

15 November 2024

David Wright
Right to Know

By email: foi+request-12047-8fff28fb@righttoknow.org.au

Dear David Wright

Freedom of Information request — Notification of Decision

Thank you for your correspondence of 28 August 2024, in which you requested access to documents held by the National Disability Insurance Agency (NDIA), under the *Freedom of Information Act 1982* (FOI Act).

The purpose of this letter is to provide you with a decision on your request.

Scope of your request

You have requested access to the following documents:

"... I seek the following information:

- 1. The NDIA's total expenditure in the 2023-2024 financial year incurred through responding to applications before the Administrative Appeals Tribunal (AAT).*
- 2. The number of AAT matters in which the NDIS was the Respondent that were closed during the 2023-2024 financial year, broken down to indicate the relevant number of the matters closed by withdrawal of the application or dismissed by the AAT, resolved by agreement, or resolved through hearing.*
- 3. The number of these AAT matters resolved by agreement where the cost incurred by the NDIA in responding to the application (in legal and other costs), outweighed the costs of the supports that were in dispute.*
- 4 The number of these AAT matters resolved through hearing where the the cost incurred by the NDIA in responding to the application (in legal and other costs), outweighed the costs of the supports that were in dispute."*

Extension of time

On 26 September 2024, you agreed to a 15-day extension of time under section 15AA of the FOI Act, making 18 October 2024 the new date to provide you with a decision on access.

Decision Structure

I advise that during the internal consultation process, information was located for only some parts of your request, therefore, for ease of reading, I have addressed my decision as two separate decisions as below.

Decision 1 – Point 1 and Point 2 of FOI request

Scope:

1. *The NDIA's total expenditure in the 2023-2024 financial year incurred through responding to applications before the Administrative Appeals Tribunal (AAT).*
2. *The number of AAT matters in which the NDIS was the Respondent that were closed during the 2023-2024 financial year, broken down to indicate the relevant number of the matters closed by withdrawal of the application or dismissed by the AAT, resolved by agreement, or resolved through hearing.*

Search efforts

A search for documents has been conducted by the Legal Practice and Capability Branch and information was located in response to your request.

Decision on access

I have decided to release this information to you in full.

Section 17(1)(c) of the FOI Act provides that an agency can produce a written document containing the requested information, by the use of a computer or other equipment that is ordinarily available for retrieving or collating stored information. We have been able to produce a document containing this information as requested by you. I have, therefore, treated your request as if it were a request for access to this document in accordance with section 17(1)(c) of the FOI Act. This document is referred to as Document 1.

Decision 2 – Point 3 and Point 4 of FOI request

Scope:

3. *The number of these AAT matters resolved by agreement where the cost incurred by the NDIA in responding to the application (in legal and other costs), outweighed the costs of the supports that were in dispute.*
4. *The number of these AAT matters resolved through hearing where the cost incurred by the NDIA in responding to the application (in legal and other costs), outweighed the costs of the supports that were in dispute.”*

Search efforts

A search for documents has been conducted by the Legal Practice and Capability Branch and no documents were located in response your request.

Decision on access to documents

I have decided to refuse access to the information you have requested in point 3 and point 4 of your FOI request, on the basis that the documents cannot be found, do not exist or have not been received pursuant to section 24A of the FOI Act.

A detailed statement of reasons explaining my decision is located at **Attachment A**.

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

Release of documents

The document for release, as referred to in the Schedule of Documents at **Attachment B**, is enclosed.

Rights of review

Your rights to seek a review of my decision, or lodge a complaint, are set out at **Attachment C**.

Should you have any enquiries concerning this matter, please do not hesitate to contact me by email at foi@ndis.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'K. M. S.', with a large, stylized flourish at the end.

Kate (KIM627)

Senior Freedom of Information Officer
Complaints Management & FOI Branch
General Counsel Division

Attachment A

Statement of Reasons

FOI24/25-0250 (point 3 and point 4 of FOI request)

Refused information

I have refused access to the information you have requested on the basis that the documents do not exist or cannot be found under section 24A of the FOI Act.

Relevant law

Under the FOI Act, a person has a right to be given access to documents of an agency. However, the right of access is subject to limitations, including grounds for refusal of access. Section 24A of the FOI Act states that an agency may refuse a request for access to a document if all reasonable steps have been taken to find the document and the agency is satisfied that the document cannot be found or does not exist.

Searches for documents

After reviewing the scope of your FOI application, searches were conducted by the with the NDIA's Legal Practice and Capability Branch to assess whether the documents you requested existed.

I was advised by the Legal Practice and Capability Branch that the NDIA does not capture within a single document or database information that is within the below requested scope:

3. *The number of these AAT matters resolved by agreement where the cost incurred by the NDIA in responding to the application (in legal and other costs), outweighed the costs of the supports that were in dispute.*
4. *The number of these AAT matters resolved through hearing where the cost incurred by the NDIA in responding to the application (in legal and other costs), outweighed the costs of the supports that were in dispute."*

The LPC Branch further advised that to obtain the information requested would require an Officer or Officers of the NDIA to perform:

- a granular assessment of each 2,920 AAT matters resolved by consent (agreement) to identify what was in the original plan vs what supports are in dispute, noting that some supports are agreed to or removed at different times during the resolution process and other supports are added during this process.
- a review of the [NDIS Pricing Arrangement and Price Limits](#) (and preceding versions) to determine the various costs of the supports in dispute,
- a review of all the documents associated with each AAT matter to identify non-legal staff members who may have been involved with the matter, which could include case managers and support staff from the Chief Counsel Division and other NDIA staff members.
- estimations of the time spent and salaries by each person on each matter for both APS and Labour hire staff at a particular point in time.

Given the reliance on the accuracy of the manual search process and the fact that the NDIA does not calculate staff hours to matters but rather pays staff in relation to specific roles and classification levels, the information would only be a guesstimate. Further, the NDIA would then be required to produce a document containing the information.

As the right of access under the FOI Act is to documents held by an agency, rather than to information, the FOI act does not require an agency to create a new document in response to a request for access to information, except in limited circumstances which are set out in section 17 of the FOI Act.¹

These limited circumstances exist where:

- A valid request is made to an agency;
- it appears from the request that the applicant is seeking access to information that is not available in a discrete form in documents held by the agency;
- the agency could produce a written document containing the information in a discrete form by the use of a computer or other equipment which is ordinarily available to the agency.
- whether a computer or other equipment is “ordinarily available” to any agency will depend upon the facts of the particular case, which may include whether “access to it would involve a departure from the agency’s ordinary or usual conduct and operations”.²

Given the response provided to me by the LPC Branch, I am satisfied that section 17 does not apply in this case as the information is not available in a discrete form, and to locate the information would require the manual search and retrieval of information by agency staff and this would be unreasonable.

Conclusion

Based on the advice I have received I am satisfied that the information specific to point 3 and point 4 of your FOI request is not available in a discrete form.

¹ FOI Guidelines 2.33

² *Collection Point Pty Ltd v Commissioner of Taxation* [2013] FCAFC 67 [48]

Schedule of Documents for FOI 24/25-0250

Document number	Page number	Description	Access Decision	Comments
1	1	Freedom of Information Statistics	FULL ACCESS	Document created under section 17 of the FOI Act

Your review rights

Internal Review

The FOI Act gives you the right to apply for an internal review of this decision. The review will be conducted by a different person to the person who made the original decision.

If you wish to seek an internal review of the decision, you must apply for the review, in writing, within 30 days of receipt of this letter.

No particular form is required for an application for internal review, but to assist the review process, you should clearly outline your grounds for review (that is, the reasons why you disagree with the decision). Applications for internal review can be lodged by email to foi@ndis.gov.au or sent by post to:

Freedom of Information Section
Complaints Management & FOI Branch
General Counsel Division
National Disability Insurance Agency
GPO Box 700
CANBERRA ACT 2601

Review by the Office of the Australian Information Commissioner

The FOI Act also gives you the right to apply to the Office of the Australian Information Commissioner (OAIC) to seek a review of this decision.

If you wish to have the decision reviewed by the OAIC, you may apply for the review, in writing, or by using the online merits review form available on the OAIC's website at www.oaic.gov.au, within 60 days of receipt of this letter.

Applications for review can be lodged with the OAIC in the following ways:

Online: www.oaic.gov.au
Post: GPO Box 5218, Sydney NSW 2001
Email: enquiries@oaic.gov.au
Phone: 1300 363 992 (local call charge)

Complaints to the Office of the Australian Information Commissioner or the Commonwealth Ombudsman

You may complain to either the Commonwealth Ombudsman or the OAIC about actions taken by the NDIA in relation to your request. The Ombudsman will consult with the OAIC before investigating a complaint about the handling of an FOI request.

Your complaint to the OAIC can be directed to the contact details identified above. Your complaint to the Ombudsman can be directed to:

Phone: 1300 362 072 (local call charge)
Email: ombudsman@ombudsman.gov.au

Your complaint should be in writing and should set out the grounds on which it is considered that the actions taken in relation to the request should be investigated.