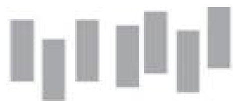

Office of the Information Commissioner
Queensland

Decision and Reasons for Decision

Citation:	***Stanway and Queensland Police Service*** **[2018] QICmr 7 (22 February 2018)**
Application Number:	**313479**
Applicant:	**Stanway**
Respondent:	**Queensland Police Service**
Decision Date:	**22 February 2018**
Catchwords:	**ADMINISTRATIVE LAW – RIGHT TO INFORMATION – DEALING WITH APPLICATION – calculation of time – whether deemed decision exists – whether external review application misconceived – whether the Information Commissioner should decide to not further deal with external review application under section 94(1)(a) of the *Right to Information Act 2009* (Qld)**

REASONS FOR DECISION

Summary

1. The applicant applied to the Queensland Police Service (**QPS**)[1] under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to certain documents.

2. The applicant contends that QPS did not make a decision on his application within the time prescribed in the RTI Act. The applicant therefore seeks external review by the Information Commissioner of the decision the applicant argues QPS is taken to have made under section 46 of the RTI Act, refusing him access to requested documents (**Deemed Decision**).

3. For reasons explained below, I do not consider any Deemed Decision has been made. I therefore decide not to deal with, or not to further deal with, the applicant's application for external review under section 94(1)(a) of the RTI Act, on the basis the application is misconceived.

Background

4. The RTI Act requires an agency to make a decision on a valid access application within 25 business days.[2] Failure to do so results in a Deemed Decision.[3]

5. The 25 business day processing period may, however, be extended in certain circumstances. It is also subject to various 'clock stopping'[4] mechanisms, the triggering of which cause the time for processing an application to cease running, until the happening of a given event.

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[1] Application received 24 July 2017.
[2] Section 18(1) of the RTI Act.
[3] Section 46(1)(a) of the RTI Act.
[4] The applicant has taken issue with OIC's use of the expression 'clock stopping' and similar, submitting (submissions dated 6 December 2017) that as it 'replaces' various periods preceding the making of a decision '*which are measured in complete days…with a down-to-the-second concept of period measurement*', this language and the metaphor on which it is based is '*apt to mislead*'. I disagree. The phrase is a useful shorthand expression for explaining the operation and interplay of what are complex and technical provisions of the RTI Act.

6. One such clock-stopping circumstance is where an agency decides to levy processing charges against an applicant, and gives an applicant a 'Charges Estimate Notice' (**CEN**).[5] The issuance of a CEN then initiates a 'revision period', which is not to be counted as part of the 25 day processing period.[6]

7. Section 18 of the RTI Act defines the 'revision period' as, relevantly, '*the period* ***starting on the date*** *of the first…*[CEN]*…*'.

Issue to be determined

8. At the heart of this matter is what is meant by the words '***starting on the date***' in section 18 of the RTI Act. This is because while it is common ground that the final day of the default processing period was 29 August 2017, QPS gave the applicant a CEN on that day.

9. The key question, then, is this – did the CEN issued by QPS on 29 August 2017 have the effect of initiating a revision period commencing **on that day – 29 August 2017**? Or in other words, is the day the CEN was issued included or excluded for the purposes of calculating when the revision period commenced?

Consideration

10. If the answer to the first of the above questions is yes, then as the revision period is not counted as part of the processing period, no Deemed Decision could have been made at the end of 29 August 2017. As no Deemed Decision will have been made – the only matter in relation to which the applicant has applied to OIC for external review[7] – there will be nothing for OIC to review, and his application will be misconceived.

11. The applicant, however, contends that the day on which the CEN was given – 29 August 2017 – should be *excluded* when calculating at what point any revision period might have commenced. The applicant's position is that the earliest a revision period might have commenced was the following day, 30 August 2017. The processing period expired, however, on 29 August 2017. QPS's CEN was therefore of no effect, and that agency will therefore have been taken to have made a Deemed Decision refusing the applicant access to requested documents: a decision that may be the subject of the applicant's current application for external review.[8]

12. In short, the applicant's case is that the issuing of a CEN by QPS on 29 August 2017 – the same day as the processing period expired – was too late to initiate a revision period. A Deemed Decision has been made, of which he is entitled to seek external review.

13. In support of his position, the applicant relies on section 38 of the *Acts Interpretation Act 1954* (Qld) (**AI Act**), which relevantly provides:

> ***38 Reckoning of time***
>
> *(1) If a period beginning on a given day, act or event is provided or allowed for a purpose by an Act, the period is to be calculated by excluding the day, or the day of the act or event …*

14. The general rules of interpretation prescribed in the AI Act – including that for reckoning time in section 38 of the AI Act, as extracted above – may be displaced by a contrary intention appearing in any Act: section 4 of the AI Act. I consider that the language of section 18 of the RTI Act, read in context of the entire RTI Act, evinces a contrary intention for the purposes of section 4 of the AI Act.

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[5] Under section 36(1)(b)(i) of the RTI Act.
[6] Section 18(2)(c) of the RTI Act.
[7] See the applicant's submissions dated 21 September 2017.
[8] See clause (j) of the definition of 'reviewable decision' in schedule 6 to the RTI Act.

15. In my view, Parliament's use of the words '***starting** on the date*' in section 18 of the RTI Act evinces an intention for the revision period to be calculated from and including the day of the notice, rather than excluding the day of the notice. This means that, for the purpose of counting the days of the processing period, 'the clock stops'[9] on the date of the first CEN and does not 're-start' until after occurrence of one of the events prescribed in that section's definition of 'revision period'.[10]

16. Section 38 of the AI Act applies where, as noted, an Act provides for '*a period beginning on a given day, act or event*'. This is relevant for counting a range of time-frames under the RTI Act, including for example, when determining '*25 business days from the day the application is received by the agency*'[11]— in which case, the day of receipt does not count as part of the processing period because of the wording '*from the day the application is received*'. However, the scheme of section 18 of the RTI Act allows for the processing period, once commenced, to stop and re-start, in order to accommodate a range of circumstances that arise in processing applications. Parliament's wording of the definition of the revision period is clear in stating the date on which the revision period starts, and therefore evinces an intention contrary to section 38 of the AI Act.

17. Further, section 36 of the RTI Act expressly provides that if an agency considers that a processing or access charge is payable, it must give the applicant a CEN before the end of the processing period. The end of the processing period is 11.59 pm on day 25 of the period. The conclusion that an agency is deemed to have refused access to requested documents if it gives an applicant a CEN on the last day of the processing period is clearly inconsistent with section 36(1)(b) which permits a CEN to be given **up to and including** the last day of the processing period. I note also that section 36(2) of the RTI Act states that '*after receiving a*…[CEN]' the applicant may consult with the agency with a view to narrowing the application to reduce the charges.

18. During this review, OIC noted to the applicant that the operation of section 36(1)(b) of the RTI Act would be greatly circumscribed were the ordinary means for calculating time set out in section 38(1) of the RTI Act to be applied to section 18 of the RTI Act, ie, in reckoning the commencement of a revision period.[12] Doing so would truncate the period available to an agency to undertake preliminary processing and make the evaluations preparatory to issuing a CEN, and, in turn, the time available to both agency and applicant in which to negotiate the scope of a given request in an effort to avoid levying of charges altogether.[13]

19. The applicant submits,[14] however, that excluding the day on which a CEN is calculated from the revision period calculation has no such consequence, arguing that he '*still had the rest of 29 August from 9:02AM to accept QPS' charges notice and this gives the charging provisions statutory work to do and ensures they are not futile.*'

20. I do not accept this submission. The revision period initiated by a CEN is integral to the charging scheme prescribed in the RTI Act, a period during which an affected applicant can negotiate with an agency in an effort to avoid monetary imposts and which, to be properly undertaken, requires something more than a matter of hours. The charging regime set out in the RTI Act is complex, but ultimately intended to strike a balance between the efficient allocation of scarce public resources and the right of the community to obtain access to Government-held information. This balance is best achieved[15] by allowing agencies the benefit of the full processing period in which to undertake the preliminary work necessary to assess whether charges will, in fact, be payable in relation to a given application, and an applicant the benefit of a full revision period within which to contemplate the several options open in reply to a CEN. Such an outcome is, in turn, only possible if section 18 is interpreted

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[9]That is, the processing period referred to in section 18 of the RTI Act stops.
[10] Being the confirmation of an access application, or confirmation of a narrowed application.
[11] The 'processing period' within which an agency must determine an access application: see paragraph 4.
[12] Letter to the applicant dated 25 September 2017.
[13] It is the duty of an agency to minimise any charges payable by an applicant: section 58 of the RTI Act.
[14] Submissions dated 6 December 2017.
[15] Noting that in interpreting section 18 of the RTI Act, an interpretation that will best achieve the purpose of the RTI Act is to be preferred to any other interpretation: section 14A(1) of the AI Act.

in accordance with its plain and natural meaning, ie, the revision period is taken to start on the date that a CEN is given to an applicant.

Case law

21. I can find no Queensland authority addressing the difference between the synonyms 'starting' as used in section 18 of the RTI Act, and 'beginning' as used in section 38(1) of the AI Act – or whether any such difference even exists.

22. The applicant argues strenuously there is no such difference, submitting that there is no real difference between the two 'strikingly similar' words, no contrary intention otherwise evident in the RTI Act, and thus the ordinary rule prescribed in section 38 of the AI Act applies.[16] In support of his case, the applicant has[17] pointed me to cases in which time was reckoned in accordance with section 38 of the AI Act,[18] and brought to my attention looseleaf commentary on the issue, which includes a series of case studies.[19] Unfortunately, none of this material deals, as far as I can see, with the interpretation of the words '*starting on*' as used in section 18 of the RTI Act.

23. There is, on the other hand, a decision of a Deputy President of the Administrative Appeals Tribunal – *Re DHLD v Executive Director, Social Security Appeals Tribunal*[20] (***Re DHLD***) – finding that the statutory expression '*starting on the day*' requires inclusion of the day on which the relevant event occurred[21] in the calculation of a prescribed time period:

> ***[64]*** *Under s 90(1), DHLD could apply for review "within the period of 28 days starting on the day on which" the notice of the decision was served on him. Section 36(1) of the AI Act provides for the reckoning of time. It provides:*
>
> > (1) Where in an Act any period of time, dating from a given day, act, or event, is prescribed or allowed for any purpose, the time shall, unless the contrary intention appears, be reckoned exclusive of such day or of the day of such act or event.
> >
> > (2) Where the last day of any period prescribed or allowed by an Act for the doing of anything falls on a Saturday, on a Sunday or on a day which is a public holiday or a bank holiday in the place in which the thing is to be or may be done, the thing may be done on the first day following which is not a *Saturday, a Sunday or a public holiday or bank holiday in that place.*
>
> ***[65]*** *I note that the expression used in s 36(1) of the AI Act when describing the period is that of "dating from a given day, act, or event … ". The expression used in s 90(1) is that of "starting on the day". On their face, there is a difference between the two expressions. That there is a difference in law as well appears from the judgment of Lindgren J in* Roskell v Snelgrove*.*
>
> > *Ordinarily, the law takes no account of parts of a day, and the expression "commencing on" must mean commencing on either the first or the last moment of the day in question. In my opinion, the expression "commencing on" in s 52(4)(a) of the Bankruptcy Act means "commencing at the first moment on", and the period of 12 months commencing on the date of presentation of the petition in the present case, 26 April 2005, expired on 25 April 2006 at midnight*

[16] Submissions dated 6 December 2017.

[17] By way of submissions dated 9 January 2018.

[18] *Claudia Tiller Holdings Pty Ltd v Poulton* [2102] QCAT 460 and *Director-General, Department of Child Safety v G-H & Ors* [2007] QChC 6 (07/0231). *Claudia Tiller* concerns the date on which a cooling off period began and ended under a construction contract; *Director-General* the time at which child protection orders made under the *Child Protection Act 1999* (Qld) end, under section 62 of that Act.

[19] M Daubney, G Mullins, G O'Grady and M Rackemann, Queensland Law Society *Law office guide*, vol 6, 'Time Limits in Queensland' (1997-1998). The applicant also relied on *The Laws of Australia* (Thomson Reuters, subscription service) Interpretation and Use of Legal Sources [25.1.1170], which notes that where '*a period is expressed to begin "on" a date, that date will generally be included…*', but that section 38(1) of the AI Act '*excludes the first day if "on" is used…*'. This latter commentary contains, however, no discussion comparing 'starting' with 'beginning'.

[20] [2010] AATA 377.

[21] Service of a notice.

> *between 25 and 26 April 2006: see* Ex parte Toohey's Ltd; Re Butler *(1934) 34 SR (NSW) 277 at 285;* Forster v Jododex Australia Pty Ltd *[1972] HCA 61; (1972) 127 CLR 421 at 453 per Mason J, with whom McTiernan J agreed;* Darwin Broadcasters Pty Ltd v Australian Broadcasting Tribunal *(1990) 21 FCR 524 at 526–527. Expressions referring to a certain period "from" or "before" or of the kind "within [a certain period] of" are different. In those cases, the starting day is excluded in the computation: see, for example,* Ex parte Toohey's Ltd: Re Butler *(1934) 34 SR (NSW) 277;* Re Gray; Ex parte Deputy Cmr of Taxation *[1993] FCA 277; (1993) 115 ALR 638; and see s 36(1) of the* Acts Interpretation Act 1901 *(Cth) (Acts Interpretation Act).*
>
> ***[66]*** *In this case, then, the 28 day period provided for in s 90(1) of the Registration and Collection Act must be counted on the basis that the day it was received or, in this case, deemed to have been received, is the first day of the 28 day period.*

24. While *Re DHLD* supports my view about the interpretation of section 18 of the RTI Act, I acknowledge that it is not decisive. As the applicant notes, the version of section 36(1) of the Commonwealth *Acts Interpretation Act 1901* contemplated in *Re DHLD* contained the expression '*dating from*',[22] rather than '*beginning on*' as used in section 38 of the AIA – the former phrasing which arguably diverges more obviously from '*starting on*' than the latter.

25. Nevertheless, *Re DHLD* does consider the exact phrase '*starting on*' as used in section 18 of the RTI Act, and on that basis, is relevant. I also think Parliament's very choice of the word '*starting*' in section 18 – rather than '*beginning*' – is indicative of an intention to depart from the standard method for calculating time set down in section 38(1) of the AI Act. Had the legislature intended for the day on which a CEN was issued to be excluded in calculating when a revision period commenced, it could simply have mirrored the language of section 38(1) of the AI Act. Taken together with the reasoning in *Re DHLD*, and the considerations set out in paragraphs 15-18 and 20 above, the use of a similar, but plainly distinct, expression leads me to conclude that Parliament intended the words '*starting on*' as used in section 18 of the RTI Act have a meaning different to '*beginning on*' contained in section 38(1) of the AI Act.

Conclusion

26. I am satisfied that the expression '*starting on the date*' used in section 18 of the RTI Act requires the date on which a CEN is given – in this case, 29 August 2017 – to be taken as the first day of the revision period.

27. The revision period does not, as explained above, count as part of the processing period.

28. In this case, therefore, the processing period did not elapse on 29 August 2017. Accordingly, no Deemed Decision that might be the subject of an application for external review could have occurred on 29 August 2017.

29. As there is no Deemed Decision, the applicant's application for external review of such a decision is misconceived. Below are my reasons for this conclusion, and my decision not to deal with, or not to further deal with, his external review application.

Section 94(1)(a) of the RTI Act

30. Section 94(1)(a) of the RTI Act provides:

> *(1) The information commissioner may decide not to deal with, or not to further deal with, all or part of an external review application if—*
>
> > *(a) the commissioner is satisfied the application, or the part of the application, is frivolous, vexatious, misconceived or lacking substance…*

[22] An earlier version of section 36 of the *Acts Interpretation Act 1901* (Cth).

31. The term 'misconceived' is not defined in the RTI Act. The Information Commissioner has previously noted that OIC:[23]

> *… may decide not to deal with an application for review if satisfied that the application is conceived wrongly. That is, it proceeds from a misunderstanding or an idea, notion or belief on the part of the applicant that is plainly wrong, such that the applicant's case is so hopeless that it should be summarily brought to an end and/or they are unable to show that they have more than a remote possibility of a well-founded claim, or in other words, where there is no real basis on which the external review can proceed.*

32. The applicant has applied to OIC for review of a Deemed Decision. For reasons explained, no such Deemed Decision has occurred, and there is therefore 'no real basis' on which an external review of this nature can proceed. Accordingly, the applicant's external review application is misconceived.

33. As matters presently stand, the only reviewable decision that may be the subject of external review by OIC is QPS' decision to levy processing charges. The applicant has made clear, however, that he is not seeking a review of QPS' decision in this regard.[24]

34. In the circumstances, I consider that:

    - there is no basis on which an external review of a Deemed Decision can proceed, as there has been no Deemed Decision; and, accordingly,
    - the application for external review is misconceived.

35. I therefore decide not to deal with, or not to further deal with, the applicant's application for external review.

36. Prior to finalising these reasons, I note that section 36(1)(b)(i) of the RTI Act obliges an agency in QPS' position to give an applicant a 'schedule of relevant documents' before the end of the processing period for the application. QPS did not discharge this obligation until 6 October 2017. This obligation is independent of the obligation to give a CEN, however,[25] and it is the latter that has the consequence of initiating a revision period, thus practically bringing the processing period to a pause. Delayed delivery of a schedule, therefore, has no impact on the timing issues addressed in these reasons, and is not an issue I am required to consider in this external review.

DECISION

37. I decide not to deal with, or not to further deal with, the applicant's application for external review dated 31 August 2017, as I am satisfied that the application is misconceived.

38. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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L Lynch
Acting Right to Information Commissioner

Date: 22 February 2018

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[23] *Leach and Department of Police* (Unreported, Queensland Information Commissioner, 26 June 2009), [21]. See also *DSR and The University of Queensland* (Unreported, Queensland Information Commissioner, 4 August 2009).
[24] See paragraph 10.
[25] Which latter obligation is mandated by section 36(1)(b)(ii) of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
31 August 2017	Applicant lodged the external review application.
4 September 2017	OIC notified QPS that it had received the external review application.
20 September 2017	OIC wrote to the applicant conveying the preliminary view that the processing period for his access application had not yet expired, and therefore there was no deemed decision for OIC to review.
21 September 2017	OIC received submissions from the applicant, contesting OIC's preliminary view.
22 September 2017	OIC wrote to the applicant reiterating the preliminary view that there existed no deemed decision that might be the subject of external review.
23 September 2017	Applicant provided further submissions, contesting OIC's reiterated preliminary view.
25 September 2017	OIC wrote to the applicant, again restating the preliminary view that no deemed decision had occurred.
28 September 2017	OIC received further submissions from the applicant.
6 October 2017	OIC wrote to QPS to provide an update on the status of the applicant's application for external review.
12 October 2017	OIC wrote to the applicant explaining that given OIC's preliminary view that no deemed decision had occurred, the application for external review was misconceived. The applicant advised OIC he did not accept OIC's preliminary view.
15 October 2017	The applicant forwarded to OIC a copy of a schedule of relevant documents prepared by QPS.
6 December 2017	OIC received additional submissions from the applicant in support of his application for review.
9 January 2018	OIC wrote again to the applicant, reiterating the preliminary view no deemed decision had occurred and that the application for external review was misconceived. OIC received final submissions from the applicant.