

6 January 2025

David Wright

By email: foi+request-12164-cdd2dadf@righttoknow.org.au

Dear David Wright

Freedom of Information request — Internal Review Decision

Thank you for your correspondence of 6 December 2024, in which you requested an internal review of the decision on your request FOI 24/25-0593, made 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 for internal review.

Original Decision

On 6 December 2024, you were notified of the NDIA's decision on your request for information. This decision is attached as **Attachment A**. It granted you partial access to a single document. Redactions were applied to the document under section 47E(d) and section 47F of the FOI Act.

Internal Review

You have requested an Internal Review on the following grounds:

I am writing to request an internal review of National Disability Insurance Agency's handling of my FOI request 'Adv 2018/7867 regarding ABA therapy for a 6 year old'.

Your decision document provides the following reasons for redacting information:

- *The disclosure of information would result in the prejudice of the effectiveness of the agency's operational methods and procedures.*
- *This in turn would, or could reasonably be expected to, result in the need to change those methods and procedures.*

- *The improper use of the operational methods and procedures would, or could, lead to a distortion of funding levels that would substantially and adversely affect the integrity of the NDIS and its financial sustainability.*
- *Disclosure would provide the world at large the criteria and threshold for decisions on access levels of supports, which could be used to manipulate justifications/recommendations for prescribed supports for participants.*
- *Disclosure would risk the integrity of the decision-making framework used by Technical Advisors in the provision of recommendations for participants to receive supports that are reasonable and necessary'*
- *Disclosure would hinder the ability of Agency decision-makers to comply with their obligations and make informed decisions, which, in turn, helps to ensure the financial stability and integrity of the National Disability Insurance Scheme.*

Each of these assertions lacks any evidence to support them:

- *You have not explained specifically how or why the disclosure of information would result in the prejudice of the effectiveness of the agency's operational methods and procedures. What evidence is this based on?*
- *Without this justification, explanation or evidence, you have not provided any reason to support the assertion that this could reasonably be expected to result in the need to changes those methods and procedures.*
- *You have not explained what 'Improper use' of the information is, nor how it would, or could, lead to a distortion of funding levels that would substantially and adversely affect the integrity of the NDIS and its financial sustainability.*
- *You have not explained how or why providing the world at large the criteria and threshold for decisions on access levels of supports could be used to manipulate justifications/recommendations for prescribed supports for participants. What evidence is this assertion based on?*
- *You have not explained how or why disclosing the information would risk the integrity of the decision-making framework used by Technical Advisors in the provision of recommendations for participants to receive supports that are reasonable and necessary. What evidence is this assertion based on?*

- *You have not explained how or why disclosing the information would hinder the ability of Agency decision-makers to comply with their obligations and make informed decisions, which, in turn, helps to ensure the financial stability of the National Disability Insurance Scheme. What evidence is this assertion based on?*

I am authorised to make internal review decisions under section 54C of the FOI Act. As a review officer, I can decide all issues raised by your request and exercise all powers available to the original decision-maker. I am not bound in any way by the original decision and am required to make a fresh decision.

Relevant consideration

Your request for review questions the redaction of material on the basis that it is exempt from disclosure under section 47E(d) of the FOI Act.

Section 47E(d) relevantly provides:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to ...:

- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

In carrying out this internal review, I have had regard to relevant parts of the Australian Information Commissioner's FOI Guidelines, as follows:

- The test "would or could reasonably be expected" requires the decision-maker to assess the likelihood of the predicted effect occurring after disclosure of a document. It does not require certainty of an effect occurring. However, the mere possibility of the effect does not qualify as a reasonable expectation.
- For a document to be conditionally exempt under section 47E(d), the expected effect must be both substantial and adverse. The term "substantial adverse effect" means an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person. Nominal damage is not sufficient to qualify as a substantial effect.

I have also taken account of the decision in *Re Attorney-General's Department and Australian Iron and Steel Pty Ltd v Peter Cockcroft*, where the Federal Court said that the words "could reasonably be expected to" should be given their ordinary meaning. The words

require a judgement to be made as to whether it is reasonable, as distinct from irrational, absurd or ridiculous to expect that an effect would occur.¹

The term “the conduct of the operations of an agency” is capable of extending to the way in which an agency discharges or performs any of its functions.²

I have reviewed the entirety of the document that was partially released to you on 6 December 2024 with these principles in mind and do not consider that the parts of the document that were withheld from you are exempt under section 47E(d) of the Act.

Decision on your request for Internal Review

Section 47F of the FOI Act

Having reviewed the original decision, I have decided to vary only the reasons for redacting the information in the document to which you have already been granted partial access. While I agree with the original decision-maker’s view that large parts of the document are exempt under section 47F of the FOI Act, I do not agree that those parts are also exempt under section 47E(d) of the Act.

My view is that all the information that was redacted from the document to which you have been granted access is exempt from disclosure under section 47F. All the information on pages 1 to 3 and most of page 4 of the document is the personal information of identifiable individuals. Most of it comprises the personal information of an NDIS child participant and their parents.

Under section 47F of the FOI Act, a document is conditionally exempt if its disclosure under the Act would involve the unreasonable disclosure of personal information. In considering whether the disclosure of the information would be unreasonable, the Act requires me to have regard to all relevant factors, including:

- The extent to which the information is well known;
- Whether the persons to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document; and
- The availability of the information from publicly accessible sources.

¹ *Re Attorney-General’s Department and Australian Iron and Steel Pty Ltd and Peter Cockcroft* [1986] FCA 35 at [29].

² *John Theodoridis and Services Australia (Freedom of Information)* [2023] AICmr 135 at [96].

In the present case, the personal information in the document is not well-known, the persons to whom the information relates are not known to be associated with the matters dealt with in the document, and the information is not available from publicly accessible sources. Given that the information relates to a child living with a disability and his family and these other factors, I am satisfied that it would be unreasonable to disclose the information contained on the specified pages.

Having decided that it would be unreasonable to disclose the third parties' personal information under the FOI Act, I must then consider whether it would be contrary to the public interest to do so. In my opinion, there are very few factors favouring access to the document. In particular, disclosure of the document under the Act would not:

- Promote the objects of the FOI Act other than in a very general way by giving access to Government held information;
- Inform debate on a matter of public importance; or
- Promote effective oversight of public expenditure.

Against these factors, I consider that it would be contrary to the public interest to disclose the personal information of a child living with a disability and that of their parents. Such information amounts to protected Agency information. Under section 62 of the *National Disability Insurance Scheme Act 2013* (the NDIS Act), it is an offence to disclose such information to any other person. While section 62 does not override the provisions of the FOI Act, its inclusion in the NDIS Act indicates Parliament's intention to protect such information from disclosure. The right to privacy is also recognised by Australian Privacy Principle 6, which provides that an entity that holds personal information about an individual that was collected for a particular purpose, must not disclose that information for another purpose unless the individual has consented to such disclosure.

I conclude that all the personal information in the document is exempt under section 47E of the FOI Act.

Section 22 of the FOI Act

You have already been granted access to the remainder of page 4 and page 5 and the top of page 6 of the document.

The remainder of page 6 and pages 7 to 9 and the top of page 10 of the document contain a table setting out whether the support that was being requested met various criteria set out under section 34 of the *National Disability Insurance Scheme Act 2013* (the NDIS Act). For

example, the Technical Advisor considered whether the requested support would represent value for money. In reaching a conclusion on this and other section 34 criteria, the advisor referred to various guidance materials that were current on 7 June 2019, the NDIS Act, Rules made under the Act and case law. The advisor then related the guidance material, the legislative material and the case law to the participant's and their parents' particular individual circumstances.

Due to this method of assessing whether the requested support amounted to a reasonable and necessary support, it is not possible to extricate the personal information of the participant and their family from the non-personal information contained in the table. The two different sorts of information are inextricably linked.

The remainder of page 10 and page 11 of the document contain the Technical Advisor's advice and recommendations. Again, in giving this advice and making this recommendation, the advisor approaches the task by referring to guidance materials and legislation and linking those back to the participant's personal situation.

Section 22 of the FOI Act requires me to consider whether it would be reasonably practicable to provide you with an edited copy of the document, having redacted only the exempt material. In considering this, I have had regard to the Information Commissioner's FOI Guidelines, which relevantly state:

... an agency or minister should take a common sense approach in considering whether the number of deletions would be so many that the remaining document would be of little or no value to the applicant. Similarly, the purpose of providing access to government information under the FOI Act may not be served if extensive editing is required that leaves only a skeleton of the former document that conveys little of its content or substance.³

In this case, I take the view that redaction of the non-exempt material from the table, the advice and recommendations, would leave only a skeleton of the original document and that what would remain would be of little value to you. In reaching this conclusion, I have had regard to the fact that the NDIS Act and the Rules made under it have been amended since the advice was prepared and the guidance materials referred to in the advice have been superseded; they are of historical value only.

³ See [Part 3: Processing and deciding on requests for access | OAIC](#). Paragraph 3.98.

Production of a document

Section 17 of the FOI Act allows an agency to produce a written document in response to an FOI request. The section applies in circumstances where it appears from the request that the applicant desires access to information that is not available in a discrete form in written documents of the agency, but the agency could produce a written document containing the information in discrete form.

As it appears to me that you would like access to the guidance materials and the like that the Technical Advisor considered in formulating their advice, I have produced a document setting out each document referred to in that advice and providing you with links to publicly available documents that contain similar information.

Release of document

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

Rights of review

I have set out your rights to seek a review of my decision at **Attachment B**.

Publication

The NDIA will publish the document released to you on our Disclosure Log. Our policy is to be publish the document within 10 business days of it being released to you.

If you have any questions regarding this decision, please contact me at foi@ndis.gov.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Helen', written in a cursive style.

Helen [HIL533]

Assistant Director, Freedom of Information
Complaints Management and FOI Branch
General Counsel Division

Schedule of Documents for IR 24/25-017

Document number	Page number	Description	Access Decision
1	1-11	Advisory Team Advice Form (2018 7867) Date: 7 June 2019	ACCESS REFUSED Exemption claimed: S47F – personal privacy

Your rights of review

Review by the Office of the Australian Information Commissioner

The FOI Act 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