Part 12 —
Vexatious applicant declarations

Version 1.6, February 2026

OAIC

Contents

Introduction **3**
Grounds for declaration **3**
General considerations 4
Repeatedly engaging in access actions 6
Engaging in a particular access action 7
Abuse of process — harassment and intimidation 7
Abuse of process — unreasonable interference with agency operations 8
Abuse of process — circumventing court-imposed access restrictions 9
Abuse of process — other types 10
A particular access action that would be manifestly unreasonable 10
Procedure **10**
Applying for a vexatious applicant declaration 10
Submissions from the person 11
Status of current and future access actions 11
Terms and conditions 13
General considerations 14
Publication of declaration and decision 15
Recent decisions in which a declaration not made 15
Making, revoking or varying a vexatious applicant declaration 16
Review **16**

Introduction

12.1 The Information Commissioner may declare a person to be a vexatious applicant, either on the Commissioner's own initiative or on the application of an agency or minister (s 89K).[1] A declaration has effect in accordance with the terms and conditions stated in the declaration (s 89M).

12.2 A decision by the Information Commissioner to make a vexatious applicant declaration will be based on the facts of the matter, after considering any application or submissions made by an agency or minister and any submissions from the person against whom a declaration may be made.

12.3 The Information Commissioner's power to make a vexatious applicant declaration is similar to the powers exercisable by courts and tribunals to declare either proceedings or a litigant to be vexatious. However caution is required in applying principles developed in the civil litigation context to the FOI context.[2]

Grounds for declaration

12.4 The Information Commissioner may declare a person to be a vexatious applicant only if the Commissioner is satisfied that:

a) the person has repeatedly engaged in access actions that involve an abuse of process

b) the person is engaging in a particular access action that would involve an abuse of process, or

c) a particular access action by the person would be manifestly unreasonable (s 89L(1)).

12.5 An 'access action' is defined under s 89L(2) as:

- making a request under s 15
- making an application for amendment or annotation of a record of personal information under s 48
- applying for internal review (s 54B)
- applying for Information Commissioner review (s 54N).

12.6 'Abuse of process' includes but is not limited to:

- harassing or intimidating an individual or an agency employee
- unreasonably interfering with an agency's operations
- seeking to use the FOI Act to circumvent access restrictions imposed by a court (s 89L(4)).

---

[1] This power is separate to the Commissioner's discretion not to undertake or continue an IC review application on the basis that it is frivolous, vexatious or not made in good faith (s 54W(a)) (see Part 10 of these Guidelines).

[2] *Department of Defence and 'W'* [2013] AICmr 2 [18]. Matters that may be considered by a court or tribunal faced with a vexatious litigant issue include a person's motive in commencing proceedings, their relationship with or attitude to the other parties in the proceedings, the legal merit of their claim, and the utility of the proceedings. Those matters are not usually relevant in an FOI context (see [12.10]). Nevertheless, the 'legally enforceable right to obtain access' declared in s 11(1) is expressed to be 'subject to this Act', which contains provisions relating to vexatious applicants. It may therefore be appropriate in applying those provisions to take into account matters that would otherwise be ignored in FOI processing.

General considerations

12.7 A declaration has the practical effect of preventing a person from exercising an important legal right conferred by the FOI Act. For that reason, a declaration will not be lightly made, and an agency that applies for a declaration must establish a clear and convincing need for a declaration. To date, no Information Commissioner has made a decision to declare a person a vexatious applicant on their own initiative and there would need to be compelling circumstances for the Information Commissioner to consider exercising this discretion.

12.8 On the other hand, the power conferred on the Information Commissioner to make a declaration is an important element of the balance in the FOI Act between conferring a right of access to government documents while ensuring that access requests do not interfere unreasonably with agency operations. This is apparent from the terms of s 89L, which expresses a principle that the legal right of access should not be abused by conduct that harasses or intimidates agency staff, unreasonably interferes with the operations of agencies, circumvents court imposed restrictions on document access, or is manifestly unreasonable.[3]

12.9 The power to make a declaration is discretionary.[4] In addition to considering the grounds for a declaration specified in s 89L, the Information Commissioner may consider other relevant features of a person's access actions, or FOI administration by the agency that has applied for a declaration.

12.10 Aspects of the FOI Act that must be taken into account in balancing the interests of agencies and an FOI applicant include:[5]

- the objects of the FOI Act to give the Australian community access to information held by government (s 3(1) and promote Australia's representative democracy by:
  - increasing public participation in government processes
  - increasing scrutiny, discussion, comment and review of government's activities (s 3(2))
- the FOI Act specifies that government-held information is a national resource, to be managed for public purposes (s 3(3))
- the lowest reasonable costs objective of the FOI Act: that the functions and powers under the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost (s 3(4))
- the FOI Act provides an important avenue for individuals to seek access to their own personal information (s 15(1)) and amendment of that information (s 48(1))
- the FOI Act does not limit the number of FOI requests a person can make in a given period, nor the number or type of documents a person can seek in an individual request to an agency subject to the FOI Act

---

3 *Department of Defence and 'W'* [2013] AICmr 2 [12].

4 *Re Sweeney and Australian Information Commissioner & Ors* [2014] AATA 531 [81] (hereafter *Re Sweeney and Australian Securities and Investments Commission*) [81].

5 *Australian Securities and Investments Commission and Sweeney* [2013] AICmr 62 [15].

- the formal requirements for making a request are minimal and allow a person to make a request by email without payment of an application fee (s 15(2))
- the FOI Act requires agencies to assist an applicant to make a valid request (s 15) and have an obligation to consult with the applicant before deciding to refuse a request for a practical refusal reason because the request does not satisfy the identification requirements of s 15(2)(b) or would substantially and unreasonably divert the agency from its other operations (s 24AB)
- a person's right of access is not affected by any reason they give for seeking access, or an agency's belief as to their reasons for seeking access (s 11(2))
- no charge is payable if an applicant requests access to a document that contains their own personal information.[6]

12.11 The FOI Act enables an agency to take steps (other than applying for a vexatious applicant declaration) to regulate or reduce the impact that individual requests may have on the workload or operations of the agency. An agency's recourse to these other measures in relation to a particular applicant may be a relevant consideration for the Information Commissioner in deciding whether to make a declaration against that person. Alternatives available to an agency include:

- consulting an applicant about the nature of a request (s 15(3)) and other means of satisfying the applicant's desire to obtain government information (see Part 3 of these Guidelines)
- seeking an applicant's agreement to an extension of processing time (s 15AA)
- applying to the OAIC for an extension of processing time if the FOI request is complex or voluminous (s 15AB), or after a decision has become a deemed refusal decision (s 15AC, 54D and 51DA)
- requiring an applicant to engage in a request consultation process if the agency believes there may be a practical refusal reason for refusing a request that substantially and unreasonably diverts the resources of the agency from its other operations, or if the request does not adequately identify the documents requested (ss 24, 24AA, 24AB)
- notifying an applicant that a charge is payable for a request for information other than personal information that involves more than five hours of decision-making time (s 29).

12.12 The Information Commissioner may consider the conduct of a person after they are notified that a declaration is being considered.[7] In particular, the Commissioner may take into account: a person's willingness to discuss their access actions and whether these constitute an abuse of process or are manifestly unreasonable; and whether the person engages in fresh access actions, directed either at the agency or the OAIC that are similar in nature to access actions under consideration by the Commissioner. The Commissioner's general view is that, at this active stage of the proceedings, it is inappropriate for a person to make fresh FOI requests for documents in the possession of the agency, or the OAIC, relating to the decision to apply for or commence consideration of a vexatious applicant declaration. The person will have an opportunity in the proceedings initiated by the Commissioner to raise issues of concern or to request information about the matters under consideration.

---

6 *Freedom of Information (Charges) Regulations 2019*, s 7(1).

7 See *Official Trustee in Bankruptcy v Gargan (No 2)* [2009] FCA 398 [12] and *Attorney-General v Tareq Altaranesi* [2013] NSWSC 63 [16].

12.13 The Information Commissioner may consider an agency's FOI administration, either generally or in relation to the person whose actions are under consideration. In particular, the Commissioner may consider whether:

- deficiencies in agency administration impaired its processing of the person's requests
- actions taken by the agency contributed to or might explain the person's access actions[8]
- the agency consulted with the person about their access actions before applying to the Commissioner for a declaration
- deficiencies in agency FOI administration should be addressed by the agency before further consideration is given to making a declaration.[9]

12.14 In deciding whether a ground has been established under s 89L, the Commissioner cannot consider contact between a person and an agency that is not part of an access action (for example, complaints and general correspondence).[10] A broader pattern of contact between a person and an agency may nevertheless be relevant in deciding whether as a matter of discretion a declaration should be made under s 89K.

12.15 In considering whether the discretion to make a declaration is justified on the material, the Information Commissioner is not bound to only consider the limb of s 89L(1) that is advanced by the agency or minister in its application for a declaration. The Commissioner can decide that a different ground has been established.[11]

Repeatedly engaging in access actions

12.16 One ground on which a declaration may be made is that a person has 'repeatedly engaged' in access actions that involve an abuse of process (s 89L(1)(a)). The term 'repeatedly' is not defined in the FOI Act and can be interpreted within its ordinary meaning: 'done, made or said again and again'.[12]

12.17 There is no fixed number of access actions required to establish a pattern of repeated requests. Whether such a pattern exists will depend in part on the nature of the abuse of process that is said to be involved. For example, if it is asserted that a person is repeating a request that has earlier been processed and decided by an agency, or is harassing agency employees,[13] a small number of requests may establish a pattern. On the other hand, if it is asserted that a person has repeatedly made different requests that in combination unreasonably interfere with an agency's operations, a higher number of requests may be required to establish a pattern of repeated requests.

---

8 See *Registrar of Indigenous Corporations and 'IO'* [2016] AICmr 34.

9 See *Registrar of Indigenous Corporations and 'IO'* [2016] AICmr 34.

10 *Re Sweeney and Australian Information Commissioner and Australian Prudential Regulation Authority (Joined Party)* [2014] AATA 539 [49]-[50] (hereafter *Re Sweeney and Australian Prudential Regulation Authority*).

11 *Francis v Administrative Appeals Tribunal* [2016] FCA 639 [40].

12 *Re Sweeney and Australian Information Commissioner and Australian Prudential Regulation Authority* [43], quoting the Macquarie Dictionary; *National Archives Australia and Ronald Price (Freedom of information)* [2019] AICmr 16 [33].

13 See for example, *Commonwealth Ombudsman and 'S'* [2013] AICmr 31 [10] (seven FOI requests plus internal review requests).

12.18 The agency or minister is not required to show that all of the conduct of the person is an abuse of process. For the purposes of s 89L(1)(a), '[i]t is sufficient that some of the access actions can be characterised as an 'abuse of process for the access action.'[14]

12.19 There may be overlap with the other grounds for making a declaration, namely, that a person is engaging in 'a particular access action' that would either involve an abuse of process (s 89L(1)(b)) or be manifestly unreasonable (s 89L(1)(c)). In a case in which access actions may independently be regarded as an abuse of process or unreasonable, deciding whether those actions are part of a pattern of repeated requests may not be a decisive issue.

Engaging in a particular access action

12.20 A declaration may be based on one access action only – specifically, 'a particular access action' that would involve either an abuse of process (s 89L(1)(b)) or be manifestly unreasonable (s 89L(1)(c)).[15]

12.21 A declaration that is based on one access action may include terms or conditions that go beyond that access action.[16] For example, the declaration may provide that an agency is not required to consider future requests from the person (either of the same kind or generally) unless the person has the written permission of the Information Commissioner to proceed. (See below at [12.45].)

Abuse of process — harassment and intimidation

12.22 The terms 'harassing' and 'intimidating' are not defined in the FOI Act and therefore have their ordinary meaning. To 'harass' a person is to disturb them persistently or torment them; and to 'intimidate' a person is to use fear to force or deter the actions of the person, or to overawe them.[17]

12.23 The occurrence of harassment or intimidation must be approached objectively.[18] The issue to be resolved is whether a person has engaged in behaviour that could reasonably be expected on at least some occasions to have the effect of, for example, tormenting, threatening or disturbing agency employees. An agency will be expected to explain or provide evidence of the impact that a person's access actions have had on agency employees, though this evidence must be considered in context with other matters.[19] Relevant evidence might include any workplace health and safety measures that the agency has taken, the involvement of police, or whether a workplace protection order has been sought.

12.24 Harassment and intimidation may be established by a variety of circumstances that include:

---

14 *Re Sweeney and Australian Information Commissioner and Australian Prudential Regulation Authority* [47].

15 See for example, *Department of Defence and Ronald Francis* [2014] AICmr 68 [12].

16 *Department of Defence and Ronald Francis* [2014] AICmr 68 [34]; and below at [12.45].

17 Macquarie Online Dictionary.

18 *Department of Defence and 'W'* [2013] AICmr 2 [31]; *Commonwealth Ombudsman and 'S'* [2013] AICmr 31 [22] and *Comcare and Price* [2014] AICmr 24 [19].

19 In *Re Sweeney and Australian Securities and Investments Commission* [57] the AAT, while affirming the objective test, commented that 'an individual or employee must be shown to have felt harassed and/or intimidated in fact'. This evidence can be presented in an agency submission, by way of description of the agency's experience of the person's access actions.

- the content, tone and language of a person's correspondence with an agency, especially if language is used that is insulting, offensive or abusive
- unsubstantiated, derogatory or inflammatory allegations against agency staff[20]
- requests that are targeted at personal information of agency employees[21]
- requests that are designed to intimidate agency staff and force them to capitulate on another issue[22]
- requests of a repetitive nature that are apparently made with the intention of annoying or harassing agency staff[23]
- a person's refusal or failure to alter dubious conduct after being requested by an agency to do so.[24]

12.25 Those circumstances, if present in an individual case, must nevertheless be assessed objectively in a broader FOI context. It is not contrary to the requirements or spirit of the FOI Act that an FOI request will contain additional commentary or complaints by the FOI applicant.[25] These may provide context for a request, or be compatible with the stated objects of the FOI Act of facilitating scrutiny, comment and review of government activity.

Abuse of process — unreasonable interference with agency operations

12.26 An abuse of process that is grounded in unreasonably interfering with an agency's operations can, under s 89L, arise from either a particular access action (s 89L(1)(b)) or a pattern of repeated access actions (s 89L(1)(a)). The more usual situation will be a pattern of repeated requests, bearing in mind that an agency can initiate a practical refusal process for a particular access action that could have an unreasonable workload impact on the agency (s 24).

12.27 Factors that may be considered in deciding whether there is a pattern of repeated access actions that unreasonably interfere with an agency's operations include:[26]

- the total number of a person's access actions to the agency in a specific period, and in particular, whether a high number of access actions has led to a substantial or prolonged processing burden on the agency or a burden that is excessive and disproportionate to a reasonable exercise by an applicant of the right to engage in access actions

---

[20] *Department of Defence and 'W'* [2013] AICmr 2 [28]-[32]; *Comcare and Price* [2014] AICmr 24 [16]-[20] and *Re Sweeney and Australian Securities and Investments Commission* [60].

[21] *Commonwealth Ombudsman and 'S'* [2013] AICmr 31 [16]-[18].

[22] *Commonwealth Ombudsman and 'S'* [2013] AICmr 31 [19]-[20].

[23] *Ford v Child Support Registrar* [2009] FCA 328.

[24] *Department of Defence and 'W'* [2013] AICmr 2 [33]; *Comcare and Price* [2014] AICmr 24 [21].

[25] *Australian Securities and Investments Commission and Sweeney* [2013] AICmr 62 [43], [49].

[26] These factors may be relevant also to the exercise of the discretionary power to make or not make a declaration. The application of the factors is discussed in *Australian Securities and Investments Commission and Sweeney* [2013] AICmr 62 [18]-[20], [30]-[49]; *Australian Prudential Regulation Authority and Sweeney* [2013] AICmr 63 [31]-[41]; and *Re Sweeney and Australian Securities and Investments Commission* [63]-[78]. See also *Davies and Department of the Prime Minister and Cabinet* [2013] AICmr 10 concerning factors relevant in deciding if a practical refusal reason exists for refusing a request.

- the impact of the person's access actions on FOI administration in the agency, and in particular, whether a substantial workload impact has arisen from the nature of a person's access actions, such as multiple FOI requests that are poorly-framed or for documents that do not exist, requests for documents that have already been provided or to which access was refused, or requests that are difficult to discern and distinguish from other complaints a person has against the agency. It is nevertheless important to bear in mind that an individual, who may lack both expertise in dealing with government and a close knowledge of an agency's records management systems, may make access requests that are poorly framed, overlapping or cause inconvenience to an agency
- the impact of the person's access actions on other work in the agency, and in particular, whether specialist or senior staff have to be redeployed from other tasks to deal with FOI requests, or whether the requests have caused distress to staff or raised security concerns that required separate action
- whether the agency has used other provisions under the FOI Act to lessen the impact of the person's access actions on its operations (see [12.11] above)
- the size of the agency and the resources it can reasonably allocate to FOI processing
- whether the person has cooperated reasonably with the agency to enable efficient FOI processing, including whether the person's access actions portray an immoderate prolongation of a separate grievance the person has against the agency, or the continued pursuit of a matter that has already been settled through proceedings in another dispute resolution forum
- whether the person has previously been declared vexatious
- whether deficiencies in an agency's FOI processing or general administration have contributed to or might explain a person's access actions (see [12.13] above).

12.28 The reference to 'unreasonable interference with agency operations' in s 89L(4) should be read alongside a similar phrase in s 24AA(1)(a)(i) for deciding whether a practical refusal reason exists in relation to an FOI request (namely, 'would substantially and unreasonably divert the resources of the agency from its other operations', see Part 3 of these Guidelines). Both sections raise similar but not identical issues. The practical refusal power applies to a single FOI request (or two or more similar requests) that will have an unreasonable workload impact on an agency; whereas the vexatious applicant declaration power is more usually focused on whether the pattern of an applicant's behaviour may be interfering unreasonably with an agency's operations.[27]

Abuse of process — circumventing court-imposed access restrictions

12.29 It will be a question of fact in the individual case whether a person has made an FOI access request or requests that are 'seeking to use the [FOI] Act for the purpose of circumventing restrictions on access to a document (or documents) imposed by a court' (s 89L(4)(c)).[28] It will be necessary to compare the terms of a person's request with the terms of a court order.

---

[27] *Australian Securities and Investments Commission and Sweeney* [2013] AICmr 62 [16]-[18].

[28] See also the exemption under section 46 of the FOI Act; where disclosure would be in contempt of court and Part 5 of these Guidelines.

Abuse of process — other types

12.30 The three categories of 'abuse of process' listed in s 89L(4) are not an exhaustive list. 'Abuse of process' can include behaviour of another kind, as illustrated by the following examples of declarations under s 89K:

- a declaration made against a person who had not cooperated reasonably with an agency in removing offensive language from FOI access requests and endeavouring to comply with the formal requirements of the Act for making requests[29]
- a declaration made against a person whose particular access action (to amend personal records) repeated an issue that had been addressed and resolved in earlier tribunal proceedings and did not raise any new issues.[30]
- a declaration made against a person who made multiple access requests directed to documents held by judicial officers after being advised that s 5(1)(b) of the FOI Act excludes the holder of judicial office from its operation.[31]

A particular access action that would be manifestly unreasonable

12.31 This ground applies only to a particular access action that would be manifestly unreasonable. The term 'manifestly unreasonable' is not defined in the FOI Act. The factors that are relevant in applying this ground are likely to be similar to those discussed above in relation to whether a particular access action or series of actions would be an abuse of process under the FOI Act. It will also be relevant to consider whether an agency could more appropriately respond to a manifestly unreasonable access action in other ways, such as consultation with the applicant, either informally or under s 24AB, to establish if a practical refusal reason exists for refusing a request.

Procedure

Applying for a vexatious applicant declaration

12.32 An agency or minister who applies for a vexatious applicant declaration has the onus of establishing that the declaration should be made (s 89K(3)). As noted above at [12.7], an agency must establish a clear and convincing need for a declaration.

12.33 In general, prior to deciding to apply for a declaration an agency should tell the person concerned that the option is being considered and invite them to consult with a view to removing the need for a declaration. If this has not occurred, the agency should include the reasons for not telling the person concerned in their application to the Information Commissioner.

12.34 An application for a vexatious applicant declaration must include:

---

29 *Department of Defence and 'W'* [2013] AICmr 2 [38]-[42]; *Comcare and Price* [2014] AICmr 24 [20]-[22].

30 *Department of Defence and Ronald Francis* [2014] AICmr 68 [13], [30].

31 *Federal Court of Australia and Garrett* [2015] AICmr 4 [57]-[60].

- background information about the person's access actions and how the agency or minister dealt with those access actions
- a clear statement of the grounds on which the agency or minister seeks the declaration
- evidence that supports those grounds, such as copies of correspondence with the person, or file notes documenting interactions between the person and agency staff
- any proposed terms or conditions which the agency or minister believes the declaration should include (see [12.45] for examples of previous terms and conditions in declarations).

12.35 In preparing the proposed terms or conditions, the agency or minister should consider:

- the length of the declaration sought (in general, the Information Commissioner is of the view that a declaration should be made for definite period, however, extenuating circumstances may require an ongoing declaration)
- whether the declaration should apply to any outstanding access actions (see [12.38]-[12.44]), and
- whether the agency or minister is seeking that the person be named in the published decision (see [12.48]).

12.36 If the agency or minister contends there has been unreasonable interference with the operations of an agency under s 89L(4)(b), an agency should provide:

- information about the proportion of requests by the person in relation to requests by other FOI applicants, and
- submissions on the number of hours spent on the person's access actions.

Submissions from the person

12.37 The Information Commissioner cannot make a vexatious applicant declaration without first giving the person concerned an opportunity to make written or oral submissions (s 89L(3)). The person will be given the opportunity to make written submissions and, if required, oral submissions.

12.38 The OAIC encourages the agency or minister to provide the person with a copy of their application and attachments at the same time as making its application to the OAIC. If the applicant has not already been provided a copy of the application, the OAIC will generally share the application with the applicant. Similarly, where the Commissioner has decided on his or her own initiative that a declaration may be warranted, the Commissioner will provide the person with the same kind of information that would have been expected in an application from an agency or minister. Submissions will generally be shared between the parties.

Status of current and future access actions

12.39 In making a declaration, the Information Commissioner may decide that an agency is no longer required to process an existing access action[32] or that an agency is not required to process access actions commenced after a particular date.[33] Such a term is likely to only be

[32] *Francis v Australian Information Commissioner* [2015] AATA 936; *Commonwealth Ombudsman and 'S'* [2013] AICmr 31.

[33] *Australian Taxation Office and Garrett* [2015] AICmr 33; *Registrar of Indigenous Corporations and 'IO'* [2016] AICmr 34.

made in circumstances where the specific access actions on hand are shown to involve an abuse of process.

12.40 In exercising a discretionary power which impacts an individual, the Information Commissioner will have regard to the principle that 'the impact on the individual should be proportionate to the interests which the decision maker is seeking to protect'.[34] The decision will involve balancing the person's right of access to documents under the FOI Act against the principle that the legal right of access should not be abused.

12.41 In *Registrar of Indigenous Corporations and 'IO'* [2016] AICmr 34, the Information Commissioner decided that a declaration would apply to access actions made after the person was advised that the application was being considered by the agency, on the basis that repeated engagement in access actions after that date involved an abuse of process for some of the individual access actions and when viewed as a whole, and because of the likely burden of processing the outstanding requests on the agency (see [75]-[80]).[35] In *Federal Court of Australia and Garrett* [2015] AICmr 4, the Commissioner declined to make such an order in relation to three access actions, including two requests made after the application for a declaration was made (at [72]).

12.42 The FOI Act does not expressly state whether an agency or minister is required to continue processing access actions that were on hand when the agency or minister applied to the Information Commissioner for a declaration, or were received while the Information Commissioner is considering the application. Given the significance of suspending a person's rights under the FOI Act, it will usually be prudent for agencies to continue to process the access actions. Deficiencies in an agency's administration in processing FOI requests of a person sought to be declared vexatious may be a factor weighing against making a declaration.[36] The OAIC should be advised if any fresh access actions are made while the application is being considered by the Commissioner.

12.43 In circumstances where an agency or minister is making an application to the Information Commissioner for a term of the declaration providing that the agency or minister is not required to process existing access actions, the agency or minister should consult the OAIC about whether existing access actions must be processed, including any fresh actions made while the matter is being considered by the Commissioner.

12.44 The Information Commissioner may approve an extension of time for processing an FOI request, for example under s 15AC of the FOI Act, until a decision is made on the application for a declaration. The Commissioner may also discuss the processing of those actions with the person during consideration of the application for a declaration. Where an agency submits that a particular IC review application is an abuse of process for that particular access action, the relevant IC review will be put on hold pending the OAIC's consideration of the application for a vexatious applicant declaration.

12.45 Agencies and ministers should be aware that even if an extension of time is sought and approved, the Commissioner may ultimately decline to make a declaration in the terms sought.

---

[34] *Re Sweeney and Australian Information Commissioner and Australian Prudential Regulation Authority* [76], citing *Edelsten v Wilcox and FC* (1988) 15 ALD 546.

[35] See also *Office of the Registrar of Indigenous Corporations and 'PW' (Freedom of information)* [2019] AICmr 6 [60]-[64].

[36] *National Archives Australia and Ronald Price (Freedom of information)* [2019] AICmr 16 [68]-[79].

Terms and conditions

12.46 A declaration may be made subject to terms and conditions (s 89M(1)), including that an agency or minister may refuse to deal with an access action without the written permission of the Information Commissioner, and the Commissioner may refuse to consider an IC review application from the person (s 89M(2)). In all previous cases in which the Information Commissioner has declared an individual to be a vexatious applicant under s 89K of the FOI Act, the terms of the declaration have had effect with reference to the particular agency that sought the declaration. Terms and conditions that have been imposed on declarations made under the FOI Act include that:

- an agency was not required to consider any fresh access actions from the person unless: the person directed the FOI request or application to the nominated email address or fax number for FOI requests and did not address or send requests to any other officer, individual, government or non-government entity; the correspondence was appropriately marked and confined to describing the documents to which access was sought or the reasons for seeking internal review; the correspondence did not contain obscene or abusive language or allegations of wrongdoing against employees[37]
- the OAIC would not consider any request by the person under s 15 of the FOI Act for access to a document relating to any matter between the person and the agency unless the terms of the request were submitted in writing by the person and the request met the requirements of s 15(2)(b) of the FOI Act and was not vexatious in nature[38]
- an agency was not required to consider any fresh access actions from the person without the written permission of the Information Commissioner, who would first decide whether the request met the requirements of s 15(2)(b) of the FOI Act and was not vexatious in nature[39]
- an agency was not required to process a particular FOI request referred to in an agency's application for a declaration, or to consider any future request from the person for access to documents relating to the personal affairs of staff of the agency, without the written permission of the Information Commissioner[40]
- an agency was not required to consider any future application from a person to amend or annotate a personal record, if the application related to three specified documents, without the written permission of the Information Commissioner[41]
- a person could only engage in access actions with respect to a particular agency on specified terms and conditions, including that the person shall not engage in:
    - more than one access action in any calendar month
    - an access action within 14 days of a previous action[42]
- a person could not engage in particular requests:

---

37 *National Archives Australia and Ronald Price (Freedom of information)* [2019] AICmr 16 [2].

38 *National Archives Australia and Ronald Price (Freedom of information)* [2019] AICmr 16 [2].

39 *Department of Defence and 'W'* [2013] AICmr 2; *Comcare and Price* [2014] AICmr 24.

40 *Commonwealth Ombudsman and 'S'* [2013] AICmr 31.

41 *Francis and Australian Information Commissioner (Freedom of information)* [2015] AATA 936.

42 *Re Sweeney and Australian Securities and Investments Commission*.

  - that seek access to more than three documents
  - that include material not essential to the making of a request or application
  - for documents previously within the possession or control of the applicant or provided by the agency to the applicant or that were the subject of an access action by or on behalf of the applicant
  - that use a pseudonym to make a request, or
  - made by an agent[43]
- an agency was not required to consider any future FOI requests from a person that duplicates or substantially duplicates any earlier request, or where the documents requested:
  - relate to current proceedings involving the person before a court or tribunal and it would be reasonable for the person to use the procedures of the court or tribunal to seek access to those documents
  - relate to the taxation affairs of some other individual or entity and the person has not provided an authority or consent from that other individual or entity, or
  - relate to the administration of a prior FOI request or the investigation of a complaint the person has made against the agency, until that request or complaint has been finalised.

  However, if one of these circumstances existed, the person could apply to the Information Commissioner for written permission to make the request[44]
- two agencies, which were Commonwealth courts, were not required to consider any future FOI or internal review request, unless the Information Commissioner granted written permission for the request or application to be made. The Commissioner would not consider any request unless it met the requirements of s 5 and sought documents relating to the management and administration of registry and office resources.[45]

12.47 An agency can nevertheless decide to process a person's access request to which a declaration would otherwise apply.

General considerations

12.48 Although declarations have been made including an express term that a person is not permitted to engage in particular FOI requests using either a pseudonym or an agent, the Information Commissioner considers those inclusions to be useful in some circumstances to provide clarity to the parties but not required by law. Requests made using a pseudonym or through an agent are included in vexatious declarations by operation of law in the absence of an express provision. In both cases, it is the subject of a declaration who is making the access request – either through a pseudonym or as the principal in an agency relationship.

12.49 The agency involved must form a reasonable view that the pseudonymous applicant is, in fact, the subject of the declaration before considering the request in the context of an existing declaration. Similarly, the government agency must be reasonably satisfied that an

---

43 *Re Sweeney and Australian Securities and Investments Commission*.

44 Australian Taxation Office and Garrett [2015] AICmr 33.

45 Federal Court of Australia and Garrett [2015] AICmr 4.

agency relationship exists between a third-party applicant and the subject of a declaration based on the particular facts and circumstances of each matter before considering the request in the context of an existing declaration.

12.50 Where a third-party makes an access request in their own personal capacity in the same or substantially the same terms as an access request made by a subject of a declaration, the agency must process that access request in accordance with the FOI Act.

Publication of declaration and decision

12.51 The Information Commissioner will generally publish reasons for making a declaration, but will generally not publish reasons for not making a declaration (this may be reported in the OAIC Annual Report).

12.52 Published reasons may either name the person concerned or identify them using a pseudonym. If the person is not named, the declaration may provide that an agency named in the declaration, in performing functions or exercising powers under the FOI Act, may disclose the person's name to another agency or minister to which the FOI Act applies.

Recent decisions in which a declaration not made

12.53 Decisions in which the Information Commissioner decided not to make a declaration include:

- An agency received 31 access actions between December 2012 and November 2015, 20 of which were made in the last financial year. While that constituted repeated engagement in access actions, the Information Commissioner was not satisfied that there had been an unreasonable interference with the operations of the agency. The decision noted that the individual requests did not appear complex or repetitive in nature and were related to the applicant's personal information.
- An agency received more than 62 access actions between January 2010 and October 2015. The Information Commissioner decided that the access actions in question did not involve harassment and intimidation. While correspondence that could be considered disturbing or harassing was sent to staff, it was outside the FOI process and there was no evidence that the FOI process or requests were used as a way to harass or intimidate staff. The Commissioner also did not consider there to have been an unreasonable interference with the operations of the agency, given that there had been only six access actions in the latest three year period.
- An agency received five FOI requests on one day from an applicant in the week after a complaint was said to have been made about the handling of an earlier FOI request. Without consulting the person, the agency interpreted the requests to be motivated by that grievance. The Information Commissioner found that the agency had provided no evidence to substantiate a claim that there had been harassment or intimidation of an individual or an employee of the agency as alleged and that the tone of the requests was cooperative and courteous.
- An agency received three FOI requests for documents in circumstances where access to those documents had been refused by the Federal Court during the discovery process. The Information Commissioner found that the agency's application and submissions had not identified any authorities to support its contention that it would be an abuse of process for a person to seek to rely on a document obtained under the FOI Act during court proceedings in circumstances where access to that document had been refused

during the discovery process. The Court's decision did not have the effect of placing restrictions on access to the documents by other means.

Making, revoking or varying a vexatious applicant declaration

12.54 A vexatious applicant declaration must be made in writing. The person against whom a declaration is made must be notified as soon as practicable by the agency, minister or the Information Commissioner (as the case requires) (ss 89K(4), 89M(3)).

12.55 A vexatious applicant declaration may be revoked or varied (s 33 of the *Acts Interpretation Act 1901* (the AI Act).

12.56 The power to revoke or vary a vexatious applicant declaration under s 33(3) of the AI Act is exercisable 'in the like manner and subject to the like conditions' as the original decision. In order to vary a vexatious applicant declaration, the Information Commissioner must be satisfied of the grounds in s 89L at the time of the variation. While the information relied upon in making the original decision may continue to be relevant, the Information Commissioner will also need to consider any new, relevant information that has arisen since that time and comply with procedural fairness obligations contained in s 89L(3).

Review

12.57 A decision by the Information Commissioner to declare a person to be a vexatious applicant is a decision that can be reviewed by the Administrative Review Tribunal (s 89N).[46] The decision can also be subject to review by the Federal Court of Australia or the Federal Circuit Court of Australia.[47]

[46] Declarations made by the Commissioner were reviewed by the AAT in *Re Sweeney and Australian Securities and Investments Commission*, *Re Sweeney and Australian Prudential Regulation Authority* and *Francis and Australian Information Commissioner (Freedom of information)* [2015] AATA 936.

[47] *Administrative Decisions (Judicial Review) Act 1977*.