

18 October 2021

Bob Buckley

**By email:** [foi+request-7697-16a91ca1@righttoknow.org.au](mailto:foi+request-7697-16a91ca1@righttoknow.org.au)

Dear Bob Buckley

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

Thank you for your correspondence of 18 August 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:

*“...information your agency gave to Minister Reynolds, and records of briefings, on the sustainability of the NDIS since she took office as Minister for the NDIS.”*

#### **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 5 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 three documents in full
- refuse access to two documents in full.

There are three further documents which fall within scope of your request that are publicly available at the following links:

- [Report to disability ministers for Q3 of Y8](#)
- [Report to disability ministers for Q4 of Y8](#)
- [Annual Financial Sustainability Report 2020-21](#)

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)

Section 47C of the FOI Act conditionally exempts a document if its release would disclose deliberative matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency.

Paragraph 6.59 of the FOI Guidelines provides that '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.

Documents 4 and 5 are Minister deep dives, which contain deliberative matter in the form of analysis, opinion, advice and recommendations of officers within the Agency, recorded in the course of assisting the Minister to reach decisions and make ongoing plans regarding the financial sustainability of the NDIS.

Section 47C(2) of the FOI Act provides that deliberative matter does not include purely factual material. The FOI Guidelines provide 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.

I am satisfied that documents 4 and 5 contain information that meets the definition of 'deliberative matter'. I am also satisfied that to the extent that the parts of the documents that contain factual material, the factual material is an integral part of the deliberative content, or is embedded or intertwined with the deliberative content such that it is impractical to excise. Therefore, I find that documents 4 and 5 do not contain purely factual material, and are conditionally exempt under section 47C of the FOI Act. My considerations of the public interest test are set out below.

#### Certain operations of agencies (section 47E(d))

Section 47E(d) of the FOI Act conditionally exempts a document if its disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

As mentioned above, documents 4 and 5 contain analysis, opinion, advice and recommendations of officers within the Agency in relation to the sustainability of the NDIS.

Disclosure of this information would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient administration of the of the NDIS, on the basis that such a disclosure would reveal methodologies, processes and analysis the NDIA uses to

make decisions, ongoing plans and administration processes to ensure the Scheme's sustainability. Any disclosure resulting in the prejudice of the effectiveness of the Agency's operational methods and procedures would, or could reasonably be expected to, result in the need for the Agency to change those methods and procedures to ensure the future effectiveness and sustainability of the Agency and the Scheme. I am satisfied that the release of this information would result in public disclosure of internal methodologies that, through improper use, would, or could, lead to a distortion of funding levels that would adversely affect the integrity of the NDIS and its financial sustainability.

Accordingly, I find that disclosure of this information would, or could reasonably be expected to, have a substantial adverse effect on the operations of the Agency and is, therefore, conditionally exempt under section 47E(d) of the FOI Act. My considerations of the public interest test are set out below.

*Public interest considerations – sections 47C, 47E(d)*

As I have decided that documents 4 and 5 are conditionally exempt under sections 47C and 47E(d) of the FOI Act, I must now consider whether access to the conditionally exempt material would be contrary to the public interest. Section 11A(5) of the FOI Act provides that access to a document covered by a conditional exemption must be provided unless disclosure would be contrary to the public interest.

In favour of disclosure, I have considered the factors outlined in section 11B(3) of the FOI Act, and I have determined that disclosure of documents 4 and 5 would promote the objects of the FOI Act by providing access to documents held by the government, and would promote effective oversight of public expenditure.

Against disclosure, I consider 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
- disclosure of the information would not enhance Australia's representative democracy in the ways described in section 11B(3) of the FOI Act
- there is strong public interest in maintaining the Agency's ability to effectively manage its programs towards strategic outcomes and maintaining Scheme sustainability.

I have not taken into consideration any of the factors set out in section 11B(4) of the FOI Act in making my decision.

While there is limited public interest in the disclosure of information conditionally exempt under sections 47C and 47E(d), 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 NDIS
- adversely affect the ability of the Agency to maintain internal processes and methodologies, which, in turn, helps to ensure the financial stability and integrity of the NDIS.

In summary, I am satisfied that the factors against disclosure of documents 4 and 5 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.

**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



**Carolyn**

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

## Schedule of Documents for FOI 21/22-0187

Document number	Page number	Description	Access Decision	Comments
1	1-6	SQ21-000071 Question on Notice – Additional Estimates Spill Over  Dated: 03.05.2021	<b>FULL ACCESS</b>	Irrelevant material removed under section 22 of the FOI Act.
2	7-10	IQ21-000022 Question on Notice – Joint Standing Committee Hearing  Dated: 18.05.2021	<b>FULL ACCESS</b>	Irrelevant material removed under section 22 of the FOI Act.
3	11-14	IQ21-000024 Question on Notice – Joint Standing Committee Hearing  Dated: 18.05.2021	<b>FULL ACCESS</b>	Irrelevant material removed under section 22 of the FOI Act.
4	-	Sustainability Action Taskforce – Minister Deep Dive  Dated: 24.03.2021	<b>REFUSED ACCESS</b>  Exemptions claimed: 47C – deliberative processes 47E(d) – certain operations of agency	
5	-	NDIS Sustainability Response – Minister Deep Dive  Dated: 28.07.2021	<b>REFUSED ACCESS</b>  Exemptions claimed: 47C – deliberative processes 47E(d) – certain operations of agency	

## **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