)  
Mr Primrose (via videoconference)

Secretariat in attendance: Steven Reynolds, Rhia Victorino, Allison Stowe and Robin Howlett.

#### 2. Apologies

Ms Higginson  
Mr Murphy  
Mr Roberts

#### 3. Correspondence

The committee noted the following item of correspondence:

##### *Received:*

- 25 February 2025 – Letter from Clerk of the Parliaments to Chair referring the interim report of the Independent Legal Arbiter entitled "Disputed Claim of Privilege—Early childhood education and care sector", dated Monday 24 February 2025, together with submissions and attachments, to the committee, under standing order 54.

#### 4. Disputed claim of privilege – Early childhood education and care sector

The committee noted the interim report of the Independent Legal Arbiter entitled "Disputed Claim of Privilege—Early childhood education and care sector", dated Monday 24 February 2025, and submissions and attachments.

##### 4.1 Method of consideration

The committee noted that it has previously resolved that, wherever possible and unless circumstances require otherwise, the committee follow the established practice in the House and adopt a two-step process.

##### 4.2 Publication of report of the Independent Legal Arbiter

Resolved on the motion of Mrs Maclaren-Jones: That the interim report of the Independent Legal Arbiter entitled "Disputed Claim of Privilege—Early childhood education and care sector", dated Monday 24 February 2025, together with submissions, be published.

#### 5. Next meeting

The committee adjourned at 1.02 pm, *sine die*.

Steven Reynolds

**Committee Clerk**

**Draft Minutes no. 22**

18 March 2025, 3.05 pm  
Parkes Room

**1. Members**

Mr Lawrence (*Chair*)  
Mrs Maclaren-Jones (*Deputy Chair*)  
Mr Fang  
Mr Donnelly (substituting for Mr Nanva)  
Ms Higginson  
Mr Murphy  
Mr Roberts  
Ms Suvaal (substituting for Mr Primrose)

Secretariat in attendance: Steven Reynolds, Sharon Ohnesorge, Rhia Victorino, Allison Stowe, Peta Leemen and Robin Howlett.

**2. Apologies**

Mr Primrose

**3. Inquiry into the consideration of disputed claims of privilege as referred by the Clerk under standing order 54 (March 2025) – Early childhood education and care sector**

Resolved, on the motion of Mr Fang: That the committee note that the Chair's draft report was circulated to members less than seven days prior to the report deliberative.

Resolved, on the motion of Mr Fang: That:

The draft report be the report of the committee and that the committee present the report to the House; and

The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling.

**4. \*\*\***

**5. \*\*\***

**6. \*\*\***

**7. \*\*\***

**8. Next meeting**

The committee adjourned at 3.46 pm, *sine die*.

Steven Reynolds  
**Committee Clerk**



