



NDIS Quality  
and Safeguards  
Commission

22 October 2024

Ref: LEX 3516

Ms Angelica Pumperknickle

**By email:** foi+request-11942-xxxxxxxx@xxxxxxxxxxxx.xxx.xx

Dear Ms Pumperknickle,

**Freedom of Information Request No. (29) 24/25-1**

**Notice of Decision on Access under the *Freedom of Information Act 1982 (Cth)***

I refer to your request dated 23 August 2024 which sought access to documents held by the NDIS Quality and Safeguard Commission (the Commission) under the *Freedom of Information Act 1982 (Cth)* (FOI Act).

Specifically, your request sought access to:

*“1. Full Contract Documentation*

*I request a complete and unredacted copy of the contract CN4089371, including all associated documents such as:*

*The main contract document,*

*All annexures, schedules, and attachments, Any specific terms and conditions applicable to the contract.*

*2. Scope of Work*

*Please provide all documents that detail the scope of work under this contract. This should include, but not be limited to:*

*Descriptions of the legal services to be provided by The Martinez HWL Practice Trust, The specific deliverables expected, Any milestones or timelines for the provision of these services, Roles and responsibilities assigned to both parties under this agreement.*

*3. Evaluation and Selection Criteria*

*I seek access to documents that describe the process and criteria used to select The Martinez HWL Practice Trust for this contract. This may include:*

*Evaluation reports or assessments conducted during the procurement process, The criteria against which bids or proposals were evaluated, Records of any meetings or decisions made in selecting this provider.*

*4. Correspondence and Communication*

*Please provide copies of all correspondence and communications between the NDIS Quality and Safeguards Commission and The Martinez HWL Practice Trust related to:*

*The negotiation and drafting of this contract, Any clarifications sought by either party during the contract formation process, Discussions regarding the execution and management of the contract.*

*5. Amendments, Variations, and Extensions If there have been any amendments, variations, or extensions to the original contract, I request copies of:*

*The documents detailing such amendments or variations, Correspondence or agreements that pertain to these changes, Any additional memorandums of understanding or similar documents that may alter the terms of the original contract.*

*6. Compliance and Performance Reports*

*If applicable, I also request access to any documents or reports that assess the performance or compliance of The Martinez HWL Practice Trust with the terms of the contract. This includes:*

*Internal or external audit reports,*

*Compliance assessments,*

*Any corrective actions or notices issued in relation to the contract.*

*Format of Documents*

*I would appreciate it if the requested documents could be provided in electronic format where possible, to facilitate ease of access and review.”*

### **Administration of your FOI request**

On 27 August 2024, the NDIS Commission acknowledged your request by email.

On the same date, the Commission received your agreement to remove the personal information of NDIS Commission staff below Senior Executive Service (SES) level and also confirmed your consent to treat the personal information of other third-party individuals as irrelevant material and such information can be removed from the documents.

On 16 September 2024, the Commission advised you of the requirement to consult with third parties pursuant to section 27 and 27A of the FOI Act, and of the 30 day extension to the processing time pursuant to section 15(6)(a) of the FOI Act. As you provided consent to be identified as the FOI applicant for the purposes of the FOI third-party consultation process, your details were disclosed to the third parties during the consultation process.

On 16 September 2024, you also agreed to remove duplicate documents and receive only the final email in any chains. You requested that the request decision should be finalised by the original due date by 23 September 2024.

On 19 September 2024, the Commission advised you that we are actively processing your request and will endeavour to finalise it as quickly as possible once these consultations have been completed and the relevant documents reviewed.

I am an authorised decision maker for the purposes of section 23 of the FOI Act and this letter gives notice of my decision.

## Decision

The Commission has located **three documents**, comprising of 38 pages, that fall within the scope of your freedom of information (FOI) request. These documents were identified by searches undertaken in NDIS Commission systems. The documents are set out in the schedule attached to this notice.

I have decided to grant full access to **one document (document 3)**. As this document is publicly available, the hyperlink of this document is provided in the Schedule of Documents.

I have also decided to grant partial access to **one document (document 1)** and refuse access in full to **one document (document 2)** with redactions made under sections 22, 47, 47C, 47E, and 47G of the FOI Act.

I have also decided to refuse your request for the scope points 5 and 6 in accordance with section 24A(1)(b)(ii) as the documents do not exist, despite reasonable searches being undertaken.

In accordance with section 22 of the FOI Act, where reasonably practicable, redactions have been made to remove any irrelevant material in the copy of the documents being released to you. I can confirm that the material redacted under this section is related to personal information of NDIS Commission staff below Senior Executive Service (SES) level and other third-party individuals as irrelevant material and such information can be removed from the documents. Duplicate email correspondences within document 1 are also removed in the email chains under this provision.

In reaching my decision, I have taken into consideration:

- the terms of your request on 23 August 2024;
- the FOI Act (in particular s24A, s47, s47E, s47C and s47G);
- submissions made during a consultation process with relevant third parties conducted in accordance with sections 27 and 27A of the FOI Act;
- the types of information and documents that are in the NDIS Commission's possession;
- correspondences between you and the NDIS Commission on 27 August 2024, 16 September 2024 and 19 September 2024
- the content of the documents that fall within the scope of your request;
- the results of searches undertaken by relevant NDIS Commission staff; and
- Guidelines issued by the Office of the Australian Information Commissioner (OAIC) under s93A of the FOI Act (**FOI Guidelines**)

## Reasons for decision

*A complete and unredacted copy of the contract CN4089371, including all associated documents such as: The main contract document. All annexures, schedules, and attachments, Any specific terms and conditions applicable to the contract.*

The Regulatory Strategy & Advice section within the Legal Services and Internal Integrity Division advised that the contract was formed under the Whole of Government Legal Services Panel. A deed of standing offer known as a Panel Head Agreement is signed between the Commonwealth and approved legal services providers. HWL Ebsworth as a member of the panel has signed such an agreement. For this specific contract for services, the Commission issued a work order detailing the scope of the task and the deliverables. On acceptance of the work order, a contract was formed for the provision of the legal services subject to the terms of the work order and incorporating the terms of the Panel Head Agreement. The standard Panel Head Agreement is publicly available, and the executed work order is already included in the bundle of documents.

**Section 24A – Requests may be refused if documents cannot be located, do not exist or have not been received.**

Section 24A relevantly provides that:

1) An agency or Minister may refuse a request for access to a document if:

(a) all reasonable steps have been taken to find the document, and

(b) the agency or Minister is satisfied that the document:

...

ii. does not exist.

The Regulatory Strategy & Advice section within the Legal Services and Internal Integrity Division conducted searches of documents relevant to the scope of your request. The business section cannot locate any documents relevant to the amendments, variations, and extensions of the original contract CN4089371, which relates to the legal services provided by HWL Ebsworth Lawyers. We confirm that no documents exist that detail any amendments, variations and/or extensions to the original term of the contract with HWL Ebsworth. The contract was for a discrete task and the agreed deliverables were met by HWL Ebsworth within the original contract period without any need for amendments or extensions.

The business area also advised there are no documents assessing the performance or compliance, internal and external audit reports and corrective actions or notices issued in relation to the contract CN4089371. HWL Ebsworth were engaged to provide discrete legal services on behalf of the Commission. HWL Ebsworth provided the deliverables that were the subject of the contract in accordance with its terms. Because of this, no further performance evaluations or compliance assessments were necessary.

Accordingly, I am satisfied that all reasonable steps have been taken to locate the documents and that the NDIS Commission does not hold the requested documents. As the documents do not exist, access to those documents is refused.

#### ***Section 47E – Public interest conditional exemptions – operations of an agency***

Section 47E of the FOI Act relevantly provides that:

*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...]*

Section 47E(d) conditionally exempts documents where disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

#### ***Guide to Procurement of Legal Services***

Document 2 includes a Guide to Procurement of Legal Services from the Whole of Australian Government panel or the Australian Government Solicitor document. Disclosure of internal guidance may prejudice the proper functioning of the Commission's procurement processes.

The guide contains information which is important to the proper and efficient operation of the Commission relevant to:

- Technical processes relating to the creation of purchase orders within the Commission's internal systems
- Internal facing email addresses to assist the Commission's operations
- References to other internal Commission documents that are outside the scope of the FOI request

Public disclosure of the guide may risk negatively affecting the Commission's proper and efficient functions because the information may provide an unfair advantage, potentially diminishing the effectiveness of

competitive procurement. Additionally, the release of this document may disrupt the commission's operation efficiency by exposing internal procedures that are designed for internal use only.

#### *Scope of the work and various work tasks related to the legal matter*

Document 1 contains contractual legal services information including the scope of work, expected deliverables, timelines of the allocated provided by HWL Ebsworth to the NDIS Commission. The document also contains specific details of the internal procurement process when it comes the selection of the legal service providers. The legal matter contracted to HWL Ebsworth relates to a specialised area of law and the legal matter is still ongoing. Other parts of the document contain other business procedures so that the legal matter can be progressed between HWL Ebsworth to the NDIS Commission. Disclosure of detailed internal business operating information, advice and strategies about a current legal matter could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations within the NDIS Commission. I am satisfied that the Legal Services and Internal Integrity Division's ability to successfully manage and administer their current legal matters and the ability of the contracted legal firm to provide their frank and fearless legal advice to its clients will be adversely impacted and inhibited on a significant scale.

For the reasons given above, I consider that the documents are conditionally exempt under section 47E(d) of the FOI Act. As I have found that the documents are conditionally exempt, I have also considered the public interest in their potential release.

#### ***Section 47C –Public interest conditionally exemptions- Deliberative Processes***

Section 47C(1) of the FOI Act states:

- (1) A document is conditionally exempt if its disclosure under this Act would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes, of the deliberative process involved in the functions of:*
- (a) an agency; or*
  - (b) a Minister; or*
  - (c) the Government of the Commonwealth.*

Section 47C exempts documents that contain deliberative matters, which includes opinions, advice or recommendations prepared for the deliberative processes involved in the functions of an agency.

Document 2 includes a Guide to Procurement of Legal Services from the Whole of Australian Government panel or the Australian Government Solicitor document. The deliberative process undertaken by the Commission in ascertaining whether an external contractor is value for money. Particularly, the guide includes templates which give examples of relevant factors which may be taken into account by the Commission in considering whether to recommend a provider as providing value for money. It further details examples of matters which may be considered as risks.

Disclosure of this information may result in less effective internal deliberations and undermine the efficacy of procurement procedures within the Commission. This in turn would impact the Commission's capacity to secure value for money in future procurement and impact the efficiency of its procurement procedures. Further, access to this information and disclosure of these deliberative processes may provide an unfair advantage to external parties providing quotes to the Commission.

Accordingly, I am satisfied that Document 2 contains matter that meets the definition of deliberative material. Therefore, I have decided that the relevant information is conditionally exempt under section 47C of the FOI Act.

## **Section 47D – Public interest conditional exemptions – financial or property interests of the Commonwealth**

Section 47D of the FOI Act provides a conditional exemption for documents where disclosure would have a substantial adverse effect on the financial and property interests of the Commonwealth or of an agency. [FOI Guidelines 6.82](#) provides this adverse effect could also be indirect such as on an agency's competitive tendering process.

I have applied the exemption pursuant to section 47D of the FOI Act to the material redacted in document 1, within the scope of your request, on the basis that the material redacted in this document includes financial information that that would prejudice any tendering process relating to future tenancy arrangements. Release of the redacted material would have a substantial adverse effect on any future Commonwealth procurement process.

For the reasons given above, I consider that the documents are conditionally exempt under section 47D of the FOI Act. As I have found that the documents are conditionally exempt, I have also considered the public interest in their potential release.

## **Section 47(1)(b) - documents disclosing commercially valuable information**

I have applied the exemption in section 47(1)(b) to parts of document 1.

Section 47(1) of the FOI Act relevantly provides:

'A document is an exempt document if disclosure of the document under this Act would disclose:

(a) trade secrets; or

(b) any other information having a commercial value that would be, or could reasonably be, destroyed or diminished if the information were disclosed.'

[Paragraph 5.234](#) of the Guidelines provides that, in order for a document to be exempt under section 47(1)(b) of the FOI Act, it must satisfy two criteria:

- The document must contain information that has a commercial value either to an agency or to another person or body; and
- The commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed.

Furthermore, [paragraph 5.235](#) of the Guidelines relevantly provides that in deciding whether information has commercial value, a decision maker may consider whether the information is known only to the agency or person for whom it has value or, if it is known to others, to what extent that detracts from its intrinsic commercial value.

The document contains information in relation to the contractual arrangement between the department and the legal services provider HWL Ebsworth, including hourly rates charged by the firm. Given the total value of the contract is publicly available, details such as the number of days relating to a contract will demonstrate information such as the total amount earned by each individual associated with the contract and rates charged by the firm for its services. The information has not been made public to date and the Commission has not publicised material of this nature. Accordingly, if the information were made available through the FOI process, it would inform the public about the financial status of the third party and therefore diminish the

commercial value of the information as the third party will lose its competitiveness in a tender process and be unable to successfully obtain contracts.

As such, I am satisfied that certain parts of the document are exempt under section 47(1)(b) of the FOI Act. As section 47(1)(b) is not a conditional exemption, I am not required to consider public interest test.

### **Section 47G – Public interest conditional exemptions – business information**

Section 47G(1) of the FOI Act provides that 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 case in which the disclosure of information:

- would, or could reasonably be expected to, unreasonably affect the 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 (s 47G(1)(a))

Document 1 contains email correspondence in relation to a contract between the NDIS Commission and the legal services provider HWL Ebsworth. The document contains information relating to the pricing of the firm's services, including hourly rates of individuals associated with the contract. On this basis, I am satisfied that the document contains information concerning a person's business, commercial or financial affairs. Following consultations with HWL Ebsworth, I am further satisfied that the disclosure of the material would, or could reasonably be expected to unreasonably affect the organisation adversely by detailing the rates charged by the company for its services which is not available in the public domain and could diminish the company's competitiveness.

For the reasons given above, I consider that the documents are conditionally exempt under section 47G of the FOI Act. As I have found that the documents are conditionally exempt, I have also considered the public interest in their potential release.

### **Applicant of the public interest test – sections 47C, 47D, 47E and 47G**

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

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

In applying the public interest test, I am required to have regard to the FOI Guidelines and the following factors for release listed in section 11B(3) of the FOI Act. Those public interest factors are that release would:

- (a) promote the objects of the Act
- (b) inform debate on a matter of public importance
- (c) promote effective oversight of public expenditure
- (d) allow a person to access his or her personal information (s 11B(3))

The objects of the FOI Act include providing for a right of access to information in the possession of Commonwealth government agencies and promoting accountability and transparency in government decision making. In this case, the release of the documents supports the objects of the FOI Act by making available information which concerns government agency decision making.

Given the nature of the documents, I do consider that access to these documents would overall inform debate on a matter of public importance and promote effective oversight of public expenditure. However, I also note that for factor 4, as the entire document bundle do not contain your personal information, therefore there is no consideration under this factor to release such information to you.

The [Australian Information Commissioner's FOI Guidelines](#) also set out a non-exhaustive list of factors weighing against disclosure. These factors relate to harm that may result from the disclosure of the documents in certain circumstances. In reaching my decision, I consider that the factors weighing against disclosure are that disclosure could be reasonably expected to:

- (a) Disclosure of the parts of the documents that are conditionally exempt under section 47E(d) of the FOI Act could reasonably be expected to inhibit frankness and candour in the making of communications, in particular between the NDIS Commission and HWL Ebsworth.
- (b) Disclosure of the parts of the documents that are conditionally exempt under section 47E(d) of the FOI Act could reasonably be expected to inhibit the Legal Services and Internal Integrity Division's ability to successfully manage and administer their current legal matters in a significant scale.
- (c) Disclosure of conditionally exempt information under section 47C could reasonably be expected to prejudice the ability of NDIS Commission to manage future deliberations in relation to procurement procedures.
- (d) Disclosure of the parts of the documents that are conditionally exempt under section 47D of the FOI Act could reasonably be expected to prejudice the competitive commercial activities of the department.
- (e) Disclosure of the parts of the documents that are conditionally exempt under section 47G(1)(a) of the FOI Act could reasonably be expected to adversely affect a person's lawful business.

In particular, Document 2 includes a detailed internal procurement guide, which contains sensitive technical and procedural information about how the Commission conducts its procurement activities, including creating of purchase orders and internal communications. Releasing the information could enable potential vendors to manipulate the procurement process to their advantage. For example, the guide's disclosure might reveal specific methods or criteria that vendors could tailor their quotes towards, thereby reducing the competitive fairness that ensure value for money. The release of these documents would significantly compromise the commission's procurement function by providing external parties with sensitive information that could undermine fair competitiveness and lead to inefficient procurement outcomes.

Based on these factors, I have decided that the public interest is weighted more heavily against disclosure and that giving access to the conditionally exempt material would, on balance, be contrary to the public interest.

#### **Deletion of exempt material or irrelevant material from documents and provide access to edited copies**

Section 22 of the FOI Act requires an agency to provide access to an edited version of a document where it is reasonably practicable to edit the document to remove exempt material or material that is irrelevant to the scope of a request.

On 27 August 2024, the Commission has received your agreement to remove the personal information of NDIS Commission staff below Senior Executive Service (SES) level. It is also acknowledged that you agreed to treat personal information of other third-party individuals as irrelevant material and such information can be removed from the documents. On 16 September 2024, you also agreed to remove duplicate documents and receive only the final email in any chains.

Some material in document 2 contain references to other internal Commission documents that are outside the scope of the request.

On this basis, I have prepared the documents for release by removing the exempt and irrelevant material in accordance with section 22 of the FOI Act. The material that has been edited for release is marked within the documents as well as at Schedule of Documents.



## **FOI Disclosure Log**

In accordance with the requirements of section 11C of the FOI Act, the Commission is required to publish details of information released under the FOI Act, subject to certain exemptions. I have decided that the following exception applies in this case:

- 11C(1)(a) - personal information about any person if publication of that information would be 'unreasonable'
- 11C(1)(b) - information about the business, commercial, financial or professional affairs of any person, if it would be unreasonable to publish the information

Accordingly, details of the redacted documents disclosed to you as part of your FOI request will not be published on the Commission's FOI disclosure log.

For further information about the Commission's FOI disclosure log please refer to our [website](#).

## **Your review rights**

If you are dissatisfied with my decision, you may apply for internal review or Information Commissioner review of the decision. We encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

### **Internal review**

Under section 54 of the FOI Act, you may apply in writing to NDIS Commission for an internal review of my decision by another NDIS Commission officer. The internal review application must be made within 30 days of the date of this letter. The request should be addressed to [xxx@xxxxxxxxxxxxxxxx.xxx.xx](mailto:xxx@xxxxxxxxxxxxxxxx.xxx.xx). Where possible please attach reasons why you believe review of the decision is necessary.

### **Information Commissioner review**

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

- online via the [OAIC review smartform](#)
- by email to: [foxxx@xxxx.xxx.xx](mailto:foxxx@xxxx.xxx.xx)
- by post to: GPO Box 5288 Sydney NSW 2001

More information about [Information Commissioner review](#) is available on the Office of the Australian Information Commissioner website.

## **FOI Complaints**

If you are unhappy with the way we have handled your FOI request, please let us know what we could have done better. We may be able to rectify the problem. If you are not satisfied with our response, you can make a complaint to the Australian Information Commissioner. A complaint to the Information Commissioner must be made in writing. Complaints can be lodged in one of the following ways:

- online via the [OAIC Complaint smartform](#)
- by email to: [foxxx@xxxx.xxx.xx](mailto:foxxx@xxxx.xxx.xx)
- by post to: GPO Box 5288 Sydney 2001

More information about [FOI complaints](#) is available on the Office of the Australian Information Commissioner.

If you are not sure whether to lodge an Information Commissioner review or an Information Commissioner complaint, the website of the [Office of the Australian Information Commissioner](#) has more information.

**Contact**

If you wish to discuss this decision, please contact [xxx@xxxxxxxxxxxxxxxx.xxx.xx](mailto:xxx@xxxxxxxxxxxxxxxx.xxx.xx)

Yours sincerely,

A handwritten signature in black ink that reads "Deepika M". The signature is written in a cursive style.

Deepika

Position No: 50091780

Assistant Director – Freedom of Information  
NDIS Quality and Safeguards Commission

**SCHEDULE OF DOCUMENTS**

<b>Document reference</b>	<b>Date</b>	<b>Description of document</b>	<b>Number of pages</b>	<b>Decision on access</b>	<b>Applicable exemptions</b>
<i>Documents relating to the scope point 1, 2 and 4 of the request</i>					
1	Various	Email correspondence bundle in relation to the contract CN4089371	27	Partial access	Section 22 Section 47(1)(b) Section 47E(d) Section 47G(1)(a)
<i>Documents relating to the scope point 3 of the request</i>					
2	Undated	Guide to Procurement of Legal Services from the Whole of Australian Government panel or the Australian Government Solicitor	9	Access refused	Section 22 Section 47E(d) Section 47C
3	19/08/2024	<a href="#">Whole of Australian Government Legal Services Panel</a>	2	Full access	N/A