



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

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| Agency | Department of Defence |
| FOI applicant | James Smith |
| Date of decision | 15 February 2024 |
| OAIC reference number | RQ24/00638 |
| Agency reference number | FOI 578/23/24 |

Decision

1. On 14 February 2024, Department of Defence (the Department) applied to the Information Commissioner under s 15AC(4) of the *Freedom of Information Act 1982* (Cth) (FOI Act) for an extension of 44 days to 8 March 2024 to process James Smith's (the FOI applicant) request of 22 December 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 Department's request for further time to deal with the request. A decision on the FOI applicant's request therefore remains due by 22 December 2023. My reasons are outlined below.

Background

4. On 22 December 2023, the FOI applicant made an FOI request to the Department. The FOI decision was due to be provided to the FOI applicant on 25 January 2024.
5. On 14 February 2024, the Department 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. A copy of the Department's reasons are included at Attachment A.

Reasons for decision

6. Subsection 15AC(5) of the FOI Act provides that I may allow further time that I consider appropriate for an agency or Minister to deal with the request.
7. In declining this application for further time 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
8. On the information before the OAIC, I am not satisfied that the application for further time is justified, for the following reasons:
- the applicant has already exercised their Information Commissioner review (IC review) rights in relation to the agency's deemed access refusal decision and an IC review is now under consideration by this office. I consider that allowing further time for the agency to deal with the request will interfere with the IC review process currently underway.
9. The effect of this decision is that the agency remains deemed to have made an access refusal decision on the applicant's request on 14 February 2024.
10. 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.
11. This extension of time matter is now closed. Your review rights are set out below.
12. 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 RQ24/00638.

Yours sincerely,



Hannah Holswilder
Director
Freedom of Information Branch
Office of the Australian Information Commissioner

15 February 2024

Attachment A

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. *

The applicant made their FOI request on 22 December 2023, the last day before the holiday period shutdown. Tasking instructions were sent promptly to the line area on 3 January 2024.

Advice was returned promptly from the line area regarding the volume of material within scope and, on 5 January 2024, a Notice of Practical Refusal - Section 24AA was sent to the applicant advising that the Afghanistan Inquiry Implementation Oversight Panel had communicated directly with accountable officers across Defence, approximating to at least 50 individuals. In order to locate all documents relevant to the scope of the request, searches of the email inboxes of more than 50 Defence personnel would have been required to be undertaken and using a conservative estimate of 1 hour to search each inbox, it would have taken 50 hours to conduct the search and retrieval phase of the process alone. The applicant was also advised that, as they had requested access to all correspondence, the subject matter could range from routine or logistical to more substantive matters and had the potential to incorporate potentially thousands of documents sent by Defence to the Afghanistan Inquiry Implementation Oversight Panel since its establishment.

The applicant was invited to revise their request by 19 January 2024. The applicant responded on 8 January and on 9 January the narrowed scope was communicated to the line area.

On 2 February, the line area advised that there was still a high volume of correspondence in scope of the request, and the line area was still keen to assist the applicant. The line area is currently sorting through the material as a priority, however this process has been timely due to the volume.

The Reduced Activity Period for military personnel extends to 14-16 January, this being valuable family time for staff in such roles and, in the pertinent area, the majority of staff had not returned until the end of January. With further extensive searches and assessment to be made, they had only 3 to 4 working days to finalise it before the due date.

With regard to the legislative timeframe, we effectively lost processing capacity during the entire RAP period, but still managed to run the matter fairly effectively. As we are still focused on assisting the applicant by managing the request to finality, and given the number of requests from this applicant we are managing, which are adding to our caseload, we seek OAIC approval of our request to have the matter brought back into time, which will also have the effect of preserving the applicant's internal review rights.

We also note that a section 54V notice was issued in this matter on 6 February 2024, which has been responded to. However, we seek this notice to finalise processing this request.

Thank you for considering our request.

What work is required to finalise the request? *

In order to finalise the request, a defence decision maker must complete their review of all documents falling within the scope of the request. Following this, the decision maker must make a decision on each document, apply any required redactions, and draft a statement of reasons and document schedule accordingly.

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 *

This request is considered to be complex due to the nature of the request. The request seeks access to email correspondence (including attachments) between the Department of Defence, ADF or Minister for Defence with three members of the Afghanistan Inquiry Implementation Oversight Panel.

The Panel provides independent oversight and assurance of Defence's response to the Inquiry and therefore careful consideration must be given to the disclosure of any material.

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

The matter is of interest to the Australian public and as such, interested parties include but are not limited to, relevant Parliamentarians and the media.

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 *

To ensure this FOI request is completed within the requested period, relevant personnel within Defence will work together to ensure resources are dedicated to make an informed and robust decision.

Defence will strive to release the Decision as soon as possible.

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>.