



NDIS Quality
and Safeguards
Commission

29 October 2024

Ref: LEX 3696

Mr Mark Pietsch

By email: foi+request-12131-3291c8f2@righttoknow.org.au

Dear Mr Pietsch,

Freedom of Information Request No. (45) 24/25-2

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

I refer to your request dated 2 October 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:

“Data from both the National Disability Insurance Agency (NDIA) and the NDIS Quality and Safeguards Commission regarding participant critical incidents, reportable incidents, and deaths. Specifically, I am interested in incidents from June 1, 2022, to the present, where investigations have indicated that lack of action, duty of care failures, errors, or delays associated with the NDIA, the Commission, as well as unmet needs associated with mainstream state-funded services, may have contributed to these incidents.

Please provide the following:

Total numbers of participant critical incidents (PCIs), reportable incidents, and deaths:

- Include cases where investigations have noted that actions, inactions, duty of care failures, as well as errors or delays by the NDIA or the Commission, were contributing factors.

-Data should also indicate where instances where unmet needs associated with mainstream state-funded services were identified as a contributing factor.

Please break down this data monthly.

Total numbers of participants who were waiting on:

-Equipment or Assistive Technology (AT) approval, -Section 48 reviews, -New plan approvals, -Indicate how many of these participants died or suffered an injury while waiting, with data also provided on a monthly basis, and the number of days waiting.”

In regard to the last scope point (marked in bold text), the NDIS Commission does not have access to documents held by the NDIA, those parts of your request were transferred to the NDIA in accordance with section 16 of the FOI Act. Any further communication in relation to documents held by the NDIA will be sent to you from that agency directly.

Administration of your FOI request

On 4 October 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

I am refusing access to the requested documents as the NDIS Commission does not hold the data that you seek, as described above, in a discrete form. I am satisfied that all reasonable steps have been taken to locate the requested documents and that they do not exist.

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 to the agency for retrieving or collating stored information. In reaching my decision, I have taken into consideration:

- the terms of your request on 2 October 2024;
- the relevant provisions of the FOI Act (specifically sections 17 and 24A)
- 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 you 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 for this 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 for data governance and reporting 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.

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 Commission's statistical holdings which includes the information you have requested would extend beyond its ordinary retrieval and reporting capability.

NDIS Commission publishes the reports on reportable incidents and deaths (a type of reportable incidents) figures regularly via our external homepage: [Quarterly Performance Report](#) (QPR). Please be advised that the next quarterly report should be made available in November 2024.

The reportable incident categories on the QPR are classified as the following:

- Abuse of a PWD;
- Death of a PWD;
- Neglect of a PWD;
- Serious Injury of a PWD;
- Sexual Misconduct;
- Unauthorised Restrictive Practices;
- Unlawful physical contact; and
- Unlawful sexual contact

Other contributing factors including actions, inactions, duty of care failures, errors, delays and unmet needs associated with mainstream state-funded services

For other contributing factors which are not covered in the QPR, significant resources and effort will be required to produce such documents would involve several processes that are not 'ordinarily available'.

Data to be presented as a monthly basis

Figures in the QPR are reported in quarterly fashion. While the Commission can break the data down in a monthly basis, quarterly figures generally provide a more accurate view to the business area as incidents can develop and be logged across multiple months. As a result, the Department considers quarterly data reporting is a more suitable approach to this type of departmental statistics. Similarly, significant resources and effort will be required to produce such documents in the monthly basis would involve several processes that are not 'ordinarily available'.

Information relating to participant critical incidents (PCI)

PCI is NDIA owned data, and the agency reports related figures regularly in their [Quarterly Reports](#). If you would like to seek data and information about PCI, please contact NDIA directly.

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 [OAIC 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,

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