



Mr Jadon Faulkner

By email: foi+request-10360-00a5345a@righttoknow.org.au

Dear Mr Faulkner,

**Freedom of Information Request No. (47) - 22/23 – (4)
Notice of Decision on Access under the *Freedom of Information Act 1982* (Cth)**

I refer to your email received by the NDIS Quality and Safeguards Commission (**Commission**) on 3 June 2023, in which you made a request for access under the *Freedom of Information Act 1982* (Cth) (**FOI Act**) in the following terms:

I want access to any emails which refer to, or discuss, the issuing of the improvement notice to the NDIS Quality and Safeguards Commission by Comcare in late April 2023. I am only interested in the above described emails where the emails were sent:

- to or by Senior Executive Service staff of the NDIS Quality and Safeguards Commission and*
- between 26 April 2023 and 10 May 2023.*

I do not need the improvement notice - the notice itself and any details about its contents can be excluded.

I do not need duplicate documents. Duplicates can be excluded.

I do not need the personal information of any NDIS Quality and Safeguards Commission staff below Senior Executive Service level. I also do not need the phone numbers of any Senior Executive Service staff. This information can be excluded.

On 5 June 2023, you confirmed you were ‘*only interested in emails sent to or by Senior Executive Service, not emails between staff below this level*’.

On 21 June 2023, the Commission notified you of the need to consult relevant third parties under section 27 and 27A. As such, the decision fell due on 2 August 2023.

Decision

The Commission has identified **17** documents, as well as **six** attachments (61 pages), as falling within the scope of your Freedom of Information (**FOI**) request.

The documents are set out in **Attachment A**.

The documents contain material relevant to your FOI request, including material withheld under sections 47C, 47E(c), 47E(d), and 47F of the FOI Act.

In accordance with section 22 of the FOI Act, where reasonably practicable, redactions have been applied to exempt or irrelevant material.

I have decided to grant **access** to the edited documents.

Reasons for decision

The reasons for my decision on access are set out in the Statement of Reasons at **Attachment B**.

FOI Disclosure Log

In accordance with the requirements of section 11C of the FOI Act, the Commission is required to publish details of information released under the FOI Act, subject to certain exemptions.

I am satisfied that details of the redacted documents disclosed to you as part of your FOI request should be published on the Commission's FOI disclosure log. For further information about the Commission's FOI disclosure log please refer to our website:

<https://www.ndiscommission.gov.au/about/freedom-information/foi-disclosure-log>

Review rights and complaints

If you are unhappy with my decision, you can find information about your rights of review, and how you can make a complaint about the handling of your request at **Attachment C**.

Contact

If you wish to discuss my decision, please contact the FOI team via email at FOI@ndiscommission.gov.au

Yours sincerely



Linda Blue
Director, Major Initiatives
2 August 2023



FOI Request No. (47)- 22/23 – (4)

FOI Decision
SCHEDULE OF DOCUMENTS

Pages	Date	Document Title	Decision / Exemption
1 – 3	Email chain ending on 1 May 2023	Document 1	Section 22 Section 47E(d) Section 47F
4 - -6	Email chain ending on 1 May 2023	Document 2	Section 22 Section 47E(d) Section 47F
7 - 9	Email chain ending on 5 May 2023	Document 3	Section 22 Section 47F – submissions
10	Undated	Image 1	Full access
11 - 13	Email chain ending 8 May 2023	Document 4	Section 22
14 - 17	Email chain ending 9 May 2023	Document 5	Section 22
18 - 19	Email chain ending 9 May 2023	Document 6	Section 22

20 - 21	26 April 2023	Document 7	Section 22 Section 22 - submissions
22 - 26	Email chain ending 1 May 2023	Document 8	Section 22 Section 47C Section 22 - submissions Section 47E(d) Section 47F
27 - 31	Email chain ending 8 May 2023	Document 9	Section 22 Section 47C Section 22 - submissions Section 47E(d) Section 47F
32 - 36	28 April 2023	Document 10	Section 22 Section 47C Section 22 - submissions Section 47E(d) Section 47F
37 - 38	Email chain ending 27 April 2023	Document 11	Section 22 Section 22 - submissions
39 - 40	Email chain ending 27 April 2023	Document 12	Section 22 Section 47F
41	27 April 2023	Attachment 1	Full release
42 - 44	Email chain ending 28 April 2023	Document 13	Section 22 Section 47F
45 - 46	Email chain ending 30 April 2023	Document 14	Section 22 Section 47F

47 - 49	Email chain ending 1 May 2023	Document 15	Section 22 Section 47F
50	28 April 2023	Attachment 2	Section 47C Section 47E(c)
51 - 53	9 May 2023	Attachment 3	Section 22
54	9 May 2023	Attachment 4	Full release
55 - 57	Email chain ending 5 May 2023	Document 16	Section 22 Section 47F – submissions
58 - 60	Email chain ending 5 May 2023	Document 17	Section 22 Section 47F – submissions Section 47F
61	5 May 2023	Attachment 5	Full release



FOI Request No. (47)- 22/23 – (4)

FOI Decision
STATEMENT OF REASONS

YOUR FOI REQUEST

1. On 3 June 2023, you requested made a request for access to documents in the following terms:

I want access to any emails which refer to, or discuss, the issuing of the improvement notice to the NDIS Quality and Safeguards Commission by Comcare in late April 2023. I am only interested in the above described emails where the emails were sent:

- to or by Senior Executive Service staff of the NDIS Quality and Safeguards Commission and
- between 26 April 2023 and 10 May 2023.

I do not need the improvement notice - the notice itself and any details about its contents can be excluded.

I do not need duplicate documents. Duplicates can be excluded.

I do not need the personal information of any NDIS Quality and Safeguards Commission staff below Senior Executive Service level. I also do not need the phone numbers of any Senior Executive Service staff. This information can be excluded.

2. On 5 June 2023, you confirmed you were 'only interested in emails sent to or by Senior Executive Service, not emails between staff below this level'.
3. On 21 June 2023, the Commission notified you of the need to consult relevant third parties under section 27 and 27A. As such, the decision fell due on 2 August 2023.

DECISION

4. I am an officer authorised under section 23 of the FOI Act to make decisions regarding access to documents.
5. I have decided to **grant access** to 17 documents, as well as six attachments, subject to various exemptions.
6. I have found that parts of the documents contain:
 - material that is irrelevant to your FOI request, in that it does not come within the scope of your revised request; and
 - material that is exempt under sections 47C, 47E(c), 47E(d), and 47F of the FOI Act.
7. The table at **Attachment A** summarises my decision as it applies to the documents covered by your request.

DELETION OF IRRELEVANT MATERIAL

8. Section 22 of the FOI Act provides that if an agency decides that granting access to a document would disclose information that would be exempt or irrelevant to the request, then, where it is reasonably practicable to do so, a copy of the document with deletions/redactions to exempt or irrelevant information should be provided.
9. As indicated above and for the reasons discussed below, I have found that some of the documents contain irrelevant material. Accordingly, the documents have been edited to remove irrelevant material in accordance with section 22 of the FOI Act.

MATERIAL ON WHICH MY FINDINGS ARE BASED

10. In reaching my decision, I have relied on the following material:

- your FOI request;
- the FOI Act;
- Submissions from relevant third parties;
- FOI case law:
 - *'DZ' and Commonwealth Ombudsman* [2014] AICmr 137;
 - *Christis Tombazos and Australian Research Council*; and
 - *'FG' and National Archives of Australia* [2015] AICmr 26
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**FOI Guidelines**).

INTERPRETATION OF SCOPE

11. The Commission has interpreted the scope of the request to be constrained to email documents sent 'to or by SES', relevant to the 'issuing of the improvement notice', between 26 April 2023 and 10 May 2023. I note that the specified date range is informative, due to conjecture relating to the issuing of any improvement notice during the relevant time period.

CONSULTATIONS

12. The Commission conducted a consultation process with relevant third parties in accordance with sections 27 and 27A of the FOI Act.

REASONS FOR DECISION

Section 47C – Public interest conditional exemptions – deliberative process

13. Section 47C of the FOI Act relevantly provides that:

- i. *A document is conditionally exempt if its disclosure under this Act would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:*
 - (a) *An agency; or*
 - (b) *A Minister; or*
 - (c) *The Government of the Commonwealth.*

14. Specifically, ‘deliberative matter’; does not include:

- i. Operational information;
- ii. Purely factual material

Section 47E – Public interest conditional exemptions – operations of an agency

15. Section 47E of the FOI Act relevantly provides that:

- i. *A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:*
 - (a) *prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;*
 - (b) *prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency;*
 - (c) *have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency;*
 - (d) *have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

Section 47F – Public interest conditional exemptions – personal privacy

16. Section 47F of the FOI Act relevantly provides that:

- i. *A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).*
- ii. *In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:*
 - i. *the extent to which the information is well known;*
 - ii. *whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;*
 - iii. *the availability of the information from publicly accessible sources;*
 - iv. *any other matters that the agency or Minister considers relevant.*

17. Section 6 of the *Privacy Act 1988* (Cth) defines ‘personal information’ as:

- i. *information or an opinion about an identified individual, or an individual who is reasonably identifiable:*
 - i. *whether the information or opinion is true or not; and*
 - ii. *whether the information or opinion is recorded in a material form or not.*

18. Relevantly, the majority of the documents within the scope of your request contain some form of personal information.

Deliberative processes

19. The FOI Guidelines provide that what constitutes deliberative matter should not be restricted to the “ordinary meanings” given to the words listed in the section. Types of deliberative matter include:

- Opinion
- Advice
- Recommendation – although, not if the recommendation relates to an action already implemented
- Consultation or deliberation

20. Deliberative process must be “in the course of, or for the purposes of, the deliberative processes” involved in the functions of the Agency. The case of *Justin Warren*, demonstrates the need for an Agency to clearly link the deliberative matter to a particular process connected to its operations.

21. I am satisfied that some of the content captured within the scope of your request does contain deliberative matter in the form of advice, the ‘weighing up’ of possible approaches and options, and recommendations.

22. Therefore, I find Documents 8, 9, 10, and Attachment 2 contain information conditionally exempt under section 47C of the FOI Act.

Operations of the agency

23. I consider that some of the documents within the scope of the request are conditionally exempt under s47E of the FOI Act, which prescribes that:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

[...]

(c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency; and

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

24. In considering 47E(c) of the FOI Act, I have considered the OAIC guidelines, which provide guidance in respect of “management” of personnel.

25. Relevantly, the guidelines outline that “management” includes the broader human resources policies, recruitment, promotion, occupational health and safety, etc. Additionally, the “assessment” of personnel includes considerations of training requirements, appraisals, feedback, etc.

26. Some of the documents also relate to management decisions around operations concerning staff below the SES level, and how relationships with those staff are to be navigated.

27. Therefore, I am satisfied that section 47E(c) of the FOI Act applies to Document 2 and Attachment 2.

28. Additionally, section 47E(d) of the FOI Act refers to an exemption to disclosure where the release of a particular document would “have a substantial adverse effect on the proper and efficient conduct of the operations of an agency”.
29. Some documents within the scope of the request relates to SES officers discussing internal human resources (HR) matters. This correspondence relates primarily to the corporate function of the Commission, as well as its management and process around its staff.
30. In terms of a “substantial adverse effect” on the operations of the Commission, I am satisfied that disclosure of this type of information would undermine the ability of SES to be forthcoming about considerations of HR processes relevant to the Commission. This could undermine the ability of the Commission to manage potential issues in the future, and may restrict its approach.
31. The Information Commissioner has accepted the application of section 47E of the FOI Act where agencies are engaging with another agency during an investigative process, and are seeking advice or participating in the conduct of that investigation. In particular, the case of *DZ and the Commonwealth Ombudsman* found that a particular document in the circumstances of an investigation could reasonably impact upon an agency’s participation in further investigation, notwithstanding any requirements under law.
32. I find that section 47E(d) of the Act applies to Documents 1, 2, 8, 9, and 10, subject to the public interest test.

Personal Information

33. I am satisfied that the information included within these documents contains personal information, including names, contact details, employment status, and signatures.
34. In determining whether disclosure of this information would be unreasonable, I must have regard to the following factors:
 - The extent to which the information is well known;
 - Whether the person to whom the information relates is known to be associated with the matters dealt with in the document;
 - The availability of the information from publicly accessible sources; and
 - Any other matters that the agency or minister considers relevant.
35. In accordance with the scope of the FOI request, EL and APS staff names and contact details of the Commission have been redacted under section 22 of the FOI Act.
36. I find that the disclosure of this information would be unreasonable for the following reasons:
 - The submissions of third parties, which have sought some information to be redacted under this section;
 - Some of the contact details – such as phone numbers – are not publicly known; and
 - Some of the individuals are not publicly known to be connected to the documents or the information therein.
37. The final factor to consider is any other matter the agency considers relevant. Following this, I have had regard to the additional principles as outlined in the case of *‘FG’ and National Archives of Australia*, in particular:

- The potential detriments to the person to whom the information relates;
- The likelihood that the third party would object to the disclosure;
- Whether disclosure of the information might advance the public interest in government transparency and integrity.

38. In considering whether disclosure might advance the public interest in respect of government transparency and integrity, I note this could apply in the circumstances. Whilst it may be in the interest of transparency and integrity to disclose such information in relation to the improvement notice, this factor cannot be considered in isolation. It was noted in *Christis Tombazos and Australian Research Council* that these principles 'may be competing, so that a balancing process is required to decide if disclosure would be unreasonable'.

39. Therefore, on all of the information before me I am satisfied that some information captured in the documents is exempt under section 47F of the FOI Act.

CONDITIONAL EXEMPTIONS – PUBLIC INTEREST TEST

40. Section 11A(5) of the FOI Act requires access to a conditionally exempt document to be granted unless (in the circumstances) access to the document at that particular time would, on balance, be contrary to the public interest.

41. For the reasons discussed above, I have found that the documents contain information that is conditionally exempt under sections 47E(c), 47E(d), and 47F of the FOI Act.

42. In applying the public interest test, I am required to have regard to the FOI Guidelines and the following factors listed in section 11B(3) of the FOI Act, which relate to whether the granting of access would:

- promote the objects of the FOI Act;
- inform debate on a matter of public importance;
- promote effective oversight of public expenditure; and
- allow a person to access his or her own personal information.

43. The following irrelevant factors (set out in subsection 11B (4) of the FOI Act) must not be taken into account in deciding whether access would be contrary to the public interest:

- Access to the document could result in embarrassment to the Commonwealth Government or Norfolk Island, or cause a loss of confidence in the Commonwealth Government or Norfolk Island,
- access to the document could result in any person misinterpreting or misunderstanding the document,
- the author of the document was (or is) of high seniority in the agency to which the FOI request was made, and
- access to the document could result in confusion or unnecessary debate.

44. In light of this, I consider the following as favouring disclosure:

- Promoting the objects of the FOI Act, in particular, revealing reasons for government decisions and background or contextual information that informed various decisions;
- Informing debate on a matter of public importance, namely, the receipt of a PIN notice by the Commission;
- Objects of transparency outlined in the FOI Act.

45. Alternatively, I consider the following non-exhaustive factors as not favouring disclosure:
- The submissions of relevant third parties;
 - Some of the information could reasonably be expected to prejudice the protection of an individual's right to privacy, such as documents relating to government employees where the disclosure could reasonably be considered to reveal information about their private disposition;
 - Some information could reasonably be expected to harm the interests of an individual or group of individuals, namely Commission staff;
 - Some information could reasonably be expected to prejudice the management function of an agency, in this case the Commission.
46. I note that, with respect to the improvement notice, there has been media coverage which has resulted in documents captured within this FOI request being made publicly available. As such, information contained in the media is able to be released under this request.
47. Additionally, I note the observations of the FOI guidelines around the application of section 47C of the FOI Act. The FOI guidelines make clear that whilst there is an argument that applying this section is necessary to protect the ability of APS staff to provide 'frankness and candour', this should be approached with caution. The FOI Guidelines provide at 6.83 that 'Agencies should start with the assumption that public servants are obliged by their position to provide robust and frank advice at all times', and that this obligation will not be undermined by processes of transparency.
48. On balance, I am satisfied that the factors against disclosure outweigh the public interest as it relates to sections 47C, 47E(c), 47E(d) and 47F of the FOI Act.

Deletion of exempt or irrelevant material

49. Section 22 of the FOI Act requires an agency to provide access to an edited version of a document where it is reasonably practicable to edit the document to remove exempt material or material that is irrelevant to the scope of a request

Contact

If you wish to discuss my decision, please contact the FOI team by email at FOI@ndiscommission.gov.au.

Kind regards,

Yours sincerely



Linda Blue
Director, Major Initiatives
2 August 2023



ATTACHMENT C

INFORMATION ON REVIEW RIGHTS

The *Freedom of Information Act 1982 (the FOI Act)* gives you the right to apply for a review of this decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of this decision by:

- (a) an internal review officer in the NDIS Quality and Safeguards Commission, or
- (b) the Australian Information Commissioner (**Information Commissioner**).

Internal Review

If you apply for internal review, it will be carried out by a different decision-maker who will make a fresh decision on your application. An application for review must be:

- (a) made in writing,
- (b) made within 30 days of receiving this letter, and
- (c) sent to FOI@ndiscommission.gov.au.

No particular form is required, but it is desirable to set out in the application the grounds upon which you consider the decision should be reviewed.

If the internal review officer decides not to grant you access to all of the documents to which you have requested access, you have the right to seek a review of that decision by the Information Commissioner. You will be further notified of your rights of review at the time you are notified of the internal review decision.

Please note that if you apply for an internal review and a decision is not made by an internal review officer within 30 days of receiving the application, you have the right to seek review by the Information Commissioner for a review of the original FOI decision on the basis of a 'deemed refusal' decision. An application for Information Commissioner review in this situation must be made within 60 days of the date when the internal review decision should have been made (provided an extension of time has not been granted or agreed).

Information Commissioner Review

If you want to seek direct review by the Information Commissioner (and not internal review), you must apply in writing within 60 days of the receipt of the decision letter and you can lodge your application in one of the following ways:

Online: www.oaic.gov.au Post: GPO Box 2999, Canberra ACT 2601 Fax: +61 2 9284 9666 Email: foidr@oaic.gov.au	In person: Level 10, 175 Pitt Street, Sydney NSW 2000
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An application form is available on the website at www.oaic.gov.au. Your application should include a copy of the notice of the decision that you are objecting to (if one was provided), and your contact details. You should also set out why you are objecting to the decision.

Complaints to the Commonwealth Ombudsman and Information Commissioner

Commonwealth Ombudsman

You may complain to the Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Ombudsman may be made in person, by telephone or in writing. The Ombudsman's contact details are:

Phone: 1300 362 072

Website: www.ombudsman.gov.au

The Commonwealth Ombudsman generally prefers applicants to seek review before complaining about a decision.

Information Commissioner

You may also complain to the Information Commissioner concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Information Commissioner must be made in writing. The Information Commissioner's contact details are:

Telephone: 1300 363 992

Website: www.oaic.gov.au