



Decision to decline an extension of time application under s 15AB of the *Freedom of Information Act 1982*

Agency	Office of the Special Investigator
FOI applicant	Mr James Smith
Date of Decision	1 November 2024
OAIC reference number	RQ24/04579
Agency reference number	FOI24/18

Decision

1. I refer to the application made by Office of the Special Investigator (the Department) under s 15AB(1) of the *Freedom of Information Act 1982* (Cth) (FOI Act) for an extension of time to process Mr James Smith's (the FOI applicant) request of 22 September 2024 (the FOI request).
2. As a delegate of the Information Commissioner, I am authorised to make decisions on extensions of time applications made under s 15AB(2) of the FOI Act.
3. On the information before the Information Commissioner, I have decided to decline the Department's request to extend the processing period on the basis that the FOI request is deemed refused on 22 October 2024 and the Department's application made on 23 October 2024 (after the deemed refusal) is invalid under s 15AB(2). A decision on the FOI applicant's request therefore remains due by 22 October 2024. My reasons are outlined below.

Background

4. On 22 September 2024, the FOI applicant made an FOI request to the Department. The FOI decision was due to be provided to the FOI applicant on 22 October 2024.
5. On 23 October 2024, the Department applied to the Information Commissioner for further time to process the FOI applicant's request under s 15AB(1) of the FOI Act, on the basis that the processing period is insufficient to adequately deal with the FOI request, because it is complex and/or voluminous. A copy of the Department's reasons is included at **Attachment A**.

Reasons for decision

6. Subsection 15AB(2) of the FOI Act requires that I consider whether the application is justified on the basis that the processing period referred to in s 15(5)(b) is insufficient for dealing with the request, on the basis that the request is complex or voluminous.
7. In declining to extend the processing period under s 15AB(2), I have considered the following factors:
 - Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act, to which I must have regard, in particular [3.150] – [3.155]
 - whether an agreement to extend the processing period under s 15AA of the FOI Act has first been attempted or obtained by the Department.
8. On the information before the OAIC, the FOI request was deemed refused on 22 October 2024. For a s 15AB extension application to be valid, it must be submitted prior to a deemed access refusal occurring. As the Department's s 15AB application was made on 23 October 2024, after the deemed access refusal decision, the Department's s 15AB application is considered invalid.
9. The FOI applicant may seek review by the Information Commissioner of [the Department]'s deemed access refusal decision of 22 October 2024. Further information on [applying for IC review](#) is available on the OAIC [website](#). Any application for IC review should be made within 60 days of the Department's decision or deemed decision. It also remains open to the Department to apply for an extension of time from the Information Commissioner under s 15AC of the FOI Act, if considered appropriate.
10. This extension of time matter is now closed. Your review rights are set out below.
11. If you wish to discuss this matter, please contact us by email at xxxxx@xxxx.xxx.xx quoting reference number RQ24/04579.

Yours sincerely



Assistant Director
Freedom of Information Branch

1 November 2024

The agency's reasons for requesting an extension of time, as included in the extension of time request form.

...

Please also explain the reasons for the request and why an extension would be justified. Requests for longer extensions of time (more than 30 days) will require greater justification.

Please provide a timeline setting out the work already completed in order to process this request. Where an extension of time has previously been granted, describe the work that was undertaken during that extended period. *

To date, the OSI has undertaken searches for the request. However, a large number of documents have been identified and the OSI is seeking to negotiate the scope with the applicant - the OSI is currently undertaking a second round of negotiation but has not received a response from the applicant.

What work is required to finalise the request? *

- The scope will need to be settled and relevant documents extracted and collated/scheduled - Relevant documents will need to be assessed for the application of exemptions - Consultation (if any) will need to be undertaken. It is anticipated, based on the current scope and documents identified so far, that consultation will be required with at least 2-3 Commonwealth agencies or departments and 1 individual. - Preparation of a decision letter and recommendation on access, which will need to be internally reviewed/cleared and subject to final decision-making.

Why is the request considered complex or voluminous? *

Currently, the request captures an estimated 62 documents comprising 694 pages. The request is broad and is not limited by a date range, nor by reference to a particular subject-matter or topic. In short, the applicant seeks copies of all correspondence between the OSI and the International Criminal Court (ICC), as well as all briefings for OSI visits to the Netherlands and London. The documents within scope at this time include material that will likely involve fine/complex decisions. This is because the kinds of documents caught by the request pertain to communications with the International Criminal Court (ICC), and also briefs prepared for OSI travel to meet with the ICC and and foreign counterparts to discuss matters relevant to the OSI's remit which is, relevantly, to work with the Australian Federal Police (AFP) to investigate the commission of criminal offences under Australian law arising from or related to any breaches of the Laws of Armed Conflict by members of the Australian Defence Force in Afghanistan from 2005 to 2016 (see: <https://www.osi.gov.au/about/our-purpose>). As such, we anticipate that the documents may contain material that would, or could reasonably be expected to, affect Australia's international relations and prejudice the conduct of ongoing OSI-AFP Investigations, and will therefore require careful assessment and consideration. There are also other contributing factors to consider, including: - The OSI has one member of staff dedicated to processing FOI requests on a day-to-day basis and FOI-related

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work is just one part of their role - All of the OSI's corporate and legal and policy functions necessary to support the running of a small APS agency are carried out by a small cohort of staff; not more than 20. - We anticipate that this request - in its current form - will require input from staff with expertise in Legal and Policy matters. - The applicant has submitted several (8) other requests to the OSI this year in addition to this one and the OSI has previously disclosed a number of documents in response to four of their requests. The applicant's requests have comprised 47% of the OSI's FOI caseload for 2024 to date.

Do other agencies or parties have an interest in the request? *

Yes - at this early stage, we conservatively estimate that at least 2-3 other Commonwealth agencies and Departments and 1 individual will need to be consulted. However, this is subject to settling the scope with the applicant.

Please describe the measures that would be taken to ensure a decision is made within the period of the requested extension and to keep the applicant informed of the progress of the request *

The OSI intends to make a decision within the requested timeframe sought under this request form. Subject to settling the scope of the FOI applicant, we will continue to process the request (having regard to the description of the work required to finalise the request above) and, if available, we will also consider any extension options that may be available to us under the FOI Act.

Please provide a copy of the FOI applicant's original FOI request and any revisions to the scope of the FOI request.

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/your-freedom-of-information-rights/freedom-of-information-complaints/make-an-foi-complaint> .

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> .