



Australian Government

Office of the Australian Information Commissioner

Our reference: RQ19/03665

Agency reference: LEX393

Mr Edward Kerrigan

Sent by email: foi+request-5587-2c630c60@righttoknow.org.au

Extension of time under s 15AC

Dear Mr Kerrigan

On 24 December 2019, the Department of Foreign Affairs and Trade (the Department) advised this office that it had not made a decision on your FOI request of 20 August 2019 within the statutory period provided by the *Freedom of Information Act 1982* (Cth) (the FOI Act). Consequently, the FOI Act deems that the Department has refused your request.

However, s 15AC of the FOI Act allows the Information Commissioner to extend the processing time for an FOI request where the initial decision period has ended and the agency or Minister has not provided the applicant with notice of a decision. The Department has applied for further time to finalise your request.

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.

On 20 December 2019, the Department sought a further extension of time under s 15AB(2) of the FOI Act (OAIC reference: RQ19/03622). On 23 December 2019, the Information Commissioner's delegate declined the Department's extension of time application.

Contact with you

On 24 December 2019, I wrote to you to seek your view on the Department's application. You responded to my inquiries and provided comments that I have taken into consideration.

Decision

As a delegate of the Information Commissioner, I am authorised to make decisions on applications for extensions of time under s 15AC(5) of the FOI Act.

I have considered Department's application, and have decided to decline an extension. My reasons follow:

- on 20 August 2019, the FOI request was received by the Department
- the Department obtained agreement under s 15AA of the FOI Act for an extension of time from Mr Kerrigan to 16 October 2019
- on 4 October 2019, the Department issued Mr Kerrigan with a charges letter
- on 9 October 2019, the Department processed the charges paid by Mr Kerrigan
- on 21 October 2019, the Department notified Mr Kerrigan of third party consultation under s 27A of the FOI Act
- on 18 November 2019, the Department sought a 15AB extension of time of 30 days, from the OAIC, until 20 December 2019
- on 26 November 2019, the OAIC granted the extension of time until 20 December 2019
- on 20 December 2019, the Department sought a further extension of time under s 15AB of the FOI Act until 9 January 2020
- on 23 December 2019, the OAIC declined the Department's extension of time application
- due to an administrative oversight by the Department, the applicant's payment of FOI deposit was not duly processed. As a result the FOI clock was inadvertently on hold for additional 12 days
- the Department has advised that it will refund the charge to you
- the documents contain material of a sensitive nature which require careful consideration and analysis
- the Director FPL is reviewing the documents in scope and assessing what material can be released to you
- the decision-maker requires this additional time to finalise his decision and prepare a decision letter to you
- the Department submits that 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. This has resulted in the Department requesting additional 10 days to what it had originally proposed in its s15AB extension request, and
- the extension will allow the Department's FOI Section additional time to prepare the documents for release to you.

The effect of this decision is that the Department is deemed to have refused your FOI request. You may wish to seek Information Commissioner review of the deemed decision.

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 (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)). This extension under s 15AC of the FOI Act does not mean that charges can be reimposed and any deposit you have paid should be refunded. However, the Department had advised that it will refund the charge to you.

Contact

If you have any questions about this email, please contact me on (02) 9284 9721 or via email shelley.napper@oaic.gov.au. In all correspondence please include OAIC reference number at the top of this letter.

Yours sincerely



Shelley Napper

Assistant Director (A/g)
Freedom of Information

6 January 2020

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/>.