

12 November 2024

Julie Keys

By email: foi+request-12013-5d7eb343@righttoknow.org.au

Dear Julie Keys

Freedom of Information request - Notification of Decision

Thank you for your correspondence of 5 September 2024, seeking access under the *Freedom of Information Act 1982* (FOI Act) to documents held by the National Disability Insurance Agency (NDIA).

The purpose of this letter is to notify you of my decision on your application.

Scope of your request

You requested access to the following documents:

“...I request a copy of all documents relating to how the NDIA requires the functional capacity of people with the neurological disability ME/CFS to be demonstrated in order to demonstrate substantially reduced functional capacity...”

The purpose of this letter is to notify you of my decision on your application.

Request for Extension of time

On 26 September 2024, we wrote to you requesting your agreement to a 30-day extension of time under section 15AA of the FOI Act. As you did not agree to the extension, the due date is unchanged.

Expiration of time

A 30-day statutory period for processing your request commenced from 6 September 2024, in accordance with section 15(5)(b) of the FOI Act. The due date for a decision on access was 2 October 2024. I note this time has lapsed and as a result we are deemed to have refused your request under section 15AC of the FOI Act.

Despite this, I have continued to process your application. I apologise for the delay and confirm that you retain your right to seek external review of this decision.

Search efforts

Staff from the NDIA's Service Guidance (SG), Technical Advice and Practice Improvement (TAPIB) and Service Delivery (SD) branches conducted searches, and no documents relating to the scope of your request were identified. I have set out the reasons for this outcome in **Attachment A** to this letter.

Decision on access to documents

I have decided to refuse access to the information you have requested on the basis that the documents do not exist or cannot be located pursuant to section 24A of the FOI Act.

I made this decision as an authorised FOI decision maker under section 23(1) of the FOI Act.

I have provided a detailed statement of the reasons for my decision in Attachment A to this decision notice.

Rights of review

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

If you have any enquiries about this matter, please contact me by email at foi@ndis.gov.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Patrick', is written over a light blue horizontal line.

Patrick (PHO293)

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

**Statement of Reasons
FOI Application 24/25-0310**

Refused information

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

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, I identified the need to make enquiries with the NDIA's Service Guidance (SG), Technical Advice and Practice Improvement (TAPIB) and Service Delivery (SD) Branches for documents relevant to the scope of your request.

I was provided with the same TAPIB research documents that have been previously released to you under FOI decision notice dated 24 July 2024 relating to FOI matters 23/24-1127, 1128 and 1134 but no additional or new documents were provided by the TAPIB branch.

I have not considered these documents relevant to the scope of your request. While their subject matter relates to ME/CFS they do not outline '*how the NDIA requires the functional capacity...to be demonstrated in order to demonstrate substantially reduced functional capacity*'.

Two documents were provided by Service Guidance that are publicly available. I do not consider them relevant to the scope of your request as they are not specific to ME/CFS, however as they are publicly available, I have provided them to you in the form of links below.

No documents were located by Service Delivery.

NDIS (Becoming a Participant) Rules 2016

The legislative instrument [National Disability Insurance Scheme \(Becoming a Participant\) Rules 2016](#) provides details under rule 5.8 about - '*When does an impairment result in substantially reduced functional capacity to undertake relevant activities*'. This rule specifies:

An impairment results in substantially reduced functional capacity of a person to undertake one or more of the relevant activities—communication, social interaction, learning, mobility, self-care, self-management (see paragraph 5.1(c))—if its result is that:

- (a) the person is unable to participate effectively or completely in the activity, or to perform tasks or actions required to undertake or participate effectively or completely in the activity, without assistive technology, equipment (other than commonly used items such as glasses) or home modifications; or*

- (b) the person usually requires assistance (including physical assistance, guidance, supervision or prompting) from other people to participate in the activity or to perform tasks or actions required to undertake or participate in the activity; or*
- (c) the person is unable to participate in the activity or to perform tasks or actions required to undertake or participate in the activity, even with assistive technology, equipment, home modifications or assistance from another person.*

This rule was particularly relevant in a recent Administrative Appeals Tribunal (AAT) decision regarding a participant with ME/CFS accessing the NDIS [Garcia Albiol and National Disability Insurance Agency \[2024\] AATA 496 \(21 March 2024\)](#).

Publicly Available Information

As discussed above, I have been advised by Service Guidance that the NDIS website discusses 'substantially reduced functional capacity' in two locations in addition to general NDIS application information. I have provided the links here:

[Do you meet the disability requirements? | NDIS](#)

[Does your impairment substantially reduce your functional capacity? | NDIS](#)

[Applying to the NDIS | NDIS](#)

Referencing the paragraph titled "Does your impairment substantially reduce your functional capacity?", the guidance discusses and gives examples of various functional impacts within the domains of communication, socialising, learning, mobility and self-care. It further goes on to state that we get information from participants when they apply to the NDIS, specifically regarding capacity and where the participant needs more support.

The guidance continues under the heading 'What type of evidence should you provide?' that evidence may be from a doctor or specialist to confirm a permanent impairment, or from an allied health professional or other medical professional that tells us about the impacts to a participant's functional capacity.

Agency delegates will also, on occasion, administer a functional capacity tool such as the [World Health Organisation Disability Assessment Tool \(WHODAS\)](#), however, this is only done in certain circumstances and, only if a person is currently accessing the scheme.

In summary, there is no document held by the NDIA that contains specific criteria that a participant with ME/CFS needs to meet to demonstrate substantially reduced functional capacity. Functional capacity is assessed on a case-by-case basis, is guided by evidence provided by a participant, and requires the participant to meet the criteria of NDIS Rule 5.8.

Conclusion

Based on the information I received from the relevant business areas, I consider there are reasonable grounds to be satisfied that documents containing the information you seek do not exist. I therefore refuse access to the information under section a 24A of the FOI Act on the basis that the information cannot be located or does not exist.

Your review rights

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 review within 60 days of receiving this letter.

You can apply to the OAIC for review 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 the NDIA took in relation to your request. The Ombudsman will consult with the OAIC before investigating a complaint about the handling of an FOI request.

You can make a complaint to the OAIC using the contact details identified above, or to the Ombudsman by:

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

Your complaint should set out the grounds on which you consider the OAIC or the Ombudsman should investigate the NDIA's handling of your FOI request.