



Australian Government

Office of the Australian Information Commissioner

Our reference: RQ21/00119

Agency reference: 39750

**Julie**

By email: [foi+request-6869-08711b5d@righttoknow.org.au](mailto:foi+request-6869-08711b5d@righttoknow.org.au)

## Extension of time under s 54D

Dear Julie

On 13 January 2021, the Department of Veterans' Affairs (the Department) advised the Office of the Australia Information Commissioner (the OAIC) that it had not made a decision on your internal review request of 8 December 2020 within the statutory period provided by the *Freedom of Information Act 1982* (Cth) (the FOI Act). Consequently, s 54D(2) of the FOI Act deems the Department to have affirmed its original decision.

However s 54D(4) of the FOI Act allows the Information Commissioner to extend the processing time for an internal review 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 under s 54D(3) of the FOI Act for further time to make a decision on your internal review request.

## Contact with you

On 13 January 2021, I wrote to you to seek your view on the Department's application.

In summary, your response of 14 January 2021 raised the following:

- the operation of s 54D of the FOI Act
- the benefit of a s 54D extension of time being granted is to an agency only
- that the only reason provided by the Department in applying for this extension of time is that 'it has been unable to finalise your request within the initial decision period' and
- that the OAIC should '... impose a condition on any granted EOT given to the Department of Veterans' Affairs in this matter, that it must provide the further documents it claims are being considered...'

My consideration of the issues you have raised follows.

### *Operation of s 54D of the FOI Act*

Section 54D(1) of the FOI Act sets out the three requirements for s 54D of the FOI Act to apply. These are:

- an application for internal review has been made to an agency (s 54D(1)(a))
- the initial decision period of 30 days since the application was received by the agency has ended (s 54D(1)(b)), and
- notice of a decision has not been received by the internal review applicant (s 54D(1)(c)).

As such, it is only open to an agency to apply for an extension of time under s 54D(3) of the FOI Act if the processing period prescribed in s 54D(1)(b) has ended.

You confirmed in your email of 14 January 2021 that the Department was due to make an internal review decision on 7 January 2021, but the Department did not apply for an extension of time under s 54D(3) until 13 January 2021. Therefore, it appears that the requirements for an extension of time under s 54D were met.

### *Processing of extension of time applications under s 54D of the FOI Act*

OAIC decision makers consider each extension of time application on a case-by-case basis.

An extension of time decision is based on all the information before the OAIC at that time. The decision maker may grant an extension of time if they consider it appropriate in the circumstances, rather than in consideration of whether granting the extension is of benefit to one party or another.

In this matter, because the processing time had ended and the Department had not made an internal review decision, the principal officer of the agency was taken to have affirmed the original decision (under s 54D(2) of the FOI Act). Because the Department was deemed to have affirmed the original decision when it failed to make a decision within the statutory period, there was no legal mechanism for the Department to make an FOI decision in relation to the additional documents it identified during the further searches conducted as part of the internal review.

By granting an extension of time in these circumstances, the Department is able to make an internal review decision that includes consideration of the additional documents identified in further searches conducted, as the deemed affirmation is taken never to have applied (s 54D(6)).

### *Reasons given by the Department*

Your response of 14 January 2021 states:

You state the Department of Veterans' Affairs has relied upon the sole ground of its application being "because it has been unable to finalise your request within the initial decision period", however you have provided no evidence or justification or even claim as to why it "has been unable to finalise" the internal review in a period that other Departments routinely do.

This portion of the consultation email is included to address the requirements of ss 54D(1)(b) and 54D(1)(c) of the FOI Act, that is, that the processing period has ended and a decision has not been provided.

The reasons for the Department applying for an extension of time are included further down in the consultation correspondence. In this case, the Department requested further time to allow for consideration of additional documents, located as a result of further searches undertaken during the internal review. I note this is considered further in the below decision.

### *Imposing a condition*

Section 54D(5) of the FOI Act allows the Information Commissioner (or delegate) to impose any condition that is considered appropriate.

The FOI Guidelines [3.159] provides examples of the types of conditions that may be imposed as follows:

In allowing further time the Information Commissioner may impose conditions (ss 15AC(6), 51DA(5) and 54D(5)). For example, the Commissioner may require the decision maker to:

- notify the applicant of the further time allowed
- provide regular progress reports to the Information Commissioner and the applicant
- provide a copy of the notice of decision when made to the Information Commissioner.

You have request that the extension of time decision maker:

... a condition on any granted EOT given to the Department of Veterans' Affairs in this matter, that it must provide the further documents it claims are being considered (otherwise it'll be just another empty claim) - even if there was no real reason as to why these activities could not have been completed within the original decision period (as section 54C(3) of the Freedom of Information Act 1982 (Cth) reasonably expects).

At this time, the OAIC is only considering the Department's extension of time application. There is no legislative provision under the FOI Act allowing the Information Commissioner to request the production of documents from the Department as you have suggested. As such, it would not be appropriate to impose a condition on an agency to produce a document to the Commissioner in relation to an extension of time application.

## Decision

As a delegate of the Information Commissioner, I am authorised to make decisions on applications for extensions of time under s 54D of the FOI Act.

I have decided to grant the Department further time of 21 days to **27 January 2021** to process your request for an internal review. My reasons follow:

- in response to your application for internal review, the Department undertook further searches
- in undertaking those further searches, the Department identified additional documents which require consideration, and
- the Department has contacted you to apologise for not having provided a decision in relation to this internal review and to confirm the Department is continuing to process your internal review request.

I have considered the condition you suggested. However, as discussed above, I do not consider it appropriate to impose a condition upon the Department.

I further note your objections to this extension of time application. Based on the information currently before the OAIC, I am satisfied that an extension of 21 days is appropriate in these circumstances. In particular, this will allow the Department time to consider the additional documents identified as potentially relevant to the scope of your request.

This extension of time under s 54D of the FOI Act means that the deemed affirmation of the original decision is taken never to have applied if the Department makes a decision on your request by 27 January 2021.

Such an extension can only be granted once and cannot be extended by a variation.

## Contact

If you have any questions about this letter, please contact me on (02) 9284 9721 or via email [shelley.napper@oaic.gov.au](mailto:shelley.napper@oaic.gov.au). In all correspondence please include OAIC reference RQ21/00119.

Yours sincerely



**Shelley Napper**  
Assistant Director  
Freedom of Information

19 January 2021

## 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/>.