



Decision to decline an extension of time under s 15AC of the *Freedom of Information Act 1982*

Agency	Office of the Commonwealth Ombudsman
FOI applicant	Stephen
Date of decision	26 June 2023
OAIC reference number	RQ23/03465
Agency reference number	FOI-2023-10039

Decision

1. I refer to the application made by the Office of the Commonwealth Ombudsman (the Ombudsman) under s 15AC(4) of the *Freedom of Information Act 1982* (Cth) (FOI Act) for an extension of time to process Stephen's (the FOI applicant) request of 20 March 2023 (the FOI request).
2. I am a delegate of the Information Commissioner. I am authorised to make decisions on applications for further time under s 15AC(5) of the FOI Act.
3. On the basis of the information before me, I have decided to decline the Ombudsman's request for further time to deal with the request. A decision on the FOI applicant's request therefore remains due by 19 April 2023. My reasons are outlined below.

Background

4. On 20 March 2023, the FOI applicant made an FOI request to the Ombudsman.
5. The Ombudsman has claimed that:

The scope of the FOI request includes approximately 15 separate documents which has required and will require consultation with 15 distinct third-parties under s 27A of the FOI Act. As we need to consult with third-parties, the original due date of 19 April 2023 has been extended for 30 days, as per s 15(6) of the FOI Act, until 19 May 2023.

6. However, I note that the Ombudsman did not notify the FOI applicant of a decision on the FOI request by 19 April 2023. Therefore, on 19 April 2023, the Ombudsman was deemed to have made an access refusal decision on the FOI request under s 15AC(3) of the FOI Act.

7. Noting the Ombudsman's claim that it only identified the FOI request on 22 May 2023, it appears that the Ombudsman could not have determined in writing on or before 19 April 2023 that the requirements of ss 26A, 27 or 27A of the FOI Act made it appropriate to extend the processing period by 30 days. Further, after 19 April 2023, it was not open to the Ombudsman to retrospectively extend the processing period referred to in s 15(5)(b) of the FOI Act, which had already ended, by a further period of 30 days under s 15(6) of the FOI Act.
8. As the Ombudsman's purported extension of time under s 15(6) was invalid and in the absence of other valid extensions of time under the FOI Act, the FOI decision was due to be provided to the FOI applicant on 19 April 2023.
9. On 13 June 2023, the Ombudsman applied to the Information Commissioner for further time to process the FOI applicant's request under s 15AC(4) on the basis that the processing period is insufficient to adequately deal with the FOI request.¹ A copy of the Ombudsman's reasons is included at **Attachment A**.
10. On 13 June 2023, the Office of the Australian Information Commissioner (OAIC) consulted with the FOI applicant to seek their views on the Ombudsman's application. The FOI applicant responded to our enquiries and provided comments which I have taken into consideration.

Reasons for decision

11. Subsection 15AC(5) of the FOI Act requires that I consider whether it is appropriate to extend the processing period referred to in s 15(5)(b) of the FOI Act, on the basis that the agency or Minister requires further time to deal with the request.
12. In declining to extend the processing period under s 15AC(5), I have considered the following factors:
 - Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act, to which I must have regard, in particular [3.164] – [3.167]
 - the reasons for delay in making an initial decision
 - the period of time sought, and the total estimated processing time
 - whether discussions with the applicant about the delay and extension of time application have occurred
 - the desirability of the decision being decided by the agency or minister rather than by IC review
 - the FOI applicant's views on this extension of time request.
13. On the information before the OAIC, I am not satisfied that the application to extend the processing period is justified, for the following reasons:
 - The Ombudsman has advised that it failed to identify the FOI request until 22 May 2023 '[d]ue to a high level of FOI requests, OAIC review requests, related litigation, staff leave and turnover ... following a recent auditing process', which appears to be the primary reason for its extension of time application.

¹ The Ombudsman has applied to the Information Commissioner under s 15AC(4) for a further period of '56 days', with a proposed new decision date of 14 July 2023, to deal with the request. As the Ombudsman's purported extension of time under s 15(6) was invalid, the Ombudsman has effectively applied for a further period of 86 days to deal with the request.

However, I am not satisfied that this reason based on the volume of the Ombudsman's aggregated workload of meeting its obligations under the FOI Act justifies further time for the Ombudsman to deal with this particular FOI request. In any case, the Ombudsman's claim that it failed to identify the FOI request until 22 May 2023 appears tenuous because according to publicly available information:

- On 19 April 2023, the FOI applicant made a further FOI request to the OAIC, in its capacity as an agency subject to the FOI Act, for the same documents that he requested in their FOI request of 20 March 2023 to the Ombudsman.
- On 27 April 2023, the OAIC advised the FOI applicant that his FOI request of 19 April 2023 had been transferred to the Ombudsman under s 16(1)(b) of the FOI Act and that '[t]he OAIC has contacted the Ombudsman *which has accepted the transfer of your request*' [emphasis added].
- In their FOI request of 19 April 2023 to the OAIC which had been transferred to the Ombudsman, the FOI applicant expressly referred to and cited their present FOI request of 20 March 2023 to the Ombudsman. Therefore, it appears that by or around 27 April 2023, the Ombudsman reasonably ought to have been aware that it had not responded to or actioned the FOI applicant's FOI request of 20 March 2023.²
- Even after it purportedly identified the FOI request on 22 May 2023, the Ombudsman failed to take any steps to acknowledge receipt of the FOI request as required under s 15(5)(a) of the FOI Act or to communicate with the FOI applicant. It appears that the FOI applicant only became aware that the Ombudsman had received their FOI request when the OAIC consulted with them on 13 June 2023 to seek their views on the Ombudsman's extension of time application.
- The rationale underlying the provision of the Information Commissioner's power under s 15AC(5) of the FOI Act to allow an agency further time to deal with a request is that the extension may avoid the need for an applicant to lodge an application for Information Commissioner review (IC review).³ I note that in this instance, the applicant has advised it already applied for IC review of the deemed access refusal decision made on 19 April 2023 by the Ombudsman. The applicant has also indicated to the OAIC their objection to the requested extension of time on this basis. Therefore, I consider that allowing further time for the Ombudsman to deal with the request may interfere with the progress of the IC review process currently underway.
- The extension of time sought by the Ombudsman appears excessive. Its requested extension of a further period of 86 days, if granted, would yield a

² Stephen, 'FOI requests the subject of applications for IC review - Commonwealth Ombudsman', *Right To Know*, <https://www.righttoknow.org.au/request/foi_requests_the_subject_of_appl_2>.

³ Revised Explanatory Memorandum, Freedom of Information Amendment (Reform) Bill 2010 (Cth) 56.

total processing period of 116 days, which would be almost quadruple the processing period of 30 days referred to in s 15(5)(b) of the FOI Act.

- These factors outlined above outweigh the reasons provided in the Ombudsman's application about the scope and complexity of the FOI request (which I have considered). Therefore, I have decided not to allow further time for the Ombudsman to deal with the request under s 15AC(5) of the FOI Act.

14. The effect of this decision is that the agency was deemed to have made an access refusal decision on the applicant's request on 19 April 2023.
15. I note that the *Freedom of Information (Charges) Regulations 2019* provides if an applicant is not notified of a decision on a request within the statutory time limit the agency or Minister cannot impose a charge for providing access, even if the applicant was earlier notified that a charge was payable (regs 7(2), (3)). This extension under s 15AC of the FOI Act means that charges cannot be imposed and therefore any deposit the applicant has paid should be refunded.
16. This extension of time matter is now closed. Your review rights are set out below.
17. If you would like to discuss this matter, please contact our office on 1300 363 992 or by email at FOIDR@oaic.gov.au, quoting reference number RQ23/03465.

Bernie L

Bernie Lai
Assistant Director
Freedom of Information
Office of the Australian Information Commissioner

26 June 2023

The agency's reasons for requesting an extension of time, as included in the extension of time request form.

Did you approach the applicant for an extension of time under s 15AA

Yes	No
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Why did you decide not to approach the applicant for an extension of time under s 15AA *

Due to a high level of FOI requests, OAIC review requests, related litigation, staff leave and turnover we did not identify this FOI request until after it was deemed, following a recent auditing process.

Has the processing period been extended as a result of other statutory provisions, or are you considering such an extension? *
(For example, through consultation provisions or provisions about charges that impact on the statutory due date)

Yes	No
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Please list these and how they have impacted on the due date for the FOI application *

The scope of the FOI request includes approximately 15 separate documents which has required and will require consultation with 15 distinct third-parties under s 27A of the FOI Act. As we need to consult with third-parties, the original due date of 19 April 2023 has been extended for 30 days, as per s 15(6) of the FOI Act, until 19 May 2023.

Has the applicant raised any concerns about delays? *

If yes, please attach a copy of the correspondence received from the applicant. (see below for attaching files).

Yes	No
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Please describe the applicant's concerns. *

Applicant was concerned with the lack of response to their FOI request. See attachment

Please provide a timeline setting out the work already completed in order to process this request. Where an extension of time has previously been granted, describe the work that was undertaken during that extended period. *

Our Office recently identified this request due to the reasons provided above on 22 May 2023. Since then we retrieved the documents within scope (which took approximately 10 hours), begun assessing the documents

What work is required to finalise the request? *

Our Office needs to finalise the third-party consultation requests regarding personal privacy and internal consultations regarding matter relating to potentially ongoing Public Interest Disclosures (PID) and other sensitive operational material. Once we have received our consultation responses from the various bodies we will need to redact/process the documents and prepare decision letter to applicant.

Please describe the scope and complexity of the request. Please provide the number of documents at issue and the number of folios, as well as any complexity in the nature of those document *

The applicant has requested 29 separate documents - original FOI requests we have received that are currently subject to IC Review. These documents contain the personal information of approximately 15-17 third parties (not including staff details) which requires consultation with each party, as well as potentially containing information relating to ongoing PID investigations and litigation.

Do other agencies or parties have an interest in the request? *

N/A

Please describe the measures that would be taken to ensure a decision is made within the period of the requested extension and to keep the applicant informed of the progress of the request *

This matter is currently being prepared by a Legal Officer, overseen by an EL1 Senior Legal Officer, and is being treated as a matter of utmost urgency. Our Office acknowledges our communication with the applicant could have been better

Review rights

Review by the Administrative Appeals Tribunal

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 and Family Court of Australia 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 is available on our website: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint/>.

Making a complaint to the Commonwealth Ombudsman

If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman). The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated unfairly.

If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the Commonwealth Ombudsman's website at <http://www.ombudsman.gov.au>.