



NDIS Quality
and Safeguards
Commission

22 October 2024

Ref: LEX 3656

Ivy

By email: foi+request-12073-7d751737@righttoknow.org.au

Dear Ivy,

Freedom of Information Request No. (41) 24/25-1

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

I refer to your request dated 22 September 2024 which sought access to documents held by the NDIS Quality and Safeguard Commission (NDIS Commission) under the *Freedom of Information Act 1982 (Cth)* (FOI Act).

Specifically, your request sought access to:

I would like to see how many complaints regarding support providers are yet to be actioned and the dates these complaints extend to?

I would also like to see any guidelines on the triaging process undertaken when receiving complaints.

Administration of your FOI request

On 26 September 2024, the NDIS Commission acknowledged your request by email.

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 NDIS Commission has located **1 document** relevant to the second part of your freedom of information (FOI) request. This document was identified by searches undertaken in NDIS Commission systems. The document is set out in the schedule attached to this notice. I have decided to refuse access in full **to this document** under section 47E(d) of the FOI Act.

I have also decided to refuse access to the first part of your request with the description of '*...I would like to see how many complaints regarding support providers are yet to be actioned ...*' as the NDIS Commission does not hold this data in the discrete form, as described above, and the NDIS Commission cannot produce a document containing the requested information in a discrete form by the use of a computer or other equipment that is ordinarily available for retrieving or collating stored information.

In reaching my decision, I have taken into consideration:

- the terms of your request on 22 September 2024;
- the FOI Act (in particular s17, s24A and s47E);
- the types of information and documents that are in the NDIS Commission's possession;

- the content of the document 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

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

Under s 24A(1) of the FOI Act, an agency or minister may refuse a request if it has taken 'all reasonable steps' to find the document requested, and is satisfied that the document cannot be found or does not exist. I am satisfied that both elements apply to your request.

Searches of the records that NDIS Commission compiles for reporting have been undertaken. I have conferred with staff with relevant responsibility to ascertain whether any documents could be located in response to your request. There has not been any previous requirement or need for the NDIS Commission to produce reports in the same terms as your request.

I have also considered whether documents could be produced containing the information in a discrete form by the use of a computer or other equipment for retrieving or collating the requested information. On the information before me, I am satisfied that documents could not be produced by ordinary use of a computer and the obligation in section 17(1) of the FOI Act does not apply in this instance (see discussion below). Accordingly, I am satisfied that no documents exist or can be produced, and I refuse your request for access to the documents under s 24A of the FOI Act.

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 17 - Requests involving use of computers etc.

Section 17 of the FOI Act relevantly provides the following:

(1) Where:

- (a) a request (including a request in relation to which a practical refusal reason exists) is made in accordance with the requirements of [subsection 15\(2\)](#) to an agency;
- (b) it appears from the request that the desire of the applicant is for information that is not available in discrete form in written documents of the agency; and
- (ba) it does not appear from the request that the applicant wishes to be provided with a computer tape or computer disk on which the information is recorded; and
- (c) the agency could produce a written document containing the information in discrete form by:
 - (i) the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or
 - (ii) the making of a transcript from a sound recording held in the agency;

the agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.

(2) An agency is not required to comply with [subsection \(1\)](#) if compliance would substantially and unreasonably divert the resources of the agency from its other operations.

The right of access under the FOI Act is to existing documents, rather than to information. The FOI Act does not require the NDIS Commission to create a new document in response to a request for access, except in limited circumstances where the applicant seeks access in a different format or where the information is stored in an agency computer system rather than in discrete form.

Section 17 of the FOI Act obliges the NDIS Commission to produce a written document of information that is stored electronically and not in a discrete written form, if:

- The NDIS Commission can produce a written document containing the requested information by using a 'computer or other equipment that is ordinarily available' to the NDIS Commission for retrieving or collating stored information: s17(1)(c)(i); and
- Producing the written document would not substantially and unreasonably divert the resources of the agency from its other operations: s17(2) (see paragraph 3.212 of the FOI Guidelines).

The FOI Guidelines at paragraphs [3.214] - [3.215] discuss the case of *Collection Point Pty Ltd v Commissioner of Taxation [2013] FCAFC 67 (Collection Point)*. In *Collection Point*, the reference to a 'computer or other equipment that is ordinarily available' was held to mean 'a functioning computer system including software, that can produce the requested document without the aid of additional components which are not themselves ordinarily available ... [The] computer or other equipment... must be capable of functioning independently to collate or retrieve stored information and to produce the requested document.'

The Freedom of Information Commissioner has also considered the extent of the obligation in s 17(1) of the FOI Act in an analogous case, *Ryan Turner and Department of Home Affairs (Freedom of information) [2022] AICmr 63 (6 September 2022)* in which the Commissioner accepted that:

- the production of a document containing the information sought by the applicant would, at this time, require the Department to depart from its ordinary or usual conduct and operations, and
- therefore, the document could not be produced by the use of a computer 'ordinarily available' to the Department within the meaning of s 17(1)(c)(i) of the FOI Act.

I have consulted with the relevant business areas of the NDIS Commission, and I am satisfied that producing a document from the NDIS Commission's statistical holdings which includes the information you have requested would extend beyond its ordinary retrieval and reporting capability of the COS database. I have been advised that the available data set does not align with the format required to address scope of your request and to produce the required data it would be required to manually review all open complaints in the system to identify those relating to support providers, noting that NDIS Commission receives complaints from multiple channels relating to various issues and concerns, not all of which are in relation to support providers.

We have also been advised that extracting and restructuring the data to meet the specifics of your request would involve manually retrieving the information and will be resource-intensive and would have an impact on our operational capabilities.

In light of the work processes required to produce documents containing NDIS Commission data that would meet the terms of first part of your request, I am satisfied that the obligation under section 17 of the FOI Act does not arise for your request.

The activity reports published on the NDIS Commission website include that information on the number of complaints received, the reports can be found at [NDIS Commission Activity Reports](#) on our website.

It is further noted that information on the timeliness of complaints handling is on [our website](#) – see Annual Reports.

Section 47E(d) – Documents affecting certain operations of agencies

Section 47E conditionally exempts a document where disclosure would, or could reasonably be expected to, prejudice or have a substantial adverse effect on certain identified agency operations. In order to apply the exemption at s47E(d), I must be satisfied that disclosure of the documents would have a “substantial adverse effect” on the efficiency of the operations of the agencies.

Document 1– Internal Complaints procedure

In the decision of the IC in *‘YU’ and Bureau of Meteorology (Freedom of Information)* [2021] AICmr 75 (29 November 2021) (YU), the IC refers to case law that highlights the importance of agencies being able to undertake confidential investigative processes and the practical need for confidentiality to extend beyond an investigation in circumstances where disclosure would likely undermine participation in future investigative processes by agency staff and/or members of the public. I consider the findings of the IC relevant to my decision in respect of your request.

The requested complaints triaging document contains guidance and process material for NDIS commission staff concerning the complaints handling and complaints information release to the subject of the complaint (i.e. an NDIS provider, NDIS participant etc.). I am satisfied this information is relevant to the implementation, delivery and management of a process administered by the NDIS Commission, and therefore is relevant to the conduct of the NDIS Commission’s operations. I consider that providing the material which is classified for *‘internal use by Commission staff only’* and not publicly available, would negatively affect the conduct of the NDIS Commission’s operations. Such information may allow individuals to circumvent elements of the NDIS Commission’s processes for their own advantage by withholding or using complaint related information that may pose a risk to vulnerable persons. Additionally, information contained in the documents would provide insight about navigating the NDIS Commission’s internal systems, assessment methods and escalation processes. Having regard to the information contained in the documents, I must also consider any actions that may be taken if the information is shared on a public domain, particularly as the FOI Act does not control or restrict use or dissemination of the information once released.

Applicant of the public interest test – sections 47E(d)

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 personal 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. Also, I also note that the document does 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 internal complaint handling, referral process and assessment tools by the NDIS Commission that are conditionally exempt under section 47E(d) of the FOI Act could reasonably be expected to prejudice the effectiveness of the agencies' enforcement function and role in investigating serious non-compliance activities from the NDIS providers

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.

FOI Disclosure Log

As documents do not exist, I am not required to consider the requirement to publish details of information released in this instance.

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 FOI@ndiscommission.gov.au. 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 [OAI review smartform](#)
- by email to: foidr@oaic.gov.au
- 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: foidr@oaic.gov.au
- 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 FOI@ndiscommission.gov.au

Yours sincerely,



Deepika

Position No: 50091780

Assistant Director – Freedom of Information
NDIS Quality and Safeguards Commission

SCHEDULE OF DOCUMENTS

| Document reference | Date | Description of document | Number of pages | Decision on access | Applicable exemptions |
|---------------------------|-------------|--------------------------------------|------------------------|---------------------------|------------------------------|
| 1 | N/A | NDIS Commission Complaints procedure | 16 | Refused in full | Section 47E(d) |