

Our reference: FOI 24/25-0080

Your reference: MR24/01605



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15 November 2024

Claire Lynch
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Freedom of Information Branch
Office of the Australian Information Commissioner
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By email: foidr@oaic.gov.au

Dear Claire Lynch

Submissions to the Information Commissioner

Thank you for your correspondence of 5 November 2024, in which you notified the National Disability Insurance Agency (NDIA) of the commencement of a review of this matter by the Information Commissioner (IC).

The purpose of this letter is to provide submissions as to the adequacy of the searches conducted by the NDIA under section 24A of the *Freedom of Information Act 1982* (the FOI Act).

Background

On 22 July 2024 the applicant made a request for access to the following documents held by the NDIA:

"Previously, FOI 23/24-0029 revealed the existence of the NDIA's AAT Case Management Guide for Applied Behaviour Analysis (ABA) 4/1/2023. Subsequently, FOI 23/24-201 showed the guide was meant to be reviewed 6-monthly.

Please provide all information (since 4/1/2023), in accordance with the Freedom of Information Act, relating to any and all reviews or the disposition of the aforementioned Guide and any revised versions or replacement guides.

Please include (but not limited to):

- 1. information, advice, recommendations, etc. that are outcomes of from reviews conducted.*
- 2. information relating to the scheduling, conduct, and to inform the review process for the guide.*
- 3. changes to the disposition of the guide.*
- 4. community concerns about the guide and the NDIA's considerations of those concerns."*

The NDIA were unable to provide a decision on access within the legislated timeframe and on 21 August 2024 the request became a deemed refusal under section 15AC of the FOI Act.

The NDIA subsequently provided the applicant with a decision on 19 September 2024. In accordance with that decision, access was granted, in full, to one document in relation to part 1 of the applicant's request. Access was refused under s24A in relation to parts 2, 3 and 4 of the applicant's request.

On 25 September 2024 the applicant emailed the NDIA seeking an internal review of the decision made 19 September 2024. The Decision Maker replied to the applicant the same day advising that as the decision was made outside of legislated timeframes, the applicant no longer had a right to internal review. The Decision Maker directed the applicant to apply for external review by the IC, however requested this application be delayed, allowing time to obtain further information in relation to the request.

On 3 October 2024 the Decision Maker provided the applicant with further information received from the relevant line area in relation to the request.

On 4 October 2024 the applicant responded noting he was still not satisfied with the NDIA's response.

On 5 November 2024 the NDIA received notice from OAIC of the IC review. We note that the decision under review is the deemed access refusal decision of 21 August 2024. Given the above, and the evidence of searches set out further in this letter, we have decided to issue the applicant with our decision of 19 September 2024 under section 55G of the FOI Act.

Evidence of Searches

Where relevant documents would be located

The applicant's request relates to the review of the document "AAT Case Management Guide for Applied Behaviour Analysis (ABA)" dated 4 January 2023. As such, any documents could be expected to be found by consulting with staff in what was known at the time as our AAT Case Management Branch (AAT CM).

Searches conducted

On 22 August 2024 the FOI Team conducted a consult with the Divisional Support Officer for AAT CM requesting they conduct searches for documents relevant to the applicant's request. The request was forwarded to the AAB Complaints Team within the AAT CM.

On 3 September 2024 AAB Complaints provided the FOI Team with 1 document relevant to the scope. They also confirmed that review of the document commenced at the end of August 2023 and was sent by the Quality, Reporting, Strategy and Training Team (QRST) to the Director of Communication and Engagement within AAT CM on 5 September 2023. While the Director of Communication and Engagement made notes to the document, the QRST Director decided no amendments or revisions were required. As such the review was finalised.

After the applicant's email of 25 September 2024 requesting an internal review, an additional consult was sent to AAB Complaints the same day. The FOI Team requested they conduct further searches for documents, specifically:

1. any communication or documents regarding the decision not to update the guide

2. any communication or documents regarding the scheduling of review
3. any communication or documents regarding the reassignment of responsibility of the document
4. any communication or documents regarding community concerns for the guide or considerations we have made regarding these concerns

On 30 September 2024 the AAB Complaints Team responded confirming the following:

1. There are no communication or documents as there was no change to communicate to staff in the Chief Counsel Division.
2. Not specifically to the AAT CM Guide of which the FOI is related. The proposed 12-month review of the AAT CM Guide is currently being considered to support the NDIS legislative reform work and the transition from the Administrative Appeals Tribunal (AAT) to the Administrative Review Tribunal (ART).
3. There was no reassignment of responsibility of the document. The QRST team was renamed (to Continuous Improvement team) and absorbed into a new branch – the Legal Practice and Capability (LPC) branch. The team itself retained responsibility for the management of guidance material for AAT case managers.
4. There are no communication or documents regarding community concerns that we are aware of. The Director, Communications and Engagement provided their comments in the decision document already provided.

The above was provided to the applicant in the Decision Maker's email of 3 October 2024.

Submissions on adequacy of searches for this request

Section 24A of the FOI Act provides guidance on the obligations placed on agencies when searching for documents within the scope of an FOI request. Specifically, section 24A(1)(a) requires the Agency to take '...all reasonable steps... to find the document' before access is refused.

Paragraphs 3.88 and 3.89 of the guidelines issued by OAIC under section 93A of the FOI Act also provide guidance on what constitutes 'all reasonable steps'.

3.88 The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.

3.89 Agencies and ministers should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office.[34] At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:

- *the subject matter of the documents*
- *the current and past file management systems and the practice of destruction or removal of documents*
- *the record management systems in place*
- *the individuals within an agency or minister's office who may be able to assist with the location of documents, and*
- *the age of the documents.*

With regard to where documents would be located, and the searches conducted, the Agency submits that its searches for documents relevant to the applicant's request satisfy the

requirements to take all reasonable steps to find a document and that those searches were 'appropriate or suitable to the circumstance or purpose'.

By conducting an initial consult for searches with the relevant line area, and then requesting additional searches in response to the applicant's queries, the Agency has taken 'comprehensive steps to locate documents'.

The Agency therefore submits that it has conducted adequate searches for documents relevant to the scope of the applicant's request and has satisfied its obligations under section 24A of the FOI Act.

If you require any further information, please contact me at foi@ndis.gov.au.

Yours sincerely

A handwritten signature in black ink, consisting of stylized initials 'KHC'.

Karla (KHC190)
Assistant Director – Information Access
Complaints Management & FOI Branch
General Counsel Division