



Our reference: RQ23/01652

Agency reference: FOI 4294

### Concerned Citizen

By email: [foi+request-10049-aeed96f5@righttoknow.org.au](mailto:foi+request-10049-aeed96f5@righttoknow.org.au)

Cc: [foi@health.gov.au](mailto:foi@health.gov.au)

## Extension of time under s 15AB

Dear Concerned Citizen

On 13 April 2023, the Department of Health and Aged Care (Department) applied to the Office of the Australian Information Commissioner (OAIC) for further time to make a decision on your FOI request of 10 March 2023, under s 15AB of the *Freedom of Information Act 1982* (Cth) (the FOI Act).

This application was made on the basis that the processing period is insufficient to deal adequately with your FOI request, because it is complex.

The Department previously obtained your agreement under s 15AA of the FOI Act for a 7-day extension of time to 16 April 2023 [OAIC reference: RQ23/01256]. The Department attempted to obtain your agreement under s 15AA of the FOI Act for a further extension of time from you. The Department advised that you refused the request for a 23-day extension.

### Contact with you

On 20 April 2023, I wrote to you to seek your view on the Department's application. You responded to my inquiries advising that:

To be honest, I don't really know how to respond to this. The idea that the Department is requesting an extension to consult on "document sensitivities" just astounds me.

I'm not aware that the FOI Act allows decision makers to decide not to disclose information that has been identified based on any so-called "sensitivities" that an agency may identify.

The FOI Act specifies a number of reasons that documents (or information within documents) might be exempt from release. The fact that there may be "sensitivities" is not amongst them.

This sounds like the Department is requesting additional time to ensure there's nothing embarrassing in the documents they've identified. I would be concerned if this were the case. My expectation is that the decision to release documents (and whether to edit them to

remove any exempt content) is based solely on whether there are reasons for such exemptions. If the Department of Health and the DTA are starting from the position that there might be “sensitivities” and then proceeding to find excuses to remove content then I’d suggest this is an inappropriate way to respond to an FOI request.

I would ask the decision maker not to agree to an extension of time simply to allow the Department and the DTA to discuss ways to frustrate a legitimate request for information.

Furthermore Section 3.71 of your guidelines state:

“In some cases, more than one agency will be involved in creating a document, such as through an inter-agency working group. In such circumstances, agencies should ensure that there are procedures in place to determine at the time a document is created whether it will be published under the IPS (see Part 13 of these Guidelines) or released in response to FOI requests. This may lessen the need for consultation between agencies if an FOI request is later received”.

If the Department of Health and the DTA failed to determine at the time the document was created whether there were any legitimate reasons it (or information within) could not be released then that failure should not mean that additional time is now required. As previously stated section 15AB can be used to provide additional time when the statutory timeframes are inadequate because of the complexity of the request (not because of a failure of foresight).

## Decision

As a delegate of the Information Commissioner, I am authorised to make decisions on applications for extensions of time under s 15AB of the FOI Act.

I have decided to grant the Department an extension of time under s 15AB(2) of the FOI Act to **16 May 2023**. I am satisfied that the Department’s application for an extension of time is justified, because the request is complex. My reasons and considerations follow:

- I am satisfied that the request is complex, as the Department advised on 4 May 2023 that the documents within scope contain ‘technical information’ and ‘distilled technical knowledge’ which required ‘subject matter expertise from Health staff’, the ‘relevant business area and department employees’ to identify any possible sensitivities. While I note your concerns about ‘so-called “sensitivities”’, it is open to agencies to consider possible exemptions as part of their dealing ‘adequately with a request’.
- Page 55 of the Revised Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2010 (Cth) provides that a complex request may include a request requiring extensive consultation for the purposes of s 15AB of the FOI Act. I am satisfied that the request is complex, as the Department advised that consultation was required with the Digital Transformation Agency (DTA), ‘two health staff members [who] had previously worked on the COVIDSafe project within other sections of the department’, and ‘the decision maker for the request’.

- Further, while I agree that para 3.71 of the FOI Guidelines would require an agency to establish procedures for the release of a document when more than one agency is involved in its creation, the Department advised that ‘two documents originated from the DTA and with former Minister Stuart Robert’s office’. I therefore do not find para 3.71 a relevant consideration regarding the need for consultation.

Based on the information currently before the OAIC, I am satisfied that an extension until **16 May 2023** is appropriate in this instance, and I consider the additional days represent a reasonable amount of time in the circumstances.

If you do not receive a decision by 16 May 2023, or you disagree with the decision you receive, you may wish to seek Information Commissioner review [here](#). Further information on [applying for IC review](#) is available on the OAIC [website](#). An application for IC review would need to be made within 60 days of the Department’s decision or deemed decision.

## Contact

If you have any questions about this letter, please contact me on 1300 363 992 or via email to [foidr@oaic.gov.au](mailto:foidr@oaic.gov.au). In all correspondence please include OAIC reference: RQ23/01652.

Yours sincerely



**Noah Harris**  
**Assistant Review Adviser**  
FOI Regulatory Group

4 May 2023

## Review rights

If you disagree with the Office of the Australian Information Commissioner's (OAIC) decision you can apply to the Federal Court of Australia or the Federal Circuit Court for a review of a decision of the Information Commissioner if you think that a decision by the Information Commissioner to grant an extension of time is not legally correct. You can make this application under the *Administrative Decisions (Judicial Review) Act 1977*.

The Court will not review the merits of your case but it may refer the matter back to the Information Commissioner for further consideration if it finds the decision was wrong in law or the Information Commissioner's powers were not exercised properly.

An application for review must be made to the Court within 28 days of the OAIC sending the decision to you. You may wish to seek legal advice as the process can involve fees and costs. Please contact the Federal Court registry in your state or territory for more information, or visit the Federal Court website at <http://www.fedcourt.gov.au/>.

## Further information

Further information about how applications to extend the timeframe to process an FOI request are handled by the OAIC can be found published on our website:

**For FOI applicants:** [How to make an FOI request: Extensions of time](#)

**For agencies and ministers:** [Guidance and advice: Extension of time for processing requests](#)

The OAIC has the power to investigate complaints about an agency's actions under the Freedom of Information Act 1982 (FOI Act). This is a separate process from asking for an Information Commissioner review following a decision made under the FOI Act. Complaints usually focus on how an agency has handled your FOI request or complied with other obligations under the FOI Act, rather than the decision itself.

In some cases, the Information Commissioner's investigation of a complaint may lead to the agency addressing the issues that you have complained about. In other cases, the Information Commissioner may make suggestions or recommendations that the agency should implement. The Information Commissioner can only make non-binding recommendations as a result of a complaint. You and the agency will be notified of the outcome of the investigation.

FOI complaints to the OAIC must be made in writing. Our preference is for you to use the [online FOI complaint form](#) if at all possible.

Further information about how to make a complaint can be found published on our website: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint/>.