

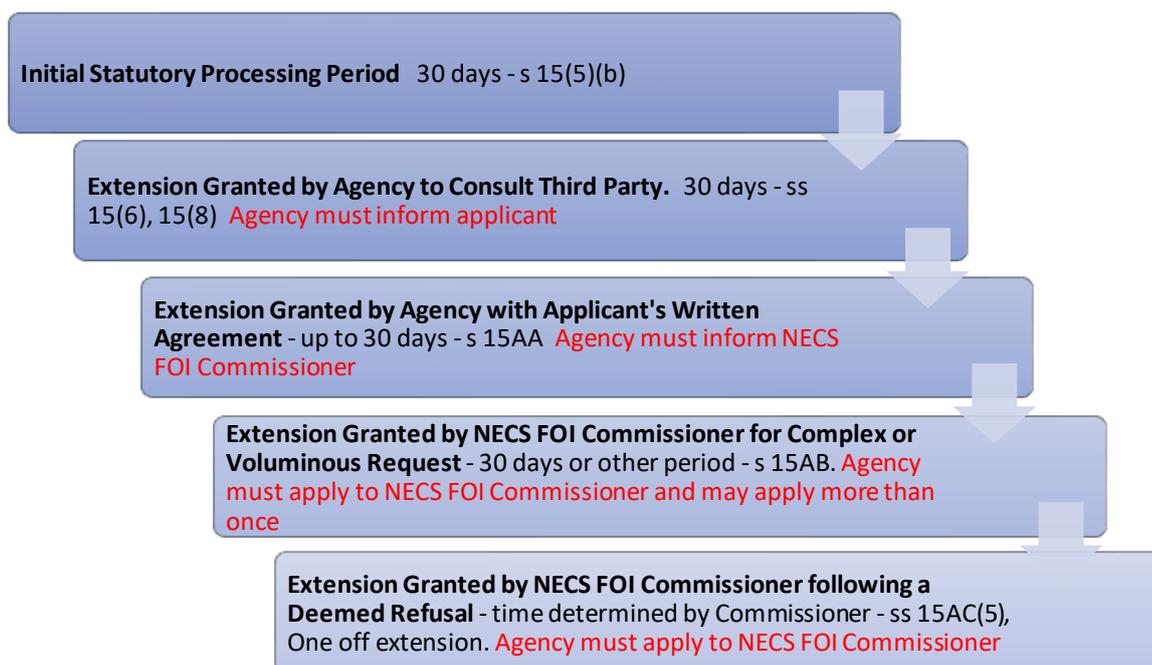
Processing and extension of time provisions under the *Freedom of Information Act 1982*

Introduction

The Commonwealth *Freedom of Information Act 1982*, as modified by the Education and Care Services National Law and associated National Regulations – the **FOI Act** – requires state and territory education and care services’ Regulatory Authorities and the Australian Children’s Education and Care Quality Authority (ACECQA) – the **ECS Agencies** – to comply with timeframes in processing freedom of information requests. In some circumstances the timeframe may be extended. This guide includes an overview of the extension of time (EOT) provisions of the FOI Act, explains when and how the NECS FOI Commissioner must be involved in an EOT, and provides templates for applying to the Commissioner for EOTs.

Figure 1 provides an overview of the statutory processing times and extension of time provisions under the FOI Act. Each provision is explained further in this guide. *Note: statutory sections referred to throughout relate to the FOI Act unless otherwise indicated*

Figure 1



Initial Period for Processing FOI Request for Access

The obligations for an ECS agency to notify a FOI applicant that their request has been received, and to notify a decision on that request, commence on receipt of a FOI application that meets the formal application requirements set out in s15(2) and 15(2A) of the FOI Act. Where an application does not meet the formal requirements, the agency must assist the applicant to ensure that it does (s15(3)).

An ECS agency must take all reasonable steps to notify a FOI applicant of receipt of their request within **14 days** of receipt of their finalized application (s15(5)(a)).

An agency must take all reasonable steps to notify an applicant of a decision on the FOI request no later than **30 days** after receiving the request (s15(5)(b)) – unless one or more of the extensions of time to the processing period outlined in Figure 1 have been granted.

Commencement of the 30 days processing period

Section 15(5)(b) of the FOI Act provides that the 30 days processing period *commences on the day after the day* the ECS agency receives the finalised FOI application. The date of receipt depends on the mode of delivery chosen under s15(2A) – see Table 1

Table 1¹

<i>Mode of delivery</i>	<i>Time of receipt</i>
Pre-paid post to an address specified by agency	The date the letter is delivered in the ordinary course of post ²
Delivery to a central or regional office	The date of delivery
Electronic communication to a specified email or fax address	The date the communication is capable of being retrieved at the address ³ . This is assumed to be the time it reaches the addressee's nominated electronic address.

The processing period refers to **calendar days**, not business (working) days and includes any public holidays that fall within the processing period. Electronic applications may therefore be received on a Saturday – in which case the processing period commences on the Sunday – or on a public holiday, in which case the processing period commences the next day, irrespective of whether it too is a public holiday.

¹ OAIC FOI Guidelines July 2019

² Acts Interpretation Act 1901 s29

³ Electronic Transactions Act 1999 s14A

The 30 days processing period **does not** include:

- the time an agency may take in a request consultation process to decide if a practical refusal reason exists (s24AB(8)) or
- the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge or a deposit, or the agency varying the decision that a charge is payable (s31).

End of the 30 days processing period

The processing period ends on either the 30th day after commencement (s15(5)(b)), or on the final date of any extension granted under the extension provisions of the FOI Act discussed below.

However, if the *final date* for notification of a decision to the applicant under s15(5)(b) (or as extended) falls on a Saturday, Sunday or public holiday, the timeframe for notification will expire on the first business day following that day.⁴

Public holidays/known peak staff leave periods

ECS agencies need to plan well in advance of public holidays and periods where there will be known reduced staff numbers and discuss any likely impact with the FOI applicant. For example, consideration might be given to seeking a s15AA agreement (discussed below) with the applicant to extend the notification date for a decision if the due date falls within such a period. At the very least, if the due date falls on a Saturday, Sunday or public holiday, the agency should advise the applicant that they will receive the decision on the next working day.

Extension of time to allow consultation with a third party – s 15(6), s 15(8)

An ECS agency may extend the processing period by 30 days under s15(6) of the FOI Act if it needs to consult an affected third party under s26A (Commonwealth/State relations), s27 (business), and/or s27A (personal privacy) of the Act. A similar extension is allowed under s15(8) of the FOI Act for consultation with a foreign entity to determine if national security or international relations exemptions apply under s33a(iii) or s33(b) of the FOI Act.

The decision to extend the processing period to allow for consultation must be in writing and the **FOI applicant must be notified** as soon as practicable about the extension of time. The Agency **does not** need to inform the NECS FOI Commissioner of this extension of time.

⁴ Acts Interpretation Act 1901 s36(2)

Extension of time with applicant's agreement – s15AA

An ECS agency may extend the processing period by *up to* 30 days if the FOI applicant agrees in writing to the extension. This EOT can be *in addition* to either the initial processing period of 30 days under s15(5)(b) or that initial period as extended for consultation under s15(6) or s15(8) to undertake consultation. This could have the cumulative effect of extending the processing period up to 90 days.

The EOT made under s15AA must be with the **agreement of the applicant in writing** and the agency must give **written notice to the NECS FOI Commissioner** as soon as practicable after the agreement is made. A s15AA EOT agreement **must be made before** the processing time has expired. It cannot be made once an FOI request has become a deemed refusal – that is the decision has not been made within the 30 days period under s15(5)(b) or that period as extended for consultation under s15(6) or s15(8).

Extension of time for complex or voluminous requests – s15AB

An ECS agency may apply to the NECS FOI Commissioner under s15AB for an extension of the initial 30 days processing period allowed under s15(5)(b) if the agency considers the period is insufficient to deal with the FOI request due to it being complex or voluminous.

The application to the Commissioner must be in writing and must explain why the FOI request is considered complex or voluminous including details about:

- the scope of the FOI request and the range, nature and number of documents covered;
- any consultation the agency has had with the applicant to narrow scope;
- work already undertaken to process the request, including details of any processing time extensions already applied under s15AA, s15(6), or s15(8);
- an estimate of the work and time required to finalise the FOI request;
- whether it is possible to identify some documents for early staged release;
- any factors that are slowing the processing of the request such as the inability to search for or access documents due to the absence of particular staff or an unexpected shutdown of the agency;
- other parties that have an interest in the request; and
- measures that will be taken to ensure a decision on the request will be made within the extended period if granted.

An application to the Commissioner under s15AB must be made *before* the expiration of the initial 30 days processing period referred to in s15(5)(b) (or that period as extended under s15AA, s15(6), or s15(8)).

The Commissioner may extend the processing period by another 30 days or a longer or shorter period as appropriate. The Commissioner must inform both the agency and the FOI applicant of the extension of time granted.

An ECS agency may apply to the NECS FOI Commissioner to extend the timeframe again under s15AB if an earlier extension granted by the Commissioner proves to be insufficient. However, the Agency must explain why a further extension is justified.

Extension of time following a deemed refusal – s 15AC

Where there has been a deemed refusal decision (that is the decision has not been made within the 30 days period under s15(5)(b) or that period as extended) an ECS agency may apply to the NECS FOI Commissioner for further time to process the request under s15AC.

An extension of time in these circumstances can only be made once and, once granted, cannot be extended further. The application to the Commissioner must be in writing and the agency must justify why an extension is appropriate including, at least, details about:

- the reasons for the delay in making the decision;
- the extension of time sought and how the agency intends to ensure a decision is made within the new timeframe; and
- whether there have been discussions with the FOI applicant about the application for an extension of time and their views.

The NECS FOI Commissioner may consult with the FOI applicant directly and, if an extension of time is granted, may impose conditions on the ECS agency. If a decision is made by the agency within the extended time allowed and any conditions imposed by the NECS FOI Commissioner are met, the deemed refusal decision no longer applies and is taken never to have applied (s15AC (7)).

If the decision is not made within the extended timeframe or any imposed conditions are not met, the deemed refusal decision continues to apply (s15AC(8)).

Note that similar provisions apply to a deemed refusal to amend or annotate personal information under s51DA of the FOI Act and a deemed refusal following an application for an internal review of an FOI decision under s54D

The FOI applicant can seek a NECS FOI Commissioner review of the deemed refusal decision.

Restrictions on imposing a FOI charge

The *Freedom of Information (Charges) Regulations 2019* allows agencies to impose charges in relation to FOI requests in certain circumstances. An ECS agency may impose a charge if the FOI applicant is notified of a decision to grant access to a document:

- within the 30 days period referred to in s15(5)(b) of the FOI Act; or
- during an extension to that period arranged by the agency for third party consultation under s15(6) or s15(8), agreed to by the applicant under s15AA, or granted by the NECS FOI Commissioner for complex or voluminous requests under s15AB.

A FOI charge **cannot** be imposed after a deemed refusal decision, even if an extension of time has been granted by the Commissioner under s15AC to complete the processing of the application.

Timeframe when transferring FOI requests to another agency

Section 16 of the FOI Act provides for the whole or partial transfer of an FOI request between agencies in certain circumstances. A transferred FOI request is deemed to have been received by the receiving agency at the time it was received by the transferring agency (s16(5)(b)) – ie the 30 days initial processing period commences when the request was originally received by the first agency.

ECS agencies should therefore aim to quickly determine whether a FOI request should be transferred and consult with the receiving agency. The transferring agency must inform the FOI applicant of the transfer (s16(4)). The receiving agency may wish to consider seeking an extension of processing time by agreement with the FOI applicant under s 15AA.

Extensions of time already granted and transfers

If in relation to a FOI request, an ECS agency has already applied one of the available extensions of time provisions of the FOI Act to that request and later determines that all or part of the request should be transferred to another agency under s16, any extension of time applied continue to apply to that request.

In transferring the request, the ECS agency should notify the receiving agency of any extensions of time that apply to the request and also notify the NECS FOI Commissioner of

the transfer. If the request is out of time (and therefore a deemed refusal would apply) the transferring agency should leave it to the receiving agency to apply for an extension time to the NECS FOI Commissioner under s 15AC.

Action when the statutory timeframe is not met

ECS agencies must continue to process a FOI request even when the statutory timeframe has expired and an extension of time has not been sought or has been refused. The expiry of the timeframe gives the applicant the right to apply for review of a deemed refusal decision. An agency's obligation to continue processing the request only ceases when the NECS FOI Commissioner commences a review of the deemed decision. At that point the provisions of the FOI Act relating to a Commissioner review apply.

If the NECS FOI Commissioner commences a review of a deemed refusal decision in relation to an FOI access request or a request to amend or annotate personal records, section 55G of the FOI Act provides that the agency may vary or set aside and replace their deemed refusal decision at any time during the Commissioner's review if the variation or substitution (the *revised decision*) would have the effect of:

- giving access to a document in accordance with the FOI request; or
- relieving the review applicant of paying a charge; or
- requiring a record of personal information to be amended or annotated in accordance with the application.

If an agency does vary or substitute a deemed refusal decision during a Commissioner review, the agency must notify the NECS FOI Commissioner. The Commissioner will then deal with the revised decision as if it were the subject of the original review application.

Notifications and applications for extensions of time to the NECS FOI Commissioner

Notifications and applications for extensions of time under the FOI Act must be emailed to the NECS FOI Commissioner at: enquiry@necsopic.edu.au

Sample extension of time notification/request emails to the NECS FOI Commissioner are attached. It is not mandatory for ECS agencies to use them and agencies may adapt them to fit their own purposes. The sample emails cover:

- s 15AA extension of time with applicant's agreement notice
- s 15AB extension of time application for complex or voluminous requests
- s 15AC extension of time application following a deemed refusal

- notification of an inter-agency transfer of an FOI request that has an existing extension of time

Document Currency

This Version	Current from October 2021
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Acknowledgement

To ensure consistent practice under the Commonwealth Freedom of Information Act 1982 the information provided in this Guide has been modified from material provided by the Office of the Australian Information Commissioner to reflect the specific jurisdiction and circumstances of the NECS FOI Commissioner.

The information in this Guide is of a general nature. It is not a substitute for legal advice.

Sample Extension of Time Notification

Notice to the NECS FOI Commissioner of an extension of time with applicant's agreement under s 15AA

To: enquiry@necsopic.edu.au

Subject: Section 15AA notification- *[insert agency name and agency reference number]*

Body text

Dear NECS FOI Commissioner

I am writing to notify you of a s 15AA extension of *[insert number]* days agreed to in writing by FOI applicant *[insert name]* on *[insert date]*.

The FOI applicant lodged their completed FOI access request with us on *[insert date]*.

Our Agency was due to decide on the applicant's request by *[insert date]*. **[Only insert if relevant- This date includes extensions made to the processing period to enable us to consult with a third party under s15(6) or s15(8)/carry out a request consultation process/apply a charge (insert whichever of these actions is relevant)].**

With the agreed *[insert number]* days extension under s15AA we must now make our decision by *[insert date]*.

Yours sincerely

[Insert name, position and contact details]

Sample Extension of Time Request

Applying to the NECS FOI Commissioner for an extension of time to process a complex or voluminous FOI request under s 15AB (or seek a further extension under this Section)

To: enquiry@necsopic.edu.au

Subject: Section 15AB request - *[insert agency name and agency FOI request reference number]*

Dear NECS FOI Commissioner

I am writing to request a s 15AB extension for a FOI request made by FOI applicant *[insert name]* on *[insert date]*. The FOI applicant is contactable at *[insert email and/or telephone contact details for the applicant]*.

Details of the access request and decision due date

The FOI applicant lodged their completed FOI access request with us on *[insert date]*. Allowable extensions of time already applied to process this FOI request have been **[insert any or all elements that are applicable]:**

- *[insert number] days to consult with a third party under s15(6) or s15(8)*
- *[insert number] days to carry out a request consultation process*
- *[insert number] days to settle a charge*
- *[insert number] days agreed to by the applicant under s 15AA. Insert details of the date the agreement was made and the date the NECS FOI Commissioner was notified of the agreement. If agreement to a s 15AA extension was sought by the agency from the applicant and the applicant refused, explain why the applicant refused the request*
- *[insert number] days already granted by the NECS FOI Commissioner under s15AB*

Our decision on this FOI request is therefore due by *[insert date]*

Choose one: Period of s 15AB extension sought **or** Variation of period of s 15AB sought

Choose one:

Our agency requests *[insert number]* days extension under s15AB. This would make the new due date for a decision *[insert date]* OR

On *[insert date]* the NECS FOI Commissioner granted our agency a *[insert number]* days extension under s 15AB. We request a variation to increase the extension to a further *[insert number]* days. This would make the new due date for a decision *[insert date]*.

Reasons for request

Insert: Your reasons for seeking an extension [or varying a previously granted extension] and why the FOI request is considered complex or voluminous including details about:

- *the scope of the FOI request and the range, nature and number of documents covered;*
- *any consultation the agency has had with the applicant to narrow scope;*

- *work already undertaken to process the request, including details of any processing time extensions already applied under s15AA, s15(6), or s15(8) or 15AB;*
- *an estimate of the work and time required to finalise the FOI request;*
- *whether it is possible to identify some documents for early staged release;*
- *any factors that are slowing the processing of the request such as the inability to search for or access documents due to the absence of particular staff or an unexpected shutdown of the agency;*
- *other parties that have an interest in the request; and*
- *measures that will be taken to ensure a decision on the request will be made within the extended period if granted.*

Yours sincerely

[Insert name, position and contact details]

Sample Extension of Time Request

Applying to the NECS FOI Commissioner for an extension of time following a deemed refusal decision under s15AC

To: enquiry@necsopic.edu.au

Subject: Section 15AC request - *[insert agency name and agency FOI request reference number]*

Dear NECS FOI Commissioner

I am writing to request a s 15AC extension of time to process a FOI request made by FOI applicant *[insert name]* on *[insert date]*. The FOI applicant is contactable at *[insert email and/or telephone contact details for the applicant]*.

Details of the access request and any extensions of processing time already applied

The FOI applicant lodged their completed FOI access request with us on *[insert date]*.

Allowable extensions of time already applied to process this FOI request have been **[insert any or all elements that are relevant]**

- *[insert number] days to consult with a third party under s15(6) or s15(8)*
- *[insert number] days to carry out a request consultation process*
- *[insert number] days to apply a charge*
- *[insert number] days agreed to by the applicant under s 15AA. Insert details of the date the agreement was made and the date the NECS FOI Commissioner was notified of the agreement. If agreement to a s 15AA extension was sought by the agency from the applicant and the applicant refused, explain why the applicant refused the request*
- *[insert number] days granted by the NECS FOI Commissioner under s15AB*

Our decision on this FOI request was therefore due by *[insert date]*.

We have not met this deadline and the decision on the request is now deemed to be refused. We have advised the FOI applicant of their right to seek a NECS FOI Commissioner review of this deemed refusal decision on *[insert date]*. (If you are yet to advise the applicant indicate when you will do so.)

Period of s 15AC extension sought

We request *[insert number]* days extension of time to process the FOI request under s 15AC. This would make the new due date for a decision *[insert date]*.

Reasons for request

Insert your reasons for requesting an extension under section 15AC and your view as to why the request is justified including at least the following details:

- *an assessment of the extent to which an extended period of processing time under s15AC would result in some or all of the documents sought by the FOI applicant being made available to the applicant;*
- *any changes to circumstances with the processing the FOI request that have affected timeframes;*

- *other relevant information including, for example, details of work already undertaken to process the request, including work undertaken following any earlier extensions granted by the NECS FOI Commissioner under s 15AB, details of the work required to finalise the request, any consultation with the applicant about the length of processing time, or with other agencies or interested third parties, and issues raised by them;*
- *measures the agency would take to ensure that a decision is made within the extended period.*

Yours sincerely

[Insert name, position and contact details]

Sample transfer of FOI application notification

Notice to the NECS FOI Commissioner of transfer of a FOI request to another agency under s 16 (required ONLY in cases **when a notification under s 15AA has been made or an extension of time under s 15AB has been granted**)

To: enquiry@necsopic.edu.au

Subject: Notification of transfer of a FOI application under s16 - **[insert agency name and agency reference number]**

Dear NECS FOI Commissioner

I am writing to notify you of a transfer of FOI application **[insert agency reference number]** under s 16 of the FOI Act from our agency to **[insert name of receiving agency]**.

The FOI applicant lodged their completed FOI access request with us on **[insert date]**.

Allowable extensions of time already applied to process this FOI request have been **[insert any or all elements that are relevant]**

- **[insert number] days to consult with a third party under s15(6) or s15(8)**
- **[insert number] days to carry out a request consultation process**
- **[insert number] days to apply a charge**
- **[insert number] days agreed to by the applicant under s 15AA. Insert details of the date the agreement was made and the date the NECS FOI Commissioner was notified of the agreement. If agreement to a s 15AA extension was sought by the agency from the applicant and the applicant refused, explain why the applicant refused the request**
- **[insert number] days granted by the NECS FOI Commissioner under s15AB**

The decision on this FOI request is therefore due by **[insert date]**.

In undertaking further work on the FOI request we have determined that it is appropriate to transfer the request to **[insert name of receiving agency]** under s 16 of the FOI Act. We have informed **[insert name of receiving agency]** of the application history and the due date for the decision. Contact details for **[insert name of receiving agency]** are **[insert name, telephone and email contact details for the receiving agency]**.

Yours sincerely

[Insert name, position and contact details]