



Our reference: RQ19/03622  
Agency reference: LEX 393

**Mr Edward Kerrigan**

Sent by email: [foi+request-5587-2c630c60@righttoknow.org.au](mailto:foi+request-5587-2c630c60@righttoknow.org.au)

**Extension of time under s 15AB**

Dear Mr Kerrigan

On 20 December 2019, the Department of Foreign Affairs and Trade (the Department) applied for further time to make a decision on your FOI request of 20 August 2019 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

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

On 16 September 2019, the Department obtained your agreement under s 15AA of the FOI Act for a 27-day extension of time to 16 October 2019.

The Department advised that the statutory timeframe had been suspended under s 31 of the FOI Act.

On 21 October 2019, the Department also advised that the statutory timeframe had already been extended to allow for consultation in accordance with s 15(6) of the FOI Act. This extended the decision period to 20 November 2019.

The Office of the Australian Information Commissioner (the OAIC) has previously granted the Department an extension of time under s 15AB(2) of the FOI Act (OAIC reference: RQ19/03020). This extended the decision period to 20 December 2019.

**Contact with you**

On 23 December 2019, I wrote to you to seek your view on the Department's application. You responded to my inquiries and provided comments which I have taken into consideration, including that:

It has now been over four months since I made my initial request. DFAT has already been granted two extensions of time (one by me and one by the OAIC) and made use of other time extensions available under the FOI legislation. In the circumstances, I think it is reasonable to expect DFAT to make a decision before the extended due date of 20 December and I oppose a further extension of time.

With respect to the points raised to support the request for a further extension:

- The Christmas shutdown falls after the due date of 20 December, so cannot be a basis for requiring an extension of time beyond that date;
- My request makes no reference to DFAT's position on employee superannuation matters. As such, DFAT's apparent assessment that my request 'engages issues related to the Department's position on the employee superannuation matters' is irrelevant - except to the extent that it suggests that matters extraneous to the content of my request appear to be being taken into account in its processing. These extraneous matters also appear to inform, at least in part, DFAT's assessment that my request is complex.
- DFAT's correspondence makes clear the Department had identified the documents relevant to my request by 21 October. It has had ample time to review them to ensure sensitive personal information is deleted.

## 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 considered Department's application and have decided to decline an extension. In coming to this decision, I have considered the following factors:

- the request is highly complex and engages issues related to the Department's position on the employee superannuation matters. The Department's decision maker is reviewing the matter which necessitates careful consideration of the material captured by this request. You have submitted that this is irrelevant to your FOI request
- the documents captured by this request contain sensitive personal information. This required a line by line review to ensure that material is not inappropriately released contrary to the Department's privacy obligations, and
- the Department has a shutdown period between 23 December 2019 and 2 January 2020. Due to the significant loss of working days over the forthcoming Christmas/New Year period the Department will not be in a position to deliver outcome due to lack of staffing resources.

The Department has further advised that since its earlier request under s 15AB of the FOI Act to the OAIC (OAIC reference: RQ19/03020), the Department:

- has conducted third party consultation which has been time consuming. After several reminders, the Department received a consultation response from one of the third parties
- requires further time to consider the consultation response and the relevant material, and
- the decision pack has been prepared and the decision maker is currently undertaking final review of the material.

I have also considered the FOI Guidelines,<sup>1</sup> in particular [3.149] which states:

Staff absences due to public holidays or agency shutdown periods may be relevant to whether an extension should be granted, if the particular staff members have skills or knowledge that may be required to process the request in the normal statutory timeframe. On the other hand, lack of staff because of inadequate allocation of resources to FOI processing or failure to assign additional temporary resources to FOI processing at peak times will not normally justify an extension in the absence of other extenuating circumstances.

The effect of this decision is that Department is deemed to have refused your FOI request. If the Department has not issued you with its decision, you may wish to seek Information Commissioner review (IC review) of the deemed decision. Further information on [applying for IC review](#) is available on the OAIC [website](#).

I note that the *Freedom of Information (Charges) Regulations 1982* provides if an applicant is not notified of a decision on a request within the statutory time limit (including any extension of time), 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)).

## Contact

If you have any questions about this email, please contact me on (02) 9284 9686 or via email [adie.chang@oaic.gov.au](mailto:adie.chang@oaic.gov.au). In all correspondence please include OAIC reference number at the top of this letter.

Yours sincerely



### **Adie Chang**

Review and Investigation Adviser (Legal)  
Freedom of Information

23 December 2019

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<sup>1</sup> The Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act which can be found at: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>.

## 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/>.