

Our reference: FOI 21/22-0051



GPO Box 700
Canberra ACT 2601
1800 800 110

ndis.gov.au

15 October 2021

Shirley

By email: foi+request-7596-075b36e9@righttoknow.org.au

Dear Shirley

Freedom of Information request — Notification of Decision

Thank you for your correspondence of 16 July 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:

“...a copy of the NDIA's Independent Assessment's Risk Assessment. That is the single, consolidated risk assessment for the entire Independent Assessments initiative recently pursued by the NDIA.

Please include the pre-launch risk assessment conducted with any business case or project plan that may have been conducted. In addition to the detailed and specific risk assessment undertaken, specifically for the entire Independent Assessments. For clarity, a 'risk register' may comprise elements of the listed risks, but risk assessment is a different document, process, and input.

Also provide a copy of the Independent Assessments' risk register.”

On 6 July 2021, we sought an extension of time through the Office of the Australian Information Commissioner, we were granted a further 30 days to process your request, due to its complex and voluminous nature, under section 15AB of the Act.

On 7 September 2021 we issued you with a Request Consultation Process under section 24AB of the FOI Act.

On 12 September 2021 you responded revising the scope of your request to be for the following documents:

“1. The NDIA's pre-launch risk assessment for "Independent Assessments"

2. The single, definitive, overall risk assessment for the NDIA' 'independent assessments”

Decision on access to documents

I am authorised to make decisions under section 23(1) of the FOI Act. My decision on your request and the reasons for my decision are set out below.

I have identified one document which falls within the scope of your request.

The document was 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 this document 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

Documents subject to legal professional privilege (section 42)

Section 42(1) of the FOI Act provides that a document is exempt if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege (LPP).

Paragraph 5.127 of the FOI Guidelines provides that the FOI Act does not define LPP for the purposes of the exemption. To determine the application of this exemption, the decision maker needs to turn to common law concepts of LPP.

Paragraph 5.129 of the FOI Guidelines provides that at common law, determining whether a communication is privileged required a consideration of:

- whether there is a legal adviser-client relationship
- whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation
- whether the advice given is independent
- whether the advice given is confidential.

Document 1 contains specific communications in the form of opinion, advice and recommendations recorded in the course of assisting NDIA decision makers in a way of highlighting risks and proposing options on relevant matters within the Independent Assessment Pilot.

Section 42(2) of the FOI Act provides that a document is not exempt under s42(1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.

Legal professional privilege belongs to the client. This means it can only be waived by the client (not the lawyer).

Paragraph 5.146 of the FOI Guidelines provides that waiver of privilege may be express or implied. For example, privilege may be waived in circumstances where:

- the communication has been widely distributed
- the content of the legal advice in question has been disclosed
- a person has publicly announced their reliance on the legal advice in question in a manner that discloses the substance of the legal advice

An implied waiver happens where the privilege-holder has acted inconsistently with the maintenance of the privilege.

The question of whether privilege has been waived requires an examination of whether an earlier disclosure is inconsistent with the maintenance of the confidentiality protected by the privilege. The mere disclosure of the existence of legal advice will generally not amount to waiver.

There is no evidence before me that legal professional privilege on the document within the scope of your request has been waived.

With reference to the above, I am satisfied that it would be unreasonable to disclose the confidentiality of this specific communication, as such a disclosure would cause a real harm to the agency. Therefore, I find that document 1 is exempt under section 42(1) of the FOI Act.

Rights of review

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

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

Yours sincerely



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

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