

From: [Shelley Napper](#)
To: "philip.gaetjens@pmc.gov.au"; "FOI"
Subject: CP21/01763 - Freedom of information complaint investigation – Notice on completion [SEC=OFFICIAL]
Date: Wednesday, 6 October 2021 4:36:00 PM
Attachments: [image001.jpg](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)
[CP2101673 - s 86 Notice - Letter to Department.pdf](#)
[CP2101673 - s 86 Notice - Attachment A.pdf](#)
[CP2101673 - s 86 Notice - Annexure A.pdf](#)

Our reference: CP21/01763
Agency reference: FOI/2021/053

Mr Philip Gaetjens

Secretary
Department of the Prime Minister and Cabinet
By email: philip.gaetjens@pmc.gov.au
Through: foi@pmc.gov.au

Freedom of information complaint investigation – Notice on completion

Dear Mr Gaetjens

Please find attached a letter from Elizabeth Hampton, Acting Freedom of Information Commissioner, and two relevant attachments.

If you would like to discuss this matter, please contact Irene Nicolaou on (02) 9284 9605 or email irene.nicolaou@oaic.gov.au.

Kind regards



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Australian Government

Office of the Australian Information Commissioner

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Mr Philip Gaetjens

Secretary

Department of the Prime Minister and Cabinet

By email: philip.gaetjens@pmc.gov.au

Through: foi@pmc.gov.au

Freedom of information complaint investigation – Notice on completion

Dear Mr Gaetjens

I refer to the investigation of an FOI complaint made under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Department of the Prime Minister and Cabinet's (the Department) compliance with statutory timeframes for processing FOI request FOI/2021/053.

The complainant is M Parkins.

On 2 September 2021 the OAIC wrote to the Department advising that the complaint would be investigated pursuant to s 75 of the FOI Act and requesting submissions in relation to the matter.

On 29 September 2021 the Department provided a response to the notice and request for information.

I am required to give you notice of:

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

The investigation results are set out at **Attachment A**.

Summary

I have found that the Department did not provide the complainant with a decision in relation to their FOI request within the relevant statutory processing timeframe.

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.¹

Recommendations

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 Champion² 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.

¹ OAIC reference numbers CP18/01243 and REC19/00001.

² 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.

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.

Next steps

Comments under s 86(3) of the FOI Act

Under s 86(3) of the FOI Act, the Department may provide any comments about the Notice on completion that the Department wishes to make. If the Department wishes to make any comments, please do so by **20 October 2021**.

A copy of this Notice with the Department's comments will be provided to the complainant pursuant to s 86(4) of the FOI Act. If I do not receive any comment from the Department by **20 October 2021**, I will proceed to provide a copy of this Notice to the complainant at that time.

I do not consider that this Notice contains matters of the kind mentioned in s 89C(2) of the FOI Act and I will therefore provide the complainant with a copy of this Notice pursuant to s86(4) of the FOI Act on or after **20 October 2021**.

I propose to publish a copy or a summary of this Notice and any comments from the Department on the OAIC's website.

If your staff would like to discuss this matter, they can contact Irene Nicolaou on (02) 9284 9605 or email irene.nicolaou@oaic.gov.au. Please quote the OAIC reference numbers above in any correspondence.

Yours sincerely



Elizabeth Hampton
Acting Freedom of Information Commissioner
5 October 2021

ATTACHMENT A**Notice on completion under s 86 of the FOI Act (CP21/01673)
M Parkins and the Department of the Prime Minister and Cabinet**

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 M Parkins.

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) (MR21/00529).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 (FOI/2021/053). 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 MR21/00529 ongoing at the time of this notice.

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 (RQ21/01068 and RQ21/01414).

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 (MR21/00529) 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 FOI2021/053, 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 CP18/01243 and REC19/00001.

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.

Annexure A

Department's response to s 75 Notice of investigation received 22 September 2021.

1. A chronology of the processing of the complainant's FOI request, including the date the FOI request was made, the date and reason for any extension of the statutory processing time, and the date the decision was made and communicated to the complainant

Date	Event
06/04/2021	FOI request made to PM&C
23/04/2021	Request to Information Commissioner (IC) for a s 15AB extension of time
30/04/2021	PM&C followed up the s 15AB application to the IC
04/05/2021	IC advised that a s 15AB extension was granted until 02/06/2021
01/06/2021	FOI decision circulated for noting
04/06/2021	IC granted a further s 15AB extension until 04/06/2021
02/07/2021	Decision noted and prepared for release
05/07/2021	Decision released to the applicant.

2. Submissions regarding any delay in responding to the FOI request including submissions addressing the issues raised by the complainant.

As advised in the s 15AB applications for extensions of time to the IC, this request was complex and voluminous and required searching through a large volume and range of complex and sensitive email.

In addition, as outlined in the publicly available PM&C FOI Business Rules, all PM&C FOI decisions are to be noted by relevant Senior Executives and the Prime Minister's Office.

3. Whether the Department extended the processing period in accordance with ss 15(6) or 15(7) and

There were no extensions under ss 15(6) or 15(7).

4. Whether the Department had considered requesting an extension of time under ss 15AA, 15AB, 15AC or 54D of the FOI Act.

The Department sought and obtained two s 15AB extension of time from the IC.