



Determination

External review - section 39 *Freedom of Information Act 1991*

Applicant	The Hon Leon Bignell MP
Agency	Environment Protection Authority
Ombudsman reference	2021/00346
Agency reference	9079057
Determination	The determination of the agency is varied.

REASONS

Application for access

1. The applicant made 14 separate applications under the *Freedom of Information Act 1991 (the FOI Act)* requesting access from the agency to various documents. The first application, received on 9 December 2020 sought access to:
 - All correspondence between the Environment Protection Authority and Southern Waste ResourceCO within the period of 1st May 2013 and 31st December 2013
 - All correspondence between the Environment Protection Authority and Southern Waste ResourceCo within the period of 1st June 2014 and 31st June 2014
 - All documents relating to Environmental Protection Order 32190
 - All documents relating to Environmental Protection Order 33631
2. On 14 December 2020 the applicant lodged a further 13 applications requesting access to:
 - All email correspondence between Southern Waste ResourceCo and the Environmental Protection Authority...
3. Each of the 13 applications were identically worded but covering separate months between December 2019 and December 2020.

Background

4. For ease of reference, procedural steps relating to the application and the external review are set out in Appendix 1.

Jurisdiction

5. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

Provisional determination

6. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 12 February 2021. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to vary the agency's determination.
7. The agency provided submissions in response which I have considered in the body of this determination.

Relevant law

8. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
9. The FOI Act provides that upon receipt of an access application, an agency may make a determination to refuse access where the documents are 'exempt'. Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusing access.
10. Section 14A of the FOI Act relevantly provides:

14A—Extension of time limit

(1) The principal officer of an agency that is dealing with an application may extend the period within which the application would otherwise have to be dealt with under section 14 if satisfied that—

- (a) the application is for access to a large number of documents or necessitates a search through a large quantity of information and dealing with the application within that period would unreasonably divert the agency's resources from their use by the agency in the exercise of its functions; or
- (b) the application is for access to a document in relation to which consultation is required under Division 2 and it will not be reasonably practicable to comply with Division 2 within that period.

(2) An extension under subsection (1) must be for a reasonable period of time having regard to the circumstances.

(3) The extension must be effected by giving written notice of the extension to the applicant within 20 days after the application is received.

- (4) Such a notice must specify—
- (a) the period of the extension; and
 - (b) the reasons for the extension; and
 - (c) the rights of review conferred by this Act.

(5) An extension under subsection (1) is a determination for the purposes of this Act.

11. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
12. Section 39(11) provides that the Ombudsman may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

¹ *Freedom of Information Act 1991*, section 12.

Issues in this review

13. The agency received the first application on 9 December 2020 and the remaining 13 applications on 14 December 2020.
14. By determination dated 29 December 2020, the agency's principal officer determined to extend the time within which the 14 applications are to be determined until 30 July 2021, an extension of six and a half months.
15. Having regard to the submissions of the parties and the length of the extension, it is for me to determine whether the agency has justified its decision to extend the time for dealing with the applications, and whether the extension is for a reasonable period of time having regard to the circumstances.

ConsiderationJurisdiction issues

16. The principal officer of the agency gave the applicant written notice of his decision to extend the time limit within 20 days of receiving the first application and within 15 days of receiving the additional 13 applications. The agency has therefore complied with subsection (3) of section 14A.
17. Section 14A(4) sets out the matters that must be addressed in a written notice of extension. I am satisfied that the notice in issue complies with this section.

Applicant's submissions

18. I consider it appropriate to first address the points raised by the applicant in his application for external review.
19. The applicant has first provided a brief explanation for his interest in the sought information. Although I understand that the applicant's interest in the information may highlight the reasons that he wishes for his applications to be dealt with expeditiously, I advise that this is not relevant to my consideration of the section 14A extension of time. If the criteria of section 14A are met, the agency is able to extend the time to deal with the applications, regardless of their urgency.
20. The applicant has referred to the agency's decision to combine the 14 FOI applications and treat them as one, stating that it is unclear what authority is granted by the FOI Act for an agency to do so.
21. The agency's decision to combine the applications is not a determination for the purposes of the FOI Act and therefore not something that I am able to review. However, although this decision is beyond my review, I acknowledge that the effect of combining the applications may be relevant to my consideration of the reasonableness of the length of the extension imposed.
22. By passing comment, I note that the agency's decision to combine the applications, particularly the 13 applications lodged on 14 December 2020, appears to address a superficial separation of one larger FOI application by the applicant.
23. The applicant has highlighted that the agency receives a relatively small number of FOI applications each year, an amount far less than other agencies such as the Department for Health and Wellbeing and local health networks. I acknowledge that the agency's comparatively low FOI workload should not afford the agency the ability to impose

extensions where the requirements of section 14A(1) have not been met. However, it is my view that, if the requirements of section 14A(1) are met, the agency's size, resources and general workload will be relevant to my consideration of the reasonableness of the length of the extension.

24. Finally, the applicant has advised that, rather than impose one extension of time in relation to the 14 applications, it would have been more efficient and effective for all parties if the agency had responded to each individual application in an agreed upon, arranged order and within an agreed timeframe.
25. To this point, I note that in its extension determination, the agency stated:

I would encourage you to continue to work with the EPA to refine your FOI requests to ensure that you are obtaining the key information you require in the most expeditious and efficient manner possible. For example there may be specific time periods or events that are of particular importance about which information could be more quickly accessed and provided.
26. The agency further advised in its submissions to this Office that it has attempted to contact the applicant to negotiate a reduction in the scope of the application without success. The agency also advised that if the scope of the application is able to be negotiated in future, the agency's response time will be adjusted accordingly.
27. Accordingly, whilst I do not necessarily disagree with the applicant's assertion that processing the applications individually in an agreed upon order would have been more efficient and effective for both parties, it appears that the agency has made an appropriate effort to pursue this option but has not been able to reach an agreement with the applicant.

Whether the requirements of section 14A are met

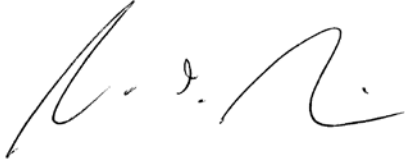
28. In its submissions to this Office the agency advised that the applications will capture approximately 900 documents and require in excess of 480 hours of staff time to search through relevant databases, locate, sort and compile relevant documents, and undertake third party consultation.
29. I am satisfied that 900 documents can certainly be characterized as being a large number of documents.
30. I am also satisfied that requiring the agency to dedicate in excess of 480 hours of staff time to deal with the applications within the 30 day legislated timeframe would unreasonably divert the agency's resources from their use in the exercise of the agency's functions. To complete this work within 30 days would require three separate staff members to each dedicate 37.5 working hours every week for almost the entire 30 days to dealing only with the applications. This would require significant time to be deflected from agency staff who do not ordinarily deal with FOI applications.
31. As I am satisfied that the requirements of section 14A(1)(a) are met, it is not necessary for me to consider whether the application requires consultation which could not reasonably be completed within the legislated 30 day period. I do note however that the agency has advised that consultation will be required in relation to many of the documents in issue. Noting the number of the documents likely to be within scope, it appears that the requirements of section 14A(1)(b) would also be met.

Whether the extension is for a reasonable period of time having regard to the circumstances

32. As outlined above, the agency has estimated that dealing with the FOI applications would take approximately 480 hours of staff time. If one staff member were to be tasked with dealing with these applications, it would require that person to commit all working hours to this application for 2.8 months.
33. Additionally, the agency advised in its submissions to this Office that staff leave was required to be taken into account, noting that the Christmas and New Year holiday period occurred soon after the applications were received. The estimated 2.8 months also does not take into account any additional staff leave not related to the holiday period, or any delays caused by third parties during consultation.
34. Whilst I acknowledge that three months is less than half of the six and a half month extension imposed by the agency, I do not consider it appropriate to expect that the agency's FOI officer will dedicate all time to these applications and neglect all other work, as well as any subsequent FOI applications that the agency may receive. Having said this, I consider that an extension of six and a half months may be excessive.
35. The agency advised in its submissions to this Office that it receives, on average, approximately 22 FOI applications per year. The current extension determination relates to 14 applications, a little over half of that average.
36. Bearing this in mind, in my provisional determination I stated that I considered it appropriate that the extension be for a period of five months rather than six and a half months. This would require the agency's FOI officer to dedicate a little over half of their working time to dealing with the applications, which is proportionate to the agency's average annual FOI workload.
37. In response to my provisional determination, the agency submitted that many of the documents will require consultation with a third party who will likely seek legal advice. The agency further submitted that it will likely need to engage the Crown Solicitor's Office to consider any submissions made by the third party and that, given the volume of documents involved, this will add to the overall time frame within which the agency is able to address the FOI applications.
38. On this basis, the agency submitted that it sought a further three weeks in addition to the five month extension I proposed in my provisional determination.
39. While I accept that the agency will be required to conduct consultation, and that the agency may wish to obtain legal advice, the agency has not provided any reason as to why this could not be achieved within the five month period of time proposed in my provisional determination.
40. I also note that it is not uncommon for agencies to seek legal advice in the course of dealing with FOI applications. The fact that the agency has highlighted this as a possibility does not, in my view, justify that a further extension of time is required. Rather, the agency was required to go one step further and justify why legal advice could not be sought within the proposed five month extension but has not done so.
41. Bearing in mind that the proposed five month extension is in addition to the legislated 30 day period already afforded to the agency to deal with the applications, I remain satisfied that six months should be sufficient for the agency to appropriately deal with the 14 FOI applications.

Determination

42. In light of my views above, I vary the agency's determination such that the time to determine the 14 applications be extended until 9 June 2021.



Wayne Lines
SA OMBUDSMAN

26 February 2021

APPENDIX 1

Procedural steps

Date	Event
9 December 2020	The agency received the first FOI application dated 9 December 2020.
14 December 2020	The agency received a further 13 FOI applications dated 14 December 2020.
29 December 2020	The agency's principal officer made a determination to extend the time for dealing with the 14 FOI applications until 30 July 2021 pursuant to section 14A of the FOI Act.
25 January 2021	The Ombudsman received the applicant's request for external review dated 25 January 2021.
27 January 2021	The Ombudsman advised the agency of the external review and requested submissions and documentation.
10 February 2021	The agency provided the Ombudsman with its submissions and documentation.
12 February 2021	The Ombudsman issued his provisional determination and invited submissions from the parties.
22 February 2021	The agency provided submissions in response to the provisional determination.