



Our reference: RQ18/03741

Julie

By email: foi+request-5111-31c4a5f4@righttoknow.org.au

Your formal complaint of 20 December 2018

I refer to your email of 20 December 2018 regarding the decision of the Office of the Australian Information Commissioner (OAIC) to grant the Department of Veterans' Affairs (the Department) a 23 day extension of time (EOT decision) under s 15AB of the *Freedom of Information Act 1982* (the FOI Act) to process your FOI request. Please accept my apologies for the delay in responding to your email.

I am the Director of the Intake and Early Resolution, Freedom of information team 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 RQ18/03741 and spoken with Ms Irene Nicolaou, the OAIC officer who made the EOT decision in this matter.

Your complaint

In your complaint, you raise concerns regarding the OAIC's EOT decision in this matter. You state:

... your decision to rapidly grant a s 15AB extension for this FOI, without consultation with me, contrary to your own guidelines and the the common law principles of natural justice, when the Department has previously breached such s 15AB extensions and has multiple deemed refusals outstanding, is appalling and lacks rationally.

At worse, it displays bad faith, at best, a callous indifference.

I would also point out that s 15AB only can be granted if the FOI is voluminous and complex, and cannot be abused under other grounds, such as Departmental incompetence or malice, alleged need to consult undefined others or other claimed grounds.

I request that copy of the Department's s 15AB application be provided to me, and I formally complain about your decision, and given notice that I will seek to have it formally reviewed as it is clear the s 15AB of the Act is being abused and used contrary to the Act. [sic]

Background

On 15 November 2018, you made a request to the Department under the FOI Act for a copy of briefs referred to and quoted from by Senior Executives of the Department during their appearance at Senate Estimate hearings.

On 17 December 2018, the Department issued a request consultation notice under s 24AB of the FOI Act on the basis that a practical refusal reason exists under s 24AA(1)(b) of the FOI Act in that your FOI request does not provide such information as is reasonably necessary to enable the Department to identify the documents you are requesting. The Department also noted that to the extent that some documents can be identified from your request, processing your request would substantially and unreasonably divert the Department from its other operations, thereby resulting in a further practical refusal reason under s 24AA(1)(a)(i) of the FOI Act. The Department requested that you respond to the request consultation notice by 31 December 2018.

On 18 December 2018, the Department advised you that it would be seeking an extension of time until 16 January 2019 from the OAIC to make a decision on your request under s 15AB of the FOI Act. The Department advised that the additional time was required to enable the Department to review and examine the 345 pages identified as possibly falling within the scope of your request and to undertake any necessary third-party consultations. The Department also noted that it was awaiting your response to its request consultation notice of 17 December 2018 and that further complexities may arise in that the Department's staff will not be present during the Department's holiday shutdown period of 25 December 2018 to 1 January 2019.

On 18 December 2018, the Department applied for a 30 day extension to the 30 day processing time to make a decision on your FOI request of 15 November 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.

In its application, the Department said:

This request is considered complex and voluminous because the applicant is requesting copies of senate estimate brief documents. Due to the broad nature of this request, the Department is currently undertaking a section 24AB consultation process with the applicant to clarify precisely which documents are being sought (e.g just the main briefs or surrounding materials, which could include for example, talking point packages prepared by all sections in the Department).

To date, the Department has so far received the formal briefing pack which includes 51 relevant files, containing 80 documents (as well as their attachments); which currently amount to 345 pages. It is possible more documents need to be sourced and assessed pending the response to the consultation process.

To finalise this request, the Department will need to review and examine the 345 pages for decision-making and due to the complexities involved, may need to consult with third parties

and cross-reference with information that may already be publicly available. This is expected to be a time consuming task but has value in that we want to ensure we are able to release appropriate material from these documents. It is also likely (pending the outcome of the consultation) that we will need to source further documents.

We have notified the applicant of our intention to seek an extension with the OAIC. Our experience is that this applicant is unlikely to agree to a 15AA extension and given the brief time available before shut down and reduced staffing available during and just after shut down, we would like to seek an appropriate extension beforehand.

On 20 December 2018, Mr Nicolaou notified you of her decision to grant the Department an extension of time until 9 January 2019 under s 15AB(2) of the FOI Act. In making the EOT decision, Ms Nicolaou noted that by granting the request it was anticipated that the Department will be better placed to finalise the consultation process and provide a well-reasoned and better managed decision.

On the same date, you made a complaint to the OAIC about Ms Nicolaou's EOT decision and requested that you be provided a copy of the Department's s 15AB application.

Consideration of your complaint

In considering your complaint, I have had regard to:

- the Department's extension of time application dated 18 December 2018
- Ms Nicolaou's decision to grant the Department's extension of time application
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (FOI Guidelines)
- relevant sections of the FOI Act
- the OAIC's [service charter](#).

You have submitted that Ms Nicolaou's decision was made without you being consulted, contrary to the OAIC's guidelines and the common law principles of natural justice.

Paragraphs [3.147] – [3.148] of the 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 you're your views into account, but the final decision rests with the OAIC. [emphasis added]

I am satisfied that the Department adhered to the above guidance issued by the OAIC by providing sufficient details about your request and why the Department considered the request to be complex or voluminous.

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 complex and voluminous nature, both in terms of the number of documents identified as falling within the scope of the request and in relation to further consultation being undertaken with you and potentially required to be undertaken with third parties.

You also contend that Ms Nicolaou's decision was made contrary to the common law principles of natural justice. In my view, there is no information before the OAIC to support such a contention. 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 in 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, 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 and the FOI Guidelines. Your review rights are set out below.

Finally, I attach a copy of the Department’s extension of time request dated 18 December 2018 as requested.

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

Yours sincerely



Allan Teves
Director
Intake and Early Resolution, Freedom of Information

31 January 2019

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].

Review rights

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>.

Accessing your information

If you would like access to the information that we hold about you, please contact FOIDR@oaic.gov.au. More information is available on the **Access our information**³ page on our website.

³ www.oaic.gov.au/about-us/access-our-information/.