



GUIDELINE FOR CALCULATING TIME AND DAYS UNDER THE FOI ACT

Purpose

These guidelines aim to provide clarity for the public and State and local government agencies on how to calculate time and the number of days when it is relevant to do so in various provisions of the *Freedom of Information Act 1992* ('the FOI Act'). The guidelines are an explanatory document only and do not have the force of law.

Introduction

There are a number of provisions in the FOI Act that refer to certain acts ('notified', 'giving' or 'given') being done 'by', 'before', 'after' or 'within' a certain time.

For example:

1. Under s.13, an agency has to deal with an access application as soon as is practicable (and, in any event, **before** the end of the permitted period) by, amongst other things, **giving** the applicant written notice of the decision in the form required by s.30.
2. Under s.19(1)(b), if an agency is not **notified** of an applicant's intention to proceed within 30 days (or such further time as the agency allows) after the day on which the notice containing an estimate of charges was **given**, an applicant is regarded as having withdrawn the access application.
3. Under s.66(2), an access applicant may lodge a complaint with the Information Commissioner **within** 60 days **after** being **given** written notice of the agency's decision.

For the purposes of calculating the time allowed and, therefore, the due date (final day) for the completion of such acts, it is first necessary to establish the starting point (the first day to be counted) and the end point (the last day to be counted), subject to any days that might be 'excluded'.

Guiding principles

For the purposes of calculating time and days under the FOI Act, the following Guiding Principles apply.

- A person can make an application to an agency or to the Information Commissioner by post, by hand, by facsimile or by email.
- Regardless of the method used, applications are taken to have been lodged on the day received by the agency or the Information Commissioner.
- The day on which an application is received is ‘day zero’ and is not counted for the purposes of calculating time. The day after an application is received is ‘day 1’ (whether it is an ‘excluded day’ or not).
- The ‘final day’ is calculated by adding all calendar days from ‘day 1’ until the number of days specified in the particular provision of the FOI Act.
- If the ‘final day’ is an ‘excluded day’, the next day that is not an excluded day is to be regarded as the final day.
- The ‘final day’ ends at midnight on that day.
- If an application is sent to an agency by post, it is taken as received by the agency at the end of the fifth day after it was posted. However, if there is evidence that the agency received it before then (eg. date stamp), the five day rule will not apply.
- Sections 12(4) and 101(1) of the FOI Act do not apply where there is sufficient evidence to show that an application was lodged by post with the agency before the end of the fifth day.
- The definition and effect of ‘excluded days’ are outlined in the *Interpretation Act 1984* (‘the Interpretation Act’).

Legislative provisions

To assist in calculating time and days, ss.61, 75 and 76 of the Interpretation Act; ss.12(4) and 101 of the FOI Act; and s.14 of the *Electronic Transactions Act 2011* ('the ET Act') provide helpful guidance.

Section 61 of the Interpretation Act, insofar as is relevant, provides:

61. Time, computation of

- (1) *In computing time for the purposes of a written law —*
 - (a) *where a period of time is expressed to begin at, on, or with a specified day, that day shall be included in the period;*
 - (b) *where a period of time is expressed to be reckoned from, or after, a specified day, that day shall not be included in the period;*
 - (c) *where anything is to be done within a time before a specified day, the time shall not include that day;*
 - (d) *where a period of time is expressed to end at, on, or with a specified day or to continue to or until a specified day, that day shall be included in the period;*
 - (e) *where the time limited for the doing of a thing expires or falls upon an excluded day, the thing may be done on the next day that is not an excluded day;*
 - (f) ...
 - (g) ...
 - (h) ...
- (2) *For the purposes of this section, **excluded day** means Saturday, Sunday, public service holiday, and a bank holiday or public holiday throughout the State or in that part of the State which is relevant to the event, act, thing or proceeding concerned.*

In applying the provisions of s.61 of the Interpretation Act to the relevant provisions of the FOI Act, the most relevant parts are ss.61(1)(a-c), (e) and 61(2).

Section 75 of the Interpretation Act provides:

75. Service of documents by post

- (1) *Where a written law authorises or requires a document to be served by post, whether the word “serve” or any of the words “give”, “deliver”, or “send” or any other similar word or expression is used, service shall be deemed to be effected by properly addressing and posting (by pre-paid post) the document as a letter to the last known address of the person to be served, and, unless the contrary is proved, to have been effected at the time when the letter would have been delivered in the ordinary course of post.*
- (2) *Where a written law authorises or requires a document to be served by registered post, whether the word “serve” or any of the words “give”, “deliver”, or “send” or any other similar word or expression is used, then, if the document is eligible and acceptable for transmission as certified mail, the service of the document may be effected either by registered post or by certified mail.*
- (3) *Subsections (1) and (2) apply unless the contrary intention appears and subsection (2) does not apply where a written law requires the production of an acknowledgment signed by a person to whom a document was addressed to the effect that the document was delivered to that person.*

Section 76 of the Interpretation Act provides:

76. Service of documents generally

Where a written law authorises or requires a document to be served, whether the word “serve” or any of the words “give”, “deliver”, or “send” or any other similar word or expression is used, without directing it to be served in a particular manner, service of that document may be effected on the person to be served —

- (a) *by delivering the document to him personally; or*
- (b) *by post in accordance with section 75(1); or*
- (c) *by leaving it for him at his usual or last known place of abode, or if he is a principal of a business, at his usual or last known place of business; or*
- (d) *in the case of a corporation or of an association of persons (whether incorporated or not), by delivering or leaving the document or posting it as a letter, addressed in each case to the corporation or association, at its principal place of business or principal office in the State.*

Section 101 of the FOI Act provides:

101. Notice sent by post or fax, presumed time of service of

- (1) If a notice under this Act is given to a person by post it is to be regarded as having been given to the person at the end of the fifth day after it was posted.*
- (2) If a notice under this Act is given to a person by facsimile it is to be regarded as having been given to the person on the day on which it was transmitted.*

Note: When a notice is sent by post, the “five-day rule” will apply in the absence of sufficient reliable evidence that a notice was received on an earlier day. However, if a person confirms receipt of a notice of decision on a date earlier than the five days after it was posted, the day the notice is received is to be regarded as the day the notice was “given”. For example, where there is no available evidence of the day the notice was received by post, s.101(1) applies and time is calculated at the end of the fifth day after it was posted. In calculating the 5 days, do not count the day it was sent (s.61(1)(b) of the Interpretation Act).

Section 12(4) of the FOI Act provides:

- (4) If an application is lodged with an agency by post it is to be regarded as having been lodged with the agency at the end of the fifth day after it was posted.*

Note: Do not count the day the application was posted (s.61(1)(b) of the Interpretation Act).

What if the fifth day (ss.12(4) and 101(1) of the FOI Act) is an excluded day?

Under s.12(4) of the FOI Act, if the fifth day is an excluded day, then the application is regarded as having been lodged with the agency on the next day that is not an excluded day.

Under s.101(1) of the FOI Act, if the fifth day is an excluded day, then the notice is regarded as having been given to the applicant on the next day that is not an excluded day.

Section 14 of the ET Act provides:

14. Time of receipt

- (1) *For the purposes of a law of this jurisdiction, unless otherwise agreed between the originator and the addressee of an electronic communication —*
 - (a) *the time of receipt of the electronic communication is the time when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee; or*
 - (b) *the time of receipt of the electronic communication at another electronic address of the addressee is the time when both —*
 - (i) *the electronic communication has become capable of being retrieved by the addressee at that address; and*
 - (ii) *the addressee has become aware that the electronic communication has been sent to that address.*
- (2) *For the purposes of subsection (1), unless otherwise agreed between the originator and the addressee of the electronic communication, it is to be assumed that the electronic communication is capable of being retrieved by the addressee when it reaches the addressee's electronic address.*
- (3) *Subsection (1) applies even though the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is taken to have been received under section 15.*

Definition of 'day'

The term 'day' is not defined in either the FOI Act or the Interpretation Act. Therefore, the common dictionary meaning is to be used.

The Shorter Oxford English Dictionary (Fifth Edition) states that, as a unit of time, a day (as a noun) is:

"... the period of twenty-four hours... from midnight to midnight."

Therefore, the 'day' by which a certain act is to be completed expires at midnight on that day.

The most important implication of this interpretation is when a document (eg. a complaint to the Information Commissioner) is received after normal business hours by fax or email. Even though it was not delivered by post or by hand on that day, it was still delivered on that day and is 'within' time if the relevant day is the last day for the calculation of time.

Case studies

No.1 – How soon must an agency give an applicant a notice of decision?

Under s.13(1) of the FOI Act, an agency has to deal with an access application, and give the applicant a written notice of decision in the form required by s.30 of the FOI Act, **as soon as is practicable** and, in any event, before the end of the permitted period of 45 days.

The most important point is the phrase ‘as soon as is practicable’. This should always be the primary focus of an agency. However, to ensure that an agency complies with its obligations, it is important that the permitted period is properly calculated. The following example may assist in that process.

An agency receives a valid access application on Thursday 8 March 2012. Although the agency is required to deal with the application ‘as soon as is practicable’ – and give the applicant written notice – the maximum “permitted period” is 45 days after the access application is received by the agency.

To calculate the last day of the maximum permitted period, the first day has to be established. As the day on which the application was received at the agency is not included, day 1 is Friday 9 March 2012 (s.61(1)(b) of the Interpretation Act). Therefore, day 45 lands notionally on Sunday 22 April 2012. However, as Sunday is an ‘excluded day’ under s.61(2) of the Interpretation Act, day 45 is the next working day – Monday 23 April 2012.

Note: The agency is required to “give” the applicant written notice before the end of the permitted period, which means that the applicant must “receive” the notice at the latest on that day. Therefore, when giving a notice by post, agencies should ensure they post a written notice well before day 45. If an agency leaves it until day 45 to finish dealing with an application the notice should be hand delivered to the applicant that same day, unless other arrangements have been made with the applicant. The agency may be able to negotiate with the applicant to give the notice by facsimile or email. Nothing prevents the parties agreeing to an alternate arrangement.

An application may not be received by post or by hand on an ‘excluded day’. However, an application that is received by facsimile or email may be received on an excluded day. For example, an applicant may lodge an application outside of normal office hours (say late Friday evening, weekend or public holiday), by facsimile or email, but will generally not be able to do so by post or by hand delivery.

No.2 – How soon must an applicant lodge an application for internal review with an agency?

Under s.40(2) of the FOI Act, an aggrieved person may lodge an application for internal review within 30 days after being given written notice of decision.

Taking into account the particular circumstances of how an applicant received the initial notice of decision, and how an applicant may lodge an application for review at the agency, the following example may assist agencies and applicants to calculate the relevant 30-day period.

An initial notice of decision is sent by the agency by post on Tuesday 1 May 2012. The applicant confirms receipt of the notice on Thursday 3 May 2012. (*Note: in this case the “five-day rule” does not apply because there is evidence the notice of decision was received before the fifth day after it was posted*). For the purposes of the 30-day period in which the applicant may seek internal review, day 1 is Friday 4 May and day 30 is Saturday 2 June. However, as Saturday 2 June 2012 and Sunday 3 June 2012 are both ‘excluded days’ under s.61(2) of the Interpretation Act, day 30 would normally be the Monday. However, in this case, Monday 4 June 2012 is a public holiday and it is also an excluded day. Therefore, day 30 is the next working day – Tuesday 5 June 2012.

As a result, the applicant has until Tuesday 5 June to lodge an application for internal review. If by post or by hand, the applicant will have to ensure it is received by the agency on that day. If by electronic means (email or facsimile), the applicant may still lodge the application for internal review before midnight on 5 June.

If there is no evidence of the date the notice of decision was received by the applicant, day 1 would be Monday 7 May 2012 (*because the end of the fifth day after it was posted is Sunday 6 May – Section 101(1) of the FOI Act*). In that case, day 30 would be Tuesday 5 June 2012.

Coincidentally, day 30 turns out to be the same as the earlier scenario. However, this may not always be the case.

No.3 – How soon must an applicant lodge an external review with the Information Commissioner?

Under s.66(2) of the FOI Act, an access applicant or applicant for amendment may lodge a complaint within 60 days after being given written notice of the decision.

Taking into account the particular circumstances of how an applicant received the internal review notice of decision, and how an applicant may make a complaint to the Information Commissioner, the following example may assist applicants to calculate the relevant 60-day period.

A notice of decision on internal review is sent by the agency by post to the applicant on Wednesday 4 July 2012. The applicant confirms receipt of the notice on Thursday 5 July 2012. (*Note: in this case the “five-day rule” does not apply because there is evidence the notice of decision was received before the fifth day after it was posted*). For the purposes of the 60-day period in which the applicant may seek external review, day 1 is Friday 6 July and day 60 is Monday 3 September 2012. In this case day 60 is not an excluded day.

The applicant has until Monday 3 September to lodge an application for external review with the Information Commissioner. If by post or by hand, the applicant will have to ensure it is received by the agency on that day. If by electronic means (email or facsimile), the applicant may still lodge the application for external review before midnight on 3 September.

If there is no evidence of the date the notice of decision on internal review was received by the applicant, day 1 would be Tuesday 10 July 2012 because the end of the fifth day after it was posted is Monday 9 July 2012 (see s.101 of the FOI Act). Therefore, day 60 is Friday 7 September 2012.
