



Australian Government

Office of the Australian Information Commissioner

Our reference: RQ18/02960

Julie

By email: foi+request-4874-0db9b8ba@righttoknow.org.au

Your formal complaint of 13 October 2018

Dear Julie

I refer to your email of 13 October 2018 regarding the decision of Office of the Australian Information Commissioner (OAIC) dated 10 October 2018 to grant the Department of Veterans' Affairs (the Department) a 14 day extension of time (EOT decision) under s 15AB of the *Freedom of Information Act 1982* (the FOI Act) to process your FOI request.

I am Acting Director at the OAIC. I am responsible for overseeing the processing of extension of time applications made to the OAIC under the FOI Act. I will respond to the issues you have raised in your formal complaint.

In responding to your complaint, I have reviewed the OAIC's extension of time file RQ18/02960 and spoken with Mr Carl English, the OAIC officer who made the EOT decision in this matter.

Your complaint

In your complaint, you raise concerns that, in making the EOT decision in this matter, the OAIC has not adhered to the Freedom of information regulatory action policy (Regulatory Action Policy) In particular you state that:

...

When taking FOI regulatory action, the Information Commissioner will act consistently with general principles of good decision making, as explained in the Best Practice Guides published by the Administrative Review Council. ^^^In particular, the Information Commissioner will act fairly and in accordance with principles of natural justice (or procedural fairness).^^^ [no mention that there is a cut off or derogation based on the amount of time involved]

Yet again, the evidence is you Carl English have not adhered to the OAIC's own directives, guidelines and policies, have been opaque and unaccountable, and have acted outside your delegated legislative powers.

Background

On 11 September 2018, you made a request to the Department under the FOI Act for a '[c]opy of the Monthly R&C metrics reports for July 2017 thru to June 2018'.

On or about 27 September 2018, the Department sought your agreement for an extension of time until 10 November 2018 to finalise your request under s 15AA of the FOI Act 'due to a large competing caseload'.

On the same date, you requested further information from the Department to enable you to assess the extension of time request.

On 3 October 2018, the Department responded to your request for further information and advised that it was waiting on the results of searches. The Department indicated that it was unable to advise at that stage how voluminous your request may be and when it was likely to be finalised.

On the same date, you raised concerns about the Department's processing of your request and requested an update on the progress by 9 October 2018 to enable you to consider the extension of time request.

On 10 October 2018, the Department applied for a 14 day extension to the 30 day processing time to make a decision on your FOI request of 11 September 2018.

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

On 10 October 2018, Mr English notified you of the decision to grant the Department an extension of time to 25 October 2018 under s 15AB(2) of the FOI Act. In making the EOT decision, Mr English noted that by granting the request it was anticipated that the Department would provide a well-reasoned and better managed decision.

In response to the decision notification you requested further information from Mr English. You said:

...

If you could explain how 1 copy of the 12 pre-existing summary reports sought (each of only a few pages) is complex and/or voluminous, I would be grateful.

This is just for copies of summary monthly reports that DVA produces for its senior management, for one financial year only. As I understand it, each report is less than 5 pages, meaning a maximum of 60 pages to be reviewed, for documents created within the last financial year.

There is no evidence that any complexity or voluminous relates to the pre-existing documents in scope of this FOI. [sic]

On the same date you, you raised some concerns with the process and said:

I note your template extension approval letter, granted despite not having giving me the opportunity to be heard before you made your decision.

I am concerned that despite no complexity or voluminous nature to this FOI, an extension has been granted instead because DVA had 'a busy caseload' which is not a s 15AB ground.

This appears to therefore be an abuse of s 15AB.

A scan of Right to Know FOIs made to DVA for which you have subsequently and always approved the granting of a s 15AB extension to, demonstrates such grants of an extension of time has not delivered a well-reasoned or better managed decision by DVA, but resulted in further delays or refusals or late notice charges.

Such a fact would have been a relevant consideration you should have taken into account before such a decision was made. Your anticipation therefore seems deeply flawed, and without reasonable basis, based on the evidence.

I note someone else here on Right to Know requested and received the s 15AB application the OAIC processed. I would like that to, to better understand what looks to be an improper decision. [sic]

In response to your enquiry, Mr English provided you with a copy of the Department's extension of time application. Mr English also provided an explanation stating:

...

The OAIC will usually only consult an applicant if the agency has asked for a particularly long extension, or if it has already applied to the OAIC for other extensions in relation to your request.

Although, I appreciate you would have liked to have been consulted, we decided that it was unnecessary in the circumstances because 14 days was not a particularly long extension and because the Department had not previously sought an extension of time from the OAIC.

On 11 October 2018 and in response to Mr English's explanation you said:

...

I write further in regards to your statement in your response of 11 October 2018 which stated you were entitled to ignore natural justice principles (which are common law) because the improper extension you granted the DVA under s 15AB for a non-s 15AB ground was 'not particularly long.

The OAIC's Information Commissioner has published her Freedom of information regulatory action policy (Feb 2018) on the OAIC website ...

Yet again, the evidence is you Carl English have not adhered to the OAIC's own directives, guidelines and policies, have been opaque and unaccountable, and have acted outside your delegated legislative powers.

This is to be regarded as a formal complaint about your decision and I want it to be dealt with by a senior OAIC officer, as a formal complaint about your conduct and your decision, to avoid all doubt.

Consideration of your complaint

In considering your complaint, I have:

- considered the extension of time request by the Department
- reviewed Mr English's correspondence with the Department in relation to their request
- considered the decision made by Mr English to grant the extension of time
- reviewed your emails of 10 and 11 October 2018 to Mr English
- reviewed the responses to your enquiries and
- considered the OAIC's [service charter](#).

You have submitted that you were not provided the opportunity to be heard prior to the EOT decision being made by the OAIC.

Paragraphs [3.147] – [3.148] of the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (FOI Guidelines) provide:

An agency or minister applying to the Information Commissioner for an extension of time under s 15AB should explain why the applicant's FOI request is complex or voluminous, including details about:

- the scope of the request and the range of documents covered
- work already undertaken on the request
- any consultation with the applicant concerning length of time
- whether other agencies or parties have an interest in the request
- measures to be taken by the agency or minister to ensure a decision is made within the extended time period and to keep the applicant informed about progress.

Where an agency or minister intends on extending the timeframe for processing the applicant's FOI request under s 15AB, the application to the Information Commissioner must be made before the expiration of the processing period referred to in s 15(5)(b).

The OAIC's FOI fact sheet 16 addressing extensions of time requests (EOT Fact Sheet) provides information and guidance on extensions for complex or voluminous requests. The fact sheet states:

...

If your request is large or complex, the agency can apply to the OAIC for an extension. The agency must explain why the request is complex or voluminous and provide details about the work already done on the request and the work still to be completed.

The OAIC will carefully consider the agency's reasoning before granting an extension. The OAIC will also take into account whether you have already agreed to an extension (see 2 above) and may seek your views about the agency's extension request if the extension request is for a particularly long period.

...

The OAIC will usually consult you if the agency has asked for a particularly long extension, or if it has already applied for other extensions in relation to your request. The OAIC will take your views into account, but the final decision rests with the OAIC. [emphasis added]

In its extension of time application, the Department adhered to the FOI Guidelines by providing details about the FOI request. In particular the Department said:

...

We sought a 15AA with the applicant as we had not received the documents from the business area despite follow up. Extension wasn't agreed to. We sent further follow ups to the relevant business area and we unfortunately were only given the documents in scope last night. Upon review this morning it is apparent complexity arises in that the information is gathered for the purpose of assisting with the ANAO reporting functions and we had not been in a position to consult with the ANAO. Until this takes place we will not be in a position to issue a decision. I understand this consult will commence this week and I have asked for a reply to be provided within a week to allow us time to consider, prep the documents if needed and to finalise the decision. If a response from the ANAO takes place sooner it will be our intention to issue a decision earlier. A copy of the FOI request will be attached. If the OAIC feels further information is required please let us know.

I have reviewed the EOT decision in this matter and am satisfied that the decision was appropriate in the circumstances. I am satisfied that, on the information before the OAIC, the Department provided sufficient reasons to support their extension of time application and that further time was required to process your FOI request due to its complexity. I am also satisfied that the Department has already undertaken work on your request, there were delays in documents within the scope of your request being provided by the relevant business area and that there may be a need to consult with the Australian National Audit Office (ANAO) with respect to your request given that the information sought under your FOI request was produced in response to the ANAO report entitled *Efficiency of Veterans Service Delivery by the Department of Veterans' Affairs*.

On the information before the OIAC, I am satisfied that complexity arises in the processing of your FOI request due to delays in the provision of documents by the relevant business area and the likely requirement to consult with the ANAO.

As regards your allegations that Mr English has acted outside his delegated legislative authority, there is no information before the OAIC to support this assertion.

Section 25 of the *Australian Information Commissioner Act 2010* provides that the Information Commissioner may delegate her functions or powers to members of staff of the OAIC, other than those functions or powers specifically referred to in s 25. [The Instrument setting out the delegation of FOI powers by the Australian Information Commissioner](#) (the Instrument) can be found on the [OAIC's website](#). I have reviewed the Instrument and I am satisfied that Mr English has the required authority to make decisions under section 15AB of the FOI and that he did not act outside of that authority.

I have reviewed the EOT decision and subsequent correspondence in this matter as set out above. In my view, there is no information before the OAIC to support your allegations that Mr English made a statement to the effect that he was 'entitled to ignore natural justice principles'. The rules of natural justice are flexible, requiring fairness in all the circumstances, including the nature of the power exercised and the statutory provisions governing its exercise.¹ In *Kioa v West* [1985] HCA 81 (*Kioa*), Chief Justice Gibbs said at [33] – [34]:

... the expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of a particular case...

The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?²

I am satisfied that, on the information before the OAIC, the EOT decision in this matter has been made in accordance with the principles stated in *Kioa*. I am satisfied that the EOT decision was made a manner that was fair and appropriate, having regard to the particular circumstances of the request, and following consideration of the objects of the FOI Act, the reasons provided by the Department, the relevant section of the Regulatory Action Policy and FOI Guidelines and the EOT Fact Sheet.

While you may be dissatisfied with the manner in which the extension of time application was determined in this matter, I am satisfied that the EOT decision was made in accordance with the FOI Act, the FOI Guidelines and the Regulatory Action Policy.

I invite you to contact me should you have any questions about this letter.

¹ *Kioa v West* [1985] HCA 81 per Gibbs CJ at [11].

² See also *Kioa v West* [1985] HCA 81 per Wilson J at [21].

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>.

Yours sincerely



Allan Teves

Acting Director
Freedom of Information

6 November 2018