

2 June 2021

Ben Fairless  
By email: [foi+request-7195-e9e5c5bc@righttoknow.org.au](mailto:foi+request-7195-e9e5c5bc@righttoknow.org.au)

Dear Ben Fairless

### **Freedom of Information request — Notification of Decision**

Thank you for your correspondence of 2 April 2021, in which you requested access under the *Freedom of Information Act 1982* (FOI Act) to documents held by the National Disability Insurance Agency (NDIA).

The purpose of this letter is to provide you with a decision on your request.

#### **Scope of your request**

You have requested access to documents about the National Disability Insurance Scheme (NDIS). Specifically, you requested access to:

1. *The independent assessment question workflow, including all questions, possible answers (if multiple choice), and the rating applied to each question.*
2. *The source code for any software used by Independent Assessment health professionals to perform independent assessments.*
3. *Questions asked prior to an independent assessment being booked.*
4. *The number of applicant health professionals who have requested access to participate or view an independent assessment, and the number who have been granted access.*
5. *Concerns raised about applicant health professionals potentially putting scrutiny on the independent assessment process.*

On 14 April 2021, you clarified Parts 3 and 5 of your request for information as follows:

- "To clarify point 3, I understand the organisations administering the pilot ask the participant or their representative a number of questions prior to an independent assessment being booked. I'm looking for a list of these questions.*
- 5.1. *concerns from the organisations participating in the NDIA pilot raised to the NDIA about non-NDIA (indepndent [sic]/applicant) health professionals being present at independent assessments.*
  - 5.2. *concerns from the NDIA to organisations participating in the pilot about non-NDIA (indepndent [sic]/applicant) health professionals being present at independent assessments*
  - 5.3. *concerns raised by non-NDIA (indepndent [sic]/applicant) health professionals being present at independent assessments raised directly to the NDIA.*
  - 5.4. *concerns raised by non-NDIA (independent/applicant) health professionals in relation to present at independent assessments to organisations participating in the NDIA Independent Assessment pilot."*

On 3 May 2021, we advised you that we were consulting with third parties whose information was contained in the documents you sought under section 27A of the FOI Act. As a result, the timeframe for processing your request was extended by 30-days, making the due date to provide you with a decision on access 2 June 2021.

Part 1 of your request for information sought access to independent assessment workflows, including all questions, possible answers (if multiple choice), and the rating applied to each question.

This information is in part available to the public and has been referenced below for your convenience:

1. [WHO Disability Assessment Schedule \(WHODAS 2.0\)](#)
2. [Lower Extremity Functional Scale \(LEFS\) \(honorhealth.com\)](#)
3. [CHIEF PACKET \(craighospital.org\)](#)
4. [Care and Scales Manual](#)
5. [CanChild](#)

Part 2 of your request sought access to the documents outlining the source code for any software used by Independent Assessment health professionals to perform independent assessments.

Our consultations with the relevant business areas have revealed that the NDIA is not in possession of such documents. This is because health professionals use software when administering assessments and the software code used is based on a third-party platform.

Part 4 of your request for information sought access to the number of health professionals who have requested access to participate or view an independent assessment, and the number who have been granted access.

Our consultations also revealed that the NDIA is not in possession of any documents containing the information relevant to this part of your request.

Part 5 of your request for information sought access to documents identifying concerns raised about applicant health professionals potentially putting scrutiny on the independent assessment process.

Our consultations also revealed that the NDIA is not in possession of any documents containing the information relevant to this part of your request.

#### **Decision on access to documents**

I am authorised to make decisions under the FOI Act. My decision on your request and the reasons for my decision are set out below.

I have identified 6 documents, which fall within the scope of your request.

The documents were identified by conducting searches of NDIA's systems, using all reasonable search terms that could return documents relevant to your request, and consulting with relevant NDIA staff who could be expected to be able to identify documents within the scope of the request.

I have decided to:

- grant access to 2 documents in full; and
- refuse access to 4 documents in full.

In reaching my decision, I took into account the following materials:

- your correspondence outlining the scope of your request;
- the nature and content of the documents falling within the scope of your request;
- the FOI Act;
- the FOI Guidelines;
- relevant case law concerning the operation of the FOI Act;
- consultation with relevant NDIA staff;
- factors relevant to my assessment of whether or not disclosure would be in the public interest; and
- the NDIA's operating environment and functions.

### **Reasons for decisions**

#### Section 47 - trade secrets or commercially valuable information

Section 47 of the FOI Act provides that a document is an exempt document if its disclosure would disclose trade secrets, or any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

Documents 3, 4, 5 and 6 (identified as relevant to Part 1 of your request) contain questions and assessment methodology that have been developed by the owners of the named assessment tools and are regarded by them as trade secrets.

The NDIA has selected appropriate commercially available professional assessment tools to be part of the Independent Assessment toolkit. More information about the assessment tools in the toolkit can be found on the NDIS website at [The assessment tools in the toolkit | NDIS](#).

The commercial agreements for use of these assessment tools include requirements for customers (including the NDIA) to keep the content and methodology of the tools confidential. The imposition by the assessment tool owners of contractual obligations to keep the tools confidential indicates their commercial value.

The term 'trade secret' is not defined in the FOI Act. The Federal Court has interpreted the meaning of 'trade secret' to be information possessed by one trader which gives that trader an advantage over its competitors while the information remains generally unknown.

I consider that the information in documents 3, 4, 5 and 6 includes 'trade secrets' because:

- the information is used in the business of the owner of each of the tools;
- the owners of the information take steps, including by the imposition of contractual obligations, to limit its dissemination and to discourage its widespread publication;
- if disclosed to a competitor, the information would be liable to cause real or significant harm to the owner of the information.

Each of the tool owners has a business that includes sale of the use of the tools. They take steps to limit the dissemination of the information by restricting access to the tools and consider that widespread publication or disclosure to others in the same field would be likely to cause loss or damage. For example, the terms and conditions of one tool owner include provisions that:

*'Customer acknowledges and agrees that the use or disclosure of trade secrets and confidential information in a manner inconsistent with the provisions of this Agreement or without authorisation ... may cause ... irreparable damage'...The Customer may not, under any circumstance, copy or reproduce in any form the text or graphic image of any test item.*

As a result, I am satisfied that the documents are exempt from disclosure under section 47(1)(a) of the FOI Act.

**Release of documents**

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

**Rights of review**

Your rights to seek a review of my decision, or lodge a complaint, are set out at **Attachment B**.

Should you have any enquiries concerning this matter, please do not hesitate to contact me by email at [foi@ndis.gov.au](mailto:foi@ndis.gov.au).

Yours sincerely



**Ausilia Woodhead**

Assistant Director, FOI  
Parliamentary, Ministerial & FOI Branch  
Government Division

**Attachment A****Schedule of Documents for FOI 20/21-0604**

<b>Document number</b>	<b>Page number</b>	<b>Description</b>	<b>Access Decision</b>
1	1	Independent Assessment Pilot: Assessor Introduction Script	<b>FULL ACCESS</b>
2	2-12	Independent Assessment Pilot: Booking Script	<b>FULL ACCESS</b>
3	-	YC-PEM workflow	<b>REFUSED ACCESS</b>  Exemption claimed: s47 - trade secrets or commercially valuable information
4	-	PEM-CY workflow	<b>REFUSED ACCESS</b>  Exemption claimed: s47 - trade secrets or commercially valuable information
5	-	PEDI-CAT workflow	<b>REFUSED ACCESS</b>  Exemption claimed: s47 - trade secrets or commercially valuable information
6	-	Vineland-3 workflow	<b>REFUSED ACCESS</b>  Exemption claimed: s47 - trade secrets or commercially valuable information

## **Your review rights**

### **Internal Review**

The FOI Act gives you the right to apply for an internal review of this decision. The review will be conducted by a different person to the person who made the original decision.

If you wish to seek an internal review of the decision, you must apply for the review, in writing, within 30 days of receipt of this letter.

No particular form is required for an application for internal review, but to assist the review process, you should clearly outline your grounds for review (that is, the reasons why you disagree with the decision). Applications for internal review can be lodged by email to [foi@ndis.gov.au](mailto:foi@ndis.gov.au) or sent by post to:

Freedom of Information Section  
Parliamentary, Ministerial & FOI Branch  
Government Division  
National Disability Insurance Agency  
GPO Box 700  
CANBERRA ACT 2601

### **Review by the Office of the Australian Information Commissioner**

The FOI Act also 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](http://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](http://www.oaic.gov.au)  
Post: GPO Box 5218, Sydney NSW 2001  
Email: [enquiries@oaic.gov.au](mailto: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](mailto: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