



Ace Chapman

By email: foi+request-9128-d281efc5@righttoknow.org.au

Dear Ace Chapman,

Freedom of Information (FOI) Request: FOI 22/23-1

1. I refer to your correspondence received by the NDIS Quality and Safeguards Commission (**the Commission**) on 14 July 2022, which requested access to documents under the *Freedom of Information Act 1982 (Cth)* (**FOI Act**).
2. The terms of your request, as revised on 12 August 2022 were as follows:
In relation to AusTender ID CN3781259 (agency reference: 91000640), final documentation relating to:
 - i) *the engagement of Weir Consulting,*
 - ii) *the scope of work for which Weir Consulting were engaged, and*
 - iii) *the deliverables of Weir Consulting's work including the final report and recommendations made as a result of the work*
3. I have made a decision to grant you **part access** to the documents. The documents that I have chosen to grant **part access** to are listed in **Schedule 1**.

Background

4. Your request of 14 July 2022, was made in the following terms:

Under the FOI Act i wish to request documentation pertaining to the engagement of Weir Consulting for

Strategic advice and review services listed on the Austender website under CN ID: CN3781259 (agency reference: 91000640)

Specifically, i am seeking documents including emails relating to the scope of work provided by Weir Consulting, the outcome of this work such as advice received, any reports produced including recommendations made and relevant correspondence between NDIS Commission SES Management and Weir Consulting Employees regarding the work.

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5. On 20 July 2022, the Commission acknowledged your request.
 6. On 12 August 2022, you revised the scope of your request as outlined in paragraph 1 above and agreed to an extension of time by a further 21 days under section 15AA of the FOI Act.
 7. On 28 September 2022, you were advised that the Commission was required to undertake a third-party consultation and that a further extension of time under section 15(6) of the FOI Act would occur as a result of this consultation.
 8. On 26 October 2022 the Office of the Australian Information Commissioner (**OAIC**) granted a further extension of time under section 15AB of the FOI Act, bringing the due date to 2 November 2022.
 9. On 25 October 2022, prior to the above OAIC decision being made, the Commission sought a further extension of time until 11 November 2022. This application was acknowledged by OAIC on the same day. However, at the time of finalising this access decision, the Commission is yet to be advised of OAIC's decision related to the application.
 10. Unfortunately, because the Commission was unable to make a decision in the relevant statutory period, the matter has been deemed refused. However, the Commission remained under an obligation to proceed to issuing you with a decision and is now in a position to do so. The Commission has separately applied to the OAIC for an extension of time under section 15AC of the FOI Act, which if granted will reinstate your rights to internal review. We will contact you with the result of this application. More information in relation to review rights is provided at **Attachment B**.
 11. In accordance with Regulation 8 of *the Freedom of Information (Charges) Regulations 2019*, I have decided not to impose a charge in relation to this request.

Authority to make decision

12. I am an officer authorised by the NDIS Quality and Safeguards Commissioner, to make decisions about access to documents in the possession of the Commission in accordance with subsection 23(1) of the FOI Act.

Material taken into account and searches

13. The following factors have been considered:
 - a. the terms of your original and revised request and other relevant correspondence between yourself and the Commission;
 - b. the types of documents in the Commission's possession;
 - c. the search records relevant to this request;
 - d. the consultation and search responses from relevant internal business areas of the Commission in response to your request;
 - e. communications with the third party who was consulted on the potential release of the documents under sections 27 and 27A of the FOI Act;
 - f. relevant provisions of the FOI Act, including sections 3, 6C, 11, 11A, 11B, 24A, 22, 26, 45, 47, 47E and 47F; and
 - g. relevant parts of the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**FOI Guidelines**).

14. The Commission undertook a reasonable search of its records and in accordance with those searches and section 6C of the FOI Act, the Commission has identified seven (7) documents falling within scope of your request.

15. I have reviewed the relevant search records conducted by the Commission's Legal Services and Internal Integrity Division and am satisfied to the best of my knowledge that the Commission has undertaken reasonable searches in response to your request and that all relevant documents have been identified.

Reasons for decision

16. I have made a decision to grant you access to three (3) documents in part and refuse access in full to four (4) documents subject to exemption under sections 45, 47, 47E and 47F of the FOI Act. My reasons for this decision follows:

Exemption – material obtained in confidence – section 45

17. Section 45(1) of the FOI Act provides for the exemption of documents in circumstances where disclosure would found an action, by a person (other than an agency or the Commonwealth), for breach of confidence.

18. At paragraph 5.159 of the FOI Guidelines, it is explained that to found an action for breach of confidence, the following five (5) criteria must be satisfied in relation to the information:
 - a. it must be specifically identified;
 - b. it must have the necessary quality of confidentiality;
 - c. it must have been communicated and received on the basis of a mutual understanding of confidence;

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- d. it must have been disclosed or threatened to be disclosed, without authority; and
 - e. unauthorised disclosure of the information has or will cause detriment.
19. In response to your FOI request, the Commission undertook a third-party consultation process with Weir Consulting National (**Weir**) under sections 27 and 27A of the FOI Act, to ascertain their views as to the potential disclosure of these documents and the relevant exemption provisions under the FOI Act. I have had regard to this consultation response in respect of my decision to exempt certain material contained within the documents under section 45 of the FOI Act.
20. I am satisfied that documents 4-7 contain material which is specifically identified and marked as confidential. I am satisfied that the documents were intended to have a limited audience and that participants in the review process engaged with Weir on an understanding that any information recorded would be treated as confidential and that all attempts would be made to limit the disclosure and dissemination of this material outside of its intended audience at the Commission
21. I am also satisfied that disclosure of this material under this FOI request or elsewhere without authority from the relevant authors and third-party people named and recorded in the documents would likely found an action in breach of confidence and otherwise cause those people detriment.
22. I have therefore made a decision to redact this material under section 45 of the FOI Act. Because section 47 is not a conditional exemption, the Commission is not required to consider a public interest test.

Exemption – trade secrets or commercially valuable information – section 47

23. Section 47 provides for the exemption of documents in circumstances where disclosure would disclose information which has a commercial value and where disclosure would or could reasonably be expected destroy or diminish that commercial value.
24. At paragraph 5.205 of the FOI Guidelines, it is explained that for information to have commercial value, it does not necessarily have to have ‘exchange value’ in the sense of something that could be sold as a trade secret or intellectual property. Instead whether something has a commercial value should be considered in respect of multiple factors, including whether the information is only known to the agency and person to whom it has value (in this case Weir), whether disclosure would reduce the value of a business operation or commercial activity and whether the information is still current.
25. The documents subject to your request can be categorised as follows:

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- a. Documents 1-3 are the contractual documents between the Commission and PACK Investigations Pty Ltd, TAS Weir Consulting National, where Weir was engaged to undertake and report on a workplace review and investigation signed in July and August 2021; and
 - b. Documents 4-7 are the deliverable reporting documents produced by Weir as a result of that contractual arrangement, dating August 2021 and March 2022.
26. As explained in paragraph 19 above, I have had regard to the consultation response from Weir in respect of my decision to exempt certain material contained within the documents, including my decision to exempt material under section 47 of the FOI Act.
27. I am satisfied that the documents contain the commercial information of Weir, including their agreed terms or work and their review and reporting methodology and the specific financial breakdown of the contracted work. I am satisfied that this material has a commercial value to Weir and that disclosure could reasonably be expected to allow competitors to take advantage of the disclosure of Weir's pricing and/or methodology in future project proposals to Government and private entities.
28. Having regard to these third-party submissions and my own review and consideration of the documents, I am satisfied that the disclosure of this material could reasonably be expected to diminish the commercial value of the material and have a significant and detrimental impact to Weir's commercial undertakings in the future.
29. I have therefore made a decision to redact this material under section 47 of the FOI Act. Because section 47 is not a conditional exemption, I am not required to consider a public interest test.

Public interest conditional exemption – certain operations of agencies – section 47E

30. Section 47E(d) provides for the conditional exemption of documents in circumstances where 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.
31. Section 47E(c) further provides for the conditional exemption of material where disclosure would or could reasonably be expected to have a substantial adverse effect on the management of Agency personnel.
32. Paragraphs 6.91-6.94 of the FOI Guidelines makes it clear that the predicted effect of the disclosure must be both substantial and adverse and should be supported by evidence during the decision-making process.

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33. It is an important accountability and review factor of Government, that agencies are able to engage independent third parties, like Weir, to conduct review and reporting activities. Such activities play a part in informing agencies on how certain areas of their operations are working and where further improvements can be made, this includes where an agency has become aware of potential issues relating to its workplace and staff. Such processes promote the integrity and accountability of Commonwealth Government and allow agencies to properly and appropriately investigate issues
34. Part of the success of such review and reporting activities is the ability of these independent consultants to provide full and proper advice to the agency on their findings and for the agency to then be provided with an ample opportunity to consider and action any findings and recommendations.
35. I've also had regard to relevant case law relating to the disclosure of investigation reports, including the recent Information Commissioner (IC) decision of *'YU' and Bureau of Meteorology (Freedom of Information) [2021] AICmr75 (29 November 2021) (YU)*, which considered the disclosure of documents relating to a Public Interest Disclosure (**PID**) and subsequent investigation. In this decision, the IC accepted the Department's submissions that certain operations of the agency could be undermined if the confidentiality established under the PID Act was circumvented by an access application made under the FOI Act. YU also refers to other relevant case law that highlights the importance of agencies being able to undertake confidential investigative processes, and the fact that the need for confidentiality will often extend past the time period of the investigation itself, since disclosure would likely undermine participation in future investigative processes by agency staff and/or members of the public. I consider this discussion and findings of the IC to be relevant to my decision in respect of your request.
36. I am satisfied that the documents contain information which record and describe the Commissioner's operations, including detailed matters pertaining to the performance and management of Commission staff. I also understand that certain people referred to in the documents are still employed by the Commission or Commonwealth at the time of this decision.
37. Noting that the final report was only recently provided to the Commission in March 2022, I consider that the disclosure of documents 4-7 at this time, would have a significant adverse effect on the Commission's ability to finalise its review of these documents and any associated actions stemming from Weir's findings. I consider that the premature release of this material would likely have a detrimental effect on the Commission's decisions in respect of these issues moving forward.

38. I further consider that the disclosure of documents 4-7 would likely have an adverse effect on current and former staff of the Commission and Commonwealth more widely, as it would associate those people with the matters discussed in the report and otherwise undermine the understanding of confidence that they participated in the reporting process under. I consider that this could likely result in the Commission receiving workplace and privacy complaints from those people and would also increase the likelihood that other staff members would be unwilling to engage in a similar review processes in the future, if they were of the understanding that the Commission would disclose the material they provided under subsequent FOI decisions.

39. I am therefore satisfied that it appropriate to exempt this material under sections 47E(c) and 47E(d) of the FOI Act. As section 47E is a conditional exemption, I have also considered the application of the public interest test below.

Public interest conditional exemptions--personal privacy - section 47F

40. Section 47F provides for the exemption of documents in circumstances where disclosure would result in an unreasonable disclosure of a person's personal information.

41. Section 4 of the FOI Act confirms that the definition of *personal information* in the FOI Act has the same meaning as it is defined in section 6 of the *Privacy Act 1988* (Privacy Act). This definition is as follows:

...information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- (a) whether the information or opinion is true or not;
- (b) whether the information or opinion is recorded in a material form or not.

42. Section 47F(2) of the FOI Act outlines the following factors that an FOI decision maker should take into account when considering the application of this conditional exemption:

- (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 the decision maker considers relevant.

43. Documents 1-3 contain the personal information of third parties and Commission staff, namely direct contact details and personal signatures. Documents 4-7 contain the detailed personal information of staff members of the Commission who participated in the review

activities and whose information was ultimately recorded in the reporting documents, this includes their accounts of events and information relating to their employment. I am satisfied that this material meets the definition of personal information for the purposes of both the FOI Act and Privacy Act.

44. As explained in paragraph 19 above, I have had regard to the consultation response from Weir in respect of my decision to exempt certain material contained within the documents, including my decision to exempt material under section 47F of the FOI Act.
45. I have also considered whether it would be possible or appropriate to seek the consent of each individual named in the documents. However, noting that I have a clear record that this material was collected under an understanding of confidence and, having regard to the sensitive nature of the personal information contained within the documents and the number of people whose personal information is contained within the documents, I consider that it would be unreasonable to undertake such an activity at this time.
46. I have also considered that the Commission has an obligation to protect the privacy of future, current and past staff members and that a disclosure under the FOI Act is considered to be a disclosure to the 'world at large' meaning that the Commission can no longer control the future dissemination of documents that are released under the FOI Act.
47. Having regard to all of these factors and as a result of my own review of this material, I am satisfied that the disclosure of the personal information contained within the documents would be unreasonable and would likely cause the relevant people detriment.
48. I am therefore satisfied that it is appropriate to exempt this material under sections 47F of the FOI Act. As section 47F is a conditional exemption, I have also considered the application of the public interest test below.

Combined public interest test – sections 47E and 47F

49. Where I have identified as conditionally exempt under section 47 and 47F, I also have to consider section 11A(5) of the FOI Act, which provides that an agency must give the person access to the document **unless** (in the circumstances) access to the document would, on balance, be contrary to the public interest.
50. In order to make a decision as to whether the release of the conditionally exempt material would be contrary to the public interest, I have had to consider factors favouring disclosure as listed under section 11B(3), including that disclosure would promote the objects of the FOI Act by providing access to government held information.

51. I have also considered the following factors which do not favour disclosure:

- a. disclosure is likely to open the Commission up to liability for breach of confidence;
- b. disclosure of the deliberative material contained within the documents would likely diminish the value of the report and adversely affect the Commissioner's ability to fully consider the report, including any recommendations contained within in;
- c. disclosure of the material contained within the documents would likely adversely affect or limit the extent that staff members would engage in a similar review activity in the future in a full and frank manner;
- d. disclosure could reasonably be expected to adversely affect the proper and efficient conduct of the operations of the Commission and other Commonwealth agencies, namely the engagement of independent third parties to undertake similar review and reporting activities;
- e. disclosure could reasonably be expected to adversely affect the Commission's management of past, current and future staff;
- f. disclosure is reasonably expected to prejudice a person's right to privacy and the understanding of confidence agreed to upon those people participating in the review activity; and
- g. disclosure could be expected to adversely affect the commercial and business affairs of a third-party business and service provider who is currently engaging with the Commission

52. I have not considered any of the listed irrelevant factors for consideration, as set out in section 11B(4) of the FOI Act.

53. In weighing up the relevant public interest factors for and against disclosure, I have placed greater weight on the factors against disclosure and have made a decision that disclosure of the material subject to conditional exemptions under sections 47E and 47F of the FOI Act would be contrary to the public interest.

Release of the documents with redactions applied

54. As explained, I have made a decision to exempt and redact certain material contained within the documents under various FOI Act provisions.

55. Where I have granted access in part (documents 1-3) I have prepared an edited copy for release to you in accordance with section 22 of the FOI Act.

56. Documents 1-3 with the relevant redactions applied in accordance are **enclosed**.

57. I have not provided you with an edited copy of documents 4-7 as I have made a decision to redact this material in full.

Disclosure Log Decision

58. I consider that the details of your request should be made available on the Commission's FOI Disclosure Log located here: <https://www.ndiscommission.gov.au/foi-disclosure-log>.

59. Please note that the Commission will not publish your name, but will publish other details of the request including the FOI Reference Number, Date of Access, the scope of the FOI request and information about the decision and how the relevant documents can be accessed by other members of the public.

Review Rights

60. Information about the review rights attached to this decision are provided at **Schedule 2**.

61. Should you have any enquiries concerning this matter you can email the FOI team by emailing FOI@ndiscommission.gov.au.

Yours sincerely,



Lisa Pulko
Chief Operating Officer
NDIS Quality and Safeguards Commission

8 November 2022

Schedule 1

Document No.	No. of pages	Date	Description	Exemption provision
1	18	June 2021	Contract	Sections 47, 47F
2	6	July 2021	Contract Variation	Sections 47, 47F
3	7	August 2021	Contract Various	Sections 47, 47F
4	22	NA	Weir Document 1	Sections 45, 47, 47E(d) and (c), 47F
5	14	NA	Weir Document 2	Sections 45, 47, 47E(d) and (c), 47F
6	104	NA	Weir Document 3	Sections 45, 47, 47E(d) and (c), 47F
7	46	NA	Weir Document 4	Sections 45, 47, 47E(d) and (c), 47F

Schedule 2 – Your Review Rights

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 AIC 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 AIC 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 AIC about how an agency handled an FOI request, or other actions the agency took under the FOI Act.

Applications for review or complaint can be lodged in one of the following ways:

Online: www.oaic.gov.au

Post: GPO Box 5218 SYDNEY NSW 2001

Phone: 1300 363 992 or +61 2 9284 9749 (international)

Email: enquiries@oaic.gov.au

In person: Level 3 175 Pitt Street SYDNEY NSW 2000