Part 12 —
Vexatious applicant declarations

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OAIC

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Key principles

12.1 The Information Commissioner may declare a person to be a vexatious applicant, either on the Information 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 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 has the onus of establishing the Information Commissioner should make the declaration (s 89K(3)).

12.3 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.

12.4 The Information Commissioner may declare a person to be a vexatious applicant only if satisfied that the following grounds set out in s 89L have been met:

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 '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, or
- seeking to use the FOI Act to circumvent access restrictions imposed by a court (s 89L(4)).

12.6 The Information Commissioner has developed a checklist to provide agencies and ministers with guidance relevant to making an application.[2] The agency or minister should provide the Information Commissioner with a copy of the completed checklist when making its application.

12.7 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. An overview of the different stages of the process for managing applications is set out in Table 1 below at [12.47].

12.8 The Information Commissioner will generally publish reasons for making a declaration, but will generally not publish reasons for not making a declaration. Statistical data around the number of requests for declarations and the outcome may be included in other reporting.

12.9 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). The

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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 See the OAIC's Vexatious applicant declaration application: Checklist and sample structure.

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decision can also be subject to review by the Federal Court of Australia or the Federal Circuit and Family Court of Australia.

Similar powers exercisable by courts or tribunals

12.10 The Information Commissioner's power to declare an applicant as vexatious 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.[3]

12.11 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 that permit the Information Commissioner to declare a person to be a vexatious applicant in certain circumstances, including where an access action, or repeated engagement in access actions, involves an abuse of process for the access action. Noting this, and that the term *abuse of the process for an access action* includes, but is not limited to, the circumstances set out in s 89l(4), it may therefore be appropriate in applying those provisions to take into account other circumstances that would otherwise be ignored in FOI processing. This may include, for example, where a particular access action or repeated access actions involve an abuse of process by reason that a person has made an application for an improper purpose.

Grounds for declaration

12.12 The Information Commissioner may declare a person to be a vexatious applicant only if 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)).

12.13 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).

12.14 '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

[3] *Department of Defence and 'W'* [2013] AICmr 2 [18].

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- seeking to use the FOI Act to circumvent access restrictions imposed by a court (s 89L(4)).

General considerations

12.15 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.

12.16 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. This may include, for example, a situation where the Information Commissioner becomes aware through its functions that an individual's access actions may be unreasonably interfering with the operations of multiple agencies, and/or where it appears they are engaged in an abuse of process which is inordinately impacting the administration of the FOI system.

12.17 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.[4]

12.18 The power to make a declaration is discretionary.[5] 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 or minister that has applied for a declaration.

12.19 Aspects of the FOI Act that must be taken into account in balancing the interests of agencies or ministers and an FOI applicant include:[6]

- 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))

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

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

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

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- 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
- 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.[7]

12.20 The FOI Act enables an agency or minister 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 or minister. An agency or minister'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 or minister 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 Information Commissioner 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 or minister 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).

12.21 The Information Commissioner may consider the conduct of a person after they are notified that a declaration is being considered.[8] In particular, the Information 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

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[7] *Freedom of Information (Charges) Regulations 2019*, s 7(1). See also *Department of Defence and 'W'* [2013] AICmr 2 (17 January 2013).

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

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engages in fresh access actions, directed either at the agency or minister, or the Information Commissioner, that are similar in nature to access actions under consideration by the Information Commissioner. The Information 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 minister, or the Information Commissioner, 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.

12.22 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 the agency or minister's administration impaired its processing of the person's requests
- actions taken by the agency or minister contributed to or might explain the person's access actions[9]
- the agency or minister consulted with the person about their access actions before applying to the Information Commissioner for a declaration
- deficiencies in agency or minister's FOI administration should be addressed by the agency or minister before further consideration is given to making a declaration.[10]

12.23 In deciding whether a ground has been established under s 89L, the Information Commissioner cannot consider contact between a person and an agency or minister that is not part of an access action (for example, complaints and general correspondence).[11] A broader pattern of contact between a person and an agency or minister may nevertheless be relevant in deciding whether as a matter of discretion a declaration should be made under s 89K.

12.24 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.[12]

Joint applications

12.25 Where the Information Commissioner receives a joint application with respect to an individual from more than one agency or minister, the Information Commissioner may decide the applications together or separately. In considering whether to decide the applications separately, the Information Commissioner may consider the circumstances including:

- the grounds relied on and whether the particular ground lends itself to the making of a joint declaration in the circumstances

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

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

11 *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*).

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

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- whether a particular access action or access actions are directed to both of the agencies making the joint application, and whether both agencies claim an abuse of process has occurred in relation to the particular access action/s
- whether the applications from both agencies raise similar issues and seek declarations in similar terms[13]
- whether the agencies commonly receive requests from the same applicant for similar records, or may regularly have to consult the other agency during FOI processing, or transfer FOI requests to the other agency under s 16 of the FOI Act.[14]
- the nature of the work undertaken by the agencies including any common interest or functions.[15]

12.26 The Information Commissioner will case manage and decide eapplications from an agency or minister about multiple (different) individuals separately because such an approach is consistent with the provisions of the FOI Act and preserves privacy rights and procedural fairness for those individuals. The only departure from this approach will be in instances where the agency claims and has evidence that the individuals are, in fact, the same person[see 12.27].

Access actions made under a pseudonym

12.27 There may be circumstances where an agency or minister applying for a declaration wishes the Information Commissioner to take into account access actions made using a different name or pseudonym. Noting that an agency or minister has the onus of establishing that the declaration should be made (s 89K(3)), the agency or minister must provide sufficient evidence to demonstrate that the pseudonymous applicant or other individual is, in fact, the subject of the application. While the bar to establishing that the subject of the application has used a pseudonym(s) is high, factors which, on their own or in combination, could contribute to this finding may include admissions by the individual, use of the same email address, identification using technical means or convincing circumstantial evidence, such as replicated phrasing or requests that are unique and specific to the individual.

12.28 The Information Commissioner will require significant evidence to make this finding of pseudonymous activity, and the individual will be given an opportunity to provide their views in relation to any claims.

Access actions made via an agent

12.29 There may also be circumstances where an agency or minister that is applying for a declaration wishes the Information Commissioner to take into account access actions made via an agent. An agent is 'a person who is able, by virtue of authority conferred upon them, to create or affect legal rights and duties as between another person, who is called their principal, and third parties'.[16]

12.30 The authority of an agent may be actual or apparent. Actual authority arises where the principal expressly confers authority on the agent (express authority), or where that

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13 *Comcare and Price* [2014] AICmr 24 (28 February 2014).

14 *Australian Securities and Investments Commission and Sweeney* [2013] AICmr 62 [8].

15 *Federal Court of Australia and Garrett* [2015] AICmr 4 (22 January 2016) [20].

16 *Petersen v Moloney* [1951] HCA 57 (1951) 84 CLR 91 [94]; [1951] HCA 57. As quoted in *Australian Competition and Consumer Commission v Flight Centre Travel Group Limited* [2016] HCA 49 (14 December 2016).

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authority is implied from the conduct of the parties or the circumstances (implied authority).[17] Apparent (ostensible) authority results from a representation made by the principal to a third party.[18]

12.31 In making an application for a vexatious applicant declaration against a person in relation to access actions purportedly made by another person on their behalf, sufficient evidence must be given to the Information Commissioner to demonstrate:

- an agency relationship exists between the subject of the application and their purported agent and
- the applicant who is the subject of the application has a level of control over the access action such that the access action could be assessed as that of the applicant.[19]

12.32 Depending on the circumstances and the capacity in which the agent is acting, an agent may have professional or ethical responsibilities that regulate their conduct. If the agency or minister considers that an agent's conduct in the course of an access action has violated their professional responsibilities, they may make a complaint to the relevant professional body.

Repeatedly engaging in access actions

12.33 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'.[20]

12.34 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,[21] 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.

12.35 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.'[22]

12.36 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

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17 *Junker v Hepburn* [2010] NSWSC 88.

18 *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR 72.

19 *Scott v Davis* [2000] HCA 52.

20 *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].

21 See for example, *Commonwealth Ombudsman and 'S'* [2013] AICmr 31 [10] (7 FOI requests plus internal review applications).

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

whether those actions are part of a pattern of repeated requests may not be a decisive issue.

Engaging in a particular access action

12.37 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)).[23]

12.38 A declaration that is based on one access action may include terms or conditions that go beyond that access action.[24] 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) for a particular period of time. (See below at [12.45].)

Abuse of process — harassment and intimidation

12.39 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.[25]

12.40 The occurrence of harassment or intimidation must be approached objectively.[26] In doing so it must be borne in mind that an officer can terminate a phone call, or not respond to written abuse.[27] 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 employees. An agency or minister will be expected to explain or provide evidence of the impact that a person's access actions have had on employees, though this evidence must be considered in context with other matters.[28] Relevant evidence might include any workplace health and safety measures that the agency or minister has taken, the involvement of police, or whether a workplace protection order has been sought.

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

- 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[29]
- requests that are targeted at personal information of employees[30]

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

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

25 Macquarie Online Dictionary.

26 *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].

27 *Department of Defence and 'W'* [2013] AICmr 2 (17 January 2013) [31].

28 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.

29 *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].

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

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- requests that are designed to intimidate staff and force them to capitulate on another issue[31]
- requests of a repetitive nature that are apparently made with the intention of annoying or harassing agency staff[32]
- a person's refusal or failure to alter dubious conduct after being requested by an agency to do so.[33]

12.42 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.[34] 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 an agency or minister's operations

12.43 An abuse of process that is grounded in unreasonably interfering with an agency or minister'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 or minister can initiate a practical refusal process for a particular access action that could have an unreasonable workload impact on the agency (s 24).

12.44 Factors that may be considered in deciding whether there is a pattern of repeated access actions that unreasonably interfere with an agency or minister's operations include:[35]

- the total number of a person's access actions to the agency or minister 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 minister or a burden that is excessive and disproportionate to a reasonable exercise by an applicant of the right to engage in access actions. However, the total number of access actions will not always be determinative. For example, it is unlikely that the power to make a vexatious applicant declaration is enlivened simply because an applicant (such as a journalist or a public interest group) has made multiple applications under the FOI Act, particularly if the applications are materially different and there appears to be a basis for repeated access requests (such as further information being available or a reason that the public interest may have changed).
- the impact of the person's access actions on FOI administration in the agency or minister, 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-

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

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

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

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

35 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.

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 or minister's records management systems, may make access requests that are poorly framed, overlapping or cause inconvenience to an agency or minister

- the impact of the person's access actions on the other work of the agency or minister, 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 or minister 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)
- whether the agency or minister engaged with the person about moderating their access actions, and the person's response to the engagement, including whether the person has failed to comply with an undertaking they made to moderate their access actions.[36]
- the size of the agency or minister and the resources it can reasonably allocate to FOI processing. Repeated access actions may involve an unreasonable interference with the operations of an agency or minister if the agency or minister is relatively small, or a significant number of the applications made by a particular person require staff in senior roles to devote a significant amount of time to the making of decisions; however this must be approached carefully as an agency or minister cannot under-resource the administration of the FOI Act and use this as a basis to claim diversion. Similarly, an agency or minister cannot claim that repeated access actions may involve an unreasonable interference with the operations of an agency or minister in circumstances where the interference with their operations is due to poor record keeping or inefficient filing systems
- whether the person has cooperated reasonably with the agency or minister 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 minister, 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, including whether the person has continued the same pattern of access actions during the term of the declaration or within 12 months after the term of the declaration has ended. In these circumstances the Information Commissioner will give this factor significant weight.
- whether deficiencies in an agency or minister's FOI processing or general administration have contributed to or might explain a person's access actions (see [12.13] above). Deficiencies in an agency or minister's administration in processing FOI requests of a person sought to be declared vexatious may be a factor weighing against making a declaration.[37]

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[36] *Australian Human Rights Commission and 'BAY' (Freedom of information)* [2026] AICmr 53 (8 July 2026) [4], [61] and [64]. *Cancer Australia and 'BAX' (Freedom of information)* [2026] AICmr 51 (30 June 2026) [41]-[46].

[37] *National Archives Australia and Ronald Price (Freedom of information)* [2019] AICmr 16 [68]-[79]. *Australian Criminal Intelligence Commission and 'BBX' (Freedom of information)* [2026] AICmr 84 (11 September 2026) [4].

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- where the person has sought IC review of deemed decisions the OAIC may give less weight to those access actions based on the reasonableness of seeking IC review in those circumstances[38].

12.45 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 or minister; 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 or minister's operations.[39]

Abuse of process — circumventing court-imposed access restrictions

12.46 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)).[40] It will be necessary to compare the terms of a person's request with the terms of any court order.

Abuse of process — other types

12.47 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 or minister in removing offensive language from FOI access requests and endeavouring to comply with the formal requirements of the Act for making requests[41]
- 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[42]
- 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.[43]

12.48 More generally 'abuse of process' may include conduct such as:

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[38] *Australian Federal Police and 'BBT' (Freedom of information)* [2026] AICmr 79 (2 September 2026) [80]-[82].

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

[40] 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.

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

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

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

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- the making of multiple applications for the same or similar documents, or to amend or annotate the same documents that contain personal information without a reasonable basis to do so.

A particular access action that would be manifestly unreasonable

12.49 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 for dealing with an application

12.50 An overview of the different stages of the process for managing applications is set out in Table 1 below.

Table 1

Stage	Description	Guidelines Reference
1) Applying for a vexatious applicant declaration	• The agency or minister should provide their application to the person at the same time as it makes its application to the Information Commissioner. • If it does not do so, the information Commissioner will ask the agency or minister to provide the person with a copy of the application before progressing the matter.	[12.43] – [12.57]
2) Initial consideration of application	• The Information Commissioner may contact the agency or minister if it needs further information or considers, based on the application alone, that it lacks substance. The Information Commissioner may invite the agency or minister to withdraw the application or to provide further submissions or evidence.	[12.58] – [12.61]
3) Procedural fairness: Submissions	• The Information Commissioner cannot make a vexatious applicant declaration without first giving the	[12.62] – [12.68]

	person concerned an opportunity to make submissions (s 89L(3)). • The person will be given an opportunity to make written submissions prior to the making of any declaration. The person should provide their written submissions to the agency or minister at the same time they provide them to the Information Commissioner.	

4) Assessment of application and submissions: preliminary declaration or decision not to make a declaration	• The Information Commissioner will consider the application and submissions made by both parties.
	• The Information Commissioner will share their assessment of the application and submissions with the parties, including through:
	  ○ the form of a preliminary view that provides a draft declaration and the proposed terms or
	  ○ in the form of a decision that advises the parties that a declaration is not justified having regard to the submissions and evidence before the Information Commissioner.
	• Where a preliminary view that sets out a draft declaration and proposed terms is provided to the parties, the parties will be provided an opportunity to respond prior to a decision being made. The person should provide their written submissions to the agency or minister at the same time they provide them to the Information Commissioner.
		[12.69] – [12.71]

5) Making and publishing the declaration	• Where the Information Commissioner makes a declaration under s 89K, the reasons for making a declaration will generally be published.	[12.72] – [12.92]

Making a vexatious applicant declaration application

12.51 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. The Information Commissioner has developed a checklist which sets out the actions that an agency should undertake prior to and when making an application.[44]

12.52 In general, prior to deciding to apply for a declaration an agency should tell the person concerned that the option is being considered, summarise the grounds on which an application is being considered and invite them to consult with a view to removing the need for a declaration.

12.53 There may be reasons not to engage in this further consultation, including for staff safety and well-being, those reasons should be documented and explained in any application.

Content of an application

12.54 An application for a vexatious applicant declaration must include:

- background information about the person's access actions and how the agency or minister dealt with those access actions; this might also include a timeline
- 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 the agency or minister's 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).

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

- the type of evidence required, noting that the presumption is that such evidence will be shared with the applicant, unless there are extenuating circumstances and confidential submissions and evidence are agreed to be received by the Information Commissioner; absent that agreement agencies and ministers should assume the evidence will be shared.
- 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]).

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

[44] See the OAIC's Vexatious applicant declaration application: Checklist and sample structure.

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- 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.

Providing a copy to the person at the same time as the Information Commissioner

12.57 The agency or minister should also provide the person with a copy of their application and attachments at the same time as making its application to the Information Commissioner.

12.58 The Information Commissioner will not generally accept confidential applications. The agency or minister should instead frame their application carefully in a manner that will not disclose information which they consider should not be disclosed to the other party.

12.59 If the agency or minister does not share the application and attachments with that person at the time of the application, the Information Commissioner will request that it do so. If they subsequently fail to provide part or all of their application to the person, without sufficient explanation, the Information Commissioner may provide the application to the person for the purposes of procedural fairness, and/or refer to the information in the decision.

12.60 The Information Commissioner will only accept that discrete information in an application may be withheld from the other party in very limited circumstances, such as where:

- disclosure would be unlawful, for example, where disclosing personal information of an individual would breach the Privacy Act
- the agency or minister reasonably believes that giving access would pose a serious threat to the life, health or safety of any individual
- the agency or minister reasonably believes that there is a real risk that disclosure would be likely to cause other adverse consequences to a person

12.61 If the Information Commissioner accepts information may be withheld from the other party, the agency or minister will be required to provide the other party with a copy of the application with that information removed. Where appropriate, the Information Commissioner may require the agency or minister to provide the other party with a summary of that information.

12.62 Similarly, where the Information Commissioner has decided on his or her own initiative that a declaration may be warranted, the Information Commissioner will provide the person with the same kind of information that would have been expected in an application from an agency or minister.

The status of new and existing access actions

12.63 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, agencies and ministers should continue to process the access actions or seek an extension of time in circumstances where the agency considers the individual has repeatedly engaged in access actions that involve an abuse of process. The Information Commissioner should be advised if any new access actions are made while the application is being considered by the Information Commissioner.

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Extensions of time

12.64 In circumstances where an agency or minister makes an application to the Information Commissioner for a term of the declaration that provides the agency or minister is not required to process existing or future access actions, the agency or minister should consider whether to apply for an extension of time under ss 15AB, 15AC, 51DA or 54D of the FOI Act (as relevant). Further guidance in relation to extension of time applications is set out in Part 3 of the FOI Guidelines.

12.65 The Information Commissioner may approve an extension of time for processing an FOI request in the following circumstances:

- Under s 15AB of the FOI Act, the Information Commissioner may extend the processing period for 30 days or such a period as the Information Commissioner considers appropriate if satisfied the applicant's FOI request is complex or voluminous. The discretion in s 15AB cannot be exercised to provide a 'blanket' extension of time to a cohort of cases; each request needs to be considered on its individual merits and should specify a specific timeframe for the extension. The agency or minister must satisfy the Information Commissioner that the request is complex or voluminous. The fact that the agency or minister has made an application for a vexatious applicant declaration may be an indicator of complexity, however, the agency or minister should provide sufficient details in their extension of time application to demonstrate complexity in relation to the particular request. This may include, for example, details of how the particular request is part of a pattern of repeated access actions that the agency or minister claims is an abuse of process.
- Under s 15AC of the FOI Act, an agency or minister may apply to the Information Commissioner in writing for an extension of time to deal with a request following a deemed decision. The Information Commissioner can only grant such an extension once. Where an application for an extension of time has been made under s 15AC in relation to an FOI request which is covered by an application for a vexatious applicant declaration, the Information Commissioner may defer the decision on the extension of time application until after the application for a vexatious applicant declaration has been finalised. Should an IC review be made in relation to an FOI request that is the subject of such an extension of time application, the Information Commissioner may put the IC review on hold pending finalisation of the application for a vexatious applicant declaration.

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

Application lacking in substance or requiring further information

12.67 In the course of assessing the application, the Information Commissioner may contact the agency or minister if it needs further information or considers the application lacks substance.

12.68 If the Information Commissioner considers the application lacks substance it may advise the agency or minister and give it an opportunity to withdraw the application. In making this assessment the Information Commissioner will consider the onus under s 89K(3) of the FOI

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Act. While it will depend on the circumstances, including the grounds of the application, some factors which may indicate an application is lacking in substance include:

- the agency or minister has not sufficiently engaged with the individual about moderating their access actions
- the individual has subsequently moderated their access actions, particularly after being advised of a potential application
- the number of access actions is significantly less than previous declarations[45]
- where harassment is an issue, the nature of the engagement from the individual is not of a similar nature to previous declarations[46]
- insufficient evidence linking harassment and/or the volume of correspondence to access actions
- insufficient evidence of the impact of the access actions on the agency or minister's operations.

Recent applications in which a declaration was not made

12.69 Each application will be assessed on its facts, and the evidence and submissions provided. However agencies and ministers may find it useful to understand examples where declarations have not been made.

12.70 Circumstances 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 previous 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 FOI 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 6 access actions in the latest 3-year period.
- An agency received 5 FOI requests in 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

[45] See, for example, *Comcare and Price* [2014] AICmr 24; *ASIC and Sweeney* [2013] AICmr 62; and *ATO and Garrett* [2015] AICmr 33.

[46] See for example, *Commonwealth Ombudsman and 'S'* [2013] AICmr 31 (27 March 2013) and *Department of Defence and 'W'* [2013] AICmr 2 (17 January 2013).

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individual or an employee of the agency as alleged and that the tone of the requests was cooperative and courteous.

- An agency received 3 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.

Submissions from the person

12.71 The High Court of Australia has established that when a statute confers power to affect a person's rights, interests, or legitimate expectations, the common law implies a duty to observe procedural fairness unless clear statutory language excludes it.[47]

12.72 Noting the nature and effect of the power to declare a person vexatious, and in particular, that a declaration has the practical effect of preventing an individual from exercising an important legal right conferred by the FOI Act, the content of the duty of procedural fairness in relation to an application for a vexatious applicant declaration is not insignificant.[48]

12.73 In addition to the common law duty to afford procedural fairness, 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, in a timeframe provided by the Information Commissioner.

12.74 The person should provide their submissions to the other party at the same time as they provide them to the Information Commissioner. The Information Commissioner will not generally accept confidential submissions. Parties should instead frame their submissions carefully in a way that will not disclose information which they consider should be kept confidential.

12.75 If a party does not share their submissions with the other party, the Information Commissioner will request that it do so. If the party subsequently fails to do this, the Information Commissioner may provide the submissions to the other party for the purposes of procedural fairness, and/or refer to the information in the decision.

12.76 The Information Commissioner will only accept that discrete information in a submission may be withheld from the other party in very limited circumstances, such as where:

- disclosure would be unlawful, for example, where disclosing personal information of an individual would breach the Privacy Act
- the party reasonably believes that giving access would pose a serious threat to the life, health or safety of any individual
- the party reasonably believes that there is a real risk that disclosure would be likely to cause other adverse consequences to a person

[47] See, for example, *Kioa v West* [1985] HCA 81, per Mason J at [31]. See also *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40 (4 November 2015), [30] (per Kiefel, Bell and Keane JJ).

[48] *Australian Federal Police and 'BBT' (Freedom of information)* [2026] AICmr 79 (2 September 2026) [23].

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12.77 The Information Commissioner acts under a duty to provide procedural fairness. Therefore, if the OAIC accepts that discrete information may be provided in confidence, the party must provide a fulsome version of the redacted submission to the other party and a copy to the Information Commissioner. Each party will have the opportunity to respond to submissions provided by the other party.

Preliminary assessment

12.78 The Information Commissioner will share their assessment of the application and submissions with the parties, including through the form of a preliminary view that provides a draft declaration and the proposed terms or in the form of a decision that advises the parties that a declaration is not justified having regard to the submissions and evidence before the Information Commissioner.

12.79 In the event the Information Commissioner provides a preliminary view to the parties that includes a draft declaration and the proposed terms, both parties will have a reasonable opportunity to respond. Parties must provide their response within the timeframe set out in the notice and provide their submissions to the other party at the same time as they provide them to the Information Commissioner.

12.80 Parties should be aware that if they do not respond in that timeframe, the matter may proceed directly to a decision without further notice, based on the available information. Noting this step occurs after and in addition to the procedural fairness step under s 89L(3) and the discretionary nature of the power under s 89K, the Information Commissioner will only provide parties with extensions of time to respond to the preliminary assessment in limited circumstances.

Making and publishing a declaration

12.81 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)). Declarations are generally published. Publication is authorised by s 8(a) of the *Australian Information Commissioner Act 2010* which broadly empowers the Commissioner to take steps in the interest of promoting awareness and understanding of the FOI Act and the objects of that Act. Relevantly, these include that the Parliament intends that functions and powers given by this 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)).

Publication of declaration and decision

12.82 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).

12.83 Published reasons may either name the person concerned or identify them using a pseudonym. In deciding whether to name the person concerned or identify them using a pseudonym, the Information Commissioner may consider:

- whether the agency or minister has requested that the person be named in the declaration, and if so, their reasons

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- the particular circumstances including whether the conduct that constitutes an abuse of process in relation to access actions is confined to a particular agency or minister
- whether other Australian Government agencies have a relevant interest in knowing the identity of the person against whom the declaration is made[49]
- whether the Information Commissioner has previously made a vexatious applicant declaration in relation to them.[50]

12.84 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.

Terms and conditions

12.85 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 Information 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 or minister 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[51]
- the Information Commissioner 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[52]
- 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[53]
- a person could not engage in particular requests:
  - that seek access to more than 3 documents

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49 *Comcare and Price* [2014] AICmr 24.

50 *Comcare and Price* [2014] AICmr 24; *National Archives Australia and Ronald Price (Freedom of information)* [2019] AICmr 16 (29 April 2019)

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

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

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

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  - 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[54]
- the Information Commissioner was not required to consider any request by the person under s 15 of the FOI for access to a document relating to any matter between the person and the agency, unless certain criteria were met[55]
- an agency was not required to further process any outstanding request for access pursuant to s 15 or any outstanding applications for internal review pursuant to s 54B of the FOI Act received by the agency after a particular date.[56]

12.86 The Information Commissioner has broad discretion under s 89M(1) to determine the terms and conditions in the circumstances of the particular application, in addition to the matters set out in s 89M(2). These terms and conditions may include, for example, an agency or minister not being required to process access actions which relate to specific subject matters.

12.87 In determining the appropriate terms in all the circumstances of the case, the Commissioner may consider:

- the objects of the FOI Act
- the nature and extent of the abuse of process, and whether the terms will likely be sufficient to prevent the abuse of process from reoccurring and/or continuing
- whether deficiencies in an agency or minister's FOI processing or general administration have contributed to the abuse of process
- in circumstances where the agency or minister has sought terms not requiring it to consider existing IC reviews, and those IC reviews relate to deemed decisions, whether the Information Commissioner has given less weight to those access actions based on the reasonableness of seeking IC review of a deemed decision in those circumstances[57]
- other relevant factors arising in the particular circumstances.

12.88 The terms of the declaration will not be punitive, but instead will relate directly to the effort to prevent the behaviour that is considered vexatious. The Information Commissioner will consider the facts and evidence in the particular circumstances when deciding the appropriate terms of any declaration to achieve this. The Information Commissioner will include the least restrictive terms that the Information Commissioner reasonably considers will achieve this outcome.

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

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[54] *Re Sweeney and Australian Securities and Investments Commission*.

[55] *Department of Defence and 'W'* [2013] AICmr 2 (17 January 2013).

[56] *Registrar of Indigenous Corporations and 'IO'* [2016] AICmr 34 (3 June 2016).

[57] *Australian Federal Police and 'BBT' (Freedom of information)* [2026] AICmr 79 (2 September 2026) [80]-[82].

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Impact of the declaration on the status of current and future actions

12.90 In making a declaration, the Information Commissioner may decide that an agency or minister is no longer required to process an existing access action[58] or that an agency or minister is not required to process access actions commenced after a particular date.[59] Such terms are likely to only be made in circumstances where the specific access actions on hand are shown to involve an abuse of process.

12.91 Where a new or existing IC review falls within the terms of a vexatious applicant declaration, the Information Commissioner may:

- decline to undertake or continue to undertake an IC review under s 54W(a)(i) as vexatious, or
- in circumstances where the subject of the vexatious applicant declaration has sought review of the decision in the Administrative Review Tribunal, the Information Commissioner may exercise the discretion under s 54W(b) to decline to undertake or continue to undertake the IC review.

12.92 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'.[60] 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.

12.93 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]).[61] In *Federal Court of Australia and Garrett* [2015] AICmr 4, the Commissioner declined to make such an order in relation to 3 access actions, including 2 requests made after the application for a declaration was made (at [72]).

Effect on FOI requests using a pseudonym

12.94 Although declarations have been made including an express term that a person is not permitted to engage in particular access actions using a pseudonym, the Information Commissioner considers those inclusions to be useful in some circumstances to provide clarity to the parties but are not required by law. Requests made using a pseudonym are included in vexatious declarations by operation of law in the absence of an express provision given that it is the subject of a declaration who is making the access request using a pseudonym.

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

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

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

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

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12.95 The agency or minister involved must form a reasonable evidence-based view that the pseudonymous applicant is, in fact, the subject of the declaration before considering the request in the context of an existing declaration.

Effect on FOI requests made by the subject of a declaration using an agent

12.96 Similarly, requests made using an agent are included in vexatious declarations given that it is the subject of a declaration who is making the access request via an agent. Where this agent representation can be evidenced those access applications are included, on the basis that a failure to do so would provide a pathway to frustrate the making of a declaration and the impact of any declaration made.

12.97 The agency or minister must be reasonably satisfied and have evidence that an 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.

12.98 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.

Revoking or varying a vexatious applicant declaration

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

12.100 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

12.101 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).[62] The decision can also be subject to review by the Federal Court of Australia or the Federal Circuit and Family Court of Australia.[63]

[62] 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.

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

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