



Australian Government

Office of the Australian Information Commissioner

Notice on completion under s 86 of the FOI Act s 22(1)(a)(ii) - irrelevant material – s 22(1)(a)(i) s 22(1)(a)(ii) - irrelevant material and Services Australia

On 3 September 2017, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about Services Australia¹ (the Department) in its performance of its functions and exercise of its powers under the FOI Act.

The FOI complainant is s 22(1)(a)(ii) - irrelevant material.

The complainant made a number of allegations that are not within my jurisdiction. In addition, s 22(1)(a)(ii) - irrelevant material raised allegations relating to the Department's processes for handling requests for access to documents under the FOI Act, in particular regarding the Department's decision that a practical refusal reason existed and the conduct of the subsequent internal review.

The FOI request which is the subject matter of this complaint was also subject to IC review of the Department's access refusal decision (s 22(1)(a)(ii) - irrelevant material).² I have referenced this FOI request in this investigation.

In reaching my conclusions I have relied upon the submissions provided by the Department and the complainant.

This notice on completion sets out the relevant:

- background to the FOI Complaint
- issues and legislative framework
- submissions from the parties and case study
- conclusions and recommendations.

Background

On 24 March 2017, the complainant lodged an FOI request for access to documents with the Department under the FOI Act.

¹ At the time this investigation commenced the responsible department was the Department of Human Services. On 29 May 2019, the Administrative Arrangements Order established Services Australia. We note that during the investigation the Department referred to itself as the Department of Human Services. In this notice Services Australia will continue to be referred to as the 'Department'.

² s 22(1)(a)(ii) - irrelevant material was finalised under s 55K of the FOI Act on 24 June 2019.

On 3 April 2017, the Department wrote to the complainant seeking confirmation that the scope of the request was:

s22(1)(a)(i) - irrelevant material
[Redacted text block]

On the same day the complainant responded to the Department confirming the scope of the FOI request as described in the Department's email of 3 April 2017.

On 24 May 2017, the Department issued the complainant with a request consultation notice under s 24AB of the FOI Act.

On 25 May 2017, the complainant responded that s22(1)(b) did not wish to revise the scope of the request. This ended the request consultation process.

On 26 May 2017, the Department provided a response to the complainant's FOI request. In its decision the Department refused access under s 24(1) on the basis that a practical refusal reason existed as the work required to process the request would substantially and unreasonably divert the resources of the Department from its other operations (s 24AA(1)(a)(i)).

On 20 June 2017, the complainant sought internal review of the Department's decision of 26 May 2017, under s 54C of the FOI Act.

On 21 July 2017, the Department provided an internal review decision, affirming the primary decision that a practical refusal reason existed.

On 14 September 2017, the complainant sought IC review of the Department's internal review decision (s 22(1)(a)(i) - irrelevant material). In s22(1)(a) application for internal review of 20 June 2017, the complainant said:

s22(1)(a)(ii) - irrelevant material
[Redacted text block]

On 23 October 2017, the OAIC notified the Department that it had commenced IC review of its internal review decision of 21 July 2017.

In 'QO' and *Department of Human Services (Freedom of information)* [2019] AICmr 46 ('QO'), I set aside the Department's internal review decision of 21 July 2017, finding that no practical refusal reason existed.

During the course of this investigation, the Department provided submissions outlining its current FOI processes and submissions addressing the allegations raised by the complainant.

During the course of this investigation and the related IC review (s22(1)(b)(i) irrelevant material), the complainant provided a number of submissions in support of s22(1) FOI complaint.

Investigation conclusions

Pursuant to s 87 of the FOI Act, the investigation conclusions will set out my opinions and conclusions about the matters raised in this complaint.

I have considered all the material put forward by the Department and the complainant in this matter.

Issue 1: The Department's decision to refuse access under s 24AA(1)(a)(i)

Allegation

The complainant alleges that no practical refusal reason existed and the Department's decision to refuse access under s 24AA(1)(a)(i) was not justified.

Discussion

As outlined above, I have recently considered this issue in 'QO'. In that decision I considered whether a practical refusal reason existed. I found that the practical refusal reason did not exist and accordingly directed the Department to process the complainant's FOI request.

Conclusion

Consistent with my findings in 'QO', I conclude that the Department's internal review decision of 21 July 2019, which refused access based on there being a practical refusal reason, was not justified. I am satisfied that any defects in the consultation process conducted pursuant to s 24AB has been cured during the related Information Commissioner decision in 'QO'.

Issue 2: Conduct of internal review

Allegation

The complainant alleges that the Department did not properly conduct an internal review of the Department's primary decision of 26 May 2017, in accordance with s 54C of the FOI Act.

The complainant alleged:

(Internal review decision maker) made her illegitimate statement of endorsement in a futile attempt somehow divert attention away from the cover-up/whitewash. However, (Internal review decision maker) efforts had the perverse effect of prompting me to shine a spotlight on the cover-up/whitewash through the lens of s 22(1)(e) conduct.

(Internal review decision maker) threw down the gauntlet; I have picked it up with a vengeance.

...

(Internal review decision maker) presents a pseudo-reason about the judicious use of the DHS's resources to justify upholding (primary decision maker) decision. However, the real reason that (Internal review decision maker) has for s 22(1)(e) decision is to try and divert attention away from the incontrovertible fact that DHS has been squandering resources my case for six years.

Essentially, the complainant alleged that the internal review decision maker did not discharge s 22(1)(e) obligations under s 54C(3) to make a fresh decision on behalf of the Department.

The Complainant also alleges that the Department did not properly consult with s 22(1)(e) prior to making a decision to affirm the primary decision that a practical refusal reason existed.

In s 22(1)(e) application for internal review the complainant said:

This email is an application under the *Freedom of Information Act 1982* (The Act), sections 54 and 54L, for a review of (Primary decision maker) 26 May 2017 decision to refuse my FOI request, Under section 24AA(1)(a)(i) of the FOI Act. (I suspect that s 22(1)(e) may have intended to write section 24A, not 24AA.)

...

I look forward to having a preliminary phone conversation about this request as soon as possible, not least to discuss the possibility of meeting face to face.

Legislative framework

Section 54B provides that an FOI applicant can seek internal review of an agency's access refusal or access grant decision.

Section 54C provides that where an FOI applicant seeks internal review of an original decision, an agency must arrange for a person other than the person who made the original decision, to make a fresh decision on behalf of the agency within 30 days of the application for internal review is received.

The FOI Guidelines explain:

If possible, it is preferable that a more senior officer who was not involved in the earlier decision be appointed to conduct the internal review. If no suitable person can be appointed, the agency should consider discussing with the applicant the option of applying for IC review instead.³

Department's submissions

During the course of this investigation the Department contended that during both the original decision and the internal review decision it had considered the time taken to:

- identify, locate and collate the document;
- examine the document;
- decide whether to grant or refuse access;
- consult with third parties;
- redact exempt material from the document; and
- notify the final decision

The Department further submitted:

I am satisfied that the decision maker undertook a full merits review of the Primary Decision. Among other things, the decision maker independently considered the documents within scope, the processing time calculations and the correspondence between the Applicant and the department. After considering this information in an independent and impartial fashion, the decision maker determined that a practical refusal reason existed.

I am satisfied that the decision maker undertook a full merits review that was compliant with the obligations identified in section 54C of the FOI Act.

Discussion

Allegation: that the internal review officer did not make a fresh decision under s 54C(3) of the FOI Act

During the course of this investigation, the Department provided a copy of a file note dated 14 July 2017, made by the internal review decision maker, which outlined her considerations prior to making the internal review decision. The internal review decision maker was different from the person who made the original decision.

There is nothing before me which suggests that the internal review decision maker did not take the steps outlined in the file note.

³ FOI Guidelines [9.26].

I have inspected the internal review decision, from my examination it complies with the requirements under ss 26 and 54C(4) of the FOI Act.

I also note that the decision was provided to the complainant within 30 days of [REDACTED] requesting the internal review in accordance with s 54C(3) of the FOI Act.

Conclusion

I find no evidence that the internal review decision maker did not make a fresh decision under s 54C(3) of the FOI Act.

Allegation: that the Department did not properly consult with the complainant prior to making the internal review decision

The complainant contended that the Department should have conducted a consultation process with the complainant during the internal review. I note that there is no statutory obligation similar to the obligation under s 24AB for a decision maker to undertake a further formal request consultation process before making an internal review decision, although it is open to the Department to do so.

Conclusion

There is no statutory requirement for internal review officers to consult with an applicant prior to making the internal review decision.



Notice on completion under s 86 of the FOI Act (s 22(1)(a)(ii) - irrelevant material) – (s 22(1)(a)(ii) - irrelevant material) and Airservices Australia

On 27 November 2017, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about Air Services Australia (Airservices) in its performance of its functions and exercise of its powers under the FOI Act.

The FOI complainant is (s 22(1)(a)(ii) - irrelevant material).

The complainant raised allegations relating to Airservices' processes for handling requests for access to documents under the FOI Act, in particular regarding the identification and provision of documents falling within the scope of (s 22(1)(a)(ii) - irrelevant material) request of 30 March 2017 (the FOI request).

The FOI request which is the subject matter of this complaint was also subject to IC review of Airservices' access refusal decision (s 22(1)(a)(ii) - irrelevant material).¹ I have used the FOI request as a case study during this investigation. A chronology of the processing of the FOI request can be found at **Attachment B**.

I note Airservices' submissions during the course of this investigation that the decision maker at the time of processing the request has since ceased employment with Airservices. Airservices advised my office that, as a result, it had been difficult to locate documents including correspondence and file notes which may go to whether the allegations made by the complainant are substantiated. Nevertheless, I thank the FOI Coordinator and authorised decision maker for their assistance during this investigation.

Pursuant to s 86, upon completion of an investigation I am required to issue a notice on completion which sets out:

- investigation results
- the investigation recommendations (if any), and
- the reasons for the investigation results and the making of the investigation recommendations.

In making these conclusions, I have relied upon the submissions provided by Airservices and the complainant.

¹ (s 22(1)(a)(ii) - irrelevant material) was finalised under s 54W(a)(ii) of the FOI Act on 14 November 2018.

Pursuant to s 88 of the FOI Act, I can make formal recommendations which I believe Airservices ought to implement in order to improve its processing of FOI requests and compliance with the FOI Act in general.

Background

s22(1)(a)(ii) - irrelevant material

It appears that on 21 March 2017, the complainant was granted access by inspection to training file; [redacted] was unable to take copies of the documents but was able to take notes.²

It was through this inspection that the complainant was able to identify the types (and particular documents) [redacted] was requesting in [redacted] subsequent FOI request.

On 30 March 2017, the complainant lodged an FOI request for access to documents under the FOI Act. s22(1)(a)(ii) - irrelevant material

In [redacted] initial request for documents and in subsequent correspondence the complainant provided details of specific information [redacted] sought, with a level of particularity that should have assisted Airservices to locate those documents.

On 18 April 2017, Airservices wrote to the complainant acknowledging the receipt of the FOI request and advised [redacted] that a decision would be due on 1 May 2017.

Between 26 April 2017 and 28 April 2017, it appears that the complainant and Airservices corresponded a number of times regarding the scope of the request.

On 28 April 2017, the complaint clarified the scope of the FOI request and excluded certain documents:

s22(1)(a)(ii) - irrelevant material

² Complainant's submissions of 10 March 2018.

s22(1)(a)(ii) - irrelevant material

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

On 1 May 2017, Airservices provided a response to the complainant’s FOI request. In its decision Airservices identified eight documents within the scope of the request providing access in full to the eight documents.

On 3 May 2017, the complainant wrote to Airservices contending that further documents existed within the scope of [REDACTED] request.

On 8 May 2017, Airservices advised the complainant that further documents would be released which fell within the scope of the FOI Act.

On 12 May 2017 and as clarified on 21 November 2017, Airservices advised the complainant it was releasing a further nine documents and refusing access to three documents on the basis that those documents were conditionally exempt under the management or assessment of personnel (s 47E(c)) and personal privacy (47F) conditional exemptions. Airservices advised the complainant that it provided access to the documents outside of the FOI Act via administrative release and invited the complainant to seek the three refused documents via the FOI Act if [REDACTED] wished to obtain access to them.

On 31 May 2017, the complainant sought IC review of Airservices’ decision under s 54L of the FOI Act.

On 23 June 2017, the OAIC notified Airservices that it had commenced IC review of its decision of 1 May 2017.

On 18 July 2017, Airservices provided submissions to the OAIC in support of its decision of 1 May 2017.

On 26 September 2017, in response to correspondence from the OAIC, Airservices issued a statement of reasons pursuant to s 26 of the FOI Act in relation to its correspondence of 12 May 2017, to the complainant releasing documents under administrative release provisions.

On 21 November 2017, during the course of the IC review (s 22(1)(a)(i) irrelevant material) Airservices made a revised decision under s 55G of the FOI Act. In its decision Airservices clarified its correspondence of 12 May 2017 and provided access in full to three documents previously exempted in full under ss 47E(c) and 47F, and a further two documents that it had additionally identified as within the scope of the request.

On 27 November 2017, the complainant lodged a complaint with the OAIC under s 70 of the FOI Act about Airservices' actions in the performance of its functions, or the exercise of its powers under the FOI Act whilst processing (s 22(1)(a)(i) irrelevant material) FOI request of 30 March 2017.

On 8 January 2018, during the course of the IC review, Airservices advised the complainant that it had decided to release two further documents that it had identified as falling within the scope of the FOI request.

On 5 March 2018, Airservices made a further revised decision under s 55G of the FOI Act. In its decision Airservices identified 232 documents within the scope of the request. Airservices decided to give the complainant access in full to 222 documents and the remaining 10 documents in part under the personal privacy exemption (s 47F) and removed irrelevant material under s 22(1)(a)(ii) of the FOI Act.

On 1 November 2018, the OAIC notified Airservices under s 75 of the FOI Act that the Information Commissioner had decided to investigate the complaint and requested that Airservices provide the OAIC with submissions in response to the complaint allegations.

On 14 November 2018, the delegate of the Information Commissioner finalised IC review (s 22(1)(a)(i) irrelevant material) under s 54W(a) of the FOI Act.

During the course of the investigation, Airservices provided submissions outlining their current FOI processes and submissions addressing the allegations raised by the complainant.

During the course of this investigation, the complainant provided a number of submissions and evidence in support of (s 22(1)(a)(i) irrelevant material) FOI complaint.³

³ 10 March 2018, 21 March 2018, 29 March 2018, and 14 March 2019.

Investigation results

Issue 1: Access to documents under the FOI Act

Allegation

The complainant alleged that [redacted] was only able to ‘inspect’ [redacted] personnel file but was not permitted to make a copy of the documents on the file.

The complainant also alleged that Airservices’ staff ‘tried to persuade’ [redacted] not to seek access to documents and a ‘senior manager made a conscious decision’ to ‘withhold documents’.

Legislative framework

Access to documents

Section 11 of the FOI Act provides that ‘every person has a legally enforceable right’ to obtain access in accordance with the FOI Act to a document of an agency or a minister where that document is not exempt.

FOI Guidelines provide:

The FOI Act closely regulates the way that agencies and ministers must process requests for access to documents. In addition to the detailed rules discussed in this Part, agencies and ministers should have regard to central principles that underpin the right to obtain access to documents held by government (see Part 1 of these Guidelines). These include:

- subject to the FOI Act, every person has a legally enforceable right to obtain access to government documents (s 11(1))⁴

The FOI Guidelines further explain:

A person’s right of access is not affected by any reasons they give for seeking access or any belief the agency or minister may have as to the reasons for seeking access (s 11(2)). In general, any use an applicant might make of the documents is not relevant to the decision whether to grant them access.⁵

⁴ FOI Guidelines [3.1] (footnotes omitted).

⁵ FOI Guidelines [3.35].

Documents of an agency

Section 4(1) of the FOI Act defines a ‘document of an agency’ as:

- (a) the document is in the possession of the agency, whether created in the agency or received in the agency; or
- (b) in order to comply with section 6C, the agency has taken contractual measures to ensure that it receives the document.

Section 4(1) further defines that a document includes:

- (a) any of, or any part of any of, the following things:
 - (i) any paper or other material on which there is writing;

The FOI Guidelines provide that the right to access applies to:

- a document of an agency that is subject to the FOI Act
- an official document of a minister, unless the document is an exempt document (s 11(1)).⁶

The FOI Guidelines explain:

The definition of ‘document’ is broadly stated and is not exhaustive. It includes sound recordings, films, video footage, microfilm, and information stored on computer tapes, disks, DVDs and portable hard drives and devices. It can also include information held on or transmitted between computer servers, backup tapes, mobile phones and mobile computing devices (see Part 3 of these Guidelines). The term would also cover forms of recorded information that are three-dimensional, such as a land use planning model.⁷

Access to personnel records

Section 15A of the FOI Act provides that

(1) In this section:

personnel records, in relation to an employee or former employee of an agency, means those documents containing personal information about him or her that are, or have been, kept by the agency for personnel management purposes.

⁶ FOI Guidelines [2.28].

⁷ FOI Guidelines [2.29] – [2.30].

(2) Where:

(a) there are established procedures in an agency (apart from those provided for by this Act) in accordance with which a request may be made by an employee of the agency for access to his or her personnel records; and

(b) a person who is or was an employee of the agency wishes to obtain access to his or her personnel records;

the person must not apply under section 15 for access to such records unless the person:

(c) has made a request for access to the records in accordance with the procedures referred to in paragraph (a); and

(d) either:

(i) is not satisfied with the outcome of the request; or

(ii) has not been notified of the outcome within 30 days after the request was made.

The FOI Guidelines explain:

If an agency has established procedures for access to personnel records, an employee or former employee may only apply for access to their records under the FOI Act in limited circumstances (s 15A). A personnel record means those documents containing personal information about an employee or former employee that an agency has kept for personnel management purposes (s 15A(1)). An application under the FOI Act for access to those records may only be made where the employee or former employee has made a request under those agency procedures and is either not satisfied with the outcome, or has not been notified of the outcome within 30 days (s 15A(2)).

Airservices' submissions

During the course of this investigation, Airservices submitted:

I have been informed by the business area responsible for training documents that there is no formal process for individuals to obtain training related documents (outside of an FOI request).

However, all requests made outside of FOI for such information would go to the Initial Training Manager who would then review the request and clear the release of the documents.

Airservices further submitted:

As there was no formal process for former employees to request their personnel records at the time most requests by former employees for their files were managed

through the FOI process. Subsequently, in this case the complainant was directed to submit an FOI request for the documents [REDACTED] was seeking.⁸

Airservices advised that it is:

... currently in the process of working with the relevant HR areas to establish a formal procedure where employees can request for their personnel files as per section 15A of the Freedom of Information Act.

In relation to the guidance that is provided to line areas on how to search for documents, Airservices submitted:

In the past Airservices has made available to all staff a guideline for managing FOI requests. However, this guideline is outdated and Airservices is currently in the process of updating this document for distribution amongst Airservices staff.

Moreover, Airservices is currently working towards a mandatory FOI awareness online training unit that all staff will have to undertake. This training unit is then intended to be undertaken as part of the mandatory new starter training package for new employees at Airservices.

In addition, Airservices is in the processing of implementing a new FOI processing model.... This model will introduce designated Action officers from each key business to assist the FOI Coordinator. These Action Officers will have training in at least the basics of FOI and will be in a position to explain the FOI process to other staff in the business area and coordinate the search and retrieval process from within the business area. They will also be able to advise the FOI coordinator on how the documents are stored and searched in their business area and whether there are any sensitivities with the release of the located documents. A pilot for this new model has already been successfully implemented in the Air Navigation Services business area. Please note that [this] is a draft version and has not been approved by Airservices executives as yet.

Discussion

Access to personnel records

In [REDACTED] complaint of 27 November 2017, the complainant raised that [REDACTED] had initially attempted to access documents, the subject matter of the FOI request, via Airservices Human Resources department.

In submissions made during the course of this investigation Airservices advised that it did not have a formal process of accessing personnel information. However, the complainant in [REDACTED] complaint as discussed above described what I am satisfied is an 'informal' process by

⁸ Airservices submissions 12 June 2018 [21].

which the complainant was allowed to inspect [REDACTED] personnel file however was unable to take notes or copies of the documents.

Section 15A above provides that where an agency has established procedures for an employee of an agency to access their personnel file, the person must not apply under s 15 for access to such records unless the person has made a request for documents in their personal file and then is either not satisfied with the response or has not been notified of an outcome within 30 days after the request was made.

I acknowledge Airservices' submissions above that at the time of the request there was no formal process established by the agency. There was an 'informal' process by which the complainant was provided an opportunity to inspect the documents.

While s 15A does not require an agency to establish a process, I am satisfied that the existence of such a process may have assisted the complainant's efficient access to [REDACTED] personnel file.

Request to withdraw FOI request

In [REDACTED] complaint of 27 November 2017, the complainant alleged:

During the early stages of the FOI process on at least 2 separate occasions I was confronted by a senior manager and [REDACTED] tried to persuade me that I should not be requesting access to documents...

The complainant submitted during the course of this investigation:

s22(1)(a)(ii) - irrelevant material
[REDACTED]

So before my FOI request even started Airservices staff were making access difficult and stating their opinions that I shouldn't be allowed access even with an FOI request.

Once my FOI request was lodged I received a phone call from [Airservices manager] where he questioned my right to even use the FOI process.

In response to the complainant's allegation that there were attempts made by an Airservices manager to persuade [REDACTED] not to request the information, Airservices submitted:

The issue was also discussed with the Operation Training Specialist (OTS) who did the Training Review for the complainant. The OTS had no recollection of any discussion with the complainant around the FOI documents and stated that no attempt to persuade [REDACTED] or anyone else from making an FOI would have been made.

As discussed above, the reasons why an applicant is seeking access to documents is an irrelevant factor when deciding an FOI request. That does not mean that the reasons for the request cannot be discussed. As the FOI Guidelines provide, it is reasonable for an agency or

minister to contact an applicant to seek further information on the types of documents they are requesting to inform their interpretation of scope and to facilitate search and retrieval.

However, I do not consider that the Airservices manager was discussing the FOI request in the context of requesting further information to facilitate the search and retrieval process, particularly given he was not the FOI practitioner processing the request.

I am satisfied that during the processing of the FOI request on two occasions an Airservices manager discussed with the complainant [REDACTED] reasons for requesting the documents the subject of the FOI request.⁹ There is no information before me that suggests that at the time of the decision making process, those discussions were considered by the FOI decision maker.

Withholding of documents within the scope of an FOI request

In [REDACTED] complaint of 27 November 2017, the complainant alleged:

...During one of these conversations [Airservices manager] also said he made a conscious decision not to provide a document.

During the course of this investigation the complainant submitted:

When I returned to the Airservices [s22(1)(a)(ii) - irrelevant material] [Airservices manager] again confronted me, questioned my right to make an FOI request, and admitted to withholding documents from the process.

During the course of this investigation, Airservices provided processing documentation which outlined the correspondence between the FOI officer and the line areas requesting search and retrieval steps be conducted in order to identify documents which would fall within the scope of the request.

From the correspondence provided by Airservices, it appears that an Airservices manager held a 'file note' regarding a discussion he had had with the complainant.

It is apparent from the scope of the FOI request, for 'all documents', the 'file note' written by the Airservices manager would fall within the scope of the request.

During the processing of the request, the FOI officer had on several occasions requested that the Airservices manager who had written the 'file note' provide a copy of the note to the FOI officer for processing.

⁹ Complainant's contemporaneous notes of 30 March 2017 and 5 May 2017 (Complainant's submissions of 10 March 2018). Correspondence from line area to FOI officer of 11 May 2017 (tab 7.14 of Airservices submissions dated 12 June 2018). Correspondence from Airservices to the complainant dated 12 May 2017.

The Airservices manager noted in one correspondence that [REDACTED] had not provided a copy of the file note to the FOI officer as it had not been 'filed'.¹⁰

As I understand it, the 'file note' was eventually received by the FOI officer and released to the complainant as part of Airservices correspondence to the complainant of 12 May 2017.

Conclusions

Based on the information before me, I make the following conclusions:

- that at the time of the request, Airservices did not have a formalised process by which employees could access their personnel records. A formalised process may have assisted the complainant's efficient access to [REDACTED] personnel file
- that an Airservices manager discussed the FOI request with the complainant. The Airservices manager with whom those discussions took place was not the officer responsible for processing the complainant's FOI request and therefore the conversation was not for the purpose of understanding the scope of the request for documents under the FOI Act
- that the Airservices manager asked the complainant the reasons why [REDACTED] requested the documents on two occasions
- that there is no information which suggests the discussion of the complainant's reasons was considered by the FOI decision maker during the decision making process
- that the Airservices manager was asked to provide the 'file note' which was within scope of the FOI request of 30 March 2017 on 30 March 2017, 26 April 2017 and 9 May 2017, and did not provide it until 10 May 2017; and
- at the time of processing the request, Airservices' did not have sufficient guidance for Airservices employees in how to process FOI requests.

Issue 2: Complying with statutory processing periods

Allegation

The complainant alleged that during the processing of [REDACTED] FOI request, Airservices did not comply with the statutory timeframes in s 15(5) of the FOI Act and no timeframe was provided for the release of documents outside the FOI Act.

¹⁰ Correspondence from line area to FOI officer (Attachment 7.8 to Airservices submissions of 12 June 2018).

Legislative framework

The FOI Act provides for a statutory timeframe of 30 days to process an FOI request (s 15(5)). That period can be extended by up to 30 days with the applicant's agreement (s 15AA), by 30 days if consultation with a third party is undertaken (s 15(6)), by 30 days if consultation with a foreign entity is undertaken (s 15(8)), or for a period approved by the Information Commissioner for complex or voluminous requests (s 15AB) or following a deemed access refusal decision (s 15AC).¹¹

The FOI Guidelines explain:

An agency or minister must, as soon as practicable, and no later than 30 days after receiving a request, take all reasonable steps to enable the applicant to be notified of a decision on the request (s 15(5)(b)). Section 15(5)(b) provides that the 30-day processing period commences on the day after the day the agency or minister is taken to have received a request that meets the formal requirements of s 15(2), (2A). An agency should act promptly to assist an applicant whose request does not meet the formal requirements in keeping with its obligations under s 15(3).¹²

Deemed access refusal

Section 15AC provides that where a decision about an FOI request has not been provided to the applicant within the statutory processing period, the agency or minister is deemed to have made a decision refusing access to the documents (15AC(3)).

The FOI Guidelines provide:

The consequence of a deemed refusal is that an applicant may apply for IC review (s 54L(2)(a))... In addition, once the time has expired and there is a deemed decision, the agency or minister cannot impose a charge for access...¹³

The FOI Guidelines explain:

Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of

¹¹ See also, *FOI Guidelines* at [3.125].

¹² *FOI Guidelines* [3.139].

¹³ *FOI Guidelines* [3.154].

reasons on the FOI request. This obligation to provide a statement of reasons on the FOI request continues until any IC review of the deemed decision is finalised.¹⁴

Discussion

Acknowledging receipt

Paragraph 15(5)(a) of the FOI Act provides that an agency or minister must respond to the FOI applicant within 14 days of receipt acknowledging the FOI request.

Accordingly, as the complainant's FOI request was lodged on 30 March 2017, Airservices was due to acknowledge receipt of the request by 13 April 2017. On 18 April 2017, Airservices emailed correspondence to the complainant acknowledging receipt of the FOI request and advised the complainant that a decision was due to be provided on 1 May 2017.¹⁵

In [REDACTED] complaint of 27 November 2017, the complainant alleged:

... ASA has repeatedly requested time extensions and delayed granting access to documents that I had been telling them exist and who has them.

Statutory processing period

As the FOI request was made on 30 March 2017, and, pursuant to s 15(5)(b) of the FOI Act, the statutory processing period is 30 days 'after the day on which the request is received' by an agency or minister, Airservices was due to provide a response to the complainant on 29 April 2017.

The due date of the FOI request fell on a Saturday that year, therefore pursuant to s 36(2) of the *Acts Interpretation Act 1901*, it was open to Airservices to provide the complainant with a response to [REDACTED] FOI request on the next working day after the decision was due, which was 1 May 2017. Airservices provided the complainant with its decision on 1 May 2017.

Conclusions

Airservices did not comply with s 15(5)(a) of the FOI Act when it did not acknowledge the complainant's FOI request within the statutory timeframe of 14 days.

Airservices provided the decision to the complainant within the applicable timeframes permitted under the FOI Act.

¹⁴ *FOI Guidelines* [3.155].

¹⁵ Airservices submissions of 12 June 2018, Attachment 2.5.

Issue 3: Revision of scope

Allegation

The complainant alleges that Airservices altered the scope of [REDACTED] FOI request without consultation or [REDACTED] agreement.

Legislative framework

Subsection 15(2) provides that in order for the request to be valid, the request must be in writing, state that the application is for the purposes of the Act, provide sufficient information to enable a reasonable officer of an agency or the Minister to identify the document sought, give details on how a response can be provided to the FOI Applicant and the request must be sent to a nominated FOI contact address. If a request is valid the general position is that s 11A requires the agency must give access to the requested documents subject to any exemptions.

The FOI Guidelines provide at [3.109]:

A formal requirement of making an FOI request is that the request must provide such information as is reasonably necessary to enable a responsible officer of the agency or the minister to identify the document that is requested (s 15(2)(b)).

The FOI Guidelines further explain at [3.110]:

An agency should not wait until the practical refusal stage to help an applicant to clarify their request. The following considerations should also be borne in mind before a request consultation process is commenced:

- A request can be described quite broadly and must be read fairly by an agency or minister, being mindful not to take a narrow or pedantic approach to its construction.
- An applicant may not know exactly what documents exist and may describe a class of documents, for example: all documents relating to a particular person or subject matter; or all documents of a specified class that contain information of a particular kind; or all documents held in a particular place relating to a subject or person. Where the applicant has requested a class of documents, it may be useful for the agency to explain to the applicant the information that is contained in those documents, as this may assist the applicant to narrow the scope of his or her request to a specific set of documents, resulting in less time spent on processing irrelevant material.

The FOI Guidelines provide at [3.54]:

A request should be interpreted as extending to any document that might reasonably be taken to be included within the description the applicant has used. A request for a 'file' should be read as a request for all of the documents contained in the file, including the file cover. There have been instances of agencies using s 22 to delete the names of government officials below the Senior Executive Service (SES) rank on the basis that those names are irrelevant to the scope of an FOI request. There is no apparent logical basis for treating the names of SES

officials as being within the scope of a request, but other officials as being irrelevant to the request. Without further explanation as to why the names of government officials are irrelevant to the scope of an applicant's request, it is unlikely that the application of s 22 is appropriately justified.¹⁶

The FOI Guidelines explain:

A request for all documents relating to a particular subject would also include any document or print-out which lists the names of all of the files the agency may consider relevant to the request. An agency will need to exercise care in relation to any sensitive material, such as personal names, that may appear on the list. If in doubt, the agency or minister should consult the applicant to discuss exactly what documents are being requested.¹⁷

Airservices' submissions

During the course of this investigation, Airservices provided copies of correspondence between Airservices personnel and the FOI officer processing the request regarding the revision of scope:

I spoke with [Airservices manager] who stated he had spoken with [redacted] who stated [redacted] did not need all the documents in the file. [Airservices manager] then forwarded to [individual] the files that were requested only. See attached emails. [Airservices manager] is happy to send an email stating the above if needed.¹⁸

The complainant submits that on 12 May 2017, Airservices provided an informal release of documents advising that the release was based on the advice of an Airservices manager that the complainant had told [redacted] to reduce the scope of the FOI request:

On 12 May in response to my concerns that not all documents had been provided Airservices legal counsel sent me an email with an attached letter. Both the email and letter refer to an informal document release, which was a downgrade conducted without my consent.

...

In the letter Airservices says I had a conversation with [Airservices manager] and he in turn advised the legal department to change my request...

The complainant further submitted that [redacted] contacted Airservices on the same day to advise that [redacted] had not reduced the scope of the request:

s 22(1)(a)(ii) irrelevant material

...

¹⁶ Footnotes omitted.

¹⁷ *FOI Guidelines* [3.55].

¹⁸ Airservices submissions of 12 June 2018, Attachment 7.14.

s 22(1)(a)(ii) irrelevant material

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Airservices legal counsel then lists other documents I was requesting:

s 22(1)(a)(ii) irrelevant material

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The complainant further submitted:

However, from my email on 03 May 2017 the actual list was:

5. I do not know the full extent of the information that wasn't provided, however, I am aware of documents that were in existence, that are unlikely to have been destroyed or deleted due to the ongoing nature of my training and review process, and seem to be covered extensively by my FOI request. Examples I am aware of:

s 22(1)(a)(ii) irrelevant material

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s 22(1)(a)(ii) irrelevant material

As noted earlier, Airservices identified early on in this investigation that the current staff of the Office of Legal Counsel faced difficulties in locating correspondence or file notes which may go to whether the scope was reduced without consultation with the applicant:

The complaint relates to events that occurred before any of the staff in the Office of Legal Counsel commenced in their current roles. The individuals (including the decision maker) who handled the matter are no longer employed by Airservices. It has proven difficult to locate relevant correspondence between the applicant and various Airservices staff as well as correspondence between the decision maker and Airservices staff. Therefore, it is difficult to substantiate the allegations such as the “decision maker altered the scope of the complainant’s request without consultation”.

Discussion

As discussed above, the FOI Guidelines provide that an agency should take the opportunity to clarify the scope of the FOI request with an applicant.

The typical approach taken by agencies or ministers when clarifying scope is for the FOI officer to speak or correspond directly with the applicant. In this matter both parties agree that the applicant and the FOI officer spoke and corresponded on several occasions regarding the scope of the request.

The issue in contention here is the complainant’s allegation that the FOI officer reduced the scope of the complainant’s request without authority to do so.

From the information before me it appears that the Airservices manager’s representative advised the FOI officer that he had been in contact with the complainant who had agreed to reduce the scope of the FOI request.

I understand that following your email dated 3 May 2017, you had a discussion with [Airservices manager] regarding the further documents you are seeking. You confirmed that you do not require all of the documents on files s 22(1)(a)(ii) irrelevant material but only documents on those file that are relevant to points 2-5 of your email.¹⁹

There is no information before me which suggests that the FOI officer contacted the complainant to confirm the reduction in scope, prior to providing an informal document release based on the purported revised scope provided by the Airservices manager.

As a result of the complainant advising the FOI officer that s 22(1)(a)(ii) had not revised the scope of the request as purported by the Airservices manager, Airservices then continued to release

¹⁹ Airservices correspondence to complainant of 12 May 2017.

documents on a further three occasions, to satisfy the clarified scope of the request, as communicated directly to the FOI officer on 28 April 2017.

There are inconsistencies between the recollection of the complainant and the correspondence provided to the FOI officer by the Airservices manager's representative in relation to the discussion that led to the advice that the complainant had reduced the scope of b2(1) request.

Conclusions

On the evidence available Airservices appeared to reduced the scope of the complainant's FOI request on the advice of an Airservices manager. There is insufficient evidence to form a view as to whether Airservices had agreement from the complainant at the time of processing the FOI request to reduce the scope of the request.

Issue 4: Requirements of a statement of reasons pursuant to s 26 of the FOI Act

Allegation

The complainant alleges that Airservices failed to comply with s 26 of the FOI Act by not including review rights in its decision letter of 1 May 2017.

Legislative framework

Section 26 provides that:

Where, in relation to a request, a decision is made relating to a refusal to grant access to a document in accordance with the request or deferring provision of access to a document, the decision-maker shall cause the applicant to be given notice in writing of the decision.

Section 26(1)(c) requires that the notice should provide appropriate information regarding:

- (i) his or her rights with respect to review of the decision;
- (ii) his or her rights to make a complaint to the Information Commissioner in relation to the decision; and
- (iii) the procedure for the exercise of the rights referred to in subparagraphs (i) and (ii); including (where applicable) particulars of the manner in which an application for internal review (Part VI) and IC review (Part VII) may be made.

The FOI Guidelines provide that a statement of reasons is a notice in writing of:

- the decision
- the findings on any material questions of fact
- the evidence or other material on which those findings are based
- the reasons for the decision (including any public interest factors taken into account in deciding to refuse access to a conditionally exempt document)
- the name and designation of the person making the decision, and
- information about the applicant's rights to make a complaint or seek a review and the procedure for doing so (s 26(1)).²⁰

The FOI Guidelines explain that there is no 'specified form for a statement of reasons. A letter to the applicant may be sufficient as long as it contains all the required information.'²¹

The FOI Guidelines explain that a statement of reasons should also include:

- the name and designation of the decision maker (where the decision relates to a document of an agency) (s 26(1)(b)). Information about the authorisation should also be included
- the applicant's review rights, including how to apply for internal and IC review, and
- the applicant's right to complain to the Information Commissioner.

Complainant's submissions

In s22(1) complaint of 27 November 2017, the complainant alleged:

ASA had also failed to comply with s 26 of the FOI act, I was not given a statement of reasons as required by the Act until OAIC review staff instructed them to provide one, and at no point have they given me details of my review or complaint rights as required by s 26 of the FOI Act (it was my own research which identified how to request OAIC review or lodge a complaint)...

Airservices' submissions

In response to the complainant's allegations, Airservices submitted:

At the time of s22(1)(b) - request made request, it appears no specific document were available to assist Decision Makers to process and make FOI decisions. At the time the number of FOI requests Airservices received was relatively low and it is possible the decision maker at the time opted to utilise the OAIC guidelines rather than create an agency specific guideline.

However, as the FOI request have significantly increased Airservices is now in the processing of drafting guidelines for FOI Decision making. The aim of this guideline is to direct the decision maker to factors he/she must consider when making a decision and to make them aware of the

²⁰ FOI Guidelines [3.166].

²¹ FOI Guidelines [3.168].

purpose of the FOI Act. Please see attachment 9.1 for the draft version of this document. Please note that this is a draft version and has not been approved by Airservices executive as yet.

Discussion

I have examined a copy of the decision of 1 May 2017. It is clear that, as the decision notice did not include any review rights, the statement of reasons did not comply with s 26(1)(c).²²

I note Airservices' submissions above that at the time of the processing of the complainant's FOI request, there was no specific document that decision makers could refer to for guidance while making FOI decisions.

I have also examined the draft 'Directions for Good Decision Making' that Airservices provided during the course of this investigation.²³ I note that the draft document does not contain information regarding the review rights and Airservices obligations under s 26(1)(c) to include these in any s 26 statement of reasons.

During the course of this investigation, Airservices provided a copy of a draft s 26 template.²⁴ I note Attachment C to that template provides information about an applicant's review rights. Accordingly, I am satisfied that the template complies with s 26(1)(c) of the FOI Act.

Conclusions

The statement of reasons of 1 May 2017 did not comply with s 26 as it did not include the complainant's review rights.

Issue 5: Providing access to documents outside of the FOI Act

Allegation

The complainant alleges that Airservices' decision maker made a decision under the FOI Act in relation to some of the documents within the scope of [REDACTED] request and then released the remainder as an informal release without consultation or agreement.

Legislative framework

Section 11 of the FOI act provides that 'every person has a legally enforceable right' to obtain access in accordance with the FOI Act to a document of an agency or a minister where that document is not exempt.

²² Airservices submissions of 12 June 2018, Attachment 2.6.1.

²³ Airservices' submissions of 12 June 2018, Attachment 9.1

²⁴ Airservices' submissions 12 June 2018, Attachment 11.1.

FOI Guidelines provide:

An agency may choose to provide administrative access outside the formal FOI Act request process. This may be as informal and flexible as providing information or documents when requested by a member of the public, or collating and releasing data or statistics following a specific request. Alternatively, an agency may choose to establish and notify on its website an administrative access arrangement that is to operate alongside the FOI Act, either generally or for specific categories of information or documents.²⁵

The FOI Guidelines explain that administrative release can offer benefits to agencies and members of the public. The advantages of administrative release is that it:

- advances the objects of the FOI Act to foster open government
- encourages flexibility and engagement with the public
- can rely on technology to facilitate easy collation, integration and distribution of information
- can offer a lead-in to the FOI process by enabling an applicant to clarify the type of information requested from an agency
- aligns with the broader movement in public administration to facilitate dialogue and negotiation between parties before formal legal processes are used
- potentially offers cost benefits and quicker processing times.²⁶

The FOI Guidelines further explain that any administrative access arrangement should operate alongside FOI Act processes and:

In circumstances where the requester has requested documents under the FOI Act, but the agency is minded to release the documents under administrative access arrangements, it is expected that the agency will seek the requester's consent, and withdrawal of the FOI request, before releasing the documents administratively. Administrative release of an individual's own personal information must also comply with the minimum requirements set out in Australian Privacy Principle (APP) 12 of the Privacy Act even if the agency has separately formalised a process for applying for access and correction under the Privacy Act. Similarly, arrangements that allow for correction of personal information must comply with the minimum requirements set out in APP 13.²⁷

The FOI Guidelines also provide:

If an agency has established procedures for access to personnel records, an employee or former employee may only apply for access to their records under the FOI Act in limited circumstances (s 15A). A personnel record means those documents containing personal information about an employee or former employee that an agency has kept for personnel management purposes (s 15A(1)). An application under the FOI Act for access to those records may only be made where the employee or former employee has made a request under those

²⁵ FOI Guidelines [3.2].

²⁶ FOI Guidelines [3.3].

²⁷ FOI Guidelines [3.5].

agency procedures and is either not satisfied with the outcome, or has not been notified of the outcome within 30 days (s 15A(2)).²⁸

Applicant's submissions

In [REDACTED] complaint of 27 November 2017, the complainant alleged:

At one point ASA Legal decided to downgrade my request from an FOI request to an informal document release without consulting me and in doing so told me they wouldn't grant access to certain documents.

As discussed above²⁹ Airservices on 17 May 2017, in response to the complainant's correspondence of 3 May 2017, released a further nine documents under administrative release provision and purported to refuse access to a further three documents under ss 47E(c) and 47F of the FOI Act. In that correspondence, Airservices also advised that if the complainant wished to gain access to the documents which would be exempt under ss 47E(c) and 47F, [REDACTED] should request access to them under the FOI Act.

The applicant alleges that Airservices released the information under administrative release, where [REDACTED] had not agreed to that process.

On 26 September 2017, during the IC review of s 22 [REDACTED] after correspondence from the OAIC, Airservices issued a statement of reasons under s 26 of the FOI Act in relation to its correspondence to the complainant of 17 May 2017.

Discussion

As discussed above, the FOI Guidelines provide that where an FOI request is on foot, and the agency or minister is minded to provide access to the documents via administrative release, it is incumbent on the agency or minister to seek the applicant's agreement prior to doing so.

The rationale behind this is that although providing access to documents via administrative release has several benefits and facilitates access to documents and promotes transparency, agencies and ministers must also be mindful that applicants are not afforded the same review rights as they are under the FOI Act and as such, any release of documents, subject to an FOI request, via administrative release, can have flow on effects on the review rights of the FOI applicant.

Conclusions

The complainant had requested the information under the FOI Act and had not agreed to the administrative release approach. Airservices was obliged to process the request under the FOI Act. Although I am satisfied that this defect has been cured during the IC review process

²⁸ FOI Guidelines [2.61].

²⁹ See also Attachment B for full background to the processing of the request.

in b2(1)(a)(i) irrelevant material the decision to release some, but not all, documents under an administrative release arrangement, and subsequent advice to the complainant that b2(1) would need to make a further request under the FOI Act for the three documents not disclosed under the administrative release, delayed access to those documents.

Issue 6: Reasonable searches

Allegation

The complainant alleges that b2(1) had to ‘repeatedly prompt’ Airservices to provide all the documents within the scope of b2(1) request.

Legislative framework

Section 4(1) of the FOI Act defines a document as:

a document of an agency if:

- (a) the document is in the possession of the agency, whether created in the agency or received in the agency; or
- (b) in order to comply with section 6C, the agency has taken contractual measures to ensure that it receives the document.

Section 24A of the FOI Act provides:

Document lost or non-existent

- (1) An agency or Minister may refuse a request for access to a document if:
 - (a) all reasonable steps have been taken to find the document; and
 - (b) the agency or Minister is satisfied that the document:
 - (i) is in the agency’s or Minister’s possession but cannot be found; or
 - (ii) does not exist.

Reasonable steps

An agency or minister may refuse a request if it has taken ‘all reasonable steps’ to find the document which may fall within the scope of a request.³⁰ It is not enough for an agency or minister to simply assert that the document cannot be found or does not exist before taking any demonstrable steps to try and find the requested document.³¹

The FOI Guidelines explain that:

The Act is silent on what constitutes ‘all reasonable steps’. The meaning of ‘reasonable’ in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not

³⁰ FOI Guidelines [3.85].

³¹ FOI Guidelines [3.86].

extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.³²

The FOI Guidelines provide that agencies and ministers are responsible for managing and storing records in a way that facilitates finding them for the purposes of an FOI request and:

The steps taken to search for documents should include the use of existing technology and infrastructure to conduct an electronic search of documents, as well as making enquiries of those who may be able to help locate the documents.³³

The FOI Guidelines explain that agencies and ministers should assist applicants to identify the specific documents they are seeking as:

To do so would facilitate and promote public access to information in accordance with the objects of the Act.

Airservices' submissions

On 12 June 2018, Airservices submitted that it was in the process of implementing a new FOI processing model.³⁴ The new model was to introduce designated Action Officers from key business areas to assist the FOI coordinator in processing FOI requests.

During the course of this investigation, Airservices advised that the new FOI processing model had been implemented and provided an update to its earlier submissions of 12 June 2018:

Since providing the submission the process of undertaking a search and retrieval has been further amended from what was stipulated in paragraphs 26 – 28 of the submissions. This amendment was to ensure that FOI trained individuals who are aware of the importance of a complete and thorough search are now undertaking or coordinating the search for documents. Since the submission we procured the Australian Government Solicitors to train 9 individuals who are embedded in the business area to undertake the role of FOI Action Officers. The role of these Action Officers are to:

- to ensure that a complete search of the documents are undertaken;
- to provide an original set of the documents to the FOI Coordinator (FOIC) in PDF format;
- to provide a set of the documents (in PDF format) to the FOIC with areas of sensitivity marked;
- to advise the FOIC on the history and background of the documents and whether or not there are sensitivities with the document;
- to advise the FOIC whether or not there are third parties that need to be consulted; and

³² *FOI Guidelines* [3.88].

³³ *FOI Guidelines* [3.91].

³⁴ Airservices submissions of 12 June 2018, Attachment 5.2.

- to provide the contact details of the relevant third parties.³⁵

In s 22(1) complaint of 27 November 2017, the complainant alleged:

At one stage ASA legal advised me by phone that each person he asked to do a document search was required to sign a statutory declaration to say all searches had been conducted and all documents provided to him.... I am now being told statutory declarations were not used, so there appears to be no method of assurance that searches were even conducted appropriately or that people required to provide information did so.

During the course of this investigation the complainant submitted:

I again expressed concern on 16 May 17 that the process didn't seem to be done properly, and asked Airservices legal counsel about the statutory declarations he advised me had been signed in relation to conduct of searches. He wouldn't give me exact details of their content, however mentioned they were comprehensive and covered checking all relevant documents and files.

When there was a change to Airservices legal counsel I asked him ...about the statutory declarations and he told me there weren't any, which seemed odd considering I had discussed them several times with his predecessor.

During the course of this investigation the complainant further submitted:

On the 27 April I informed Airservices legal counsel there had been a printed and signed document.

It was signed by [Individual] and [Individual], I was shown the document on 21 March by [Airservices manager] and [Individual], they told me I could hand write some notes, but was prohibited from copying the document. I could not recall the signature date however it would have been signed between 10 and 21 March.

...

I discussed this particular document with Airservices Legal on 27 April, and identified it in emails on 27 and 28 April. Airservices have not provided me with the document or indicated where the document is.³⁶

The complainant provided a further example of a document which s 22(1) contended was in existence at the time of s 22(1)(b) FOI request which was not captured in the FOI response of 1 May 2017:

s 22(1)(a)(ii) irrelevant material

³⁵ Airservices submissions of 30 May 2019.

³⁶ On 5 March 2018, during the course of IC review s 22(1)(a)(ii) irrelevant material Airservices made a 55G revised decision releasing a further 222 documents to the complainant. Subsequently, the only remaining document subject to IC review was document 163 which Airservices had refused in part under s 47F of the FOI Act.

s 22(1)(a)(ii) irrelevant material

Discussion

As outlined above and in **Attachment B**, after finalisation of the FOI request, the complainant contacted Airservices on several occasions contending that there were further documents which fell within the scope of the request, which had not formed part of the access refusal decision of 1 May 2017. [REDACTED] provided particularities of the documents – including approximate timeframes for their creation, the subject of the document and the author(s).

During the course of the complainant's related IC review ([REDACTED]), Airservices located a number of documents which had not previously been identified during the initial search and retrieval process.

There is also evidence before me which suggests that, during the processing of the FOI request, there were a number of approaches to the business areas seeking further searches for particular documents. Given the outcome of the IC review, namely that approximately a further 243 documents were eventually located within the scope of the request over several occasions, it appeared that Airservices' search and retrieval processes required significant improvement.

It is important that agencies and ministers maintain good record keeping practices which facilitate the quick and efficient search and retrieval process to ensure that all documents within the scope of the request are located and that all reasonable steps have been taken.

Conclusions

During the processing of the FOI request, Airservices did not take all reasonable steps to identify the documents within the scope of the request.

I note that Airservices has advised its intention to implement strategies to ensure future search and retrieval processes are streamlined and accurate, in particular the implementation of a new FOI processing model and the creation of an Action Officer Network. Nevertheless, its existing FOI practices and procedures would appear to be deficient if documents with the particularity specified by this particular complainant could not be found and retrieved and that documents within the scope of the request continued to be identified at various times over a 12 month period.

Recommendations

The purpose of my recommendations, as set out below, are to conclude the complaint investigation and ensure Airservices meets its obligations under the FOI Act, including that the Airservices' current and future processes and practices are consistent with the objects of the FOI Act.

Pursuant to s 88 of the FOI Act, I have set out the following recommendations, being formal recommendations to Airservices that I believe Airservices ought to implement within 3 months of this Notice:

1. Issue a statement to all staff highlighting the agency's obligations under the FOI Act. This statement should encourage and support staff in meeting their obligations under the FOI Act, to facilitate and promote public access to information, promptly and at the lowest reasonable cost and support a whole-of-agency approach in appropriate storage of documents which facilitates search and retrieval processes.
2. Airservices should ensure that the objects of the FOI Act are promoted and the functions and powers performed under the FOI Act are exercised, as far as possible, to facilitate and promote access to information, promptly and at the lowest reasonable cost by:
 - a. establishing a general FOI training programme for inclusion in Airservices' induction process for new employees and refresher training for existing employees
 - b. finalise FOI policies and procedures and communicate them to all staff with appropriate Executive support. This would include updating the 'Directions for Good Decision Making' manual to include:
 - i. information regarding the provision of review rights in decisions issued under s 26 of the FOI Act, and
 - ii. where an applicant agrees that an FOI request can be managed through administrative release provisions, the agreement should be received in writing from the applicant or the applicant's representative.
 - c. implementing procedures to ensure that it:
 - i. adheres to s 15(5)(a) of the FOI Act which requires that FOI requests are to be acknowledged within 14 days of receipt
 - ii. clarifies the scope of an FOI request with the applicant at the time of acknowledgment of the request, and
 - iii. provides a mechanism for Airservices' personnel to request their information, in accordance with 15A of the FOI Act.

- d. review its record keeping policies and practices to ensure they support the objectives of the FOI Act in relation to access to documents and provide the OAIIC with a copy of that review.
3. Within 4 weeks Airservices review its correspondence to all individuals who have applied for access to documents under the FOI Act where the request was refused or refused in part in the last 12 months prior to the template being updated where that correspondence did not include information about the applicant's review and appeal rights, Airservices should write to those applicants setting out those rights in detail and advising that they may seek Information Commissioner review and that a copy of the correspondence from Airservices should be provided to the OAIIC in support of a late application. The Information Commissioner is to be provided with the numbers of applicants who were not so advised of their review and appeal rights, as the Commissioner may consider that deficiency in the event an applicant applies for an Information Commissioner review outside the statutory timeframe established in s 54S of the FOI Act.
4. Within six months Airservices should conduct an audit on the following and provide the OAIIC with a report on the outcomes of:
 - a. the effectiveness of the implementation of the new FOI procedures and training, and
 - b. the compliance of its decision notices under s 26 of the FOI Act.



Notice on completion under s 86 of the FOI Act (s 22(1)(a)(ii) - irrelevant material) – (s 22(1)(a)(ii) - irrelevant material) and Services Australia

On 4 December 2017, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982 (Cth)* (the FOI Act) from (s 22(1)(a)(ii) - irrelevant material) about Services Australia (formerly the Department of Human Services) in the performance of its functions and exercise of its powers under the FOI Act.

The complainant complained about Services Australia's assessment and management of documents under the Information Publication Scheme (IPS), as well as the charge imposed for access to documents made available under the IPS within a short time of (s 22(1)(a)(ii) - irrelevant material) request.

Following preliminary inquiries, on 20 August 2019 the delegate of the Information Commissioner commenced an inquiry into the complaint.

Upon completion of an investigation I am required to issue a notice on completion which sets out:

- investigation results
- the investigation recommendations (if any), and
- the reasons for the investigation results and the making of the investigation recommendations (s 86).

I can make formal recommendations which I believe Services Australia ought to implement (s 88).

Background

On 20 October 2017, the complainant lodged an FOI request with Services Australia seeking access to 10 documents, the titles of which appeared on Services Australia's website. In (s 22(1)(a)(ii) - irrelevant material) request the complainant hyperlinked the title of each document to where it was referenced, but not published, on Services Australia's website.

On 30 October 2017, Services Australia acknowledged receipt of the request (Services Australia reference: (s 22(1)(a)(ii) - irrelevant material)).

On 3 November 2017, Services Australia issued a charge notice to the complainant under s 29 of the FOI Act for an estimated charge of \$57.05. One document was excluded from both the charge assessment and the access request because it was published on the agency's website.

On 29 November 2017, in response to Services Australia's preliminary notification of a charge, the complainant emailed Services Australia noting that all of the requested documents were now published in full on Services Australia's website at the same URLs that

had previously only displayed the titles of the documents on 20 October 2017. In [REDACTED] correspondence the complainant contended that Services Australia had acted improperly in order to make a profit by imposing a charge to access documents that were later made publicly available.

A summary of key dates in relation to these matters is at **Attachment B**.

On 4 December 2017¹, the complainant lodged an FOI complaint with the OAIC.

The full particulars of the complaint were provided to Services Australia on 20 July 2018. In essence the complainant alleged that Services Australia did not comply with its obligations under s 8(2)(j) of the FOI Act to publish operational information and that [REDACTED] was required to pay a charge to access documents that should be published by the Department under the IPS.

Services Australia was invited to provide submissions in response to the complaint. I have had regard to the submissions made by Services Australia on:

- 7 August 2018 (including the attached submissions dated 10 April 2018 relating to a different complaint about similar matters)
- 9 November 2018
- 10 September 2019.

Investigation results

Issue 1: Publication of operational information under the Information Publication Scheme (IPS)

Allegation

The complainant alleged that Services Australia classified 'simple policy/procedure documents' as 'potentially exempt', displaying only the titles of the documents and information about how to lodge an FOI request on its website, and considered whether to publish the documents under the IPS only following receipt of an FOI request.

¹ The complainant provided further submissions and supporting information on 11 December 2018, 13 December 2018 and 7 January 2019.

Legislative framework

Information Publication Scheme (IPS)

Part II of the FOI Act establishes an IPS that requires an agency to publish a range of information about its functions, including the information dealt with or used to carry them out (s 7A).

Part II imposes some particular requirements on agencies. Relevant to this matter:

- ‘operational information’ as defined by s 8A must be published – s 8(2)(j)
- the information must be ‘accurate, up-to-date and complete’ - s 8B
- the information must be published in a particular way – s 8D.

A charge may only be imposed for access to the information in certain circumstances described in s 8E(4).

An agency is not required to publish ‘exempt matter’ (the inclusion of which in a document causes the document to be an exempt document) or if publication is restricted or prohibited by an enactment (s 8C).

The [FOI Guidelines](#) provide:

- ... Operational information should be updated in the IPS at the same time that a revised or updated version of the information is provided to agency officers².
- Where information is not published because an exception applies, agencies may record this in an IPS information register, including the title of the document to which an exception applies and the reason it was not published under the IPS... Capturing this information may help an agency if it needs to respond to any complaints to the Information Commissioner about its IPS compliance³.
- ... if a document contains exempt and non-exempt material the agency should prepare an edited copy⁴.

Services Australia’s submissions

In summary, Services Australia submitted that Operational Blueprints (OBPs) are documents that include operational information as defined in s 8A of the FOI Act. OBPs are prepared by business areas, who decide whether the document should be published on the IPS.

² FOI Guidelines at 13.123

³ FOI Guidelines at 13.72

⁴ FOI Guidelines at 13.104

Business areas may – but are not required to – refer to the FOI team when making the assessment as to whether or not the OBP contains ‘operational information’ and if so, whether or not the exemptions from publication in s 8C apply.

All OBPs are stored in one repository, used by both staff and accessed by the public. Where a business area considers the OBP to be exempt from the requirements of Part II of the FOI Act, the document is made available to staff but not the public. As a result, it is not possible to make only some parts of an OBP publicly accessible. The titles of all OBPs are accessible to the public, even where the document itself is not.

In circumstances where a member of the public seeks access to a document that is not publicly available, they are invited to make a request under the FOI Act. Services Australia then considers whether all or part of the document should be provided in response to the request. In particular, Services Australia advised:

...In accordance with the department’s FOI Procedure Manual, FOI requests are always reviewed to determine whether release under the department’s administrative access arrangements would be suitable. This would occur if, following further consideration of the OBP, it was determined that the latest update to the OBP document did not contain any exempt material and could therefore be released in full. In this circumstance, the OBP would be made publicly accessible on the IPS, and the FOI team would work with the person seeking access to confirm that access to the relevant link satisfied their FOI request.

... If it is determined that the OBP contains material that is exempt from release under the FOI Act, but an edited copy can be prepared under section 22 of the FOI Act, an FOI decision will be made to facilitate the release of this edited copy. The version of the OBP that is released will be published on the department’s disclosure log. The IPS cannot be updated to reflect this decision - as explained above, OBP’s cannot be published on the IPS in part or in some other form that the one live version that the department maintains.

...If it is determined that the OBP is wholly exempt from release under the FOI Act, an FOI decision is made to this effect. The relevant page on the IPS will continue to include the disclaimer that the information is potentially FOI exempt, or unavailable to external audiences. This is because while a decision has been made that this particular version of the OBP is presently exempt from release, this could change over time, particularly if the OBP is revised or updated.

In relation to the documents that the complainant requested, Services Australia submits:

Eight out of the nine OBPs within the scope of the complainant’s request were not published at the time the applicant made [REDACTED] request... The line area/s that initially created those OBPs would have considered that they were exempt under the FOI Act, on the basis that they contained information that was exempt under section 8C of the FOI Act...

On 9 November 2017, [the relevant line area] advised the FOI officer that they had determined the requested OBPs were no longer exempt from publication and that they have contacted the OBP Section to have the requested OBPs published.

Discussion

The documents within the scope of the complainant's request were not published on 20 October 2017 but were published in full under the IPS on 9 November 2017.⁵ However, Services Australia could not advise the OAIC:

- when the documents in question were created
- why the business area initially formed the view that they were not suitable for publication: 'The FOI team cannot advise on the subjective intentions of the business areas at the time they created the Operational Blueprints in question' (submission dated 9 November 2018), nor when they were subsequently published
- whether the business area consulted the FOI team in reaching its determination that the documents were not suitable for publication
- the circumstances or schedule by which unpublished operational information is reviewed for inclusion in the IPS, instead noting that business areas review the document 'as business areas do from time to time' and that reviews are conducted 'as often as required'
- what changed following receipt of the complainant's FOI request such that operational information that was previously considered exempt from release under the FOI Act was no longer considered exempt.

Services Australia submitted that there was no requirement for the relevant business area to record reasons for the decision not to publish operational information.

I note that the [FOI Guidelines](#) at [13.72] encourage agencies to record reasons for a determination that an exemption applies to a document under the IPS. I also note that Services Australia's internal guidance material provides:⁶

Business areas responsible for operational information have been asked to identify all operational information and any documents which may contain information that should not be published (*including why the information should not be released*). [emphasis added]...

When reviewing operational information and considering whether it needs to be published, the following questions will help:...

Have I documented the reasons for any decision not to release operational information?
[emphasis added]

Services Australia has been unable to explain what changed between the date the complainant requested the documents at issue when the documents were unavailable and the date the agency decided to publish them under its IPS. There is no explanation before me as to why the agency reasonably considered those documents to be exempt from inclusion in the IPS under s 8C prior to the access request. The subsequent publication of the documents and the absence of evidence of any changes to or review of the content of the

⁵ Services Australia's submissions dated 7 August 2018 at [9] and [12].

⁶ Attachment A to Services Australia's submissions of 10 September 2019.

document allows the reasonable inference that the documents may have been similarly suitable for publication at or some time before the complainant's access request.

Services Australia has provided no explanation regarding the business area's failure to adhere to internal guidance requirements to document the reasons for the decision not to publish this operational information and has submitted that the review of documents considered at one time to be unsuitable for publication occurred on an ad hoc, rather than systematic basis.

While it is appropriate for agencies to consider proactive publication of information following access requests for it (s 8(2)(g)), this does not supplant the ongoing obligation to proactively publish all operational information (s 8(2)(j)).


Conclusion

Based on the information before me, I am satisfied that, at the time of this complaint, Services Australia did not meet its obligation to publish operational information as required by s 8(2)(j).

I am not satisfied that, as alleged, Services Australia deliberately failed to proactively publish this information with a view to extracting charges from FOI applicants. Rather, I consider that Services Australia failed to have adequate systems and processes in place to confirm that business areas were appropriately considering their IPS obligations at the time that OPBs were created or adequate systems and processes to ensure that documents appropriately categorised under s 8C were reviewed to consider whether s 8C continued to apply.

Issue 2: Charge for request to access information under the IPS

Allegation

The complainant alleged that Services Australia improperly issued a charge notice for  request to access documents that should have been publicly available under the IPS.

Consideration

The notice of a charge issued by Services Australia related to the complainant's access request under s 15 of the FOI Act and was not imposed in relation to access to documents under the IPS. This is clear from the correspondence sent to the complainant by the agency on 3 November 2017 which specifically refers to s 29 of the FOI Act.

The substance of the complaint is that a charge should not have been imposed in the FOI request in relation to documents that should have been available to the public through the IPS.

I note that at the time of the FOI request, the documents were not publicly available and that it was open to Services Australia to consider whether to impose a charge for that access. I also note that the information requested was subsequently published by Services Australia on its IPS resulting in the complainant receiving full access to the documents without paying a charge.

Services Australia submitted that:

17. If a request is received for an OBP document that has been flagged by the business area as not being suitable for external release, the FOI team may check with the business area in the first instance to review whether the OBP can in fact be published on the IPS (and therefore provided administratively)...

26. If an OBP that was initially identified by the business area as not suitable for external release because it contained exempt material is later released in full under the FOI Act, the FOI team work with the business area to ensure that the OBP settings are updated to make the material public on the IPS⁷.

It appears that this process was likely to have occurred in this case – in that a request was made for an OBP that the business area had categorised as not suitable for external release, that, upon receipt of the access request the FOI team approached the business area which resulted in the business area reviewing its earlier decision and publishing the material.

It would also appear that this occurred in the period between the complainant receiving the correspondence about a charge for access (3 November 2017) and reviewing the links to the documents online and learning that they were altered to provide access to the documents (29 November 2017).

While the conclusion reached by the complainant in this case is not unreasonable, I do not consider that Services Australia was deliberately and inappropriately imposing a charge for the reasons or in the manner suggested by the complainant. As noted above, it is open to agencies to consider imposing a charge for access to material that is not publicly available under s 29 of the FOI Act.

However, it does appear that the notification of a charge in this case was inconsistent with Services Australia's internal guidance regarding access requests for OBPs that were not publicly available. In those circumstances, Services Australia has submitted that its practice is to release documents administratively if possible. No charge is imposed for administrative release of documents.

Had Services Australia complied with this policy in this case, it is likely that the documents would have been provided to the complainant through administrative release, and no charge notice would have been sent.

⁷ Services Australia submission dated 10 September 2019

Conclusion

I am not satisfied that Services Australia deliberately withheld from publication documents that were required to be published under the IPS for the purpose of improperly imposing a charge in relation to access requests for those documents.

I am satisfied that the failure to adhere to internal guidance which gave consideration to the publication of and administrative access to documents sought through an access request resulted in the complainant's perception in this case.

Recommendations

The purpose of my recommendations, as set out below, are to conclude the complaint investigation and ensure Services Australia meets its obligations under the FOI Act, including that Services Australia's current and future processes and practices are consistent with the objects of the FOI Act.

Pursuant to s 88 of the FOI Act, I have set out the following recommendations, being formal recommendations to Services Australia that I believe Services Australia ought to implement by **1 December 2021**. I recommend that Services Australia:

1. Develop and implement a system to ensure that:
 - a. decisions taken by business areas in relation to the publication of operational information are consistent with Part II of the FOI Act, and
 - b. where a decision is taken not to publish an OBP – either because it does not comprise operational information or is exempt under s 8C of the FOI Act – that decision is recorded.
 - c. decisions taken by business areas not to publish particular OBPs are periodically reviewed to determine whether the reasons for non-publication continue to apply to the OBP.
2. Adheres to current internal policies to consider the potential administrative release of OBPs in response to access requests before considering whether a charge should be applied under s 29 of the FOI Act for access to those materials.



Notice on completion under s 86 of the FOI Act ([redacted]) – [redacted] [redacted] and Services Australia

On 30 January 2018, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) from [redacted] about Services Australia (formerly the Department of Human Services) in the performance of its functions and exercise of its powers under the FOI Act.

The complainant made complaints relating to Services Australia’s publication of documents under the Information Publication Scheme (IPS).

Pursuant to s 86, upon completion of an investigation I am required to issue a notice on completion which sets out:

- the investigation results
- the investigation recommendations (if any), and
- the reasons for the investigation results and the making of the investigation recommendations.

In the course of this investigation, I have relied upon the documents provided by Services Australia and the complainant.

Pursuant to s 88 of the FOI Act, I can make formal recommendations which I believe Services Australia ought to implement in order to improve its processing of FOI requests and compliance with the FOI Act.

Background

On 30 January 2018, the complainant lodged an FOI complaint with the OAIC.

The complaint related to Services Australia’s [‘Operational Blueprint’](#) website, specifically that Services Australia:

... is failing to publish substantial amounts of operational information while claiming that the information *might* be exempt but without actually stating which exemptions apply to this information, or preparing edited documents that do not contain exempt material...

The department is placing the onus on members of the public to make FOI requests to cause the department to publish information that should already be published under the information publication scheme required by the FOI Act.

Investigation results

Allegation

The complainant alleged that Services Australia:

- does not publish ‘substantial amounts of operational information’ in accordance with s 8 of the FOI Act and instead requires the public to request that information under the FOI Act and
- where documents comprising operational information contain exempt material, Services Australia should list those exemptions against the title of the unpublished document.

Legislative framework

Information Publication Scheme (IPS)

Part II of the FOI Act establishes the IPS, which requires an agency to publish a range of information about its functions, including the information dealt with or used to carry them out (s 7A).

Part II imposes particular requirements on agencies, including:

- ‘operational information’ as defined by s 8A must be published (s 8(2)(j))
- the information must be ‘accurate, up-to-date and complete’ (s 8B)
- the information must be published in a particular way (s 8D).

An agency is not required to publish ‘exempt matter’ (the inclusion of which in a document causes the document to be an exempt document) or if publication is restricted or prohibited by an enactment (s 8C). An agency is not required to publish personal or business information as part of its IPS if it would be unreasonable to publish that information (ss 8(2)(g)(i), (ii)).

The Guidelines issued by the Information Commissioner under s 93A of the FOI Act ([FOI Guidelines](#)) provide further guidance about the publication of ‘operational information’:

- In relation to the requirement that the information must be ‘accurate, up-to-date and complete’, operational information should be updated in the IPS at the same time that a revised or updated version of the information is provided to agency officers.¹
- Where information is not published because an exception applies, agencies may record this in an IPS information register, including the title of the document to which an exception applies and the reason it was not published under the IPS...

¹ FOI Guidelines at [13.123].

Capturing this information may help an agency if it needs to respond to any complaints to the Information Commissioner about its IPS compliance.²

- In relation to a document of an agency which is exempt under an exemption provision in Part IV of the Act, if a document contains exempt and non-exempt material, the agency should prepare an edited copy.³

Services Australia's submissions

During the investigation, Services Australia was invited to provide submissions in response to the complaint.

In summary, Services Australia submitted that:

- Operational Blueprints (OBPs) are documents that include operational information as defined in s 8A of the FOI Act. OBPs are prepared by business areas, which decide whether the document should be published on the IPS.
- Business areas may – but are not required to – refer to the FOI team when making the assessment as to whether or not the OBP contains ‘operational information’ and if so, whether or not the exemptions from publication in s 8C apply.
- All OBPs are stored in one repository, used by both staff and accessed by the public. Where a business area considers the OBP to be exempt from the requirements of Part II of the FOI Act, the document is made available to staff but not the public. As a result, it is not possible to make only some parts of an OBP publicly accessible through this repository. The titles of all OBPs are accessible to the public, even where the document itself is not.
- In circumstances where a member of the public seeks access to a document that is not publicly available, they are invited to make a request under the FOI Act. Services Australia then considers whether all or part of the document should be provided in response to the request. In particular, Services Australia advised:

...In accordance with the department's FOI Procedure Manual, FOI requests are always reviewed to determine whether release under the department's administrative access arrangements would be suitable. This would occur if, following further consideration of the OBP, it was determined that the latest update to the OBP document did not contain any exempt material and could therefore be released in full. In this circumstance, the OBP would be made publicly accessible on the IPS, and the FOI team would work with the person seeking access to confirm that access to the relevant link satisfied their FOI request.

... If it is determined that the OBP contains material that is exempt from release under the FOI Act, but an edited copy can be prepared under section 22 of the FOI Act, an FOI decision will be made to facilitate the release of this edited copy. The version of the OBP that is released will be published on the department's disclosure log. The IPS cannot be updated to reflect this decision - as explained above, OBP's cannot be published on the IPS in part or in some other form that the one live version that the department maintains.

² FOI Guidelines at 13.72

³ FOI Guidelines at 13.104

...If it is determined that the OBP is wholly exempt from release under the FOI Act, an FOI decision is made to this effect. The relevant page on the IPS will continue to include the disclaimer that the information is potentially FOI exempt, or unavailable to external audiences. This is because while a decision has been made that this particular version of the OBP is presently exempt from release, this could change over time, particularly if the OBP is revised or updated.

- As at 13 September 2021 there were 5189 documents included in Services Australia's '[Operational Blueprint' website](#).⁴ Of those, 2561 were available to the public directly from the link in the title of the document, and 2628 were unavailable directly through that mechanism.

Discussion

Publication of operational information and requesting information through the FOI Act

As noted above, where a document is unavailable to the public through a link, a person is directed to seek the document through a request under the FOI Act. On receipt of such a request, Services Australia has submitted that it considers first whether the document should be release outside the FOI Act, through an administrative mechanism. Where the document is released in these circumstances, Services Australia also enlivens the direct public link to the document through the OBP website.

Where the document is not able to be released through an administrative mechanism, a decision is taken in response to the FOI request. That decision will either result in the release of the document, the release of the document with redactions, or a decision not to release the document.

In relation to the release of the redacted document, Services Australia has submitted that it then publishes the redacted document on its disclosure log, which makes the document available to the public more widely.

In the event a decision is taken under the FOI Act not to release the document to the applicant, that decision is communicated to the applicant with a statement of reasons and is internally and externally reviewable.

In these circumstances, it is a good transparency mechanism for Services Australia to publish the names of operational documents it has decided not to make generally available to the public in order to provide an opportunity for members of the public to make a request for the document. Where the request is considered under the FOI Act (with the associated benefits to the person seeking access of reasons for that decision and review rights).

While it is also appropriate for an agency that receives an FOI request for a document to first consider whether the document can be released administratively, I am concerned that this

⁴ [Operational Blueprint' website](#) accessed on 17 September 2020.

practice, in the context of the OBPs and the IPS, suggests that there are documents that perhaps should have but have not been proactively published.

It is reasonable to infer that documents released administratively, and also those fully released as a result of an FOI request, should have been made available on Services Australia's IPS at or before the time of the request. Consequently, while these steps are useful mechanisms to review and reconsider earlier decisions taken not to publish the documents, they do not supplant the agency's ongoing responsibility to systematically consider and publish operational information as required by the IPS provisions in the FOI Act.

Consequently, I find that the process of recommending that individuals seek access to non-published OBP information is appropriate in circumstances where the agency has robust and reliable processes in place to ensure that is not the sole or predominant mechanism for reviewing and reconsidering earlier decisions not to publish operational information, or testing whether those earlier decisions not to publish documents are consistent with the FOI Act.

Services Australia should have in place processes and procedures to ensure that decisions taken not to publish certain operational information are, and remain, consistent with the IPS requirements. There is nothing before me to suggest that Services Australia has a systematic mechanism to ensure that decisions not to publish certain OBPs are compliant with Part II of the FOI Act or that those decisions are regularly reviewed.

Whether reasons for exemption should be published

The complainant also recommends that the reasons a particular unlinked document is considered to be exempt should also be published on the OBP website.

While this would provide greater clarity to the public regarding the reasons for the non-publication of the particular document, it is not required by either the FOI Act or FOI Guidelines. The FOI Act contains no statutory requirement for agencies to publish the reasons for non-publication of exempt matter. The FOI Guidelines (at [13.72]) suggest that agencies should consider creating an IPS information register, in which these exceptions to publication are recorded, but do not require publication of that register or the exemptions that apply in relation to particular documents.

Conclusions

Following this investigation, I have formed the opinion that the matters raised in this complaint do not suggest that Services Australia is non-compliant with the FOI Act or Guidelines in relation to the suggestion that that the agency publish the exemption relied on in relation to the non-published OBPs.

I consider that the process undertaken by Services Australia in relation to unlinked documents – whereby requests for those documents are invited which may result in either:

- administrative release and publication of the document
- release of a redacted document and publication of that redacted document through the agency's disclosure log, or
- a decision not to release the document, accompanied by a statement of reasons and internal and external review rights

is appropriate, but only where decisions about publication are consistent with the requirements of Part II of the FOI Act and there is regular and systematic reconsideration of decisions not to publish OBP information. This mechanism should not be relied upon in order to meet those obligations.

Recommendation

The purpose of my recommendation below is to conclude the complaint investigation and ensure Services Australia meets its obligations under the FOI Act, including that Services Australia's current and future processes and practices are consistent with the objects of the FOI Act.

Pursuant to s 88 of the FOI Act, I have set out the following recommendation, being a formal recommendation to Services Australia that I believe Services Australia ought to implement by **15 December 2021**. I recommend that Services Australia:

1. Develop and implement a system to ensure that:
 - a. decisions taken by business areas in relation to the publication of operational information are consistent with Part II of the FOI Act, and
 - b. decisions taken by business areas not to publish particular OBPs are periodically reviewed to determine whether the reasons for non-publication continue to apply to the OBP.



ATTACHMENT A

Notice on completion under s 86 of the FOI Act (s 22(1)(a)(ii) irrelevant material) – (s 22(1)(b)) and Australian Building and Construction Commission

On 8 June 2018, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) from (s 22(1)(b)) about the Australian Building and Construction Commission (ABCC) in the performance of its functions, and the exercise of its powers, under the FOI Act.

The complainant alleges the ABCC:

- extended the processing period under s 15(6) where it was not appropriate to do so
- did not process an FOI request in accordance with the FOI Act, where the request was transferred to the ABCC under s 16 of the FOI Act, and
- does not maintain its disclosure log as it is required to do so under s 11C of the FOI Act.

During the course of the investigation of this complaint the complainant withdrew their complaint in relation to aspects of the ABCC's disclosure log.

s 22(1)(a)(ii) irrelevant material

Pursuant to s 86, upon completion of an investigation I am required to issue a notice on completion which sets out:

- investigation results
- the investigation recommendations (if any), and
- the reasons for the investigation results and the making of the investigation recommendations.

In issuing this notice, I have relied upon the submissions provided by the ABCC and the complainant.

Background

On 7 October 2017, the complainant contacted the ABCC to request access to documents relating to (s 22(1)(a)(ii) irrelevant material) (Request A):

s 22(1)(a)(ii) irrelevant material

On 20 October 2017 the ABCC acknowledged receipt of Request A.

On 7 October 2017, the complainant contacted the Department of Jobs and Small Business (the Department) to request access to documents held by the Department in identical terms to Request A above (**Request B**).

On 16 October 2017, the Department wrote to the complainant advising that Request B had been transferred to the ABCC pursuant to s 16 of the FOI Act on the basis that the Department was satisfied that the subject matter of the documents was more closely related with the functions of the ABCC than those of the Department.

On 17 October 2017, the complainant responded to the Department advising that they did not agree with the Department's decision to transfer the request:

While "We" is satisfied that the subject-matter of the documents being sought is more closely related with the functions of the ABCC than those of the Department I note that "We" does not provide any basis for that satisfaction. In any event I do not agree that the subject-matter of the documents being sought is more closely related with the functions of the ABCC than those of the Department.

...

s 22(1)(a)(ii) irrelevant material

On 24 October 2017, the Department responded to the complainant's objection to the transfer of the request:

Upon receiving your request, the Department consulted with the ABCC, which agreed that the subject matter of the documents you requested were more closely connected with its own functions. It is on the basis of this consultation that the Department was satisfied that a transfer was appropriate and permitted under the FOI Act.

...

Notwithstanding the above, the relevant areas of the Department have conducted preliminary searches of their records, and have advised that they do not hold any documents within the scope of your request.

On 3 November 2017, the ABCC wrote to the complainant advising that the statutory processing period for Request A would be extended by 30 days in order to conduct consultation with third parties:

In conducting a search for documents that are relevant to your access request, it has become apparent that the ABCC will be required to consult relevant parties.

As a result, we write to inform you that it is appropriate for the processing period under section 15(5)(b) to be extended by a further 30 days pursuant to subsection 15(6)(a).

On 6 December 2017 the ABCC provided a decision on Request A. In that decision the ABCC refused access under s 24A(1) on the basis that the ABCC had taken all reasonable steps to locate documents within the scope of the request and was satisfied that the documents did not exist.

In that decision, the ABCC also referred to the consultation period stating:

By letter dated 3 November 2017, the ABCC notified you of an extended timeframe to process the FOI request pursuant to section 15(6)(a)...

The letter communicated to you that the required further time arose because it was appropriate to consult relevant parties.

Those consultations are now complete. However, for the purposes of notifying a decision to you and of disclosure of the relevant document that may follow, it should be noted that relevant third-parties with whom we consulted are accorded review or appeal rights under the FOI Act...

In other words, this section [s 27A of the FOI Act] provides that in respect of the relevant document, the review or appeal rights that are available to the consulted parties are to “run out” before access to the document is provided to the FOI applicant.

On 11 December 2017, the complainant wrote to the ABCC seeking clarification about the consultation with third parties:

Having read the guidelines I assumed (wrongly as it turns out) that the ABCC was consulting with relevant third parties about a document or documents. Clearly that was not the case. In my opinion the OAIC Guidelines are deficient in that the guidelines make no reference to consultation with relevant third parties in circumstances where relevant documents have not been identified or located. I propose to raise the issue with OAIC and would be grateful if the ABCC would provide me with:

- (a) Details of the circumstances that made it apparent that the ABCC was required to consult relevant parties.
- (b) In the absence of relevant documents, the criteria used to select relevant third parties to consult
- (c) An outline of the consultation that took place given the absence of relevant documents (I do not seek information about the identities of the third parties who were consulted.)

The complainant also sought an update about Request B, which had been transferred to the ABCC on 16 October 2017:

On the second matter, on 7 October 2017 I made a request for access to documents to the Department of Employment who subsequently advised me that my FOI request had been

transferred to the ABCC pursuant to section 16. I have received no information on the status of that FOI application.

On 14 December 2017, the ABCC responded to the complainant's correspondence of 11 December 2017:

In relation to the first issue, the ABCC proposed to consult a third party in this matter as advised. However, it was later determined, after the consultation period had commenced, that no document existed that met the description referred to in the FOI request.

In relation to the second issue, the decision dated on 6 December 2017 was issued in response to both the FOI request you sent to the ABCC on 7 October 2017 and the FOI request you sent to the Department on 7 October 2017.

On 8 June 2018, the complainant lodged an FOI complaint with the OAIC about the ABCC's actions in processing Request A and Request B.

On 5 September 2018, the OAIC notified the ABCC of the complaint and conducted preliminary inquiries with the ABCC under s 72 of the FOI Act. The ABCC provided submissions on 19 September 2018 and 5 November 2018.

On 5 November 2018, the ABCC provided a decision to the complainant in response to Request B. In its decision, the ABCC refused access pursuant to s 24A(1) on the basis that all reasonable steps had been taken to locate documents within the scope of the request but no documents existed.

On 18 December 2018, the OAIC notified the ABCC under s 75 of the FOI Act that the Information Commissioner had decided to investigate the complaint. The ABCC provided further submissions on 29 January 2019 and 17 September 2019.

Issue 1: Consultation with third parties

Allegation

The complainant complained that it was inappropriate for the ABCC to extend the processing period to consult third parties where it later decided that no documents existed.

Legislation and Guidelines

The FOI Act provides a statutory timeframe of 30 days to process an FOI request (s 15(5)).

That period can be extended by up to 30 days with the applicant's agreement (s 15AA), if consultation with a third party is undertaken (s 15(6)), or if consultation with a foreign entity is undertaken (s 15(8)).

Section 27A provides for consultation with third parties where the documents sought contain personal information and the third party may reasonably object to the release of the information.

The FOI Guidelines are issued under s 93A of the FOI Act. Agencies and ministers are required to have regard to the Guidelines when performing a function or exercising a power under the FOI Act. The FOI Guidelines provide:

An agency or minister may need to consult a third party where documents subject to a request affect Commonwealth-State relations (s 26A), are business documents (s 27) or are documents affecting another person's privacy (s 27A).¹

...

There must be some rational basis which the agency or Minister can discern, based on the face of the document or from anything else actually known to the decision-maker, indicating that disclosure of the document would, or could be expected to, unreasonably affect the person adversely in relation to his or her personal information, lawful business or professional affairs. The mere appearance of a person's name in the document, in the absence of anything more, may not be sufficient for it to be apparent that a person might reasonably wish to make an exemption contention.²

Complainant's submissions

In their complaint, the complainant submits:

By letter dated 6 Dec 2017 the ABCC decision maker decided to refuse access under s 24A(1) of the FOI Act on the grounds that all reasonable steps had been taken to find the documents requested and the decision maker was satisfied that the documents did not exist. The decision maker confirmed that the processing time had been extended because it was appropriate to consult relevant parties and that those consultations had been completed.

On 11 December 2017, the complainant wrote to the ABCC seeking further information on the consultations that had purportedly occurred.

On 14 December 2017, the complainant submits that the ABCC advised:

... ABCC proposed to consult a third party in this matter as advised. However, it was later determined, after the consultation period had commenced, that no document existed that met the description referred to in the FoI request.

ABCC's submissions

In correspondence to the complainant on 3 November 2017, the ABCC advised that it was conducting consultation with a third party pursuant to s 27A of the FOI Act.

¹ FOI Guidelines [3.74].

² FOI Guidelines [3.77] footnotes omitted.

In the decision notice of 6 December 2017, the ABCC advised the complainant that:

By letter dated 3 November 2017, the ABCC notified you of an extended timeframe to process the FOI request pursuant to section 15(6)(a)...

The letter communicated to you that the required further time arose because it was appropriate to consult relevant parties.

Those consultations are now complete. However, for the purposes of notifying a decision to you and of disclosure of the relevant document that may follow, it should be noted that relevant third-parties with whom we consulted are accorded review or appeal rights under the FOI Act...

In other words, this decision provides that in respect of the relevant document, the review or appeal rights that are available to the consulted parties are to 'run out' before access to the document is provided to the FOI applicant.

In response to this complaint, the ABCC submitted:

- a. The ABCC initially identified two documents that it considered came within the scope of the request. The documents contained the personal information of a number of individuals. As a consequence, the ABCC determined it would consult with those persons pursuant to s 27A of the Freedom of Information Act 1982 (Cth) (FOI Act).
- b. No consultation took place as a result of the ABCC determining that the documents that it had initially identified as coming within the scope of the request...
- c. ... In preparing to consult with individuals whose personal information was contained in the document and again considering the terms of the scope of the request and the documents, it was determined the documents were not within scope of the request.

In relation to the extension of the processing time because of the requirement to consult, the ABCC advised:

It follows from the clear words of the section [15(6) of the FOI Act] that, once such a determination is made from the terms of the request and [put] in writing (as it was on 3 November 2017), the period to process a request is extended by a further 30 day period: 16(6)(a) [sic]. The prerequisite to any extension is the making of the determination that the consultation requirements apply. Once done, the agency must, as soon as practicable, inform the applicant that the period has been so extended: 15(6)(b). The obligation to notify the applicant as soon as practicable acknowledges that the agency may not, as yet, have identified or considered all the documents. Similarly, it is not inconsistent with the scheme that a determination to consult is made, but the circumstances alter whether consultation occurs or is required. This outcome does not invalidate the genuineness or appropriateness of the initial determination that the consultation provisions of the FOI Act would need to be applied.

The ABCC maintains that it was appropriate to extend the period for the purpose of consultation at the relevant time (3 November 2017) and that it was entitled to do so in accordance with s 15(6) of the FOI Act. This is so even if, ultimately, formal consultation did not take place.

In a submission provided to the OAIC on 29 January 2019, the ABCC submitted:

The difference between the two phrases "consultations are now complete" and "the consultation process was now complete" is simply to confirm that, while the consultation process was initiated, the formal steps did not take place. To the extent that the first phrase implies that actual consultations took place, this was incorrect and this lack of precision in expression is regrettable. Whereas the second phrase more precisely expresses that the process of consultation had been concluded after inquiries made clear that no s 22(1)(a)(ii) irrelevant material. In other words, the process was considered to be appropriate as described above and commenced accordingly, but was ultimately concluded with no consultation being needed (because the documents initially identified as relevant were found to be irrelevant by the decision maker). This concluded the process of consultation in the context of this request....

Why were third party review rights included in the decision?

Third review rights were included in the decision as the decision maker took the view they should be included because there had been an extension of time for consultation. It is acknowledged that the decision did not need to contain any reference to third party review rights where actual consultation did not take place in accordance with s 27A of the FOI Act.

During the course of this investigation the ABCC provided submissions acknowledging that the wording used in its decision of 6 December 2017 could have caused confusion to the applicant:

The ABCC can appreciate that the expression used has caused some confusion to the applicant and we regret that occurring.

The ABCC wishes to make it clear that at the time we advised the applicant that we would be engaging in a consultation process, we did so in good faith and with the genuine belief that those consultations were necessary...

It was only after the ABCC began identifying the persons with whom we should consult that we reconsidered our earlier position as to whether the documents were in fact within scope. Unfortunately, this occurred after the consultation process had commenced.

...

The ABCC's objective remained at all times to process the request in accordance with the Freedom of Information Act 1982 (FOI Act). Naturally, we regret any confusion caused to the applicant.

Discussion

I have considered the ABCC's contention that the requirement to notify applicants of an extension to the statutory processing timeframe 'as soon as practicable' in accordance with s 15(6) suggests that the agency or Minister can do so in advance of considering or identifying the relevant documents. I disagree with this contention.

Subsection 15(6) will only have effect when the decision maker determines, in writing, that (in this case) s 27A applies and the requirements of s 27A ‘make it appropriate to extend the period referred to in paragraph 15(5)(b).’

There are several elements to this provision: first, the agency must have determined, in writing, that s 27A applied. Section 27A applies where there has been a request for a document that contains personal information about a person, and it appears that the person might reasonably wish to make a contention that both the document is conditionally exempt under s 47F and that providing access to the document would be contrary to the public interest. In forming the necessary view that a person may wish to make the described exemption contention, s 27A(2) provides a list of matters to which the decision maker must have regard, that includes the age and public availability of the information. Only once those elements are satisfied is it open to the agency to determine whether it is appropriate to extend the processing period.

Given this, it is not possible for an agency to form the view that it is appropriate to extend the processing period under s 15(6) without an examination of the documents in scope and satisfaction of the elements described above. This interpretation has support in the FOI Guidelines which provide (at [3.77]) that ‘there must be some rational basis which the agency or Minister can discern, *based on the face of the document...*’ (my italics).

Once those elements of the FOI Act described above are reasonably satisfied and the processing period has been extended under s 15(6), it is not unlawful or unforeseeable that an agency may then reconsider the documents at issue and reasonably form a different view regarding the necessity of consultation under s 27A. In such circumstances, while it is administratively possible for the decision maker to make a decision on the request within a shorter period, the exercise of the power in s 15(6) has occurred and that extension of time has effect. The subsequent re-assessment of the necessity to consult does not, of itself, ‘undo’ the determination to extend the processing period under s 15(6) of the FOI Act.

The ABCC submitted that as a result of its officer’s preliminary assessment of the scope of the review, it identified documents that were potentially relevant that included the personal information of individuals who may wish to make a contention that those documents were conditionally exempt under s 47F of the FOI Act. It was only after further inquiries were made that the decision maker formed the view – in mid-November 2017 – that the documents did not meet the terms of the request. As described above, the ABCC has also provided generalised submissions about the application of the provisions, suggesting that they may be enlivened in the absence of identification and proper consideration of the documents at issue.

Conclusion

In the event the ABCC examined the documents it initially considered to be within scope of the FOI request and was reasonably satisfied that the elements of ss 15(6) and 27A were met, it was open to the ABCC to extend the processing period by 30 days, even in circumstances where the ABCC’s subsequent consideration of the documents in scope resulted in the

conclusion that the consultation was not necessary or where the documents considered in scope were subsequently found to be outside the scope of the request.

However, it was not open to the ABCC to extend the scope of the processing period under s 15(6) in circumstances where it had not identified or considered the documents at issue, as described by the ABCC in its generalised submission. In this case, and in relation to these particular circumstances, the ABCC has submitted that its officer did identify documents potentially within scope and formed the requisite view that they contained the personal information of third parties who may wish to contend that s 47F should be applied. In those circumstances, the extension of the processing period was available, even where the subsequent consideration of the documents resulted in a decision that they were, in fact, out of scope.

Other issues

In the decision letter of 6 December 2017 for Request A, the ABCC advised the complainant that '[t]hose consultations are now complete' and referred to 'relevant third parties with whom we consulted'. This conveys that the ABCC did, in fact, consult with third parties in relation to the documents it identified initially as within the scope of the request but subsequently considered not to be within scope.

In the same letter, the ABCC reproduced parts of s 27A of the FOI Act and explained that, not only could the timeframe for statutory compliance with an access request be extended under s 15(6) of the FOI Act, but, where third party consultations were required, documents must not be disclosed until review and appeal opportunities available to those third parties had expired.

However, in submissions to the OAIC, the ABCC confirmed that it did not consult with any third parties in relation to the request, and that it formed the view that the documents initially identified as within scope were not within scope before any consultation with third parties had occurred.

I find the statements regarding consultation with third parties made by the ABCC to the complainant in the FOI decision letter of 6 December 2017 create the impression that any delay in processing the FOI request was legitimately attributable to consultation with third parties and the review and appeal periods applicable to that third party consultation. The ABCC submitted that this was intended to explain the reason for the extension of time, but acknowledged that the description of the third party review rights was not necessary in the absence of actual consultation.

Conclusion

I find the ABCC's decision notice of 6 December 2017 inaccurately referred to third party consultation and review rights as the reason for the delay in providing the applicant access to the document when that consultation did not occur.

Issue 2: Transfer of request

Allegation

The complainant complained that:

- Request B was transferred from the Department to the ABCC without their consent and the ABCC did not notify them of the transfer of Request B
- Request B was not processed within the statutory processing period.

I have discussed these issues separately below.

Transfer of Request B without the consent of the complainant and lack of notification of transfer by ABCC

Legislation and Guidelines

Section 16 of the FOI Act provides that an agency can transfer a request to another agency where either the document is not in the possession of the first agency but is in the possession of another agency or the subject matter of the document is more closely connected with the functions of another agency than with the agency to which the request is made.³

Subsection 16(4) requires the transferring agency to inform the person making the request of the transfer and, if necessary, send the document to the receiving agency.

The FOI Guidelines explain that the transfer of a request under s 16 facilitates and promotes access by avoiding the need for the applicant to make a new request to another agency or minister and also by providing a whole of government approach to making information available to the public.⁴

Submissions

The ABCC's submissions confirm that it accepted a transfer from the Department pursuant to s 16 of the FOI Act advising:

The ABCC treated the request made of it and of the Department as a single request. The two requests were identical in their terms and scope.

In their complaint, the complainant submits:

I did not agree with the decision to transfer but the request had been transferred to the ABCC in any event.

³ Section 16 provides for the purposes of this section, the term 'agency' includes a minister.

⁴ *FOI Guidelines* [3.59].

On 17 October 2017, the complainant responded to the Department advising that [REDACTED] did not agree with the Department's decision to transfer the request:

While "We" is satisfied that the subject-matter of the documents being sought is more closely related with the functions of the ABCC than those of the Department I note that "We" does not provide any basis for that satisfaction. In any event I do not agree that the subject-matter of the documents being sought is more closely related with the functions of the ABCC than those of the Department.

... Consequently, I do not agree with the transfer and believe the Department should process the FOI request.

Discussion

The complaint relates to the transfer of Request B from the Department to the ABCC without the consent of the complainant. I note that s 16 of the FOI Act does not require consultation with or the consent of an FOI applicant as a precondition of transfer.

Subsection 16(4) requires that the transferring agency must inform the person making the request of the transfer. That obligation rested on the Department, not on the ABCC. The Department advised the complainant of the transfer on 16 October 2017. The ABCC was under no statutory obligation to notify the complainant of the transfer of Request B in this case.

Conclusion

Failure to consult with the complainant as part of the transfer of Request B or transferring Request B to the ABCC without regard to the complainant's opposition to the transfer was not inconsistent with s 16 of the FOI Act. The ABCC was not obliged to notify the complainant of the transfer.

Request B was not processed within statutory processing period

Legislation and Guidelines

Subsection 16(5) of the FOI Act provides that where a request is transferred to an agency under s 16, the request is taken to be a request to the receiving agency (ABCC) made at the time it was received by the transferring agency (the Department).

Paragraph [3.62] of the FOI Guidelines provide that:

The decision-making period commences when the request was originally received, and the receiving agency or minister is not given extra time. It is therefore important that agencies and ministers give early consideration to whether a request should be transferred. This will enable the notices to the applicant under s 15(5)(a) (acknowledgement of receipt) and s 16(4) (transfer of request) to be combined and ensure that the receiving agency or minister is not disadvantaged by delay. In these circumstances, the receiving agency may also wish to consider seeking an extension with the agreement of the applicant under s 15AA. In order for the extension to be valid, the agency must ensure that the requirements under s 15AA are

followed. Further information about the timeframe for notifying a decision under the FOI Act is below at [3.137].

Submissions

In their complaint, the complainant submits:

I did not agree with the decision to transfer but the request had been transferred to the ABCC in any event.

In my email dated 11 December 2017 (see above) I sought information from the ABCC about the status of my FOI application to the Department of Employment that had been transferred to the ABCC pursuant to section 16. In its unsigned response dated 14 Dec 2017 the ABCC advised that:

“the letter dated on 6 December 2017 was issued in response to both the FOI request you sent to the ABCC on 7 October 2017 and the FOI request you sent to the Department on 7 October 2017”.

The complainant further submits:

The ABCC letter of 6 Dec 2017 does not contain information indicating the decision maker turned their mind to the FOI application made to the Dept and transferred to the ABCC. The letter of 6 Dec is silent on the subject. Moreover, the ABCC did not seek an extension of time to finalise the application nor did it advise that it had become apparent to the ABCC that it would be required to consult relevant parties and that it would be appropriate for the processing period be extended, nor did the ABCC advise that it was treating the two applications as one. Shortly put, the ABCC has not provided a response to the FOI application.

The ABCC's submissions confirm that it accepted a transfer from the Department pursuant to s 16 of the FOI Act advising:

The ABCC treated the request made of it and of the Department as a single request. The two requests were identical in their terms and scope.

During the course of the investigation the ABCC confirmed that it had not advised the complainant that § 92(1)(b) two requests had been purportedly combined until 14 December 2017.

Discussion

The effect of s 16(5) is that Request B – which was transferred to the ABCC on 16 October 2017 – was taken to be received by the ABCC on 7 October 2017, which was the date that it was received by the Department.

While the ABCC applied s 15(6) to extend the statutory processing timeframe by 30 days in relation to the Request A, there is nothing before me to suggest that the ABCC also applied s 15(6) to extend the processing timeframe for Request B. The letter sent to the complainant on 5 November 2018 in relation to Request B includes ‘It should be noted, however, that the FOI Act provides for processing times to be extended for particular purposes. As explained below, your request was extended for one such purpose’, however there is no explanation or

mention of the extension of the processing timeframe provided below that text in the correspondence. Without adjustment permitted under the FOI Act, Request B was required to be processed by 6 November 2017.

The ABCC provided a decision in relation to Request A on 6 December 2017. On 14 December 2017, following correspondence from the complainant on 11 December 2017 seeking an update in relation to Request B, the ABCC advised that ‘the decision dated on 6 December 2017 was issued in response to both the FOI request you sent to the ABCC on 7 October 2017 and the FOI request you sent to the Department on 7 October 2017.’

I have reviewed the FOI decision letter provided to the complainant by the ABCC on 6 December 2017. That letter opens with:

I refer to your request for access to documents made under the Freedom of Information Act 1982 (Cth) (FOI Act) and received by the Australian Building and Construction Commissioner (ABCC) on 7 October 2017 (FOI request).

It then quotes the complainant’s request, describes the extension of the statutory processing period under 15(6), and outlines the decision made by the ABCC delegate in relation to the request. At no point in that decision document does the ABCC delegate refer to Request B.

While it is open to an agency to provide a combined statement of reasons in relation to more than one access request, it is important that this is clearly communicated to the applicant. In this case, had the ABCC intended to include reasons for the decision in relation to the second request in the letter regarding the first request, the ABCC should have referred to the transferred request and explicitly advised the complainant that the notice applied to both requests. It did not do so.

The ABCC subsequently provided a decision notice in relation to Request B on 5 November 2018. In that correspondence, the ABCC advised that it had ‘previously considered that it had responded to this request when it issued its decision on 6 December 2017 in relation to an identical request that you had sent directly to the ABCC. However, as a result of communications with the Office of the Australian Information Commissioner (OAIC), we have agreed to issue a separate decision.’

While it may have been the ABCC’s intention to convey the decision outcomes in relation to both Request A and Request B in its correspondence to the complainant on 6 December 2017, there is nothing on the face of the document that makes that apparent to the recipient. While it is open to agencies to provide a combined statement of reasons for multiple requests, in this case the correspondence did not make it clear that it was providing the decision in relation to both requests. Clarity is important for several reasons, including the fact that notification of a decision triggers review rights. In this case the complainant did not understand, and could not have understood from the initial correspondence, that decisions in relation to both requests had been made.

Conclusions

The ABCC was permitted to accept transfer of Request B from the Department, but when that occurred, the statutory timeframe for processing that request expired 30 days after the Department received the request. Although there is some suggestion that the ABCC extended the processing timeframe for Request B in its correspondence to the complainant on 5 November 2018, there is no explanation in the correspondence or submissions about the provision of the FOI Act that was applied to extend that processing period.

Further, although the ABCC submitted that the notification to the complainant on 6 December 2017 was intended to apply to both Request A and Request B, as explained above, I consider there was no way the complainant could have reasonably understood that to be the case from the correspondence.

Even if the 6 December 2017 correspondence is taken to be notification of a decision in relation to Request B, it is made outside the statutory processing period for Request B. If the correspondence of 5 November 2018 is the first notification of the decision in relation to Request B, then that decision is made significantly outside the processing period.

Recommendations

The purpose of my recommendations, as set out below, are to conclude the complaint investigation and ensure the ABCC meets its obligations under the FOI Act, including that the ABCC's current and future processes and practices are consistent with the objects of the FOI Act.

Pursuant to s 88 of the FOI Act, I have set out the following recommendations, being formal recommendations to the ABCC that I believe the ABCC ought to implement by **22 October 2021**:

1. The ABCC should provide guidance to FOI officers to ensure that, prior to extending the processing periods as permitted by s 15 of the FOI Act, proper consideration is given to the statutory prerequisites to the exercise of that power.
2. That the ABCC review its correspondence with FOI applicants to ensure that it is clear, accurate and not misleading.
3. That the ABCC implement systems and processes to ensure that the ABCC understands and adheres to FOI processing timeframes.



Notice of completion under s 86 of the FOI Act (s 22(1)(a)(i) irrelevant material) and (s 22(1)(a)(ii) irrelevant material) – s22(1)(a)(ii) - irrelevant material and Australian Federal Police

On 4 July 2018 and 1 February 2019, the Office of the Australian Information Commissioner (OAIC) received two FOI complaints under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Australian Federal Police (the AFP) in relation to the performance of its functions and exercise of its powers under the FOI Act.

The FOI complainant in both complaints is the s22(1)(a)(ii) - irrelevant material

On 4 July 2018 s22(1)(a)(ii) complained about the AFP's compliance with statutory timeframes when handling requests for access to documents under the FOI Act (OAIC reference: s 22(1)(a)(i) irrelevant material). In its complaint, s22(1)(a)(i) provided examples where the AFP had exceeded the statutory processing period for FOI requests lodged with the AFP on behalf of its members.

On 1 February 2019 (OAIC reference: s 22(1)(a)(i) irrelevant material), s22(1)(a)(i) made another complaint that was similar in its terms to s 22(1)(a)(i) irrelevant material, namely the delays in processing FOI requests by the AFP.

I have used these matters as case studies during this investigation. A chronology of the processing of those case studies can be found at **Attachment B**.

This notice on completion sets out the relevant:

- investigation results
- investigation recommendations
- reasons for the investigation results and recommendations.

Background

The complainant in this matter is the s22(1)(a)(ii) - irrelevant material

Between 11 September 2017 and 23 May 2018, the complainant's members made a number of FOI requests to the AFP for access to documents under the FOI Act. In relation to one of these requests, the applicant sought both Information Commissioner review (IC review) and made an FOI complaint.¹

¹ Both IC review and a complaint were raised for s 22(1)(a)(i) irrelevant material s22(1)(a)(ii) irrelevant material).

On 4 July 2018 and 1 February 2019, the complainant made two FOI complaints under s 70 of the FOI Act about the AFP's actions in the performance of its functions, or the exercise of its powers, under the FOI Act when processing FOI requests lodged by the complainant.

On 23 May 2019, the OAIC notified the AFP under s 75 of the FOI Act that the Information Commissioner had decided to investigate the complaints and requested that the AFP provide the OAIC with submissions in response to the complaint allegations. The OAIC informed the AFP that, due to the similar allegations and issues raised, and given that both the complaints had been lodged by [s 22(1)(a)(ii) irrelevant material], the OAIC would be combining the two complaints.

During the course of the investigation the AFP provided submissions outlining its current FOI processes and submissions addressing the allegations raised by the complainant.

Further information on the background of the FOI complaints can be found at **Attachment C**.

Investigation conclusions

Pursuant to s 87 of the FOI Act, the investigation results set out my opinions, conclusions and suggestions about how the processes of the AFP might be improved.

I have had regard to the submissions and correspondence provided by the AFP and the complainant.

Issue 1: Compliance with the statutory processing period

Complaints

[s 22(1)(a)(ii) irrelevant material] complained that²:

- the AFP did not comply with the statutory timeframes as required by the FOI Act³ and
- the FOI requests lodged by [s 22(1)(a)(ii) irrelevant material] members were 'seemingly being ignored' by the AFP.⁴

In [s 22(1)(a)(ii) irrelevant material] letter to the AFP raising these concerns, it stated:

Increasingly, our members' FOI requests are seemingly being ignored by the AFP, with no regard to its obligations under the FOI Act or in fact the spirit of that legislation... The response we receive when we question these delays is that the FOI Team is understaffed or

² Allegations were raised in relation to the following case studies: [s 22(1)(a)(ii) irrelevant material]
[s 22(1)(a)(ii) irrelevant material]

³ [s 22(1)(a)(ii) irrelevant material]

⁴ [s 22(1)(a)(ii) irrelevant material]

have a high volume of requests. If this is the case, this is not in our view a sufficient reason to disrespect the principles of the FOI scheme and in turn, our members.⁵

§ 22(1)(a)(i) made similar submissions to the OAIC⁶:

Our member has been experiencing significant mental anguish and the continued extensions have exacerbated § 22(1)(b) situation. We are also waiting on the information to prepare other documents on § 22(1)(b) behalf relating to other proceedings.

Despite § 22(1)(a)(i) continually requesting the documents, the AFP has paid little heed to our requests and continues to blatantly breach its statutory requirements, with seeming impunity.

Legislative framework

Access to documents

Section 11 of the FOI Act provides that ‘every person has a legally enforceable right’ to obtain access to a document of an agency or a minister where that document is not exempt.

Subsection 15(2) provides that in order for the request to be valid, certain requirements must be met. There is no dispute that the FOI requests that are the subject of these complaints met the statutory requirements for validity.

Deemed access refusal

Section 15AC provides that where a decision about an FOI request has not been provided to the applicant within the statutory processing period, the agency or minister is deemed to have made a decision refusing access to the documents (s 15AC(3)).

The FOI Guidelines provide:

The consequence of a deemed refusal is that an applicant may apply for IC review (s 54L(2)(a))... In addition, once the time has expired and there is a deemed decision, the agency or minister cannot impose a charge for access.⁷

...Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of reasons on the FOI request. This obligation to provide a statement of reasons on the FOI request continues until any IC review of the deemed decision is finalised.⁸

⁵ § 22(1)(a)(i) submissions of 4 July 2018 (§ 22(1)(a)(i) relevant part).

⁶ § 22(1)(a)(i) relevant part.

⁷ FOI Guidelines [3.154].

⁸ FOI Guidelines [3.155].

AFP's submissions

During the course of this investigation, the AFP submitted:

The AFP acknowledges that there were delays in processing these requests, and we apologise for those delays.

... the AFP takes its obligations under the FOI Act seriously and endeavours to meet the requirements of the Act in relation to timeframes. The FOI team has been dealing with a significant backlog of overdue requests as well as an increase in requests more generally. Consequently, the AFP has faced challenges in making decisions within the statutory time limits.

...

At the beginning of July 2018, the AFP temporarily allocated additional resources for three months to assist with processing requests and address the backlog of requests. The backlog has now been substantially addressed, and going forward, we anticipate a substantial improvement in the processing of requests within the statutory timeframes set out in the FOI Act.

In the response that the AFP sent to s 22(1)(a)(ii) irrelevant material addressing their complaint of 18 June 2018 s 22(1)(a)(ii) irrelevant material, the AFP stated:

The AFP apologises for the delays which have occurred in the processing of these requests. The AFP takes its obligations under the *Freedom of Information Act 1982* (Cth) seriously and endeavours to meet the requirements of the Act in relation to timeframes. However, in recent months the FOI team has been dealing with a significant backlog of overdue requests and has faced challenges in making decisions within the statutory time limits.

Discussion

It is clear from the evidence before me that the AFP did not comply with the statutory processing period in all 5 case studies.

In relation to s 22(1)(a)(ii) irrelevant material:

1. The statutory timeframe of 30 days to process these FOI requests under s 15(5) was extended by agreement under s 15AA and as a result of consultation under ss 15(6) or 15(8). The statutory timeframe was not extended by the Information Commissioner under ss 15AB or 15AC.
2. The statutory processing period was not affected by a request consultation process under s 24AB(8) or by the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable under s 31.

3. The AFP was therefore required to provide a decision to the complainant within the statutory timeframe based on the agreements under s 15AA.⁹
4. The AFP did not provide a decision within the statutory timeframe.
5. The AFP did not comply with s 15(5)(b) of the FOI Act.

In relation to **s 22(1)(a)(ii) irrelevant material**:

1. The statutory timeframe of 30 days to process these FOI requests under s 15(5) was not extended by agreement under s 15AA, or as a result of consultation under ss 15(6) or 15(8), or by the Information Commissioner under ss 15AB or 15AC.
2. The statutory processing period was not affected by a request consultation process under s 24AB(8) or by the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable under s 31.
3. The AFP was therefore required to provide a decision to the complainant within 30 days.
4. The AFP did not provide a decision within 30 days.
5. The AFP did not comply with s 15(5)(b) of the FOI Act.

In relation to **s 22(1)(a)(i) irrelevant material**:

1. The statutory timeframe of 30 days to process these FOI requests under s 15(5) was extended by agreement under s 15AA. The statutory timeframe was not extended as a result of consultation under ss 15(6) or 15(8), or by the Information Commissioner under ss 15AB or 15AC.
2. The statutory processing period was affected by a request consultation process under s 24AB(8). The statutory processing period was not affected by the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable under s 31.
3. The AFP was therefore required to provide a decision to the complainant within the extended statutory processing period.
4. The AFP did not provide a decision within the extended statutory processing period.
5. The AFP did not comply with s 15(5)(b) of the FOI Act.

The period that the AFP exceeded the processing period ranged from 10 days to 180 days.¹⁰

⁹ In **s 22(1)(a)(i) irrelevant material**, the AFP was required to provide the decision within 90 days as the statutory timeframe had been extended by 30 days under s 15AA and by a further 30 days under s 15(6). In **s 22(1)(a)(i) irrelevant material**, the AFP was required to provide the decision within 37 days as the statutory timeframe had been extended by 7 days under s 15AA and by a further 30 days under s 15(6).

¹⁰ **s 22(1)(a)(i) irrelevant material** – 10 days, **s 22(1)(a)(i) irrelevant material** – 25 days, **s 22(1)(a)(i) irrelevant material** – 33 days, **s 22(1)(a)(i) irrelevant material** – 125 days and **s 22(1)(a)(i) irrelevant material** – 180 days.

Related IC reviews

In relation to [§ 22(1)(a)(i) irrelevant material], there is no evidence before me that the applicant sought IC review of any of the deemed access refusal decisions under s 54L of the FOI Act.

In relation to [§ 22(1)(a)(i) irrelevant material], on 7 February 2019 the applicant sought IC review of the AFP’s deemed access refusal decision in [§ 22(1)(a)(i) irrelevant material]. The IC review is [§ 22(1)(a)(i) irrelevant material] ([§ 22(1)(a)(i) irrelevant material]).

Delays

From an analysis of the chronology of each FOI request provided by the AFP during this investigation, the AFP’s FOI Section appears to commence the preliminary processing action within a reasonable timeframe, which includes, on average, acknowledging a request within 1 – 2 days of receipt and commencing the search and retrieval process within a further 1 - 2 days.

During the course of this investigation, the AFP advised that it’s ‘National Guideline on Freedom of Information releases’ allows for a period of 10 working days for AFP appointees to provide a response to the FOI Team:

An AFP appointee who retrieves a Freedom of Information (FOI) request from the FOI-IL Team should within 10 working days...

From then, the FOI Section are reliant on a timely and thorough response from the business area to be able to continue to process the request within statutory timeframes. In several instances, it appears that the FOI Section had to follow up or seek further assistance from the line areas to complete the search and retrieval process.

The following table provides the request and response times in relation to the search and retrieval process in each case study.

FOI Request	Date of FOI request	Date of search and retrieval email	Final response received by FOI Team	Calendar Days between request and provision of information	Decision provided to applicant ¹¹	Days between final response received by FOI team and decision provided to applicant
[§ 22(1)(a)(i) irrelevant material]	11 September 2017	12 September 2017	1 November 2017	29 days	4 January 2018	64 days

¹¹ Dates sourced from [§ 22(1)(a)(i) irrelevant material] chronologies.

s 22(1)(a)(ii) irrelevant material	31 October 2017	3 November 2017	20 November 2017 ¹²	16 days	22 January 2018 ¹³	63 days
Revised scope for s 22(1)(a)(ii) irrelevant material		13 February 2018	21 February 2018 ¹⁴	8 days	28 June 2018	135 days
s 22(1)(a)(ii) irrelevant material	30 April 2018	1 May 2018	9 May 2018	8 days	2 July 2018	54 days
s 22(1)(a)(ii) irrelevant material	23 May 2018	25 May 2018	31 May 2018 ¹⁵	6 days	12 July 2018	42 days
s 22(1)(a)(ii) irrelevant material	26 October 2018	31 October 2018	16 November 2018	15 days	28 February 2019	104 days

Although I appreciate that the AFP business areas have competing operational requirements, any delay in identifying the documents at issue will have a resultant effect on the timeliness of FOI processing.

However, the failure by the AFP to finalise the request within the processing period cannot solely be attributed to delays from the business areas. This is because delays of up to 135 days were still recorded even in instances where the business area(s) were able to provide documents in under 10 calendar days.¹⁶

Conclusions

The AFP did not comply with the statutory processing period in relation to FOI requests **s 22(1)(a)(ii) irrelevant material**. The AFP's failure to comply with the statutory processing period is attributable to the failure of business areas to provide documents at issue to the FOI section and/or the time taken in the subsequent processing by the FOI section.

¹² Final response to the initial search and retrieval email advising that the request is voluminous.

¹³ Parties hold a teleconference concerning the processing of the request. The outcome of the teleconference was the **s 22(1)(a)(ii) irrelevant material** was to consider providing a revised scope. A revised scope was provided on 6 February 2018.

¹⁴ Response to the search and retrieval email regarding the revised scope of 13 February 2018, advising the request remained voluminous.

¹⁵ The AFP advises a second search and retrieval email was sent to the line area on 30 May 2018.

¹⁶ For example, in **s 22(1)(a)(ii) irrelevant material** (8 days) and **s 22(1)(a)(ii) irrelevant material** (6 days). In **s 22(1)(a)(ii) irrelevant material**, there were 54 days between when the final response was received by the FOI team and when the decision was provided to **s 22(1)(a)(ii) irrelevant material**. In **s 22(1)(a)(ii) irrelevant material** there were 42 days between when the final response was received by the FOI team and when the decision was provided to **s 22(1)(a)(ii) irrelevant material**.

Issue 2: Extending the statutory processing period

Allegation

In [§ 22(1)(a)(ii) irrelevant material], [§ 22(1)(a)(ii)] raised two specific concerns regarding extensions of the statutory processing period.

[§ 22(1)(a)(ii)] allege that¹⁷:

- the AFP seeks to extend the processing period at ‘the end or close to the end of the 30 days it is required to respond to a request’, and
- the AFP does not determine whether a request requires consultation, or the scope is voluminous, until towards the end of the processing period.

In relation to the above allegations, the [§ 22(1)(a)(ii)] submitted:

... we have concerns about the AFP’s practice of seeking extensions for responding to FOI requests. While we recognise that the FOI Team can request an applicant agree to an extension, as well as allowances for additional time in some circumstances under the *Freedom of Information Act 1982* (such as under subsection 15(6)), it appears that the FOI Team does not seek an initial extension until the end or close to the end of the 30 days it is required to respond to a request...

... when the FOI Team states reasons for seeking extensions to be that third parties need to be consulted or there is a large volume of documents or the terms of the request need to be narrowed, these reasons should have been determined far earlier than almost 4 weeks into every process.

Legislative framework

Extending the processing period

Paragraph 15(5)(b) provides that an agency or minister must, as soon as practicable and no later than 30 days after receiving a request, take all reasonable steps to enable the applicant to be notified of a decision on the request.

¹⁷ These allegations were raised in relation to the following case studies: [§ 22(1)(a)(ii) irrelevant material] [§ 22(1)(a)(ii) irrelevant material]. I note, that although [§ 22(1)(a)(ii)] had not raised this issue specifically in relation to [§ 22(1)(a)(ii) irrelevant material] the AFP notified the applicant of an extension under s 15(6) for consultation on day 30 of 37 of the extended processing period. The AFP had received an agreement from the applicant to extend the processing time by 7 days to 1 December 2018.

The FOI Act contains several provisions which can extend the processing period for reasons including:

- third party consultation (15(6))
- consultation with foreign entities (15(7), (8))
- agreement between the applicant and the agency or minister (15AA)
- the request is complex or voluminous (15AB), and
- the request has become deemed access refusal (15AC).

Where an agency or minister is unable to process an FOI request within the processing period, they are able to request an extension of time from the FOI applicant (s 15AA) or the Information Commissioner (ss 15AB and 15AC).

The Information Commissioner may grant extensions of time to agencies or ministers where they are able to demonstrate that the processing of the FOI request has been delayed because the FOI request is voluminous or complex in nature (s 15AB) or where the agency or minister has been unable to process the request within the statutory timeframe and the agency or minister is deemed to have made a decision refusing the FOI request (s 15AC).

In relation to third party consultations, an agency or minister may extend the processing period for a period of 30 days in order to conduct consultations (s 15(6)). Where an agency or minister extends the processing period under s 15(6), it must notify the applicant in writing.¹⁸

Utilising the practical refusal mechanism

According to s 24AA, an agency or minister may refuse a request if a 'practical refusal reason' exists, where either the request does not sufficiently identify the requested documents or the resource impact of processing the request would be substantial and unreasonable. In either instance, the agency or minister must first follow a 'request consultation process' under s 24AB before refusing the request.

Subsection 24AB(2) of the FOI Act, provides that a notice of an intent to refuse access must state:

- an intention to refuse access to a document in accordance with a request
- the practical refusal reason
- the name and contact details of an officer with whom the applicant may consult during the process
- details of how the applicant may contact them, and

¹⁸ During the course of the investigation, the AFP provided chronologies of the processing of each request which shows whether the above extensions were applied.

- that the consultation period during which the applicant may consult the contact person is 14 days after the day the applicant is given the notice (s 24AB(2)).

The effect of issuing a consultation notice is that the processing clock is ‘stopped’ on the day that the notice is issued and does not re-start until the applicant has responded to the notice (24AB(8)). If the applicant does not respond to the consultation notice within 14 days, the agency or minister can take the request as withdrawn (24AB(7)).

AFP’s submissions

The AFP submits:

The increase in FOI requests, and particularly complex requests, has also had a significant impact on the timeliness of progressing requests. The AFP endeavours to identify the need for extensions of time or third party consultation in a timely manner. Any delay progressing these actions has not been for the purpose of delaying access to documents, or because requests from [redacted] members are being ignored or given low priority.

...

We note the [redacted] concern that the AFP does not seek extensions until late in the statutory timeframe. However, there is no limit on when an agency may seek such an extension, as long as it is within the 30 day period specified in the FOI Act. Nevertheless, we will endeavour to meet the [redacted] preference to be contacted about extensions of time and the scoping of requests as early as practicable.

In correspondence from the AFP to [redacted] addressing their complaint of 18 June 2018:

With respect to your concerns in relation to requests for extension, I note that apart from requiring an extension request to be made within a 30 day time limit the Act does not prescribe a time period for approaching the applicant. However, we note your preference to be contacted as early as practicable in relation to extensions. We will endeavour to meet your preferred timeframe in the future.

Discussion

In all five case studies, the statutory processing period had expired prior to the AFP providing a decision in response to the requests.

In four case studies, the AFP requested an extension of time under s 15AA from the applicant.¹⁹ The AFP did not request an extension of time under ss 15AB or 15AC in any of the case studies.

The AFP does not dispute that it did not comply with the statutory processing period and it is clear from the information before me that the AFP extended, or requested to extend, the

¹⁹ s 22(1)(a)(ii) irrelevant material [redacted] requested 30 days – [redacted] agreed to 7 days).

processing timeframe under ss 15(6) or 24AB within the final 2,²⁰ 7,²¹ and 8²² days of the processing period in relation to three requests.

The FOI Act requires that extensions to the decision notification period, with the exception of requests under s 15AC, are undertaken within the statutory processing period.

In relation to the extension of the processing period under s 15AA, the FOI Guidelines provides that:

Agencies and ministers are encouraged to build into their FOI process an early and quick assessment of whether an extension of time may be required, to ensure that decisions are made within the statutory processing period.²³

In relation to the extension of the processing period under s 15(6), the FOI Guidelines provide that ‘prompt and effective consultation with relevant parties involved in dealing with an FOI access request is essential to good administration’²⁴ and that ‘in determining whether it would be reasonably practicable to consult, the agency or minister should have regard to all circumstances, including the time limits for processing the request’²⁵.

In relation to the extension of the processing period under s 24AB, the FOI Guidelines provide:

Before commencing a formal request consultation process, agencies and ministers’ offices are encouraged to discuss the request with the applicant. This is often a more efficient way of obtaining further information from the applicant and helping them to refine a request that is too large or vague. However, if the applicant cannot be contacted promptly, or the discussion does not elicit information that allows relevant documents to be identified, the request consultation process should be commenced.

Conclusions

The FOI Act requires that extensions to the decision notification period, with the exception of requests under s 15AC, are undertaken within the statutory processing period. While this will not be possible in all circumstances, the AFP should ensure that it considers whether an

²⁰ s 22(1)(a)(ii) irrelevant material A decision was due on 10 November 2017. On 8 November 2017, the AFP advised the complainant that the processing period had been extended under s 15(6) of the FOI Act.

²¹ s 22(1)(a)(ii) irrelevant material A decision was due on 30 May 2017. On 23 May 2017 the AFP requested an extension of time under s 15AA of the FOI Act. CRM2019/228: A decision was due on 2 December 2018. On 26 November 2018 the AFP extended the processing period by under s 15(6) of the FOI Act.

²² s 22(1)(a)(ii) irrelevant material A decision was due on 30 December 2017. On 22 January 2018 the AFP took steps to revise the scope of the request by holding a teleconference. On 22 February 2018 the AFP issued a s 24AB consultation notice. At both stages the statutory processing period has expired.

²³ FOI Guidelines [3.144].

²⁴ FOI Guidelines [3.69]

²⁵ FOI Guidelines [3.76]

extension to the processing period under 15AA, s 15(6) or 24AB is required at the earlier stages of processing FOI requests.

Investigation recommendations

In considering whether it is appropriate to make recommendations, I have considered the AFP's efforts and steps to improve its compliance with the statutory processing timeframes under the FOI Act:

1. The AFP has taken some steps to address the backlog of FOI requests in the period since the lodgement of the FOI requests and the commencement of this investigation.
2. The AFP's advice on 14 July 2020 that it had implemented recommendations made by the Information Commissioner in relation to a separate FOI complaint about non-compliance with the statutory processing timeframes, which recommended the AFP undertake the following activities:
 - a) Issue a statement issued to all staff highlighting the AFP's obligations under the FOI Act
 - b) Conduct general FOI training during the induction process for new employees and refresher training for existing employees at least annually
 - c) Build into the AFP's FOI process an early assessment of whether an extension of time and/or consultation with third parties may be required and advise the FOI applicant as soon as practicable
 - d) Review and update its guidance material in line with the findings of the investigation including:
 - i. Search and retrieval timeliness
 - ii. Appropriate escalation points where delays occur
 - iii. Keeping applicants updated on the progress of their requests where delays are being experienced.

I have also considered the AFP's FOI quarterly and annual statistical returns, as provided by the AFP to my office for the 2019-20 and 2020-21 financial years.

Financial year	Total FOI requests received	Total FOI requests processed in time	Compliance with the statutory processing period
2019-20	827	491	59%
2020-21	754	332	54%

As noted in the above table, the AFP's statutory compliance diminished from 59% to 54% between 2019-20 and 2020-21. These statistics, as provided by the AFP, indicate that the AFP's compliance with the statutory processing period has not improved.

To assist the AFP to improve its compliance with the statutory processing timeframes, I make the following recommendations under s 88 of the FOI Act:

1. Self assessment of compliance

The AFP should develop and implement a compliance action plan and provide a copy of that plan to the OAIC by **27 January 2022**. The compliance action plan should include an explanation and assessment of the reasons for non-compliance with the statutory processing period for the 2019-20 and 2020-21 financial years and proposals to improve compliance, including in relation to:

- a) adequacy of resources
- b) training
- c) operational improvements and
- d) proposals for how the AFP will comply with the statutory processing period in relation to any backlog of outstanding FOI requests as well as new requests.

2. Report of compliance

The AFP should provide an implementation report to the OAIC by **27 April 2022**, providing statistical evidence and analysis to demonstrate the effectiveness of the implementation of the compliance action plan in recommendation 1 and whether the reasons for non-compliance identified in the compliance action plan have been rectified.



ATTACHMENT A

On 10 July 2018, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) from [redacted] about the Department of Defence (the Department) in the performance of its functions, and the exercise of its powers under the FOI Act.

The complainant alleges the Department's process for collecting charges delays access to information in contravention of the objects of the FOI Act. [redacted]

I have used these FOI requests as a case studies during this investigation. A chronology of the processing of each FOI request can be found at **Appendix A**.

Pursuant to s 86, upon completion of an investigation I am required to issue a notice on completion which sets out:

- investigation results
- the investigation recommendations (if any), and
- the reasons for the investigation results and the making of the investigation recommendations.

In reaching these conclusions, I have relied upon the submissions provided by the Department and the complainant.

Pursuant to s 88 of the FOI Act, I can make formal recommendations which I believe the Department ought to implement in order to improve its processing of collecting payment of charges and compliance with the FOI Act in general. In this case I have not made any formal recommendations, but rather suggestions to the Department for the improvement of its processes.

Background

[redacted]

On 26 May 2018, the complainant made an FOI request to the Department of Finance for access to documents relating to [redacted]:

s22(1)(a)(ii) - irrelevant material

The FOI request was transferred to the Department on 13 June 2020. Further background on the processing of s22(1)(a)(ii) - irrelevant material can be found at **Appendix A**.

s22(1)(a)(ii) - irrelevant material

On 28 May 2018, the complainant made an FOI request to the Department for access to:

s22(1)(a)(ii) - irrelevant material

Further background on the processing of s22(1)(a)(ii) - irrelevant material can be found in **Appendix A**.

The FOI Complaint

On 10 July 2018, the complainant lodged an FOI complaint with the OAIC about the Department's actions while processing s22(1)(a)(ii) - irrelevant material FOI requests s22(1)(a)(ii) - irrelevant material.

On 7 September 2018, the OAIC notified the Department of the complaint and conducted preliminary inquiries with the Department under s 72 of the FOI Act.

On 9 October 2018, the Department responded to the OAIC's preliminary inquiries. On 17 October 2018, the Department provided further submissions in response to the OAIC's preliminary inquiries.

On 18 December 2018, the OAIC notified the Department under s 75 of the FOI Act that the Information Commissioner had decided to investigate the complaint and requested that the Department provide the OAIC with submissions in response to the complaint allegations.

On 8 and 13 February 2019, the Department provided submissions in response to the investigation notice.

On 15 November 2019, the Department provided further submissions.

Investigation conclusions

Pursuant to s 87 of the FOI Act, the investigation conclusions will set out my opinions, conclusions and suggestions about how the processes of the Department might be improved.

I have considered all the material provided by the Department and the complainant in this matter.

Issue: Collection of charges amounts

Allegation

The complainant alleged that [REDACTED] office encounters delays when the Department provides invoices for payment of FOI charges, which in turn ‘unreasonably delays the processing of the request’.

The complainant submits that [REDACTED] has encountered delays of between ‘one and two weeks’ from the time of the complainant agreeing to pay the charges and the Department providing an invoice in order for the complainant to pay the charges deposit.

Legislative framework

Section 11 provides that every person has the legally enforceable right to access documents held by the government. The FOI Act also provides that this should be done at the lowest reasonable cost.

Section 29 of the FOI Act provides that an agency or minister may impose a charge to process an FOI request in accordance with the *Freedom of Information (Charges) Regulations 1982* (Charges Regulations).

Paragraph 29(1)(f) of the FOI Act provides that once an agency or minister has provided a preliminary assessment of charges to an applicant, the applicant must, within 30 days, notify the agency or Minister in writing whether they agree to pay the charges, contest the charge or withdraw the request.

Subsection 31(2) of the FOI Act provides that the processing period is to be calculated by disregarding the period in which the charge is unpaid:

(2) In working out the length of the processing period (or that period as extended) for the purposes of paragraph 15(5)(b), disregard the number of days in the period starting on the charge notice day and ending on the earliest occurring of the following days:

- (a) the day the applicant pays the amount of the charge (or a deposit on account of the charge prescribed by the regulations), whether or not the decision to impose the charge has been considered under section 29, or is the subject of a review under this Act;
- (b) if the amount of the charge is changed under section 29, or following a review under this Act—the day the applicant pays the amount of the charge (or a deposit on account of the charge prescribed by the regulations) as changed following the review;
- (c) if, under section 29, or following a review under this Act, a decision is made with the effect that the charge is not imposed—the day the applicant is notified of the decision.

Section 11A of the FOI Act and Regulation 11 of the FOI Charges Regulations provides that an applicant shall pay the required charge before being given access to a document, except for a charge for an officer to supervise inspection, hearing or viewing of a document.

FOI Guidelines provide that:

Agencies may develop and publish on their website their own internal procedures for imposing charges, consistent with the FOI Act, the Charges Regulations and these Guidelines. This will assist the public understand the agency's approach to imposing charges, and the supporting evidence the agency requires from applicants who apply for a reduction or waiver of a charge.¹

The FOI Guidelines further explain that:

The Goods and Services Tax (GST) is not payable on FOI charges. Section 81-10 of *A New Tax System (Goods and Services Tax) Act 1999* provides that GST applies to payments of Australian taxes, fees and charges, *except* those involving a fee or a charge paid to an Australian government agency if the fee or charge relates to 'recording information; copying information; modifying information; allowing access to information; receiving information, processing information and searching for information'.²

During the investigation of this FOI complaint I have considered the following issues:

- the Department's process for collection of charges
- the Department's submissions regarding its obligations under the *Public Governance, Performance and Accountability Act 2013* and *Goods and Services Tax Act 1999*
- whether a tax invoice can be provided to an applicant at the time of the provision of preliminary assessment of charges, and
- the issuing of a credit note.

The Department's process for collection of charges

In its submissions of 9 October 2018, the Department provided an explanation of the process by which it collects payment from FOI applicants:

Within the Department, **s22(1)(a)(ii) - irrelevant material** is responsible for preparing and issuing accounts receivable invoices and they aim to process invoice requests within three business days of receipt of the request. Electronic Funds Transfer (EFT) is the Department's preferred method of receiving payments and the EFT details are listed on all accounts receivable invoices; however, the EFT details are not listed on the preliminary assessment of charges as the EFT reference numbers are not generated until the **s22(1)(a)(ii) - irrelevant material** creates the invoice.

¹ FOI Guidelines [4.51].

² FOI Guidelines [4.50].

The Department's preliminary charges notice provides:³

By signing this form you are agreeing to pay the charges notified to you by the Freedom of Information Directorate. The deposit is not refundable except in some limited circumstances (for example, if Defence fails to make a decision on your request within the statutory time limit), or may be refundable in part if the final charge is less than the deposit paid.

On completion of your request a final invoice will be generated for the outstanding balance of charges.

PLEASE DO NOT SEND CHEQUES OR MONEY ORDERS TO FOI

Once our office receives this form, the Department of Defence will generate an invoice in order for you to make payment of the agreed charges via one of the payment options.

Our office will not proceed to process your request until a receipt has been received in our office notifying that the deposit amount has been paid.

Please sign below and return this form by one of the following:

The Department's preliminary charges notice for FOI request s22(1)(a)(ii) - irrelevant material [REDACTED] can be found at **Appendix B**.

The Department's 'Decision management SOPS' procedures manual provides guidance to FOI officers at [1.2] on the procedures to follow when deciding to impose charges for the processing of an FOI request (**Appendix C**).

During the course of this investigation, the Department submitted that it took on average 5.7 days:

... between an applicant agreeing to pay the charge and the issuing of an invoice to pay the charge.⁴

The Department submitted that the raising of invoices are done within a reasonable timeframe:

In most instances, invoices relating to s7(2)(d) - certain operations of agencies FOI applications (and in fact the invoices for all FOI applicants) have been raised and issued in a matter of days following receipt of the applicants agreement to the charges; however, when the Department has not been able to raise and issue an invoice in its usual incredibly expedient manner, the invoice has been raised and issued in a reasonable timeframe in accordance with the *Goods and Services Tax Act 1999*. Whilst it is reasonable to expect that the Department will always raise an invoice in a reasonable timeframe, it is not reasonable to expect that there will never be instances when the Department is unable to meet the extremely expedient turnaround times of a matter of days that it is usually able to provide to s22(1)(a)(ii) - irrelevant material and all other FOI applicants.

³ Department's submissions of 9 October 2018 (Attachment 1).

⁴ Department's submissions of 15 November 2019.

The Department's review of the invoicing process found that the Department does in all instances raise and issue invoices expediently, cost effectively and in all circumstances in a reasonable timeframe in accordance with both the *Public Governance, Performance and Accountability Act 2013* and the *Goods and Services Tax Act 1999*.⁵

During the course of the investigation, the Department advised that it had altered its process in that it now:

[asks] Accounts Receivable to send the invoice directly to the applicant once it has been raised, so there is no delay.⁶

Complainant's submissions on the Department's process for the collection of charges

In s 22(1) complaint, the complainant said:

On two separate occasions the Department has taken between one and two weeks from sending a preliminary assessment of charges to sending an invoice to pay the said charges. The Department has stopped the clock on their processing time during these self-induced delays.

The complainant acknowledges that:

Neither the FOI Guidelines, nor section 31 of the FOI Act indicate a specific amount of time to provide an invoice after an agency receives the request for a generation of an invoice.

It is clear that is a delay occurs on our side the clock should be stopped. However, for delays on the other side it should not. The Department has 30 days provided to it under the Act to deal with all administrative tasks associated with a request.

Department's submissions regarding its obligations under the Public Governance, Performance and Accountability Act 2013 (PGPA Act) and Goods and Services Tax Act 1999

In response to the investigation notice of 8 February 2019, the Department provided a number of submissions going to its obligations under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and the *Goods and Services Tax Act 1999* (GST Act).⁷

Given the Department's explanation as to why an invoice or method of payment cannot be made at the time of providing a preliminary assessment of charges appears to rely in part on its purported compliance with the PGPA and GST Acts, for completeness I have included its submissions on those laws here.

⁵ Department's submissions 9 October 2018.

⁶ Department's submissions of 13 February 2019.

⁷ Department's submissions of 17 October 2018 and 8 February 2019.

The Department contends that it is open to the Department under the GST Act to take up to 28 days to issue an invoice to an FOI applicant:

Further to the Department of Defence's response to your reference [REDACTED] - FOI complaint about the Department of Defence - Preliminary Inquiries on Tuesday 9 October 2018, yesterday I received confirmation from the Australian Taxation Office that, in accordance with subsection 29-70(2) of the A New Tax System (Goods and Services Tax) Act 1999 (GST Act), the supplier of a taxable supply must within 28 days after the recipient of the supply requests it, give to the recipient, a tax invoice for the supply. Whether a recipient is required to pay for a taxable supply before or after the making of the taxable supply will have no impact on the 28 day timeframe provided for issuing a tax invoice in subsection 29-70(2).

Therefore, the Department of Defence was well within the 28 day legislated timeframe for issuing the invoices associated with **s22(1)(a)(ii) - irrelevant material**.⁸

The Department's response to the investigation notice further asserted:

13. The Department's initial submissions went to the point that, in accordance with the accepted timeframe under the GST Act, the Department issues invoices within the 28 day timeframe set by the GST Act for payment of tax invoices. The need to issue the invoice is to ensure that the Department meets its accountability obligations pursuant to section 41 of the PGPA Act to "cause accounts and records to be kept that properly record and explain the entity's transactions and financial position".

14. Point 6 (a) of the OIAC letter queried the Department on why an invoice is required for a charge imposed in the context of an FOI request. The provision of an invoice complies with the Department's legislative obligations under section 41 of the PGPA Act to "cause accounts and records to be kept that properly record and explain the entity's transactions and financial position". The issuing of an invoice is an accepted accounting practice (recognised by the Australian government to ensure accountability of all monies received by the Commonwealth).⁹

Provision of a tax invoice at the time of preliminary assessment of charges

In response to the investigation notice, the Department submitted that to provide an applicant with an invoice (or method of payment) at the time of issuing a preliminary assessment of charges would be a breach of the FOI Act:

Point 6 (b) of the OIAC letter queried why an invoice cannot be issued at the same time as the preliminary assessment. The answer to this question is that it would be a breach of the Department's obligations under the FOI Act to issue an invoice at the same time as the preliminary assessment. The FOI Act specially uses both the term "preliminary assessment" and "charge". This means that, in-line with the rules of statutory interpretation, these two terms must be considered to be different and are not interchangeable. Further, it is very clear in the FOI Act that not only are the two terms different and not interchangeable, but the

⁸ The Department's submissions of 17 October 2018.

⁹ The Department's submission of 8 February 2019.

processes in which the two terms are used are also two distinct processes. The second process is dependent upon the outcome of the first process and therefore cannot be commenced without a specific outcome from the first process, as set out in section 29 of the FOI Act.

Pursuant to section 29(1)(b) of the FOI Act, the preliminary assessment must be sent to the applicant with the written notice that a charge is going to be imposed. However, the imposition of charges is not permissible until such time as the applicant notifies the agency in writing of their agreement to pay the charge, as per section 29(3) and 29(1)(f). This means that the issuing of an invoice at the same time as the preliminary assessment would still constitute the imposition of a charge prior to receiving written notice from the applicant of their agreement to the charge, and therefore be a breach of section 29(3) of the FOI Act.

As explained above, the FOI Act is clear that the term “preliminary assessment” is different to the term “charge” and must be dealt with in a separate process, in which the acceptance of the preliminary assessment must be received in writing from the applicant before a charge is issued to the applicant. This is set out in detail above in the submissions relating to point 6 (b) and also in the Department’s initial submissions.

The Department also asserts:

17. The need for this mechanism is recognised in the Guidelines at paragraph 4.69 where it states:

“Whilst the FOI Act states that an agency may decide ‘that an applicant is liable to pay a charge’ and an applicant may signify ‘agreement to pay the charges’ (s29(1)), other elements necessary to create a debt due are either absent or uncertain. For example, neither the FOI Act nor the Charges Regulations declare that an assessed charge is a debt due to the Commonwealth; nor do they confer jurisdiction upon any court to enforce a debt; an assessed charge is not necessarily an ascertainable or settled amount; and the FOI Act provides its own limited mechanism to ensure that assessed charges are paid before access is granted.”

18. It is clear from the Guidelines that the issue of the uncertain legal status of the debt is a well-recognised issue. Similarly it is also clear from the Guidelines that the mechanism set out at section 29 of the FOI Act, and as applied by the Department, is the only mechanism for which charges can be raised and accepted.¹⁰

¹⁰ The Department’s submissions of 8 February 2019. I note on 19 June 2020 the Information Commissioner issued the revised guidelines [4.91] which state:

The Information Commissioner is of the view that a charge assessed by an agency under the Charges Regulations is not a debt due to the Commonwealth that can be recovered by the agency. Although the FOI Act states that an agency may decide ‘that an applicant is liable to pay a charge’ and an applicant may signify agreement to pay the charge (s 29(1)), other elements necessary to create a debt due to the Commonwealth are absent. For example, neither the FOI Act nor the Charges Regulations state that an assessed charge is a debt due to the Commonwealth, nor do they confer jurisdiction on any court to enforce a debt. Further, an assessed charge is not necessarily a settled amount and the FOI Act provides its own limited mechanism to ensure assessed charges are paid before access is granted.

In [REDACTED] complaint the complainant stated:

I ask that you direct the agency to not extend the processing time when the delay has been caused by them.

I further note that some agencies' FOI sections provide EFT details to accompany preliminary assessment of charges forms. If the Department were to implement a similar system this may prevent unnecessary delays in the future.

Discussion

In *'ND' and Department of Human Services*¹¹ ('ND'), the former Information Commissioner considered the issue raised by the FOI applicant and commented that: 'where a charge is justified, it would be in keeping with the objects of the FOI Act to ensure that the method of payment should also facilitate prompt access to the documents'.

I do not accept the Department's assertions that it is prevented by the FOI Act to provide payment details at the time of issuing the preliminary charges notice, particularly given the subsequent process, as outlined by the Department, can add on average up to 5.7 days to the statutory processing period. Given the statutory processing period is 30 days, the Department's reported delays can extend the processing period by approximately 20%.

I consider it reasonable that where an applicant pays a deposit (or full amount) as calculated in the preliminary assessment, that payment can be taken as their agreement to pay the charges amount satisfying s 29(3). As a consequence of this investigation, consideration will be made as to whether the Guidelines should be revised to provide greater clarity to agencies that payment of a charge can be taken to constitute notification in writing of the applicant's agreement to pay the charge for the purposes of s 29(1)(f) of the Act.

I also note the Department's submissions which refer to the Department's internal processes to only raise an EFT reference number once an invoice has been raised as a further reason why the Department cannot include payment details on a preliminary charges notice. I consider this approach to be an internal policy approach of the Department and note that it is common practice in Commonwealth agencies to provide payment details to FOI applicants at the time of the preliminary charges notice.

I appreciate that the current process would assist in the Department's ability to easily reconcile accounts, however an alternative and pragmatic approach would be to request that applicants include an internally agreed naming convention in the 'payment reference' field of the EFT payment such as: 'FOI XXXXXX'. This approach would ensure it is easily identifiable when reconciling the accounts and the date upon which the processing period should recommence according to s 31(2) of the FOI Act.

¹¹ *'ND' and Department of Human Services (Freedom of information)* [2017] AICmr 119 (20 November 2017) at [25].

It is clear that a self-imposed extension of up to 5.7 days (approximately 20% of the overall initial statutory processing timeframe) is not an efficient process for collection of payment of charges.

As discussed above a practical solution to the issues raised by the complainant is for the Department to issue payment options at the time of issuing a preliminary charges notice¹² and consider payment by the applicant to constitute agreement to pay the charge.

Issuing a credit note

During the course of the investigation, the Department advised that it issued the complainant a credit note on 22 August 2018:

As discussed there was an overpayment made in relation to the balance of charges for [REDACTED] in the amount of \$20.00.

I have attached a credit note in case you need it for your records which you can use for any future FOI requests.

I note that Regulation 10(4)(a) and the FOI Guidelines provide that where there has been an overpayment, the agency must refund the difference:

After making a decision on an FOI request where a charge was estimated under s 9 of the Charges Regulations, an agency or minister is required to calculate the final charge based on the actual time taken to process the request, using the applicable charges in Schedule 1 (s 10(1)). The new charge may be different to the estimated charge. If the new charge is less than the amount already paid by an applicant, a refund of the difference *must* be made (s 10(5)(a)). If the new charge is higher than the amount already paid, that payment will be treated as a deposit on account of the charge (s 10(5)(b)).¹³

I note the FOI Guidelines provide:

The agency should refund the deposit in the same way the deposit was paid (for example, direct credit into a bank account). The FOI Act does not provide for the issuing of a 'credit note' to offset potential charges for future FOI requests.¹⁴

Although there is no legislative basis for the Department to issue a credit note where there has been an overpayment of a charges amount, I note the Department's advice that the complainant subsequently used the credit note towards payment of another charges notice in another FOI request. I also acknowledge the Department's submissions that it had ceased this practice.

¹² See FOI Guidelines [4.56] and 'Applicant is liable to pay a charge (preliminary view)' template: <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/sample-foi-notices/>

¹³ FOI Guidelines [4.78].

¹⁴ FOI Guidelines [4.87].

Conclusions

The Department's current process that requires an invoice to be raised before allowing a FOI applicant to make a payment in order to recommence the processing period is inefficient and does not facilitate and promote public access to information, promptly and at the lowest reasonable cost.

I do not consider the Department's current approach, which delays the processing of an FOI request by on average 5.7 days, is an approach which supports an individual's legally enforceable right to obtain access to a document of an agency or minister in accordance with s 11 of the FOI Act.

Suggestions on how the Department can improve its processes

The purpose of my suggestions, as set out below, are to conclude the complaint investigation and ensure the Department meets its obligations under the FOI Act, including that the Department's current and future processes and practices are consistent with the objects of the FOI Act.

Pursuant to s 87(d) of the FOI Act, I have set out the following suggestions that I believe might improve the processes of the Department. Within **14 January 2021** of this Notice I suggest the Department:

1. Update its guidance to ensure that, where there has been an overpayment of a charges amount, the FOI applicant is to receive a refund in accordance with regulation 10(4)(a) of the FOI Charges Regulations.
2. The Department adjust the way it administers charges to:
 - i. Provide payment options at the time of issuing a preliminary charges notice and
 - ii. Accept payment of the charge as notification in writing by the applicant of acceptance of the charge.

I consider these suggestions to be consistent with the object of the Act and likely to reduce the administrative impost on the Department.



Notice on completion under s 86 of the FOI Act ([redacted]) – [redacted] [redacted] and Services Australia

On 12 July 2018, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) from [redacted] about Services Australia (formerly, the Department of Human Services) in the performance of its functions and exercise of its powers under the FOI Act.

The complainant complains that Services Australia imposed a charge to process an FOI request in circumstances where Services Australia had previously twice determined the document requested was exempt in full and would not be released.

The FOI request referred to in this complaint was subject to Information Commissioner review (IC review) of Services Australia's access refusal decision (OAIC reference: [redacted])¹ and charges decision (OAIC reference: [redacted]).² The complainant elected to continue to pursue this complaint following resolution of those reviews.

Pursuant to s 86, upon completion of an investigation I am required to issue a notice on completion which sets out:

- the investigation results
- the investigation recommendations (if any), and
- the reasons for the investigation results and the making of the investigation recommendations.

In considering this matter I have relied upon the submissions provided by Services Australia and the complainant.

Investigation results

Allegations

The complainant submits that Services Australia should not have imposed a charge to process an FOI request for one document that had been previously requested and where access had been refused. [redacted] also asserts that Services Australia should not invite people to

¹ On 24 June 2019, the Information Commissioner set aside Services Australia's decision of 15 December 2017, as varied on 7 December 2018, and substituted a decision that the material was not exempt under ss 37(2)(b) and 47E(d). See *Darren McAulay and Department of Human Services (Freedom of information)* [2019] AICmr 45.

² On 14 March 2019, Services Australia issued the complainant with a revised decision under s 55G to waive the charges (OAIC reference: [redacted]). The matter was finalised on 15 March 2019 when the complainant withdrew [redacted] application for IC review under s 54R of the FOI Act.

apply for a document, the title of which is listed on its IPS, where access to that document is routinely refused. On 9 July 2018, the complainant advised:

I am not sure how to frame my query relating the amount charged, except as follows. Initially i did not care that there was a minor charge for the service. I objected to the charge once i realised that the Department responded to multiple requests for the same document in the same manner, by first charging a fee "to inspect the document", and then an outright refusal of the document under FOI. The fact that the Department has obviously already inspected the document and made a determination that it is 100% exempt, but still charges people for "its service to inspect" the document almost borders on fraudulent. Secondly, if the document is determined to be 100% exempt, then the "invitation" to request it under FOI on the website ought to be removed.

Issue 1: Publication of OBP titles and inviting requests for unpublished documents through the FOI Act

The complainant alleges that Services Australia should not invite people to apply for a document, the title of which is listed on its IPS, where access to that document is routinely refused.

Legislative framework

Information Publication Scheme

Part II of the FOI Act establishes the IPS, which requires an agency to publish a range of information about its functions, including the information dealt with or used to carry them out (s 7A).

Part II imposes particular requirements on agencies, including:

- 'operational information' as defined by s 8A must be published (s 8(2)(j))
- the information must be 'accurate, up-to-date and complete' (s 8B)
- the information must be published in a particular way (s 8D).

An agency is not required to publish 'exempt matter' (the inclusion of which in a document causes the document to be an exempt document) or if publication is restricted or prohibited by an enactment (s 8C). An agency is not required to publish personal or business information as part of its IPS if it would be unreasonable to publish that information (ss 8(2)(g)(i), (ii)).

The Guidelines issued by the Information Commissioner under s 93A of the FOI Act (FOI Guidelines) provide further guidance about the publication of 'operational information':

- In relation to the requirement that the information must be 'accurate, up-to-date and complete', operational information should be updated in the IPS at the same

time that a revised or updated version of the information is provided to agency officers.³

- Where information is not published because an exception applies, agencies may record this in an IPS information register, including the title of the document to which an exception applies and the reason it was not published under the IPS. Capturing this information may help an agency if it needs to respond to any complaints to the Information Commissioner about its IPS compliance.⁴
- In relation to a document of an agency which is exempt under a provision in Part IV of the FOI Act, if a document contains exempt and non-exempt material, the agency should prepare an edited copy.⁵

Services Australia's submissions

During the investigation Services Australia was invited to provide submissions in response to the complaint.

Services Australia has advised that all OBPs are stored in one repository, used by both staff and accessed by the public. Where a business area considers the OBP to be exempt from the requirements of Part II of the FOI Act, the document is made available to staff but not the public. The titles of all OBPs are accessible to the public, even where the document itself is not.

In circumstances where a member of the public seeks access to a document that is not publicly available, they are invited to make a request under the FOI Act. Services Australia then considers whether all or part of the document should be provided in response to the request. Services Australia advised:

...In accordance with the department's FOI Procedure Manual, FOI requests are always reviewed to determine whether release under the department's administrative access arrangements would be suitable. This would occur if, following further consideration of the OBP, it was determined that the latest update to the OBP document did not contain any exempt material and could therefore be released in full. In this circumstance, the OBP would be made publicly accessible on the IPS, and the FOI team would work with the person seeking access to confirm that access to the relevant link satisfied their FOI request.

... If it is determined that the OBP contains material that is exempt from release under the FOI Act, but an edited copy can be prepared under section 22 of the FOI Act, an FOI decision will be made to facilitate the release of this edited copy. The version of the OBP that is released will be published on the department's disclosure log. The IPS cannot be updated to reflect this decision - as explained above, OBP's cannot be published on the IPS in part or in some other form that the one live version that the department maintains.

³ FOI Guidelines at [13.123].

⁴ FOI Guidelines at [13.72].

⁵ FOI Guidelines at [13.104].

...If it is determined that the OBP is wholly exempt from release under the FOI Act, an FOI decision is made to this effect. The relevant page on the IPS will continue to include the disclaimer that the information is potentially FOI exempt, or unavailable to external audiences. This is because while a decision has been made that this particular version of the OBP is presently exempt from release, this could change over time, particularly if the OBP is revised or updated.

Services Australia advised that it had received and refused 2 earlier FOI requests for the document, 7 months before the complainant's request.

Discussion

In relation to the practice of publishing the OBP titles, I accept that Services Australia's practice of making the titles of all OBPs available to the public, even when the substantive document is itself not published on the website, is a good transparency measure that is consistent with the objects of the FOI Act.

In relation to whether Services Australia should not invite access to a document listed but not published on its IPS and where access to that document has been previously refused, I have considered Services Australia's submissions that '*while a decision has been made that this particular version of the OBP is presently exempt from release, this could change over time, particularly if the OBP is revised or updated*'. I acknowledge that this practice may provide members of the public an opportunity to challenge the decision not to provide access to a particular document through the formal FOI request process, which carries with it internal and external review rights.

In this matter, the complainant requested access to a OBP document under the FOI Act and subsequently sought Information Commissioner review of Services Australia's access refusal decision. The application for review was finalised by way of an Information Commissioner decision under s 55K of the FOI Act which set aside the decision under review, finding that the material was not exempt under ss 37(2)(b) and 47E(d).

I find that the process of recommending that individuals seek access to non-published OBP information is appropriate in circumstances where the agency has robust and reliable processes in place to ensure that it is not the sole or predominant mechanism for reviewing and reconsidering earlier decisions not to publish operational information, or testing whether those earlier decisions not to publish documents are consistent with the FOI Act.

Services Australia should have in place processes and procedures to ensure that decisions taken not to publish certain operational information – whether administratively or through formal request processes under the FOI Act – are consistent with IPS requirements.

Issue 2: Whether it was appropriate for the Department to impose a charge in relation to a document listed, but not published, on the IPS, that had previously been requested and found exempt under the FOI Act

The complainant submits that Services Australia should not have imposed a charge to process an FOI request for one document that had been previously requested and where access had been refused. In this case, the complainant sought access to an OBP that was listed, but not published, as part of Services Australia's IPS. [REDACTED] submitted that other people known to [REDACTED] had also sought access to the document.

Legislative framework

Section 11 provides that every person has the legally enforceable right to access documents held by the government. The FOI Act also provides that this should be done at the lowest reasonable cost.

Section 29 of the FOI Act provides that an agency or minister may impose a charge to process an FOI request in accordance with the *Freedom of Information (Charges) Regulations 1982 (Charges Regulations)*. Subsection 29(4) of the FOI Act provides agencies with a discretion to reduce or not impose a charge. In deciding whether to exercise the discretion, the agency may consider any relevant matter, however s 29(5) provides, without limiting the matters to be taken into account, that the agency must consider whether giving access to the documents in question is in the general interest, or in the interest of a substantial section of the public, and whether payment of the charge would cause financial hardship to the applicant.

The FOI Guidelines (at [4.5] and [4.53]) explain that the decision to impose a charge is discretionary and any charges must be fair, accurate and should not be used to unreasonably hinder an applicant from pursuing an FOI request. The FOI Guidelines further explain (at [4.3]) that, in exercising the discretion to impose a charge, an agency should take into account the objective in s 3(4) of the FOI Act, which provides that 'functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost'.

The FOI Guidelines (at [4.6]) provide principles that are relevant to charges under the FOI Act. They are:

- A charge must not be used to unnecessarily delay access or to discourage an applicant from exercising the right of access conferred by the FOI Act.
- A charge should fairly reflect the work involved in providing access to documents.
- Charges are discretionary and should be justified on a case by case basis.
- Agencies should encourage administrative access at no charge, where appropriate.
- Agencies should assist applicants to frame FOI requests (s 15(3) of the FOI Act).
- Agencies should draw an applicant's attention to opportunities to obtain free access to a document or information outside the FOI Act (s 3A(2)(b)).

- A decision to impose a charge should be transparent.

Services Australia's submissions

Services Australia agreed that it had received and refused 2 earlier FOI requests for the document, 7 months prior to the complainant's request.

The Department has advised that the charge of \$22.55 was broken down as follows:

Search and retrieval time: 0.97 hours, at \$15.00 per hour:	\$14.55
Decision-making time: 5.40 in total, (* after deduction of 5 hours) 0.40 hours, at \$20.00 per hour	\$8.00
TOTAL	\$22.55

In relation to the search and retrieval time of 0.97 hours, Services Australia submitted:

Operational Blueprints are accessible to departmental staff (including the FOI team) on the department's intranet. However, the FOI team would still need consult with the relevant business area owner of an Operational Blueprint to determine whether the version on the intranet is the current version and whether there is any sensitivity with its release. This is what the department's undertook in relation to the complainant's request (see Attachment A).

It further submits:

The time taken by the business area to review whether the document already held by the FOI team (which was in relation to an earlier request that was over 6 months old) was the current version, was included in the 'search and retrieval time', as the business area was required to 'search and retrieve' the current version of the document (which they hold) and compare it to the document held by the FOI team, to ensure the current version of the document would be the one processed by the FOI team.

In the alternative, the time taken by the business area to review whether the document already held by the FOI team was the current version, could be considered as part of 'decision-making time'. Since decision-making time is set at \$20 per hour, whereas search and retrieval time is set at \$15 per hour, this approach would actually increase the charge payable by the applicant.

These submissions appear inconsistent with Services Australia's advice that:

If the business area determines that an OBP contains information that does not meet the definition of "operational information" in section 8A of the FOI Act, or contains material that is exempt from release under the FOI Act, that OBP will be published in such a way that it is only accessible to the department.

and

OBPs are 'living documents' – they are regularly reviewed and updated to reflect any changes in the department's service and to ensure customer's do not rely on outdated information to organise their affairs.

From the above submissions, I understand that OBPs unavailable to the public remain accessible to staff to assist with their statutory functions, and that they are updated and maintained for that purpose. I infer that the published versions of those documents are necessarily the most contemporary, approved versions.

It is unclear to me how Services Australia would estimate that it would take almost one hour for the decision maker to find and download a document where:

- the complainant provided a specific document title for the document which replicated the title of the document on the OBP document repository
- the contents of the OBP document repository were accessible to all staff, including FOI processing staff
- the documents in that repository are regularly reviewed and updated, and relied upon by internal decision makers in managing the agency's functions.

I accept that consultation between a business area and the FOI team would be required to inform a decision about whether the document, or a part of the document, could be provided to the complainant, however I consider that engagement to be a component of the decision-making time, which is separately charged.

In relation to the decision-making time of 5.40 hours, I note that Services Australia submitted:

- the applicant's request was a duplication of prior requests received by the Department
- there had been no changes to the document at issue since it was last considered by the FOI team on 14 March 2017
- the relevant business area clearly maintained its previously stated position and objected to the document's release.

The submissions also suggest that all the internal parties quickly understood the document to be the same as that which had been requested previously and considered that the earlier decision regarding non-disclosure of the document should be applied.

The submissions of the agency do not suggest that there was significant time spent in engagement between the business areas and the FOI team that might justify the estimate of processing time included in the charge notice.

I note that, during the course of the IC review relating to the decision to impose a charge in this matter, submissions were exchanged in relation to the application of the statutory considerations and the Guidelines to the matter. Given the matter was ultimately withdrawn by the complainant following Services Australia's revised decision under 55G not to impose

a charge in relation to the request, it is not appropriate for this complaint investigation to re-examine whether that was the correct or preferable decision.

However, in this case, although the revised s 55G decision ultimately resolved the IC review, the complainant remains of the view that the original decision regarding the imposition of a charge was flawed, and in ████████ view, potentially improper.

The complaint handling powers in ss 69 and 70 of the FOI Act allow an investigation into an action taken by an agency in the performance of its functions or the exercise of its powers under the FOI Act.

In that respect, I find that the evidence raises a reasonable inference that Services Australia's decision to impose a charge may not have been appropriate in the circumstances of this case, specifically:

- Where there was only one document at issue and that document was readily available to the FOI team
- Where internal considerations regarding the potential release of the document were informed by and consistent with recent decisions finding the document was exempt from release in similar circumstances and where the document had not altered since that assessment was made.

In particular, I draw Services Australia's attention to the principles that the decision to impose a charge is discretionary and as set out in the FOI Guidelines (at [4.3]), in exercising the discretion to impose a charge, an agency should take into account the 'lowest reasonable cost objective' in s 3(4) of the FOI Act.

Recommendations

The purpose of my recommendations, as set out below, are to conclude the complaint investigation and ensure Services Australia meets its obligations under the FOI Act, including that Services Australia's current and future processes and practices are consistent with the objects of the FOI Act.

Pursuant to s 88 of the FOI Act, I have set out the following recommendations, being formal recommendations to Services Australia that I believe Services Australia ought to implement by **15 December 2021**. I recommend that Services Australia:

1. Develop and implement a system to ensure that:
 - a. decisions taken by business areas in relation to the publication of operational information are consistent with Part II of the FOI Act, and
 - b. decisions taken business areas not to publish particular OBPs are periodically reviewed to determine whether the reasons for non-publication continue to apply to the OBP.
2. Develop and implement systems and processes to ensure that, where Services Australia exercises its discretion to impose a charge under s 29, that decision is

consistent with both the relevant statutory provisions, the FOI Guidelines and its obligations under Part II of the FOI Act.



Notice of completion under s 86 of the FOI Act ([redacted]) and [redacted]) – [redacted] and Australian Digital Health Agency

On 31 August 2018 ([redacted]) and 26 September 2018 ([redacted]), the Office of the Australian Information Commissioner (OAIC) received two FOI complaints under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Australian Digital Health Agency (ADHA) in relation to the performance of its functions and exercise of its powers under the FOI Act.

The complainant in both complaints is [redacted]

On 31 August 2018 the complainant complained about the ADHA's compliance with the FOI Act when processing FOI requests [redacted] and [redacted]. The issues raised by the complainant were:

- in relation to Request 1 and Request 2, that the ADHA failed to acknowledge receipt of the FOI requests within 14 days as required by s 15(5)(a) of the FOI Act.
- in relation to Request 1, the ADHA deliberately delayed providing a response to the request until after the opt-out period ceased.

On 26 September 2018 the complainant made a further complaint about the processing of Request 1, namely:

- in relation to Request 1, the ADHA improperly extended the processing time under s 27 of the FOI Act when it did not advise the complainant of the identity third party to be consulted under s 47G and where the documents provided in response to the request did not reflect any third party consultation under s 47G.

A copy of the complaints are at **Attachment B**.

A chronology of the processing of those matters can be found at **Attachment C**.

This notice on completion sets out the relevant:

- investigation results
- investigation recommendations
- reasons for the investigation results and recommendations.

Background

Request 1 – Request relating to ‘Opt-out’ applications (s 22(1)(a)(i) irrelevant material)

Request 1 was made on 27 July 2018 (s 22(1)(a)(i) irrelevant material) and was for documents relating to the number of ‘opt-outs’ from the My Health Record system for the period of 16 - 27 July 2018. A decision was provided to the complainant in response to Request 1 on 21 September 2018.

Complaints relating to Request 1 were raised in both s 22(1)(a)(ii) irrelevant material.

Request 2 – Request relating to travel and entertainment expenditure (s 22(1)(a)(i) irrelevant material)

Request 2 was made on 13 August 2018 (s 22(1)(a)(i) irrelevant material) and was for documents relating to the official travel, gift and entertainment expenditure of key management personnel of the AHDA for the 2016-17 and 2017-18 financial years. A decision was provided to the complainant in response to Request 2 on 24 December 2018.

The complaint relating to request 2 was raised in s 22(1)(a)(i) irrelevant material.

The OAIC conducted preliminary inquiries with the ADHA in relation to both s 22(1)(a)(i) irrelevant material and s 22(1)(a)(i) irrelevant material. On 22 October 2021 the OAIC advised the ADHA that it was commencing investigations under s 75 of the FOI Act in relation to both complaints.

Scope of investigation

For the purposes of this investigation, I consider the issues are:

1. In relation to Request 1 and Request 2, whether the ADHA failed to acknowledge receipt of the FOI requests within 14 days as required by s 15(5)(a) of the FOI Act.
2. In relation to Request 1, whether the ADHA improperly extended the processing time under s 27 of the FOI Act when it did not advise the complainant of the identity of the third party to be consulted under s 47G and where the documents provided in response to the request did not reflect any third party consultation under s 47G.
3. In relation to Request 1, whether the ADHA deliberately delayed providing a response to the request until after the opt-out period ceased.

Investigation results

Pursuant to s 87 of the FOI Act, the investigation results set out my opinions, conclusions and suggestions about how the processes of the ADHA might be improved.

I have had regard to the submissions and correspondence provided by the ADHA and the complainant.

Issue 1: Acknowledgement of FOI requests

In relation to Request 1 and Request 2, the complainant complained that the ADHA failed to acknowledge receipt of the FOI requests within 14 days as required by s 15(5)(a) of the FOI Act.

Request 1- Opt- out application numbers

The complainant submitted a request for access to certain documents to the ADHA on 27 July 2018 via the 'Right to Know' website, which automatically sent the request to a nominated email address within the ADHA's Agency Customer Care Help Centre.

On 27 July 2018 the ADHA wrote to the complainant in relation to Request 1:

Thank you for your enquiry titled: Freedom of Information request – Opt out application numbers for Monday 16 July 2018 to Friday 27 July 2018 inclusive – s 17 FOI Application.

Your request has been created with ID [REDACTED]. An Australian Digital Health Agency representative will be in contact with you shortly.

If you have any questions or require further information please don't hesitate to contact us...'

The complainant responded to this email on 2 August 2018, requesting that the FOI request be managed through the 'Right to Know' website.

On 10 August 2018, the ADHA wrote to the complainant, advising them that:

The Australian Digital Health Agency email address you have used, through the Right to Know website, is not the email address specified by the Agency for making a valid FOI request under subsection 15(2A)(c) of the Freedom of Information Act 1982 (Cth). Information on how to make a valid FOI request to the Australian Digital Health Agency is available at <https://www.digitalhealth.gov.au/about-the-agency/freedom-of-information-foi>

If your FOI request is otherwise valid, the Agency will acknowledge the original request date of 27 July 2018 if you promptly send your FOI request to the email address specified by the Agency for processing FOI requests at this time: [email address]

On 10 August 2018 at 1:34pm, the complainant responded:

Dear foi@digitalhealth.gov.au,

The claim that you will not recognise an FOI you have received, unless taken offline from Right to Know, is unlawful and invalid.

You may contact Right to Know to update your preferred contact details from help@digitalhealth.gov.au to foi@digitalhealth.gov.au but it is unlawful to insist that FOI applications must be taken offline from Right to Know.

Your response clearly indicates your agency have received and acknowledged the FOI application, and therefore is valid under the Act. Section 15(3) applies - a reasonable step in the circumstances is to update your preferred contact email with Right to Know and internally forward the application to your preferred email. Your actions are otherwise arbitrary and high handed, and contrary to the aims and objects of the Act.

If you do refuse to process the FOI, then this FOI becomes subject to access refusal review rights. Previous ruling indicates adverse funding for you, given this pedantic attitude is contrary to your obligations.

Later that day, at 2:19pm, the complainant wrote:

Further to my FOI, please note that I do not wish to handle my FOI offline at any point, and intend for it to be handled via Right to Know, given there is no personal information component to this FOI (having the FOI on Right to Know reduces the burden to agencies as it means parties wishing to make similar FOIs may discover their questions have already been asked and answered, avoiding the need for multiple FOIs on the same issue or topic). The only time an FOI made on Right to Know should be answered offline is when someone has mistakenly put in a personal information FOI to an agency (personal information FOIs should not be made via Right to Know).

Also, to confirm, my application was an FOI application (and explicitly one involving s 17), Administrative release is not possible in this instance given the agency's earlier statements that it would not be administratively releasing opt out numbers until well after the opt out period ceased (which, given recent announcements, may be never, as opt out has been claimed to be able to done at any point in the future in recent Ministerial announcements not yet implemented by the agency).

Finally, later that day, at 2:48pm, the complainant wrote:

Dear foi@digitalhealth.gov.au,

I understand Right to Know has put your preferred FOI email into effect and resubmitted all prior correspondence, therefore as per your response, the original FOI deadline remains intact and the application can not be contested as invalid any further.

Request 2 – Travel and entertainment expenditure

The complainant submitted a request for access to certain documents to the ADHA on 13 August 2018.

During the course of this investigation, the ADHA submitted that it did not acknowledge receipt of this request pursuant to s 15(5)(a).

In relation to this omission, as well as the failure to provide a decision on the request within the statutory processing period, the ADHA has submitted:

The Agency received the FOI request on 13 August 2018. A statement of reasons and documentation was provided to the applicant on 24 December 2018, after a delay in processing.

...

The Agency has already acknowledged that the timeframe for the response was inconsistent with the FOI Framework in this instance.

At the time of this FOI request, the staff member processing FOI applications had left the organisation and the Agency was in the processing [sic] a replacement officer. During this time, FOI processing was undertaken by the manager of that area, and in this instance the timeframe was not met. The scope of the FOI request and the complexity of gathering the data was underestimated by our team and this contributed to the delay in providing [REDACTED] with the requested information.

I am pleased to advise that the Agency successfully recruited an experienced FOI officer into this role later in 2018, and we have since met the statutory timeframes in responding to FOI requests.

Legislation and Guidelines

Subsection 15(2) of the FOI provides that a request must:

- (a) be in writing; and
- (aa) state that the request is an application for the purposes of this Act; and
- (b) provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, to identify it; and
- (c) give details of how notices under this Act may be sent to the applicant (for example, by providing an electronic address to which notices may be sent by electronic communication).

Further, subsection 15(2A) provides that the request may be sent in any of the following ways:

The request must be sent to the agency or Minister. The request may be sent in any of the following ways:

- (a) delivery to an officer of the agency, or a member of the staff of the Minister, at the address of any central or regional office of the agency or Minister specified in a current telephone directory;
- (b) postage by pre-paid post to an address mentioned in paragraph (a);
- (c) sending by electronic communication to an electronic address specified by the agency or Minister.

Paragraph 15(5)(a) of the FOI Act provides that:

- (5) On receiving a request, the agency or Minister must:
 - (a) as soon as practicable but in any case not later than 14 days after the day on which the request is received by or on behalf of the agency or Minister, take all reasonable steps to enable the applicant to be notified that the request has been received

Discussion

There is a distinction to be drawn from the language of s 15(2A) of the FOI Act. The provision states that a request ‘must’ be sent to the agency or Minister. The use of the term ‘must’ makes it clear that this is a mandatory requirement for a valid FOI request.

However, in specifying the ways in which the FOI request must be provided to the agency or Minister, s 15(2A) provides that the request ‘may’ be sent in one of the following ways. This permissive language suggests that the methods listed in the paragraphs below will be considered to be valid delivery methods, but that failure to adhere to those particular requirements will not, of itself, invalidate the request.

In relation to Request 1, the complainant did not send their original request to the email address specified by the ADHA for receipt and processing requests under the FOI Act. It appears that on 10 August 2018 the ‘Right to Know’ website adjusted the recipient email

address to which ADHA FOI requests were sent through that website to the FOI team email address, and resent the complainant's request of 27 July 2018 to that email address.

Although the original request for Request 1 was not sent to the nominated FOI processing email address in the ADHA, the recipient of that request was help@digitalhealth.gov.au, an email address managed by the agency. I understand that the request was then forwarded to the FOI team on 30 July 2018.

In this case, I consider the ADHA's subsequent correspondence with the complainant, advising them that the original request may be considered invalid unless it was sent to the specified ADHA email address, was inaccurate. Although the original request was provided to an email address not specified in accordance with s 15(2A)(c), the request was nevertheless sent to ADHA and was not invalid on that basis. The calculation of the period for acknowledging and responding to the request commenced from the date of the original request, that is, 27 July 2018.

Although the ADHA acknowledged receipt of the original request within the statutory timeframe as required by s 15(5)(a) of the FOI Act, it is clear from subsequent correspondence that the ADHA considered the original request to be invalid unless resent to the specified email address. Subsequently, the request was sent to the specified email address on 10 August 2018, however I consider that step to be unnecessary in circumstances where the original request was sent to the agency on 27 July 2018.

I have reviewed the ADHA's current FOI processing documentation¹. That documentation provides:

Requirements of a request

For a request to be valid, it must:

- be in writing, and state that the request is for the purposes of the FOI Act;
- provide details of how we can send notices to the applicant;
- be sent to the email or postal address we specify; and
- include sufficient information to identify requested documents.

Acknowledging requests

The Agency should acknowledge the request as soon as possible and must acknowledge it within 14 calendar days of receipt by the Agency. This 14-day timeframe applies from the date the request is received by the Agency, not the date it is brought to the attention of the FOI officer or any other Agency staff. The Agency can acknowledge the request by email and must include a reference number. The Agency should advise the applicant of the potential for fees to apply if such advice is likely to follow the initial acknowledgement.

I note that the section on 'acknowledging requests' implicitly acknowledges that requests can be valid, and the processing period commences, when a request is received by the

¹ Freedom of Information Policy and Guidelines, Draft version 007

agency, not necessarily the FOI team. However, the section titled ‘requirements of a request’ suggest that a valid request is contingent on the request being sent to ‘the email or postal address we specify’. While I acknowledge that is accurate – in that requests sent to that address will be valid – it does not assist staff to understand that FOI requests sent to the agency through a different mechanism (such as a different email address) will not be invalid on that basis alone.

Findings

I find that the ADHA acknowledged receipt of the Request 1 within 14 days of 27 July 2018. However, I consider that the subsequent correspondence between the ADHA and the complainant, suggesting that the request will be considered to be invalid unless resent to a specified email address, may reasonably have undermined the effect of the original acknowledgement and created doubt in the mind of the complainant as to whether the request would, in fact, be processed unless that subsequent requirement was met. Further, although part of the ADHA’s FOI processing guidelines reflect the fact that FOI requests received by other parts of the agency may be valid and that processing periods commence from the time of receipt by the agency rather than the time of receipt by the FOI team, there appears to be scope to provide further clarity in relation to that in the internal policy and guidelines document.

Consistent with the complainant and ADHA’s submission, I find that the ADHA failed to acknowledge Request 2 within the period required by s 15(5)(a) of the FOI Act.

Issue 2: extending the processing under s 15(6) of the FOI Act to conduct third party consultation.

In relation to Request 1, the complainant complained that the ADHA improperly extended the processing time under s 27 of the FOI Act when it did not advise the complainant of the identity of the third party to be consulted under s 47G and where the documents provided in response to the request did not reflect any third party consultation under s 47G.²

On 24 August 2018, the ADHA advised the complainant that ‘your request covers information held by a third party’ and that consultation under s 27 was required. The ADHA advised that the processing period had been extended by 30 days under s 15(6) of the FOI Act to allow it to conduct third party consultation:

s 22(1)(a)(ii) - irrelevant material

By email: s 22(1)(a)(ii) - irrelevant material

Freedom of Information request no. s 22(1)(a)(ii) irrelevant material - Third Party Consultation

I refer to your request for access under the *Freedom of Information Act 1982* (FOI Act) to documents relating to the number of opt-outs during 16-27 July 2018. As your request covers

² This issue was raised in both FOI complaints s 22(1)(a)(ii) irrelevant material

information held by a third party, this agency is required to consult with that party (under section 27 of the FOI Act) before making a decision on the release of those documents.

For this reason, the period for processing your request has been extended by 30 days in order to allow our agency time to consult with that third party (section 15(6) of the FOI Act).

The processing period for your request will now end on 25 September 2018.

The consultation mechanism under section 27 applies when we believe a third party may wish to contend that requested documents are exempt for reasons of business information. We will take into account any comments we receive from the third party but the final decision about whether to grant you access to the documents you requested rests with this agency.

If you have any questions, please contact the FOI Team by email foi@digitalhealth.gov.au or by phone 02 6289 9932. [Emphasis in original]

On 24 August 2018, the complainant responded to the ADHA requesting information about the third party/ parties who would be consulted. The complainant sought a response to this correspondence on 27 August 2018, 29 August 2018 and 11 September 2018. In their correspondence of 11 September 2018, the complainant alleged that the decision on the FOI request was deemed to be refused on 27 August 2018 because they contended that the notice advising them of the extension of the processing period under s 27 of the FOI Act was invalid because 'it failed to identify the statutory ground required for s 27 to apply, and repeated attempts to get your agency to specify a required ground has been ignored by your agency.'

Legislation and Guidelines

Section 27 of the FOI Act provides for consultation with third parties where the documents within the scope of an FOI request are business documents and the agency or minister is satisfied that disclosure of the documents would or could be expected to unreasonably affect the business adversely in relation to its lawful business: see **Attachment D**.

Subsection 15(6) of the FOI Act provides that where an agency or minister conducts third party consultation under ss 26A, 27 or 27A, the timeframe for making a decision is extended by 30 days.

In relation to conducting third party consultations, the FOI Guidelines provide:

An agency or minister may need to consult a third party where documents subject to a request affect Commonwealth-State relations (s 26A), are business documents (s 27) or are documents affecting another person's privacy (s 27A)...³

The consultation requirements in relation to documents that are business documents (s 27) or documents affecting personal privacy (s 27A) only require an agency or minister to undertake consultations if it is reasonably practicable to give that person a reasonable opportunity to make submissions in support of the exemption contention (ss 27(5) and 27A(4)). In determining whether

³ FOI Guidelines at [3.74].

it would be reasonably practicable to consult, the agency or minister should have regard to all circumstances, including the time limits for processing the request.⁴

There must be some rational basis which the agency or Minister can discern, based on the face of the document or from anything else actually known to the decision-maker, indicating that disclosure of the document would, or could be expected to, unreasonably affect the person adversely in relation to his or her personal information, lawful business or professional affairs. The mere appearance of a person's name in the document, in the absence of anything more, may not be sufficient for it to be apparent that a person might reasonably wish to make an exemption contention.⁵

Where an agency or minister is required to consult with a third party:

- the timeframe for making a decision is extended by 30 days (s 15(6))
- the agency or minister must give the third party a reasonable opportunity to make submissions in support of the exemption contention (ss 27(4)(a) and 27A(3)(a))
- any submissions by the third party must be considered (ss 27(4)(b) and 27A(3)(b))
- the third party must be given notice of the decision and their review rights (ss 27(6) and 27A(5)), and
- the applicant will only be given access to a document when the third party's opportunities for review have run out (ss 27(7) and 27A(6)).⁶

In relation to extending the processing period when conducting third party consultations, the FOI Guidelines provide:

The FOI Act contains extension of time provisions which are set out in Table 3 below. Agencies and ministers are encouraged to build into their FOI process an early and quick assessment of whether an extension of time may be required, to ensure that decisions are made within the statutory processing period.⁷

Table 3: Extension of time provisions

Reason for extension	Extension period	Determined by	Notification requirement
Third party consultation: consultation with a state, or a person or business concerning personal or business information (s 15(6))	30 days	by default if agency or minister determines ss 26A, 27 or 27A apply	agency or minister must inform applicant of extension as soon as practicable (s 15(6)(b))

⁴ FOI Guidelines at [3.76].

⁵ FOI Guidelines at [3.77] (footnotes omitted).

⁶ FOI Guidelines at [3.78].

⁷ FOI Guidelines at [3.144] (footnotes omitted).

Discussion

In order for s 27 to apply, the ADHA must have formed the view that the request for information relates to information about the business, commercial or financial affairs of the organisation or undertaking and that the organisation might reasonably wish to make a contention that the document is exempt under s 47 of the Act (trade secrets) or is conditionally exempt under s 47G and access to the document would be contrary to the public interest.

On 24 August 2018, the ADHA advised the complainant that it formed such a view.

Subsection 15(6) of the FOI Act provides that in circumstances where the agency determines that s 27 of the FOI Act makes it appropriate to extend the period referred to in s 15(5)(b), then it is extended by a period of 30 days, and the applicant must be informed 'as soon as practicable'. I note that there are no statutory requirements as to the form of that notification to the applicant, and no requirement for the applicant to be advised with whom the consultation pursuant to s 27 is to occur.

In this case, the s 15(6) notification occurred on 24 August 2018, within the 30 day processing period commencing on the date of the FOI request, 27 July 2018. Although the complainant sought further particulars about with whom that consultation was to occur, the provision of that information is not required by the FOI Act and the omission of those particulars does not invalidate the notice.

Further, as the s 15(6) notification to the complainant was valid, the processing period was extended by 30 days and a decision on the FOI request was not deemed to have occurred as submitted by the complainant on 11 September 2018.

The complainant also advised that the foreshadowed consultation under s 27 of the FOI Act had not occurred, because the document released in relation to an FOI request 'appears to be an email from a Department Liaison Officer at Centrelink with a draft of talking points for opt outs received on the first day of the My Health Record opt out period.'

During the course of the OAIC's inquiries into this complaint, the ADHA submitted that it did undertake consultation with a third party company under s 47G in relation to the request, as well as informally consulting with another Commonwealth agency. The ADHA advised that consultation occurred between an Executive General Manager at the ADHA and the third party company, as well as another Commonwealth government agency.

Findings

I find there to be evidence that the ADHA reasonably formed the view that consultation with a third party was required and notified the complainant of the extension of the processing period for this purpose as required by the FOI Act. Consequently, I find this complaint unsubstantiated.

Issue 3: Delay in responding to FOI request [s 22(1)(a)(ii) irrelevant material] ('Opt-out' applications)

In relation to Request 1, the complainant raised that the ADHA 'intentionally delayed' providing a response to the request until after the opt-out period ceased. The complainant advised that:

The ADHA have therefore been intentionally stalling and delaying this FOI so as to prevent access until after the opt out period has finished, because it does not want the number of current opt outs to influence opt out behaviour (nor for earlier statements of the Ministers involved to be contradicted, and claims of fraud to be made).

As noted earlier, Request 1 was made on 27 July 2018 and a response was provided on 21 September 2018.

Discussion

Although the ADHA extended the statutory processing period for Request 1 consistent with the relevant provisions in the FOI Act (ss 27 and 15(6)), there is also some evidence that those provisions were also utilised in order to delay providing a timely response in relation to the request.

In an email dated 10 August 2018, an officer of the ADHA wrote an internal email in relation to Request 1 in which they said:

The sticking point on this one... was how we were going to handle the aspect of this FOI coming through righttoknow.org.au, and whether or not we could buy some more time by redirecting [the applicant] back through our FOI email address.

That aside, I think after the discussion with [another officer] today it can be ascertained whether or not any of our systems contain this data etc and then it would be a case of trying to apply any possible exemptions or at least deter access to this information until after the opt-out period.⁸

The ADHA subsequently sent the complainant the email discussed in Issue 1 advising that:

The Australian Digital Health Agency email address you have used through the Right to Know website is not the email address specified by the Agency for making a valid FOI request under subsection 15(2A)(c) of the *Freedom of Information Act 1982* (Cth).

Information on how to make a valid FOI request to the Australian Digital Health Agency is available at <https://www.digitalhealth.gov.au/about-the-agency/freedom-of-information-foi>

If your FOI request is otherwise valid, the Agency will acknowledge the original request date of 27 July 2018 if you promptly send your FOI request to the email address specified by the Agency for processing FOI requests at this time: foi@digitalhealth.gov.au

⁸ Email from [s 22(1)(a)(ii) - irrelevant material] titled 'ADHA FOI ID 1807018 [s 22(1)(a)(ii) - irrelevant material]'

It would appear from the internal correspondence above, that the subsequent email to the complainant was a deliberate mechanism to recommence the processing period to delay the provision of requested information.

On 18 September 2018, an email was sent between officers of the ADHA which stated:

We have two outstanding FOI applications for opt out figures. **We have been waiting until after last night's Senate Inquiry hearing before responding...**

Our understanding is that there are at least two documents within the scope of these requests:

- 9) a Prime Ministerial Statement in July
- 10) The outcome from last nights' senate Inquiry

Grateful for your advice and copies of the relevant documents. If redactions are needed to the documents, it would be helpful if you would indicate which parts of the text need redaction.'
(sic) [Emphasis added]

This suggests that the ADHA was deliberately delaying provision of requested information to the complainant until after a particular event occurred, inconsistent with the objects of the FOI Act.

Findings

I find that the ADHA attempted to delay the processing of Request 1 when it corresponded with the complainant to advise them that they must submit a new FOI request to a different email address in order for the request to be valid, when the original request was validly made.

Investigation recommendations

To assist the ADHA in improving its compliance with the statutory processing period, and pursuant to s 88 of the FOI Act, I make the following formal recommendations to the ADHA that I believe the ADHA ought to implement within the timeframes specified below:

1. by **12 January 2022**, that the ADHA review its internal policies, procedures and practices to clarify that the processing periods for valid FOI requests commence from the day the request is received by the agency, even if the request is not sent to the FOI team until a later day, and that FOI requests are not invalid only because they were not sent to the email address specified pursuant to s 15(2A).
2. by **12 January 2022**, that the ADHA review its processes and procedures to ensure that FOI requests are acknowledged within 14 days of receipt and that decisions are provided within the relevant statutory processing period.
3. by **12 January 2022**, that the Chief Executive Officer issue a statement to all staff, highlighting the ADHA's obligations under the FOI Act and pro-disclosure emphasis of the Act, this statement should encourage and support staff in meeting their

obligations under the FOI Act, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

4. by **1 March 2022**, that the ADHA appoint a member of the Executive to be the agency's Information Champion, to foster and promote compliance with the objectives and requirements of the FOI Act.



Notice of completion under s 86 of the FOI Act ([redacted]) and [redacted]) – [redacted] and Australian Digital Health Agency

On 31 August 2018 ([redacted]) and 26 September 2018 ([redacted]), the Office of the Australian Information Commissioner (OAIC) received two FOI complaints under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Australian Digital Health Agency (ADHA) in relation to the performance of its functions and exercise of its powers under the FOI Act.

The complainant in both complaints is [redacted]

On 31 August 2018 the complainant complained about the ADHA's compliance with the FOI Act when processing FOI requests [redacted] and [redacted]. The issues raised by the complainant were:

- in relation to Request 1 and Request 2, that the ADHA failed to acknowledge receipt of the FOI requests within 14 days as required by s 15(5)(a) of the FOI Act.
- in relation to Request 1, the ADHA deliberately delayed providing a response to the request until after the opt-out period ceased.

On 26 September 2018 the complainant made a further complaint about the processing of Request 1, namely:

- in relation to Request 1, the ADHA improperly extended the processing time under s 27 of the FOI Act when it did not advise the complainant of the identity third party to be consulted under s 47G and where the documents provided in response to the request did not reflect any third party consultation under s 47G.

A copy of the complaints are at **Attachment B**.

A chronology of the processing of those matters can be found at **Attachment C**.

This notice on completion sets out the relevant:

- investigation results
- investigation recommendations
- reasons for the investigation results and recommendations.

Background

Request 1 – Request relating to ‘Opt-out’ applications (s 22(1)(a)(i) irrelevant material)

Request 1 was made on 27 July 2018 (s 22(1)(a)(i) irrelevant material) and was for documents relating to the number of ‘opt-outs’ from the My Health Record system for the period of 16 - 27 July 2018. A decision was provided to the complainant in response to Request 1 on 21 September 2018.

Complaints relating to Request 1 were raised in both s 22(1)(a)(ii) irrelevant material.

Request 2 – Request relating to travel and entertainment expenditure (s 22(1)(a)(i) irrelevant material)

Request 2 was made on 13 August 2018 (s 22(1)(a)(i) irrelevant material) and was for documents relating to the official travel, gift and entertainment expenditure of key management personnel of the AHDA for the 2016-17 and 2017-18 financial years. A decision was provided to the complainant in response to Request 2 on 24 December 2018.

The complaint relating to request 2 was raised in (s 22(1)(a)(i) irrelevant material)

The OAIC conducted preliminary inquiries with the ADHA in relation to both (s 22(1)(a)(i) irrelevant material) and (s 22(1)(a)(i) irrelevant material). On 22 October 2021 the OAIC advised the ADHA that it was commencing investigations under s 75 of the FOI Act in relation to both complaints.

Scope of investigation

For the purposes of this investigation, I consider the issues are:

1. In relation to Request 1 and Request 2, whether the ADHA failed to acknowledge receipt of the FOI requests within 14 days as required by s 15(5)(a) of the FOI Act.
2. In relation to Request 1, whether the ADHA improperly extended the processing time under s 27 of the FOI Act when it did not advise the complainant of the identity of the third party to be consulted under s 47G and where the documents provided in response to the request did not reflect any third party consultation under s 47G.
3. In relation to Request 1, whether the ADHA deliberately delayed providing a response to the request until after the opt-out period ceased.

Investigation results

Pursuant to s 87 of the FOI Act, the investigation results set out my opinions, conclusions and suggestions about how the processes of the ADHA might be improved.

I have had regard to the submissions and correspondence provided by the ADHA and the complainant.

Issue 1: Acknowledgement of FOI requests

In relation to Request 1 and Request 2, the complainant complained that the ADHA failed to acknowledge receipt of the FOI requests within 14 days as required by s 15(5)(a) of the FOI Act.

Request 1- Opt- out application numbers

The complainant submitted a request for access to certain documents to the ADHA on 27 July 2018 via the 'Right to Know' website, which automatically sent the request to a nominated email address within the ADHA's Agency Customer Care Help Centre.

On 27 July 2018 the ADHA wrote to the complainant in relation to Request 1:

Thank you for your enquiry titled: Freedom of Information request – Opt out application numbers for Monday 16 July 2018 to Friday 27 July 2018 inclusive – s 17 FOI Application.

Your request has been created with ID 40969. An Australian Digital Health Agency representative will be in contact with you shortly.

If you have any questions or require further information please don't hesitate to contact us...'

The complainant responded to this email on 2 August 2018, requesting that the FOI request be managed through the 'Right to Know' website.

On 10 August 2018, the ADHA wrote to the complainant, advising them that:

The Australian Digital Health Agency email address you have used, through the Right to Know website, is not the email address specified by the Agency for making a valid FOI request under subsection 15(2A)(c) of the Freedom of Information Act 1982 (Cth). Information on how to make a valid FOI request to the Australian Digital Health Agency is available at <https://www.digitalhealth.gov.au/about-the-agency/freedom-of-information-foi>

If your FOI request is otherwise valid, the Agency will acknowledge the original request date of 27 July 2018 if you promptly send your FOI request to the email address specified by the Agency for processing FOI requests at this time: [email address]

On 10 August 2018 at 1:34pm, the complainant responded:

Dear foi@digitalhealth.gov.au,

The claim that you will not recognise an FOI you have received, unless taken offline from Right to Know, is unlawful and invalid.

You may contact Right to Know to update your preferred contact details from help@digitalhealth.gov.au to foi@digitalhealth.gov.au but it is unlawful to insist that FOI applications must be taken offline from Right to Know.

Your response clearly indicates your agency have received and acknowledged the FOI application, and therefore is valid under the Act. Section 15(3) applies - a reasonable step in the circumstances is to update your preferred contact email with Right to Know and internally forward the application to your preferred email. Your actions are otherwise arbitrary and high handed, and contrary to the aims and objects of the Act.

If you do refuse to process the FOI, then this FOI becomes subject to access refusal review rights. Previous ruling indicates adverse funding for you, given this pedantic attitude is contrary to your obligations.

Later that day, at 2:19pm, the complainant wrote:

Further to my FOI, please note that I do not wish to handle my FOI offline at any point, and intend for it to be handled via Right to Know, given there is no personal information component to this FOI (having the FOI on Right to Know reduces the burden to agencies as it means parties wishing to make similar FOIs may discover their questions have already been asked and answered, avoiding the need for multiple FOIs on the same issue or topic). The only time an FOI made on Right to Know should be answered offline is when someone has mistakenly put in a personal information FOI to an agency (personal information FOIs should not be made via Right to Know).

Also, to confirm, my application was an FOI application (and explicitly one involving s 17), Administrative release is not possible in this instance given the agency's earlier statements that it would not be administratively releasing opt out numbers until well after the opt out period ceased (which, given recent announcements, may be never, as opt out has been claimed to be able to done at any point in the future in recent Ministerial announcements not yet implemented by the agency).

Finally, later that day, at 2:48pm, the complainant wrote:

Dear foi@digitalhealth.gov.au,

I understand Right to Know has put your preferred FOI email into effect and resubmitted all prior correspondence, therefore as per your response, the original FOI deadline remains intact and the application can not be contested as invalid any further.

Request 2 – Travel and entertainment expenditure

The complainant submitted a request for access to certain documents to the ADHA on 13 August 2018.

During the course of this investigation, the ADHA submitted that it did not acknowledge receipt of this request pursuant to s 15(5)(a).

In relation to this omission, as well as the failure to provide a decision on the request within the statutory processing period, the ADHA has submitted:

The Agency received the FOI request on 13 August 2018. A statement of reasons and documentation was provided to the applicant on 24 December 2018, after a delay in processing.

...

The Agency has already acknowledged that the timeframe for the response was inconsistent with the FOI Framework in this instance.

At the time of this FOI request, the staff member processing FOI applications had left the organisation and the Agency was in the processing [sic] a replacement officer. During this time, FOI processing was undertaken by the manager of that area, and in this instance the timeframe was not met. The scope of the FOI request and the complexity of gathering the data was underestimated by our team and this contributed to the delay in providing [REDACTED] with the requested information.

I am pleased to advise that the Agency successfully recruited an experienced FOI officer into this role later in 2018, and we have since met the statutory timeframes in responding to FOI requests.

Legislation and Guidelines

Subsection 15(2) of the FOI provides that a request must:

- (a) be in writing; and
- (aa) state that the request is an application for the purposes of this Act; and
- (b) provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, to identify it; and
- (c) give details of how notices under this Act may be sent to the applicant (for example, by providing an electronic address to which notices may be sent by electronic communication).

Further, subsection 15(2A) provides that the request may be sent in any of the following ways:

The request must be sent to the agency or Minister. The request may be sent in any of the following ways:

- (a) delivery to an officer of the agency, or a member of the staff of the Minister, at the address of any central or regional office of the agency or Minister specified in a current telephone directory;
- (b) postage by pre-paid post to an address mentioned in paragraph (a);
- (c) sending by electronic communication to an electronic address specified by the agency or Minister.

Paragraph 15(5)(a) of the FOI Act provides that:

- (5) On receiving a request, the agency or Minister must:
 - (a) as soon as practicable but in any case not later than 14 days after the day on which the request is received by or on behalf of the agency or Minister, take all reasonable steps to enable the applicant to be notified that the request has been received

Discussion

There is a distinction to be drawn from the language of s 15(2A) of the FOI Act. The provision states that a request ‘must’ be sent to the agency or Minister. The use of the term ‘must’ makes it clear that this is a mandatory requirement for a valid FOI request.

However, in specifying the ways in which the FOI request must be provided to the agency or Minister, s 15(2A) provides that the request ‘may’ be sent in one of the following ways. This permissive language suggests that the methods listed in the paragraphs below will be considered to be valid delivery methods, but that failure to adhere to those particular requirements will not, of itself, invalidate the request.

In relation to Request 1, the complainant did not send their original request to the email address specified by the ADHA for receipt and processing requests under the FOI Act. It appears that on 10 August 2018 the ‘Right to Know’ website adjusted the recipient email

address to which ADHA FOI requests were sent through that website to the FOI team email address, and resent the complainant's request of 27 July 2018 to that email address.

Although the original request for Request 1 was not sent to the nominated FOI processing email address in the ADHA, the recipient of that request was help@digitalhealth.gov.au, an email address managed by the agency. I understand that the request was then forwarded to the FOI team on 30 July 2018.

In this case, I consider the ADHA's subsequent correspondence with the complainant, advising them that the original request may be considered invalid unless it was sent to the specified ADHA email address, was inaccurate. Although the original request was provided to an email address not specified in accordance with s 15(2A)(c), the request was nevertheless sent to ADHA and was not invalid on that basis. The calculation of the period for acknowledging and responding to the request commenced from the date of the original request, that is, 27 July 2018.

Although the ADHA acknowledged receipt of the original request within the statutory timeframe as required by s 15(5)(a) of the FOI Act, it is clear from subsequent correspondence that the ADHA considered the original request to be invalid unless resent to the specified email address. Subsequently, the request was sent to the specified email address on 10 August 2018, however I consider that step to be unnecessary in circumstances where the original request was sent to the agency on 27 July 2018.

I have reviewed the ADHA's current FOI processing documentation¹. That documentation provides:

Requirements of a request

For a request to be valid, it must:

- be in writing, and state that the request is for the purposes of the FOI Act;
- provide details of how we can send notices to the applicant;
- be sent to the email or postal address we specify; and
- include sufficient information to identify requested documents.

Acknowledging requests

The Agency should acknowledge the request as soon as possible and must acknowledge it within 14 calendar days of receipt by the Agency. This 14-day timeframe applies from the date the request is received by the Agency, not the date it is brought to the attention of the FOI officer or any other Agency staff. The Agency can acknowledge the request by email and must include a reference number. The Agency should advise the applicant of the potential for fees to apply if such advice is likely to follow the initial acknowledgement.

I note that the section on 'acknowledging requests' implicitly acknowledges that requests can be valid, and the processing period commences, when a request is received by the

¹ Freedom of Information Policy and Guidelines, Draft version 007

agency, not necessarily the FOI team. However, the section titled ‘requirements of a request’ suggest that a valid request is contingent on the request being sent to ‘the email or postal address we specify’. While I acknowledge that is accurate – in that requests sent to that address will be valid – it does not assist staff to understand that FOI requests sent to the agency through a different mechanism (such as a different email address) will not be invalid on that basis alone.

Findings

I find that the ADHA acknowledged receipt of the Request 1 within 14 days of 27 July 2018. However, I consider that the subsequent correspondence between the ADHA and the complainant, suggesting that the request will be considered to be invalid unless resent to a specified email address, may reasonably have undermined the effect of the original acknowledgement and created doubt in the mind of the complainant as to whether the request would, in fact, be processed unless that subsequent requirement was met. Further, although part of the ADHA’s FOI processing guidelines reflect the fact that FOI requests received by other parts of the agency may be valid and that processing periods commence from the time of receipt by the agency rather than the time of receipt by the FOI team, there appears to be scope to provide further clarity in relation to that in the internal policy and guidelines document.

Consistent with the complainant and ADHA’s submission, I find that the ADHA failed to acknowledge Request 2 within the period required by s 15(5)(a) of the FOI Act.

Issue 2: extending the processing under s 15(6) of the FOI Act to conduct third party consultation.

In relation to Request 1, the complainant complained that the ADHA improperly extended the processing time under s 27 of the FOI Act when it did not advise the complainant of the identity of the third party to be consulted under s 47G and where the documents provided in response to the request did not reflect any third party consultation under s 47G.²

On 24 August 2018, the ADHA advised the complainant that ‘your request covers information held by a third party’ and that consultation under s 27 was required. The ADHA advised that the processing period had been extended by 30 days under s 15(6) of the FOI Act to allow it to conduct third party consultation:

s22(1)(a)(ii) - irrelevant ma

By email: s22(1)(a)(ii) - irrelevant material

Freedom of Information request no. s22(1)(a)(ii) irrelevant - Third Party Consultation

I refer to your request for access under the *Freedom of Information Act 1982* (FOI Act) to documents relating to the number of opt-outs during 16-27 July 2018. As your request covers

² This issue was raised in both FOI complaints s22(1)(a)(ii) irrelevant material.

information held by a third party, this agency is required to consult with that party (under section 27 of the FOI Act) before making a decision on the release of those documents.

For this reason, the period for processing your request has been extended by 30 days in order to allow our agency time to consult with that third party (section 15(6) of the FOI Act).

The processing period for your request will now end on 25 September 2018.

The consultation mechanism under section 27 applies when we believe a third party may wish to contend that requested documents are exempt for reasons of business information. We will take into account any comments we receive from the third party but the final decision about whether to grant you access to the documents you requested rests with this agency.

If you have any questions, please contact the FOI Team by email foi@digitalhealth.gov.au or by phone 02 6289 9932. [Emphasis in original]

On 24 August 2018, the complainant responded to the ADHA requesting information about the third party/ parties who would be consulted. The complainant sought a response to this correspondence on 27 August 2018, 29 August 2018 and 11 September 2018. In their correspondence of 11 September 2018, the complainant alleged that the decision on the FOI request was deemed to be refused on 27 August 2018 because they contended that the notice advising them of the extension of the processing period under s 27 of the FOI Act was invalid because 'it failed to identify the statutory ground required for s 27 to apply, and repeated attempts to get your agency to specify a required ground has been ignored by your agency.'

Legislation and Guidelines

Section 27 of the FOI Act provides for consultation with third parties where the documents within the scope of an FOI request are business documents and the agency or minister is satisfied that disclosure of the documents would or could be expected to unreasonably affect the business adversely in relation to its lawful business: see **Attachment D**.

Subsection 15(6) of the FOI Act provides that where an agency or minister conducts third party consultation under ss 26A, 27 or 27A, the timeframe for making a decision is extended by 30 days.

In relation to conducting third party consultations, the FOI Guidelines provide:

An agency or minister may need to consult a third party where documents subject to a request affect Commonwealth-State relations (s 26A), are business documents (s 27) or are documents affecting another person's privacy (s 27A)...³

The consultation requirements in relation to documents that are business documents (s 27) or documents affecting personal privacy (s 27A) only require an agency or minister to undertake consultations if it is reasonably practicable to give that person a reasonable opportunity to make submissions in support of the exemption contention (ss 27(5) and 27A(4)). In determining whether

³ FOI Guidelines at [3.74].

it would be reasonably practicable to consult, the agency or minister should have regard to all circumstances, including the time limits for processing the request.⁴

There must be some rational basis which the agency or Minister can discern, based on the face of the document or from anything else actually known to the decision-maker, indicating that disclosure of the document would, or could be expected to, unreasonably affect the person adversely in relation to his or her personal information, lawful business or professional affairs. The mere appearance of a person's name in the document, in the absence of anything more, may not be sufficient for it to be apparent that a person might reasonably wish to make an exemption contention.⁵

Where an agency or minister is required to consult with a third party:

- the timeframe for making a decision is extended by 30 days (s 15(6))
- the agency or minister must give the third party a reasonable opportunity to make submissions in support of the exemption contention (ss 27(4)(a) and 27A(3)(a))
- any submissions by the third party must be considered (ss 27(4)(b) and 27A(3)(b))
- the third party must be given notice of the decision and their review rights (ss 27(6) and 27A(5)), and
- the applicant will only be given access to a document when the third party's opportunities for review have run out (ss 27(7) and 27A(6)).⁶

In relation to extending the processing period when conducting third party consultations, the FOI Guidelines provide:

The FOI Act contains extension of time provisions which are set out in Table 3 below. Agencies and ministers are encouraged to build into their FOI process an early and quick assessment of whether an extension of time may be required, to ensure that decisions are made within the statutory processing period.⁷

Table 3: Extension of time provisions

Reason for extension	Extension period	Determined by	Notification requirement
Third party consultation: consultation with a state, or a person or business concerning personal or business information (s 15(6))	30 days	by default if agency or minister determines ss 26A, 27 or 27A apply	agency or minister must inform applicant of extension as soon as practicable (s 15(6)(b))

⁴ FOI Guidelines at [3.76].

⁵ FOI Guidelines at [3.77] (footnotes omitted).

⁶ FOI Guidelines at [3.78].

⁷ FOI Guidelines at [3.144] (footnotes omitted).

Discussion

In order for s 27 to apply, the ADHA must have formed the view that the request for information relates to information about the business, commercial or financial affairs of the organisation or undertaking and that the organisation might reasonably wish to make a contention that the document is exempt under s 47 of the Act (trade secrets) or is conditionally exempt under s 47G and access to the document would be contrary to the public interest.

On 24 August 2018, the ADHA advised the complainant that it formed such a view.

Subsection 15(6) of the FOI Act provides that in circumstances where the agency determines that s 27 of the FOI Act makes it appropriate to extend the period referred to in s 15(5)(b), then it is extended by a period of 30 days, and the applicant must be informed 'as soon as practicable'. I note that there are no statutory requirements as to the form of that notification to the applicant, and no requirement for the applicant to be advised with whom the consultation pursuant to s 27 is to occur.

In this case, the s 15(6) notification occurred on 24 August 2018, within the 30 day processing period commencing on the date of the FOI request, 27 July 2018. Although the complainant sought further particulars about with whom that consultation was to occur, the provision of that information is not required by the FOI Act and the omission of those particulars does not invalidate the notice.

Further, as the s 15(6) notification to the complainant was valid, the processing period was extended by 30 days and a decision on the FOI request was not deemed to have occurred as submitted by the complainant on 11 September 2018.

The complainant also advised that the foreshadowed consultation under s 27 of the FOI Act had not occurred, because the document released in relation to an FOI request 'appears to be an email from a Department Liaison Officer at Centrelink with a draft of talking points for opt outs received on the first day of the My Health Record opt out period.'

During the course of the OAIC's inquiries into this complaint, the ADHA submitted that it did undertake consultation with a third party company under s 47G in relation to the request, as well as informally consulting with another Commonwealth agency. The ADHA advised that consultation occurred between an Executive General Manager at the ADHA and the third party company, as well as another Commonwealth government agency.

Findings

I find there to be evidence that the ADHA reasonably formed the view that consultation with a third party was required and notified the complainant of the extension of the processing period for this purpose as required by the FOI Act. Consequently, I find this complaint unsubstantiated.

Issue 3: Delay in responding to FOI request FOI [REDACTED] ('Opt-out' applications)

In relation to Request 1, the complainant raised that the ADHA 'intentionally delayed' providing a response to the request until after the opt-out period ceased. The complainant advised that:

The ADHA have therefore been intentionally stalling and delaying this FOI so as to prevent access until after the opt out period has finished, because it does not want the number of current opt outs to influence opt out behaviour (nor for earlier statements of the Ministers involved to be contradicted, and claims of fraud to be made).

As noted earlier, Request 1 was made on 27 July 2018 and a response was provided on 21 September 2018.

Discussion

Although the ADHA extended the statutory processing period for Request 1 consistent with the relevant provisions in the FOI Act (ss 27 and 15(6)), there is also some evidence that those provisions were also utilised in order to delay providing a timely response in relation to the request.

In an email dated 10 August 2018, an officer of the ADHA wrote an internal email in relation to Request 1 in which they said:

The sticking point on this one... was how we were going to handle the aspect of this FOI coming through righttoknow.org.au, and whether or not we could buy some more time by redirecting [the applicant] back through our FOI email address.

That aside, I think after the discussion with [another officer] today it can be ascertained whether or not any of our systems contain this data etc and then it would be a case of trying to apply any possible exemptions or at least deter access to this information until after the opt-out period.⁸

The ADHA subsequently sent the complainant the email discussed in Issue 1 advising that:

The Australian Digital Health Agency email address you have used through the Right to Know website is not the email address specified by the Agency for making a valid FOI request under subsection 15(2A)(c) of the *Freedom of Information Act 1982* (Cth).

Information on how to make a valid FOI request to the Australian Digital Health Agency is available at <https://www.digitalhealth.gov.au/about-the-agency/freedom-of-information-foi>

If your FOI request is otherwise valid, the Agency will acknowledge the original request date of 27 July 2018 if you promptly send your FOI request to the email address specified by the Agency for processing FOI requests at this time: foi@digitalhealth.gov.au

⁸ Email from [REDACTED] titled 'ADHA FOI ID 1807018 [REDACTED]'

It would appear from the internal correspondence above, that the subsequent email to the complainant was a deliberate mechanism to recommence the processing period to delay the provision of requested information.

On 18 September 2018, an email was sent between officers of the ADHA which stated:

We have two outstanding FOI applications for opt out figures. **We have been waiting until after last night's Senate Inquiry hearing before responding...**

Our understanding is that there are at least two documents within the scope of these requests:

- 9) a Prime Ministerial Statement in July
- 10) The outcome from last night's senate Inquiry

Grateful for your advice and copies of the relevant documents. If redactions are needed to the documents, it would be helpful if you would indicate which parts of the text need redaction.'
(sic) [Emphasis added]

This suggests that the ADHA was deliberately delaying provision of requested information to the complainant until after a particular event occurred, inconsistent with the objects of the FOI Act.

Findings

I find that the ADHA attempted to delay the processing of Request 1 when it corresponded with the complainant to advise them that they must submit a new FOI request to a different email address in order for the request to be valid, when the original request was validly made.

Investigation recommendations

To assist the ADHA in improving its compliance with the statutory processing period, and pursuant to s 88 of the FOI Act, I make the following formal recommendations to the ADHA that I believe the ADHA ought to implement within the timeframes specified below:

1. by **12 January 2022**, that the ADHA review its internal policies, procedures and practices to clarify that the processing periods for valid FOI requests commence from the day the request is received by the agency, even if the request is not sent to the FOI team until a later day, and that FOI requests are not invalid only because they were not sent to the email address specified pursuant to s 15(2A).
2. by **12 January 2022**, that the ADHA review its processes and procedures to ensure that FOI requests are acknowledged within 14 days of receipt and that decisions are provided within the relevant statutory processing period.
3. by **12 January 2022**, that the Chief Executive Officer issue a statement to all staff, highlighting the ADHA's obligations under the FOI Act and pro-disclosure emphasis of the Act, this statement should encourage and support staff in meeting their

obligations under the FOI Act, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

4. by **1 March 2022**, that the ADHA appoint a member of the Executive to be the agency's Information Champion, to foster and promote compliance with the objectives and requirements of the FOI Act.



Australian Government

Office of the Australian Information Commissioner

Notice on completion under s 86 of the FOI Act ([redacted]) – [redacted] [redacted] and Department of Foreign Affairs and Trade

On 20 July 2018, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982 (Cth)* (the FOI Act) from [redacted] about the Department of Foreign Affairs and Trade (DFAT) in the performance of its functions and exercise of its powers under the FOI Act.

The complainant complained that the officer conducting an internal review of a decision to impose a charge in relation to a request made by [redacted] under the FOI Act was not impartial.

Following preliminary inquiries, on 8 August 2019 the delegate of the Information Commissioner commenced an investigation into the complaint.

Upon completion of an investigation I am required to issue a notice on completion which sets out:

- investigation results
- the investigation recommendations (if any), and
- the reasons for the investigation results and the making of the investigation recommendations (s 86).

I can make formal recommendations which I believe DFAT ought to implement (s 88).

Background

On 26 September 2017, the complainant made an FOI request.

On 3 October 2017, the delegate provided notice of preliminary assessment advising that a charge of \$100.00 is payable.

On 3 and 8 October 2017, the complainant responded to the Department seeking waiver of the preliminary assessment of charge.

On 17 October 2017, the delegate made a decision to impose a charge to process the complainant's FOI request. In that decision, the delegate reduced the processing charge to \$40.00.

On 17 October 2017 the complainant sought internal review of the Department's decision to impose a charge.

On 17 November 2017 the internal review was completed and a notice of decision was sent to the complainant. In that decision, the delegate made a decision to re-impose the original preliminary charge of \$100.00.

On 20 July 2018 the complainant made a complaint to the OAIC about the internal review decision. The complainant alleged:

- that the internal review decision maker 'was neither independent nor impartial. He had a predetermination to decline due to his jaundiced view of my case'.

In the complaint correspondence, the complainant raised a number of other issues regarding matters between the Department and the complainant in the Administrative Appeals Tribunal (AAT).

I note the further issues raised by the complainant are either not within the jurisdiction of the OAIC or relate to the merits of the decision making. In relation to the latter, I note that the complainant has exercised [REDACTED] right of review in relation to the merits of the decision¹. Accordingly, this complaint investigation is limited to the question of whether the internal review decision maker was partial or not independent in making their decision.

The full particulars of the complaint were provided to DFAT on 5 October 2018 and 8 August 2019.

DFAT was invited to provide submissions in response to the complaint. I have had regard to the submissions made by DFAT on:

- 2 October 2018
- 16 November 2018
- 4 November 2019
- 20 November 2019
- 4 December 2019.

I have had regard to the submissions provided by the complainant on:

- 20 July 2018
- 30 October 2018
- 8, 9 and 12 August 2019
- 15 July 2020.

¹ During the course of the related IC review [REDACTED], the Department provided a revised decision under s 55G of the FOI Act to waive the charge imposed in full. The IC review was later finalised under s 54W(a)(i) of the FOI Act on 26 February 2019.

Investigation results

Allegation

The complainant alleged that the internal review decision maker was not independent or impartial when making the internal review decision. The complainant has not provided evidence to support [redacted] assertion that the internal review decision maker was partial or in some way involved in the original decision to impose a charge, nor directed me to a specific factor that demonstrates that partiality, other than the complainant's opinion of the merits of that decision. Consequently, I have assessed this complaint against the statutory processing requirements in the FOI Act that apply to internal review decisions to consider whether the internal review decision maker deviated from those requirements in a manner that would suggest partiality.

As noted above, the merits of the decision to impose a charge is a matter for Information Commissioner review.

Legislative framework

Internal review

Part VI of the FOI Act imposes particular requirements in relation to internal reviews.

In addition, in performing a function or exercising a power under the FOI Act, s 9A requires agencies to have regard to guidelines issued by the Information Commissioner under s 93A. Part 9 of the FOI Guidelines relate to internal reviews.

Section 29 of the FOI Act relates to the imposition of a charge in respect of a request for access to a document.

Discussion

Subsection 54C(2) of the FOI Act provides:

The agency must, as soon as practicable, arrange for a person (other than the person who made the original decision) to review the decision.

In this matter, the original decision was made by [redacted], who was the Director of Freedom of Information and Privacy Law Section. The internal review decision was made by [redacted], Corporate Counsel, Corporate Legal Branch. In the internal review decision notice, [redacted] stated 'I had no part in the original decision-making process.'

There is no evidence before me from the complainant that [redacted] was involved in the original decision.

Subsection 54C(3) of the FOI Act provides:

The person must make a fresh decision on behalf of the agency within 30 days after the day on which the application was received by, or on behalf of, the agency.

The request for internal review was made on 17 October 2017 and the internal review was made on 17 November 2017. Accordingly, I find that the internal review decision maker complied with this requirement.

Subsection 29(4) of the FOI Act applies where an applicant contends that a charge should be reduced or not imposed. In those circumstances, s 29(5) provides that, without limiting the matters that an agency may take into account, the agency must take into account:

- (a) whether the payment of the charge, or part of it, would cause financial hardship to the applicant, or to a person on whose behalf the application was made; and*
- (b) whether the giving of access to the document in question is in the general public interest or in the interest of a substantial section of the public.*

I have reviewed the internal review decision. It is evident from the decision notification that the decision maker took into account whether the payment of the charge or part of it would cause financial hardship to the applicant, and whether giving access to the document in question is in the general public interest or in the interest of a substantial section of the public.

Conclusion

I am not satisfied that the internal review decision maker in this matter was not independent or impartial.

I am not satisfied that the internal review decision maker had predetermined the matter under review.

I note that this investigation has not considered the merits of the decisions made by DFAT regarding charges; those are matters more properly considered through merits review mechanisms. Rather, I have considered the submissions of the parties and whether the statutory processing requirements have been met. In conducting that assessment I have found no evidence that the internal review decision maker failed to comply with those requirements when processing the internal review application.

Recommendations

The purpose of any recommendations is to conclude the complaint investigation and ensure DFAT meets its obligations under the FOI Act, including that DFAT's current and future processes and practices are consistent with the objects of the FOI Act.

Given that I have found the complaint to be unsubstantiated, I have made no recommendations pursuant to s 88 of the FOI Act.



ATTACHMENT A

Notice on completion under s 86 of the FOI Act (s 22(1)(a)(i) - irrelevant material) and the Department of Home Affairs (s 22(1)(a)(ii) - irrelevant material)

On 7 December 2018, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act), about the Department of Home Affairs (the Department) in the performance of its functions and the exercise of its powers under the FOI Act.

The complainant is (s 22(1)(a)(ii) - irrelevant material).

The complainant alleges the Department failed to provide a decision on (s 22(1)(a)(ii) - irrelevant material) FOI request of 26 October 2018 within the statutory timeframes set out in the FOI Act.

The FOI request the subject of this FOI complaint was also the subject of an Information Commissioner review (IC review) (s 22(1)(a)(i) - irrelevant material).¹

This Notice on Completion sets out the issue as identified from the allegation raised by the complainant. The allegation is assessed against the legislative framework and the FOI Guidelines² which agencies and ministers must have regard to. I have considered the complaint and the Department's submissions in response before making findings about the allegation.

Background

On 26 October 2018, the complainant made the FOI request to the Department (s 22(1)(a)(ii) - irrelevant material). Under s 15(5) of the FOI Act, the Department was required to provide a decision to the complainant by 25 November 2018.

On 25 November 2018, the Department was deemed to have refused access pursuant to s 15AC of the FOI Act.

On 7 December 2018, the complainant lodged a complaint under s 70 of the FOI Act about the Department's non-compliance with the statutory processing period and sought IC review of the deemed access refusal decision.

On 11 January 2019, the OAIC conducted Preliminary Inquiries with the Department. On 22 February 2019, the Department provided a response to the Preliminary Inquiries.

¹ (s 22(1)(a)(ii) - irrelevant material) finalised on 4 May 2020 under s 54R.

² The Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard to in performing a function or exercising a power under the FOI Act.

On 23 April 2021, the OAIC notified the Department that it would investigate the complaint and requested the Department's response to the complaint.

On 3 June 2021, the Department provided a response to the notice and request for information under s 75 of the FOI Act.

On 3 August 2021 and 14 September 2021, the Department provided further submissions in response to the investigation notice of 23 April 2021.

The key procedural events in this FOI complaint are set out in **Annexure A** to this Attachment.

Investigation results

Pursuant to s 87 of the FOI Act, the investigation results set out the matters that I have investigated and my opinion and conclusions about the Department's processing of the complainant's FOI request. I have considered all the material provided by the Department and the complainant in this matter.

Issue: Compliance with statutory processing periods

Complainant's allegation

The complainant alleges the Department failed to provide a decision on [REDACTED] FOI request dated 26 October 2018 within the statutory timeframes set out in the FOI Act.

Legislative framework

The FOI Act provides a statutory timeframe of 30 days to process an FOI request (s 15(5)).

The period can be extended by up to 30 days with the applicant's agreement (s 15AA), by 30 days if consultation with a third party is undertaken (s 15(6)), and by 30 days if consultation with a foreign entity is undertaken (s 15(8)).

An agency or minister may apply to the Information Commissioner for extension of the statutory timeframe for complex or voluminous requests (s 15AB) or following a deemed access refusal decision (s 15AC).

The FOI Guidelines at [3.139] state:

An agency or minister must, as soon as practicable, and no later than 30 days after receiving a request, take all reasonable steps to enable the applicant to be notified of a decision on the request (s 15(5)(b)). Section 15(5)(b) provides that the 30-day processing period commences the day after the day the agency or minister is taken to have received a request that meets the formal requirements of s 15(2), (2A). An agency should act promptly to assist an applicant whose request does not meet the formal requirements in keeping with its obligations under s 15(3).

Table 1: Extension of time provisions

Reason for extension	Extension period	Determined by	Notification requirement
Third party consultation: consultation with a State, or a person in relation to personal information or business concerning personal or business information (s 15(6))	30 days	By operation of the law if agency or minister determines ss 26A, 27 or 27A apply	Agency or minister must inform applicant of extension as soon as practicable (s 15(6)(b))
Consultation with foreign entity if required to determine if 33(a)(iii) or 33(b) exemptions apply (s 15(7),(8))	30 days	By operation of law if agency or minister determines consultation is appropriate	Agency or minister must inform applicant of extension as soon as practicable (s 15(8)(b))
By agreement between applicant and agency or minister (s 15AA)	Up to 30 days, as either a single extension or a series of shorter extensions. This may be in addition to an extension for third party consultation.	Agency or minister but only with written agreement of applicant	Agency or minister must give written notice of the extension to the Information Commissioner as soon as practicable (s 15AA(b))
Complex or voluminous request (s 15AB)	30 days or other period	Information Commissioner, upon request from agency or minister	Commissioner must inform applicant and agency or minister of an extension period as soon as practicable where a decision is made to grant the extension (s 15AB(3))
Following a deemed refusal (s 15AC(4))	As determined by the Information Commissioner	Information Commissioner, upon request from agency or minister	No legislative requirement but Commissioner may require agency or minister to notify applicant or third party as a condition of granting the extension (s 15AC(6))

The statutory processing period does not include:

- the time that an agency may take in a request consultation process to decide if a practical refusal exists (s 24AB(8))
- the time elapsing between an applicant being notified that a charge is payable and
 - either the applicant paying the charge (or a deposit on account of the charge) or the
 - agency varying the decision that a charge is payable (s 31).

Deemed access refusal

Section 15AC provides that where a decision on an FOI request has not been provided to the applicant within the statutory processing period, the principal officer of the agency or the minister is deemed to have made a decision refusing access to the documents (s 15AC (3)). The FOI Guidelines at [3.154] – [3.155] explain:

The consequence of a deemed refusal is that an applicant may apply for IC review (s 54L(2)(a)) In addition, once the time has expired and there is a deemed decision, the agency or minister cannot impose a charge for access...

Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of reasons on the FOI request. This obligation to provide a statement of reasons on the FOI request continues until any IC review of the deemed decision is finalised. ...

Department's submissions to complaint

Response to Preliminary Inquiries dated 11 January 2019

In its response to preliminary inquiries dated 11 January 2019, the Department acknowledged a delay in processing the FOI request and advised that:

- the business area responsible for the retrieval of the documents consists of a small team with high operational demands. Documents maintained by this area are not accessible to officers external to that area, for this reason only an officer within that area could conduct the search and retrieval process
- a number of staff were on leave during the processing period, and
- a decision on an extension of time application is made on a case by case basis by an FOI officer once a case has been allocated. In this matter, the request was not allocated until after the initial 30 day timeframe.

Response to the Notice of investigation under s 75 of the FOI Act

On 3 June 2021, the Department provided its response to the complaint. The Department provided a chronology of the processing of the request and advised that:

- the Department did not seek extensions of time under either ss 15AB, 15AC or 54D of the FOI Act
- the statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act, and
- there were extensive delays with internal consultation with other business areas.

The Department also provided submissions in relation to the general grounds for delay in processing FOI requests for personal information and the measures it is taking to address those factors (**Attachment B**).

On 3 August 2021³ (**Attachment C**) and 14 September 2021⁴ (**Attachment D**),⁵ the Department provided further submissions on the steps that it has undertaken to extend the recommendations made in the Final Report of the CII into the Department's processing of FOI requests for non-personal information, to its processes and procedures for processing FOI requests for personal information. The Department advised that:

1. Recommendation 1: Appoint an Information Champion

- This recommendation is complete, noting the Information Champion's role extends equally to the non-personal and personal caseload.
- Our Information Champion (SES Band 2) is actively engaged with the management and oversight of the personal caseload as well as the non-personal caseload.

2. Recommendation 2: Operational Processes and Procedures

- This recommendation is complete. In line with the scope of the CII, the new Procedural Instruction (PI) is focused on non-personal FOI requests. However, we will shortly begin work on a Procedural Instruction directed at personal FOI requests, noting that the majority of the processes set out in the new PI apply equally to personal FOI requests.
- Recommendations 2 and 3 related to the development of procedural guidance (procedural instructions) and training in applying those instructions in the non-personal caseload. The Department has finalised the procedural instruction for the non-personal caseload. The Department is now developing procedural instructions for personal access and amendment requests. This is an active project which will be completed by Q3 – an earlier completion date is not possible while maintaining a focus on reducing backlogs across the caseload.

3. Recommendation 3: Training

- This recommendation is well advanced. In line with the scope of the CII, the new eLearning package for FOI decision-makers is focused on non-personal FOI requests. In addition, we will train Departmental staff involved in the processing of personal requests in the Procedural Instruction for personal FOI requests.
- earlier this month, the Department launched its new FOI eLearning package for all staff and decision-makers. Module one includes an FOI overview that is relevant to both the personal and non-personal space. We are actively tracking the take up of this package across the Department.
- AGS training (decision maker and exemptions) is available for all staff who require a more in-depth understanding of FOI requirements and processes. The AGS module contains

³ Email from the Department of Home Affairs to the OAIC on 3 August 2021

⁴ Email from the Department of Home Affairs to the OAIC on 14 September 2021

⁵The Department provided its response of 14 September 2021 (Attachment D) in response to my request of 3 September 2021 for further information on the steps it has taken or is taking to extend the CII recommendations to its processing of FOI requests for personal information.

information relevant to decision making, regardless of caseload. Our September session has generated a lot of interest and we will run another two sessions in November 2021.

4. Recommendation 4: Audit

- The internal audit scheduled for late 2021 or early 2022 will focus on the CII's recommendations but we expect it will include observations on and recommendations for the FOI caseload as a whole, including the personal case load.
- Recommendation 4 requires us to complete an internal audit. This will necessarily focus on the Department's implementation of the CII recommendations due to the nature of the CII report but may make general observations on FOI processing by the Department as a whole.

The Department's submissions regarding its processing of FOI requests in general

In its response of 3 August 2021, (**Attachment C**), the Department advised that, more broadly, the Department is considering options to facilitate the processing of FOI requests, such as:

- pro-actively publishing a wider range of commonly requested statistics
- business process reforms and administrative release of documents to reduce demand for personal FOI requests
- robotic process automation of request registration so that we can redirect staff time toward processing and decision-making.

In its response of 14 September 2021, the Department made further submissions regarding the general processing of FOI requests as follows: (**Attachment D**)

While our immediate priority continues to be implementation of the recommendations of the CII, the Department has progressed a number of improvements in the personal space which do not relate to CII. These include:

- a successful extension of time trial - guidance is now being developed for officers on when and how to use s15AA extensions;
- the development of dashboards, including daily updates to our on-hand data, which increase management visibility of the caseload;
- increased management focus on priority parts of the caseload, including resources dedicated to resolving our oldest and intractable cases in the personal caseload. In 2020-21, in addition to processing new personal access requests, the Department finalised more cases older than 90 days in 2020-21 than in 2019-20;
- maintenance of an improvements register which includes ideas for changes to the personal caseload; and
- better management of complaints received into the inboxes.

We are also exploring the possibilities of automating registration processes, releasing resources for decision making and expediting redactions. These are longer term projects and subject to resourcing.

General comments

The very high volume of FOI requests received by the Department will mean continuing pressures across the FOI program, including in the personal caseload. However, the Department is committed to continuing to improve its processes for responding to FOI requests, within its allocated resources. To this end, the Department has maintained a stable level of resourcing in FOI, even when managing whole of government priorities such as the humanitarian response in Afghanistan and the establishment of a border measures program.

The impact of recent business process reforms, in response to the CII and independently, has led to a significant improvement in the Department's compliance with statutory timeframes for non-personal requests (up from 37 per cent to 65 per cent) and a reduction in the age of the oldest non-personal request with no on-hand request older than 90 days. This was achieved on the back of a further increase in the total number of non-personal requests in 2020-21; up almost 15% when compared to the previous financial year.

However, to deliver these improvements quickly, the Department has had to phase its reforms and transfer some resources internally, from the personal caseload to the business improvement function and non-personal caseload. To deliver broader process improvements in the personal space will require similar decisions and trade-offs, noting the personal caseload is a much larger program and has particular complexities in relation to identity resolution and integrity.

Discussion

The FOI request was made on 26 October 2018. Pursuant to s 15(5)(b) of the FOI Act, the Department was due to provide a decision to the complainant by 25 November 2018, but did not do so until 6 February 2019.

It was open to the Department to seek extensions of time under either ss 15AA, 15AB, 15AC or 54D of the FOI Act, but it did not do so. The statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.

Conclusions

The Department did not comply with s 15(5)(b) of the FOI Act when processing FOI request s 22(1)(a)(ii) (irrelevant material), in that:

- the Department was required to provide a decision to the complainant by 25 November 2018, but did not do so until 6 February 2019
- the Department did not seek an extension of the statutory timeframe under ss 15AA, 15AB, 15AC or by consultation under ss 15(6) or 15(8)
- the statutory timeframe was not affected by a request consultation process under s 24AB(8) or by the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable under s 31 of the FOI Act.

Recommendations

In light of the Department's submissions, pursuant to s 88 of the FOI Act, I make the following formal recommendations to the Department that I believe the Department ought to implement within the timeframes specified below:

Recommendation 1

The Department prepare and implement an operational manual for processing FOI requests for personal information to be approved by the Information Champion by **28 February 2022**. The operational manual is to include, at a minimum, the steps that will be taken to ensure compliance with statutory processing requirements. Consistent with the requirements of the Information Publication Scheme, the operational manual should be made publicly available by the Department on its website.

Recommendation 2

By **28 February 2022**, the Department ascertain the additional resources (human or otherwise) anticipated to be required in order to meet statutory timeframes (taking account of the improvements through implementing recommendation 1) and provide an action plan to meet those requirements.

Recommendation 3

The Department:

- a. undertake and complete training on the operational manual for FOI Section staff and other staff (both decision makers and other staff who assist decision makers) **28 March 2022**
- b. ensure that online training in processing FOI requests for personal information is available to all staff of the Department by **28 March 2022**, and
- c. ensure that new staff joining the FOI Section are trained in relation to the operational manual within 2 weeks of commencing in the FOI Section.

Recommendation 4

By **30 May 2022**, the Department undertake an audit of the processing of FOI requests for personal information to assess whether Recommendations 1, 2 and 3 have been implemented and operationalised and whether those actions have been sufficient to address the issues identified in these complaints. The audit is to be undertaken by either the Department's internal auditors or by an external auditor, as determined by the Department. A copy of the audit report should be provided to the OAI.

When considering the recommendations made above, the Department should refer to relevant OAIC FOI resources which can be found on the OAIC website.⁶

I request that the Department advise the OAIC of the implementation of each of the recommendations within the timeframes specified.

⁶ See <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/>. The OAIC's FOI Essentials toolkit, may be of particular assistance to the Department.



Notice of completion under s 86 of the FOI Act ([redacted]) and [redacted] – s22(1)(a)(ii) - irrelevant material and Australian Federal Police

On 4 July 2018 and 1 February 2019, the Office of the Australian Information Commissioner (OAIC) received two FOI complaints under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Australian Federal Police (the AFP) in relation to the performance of its functions and exercise of its powers under the FOI Act.

The FOI complainant in both complaints is the Australian Federal Police Association [redacted]. [redacted] is a representative body of members employed by the Australian Federal Police and other federal law enforcement agencies.

On 4 July 2018 [redacted] complained about the AFP's compliance with statutory timeframes when handling requests for access to documents under the FOI Act (OAIC reference: [redacted]). In its complaint, [redacted] provided examples where the AFP had exceeded the statutory processing period for FOI requests lodged with the AFP on behalf of its members.

On 1 February 2019 (OAIC reference: [redacted], [redacted] made another complaint that was similar in its terms to [redacted], namely the delays in processing FOI requests by the AFP.

I have used these matters as case studies during this investigation. A chronology of the processing of those case studies can be found at **Attachment B**.

This notice on completion sets out the relevant:

- investigation results
- investigation recommendations
- reasons for the investigation results and recommendations.

Background

The complainant in this matter is the Australian Federal Police Association [redacted].

Between 11 September 2017 and 23 May 2018, the complainant's members made a number of FOI requests to the AFP for access to documents under the FOI Act. In relation to one of these requests, the applicant sought both Information Commissioner review (IC review) and made an FOI complaint.¹

¹ Both IC review and a complaint were raised for s 22(1)(a)(ii) irrelevant material).

On 4 July 2018 and 1 February 2019, the complainant made two FOI complaints under s 70 of the FOI Act about the AFP's actions in the performance of its functions, or the exercise of its powers, under the FOI Act when processing FOI requests lodged by the complainant.

On 23 May 2019, the OAIC notified the AFP under s 75 of the FOI Act that the Information Commissioner had decided to investigate the complaints and requested that the AFP provide the OAIC with submissions in response to the complaint allegations. The OAIC informed the AFP that, due to the similar allegations and issues raised, and given that both the complaints had been lodged by [s 22(1)(a)(ii) irrelevant material], the OAIC would be combining the two complaints.

During the course of the investigation the AFP provided submissions outlining its current FOI processes and submissions addressing the allegations raised by the complainant.

Further information on the background of the FOI complaints can be found at **Attachment C**.

Investigation conclusions

Pursuant to s 87 of the FOI Act, the investigation results set out my opinions, conclusions and suggestions about how the processes of the AFP might be improved.

I have had regard to the submissions and correspondence provided by the AFP and the complainant.

Issue 1: Compliance with the statutory processing period

Complaints

[s 22(1)(a)(ii) irrelevant material] complained that²:

- the AFP did not comply with the statutory timeframes as required by the FOI Act³ and
- the FOI requests lodged by [s 22(1)(a)(ii) irrelevant material] members were 'seemingly being ignored' by the AFP.⁴

In [s 22(1)(a)(ii) irrelevant material] letter to the AFP raising these concerns, it stated:

Increasingly, our members' FOI requests are seemingly being ignored by the AFP, with no regard to its obligations under the FOI Act or in fact the spirit of that legislation... The response we receive when we question these delays is that the FOI Team is understaffed or

² Allegations were raised in relation to the following case studies: [s 22(1)(a)(ii) irrelevant material]; [s 22(1)(a)(ii) irrelevant material].

³ [s 22(1)(a)(ii) irrelevant material]

⁴ [s 22(1)(a)(ii) irrelevant material]

have a high volume of requests. If this is the case, this is not in our view a sufficient reason to disrespect the principles of the FOI scheme and in turn, our members.⁵

§ 22(1)(a)(i) made similar submissions to the OAIC⁶:

Our member has been experiencing significant mental anguish and the continued extensions have exacerbated § 22(1)(b) situation. We are also waiting on the information to prepare other documents on § 22(1)(b) behalf relating to other proceedings.

Despite § 22(1)(a)(i) continually requesting the documents, the AFP has paid little heed to our requests and continues to blatantly breach its statutory requirements, with seeming impunity.

Legislative framework

Access to documents

Section 11 of the FOI Act provides that ‘every person has a legally enforceable right’ to obtain access to a document of an agency or a minister where that document is not exempt.

Subsection 15(2) provides that in order for the request to be valid, certain requirements must be met. There is no dispute that the FOI requests that are the subject of these complaints met the statutory requirements for validity.

Deemed access refusal

Section 15AC provides that where a decision about an FOI request has not been provided to the applicant within the statutory processing period, the agency or minister is deemed to have made a decision refusing access to the documents (s 15AC(3)).

The FOI Guidelines provide:

The consequence of a deemed refusal is that an applicant may apply for IC review (s 54L(2)(a))... In addition, once the time has expired and there is a deemed decision, the agency or minister cannot impose a charge for access.⁷

...Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of reasons on the FOI request. This obligation to provide a statement of reasons on the FOI request continues until any IC review of the deemed decision is finalised.⁸

⁵ § 22(1)(a)(i) submissions of 4 July 2018 (§ 22(1)(a)(i) relevant to).

⁶ § 22(1)(a)(i) relevant to .

⁷ FOI Guidelines [3.154].

⁸ FOI Guidelines [3.155].

AFP's submissions

During the course of this investigation, the AFP submitted:

The AFP acknowledges that there were delays in processing these requests, and we apologise for those delays.

... the AFP takes its obligations under the FOI Act seriously and endeavours to meet the requirements of the Act in relation to timeframes. The FOI team has been dealing with a significant backlog of overdue requests as well as an increase in requests more generally. Consequently, the AFP has faced challenges in making decisions within the statutory time limits.

...

At the beginning of July 2018, the AFP temporarily allocated additional resources for three months to assist with processing requests and address the backlog of requests. The backlog has now been substantially addressed, and going forward, we anticipate a substantial improvement in the processing of requests within the statutory timeframes set out in the FOI Act.

In the response that the AFP sent to [s 22(1)(a)(i) irrelevant material] addressing their complaint of 18 June 2018 [s 22(1)(a)(i) irrelevant material], the AFP stated:

The AFP apologises for the delays which have occurred in the processing of these requests. The AFP takes its obligations under the *Freedom of Information Act 1982* (Cth) seriously and endeavours to meet the requirements of the Act in relation to timeframes. However, in recent months the FOI team has been dealing with a significant backlog of overdue requests and has faced challenges in making decisions within the statutory time limits.

Discussion

It is clear from the evidence before me that the AFP did not comply with the statutory processing period in all 5 case studies.

In relation to [s 22(1)(a)(i) irrelevant material] and [s 22(1)(a)(i) irrelevant material]:

1. The statutory timeframe of 30 days to process these FOI requests under s 15(5) was extended by agreement under s 15AA and as a result of consultation under ss 15(6) or 15(8). The statutory timeframe was not extended by the Information Commissioner under ss 15AB or 15AC.
2. The statutory processing period was not affected by a request consultation process under s 24AB(8) or by the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable under s 31.

3. The AFP was therefore required to provide a decision to the complainant within the statutory timeframe based on the agreements under s 15AA.⁹
4. The AFP did not provide a decision within the statutory timeframe.
5. The AFP did not comply with s 15(5)(b) of the FOI Act.

In relation to [§ 22(1)(a)(i) irrelevant material] and [§ 22(1)(a)(i) irrelevant material]:

1. The statutory timeframe of 30 days to process these FOI requests under s 15(5) was not extended by agreement under s 15AA, or as a result of consultation under ss 15(6) or 15(8), or by the Information Commissioner under ss 15AB or 15AC.
2. The statutory processing period was not affected by a request consultation process under s 24AB(8) or by the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable under s 31.
3. The AFP was therefore required to provide a decision to the complainant within 30 days.
4. The AFP did not provide a decision within 30 days.
5. The AFP did not comply with s 15(5)(b) of the FOI Act.

In relation to [§ 22(1)(a)(i) irrelevant material]:

1. The statutory timeframe of 30 days to process these FOI requests under s 15(5) was extended by agreement under s 15AA. The statutory timeframe was not extended as a result of consultation under ss 15(6) or 15(8), or by the Information Commissioner under ss 15AB or 15AC.
2. The statutory processing period was affected by a request consultation process under s 24AB(8). The statutory processing period was not affected by the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable under s 31.
3. The AFP was therefore required to provide a decision to the complainant within the extended statutory processing period.
4. The AFP did not provide a decision within the extended statutory processing period.
5. The AFP did not comply with s 15(5)(b) of the FOI Act.

The period that the AFP exceeded the processing period ranged from 10 days to 180 days.¹⁰

⁹ In [§ 22(1)(a)(i) irrelevant material], the AFP was required to provide the decision within 90 days as the statutory timeframe had been extended by 30 days under s 15AA and by a further 30 days under s 15(6). In [§ 22(1)(a)(i) irrelevant material], the AFP was required to provide the decision within 37 days as the statutory timeframe had been extended by 7 days under s 15AA and by a further 30 days under s 15(6).

¹⁰ [§ 22(1)(a)(i) irrelevant material] – 10 days, [§ 22(1)(a)(i) irrelevant material] – 25 days, [§ 22(1)(a)(i) irrelevant material] – 33 days, [§ 22(1)(a)(i) irrelevant material] – 125 days and [§ 22(1)(a)(i) irrelevant material] – 180 days.

Related IC reviews

In relation to [§ 22(1)(a)(i) irrelevant material] there is no evidence before me that the applicant sought IC review of any of the deemed access refusal decisions under s 54L of the FOI Act.

In relation to [§ 22(1)(a)(i) irrelevant material], on 7 February 2019 the applicant sought IC review of the AFP’s deemed access refusal decision in [§ 22(1)(a)(i) irrelevant material]. The IC review is ongoing [§ 22(1)(a)(i) irrelevant material].

Delays

From an analysis of the chronology of each FOI request provided by the AFP during this investigation, the AFP’s FOI Section appears to commence the preliminary processing action within a reasonable timeframe, which includes, on average, acknowledging a request within 1 – 2 days of receipt and commencing the search and retrieval process within a further 1 - 2 days.

During the course of this investigation, the AFP advised that it’s ‘National Guideline on Freedom of Information releases’ allows for a period of 10 working days for AFP appointees to provide a response to the FOI Team:

An AFP appointee who retrieves a Freedom of Information (FOI) request from the FOI-IL Team should within 10 working days...

From then, the FOI Section are reliant on a timely and thorough response from the business area to be able to continue to process the request within statutory timeframes. In several instances, it appears that the FOI Section had to follow up or seek further assistance from the line areas to complete the search and retrieval process.

The following table provides the request and response times in relation to the search and retrieval process in each case study.

FOI Request	Date of FOI request	Date of search and retrieval email	Final response received by FOI Team	Calendar Days between request and provision of information	Decision provided to applicant¹¹	Days between final response received by FOI team and decision provided to applicant
[§ 22(1)(a)(i) irrelevant material]	11 September 2017	12 September 2017	1 November 2017	29 days	4 January 2018	64 days

¹¹ Dates sourced from [§ 22(1)(a)(i) irrelevant material] chronologies.

s 22(1)(a)(ii) irrelevant material	31 October 2017	3 November 2017	20 November 2017 ¹²	16 days	22 January 2018 ¹³	63 days
Revised scope for s 22(1)(a)(ii) irrelevant material		13 February 2018	21 February 2018 ¹⁴	8 days	28 June 2018	135 days
s 22(1)(a)(ii) irrelevant material	30 April 2018	1 May 2018	9 May 2018	8 days	2 July 2018	54 days
s 22(1)(a)(ii) irrelevant material	23 May 2018	25 May 2018	31 May 2018 ¹⁵	6 days	12 July 2018	42 days
s 22(1)(a)(ii) irrelevant material	26 October 2018	31 October 2018	16 November 2018	15 days	28 February 2019	104 days

Although I appreciate that the AFP business areas have competing operational requirements, any delay in identifying the documents at issue will have a resultant effect on the timeliness of FOI processing.

However, the failure by the AFP to finalise the request within the processing period cannot solely be attributed to delays from the business areas. This is because delays of up to 135 days were still recorded even in instances where the business area(s) were able to provide documents in under 10 calendar days.¹⁶

Conclusions

The AFP did not comply with the statutory processing period in relation to FOI requests s 22(1)(a)(ii) irrelevant material and s 22(1)(a)(ii) irrelevant material. The AFP's failure to comply with the statutory processing period is attributable to the failure of business areas to provide documents at issue to the FOI section and/or the time taken in the subsequent processing by the FOI section.

¹² Final response to the initial search and retrieval email advising that the request is voluminous.

¹³ Parties hold a teleconference concerning the processing of the request. The outcome of the teleconference was the s 22(1)(a)(ii) irrelevant material was to consider providing a revised scope. A revised scope was provided on 6 February 2018.

¹⁴ Response to the search and retrieval email regarding the revised scope of 13 February 2018, advising the request remained voluminous.

¹⁵ The AFP advises a second search and retrieval email was sent to the line area on 30 May 2018.

¹⁶ For example, in s 22(1)(a)(ii) irrelevant material (8 days) and s 22(1)(a)(ii) irrelevant material (6 days). In s 22(1)(a)(ii) irrelevant material, there were 54 days between when the final response was received by the FOI team and when the decision was provided to s 22(1)(a)(ii) irrelevant material. In s 22(1)(a)(ii) irrelevant material there were 42 days between when the final response was received by the FOI team and when the decision was provided to s 22(1)(a)(ii) irrelevant material.

Issue 2: Extending the statutory processing period

Allegation

In § 22(1)(a)(i) irrelevant material § 22(1)(a)(i) raised two specific concerns regarding extensions of the statutory processing period.

§ 22(1)(a)(i) allege that¹⁷:

- the AFP seeks to extend the processing period at ‘the end or close to the end of the 30 days it is required to respond to a request’, and
- the AFP does not determine whether a request requires consultation, or the scope is voluminous, until towards the end of the processing period.

In relation to the above allegations, the § 22(1)(a)(i) submitted:

... we have concerns about the AFP’s practice of seeking extensions for responding to FOI requests. While we recognise that the FOI Team can request an applicant agree to an extension, as well as allowances for additional time in some circumstances under the *Freedom of Information Act 1982* (such as under subsection 15(6)), it appears that the FOI Team does not seek an initial extension until the end or close to the end of the 30 days it is required to respond to a request...

... when the FOI Team states reasons for seeking extensions to be that third parties need to be consulted or there is a large volume of documents or the terms of the request need to be narrowed, these reasons should have been determined far earlier than almost 4 weeks into every process.

Legislative framework

Extending the processing period

Paragraph 15(5)(b) provides that an agency or minister must, as soon as practicable and no later than 30 days after receiving a request, take all reasonable steps to enable the applicant to be notified of a decision on the request.

¹⁷ These allegations were raised in relation to the following case studies: § 22(1)(a)(ii) irrelevant material § 22(1)(a)(ii) irrelevant material. I note, that although § 22(1)(a)(i) had not raised this issue specifically in relation to § 22(1)(a)(i) irrelevant material, the AFP notified the applicant of an extension under s 15(6) for consultation on day 30 of 37 of the extended processing period. The AFP had received an agreement from the applicant to extend the processing time by 7 days to 1 December 2018.

The FOI Act contains several provisions which can extend the processing period for reasons including:

- third party consultation (15(6))
- consultation with foreign entities (15(7), (8))
- agreement between the applicant and the agency or minister (15AA)
- the request is complex or voluminous (15AB), and
- the request has become deemed access refusal (15AC).

Where an agency or minister is unable to process an FOI request within the processing period, they are able to request an extension of time from the FOI applicant (s 15AA) or the Information Commissioner (ss 15AB and 15AC).

The Information Commissioner may grant extensions of time to agencies or ministers where they are able to demonstrate that the processing of the FOI request has been delayed because the FOI request is voluminous or complex in nature (s 15AB) or where the agency or minister has been unable to process the request within the statutory timeframe and the agency or minister is deemed to have made a decision refusing the FOI request (s 15AC).

In relation to third party consultations, an agency or minister may extend the processing period for a period of 30 days in order to conduct consultations (s 15(6)). Where an agency or minister extends the processing period under s 15(6), it must notify the applicant in writing.¹⁸

Utilising the practical refusal mechanism

According to s 24AA, an agency or minister may refuse a request if a 'practical refusal reason' exists, where either the request does not sufficiently identify the requested documents or the resource impact of processing the request would be substantial and unreasonable. In either instance, the agency or minister must first follow a 'request consultation process' under s 24AB before refusing the request.

Subsection 24AB(2) of the FOI Act, provides that a notice of an intent to refuse access must state:

- an intention to refuse access to a document in accordance with a request
- the practical refusal reason
- the name and contact details of an officer with whom the applicant may consult during the process
- details of how the applicant may contact them, and

¹⁸ During the course of the investigation, the AFP provided chronologies of the processing of each request which shows whether the above extensions were applied.

- that the consultation period during which the applicant may consult the contact person is 14 days after the day the applicant is given the notice (s 24AB(2)).

The effect of issuing a consultation notice is that the processing clock is ‘stopped’ on the day that the notice is issued and does not re-start until the applicant has responded to the notice (24AB(8)). If the applicant does not respond to the consultation notice within 14 days, the agency or minister can take the request as withdrawn (24AB(7)).

AFP’s submissions

The AFP submits:

The increase in FOI requests, and particularly complex requests, has also had a significant impact on the timeliness of progressing requests. The AFP endeavours to identify the need for extensions of time or third party consultation in a timely manner. Any delay progressing these actions has not been for the purpose of delaying access to documents, or because requests from [redacted] members are being ignored or given low priority.

...

We note the [redacted] concern that the AFP does not seek extensions until late in the statutory timeframe. However, there is no limit on when an agency may seek such an extension, as long as it is within the 30 day period specified in the FOI Act. Nevertheless, we will endeavour to meet the [redacted] preference to be contacted about extensions of time and the scoping of requests as early as practicable.

In correspondence from the AFP to [redacted] addressing their complaint of 18 June 2018:

With respect to your concerns in relation to requests for extension, I note that apart from requiring an extension request to be made within a 30 day time limit the Act does not prescribe a time period for approaching the applicant. However, we note your preference to be contacted as early as practicable in relation to extensions. We will endeavour to meet your preferred timeframe in the future.

Discussion

In all five case studies, the statutory processing period had expired prior to the AFP providing a decision in response to the requests.

In four case studies, the AFP requested an extension of time under s 15AA from the applicant.¹⁹ The AFP did not request an extension of time under ss 15AB or 15AC in any of the case studies.

The AFP does not dispute that it did not comply with the statutory processing period and it is clear from the information before me that the AFP extended, or requested to extend, the

¹⁹ [redacted] (agreed), [redacted] (agreed), [redacted] (refused) and [redacted] (AFP requested 30 days – [redacted] agreed to 7 days).

processing timeframe under ss 15(6) or 24AB within the final 2,²⁰ 7,²¹ and 8²² days of the processing period in relation to three requests.

The FOI Act requires that extensions to the decision notification period, with the exception of requests under s 15AC, are undertaken within the statutory processing period.

In relation to the extension of the processing period under s 15AA, the FOI Guidelines provides that:

Agencies and ministers are encouraged to build into their FOI process an early and quick assessment of whether an extension of time may be required, to ensure that decisions are made within the statutory processing period.²³

In relation to the extension of the processing period under s 15(6), the FOI Guidelines provide that ‘prompt and effective consultation with relevant parties involved in dealing with an FOI access request is essential to good administration’²⁴ and that ‘in determining whether it would be reasonably practicable to consult, the agency or minister should have regard to all circumstances, including the time limits for processing the request’²⁵.

In relation to the extension of the processing period under s 24AB, the FOI Guidelines provide:

Before commencing a formal request consultation process, agencies and ministers’ offices are encouraged to discuss the request with the applicant. This is often a more efficient way of obtaining further information from the applicant and helping them to refine a request that is too large or vague. However, if the applicant cannot be contacted promptly, or the discussion does not elicit information that allows relevant documents to be identified, the request consultation process should be commenced.

Conclusions

The FOI Act requires that extensions to the decision notification period, with the exception of requests under s 15AC, are undertaken within the statutory processing period. While this will not be possible in all circumstances, the AFP should ensure that it considers whether an

²⁰ s.22(1)(a)(i) irrelevant material. A decision was due on 10 November 2017. On 8 November 2017, the AFP advised the complainant that the processing period had been extended under s 15(6) of the FOI Act.

²¹ s.22(1)(a)(i) irrelevant material. A decision was due on 30 May 2017. On 23 May 2017 the AFP requested an extension of time under s 15AA of the FOI Act. s.22(1)(a)(i) irrelevant material: A decision was due on 2 December 2018. On 26 November 2018 the AFP extended the processing period by under s 15(6) of the FOI Act.

²² s.22(1)(a)(i) irrelevant material. A decision was due on 30 December 2017. On 22 January 2018 the AFP took steps to revise the scope of the request by holding a teleconference. On 22 February 2018 the AFP issued a s 24AB consultation notice. At both stages the statutory processing period has expired.

²³ FOI Guidelines [3.144].

²⁴ FOI Guidelines [3.69]

²⁵ FOI Guidelines [3.76]

extension to the processing period under 15AA, s 15(6) or 24AB is required at the earlier stages of processing FOI requests.

Investigation recommendations

In considering whether it is appropriate to make recommendations, I have considered the AFP's efforts and steps to improve its compliance with the statutory processing timeframes under the FOI Act:

1. The AFP has taken some steps to address the backlog of FOI requests in the period since the lodgement of the FOI requests and the commencement of this investigation.
2. The AFP's advice on 14 July 2020 that it had implemented recommendations made by the Information Commissioner in relation to a separate FOI complaint about non-compliance with the statutory processing timeframes, which recommended the AFP undertake the following activities:
 - a) Issue a statement issued to all staff highlighting the AFP's obligations under the FOI Act
 - b) Conduct general FOI training during the induction process for new employees and refresher training for existing employees at least annually
 - c) Build into the AFP's FOI process an early assessment of whether an extension of time and/or consultation with third parties may be required and advise the FOI applicant as soon as practicable
 - d) Review and update its guidance material in line with the findings of the investigation including:
 - i. Search and retrieval timeliness
 - ii. Appropriate escalation points where delays occur
 - iii. Keeping applicants updated on the progress of their requests where delays are being experienced.

I have also considered the AFP's FOI quarterly and annual statistical returns, as provided by the AFP to my office for the 2019-20 and 2020-21 financial years.

Financial year	Total FOI requests received	Total FOI requests processed in time	Compliance with the statutory processing period
2019-20	827	491	59%
2020-21	754	332	54%

As noted in the above table, the AFP's statutory compliance diminished from 59% to 54% between 2019-20 and 2020-21. These statistics, as provided by the AFP, indicate that the AFP's compliance with the statutory processing period has not improved.

To assist the AFP to improve its compliance with the statutory processing timeframes, I make the following recommendations under s 88 of the FOI Act:

1. Self assessment of compliance

The AFP should develop and implement a compliance action plan and provide a copy of that plan to the OAIC by **27 January 2022**. The compliance action plan should include an explanation and assessment of the reasons for non-compliance with the statutory processing period for the 2019-20 and 2020-21 financial years and proposals to improve compliance, including in relation to:

- a) adequacy of resources
- b) training
- c) operational improvements and
- d) proposals for how the AFP will comply with the statutory processing period in relation to any backlog of outstanding FOI requests as well as new requests.

2. Report of compliance

The AFP should provide an implementation report to the OAIC by **27 April 2022**, providing statistical evidence and analysis to demonstrate the effectiveness of the implementation of the compliance action plan in recommendation 1 and whether the reasons for non-compliance identified in the compliance action plan have been rectified.



Notice on completion under s 86 of the FOI Act ([REDACTED]) [REDACTED] [REDACTED] and the Department of Veterans' Affairs

On 5 February 2019, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Department of Veterans' Affairs (the Department) in the performance of its functions and the exercise of its powers under the FOI Act.

The complainant is [REDACTED].

The complainant alleges that the Department failed to provide a decision on 3 of [REDACTED] FOI requests within the statutory timeframes set out in the FOI Act (Department references: [REDACTED]; [REDACTED]). The FOI requests are also the subject of Information Commissioner reviews.¹

This Notice on Completion sets out the issues identified from the complainant's allegations. The allegations are assessed against the legislative framework and the FOI Guidelines,² to which agencies and ministers must have regard in performing a function or exercising a power under the FOI Act.

Background

On 14 September 2018 the complainant made 2 FOI requests to the Department ([REDACTED] and [REDACTED]).

Under s 15(5) of the FOI Act, the Department was required to provide decisions to the complainant in respect of these requests by 14 October 2018. As 14 October 2018 was a Sunday, the Department should have provided a decision by the following Monday 15 October 2018.³

On 11 October 2018, the complainant made another FOI request to the Department ([REDACTED]).

Under s 15(5) of the FOI Act, the Department was required to provide a decision to the complainant in respect of this request by 10 November 2018. As 10 November 2018 was a Saturday, the Department should have provided a decision by the following Monday 12 November 2018.

For all 3 FOI requests, the Department was deemed to have refused the requests on the basis that decisions were not provided to the complainant within the applicable statutory processing periods (s 15AC).

¹ OAIC reference numbers [REDACTED]. These IC reviews remain ongoing.

² Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the FOI Guidelines).

³ In its submissions of 10 September 2020, the Department notes that the decision was due by 14 October 2018. As the 14 October 2018 was a Sunday, s 36(2) of the *Acts Interpretation Act 1901* provides that a decision was due on the following Monday being 15 October 2018.

On 5 February 2019, having not received decisions on the 3 FOI requests, the complainant lodged a complaint with the OAIC under s 70 of the FOI Act and sought IC review of the 3 FOI requests under s 54L of the FOI Act.

On 4 March 2019, the Department provided the complainant with a decision on all 3 requests.

On 20 July 2020, the OAIC notified the Department in accordance with s 75 of the FOI Act that it would investigate the complaint and requested the Department's submissions in response.

On 10 September 2020, the Department responded to the notice and request for information.

On 28 September 2020, the OAIC wrote to the complainant providing an outline of the Department's response to the complaint, which included an apology and information about the improvements made since the FOI requests were processed. A response was requested from the complainant by 12 October 2020. No response was received.

The key procedural events in this FOI complaint are set out in **Attachment B**.

During this investigation, I have had regard to:

- the complaint dated 5 February 2019
- the complainant's further submissions (5 February and 3 March 2019)
- the Department's submissions dated 5 April 2019⁴ and 10 September 2020⁵.

Complainant's allegations

The complainant alleges the Department failed to provide a decision on [redacted] 3 FOI requests within the statutory timeframes set out in the FOI Act and did not correspond with [redacted] in relation to the Department's preliminary notice of a charge. The issues I have considered in this investigation are:

1. Whether the Department complied with the statutory processing timeframes when processing the 3 requests.
2. Whether the Department provided a decision to the complainant regarding the charge notice within 30 days, as required by s 29(6) of the FOI Act.
3. Whether the Department corresponded in a timely manner with the complainant in relation to the charge notice issued in FOI request 24507.

Investigation results

Pursuant to s 87 of the FOI Act, the investigation results set out my opinions, conclusions and suggestions arising from the investigation of this matter.

⁴ Department's response to preliminary inquiries dated 5 April 2019.

⁵ Department's response to s 75 Notice dated 10 September 2020.

Legislative framework

The relevant provisions of the FOI Act and the FOI Guidelines regarding extensions of timeframes and charge notices for FOI requests are set out in detail at **Attachment C**.

Department's submissions

Discussion

Issue 1: Compliance with statutory timeframes

Statutory processing period

The FOI Act provides a statutory timeframe of 30 days to process an FOI request (s 15(5)).

However, the FOI Act contains a number of provisions which allow for extension of the timeframes in s 15: ss 15(6) (to consult individuals or businesses), 15(7) (to consult a foreign government), 15AA (with the agreement of the applicant), 15AB (to process complex or voluminous requests) and 15AC (when a decision has not been made within the statutory timeframe).

The Department advised that the complainant lodged 10 FOI requests (including the 3 that are the subject of this FOI complaint) which broadly covered the same material. The Department was required to consult with the complainant about the scope of the requests, given their volume and complexity. Following consultation, the 10 requests were reduced to 6, however the complexity and volume of the processing task remained significant. The Department regrets it did not meet the processing timeframes and identified processing deficiencies about which it undertook to provide guidance to staff.

FOI request s 22(1)(a)(ii) req

FOI request s 22(1)(a)(ii) req was received by the Department on 14 September 2018 and acknowledged on 17 September 2018.

Pursuant to s 15(5)(b) of the FOI Act, the Department was due to provide a decision to the complainant by 14 October 2018. As 14 October 2018 fell on a Sunday, the initial processing period expired on Monday 15 October 2018.⁶

However, during the processing of FOI request s 22(1)(a)(ii) req the statutory processing period was extended under various provisions of the FOI Act. Following the application of those extension provisions, the decision date was extended to 15 February 2019.⁷

⁶ In its submissions of 10 September 2020, the Department notes that the decision was due by 14 October 2018. As the 14 October 2018 was a Sunday, s 36(2) of the *Acts Interpretation Act 1901* provides that a decision was due on the following Monday being 15 October 2018.

⁷ In its submissions of 10 September 2020, the Department incorrectly calculates the new decision date to 13 February 2019.

On 15 February 2019, the Department was deemed to have refused the request under s 15AC of the FOI Act as it did not provide a decision to the complainant by the due date.

On 4 March 2019 the Department provided the complainant with its substantive decision in relation to FOI request 24507.

FOI request [REDACTED]

FOI request [REDACTED] was received by the Department on 14 September 2018 and acknowledged on 17 September 2018.

Pursuant to s 15(5)(b) of the FOI Act, the Department was due to provide a decision to the complainant by 14 October 2018. As 14 October 2018 fell on a Sunday, the initial processing period expired on Monday 15 October 2018.

However, during the processing of FOI request 24508, the statutory processing period was extended under various provisions of the FOI Act. Following the application of those extension provisions, the decision date was extended to 2 February 2019. As 2 February 2019 fell on a Saturday, the Department was required to provide a decision on Monday 4 February 2019.

On 4 February 2019 the Department was deemed to have refused the request under s 15AC of the FOI Act as it did not provide a decision to the complainant by the due date.

On 4 March 2019 the Department provided the complainant with its substantive decision in relation to FOI request [REDACTED]

FOI request [REDACTED]

FOI request [REDACTED] was received by the Department on 11 October 2018 and acknowledged on 15 October 2018.

Pursuant to s 15(5)(b) of the FOI Act, the Department was due to provide a decision to the complainant by 10 November 2018. As 10 November 2018 fell on a Saturday, the initial processing period expired on Monday 12 November 2018.

During the processing of FOI request [REDACTED], the statutory processing period was extended under various provisions of the FOI Act. Following the application of those extension provisions, the decision date was extended to 2 February 2019. As 2 February 2018 fell on a Saturday, the Department was required to provide a decision on Monday 4 February 2019.

On 4 February 2019 the Department was deemed to have refused the request under s 15AC of the FOI Act as it did not provide a decision to the complainant by the due date.

On 4 March 2019 the Department provided the complainant with its substantive decision in relation to FOI request [REDACTED].

Conclusion

The Department did not comply with the statutory timeframes when processing 3 FOI requests (s 22(1)(a)(ii) irrelevant material).

Issue 2: Compliance with s 29(6) of the FOI Act

On 16 January 2019, the Department issued a preliminary assessment of charge notice under s 29 of the FOI Act for FOI request [REDACTED].

On the same day, the complainant contacted the Department under s 29(4) of the FOI Act, disputing the assessment of a charge.

Under s 29(6) of the FOI Act, on receiving notice of the complainant's contention of the charge, the Department was required to provide the complainant with a decision on the amount of charge payable within 30 days, that is by 15 February 2019. The Department did not do so until it provided the decision on the request to the complainant on 4 March 2019.

Furthermore, by not providing the decision to the complainant within the 30-day period, the Department was taken to have made a decision to impose the charge specified in the notice (s 29(7) of the FOI Act). In this case, however, the Department waived the charge in its decision on 4 March 2019.

In its submission of 10 September 2020, the Department acknowledged that:

...the preferable approach would have been to issue a separate charges decision and to have done so by 15 February 2019, or if the charge was to be waived, to have ensured that the access decision noted the waiver and that it was issued within that 30 day period.⁸

Conclusion

The Department did not comply with s 29(6) of the FOI Act. Subsection 29(6) requires agencies to take all reasonable steps to notify the applicant of a decision regarding the amount of a charge payable following a contention that the charge has been wrongly assessed, should be reduced or not imposed within 30 days. There is nothing before me to suggest that the Department took those reasonable steps in this case.

Issue 3: Communication

The complainant alleged that the Department did not correspond with them in a timely manner about the charge notice issued in FOI request [REDACTED].

On 16 January 2019 the Department issued a preliminary notice of a charge to the complainant for request [REDACTED].⁹ The complainant responded the same day raising concerns that the notice was incorrectly assessed. The complainant asked the Department to recalculate the charges and

⁸ Department's response to s 75 Notice dated 10 September 2020, page 8.

⁹ Charge Notice 16 January 2019.

reissue the notice to [REDACTED].¹⁰ The complainant followed up with the Department by email on 5 February and 3 March 2019. The complainant did not receive a response from the Department to that correspondence.

The Department submitted that, prior to the 16 January 2019 correspondence, it engaged with the complainant in a timely way in relation to the FOI requests. However the Department acknowledged that it had not responded to the complainant's correspondence of 16 January, 5 February and 3 March 2019 regarding the charges notice.

On 5 February 2019 and 3 March 2019, [REDACTED] contacted the Department noting that a response had not been provided to [REDACTED] regarding the charges notice. The OAIC was copied into the correspondence. The Department did not effectively engage with [REDACTED] after receipt of those emails.¹¹

The Department also accepted that it could have been clearer in its explanation of the effect of the charges notice on the processing period.¹²

Conclusion

As discussed above, the FOI Act provides that, in circumstances where an applicant contests a charge notice in accordance with s 29(1)(f), it is required to take all reasonable steps to provide a notification of the decision on the amount of the charge payable within 30 days of the day the applicant contested the charge. The complainant responded to the notice on 16 January, 5 February and 3 March 2019. The Department was required to respond and provide the complainant with a decision within 30 days, that is by 15 February 2019. The Department did not do so until it provided the decision to the complainant on 4 March 2019.

Department FOI resources – FOI processing manual

During the course of this investigation, the Department advised the OAIC that it does not currently have an FOI processing manual. Instead, the Department submitted that it has a PowerPoint presentation which it utilises in a series of training sessions with the Department's National Information Access Processing Team and advised the OAIC of the steps it has taken or proposes to take to improve its FOI processes.¹³

In relation to why the Department does not have a manual, the Department advised:

The Department does not have its own FOI Manual. Staff are encouraged to refer to the OAIC's very comprehensive FOI Guidelines and resource materials that are made available on the OAIC's website. Those resources address the matters referred to in question 2 above.

As a small agency with limited resourcing, the time and staff effort to produce and maintain a dedicated FOI Manual is a significant impost. While we have been working toward developing our own FOI Manual and training materials, we have to undertake this task progressively while ensuring we maintain our information access operations.

¹⁰ Complainant email to Department 16 January 2019.

¹¹ Department s 75 response dated 10 September 2020 page 8.

¹² Department s 75 response dated 10 September 2020, page 9.

¹³ Department submissions 10 September 2020, pages 3-4.

Although I have found above that the Department did not comply with the statutory processing timeframe when processing the complainant's FOI requests, I acknowledge the context in which the delays occurred. However, I am concerned that an agency which receives a significant number of FOI requests each year¹⁴ does not have an FOI processing manual which can assist staff to meet statutory processing requirements associated with FOI requests.

Under s 87(b) of the FOI Act, I am of the opinion that an FOI processing manual will assist Departmental officers to meet their obligations under the FOI Act.

Recommendations

In considering whether to make any recommendations which I believe the Department ought to implement, I have considered the Department's submissions in relation to its current FOI processes and resources and the steps it has taken or proposes to take to improve both.

Pursuant to s 88 of the FOI Act, I make the following recommendation to the Department that I believe the Department ought to implement by **22 December 2021**:

1. That the Department develops and makes available to staff an operational manual for processing FOI requests¹⁵ that should include, at a minimum, the steps that will be taken to ensure compliance with statutory processing requirements, including in relation to:
 - a. meeting processing timeframes under the FOI Act
 - b. the steps to be taken when notifying an applicant of the imposition of a charge, including the obligation to provide a decision in accordance with s 29(6).

Consistent with the requirements of the Information Publication Scheme, the operational manual should be made publicly available by the Department on its website.

¹⁴ An OAIC analysis of FOI data received from the Department as part of its reporting requirements identified that between 2018-2021, the Department received on average 440 FOI requests each financial year.

¹⁵ Assistance in preparing this material is available through the OAIC's website. The OAIC's recently released FOI Essentials toolkit, which contains information that is also available in the FOI Guidelines but in a short form user friendly package, may be of assistance.



ATTACHMENT A

Notice on completion under s 86 of the FOI Act (s 22(1)(a)(i) - irrelevant material) s 22(1)(a)(ii) - irrelevant material and the Department of Home Affairs

On 11 April 2019, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Department of Home Affairs (the Department) in the performance of its functions, and the exercise of its powers, under the FOI Act.

The complainant is s 22(1)(a)(ii) - irrelevant material.

The complainant alleges the Department failed to provide a decision on s 22(1)(a)(ii) - irrelevant material FOI request of 21 December 2018 within the statutory timeframes set out in the FOI Act.

The FOI request the subject of this FOI complaint was also the subject of an Information Commissioner review (IC review) (s 22(1)(a)(ii) - irrelevant material).¹

This Notice on Completion sets out the issue as identified from the allegation raised by the complainant. The allegation is assessed against the legislative framework and the FOI Guidelines² which agencies and ministers must have regard to. I have considered the complaint and the Department's submissions in response before making conclusions about the allegation.

Background

On 21 December 2018, the complainant made the FOI request to the Department

s 22(1)(a)(ii) - irrelevant material

Under s 15(5) of the FOI Act, the Department was required to provide a decision to the complainant by 20 January 2019.

On 15 January 2019, the Department requested that the complainant clarify the scope of the request and sought the complainant's agreement to a 30-day extension of time under s 15AA of the FOI Act. The complainant declined the extension of time.

On 20 January 2019, the Department was deemed to have refused access pursuant to s 15AC of the FOI Act.

¹ s 22(1)(a)(ii) - irrelevant material was finalised on 28 June 2019 under s 54W

² The Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard to in performing a function or exercising a power under the FOI Act.

On 11 April 2019, the complainant sought IC review of the deemed access refusal decision and lodged an FOI complaint under s 70 of the FOI Act about the Department's non-compliance with the statutory processing period.

On 23 April 2019, the Department provided a substantive decision to the complainant.

On 23 April 2021, the OAIC notified the Department that it would investigate the complaint and requested the Department's response to the complaint.

On 3 June 2021, the Department provided a response to the notice and request for information under s 75 of the FOI Act.

On 3 August 2021 and 14 September 2021, the Department provided further submissions in response to the investigation notice of 23 April 2021.

The key procedural events in this FOI complaint are set out in **Annexure A** to this Notice.

Investigation results

Pursuant to s 87 of the FOI Act, the investigation conclusions set out my opinion and conclusion on how the Department processed the complainant's FOI request. I have considered all the material provided by the Department and the complainant in this matter.

Issue: Compliance with statutory processing periods

Complainant's allegation

The complainant alleges the Department failed to provide a decision on [REDACTED] FOI request of 21 December 2018 within the statutory timeframes set out in the FOI Act.

Legislative framework

The FOI Act provides a statutory timeframe of 30 days to process an FOI request (s 15(5)).

The period can be extended by up to 30 days with the applicant's agreement (s 15AA), by 30 days if consultation with a third party is undertaken (s 15(6)), and by 30 days if consultation with a foreign entity is undertaken (s 15(8)).

An agency or minister may apply to the Information Commissioner for extension of the statutory timeframe for complex or voluminous requests (s 15AB) or following a deemed access refusal decision (s 15AC).

The FOI Guidelines at [3.139] state:

An agency or minister must, as soon as practicable, and no later than 30 days after receiving a request, take all reasonable steps to enable the applicant to be notified of a decision on the

request (s 15(5)(b)). Section 15(5)(b) provides that the 30-day processing period commences on 3 See also, FOI Guidelines at [3.125]. 4 the day after the day the agency or minister is taken to have received a request that meets the formal requirements of s 15(2), (2A). An agency should act promptly to assist an applicant whose request does not meet the formal requirements in keeping with its obligations under s 15(3).

Table 1: Extension of time provisions

Reason for extension	Extension period	Determined by	Notification requirement
Third party consultation: consultation with a state, or a person or business concerning personal or business information (s 15(6))	30 days	by default if agency or minister determines ss 26A, 27 or 27A apply	agency or minister must inform applicant of extension as soon as practicable (s 15(6)(b))
Consultation with foreign entity required to determine if 33(a)(iii) or 33(b) exemptions apply (s 15(7),(8))	30 days	by default if agency or minister determines consultation is needed	agency or minister must inform applicant of extension as soon as practicable (s 15(8)(b))
By agreement between applicant and agency or minister (s 15AA)	up to 30 days, as either a single extension or a series of shorter extensions. This may be in addition to an extension for third party consultation	agency or minister but only with written agreement of applicant	agency or minister must give written notice of the extension to the Information Commissioner as soon as practicable (s 15AA(b))
Complex or voluminous request (s 15AB)	30 days or other period	Information Commissioner, upon request from agency or minister	Commissioner must inform applicant and agency or minister of an extension period as soon as practicable where a decision is made to grant the extension (s 15AB(3))
Following a deemed refusal (s 15AC(4))	as determined by the Information Commissioner	Information Commissioner, upon request from agency or minister	no legislative requirement but Commissioner may require agency or minister to notify applicant or third party as a condition of granting the extension (s 15AC(6))

The statutory processing period does not include:

- the time that an agency may take in a request consultation process to decide if a practical refusal exists (s 24AB (8))
- the time elapsing between an applicant being notified that a charge is payable and
- either the applicant paying the charge (or a deposit on account of the charge) or the
- agency varying the decision that a charge is payable (s 31).

Deemed access refusal

Section 15AC provides that where a decision on an FOI request has not been provided to the applicant within the statutory processing period, the principal officer of the agency or the minister is deemed to have made a decision refusing access to the documents (s 15AC (3)).

The FOI Guidelines at [3.154] – [3.155] explain:

The consequence of a deemed refusal is that an applicant may apply for IC review (s 54L(2)(a)) In addition, once the time has expired and there is a deemed decision, the agency or minister cannot impose a charge for access...

Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of reasons on the FOI request. This obligation to provide a statement of reasons on the FOI request continues until any IC review of the deemed decision is finalised. ...

Department's submissions to complaint

Response to the Notice of investigation under s 75 of the FOI Act

On 3 June 2021, the Department provided its response to the complaint. The Department provided a chronology of the processing of the request and advised that:

- the Department did seek an extension of time under s 15AA of the FOI Act, but this was declined by the complainant. The Department did not seek extensions of time under either ss 15AB, 15AC or 54D of the FOI Act, and
- the statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.

The Department also provided submissions in relation to the general grounds for delay in processing FOI requests, and the measures it is taking to address those factors (**Attachment B**).

On 3 August 2021³ (**Attachment C**) and 14 September 2021⁴ (**Attachment D**),⁵ the Department provided further submissions on the steps that it has undertaken to extend the recommendations made in the Final Report of the CII into the Department's processing of

³ Email from the Department of Home Affairs to the OAIC on 3 August 2021

⁴ Email from the Department of Home Affairs to the OAIC on 14 September 2021

⁵ The Department provided its response of 14 September 2021 (Attachment D) in response to my request of 3 September 2021 for further information on the steps it has taken or is taking to extend the CII recommendations to its processing of FOI requests for personal information.

FOI requests for non-personal information, to its processes and procedures for processing FOI requests for personal information. The Department advised that:

1. Recommendation 1: Appoint an Information Champion

- This recommendation is complete, noting the Information Champion's role extends equally to the non-personal and personal caseload.
- Our Information Champion (SES Band 2) is actively engaged with the management and oversight of the personal caseload as well as the non-personal caseload.

2. Recommendation 2: Operational Processes and Procedures

- This recommendation is complete. In line with the scope of the CII, the new Procedural Instruction (PI) is focused on non-personal FOI requests. However, we will shortly begin work on a Procedural Instruction directed at personal FOI requests, noting that the majority of the processes set out in the new PI apply equally to personal FOI requests.
- Recommendations 2 and 3 related to the development of procedural guidance (procedural instructions) and training in applying those instructions in the non-personal caseload. The Department has finalised the procedural instruction for the non-personal caseload. The Department is now developing procedural instructions for personal access and amendment requests. This is an active project which will be completed by Q3 – an earlier completion date is not possible while maintaining a focus on reducing backlogs across the caseload.

3. Recommendation 3: Training

- This recommendation is well advanced. In line with the scope of the CII, the new eLearning package for FOI decision-makers is focused on non-personal FOI requests. In addition, we will train Departmental staff involved in the processing of personal requests in the Procedural Instruction for personal FOI requests.
- earlier this month, the Department launched its new FOI eLearning package for all staff and decision-makers. Module one includes an FOI overview that is relevant to both the personal and non-personal space. We are actively tracking the take up of this package across the Department.
- AGS training (decision maker and exemptions) is available for all staff who require a more in-depth understanding of FOI requirements and processes. The AGS module contains information relevant to decision making, regardless of caseload. Our September session has generated a lot of interest and we will run another two sessions in November 2021.

4. Recommendation 4: Audit

- The internal audit scheduled for late 2021 or early 2022 will focus on the CII's recommendations but we expect it will include observations on and recommendations for the FOI caseload as a whole, including the personal case load.
- Recommendation 4 requires us to complete an internal audit. This will necessarily focus on the Department's implementation of the CII recommendations due to the nature of the CII

report but may make general observations on FOI processing by the Department as a whole.

Department's submissions regarding its processing of FOI requests in general

In its response of 3 August 2021, (**Attachment C**), the Department advised that, more broadly, the Department is considering options to facilitate the processing of FOI requests, such as:

- pro-actively publishing a wider range of commonly requested statistics
- business process reforms and administrative release of documents to reduce demand for personal FOI requests
- robotic process automation of request registration so that we can redirect staff time toward processing and decision-making.

In its response of 14 September 2021, the Department made further submissions regarding the general processing of FOI requests as follows: (**Attachment D**)

While our immediate priority continues to be implementation of the recommendations of the CII, the Department has progressed a number of improvements in the personal space which do not relate to CII. These include:

- a successful extension of time trial - guidance is now being developed for officers on when and how to use s15AA extensions;
- the development of dashboards, including daily updates to our on-hand data, which increase management visibility of the caseload;
- increased management focus on priority parts of the caseload, including resources dedicated to resolving our oldest and intractable cases in the personal caseload. In 2020-21, in addition to processing new personal access requests, the Department finalised more cases older than 90 days in 2020-21 than in 2019-20;
- maintenance of an improvements register which includes ideas for changes to the personal caseload; and
- better management of complaints received into the inboxes.

We are also exploring the possibilities of automating registration processes, releasing resources for decision making and expediting redactions. These are longer term projects and subject to resourcing.

General comments

The very high volume of FOI requests received by the Department will mean continuing pressures across the FOI program, including in the personal caseload. However, the Department is committed to continuing to improve its processes for responding to FOI requests, within its allocated resources. To this end, the Department has maintained a stable level of resourcing in FOI, even when managing whole of government priorities such as the humanitarian response in Afghanistan and the establishment of a border measures program.

The impact of recent business process reforms, in response to the CII and independently, has led to a significant improvement in the Department's compliance with statutory timeframes for non-personal requests (up from 37 per cent to 65 per cent) and a reduction in the age of the oldest non-personal request with no on-hand request older than 90 days. This was achieved on the back of a further increase in the total number of non-personal requests in 2020-21; up almost 15% when compared to the previous financial year.

However, to deliver these improvements quickly, the Department has had to phase its reforms and transfer some resources internally, from the personal caseload to the business improvement function and non-personal caseload. To deliver broader process improvements in the personal space will require similar decisions and trade-offs, noting the personal caseload is a much larger program and has particular complexities in relation to identity resolution and integrity.

Discussion

The FOI request was made on 21 December 2018. Pursuant to s 15(5)(b) of the FOI Act, the Department was due to provide a decision to the complainant by 20 January 2019, but did not do so until 23 April 2019.

The Department sought the complainant's agreement to a 30-day extension of time under s 15AA of the FOI Act, but this was declined by the complainant.

The Department did not seek extensions of time under either ss 15AB, 15AC or 54D of the FOI Act, and the statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.

Conclusions

The Department did not comply with s 15(5)(b) of the FOI Act when processing FOI request s 22(1)(a)(ii) irrelevant material, in that:

- The Department was required to provide a decision to the complainant by 20 January 2019, but did not do so until 23 April 2019.
- The Department sought the complainant's agreement to a 30-day extension of time under s 15AA of the FOI Act, but the complainant did not agree to provide the extension of time.
- The Department did not seek extensions of time under ss 15AB, 15AC or 54D of the FOI Act, and the statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.
- The statutory timeframe was not affected by a request consultation process under s 24AB(8) or by the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable under s 31 of the FOI Act.

Recommendations

In light of the Department's submissions, pursuant to s 88 of the FOI Act, I make the following formal recommendations to the Department that I believe the Department ought to implement within the timeframes specified below:

Recommendation 1

The Department prepare and implement an operational manual for processing FOI requests for personal information to be approved by the Information Champion by **28 February 2022**. The operational manual is to include, at a minimum, the steps that will be taken to ensure compliance with statutory processing requirements. Consistent with the requirements of the Information Publication Scheme, the operational manual should be made publicly available by the Department on its website.

Recommendation 2

By **28 February 2022**, the Department ascertain the additional resources (human or otherwise) anticipated to be required in order to meet statutory timeframes (taking account of the improvements through implementing recommendation 1) and provide an action plan to meet those requirements.

Recommendation 3

The Department:

- a. undertake and complete training on the operational manual for FOI Section staff and other staff (both decision makers and other staff who assist decision makers) **28 March 2022**
- b. ensure that online training in processing FOI requests for personal information is available to all staff of the Department by **28 March 2022**, and
- c. ensure that new staff joining the FOI Section are trained in relation to the operational manual within 2 weeks of commencing in the FOI Section.

Recommendation 4

By **30 May 2022**, the Department undertake an audit of the processing of FOI requests for personal information to assess whether Recommendations 1, 2 and 3 have been implemented and operationalised and whether those actions have been sufficient to address the issues identified in these complaints. The audit is to be undertaken by either the Department's internal auditors or by an external auditor, as determined by the Department. A copy of the audit report should be provided to the OAIC.

When considering the recommendations made above, the Department should refer to relevant OAIC FOI resources which can be found on the OAIC website.⁶

I request that the Department advise the OAIC of the implementation of each of the recommendations within the timeframes specified.

⁶ See <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/>. The OAIC's FOI Essentials toolkit, may be of particular assistance to the Department.



ATTACHMENT A

Notice on completion under s 86 of the FOI Act ([REDACTED]) s22(1)(a)(ii) - irrelevant material and the Department of Home Affairs

On 16 July 2019, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Department of Home Affairs (the Department) in the performance of its functions, and the exercise of its powers, under the FOI Act.

The complainant is s22(1)(a)(ii) - irrelevant material .

The complainant alleges the Department failed to provide a decision on [REDACTED] FOI request of 5 June 2019 within the statutory timeframes set out in the FOI Act.

The FOI request the subject of this FOI complaint was also the subject of an Information Commissioner review (IC review) ([REDACTED]).¹

This Notice on Completion sets out the issue as identified from the allegation raised by the complainant. The allegation is assessed against the legislative framework and the FOI Guidelines² which agencies and ministers must have regard to. I have considered the complaint and the Department's submissions in response before making conclusions about the allegation.

Background

On 5 June 2019, the complainant made the FOI request to the Department ([REDACTED]). Under s 15(5) of the FOI Act, the Department was required to provide a decision to the complainant by 5 July 2019³.

On 7 June 2019, the Department sought to clarify the scope of the request with the complainant. The complainant objected to the suggested revised scope.

On 6 July 2019, the Department was deemed to have refused access pursuant to s 15AC of the FOI Act.

¹ [REDACTED] finalised on 23 October 2019 under s 54R

² The Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard to in performing a function or exercising a power under the FOI Act.

³ The Department's submissions of 3 June 2021 record the decision due date as 7 July 2021.

On 16 July 2019, the complainant sought IC review of the deemed access refusal decision and lodged an FOI complaint under s 70 of the FOI Act about the Department's non-compliance with the statutory processing period.

On 31 July 2019, the Department provided a substantive decision to the complainant.

On 31 July 2019, the OAIC conducted preliminary inquiries with the Department. On 19 August 2019, the Department provided a response to the preliminary inquiries.

On 23 April 2021, the OAIC commenced an investigation into this complaint.

On 3 June 2021, the Department provided a response to the notice and request for information under s 75 of the FOI Act.

On 3 August 2021 and 14 September 2021, the Department provided further submissions in response to the investigation notice of 23 April 2021.

The key procedural events in this FOI complaint are set out in **Annexure A** to this Notice.

Investigation results

Pursuant to s 87 of the FOI Act, the investigation results set out the matters that I have investigated and my opinion and conclusion on how the Department processed the complainant's FOI request. I have considered all the material provided by the Department and the complainant in this matter.

Issue: Compliance with statutory processing periods

Complainant's allegation

The complainant alleges the Department failed to provide a decision on [REDACTED] FOI request of 5 June 2019 within the statutory timeframes set out in the FOI Act.

Legislative framework

The FOI Act provides a statutory timeframe of 30 days to process an FOI request (s 15(5)).

The period can be extended by up to 30 days with the applicant's agreement (s 15AA), by 30 days if consultation with a third party is undertaken (s 15(6)), and by 30 days if consultation with a foreign entity is undertaken (s 15(8)).

An agency or minister may apply to the Information Commissioner for extension of the statutory timeframe for complex or voluminous requests (s 15AB) or following a deemed access refusal decision (s 15AC).

The FOI Guidelines at [3.139] state:

An agency or minister must, as soon as practicable, and no later than 30 days after receiving a request, take all reasonable steps to enable the applicant to be notified of a decision on the request (s 15(5)(b)). Section 15(5)(b) provides that the 30-day processing period commences on³ See also, FOI Guidelines at [3.125]. 4 the day after the day the agency or minister is taken to have received a request that meets the formal requirements of s 15(2), (2A). An agency should act promptly to assist an applicant whose request does not meet the formal requirements in keeping with its obligations under s 15(3).

Table 1: Extension of time provisions

Reason for extension	Extension period	Determined by	Notification requirement
Third party consultation: consultation with a state, or a person or business concerning personal or business information (s 15(6))	30 days	by default if agency or minister determines ss 26A, 27 or 27A apply	agency or minister must inform applicant of extension as soon as practicable (s 15(6)(b))
Consultation with foreign entity required to determine if 33(a)(iii) or 33(b) exemptions apply (s 15(7),(8))	30 days	by default if agency or minister determines consultation is needed	agency or minister must inform applicant of extension as soon as practicable (s 15(8)(b))
By agreement between applicant and agency or minister (s 15AA)	up to 30 days, as either a single extension or a series of shorter extensions. This may be in addition to an extension for third party consultation	agency or minister but only with written agreement of applicant	agency or minister must give written notice of the extension to the Information Commissioner as soon as practicable (s 15AA(b))
Complex or voluminous request (s 15AB)	30 days or other period	Information Commissioner, upon request from agency or minister	Commissioner must inform applicant and agency or minister of an extension period as soon as practicable where a decision is made to grant the extension (s 15AB(3))
Following a deemed refusal (s 15AC(4))	as determined by the Information Commissioner	Information Commissioner, upon request from agency or minister	no legislative requirement but Commissioner may require agency or minister to notify applicant or third party as a condition of granting the extension (s 15AC(6))

The statutory processing period does not include:

- the time that an agency may take in a request consultation process to decide if a practical refusal exists (s 24AB(8))
- the time elapsing between an applicant being notified that a charge is payable and
 - either the applicant paying the charge (or a deposit on account of the charge) or the
 - agency varying the decision that a charge is payable (s 31).

Deemed access refusal

Section 15AC provides that where a decision on an FOI request has not been provided to the applicant within the statutory processing period, the principal officer of the agency or the minister is deemed to have made a decision refusing access to the documents (s 15AC (3)).

The FOI Guidelines at [3.154] – [3.155] explain:

The consequence of a deemed refusal is that an applicant may apply for IC review (s 54L(2)(a)) In addition, once the time has expired and there is a deemed decision, the agency or minister cannot impose a charge for access...

Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of reasons on the FOI request. This obligation to provide a statement of reasons on the FOI request continues until any IC review of the deemed decision is finalised. ...

Department's submissions to complaint

Response to Preliminary Inquiries dated 19 August 2019

In response to preliminary inquiries dated 19 August 2019, the Department acknowledged a delay in processing the FOI request. The Department advised that the delay was not intentional, and was solely due to the large number of requests received by the Department at that time.

Response to the Notice of investigation under s 75 of the FOI Act

On 3 June 2021, the Department provided its response to the complaint. The Department provided a chronology of the processing of the request and advised that:

- the Department did not seek extensions of time under either ss 15AB, 15AC or 54D of the FOI Act, and the statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act, and
- the Department relied on its preliminary inquiries response.

The Department also provided submissions in relation to the general grounds for delay in processing FOI requests, and the measures it is taking to address those factors (**Attachment B**).

On 3 August 2021⁴ (**Attachment C**) and 14 September 2021⁵ (**Attachment D**),⁶ the Department provided further submissions on the steps that it has undertaken to extend the recommendations made in the Final Report of the CII into the Department's processing of FOI requests for non-personal information, to its processes and procedures for processing FOI requests for personal information. The Department advised that:

1. Recommendation 1: Appoint an Information Champion

- This recommendation is complete, noting the Information Champion's role extends equally to the non-personal and personal caseload.
- Our Information Champion (SES Band 2) is actively engaged with the management and oversight of the personal caseload as well as the non-personal caseload.

2. Recommendation 2: Operational Processes and Procedures

- This recommendation is complete. In line with the scope of the CII, the new Procedural Instruction (PI) is focused on non-personal FOI requests. However, we will shortly begin work on a Procedural Instruction directed at personal FOI requests, noting that the majority of the processes set out in the new PI apply equally to personal FOI requests.
- Recommendations 2 and 3 related to the development of procedural guidance (procedural instructions) and training in applying those instructions in the non-personal caseload. The Department has finalised the procedural instruction for the non-personal caseload. The Department is now developing procedural instructions for personal access and amendment requests. This is an active project which will be completed by Q3 – an earlier completion date is not possible while maintaining a focus on reducing backlogs across the caseload.

3. Recommendation 3: Training

- This recommendation is well advanced. In line with the scope of the CII, the new eLearning package for FOI decision-makers is focused on non-personal FOI requests. In addition, we will train Departmental staff involved in the processing of personal requests in the Procedural Instruction for personal FOI requests.

⁴ Email from the Department of Home Affairs to the OAIC on 3 August 2021

⁵ Email from the Department of Home Affairs to the OAIC on 14 September 2021

⁶ The Department provided its response of 14 September 2021 (Attachment D) in response to my request of 3 September 2021 for further information on the steps it has taken or is taking to extend the CII recommendations to its processing of FOI requests for personal information.

- earlier this month, the Department launched its new FOI eLearning package for all staff and decision-makers. Module one includes an FOI overview that is relevant to both the personal and non-personal space. We are actively tracking the take up of this package across the Department.
- AGS training (decision maker and exemptions) is available for all staff who require a more in-depth understanding of FOI requirements and processes. The AGS module contains information relevant to decision making, regardless of caseload. Our September session has generated a lot of interest and we will run another two sessions in November 2021.

4. Recommendation 4: Audit

- The internal audit scheduled for late 2021 or early 2022 will focus on the CII's recommendations but we expect it will include observations on and recommendations for the FOI caseload as a whole, including the personal case load.
- Recommendation 4 requires us to complete an internal audit. This will necessarily focus on the Department's implementation of the CII recommendations due to the nature of the CII report but may make general observations on FOI processing by the Department as a whole.

Department's submissions regarding its processing of FOI requests in general

In its response of 3 August 2021, (**Attachment C**), the Department advised that, more broadly, the Department is considering options to facilitate the processing of FOI requests, such as:

- pro-actively publishing a wider range of commonly requested statistics
- business process reforms and administrative release of documents to reduce demand for personal FOI requests
- robotic process automation of request registration so that we can redirect staff time toward processing and decision-making.

In its response of 14 September 2021, the Department made further submissions regarding the general processing of FOI requests as follows: (**Attachment D**)

While our immediate priority continues to be implementation of the recommendations of the CII, the Department has progressed a number of improvements in the personal space which do not relate to CII. These include:

- a successful extension of time trial - guidance is now being developed for officers on when and how to use s15AA extensions;
- the development of dashboards, including daily updates to our on-hand data, which increase management visibility of the caseload;
- increased management focus on priority parts of the caseload, including resources dedicated to resolving our oldest and intractable cases in the personal caseload. In 2020-

21, in addition to processing new personal access requests, the Department finalised more cases older than 90 days in 2020-21 than in 2019-20;

- maintenance of an improvements register which includes ideas for changes to the personal caseload; and
- better management of complaints received into the inboxes.

We are also exploring the possibilities of automating registration processes, releasing resources for decision making and expediting redactions. These are longer term projects and subject to resourcing.

General comments

The very high volume of FOI requests received by the Department will mean continuing pressures across the FOI program, including in the personal caseload. However, the Department is committed to continuing to improve its processes for responding to FOI requests, within its allocated resources. To this end, the Department has maintained a stable level of resourcing in FOI, even when managing whole of government priorities such as the humanitarian response in Afghanistan and the establishment of a border measures program.

The impact of recent business process reforms, in response to the CII and independently, has led to a significant improvement in the Department's compliance with statutory timeframes for non-personal requests (up from 37 per cent to 65 per cent) and a reduction in the age of the oldest non-personal request with no on-hand request older than 90 days. This was achieved on the back of a further increase in the total number of non-personal requests in 2020-21; up almost 15% when compared to the previous financial year.

However, to deliver these improvements quickly, the Department has had to phase its reforms and transfer some resources internally, from the personal caseload to the business improvement function and non-personal caseload. To deliver broader process improvements in the personal space will require similar decisions and trade-offs, noting the personal caseload is a much larger program and has particular complexities in relation to identity resolution and integrity.

Discussion

The FOI request was made on 5 June 2019. Pursuant to s 15(5)(b) of the FOI Act, the Department was due to provide a decision to the complainant by 5 July 2019, but did not do so until 31 July 2019.

It was open to the Department to seek extensions of time under either ss 15AA, 15AB, 15AC or 54D of the FOI Act, but it did not do so. The statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.

Conclusions

The Department did not comply with s 15(5)(b) of the FOI Act when processing FOI request s 22(1)(a)(ii) irrelevant material in that:

- The Department was required to provide a decision to the complainant by 5 July 2019 but did not do so until 31 July 2019.
- The Department did not seek extensions of time under ss 15AA, 15AB, 15AC or 54D of the FOI Act, and the statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.
- The statutory timeframe was not affected by a request consultation process under s 24AB (8) or by the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable under s 31 of the FOI Act.

Recommendations

In light of the Department's submissions, pursuant to s 88 of the FOI Act, I make the following formal recommendations to the Department that I believe the Department ought to implement within the timeframes specified below:

Recommendation 1

The Department prepare and implement an operational manual for processing FOI requests for personal information to be approved by the Information Champion by **28 February 2022**. The operational manual is to include, at a minimum, the steps that will be taken to ensure compliance with statutory processing requirements. Consistent with the requirements of the Information Publication Scheme, the operational manual should be made publicly available by the Department on its website.

Recommendation 2

By **28 February 2022**, the Department ascertain the additional resources (human or otherwise) anticipated to be required in order to meet statutory timeframes (taking account of the improvements through implementing recommendation 1) and provide an action plan to meet those requirements.

Recommendation 3

The Department:

- a. undertake and complete training on the operational manual for FOI Section staff and other staff (both decision makers and other staff who assist decision makers)
28 March 2022

- b. ensure that online training in processing FOI requests for personal information is available to all staff of the Department by **28 March 2022**, and
- c. ensure that new staff joining the FOI Section are trained in relation to the operational manual within 2 weeks of commencing in the FOI Section.

Recommendation 4

By **30 May 2022**, the Department undertake an audit of the processing of FOI requests for personal information to assess whether Recommendations 1, 2 and 3 have been implemented and operationalised and whether those actions have been sufficient to address the issues identified in these complaints. The audit is to be undertaken by either the Department's internal auditors or by an external auditor, as determined by the Department. A copy of the audit report should be provided to the Oaic.

When considering the recommendations made above, the Department should refer to relevant Oaic FOI resources which can be found on the Oaic website.⁷

I request that the Department advise the Oaic of the implementation of each of the recommendations within the timeframes specified.

⁷ See <https://www.oiac.gov.au/freedom-of-information/guidance-and-advice/>. The Oaic's FOI Essentials toolkit, may be of particular assistance to the Department.



ATTACHMENT A

Notice on completion under s 86 of the FOI Act (s 22(1)(a)(i) - irrelevant material) and the Department of Home Affairs (s 22(1)(a)(ii) - irrelevant material)

On 29 July 2019, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Department of Home Affairs (the Department) in the performance of its functions, and the exercise of its powers, under the FOI Act.

The complainant is (s 22(1)(a)(ii) - irrelevant material).

The complainant alleges the Department did not comply with the statutory timeframes set out in the FOI Act when processing (s 22(1)(a)(ii) - irrelevant material) FOI request of 21 November 2018.

The FOI request the subject of this FOI complaint was also the subject of an Information Commissioner review (IC review) (s 22(1)(a)(i) - irrelevant material).¹

This Notice on Completion sets out the issue as identified from the allegation raised by the complainant. The allegation is assessed against the legislative framework and the FOI Guidelines² which agencies and ministers must have regard to. I have considered the complaint and the Department's submissions in response before making conclusions about the allegation.

Background

On 21 November 2018, the complainant lodged the FOI request with the Department (s 22(1)(a)(ii) - irrelevant material). Under s 15(5) of the FOI Act, the Department was required to provide a decision to the complainant by 21 December 2018.

On 21 December 2018, the Department was deemed to have refused access pursuant to s 15AC of the FOI Act.

On 4 January 2019, the Department released tranche 1 of the documents.

On 6 March 2019, the Department released tranche 2 of the documents.

¹ (s 22(1)(a)(ii) - irrelevant material).

² The Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard to in performing a function or exercising a power under the FOI Act.

On 12 April 2019, the Department released tranche 3 of the documents.

On 29 July 2019, the complainant sought IC review of the deemed access refusal decision and lodged a complaint under s 70 of the FOI Act about the Department's non-compliance with the statutory processing period.

On 30 July 2019, the Department provided the final tranche of the substantive decision to the complainant.

On 22 August 2019, the OAIC conducted preliminary inquiries with the Department. On 7 November 2019, the Department provided responses to the preliminary inquiries.

On 23 April 2021, the OAIC commenced an investigation into this complaint. On 3 June 2021, the Department provided a response to the notice and request for information under s 75 of the FOI Act.

On 3 August 2021 and 14 September 2021, the Department provided further submissions in response to the investigation notice of 23 April 2021.

The key procedural events in this FOI complaint are set out in **Annexure A** to this Notice.

Investigation results

Pursuant to s 87 of the FOI Act, the investigation conclusions set out my opinion and conclusion on how the Department processed the complainant's FOI request. I have considered all the material provided by the Department and the complainant in this matter.

Issue: Compliance with statutory processing periods

Complainant's allegation

The complainant alleges that the Department did not comply with the statutory timeframes set out in the FOI Act when processing [REDACTED] FOI request of 21 November 2018.

Legislative framework

The FOI Act provides a statutory timeframe of 30 days to process an FOI request (s 15(5)).

The period can be extended by up to 30 days with the applicant's agreement (s 15AA), by 30 days if consultation with a third party is undertaken (s 15(6)), and by 30 days if consultation with a foreign entity is undertaken (s 15(8)).

An agency or minister may apply to the Information Commissioner for extension of the statutory timeframe for complex or voluminous requests (s 15AB) or following a deemed access refusal decision (s 15AC).

The FOI Guidelines at [3.139] state:

An agency or minister must, as soon as practicable, and no later than 30 days after receiving a request, take all reasonable steps to enable the applicant to be notified of a decision on the request (s 15(5)(b)). Section 15(5)(b) provides that the 30-day processing period commences on the day after the day the agency or minister is taken to have received a request that meets the formal requirements of s 15(2), (2A). An agency should act promptly to assist an applicant whose request does not meet the formal requirements in keeping with its obligations under s 15(3).

Table 1: Extension of time provisions

Reason for extension	Extension period	Determined by	Notification requirement
Third party consultation: consultation with a state, or a person or business concerning personal or business information (s 15(6))	30 days	by default if agency or minister determines ss 26A, 27 or 27A apply	agency or minister must inform applicant of extension as soon as practicable (s 15(6)(b))
Consultation with foreign entity required to determine if 33(a)(iii) or 33(b) exemptions apply (s 15(7),(8))	30 days	by default if agency or minister determines consultation is needed	agency or minister must inform applicant of extension as soon as practicable (s 15(8)(b))
By agreement between applicant and agency or minister (s 15AA)	up to 30 days, as either a single extension or a series of shorter extensions. This may be in addition to an extension for third party consultation	agency or minister but only with written agreement of applicant	agency or minister must give written notice of the extension to the Information Commissioner as soon as practicable (s 15AA(b))
Complex or voluminous request (s 15AB)	30 days or other period	Information Commissioner, upon request from agency or minister	Commissioner must inform applicant and agency or minister of an extension period as soon as practicable where a decision is made to grant the extension (s 15AB(3))
Following a deemed refusal (s 15AC(4))	as determined by the Information Commissioner	Information Commissioner, upon request from agency or minister	no legislative requirement but Commissioner may require agency or minister to notify applicant or third party as a condition of granting the extension (s 15AC(6))

The statutory processing period does not include:

- the time that an agency may take in a request consultation process to decide if a practical refusal exists (s 24AB (8))
- the time elapsing between an applicant being notified that a charge is payable and
- either the applicant paying the charge (or a deposit on account of the charge) or the

- agency varying the decision that a charge is payable (s 31).

Deemed access refusal

Section 15AC provides that where a decision on an FOI request has not been provided to the applicant within the statutory processing period, the principal officer of the agency or the minister is deemed to have made a decision refusing access to the documents (s 15AC (3)).

The FOI Guidelines at [3.154] – [3.155] explain:

The consequence of a deemed refusal is that an applicant may apply for IC review (s 54L(2)(a)) In addition, once the time has expired and there is a deemed decision, the agency or minister cannot impose a charge for access...

Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of reasons on the FOI request. This obligation to provide a statement of reasons on the FOI request continues until any IC review of the deemed decision is finalised. ...

Department's submissions to complaint

Response to Preliminary Inquiries dated 7 November 2019

On 7 November 2019, the Department provided submissions to the OAIC in response to preliminary inquiries. The Department acknowledged a delay in the processing of the request and advised that:

- The delay in processing was due to staff leave. The decision maker did not gain access to the documents until early January 2019.
- The FOI Section experienced an increase of volume of requests and a decrease in available staff (including due to the Christmas/New Year period) during this time. These factors resulted in the request being allocated to the FOI Reviews team for decision, despite its status as a primary decision case.
- During the assessment and consultation period as part of the decision-making processes for stages 3 and 4 of the request, the team was also responding to a significant internal and external review caseload and other FOI responsibilities (including coordinating FOI training sessions for the Department).
- The Department's decision to release the documents as a series of staged releases resulted from the volume of the request (700 pages in total) and the complexity of the documents, particularly those assessed in Stage 4 of the decision. The decision to release documents in this manner also reflects the Department's commitment to ensure the complainant was given access to as many documents as possible as soon as they were available for release, rather than the more delayed response that would have resulted from releasing all of the documents in a single decision.

- The documents assessed in stage 4 of the decision – the stage of the decision which occupied the most time – contained sensitive information about the Department’s engagement with officials of other countries, details of negotiations between the governments of Australia and the other countries and information about the development and consideration of relevant policies. The documents also contained the names and contact details of a large number of officers from a range of Australian and international agencies. Each name was researched to determine whether it should be redacted on the basis of an exemption or of irrelevance to the scope of the request.
- The complexity of the documents assessed in Stage 4 also meant that these documents required assessment and marking up for with redactions twice: firstly to provide a copy to the two officers with whom the decision maker consulted, and secondly, to incorporate the changes proposed by the two officers and prepare the documents for decision.
- The Department acknowledges the comments of the complainant that it should have communicated more effectively with [REDACTED] about the delay. The Department notes, however, that it responded to all communications from the complainant about the delay, including by issuing further stages of the decision to [REDACTED].

Response to the Notice of investigation under s 75 of the FOI Act

On 3 June 2021, the Department provided its response to the complaint. The Department provided a chronology of the processing of the request and advised that:

- the Department did not seek extensions of time under either ss 15AB, 15AC or 54D of the FOI Act, and the statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act, and
- the Department relied on its submissions to preliminary inquiries provided on 7 November 2019.

The Department also provided submissions in relation to the general grounds for delay in processing FOI requests, and the measures it is taking to address those factors **Attachment B**).

On 3 August 2021³ (**Attachment C**) and 14 September 2021⁴ (**Attachment D**),⁵ the Department provided further submissions on the steps that it has undertaken to extend the recommendations made in the Final Report of the CII into the Department’s processing of FOI

³ Email from the Department of Home Affairs to the OAIC on 3 August 2021

⁴ Email from the Department of Home Affairs to the OAIC on 14 September 2021

⁵ The Department provided its response of 14 September 2021 (Attachment D) in response to my request of 3 September 2021 for further information on the steps it has taken or is taking to extend the CII recommendations to its processing of FOI requests for personal information.

requests for non-personal information, to its processes and procedures for processing FOI requests for personal information. The Department advised that:

1. Recommendation 1: Appoint an Information Champion

- This recommendation is complete, noting the Information Champion's role extends equally to the non-personal and personal caseload.
- Our Information Champion (SES Band 2) is actively engaged with the management and oversight of the personal caseload as well as the non-personal caseload.

2. Recommendation 2: Operational Processes and Procedures

- This recommendation is complete. In line with the scope of the CII, the new Procedural Instruction (PI) is focused on non-personal FOI requests. However, we will shortly begin work on a Procedural Instruction directed at personal FOI requests, noting that the majority of the processes set out in the new PI apply equally to personal FOI requests.
- Recommendations 2 and 3 related to the development of procedural guidance (procedural instructions) and training in applying those instructions in the non-personal caseload. The Department has finalised the procedural instruction for the non-personal caseload. The Department is now developing procedural instructions for personal access and amendment requests. This is an active project which will be completed by Q3 – an earlier completion date is not possible while maintaining a focus on reducing backlogs across the caseload.

3. Recommendation 3: Training

- This recommendation is well advanced. In line with the scope of the CII, the new eLearning package for FOI decision-makers is focused on non-personal FOI requests. In addition, we will train Departmental staff involved in the processing of personal requests in the Procedural Instruction for personal FOI requests.
- earlier this month, the Department launched its new FOI eLearning package for all staff and decision-makers. Module one includes an FOI overview that is relevant to both the personal and non-personal space. We are actively tracking the take up of this package across the Department.
- AGS training (decision maker and exemptions) is available for all staff who require a more in-depth understanding of FOI requirements and processes. The AGS module contains information relevant to decision making, regardless of caseload. Our September session has generated a lot of interest and we will run another two sessions in November 2021.

4. Recommendation 4: Audit

- The internal audit scheduled for late 2021 or early 2022 will focus on the CII's recommendations but we expect it will include observations on and recommendations for the FOI caseload as a whole, including the personal case load.

- Recommendation 4 requires us to complete an internal audit. This will necessarily focus on the Department's implementation of the CII recommendations due to the nature of the CII report but may make general observations on FOI processing by the Department as a whole.

Department's submissions regarding its processing of FOI requests in general

In its response of 3 August 2021, (**Attachment C**), the Department advised that, more broadly, the Department is considering options to facilitate the processing of FOI requests, such as:

- pro-actively publishing a wider range of commonly requested statistics
- business process reforms and administrative release of documents to reduce demand for personal FOI requests
- robotic process automation of request registration so that we can redirect staff time toward processing and decision-making.

In its response of 14 September 2021, the Department made further submissions regarding the general processing of FOI requests as follows: (**Attachment D**)

While our immediate priority continues to be implementation of the recommendations of the CII, the Department has progressed a number of improvements in the personal space which do not relate to CII. These include:

- a successful extension of time trial - guidance is now being developed for officers on when and how to use s15AA extensions;
- the development of dashboards, including daily updates to our on-hand data, which increase management visibility of the caseload;
- increased management focus on priority parts of the caseload, including resources dedicated to resolving our oldest and intractable cases in the personal caseload. In 2020-21, in addition to processing new personal access requests, the Department finalised more cases older than 90 days in 2020-21 than in 2019-20;
- maintenance of an improvements register which includes ideas for changes to the personal caseload; and
- better management of complaints received into the inboxes.

We are also exploring the possibilities of automating registration processes, releasing resources for decision making and expediting redactions. These are longer term projects and subject to resourcing.

General comments

The very high volume of FOI requests received by the Department will mean continuing pressures across the FOI program, including in the personal caseload. However, the Department is committed to continuing to improve its processes for responding to FOI requests, within its allocated resources. To this end, the Department has maintained a stable level of resourcing in FOI, even when managing whole of government priorities such as the humanitarian response in Afghanistan and the establishment of a border measures program.

The impact of recent business process reforms, in response to the CII and independently, has led to a significant improvement in the Department's compliance with statutory timeframes for non-personal requests (up from 37 per cent to 65 per cent) and a reduction in the age of the oldest non-personal request with no on-hand request older than 90 days. This was achieved on the back of a further increase in the total number of non-personal requests in 2020-21; up almost 15% when compared to the previous financial year.

However, to deliver these improvements quickly, the Department has had to phase its reforms and transfer some resources internally, from the personal caseload to the business improvement function and non-personal caseload. To deliver broader process improvements in the personal space will require similar decisions and trade-offs, noting the personal caseload is a much larger program and has particular complexities in relation to identity resolution and integrity.

Discussion

The FOI request was made on 21 November 2018. Pursuant to s 15(5)(b) of the FOI Act, the Department was due to provide a decision to the complainant by 21 December 2018. Instead, the Department provided its decision in four tranches between 4 January and 30 July 2019.

The Department submits the delay was due to it being short staffed and experiencing a heavy workload. It released the decision in tranches to provide the complainant with documents as soon as they became available.

It was open to the Department to seek extensions of time under either ss 15AA, 15AB, 15AC or 54D of the FOI Act, but it did not do so. The statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.

Conclusions

The Department did not comply with s 15(5)(b) of the FOI Act when processing FOI request FA 18/11/01139, in that:

- The Department was required to provide a decision to the complainant by 21 December 2018, but did not do so until the first tranche release on 4 January 2019, and thereafter through to the final tranche release on 30 July 2019.
- The Department did not seek extensions of time under ss 15AB, 15AC or 54D of the FOI Act, and the statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.
- The statutory timeframe was not affected by a request consultation process under s 24AB (8) or by the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable under s 31 of the FOI Act.

Recommendations

In light of the Department's submissions, pursuant to s 88 of the FOI Act, I make the following formal recommendations to the Department that I believe the Department ought to implement within the timeframes specified below:

Recommendation 1

The Department prepare and implement an operational manual for processing FOI requests for personal information to be approved by the Information Champion by **28 February 2022**. The operational manual is to include, at a minimum, the steps that will be taken to ensure compliance with statutory processing requirements. Consistent with the requirements of the Information Publication Scheme, the operational manual should be made publicly available by the Department on its website.

Recommendation 2

By **28 February 2022**, the Department ascertain the additional resources (human or otherwise) anticipated to be required in order to meet statutory timeframes (taking account of the improvements through implementing recommendation 1) and provide an action plan to meet those requirements.

Recommendation 3

The Department:

- a. undertake and complete training on the operational manual for FOI Section staff and other staff (both decision makers and other staff who assist decision makers) **28 March 2022**
- b. ensure that online training in processing FOI requests for personal information is available to all staff of the Department by **28 March 2022**, and
- c. ensure that new staff joining the FOI Section are trained in relation to the operational manual within 2 weeks of commencing in the FOI Section.

Recommendation 4

By **30 May 2022**, the Department undertake an audit of the processing of FOI requests for personal information to assess whether Recommendations 1, 2 and 3 have been implemented and operationalised and whether those actions have been sufficient to address the issues identified in these complaints. The audit is to be undertaken by either the Department's internal auditors or by an external auditor, as determined by the Department. A copy of the audit report should be provided to the OAIIC.

When considering the recommendations made above, the Department should refer to relevant OAIC FOI resources which can be found on the OAIC website.⁶

I request that the Department advise the OAIC of the implementation of each of the recommendations within the timeframes specified.

⁶ See <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/>. The OAIC's FOI Essentials toolkit, may be of particular assistance to the Department.



Australian Government
Office of the Australian Information Commissioner

Notice on completion under s 86 of the FOI Act ([REDACTED]) – [REDACTED]
[REDACTED] and Department of Defence

On 22 August 2019, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Department of Defence (the Department) in its performance of its functions and exercise of its powers under the FOI Act.

The FOI complainant is [REDACTED].

The complainant raised allegations relating to the Department's processes for handling requests for access to documents under the FOI Act, in particular regarding the Department's consultation process during the processing of [REDACTED] FOI request [REDACTED].

s 22(1)(a)(ii) irrelevant material

In reaching my conclusions in this investigation, I have relied upon the submissions provided by the Department and the complainant.²

This notice on completion sets out the relevant:

- background to the FOI Complaint
- issues and legislative framework
- submissions from the parties
- conclusions and recommendations.

Background

A detailed background of the processing of FOI request [REDACTED] can be found at **Appendix A**.

Investigation conclusions

Pursuant to s 87 of the FOI Act, the investigation conclusions will set out my opinions and conclusions about the matters raised in this complaint.

¹ [REDACTED]

² [REDACTED]

I have considered all the material put forward by the Department and the complainant in this matter.

Issue: The Department's consultation process during the processing of [REDACTED]

Allegation

The complainant alleges that the Department did not consult with [REDACTED] on material which fell within the scope of s 22(1)(a)(ii) irrelevant material which contained [REDACTED] personal information.

Legislative framework

Section 27A provides for consultation with third parties where the documents contain personal information and the third party may reasonably object to the release of the information:

(1) This section applies if:

- (a) a request is made to an agency or Minister for access to a document containing personal information about a person (including a person who has died); and
- (b) it appears to the agency or Minister that the person or the person's legal personal representative (the **person concerned**) might reasonably wish to make a contention (the **exemption contention**) that:
 - (i) the document is conditionally exempt under section 47F; and
 - (ii) access to the document would, on balance, be contrary to the public interest for the purposes of subsection 11A(5).

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

(2) In determining, for the purposes of paragraph (1)(b), whether the person concerned might reasonably wish to make an exemption contention because of personal information in a document, the agency or Minister must have regard to the following matters:

- (a) the extent to which the information is well known;
- (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the information;
- (c) the availability of the information from publicly accessible sources;
- (d) any other matters that the agency or Minister considers relevant.

Opportunity to make submissions

(3) The agency or Minister must not decide to give the applicant access to the document unless:

(a) the person concerned is given a reasonable opportunity to make submissions in support of the exemption contention; and

(b) the agency or the Minister has regard to any submissions so made.

(4) However, subsection (3) only applies if it is reasonably practicable for the agency or Minister to give the person concerned a reasonable opportunity to make submissions in support of the exemption contention, having regard to all the circumstances (including the application of subsections 15(5) and (6) (time limits for processing requests)).

The FOI Guidelines, issued under s 93A which require Australian Government ministers and agencies to have regard to, explain that the FOI Act also specifically recognises the right of third parties to be consulted about release of documents that affect their interests in certain circumstances.³

The FOI Guidelines also explain:

The consultation requirements in relation to documents that are business documents (s 27) or documents affecting personal privacy (s 27A) only require an agency or minister to undertake consultations if it is reasonably practicable to give that person a reasonable opportunity to make submissions in support of the exemption contention (ss 27(5) and 27A(4)). In determining whether it would be reasonably practicable to consult, the agency or minister should have regard to all circumstances, including the time limits for processing the request.⁴

There must be some rational basis which the agency or Minister can discern, based on the face of the document or from anything else actually known to the decision-maker, indicating that disclosure of the document would, or could be expected to, unreasonably affect the person adversely in relation to his or her personal information, lawful business or professional affairs. The mere appearance of a person's name in the document, in the absence of anything more, may not be sufficient for it to be apparent that a person might reasonably wish to make an exemption contention.⁵

The FOI Guidelines further explain:

Where a document includes personal information relating to a person who is not the applicant, an agency or minister should give that individual (the third party) a reasonable opportunity to make a submission that the document should be exempt from disclosure before making a decision to give access (s 27A). If the third party is deceased, their legal representative should be given this opportunity.

Such consultation should occur where:

(a) it is reasonably practicable. This will depend on all the circumstances including the time limits for processing the request (s 27A(4)). For example, it may not be reasonably practicable if the agency cannot locate the third party in a timely and effective way.

³ FOI Guidelines [3.20].

⁴ FOI Guidelines [3.76] (footnotes omitted).

⁵ FOI Guidelines [3.77] (footnotes omitted).

(b) it appears to the agency or minister that the third party might reasonably wish to make a submission that the document should be exempt from disclosure having regard to:

- the extent to which the information is well known
- whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the information
- whether the information is publicly available, and
- any other relevant matters (s 27A(2)).

Agencies and ministers should generally start from the position that a third party might reasonably wish to make a submission. This is because the third party may bring to the agency or minister's attention sensitivities that may not have been otherwise apparent.⁶

Department's submissions

During the course of this investigation the Department advised that it wished to rely on submissions made **s 22(1)(a)(ii) irrelevant material**, dated 30 January 2018 and 20 June 2018.

The Department's submissions **s 22(1)(a)(ii) irrelevant material** essentially asserted that, at the time of assessing the documents that fell within the scope of the request, the decision maker considered whether the complainant would reasonably wish to make an objection:

...

s 22(1)(a)(ii) irrelevant material

In relation to the serials that the complainant was not consulted on, the Department submitted:

s 22(1)(a)(ii) irrelevant material

⁶ *FOI Guidelines* [6.161 – 6.163] (foot notes omitted).

⁷ Department's submissions dated 20/6/2018.

s 22(1)(a)(ii) irrelevant material

Complainant's submissions

During the course of the privacy complaint and this FOI investigation, the complainant maintained that the Department did not consult with [redacted] on documents that contained [redacted] personal information.

s 22(1)(a)(ii) irrelevant material

The complainant also submits:

s 22(1)(a)(ii) irrelevant material

The complainant further submits that after consultation the decision maker took [redacted] objections into account when refusing access to particular material and provided submissions on the effect the disclosure:

s 22(1)(a)(ii) irrelevant material

⁸ Department's submissions dated 20/6/2018.

s 22(1)(a)(ii) irrelevant material

Discussions between the FOI complainant and the FOI decision maker

During the course of this investigation the complainant provided contemporaneous notes which the complainant asserts recorded discussions with the FOI contact officer and decision maker of [s22(1)(a)(ii) - irrelevant material]. The complainant submits that these conversations occurred on 21 September 2016 and 10 January 2017. The complainant's submissions essentially asserted that:

- in a diary entry dated 10 January 2017, the complainant notes that [s22(1)(a)(ii) - irrelevant material] recalled the decision maker had previously advised the complainant that the process had become 'messy'
- there had been 'pressure' put on the decision maker by the [s22(1)(a)(ii) - irrelevant material] during the processing of [s22(1)(a)(ii) - irrelevant material] and
- due process was not followed.

The complainant's assertions and notes were provided to the Department. The Department advised that the decision maker's recollection of events differed to that of the complainants. In particular, the decision maker did not recall advising the complainant that the request had become 'messy'. The Department submits:

s 22(1)(a)(ii) irrelevant material

In relation to whether due process was followed during the processing of [s22(1)(a)(ii) - irrelevant material], the Department submits:

[The decision maker] strongly disagrees with this assertion. By the time of this FOI Request, [the decision maker] had managed a significant number of [s22(1)(a)(ii) - irrelevant material] FOI Requests and [s22(1)(a)(ii) - irrelevant material] believes [s22(1)(a)(ii) - irrelevant material] was proficient and diligent in managing the requests.

Consultation process during the processing of [s22(1)(a)(ii) - irrelevant material]

During the processing of [s22(1)(a)(ii) - irrelevant material] the decision maker contacted the complainant and advised:

s 22(1)(a)(ii) irrelevant material

The Department's consultation notice dated 17 February 2016 stated:

...

The decision maker has identified the enclosed documents as relating to the request. I am contacting you because the decision maker considers that the documents contain personal information about you and that you may object to their release.

s22(1)(a)(ii) - irrelevant material

The areas in the attached document that are covered by a box represent material the decision maker does not intend to release to the applicant, or over which you are not being consulted (such as other people's information or information irrelevant to the request).

Under section 27A of the FOI Act you are only invited to comment on the release of your personal information, which means information that could be used to identify you and says something about you. Any information in the attachment that does not relate to you has been left in for context only. Defence will consult with other parties whose personal information appears in the documents where appropriate.

So that the department can give full consideration to this request, I seek your comments on whether you consider that disclosure of any of the enclosed document would involve an unreasonable disclosure of your personal information and would be contrary to the public interest. If you believe that the decision maker should consider the deletion of more of your personal information, you are invited to forward a copy of the documents in your preferred form. Don't forget to provide your reasons, as this will assist the decision maker in deciding whether to remove the material. It should be noted that merely stating that the material is your personal information would not be sufficient in convincing the decision maker to remove the material.

Should the decision maker decide not to accept your objections, in full or in part, you will be provided with your rights for review of the decision. Please note that no documents will be disclosed to the applicant, until your such time that you either exhaust your review rights, or it becomes apparent that you do not propose to exercise your right to seek review of the decision.¹⁰

⁹ Email from decision maker to complainant dated 29 January 2016 at 9:52am contained in complainant's submissions to the OAIC of 12 September 2019.

¹⁰ See Appendix B.

The consultation notice also included a 'FOI Factsheet – consultation under section 27A (personal information) of the FOI Act.'¹¹ Attached to the consultation notice was a copy of documents 7 and 9.

Discussion

As discussed above, s 27A of the FOI Act provides for consultation with third parties where the documents contain personal information and the third party may reasonably object to the release of the information.

The Department's 'Defence ADM – Manual – Guidance for FOI Decision Maker Guide – June 2014'¹² provides:

PERSONAL INFORMATION

6.66 Where a document contains personal information about a person (including a deceased person), the accredited decision maker must consult the person (or, if the person is deceased, the legal representative of that person) if:

- it is reasonably practicable to do so;
- it appears that the person (or the representative) might reasonably wish to contend that the document is conditionally exempt from disclosure under section 47F (personal privacy); and
- it appears that the person (or the representative) might reasonably wish to contend that access to the document would, on balance, be contrary to the public interest for the purpose of section 11A(5).

6.67 Although section 27A enables decision makers to exercise some discretion as to whether they consult the person or their representative, it is strongly preferable that this be done, except in the clearest of cases (where it is not possible to consult).

I understand that the Department relies on the reference to the Guidelines¹³ that unless special circumstances exist it would generally not be unreasonable to provide access to public servant's information which relate to their usual duties and responsibilities.

However, given that a consultation had taken place with the complainant over two documents, I am satisfied that in these circumstances it would not have been unreasonable for the Department to have consulted at the same time on the further documents.

I have given further weight to the consideration that the complainant raised objections to the material that [REDACTED] was consulted on and it would be reasonable for the decision maker to

¹¹ See Appendix B.

¹² The Department in its submissions of 6 December 2019 advise that the manual was updated in February 2018. The wording of paras [6.66] and [6.67] remain the same.

¹³ *FOI Guidelines* [6.153].

have turned their mind to the likelihood that the complainant may also raise objections to the other information that the complainant was not consulted on.

I note that the Department in its submissions have not provided any explanation as to why the Department, once notified by the complainant that [REDACTED] had objected to parts of the information, did not consider further whether to conduct consultation on the remaining documents.

Conclusions

There is an obligation to consider whether a person might reasonably wish to make a contention that a document is conditionally exempt under s 47F of the FOI Act (s 27A(1)(b)).

The Department's FOI manual at paras [6.66] and [6.67] sets out the procedure for conducting consultations with third parties. The Department did not consult with the complainant where it was 'possible to consult' and 'reasonably practicable' to do so.

There is no information before me which suggests that it would have been unreasonable for the Department to consult with the complainant on all of the document which fell within the scope of the FOI request.

Recommendation on how the Department can improve its processes

The purpose of my recommendation, as set out below, is to conclude the complaint investigation and ensure the Department meets its obligations under the FOI Act, including that the Department's current and future processes and practices are consistent with the objects of the FOI Act.

Pursuant to s 88 of the FOI Act, I have set out the following recommendation, being a formal recommendation to the Department that I believe the Department ought to implement within 4 weeks of this Notice:

1. Issue a statement to staff engaged in processing FOI requests highlighting the Department's obligations under the FOI Act to consider whether a person might reasonably wish to make a contention that a document is conditionally exempt under s 47F of the FOI Act (s 27A(1)(b)). The statement should highlight the importance of following the Department's processes and procedures when processing and making decisions on FOI requests particularly where third party information is contained within documents that fall within the scope an FOI request.



ATTACHMENT A

Notice on completion under s 86 of the FOI Act (s 22(1)(a)(ii) irrelevant material) and the Department of Home Affairs (s 22(1)(a)(ii) - irrelevant material)

On 16 August 2019, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Department of Home Affairs (the Department) in the performance of its functions, and the exercise of its powers, under the FOI Act.

The complainant is s 22(1)(a)(ii) - irrelevant material.

The complainant alleges the Department failed to provide a decision on s 22(1)(a)(ii) FOI request of 17 May 2019¹ within the statutory timeframes set out in the FOI Act.

The FOI request the subject of this FOI complaint was also the subject of an Information Commissioner review (IC review) (s 22(1)(a)(ii) irrelevant material).²

This Notice on Completion sets out the issue as identified from the allegation raised by the complainant. The allegation is assessed against the legislative framework and the FOI Guidelines³ which agencies and ministers must have regard to. I have considered the complaint and the Department's submissions in response before making conclusions about the allegation.

Background

On 16 and 17 May 2019, the complainant made the FOI request to the Department (s 22(1)(a)(ii) irrelevant material). The request made on 17 May 2019 was agreed to by the complainant and the Department to be the correct request.

Under s 15(5) of the FOI Act, the Department was required to provide a decision to the complainant by 16 June 2019.

On 16 July 2019, the Department was deemed to have refused access pursuant to s 15AC of the FOI Act. This followed an extension to the statutory processing period for third party consultation under ss 27AB and 27 of the FOI Act.

On 31 July 2019, the complainant sought IC review of the deemed access refusal decision.

¹ The Department's response to s 75 Notice also notes that a duplicate request was also received.

² s 22(1)(a)(ii) irrelevant material

³ The Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard to in performing a function or exercising a power under the FOI Act.

On 14 August 2019, the complainant lodged a complaint under s 70 of the FOI Act about the Department's non-compliance with the statutory processing period.

On 19 August 2019, the Department provided a substantive decision to the complainant.

On 10 September 2019, the OAIC conducted preliminary inquiries with the Department. On 1 October 2019, the Department provided a response to the preliminary inquiries.

On 23 April 2021, the OAIC commenced an investigation into this complaint. On 3 June 2021, the Department provided a response to the notice and request for information under s 75 of the FOI Act.

On 3 August 2021 and 14 September 2021, the Department provided further submissions in response to the investigation notice of 23 April 2021.

The key procedural events in this FOI complaint are set out in **Annexure A** to this Notice.

Investigation results

Pursuant to s 87 of the FOI Act, the investigation conclusions set out my opinion and conclusion on how the Department processed the complainant's FOI request. I have considered all the material provided by the Department and the complainant in this matter.

Issue: Compliance with statutory processing periods

Complainant's allegation

The complainant alleges the Department failed to provide a decision on [REDACTED] FOI request of 17 May 2019 within the statutory timeframes set out in the FOI Act.⁴

Legislative framework

The FOI Act provides a statutory timeframe of 30 days to process an FOI request (s 15(5)).

The period can be extended by up to 30 days with the applicant's agreement (s 15AA), by 30 days if consultation with a third party is undertaken (s 15(6)), and by 30 days if consultation with a foreign entity is undertaken (s 15(8)).

An agency or minister may apply to the Information Commissioner for extension of the

⁴ The complainant also contested:

- the Department's access refusal decision, and
- whether reasonable steps were taken by the Department to locate documents within the scope of the request.

The complainant subsequently withdrew these allegations as the issues will be addressed in the related IC review application (OAIC ref no [REDACTED]).

statutory timeframe for complex or voluminous requests (s 15AB) or following a deemed access refusal decision (s 15AC).

The FOI Guidelines at [3.139] state:

An agency or minister must, as soon as practicable, and no later than 30 days after receiving a request, take all reasonable steps to enable the applicant to be notified of a decision on the request (s 15(5)(b)). Section 15(5)(b) provides that the 30-day processing period commences on³ See also, FOI Guidelines at [3.125]. 4 the day after the day the agency or minister is taken to have received a request that meets the formal requirements of s 15(2), (2A). An agency should act promptly to assist an applicant whose request does not meet the formal requirements in keeping with its obligations under s 15(3).

Table 1: Extension of time provisions

Reason for extension	Extension period	Determined by	Notification requirement
Third party consultation: consultation with a state, or a person or business concerning personal or business information (s 15(6))	30 days	by default if agency or minister determines ss 26A, 27 or 27A apply	agency or minister must inform applicant of extension as soon as practicable (s 15(6)(b))
Consultation with foreign entity required to determine if 33(a)(iii) or 33(b) exemptions apply (s 15(7),(8))	30 days	by default if agency or minister determines consultation is needed	agency or minister must inform applicant of extension as soon as practicable (s 15(8)(b))
By agreement between applicant and agency or minister (s 15AA)	up to 30 days, as either a single extension or a series of shorter extensions. This may be in addition to an extension for third party consultation	agency or minister but only with written agreement of applicant	agency or minister must give written notice of the extension to the Information Commissioner as soon as practicable (s 15AA(b))
Complex or voluminous request (s 15AB)	30 days or other period	Information Commissioner, upon request from agency or minister	Commissioner must inform applicant and agency or minister of an extension period as soon as practicable where a decision is made to grant the extension (s 15AB(3))
Following a deemed refusal (s 15AC(4))	as determined by the Information Commissioner	Information Commissioner, upon request from agency or minister	no legislative requirement but Commissioner may require agency or minister to notify applicant or third party as a condition of granting the extension (s 15AC(6))

The statutory processing period does not include:

- the time that an agency may take in a request consultation process to decide if a practical refusal exists (s 24AB (8))
- the time elapsing between an applicant being notified that a charge is payable and
- either the applicant paying the charge (or a deposit on account of the charge) or the
- agency varying the decision that a charge is payable (s 31).

Deemed access refusal

Section 15AC provides that where a decision on an FOI request has not been provided to the applicant within the statutory processing period, the principal officer of the agency or the minister is deemed to have made a decision refusing access to the documents (s 15AC (3)).

The FOI Guidelines at [3.154] – [3.155] explain:

The consequence of a deemed refusal is that an applicant may apply for IC review (s 54L(2)(a)) In addition, once the time has expired and there is a deemed decision, the agency or minister cannot impose a charge for access...

Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of reasons on the FOI request. This obligation to provide a statement of reasons on the FOI request continues until any IC review of the deemed decision is finalised. ...

Department's submissions to complaint

Response to Preliminary Inquiries dated 1 October 2019

The Department provided a chronology of the request, and advised that:

- On 12 June 2019, the Department notified the complainant that it was undertaking third party consultations because the document sought contained the personal information of a third party. The complainant was advised that this extended the decision date by 30 days (to 16 July 2019). The Department asked the complainant to provide [REDACTED] consent to the disclosure of [REDACTED] identity as the FOI applicant.
- On 26 June 2019, the Department again asked the complainant to provide [REDACTED] consent to the disclosure of [REDACTED] identity as the FOI applicant. On 27 June 2019, the complainant provided [REDACTED] consent.
- On 19 August 2019, the Department provided its decision to the complainant. The third party objected to the disclosure of the document. On 27 September 2019, the Department provided the document to the complainant upon the expiry of the third party review rights.

Response to the Notice of investigation under s 75 of the FOI Act

On 3 June 2021, the Department provided its response to the complaint. The Department again provided a chronology of the processing of the request and advised that:

- the Department did not seek extensions of time under either ss 15AB, 15AC or 54D of the FOI Act
- the statutory processing period was extended for the purpose of conducting consultations pursuant to ss 15(6) and (7) of the FOI Act, and
- the Department relied on its submissions to preliminary inquiries of 1 October 2019.

The Department also provided submissions in relation to the general grounds for delay in processing FOI requests for personal information, and the measures it is taking to address those factors (**Attachment B**).

On 3 August 2021⁵ (**Attachment C**) and 14 September 2021⁶ (**Attachment D**),⁷ the Department provided further submissions on the steps that it has undertaken to extend the recommendations made in the Final Report of the CII into the Department's processing of FOI requests for non-personal information, to its processes and procedures for processing FOI requests for personal information. The Department advised that:

1. Recommendation 1: Appoint an Information Champion

- This recommendation is complete, noting the Information Champion's role extends equally to the non-personal and personal caseload.
- Our Information Champion (SES Band 2) is actively engaged with the management and oversight of the personal caseload as well as the non-personal caseload.

2. Recommendation 2: Operational Processes and Procedures

- This recommendation is complete. In line with the scope of the CII, the new Procedural Instruction (PI) is focused on non-personal FOI requests. However, we will shortly begin work on a Procedural Instruction directed at personal FOI requests, noting that the majority of the processes set out in the new PI apply equally to personal FOI requests.
- Recommendations 2 and 3 related to the development of procedural guidance (procedural instructions) and training in applying those instructions in the non-personal caseload. The Department has finalised the procedural instruction for the non-personal caseload. The Department is now developing procedural instructions for personal access and amendment requests. This is an active project which will be completed by Q3 – an earlier completion date is not possible while maintaining a focus on reducing backlogs across the caseload.

3. Recommendation 3: Training

- This recommendation is well advanced. In line with the scope of the CII, the new eLearning package for FOI decision-makers is focused on non-personal FOI requests. In addition, we

⁵ Email from the Department of Home Affairs to the OAIC on 3 August 2021

⁶ Email from the Department of Home Affairs to the OAIC on 14 September 2021

⁷ The Department provided its response of 14 September 2021 (Attachment D) in response to my request of 3 September 2021 for further information on the steps it has taken or is taking to extend the CII recommendations to its processing of FOI requests for personal information.

will train Departmental staff involved in the processing of personal requests in the Procedural Instruction for personal FOI requests.

- earlier this month, the Department launched its new FOI eLearning package for all staff and decision-makers. Module one includes an FOI overview that is relevant to both the personal and non-personal space. We are actively tracking the take up of this package across the Department.
- AGS training (decision maker and exemptions) is available for all staff who require a more in-depth understanding of FOI requirements and processes. The AGS module contains information relevant to decision making, regardless of caseload. Our September session has generated a lot of interest and we will run another two sessions in November 2021.

4. Recommendation 4: Audit

- The internal audit scheduled for late 2021 or early 2022 will focus on the CII's recommendations but we expect it will include observations on and recommendations for the FOI caseload as a whole, including the personal case load.
- Recommendation 4 requires us to complete an internal audit. This will necessarily focus on the Department's implementation of the CII recommendations due to the nature of the CII report but may make general observations on FOI processing by the Department as a whole.

Department's submissions regarding its processing of FOI requests in general

In its response of 3 August 2021, (**Attachment C**), the Department advised that, more broadly, the Department is considering options to facilitate the processing of FOI requests, such as:

- pro-actively publishing a wider range of commonly requested statistics
- business process reforms and administrative release of documents to reduce demand for personal FOI requests
- robotic process automation of request registration so that we can redirect staff time toward processing and decision-making.

In its response of 14 September 2021, the Department made further submissions regarding the general processing of FOI requests as follows: (**Attachment D**)

While our immediate priority continues to be implementation of the recommendations of the CII, the Department has progressed a number of improvements in the personal space which do not relate to CII. These include:

- a successful extension of time trial - guidance is now being developed for officers on when and how to use s15AA extensions;
- the development of dashboards, including daily updates to our on-hand data, which increase management visibility of the caseload;
- increased management focus on priority parts of the caseload, including resources dedicated to resolving our oldest and intractable cases in the personal caseload. In 2020-

21, in addition to processing new personal access requests, the Department finalised more cases older than 90 days in 2020-21 than in 2019-20;

- maintenance of an improvements register which includes ideas for changes to the personal caseload; and
- better management of complaints received into the inboxes.

We are also exploring the possibilities of automating registration processes, releasing resources for decision making and expediting redactions. These are longer term projects and subject to resourcing.

General comments

The very high volume of FOI requests received by the Department will mean continuing pressures across the FOI program, including in the personal caseload. However, the Department is committed to continuing to improve its processes for responding to FOI requests, within its allocated resources. To this end, the Department has maintained a stable level of resourcing in FOI, even when managing whole of government priorities such as the humanitarian response in Afghanistan and the establishment of a border measures program.

The impact of recent business process reforms, in response to the CII and independently, has led to a significant improvement in the Department's compliance with statutory timeframes for non-personal requests (up from 37 per cent to 65 per cent) and a reduction in the age of the oldest non-personal request with no on-hand request older than 90 days. This was achieved on the back of a further increase in the total number of non-personal requests in 2020-21; up almost 15% when compared to the previous financial year.

However, to deliver these improvements quickly, the Department has had to phase its reforms and transfer some resources internally, from the personal caseload to the business improvement function and non-personal caseload. To deliver broader process improvements in the personal space will require similar decisions and trade-offs, noting the personal caseload is a much larger program and has particular complexities in relation to identity resolution and integrity.

Discussion

The FOI request was made on 17 May 2019. Pursuant to s 15(5)(b) of the FOI Act, the Department was due to provide a decision to the complainant by 16 June 2019. This date was extended for third party consultation under ss 15(6) and (7) of the FOI Act to 16 July 2019.

The Department provided its decision on 19 August 2019.

It was open to the Department to seek extensions of time under either ss 15AA, 15AB, 15AC or 54D of the FOI Act, but it did not do so.

Conclusions

The Department did not comply with s 15(5)(b) of the FOI Act when processing FOI request FA 19/05/01102, in that:

- Taking into account the extension of time under ss 15(6) and (7) of the FOI Act, the Department was required to provide a decision to the complainant by 16 July 2019 but did not do so until 19 August 2019.
- The Department did not seek extensions of time under ss 15 AA, 15AB, 15AC or 54D of the FOI Act.
- The statutory timeframe was not affected by the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable under s 31 of the FOI Act.

Recommendations

In light of the Department's submissions, pursuant to s 88 of the FOI Act, I make the following formal recommendations to the Department that I believe the Department ought to implement within the timeframes specified below:

Recommendation 1

The Department prepare and implement an operational manual for processing FOI requests for personal information to be approved by the Information Champion by **28 February 2022**. The operational manual is to include, at a minimum, the steps that will be taken to ensure compliance with statutory processing requirements. Consistent with the requirements of the Information Publication Scheme, the operational manual should be made publicly available by the Department on its website.

Recommendation 2

By **28 February 2022**, the Department ascertain the additional resources (human or otherwise) anticipated to be required in order to meet statutory timeframes (taking account of the improvements through implementing recommendation 1) and provide an action plan to meet those requirements.

Recommendation 3

The Department:

- a. undertake and complete training on the operational manual for FOI Section staff and other staff (both decision makers and other staff who assist decision makers) **28 March 2022**
- b. ensure that online training in processing FOI requests for personal information is available to all staff of the Department by **28 March 2022**, and

- c. ensure that new staff joining the FOI Section are trained in relation to the operational manual within 2 weeks of commencing in the FOI Section.

Recommendation 4

By **30 May 2022**, the Department undertake an audit of the processing of FOI requests for personal information to assess whether Recommendations 1, 2 and 3 have been implemented and operationalised and whether those actions have been sufficient to address the issues identified in these complaints. The audit is to be undertaken by either the Department's internal auditors or by an external auditor, as determined by the Department. A copy of the audit report should be provided to the OAIC.

When considering the recommendations made above, the Department should refer to relevant OAIC FOI resources which can be found on the OAIC website.⁸

I request that the Department advise the OAIC of the implementation of each of the recommendations within the timeframes specified.

⁸ See <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/>. The OAIC's FOI Essentials toolkit, may be of particular assistance to the Department.



ATTACHMENT A

Notice on completion under s 86 of the FOI Act (s 22(1)(a)(ii) - irrelevant material) and the Department of Home Affairs (s 22(1)(a)(ii) - irrelevant material)

On 16 October 2019, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Department of Home Affairs (the Department) in the performance of its functions, and the exercise of its powers, under the FOI Act.

The complainant is (s 22(1)(a)(ii) - irrelevant material).

The complainant alleges the Department failed to provide a decision on (s 22(1)(a)(ii) - irrelevant material) FOI request of 9 July 2019 within the statutory timeframes set out in the FOI Act.

The FOI request the subject of this FOI complaint was also the subject of an Information Commissioner review (IC review) (s 22(1)(a)(ii) - irrelevant material).¹

This Notice on Completion sets out the issue as identified from the allegation raised by the complainant. The allegation is assessed against the legislative framework and the FOI Guidelines² which agencies and ministers must have regard to. I have considered the complaint and the Department's submissions in response before making conclusions about the allegation.

Background

On 9 July 2019, the complainant made the FOI request to the Department (s 22(1)(a)(ii) - irrelevant material). Under s 15(5) of the FOI Act, the Department was required to provide a decision to the complainant by 8 August 2019.

On 8 August 2019, the Department was deemed to have refused access pursuant to s 15AC of the FOI Act.

On 27 September 2019, the complainant sought IC review of the deemed access refusal decision.

On 4 October 2019, the decision was provided to the complainant.

¹ (s 22(1)(a)(ii) - irrelevant material) was finalised on 31 October 2019 under s 54R of the FOI Act.

² The Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard to in performing a function or exercising a power under the FOI Act.

On 16 October 2019, the complainant lodged a complaint under s 70 of the FOI Act about the Department's non-compliance with the statutory processing period.

On 14 November 2019, the OAIC conducted preliminary inquiries with the Department. On 5 December 2019, the Department provided a response to the preliminary inquiries.

On 23 April 2021, the OAIC commenced an investigation into this complaint. On 3 June 2021, the Department provided a response to the notice and request for information under s 75 of the FOI Act.

On 3 August 2021 and 14 September 2021, the Department provided further submissions in response to the investigation notice of 23 April 2021.

The key procedural events in this FOI complaint are set out in **Annexure A** to this Notice.

Investigation results

Pursuant to s 87 of the FOI Act, the investigation conclusions set out my opinion and conclusion on how the Department processed the complainant's FOI request. I have considered all the material provided by the Department and the complainant in this matter.

Issue: Compliance with statutory processing periods

Complainant's allegation

The complainant alleges the Department failed to provide a decision on [REDACTED] FOI request of 9 July 2019 within the statutory timeframes set out in the FOI Act.

Legislative framework

The FOI Act provides a statutory timeframe of 30 days to process an FOI request (s 15(5)).

The period can be extended by up to 30 days with the applicant's agreement (s 15AA), by 30 days if consultation with a third party is undertaken (s 15(6)), and by 30 days if consultation with a foreign entity is undertaken (s 15(8)).

An agency or minister may apply to the Information Commissioner for extension of the statutory timeframe for complex or voluminous requests (s 15AB) or following a deemed access refusal decision (s 15AC).

The FOI Guidelines at [3.139] state:

An agency or minister must, as soon as practicable, and no later than 30 days after receiving a request, take all reasonable steps to enable the applicant to be notified of a decision on the request (s 15(5)(b)). Section 15(5)(b) provides that the 30-day processing period commences on 3 See also, FOI Guidelines at [3.125]. 4 the day after the day the agency or minister is taken

to have received a request that meets the formal requirements of s 15(2), (2A). An agency should act promptly to assist an applicant whose request does not meet the formal requirements in keeping with its obligations under s 15(3).

Table 1: Extension of time provisions

Reason for extension	Extension period	Determined by	Notification requirement
Third party consultation: consultation with a state, or a person or business concerning personal or business information (s 15(6))	30 days	by default if agency or minister determines ss 26A, 27 or 27A apply	agency or minister must inform applicant of extension as soon as practicable (s 15(6)(b))
Consultation with foreign entity required to determine if 33(a)(iii) or 33(b) exemptions apply (s 15(7),(8))	30 days	by default if agency or minister determines consultation is needed	agency or minister must inform applicant of extension as soon as practicable (s 15(8)(b))
By agreement between applicant and agency or minister (s 15AA)	up to 30 days, as either a single extension or a series of shorter extensions. This may be in addition to an extension for third party consultation	agency or minister but only with written agreement of applicant	agency or minister must give written notice of the extension to the Information Commissioner as soon as practicable (s 15AA(b))
Complex or voluminous request (s 15AB)	30 days or other period	Information Commissioner, upon request from agency or minister	Commissioner must inform applicant and agency or minister of an extension period as soon as practicable where a decision is made to grant the extension (s 15AB(3))
Following a deemed refusal (s 15AC(4))	as determined by the Information Commissioner	Information Commissioner, upon request from agency or minister	no legislative requirement but Commissioner may require agency or minister to notify applicant or third party as a condition of granting the extension (s 15AC(6))

The statutory processing period does not include:

- the time that an agency may take in a request consultation process to decide if a practical refusal exists (s 24AB (8))
- the time elapsing between an applicant being notified that a charge is payable and
- either the applicant paying the charge (or a deposit on account of the charge) or the
- agency varying the decision that a charge is payable (s 31).

Deemed access refusal

Section 15AC provides that where a decision on an FOI request has not been provided to the

applicant within the statutory processing period, the principal officer of the agency or the minister is deemed to have made a decision refusing access to the documents (s 15AC (3)).

The FOI Guidelines at [3.154] – [3.155] explain:

The consequence of a deemed refusal is that an applicant may apply for IC review (s 54L(2)(a)) In addition, once the time has expired and there is a deemed decision, the agency or minister cannot impose a charge for access...

Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of reasons on the FOI request. This obligation to provide a statement of reasons on the FOI request continues until any IC review of the deemed decision is finalised. ...

Department's submissions to complaint

Response to Preliminary Inquiries dated 5 December 2019

The Department provided a chronology of the request and advised that:

- The FOI decision was finalised and sent to the FOI applicant's authorised contact on 4 October 2019, 87 days from receipt of the request. The allegation that it took the Department 6 months to finalise the decision is not correct.
- The FOI decision was sent to the authorised contact on the same day it was finalised – that is on 4 October 2019. There was no two-month delay between the making of the FOI decision and its transmittal to the authorised contact.
- There was no intention to delay the processing of the FOI request and its finalisation. The delay occurred due to the large number of FOI requests the Department was processing. The Department is reviewing its processes to efficiently address its growing caseload.

Response to the Notice of investigation under s 75 of the FOI Act

On 3 June 2021, the Department provided its response to the complaint. The Department provided a chronology of the processing of the request and advised that:

- The Department did not seek extensions of time under either ss 15AA, 15AB, 15AC or 54D of the FOI Act, and the statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act, and
- The Department relied on its submissions to preliminary inquiries of 5 December 2019.

The Department also provided submissions in relation to the general grounds for delay in processing FOI requests for personal information, and the measures it is taking to address those factors (**Attachment B**).

On 3 August 2021³ (**Attachment C**) and 14 September 2021⁴ (**Attachment D**),⁵ the Department provided further submissions on the steps that it has undertaken to extend the recommendations made in the Final Report of the CII into the Department's processing of FOI requests for non-personal information, to its processes and procedures for processing FOI requests for personal information. The Department advised that:

1. Recommendation 1: Appoint an Information Champion

- This recommendation is complete, noting the Information Champion's role extends equally to the non-personal and personal caseload.
- Our Information Champion (SES Band 2) is actively engaged with the management and oversight of the personal caseload as well as the non-personal caseload.

2. Recommendation 2: Operational Processes and Procedures

- This recommendation is complete. In line with the scope of the CII, the new Procedural Instruction (PI) is focused on non-personal FOI requests. However, we will shortly begin work on a Procedural Instruction directed at personal FOI requests, noting that the majority of the processes set out in the new PI apply equally to personal FOI requests.
- Recommendations 2 and 3 related to the development of procedural guidance (procedural instructions) and training in applying those instructions in the non-personal caseload. The Department has finalised the procedural instruction for the non-personal caseload. The Department is now developing procedural instructions for personal access and amendment requests. This is an active project which will be completed by Q3 – an earlier completion date is not possible while maintaining a focus on reducing backlogs across the caseload.

3. Recommendation 3: Training

- This recommendation is well advanced. In line with the scope of the CII, the new eLearning package for FOI decision-makers is focused on non-personal FOI requests. In addition, we will train Departmental staff involved in the processing of personal requests in the Procedural Instruction for personal FOI requests.
- earlier this month, the Department launched its new FOI eLearning package for all staff and decision-makers. Module one includes an FOI overview that is relevant to both the personal and non-personal space. We are actively tracking the take up of this package across the Department.

³ Email from the Department of Home Affairs to the OAIC on 3 August 2021

⁴ Email from the Department of Home Affairs to the OAIC on 14 September 2021

⁵The Department provided its response of 14 September 2021 (Attachment D) in response to my request of 3 September 2021 for further information on the steps it has taken or is taking to extend the CII recommendations to its processing of FOI requests for personal information.

- AGS training (decision maker and exemptions) is available for all staff who require a more in-depth understanding of FOI requirements and processes. The AGS module contains information relevant to decision making, regardless of caseload. Our September session has generated a lot of interest and we will run another two sessions in November 2021.

4. Recommendation 4: Audit

- The internal audit scheduled for late 2021 or early 2022 will focus on the CII's recommendations but we expect it will include observations on and recommendations for the FOI caseload as a whole, including the personal case load.
- Recommendation 4 requires us to complete an internal audit. This will necessarily focus on the Department's implementation of the CII recommendations due to the nature of the CII report but may make general observations on FOI processing by the Department as a whole.

Department's submissions regarding its processing of FOI requests in general

In its response of 3 August 2021, (**Attachment C**), the Department advised that, more broadly, the Department is considering options to facilitate the processing of FOI requests, such as:

- pro-actively publishing a wider range of commonly requested statistics
- business process reforms and administrative release of documents to reduce demand for personal FOI requests
- robotic process automation of request registration so that we can redirect staff time toward processing and decision-making.

In its response of 14 September 2021, the Department made further submissions regarding the general processing of FOI requests as follows: (**Attachment D**)

While our immediate priority continues to be implementation of the recommendations of the CII, the Department has progressed a number of improvements in the personal space which do not relate to CII. These include:

- a successful extension of time trial - guidance is now being developed for officers on when and how to use s15AA extensions;
- the development of dashboards, including daily updates to our on-hand data, which increase management visibility of the caseload;
- increased management focus on priority parts of the caseload, including resources dedicated to resolving our oldest and intractable cases in the personal caseload. In 2020-21, in addition to processing new personal access requests, the Department finalised more cases older than 90 days in 2020-21 than in 2019-20;
- maintenance of an improvements register which includes ideas for changes to the personal caseload; and
- better management of complaints received into the inboxes.

We are also exploring the possibilities of automating registration processes, releasing resources for decision making and expediting redactions. These are longer term projects and subject to resourcing.

General comments

The very high volume of FOI requests received by the Department will mean continuing pressures across the FOI program, including in the personal caseload. However, the Department is committed to continuing to improve its processes for responding to FOI requests, within its allocated resources. To this end, the Department has maintained a stable level of resourcing in FOI, even when managing whole of government priorities such as the humanitarian response in Afghanistan and the establishment of a border measures program.

The impact of recent business process reforms, in response to the CII and independently, has led to a significant improvement in the Department's compliance with statutory timeframes for non-personal requests (up from 37 per cent to 65 per cent) and a reduction in the age of the oldest non-personal request with no on-hand request older than 90 days. This was achieved on the back of a further increase in the total number of non-personal requests in 2020-21; up almost 15% when compared to the previous financial year.

However, to deliver these improvements quickly, the Department has had to phase its reforms and transfer some resources internally, from the personal caseload to the business improvement function and non-personal caseload. To deliver broader process improvements in the personal space will require similar decisions and trade-offs, noting the personal caseload is a much larger program and has particular complexities in relation to identity resolution and integrity.

Discussion

The FOI request was made on 9 July 2019. Pursuant to s 15(5)(b) of the FOI Act, the Department was due to provide a decision to the complainant by 8 August 2019, but did not do so until 4 October 2019.

It was open to the Department to seek extensions of time under either ss 15AA, 15AB, 15AC or 54D of the FOI Act, but it did not do so. The statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.

The Department submits that the delay was due to the large number of requests it was processing at that time.

Conclusions

The Department did not comply with s 15(5)(b) of the FOI Act when processing FOI request s 22(1)(a)(ii) irrelevant material in that:

- The Department was due to provide a decision to the complainant by 8 August 2019, but did not do so until 4 October 2019.

- The Department did not seek extensions of time under ss 15AB, 15AC or 54D of the FOI Act, and the statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.
- The statutory timeframe was not affected by a request consultation process under s 24AB(8) or by the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable under s 31 of the FOI Act.

Recommendations

In light of the Department's submissions, pursuant to s 88 of the FOI Act, I make the following formal recommendations to the Department that I believe the Department ought to implement within the timeframes specified below:

Recommendation 1

The Department prepare and implement an operational manual for processing FOI requests for personal information to be approved by the Information Champion by **28 February 2022**. The operational manual is to include, at a minimum, the steps that will be taken to ensure compliance with statutory processing requirements. Consistent with the requirements of the Information Publication Scheme, the operational manual should be made publicly available by the Department on its website.

Recommendation 2

By **28 February 2022**, the Department ascertain the additional resources (human or otherwise) anticipated to be required in order to meet statutory timeframes (taking account of the improvements through implementing recommendation 1) and provide an action plan to meet those requirements.

Recommendation 3

The Department:

- undertake and complete training on the operational manual for FOI Section staff and other staff (both decision makers and other staff who assist decision makers)
28 March 2022
- ensure that online training in processing FOI requests for personal information is available to all staff of the Department by **28 March 2022**, and
- ensure that new staff joining the FOI Section are trained in relation to the operational manual within 2 weeks of commencing in the FOI Section.

Recommendation 4

By **30 May 2022**, the Department undertake an audit of the processing of FOI requests for personal information to assess whether Recommendations 1, 2 and 3 have been implemented and operationalised and whether those actions have been sufficient to address the issues identified in these complaints. The audit is to be undertaken by either the Department's internal auditors or by an external auditor, as determined by the Department. A copy of the audit report should be provided to the OAIC.

When considering the recommendations made above, the Department should refer to relevant OAIC FOI resources which can be found on the OAIC website.⁶

I request that the Department advise the OAIC of the implementation of each of the recommendations within the timeframes specified.

⁶ See <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/>. The OAIC's FOI Essentials toolkit, may be of particular assistance to the Department.



ATTACHMENT A

Notice on completion under s 86 of the FOI Act (s 22(1)(a)(ii) - irrelevant material) and the Department of Home Affairs (s 22(1)(a)(ii) - irrelevant material)

On 23 October 2019, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Department of Home Affairs (the Department) in the performance of its functions, and the exercise of its powers, under the FOI Act.

The complainant is (s 22(1)(a)(ii) - irrelevant material).

The complainant alleges the Department failed to provide a decision on (s 22(1)(b) - irrelevant material) FOI request of 23 September 2019 within the statutory timeframes set out in the FOI Act.

The FOI request the subject of this FOI complaint was also the subject of an Information Commissioner review (IC review) (s 22(1)(a)(ii) - irrelevant material).¹

This Notice on Completion sets out the issue as identified from the allegation raised by the complainant. The allegation is assessed against the legislative framework and the FOI Guidelines² which agencies and ministers must have regard to. I have considered the complaint and the Department's submissions in response before making conclusions about the allegation.

Background

On 23 September 2019, the complainant made the FOI request to the Department (s 22(1)(a)(ii) - irrelevant material). Under s 15(5) of the FOI Act, the Department was required to provide a decision to the complainant by 23 October 2019.

On 1 October 2019, the Department issued a request consultation notice under s 24AB of the FOI Act to the complainant. On 2 October 2019, the complainant advised the Department that (s 22(1)(b) - irrelevant material) refused to revise the scope of the request.

On 10 October 2019, the Department decided to accept the original scope of the applicant's request.

¹ (s 22(1)(a)(ii) - irrelevant material) finalised on 1 April 2020 under s 54W of the FOI Act.

² The Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard to in performing a function or exercising a power under the FOI Act.

On 23 October 2019, the complainant lodged a complaint under s 70 of the FOI Act about the Department's non-compliance with the statutory processing period and sought IC review of the deemed access refusal decision.

On 24 October 2019, the Department was deemed to have refused access pursuant to s 15AC of the FOI Act.³

On 13 November 2019, the OAIC conducted preliminary inquiries with the Department. On 8 January 2020, the Department provided a response to the preliminary inquiries.

On 15 November 2019, the Department provided a substantive decision to the complainant.

On 23 April 2021, the OAIC commenced an investigation into this complaint. On 3 June 2021, the Department provided a response to the notice and request for information under s 75 of the FOI Act.

On 3 August 2021 and 14 September 2021, the Department provided further submissions in response to the investigation notice of 23 April 2021.

The key procedural events in this FOI complaint are set out in **Annexure A** to this Notice.

Investigation results

Pursuant to s 87 of the FOI Act, the investigation conclusions set out my opinion and conclusion on how the Department processed the complainant's FOI request. I have considered all the material provided by the Department and the complainant in this matter.

Issue: Compliance with statutory processing periods

Complainant's allegation

The complainant alleges the Department failed to provide a decision on [REDACTED] FOI request of 23 September 2019 within the statutory timeframes set out in the FOI Act.⁴

³ I note that in its submissions of 3 June 2021, the Department has advised that on 10 October 2019, 'Department decides to accept original scope and processing according'. However, the complainant on 2 October 2019 indicated to the Department that they did not wish to revise the request pursuant to s 24AB(6)(c) of the FOI Act. As such, pursuant to s 24AB(8) of the FOI Act, the period to be disregarded is 1 day, rather than the 8 days indicated in the Department's submissions. As such, I am satisfied a decision was due to be provided on 24 October 2019, rather than 30 October 2019 as purported by the Department's submissions.

⁴ The complainant also raised issues related to the Department's consultation process. This issue will be dealt with separately from this investigation.

Legislative framework

The FOI Act provides a statutory timeframe of 30 days to process an FOI request (s 15(5)).

The period can be extended by up to 30 days with the applicant's agreement (s 15AA), by 30 days if consultation with a third party is undertaken (s 15(6)), and by 30 days if consultation with a foreign entity is undertaken (s 15(8)).

An agency or minister may apply to the Information Commissioner for extension of the statutory timeframe for complex or voluminous requests (s 15AB) or following a deemed access refusal decision (s 15AC).

The FOI Guidelines at [3.139] state:

An agency or minister must, as soon as practicable, and no later than 30 days after receiving a request, take all reasonable steps to enable the applicant to be notified of a decision on the request (s 15(5)(b)). Section 15(5)(b) provides that the 30-day processing period commences on the day after the day the agency or minister is taken to have received a request that meets the formal requirements of s 15(2), (2A). An agency should act promptly to assist an applicant whose request does not meet the formal requirements in keeping with its obligations under s 15(3).

Table 1: Extension of time provisions

Reason for extension	Extension period	Determined by	Notification requirement
Third party consultation: consultation with a state, or a person or business concerning personal or business information (s 15(6))	30 days	by default if agency or minister determines ss 26A, 27 or 27A apply	agency or minister must inform applicant of extension as soon as practicable (s 15(6)(b))
Consultation with foreign entity required to determine if 33(a)(iii) or 33(b) exemptions apply (s 15(7),(8))	30 days	by default if agency or minister determines consultation is needed	agency or minister must inform applicant of extension as soon as practicable (s 15(8)(b))
By agreement between applicant and agency or minister (s 15AA)	up to 30 days, as either a single extension or a series of shorter extensions. This may be in addition to an extension for third party consultation	agency or minister but only with written agreement of applicant	agency or minister must give written notice of the extension to the Information Commissioner as soon as practicable (s 15AA(b))
Complex or voluminous request (s 15AB)	30 days or other period	Information Commissioner, upon request from agency or minister	Commissioner must inform applicant and agency or minister of an extension period as soon as practicable where a decision is made to grant the extension (s 15AB(3))

Reason for extension	Extension period	Determined by	Notification requirement
Following a deemed refusal (s 15AC(4))	as determined by the Information Commissioner	Information Commissioner, upon request from agency or minister	no legislative requirement but Commissioner may require agency or minister to notify applicant or third party as a condition of granting the extension (s 15AC(6))

The statutory processing period does not include:

- the time that an agency may take in a request consultation process to decide if a practical refusal exists (s 24AB (8))
- the time elapsing between an applicant being notified that a charge is payable and
- either the applicant paying the charge (or a deposit on account of the charge) or the
- agency varying the decision that a charge is payable (s 31).

Deemed access refusal

Section 15AC provides that where a decision on an FOI request has not been provided to the applicant within the statutory processing period, the principal officer of the agency or the minister is deemed to have made a decision refusing access to the documents (s 15AC (3)).

The FOI Guidelines at [3.154] – [3.155] explain:

The consequence of a deemed refusal is that an applicant may apply for IC review (s 54L(2)(a)) In addition, once the time has expired and there is a deemed decision, the agency or minister cannot impose a charge for access...

Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of reasons on the FOI request. This obligation to provide a statement of reasons on the FOI request continues until any IC review of the deemed decision is finalised. ...

Department's submissions to complaint

Response to Preliminary Inquiries dated 8 January 2020

The Department provided a chronology of the request and advised that the notice of intention to refuse access was sent to the applicant to initiate the consultation process under s 24AB of the FOI Act. There was no intention to intimidate or delay the decision but rather to re-scope the request to a specific identified file so that the FOI Section could streamline and expedite the processing of the request.

Department response to the s 75 Notice

On 3 June 2021, the Department provided its response to the complaint. The Department again provided a chronology of the processing of the request and advised that:

- The initial delay on this request was due to the applicant's unwillingness to revise the scope of their request following a practical refusal notice. The Department could have refused the request on practical grounds however, it chose to engage with the applicant and ultimately decided to process the request in its original scope. This was communicated to the applicant on 24 October 2019, at which point the applicant agreed to the Department having 'any extension of time to provide the information sought' (although a date was not specified).
- The Department asserts the processing clock stopped on 1 October 2019 with the provision of the practical refusal notice, and restarted on 10 October 2019 when the Department decided to process the request. This is not reflected in the OAIC's calculation of time.
- The Department did not seek extensions of time under either ss 15AA, 15AB, 15AC or 54D of the FOI Act, and the statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.

The Department also provided submissions in relation to the general grounds for delay in processing FOI requests for personal information, and the measures it is taking to address those factors (**Attachment B**).

On 3 August 2021⁵ (**Attachment C**) and 14 September 2021⁶ (**Attachment D**),⁷ the Department provided further submissions on the steps that it has undertaken to extend the recommendations made in the Final Report of the CII into the Department's processing of FOI requests for non-personal information, to its processes and procedures for processing FOI requests for personal information. The Department advised that:

1. Recommendation 1: Appoint an Information Champion

- This recommendation is complete, noting the Information Champion's role extends equally to the non-personal and personal caseload.
- Our Information Champion (SES Band 2) is actively engaged with the management and oversight of the personal caseload as well as the non-personal caseload.

2. Recommendation 2: Operational Processes and Procedures

- This recommendation is complete. In line with the scope of the CII, the new Procedural Instruction (PI) is focused on non-personal FOI requests. However, we will shortly begin

⁵ Email from the Department of Home Affairs to the OAIC on 3 August 2021

⁶ Email from the Department of Home Affairs to the OAIC on 14 September 2021

⁷ The Department provided its response of 14 September 2021 (Attachment D) in response to my request of 3 September 2021 for further information on the steps it has taken or is taking to extend the CII recommendations to its processing of FOI requests for personal information.

work on a Procedural Instruction directed at personal FOI requests, noting that the majority of the processes set out in the new PI apply equally to personal FOI requests.

- Recommendations 2 and 3 related to the development of procedural guidance (procedural instructions) and training in applying those instructions in the non-personal caseload. The Department has finalised the procedural instruction for the non-personal caseload. The Department is now developing procedural instructions for personal access and amendment requests. This is an active project which will be completed by Q3 – an earlier completion date is not possible while maintaining a focus on reducing backlogs across the caseload.

3. Recommendation 3: Training

- This recommendation is well advanced. In line with the scope of the CII, the new eLearning package for FOI decision-makers is focused on non-personal FOI requests. In addition, we will train Departmental staff involved in the processing of personal requests in the Procedural Instruction for personal FOI requests.
- earlier this month, the Department launched its new FOI eLearning package for all staff and decision-makers. Module one includes an FOI overview that is relevant to both the personal and non-personal space. We are actively tracking the take up of this package across the Department.
- AGS training (decision maker and exemptions) is available for all staff who require a more in-depth understanding of FOI requirements and processes. The AGS module contains information relevant to decision making, regardless of caseload. Our September session has generated a lot of interest and we will run another two sessions in November 2021.

4. Recommendation 4: Audit

- The internal audit scheduled for late 2021 or early 2022 will focus on the CII's recommendations but we expect it will include observations on and recommendations for the FOI caseload as a whole, including the personal case load.
- Recommendation 4 requires us to complete an internal audit. This will necessarily focus on the Department's implementation of the CII recommendations due to the nature of the CII report but may make general observations on FOI processing by the Department as a whole.

Department's submissions regarding its processing of FOI requests in general

In its response of 3 August 2021, (**Attachment C**), the Department advised that, more broadly, the Department is considering options to facilitate the processing of FOI requests, such as:

- pro-actively publishing a wider range of commonly requested statistics
- business process reforms and administrative release of documents to reduce demand for personal FOI requests

- robotic process automation of request registration so that we can redirect staff time toward processing and decision-making.

In its response of 14 September 2021, the Department made further submissions regarding the general processing of FOI requests as follows: **(Attachment D)**

While our immediate priority continues to be implementation of the recommendations of the CII, the Department has progressed a number of improvements in the personal space which do not relate to CII. These include:

- a successful extension of time trial - guidance is now being developed for officers on when and how to use s15AA extensions;
- the development of dashboards, including daily updates to our on-hand data, which increase management visibility of the caseload;
- increased management focus on priority parts of the caseload, including resources dedicated to resolving our oldest and intractable cases in the personal caseload. In 2020-21, in addition to processing new personal access requests, the Department finalised more cases older than 90 days in 2020-21 than in 2019-20;
- maintenance of an improvements register which includes ideas for changes to the personal caseload; and
- better management of complaints received into the inboxes.

We are also exploring the possibilities of automating registration processes, releasing resources for decision making and expediting redactions. These are longer term projects and subject to resourcing.

General comments

The very high volume of FOI requests received by the Department will mean continuing pressures across the FOI program, including in the personal caseload. However, the Department is committed to continuing to improve its processes for responding to FOI requests, within its allocated resources. To this end, the Department has maintained a stable level of resourcing in FOI, even when managing whole of government priorities such as the humanitarian response in Afghanistan and the establishment of a border measures program.

The impact of recent business process reforms, in response to the CII and independently, has led to a significant improvement in the Department's compliance with statutory timeframes for non-personal requests (up from 37 per cent to 65 per cent) and a reduction in the age of the oldest non-personal request with no on-hand request older than 90 days. This was achieved on the back of a further increase in the total number of non-personal requests in 2020-21; up almost 15% when compared to the previous financial year.

However, to deliver these improvements quickly, the Department has had to phase its reforms and transfer some resources internally, from the personal caseload to the business improvement function and non-personal caseload. To deliver broader process improvements in the personal space will require similar decisions and trade-offs, noting the personal caseload is a much larger program and has particular complexities in relation to identity resolution and integrity.

Discussion

The FOI request was made on 23 September 2019. Pursuant to s 15(5)(b) of the FOI Act, the Department was due to provide a decision to the complainant by 23 October 2019. Taking into account the stop clock for the practice refusal notice, the decision date was extended to 24 October 2019.

The Department provided its decision to the complainant on 15 November 2019.

The Department engaged in a request consultation process with the complainant under s 24AB of the FOI Act, but the complainant refused to revise the scope of the request. The Department subsequently accepted the original scope 10 days after notifying the complainant of the practical refusal notice.

However, pursuant to section 24AB(8) of the FOI Act, the period of time to be disregarded from the calculation of the processing period starts the day the notice under s 24AB (2) is issued and ends the day the FOI applicant does one of the things mentioned at s 24AB(6)(b) or (c). In this case, the complaint advised the Department the day after the notice was issued that they did not wish to revise the request, and as such, I am satisfied a decision was due to be provided on 24 October 2019.

It was open to the Department to seek extensions of time under either ss 15AA, 15AB, 15AC or 54D of the FOI Act, but it did not do so. The statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.

Conclusions

The Department did not comply with s 15(5)(b) of the FOI Act when processing FOI request FA 19/10/00027, in that:

- The Department was required to provide a decision to the complainant by 24 October 2019 but did not do so until 15 November 2019.
- The Department did not seek extensions of time under ss 15AA, 15AB, 15AC or 54D of the FOI Act, and the statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.
- The statutory timeframe was affected by a request consultation process under s 24AB(8) (1 days).
- The statutory timeframe was not affected by the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable under s 31 of the FOI Act.

Recommendations

In light of the Department's submissions, pursuant to s 88 of the FOI Act, I make the following formal recommendations to the Department that I believe the Department ought to implement within the timeframes specified below:

Recommendation 1

The Department prepare and implement an operational manual for processing FOI requests for personal information to be approved by the Information Champion by **28 February 2022**. The operational manual is to include, at a minimum, the steps that will be taken to ensure compliance with statutory processing requirements. Consistent with the requirements of the Information Publication Scheme, the operational manual should be made publicly available by the Department on its website.

Recommendation 2

By **28 February 2022**, the Department ascertain the additional resources (human or otherwise) anticipated to be required in order to meet statutory timeframes (taking account of the improvements through implementing recommendation 1) and provide an action plan to meet those requirements.

Recommendation 3

The Department:

- a. undertake and complete training on the operational manual for FOI Section staff and other staff (both decision makers and other staff who assist decision makers) **28 March 2022**
- b. ensure that online training in processing FOI requests for personal information is available to all staff of the Department by **28 March 2022**, and
- c. ensure that new staff joining the FOI Section are trained in relation to the operational manual within 2 weeks of commencing in the FOI Section.

Recommendation 4

By **30 May 2022**, the Department undertake an audit of the processing of FOI requests for personal information to assess whether Recommendations 1, 2 and 3 have been implemented and operationalised and whether those actions have been sufficient to address the issues identified in these complaints. The audit is to be undertaken by either the Department's internal auditors or by an external auditor, as determined by the Department. A copy of the audit report should be provided to the OAIC.

When considering the recommendations made above, the Department should refer to relevant OAIC FOI resources which can be found on the OAIC website.⁸

I request that the Department advise the OAIC of the implementation of each of the recommendations within the timeframes specified.

⁸ See <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/>. The OAIC's FOI Essentials toolkit, may be of particular assistance to the Department.



Notice on completion under s 86 of the FOI Act ([redacted]) – [redacted] [redacted] and the Australian National University

On 30 October 2019, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) from [redacted] about the Australian National University (the ANU) in its performance of its functions and exercise of its powers under the FOI Act.

The complainant complained about the ANU's processes for handling requests for access to documents under the FOI Act, particularly regarding compliance with the statutory timeframe and communication about the processing delays.

The FOI request which is the subject matter of this complaint was also subject to IC review of the ANU's access refusal decision ([redacted]).¹ I have used the FOI request as a case study during this investigation. A chronology of the processing of the FOI request can be found at **Appendix A**.

Pursuant to s 86, upon completion of an investigation I am required to issue a notice on completion which sets out:

- investigation results
- the investigation recommendations (if any), and
- the reasons for the investigation results and the making of the investigation recommendations.

In making these conclusions, I have relied upon the submissions provided by the ANU and the complainant.

Pursuant to s 88 of the FOI Act, I can make formal recommendations which I believe the ANU ought to implement to improve its processing of FOI requests and compliance with the FOI Act in general.

¹ On 13 November 2019, the ANU provided a response dated 12 November 2019 to the complainant's FOI request, granting access in full to three documents and partial access to 27 documents falling within the scope of the FOI request; and refusing access to one document falling within the scope of the FOI based on the exemptions under s 47F and s 22 of the FOI Act. The IC review in respect of these claimed exemptions [redacted]

Background

On 18 September 2019, the complainant lodged an FOI request with the ANU seeking access to documents written or held by the Vice Chancellor that related to [REDACTED].

On 20 September 2019, after discussions with the FOI officer, the complainant clarified the scope of the request to be:

... any email, file, text document, sound recording, image or video written, composed or held by the office of the vice chancellor--including anything written or composed by [identified individual]--that concerns me, my conduct, my scholarship or a necessity to infringe my academic freedom.

A background to the processing of the FOI request, the complainant's application for IC review, and the FOI complaint is at **Appendix A**.

Investigation results

Allegations

The complainant alleged that [REDACTED] had 'not been provided the documents by the due date' in accordance with s 15(5)(b) of the FOI Act.

The complainant also alleged that [REDACTED] 'received no explanation from the ANU as to why [REDACTED] had] not been provided the documents' within the statutory timeframe.

Legislative framework

Section 11 of the FOI Act provides that 'every person has a legally enforceable right' to obtain access in accordance with the FOI Act to a document of an agency or a Minister where that document is not exempt.

Statutory timeframe

Paragraph 15(5)(a) provides that an agency or Minister must take all reasonable steps to enable an applicant to be notified that the request has been received as soon as practicable, and no later than 14 days after receiving a request.

Paragraph 15(5)(b) requires an agency or Minister to take all reasonable steps to enable an applicant to be notified of a decision on a request as soon as practicable, and no later than 30 days after receiving a request.

The FOI Guidelines provide at [3.139]:

... the 30-day processing period commences on the day after the day the agency or minister is taken to have received a request that meets the formal requirements of s 15(2), (2A).

The statutory processing period can be extended by up to 30 days with the applicant's agreement (s 15AA), by 30 days if consultation with a third party is undertaken (s 15(6)), and by 30 days if consultation with a foreign entity is undertaken (s 15(8)).

An agency or minister may also apply to the Information Commissioner for extension of the statutory timeframe for complex or voluminous requests (s 15AB) or following a deemed access refusal decision (s 15AC).

Deemed access refusal

Section 15AC provides that where a decision on an FOI request has not been provided to the applicant within the statutory processing period, the agency or minister is deemed to have made a decision refusing access to the documents (s 15AC(3)).

The FOI Guidelines provide at [3.154] – [3.155]:

The consequence of a deemed refusal is that an applicant may apply for IC review (s 54L(2)(a)) ...

Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of reasons on the FOI request. This obligation to provide a statement of reasons on the FOI request continues until any IC review of the deemed decision is finalised...

The ANU's submissions

During the course of the investigation, the ANU was invited to provide submissions in response to the complainant's allegations. In summary, the ANU submits:

- it acknowledged receipt of the complainant's FOI request within the statutory timeframe
- the delay in processing the complainant's request was due to the absence of key staff in the relevant work area tasked with conducting searches. When it became apparent that those absences would impact the timeliness of processing the request, the ANU contacted the complainant to seek an extension of time pursuant to s 15AA, which was refused
- it contacted the complainant by telephone after the statutory processing period had lapsed to advise that it would provide a substantive decision on the request as soon as possible, and
- the complainant's request was processed in the context of an unusually high volume of requests received in a short period of time. In particular, the complainant made 27 requests in the period 17 September to 15 October 2019, 12 of which were received in a two-day period. The complainant's requests constituted approximately one third of the total average number of requests that the ANU receives annually. Twenty-five of the complainant's requests were framed broadly, requiring the ANU to initiate a request consultation process to narrow the scope. The complainant did

not respond to the majority of the ANU's correspondence or responded up to 24 days later. Only one of the applicant's requests was finalised outside the statutory processing timeframe.

Discussion

Delay

The FOI request was made on 18 September 2019. Pursuant to s 15(5)(b) of the FOI Act, the ANU was due to provide a decision to the complainant no later than 18 October 2019.²

The ANU did not seek to extend the statutory processing period until 15 October 2019 – three days before the end of the period – when it sought an extension by agreement pursuant to s 15AA. The complainant advised on 17 October 2019 that [REDACTED] did not agree to an extension of time.

From the information before me, it does not appear that the ANU sought an extension of time under s 15AB of the FOI Act following the complainant's refusal to an extension of time under s 15AA.

From my analysis of the chronology of the processing of the request, it appears that the FOI request became a deemed access refusal decision on 18 October 2019 and remained an access refusal decision until the ANU provided its substantive decision 26 days later, on 13 November 2019.³

There is no information to suggest that the ANU sought an extension of time pursuant to s 15AC once the decision was deemed an access refusal as at 18 October 2019. Additionally, it does not appear that the statutory processing period was extended for the purpose of conducting consultations with third parties (ss 15(6), s 15(8), 26A, 27, 27A).

I acknowledge the increase in the volume of FOI applications experienced by the ANU at and around this period and the complainant's refusal to agree to an extension under s 15AA, however I consider that it was open to ANU to seek an extension of time pursuant to s 15AC which the ANU did not do in this case.

² The ANU's acknowledgement letter of 2 October 2019 to the complainant incorrectly stated that its decision on the request was due 20 October 2019.

³ ANU's decision refused the applicant access to one document in full, 27 document in part and gave access in full to three documents.

Communication

On 15 October 2019, the ANU contacted the complainant to seek [redacted] agreement to an extension of time under s 15AA of the FOI Act. In that correspondence, the ANU provided the following explanation for why it was requesting an extension of time:

We are currently experiencing delays regarding your request. The delays are due to staff absences in the relevant work area resulting in processing delays.

The ANU submits that it also contacted the complainant by phone on or around 28 October 2019 to advise that it had been unable to finalise [redacted] request during the statutory processing period and was working to provide [redacted] with a substantive decision on the request as soon as possible.

Based on the information before me, I am satisfied that the ANU provided information to the complainant about the processing of the request and provided reasons for the delay.

Conclusions

In relation to the processing of FOI request (ANU reference: [redacted]):

1. The statutory timeframe of 30 days to process the FOI request under s 15(5)(b) was not extended by agreement under s 15AA, or as a result of consultation (ss 15(6), 15(8), 26A, 27, 27A), or by the Information Commissioner under ss 15AB or 15AC.
2. The ANU was required to provide a decision to the complainant by 18 October 2019.
3. The ANU exceeded the statutory processing period by 26 days without authority.
4. The ANU provided information to the complainant about the processing of the request and provided reasons for the delay.

Recommendations

The purpose of my recommendations, as set out below, are to conclude the complaint investigation and ensure the ANU meets its obligations under the FOI Act, including that the ANU's current and future processes and practices are consistent with the objects of the FOI Act.

Pursuant to s 88 of the FOI Act, I have set out the following recommendations, being formal recommendations to the ANU that I believe the ANU ought to implement within one month of this Notice:

1. The ANU should update its 'Guideline 1.15: Freedom of Information processing checklist' and 'Guideline 1.18: Freedom of Information request processing timeframes' to require staff to conduct an early assessment of whether an extension

of time may be required and if so, to seek agreement with the FOI applicant to extend the processing period under s 15AA.

2. The ANU should update its 'Guideline 1.15: Freedom of Information request processing checklist' and 'Guideline 1.18: Freedom of Information request processing timeframes', to require staff to consider whether it is appropriate to seek an extension of time pursuant to s 15AB where an applicant has not agreed to extend the statutory processing period under s 15AA, or to seek an extension of time from the Information Commissioner under s 15AC where a decision on an FOI request has not been provided to the applicant within the statutory processing period.



ATTACHMENT A

Notice on completion under s 86 of the FOI Act s 22(1)(a)(ii) - irrelevant material s22(1)(a)(ii) - irrelevant material and the Department of Home Affairs

On 11 November 2019, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Department of Home Affairs (the Department) in the performance of its functions, and the exercise of its powers, under the FOI Act.

The complainant is s22(1)(a)(ii) - irrelevant material (referred to as s22(1)(a)(ii) - irrelevant material by the Department).¹

The complainant alleges the Department failed to provide a decision on s22(1)(a)(ii) - irrelevant material FOI request of 16 July 2019, within the statutory timeframes set out in the FOI Act.²

The FOI request the subject of this FOI complaint is also the subject of an Information Commissioner review (IC review) s 22(1)(a)(ii) - irrelevant material.³

This Notice on Completion sets out the issue as identified from the allegation raised by the complainant. The allegation is assessed against the legislative framework and the FOI Guidelines⁴ which agencies and ministers must have regard to. I have considered the complaint and the Department's submissions in response before making conclusions about the allegation.

Background

On 4 June 2019 and 3 July 2019, OMARA⁵ received correspondence from the complainant. The correspondence did not reference the FOI Act. OMARA did not forward the correspondence to the FOI section.

On 16 July 2019, the complainant advised the OAIC that s22(1)(a)(ii) - irrelevant material had submitted a request under the FOI Act and received no response.

¹ Department submissions to OAIC dated 3 June 2021 refer to s22(1)(a)(ii) - irrelevant material.

² Department submissions to OAIC dated 3 June 2021 state s22(1)(a)(ii) - irrelevant material initially made a request on 4 June 2019 but to the wrong agency and did not reference the FOI Act.

³ s 22(1)(a)(ii) - irrelevant material.

⁴ The Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard to in performing a function or exercising a power under the FOI Act.

⁵ Office of the Migration Agents Registration Authority.

On 16 July 2019, OMARA received an email from the complainant expressing dissatisfaction the lack of progress. Reference is made in this email to the FOI Act. Accordingly, this date is taken by the Department to be the date of the FOI request to the Department.

On 15 August 2019, the Department is deemed to have refused access under s 15AC of the FOI Act.

On 12 September 2019, the OAIC advises the Department of the complainant's request for IC review. The complainant lodges a complaint under s 70 of the FOI Act.

On 16 September 2019, OMARA advised the Department of the FOI request.

On 17 September 2019, the FOI section acknowledged the FOI request.

On 25 November 2019, the Department provides a decision to the complainant.

On 23 April 2021, the OAIC notified the Department that it would investigate the complaint and requested the Department's response to the complaint.

On 3 June 2021, the Department provided a response to the notice and request for information under s 75 of the FOI Act.

On 3 August 2021 and 14 September 2021, the Department provided further submissions in response to the investigation notice of 23 April 2021.

The key procedural events in this FOI complaint are set out in **Annexure A** to this Notice.

Investigation results

Pursuant to s 87 of the FOI Act, the investigation conclusions set out my opinion and conclusion on how the Department processed the complainant's FOI request. I have considered all the material provided by the Department and the complainant in this matter.

Issue: Compliance with statutory processing periods

Complainant's allegation

The complainant alleges the Department failed to provide a decision on [REDACTED] FOI request of 16 July 2019 within the statutory timeframes set out in s 15(5) of the FOI Act.⁶

⁶ The complainant also raised issues related to the Department's access refusal decision. These issues will be dealt with separately to this investigation.

Legislative framework

The FOI Act provides a statutory timeframe of 30 days to process an FOI request (s 15(5)).

The period can be extended by up to 30 days with the applicant's agreement (s 15AA), by 30 days if consultation with a third party is undertaken (s 15(6)), and by 30 days if consultation with a foreign entity is undertaken (s 15(8)).

An agency or minister may apply to the Information Commissioner for extension of the statutory timeframe for complex or voluminous requests (s 15AB) or following a deemed access refusal decision (s 15AC).

The FOI Guidelines at [3.139] state:

An agency or minister must, as soon as practicable, and no later than 30 days after receiving a request, take all reasonable steps to enable the applicant to be notified of a decision on the request (s 15(5)(b)). Section 15(5)(b) provides that the 30-day processing period commences on the day after the day the agency or minister is taken to have received a request that meets the formal requirements of s 15(2), (2A). An agency should act promptly to assist an applicant whose request does not meet the formal requirements in keeping with its obligations under s 15(3).

Table 1: Extension of time provisions

Reason for extension	Extension period	Determined by	Notification requirement
Third party consultation: consultation with a state, or a person or business concerning personal or business information (s 15(6))	30 days	by default if agency or minister determines ss 26A, 27 or 27A apply	agency or minister must inform applicant of extension as soon as practicable (s 15(6)(b))
Consultation with foreign entity required to determine if 33(a)(iii) or 33(b) exemptions apply (s 15(7),(8))	30 days	by default if agency or minister determines consultation is needed	agency or minister must inform applicant of extension as soon as practicable (s 15(8)(b))
By agreement between applicant and agency or minister (s 15AA)	up to 30 days, as either a single extension or a series of shorter extensions. This may be in addition to an extension for third party consultation	agency or minister but only with written agreement of applicant	agency or minister must give written notice of the extension to the Information Commissioner as soon as practicable (s 15AA(b))
Complex or voluminous request (s 15AB)	30 days or other period	Information Commissioner, upon request from agency or minister	Commissioner must inform applicant and agency or minister of an extension period as soon as practicable where a decision is made to grant the extension (s 15AB(3))

Following a deemed refusal (s 15AC(4))	as determined by the Information Commissioner	Information Commissioner, upon request from agency or minister	no legislative requirement but Commissioner may require agency or minister to notify applicant or third party as a condition of granting the extension (s 15AC(6))
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The statutory processing period does not include:

- the time that an agency may take in a request consultation process to decide if a practical refusal exists (s 24AB (8))
- the time elapsing between an applicant being notified that a charge is payable and
- either the applicant paying the charge (or a deposit on account of the charge) or the
- agency varying the decision that a charge is payable (s 31).

Deemed access refusal

Section 15AC provides that where a decision on an FOI request has not been provided to the applicant within the statutory processing period, the principal officer of the agency or the minister is deemed to have made a decision refusing access to the documents (s 15AC (3)).

The FOI Guidelines at [3.154] – [3.155] explain:

The consequence of a deemed refusal is that an applicant may apply for IC review (s 54L(2)(a)) In addition, once the time has expired and there is a deemed decision, the agency or minister cannot impose a charge for access...

Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of reasons on the FOI request. This obligation to provide a statement of reasons on the FOI request continues until any IC review of the deemed decision is finalised. ...

Department's submissions to complaint

Response to the Notice of investigation under s 75 of the FOI Act

On 3 June 2021, the Department provided its response to the complaint. The Department provided a chronology of the processing of the request and advised that:

- OMARA received the initial request and did not refer it on to the FOI Section. The FOI Section only became aware of the FOI request when the IC Review was initiated.
- The statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act, and
- The Department did not seek extensions of time under ss 15AA, 15AB, 15AC or 54D of the FOI Act.

Specifically, the Department submitted:

Additional comment

The Department has nominated channels for receiving FOI requests, including an online form, email address and mailing address. The initial correspondence to the OMARA did not reference the FOI Act. Subsequent correspondence did reference the FOI Act and should have been forwarded by the OMARA to the FOI Section, which did not occur due to administrative oversight. However, this delay could have been avoided by the applicant making their FOI request through the appropriate channels.

The above chronology reflects OAIC's view of the day the FOI request was received.

The Department asserts the better view is the FOI request was only properly received on 16 September 2019, when it was received at the nominated email address for FOI requests (see para 3.140 of the Guidelines). This would have meant the decision, issued on 25 November 2019, was sent on day 38, rather than day 71.

While I note the Department's submissions regarding the date it received the FOI request from OMARA, a review of the relevant documents demonstrates that the complainant made an FOI request which was received by OMARA on 16 July 2019. The OMARA website does not make it clear as to where FOI requests to OMARA should be directed, and I note the obligations under s 15(3) of the FOI Act to assist an FOI applicant to make a request that complies with s 15. On this basis I have taken the FOI request to be received by the Department on 16 July 2019.

The Department also provided submissions in relation to the general grounds for delay in processing FOI requests for personal information, and the measures it is taking to address those factors (**Attachment B**).

On 3 August 2021⁷ (**Attachment C**) and 14 September 2021⁸ (**Attachment D**),⁹ the Department provided further submissions on the steps that it has undertaken to extend the recommendations made in the Final Report of the CII into the Department's processing of FOI requests for non-personal information, to its processes and procedures for processing FOI requests for personal information. The Department advised that:

1. Recommendation 1: Appoint an Information Champion

⁷ Email from the Department of Home Affairs to the OAIC on 3 August 2021

⁸ Email from the Department of Home Affairs to the OAIC on 14 September 2021

⁹ The Department provided its response of 14 September 2021 (Attachment D) in response to my request of 3 September 2021 for further information on the steps it has taken or is taking to extend the CII recommendations to its processing of FOI requests for personal information.

- This recommendation is complete, noting the Information Champion's role extends equally to the non-personal and personal caseload.
- Our Information Champion (SES Band 2) is actively engaged with the management and oversight of the personal caseload as well as the non-personal caseload.

2. Recommendation 2: Operational Processes and Procedures

- This recommendation is complete. In line with the scope of the CII, the new Procedural Instruction (PI) is focused on non-personal FOI requests. However, we will shortly begin work on a Procedural Instruction directed at personal FOI requests, noting that the majority of the processes set out in the new PI apply equally to personal FOI requests.
- Recommendations 2 and 3 related to the development of procedural guidance (procedural instructions) and training in applying those instructions in the non-personal caseload. The Department has finalised the procedural instruction for the non-personal caseload. The Department is now developing procedural instructions for personal access and amendment requests. This is an active project which will be completed by Q3 – an earlier completion date is not possible while maintaining a focus on reducing backlogs across the caseload.

3. Recommendation 3: Training

- This recommendation is well advanced. In line with the scope of the CII, the new eLearning package for FOI decision-makers is focused on non-personal FOI requests. In addition, we will train Departmental staff involved in the processing of personal requests in the Procedural Instruction for personal FOI requests.
- earlier this month, the Department launched its new FOI eLearning package for all staff and decision-makers. Module one includes an FOI overview that is relevant to both the personal and non-personal space. We are actively tracking the take up of this package across the Department.
- AGS training (decision maker and exemptions) is available for all staff who require a more in-depth understanding of FOI requirements and processes. The AGS module contains information relevant to decision making, regardless of caseload. Our September session has generated a lot of interest and we will run another two sessions in November 2021.

4. Recommendation 4: Audit

- The internal audit scheduled for late 2021 or early 2022 will focus on the CII's recommendations but we expect it will include observations on and recommendations for the FOI caseload as a whole, including the personal case load.
- Recommendation 4 requires us to complete an internal audit. This will necessarily focus on the Department's implementation of the CII recommendations due to the nature of the CII report but may make general observations on FOI processing by the Department as a whole.

Department's submissions regarding its processing of FOI requests in general

In its response of 3 August 2021, (**Attachment C**), the Department advised that, more broadly, the Department is considering options to facilitate the processing of FOI requests, such as:

- pro-actively publishing a wider range of commonly requested statistics
- business process reforms and administrative release of documents to reduce demand for personal FOI requests
- robotic process automation of request registration so that we can redirect staff time toward processing and decision-making.

In its response of 14 September 2021, the Department made further submissions regarding the general processing of FOI requests as follows: (**Attachment D**)

While our immediate priority continues to be implementation of the recommendations of the CII, the Department has progressed a number of improvements in the personal space which do not relate to CII. These include:

- a successful extension of time trial - guidance is now being developed for officers on when and how to use s15AA extensions;
- the development of dashboards, including daily updates to our on-hand data, which increase management visibility of the caseload;
- increased management focus on priority parts of the caseload, including resources dedicated to resolving our oldest and intractable cases in the personal caseload. In 2020-21, in addition to processing new personal access requests, the Department finalised more cases older than 90 days in 2020-21 than in 2019-20;
- maintenance of an improvements register which includes ideas for changes to the personal caseload; and
- better management of complaints received into the inboxes.

We are also exploring the possibilities of automating registration processes, releasing resources for decision making and expediting redactions. These are longer term projects and subject to resourcing.

General comments

The very high volume of FOI requests received by the Department will mean continuing pressures across the FOI program, including in the personal caseload. However, the Department is committed to continuing to improve its processes for responding to FOI requests, within its allocated resources. To this end, the Department has maintained a stable level of resourcing in FOI, even when managing whole of government priorities such as the humanitarian response in Afghanistan and the establishment of a border measures program.

The impact of recent business process reforms, in response to the CII and independently, has led to a significant improvement in the Department's compliance with statutory timeframes for non-personal requests (up from 37 per cent to 65 per cent) and a reduction in the age of the oldest non-personal request with no on-hand request older than 90 days. This was

achieved on the back of a further increase in the total number of non-personal requests in 2020-21; up almost 15% when compared to the previous financial year.

However, to deliver these improvements quickly, the Department has had to phase its reforms and transfer some resources internally, from the personal caseload to the business improvement function and non-personal caseload. To deliver broader process improvements in the personal space will require similar decisions and trade-offs, noting the personal caseload is a much larger program and has particular complexities in relation to identity resolution and integrity.

Discussion

The date of the FOI request is taken as 16 July 2019 when the complainant emailed OMARA and referenced the FOI Act. Pursuant to s 15(5)(b) of the FOI Act, the Department was due to provide a decision to the complainant by 15 August 2019, but did not do so until 25 November 2019.

The Department did not seek extensions of time under either ss 15AB, 15AC or 54D of the FOI Act, and the statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.

Conclusions

The Department did not comply with s 15(5)(b) of the FOI Act when processing FOI request s 22(1)(a)(ii) irrelevant material, in that:

- The Department was required to provide a decision to the complainant by 15 August 2019, but did not do so until 25 November 2019.
- The Department did not seek extensions of time under ss 15AB, 15AC or 54D of the FOI Act, and the statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.
- The statutory timeframe was not affected by a request consultation process under s 24AB(8) or by the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable under s 31 of the FOI Act.

Recommendations

In light of the Department's submissions, pursuant to s 88 of the FOI Act, I make the following formal recommendations to the Department that I believe the Department ought to implement within the timeframes specified below:

Recommendation 1

The Department prepare and implement an operational manual for processing FOI requests for personal information to be approved by the Information Champion by **28 February 2022**. The operational manual is to include, at a minimum, the steps that will be taken to ensure compliance with statutory processing requirements. Consistent with the requirements of the Information Publication Scheme, the operational manual should be made publicly available by the Department on its website.

Recommendation 2

By **28 February 2022**, the Department ascertain the additional resources (human or otherwise) anticipated to be required in order to meet statutory timeframes (taking account of the improvements through implementing recommendation 1) and provide an action plan to meet those requirements.

Recommendation 3

The Department:

- a. undertake and complete training on the operational manual for FOI Section staff and other staff (both decision makers and other staff who assist decision makers) **28 March 2022**
- b. ensure that online training in processing FOI requests for personal information is available to all staff of the Department by **28 March 2022**, and
- c. ensure that new staff joining the FOI Section are trained in relation to the operational manual within 2 weeks of commencing in the FOI Section.

Recommendation 4

By **30 May 2022**, the Department undertake an audit of the processing of FOI requests for personal information to assess whether Recommendations 1, 2 and 3 have been implemented and operationalised and whether those actions have been sufficient to address the issues identified in these complaints. The audit is to be undertaken by either the Department's internal auditors or by an external auditor, as determined by the Department. A copy of the audit report should be provided to the OAIC.

When considering the recommendations made above, the Department should refer to relevant OAIC FOI resources which can be found on the OAIC website.¹⁰

I request that the Department advise the OAIC of the implementation of each of the recommendations within the timeframes specified.

¹⁰ See <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/>. The OAIC's FOI Essentials toolkit, may be of particular assistance to the Department.



Australian Government
Office of the Australian Information Commissioner

ATTACHMENT A

Notice on completion under s 86 of the FOI Act (s 22(1)(a)(i) - irrelevant material) and the Department of Home Affairs (s 22(1)(a)(i) - irrelevant material)

On 22 November 2019, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Department of Home Affairs (the Department) in the performance of its functions, and the exercise of its powers, under the FOI Act.

The complainant is (s 22(1)(a)(i) - irrelevant material).

The complainant alleges the Department failed to provide a decision on (s 22(1)(a) - irrelevant material) FOI request of 18 August 2019 within the statutory timeframes set out in the FOI Act.

The FOI request the subject of this FOI complaint was also the subject of an Information Commissioner review (IC review) (s 22(1)(a)(i) - irrelevant material).¹

This Notice on Completion sets out the issue as identified from the allegation raised by the complainant. The allegation is assessed against the legislative framework and the FOI Guidelines² which agencies and ministers must have regard to. I have considered the complaint and the Department's submissions in response before making conclusions about the allegation.

Background

On 18 August 2019, the complainant made the FOI request to the Department (s 22(1)(a)(i) - irrelevant material).

Under s 15(5) of the FOI Act, the Department was required to provide a decision to the complainant by 17 September 2019.

On 16 September 2019, the complainant agreed to an extension of time under s 15AA of the FOI Act. This extended the decision date to 17 October 2019.

¹ (s 22(1)(a)(i) - irrelevant material)

² The Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard to in performing a function or exercising a power under the FOI Act.

On 17 October 2019, the Department was deemed to have refused access pursuant to s 15AC of the FOI Act.

On 22 November 2019, the complainant lodged a complaint under s 70 of the FOI Act about the Department's non-compliance with the statutory processing period.

On 7 February 2020, the complainant sought IC review of the deemed access refusal decision.

On 10 July 2020, the Department provided two substantive decisions to the complainant.

On 23 April 2021, the OAIC commenced an investigation into this complaint. On 3 June 2021, the Department provided a response to the notice and request for information under s 75 of the FOI Act.

On 3 August 2021 and 14 September 2021, the Department provided further submissions in response to the investigation notice of 23 April 2021.

The key procedural events in this FOI complaint are set out in **Annexure A** to this Notice.

Investigation results

Pursuant to s 87 of the FOI Act, the investigation conclusions set out my opinion and conclusion on how the Department processed the complainant's FOI request. I have considered all the material provided by the Department and the complainant in this matter.

Issue: Compliance with statutory processing periods

Complainant's allegation

The complainant alleges the Department failed to provide a decision on [REDACTED] FOI request of 18 August 2019 within the statutory timeframes set out in the FOI Act.³

Legislative framework

The FOI Act provides a statutory timeframe of 30 days to process an FOI request (s 15(5)).

The period can be extended by up to 30 days with the applicant's agreement (s 15AA), by 30 days if consultation with a third party is undertaken (s 15(6)), and by 30 days if consultation with a foreign entity is undertaken (s 15(8)).

³ The complainant also raised issues in relation to the Department's practical refusal decision and consultation process. These issues will be dealt with separately to this investigation.

An agency or minister may apply to the Information Commissioner for extension of the statutory timeframe for complex or voluminous requests (s 15AB) or following a deemed access refusal decision (s 15AC).

The FOI Guidelines at [3.139] state:

An agency or minister must, as soon as practicable, and no later than 30 days after receiving a request, take all reasonable steps to enable the applicant to be notified of a decision on the request (s 15(5)(b)). Section 15(5)(b) provides that the 30-day processing period commences on 3 See also, FOI Guidelines at [3.125]. 4 the day after the day the agency or minister is taken to have received a request that meets the formal requirements of s 15(2), (2A). An agency should act promptly to assist an applicant whose request does not meet the formal requirements in keeping with its obligations under s 15(3).

Table 1: Extension of time provisions

Reason for extension	Extension period	Determined by	Notification requirement
Third party consultation: consultation with a state, or a person or business concerning personal or business information (s 15(6))	30 days	by default if agency or minister determines ss 26A, 27 or 27A apply	agency or minister must inform applicant of extension as soon as practicable (s 15(6)(b))
Consultation with foreign entity required to determine if 33(a)(iii) or 33(b) exemptions apply (s 15(7),(8))	30 days	by default if agency or minister determines consultation is needed	agency or minister must inform applicant of extension as soon as practicable (s 15(8)(b))
By agreement between applicant and agency or minister (s 15AA)	up to 30 days, as either a single extension or a series of shorter extensions. This may be in addition to an extension for third party consultation	agency or minister but only with written agreement of applicant	agency or minister must give written notice of the extension to the Information Commissioner as soon as practicable (s 15AA(b))
Complex or voluminous request (s 15AB)	30 days or other period	Information Commissioner, upon request from agency or minister	Commissioner must inform applicant and agency or minister of an extension period as soon as practicable where a decision is made to grant the extension (s 15AB(3))
Following a deemed refusal (s 15AC(4))	as determined by the Information Commissioner	Information Commissioner, upon request from agency or minister	no legislative requirement but Commissioner may require agency or minister to notify applicant or third party as a condition of granting the extension (s 15AC(6))

The statutory processing period does not include:

- the time that an agency may take in a request consultation process to decide if a practical refusal exists (s 24AB(8))
- the time elapsing between an applicant being notified that a charge is payable and
 - either the applicant paying the charge (or a deposit on account of the charge) or the
 - agency varying the decision that a charge is payable (s 31).

Deemed access refusal

Section 15AC provides that where a decision on an FOI request has not been provided to the applicant within the statutory processing period, the principal officer of the agency or the minister is deemed to have made a decision refusing access to the documents (s 15AC (3)).

The FOI Guidelines at [3.154] – [3.155] explain:

The consequence of a deemed refusal is that an applicant may apply for IC review (s 54L(2)(a)) In addition, once the time has expired and there is a deemed decision, the agency or minister cannot impose a charge for access...

Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of reasons on the FOI request. This obligation to provide a statement of reasons on the FOI request continues until any IC review of the deemed decision is finalised. ...

Department's submissions to complaint

Department response to the s 75 Notice

On 3 June 2021, the Department provided its response to the complaint. The Department provided a chronology of the processing of the request and advised that:

- On 16 September 2019, the complainant agreed to an extension of time under s 15AA of the FOI Act. This extended the decision date to 17 October 2019.
- The documents in scope were provided by the business area on 1 October 2019.
- On 1 October 2019, the Department requested that the complainant revise scope. On 8 November 2019, the Department issued the complainant with a Practical Refusal Notice on the grounds that the request would be an unreasonable diversion of resources. On 22 November 2019, the complainant refused to modify the scope of the request.
- Subsequent delays in processing were due to consultation with the business areas and staff redeployment due to the COVID19 response.
- The Department did not seek extensions of time under either ss 15AB, 15AC or 54D of the FOI Act.

The Department also provided submissions in relation to the general grounds for delay in processing FOI requests for personal information, and the measures it is taking to address those factors. (**Attachment B**).

On 3 August 2021⁴ (**Attachment C**) and 14 September 2021⁵ (**Attachment D**),⁶ the Department provided further submissions on the steps that it has undertaken to extend the recommendations made in the Final Report of the CII into the Department's processing of FOI requests for non-personal information, to its processes and procedures for processing FOI requests for personal information. The Department advised that:

1. Recommendation 1: Appoint an Information Champion

- This recommendation is complete, noting the Information Champion's role extends equally to the non-personal and personal caseload.
- Our Information Champion (SES Band 2) is actively engaged with the management and oversight of the personal caseload as well as the non-personal caseload.

2. Recommendation 2: Operational Processes and Procedures

- This recommendation is complete. In line with the scope of the CII, the new Procedural Instruction (PI) is focused on non-personal FOI requests. However, we will shortly begin work on a Procedural Instruction directed at personal FOI requests, noting that the majority of the processes set out in the new PI apply equally to personal FOI requests.
- Recommendations 2 and 3 related to the development of procedural guidance (procedural instructions) and training in applying those instructions in the non-personal caseload. The Department has finalised the procedural instruction for the non-personal caseload. The Department is now developing procedural instructions for personal access and amendment requests. This is an active project which will be completed by Q3 – an earlier completion date is not possible while maintaining a focus on reducing backlogs across the caseload.

3. Recommendation 3: Training

- This recommendation is well advanced. In line with the scope of the CII, the new eLearning package for FOI decision-makers is focused on non-personal FOI requests. In addition, we will train Departmental staff involved in the processing of personal requests in the Procedural Instruction for personal FOI requests.
- earlier this month, the Department launched its new FOI eLearning package for all staff and decision-makers. Module one includes an FOI overview that is relevant to both the personal

⁴ Email from the Department of Home Affairs to the OAIC on 3 August 2021

⁵ Email from the Department of Home Affairs to the OAIC on 14 September 2021

⁶ The Department provided its response of 14 September 2021 (Attachment D) in response to my request of 3 September 2021 for further information on the steps it has taken or is taking to extend the CII recommendations to its processing of FOI requests for personal information.

and non-personal space. We are actively tracking the take up of this package across the Department.

- AGS training (decision maker and exemptions) is available for all staff who require a more in-depth understanding of FOI requirements and processes. The AGS module contains information relevant to decision making, regardless of caseload. Our September session has generated a lot of interest and we will run another two sessions in November 2021.

4. Recommendation 4: Audit

- The internal audit scheduled for late 2021 or early 2022 will focus on the CII's recommendations but we expect it will include observations on and recommendations for the FOI caseload as a whole, including the personal case load.
- Recommendation 4 requires us to complete an internal audit. This will necessarily focus on the Department's implementation of the CII recommendations due to the nature of the CII report but may make general observations on FOI processing by the Department as a whole.

Department's submissions regarding its processing of FOI requests in general

In its response of 3 August 2021, (**Attachment C**), the Department advised that, more broadly, the Department is considering options to facilitate the processing of FOI requests, such as:

- pro-actively publishing a wider range of commonly requested statistics
- business process reforms and administrative release of documents to reduce demand for personal FOI requests
- robotic process automation of request registration so that we can redirect staff time toward processing and decision-making.

In its response of 14 September 2021, the Department made further submissions regarding the general processing of FOI requests as follows: (**Attachment D**)

While our immediate priority continues to be implementation of the recommendations of the CII, the Department has progressed a number of improvements in the personal space which do not relate to CII. These include:

- a successful extension of time trial - guidance is now being developed for officers on when and how to use s15AA extensions;
- the development of dashboards, including daily updates to our on-hand data, which increase management visibility of the caseload;
- increased management focus on priority parts of the caseload, including resources dedicated to resolving our oldest and intractable cases in the personal caseload. In 2020-21, in addition to processing new personal access requests, the Department finalised more cases older than 90 days in 2020-21 than in 2019-20;

- maintenance of an improvements register which includes ideas for changes to the personal caseload; and
- better management of complaints received into the inboxes.

We are also exploring the possibilities of automating registration processes, releasing resources for decision making and expediting redactions. These are longer term projects and subject to resourcing.

General comments

The very high volume of FOI requests received by the Department will mean continuing pressures across the FOI program, including in the personal caseload. However, the Department is committed to continuing to improve its processes for responding to FOI requests, within its allocated resources. To this end, the Department has maintained a stable level of resourcing in FOI, even when managing whole of government priorities such as the humanitarian response in Afghanistan and the establishment of a border measures program.

The impact of recent business process reforms, in response to the CII and independently, has led to a significant improvement in the Department's compliance with statutory timeframes for non-personal requests (up from 37 per cent to 65 per cent) and a reduction in the age of the oldest non-personal request with no on-hand request older than 90 days. This was achieved on the back of a further increase in the total number of non-personal requests in 2020-21; up almost 15% when compared to the previous financial year.

However, to deliver these improvements quickly, the Department has had to phase its reforms and transfer some resources internally, from the personal caseload to the business improvement function and non-personal caseload. To deliver broader process improvements in the personal space will require similar decisions and trade-offs, noting the personal caseload is a much larger program and has particular complexities in relation to identity resolution and integrity.

Discussion

The FOI request was made on 18 August 2019. Taking into account the extension of time under s 15AA of the FOI Act, the Department was due to provide a decision to the complainant by 17 October 2019, but did not do so until 10 July 2020.

On 8 November 2019, the Department issued the complainant with a purported practical refusal notice⁷ on the grounds that the request would be an unreasonable diversion of resources. On 22 November 2019, the complainant refused to modify the scope of the request.

The Department attributes delay after this time to consultation with the business areas and staff redeployment due to the COVID19 response.

⁷ The purported consultation process under s 24AB of the FOI Act commenced outside of the statutory processing period.

It was open to the Department to seek extensions of time under either ss 15AB, 15AC or 54D of the FOI Act, but it did not do so.

Conclusions

The Department did not comply with s 15(5)(b) of the FOI Act when processing FOI request FA 19/08/01062, in that, taking into account its use of the extension provision of s 15AA of the FOI Act, the Department was required to provide a decision to the complainant by 17 October 2019. The Department did not provide the decision until 10 July 2020.

- The Department sought and received the complainant's agreement to a 30-day extension of time under s 15AA of the FOI Act to 17 October 2019.
- The statutory processing period was not affected by a request consultation process under s 24AB (8). However, on 8 November 2019 after the decision was deemed to have been refused the Department conducted a purported consultation process. The complainant declined to revise scope.
- The Department did not seek extensions of time under ss 15AB, 15AC or 54D of the FOI Act.
- The statutory timeframe was not affected by the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable under s 31 of the FOI Act.

Recommendations

In light of the Department's submissions, pursuant to s 88 of the FOI Act, I make the following formal recommendations to the Department that I believe the Department ought to implement within the timeframes specified below:

Recommendation 1

The Department prepare and implement an operational manual for processing FOI requests for personal information to be approved by the Information Champion by **28 February 2022**. The operational manual is to include, at a minimum, the steps that will be taken to ensure compliance with statutory processing requirements. Consistent with the requirements of the Information Publication Scheme, the operational manual should be made publicly available by the Department on its website.

Recommendation 2

By **28 February 2022**, the Department ascertain the additional resources (human or otherwise) anticipated to be required in order to meet statutory timeframes (taking account of the improvements through implementing recommendation 1) and provide an action plan to meet those requirements.

Recommendation 3

The Department:

- a. undertake and complete training on the operational manual for FOI Section staff and other staff (both decision makers and other staff who assist decision makers)
28 March 2022
- b. ensure that online training in processing FOI requests for personal information is available to all staff of the Department by **28 March 2022**, and
- c. ensure that new staff joining the FOI Section are trained in relation to the operational manual within 2 weeks of commencing in the FOI Section.

Recommendation 4

By **30 May 2022**, the Department undertake an audit of the processing of FOI requests for personal information to assess whether Recommendations 1, 2 and 3 have been implemented and operationalised and whether those actions have been sufficient to address the issues identified in these complaints. The audit is to be undertaken by either the Department's internal auditors or by an external auditor, as determined by the Department. A copy of the audit report should be provided to the OAIC.

When considering the recommendations made above, the Department should refer to relevant OAIC FOI resources which can be found on the OAIC website.⁸

I request that the Department advise the OAIC of the implementation of each of the recommendations within the timeframes specified.

⁸ See <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/>. The OAIC's FOI Essentials toolkit, may be of particular assistance to the Department.



ATTACHMENT A

Notice on completion under s 86 of the FOI Act (s 22(1)(a)(i) - irrelevant material) and the Department of Home Affairs (s 22(1)(a)(ii) - irrelevant material)

On 16 December 2019, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Department of Home Affairs (the Department) in the performance of its functions, and the exercise of its powers, under the FOI Act.

The complainant is (s 22(1)(a)(ii) - irrelevant material), represented by the (s 22(1)(a)(ii) - irrelevant material).

The complainant alleges the Department failed to provide a decision on (s 22(1)(a)(ii) - irrelevant material) FOI request of 28 August 2019 within the statutory timeframes set out in the FOI Act.

The FOI request the subject of this FOI complaint was also the subject of an Information Commissioner review (IC review) (s 22(1)(a)(ii) - irrelevant material).¹

This Notice on Completion sets out the issue as identified from the allegation raised by the complainant. The allegation is assessed against the legislative framework and the FOI Guidelines² which agencies and ministers must have regard to. I have considered the complaint and the Department's submissions in response before making conclusions about the allegation.

Background

The background to the complaint is in dispute. The Department and the complainant disagree over whether the request was properly deemed withdrawn by the Department on 16 October 2019.

On 28 August 2019, the complainant made the FOI request to the Department (s 22(1)(a)(ii) - irrelevant material).

On 30 August 2019, the Department issued the complainant with a request consultation notice under s 24AB of the FOI Act.

On 3 September 2019, the complainant revised the scope of the request.

On 30 September 2019, the complainant agreed to an extension under s 15AA of the FOI Act to 30 October 2019.

¹ (s 22(1)(a)(ii) - irrelevant material) was finalised on 16 November 2021 under s 54R of the FOI Act.

² The Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard to in performing a function or exercising a power under the FOI Act.

On 1 October 2019, the Department sent the complainant a second request consultation notice. The Department considers that the notice was received by the applicant on 7 October 2019.

On 16 October 2019, the Department advised the complainant that it had taken the request to be withdrawn as it had not received a response to the second request consultation notice.³

On 18 October 2019, the complainant provided the Department with a timeline of [redacted] engagement with the Department but did not provide a copy of [redacted] response to the second request consultation notice. The complainant requested an internal review of the deemed withdrawal decision.

On 27 November 2019, the complainant sought IC review of the deemed access refusal decision.⁴

On 16 December 2019, the complainant lodged an FOI complaint about the Department's non-compliance with the statutory processing period under s 70 of the FOI Act ([redacted]).

On 14 February 2020, the Department reopened the FOI request on the grounds that the complainant's letter of 18 October 2019 satisfied the 14-day consultation period time requirement.

Between 24 February and 6 April 2020, the Department and complainant consulted about the scope of the request.

On 27 April 2020, the Department provided the substantive decision to the complainant.

On 23 April 2021, the OAIC commenced an investigation into this complaint. On 3 June 2021, the Department provided a response to the notice and request for information under s 75 of the FOI Act.

On 3 August 2021 and 14 September 2021, the Department provided further submissions in response to the investigation notice of 23 April 2021.

The key procedural events in this FOI complaint are set out in **Annexure A** to this Notice.

³ The complainant then claimed [redacted] had responded to the second request consultation notice. [redacted] did not supply details in support.

⁴ OAIC reference: [redacted], which was finalised on 16 November 2021 under s 54R of the FOI Act.

Investigation results

Pursuant to s 87 of the FOI Act, the investigation conclusions set out my opinion and conclusion on how the Department processed the complainant's FOI request. I have considered all the material provided by the Department and the complainant in this matter.

Issue: Compliance with statutory processing periods

Complainant's allegation

The complainant alleges the Department failed to provide a decision on [REDACTED] FOI request of 28 August 2019 within the statutory timeframes set out in s 15(5) of the FOI Act.⁵

Legislative framework

The FOI Act provides a statutory timeframe of 30 days to process an FOI request (s 15(5)).

The period can be extended by up to 30 days with the applicant's agreement (s 15AA), by 30 days if consultation with a third party is undertaken (s 15(6)), and by 30 days if consultation with a foreign entity is undertaken (s 15(8)).

An agency or minister may apply to the Information Commissioner for extension of the statutory timeframe for complex or voluminous requests (s 15AB) or following a deemed access refusal decision (s 15AC).

The FOI Guidelines at [3.139] state:

An agency or minister must, as soon as practicable, and no later than 30 days after receiving a request, take all reasonable steps to enable the applicant to be notified of a decision on the request (s 15(5)(b)). Section 15(5)(b) provides that the 30-day processing period commences on³ See also, FOI Guidelines at [3.125]. ⁴ the day after the day the agency or minister is taken to have received a request that meets the formal requirements of s 15(2), (2A). An agency should act promptly to assist an applicant whose request does not meet the formal requirements in keeping with its obligations under s 15(3).

⁵ The complainant also raised issues in relation to the Department's consultation process. These issues will be dealt with separately to this investigation.

Table 1: Extension of time provisions

Reason for extension	Extension period	Determined by	Notification requirement
Third party consultation: consultation with a state, or a person or business concerning personal or business information (s 15(6))	30 days	by default if agency or minister determines ss 26A, 27 or 27A apply	agency or minister must inform applicant of extension as soon as practicable (s 15(6)(b))
Consultation with foreign entity required to determine if 33(a)(iii) or 33(b) exemptions apply (s 15(7),(8))	30 days	by default if agency or minister determines consultation is needed	agency or minister must inform applicant of extension as soon as practicable (s 15(8)(b))
By agreement between applicant and agency or minister (s 15AA)	up to 30 days, as either a single extension or a series of shorter extensions. This may be in addition to an extension for third party consultation	agency or minister but only with written agreement of applicant	agency or minister must give written notice of the extension to the Information Commissioner as soon as practicable (s 15AA(b))
Complex or voluminous request (s 15AB)	30 days or other period	Information Commissioner, upon request from agency or minister	Commissioner must inform applicant and agency or minister of an extension period as soon as practicable where a decision is made to grant the extension (s 15AB(3))
Following a deemed refusal (s 15AC(4))	as determined by the Information Commissioner	Information Commissioner, upon request from agency or minister	no legislative requirement but Commissioner may require agency or minister to notify applicant or third party as a condition of granting the extension (s 15AC(6))

The statutory processing period does not include:

- the time that an agency may take in a request consultation process to decide if a practical refusal exists (s 24AB (8))
- the time elapsing between an applicant being notified that a charge is payable and
- either the applicant paying the charge (or a deposit on account of the charge) or the
- agency varying the decision that a charge is payable (s 31).

Deemed access refusal

Section 15AC provides that where a decision on an FOI request has not been provided to the applicant within the statutory processing period, the principal officer of the agency or the minister is deemed to have made a decision refusing access to the documents (s 15AC (3)).

The FOI Guidelines at [3.154] – [3.155] explain:

The consequence of a deemed refusal is that an applicant may apply for IC review (s 54L(2)(a)) In addition, once the time has expired and there is a deemed decision, the agency or minister cannot impose a charge for access...

Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of reasons on the FOI request. This obligation to provide a statement of reasons on the FOI request continues until any IC review of the deemed decision is finalised. ...

Department's submissions to the complaint

Department's response to the s 75 Notice

On 3 June 2021, the Department provided its response to the complaint. The Department provided a chronology of the processing of the request and advised that:

- The Department took all reasonable steps to work with the complainant on this request, recognising that documents requested had been previously released to [REDACTED]
- The Department asserts the decision on 16 October 2019 to deem the case withdrawn was open to it. The complainant claimed that [REDACTED] had responded to the second request consultation notice. The Department's chronology records that on 18 October 2019, the complainant provided a timeline of [REDACTED] dealings with the Department, but at no time did [REDACTED] provide evidence of a response to the second request consultation notice.⁶
- On 18 February 2020, the Department agreed to re-open the request in the interests of assisting the complainant, and worked with the complainant to settle a scope that could be responded to. The scope was ultimately only agreed to in April 2020, and the decision was provided the same month.
- The Department asserts that it took all reasonable steps within its control to meet the complainant's request, and the better view is that in the circumstances of this request, the decision was provided within 30 days of the scope being settled.

The Department also provided submissions in relation to the general grounds for delay in processing FOI requests for personal information, and the measures it is taking to address those factors (**Attachment B**).

On 3 August 2021⁷ (**Attachment C**) and 14 September 2021⁸ (**Attachment D**),⁹ the Department provided further submissions on the steps that it has undertaken to extend the

⁶ The second request consultation notice was posted to complainant on 1 October 2019. Department later advises that it accepts that the notice was received by the applicant on 7 October 2019.

⁷ Email from the Department of Home Affairs to the OAIC on 3 August 2021

⁸ Email from the Department of Home Affairs to the OAIC on 14 September 2021

⁹ The Department provided its response of 14 September 2021 (Attachment D) in response to my request of 3 September 2021 for further information on the steps it has taken or is taking to extend the CII recommendations to its processing of FOI requests for personal information.

recommendations made in the Final Report of the CII into the Department's processing of FOI requests for non-personal information, to its processes and procedures for processing FOI requests for personal information. The Department advised that:

1. Recommendation 1: Appoint an Information Champion

- This recommendation is complete, noting the Information Champion's role extends equally to the non-personal and personal caseload.
- Our Information Champion (SES Band 2) is actively engaged with the management and oversight of the personal caseload as well as the non-personal caseload.

2. Recommendation 2: Operational Processes and Procedures

- This recommendation is complete. In line with the scope of the CII, the new Procedural Instruction (PI) is focused on non-personal FOI requests. However, we will shortly begin work on a Procedural Instruction directed at personal FOI requests, noting that the majority of the processes set out in the new PI apply equally to personal FOI requests.
- Recommendations 2 and 3 related to the development of procedural guidance (procedural instructions) and training in applying those instructions in the non-personal caseload. The Department has finalised the procedural instruction for the non-personal caseload. The Department is now developing procedural instructions for personal access and amendment requests. This is an active project which will be completed by Q3 – an earlier completion date is not possible while maintaining a focus on reducing backlogs across the caseload.

3. Recommendation 3: Training

- This recommendation is well advanced. In line with the scope of the CII, the new eLearning package for FOI decision-makers is focused on non-personal FOI requests. In addition, we will train Departmental staff involved in the processing of personal requests in the Procedural Instruction for personal FOI requests.
- earlier this month, the Department launched its new FOI eLearning package for all staff and decision-makers. Module one includes an FOI overview that is relevant to both the personal and non-personal space. We are actively tracking the take up of this package across the Department.
- AGS training (decision maker and exemptions) is available for all staff who require a more in-depth understanding of FOI requirements and processes. The AGS module contains information relevant to decision making, regardless of caseload. Our September session has generated a lot of interest and we will run another two sessions in November 2021.

4. Recommendation 4: Audit

- The internal audit scheduled for late 2021 or early 2022 will focus on the CII's recommendations but we expect it will include observations on and recommendations for the FOI caseload as a whole, including the personal case load.
- Recommendation 4 requires us to complete an internal audit. This will necessarily focus on the Department's implementation of the CII recommendations due to the nature of the CII report but may make general observations on FOI processing by the Department as a whole.

Department's submissions regarding its processing of FOI requests in general

In its response of 3 August 2021, (**Attachment C**), the Department advised that, more broadly, the Department is considering options to facilitate the processing of FOI requests, such as:

- pro-actively publishing a wider range of commonly requested statistics
- business process reforms and administrative release of documents to reduce demand for personal FOI requests
- robotic process automation of request registration so that we can redirect staff time toward processing and decision-making.

In its response of 14 September 2021, the Department made further submissions regarding the general processing of FOI requests as follows: (**Attachment D**)

While our immediate priority continues to be implementation of the recommendations of the CII, the Department has progressed a number of improvements in the personal space which do not relate to CII. These include:

- a successful extension of time trial - guidance is now being developed for officers on when and how to use s15AA extensions;
- the development of dashboards, including daily updates to our on-hand data, which increase management visibility of the caseload;
- increased management focus on priority parts of the caseload, including resources dedicated to resolving our oldest and intractable cases in the personal caseload. In 2020-21, in addition to processing new personal access requests, the Department finalised more cases older than 90 days in 2020-21 than in 2019-20;
- maintenance of an improvements register which includes ideas for changes to the personal caseload; and
- better management of complaints received into the inboxes.

We are also exploring the possibilities of automating registration processes, releasing resources for decision making and expediting redactions. These are longer term projects and subject to resourcing.

General comments

The very high volume of FOI requests received by the Department will mean continuing pressures across the FOI program, including in the personal caseload. However, the Department is committed to continuing to improve its processes for responding to FOI requests, within its allocated resources. To this end, the Department has maintained a stable level of resourcing in FOI, even when managing whole of government priorities such as the humanitarian response in Afghanistan and the establishment of a border measures program.

The impact of recent business process reforms, in response to the CII and independently, has led to a significant improvement in the Department's compliance with statutory timeframes for non-personal requests (up from 37 per cent to 65 per cent) and a reduction in the age of the oldest non-personal request with no on-hand request older than 90 days. This was achieved on the back of a further increase in the total number of non-personal requests in 2020-21; up almost 15% when compared to the previous financial year.

However, to deliver these improvements quickly, the Department has had to phase its reforms and transfer some resources internally, from the personal caseload to the business improvement function and non-personal caseload. To deliver broader process improvements in the personal space will require similar decisions and trade-offs, noting the personal caseload is a much larger program and has particular complexities in relation to identity resolution and integrity.

Discussion

The FOI request was made on 28 August 2019. Taking into account the stop clock for consultation and the s 15AA extension (decision date extended to 30 October 2019), the request was within the statutory processing period on 16 October 2019, when the Department issued the 'Deemed Withdrawal' letter.

The Department submits that the request did not become deemed on the following grounds:

- It was open to the Department to issue the 'Deemed Withdrawal Letter' on 16 October 2019 because the complainant had not responded to the second request consultation notice. The Department reopened the request in February 2020 to assist the complainant.
- From February to April 2020, the parties engaged in further consultation to revise the scope of the request.
- The scope was clarified in April 2020 and the Department provided the substantive decision to the complainant in April 2020.

The complainant essentially claims that [REDACTED] responded to the second request consultation notice. This would mean that it was not open to the Department to take the request as withdrawn. I note that whilst the complainant has not provided a copy of this correspondence to either the Department or the OIAC, the Department later accepted the complainant's correspondence of 18 October 2019 as a response to the second request consultation notice.

Conclusions

The Department did not comply with s 15(5)(b) of the FOI Act when processing FOI request [REDACTED] in that:

- Taking into account the extension of time under s 15AA of the FOI Act and the request consultation processes under s 24AB of the FOI Act, the Department was required to provide a decision to the complainant by 11 November 2019 but did not do so until 22 April 2020.¹⁰

¹⁰ I note that the Department 'reopened' the matter on 18 February 2020 and during the related IC review the Department worked with the complainant to reach a scope that could be processed. Once agreement to the scope of the request was reached within the IC review process, the Department provided its decision in a timely manner. However, this does not negate the fact the decision was provided 238 days after the receipt of the FOI request.

- The Department did not seek extensions of time under ss 15AB, 15AC or 54D of the FOI Act, and the statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.
- The statutory timeframe was not affected by the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable under s 31 of the FOI Act.

Recommendations

In light of the Department's submissions, pursuant to s 88 of the FOI Act, I make the following formal recommendations to the Department that I believe the Department ought to implement within the timeframes specified below:

Recommendation 1

The Department prepare and implement an operational manual for processing FOI requests for personal information to be approved by the Information Champion by **28 February 2022**. The operational manual is to include, at a minimum, the steps that will be taken to ensure compliance with statutory processing requirements. Consistent with the requirements of the Information Publication Scheme, the operational manual should be made publicly available by the Department on its website.

Recommendation 2

By **28 February 2022**, the Department ascertain the additional resources (human or otherwise) anticipated to be required in order to meet statutory timeframes (taking account of the improvements through implementing recommendation 1) and provide an action plan to meet those requirements.

Recommendation 3

The Department:

- undertake and complete training on the operational manual for FOI Section staff and other staff (both decision makers and other staff who assist decision makers) **28 March 2022**
- ensure that online training in processing FOI requests for personal information is available to all staff of the Department by **28 March 2022**, and
- ensure that new staff joining the FOI Section are trained in relation to the operational manual within 2 weeks of commencing in the FOI Section.

Recommendation 4

By **30 May 2022**, the Department undertake an audit of the processing of FOI requests for personal information to assess whether Recommendations 1, 2 and 3 have been implemented and operationalised and whether those actions have been sufficient to

address the issues identified in these complaints. The audit is to be undertaken by either the Department's internal auditors or by an external auditor, as determined by the Department. A copy of the audit report should be provided to the OAIC.

When considering the recommendations made above, the Department should refer to relevant OAIC FOI resources which can be found on the OAIC website.¹¹

I request that the Department advise the OAIC of the implementation of each of the recommendations within the timeframes specified.

¹¹ See <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/>. The OAIC's FOI Essentials toolkit, may be of particular assistance to the Department.



ATTACHMENT A

Notice on completion under s 86 of the FOI Act (s 22(1)(a)(i) - irrelevant material) and the Department of Home Affairs (s 22(1)(a)(ii) - irrelevant material)

On 4 January 2020, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act), about the Department of Home Affairs (the Department) in the performance of its functions and the exercise of its powers under the FOI Act.

The complainant is (s 22(1)(a)(ii) - irrelevant material).

The complainant alleges the Department failed to provide a decision on (s 22(1)(a)(ii) - irrelevant material) FOI request of 4 November 2019 within the statutory timeframes set out in the FOI Act.

The FOI request the subject of this FOI complaint was also the subject of an Information Commissioner review (IC review) (M (s 22(1)(a)(ii) - irrelevant material)).¹

This Notice on Completion sets out the issue as identified from the allegation raised by the complainant. The allegation is assessed against the legislative framework and the FOI Guidelines² which agencies and ministers must have regard to. I have considered the complaint and the Department's submissions in response before making findings about the allegation.

Background

On 4 November 2019, the complainant made the FOI request to the Department (s 22(1)(a)(ii) - irrelevant material).

Under s 15(5) of the FOI Act, the Department was required to provide a decision to the complainant by 4 December 2019.

On 4 December 2019, the Department was deemed to have refused access pursuant to s 15AC of the FOI Act.

On 19 December 2019, the complainant sought IC Review of the deemed access refusal decision.

¹ (s 22(1)(a)(ii) - irrelevant material) finalised on 17 February 2020 under s 54R of the FOI Act.

² The Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard to in performing a function or exercising a power under the FOI Act.

On 20 December 2019, the Department sought an extension of time under s 15AC from the OAIC. On 24 December 2019, the OAIC refused the extension of time.

On 20 December 2019, the Department released tranche 1 decision and documents to the complainant.

On 30 December 2019, the Department released tranche 2 decision and documents to the complainant.

On 2 January 2020, the Department released tranche 3 decision and documents to the complainant.

On 23 January 2020, the Department released tranche 4 decision and documents to the complainant.

On 5 February 2020, the Department provided the final decision and documents to the applicant.

On 23 April 2021, the OAIC notified the Department that it would investigate the complaint and requested the Department's response to the complaint.

On 3 June 2021, the Department provided a response to the notice and request for information under s 75 of the FOI Act.

On 3 August 2021 and 14 September 2021, the Department provided further submissions in response to the investigation notice of 23 April 2021.

The key procedural events in this FOI complaint are set out in **Annexure A** to this Attachment.

Investigation results

Pursuant to s 87 of the FOI Act, the investigation results set out the matters that I have investigated and my opinion and conclusions about the Department's processing of the complainant's FOI request. I have considered all the material provided by the Department and the complainant in this matter.

Issue: Compliance with statutory processing periods

Complainant's allegation

The complainant alleges the Department failed to provide a decision on [redacted] FOI request of 4 November 2019 within the statutory timeframes set out in the FOI Act.³

³ The complainant also raised issues in relation to the Department's access refusal decision. This issue will be dealt with separately to this investigation.

Legislative framework

The FOI Act provides a statutory timeframe of 30 days to process an FOI request (s 15(5)).

The period can be extended by up to 30 days with the applicant's agreement (s 15AA), by 30 days if consultation with a third party is undertaken (s 15(6)), and by 30 days if consultation with a foreign entity is undertaken (s 15(8)).

An agency or minister may apply to the Information Commissioner for extension of the statutory timeframe for complex or voluminous requests (s 15AB) or following a deemed access refusal decision (s 15AC).

The FOI Guidelines at [3.139] state:

An agency or minister must, as soon as practicable, and no later than 30 days after receiving a request, take all reasonable steps to enable the applicant to be notified of a decision on the request (s 15(5)(b)). Section 15(5)(b) provides that the 30-day processing period commences the day after the day the agency or minister is taken to have received a request that meets the formal requirements of s 15(2), (2A). An agency should act promptly to assist an applicant whose request does not meet the formal requirements in keeping with its obligations under s 15(3).

Table 1: Extension of time provisions

Reason for extension	Extension period	Determined by	Notification requirement
Third party consultation: consultation with a State, or a person in relation to personal information or business concerning personal or business information (s 15(6))	30 days	By operation of the law if agency or minister determines ss 26A, 27 or 27A apply	Agency or minister must inform applicant of extension as soon as practicable (s 15(6)(b))
Consultation with foreign entity if required to determine if 33(a)(iii) or 33(b) exemptions apply (s 15(7),(8))	30 days	By operation of law if agency or minister determines consultation is appropriate	Agency or minister must inform applicant of extension as soon as practicable (s 15(8)(b))
By agreement between applicant and agency or minister (s 15AA)	Up to 30 days, as either a single extension or a series of shorter extensions. This may be in addition to an extension for third party consultation.	Agency or minister but only with written agreement of applicant	Agency or minister must give written notice of the extension to the Information Commissioner as soon as practicable (s 15AA(b))
Complex or voluminous request (s 15AB)	30 days or other period	Information Commissioner, upon request from agency or minister	Commissioner must inform applicant and agency or minister of an extension period as soon as practicable where a decision is made to grant the extension (s 15AB(3))

Following a deemed refusal (s 15AC(4))	As determined by the Information Commissioner	Information Commissioner, upon request from agency or minister	No legislative requirement but Commissioner may require agency or minister to notify applicant or third party as a condition of granting the extension (s 15AC(6))
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The statutory processing period does not include:

- the time that an agency may take in a request consultation process to decide if a practical refusal exists (s 24AB(8))
- the time elapsing between an applicant being notified that a charge is payable and
 - either the applicant paying the charge (or a deposit on account of the charge) or the
 - agency varying the decision that a charge is payable (s 31).

Deemed access refusal

Section 15AC provides that where a decision on an FOI request has not been provided to the applicant within the statutory processing period, the principal officer of the agency or the minister is deemed to have made a decision refusing access to the documents (s 15AC (3)). The FOI Guidelines at [3.154] – [3.155] explain:

The consequence of a deemed refusal is that an applicant may apply for IC review (s 54L(2)(a)) In addition, once the time has expired and there is a deemed decision, the agency or minister cannot impose a charge for access...

Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of reasons on the FOI request. This obligation to provide a statement of reasons on the FOI request continues until any IC review of the deemed decision is finalised. ...

Department's submissions to complaint

Response to the Notice of investigation under s 75 of the FOI Act

On 3 June 2021, the Department provided its response to the complaint. The Department provided a chronology of the processing of the request and advised that:

- The Department sought an extension of time under s15AC from the OAIC, but was declined.
- The statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.
- Consultation was required with another agency.

The Department also provided submissions in relation to the general grounds for delay in processing FOI requests for personal information and the measures it is taking to address those factors (**Attachment B**).

On 3 August 2021⁴ (**Attachment C**) and 14 September 2021⁵ (**Attachment D**),⁶ the Department provided further submissions on the steps that it has undertaken to extend the recommendations made in the Final Report of the CII into the Department's processing of FOI requests for non-personal information, to its processes and procedures for processing FOI requests for personal information. The Department advised that:

1. Recommendation 1: Appoint an Information Champion

- This recommendation is complete, noting the Information Champion's role extends equally to the non-personal and personal caseload.
- Our Information Champion (SES Band 2) is actively engaged with the management and oversight of the personal caseload as well as the non-personal caseload.

2. Recommendation 2: Operational Processes and Procedures

- This recommendation is complete. In line with the scope of the CII, the new Procedural Instruction (PI) is focused on non-personal FOI requests. However, we will shortly begin work on a Procedural Instruction directed at personal FOI requests, noting that the majority of the processes set out in the new PI apply equally to personal FOI requests.
- Recommendations 2 and 3 related to the development of procedural guidance (procedural instructions) and training in applying those instructions in the non-personal caseload. The Department has finalised the procedural instruction for the non-personal caseload. The Department is now developing procedural instructions for personal access and amendment requests. This is an active project which will be completed by Q3 – an earlier completion date is not possible while maintaining a focus on reducing backlogs across the caseload.

3. Recommendation 3: Training

- This recommendation is well advanced. In line with the scope of the CII, the new eLearning package for FOI decision-makers is focused on non-personal FOI requests. In addition, we will train Departmental staff involved in the processing of personal requests in the Procedural Instruction for personal FOI requests.
- earlier this month, the Department launched its new FOI eLearning package for all staff and decision-makers. Module one includes an FOI overview that is relevant to both the personal and non-personal space. We are actively tracking the take up of this package across the Department.
- AGS training (decision maker and exemptions) is available for all staff who require a more in-depth understanding of FOI requirements and processes. The AGS module contains information relevant to decision making, regardless of caseload. Our September session has generated a lot of interest and we will run another two sessions in November 2021.

⁴ Email from the Department of Home Affairs to the OAIC on 3 August 2021

⁵ Email from the Department of Home Affairs to the OAIC on 14 September 2021

⁶ The Department provided its response of 14 September 2021 (Attachment D) in response to my request of 3 September 2021 for further information on the steps it has taken or is taking to extend the CII recommendations to its processing of FOI requests for personal information.

4. Recommendation 4: Audit

- The internal audit scheduled for late 2021 or early 2022 will focus on the CII's recommendations but we expect it will include observations on and recommendations for the FOI caseload as a whole, including the personal case load.
- Recommendation 4 requires us to complete an internal audit. This will necessarily focus on the Department's implementation of the CII recommendations due to the nature of the CII report but may make general observations on FOI processing by the Department as a whole.

Department's submissions regarding its processing of FOI requests in general

In its response of 3 August 2021, (**Attachment C**), the Department advised that, more broadly, the Department is considering options to facilitate the processing of FOI requests, such as:

- pro-actively publishing a wider range of commonly requested statistics
- business process reforms and administrative release of documents to reduce demand for personal FOI requests
- robotic process automation of request registration so that we can redirect staff time toward processing and decision-making.

In its response of 14 September 2021, the Department made further submissions regarding the general processing of FOI requests as follows: (**Attachment D**)

While our immediate priority continues to be implementation of the recommendations of the CII, the Department has progressed a number of improvements in the personal space which do not relate to CII. These include:

- a successful extension of time trial - guidance is now being developed for officers on when and how to use s15AA extensions;
- the development of dashboards, including daily updates to our on-hand data, which increase management visibility of the caseload;
- increased management focus on priority parts of the caseload, including resources dedicated to resolving our oldest and intractable cases in the personal caseload. In 2020-21, in addition to processing new personal access requests, the Department finalised more cases older than 90 days in 2020-21 than in 2019-20;
- maintenance of an improvements register which includes ideas for changes to the personal caseload; and
- better management of complaints received into the inboxes.

We are also exploring the possibilities of automating registration processes, releasing resources for decision making and expediting redactions. These are longer term projects and subject to resourcing.

General comments

The very high volume of FOI requests received by the Department will mean continuing pressures across the FOI program, including in the personal caseload. However, the

Department is committed to continuing to improve its processes for responding to FOI requests, within its allocated resources. To this end, the Department has maintained a stable level of resourcing in FOI, even when managing whole of government priorities such as the humanitarian response in Afghanistan and the establishment of a border measures program.

The impact of recent business process reforms, in response to the CII and independently, has led to a significant improvement in the Department's compliance with statutory timeframes for non-personal requests (up from 37 per cent to 65 per cent) and a reduction in the age of the oldest non-personal request with no on-hand request older than 90 days. This was achieved on the back of a further increase in the total number of non-personal requests in 2020-21; up almost 15% when compared to the previous financial year.

However, to deliver these improvements quickly, the Department has had to phase its reforms and transfer some resources internally, from the personal caseload to the business improvement function and non-personal caseload. To deliver broader process improvements in the personal space will require similar decisions and trade-offs, noting the personal caseload is a much larger program and has particular complexities in relation to identity resolution and integrity.

Discussion

The FOI request was made on 4 November 2019. Pursuant to s 15(5)(b) of the FOI Act, the Department was due to provide a decision to the complainant by 4 December 2019, but did not do so until the final tranche of 5 February 2020.

On 20 December 2019, the Department sought an extension of time under s 15AC from the OAIC, the application was declined (s 22(1)(a)(ii) irrelevant material).

Conclusions

The Department did not comply with s 15(5)(b) of the FOI Act when processing FOI request (s 22(1)(a)(ii) irrelevant material), in that:

- The Department was required to provide a decision to the complainant by 4 December 2019, but did not do so until its final tranche release of 5 February 2020.
- The Department did take steps to request an extension of time under s 15AC of the FOI Act.
- The statutory timeframe was not affected by a request consultation process under s 24AB(8) or by the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable under s 31 of the FOI Act.

Recommendations

In light of the Department's submissions, pursuant to s 88 of the FOI Act, I make the following formal recommendations to the Department that I believe the Department ought to implement within the timeframes specified below:

Recommendation 1

The Department prepare and implement an operational manual for processing FOI requests for personal information to be approved by the Information Champion by **28 February 2022**. The operational manual is to include, at a minimum, the steps that will be taken to ensure compliance with statutory processing requirements. Consistent with the requirements of the Information Publication Scheme, the operational manual should be made publicly available by the Department on its website.

Recommendation 2

By **28 February 2022**, the Department ascertain the additional resources (human or otherwise) anticipated to be required in order to meet statutory timeframes (taking account of the improvements through implementing recommendation 1) and provide an action plan to meet those requirements.

Recommendation 3

The Department:

- a. undertake and complete training on the operational manual for FOI Section staff and other staff (both decision makers and other staff who assist decision makers) **28 March 2022**
- b. ensure that online training in processing FOI requests for personal information is available to all staff of the Department by **28 March 2022**, and
- c. ensure that new staff joining the FOI Section are trained in relation to the operational manual within 2 weeks of commencing in the FOI Section.

Recommendation 4

By **30 May 2022**, the Department undertake an audit of the processing of FOI requests for personal information to assess whether Recommendations 1, 2 and 3 have been implemented and operationalised and whether those actions have been sufficient to address the issues identified in these complaints. The audit is to be undertaken by either the Department's internal auditors or by an external auditor, as determined by the Department. A copy of the audit report should be provided to the OAIC.

When considering the recommendations made above, the Department should refer to relevant OAIC FOI resources which can be found on the OAIC website.⁷

I request that the Department advise the OAIC of the implementation of each of the recommendations within the timeframes specified.

⁷ See <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/>. The OAIC's FOI Essentials toolkit, may be of particular assistance to the Department.



Notice on completion under s 86 of the FOI Act (s22(1)(a)(ii) - irrelevant material) – s22(1)(a)(ii) - irrelevant material and Attorney-General's Department

On 1 March 2020, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Attorney-General's Department (the Department) in its performance of its functions and exercise of its powers under the FOI Act.

The FOI complainant is the s22(1)(a)(ii) - irrelevant material.

The complaint is outlined in detail in correspondence dated 24 February 2020 and the submissions provided by the complainant on 1 March 2020 and 27 October 2020. Those submissions have been provided to the Department so I will not reproduce them here. The complainant has asked that the Information Commissioner investigate:

- *the decision by the Attorney-General's Department to accept the transfer of the freedom of information request from the Attorney-General; and*
- *the Department's processing of the freedom of information request (given that, for the reasons set out below, it could not have possibly been satisfied that it had identified – or could possibly identify – all or even most of the documents that fell within the scope of s22(1)(a)(ii) - irrelevant material request)¹.*

In relation the second element of the complaint above, I note that the complainant requested IC review of the Department's decision in relation to the transferred FOI request that is the subject of this complaint (s22(1)(a)(ii) - irrelevant material). In that context, I consider the second limb of the complaint relates to the Department's decision to accept transfer of the complaint from the Attorney-General in circumstances where the complainant submits it could not be satisfied that it had or could identify all most of the documents within the scope of the request.

Following preliminary inquiries, a notice of the decision to investigate this matter under s 75 of the FOI Act was sent to the Department on 29 April 2021.

For clarity, I note that a decision to transfer an FOI request under s 16 of the FOI Act is not an 'IC reviewable decision' subject to review by the Information Commissioner under Part VII of that Act. In addition, the Information Commissioner does not have jurisdiction to investigate the conduct of ministers under Part VIIB of the FOI Act. Accordingly, the investigation of this complaint related to the action taken by the Department in the performance of functions or

¹ Submission from complainant 1 March 2020.

the exercise of powers under the FOI Act, with reference to its acceptance of the transfer of the FOI request from the Attorney-General.

I have had regard to the complaint and submissions of the complainant described above and the submissions provided by the Department dated 24 September 2020, 1 October 2020, 21 May 2021 and 19 July 2021.

Background

On 16 August 2019, the complainant made an FOI request to the Department (Departmental reference s22(1)(a)(ii) - irrelevant mat **(the first request)**, requesting access to documents, including:

s22(1)(a)(ii) - irrelevant material
[Redacted text block]

Also on 16 August 2019, the complainant made an FOI request to the Attorney-General (**the second request**), seeking:

s22(1)(a)(ii) - irrelevant material
[Redacted text block]

s22(1)(a)(ii) - irrelevant material [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

s22(1)(a)(ii) - irrelevant material

[REDACTED]

[REDACTED]

On 30 October 2019 an adviser from the Attorney-General's Office wrote to the Department seeking agreement to the transfer of the second request to the Department. Later that day, the Department agreed to the conditional transfer of the second request on the basis that 'the Office has not identified any documents it holds that aren't caught within the scope of the similar request [REDACTED] made of us [REDACTED]'. Shortly thereafter, also on 30 October 2019, the adviser confirmed 'I can confirm that the office does not hold any additional documents to those that are not already captured by the department's similar request - [REDACTED]';.

The Department wrote to the complainant on 31 October 2019 to advise the complainant that the Department had accepted transfer of the FOI request from the Attorney-General (Departmental reference [REDACTED]). In that correspondence, the FOI officer advised that 'The department accepted transfer on the same day as any documents identified by AGO relevant to the request were already in the department's possession'.

Legislation and Guidelines

Relevant to this complaint, s 16 of the FOI Act provides:

- (1) Where a request is made to an agency for access to a document and:
 - (a) the document is not in the possession of that agency but is, to the knowledge of that agency, in the possession of another agency; or
 - (b) the subject-matter of the document is more closely connected with the functions of another agency than with those of the agency to which the request is made;
 the agency to which the request is made may, with the agreement of the other agency, transfer the request to the other agency.

...

- (4) Where a request is transferred to an agency in accordance with this section, the agency making the transfer shall inform the person making the request accordingly and, if it is necessary to do so in order to enable the other agency to deal with the request, send the document to the other agency.
- (5) Where a request is transferred to an agency in accordance with this section, the request is to be taken to be a request:
 - (a) made to the agency for access to the document that is the subject of the transfer; and
 - (b) received by the agency at the time at which it was first received by an agency.

(6) In this section, **agency** includes a Minister.

The FOI Guidelines are issued under s 93A of the FOI Act. Agencies and ministers are required to have regard to the FOI Guidelines when performing a function or exercising a power under the FOI Act. Relevant to this complaint, the FOI Guidelines provide:

3.64 An agency or minister who receives a request may transfer the request, or part of the request, to another agency or minister with their agreement if:

- the document is not in the first agency or minister's possession but is to their knowledge in the possession of another agency or minister, or
- the subject matter of the document is more closely connected with the functions of another agency or minister (s 16(1)).

3.65 It is implicit in those requirements that a request cannot be transferred solely as a matter of administrative convenience, or because another agency or minister produced the document requested or also has a copy of it. Equally, before a decision is made to transfer a request an agency or minister should take whatever reasonable steps are necessary to ascertain whether they have the documents that may meet the description in the FOI request.

3.66 Documents generated by the joint activities of a number of agencies (such as an interdepartmental committee) might be 'more closely connected' with the agency that chaired the committee or which initiated the production of the document.

Consideration

Subsection 16(1) of the FOI Act makes it clear that transfer from one agency to another is both discretionary and subject to the agreement of the receiving agency.

The transfer correspondence between the Attorney-General's adviser and the departmental officer does not specify whether the transfer was proposed and accepted under s 16(1)(a) or (b). For the purpose of this investigation, I have considered whether the Department could reasonably be satisfied that the terms of either s 16(1)(a) or (b) applied before agreeing to the transfer of the second request.

I note that it is also open to a receiving agency or minister to transfer part of a request under s 16(3A) of the FOI Act while retaining and processing the remainder of the request. As that provision was not applied in this matter I did not consider it during the course of this investigation.

Paragraph 16(1)(a) of the FOI Act

Section 16(1)(a) requires the Department to reasonably form the view that both:

- the Attorney-General was not in the possession of the documents that were the subject of the second request and
- the documents were in the possession of the Department.

If both those conditions were met, it would reasonably be open to the Department to agree to the transfer of the second request.

The Department has submitted that ‘the department considers it is clear that the documents subject to the request were in the possession of the department at the time the request was made, and that the department could be reasonably satisfied of this given the searches that had already been undertaken for related FOI request [redacted]’. However, in addition to the documents being in the possession of the Department, s 16(1)(a) also requires that the documents were *not* in the possession of the Attorney-General.

I am not satisfied that the documents in the possession of the Department were not in the possession of the Attorney-General (or his office). In relation to those parts of the first and second requests that similarly related to documents containing correspondence between the Attorney-General (or his office) and the Department, it is reasonable to conclude that such documents (to the extent they existed), would be in the possession of *both* the Department and the Attorney-General (or his office). The correspondence from the adviser of 30 October 2019 referred to above which stated ‘I can confirm that the office does not hold any additional documents to those that are not already captured by the department’s similar request - [redacted]’ indicates that documents common to both requests were in the possession of the Attorney-General (or his office).

In addition, there is no evidence before me to suggest that the Department would hold documents that fell outside the first request to the Department and was solely the subject of the second request to the Attorney-General. [redacted] s 22(1)(a)(ii) irrelevant material

[redacted] s 22(1)(a)(ii) irrelevant material

[redacted] s 22(1)(a)(ii) irrelevant material The Department has not submitted that documents of this nature were routinely provided to the Department by the Attorney-General.

I am of the view that it was not reasonably open to the Department to agree to the transfer of the second request under s 16(1)(a) of the FOI Act.

Paragraph 16(1)(b) of the FOI Act

The alternative interpretation - that the Department agreed to the transfer on the basis that s 16(1)(b) had been met – has some support in the submissions provided but is not explicitly stated. Paragraph 16(1)(b) provides a discretion to transfer an FOI request with the agreement of the receiving agency where ‘the subject matter of the document is more closely connected with the functions of another agency than with those of the agency to which the request is made’. A mere connection to the subject matter of the documents is insufficient to enliven the provision; so is simply possessing some or all of the documents. Rather, the provision requires weighing the relative functional connections of both agencies

involved with the subject matter of the documents to determine which is ‘more closely’ connected with it. The FOI Guidelines provide² that:

It is implicit in those requirements [s16(1)] that a request cannot be transferred solely as a matter of administrative convenience, or because another agency or minister produced the document requested or also has a copy of it. Equally, before a decision is made to transfer a request an agency or minister should take whatever reasonable steps are necessary to ascertain whether they have the documents that may meet the description in the FOI request.

The Department has submitted that this assessment was conducted:

‘Moreover, the department considers that the documents subject to the request are closely connected to the functions of the department and, in particular, to the department’s role in providing the best available advice and evidence to the Attorney-General in his role as First Law Officer.’

This submission notes the documents subject to the request ‘are’ closely connected to the functions of the Department but does not articulate how they are ‘more closely’ connected to the functions of the Department than the functions of the Attorney-General as required by s 16(1)(b). This submission must be considered in the context of the terms of the second request, which specified documents **s22(1)(a)(ii) - irrelevant material**

The second request referred to a broader description of documents than the first request and sought documents containing **s 22(1)(a)(ii) irrelevant material** **2(1)(a)(ii) - irrelevant material**

² FOI Guidelines at 3.65

s 22(1)(a)(ii) irrelevant material

In addition to that function, the Department maintains a register **s22(1)(a)(ii) - irrelevant material**

[Redacted]

[Redacted]

Correspondence between the Attorney-General and those individuals named in the second request would appear to be more closely aligned to the Attorney-General's functions than those of the Department, **s22(1)(a)(ii) - irrelevant material**

[Redacted]

[Redacted]

I am of the view that it was not reasonably open to the Department to agree to the transfer of the second request under s 16(1)(b) of the FOI Act. The second request was for documents that related to **s 22(1)(a)(ii) irrelevant material;22(1)(a)(ii) - irrelevant material**

[Redacted] While the Department provides support to the Attorney-General in relation to that function, that support is temporally limited and the function itself is that of government.

s22(1)(a)(ii) - irrelevant material

[Redacted]

Investigation conclusions

Pursuant to s 87 of the FOI Act, the investigation conclusions will set out my opinions and conclusions about the matters raised in this complaint.

Following this investigation, I have concluded that the Department did not correctly apply the statutory test in s 16(1) of the FOI Act when it agreed to accept the transfer of the second request. The Department could not be reasonably satisfied that the requirements of s 16(1) were met at the time transfer was requested and should have not agreed to accept transfer of the request on that basis.

Recommendation

The purpose of my recommendations, as set out below, is to conclude the complaint investigation and ensure the Department meets its obligations in relation to the transfer of requests under s 16 of the FOI Act.

Pursuant to s 88 of the FOI Act, I have set out the following recommendations, being formal recommendations to the Department that I believe the Department ought to implement:

1. by 18 February 2022, that the Department update its *AGD FOI Procedures Manual: Standard procedures for processing FOI requests to the Attorney-General's Department* in relation to the matters required to be considered in accepting the transfer of FOI requests, including but not limited to:
 - whether the transferring agency demonstrated that it took reasonable steps to search for documents that are the subject of the FOI request and the Department is reasonably satisfied that either:
 - the transferring agency is not in possession of the documents within the scope of the request (s 16(1)(a)) or
 - the transferring agency or minister has indicated why, and the Department agrees, that the subject matter is more closely connected to the functions of the Department (s 16(1)(b))
 - where the Department accepts a transfer under s 16(1), it should record the reasons why it has accepted the transfer, including (where relevant) how the agency demonstrated it is not in possession of the documents or why it considers the subject matter to be more closely connected to the functions of the Department
 - the option of transferring or accepting the transfer of part of an FOI request in accordance with s 16(3A) of the FOI Act.
2. by 30 July 2022, that the Department provide a report to the OAIC on the implementation of the amended procedures relevant to accepting the transfer of FOI requests under s 16 of the FOI Act. This may take the form of a report following a

review of matters transferred to the Department between 11 February and 30 June 2022 to ensure that the amended procedures have been implemented.



ATTACHMENT A

Notice on completion under s 86 of the FOI Act (s 22(1)(a)(ii) - irrelevant material) and the Department of Foreign Affairs and Trade (s 22(1)(a)(ii) - irrelevant material)

On 13 November 2020, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act), about the Department of Foreign Affairs and Trade (the Department) in the performance of its functions and the exercise of its powers under the FOI Act.

The complainant is (s 22(1)(a)(ii) - irrelevant material).

The complainant alleges the Department failed to provide a decision on (s 22(1)(a)(ii) - irrelevant material) two FOI requests of 18 June 2020 within the statutory timeframes set out in the FOI Act (Agency references: (s 22(1)(a)(ii) - irrelevant material)), that the Department appears to have no administrative access arrangements in place to provide documents to individuals other than through the FOI Act, that the discretion of the Department is always exercised in favour of imposing a charge, the Department requests extensions of time and provides the wrong form in circumstances where the Department has agreed to refund a charge.

The FOI requests the subject of this FOI complaint were also the subject of Information Commissioner reviews (IC review) (OAIC references: (s 22(1)(a)(ii) - irrelevant material)).¹

This Notice on Completion sets out the issues identified in the complaint raised by the complainant. The complaint is assessed against the legislative framework and the FOI Guidelines² to which agencies and ministers must have regard. I have considered the complaint and the Department's submissions in response before making findings about the complaint.

Background

On 13 November 2020, the complainant lodged a complaint under s 70 of the FOI Act about the Department's processing of 2 FOI requests and sought IC review of the deemed access refusal decisions (OAIC references: (s 22(1)(a)(ii) - irrelevant material)).

The complainant stated:

¹ The IC review matters remain ongoing at this time.

² The Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard to in performing a function or exercising a power under the FOI Act.

There are important issues here regarding DFAT's management of its FOI responsibilities. You should take a look.

One application was for one document. DFAT apparently has no Administrative Access, exercises the discretion regarding charges by always charging, argues the toss about the waving of charges, asks for more time and when the OAIC decides it is not complex or voluminous goes into lock down anyway, sends the wrong form when it recognises I'm due for a refund, all this before a decision on access is made. The last straw is that despite a decentralised decision making system the latest silence is because "Danielle is not in the office this week."

The handling of this must have cost hundreds of dollars in APS time spent. Highly inefficient. Tip of the iceberg?

On 2 September 2021, the OAIC notified the Department pursuant to s 75 of the FOI Act that it would investigate the complaint and requested the Department's submissions in response.

On 23 September 2021 the Department provided a response to the notice and request for information (**Attachment C**).

A timeline of the processing the 2 FOI requests is at **Attachment B**.

Investigation results

Pursuant to s 87 of the FOI Act, the investigation results set out the matters that I have investigated and my opinion and conclusions about the Department's processing of the complainant's FOI requests. I have considered all the material provided by the Department and the complainant in this matter.

Issue 1: Compliance with statutory processing periods

Complainant's allegation

The complainant alleges the Department failed to provide decisions on b2201 2 FOI requests made on 18 June 2020 within the statutory timeframes set out in the FOI Act.

Legislative framework

The FOI Act provides a statutory timeframe of 30 days to process an FOI request (s 15(5)).

The period can be extended by up to 30 days with the applicant's agreement (s 15AA), by 30 days if consultation with a third party is undertaken (s 15(6)), and by 30 days if consultation with a foreign entity is undertaken (s 15(8)).

An agency or minister may apply to the Information Commissioner for extension of the statutory timeframe for complex or voluminous requests (s 15AB) or following a deemed access refusal decision (s 15AC).

The statutory processing period does not include:

- the time that an agency may take in a request consultation process to decide if a practical refusal exists (s 24AB(8))
- the time elapsing between an applicant being notified that a charge is payable and
 - either the applicant paying the charge (or a deposit on account of the charge) or the
 - agency varying the decision that a charge is payable (s 31).

Department's submissions to complainant

The Department provided a chronology of the processing of the requests and advised that both decisions were provided to the complainant outside the statutory processing period. The Department submitted that:

- a) the FOI requests were received on 18 June 2020
- b) the Department sought extensions of time under both ss 15AA and 15AB of the FOI Act in relation to both FOI requests
- c) the complainant agreed to a 10-day extension of time in relation to [s 22(1)(b)(ii) irrelevant] but declined to agree to an extension in relation to [s 22(1)(a)(i) irrelevant]
- d) the OAIC granted a 30-day extension of time under s 15AB of the FOI Act in relation to [s 22(1)(a)(i) irrelevant], but an extension was not granted by the OAIC in relation to [s 22(1)(a)(i) irrelevant]
- e) the statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act
- f) that both requests 'are connected to complex foreign policy issues concerning Australia's engagement in international organisations. The Department, therefore, in processing the requests adopted a careful approach to consultation and deliberation to mitigate the risk to Australia's international relations and national interest', and
- g) the Department provided a decision in relation to [s 22(1)(a)(i) irrelevant material] 4 March 2021 and in relation to [s 22(1)(b)(ii) irrelevant] on 30 November 2020.

The Department also made submissions regarding the complex considerations relevant to processing FOI requests generally, as well as with regard to the complainant's specific FOI requests:

The department is committed to providing access to documents in accordance with the FOI Act. However, the department must also ensure that Australia's strategic foreign policy interests are carefully considered and, where appropriate, documents are exempted in accordance with the FOI Act. As such, the department's FOI team works closely with decision-makers and stakeholders to assess documents for sensitivities.

The documents sought by the complainant in [s 22(1)(a)(i) irrelevant material] are connected to complex foreign policy issues concerning Australia's engagement in international organisations. The department, therefore, in processing the requests adopted a careful approach to consultation and deliberation to mitigate the risk to Australia's international relations and national interest.

Discussion

The FOI requests were made on 18 June 2020 and acknowledged by the Department on 24 June 2020.

I am satisfied that the initial statutory processing period was otherwise extended as follows:

- a) in relation to [s 22(1)(a)(i) irrelevant]:
 - i. by a request consultation period under s 24(8) of the FOI Act
 - ii. when the complainant agreed to a 10-day extension of time under s 15AA of the FOI Act
 - iii. when the OAIC granted a 30-day extension of time under s 15AB of the FOI Act, and
- b) in relation to [s 22(1)(a)(i) irrelevant]:
 - i. the statutory timeframe was affected by the time elapsing between the complainant being notified that a charge is payable and the complainant paying the charge pursuant to s 31 of the FOI Act.

I note the Department's submissions regarding the nature of the documents requested in relation to [s 22(1)(a)(i) irrelevant]:

As the Foreign Minister's speech makes clear, these documents are connected to Australia's [sic] strategic position for the management of relationships with multinational organisations and other governments to advance the Australian national interest. The sensitivities contained in the documents contributed to the complexity of processing of the requests.

In relation to [s 22(1)(a)(i) irrelevant], the Department submitted that the processing period had been impacted by the Department of Health declining to accept transfer of the request pursuant to s 16 of the FOI Act. The Department consulted with the Department of Health in relation to the potential transfer of this request on 29 June 2020 and the Department declined to accept the transfer on 30 June 2020. Consequently, I do not consider that the engagement with the Department of Health in relation to the potential transfer of the request significantly impacted the timeliness of the Department in processing this request.

Taking into account the extensions of time that were obtained and any time periods to be disregarded from the processing periods under the FOI Act, the Department was due to provide the complainant with a decision in relation to [s 22(1)(a)(i) irrelevant] on 7 September 2020 and in relation to [s 22(1)(a)(i) irrelevant] on 31 August 2020.

The Department provided a decision to the applicant in relation to [s 22(1)(a)(i) irrelevant] on 4 March 2021; that is, 178 calendar days after the processing period for this request elapsed.

The Department provided a decision to the applicant in relation to [s 22(1)(a)(i) irrelevant] on 30 November 2020; that is, 91 calendar days after the processing period for this request elapsed.

Conclusions

The Department did not comply with s 15(5)(b) of the FOI Act when processing the FOI requests **s 22(1)(a)(ii) irrelevant material** in that:

- a) the Department was required to provide a decision to the complainant in relation to **s 22(1)(a)(ii) irrelevant material** by 7 September 2020, but did not do so until 4 March 2021, and
- b) the Department was required to provide a decision to the complainant in relation to **s 22(1)(a)(ii) irrelevant material** by 31 August 2020, but did not do so until 30 November 2020.

As such, I am satisfied that the Department's decisions in relation to the 2 FOI requests were provided significantly outside the statutory processing periods (by 178 and 91 calendar days) set out in the FOI Act.

Issue 2: Administrative access arrangements within the Department

Allegation

The complainant alleges that the Department did not provide the requested documents through administrative access arrangements and the Department does not appear to have administrative access arrangements in place.

Department submissions

The Department's submissions address its administrative access arrangements generally and whether it was appropriate for the Department to consider the complainant's FOI requests under an administrative access arrangement.

The Department submits:

This department utilises administrative access arrangements for various matters including but not limited to requests for information previously published by the department such as Country Information Reports as well as access to a person's own personal information relating to passport and consular matters.

In deciding on whether an administrative access arrangement is an appropriate mechanism for access, the FIO team and relevant business areas of the department review the request and balance the complexity of any policy issues raised by the request and the types of information sought against the FOI framework for decision-making.

In both **s 22(1)(a)(ii) irrelevant material**, while the complainant did request administrative access, the requests were assessed as raising complex foreign policy issues and it was considered FOI would provide a better decision-making framework in these instances. The department respectfully submits that it is not realistic for the complainant to expect that the department would process requests raising complex foreign policy issues under administrative access arrangements.

The department further notes that in both matters the department refused access to the documents in full. In such circumstances, unless the complainant agreed to withdraw [REDACTED] requests without the department releasing any documents and without any review rights, it would not have been possible for the department to finalise the requests under administrative access arrangements.

Discussion

Disclosure of information through an administrative access arrangement may be advantageous to both agencies and individuals seeking access to information, as it provides an informal avenue for provision of government information, and may offer resourcing benefits to the agency and potentially quicker processing times for applicants compared to processing requests under the FOI Act.³

The *FOI Guidelines* at [3.5] advise that administrative access arrangements should operate alongside the FOI Act, however '[w]here it appears that the document is likely to contain a substantial number of redactions, it would generally be more appropriate for the request to be processed under the FOI Act'.⁴

Conclusion

There is no information before me which indicates that the Department does not have administrative access arrangements in place as alleged by the complainant in [REDACTED] FOI complaint, or that these particular FOI requests would be more appropriately processed under an administrative access arrangement.

In consideration of the above, I do not make any recommendations in relation to this issue.

Issue 3: Exercising a discretion to impose a charge

Allegation

The complainant alleges that the Department 'exercises the discretion regarding charges by always charging'.

Legislative framework

An agency or minister may impose a charge in respect of a request for access to a document or for providing access to a document, under s 29 of the FOI Act. The charge must be assessed in accordance with the *Freedom of Information (Charges) Regulations 2019* (Charges Regulations).

³ <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/administrative-access>

⁴ See FOI Guidelines [3.5] footnote 3.

Where the applicant objects to the estimated charge, they may contend that the charge has been wrongly assessed or should be reduced or not imposed (s 29(1)(f)). The application must:

- be made in writing (s 29(1)(f))
- be made within 30 days of receiving the notice or such further period as the agency or minister allows (s 29(1)(f))
- set out the applicant's reasons for contending that the charge has been wrongly assessed or should otherwise be reduced or not imposed (s 29(1)(f)(ii)).

Department submissions

In relation to the Department exercising its discretion to impose a charge, the Department submits:

The department notes that in respect of the two FOI requests that are the subject of the complaint, the department exercised its discretion to only issue charges in respect of one of the requests (s 22(1)(a)(i) irrelevant). Furthermore, the department notes that it exercised its discretion to reduce those charges in light of the contentions made by the complainant.

...

The department submits that it was appropriate for the department to exercise its discretion to impose charges in (s 22(1)(a)(i) irrelevant) noting the complex foreign policy issues involved in the request. While only one document was within scope of the request, processing the request required consultation within the department and with PM&C, with access to the document being refused on the basis of sections 34(1)(a), 33(a)(iii), and 33(a)(i) of the FOI Act.

Discussion

The FOI Guidelines [4.3] state:

Under s 8 of the Charges Regulations, an agency or minister has a discretion to impose or not impose a charge, or impose a charge that is lower than the applicable charge. In exercising that discretion, the agency or minister should take account of the 'lowest reasonable cost' objective stated in the objects of the FOI Act (s 3(4)).

I note that in relation to the 2 FOI requests for access to non-personal information under consideration in this FOI complaint, the Department exercised its discretion to impose a charge in relation to (s 22(1)(a)(i) irrelevant), but not in relation to (s 22(1)(a)(i) irrelevant).

In relation to (s 22(1)(a)(i) irrelevant), when the complainant contended the charge should be reduced or not imposed, the Department reduced the charge in response to the contentions raised by the complainant.

I have reviewed the Department's annual FOI statistics, provided to the OAIC pursuant to s 93 of the FOI Act in relation to FOI processing. In 2020-21, the Department received 277 FOI requests. Of those, 90 requests were for personal information, for which a charge cannot be imposed; the remaining 187 were for non-personal information. The Department exercised the discretion to impose a charge in relation to 48 of those non-personal requests.

Conclusion

I am not satisfied that the Department exercises the discretion to impose a charge in relation to FOI requests in relation to all or a significant majority of FOI requests.

In consideration of the above, I do not make any recommendations in relation to this issue.

Issue 4: Respondent sent the incorrect refund form

Allegation

The complainant alleges that the Department sent them the wrong form through which to arrange a refund of a paid FOI charge.

Department submissions

In relation to the Department providing the incorrect refund form, the Department advises:

The complainant is correct that [redacted] was provided the incorrect form to process the refund of the charges [redacted] paid for the processing of [redacted]. The department regrets that the officer sent the complainant the incorrect form and for any inconvenience that caused.

Following this error, the department reviewed and revised its refund procedures with the department's accounts team to ensure that the procedures for processing refunds are streamlined and officers are aware of the correct forms to use.

Discussion

The Department has acknowledged that it provided the wrong form to the complainant in this case and that it has taken steps to reduce the likelihood of that error occurring in the future.

Conclusion

I am satisfied that the Department provided the wrong form to the complainant in relation to the refund of a paid FOI charge. I am also satisfied that the Department has taken steps to reduce the likelihood of that error recurring.

In consideration of the above, I do not make any recommendations in relation to this issue.

Recommendations

In considering whether it is appropriate to make recommendations in relation to the Department's compliance with statutory processing periods, I have considered the

Department's annual statistical returns, as provided to the OAIC for the 2019-20 and 2020-21 financial years:

Financial year	Total FOI requests received	Total FOI requests processed in time	Compliance with statutory timeframes
2019-20	136	117	86.0%
2020-21	168	115	68.4%

As noted in the table above, the Department's statutory compliance reduced from 86% to 68.4% between 2019-20 and 2020-21. These statistics, as provided by the Department, indicate that the Department's compliance with the statutory processing period has diminished.

To assist the Department in improving its compliance with the statutory processing period, and pursuant to s 88 of the FOI Act, I make the following formal recommendations to the Department that I believe the Department ought to implement within the timeframes specified below:

1. The Department appoint an Information Champion⁵ by **10 December 2021**. The Information Champion may be supported by an information governance board to provide leadership, oversight and accountability necessary to promote and operationalise the Department's compliance with the FOI Act.
2. The Department should develop and implement a compliance action plan and provide a copy of that plan to the OAIC by **10 February 2022**. The compliance action plan should include an explanation and assessment of the reasons for non-compliance with the statutory processing period for the 2019-20 and 2020-21 financial years and proposals to improve compliance, including in relation to:
 - a) adequacy of resources
 - b) training
 - c) operational improvements and

⁵ This recommendation is consistent with recommendations made by the Information Commissioner in investigations into other agencies' compliance with statutory processing timeframes. In those investigations, the Information Commissioner recommended the appointment of an 'Information Champion' to promote and operationalise compliance with the FOI Act, the preparation and implementation of an operational manual for processing FOI requests and the provision of FOI training to staff.

- d) proposals for how the Department will comply with the statutory processing period in relation to any backlog of outstanding FOI requests as well as new requests.
3. The Department should provide an implementation report to the OAIC by **10 May 2022**, providing statistical evidence and analysis to demonstrate the effectiveness of the implementation of the compliance action plan in recommendation 2 and whether the reasons for non-compliance identified in the compliance action plan have been rectified.

In developing the compliance action plan in response to recommendation 2, I suggest that the Department have regard to the formal recommendations set out in the Information Commissioner's recent report on the *Department of Home Affairs' compliance with the statutory processing requirements under the Freedom of Information Act 1982 in relation to requests for non-personal information.*

When considering the recommendations made above, the Department should consider referring to relevant OAIC FOI resources which can be found on the OAIC website. I request that the Department advise the OAIC of the implementation of each recommendation within the timeframes specified.



ATTACHMENT A

Notice on completion under s 86 of the FOI Act (s 22(1)(a)(ii) irrelevant material) and the Department of Home Affairs (s 22(1)(a)(ii) - irrelevant material)

On 8 February 2021, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Department of Home Affairs (the Department) in the performance of its functions, and the exercise of its powers, under the FOI Act.

The complainant is s 22(1)(a)(ii) - irrelevant material, represented by s 22(1)(a)(ii) - irrelevant material.

The complainant alleges the Department failed to provide a decision on their FOI request of 27 November 2020 within the statutory timeframes set out in the FOI Act.

The FOI request the subject of this FOI complaint was also the subject of an Information Commissioner review (IC review) (s 22(1)(a)(ii) irrelevant material).¹

This Notice on Completion sets out the issue as identified from the allegation raised by the complainant. The allegation is assessed against the legislative framework and the FOI Guidelines² which agencies and ministers must have regard to. I have considered the complaint and the Department's submissions in response before making conclusions about the allegation.

Background

On 27 November 2020, the complainant made the FOI request to the Department (s 22(1)(a)(ii) irrelevant material).

Under s 15(5) of the FOI Act, the Department was required to provide a decision to the complainant by 27 December 2020.

On 27 December 2020, the Department was deemed to have refused access pursuant to s 15AC of the FOI Act.

On 6 January 2021, the complainant sought IC review of the deemed access refusal decision.

¹ s 22(1)(a)(ii) irrelevant material

² The Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard to in performing a function or exercising a power under the FOI Act.

On 12 January 2021, the Department issued the complainant with a request consultation notice under s 24AB of the FOI Act. The complainant clarified the scope of the request the same day.

On 20 January 2021, the Department provided a substantive decision to the complainant.

On 21 January 2021, the complainant requested an internal review of the Department's decision. On 22 January 2021, the Department advised the complainant that this request was invalid on the basis that as the decision became deemed under s 15AC, internal review is unavailable.

On 8 February 2021, the complainant lodged an FOI complaint about the Department's non-compliance with the statutory processing period under s 70 of the FOI Act.

On 23 April 2021, the OAIC commenced an investigation into this complaint. On 3 June 2021, the Department provided a response to the notice and request for information under s 75 of the FOI Act.

On 3 August 2021 and 14 September 2021, the Department provided further submissions in response to the investigation notice of 23 April 2021.

The key procedural events in this FOI complaint are set out in **Annexure A** to this Notice.

Investigation results

Pursuant to s 87 of the FOI Act, the investigation conclusions set out my opinion and conclusion on how the Department processed the complainant's FOI request. I have considered all the material provided by the Department and the complainant in this matter.

Issue: Compliance with statutory processing periods

Complainant's allegation

The complainant alleges the Department failed to provide a decision on their FOI request of 27 November 2020 within the statutory timeframes set out in the FOI Act.³

Legislative framework

The FOI Act provides a statutory timeframe of 30 days to process an FOI request (s 15(5)).

The period can be extended by up to 30 days with the applicant's agreement (s 15AA), by 30 days if consultation with a third party is undertaken (s 15(6)), and by 30 days if

³ The complainant also raised issues relating to the Department's response to their request for internal review. This issue will be dealt with separately to this investigation.

consultation with a foreign entity is undertaken (s 15(8)).

An agency or minister may apply to the Information Commissioner for extension of the statutory timeframe for complex or voluminous requests (s 15AB) or following a deemed access refusal decision (s 15AC).

The FOI Guidelines at [3.139] state:

An agency or minister must, as soon as practicable, and no later than 30 days after receiving a request, take all reasonable steps to enable the applicant to be notified of a decision on the request (s 15(5)(b)). Section 15(5)(b) provides that the 30-day processing period commences on 3 See also, FOI Guidelines at [3.125]. 4 the day after the day the agency or minister is taken to have received a request that meets the formal requirements of s 15(2), (2A). An agency should act promptly to assist an applicant whose request does not meet the formal requirements in keeping with its obligations under s 15(3).

Table 1: Extension of time provisions

Reason for extension	Extension period	Determined by	Notification requirement
Third party consultation: consultation with a state, or a person or business concerning personal or business information (s 15(6))	30 days	by default if agency or minister determines ss 26A, 27 or 27A apply	agency or minister must inform applicant of extension as soon as practicable (s 15(6)(b))
Consultation with foreign entity required to determine if 33(a)(iii) or 33(b) exemptions apply (s 15(7),(8))	30 days	by default if agency or minister determines consultation is needed	agency or minister must inform applicant of extension as soon as practicable (s 15(8)(b))
By agreement between applicant and agency or minister (s 15AA)	up to 30 days, as either a single extension or a series of shorter extensions. This may be in addition to an extension for third party consultation	agency or minister but only with written agreement of applicant	agency or minister must give written notice of the extension to the Information Commissioner as soon as practicable (s 15AA(b))
Complex or voluminous request (s 15AB)	30 days or other period	Information Commissioner, upon request from agency or minister	Commissioner must inform applicant and agency or minister of an extension period as soon as practicable where a decision is made to grant the extension (s 15AB(3))
Following a deemed refusal (s 15AC(4))	as determined by the Information Commissioner	Information Commissioner, upon request from agency or minister	no legislative requirement but Commissioner may require agency or minister to notify applicant or third party as a condition of granting the extension (s 15AC(6))

The statutory processing period does not include:

- the time that an agency may take in a request consultation process to decide if a practical refusal exists (s 24AB (8))
- the time elapsing between an applicant being notified that a charge is payable and
- either the applicant paying the charge (or a deposit on account of the charge) or the
- agency varying the decision that a charge is payable (s 31).

Deemed access refusal

Section 15AC provides that where a decision on an FOI request has not been provided to the applicant within the statutory processing period, the principal officer of the agency or the minister is deemed to have made a decision refusing access to the documents (s 15AC (3)).

The FOI Guidelines at [3.154] – [3.155] explain:

The consequence of a deemed refusal is that an applicant may apply for IC review (s 54L(2)(a)) In addition, once the time has expired and there is a deemed decision, the agency or minister cannot impose a charge for access...

Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of reasons on the FOI request. This obligation to provide a statement of reasons on the FOI request continues until any IC review of the deemed decision is finalised. ...

Department's submissions to the complaint

Response to the Notice of investigation under s 75 of the FOI Act

On 3 June 2021, the Department provided its response to the complaint. The Department provided a chronology of the processing of the request and advised that:

- The Department regretted that, due to a large backlog and staff leave over the December/January holiday period, this request was not registered and acknowledged until after it had already been deemed refused. The Department is confident recent changes to its registration processes will mean this should not occur in the future.
- The Department notes the decision was ultimately finalised 8 days after the revised scope was agreed with the complainant.
- The Department did not seek extensions of time under either ss 15AB, 15AC or 54D of the FOI Act.
- The statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.

The Department also provided submissions in relation to the general grounds for delay in processing FOI requests for personal information, and the measures it is taking to address those factors (**Attachment B**).

On 3 August 2021⁴ (**Attachment C**) and 14 September 2021⁵ (**Attachment D**),⁶ the Department provided further submissions on the steps that it has undertaken to extend the recommendations made in the Final Report of the CII into the Department's processing of FOI requests for non-personal information, to its processes and procedures for processing FOI requests for personal information. The Department advised that:

1. Recommendation 1: Appoint an Information Champion

- This recommendation is complete, noting the Information Champion's role extends equally to the non-personal and personal caseload.
- Our Information Champion (SES Band 2) is actively engaged with the management and oversight of the personal caseload as well as the non-personal caseload.

2. Recommendation 2: Operational Processes and Procedures

- This recommendation is complete. In line with the scope of the CII, the new Procedural Instruction (PI) is focused on non-personal FOI requests. However, we will shortly begin work on a Procedural Instruction directed at personal FOI requests, noting that the majority of the processes set out in the new PI apply equally to personal FOI requests.
- Recommendations 2 and 3 related to the development of procedural guidance (procedural instructions) and training in applying those instructions in the non-personal caseload. The Department has finalised the procedural instruction for the non-personal caseload. The Department is now developing procedural instructions for personal access and amendment requests. This is an active project which will be completed by Q3 – an earlier completion date is not possible while maintaining a focus on reducing backlogs across the caseload.

3. Recommendation 3: Training

- This recommendation is well advanced. In line with the scope of the CII, the new eLearning package for FOI decision-makers is focused on non-personal FOI requests. In addition, we will train Departmental staff involved in the processing of personal requests in the Procedural Instruction for personal FOI requests.

⁴ Email from the Department of Home Affairs to the OAIC on 3 August 2021

⁵ Email from the Department of Home Affairs to the OAIC on 14 September 2021

⁶ The Department provided its response of 14 September 2021 (Attachment D) in response to my request of 3 September 2021 for further information on the steps it has taken or is taking to extend the CII recommendations to its processing of FOI requests for personal information.

- earlier this month, the Department launched its new FOI eLearning package for all staff and decision-makers. Module one includes an FOI overview that is relevant to both the personal and non-personal space. We are actively tracking the take up of this package across the Department.
- AGS training (decision maker and exemptions) is available for all staff who require a more in-depth understanding of FOI requirements and processes. The AGS module contains information relevant to decision making, regardless of caseload. Our September session has generated a lot of interest and we will run another two sessions in November 2021.

4. Recommendation 4: Audit

- The internal audit scheduled for late 2021 or early 2022 will focus on the CII's recommendations but we expect it will include observations on and recommendations for the FOI caseload as a whole, including the personal case load.
- Recommendation 4 requires us to complete an internal audit. This will necessarily focus on the Department's implementation of the CII recommendations due to the nature of the CII report but may make general observations on FOI processing by the Department as a whole.

Department's submissions regarding its processing of FOI requests in general

In its response of 3 August 2021, (**Attachment C**), the Department advised that, more broadly, the Department is considering options to facilitate the processing of FOI requests, such as:

- pro-actively publishing a wider range of commonly requested statistics
- business process reforms and administrative release of documents to reduce demand for personal FOI requests
- robotic process automation of request registration so that we can redirect staff time toward processing and decision-making.

In its response of 14 September 2021, the Department made further submissions regarding the general processing of FOI requests as follows: (**Attachment D**)

While our immediate priority continues to be implementation of the recommendations of the CII, the Department has progressed a number of improvements in the personal space which do not relate to CII. These include:

- a successful extension of time trial - guidance is now being developed for officers on when and how to use s15AA extensions;
- the development of dashboards, including daily updates to our on-hand data, which increase management visibility of the caseload;
- increased management focus on priority parts of the caseload, including resources dedicated to resolving our oldest and intractable cases in the personal caseload. In 2020-

21, in addition to processing new personal access requests, the Department finalised more cases older than 90 days in 2020-21 than in 2019-20;

- maintenance of an improvements register which includes ideas for changes to the personal caseload; and
- better management of complaints received into the inboxes.

We are also exploring the possibilities of automating registration processes, releasing resources for decision making and expediting redactions. These are longer term projects and subject to resourcing.

General comments

The very high volume of FOI requests received by the Department will mean continuing pressures across the FOI program, including in the personal caseload. However, the Department is committed to continuing to improve its processes for responding to FOI requests, within its allocated resources. To this end, the Department has maintained a stable level of resourcing in FOI, even when managing whole of government priorities such as the humanitarian response in Afghanistan and the establishment of a border measures program.

The impact of recent business process reforms, in response to the CII and independently, has led to a significant improvement in the Department's compliance with statutory timeframes for non-personal requests (up from 37 per cent to 65 per cent) and a reduction in the age of the oldest non-personal request with no on-hand request older than 90 days. This was achieved on the back of a further increase in the total number of non-personal requests in 2020-21; up almost 15% when compared to the previous financial year.

However, to deliver these improvements quickly, the Department has had to phase its reforms and transfer some resources internally, from the personal caseload to the business improvement function and non-personal caseload. To deliver broader process improvements in the personal space will require similar decisions and trade-offs, noting the personal caseload is a much larger program and has particular complexities in relation to identity resolution and integrity.

Discussion

The FOI request was made on 27 November 2020. Pursuant to s 15(5)(b) of the FOI Act, the Department was due to provide a decision to the complainant by 27 December 2020, but did not do so until 20 January 2021.

The Department submits that the initial delay was due to staffing levels during the end of year holiday period. Once the Department commenced processing the request, it provided a decision within 8 days of the revised scope being finalised.

The Department did not seek extensions of time under either ss 15AB, 15AC or 54D of the FOI Act, and the statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.

Conclusions

The Department did not comply with s 15(5)(b) of the FOI Act when processing FOI request s 22(1)(a)(ii) irrelevant material, in that:

- The Department was due to provide a decision to the complainant by 27 December 2020, but did not do so until 20 January 2021.
- The Department did not seek extensions of time under ss 15AB, 15AC or 54D of the FOI Act, and the statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.
- The statutory timeframe was not affected by the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable under s 31 of the FOI Act.

Recommendations

In light of the Department's submissions, pursuant to s 88 of the FOI Act, I make the following formal recommendations to the Department that I believe the Department ought to implement within the timeframes specified below:

Recommendation 1

The Department prepare and implement an operational manual for processing FOI requests for personal information to be approved by the Information Champion by **28 February 2022**. The operational manual is to include, at a minimum, the steps that will be taken to ensure compliance with statutory processing requirements. Consistent with the requirements of the Information Publication Scheme, the operational manual should be made publicly available by the Department on its website.

Recommendation 2

By **28 February 2022**, the Department ascertain the additional resources (human or otherwise) anticipated to be required in order to meet statutory timeframes (taking account of the improvements through implementing recommendation 1) and provide an action plan to meet those requirements.

Recommendation 3

The Department:

- a. undertake and complete training on the operational manual for FOI Section staff and other staff (both decision makers and other staff who assist decision makers)
28 March 2022

- b. ensure that online training in processing FOI requests for personal information is available to all staff of the Department by **28 March 2022**, and
- c. ensure that new staff joining the FOI Section are trained in relation to the operational manual within 2 weeks of commencing in the FOI Section.

Recommendation 4

By **30 May 2022**, the Department undertake an audit of the processing of FOI requests for personal information to assess whether Recommendations 1, 2 and 3 have been implemented and operationalised and whether those actions have been sufficient to address the issues identified in these complaints. The audit is to be undertaken by either the Department's internal auditors or by an external auditor, as determined by the Department. A copy of the audit report should be provided to the OAIC.

When considering the recommendations made above, the Department should refer to relevant OAIC FOI resources which can be found on the OAIC website.⁷

I request that the Department advise the OAIC of the implementation of each of the recommendations within the timeframes specified.

⁷ See <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/>. The OAIC's FOI Essentials toolkit, may be of particular assistance to the Department.



Australian Government
Office of the Australian Information Commissioner

ATTACHMENT A

Notice on completion under s 86 of the FOI Act (s 22(1)(a)(i) - irrelevant material) and the Department of Home Affairs (s 22(1)(a)(ii) - irrelevant material)

On 12 February 2021, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Department of Home Affairs (the Department) in the performance of its functions, and the exercise of its powers, under the FOI Act.

The complainant is (s 22(1)(a)(ii) - irrelevant material), represented by the (s 22(1)(a)(ii) - irrelevant material).

The complainant alleges the Department failed to provide a decision on (s 22(1)(a) - irrelevant material) FOI request of 5 January 2021 within the statutory timeframes set out in the FOI Act.

The FOI request the subject of this FOI complaint was also the subject of an Information Commissioner review (IC review) (s 22(1)(a)(i) - irrelevant material).¹

This Notice on Completion sets out the issue as identified from the allegation raised by the complainant. The allegation is assessed against the legislative framework and the FOI Guidelines² which agencies and ministers must have regard to. I have considered the complaint and the Department's submissions in response before making conclusions about the allegation.

Background

On 5 January 2021, the complainant made the FOI request to the Department (s 22(1)(a)(ii) - irrelevant material).

Under s 15 (5) of the FOI Act, the Department was required to provide a decision to the complainant by 4 February 2021.

On 13 January 2021, the Department issued the complainant with a request consultation notice under s 24AB of the FOI Act. The complainant responded that day, but did not revise the scope of the request.

¹ (s 22(1)(a)(ii) - irrelevant material) was finalised on 6 April 2021 under s 54R of the FOI Act.

² The Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard to in performing a function or exercising a power under the FOI Act.

On 23 January 2021, the Department requested that a third party contractor conduct search and retrieval for documents within their possession which would fall within the scope of the request. These were received on 28 January 2021.

On 4 February 2021, the Department was deemed to have refused access pursuant to s 15AC of the FOI Act.

On 12 February 2021, the complainant lodged a complaint under s 70 of the FOI Act about the Department's non-compliance with the statutory processing period.

On 23 February 2021, the complainant sought IC review of the deemed access refusal decision.

On 31 March 2021, the Department provided a substantive decision to the complainant.

On 23 April 2021, the OAIC commenced an investigation into this complaint. On 3 June 2021, the Department provided a response to the notice and request for information under s 75 of the FOI Act.

On 3 August 2021 and 14 September 2021, the Department provided further submissions in response to the investigation notice of 23 April 2021.

The key procedural events in this FOI complaint are set out in **Annexure A** to this Notice.

Investigation results

Pursuant to s 87 of the FOI Act, the investigation conclusions set out my opinion and conclusion on how the Department processed the complainant's FOI request. I have considered all the material provided by the Department and the complainant in this matter.

Issue: Compliance with statutory processing periods

Complainant's allegation

The complainant alleges the Department failed to provide a decision on [REDACTED] FOI request of 5 January 2021 within the statutory timeframes set out in the FOI Act.

Legislative framework

The FOI Act provides a statutory timeframe of 30 days to process an FOI request (s 15(5)).

The period can be extended by up to 30 days with the applicant's agreement (s 15AA), by 30 days if consultation with a third party is undertaken (s 15(6)), and by 30 days if consultation with a foreign entity is undertaken (s 15(8)).

An agency or minister may apply to the Information Commissioner for extension of the

statutory timeframe for complex or voluminous requests (s 15AB) or following a deemed access refusal decision (s 15AC).

The FOI Guidelines at [3.139] state:

An agency or minister must, as soon as practicable, and no later than 30 days after receiving a request, take all reasonable steps to enable the applicant to be notified of a decision on the request (s 15(5)(b)). Section 15(5)(b) provides that the 30-day processing period commences on the day after the day the agency or minister is taken to have received a request that meets the formal requirements of s 15(2), (2A). An agency should act promptly to assist an applicant whose request does not meet the formal requirements in keeping with its obligations under s 15(3).

Table 1: Extension of time provisions

Reason for extension	Extension period	Determined by	Notification requirement
Third party consultation: consultation with a state, or a person or business concerning personal or business information (s 15(6))	30 days	by default if agency or minister determines ss 26A, 27 or 27A apply	agency or minister must inform applicant of extension as soon as practicable (s 15(6)(b))
Consultation with foreign entity required to determine if 33(a)(iii) or 33(b) exemptions apply (s 15(7),(8))	30 days	by default if agency or minister determines consultation is needed	agency or minister must inform applicant of extension as soon as practicable (s 15(8)(b))
By agreement between applicant and agency or minister (s 15AA)	up to 30 days, as either a single extension or a series of shorter extensions. This may be in addition to an extension for third party consultation	agency or minister but only with written agreement of applicant	agency or minister must give written notice of the extension to the Information Commissioner as soon as practicable (s 15AA(b))
Complex or voluminous request (s 15AB)	30 days or other period	Information Commissioner, upon request from agency or minister	Commissioner must inform applicant and agency or minister of an extension period as soon as practicable where a decision is made to grant the extension (s 15AB(3))
Following a deemed refusal (s 15AC(4))	as determined by the Information Commissioner	Information Commissioner, upon request from agency or minister	no legislative requirement but Commissioner may require agency or minister to notify applicant or third party as a condition of granting the extension (s 15AC(6))

The statutory processing period does not include:

- the time that an agency may take in a request consultation process to decide if a practical refusal exists (s 24AB (8))

- the time elapsing between an applicant being notified that a charge is payable and
- either the applicant paying the charge (or a deposit on account of the charge) or the
- agency varying the decision that a charge is payable (s 31).

Deemed access refusal

Section 15AC provides that where a decision on an FOI request has not been provided to the applicant within the statutory processing period, the principal officer of the agency or the minister is deemed to have made a decision refusing access to the documents (s 15AC (3)).

The FOI Guidelines at [3.154] – [3.155] explain:

The consequence of a deemed refusal is that an applicant may apply for IC review (s 54L(2)(a)) In addition, once the time has expired and there is a deemed decision, the agency or minister cannot impose a charge for access...

Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of reasons on the FOI request. This obligation to provide a statement of reasons on the FOI request continues until any IC review of the deemed decision is finalised. ...

Department's submissions to the complaint

Response to the Notice of investigation under s 75 of the FOI Act

On 3 June 2021, the Department provided its response to the complaint. The Department provided a chronology of the processing of the request and advised that:

- there were delays in obtaining documents in scope held by a third party contractor
- the request included police briefs and character assessments and the Department needed to assess a substantial amount of information to determine documents in scope
- the documents required Quality Assessment by an FOI Manager, due to the complexity and sensitivity of the subject matter
- the Department did not seek extensions of time under either ss 15 AA, 15AB, 15AC or 54D of the FOI Act, and
- the statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.

The Department also provided submissions in relation to the general grounds for delay in processing FOI requests for personal information, and the measures it is taking to address those factors (**Attachment B**).

On 3 August 2021³ (**Attachment C**) and 14 September 2021⁴ (**Attachment D**),⁵ the Department provided further submissions on the steps that it has undertaken to extend the recommendations made in the Final Report of the CII into the Department's processing of FOI requests for non-personal information, to its processes and procedures for processing FOI requests for personal information. The Department advised that:

1. Recommendation 1: Appoint an Information Champion

- This recommendation is complete, noting the Information Champion's role extends equally to the non-personal and personal caseload.
- Our Information Champion (SES Band 2) is actively engaged with the management and oversight of the personal caseload as well as the non-personal caseload.

2. Recommendation 2: Operational Processes and Procedures

- This recommendation is complete. In line with the scope of the CII, the new Procedural Instruction (PI) is focused on non-personal FOI requests. However, we will shortly begin work on a Procedural Instruction directed at personal FOI requests, noting that the majority of the processes set out in the new PI apply equally to personal FOI requests.
- Recommendations 2 and 3 related to the development of procedural guidance (procedural instructions) and training in applying those instructions in the non-personal caseload. The Department has finalised the procedural instruction for the non-personal caseload. The Department is now developing procedural instructions for personal access and amendment requests. This is an active project which will be completed by Q3 – an earlier completion date is not possible while maintaining a focus on reducing backlogs across the caseload.

3. Recommendation 3: Training

- This recommendation is well advanced. In line with the scope of the CII, the new eLearning package for FOI decision-makers is focused on non-personal FOI requests. In addition, we will train Departmental staff involved in the processing of personal requests in the Procedural Instruction for personal FOI requests.
- earlier this month, the Department launched its new FOI eLearning package for all staff and decision-makers. Module one includes an FOI overview that is relevant to both the personal and non-personal space. We are actively tracking the take up of this package across the Department.
- AGS training (decision maker and exemptions) is available for all staff who require a more in-depth understanding of FOI requirements and processes. The AGS module contains

³ Email from the Department of Home Affairs to the OAIC on 3 August 2021

⁴ Email from the Department of Home Affairs to the OAIC on 14 September 2021

⁵ The Department provided its response of 14 September 2021 (Attachment D) in response to my request of 3 September 2021 for further information on the steps it has taken or is taking to extend the CII recommendations to its processing of FOI requests for personal information.

information relevant to decision making, regardless of caseload. Our September session has generated a lot of interest and we will run another two sessions in November 2021.

4. Recommendation 4: Audit

- The internal audit scheduled for late 2021 or early 2022 will focus on the CII's recommendations but we expect it will include observations on and recommendations for the FOI caseload as a whole, including the personal case load.
- Recommendation 4 requires us to complete an internal audit. This will necessarily focus on the Department's implementation of the CII recommendations due to the nature of the CII report but may make general observations on FOI processing by the Department as a whole.

Department's submissions regarding its processing of FOI requests in general

In its response of 3 August 2021, (**Attachment C**), the Department advised that, more broadly, the Department is considering options to facilitate the processing of FOI requests, such as:

- pro-actively publishing a wider range of commonly requested statistics
- business process reforms and administrative release of documents to reduce demand for personal FOI requests
- robotic process automation of request registration so that we can redirect staff time toward processing and decision-making.

In its response of 14 September 2021, the Department made further submissions regarding the general processing of FOI requests as follows: (**Attachment D**)

While our immediate priority continues to be implementation of the recommendations of the CII, the Department has progressed a number of improvements in the personal space which do not relate to CII. These include:

- a successful extension of time trial - guidance is now being developed for officers on when and how to use s15AA extensions;
- the development of dashboards, including daily updates to our on-hand data, which increase management visibility of the caseload;
- increased management focus on priority parts of the caseload, including resources dedicated to resolving our oldest and intractable cases in the personal caseload. In 2020-21, in addition to processing new personal access requests, the Department finalised more cases older than 90 days in 2020-21 than in 2019-20;
- maintenance of an improvements register which includes ideas for changes to the personal caseload; and
- better management of complaints received into the inboxes.

We are also exploring the possibilities of automating registration processes, releasing resources for decision making and expediting redactions. These are longer term projects and subject to resourcing.

General comments

The very high volume of FOI requests received by the Department will mean continuing pressures across the FOI program, including in the personal caseload. However, the Department is committed to continuing to improve its processes for responding to FOI requests, within its allocated resources. To this end, the Department has maintained a stable level of resourcing in FOI, even when managing whole of government priorities such as the humanitarian response in Afghanistan and the establishment of a border measures program.

The impact of recent business process reforms, in response to the CII and independently, has led to a significant improvement in the Department's compliance with statutory timeframes for non-personal requests (up from 37 per cent to 65 per cent) and a reduction in the age of the oldest non-personal request with no on-hand request older than 90 days. This was achieved on the back of a further increase in the total number of non-personal requests in 2020-21; up almost 15% when compared to the previous financial year.

However, to deliver these improvements quickly, the Department has had to phase its reforms and transfer some resources internally, from the personal caseload to the business improvement function and non-personal caseload. To deliver broader process improvements in the personal space will require similar decisions and trade-offs, noting the personal caseload is a much larger program and has particular complexities in relation to identity resolution and integrity.

Discussion

The FOI request was made on 5 January 2021. Pursuant to s 15(5)(b) of the FOI Act, the Department was due to provide a decision to the complainant by 4 February 2021, but did not do so until 31 March 2021.

The Department submits that the request was complex and voluminous requiring managerial oversight. Further, the Department waited 5 days to receive the documents from the third party.

It was open to the Department to seek extensions of time under either ss 15AA, 15AB, 15AC or 54D of the FOI Act, but it did not so. Further, the statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.

Conclusions

The Department did not comply with s 15(5)(b) of the FOI Act when processing FOI request s 22(1)(a)(ii) irrelevant material, in that:

- The Department was required to provide a decision to the complainant by 4 February 2021, but did not do so until 31 March 2021.

- The Department did not seek extensions of time under ss 15 AA, 15AB, 15AC or 54D of the FOI Act, and the statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.
- The statutory timeframe was not affected by a request consultation process under s 24AB (8) or by the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable under s 31 of the FOI Act.

Recommendations

In light of the Department's submissions, pursuant to s 88 of the FOI Act, I make the following formal recommendations to the Department that I believe the Department ought to implement within the timeframes specified below:

Recommendation 1

The Department prepare and implement an operational manual for processing FOI requests for personal information to be approved by the Information Champion by **28 February 2022**. The operational manual is to include, at a minimum, the steps that will be taken to ensure compliance with statutory processing requirements. Consistent with the requirements of the Information Publication Scheme, the operational manual should be made publicly available by the Department on its website.

Recommendation 2

By **28 February 2022**, the Department ascertain the additional resources (human or otherwise) anticipated to be required in order to meet statutory timeframes (taking account of the improvements through implementing recommendation 1) and provide an action plan to meet those requirements.

Recommendation 3

The Department:

- undertake and complete training on the operational manual for FOI Section staff and other staff (both decision makers and other staff who assist decision makers) **28 March 2022**
- ensure that online training in processing FOI requests for personal information is available to all staff of the Department by **28 March 2022**, and
- ensure that new staff joining the FOI Section are trained in relation to the operational manual within 2 weeks of commencing in the FOI Section.

Recommendation 4

By **30 May 2022**, the Department undertake an audit of the processing of FOI requests for personal information to assess whether Recommendations 1, 2 and 3 have been implemented and operationalised and whether those actions have been sufficient to address the issues identified in these complaints. The audit is to be undertaken by either the Department's internal auditors or by an external auditor, as determined by the Department. A copy of the audit report should be provided to the OAIC.

When considering the recommendations made above, the Department should refer to relevant OAIC FOI resources which can be found on the OAIC website.⁶

I request that the Department advise the OAIC of the implementation of each of the recommendations within the timeframes specified.

⁶ See <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/>. The OAIC's FOI Essentials toolkit, may be of particular assistance to the Department.



ATTACHMENT A

Notice on completion under s 86 of the FOI Act (s 22(1)(a)(ii) irrelevant material) s22(1)(a)(ii) - irrelevant material and the Department of Home Affairs

On 22 March 2021, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Department of Home Affairs (the Department) in the performance of its functions, and the exercise of its powers, under the FOI Act.

The complainant is s22(1)(a)(ii) - irrelevant material, represented by s22(1)(a)(ii) - irrelevant material. The Department refers to the complainant as s22(1)(a)(ii) - irrelevant material.¹

The complainant alleges the Department failed to provide a decision on their FOI request of 6 January 2021 within the statutory timeframes set out in the FOI Act.

The FOI request the subject of this FOI complaint was also the subject of an Information Commissioner review (IC review) (s 22(1)(a)(ii) irrelevant material).²

This Notice on Completion sets out the issue as identified from the allegation raised by the complainant. The allegation is assessed against the legislative framework and the FOI Guidelines³ which agencies and ministers must have regard to. I have considered the complaint and the Department's submissions in response before making conclusions about the allegation.

Background

On 6 January 2021, the complainant made the FOI request to the Department (s 22(1)(a)(ii) irrelevant material).

Under s 15(5) of the FOI Act, the Department was required to provide a decision to the complainant by 5 February 2021.

¹ Department submission to the OAIC dated 3 June 2021

² s 22(1)(a)(ii) irrelevant material.

³ The Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard to in performing a function or exercising a power under the FOI Act.

On 14 January 2021, the Department issued the complainant with a request consultation notice under s 24AB of the FOI Act. On the same day, the complainant refused to revise the scope of the request.

On 5 February 2021, the Department was deemed to have refused access pursuant to s 15AC of the FOI Act.

On 9 February 2021, the complainant sought IC review of the deemed access refusal Decision.

On 16 March 2021, the Department provided a substantive decision to the complainant.

On 16 March 2021, the complainant requested an internal review of the decision. On 18 March 2021, the Department advised the complainant that the internal review request is invalid.

On 22 March 2021, the complainant lodged a complaint under s 70 of the FOI Act about the Department's non-compliance with the statutory processing period.

On 23 April 2021, the OAIC commenced an investigation into this complaint. On 3 June 2021, the Department provided a response to the notice and request for information under s 75 of the FOI Act.

On 3 August 2021 and 14 September 2021, the Department provided further submissions in response to the investigation notice of 23 April 2021.

The key procedural events in this FOI complaint are set out in **Annexure A** to this Notice.

Investigation results

Pursuant to s 87 of the FOI Act, the investigation conclusions set out my opinion and conclusion on how the Department processed the complainant's FOI request. I have considered all the material provided by the Department and the complainant in this matter.

Issue: Compliance with statutory processing periods

Complainant's allegation

The complainant alleges the Department failed to provide a decision on their FOI request of 6 January 2021 within the statutory timeframes set out in the FOI Act.⁴

⁴ The complainant also raised issues in relation to the Department's response to their request for internal review. This issue will be dealt with separately to this investigation.

Legislative framework

The FOI Act provides a statutory timeframe of 30 days to process an FOI request (s 15(5)).

The period can be extended by up to 30 days with the applicant's agreement (s 15AA), by 30 days if consultation with a third party is undertaken (s 15(6)), and by 30 days if consultation with a foreign entity is undertaken (s 15(8)).

An agency or minister may apply to the Information Commissioner for extension of the statutory timeframe for complex or voluminous requests (s 15AB) or following a deemed access refusal decision (s 15AC).

The FOI Guidelines at [3.139] state:

An agency or minister must, as soon as practicable, and no later than 30 days after receiving a request, take all reasonable steps to enable the applicant to be notified of a decision on the request (s 15(5)(b)). Section 15(5)(b) provides that the 30-day processing period commences on the day after the day the agency or minister is taken to have received a request that meets the formal requirements of s 15(2), (2A). An agency should act promptly to assist an applicant whose request does not meet the formal requirements in keeping with its obligations under s 15(3).

Table 1: Extension of time provisions

Reason for extension	Extension period	Determined by	Notification requirement
Third party consultation: consultation with a state, or a person or business concerning personal or business information (s 15(6))	30 days	by default if agency or minister determines ss 26A, 27 or 27A apply	agency or minister must inform applicant of extension as soon as practicable (s 15(6)(b))
Consultation with foreign entity required to determine if 33(a)(iii) or 33(b) exemptions apply (s 15(7),(8))	30 days	by default if agency or minister determines consultation is needed	agency or minister must inform applicant of extension as soon as practicable (s 15(8)(b))
By agreement between applicant and agency or minister (s 15AA)	up to 30 days, as either a single extension or a series of shorter extensions. This may be in addition to an extension for third party consultation	agency or minister but only with written agreement of applicant	agency or minister must give written notice of the extension to the Information Commissioner as soon as practicable (s 15AA(b))
Complex or voluminous request (s 15AB)	30 days or other period	Information Commissioner, upon request from agency or minister	Commissioner must inform applicant and agency or minister of an extension period as soon as practicable where a decision is made to grant the extension (s 15AB(3))

Reason for extension	Extension period	Determined by	Notification requirement
Following a deemed refusal (s 15AC(4))	as determined by the Information Commissioner	Information Commissioner, upon request from agency or minister	no legislative requirement but Commissioner may require agency or minister to notify applicant or third party as a condition of granting the extension (s 15AC(6))

The statutory processing period does not include:

- the time that an agency may take in a request consultation process to decide if a practical refusal exists (s 24AB (8))
- the time elapsing between an applicant being notified that a charge is payable and
- either the applicant paying the charge (or a deposit on account of the charge) or the
- agency varying the decision that a charge is payable (s 31).

Deemed access refusal

Section 15AC provides that where a decision on an FOI request has not been provided to the applicant within the statutory processing period, the principal officer of the agency or the minister is deemed to have made a decision refusing access to the documents (s 15AC (3)).

The FOI Guidelines at [3.154] – [3.155] explain:

The consequence of a deemed refusal is that an applicant may apply for IC review (s 54L(2)(a)) In addition, once the time has expired and there is a deemed decision, the agency or minister cannot impose a charge for access...

Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of reasons on the FOI request. This obligation to provide a statement of reasons on the FOI request continues until any IC review of the deemed decision is finalised. ...

Department submissions

Response to the Notice of investigation under s 75 of the FOI Act

On 3 June 2021, the Department provided its response to the complaint. The Department provided a chronology of the processing of the request and advised that:

- The Department decided to process this request, despite there being grounds to practically refuse it and the applicant being unwilling to revise the scope. The Department considers a processing time of approximately 60 days to be consistent with the practical refusal reasons set out in the original notice.
- The Department did not seek extensions of time under either ss 15AA, 15AB, 15AC or 54D of the FOI Act.

- The statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.

The Department also provided submissions in relation to the general grounds for delay in processing FOI requests for personal information, and the measures it is taking to address those factors (**Attachment B**).

On 3 August 2021⁵ (**Attachment C**) and 14 September 2021⁶ (**Attachment D**),⁷ the Department provided further submissions on the steps that it has undertaken to extend the recommendations made in the Final Report of the CII into the Department's processing of FOI requests for non-personal information, to its processes and procedures for processing FOI requests for personal information. The Department advised that:

1. Recommendation 1: Appoint an Information Champion

- This recommendation is complete, noting the Information Champion's role extends equally to the non-personal and personal caseload.
- Our Information Champion (SES Band 2) is actively engaged with the management and oversight of the personal caseload as well as the non-personal caseload.

2. Recommendation 2: Operational Processes and Procedures

- This recommendation is complete. In line with the scope of the CII, the new Procedural Instruction (PI) is focused on non-personal FOI requests. However, we will shortly begin work on a Procedural Instruction directed at personal FOI requests, noting that the majority of the processes set out in the new PI apply equally to personal FOI requests.
- Recommendations 2 and 3 related to the development of procedural guidance (procedural instructions) and training in applying those instructions in the non-personal caseload. The Department has finalised the procedural instruction for the non-personal caseload. The Department is now developing procedural instructions for personal access and amendment requests. This is an active project which will be completed by Q3 – an earlier completion date is not possible while maintaining a focus on reducing backlogs across the caseload.

3. Recommendation 3: Training

- This recommendation is well advanced. In line with the scope of the CII, the new eLearning package for FOI decision-makers is focused on non-personal FOI requests. In addition, we will train Departmental staff involved in the processing of personal requests in the Procedural Instruction for personal FOI requests.

⁵ Email from the Department of Home Affairs to the OAIC on 3 August 2021

⁶ Email from the Department of Home Affairs to the OAIC on 14 September 2021

⁷ The Department provided its response of 14 September 2021 (Attachment D) in response to my request of 3 September 2021 for further information on the steps it has taken or is taking to extend the CII recommendations to its processing of FOI requests for personal information.

- earlier this month, the Department launched its new FOI eLearning package for all staff and decision-makers. Module one includes an FOI overview that is relevant to both the personal and non-personal space. We are actively tracking the take up of this package across the Department.
- AGS training (decision maker and exemptions) is available for all staff who require a more in-depth understanding of FOI requirements and processes. The AGS module contains information relevant to decision making, regardless of caseload. Our September session has generated a lot of interest and we will run another two sessions in November 2021.

4. Recommendation 4: Audit

- The internal audit scheduled for late 2021 or early 2022 will focus on the CII's recommendations but we expect it will include observations on and recommendations for the FOI caseload as a whole, including the personal case load.
- Recommendation 4 requires us to complete an internal audit. This will necessarily focus on the Department's implementation of the CII recommendations due to the nature of the CII report but may make general observations on FOI processing by the Department as a whole.

Department's submissions regarding its processing of FOI requests in general

In its response of 3 August 2021, (**Attachment C**), the Department advised that, more broadly, the Department is considering options to facilitate the processing of FOI requests, such as:

- pro-actively publishing a wider range of commonly requested statistics
- business process reforms and administrative release of documents to reduce demand for personal FOI requests
- robotic process automation of request registration so that we can redirect staff time toward processing and decision-making.

In its response of 14 September 2021, the Department made further submissions regarding the general processing of FOI requests as follows: (**Attachment D**)

While our immediate priority continues to be implementation of the recommendations of the CII, the Department has progressed a number of improvements in the personal space which do not relate to CII. These include:

- a successful extension of time trial - guidance is now being developed for officers on when and how to use s15AA extensions;
- the development of dashboards, including daily updates to our on-hand data, which increase management visibility of the caseload;
- increased management focus on priority parts of the caseload, including resources dedicated to resolving our oldest and intractable cases in the personal caseload. In 2020-21, in addition to processing new personal access requests, the Department finalised more cases older than 90 days in 2020-21 than in 2019-20;

- maintenance of an improvements register which includes ideas for changes to the personal caseload; and
- better management of complaints received into the inboxes.

We are also exploring the possibilities of automating registration processes, releasing resources for decision making and expediting redactions. These are longer term projects and subject to resourcing.

General comments

The very high volume of FOI requests received by the Department will mean continuing pressures across the FOI program, including in the personal caseload. However, the Department is committed to continuing to improve its processes for responding to FOI requests, within its allocated resources. To this end, the Department has maintained a stable level of resourcing in FOI, even when managing whole of government priorities such as the humanitarian response in Afghanistan and the establishment of a border measures program.

The impact of recent business process reforms, in response to the CII and independently, has led to a significant improvement in the Department's compliance with statutory timeframes for non-personal requests (up from 37 per cent to 65 per cent) and a reduction in the age of the oldest non-personal request with no on-hand request older than 90 days. This was achieved on the back of a further increase in the total number of non-personal requests in 2020-21; up almost 15% when compared to the previous financial year.

However, to deliver these improvements quickly, the Department has had to phase its reforms and transfer some resources internally, from the personal caseload to the business improvement function and non-personal caseload. To deliver broader process improvements in the personal space will require similar decisions and trade-offs, noting the personal caseload is a much larger program and has particular complexities in relation to identity resolution and integrity.

Discussion

The FOI request was made on 6 January 2021. Pursuant to s 15(5)(b) of the FOI Act, the Department was due to provide a decision to the complainant by 5 February 2021, but did not do so until 16 March 2021.

The Department considers a processing time of approximately 60 days is consistent with the practical refusal reasons set out in the original notice.

It was open to the Department to seek extensions of time under either ss 15AB, 15AC or 54D of the FOI Act, but it did not do so.

Conclusions

The Department did not comply with s 15(5)(b) of the FOI Act when processing FOI request s 22(1)(a)(ii) irrelevant material, in that:

- The Department was required to provide a decision to the complainant by 5 February 2021 but did not do so until 16 March 2021.

- The Department did not seek extensions of time under ss 15AB, 15AC or 54D of the FOI Act, and the statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.
- The statutory timeframe was not affected by the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable under s 31 of the FOI Act.

Recommendations

In light of the Department's submissions, pursuant to s 88 of the FOI Act, I make the following formal recommendations to the Department that I believe the Department ought to implement within the timeframes specified below:

Recommendation 1

The Department prepare and implement an operational manual for processing FOI requests for personal information to be approved by the Information Champion by **28 February 2022**. The operational manual is to include, at a minimum, the steps that will be taken to ensure compliance with statutory processing requirements. Consistent with the requirements of the Information Publication Scheme, the operational manual should be made publicly available by the Department on its website.

Recommendation 2

By **28 February 2022**, the Department ascertain the additional resources (human or otherwise) anticipated to be required in order to meet statutory timeframes (taking account of the improvements through implementing recommendation 1) and provide an action plan to meet those requirements.

Recommendation 3

The Department:

- undertake and complete training on the operational manual for FOI Section staff and other staff (both decision makers and other staff who assist decision makers) **28 March 2022**
- ensure that online training in processing FOI requests for personal information is available to all staff of the Department by **28 March 2022**, and
- ensure that new staff joining the FOI Section are trained in relation to the operational manual within 2 weeks of commencing in the FOI Section.

Recommendation 4

By **30 May 2022**, the Department undertake an audit of the processing of FOI requests for personal information to assess whether Recommendations 1, 2 and 3 have been implemented and operationalised and whether those actions have been sufficient to address the issues identified in these complaints. The audit is to be undertaken by either the Department's internal auditors or by an external auditor, as determined by the Department. A copy of the audit report should be provided to the OAIC.

When considering the recommendations made above, the Department should refer to relevant OAIC FOI resources which can be found on the OAIC website.⁸

I request that the Department advise the OAIC of the implementation of each of the recommendations within the timeframes specified.

⁸ See <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/>. The OAIC's FOI Essentials toolkit, may be of particular assistance to the Department.



ATTACHMENT A

Notice on completion under s 86 of the FOI Act ([redacted]) [redacted] and the Department of Home Affairs

On 29 March 2021, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Department of Home Affairs (the Department) in the performance of its functions, and the exercise of its powers, under the FOI Act.

The complainant is [redacted] represented by [redacted]. The Department refers to the complainant as [redacted].¹

The complainant alleges the Department failed to provide a decision on [redacted] FOI request of 9 October 2020 within the statutory timeframes set out in the FOI Act.

The FOI request the subject of this FOI complaint was also the subject of an Information Commissioner review (IC review) [redacted].²

This Notice on Completion sets out the issue as identified from the allegation raised by the complainant. The allegation is assessed against the legislative framework and the FOI Guidelines³ which agencies and ministers must have regard to. I have considered the complaint and the Department's submissions in response before making conclusions about the allegation.

Background

On 9 October 2020, the complainant made the FOI request to the Department [redacted].⁴

Under s 15(5) of the FOI Act, the Department was required to provide a decision to the complainant by 8 November 2020.

¹ Department submissions to OAIC dated 3 June 2021

² [redacted] was finalised on 22 September 2021 under s 54W of the FOI Act.

³ The Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard to in performing a function or exercising a power under the FOI Act.

⁴ The OAIC's s 75 Notice to the Department incorrectly dated the FOI request at 22 July 2020

On 8 November 2020, the Department was deemed to have refused access pursuant to s 15AC of the FOI Act⁵.

On 29 March 2021, the complainant lodged a complaint under s 70 of the FOI Act about the Department's non-compliance with the statutory processing period.

On 23 April 2021, the OAIC commenced an investigation into this complaint.

On 26 April 2021, the complainant sought IC Review of the deemed access refusal decision.

On 3 June 2021, the Department provided a response to the notice and request for information under s 75 of the FOI Act.

On 29 April 2021, the Department provided a substantive decision to the complainant.

On 3 August 2021 and 14 September 2021, the Department provided further submissions in response to the investigation notice of 23 April 2021.

The key procedural events in this FOI complaint are set out in **Annexure A** to this Notice.

Investigation results

Pursuant to s 87 of the FOI Act, the investigation conclusions set out my opinion and conclusion on how the Department processed the complainant's FOI request. I have considered all the material provided by the Department and the complainant in this matter.

Issue: Compliance with statutory processing periods

Complainant's allegation

The complainant alleges the Department failed to provide a decision on b2(1)(a) FOI request of 9 October 2020 within the statutory timeframes set out in the FOI Act.

Legislative framework

The FOI Act provides a statutory timeframe of 30 days to process an FOI request (s 15(5)).

The period can be extended by up to 30 days with the applicant's agreement (s 15AA), by 30 days if consultation with a third party is undertaken (s 15(6)), and by 30 days if consultation with a foreign entity is undertaken (s 15(8)).

An agency or minister may apply to the Information Commissioner for extension of the

⁵ In its chronology dated 3 June 2021, the Department incorrectly states that the request became deemed on 18 November 2020

statutory timeframe for complex or voluminous requests (s 15AB) or following a deemed access refusal decision (s 15AC).

The FOI Guidelines at [3.139] state:

An agency or minister must, as soon as practicable, and no later than 30 days after receiving a request, take all reasonable steps to enable the applicant to be notified of a decision on the request (s 15(5)(b)). Section 15(5)(b) provides that the 30-day processing period commences on 3 See also, FOI Guidelines at [3.125]. 4 the day after the day the agency or minister is taken to have received a request that meets the formal requirements of s 15(2), (2A). An agency should act promptly to assist an applicant whose request does not meet the formal requirements in keeping with its obligations under s 15(3).

Table 1: Extension of time provisions

Reason for extension	Extension period	Determined by	Notification requirement
Third party consultation: consultation with a state, or a person or business concerning personal or business information (s 15(6))	30 days	by default if agency or minister determines ss 26A, 27 or 27A apply	agency or minister must inform applicant of extension as soon as practicable (s 15(6)(b))
Consultation with foreign entity required to determine if 33(a)(iii) or 33(b) exemptions apply (s 15(7),(8))	30 days	by default if agency or minister determines consultation is needed	agency or minister must inform applicant of extension as soon as practicable (s 15(8)(b))
By agreement between applicant and agency or minister (s 15AA)	up to 30 days, as either a single extension or a series of shorter extensions. This may be in addition to an extension for third party consultation	agency or minister but only with written agreement of applicant	agency or minister must give written notice of the extension to the Information Commissioner as soon as practicable (s 15AA(b))
Complex or voluminous request (s 15AB)	30 days or other period	Information Commissioner, upon request from agency or minister	Commissioner must inform applicant and agency or minister of an extension period as soon as practicable where a decision is made to grant the extension (s 15AB(3))
Following a deemed refusal (s 15AC(4))	as determined by the Information Commissioner	Information Commissioner, upon request from agency or minister	no legislative requirement but Commissioner may require agency or minister to notify applicant or third party as a condition of granting the extension (s 15AC(6))

The statutory processing period does not include:

- the time that an agency may take in a request consultation process to decide if a practical refusal exists (s 24AB(8))
- the time elapsing between an applicant being notified that a charge is payable and
 - either the applicant paying the charge (or a deposit on account of the charge) or the
 - agency varying the decision that a charge is payable (s 31).

Deemed access refusal

Section 15AC provides that where a decision on an FOI request has not been provided to the applicant within the statutory processing period, the principal officer of the agency or the minister is deemed to have made a decision refusing access to the documents (s 15AC (3)).

The FOI Guidelines at [3.154] – [3.155] explain:

The consequence of a deemed refusal is that an applicant may apply for IC review (s 54L(2)(a)) In addition, once the time has expired and there is a deemed decision, the agency or minister cannot impose a charge for access...

Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of reasons on the FOI request. This obligation to provide a statement of reasons on the FOI request continues until any IC review of the deemed decision is finalised. ...

Department submissions

Response to the Notice of investigation under s 75 of the FOI Act

On 3 June 2021, the Department provided its response to the complaint. The Department provided a chronology of the processing of the request and advised that:

- The Department did not seek extensions of time under either ss 15 AA, 15AB, 15AC or 54D of the FOI Act
- The statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.

The Department did not provide any further submissions in response to this complaint.

The Department also provided submissions in relation to the general grounds for delay in processing FOI requests for personal information, and the measures it is taking to address those factors (**Attachment B**).

On 3 August 2021⁶ (**Attachment C**) and 14 September 2021⁷ (**Attachment D**),⁸ the Department provided further submissions on the steps that it has undertaken to extend the recommendations made in the Final Report of the CII into the Department's processing of FOI requests for non-personal information, to its processes and procedures for processing FOI requests for personal information. The Department advised that:

1. Recommendation 1: Appoint an Information Champion

- This recommendation is complete, noting the Information Champion's role extends equally to the non-personal and personal caseload.
- Our Information Champion (SES Band 2) is actively engaged with the management and oversight of the personal caseload as well as the non-personal caseload.

2. Recommendation 2: Operational Processes and Procedures

- This recommendation is complete. In line with the scope of the CII, the new Procedural Instruction (PI) is focused on non-personal FOI requests. However, we will shortly begin work on a Procedural Instruction directed at personal FOI requests, noting that the majority of the processes set out in the new PI apply equally to personal FOI requests.
- Recommendations 2 and 3 related to the development of procedural guidance (procedural instructions) and training in applying those instructions in the non-personal caseload. The Department has finalised the procedural instruction for the non-personal caseload. The Department is now developing procedural instructions for personal access and amendment requests. This is an active project which will be completed by Q3 – an earlier completion date is not possible while maintaining a focus on reducing backlogs across the caseload.

3. Recommendation 3: Training

- This recommendation is well advanced. In line with the scope of the CII, the new eLearning package for FOI decision-makers is focused on non-personal FOI requests. In addition, we will train Departmental staff involved in the processing of personal requests in the Procedural Instruction for personal FOI requests.
- earlier this month, the Department launched its new FOI eLearning package for all staff and decision-makers. Module one includes an FOI overview that is relevant to both the personal and non-personal space. We are actively tracking the take up of this package across the Department.
- AGS training (decision maker and exemptions) is available for all staff who require a more in-depth understanding of FOI requirements and processes. The AGS module contains

⁶ Email from the Department of Home Affairs to the OAIC on 3 August 2021

⁷ Email from the Department of Home Affairs to the OAIC on 14 September 2021

⁸ The Department provided its response of 14 September 2021 (Attachment D) in response to my request of 3 September 2021 for further information on the steps it has taken or is taking to extend the CII recommendations to its processing of FOI requests for personal information.

information relevant to decision making, regardless of caseload. Our September session has generated a lot of interest and we will run another two sessions in November 2021.

4. Recommendation 4: Audit

- The internal audit scheduled for late 2021 or early 2022 will focus on the CII's recommendations but we expect it will include observations on and recommendations for the FOI caseload as a whole, including the personal case load.
- Recommendation 4 requires us to complete an internal audit. This will necessarily focus on the Department's implementation of the CII recommendations due to the nature of the CII report but may make general observations on FOI processing by the Department as a whole.

Department's submissions regarding its processing of FOI requests in general

In its response of 3 August 2021, (**Attachment C**), the Department advised that, more broadly, the Department is considering options to facilitate the processing of FOI requests, such as:

- pro-actively publishing a wider range of commonly requested statistics
- business process reforms and administrative release of documents to reduce demand for personal FOI requests
- robotic process automation of request registration so that we can redirect staff time toward processing and decision-making.

In its response of 14 September 2021, the Department made further submissions regarding the general processing of FOI requests as follows: (**Attachment D**)

While our immediate priority continues to be implementation of the recommendations of the CII, the Department has progressed a number of improvements in the personal space which do not relate to CII. These include:

- a successful extension of time trial - guidance is now being developed for officers on when and how to use s15AA extensions;
- the development of dashboards, including daily updates to our on-hand data, which increase management visibility of the caseload;
- increased management focus on priority parts of the caseload, including resources dedicated to resolving our oldest and intractable cases in the personal caseload. In 2020-21, in addition to processing new personal access requests, the Department finalised more cases older than 90 days in 2020-21 than in 2019-20;
- maintenance of an improvements register which includes ideas for changes to the personal caseload; and
- better management of complaints received into the inboxes.

We are also exploring the possibilities of automating registration processes, releasing resources for decision making and expediting redactions. These are longer term projects and subject to resourcing.

General comments

The very high volume of FOI requests received by the Department will mean continuing pressures across the FOI program, including in the personal caseload. However, the Department is committed to continuing to improve its processes for responding to FOI requests, within its allocated resources. To this end, the Department has maintained a stable level of resourcing in FOI, even when managing whole of government priorities such as the humanitarian response in Afghanistan and the establishment of a border measures program.

The impact of recent business process reforms, in response to the CII and independently, has led to a significant improvement in the Department's compliance with statutory timeframes for non-personal requests (up from 37 per cent to 65 per cent) and a reduction in the age of the oldest non-personal request with no on-hand request older than 90 days. This was achieved on the back of a further increase in the total number of non-personal requests in 2020-21; up almost 15% when compared to the previous financial year.

However, to deliver these improvements quickly, the Department has had to phase its reforms and transfer some resources internally, from the personal caseload to the business improvement function and non-personal caseload. To deliver broader process improvements in the personal space will require similar decisions and trade-offs, noting the personal caseload is a much larger program and has particular complexities in relation to identity resolution and integrity.

Discussion

The FOI request was made on 9 October 2020. Pursuant to s 15(5)(b) of the FOI Act, the Department was due to provide a decision to the complainant by 8 November 2020, but did not do so until 29 April 2021.

The Department did not seek extensions of time under either ss 15AB, 15AC or 54D of the FOI Act, and the statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act. The Department did not provide an explanation for the delay.

Conclusions

The Department did not comply with s 15(5)(b) of the FOI Act when processing FOI request s 22(1)(b)(i) irrelevant material0, in that:

- The Department was required to provide a decision to the complainant by 8 November 2020, but did not do so until 29 April 2021.
- The Department did not seek extensions of time under ss 15 AA, 15AB, 15AC or 54D of the FOI Act, and the statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.

- The statutory timeframe was not affected by a request consultation process under s 24AB(8) or by the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable under s 31 of the FOI Act.

Recommendations

In light of the Department's submissions, pursuant to s 88 of the FOI Act, I make the following formal recommendations to the Department that I believe the Department ought to implement within the timeframes specified below:

Recommendation 1

The Department prepare and implement an operational manual for processing FOI requests for personal information to be approved by the Information Champion by **28 February 2022**. The operational manual is to include, at a minimum, the steps that will be taken to ensure compliance with statutory processing requirements. Consistent with the requirements of the Information Publication Scheme, the operational manual should be made publicly available by the Department on its website.

Recommendation 2

By **28 February 2022**, the Department ascertain the additional resources (human or otherwise) anticipated to be required in order to meet statutory timeframes (taking account of the improvements through implementing recommendation 1) and provide an action plan to meet those requirements.

Recommendation 3

The Department:

- undertake and complete training on the operational manual for FOI Section staff and other staff (both decision makers and other staff who assist decision makers) **28 March 2022**
- ensure that online training in processing FOI requests for personal information is available to all staff of the Department by **28 March 2022**, and
- ensure that new staff joining the FOI Section are trained in relation to the operational manual within 2 weeks of commencing in the FOI Section.

Recommendation 4

By **30 May 2022**, the Department undertake an audit of the processing of FOI requests for personal information to assess whether Recommendations 1, 2 and 3 have been implemented and operationalised and whether those actions have been sufficient to

address the issues identified in these complaints. The audit is to be undertaken by either the Department's internal auditors or by an external auditor, as determined by the Department. A copy of the audit report should be provided to the OAIIC.

When considering the recommendations made above, the Department should refer to relevant OAIIC FOI resources which can be found on the OAIIC website.⁹

I request that the Department advise the OAIIC of the implementation of each of the recommendations within the timeframes specified.

⁹ See <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/>. The OAIIC's FOI Essentials toolkit, may be of particular assistance to the Department.



Australian Government
Office of the Australian Information Commissioner

ATTACHMENT A

Notice on completion under s 86 of the FOI Act (s 22(1)(a)(ii) - irrelevant material) s 22(1)(a)(ii) - irrelevant material and the Department of Home Affairs

On 6 April 2021, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Department of Home Affairs (the Department) in the performance of its functions, and the exercise of its powers, under the FOI Act.

The complainant is s 22(1)(a)(ii) - irrelevant material, represented by s 22(1)(a)(ii) - irrelevant material.

The complainant alleges the Department failed to provide a decision on s 22(1)(a)(ii) - irrelevant material FOI request of 8 October 2020 within the statutory timeframes set out in the FOI Act.

This Notice on Completion sets out the issue as identified from the allegation raised by the complainant. The allegation is assessed against the legislative framework and the FOI Guidelines¹ which agencies and ministers must have regard to. I have considered the complaint and the Department's submissions in response before making conclusions about the allegation.

Background

On 8 October 2020, the complainant made the FOI request to the Department

s 22(1)(a)(ii) - irrelevant material.²

Under s 15(5) of the FOI Act, the Department was required to provide a decision to the complainant by 7 November 2020.

On 6 April 2021, the complainant lodged a complaint under s 70 of the FOI Act about the Department's non-compliance with the statutory processing period. The complainant did not seek IC Review.

On 23 April 2021, the OAIC commenced an investigation into this complaint. On 3 June 2021, the Department provided a response to the notice and request for information under s 75 of the FOI Act.

¹ The Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard to in performing a function or exercising a power under the FOI Act.

² In the s 75 Notice to the Department, the OAIC incorrectly recorded the date of receipt as 22 July 2020.

On 3 May 2021, the Department provided a substantive decision to the complainant.

On 3 August 2021 and 14 September 2021, the Department provided further submissions in response to the investigation notice of 23 April 2021.

The key procedural events in this FOI complaint are set out in **Annexure A** to this Notice.

Investigation results

Pursuant to s 87 of the FOI Act, the investigation conclusions set out my opinion and conclusion on how the Department processed the complainant's FOI request. I have considered all the material provided by the Department and the complainant in this matter.

Issue: Compliance with statutory processing periods

Complainant's allegation

The complainant alleges the Department failed to provide a decision on [REDACTED] FOI request of 8 October 2020 within the statutory timeframes set out in the FOI Act.

Legislative framework

The FOI Act provides a statutory timeframe of 30 days to process an FOI request (s 15(5)).

The period can be extended by up to 30 days with the applicant's agreement (s 15AA), by 30 days if consultation with a third party is undertaken (s 15(6)), and by 30 days if consultation with a foreign entity is undertaken (s 15(8)).

An agency or minister may apply to the Information Commissioner for extension of the statutory timeframe for complex or voluminous requests (s 15AB) or following a deemed access refusal decision (s 15AC).

The FOI Guidelines at [3.139] state:

An agency or minister must, as soon as practicable, and no later than 30 days after receiving a request, take all reasonable steps to enable the applicant to be notified of a decision on the request (s 15(5)(b)). Section 15(5)(b) provides that the 30-day processing period commences on 3 See also, FOI Guidelines at [3.125]. 4 the day after the day the agency or minister is taken to have received a request that meets the formal requirements of s 15(2), (2A). An agency should act promptly to assist an applicant whose request does not meet the formal requirements in keeping with its obligations under s 15(3).

Table 1: Extension of time provisions

Reason for extension	Extension period	Determined by	Notification requirement
Third party consultation: consultation with a state, or a person or business concerning personal or business information (s 15(6))	30 days	by default if agency or minister determines ss 26A, 27 or 27A apply	agency or minister must inform applicant of extension as soon as practicable (s 15(6)(b))
Consultation with foreign entity required to determine if 33(a)(iii) or 33(b) exemptions apply (s 15(7),(8))	30 days	by default if agency or minister determines consultation is needed	agency or minister must inform applicant of extension as soon as practicable (s 15(8)(b))
By agreement between applicant and agency or minister (s 15AA)	up to 30 days, as either a single extension or a series of shorter extensions. This may be in addition to an extension for third party consultation	agency or minister but only with written agreement of applicant	agency or minister must give written notice of the extension to the Information Commissioner as soon as practicable (s 15AA(b))
Complex or voluminous request (s 15AB)	30 days or other period	Information Commissioner, upon request from agency or minister	Commissioner must inform applicant and agency or minister of an extension period as soon as practicable where a decision is made to grant the extension (s 15AB(3))
Following a deemed refusal (s 15AC(4))	as determined by the Information Commissioner	Information Commissioner, upon request from agency or minister	no legislative requirement but Commissioner may require agency or minister to notify applicant or third party as a condition of granting the extension (s 15AC(6))

The statutory processing period does not include:

- the time that an agency may take in a request consultation process to decide if a practical refusal exists (s 24AB (8))
- the time elapsing between an applicant being notified that a charge is payable and
- either the applicant paying the charge (or a deposit on account of the charge) or the
- agency varying the decision that a charge is payable (s 31).

Deemed access refusal

Section 15AC provides that where a decision on an FOI request has not been provided to the applicant within the statutory processing period, the principal officer of the agency or the minister is deemed to have made a decision refusing access to the documents (s 15AC (3)).

The FOI Guidelines at [3.154] – [3.155] explain:

The consequence of a deemed refusal is that an applicant may apply for IC review (s 54L(2)(a)) In addition, once the time has expired and there is a deemed decision, the agency or minister cannot impose a charge for access...

Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of reasons on the FOI request. This obligation to provide a statement of reasons on the FOI request continues until any IC review of the deemed decision is finalised. ...

Department's submissions to the complaint

Response to the Notice of investigation under s 75 of the FOI Act

On 3 June 2021, the Department provided its response to the complaint. The Department provided a chronology of the processing of the request and advised that:

- The Department did not seek extensions of time under either ss 15 AA, 15AB, 15AC or 54D of the FOI Act.
- The statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.

The Department did not provide an explanation for the delay in processing this request.

The Department also provided submissions in relation to the general grounds for delay in processing FOI requests for personal information, and the measures it is taking to address those factors (**Attachment B**).

On 3 August 2021³ (**Attachment C**) and 14 September 2021⁴ (**Attachment D**),⁵ the Department provided further submissions on the steps that it has undertaken to extend the recommendations made in the Final Report of the CII into the Department's processing of FOI requests for non-personal information, to its processes and procedures for processing FOI requests for personal information. The Department advised that:

1. Recommendation 1: Appoint an Information Champion

- This recommendation is complete, noting the Information Champion's role extends equally to the non-personal and personal caseload.

³ Email from the Department of Home Affairs to the OAIC on 3 August 2021

⁴ Email from the Department of Home Affairs to the OAIC on 14 September 2021

⁵The Department provided its response of 14 September 2021 (Attachment D) in response to my request of 3 September 2021 for further information on the steps it has taken or is taking to extend the CII recommendations to its processing of FOI requests for personal information.

- Our Information Champion (SES Band 2) is actively engaged with the management and oversight of the personal caseload as well as the non-personal caseload.

2. Recommendation 2: Operational Processes and Procedures

- This recommendation is complete. In line with the scope of the CII, the new Procedural Instruction (PI) is focused on non-personal FOI requests. However, we will shortly begin work on a Procedural Instruction directed at personal FOI requests, noting that the majority of the processes set out in the new PI apply equally to personal FOI requests.
- Recommendations 2 and 3 related to the development of procedural guidance (procedural instructions) and training in applying those instructions in the non-personal caseload. The Department has finalised the procedural instruction for the non-personal caseload. The Department is now developing procedural instructions for personal access and amendment requests. This is an active project which will be completed by Q3 – an earlier completion date is not possible while maintaining a focus on reducing backlogs across the caseload.

3. Recommendation 3: Training

- This recommendation is well advanced. In line with the scope of the CII, the new eLearning package for FOI decision-makers is focused on non-personal FOI requests. In addition, we will train Departmental staff involved in the processing of personal requests in the Procedural Instruction for personal FOI requests.
- earlier this month, the Department launched its new FOI eLearning package for all staff and decision-makers. Module one includes an FOI overview that is relevant to both the personal and non-personal space. We are actively tracking the take up of this package across the Department.
- AGS training (decision maker and exemptions) is available for all staff who require a more in-depth understanding of FOI requirements and processes. The AGS module contains information relevant to decision making, regardless of caseload. Our September session has generated a lot of interest and we will run another two sessions in November 2021.

4. Recommendation 4: Audit

- The internal audit scheduled for late 2021 or early 2022 will focus on the CII's recommendations but we expect it will include observations on and recommendations for the FOI caseload as a whole, including the personal case load.
- Recommendation 4 requires us to complete an internal audit. This will necessarily focus on the Department's implementation of the CII recommendations due to the nature of the CII report but may make general observations on FOI processing by the Department as a whole.

Department's submissions regarding its processing of FOI requests in general

In its response of 3 August 2021, (**Attachment C**), the Department advised that, more broadly, the Department is considering options to facilitate the processing of FOI requests, such as:

- pro-actively publishing a wider range of commonly requested statistics
- business process reforms and administrative release of documents to reduce demand for personal FOI requests
- robotic process automation of request registration so that we can redirect staff time toward processing and decision-making.

In its response of 14 September 2021, the Department made further submissions regarding the general processing of FOI requests as follows: (**Attachment D**)

While our immediate priority continues to be implementation of the recommendations of the CII, the Department has progressed a number of improvements in the personal space which do not relate to CII. These include:

- a successful extension of time trial - guidance is now being developed for officers on when and how to use s15AA extensions;
- the development of dashboards, including daily updates to our on-hand data, which increase management visibility of the caseload;
- increased management focus on priority parts of the caseload, including resources dedicated to resolving our oldest and intractable cases in the personal caseload. In 2020-21, in addition to processing new personal access requests, the Department finalised more cases older than 90 days in 2020-21 than in 2019-20;
- maintenance of an improvements register which includes ideas for changes to the personal caseload; and
- better management of complaints received into the inboxes.

We are also exploring the possibilities of automating registration processes, releasing resources for decision making and expediting redactions. These are longer term projects and subject to resourcing.

General comments

The very high volume of FOI requests received by the Department will mean continuing pressures across the FOI program, including in the personal caseload. However, the Department is committed to continuing to improve its processes for responding to FOI requests, within its allocated resources. To this end, the Department has maintained a stable level of resourcing in FOI, even when managing whole of government priorities such as the humanitarian response in Afghanistan and the establishment of a border measures program.

The impact of recent business process reforms, in response to the CII and independently, has led to a significant improvement in the Department's compliance with statutory timeframes for non-personal requests (up from 37 per cent to 65 per cent) and a reduction in the age of

the oldest non-personal request with no on-hand request older than 90 days. This was achieved on the back of a further increase in the total number of non-personal requests in 2020-21; up almost 15% when compared to the previous financial year.

However, to deliver these improvements quickly, the Department has had to phase its reforms and transfer some resources internally, from the personal caseload to the business improvement function and non-personal caseload. To deliver broader process improvements in the personal space will require similar decisions and trade-offs, noting the personal caseload is a much larger program and has particular complexities in relation to identity resolution and integrity.

Discussion

The FOI request was lodged on 8 October 2020. Under s 15 (5) of the FOI Act, the Department was required to provide the complainant with a decision by 7 November 2020, but did not do so until 3 May 2021.

It was open to the Department to seek extensions of time under either ss 15AA, 15AB, 15AC or 54D of the FOI Act, but it did not do so.

Conclusions

The Department did not comply with s 15(5)(b) of the FOI Act when processing FOI request FA 20/10/00544 in that:

- The Department was required to provide a decision to the complainant by 7 November 2020, but did not do so until 3 May 2021.
- The Department did not seek extensions of time under ss 15AA, 15AB, 15AC or 54D of the FOI Act, and the statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.
- The statutory timeframe was not affected by a request consultation process under s 24AB(8) or by the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable under s 31 of the FOI Act.

Recommendations

In light of the Department's submissions, pursuant to s 88 of the FOI Act, I make the following formal recommendations to the Department that I believe the Department ought to implement within the timeframes specified below:

Recommendation 1

The Department prepare and implement an operational manual for processing FOI requests for personal information to be approved by the Information Champion by **28 February 2022**. The operational manual is to include, at a minimum, the steps that will be taken to ensure

compliance with statutory processing requirements. Consistent with the requirements of the Information Publication Scheme, the operational manual should be made publicly available by the Department on its website.

Recommendation 2

By **28 February 2022**, the Department ascertain the additional resources (human or otherwise) anticipated to be required in order to meet statutory timeframes (taking account of the improvements through implementing recommendation 1) and provide an action plan to meet those requirements.

Recommendation 3

The Department:

- a. undertake and complete training on the operational manual for FOI Section staff and other staff (both decision makers and other staff who assist decision makers)
28 March 2022
- b. ensure that online training in processing FOI requests for personal information is available to all staff of the Department by **28 March 2022**, and
- c. ensure that new staff joining the FOI Section are trained in relation to the operational manual within 2 weeks of commencing in the FOI Section.

Recommendation 4

By **30 May 2022**, the Department undertake an audit of the processing of FOI requests for personal information to assess whether Recommendations 1, 2 and 3 have been implemented and operationalised and whether those actions have been sufficient to address the issues identified in these complaints. The audit is to be undertaken by either the Department's internal auditors or by an external auditor, as determined by the Department. A copy of the audit report should be provided to the OAIC.

When considering the recommendations made above, the Department should refer to relevant OAIC FOI resources which can be found on the OAIC website.⁶

I request that the Department advise the OAIC of the implementation of each of the recommendations within the timeframes specified.

⁶ See <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/>. The OAIC's FOI Essentials toolkit, may be of particular assistance to the Department.



ATTACHMENT A

Notice on completion under s 86 of the FOI Act [REDACTED] s22(1)(a)(ii) - irrelevant material and the Department of Home Affairs

On 6 April 2021, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Department of Home Affairs (the Department) in the performance of its functions, and the exercise of its powers, under the FOI Act.

The complainant is s22(1)(a)(ii) - irrelevant material, represented by s22(1)(a)(ii) - irrelevant material.

The complainant alleges the Department failed to provide a decision on [REDACTED] FOI request of 22 January 2021 within the statutory timeframes set out in the FOI Act.

This Notice on Completion sets out the issue as identified from the allegation raised by the complainant. The allegation is assessed against the legislative framework and the FOI Guidelines¹ which agencies and ministers must have regard to. I have considered the complaint and the Department's submissions in response before making conclusions about the allegation.

Background

On 22 January 2021, the complainant made the FOI request to the Department s22(1)(a)(ii) irrelevant material.²

Under s 15(5) of the FOI Act, the Department was required to provide a decision to the complainant by 21 February 2021.

On 21 February 2021, the Department was deemed to have refused access pursuant to s 15AC of the FOI Act.

On 6 April 2021, the complainant lodged a complaint under s 70 of the FOI Act about the Department's non-compliance with the statutory processing period. The complainant has not sought IC Review.

¹ The Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard to in performing a function or exercising a power under the FOI Act.

² The OAIC s 75 letter to the Department noted the FOI request was received on 15 January 2021, this should read 'dated 15 January 2021 and received by the Department on 22 January 2021'.

On 23 April 2021, the OAIC commenced an investigation into this complaint. On 3 June 2021, the Department provided a response to the notice and request for information under s 75 of the FOI Act.

On 30 April 2021, the Department provided the substantive decision to the complainant.

On 3 August 2021 and 14 September 2021, the Department provided further submissions in response to the investigation notice of 23 April 2021.

The key procedural events in this FOI complaint are set out in **Annexure A** to this Notice.

Investigation results

Pursuant to s 87 of the FOI Act, the investigation conclusions set out my opinion and conclusion on how the Department processed the complainant's FOI request. I have considered all the material provided by the Department and the complainant in this matter.

Issue: Compliance with statutory processing periods

Complainant's allegation

The complainant alleges the Department failed to provide a decision on their FOI request of 22 January 2021 within the statutory timeframes set out in the FOI Act.

Legislative framework

The FOI Act provides a statutory timeframe of 30 days to process an FOI request (s 15(5)).

The period can be extended by up to 30 days with the applicant's agreement (s 15AA), by 30 days if consultation with a third party is undertaken (s 15(6)), and by 30 days if consultation with a foreign entity is undertaken (s 15(8)).

An agency or minister may apply to the Information Commissioner for extension of the statutory timeframe for complex or voluminous requests (s 15AB) or following a deemed access refusal decision (s 15AC).

The FOI Guidelines at [3.139] state:

An agency or minister must, as soon as practicable, and no later than 30 days after receiving a request, take all reasonable steps to enable the applicant to be notified of a decision on the request (s 15(5)(b)). Section 15(5)(b) provides that the 30-day processing period commences on 3 See also, FOI Guidelines at [3.125]. 4 the day after the day the agency or minister is taken to have received a request that meets the formal requirements of s 15(2), (2A). An agency should act promptly to assist an applicant whose request does not meet the formal requirements in keeping with its obligations under s 15(3).

Table 1: Extension of time provisions

Reason for extension	Extension period	Determined by	Notification requirement
Third party consultation: consultation with a state, or a person or business concerning personal or business information (s 15(6))	30 days	by default if agency or minister determines ss 26A, 27 or 27A apply	agency or minister must inform applicant of extension as soon as practicable (s 15(6)(b))
Consultation with foreign entity required to determine if 33(a)(iii) or 33(b) exemptions apply (s 15(7),(8))	30 days	by default if agency or minister determines consultation is needed	agency or minister must inform applicant of extension as soon as practicable (s 15(8)(b))
By agreement between applicant and agency or minister (s 15AA)	up to 30 days, as either a single extension or a series of shorter extensions. This may be in addition to an extension for third party consultation	agency or minister but only with written agreement of applicant	agency or minister must give written notice of the extension to the Information Commissioner as soon as practicable (s 15AA(b))
Complex or voluminous request (s 15AB)	30 days or other period	Information Commissioner, upon request from agency or minister	Commissioner must inform applicant and agency or minister of an extension period as soon as practicable where a decision is made to grant the extension (s 15AB(3))
Following a deemed refusal (s 15AC(4))	as determined by the Information Commissioner	Information Commissioner, upon request from agency or minister	no legislative requirement but Commissioner may require agency or minister to notify applicant or third party as a condition of granting the extension (s 15AC(6))

The statutory processing period does not include:

- the time that an agency may take in a request consultation process to decide if a practical refusal exists (s 24AB (8))
- the time elapsing between an applicant being notified that a charge is payable and
- either the applicant paying the charge (or a deposit on account of the charge) or the
- agency varying the decision that a charge is payable (s 31).

Deemed access refusal

Section 15AC provides that where a decision on an FOI request has not been provided to the applicant within the statutory processing period, the principal officer of the agency or the minister is deemed to have made a decision refusing access to the documents (s 15AC (3)).

The FOI Guidelines at [3.154] – [3.155] explain:

The consequence of a deemed refusal is that an applicant may apply for IC review (s 54L(2)(a)) In addition, once the time has expired and there is a deemed decision, the agency or minister cannot impose a charge for access...

Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of reasons on the FOI request. This obligation to provide a statement of reasons on the FOI request continues until any IC review of the deemed decision is finalised. ...

Department's submissions to the complaint

Response to the Notice of investigation under s 75 of the FOI Act

On 3 June 2021, the Department provided its response to the complaint. The Department provided a chronology of the processing of the request and advised that:

- The Department did not seek extensions of time under either ss 15AB, 15AC or 54D of the FOI Act.
- The statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.

The Department did not provide an explanation for the delay in processing this request.

The Department also provided submissions in relation to the general grounds for delay in processing FOI requests for personal information, and the measures it is taking to address those factors (**Attachment B**).

On 3 August 2021³ (**Attachment C**) and 14 September 2021⁴ (**Attachment D**),⁵ the Department provided further submissions on the steps that it has undertaken to extend the recommendations made in the Final Report of the CII into the Department's processing of FOI requests for non-personal information, to its processes and procedures for processing FOI requests for personal information. The Department advised that:

1. Recommendation 1: Appoint an Information Champion
 - This recommendation is complete, noting the Information Champion's role extends equally to the non-personal and personal caseload.

³ Email from the Department of Home Affairs to the OAIC on 3 August 2021

⁴ Email from the Department of Home Affairs to the OAIC on 14 September 2021

⁵The Department provided its response of 14 September 2021 (Attachment D) in response to my request of 3 September 2021 for further information on the steps it has taken or is taking to extend the CII recommendations to its processing of FOI requests for personal information.

- Our Information Champion (SES Band 2) is actively engaged with the management and oversight of the personal caseload as well as the non-personal caseload.

1. Recommendation 2: Operational Processes and Procedures

- This recommendation is complete. In line with the scope of the CII, the new Procedural Instruction (PI) is focused on non-personal FOI requests. However, we will shortly begin work on a Procedural Instruction directed at personal FOI requests, noting that the majority of the processes set out in the new PI apply equally to personal FOI requests.
- Recommendations 2 and 3 related to the development of procedural guidance (procedural instructions) and training in applying those instructions in the non-personal caseload. The Department has finalised the procedural instruction for the non-personal caseload. The Department is now developing procedural instructions for personal access and amendment requests. This is an active project which will be completed by Q3 – an earlier completion date is not possible while maintaining a focus on reducing backlogs across the caseload.

2. Recommendation 3: Training

- This recommendation is well advanced. In line with the scope of the CII, the new eLearning package for FOI decision-makers is focused on non-personal FOI requests. In addition, we will train Departmental staff involved in the processing of personal requests in the Procedural Instruction for personal FOI requests.
- earlier this month, the Department launched its new FOI eLearning package for all staff and decision-makers. Module one includes an FOI overview that is relevant to both the personal and non-personal space. We are actively tracking the take up of this package across the Department.
- AGS training (decision maker and exemptions) is available for all staff who require a more in-depth understanding of FOI requirements and processes. The AGS module contains information relevant to decision making, regardless of caseload. Our September session has generated a lot of interest and we will run another two sessions in November 2021.

3. Recommendation 4: Audit

- The internal audit scheduled for late 2021 or early 2022 will focus on the CII's recommendations but we expect it will include observations on and recommendations for the FOI caseload as a whole, including the personal case load.
- Recommendation 4 requires us to complete an internal audit. This will necessarily focus on the Department's implementation of the CII recommendations due to the nature of the CII report but may make general observations on FOI processing by the Department as a whole.

Department's submissions regarding its processing of FOI requests in general

In its response of 3 August 2021, (**Attachment C**), the Department advised that, more broadly, the Department is considering options to facilitate the processing of FOI requests, such as:

- pro-actively publishing a wider range of commonly requested statistics
- business process reforms and administrative release of documents to reduce demand for personal FOI requests
- robotic process automation of request registration so that we can redirect staff time toward processing and decision-making.

In its response of 14 September 2021, the Department made further submissions regarding the general processing of FOI requests as follows: (**Attachment D**)

While our immediate priority continues to be implementation of the recommendations of the CII, the Department has progressed a number of improvements in the personal space which do not relate to CII. These include:

- a successful extension of time trial - guidance is now being developed for officers on when and how to use s15AA extensions;
- the development of dashboards, including daily updates to our on-hand data, which increase management visibility of the caseload;
- increased management focus on priority parts of the caseload, including resources dedicated to resolving our oldest and intractable cases in the personal caseload. In 2020-21, in addition to processing new personal access requests, the Department finalised more cases older than 90 days in 2020-21 than in 2019-20;
- maintenance of an improvements register which includes ideas for changes to the personal caseload; and
- better management of complaints received into the inboxes.

We are also exploring the possibilities of automating registration processes, releasing resources for decision making and expediting redactions. These are longer term projects and subject to resourcing.

General comments

The very high volume of FOI requests received by the Department will mean continuing pressures across the FOI program, including in the personal caseload. However, the Department is committed to continuing to improve its processes for responding to FOI requests, within its allocated resources. To this end, the Department has maintained a stable level of resourcing in FOI, even when managing whole of government priorities such as the humanitarian response in Afghanistan and the establishment of a border measures program.

The impact of recent business process reforms, in response to the CII and independently, has led to a significant improvement in the Department's compliance with statutory timeframes for non-personal requests (up from 37 per cent to 65 per cent) and a reduction in the age of

the oldest non-personal request with no on-hand request older than 90 days. This was achieved on the back of a further increase in the total number of non-personal requests in 2020-21; up almost 15% when compared to the previous financial year.

However, to deliver these improvements quickly, the Department has had to phase its reforms and transfer some resources internally, from the personal caseload to the business improvement function and non-personal caseload. To deliver broader process improvements in the personal space will require similar decisions and trade-offs, noting the personal caseload is a much larger program and has particular complexities in relation to identity resolution and integrity.

Discussion

The FOI request was made on 22 January 2021. Pursuant to s 15(5)(b) of the FOI Act, the Department was due to provide a decision to the complainant by 21 February 2021, but did not do so until 30 April 2021.

It was open to the Department to seek extensions of time under either ss 15AA, 15AB, 15AC or 54D of the FOI Act, but it did not do so.

The statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.

Conclusions

The Department did not comply with s 15(5)(b) of the FOI Act when processing FOI request FA 21/01/01494, in that:

- The Department was required to provide a decision to the complainant by 21 February 2021, but did not do so until 30 April 2021.
- The Department did not seek extensions of time under ss 15AB, 15AC or 54D of the FOI Act, and the statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.
- The statutory timeframe was not affected by a request consultation process under s 24AB(8) or by the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable under s 31 of the FOI Act.

Recommendations

In light of the Department's submissions, pursuant to s 88 of the FOI Act, I make the following formal recommendations to the Department that I believe the Department ought to implement within the timeframes specified below:

Recommendation 1

The Department prepare and implement an operational manual for processing FOI requests for personal information to be approved by the Information Champion by **28 February 2022**. The operational manual is to include, at a minimum, the steps that will be taken to ensure compliance with statutory processing requirements. Consistent with the requirements of the Information Publication Scheme, the operational manual should be made publicly available by the Department on its website.

Recommendation 2

By **28 February 2022**, the Department ascertain the additional resources (human or otherwise) anticipated to be required in order to meet statutory timeframes (taking account of the improvements through implementing recommendation 1) and provide an action plan to meet those requirements.

Recommendation 3

The Department:

- a. undertake and complete training on the operational manual for FOI Section staff and other staff (both decision makers and other staff who assist decision makers)
28 March 2022
- b. ensure that online training in processing FOI requests for personal information is available to all staff of the Department by **28 March 2022**, and
- c. ensure that new staff joining the FOI Section are trained in relation to the operational manual within 2 weeks of commencing in the FOI Section.

Recommendation 4

By **30 May 2022**, the Department undertake an audit of the processing of FOI requests for personal information to assess whether Recommendations 1, 2 and 3 have been implemented and operationalised and whether those actions have been sufficient to address the issues identified in these complaints. The audit is to be undertaken by either the Department's internal auditors or by an external auditor, as determined by the Department. A copy of the audit report should be provided to the OAIC.

When considering the recommendations made above, the Department should refer to relevant OAIC FOI resources which can be found on the OAIC website.⁶

⁶ See <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/>. The OAIC's FOI Essentials toolkit, may be of particular assistance to the Department.

I request that the Department advise the OAIC of the implementation of each of the recommendations within the timeframes specified.



Australian Government
Office of the Australian Information Commissioner

ATTACHMENT A

Notice on completion under s 86 of the FOI Act (s 22(1)(a)(ii) irrelevant material) and (s 22(1)(a)(ii) irrelevant material) - s 22(1)(a)(ii) - irrelevant material and the Department of Veterans' Affairs

On 16 March 2021, the Office of the Australian Information Commissioner (OAIC) received two complaints under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Department of Veterans' Affairs (the Department) in the performance of its functions and the exercise of its powers under the FOI Act.

The complainant is s 22(1)(a)(ii) - irrelevant material.

The complainant alleges the Department failed to provide decisions on s 22(1) two FOI requests of 1 February 2021 within the statutory processing period set out in the FOI Act.

The two FOI requests relating to these two FOI complaints were also the subject of two Information Commissioner reviews (IC review) (OAIC references: s 22(1)(a)(ii) irrelevant material and s 22(1)(a)(ii) irrelevant material) and Agency references: s 22(1)(a)(ii) irrelevant material which have now been finalised.

This Notice on Completion assesses the complaints against the FOI Act and the FOI Guidelines¹ to which agencies and ministers must have regard. I have considered the complaints and the Department's submissions in response when making these findings.

Background

On 1 February 2021, the complainant applied to the Department for access to documents, submitting two separate FOI requests (Agency references: s 22(1)(a)(ii) irrelevant material). Under s 15(5) of the FOI Act, the Department was required to provide decisions on the access requests to the complainant by 3 March 2021.

On 2 March 2021, the Department applied to the OAIC for an extension of time in each matter under s 15AB of the FOI Act (OAIC references: s 22(1)(a)(ii) irrelevant material).

On 9 March 2021, the OAIC granted the Department extensions of time under s 15AB of the FOI Act for each FOI request. As a result of those extensions of time, the Department was required to provide the complainant with decisions in each matter by 12 March 2021.

¹ The Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard to in performing a function or exercising a power under the FOI Act.

On 16 March 2021, the complainant lodged two FOI complaints under s 70 of the FOI Act about the Department's non-compliance with the statutory processing period (this matter; **s 22(1)(a)(ii) irrelevant material**). The complainant also sought two IC reviews as the complainant contended that both FOI requests were deemed access refusal decisions (OAIC references **s 22(1)(a)(ii) irrelevant material**).²

During the course of this investigation the Department advised the OAIC that on 10 March 2021, it informed the complainant that third party consultations were required under s 27 of the FOI Act. Under s 15(6) of the FOI Act, the processing period was extended by 30 days to conduct third party consultations, with the Department's decisions in these matters due to be provided to the complainant by 12 April 2021.

On 7 April 2021, the Department provided the complainant with one decision letter which set out the reasons for decision for each of the two FOI requests (Agency references: **s 22(1)(a)(ii) irrelevant material**).

On 2 September 2021, in accordance with s 75 of the FOI Act, the OAIC notified the Department that it would investigate the complaint and requested the Department's response to the complaint.

On 24 September 2021, the Department provided a response to the notice and request for information (**Annexure A**).

Investigation results

Pursuant to s 87 of the FOI Act, the investigation results set out the matters that I have investigated and my opinion and conclusions about the complaint. I have considered all the material provided by the Department and the complainant in this investigation.

Issue: Compliance with statutory processing periods

Complainant's allegation

The complainant alleges that the Department failed to provide a decision for the two FOI requests dated 1 February 2021 within the statutory processing period set out in the FOI Act.

² **s 22(1)(a)(ii) irrelevant material** were finalised on 11 May 2021 and 29 June 2021 respectively under s 54 R of the FOI Act.

Legislative framework

The FOI Act provides a statutory processing period of 30 days to process an FOI request (s 15(5)).

The period can be extended by up to 30 days with the applicant's agreement (s 15AA), by 30 days if consultation with a third party is undertaken (s 15(6)), and by 30 days if consultation with a foreign entity is undertaken (s 15(8)).

An agency or minister may apply to the Information Commissioner for extension of the statutory processing period for complex or voluminous requests (s 15AB) or following a deemed access refusal decision (s 15AC).

The statutory processing period does not include:

- the time that an agency may take in a request consultation process to decide if a practical refusal exists (s 24AB(8))
- the time elapsing between an applicant being notified that a charge is payable and
 - either the applicant paying the charge (or a deposit on account of the charge) or the
 - agency varying the decision that a charge is payable (s 31).

Department's submissions to the complaints

On 24 September 2021 the Department provided its response to the OAIC notice under s 75 of the FOI Act, providing submissions addressing the complaints (**Annexure A**). The Department provided a chronology of the processing of the requests, advised that both decisions were provided to the complainant within the statutory processing period. The Department submitted that:

- a) the FOI requests were received on 1 February 2021
- b) the Department attempted to obtain an agreement for an extension of time for both FOI requests under s 15AA, however the complainant did not agree to the extensions of time
- c) the Department obtained an extension of time under s 15AB of the FOI Act for both FOI requests from the OAIC
- d) the statutory processing period was extended for the purpose of conducting consultations pursuant to s 15(6) of the FOI Act for both FOI requests, and
- e) the Department provided its decision in each matter on 7 April 2021.

Discussion

The FOI requests were made on 1 February 2021. On 2 March 2021, extensions to the statutory processing time were sought by the Department under s 15AB of the FOI Act. On 9 March 2021, extensions were granted for the requests on the basis that the requests were

considered complex. Following extensions of time granted under the FOI Act, the statutory processing period for both requests was extended to 12 March 2021.

Following the decisions to grant the extensions of time to 12 March 2021, on 10 March 2021, the Department informed the complainant that third party consultations were required under s 27 of the FOI Act. Under s 15(6) of the FOI Act, the processing period was extended by an additional 30 days to conduct third party consultations. This information was not provided by the complainant in [redacted] FOI complaint submissions.

I have reviewed the Department's correspondence to the complaint advising [redacted] that the statutory processing period had been extended under s 15(6) of the FOI Act for the purposes of conducting third party consultations. I am satisfied that the Department's correspondence is compliant with s 15(6)(b).

Accordingly, the Department's decisions were due to be provided to the complainant by the extended decision date 12 April 2021. The Department provided one decision letter encompassing both FOI requests to the complainant on 7 April 2021.

Conclusions

I am satisfied that the statutory processing period was extended as follows:

- a) On 9 March 2021, the statutory processing period for both requests was extended under s 15AB of the Act. The statutory processing period for both requests was extended to 12 March 2021.
- b) On 10 March 2021, the complainant was notified that third party consultations were required under s 27 of the FOI Act. The statutory processing period was extended by an additional 30 days under s 15(6) of the FOI Act to 12 April 2021.

I am satisfied that the statutory processing period was not affected by a request consultation process under s 24AB(8) or by the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable under s 31 of the FOI Act.

As the Department provided one decision letter encompassing both FOI requests to the complainant on 7 April 2021, I am satisfied that the Department's decisions in relation to FOI requests were provided within the statutory processing period set out in the FOI Act.

Recommendations

In consideration of the above, I make no recommendations pursuant to s 88 of the FOI Act.



ATTACHMENT A

Notice on completion under s 86 of the FOI Act (s 22(1)(a)(ii) irrelevant material and [redacted]) - s 22(1)(a)(ii) - irrelevant material and the Department of Veterans' Affairs

On 16 March 2021, the Office of the Australian Information Commissioner (OAIC) received two complaints under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Department of Veterans' Affairs (the Department) in the performance of its functions and the exercise of its powers under the FOI Act.

The complainant is s 22(1)(a)(ii) - irrelevant material

The complainant alleges the Department failed to provide decisions on s 22(1)(a) two FOI requests of 1 February 2021 within the statutory processing period set out in the FOI Act.

The two FOI requests relating to these two FOI complaints were also the subject of two Information Commissioner reviews (IC review) (OAIC references: s 22(1)(a)(ii) irrelevant material and s 22(1)(a)(ii) irrelevant material and Agency references: s 22(1)(a)(ii) irrelevant material) which have now been finalised.

This Notice on Completion assesses the complaints against the FOI Act and the FOI Guidelines¹ to which agencies and ministers must have regard. I have considered the complaints and the Department's submissions in response when making these findings.

Background

On 1 February 2021, the complainant applied to the Department for access to documents, submitting two separate FOI requests (Agency references: s 22(1)(a)(ii) irrelevant material). Under s 15(5) of the FOI Act, the Department was required to provide decisions on the access requests to the complainant by 3 March 2021.

On 2 March 2021, the Department applied to the OAIC for an extension of time in each matter under s 15AB of the FOI Act (OAIC references: s 22(1)(a)(ii) irrelevant material).

On 9 March 2021, the OAIC granted the Department extensions of time under s 15AB of the FOI Act for each FOI request. As a result of those extensions of time, the Department was required to provide the complainant with decisions in each matter by 12 March 2021.

¹ The Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard to in performing a function or exercising a power under the FOI Act.

On 16 March 2021, the complainant lodged two FOI complaints under s 70 of the FOI Act about the Department's non-compliance with the statutory processing period (this matter; **s 22(1)(a)(ii) irrelevant material**). The complainant also sought two IC reviews as the complainant contended that both FOI requests were deemed access refusal decisions (OAIC references **s 22(1)(a)(ii) irrelevant material**).²

During the course of this investigation the Department advised the OAIC that on 10 March 2021, it informed the complainant that third party consultations were required under s 27 of the FOI Act. Under s 15(6) of the FOI Act, the processing period was extended by 30 days to conduct third party consultations, with the Department's decisions in these matters due to be provided to the complainant by 12 April 2021.

On 7 April 2021, the Department provided the complainant with one decision letter which set out the reasons for decision for each of the two FOI requests (Agency references: FOI 40586 and FOI 40589).

On 2 September 2021, in accordance with s 75 of the FOI Act, the OAIC notified the Department that it would investigate the complaint and requested the Department's response to the complaint.

On 24 September 2021, the Department provided a response to the notice and request for information (**Annexure A**).

Investigation results

Pursuant to s 87 of the FOI Act, the investigation results set out the matters that I have investigated and my opinion and conclusions about the complaint. I have considered all the material provided by the Department and the complainant in this investigation.

Issue: Compliance with statutory processing periods

Complainant's allegation

The complainant alleges that the Department failed to provide a decision for the two FOI requests dated 1 February 2021 within the statutory processing period set out in the FOI Act.

² **s 22(1)(a)(ii) irrelevant material** finalised on 11 May 2021 and 29 June 2021 respectively under s 54 R of the FOI Act.

Legislative framework

The FOI Act provides a statutory processing period of 30 days to process an FOI request (s 15(5)).

The period can be extended by up to 30 days with the applicant's agreement (s 15AA), by 30 days if consultation with a third party is undertaken (s 15(6)), and by 30 days if consultation with a foreign entity is undertaken (s 15(8)).

An agency or minister may apply to the Information Commissioner for extension of the statutory processing period for complex or voluminous requests (s 15AB) or following a deemed access refusal decision (s 15AC).

The statutory processing period does not include:

- the time that an agency may take in a request consultation process to decide if a practical refusal exists (s 24AB(8))
- the time elapsing between an applicant being notified that a charge is payable and
 - either the applicant paying the charge (or a deposit on account of the charge) or the
 - agency varying the decision that a charge is payable (s 31).

Department's submissions to the complaints

On 24 September 2021 the Department provided its response to the OAIC notice under s 75 of the FOI Act, providing submissions addressing the complaints (**Annexure A**). The Department provided a chronology of the processing of the requests, advised that both decisions were provided to the complainant within the statutory processing period. The Department submitted that:

- a) the FOI requests were received on 1 February 2021
- b) the Department attempted to obtain an agreement for an extension of time for both FOI requests under s 15AA, however the complainant did not agree to the extensions of time
- c) the Department obtained an extension of time under s 15AB of the FOI Act for both FOI requests from the OAIC
- d) the statutory processing period was extended for the purpose of conducting consultations pursuant to s 15(6) of the FOI Act for both FOI requests, and
- e) the Department provided its decision in each matter on 7 April 2021.

Discussion

The FOI requests were made on 1 February 2021. On 2 March 2021, extensions to the statutory processing time were sought by the Department under s 15AB of the FOI Act. On 9 March 2021, extensions were granted for the requests on the basis that the requests were

considered complex. Following extensions of time granted under the FOI Act, the statutory processing period for both requests was extended to 12 March 2021.

Following the decisions to grant the extensions of time to 12 March 2021, on 10 March 2021, the Department informed the complainant that third party consultations were required under s 27 of the FOI Act. Under s 15(6) of the FOI Act, the processing period was extended by an additional 30 days to conduct third party consultations. This information was not provided by the complainant in [REDACTED] FOI complaint submissions.

I have reviewed the Department's correspondence to the complaint advising [REDACTED] that the statutory processing period had been extended under s 15(6) of the FOI Act for the purposes of conducting third party consultations. I am satisfied that the Department's correspondence is compliant with s 15(6)(b).

Accordingly, the Department's decisions were due to be provided to the complainant by the extended decision date 12 April 2021. The Department provided one decision letter encompassing both FOI requests to the complainant on 7 April 2021.

Conclusions

I am satisfied that the statutory processing period was extended as follows:

- a) On 9 March 2021, the statutory processing period for both requests was extended under s 15AB of the Act. The statutory processing period for both requests was extended to 12 March 2021.
- b) On 10 March 2021, the complainant was notified that third party consultations were required under s 27 of the FOI Act. The statutory processing period was extended by an additional 30 days under s 15(6) of the FOI Act to 12 April 2021.

I am satisfied that the statutory processing period was not affected by a request consultation process under s 24AB(8) or by the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable under s 31 of the FOI Act.

As the Department provided one decision letter encompassing both FOI requests to the complainant on 7 April 2021, I am satisfied that the Department's decisions in relation to FOI requests were provided within the statutory processing period set out in the FOI Act.

Recommendations

In consideration of the above, I make no recommendations pursuant to s 88 of the FOI Act.



Australian Government

Office of the Australian Information Commissioner

Notice on completion under s 86 of the FOI Act ([redacted]) [redacted] [redacted] and the Department of Veterans' Affairs

On 25 May 2021, the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Department of Veterans' Affairs (the Department) in the performance of its functions and the exercise of its powers under the FOI Act.

The complainant is [redacted].

The complainant alleges that the Department failed to adhere to statutory processing timeframes in relation to [redacted] FOI request dated 6 January 2021 [redacted].

This Notice on completion sets out the issues identified from the complainant's allegations. The allegations are assessed against the legislative framework and the FOI Guidelines,¹ to which agencies and ministers must have regard in performing a function or exercising a power under the FOI Act.

Background

On 6 January 2021 the complainant wrote to the Secretary to the Department in relation to a matter that [redacted] was seeking to have investigated. At the end of that 8-page correspondence [redacted] requested documents under the FOI Act.

On 5 February 2021, the Department was due to provide the complainant a decision on the FOI request.

On 11 March 2021 the complainant wrote to the Department in relation to a new FOI request and referenced [redacted] earlier request of 6 January 2021. It was following receipt of that correspondence that the Department re-examined the complainant's letter to the Secretary of 6 January 2021 and identified the FOI request contained therein and sent the request to the relevant team for processing.

On 25 May 2021, the complainant lodged a complaint under s 70 of the FOI Act about the Department's non-compliance with the statutory processing period and sought IC review of the deemed access refusal decision on 23 March 2021.

On 3 June 2021, the complainant withdrew [redacted] IC review application.

On 6 September 2021, the OAIC notified the Department that it would investigate the complaint under s 75 of the FOI Act and requested the Department's response to the complaint.

¹ Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the FOI Guidelines).

On 5 October 2021, the Department provided a response to the notice and request for information.

Investigation results

Pursuant to s 87 of the FOI Act, the investigation results set out my opinions, conclusions and suggestions arising from the investigation of this matter. During this investigation, I have had regard to:

- the complaint
- the Department's submissions of 5 October 2021
- the FOI Act and
- the Guidelines issued by the Australian Information Commissioner under 93A of the FOI Act to which agencies must have regard in performing a function or exercising a power under the FOI Act (FOI Guidelines).

Complainant's allegation

The complainant alleges the Department failed to provide a decision on [REDACTED] FOI request within the statutory timeframes set out in the FOI Act.

Legislative framework

The FOI Act provides a statutory timeframe of 30 days to process an FOI request (s 15(5)).

The period can be extended by up to 30 days with the applicant's agreement (s 15AA), by 30 days if consultation with a third party is undertaken (s 15(6)), and by 30 days if consultation with a foreign entity is undertaken (s 15(8)).

An agency or minister may apply to the Information Commissioner for extension of the statutory timeframe for complex or voluminous requests (s 15AB) or following a deemed access refusal decision (s 15AC).

The statutory processing period does not include:

- the time that an agency may take in a request consultation process to decide if a practical refusal exists (s 24AB(8))
- the time elapsing between an applicant being notified that a charge is payable and
 - either the applicant paying the charge (or a deposit on account of the charge) or the
 - agency varying the decision that a charge is payable (s 31).

Department's submissions

In response to the OAIC's investigation, the Department submits:

On 11 March 2021, the Department became aware of the sentence where [redacted] made an FOI request and [redacted] email was referred to the correct electronic address and processing commenced. The Department explained what occurred to [redacted] and adopted a consultative approach throughout the processing of the FOI request. The officers engaged with [redacted] to also apologise that the request was not processed earlier and a decision was made within 30 days of the Department becoming aware of the request. The decision maker notified [redacted] of a decision to give part access on 30 March 2021. [redacted] lodged a further FOI request in April 2021, which was processed within the statutory timeframe.

The full submissions from the Department are at **Attachment A**.

Conclusions

The FOI request was made on 6 January 2021. Pursuant to s 15(5)(b) of the FOI Act, the Department was due to provide a decision to the complainant by 5 February 2021 but did not do so until 30 March 2021.

It was open to the Department to seek extensions of time under either ss 15AA, 15AB, 15AC or 54D of the FOI Act, but it did not do so. The statutory processing period was not extended for the purpose of conducting consultations pursuant to subsections 15(6) and (7) of the FOI Act.

I have considered that when the request of 6 January 2021 was drawn to the Department's attention, it took appropriate steps to process the request, provided an explanation of what had occurred to the complainant and apologised.

In response to the OAIC's investigation notice, the Department submitted that it is 'implementing improvements to respond to FOI requests, including better communications with business areas who receive potential FOI requests to ensure they identify such requests early and forward the correspondence to the correct area within the Department as soon as practicable'.

Recommendations

In considering whether to make any recommendations which I believe the Department ought to implement, I have considered the Department's submissions explaining what had occurred in this case and steps it was taking to ensure that FOI requests received by the Department other than through its specified FOI email address are processed within statutory timeframes.

I have considered the steps that the Department took upon becoming aware that the FOI request had been overlooked, including engaging with and providing an explanation to the complainant, processing the request and apologising to the complainant.

Given the Department's response to this complaint, and the steps it is taking to ensure that FOI requests received other than through its specified FOI email address are processed within statutory timeframes, I do not consider any recommendations are warranted in this case.



ATTACHMENT A

Notice on completion under s 86 of the FOI Act (s 22(1)(a)(ii) irrelevant material) and the Department of the Prime Minister and Cabinet (s 22(1)(a)(i) irrelevant material)

On 9 June 2021 the Office of the Australian Information Commissioner (OAIC) received a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Department of the Prime Minister and Cabinet (the Department) in the performance of its functions and the exercise of its powers under the FOI Act.

The complainant is (s 22(1)(a)(ii) irrelevant material).

The complainant alleges the Department failed to provide a decision on their FOI request of 3 April 2021 within the statutory timeframes set out in the FOI Act.

The FOI request related to this complaint is also the subject of an Information Commissioner review (IC review) (s 22(1)(a)(ii) irrelevant material).¹

This Notice on Completion assesses the complaint against the FOI Act and the FOI Guidelines² to which agencies and ministers must have regard. I have considered the complaint and the Department's submissions in response when making these findings.

Background

On 3 April 2021³, the complainant made the FOI request to the Department (s 22(1)(a)(ii) irrelevant material). Following extensions of the statutory processing time permitted under the FOI Act, the Department was required to provide a decision to the complainant on 4 June 2021⁴.

¹ s 22(1)(a)(ii) irrelevant material

² The Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard to in performing a function or exercising a power under the FOI Act.

³ The Department in its submissions of 29 September 2021 submit the lodgement date as 6 April 2021, the Department's decision of 5 July 2021 records the lodgement date as 3 April 2021.

⁴ The statutory processing period was extended under s 15AB of the FOI Act (s 22(1)(a)(ii) irrelevant material).

On 4 June 2021, the Department was deemed to have refused access pursuant to s 15AC of the FOI Act as it had not provided a decision to the complainant.

On 4 and 5 June 2021 the complainant sought IC review of the deemed access refusal decision (s 22(1)(b)(iii) irrelevant material) and lodged a complaint under s 70 of the FOI Act about the Department's non-compliance with the statutory processing period.⁵

On 2 September 2021, in accordance with s 75 of the FOI Act, the OAIC notified the Department that it would investigate the complaint and requested the Department's response to the complaint.

On 29 September 2021, the Department provided a response to the notice and request for information (**Annexure A**).

Investigation results

Pursuant to s 87 of the FOI Act, the investigation results set out the matters that I have investigated and my opinion and conclusions about the complaint. I have considered the material provided by the Department and the complainant in this investigation.

Issue: Compliance with statutory processing periods

Complainant's allegation

The complainant alleges the Department failed to provide a decision on their FOI request dated 3 April 2021 within the statutory timeframes set out in the FOI Act.

Legislative framework

The FOI Act provides a statutory timeframe of 30 days to process an FOI request (s 15(5)).

The period can be extended by up to 30 days with the applicant's agreement (s 15AA), by 30 days if consultation with a third party is undertaken (s 15(6)), and by 30 days if consultation with a foreign entity is undertaken (s 15(8)).

An agency or minister may apply to the Information Commissioner for extension of the statutory timeframe for complex or voluminous requests (s 15AB) or following a deemed access refusal decision (s 15AC).

⁵ On 5 July 2021, the Department provided a decision to the complainant in response to their FOI request of 3 April 2021.

The FOI Guidelines at [3.139] state:

An agency or minister must, as soon as practicable, and no later than 30 days after receiving a request, take all reasonable steps to enable the applicant to be notified of a decision on the request (s 15(5)(b)). Section 15(5)(b) provides that the 30-day processing period commences the day after the day the agency or minister is taken to have received a request that meets the formal requirements of s 15(2), (2A). An agency should act promptly to assist an applicant whose request does not meet the formal requirements in keeping with its obligations under s 15(3).

Table 1: Extension of time provisions

Reason for extension	Extension period	Determined by	Notification requirement
Third party consultation: consultation with a State, or a person in relation to personal information or business concerning personal or business information (s 15(6))	30 days	By operation of the law if agency or minister determines ss 26A, 27 or 27A apply	Agency or minister must inform applicant of extension as soon as practicable (s 15(6)(b))
Consultation with foreign entity if required to determine if 33(a)(iii) or 33(b) exemptions apply (s 15(7),(8))	30 days	By operation of law if agency or minister determines consultation is appropriate	Agency or minister must inform applicant of extension as soon as practicable (s 15(8)(b))
By agreement between applicant and agency or minister (s 15AA)	Up to 30 days, as either a single extension or a series of shorter extensions. This may be in addition to an extension for third party consultation.	Agency or minister but only with written agreement of applicant	Agency or minister must give written notice of the extension to the Information Commissioner as soon as practicable (s 15AA(b))
Complex or voluminous request (s 15AB)	30 days or other period	Information Commissioner, upon request from agency or minister	Commissioner must inform applicant and agency or minister of an extension period as soon as practicable where a decision is made to grant the extension (s 15AB(3))
Following a deemed refusal (s 15AC(4))	As determined by the Information Commissioner	Information Commissioner, upon request from agency or minister	No legislative requirement but Commissioner may require agency or minister to notify applicant or third party as a condition of granting the extension (s 15AC(6))

The statutory processing period does not include:

- the time taken in a request consultation process where the agency or minister has given the applicant a notice about a practical refusal reason (s 24AB(8))
- the time elapsing between an applicant being notified that a charge is payable and either
 - the applicant paying the charge (or a deposit on account of the charge) or
 - the agency varying the decision that a charge is payable (s 31).

Department's submissions to complaint

On 29 September 2021, the Department provided its response to the complaint (**Annexure A**). The Department provided a chronology of the processing of the request and advised that the delay in finalising the request was due to:

- a) the request was complex and voluminous and required searching through a large volume and range of complex and sensitive email and
- b) all PM&C FOI decisions are to be noted by relevant Senior Executives and the Prime Minister's Office.

The Department did not explain to what extent the engagement with relevant Senior Executives and the Prime Minister's Office contributed to the processing delay.

Discussion

The FOI request was made on 3 April 2021⁶. Extensions to the statutory processing time were sought and provided to the Department under s 15AB of the FOI Act on the basis that the FOI request was complex or voluminous. Following extensions of time permitted under the FOI Act, the Department was required to provide a decision to the complainant by 4 June 2021, but did not do so until 5 July 2021⁷.

Extensions to the statutory processing time under s 15AB of the FOI Act are provided to ensure that the agency has adequate time to finalise the processing of the FOI request in circumstances where the standard processing time of 30 days is insufficient due to its complexity or volume.

⁶ Department decision letter dated 5 July 2021.

⁷ Department decision letter dated 5 July 2021.

Where agencies or ministers make an application to extend the processing timeframe under the FOI Act and the OAIC grants the application and extends the processing period, agencies are expected to finalise the FOI request within that extended period. In making a decision to extend the processing timeframe, the OAIC is cognisant of the impact of that decision, which delays the deeming effect of s 15AC(3) of the FOI Act that is enlivened when an agency fails to process an FOI request within the 30 day period. In this particular matter, the OAIC's decisions to extend the processing period were based on the information that the Department had provided, including information about the time needed to process the FOI request. Following the decisions to grant the extensions of time, the Department was expected to be in a position to provide a well-reasoned decision by the extended decision date.

Conclusions

The Department did not comply with the processing period extended twice under s 15AB of the FOI Act when processing FOI request [REDACTED], in that:

- a) the Department was required to provide a decision to the complainant by 4 June 2021, but did not do so until 5 July 2021
- b) the Department sought and was granted extensions of time under s 15AB of the FOI Act which were provided to the Department on the basis that the FOI request was complex or voluminous
- c) the Department considered the delay attributable to both the volume and complexity of the FOI request and the Department's internal clearance and communication processes.

Recommendations

In considering whether to make any recommendations which I believe the Department ought to implement, I have considered:

- the Department's submissions of 29 September 2021
- recommendations made by the Information Commissioner into a separate investigation about the Department's compliance with statutory timeframes which were implemented by the Department, including recommendations that:
 - a statement be issued to all staff highlighting the Department's obligations under the FOI Act
 - the Department provide FOI training to new employees during induction and annual refresher training to existing employees

- the Department develop policies and procedures in relation to administrative access to information
- the Department review its FOI processing guidance material and conduct an audit into its compliance with statutory timeframes.⁸

Pursuant to s 88 of the FOI Act, I make the following formal recommendations to the Department that I believe the Department ought to implement within the timeframes specified below:

1. The Department appoint an Information Champion⁹ by **5 November 2021**. The Information Champion may be supported by an information governance board to provide leadership, oversight and accountability necessary to promote and operationalise the Department's compliance with the FOI Act.
2. The Department provide training to FOI Section staff and relevant Senior Executives by **5 January 2022** about the obligations under the FOI Act to comply with statutory processing periods.

I request that the Department advise the OAIC of the implementation of each recommendation within the timeframes specified.

⁸ OAIC reference numbers **s 22(1)(a)(ii) irrelevant material**.

⁹ This recommendation is consistent with recommendations made by the Information Commissioner in investigations into other agencies' compliance with statutory processing timeframes. In those investigations, the Information Commissioner recommended the appointment of an 'Information Champion' to promote and operationalise compliance with the FOI Act, the preparation and implementation of an operational manual for processing FOI requests and the provision of FOI training to staff.