

30 July 2021

Karen Reynolds

By email: foi+request-7325-48eaa74b@righttoknow.org.au

Dear Karen Reynolds

Freedom of Information request — Notification of Decision

Thank you for your correspondence of 1 June 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.

On 1 July 2021, the Office of the Australian information Commissioner granted the NDIA an additional 30 days to process your request, under section 15AB of the FOI Act. Accordingly, the new due date to provide a decision on access became 2 August 2021.

Scope of your request

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

"I refer to the following response by Mr Oliver Bladek on the 25.3.21 Community Affairs Committee -

<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2F22c34e3c-d8ac-47c2-9bb3-787f23065247%2F0004%22;src1=sm1>

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(Response: Mr Bladek : We used a limited tender, consistent with the Commonwealth procurement rule 10.3(b)B.)

Given that the appointment of former CEO Rob de Luca's company was carried out in accordance with this finance rule, (when, for reasons of extreme urgency brought about by events unforeseen by the relevant entity, the goods and services could not be obtained in time under open tender) I make this request in accordance with the relevant rules:

I request the following information in relation to both Plena Healthcare and Healthstrong:

The written reports that were required to be provided that include:

- the value and type of goods and services procured;*
- a statement indicating the circumstances and conditions that justified the use of limited tender; and*
- a record demonstrating how the procurement represented value for money in the circumstances.*

I further request a copy of the request documentation associated with the two companies, including:

- a complete description of the procurement, including the nature, scope and the quantity of the goods and services to be procured or, where the quantity is not known, - - the estimated quantity, and any requirements to be fulfilled, including any technical specifications, conformity certification, plans, drawings, or instructional materials;
- any conditions for participation, including any financial guarantees, information and documents that potential suppliers are required to submit;
- any minimum content and format requirements;
- evaluation criteria to be considered in assessing submissions and, if applicable to the evaluation, the relative importance of those criteria;
- any dates for the delivery of goods or supply of services, taking into account the complexity of the procurement; and
- any other terms or conditions relevant to the evaluation of submissions.”

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 16 documents, including attachments, 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 refuse access to 16 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
- the NDIA’s operating environment and functions.

Reasons for decisions

Deliberative processes (section 47C)

Under Section 47C of the FOI Act a document is conditionally exempt if its disclosure would disclose deliberative matter. Deliberative matter is content that is in the nature of, or relating to either:

- an opinion, advice or recommendation that has been obtained, prepared or recorded; or
- a consultation or deliberation that has taken place in the course of, or for the purposes of, a deliberative process of the government, an agency or minister.

Documents within the scope of your request contain advice and recommendations prepared in order to inform and brief executive level staff within the NDIA about agency considerations regarding current and future NDIA functions and processes.

Deliberative matter does not include purely factual material, however, where material was gathered as a basis for intended deliberations, it may be deliberative matter (see FOI Guidelines [6.67]). The FOI Guidelines [6.73] also explain that

'Purely factual material' does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.

As the FOI Guidelines explain [6.59]:

'Deliberative process' generally refers to the process of weighing up or evaluating competing arguments or considerations or to thinking processes – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action'.

The NDIA has the responsibility for weighing up or considering proposals and actions aimed at efficient and effective execution of functions of the NDIA. The material within the requested documents includes suggestions, opinions, advice and recommendations relating to the particular functions and activities of the NDIA, which are weighed and evaluated by the NDIA as part of the deliberative processes of the NDIA.

I am satisfied that the documents considered as part of this decision contain deliberative material and that they are conditionally exempt under section 47C of the FOI Act.

Personal privacy (section 47F)

Section 47F of the FOI Act conditionally exempts a document if its disclosure would involve the unreasonable disclosure of personal information about any person.

I have identified material in the documents falling within scope of your request which contains personal information of third parties.

Under section 47F(2) of the FOI Act, in determining whether the disclosure of documents would involve unreasonable disclosure of personal information, regard must be had to:

- a. the extent to which the information is well known;
- b. 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;
- c. the availability of the information from publicly accessible sources; and
- d. any other matters that the agency considers relevant.

Against these criteria, I take the view that:

- a. it is apparent from the information that an individual is identifiable; and
- b. the information referred to above is not readily available from publicly accessible sources.

With reference to the assessment above, it would be unreasonable to disclose publicly this personal information and is therefore conditionally exempt under section 47F(1) of the FOI Act.

Business Information (section 47G)

Section 47G of the FOI Act conditionally exempts a document if its disclosure would disclose information concerning a person in respect of their business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in which the disclosure of the information:

- would or could reasonably be expected to, unreasonably affect that person adversely in respect of their lawful business or professional affairs of that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or
- could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the

Commonwealth or of a Territory or the administration of matters administered by an agency.

The information that is conditionally exempt includes sensitive business details of third parties that were provided to the Agency in confidence with an expectation that they would not be disclosed further.

I am satisfied that the disclosure of this information could unreasonably and adversely affect the business affairs of a third party and affect any potential or current business relationship with the Agency.

Public interest considerations – sections 47C, 47F and 47G

Under the FOI Act, access to a document covered by a conditional exemption must be provided unless disclosure would be contrary to the public interest.

After considering the public interest factors outlined in section 11B(3) of the FOI Act, I have determined that disclosure of the material identified as subject to conditional exemptions would, to some extent, oversight of public expenditure. However, I have also considered that:

- disclosure of the information would not contribute to the publication of information of sufficient public interest to justify the likely harm caused by release; and
- disclosure of the information would not inform debate on a matter of public importance or promote oversight of public expenditure of sufficient public interest to justify the likely harm caused by release.

While there is limited public interest in the disclosure of information conditionally exempt under sections 47C, 47F and 47G, the harm that would result from disclosure is that it could reasonably be expected to:

- hinder the Agency's thinking processes and 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;
- affect an individual's right to privacy by having their personal information in the public domain; and
- compromise the business or professional affairs of third parties and interfere with their ability to undertake their lawful business.

I also note that the Minister for the NDIA has recently announced that independent assessments will not be implemented. I am satisfied that the factors against disclosure of the information outweigh the factors in favour of disclosure and that, on balance, it would be contrary to the public interest to release this information to you.

The documents considered as part of this decision have been referenced in the Schedule of Documents at **Attachment A**.

Access to edited copies with exempt or irrelevant material deleted (section 22)

In accordance with section 22 of the FOI Act I have given to consideration to whether it would be practicable to prepare and provide to you an edited copy of any of the documents with exempt material deleted.

A number of documents contain deliberative matter that is exempt from disclosure under section 47C of the FOI Act. I have considered whether it would be practicable to edit the documents to delete the deliberative matter and produce copies that would not disclose exempt material.

As the FOI Guidelines explain [6.73], factual material may be so embedded in deliberative matter that it becomes part of the deliberative matter and cannot be separated. The FOI Guidelines also explain [3.98] that a common sense approach should be taken in considering whether the number and extent of deletions would result in the remaining document being of little or no value to the applicant or would leave only a skeleton of the former document that conveys little of its content or substance.

To the extent that the documents listed in the attached schedule contain factual material, it is so embedded in the deliberative matter that it is not possible to separate it.

I consider that it would not be practicable to produce edited versions of the documents listed in the attached schedule.

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.

Yours sincerely



Ausilia Woodhead

Assistant Director
Parliamentary, Ministerial & FOI Branch
Government Division

Schedule of Documents for FOI 20/21-0805

Document number	Page number	Description	Access Decision	Comments
1	-	Spending Proposal for the provision of Pilot 3 Independent Assessments.	REFUSED ACCESS Exemptions claimed: s47C – deliberative processes s47F – personal privacy s47G – business information	
2	-	Executed contract for the provision of independent assessments.	REFUSED ACCESS Exemptions claimed: s47F – personal privacy s47G – business information	
3	-	Executed contract for the provision of independent assessments.	REFUSED ACCESS Exemptions claimed: s47F – personal privacy s47G – business information	
4	-	Email Subject: RE: FOR APPROVAL: IA Pilot - Spending Proposal and Draft Contracts Date: 20/01/2021	REFUSED ACCESS Exemptions claimed: s47C – deliberative processes s47G – business information	

Document number	Page number	Description	Access Decision	Comments
5	-	Email Subject: RE: FOR APPROVAL: IA Pilot - Spending Proposal and Draft Contracts Date: 20/01/2021	REFUSED ACCESS Exemption claimed: s47C – deliberative processes s47G – business information	
5.1	-	Attachment to Document 5 SPC1244 - Healthstrong IA Pilot final.docx	REFUSED ACCESS Exemptions claimed: s47C – deliberative processes s47F – personal privacy s47G – business information	
5.2	-	Attachment to Document 5 SPC1245 - Dimple IA Pilot final.docx	REFUSED ACCESS Exemptions claimed: s47C – deliberative processes s47F – personal privacy s47G – business information	
6	-	Email Subject: Re: Pilot new orgs Date: 18/01/2021	REFUSED ACCESS Exemption claimed: s47C – deliberative processes s47G – business information	

Document number	Page number	Description	Access Decision	Comments
7	-	Email Subject: FW: Statement of work for IA Pilot V1 BB Date: 14/01/2021	REFUSED ACCESS Exemption claimed: s47C – deliberative processes s47G – business information	
8	-	Email Subject: FW: IA contract extension - corrected details re APM company name Date: 08/01/2021	REFUSED ACCESS Exemptions claimed: s47C – deliberative processes s47G – business information	
8.1	-	Attachment to Document 8 Deed of Variation between supplier and NDIA.	REFUSED ACCESS Exemptions claimed: s47F – personal privacy s47G – business information	
8.2	-	Attachment to Document 8 Email Subject: FW: IA contract extension - corrected details re APM company name Date: 15/12/2020	REFUSED ACCESS Exemptions claimed: s47C – deliberative processes s47F – personal privacy s47G – business information	

Document number	Page number	Description	Access Decision	Comments
8.2.1	-	Attachment to Document 8.1 20201214 APM Assessment Contract M000001271- DOV 2.pdf	REFUSED ACCESS Exemptions claimed: s47F – personal privacy s47G – business information	
9	-	Email Subject: FW: IA Pilot Contract and way forward Date: 04/01/2021	REFUSED ACCESS Exemption claimed: s47C – deliberative processes s47G – business information	
10	-	Email Subject: RE: IA Pilot Date: 29/12/2020	REFUSED ACCESS Exemption claimed: s47C – deliberative processes s47G – business information	
11	-	Executed Contract for the provision of independent assessments.	REFUSED ACCESS Exemptions claimed: s47F – personal privacy s47G – business 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 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, 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