

Our references: IR 21/22-010



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16 November 2021

Shirley

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

Dear Shirley

Your Freedom of Information request - Internal Review Decision

Thank you for your correspondence of 17 October 2021, in which you requested under the *Freedom of Information Act 1982* (FOI Act) an internal review of the decision by the National Disability Insurance Agency (NDIA) made on 15 October 2021 in relation to your request FOI 21/22-0051.

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

Original Decision

On 16 July 2021, you requested access under the FOI Act to the following documents:

“...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 15 October 2021, you were notified of the NDIA's decision to refuse access to documents you had requested.

Request for internal review

On 17 October 2021, you requested an internal review of that decision. In particular, you raised the following query with regard to the decision to refuse access to the document because of the exemption in section 42 of the FOI Act for documents subject to legal professional privilege:

“Assuming more risks than just legal have been considered within the document, as has been the practice with dozens of other documents provided, it would seem acceptable to redact the legal advice and provide the remainder of the document.”

I am authorised to make decisions under the FOI Act, including making internal review decisions under section 54C of that Act. In undertaking an internal review I am not bound in any way by the original decision and am required to make a fresh decision.

In reviewing the earlier decision, I identified one document which fell within the scope of your request. I did this by conducting searches of NDIA's record keeping systems, using all reasonable search terms relevant to your request, and by consulting with 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 the document identified as falling within the scope of your request under section 42 (documents subject to legal professional privilege).

My reasons for decision are set out below.

In making my decision, I have considered the following:

- your correspondence in relation to your request
- the original decision dated 15 October 2021
- your correspondence seeking an internal review of original decision
- relevant case law concerning the operation of the FOI Act
- the NDIA's operating environment and functions
- the FOI Act
- the FOI Guidelines published under section 93A of the FOI Act

Reasons for Decision

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).

Legal professional privilege applies to communications between a lawyer and their client. Paragraph 5.129 of the FOI Guidelines explains that determining whether a communication is privileged requires 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

The document identified as within the scope of your request contains advice prepared by in-house legal professionals for a separate business area in the NDIA.

The FOI Guidelines at paragraphs 5.131 and 5.132 explain that in-house lawyers may have the necessary degree of independence. The following factors are relevant to establishing whether a legal adviser-client relationship exists:

- the legal adviser must be acting in his/her capacity as a professional legal adviser
- the giving of the advice must be attended by the necessary degree of independence
- the dominant purpose test must be satisfied
- the advice must be confidential
- the fact that the advice arose out of a statutory duty does not preclude the privilege from applying
- whether the lawyer is subject to professional standards can be relevant

In relation to the document I am satisfied that it was prepared by a qualified legal practitioner, subject to professional standards and acting in the capacity of legal adviser.

In addition, I am satisfied that the document was prepared for the dominant purpose of providing legal advice. The author of the document held the position of Principal Legal

Officer and I am satisfied that the internal management structures provided a sufficient degree of independence for them to carry out their professional role.

Finally, the document was marked to ensure confidence and I am satisfied that it has been kept confidential and that the privilege has not been waived.

As a result, I consider that the document is of such a nature that it would be privileged from production in legal proceedings on the grounds of legal professional privilege and is exempt under section 42 of the FOI Act.

For this reason I have decided to refuse access to the document.

In your request for internal review you raised the question whether parts of the document contain material that is not covered by legal professional privilege and could be disclosed in an edited copy of the document.

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

Under section 22 of the FOI Act I have an obligation to consider whether it would be reasonably practicable to prepare a copy of this exempt document with exempt material edited from it. The document as a whole is subject to legal professional privilege, having been created for the purpose of providing legal advice.

The FOI Guidelines advise, at paragraph 3.98 that:

... an agency or minister should take a common sense approach in considering whether the number of deletions would be so many that the remaining document would be of little or no value to the applicant. Similarly, the purpose of providing access to government information under the FOI Act may not be served if extensive editing is required that leaves only a skeleton of the former document that conveys little of its content or substance.

Although there is a small amount of information in the document that is not legal advice, I do not consider that it is practicable to prepare an edited copy in accordance with section 22 as the extent of the deletions would result in a document of little value, conveying nothing of its substance.

Rights of Review

I have set out your rights to seek a review of my decision at **Attachment B**.

If you would like to clarify any aspects of my decision, please do not hesitate to contact me via email at foi@ndis.gov.au.

Yours sincerely



Rafaela

A/g Assistant Director FOI
Parliamentary, Ministerial & FOI Branch
Government Division

Your rights of review

External Review by the Australian Information Commissioner

Section 54L of the FOI Act gives you the right to apply directly to the Australian Information Commissioner (AIC) to seek a review of this decision.

If you wish to have the decision reviewed by the OAIC you must apply for the review, in writing or by using the online merits review form available on the AIC's website at www.oaic.gov.au, within 60 days of receipt of this letter.

To assist the OAIC your application should include a copy of this decision and your contact details. You should also clearly set out why you are objecting to the decision.

You can also complain to the OAIC about how an agency handled an FOI request, or other actions the agency took under the FOI Act.

Applications for review or complaints can be lodged with the OAIC in the following ways:

Online: www.oaic.gov.au
Post: GPO Box 5218, Sydney NSW 2001
Fax: +61 2 9284 9666
Email: enquiries@oaic.gov.au

The OAIC can also be contacted on **1300 363 992**.

The Commonwealth Ombudsman

You can complain to the Commonwealth Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act.

A complaint to the Commonwealth Ombudsman may be made orally or in writing. The Ombudsman may be contacted for the cost of a local call from anywhere in Australia on telephone **1300 362 072**.