



**NDIS Quality
and Safeguards
Commission**

13 February 2024

Ref: LEX 2454

Concerned Public Member

By email: foi+request-10872-06ce58af@righttoknow.org.au

Dear Concerned Public Member,

Freedom of Information Request No. (68) – 23/24 – 2 – Concerned Public Member (RTK)

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

I refer to your request dated 15 November 2023 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).

The NDIS Commission acknowledged this request on 21 November 2023, and confirmed the scope to be the following:

- *Any information held regarding investigations, audits, complaints and raised concerns in relation to services provided by Sanctuary Aus (Quality and Safeguards Commission Registration ID: 4-4331-4175 / NDIS Registration ID: 4050043895) or any of the board members and employees attached to the charity/business.*
- *Any information held regarding which staff member/s hold the appropriate qualifications to provide services as a Behaviour Support Practitioner or Specialist Behaviour Support Practitioner.*
- *Information regarding the identification of the staff member attached to the authorisation number A5398 and NDIS Practitioner number P1101442, for behaviour support.*

In that same email, you agreed to exclude duplicates and the personal information of third parties from the scope. We have interpreted this to include NDIS Commission staff names.

I am an authorised decision maker for the purposes of section 23 of the FOI Act and this letter gives notice of my decision.

On 6 December 2023, the NDIS Commission notified you of the requirement to consult third parties under sections 27 and 27A of the FOI Act. This had the effect of extending the timeline for decision by 30 days.

On 13 December 2023, the NDIS Commission sought your consent for an extension of time under section 15AA of the FOI Act. You agreed to this extension on the same day. This moved the date for decision to 13 February 2024.

The NDIS Commission undertook searches for documents falling within the scope of your request. The Commission has identified **23** falling within the scope of your request. The documents were identified by searches undertaken in various NDIS Commission databases. These documents are set out in the schedule attached to this notice.

Decision

I have decided to:

- grant access in part to documents 1 to 15; and
- refuse access in full to documents 16 to 23.

In reaching my decision, I have taken into consideration:

- the terms of your request;
- the relevant provisions of the FOI Act (Specifically sections 22, 37(1)(a), and 47F);
- the results of searches undertaken by relevant NDIS Commission staff;
- Guidelines issued by the Office of the Australian Information Commissioner (OAIC) under s93A of the FOI Act (**FOI Guidelines**); and
- The views of a third party consulted under section 27/27A of the FOI Act.

Reasons for decision

Section 37 – Exemption – Documents affecting enforcement of law and protection of public safety

Document 9 contains information that I consider exempt under section 37(1)(a) of the FOI Act.

Section 37(1)(a) relevantly provides:

(1) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:

(a) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance;

Section 37 generally applies where documents are connected to the “investigative or compliance activities of an agency” [Guidelines, 5.81]. In respect of 37(1)(a), this includes the actions of the agency which involve monitoring compliance, and investigating potential breaches. The NDIS Commission regularly conducts compliance actions based on suspected breaches of the NDIS Act and Rules – compliance actions are listed as one of the Commissioner’s core functions under section 181E(d) of the NDIS Act.

The FOI Guidelines at 5.86 outline that this exemption is only available where an investigation is “current or pending”, and where release of the documents would, or could, “reasonably be expected to” prejudice the investigation. Determining whether release will prejudice an investigation is a question of fact to be determined “on the evidence” – it is not enough that a document may be relevant to an investigation [Guidelines, 5.89]. In demonstrating prejudice, the FOI Guidelines at 5.79 provide a list of examples of types of potential harms that could occur, should documents covered by this exemption be released.

Relevantly, Document 9 relates to a compliance matter that is currently under assessment by the NDIS Commission. At this preliminary stage, the NDIS Commission gathers information and outlines the best approach. This may involve contacting relevant parties, assessing information from multiple sources, and considering various compliance tools that may be pertinent. Releasing information prematurely may place parties on notice of a pending investigation which has not commenced formally, or may inadvertently reveal the source of particular information. This could prejudice the investigation as it develops in the following ways:

- Individuals may be unwilling to engage with the NDIS Commission, as information has been released which has impacted their confidence in their communications;
- The investigation may be tainted as individuals are put on notice earlier than expected, which could impact the ability of the NDIS Commission to control the investigation; and/or
- The disclosure could imply preliminary findings, which could cause distress to parties where the investigation has not been finalised, or the findings reported.

I am satisfied that section 37(1)(a) applies to some of the information contained in document 9.

Section 47F – Public interest conditional exemptions – personal privacy

Document 1, 12, and 13, and Documents 16 to 23, contain information that I consider conditionally exempt under section 47F of the FOI Act.

Section 47F relevantly provides:

(1) 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)

The term ‘personal information’ is defined in section 4 of the FOI Act to have the same meaning as the *Privacy Act 1988* (Cth) (**Privacy Act**). Section 6 of the Privacy Act defines personal information as:

...information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- (a) whether the information or opinion is true or not; and*
- (b) whether the information or opinion is recorded in a material form or not.*

The FOI Guidelines at 6.142 provide that the key factors for determining whether disclosure of a document would involve unreasonable disclosure of personal information include whether:

- the author of the document is identifiable
- the document contains third party personal information
- release of the documents would cause stress on the third party
- no public purpose would be achieved through release

As discussed in *‘FG’ and National Archives of Australia* [2015] AICmr 26, other relevant factors include:

- the nature, age and current relevance of the information
- any detriment that disclosure may cause to the person to whom the information relates
- any opposition to disclosure expressed or likely to be held by that person
- the circumstances of an agency’s collection and use of the information
- the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act
- any submission an FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information, and
- whether disclosure of the information might advance the public interest in government transparency and integrity¹

¹ FOI Guidelines [6.143]

Documents 1, 12 and 13, and 16 to 23 contain personal information relating to NDIS participants and workers, including their names, phone numbers and email addresses. I am satisfied that it would be unreasonable to disclose this personal information because:

- the information is not well known or available from publicly accessible sources;
- disclosure could be reasonably expected to cause detriment to the individuals concerned;
- the individuals would be likely to object to disclosure;
- the content including personal information of NDIS participants and workers that are likely not to be known by the applicant; and
- the risk of detriment to the individuals, noting the content of the information included, the fact this information will be immediately published on the Right to Know website, and the particular vulnerability of the individuals concerned.

I note the intent of connecting a particular identifier with the name of a practitioner. This information is not publicly available – for example, the NDIS Commission public register is only searchable by name.

Accordingly, I am satisfied that the information outlined above is conditionally exempt under s47F. As this is a public interest conditional exemption, I have considered the public interest test below.

Public interest test

Section 11A(5) of the FOI Act provides that access must be given to a document covered by a conditional exemption unless it would, on balance, be contrary to the public interest. In weighing the public interest, the FOI Act sets out four factors favouring access which must be considered if relevant. They are that disclosure 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))

I am of the view that one of the four factors is relevant to this decision, that is, that disclosure would promote the object of the Act by increasing scrutiny and discussion of the government's activities.

In addition, the right to access of information as expected by the FOI Act weighs in favour of disclosing the captured information.

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:

- prejudice the protection of an individual's right to privacy – noting the content of information captured;
- harm the interests of an individual, specifically NDIS participants and the relevant practitioner; and
- The submissions of the relevant third party, which highlighted the use of this exemption based on their concerns for the privacy of those included.

I place greater weight on the considerations of an individual's right to privacy including NDIS participants, their guardians and families, workers, and practitioners. The publication of an individual's personal information online is a high risk to consider, particularly this information can be freely

accessed and not be controlled. It would be detrimental to individual's to have their contact details publicised this way, particularly without their consent.

Based on these factors, I have decided that the public interests is weighted more heavily against disclosure and that giving access to the conditionally exempt material would, on balance, be contrary to the public interest.

Accordingly, I am satisfied that the information contained in document 1, 12, 13, and documents 16 to 23, is exempt under section 47F.

Deletion of exempt or irrelevant material

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

Where possible, this process has been followed for documents with exempt information under the relevant sections of the FOI Act.

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 have considered these exemptions and have decided that they do not apply in this instance.

Accordingly, details of the redacted documents disclosed to you as part of your FOI request will be published on the Commission's FOI disclosure log. For further information about the Commission's FOI disclosure log please refer to our website: [FOI Disclosure Log | NDIS Quality and Safeguards Commission \(ndiscommission.gov.au\)](https://www.ndiscommission.gov.au/foi-disclosure-log)

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: https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10

Email: foidr@oaic.gov.au

Post: GPO Box 5218 Sydney NSW 2001

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

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: https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA_1

Email: foidr@oaic.gov.au

Post: GPO Box 5218 Sydney 2001

More information about complaints is available on the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint/>.

If you are not sure whether to lodge an Information Commissioner review or an Information Commissioner complaint, the Office of the Australian Information Commissioner has more information at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/>.

Questions about this decision

If you wish to discuss this decision, please contact FOI@ndiscommission.gov.au.

Yours sincerely



Monique Lindridge
Senior Lawyer
NDIS Quality and Safeguards Commission

SCHEDULE OF DOCUMENTS

Document reference	Date	Description of document	Number of pages	Decision on access	Applicable exemptions
1	3/12/2020	Email	1	Partial access	22, 47F
2	Undated	Internal screenshot	5	Partial access	22
3	Undated	Internal screenshot	6	Partial access	22
4	Undated	Web form	3	Partial access	22
5	Undated	Internal screenshot	3	Partial access	22
6	Undated	Internal screenshot	5	Partial access	22
7	24/11/2023	Internal screenshot	5	Partial access	22
8	14/11/2023	Internal screenshot	4	Partial access	22
9	14/11/2023	Internal screenshot	5	Partial access	37(1)(a)
10	Undated	Internal screenshot	16	Partial access	22
11	23/11/2023	Internal screenshot	6	Partial access	22
12	14/09/2023	Audit report	31	Partial access	22, 47F

13	14/09/2023	Audit report	31	Partial access	22, 47F
14	Undated	Internal screenshot	4	Partial access	22
15	22/08/2023	Correspondence	2	Partial access	22
<i>Refused</i>					
16 - 23		Documents 16 - 23, including internal screenshots, and complaints information		Access refused	47F