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20 April 2017

Mr B Buckley

By email: [convenor@a4.org.au](mailto:convenor@a4.org.au)

Dear Mr Buckley

**Your freedom of information request – notification of decision**  
**Our reference: FOI 16.17-049**

1. I refer to your correspondence dated 21 March 2017, received by the National Disability Insurance Agency (**Agency**) on 21 March 2017, requesting access under the *Freedom of Information Act 1982 (FOI Act)* to the following documents:

*“All information, advice or instruction that the National Disability Insurance Agency provided to any NDIS Planner relating to Applied Behaviour Analysis (ABA) for autistic children*

1. *aged 5 years or older; or*
2. *who attend school.*

*Information that is particularly relevant may have been given to NDIS planners in the ACT in February 2017.”*

**DECISION ON ACCESS TO DOCUMENTS**

2. I am authorised under section 23(1) of the FOI Act to make decisions under the FOI Act and my decision regarding your request and the reasons for my decision are set out below. The Schedule of Documents at **Attachment A** sets out the documents which the Agency has assessed as falling within the scope of your request, and to which documents I have granted you access.
3. I am advised that the Agency has in its possession six documents which fall within the scope of your request.
4. I note that three documents that have been identified as falling within the scope of your request as being documents that are publically available. I have identified these documents in the Schedule of Documents at **Annexure A** (with links).
5. I have decided in relation to your request to grant access to two documents in full and refuse access to one document.

6. In reaching my decision, I took into account the following materials:
- correspondence dated 21 March 2017, outlining the particulars of the request;
  - the content of the documents falling within the scope of the request;
  - the FOI Act;
  - the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act;
  - relevant Tribunal decisions concerning the operation of the FOI Act;
  - factors relevant to my assessment of whether or not disclosure of certain documents would be in the public interest;
  - consultations with Agency officers about:
    - the nature of the documents; and
    - the Agency's operating environment and functions.

## **REASONS FOR DECISION**

### **Redaction of exempt material**

7. I have decided that one document within the scope of your request contains material that is exempt.
8. In accordance with section 22 of the FOI Act, where possible, I have deleted exempt material from the abovementioned document and have decided to release to you the balance of the documents. Such deletions are identified in the Schedule of Documents at **Attachment A**.

### **Deliberative processes (section 47C)**

9. Section 47C of the FOI Act provides that:

*A document is conditionally exempt if its disclosure under this Act would disclose matter (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:*

- a) *an agency; or*
  - b) *a Minister; or*
  - c) *the Government of the Commonwealth; or*
  - d) *the Government of Norfolk Island.*
10. Under the FOI Act, access to a document covered by a conditional exemption (such as section 47C) must be provided unless release of the document would be contrary to the public interest.
11. I have identified one document within the scope of your request which I consider falls within the section 47C conditional exemption, and for which, release would be contrary to the public interest. My reasons for these findings for the document is set out below.
12. Material within the document provides advice and recommendations to Agency staff on the delivery and management of the Agency's approach to early childhood intervention under the National Disability Insurance Scheme (**NDIS**). However, the document has been labelled as a working draft and it is not a final or formal iteration of practice or policy, and may be subject to further change.

13. While the document contains some factual material I have, to the extent it is possible, released all purely factual material in the document which is in accordance with section 47C(2)(b) of the FOI Act.

*Public interest considerations – Section 47C*

14. Under the FOI Act, access to documents covered by a conditional exemption must be provided unless disclosure would be contrary to the public interest. My consideration of the public interest factors both in favour and against disclosure follows.
15. I note that the factors favouring access to the documents, on public interest grounds, are outlined in section 11B(3) of the FOI Act and include whether access to the document would do any of the following:
  - a. promote the objects of the FOI Act, which include:
    - i. requiring agencies to publish requested information; and
    - ii. providing for a right of access to documents;
  - b. promote Australia's representative democracy by contributing towards:
    - i. increasing public participation in Government process, with a view to promoting better informed decision making; and
    - ii. increasing scrutiny, discussion, comment and review of the Government's activities;
  - c. inform debate on a matter of public importance;
  - d. promote effective oversight of public expenditure; and
  - e. allow a person access to his or her own personal information.
16. After considering the above factors, I have determined the following:
  - a. disclosure of the relevant information would not contribute to the publication of information of sufficient public interest value that may justify the disclosure of the Agency's deliberative processes;
  - b. disclosure of the relevant information will not enhance Australia's representative democracy in the ways described in section 11B(3) of the FOI Act; and
  - c. disclosure of the relevant information will not inform debate on a matter of public importance or promote oversight of public expenditure.
17. While Early Childhood Intervention is an area that is of some interest to the public, the harm that may result from disclosing this information stems from the possibility of the information being used in a way that may adversely prejudice the Agency's ability to provide guidance to staff on various funded supports to ensure the integrity and financial sustainability of the NDIS. The document is a working draft with the information circulated in this document representing a step in the policy formation process which is not yet final. While it may serve an informational purpose for staff within this area of the Agency, to publicly release this information before it has been comprehensively considered and tested prior to being finalised would adversely affect the Agency's ability to properly implement important policy. The disclosure of deliberative, drafted material such as this would restrict the Agency's ability to develop a policy of a quality and format that would be suitable for public scrutiny in the event of public disclosure.

18. Therefore, in light of the fact that there is comparatively limited public interest in the disclosure of this information, the factors against disclosure outweigh the factors in favour of disclosure. Accordingly, I have decided that in the circumstances, the public interest in disclosing the information in the documents is outweighed by the public interest against disclosure.
19. I have not taken into account any of the irrelevant factors set out in section 11B(4) of the FOI Act in making this decision.
20. Accordingly, I am satisfied that the above mentioned information is conditionally exempt under section 47C of the FOI Act and that disclosure would, on balance, be contrary to the public interest.

### **RELEASE OF DOCUMENTS**

21. The Schedule of Documents at **Attachment A** sets out details of the documents. I enclose a copy of the documents released to you.
22. Where possible, and as identified in the Schedule of Documents at **Attachment A**, I have deleted all of the exempt material as referenced above in the documents and release the remaining material to you in accordance with section 22(1) of the FOI Act.

### **Rights of review**

23. Your rights to seek a review of my decision, or lodge a complaint, are set out at **Attachment B**.
24. Provisions of the FOI Act referred to in this letter are set out at **Attachment C**.
25. Should you have any enquiries concerning this matter, please do not hesitate to contact me on 03 5272 7900 or via email at [foi@ndis.gov.au](mailto:foi@ndis.gov.au).

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Andrew Ford', is written over a light blue circular stamp.

**Andrew Ford**  
Corporate Counsel  
National Disability Insurance Agency

## Schedule of Documents for FOI 16/17-049

Document Number	Folio page number	Date	Description	Decision on access
1	N/A	N/A	National Disability Insurance Scheme Act 2013	FULL ACCESS  Publicly available document  <a href="https://www.legislation.gov.au/Details/C2016C00934">https://www.legislation.gov.au/Details/C2016C00934</a>
2	N/A	N/A	National Disability Insurance Scheme (Supports for Participants) Rules 2013	FULL ACCESS  Publicly available document  <a href="https://www.legislation.gov.au/Details/F2013L01063">https://www.legislation.gov.au/Details/F2013L01063</a>
3	N/A	N/A	Operational Guidelines of the National Disability Insurance Agency	FULL ACCESS  Publicly available document  <a href="https://www.ndis.gov.au/Operational-Guidelines">https://www.ndis.gov.au/Operational-Guidelines</a>
4	1	1/02/2016	Autism Spectrum Disorder Report: Evidence-Based/Evidence-Informed Good Practice For Supports Provided To Preschool Children, Their Families and Carers	FULL ACCESS
5	93	Undated	National Guidelines: Best Practice in Early Childhood Intervention	FULL ACCESS
6	118	Undated	Determining and Delivering Reasonable and Necessary NDIS ECEI Intensive Capacity Building Supports - Working Draft Document	REFUSED ACCESS Deletions made pursuant to s 22(1). Exemptions claimed: s 47C (deliberative process).

## **Your review rights**

### **Internal Review**

Section 54 of 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:

Legal Branch  
National Disability Insurance Agency  
GPO Box 700  
Canberra ACT 2601

### **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 may 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](http://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 the Agency handled your FOI request, or other actions the Agency took under the FOI Act.

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

Online: [www.oaic.gov.au](http://www.oaic.gov.au)  
Post: GPO Box 5218, Sydney NSW 2001  
Fax: +61 2 9284 9666  
Email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

The Office of the AIC can also be contacted on 1300 363 992.

### **The Commonwealth Ombudsman**

You can complain to the Commonwealth Ombudsman concerning action taken by the Agency in the exercise of powers or the performance of its 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.

*Freedom of Information Act 1982—relevant provisions*

**11A Access to documents on request**

*Scope*

- (1) This section applies if:
- (a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
    - (i) a document of the agency; or
    - (ii) an official document of the Minister; and
  - (b) any charge that, under the regulations, is required to be paid before access is given has been paid.
- (2) This section applies subject to this Act.

**Note:** Other provisions of this Act are relevant to decisions about access to documents, for example the following:

- (a) section 12 (documents otherwise available);
- (b) section 13 (documents in national institutions);
- (c) section 15A (personnel records);
- (d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

*Mandatory access—general rule*

- (3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

*Exemptions and conditional exemptions*

- (4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

**Note:** Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects—information or documents otherwise accessible)).

- (5) The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

**Note 1:** Division 3 of Part IV provides for when a document is conditionally exempt.

**Note 2:** A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

**Note 3:** Section 11B deals with when it is contrary to the public interest to give a person access to the document.

- (6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:
  - (a) a conditionally exempt document; and
  - (b) an exempt document:
    - (i) under Division 2 of Part IV (exemptions); or
    - (ii) within the meaning of paragraph (b) or (c) of the definition of **exempt document** in subsection 4(1).

## **22 Access to edited copies with exempt or irrelevant matter deleted**

### *Scope*

- (1) This section applies if:
  - (a) an agency or Minister decides:
    - (i) to refuse to give access to an exempt document; or
    - (ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and
  - (b) it is possible for the agency or Minister to prepare a copy (an edited copy) of the document, modified by deletions, ensuring that:
    - (i) access to the edited copy would be required to be given under section 11A (access to documents on request); and
    - (ii) the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and
  - (c) it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:
    - (i) the nature and extent of the modification; and
    - (ii) the resources available to modify the document; and
  - (d) it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.

### *Access to edited copy*

- (2) The agency or Minister must:
  - (a) prepare the edited copy as mentioned in paragraph (1)(b); and
  - (b) give the applicant access to the edited copy.

### *Notice to applicant*

- (3) The agency or Minister must give the applicant notice in writing:



- (a) that the edited copy has been prepared; and
  - (b) of the grounds for the deletions; and
  - (c) if any matter deleted is exempt matter—that the matter deleted is exempt matter because of a specified provision of this Act.
- (4) Section 26 (reasons for decision) does not apply to the decision to refuse access to the whole document unless the applicant requests the agency or Minister to give the applicant a notice in writing in accordance with that section.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

#### **47C Public interest conditional exemptions--deliberative processes**

##### General rule

- (1) A document is conditionally exempt if its disclosure under this Act would disclose matter ( 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:
- (a) an agency; or
  - (b) a Minister; or
  - (c) the Government of the Commonwealth; or
  - (d) the Government of Norfolk Island.

##### Exceptions

- (2) Deliberative matter does not include either of the following:
- (a) operational information (see [section 8A](#));
  - (b) purely factual material.

Note: An agency must publish its operational information (see [section 8](#)).

- (3) This section does not apply to any of the following:
- (a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;
  - (b) reports of a body or organisation, prescribed by the regulations, that is established within an agency;
  - (c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see [section 11A](#)).