Applications for vexatious applicant declarations (VADs)

Period: 1 January 2006 to date of request

Period	Applications for VADs submitted	Applications for VADs granted	Applications for VADs not granted	Applications for VADs withdrawn
FY 2010/2011[1]	0	0	0	0
FY 2011/2012	4	0	0	0
FY 2012/2013	3	2	2	0
FY 2013/2014	6	4	3	1
FY 2014/2015	2	2	1	0
FY 2015/2016	7	2	3	0
FY 2016/2017	4[2]	2	4	0
FY 2017/2018	2	0	0	2
FY 2018/2019	9	3	3	2
FY 2019/2020	3	1	0	0

[1] The *Australian Information Commissioner Act 2010* (AIC Act) established the Office of the Australian Information Commissioner on 1 November 2010. Part VIII, Division 1 of the *Freedom of Information Act 1982*, containing ss 89K, 89L, 89M and 89N, was introduced by the *Freedom of Information Amendment (Reform) Act 2010* and also commenced on 1 November 2010.

[2] One further application for a VAD was registered in the FY 2016/2017, however it is marked 'invalid' and it is noted it not an application for a VAD but is a notification of an intention to make an application for a VAD. The agency does not appear to have subsequently made an application for a VAD in this instance.

FY 2020/2021	1	2	1	0
FY 2021/2022	7[3]	1	2	2
FY 2022/2023	2	0	0	4
FY 2023/2024	1	0	0	2
FY 2024/2025	1	0	0	0
FY 2025/2026	11	1	0	2
FY 2026/2027	1	3	0	0
Total period[4] **(1 January 2006 – date of request)**	**64**	**23**	**19**	**15**

[3] One further application for a VAD was registered in the FY 2021/2022, however it is marked 'invalid' and it is noted to be a duplicate of another application registered the same financial year.
[4] As at the date of the request, 7 VAD applications are current and remain on hand.

Australian Government
Office of the Australian Information Commissioner

Our reference: RQ11/01100

s47F
s47F
Policy Officer
s47F
s47F
s47F

Sent via email to: s47F .gov.au

Dear s47F

s47F application for vexatious applicant declaration

I am writing regarding s47F application of 14 July 2011 that s47F be declared a vexatious applicant under s 89K of the *Freedom of Information Act 1982* (the FOI Act).

I am writing to inform you that, after careful consideration, I have decided not to declare s47F a vexatious applicant. My reasons for this decision follow.

Background

s47F

s47F

Legislative framework

Under s 89K(1) of the FOI Act, the Information Commissioner may, by written instrument, declare a person to be a vexatious applicant. An agency may apply to the Information Commissioner to make a declaration (s 89K(2)(a)) and the agency bears the onus of establishing that the Information Commissioner should make the declaration (s 89K(3)).

Section 89L of the FOI Act outlines the grounds on which the Information Commissioner may make a declaration. Before I can make a declaration, I must be satisfied that a person has engaged or repeatedly engaged in access actions that would involve an abuse of process (s 89L(1)(a)).

An access action is defined as making an FOI request, a request for the amendment or annotation of records, an application for internal review or an IC review application (s 89L(2)). An abuse of process for an access action is defined in s 89L(4) and is explained further below.

Section 12.4 of the Guidelines issued by the Information Commissioner under s 93A of the FOI Act states that relevant in considering an abuse of process is whether an applicant has made repeated requests for documents which have been provided earlier or to which access has been refused. The Guidelines also note the decision by the Federal Court of Australia in *Ford v Child Support Registrar* [2009] FCA 328, which stated that a series of FOI applications of a repetitive nature and apparently made with the intention of annoying or harassing agency staff could be classified as vexatious.

Vexatious applicant declaration application

s47F has submitted that s47F had repeatedly engaged in access actions and those actions also involve an abuse of the process. As detailed above, s47F has provided evidence that s47F has repeatedly engaged in access actions, and has argued that these amount to an abuse of process under s 89L(1)(a)(ii) for the following reasons:

- s47F is using the FOI Act to continue to pursue a s47F that has been addressed in a number of different fora, including the Federal Court
- s47F repeated requests for similar or related documents are resulting in an unreasonable interference with its operations

- s47F is using FOI requests as a platform for allegations of misconduct, incompetence, fraud and corruption by s47F its staff and the minister.

Decision

Before making a declaration under s 89K, I must be satisfied that one of the grounds for declaration in s 89L(1) is made out. s47F has made a number of repeated access requests and therefore would meet the first part of the test set out at s 89L(1)(a). However, an abuse of process for an access action is defined in s 89L(4) as including, but not being limited to, the following:

(a) harassing, or intimidating an individual or an employee of an agency

(b) unreasonably interfering with the operations of an agency

(c) seeking to use the FOI Act for the purpose of circumventing restrictions on access to a document (or documents) imposed by a court.

s47F bears the onus of establishing that there is an abuse of process (s 89K(3)) and it submits that s47F repeated access requests constitute an abuse of process. On the information before me, I am not satisfied that s47F repeated access requests involve an abuse of the process under s 89L(1)(a)(ii) of the FOI Act.

There is a significant public interest in a person having and exercising a right to access information held by government agencies. But there is also significant public interest that in the giving of access to information, government agencies are not burdened to such an extent that the efficiency of their operations is hampered. Given that the practical effect of a vexatious applicant declaration is to affect a person's access rights under the FOI Act, I must carefully balance these factors.

I have reviewed copies of s47F access requests. The requests are intermingled with allegations and accusations of corrupt conduct by staff and frequent references to his underlying dissatisfaction with the outcome of the s47F. It is clear from some of the access requests that the purpose of the correspondence is not primarily to request access to information but to re-enliven grievances against s47F and restate allegations and accusations.

The ordinary meaning of the words 'harassment' and 'intimidation' involve a person being troubled by repeated attacks, persistently disturbed or forced into or deterred from some action by inducing fear.[1] While the access requests may have been inconvenient and a source of annoyance to s47F in my opinion they cannot be characterised as 'harassment' and 'intimidation'.[2]

While I appreciate that s47F has made more than 20 access requests in the period leading up to September 2011, and continues to make such requests, I am not satisfied that

[1] *Macquarie Oxford Dictionary*, 2nd edition.
[2] *Price and Queensland Police Service*, Unreported, Queensland Information Commissioner, 29 June 2007.

the volume of requests generated by s47F is sufficient to be an unreasonable interference with the operations of the agency (s 89L(4)(b)).[3] I note that s47F is continuing to process s47F access request (as recently as 29 June 2012) where these are the same or similar to previous requests that have been refused. It is open to s47F to continue to make access refusal decisions citing its past decisions and reasons. I do not consider that doing so would constitute an unreasonable interference with s47F resources such that applying a restriction on s47F statutory rights under the FOI Act is warranted.

I also note that there is scope for s47F to consider using other provisions in the Act to more effectively deal with future requests from s47F I understand that this office has provided guidance on the most appropriate way to handle s47F correspondence when s47F requests information rather than documents.

Finally, I note that this office is also currently considering s47F application for Information Commissioner review (IC review) of s47F That review will consider the adequacy of s47F searches for the evidence at the centre of s47F FOI requests to s47F

For the reasons I have outlined above, I have decided to refuse s47F application for a vexatious applicant declaration under s 89K of the FOI Act.

If you would like to discuss this matter please contact s47F, the case officer in charge of this matter, on s47F or email s47F @oaic.gov.au. In all correspondence on this matter, please quote the reference number **RQ11/01100.**

Yours sincerely

s47F

James Popple
Freedom of Information Commissioner
29 August 2012

[3] s47F received 322 and 302 access requests in 2009-10 and 2010-11 respectively.

Australian Government
Office of the Australian Information Commissioner

Our reference: RQ11/01453

s47F
FOI Coordinator
s47F

Sent via email to: s47F s47F gov.au

Dear s47F

s47F application for vexatious applicant declaration

I am writing regarding the application of the s47F of 7 September 2011 that s47F be declared a vexatious applicant under s 89K of the *Freedom of Information Act 1982* (the FOI Act).

I am writing to inform you that, after careful consideration, I have decided not to declare s47F a vexatious applicant. My reasons for this decision follow.

Background

s47F

s47F requests to s47F relate typically to grievance investigations conducted by s47F documents in relation to s47F ', s47F reports and copies of correspondence between s47F officers, with three officers in particular referenced.

On 9 September 2011, s47F applied to the Information Commissioner to declare s47F a vexatious applicant under s 89K of the FOI Act. s47F submitted that 's47F *has repeatedly engaged in access actions that involve an abuse of process'*. I understand that since s47F made its vexatious applicant declaration application to this office, s47F has made a further 6 FOI requests.

Legislative framework

Under s 89K(1) of the FOI Act, the Information Commissioner may, by written instrument, declare a person to be a vexatious applicant. An agency may apply to the Information Commissioner to make a declaration (s 89K(2)(a)) and the agency bears the onus of establishing that the Information Commissioner should make the declaration (s 89K(3)).

Section 89L of the FOI Act outlines the grounds on which the Information Commissioner may make a declaration. Before I can make a declaration, I must be satisfied that a person has engaged or repeatedly engaged in access actions that would involve an abuse of process (s 89L(1)(a)).

An access action is defined as making an FOI request, a request for the amendment or annotation of records, an application for internal review or an IC review application (s 89L(2)). An abuse of process for an access action is defined in s 89L(4) and is explained further below.

Paragraph 12.4 of the Guidelines issued by the Information Commissioner under s 93A of the FOI Act states that relevant in considering an abuse of process is whether an applicant has made repeated requests for documents which have been provided earlier or to which access has been refused. The Guidelines also note the decision by the Federal Court of Australia in *Ford v Child Support Registrar* [2009] FCA 328, which stated that a series of FOI applications of a repetitive nature and apparently made with the intention of annoying or harassing agency staff could be classified as vexatious.

Vexatious applicant declaration application

As detailed above s47F has provided evidence that s47F has repeatedly engaged in access actions, and contend that these amount to an abuse of process under s 89L(1)(a)(ii) for the following reasons:

- s47F 33 FOI requests have interfered with the normal operations of s47F accounting for 60% of s47F FOI line area workload
- s47F repeated requests for similar or related documents are resulting in an unreasonable interference with its operations
- s47F directs FOI requests to s47F employees rather than s47F FOI officer.

Decision

There is a significant public interest in a person having and exercising a right to access information held by government agencies. But there is also significant public interest that in the giving of access to information, government agencies are not burdened to such an extent that the efficiency of their operations is hampered. Given that the practical effect of a vexatious applicant declaration is to affect a person's access rights under the FOI Act, I must carefully balance these factors.

Before making a declaration under s 89K, I must be satisfied that one of the grounds for declaration in s 89L(1) is made out. s47F has made a number of repeated access requests

and therefore would meet the first part of the test set out at s 89L(1)(a). However, an abuse of process for an access action is defined in s 89L(4) as including, but not being limited to, the following:

(a) harassing, or intimidating an individual or an employee of an agency

(b) unreasonably interfering with the operations of an agency

(c) seeking to use the FOI Act for the purpose of circumventing restrictions on access to a document (or documents) imposed by a court.

s47F bears the onus of establishing that there is an abuse of process (s 89K(3)). s47F has not made explicit submissions that s47F access actions constitute harassment or intimidation other than referring to him as having engaged in emails and phone calls to the General Counsel, consistently disputed internal review decisions and ignored advice relating to avenues of appeal.

The ordinary meaning of the words 'harassment' and 'intimidation' involve a person being troubled by repeated attacks, persistently disturbed or forced into or deterred from some action by inducing fear.[1] While s47F access requests may have been inconvenient and a burden upon the resources of the s47F FOI area, in my opinion they cannot be characterised as an abuse of process because they did not involve 'harassment' and 'intimidation'.[2]

On the information before me, I am not satisfied that s47F repeated access requests involve an abuse of process under s 89L(1)(a)(ii) of the FOI Act.

I will now consider whether the access actions constituted an unreasonable interference with the operations of the agency.

While I appreciate that s47F has made more than 30 access actions in the period from January 2010 accounting for 60% of s47F FOI workload, I am not satisfied that the volume of requests generated by s47F is sufficient to be an unreasonable interference with the operations of the agency (s 89L(4)(b)).

I note that the majority of s47F requests cited by the s47F were made before the reforms to the FOI Act in November 2010. As the Guidelines explain at paragraph 12.6:

> *Because this power is a new one, the Information Commissioner will not consider making a vexatious applicant declaration based only on a person's FOI access actions prior to 1 November 2010. A declaration must relate to a person's access actions under the law that applies from 1 November. A prior access action may, however, be relevant, particularly if it was pursued through all stages of the review process and relates to the same documents or issues arising in a fresh access application.*

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[1] *Macquarie Oxford Dictionary*, 2nd edition.

[2] *Price and Queensland Police Service, Unreported, Queensland Information Commissioner 29 June 2007.* In this decision the Information Commissioner found that a person's right to access information would not automatically be lost if they annoyed a public official or used abusive or offensive language.

Since the reforms to the FOI Act, s47F has made 20 access actions to s47F in a period approaching two years and I am not satisfied that this number is an unreasonable interference on s47F operations.

s47F failure to direct his FOI requests to the s47F FOI section and the subsequent time and effort expended by s47F staff to search for documents similarly cannot be characterised as neither 'harassment' and 'intimidation' nor an unreasonable interference on s47F operations. If s47F considers the volume of the requests to be such that officers would need to be diverted from their usual duties then there is scope for s47F to consider using the practical refusal mechanism (s 24AB) in the FOI Act to more effectively deal with future requests from s47F

s47F also argued that s47F has made requests for documents that are the same or similar to documents previously requested under the FOI Act. From the evidence provided by s47F two requests by s47F were for similar documents previously requested (s47F ref: FOI 2011/28 and FOI 2011/14). Where FOI requests are the same or similar to previous requests that have been refused or granted, it is open to s47F to continue to make access refusal or access grant decisions citing its past decisions and reasons. I do not consider that doing so would constitute an unreasonable interference with s47F resources such that applying a restriction on s47F statutory rights under the FOI Act is warranted.

For the reasons I have outlined above, I have decided not to make a declaration under s89K(1) and refuse s47F application for a vexatious applicant declaration. I appreciate that you will be disappointed with my decision and I encourage the s47F to consider using other provisions in the Act to more effectively deal with future requests from s47F. The OAIC is happy to provide agencies with further guidance on the use of such provisions in the FOI Act to deal with challenging and difficult FOI requests.

If you would like to discuss this matter please contact s47F, the case officer in charge of this matter, on s47F or email s47F @oaic.gov.au. In all correspondence on this matter, please quote the reference number **RQ11/01453.**

Yours sincerely

s47F

James Popple
Freedom of Information Commissioner
7 September 2012

Australian Government
Office of the Australian Information Commissioner

Our reference: RQ13/01318

s47F
Acting Principal Legal Advisor
s47F

Sent via email: s47F gov.au

Dear s47F

s47F vexatious applicant submissions: s47F (OAIC reference RQ13/01318) and s47F (OAIC reference RQ13/01319)

I am writing to you in response to the s47F s47F application to this Office, to have s47F and s47F declared as vexatious applicants under the *Freedom of Information Act 1982* (the FOI Act).

I have decided to decline the application. s47F application seeks a declaration that would apply to both s47F and s47F It is my view that an application should be submitted in relation to each individual so their circumstances can be considered separately. This would be of obvious benefit in undertaking any consultations with s47F and s47F if required by s 89(3).

I note that on 30 August 2013, s47F of this office discussed this view with s47F . As advised in that conversation, it is open to s47 to consider making an application that relates to each individual about their individual circumstances.

If you have any questions with regards to this correspondence, please feel free to contact s47F via email s47F @oaic.gov.au or s47F In all correspondence with regards to these matters, please include the above mentioned OAIC reference numbers.

s47F

Prof John McMillian
Australian Information Commissioner

9 September 2013

Australian Government
Office of the Australian Information Commissioner

s47F
Secretary
s47F
s47F

Dear s47F

s47F application for vexatious applicant declaration

I refer to the s47F (the Department) application of 1 November 2013 that s47F be declared a vexatious applicant under s 89K of the *Freedom of Information Act 1982* (the FOI Act).

I am writing to inform you that, after careful consideration, I have decided not to declare s47F a vexatious applicant. My reasons for this decision follow.

Background and procedure followed in this case

On 1 November 2013, the Department applied to the OAIC to have s47F declared a vexatious applicant under s 89K of the FOI Act. The Department contended that s47F *repeated engagement in access actions is an unreasonable interference with the operations of the Department and that this behaviour constitutes an abuse of process'.* The Department's application included a table outlining access action details and copies of correspondence between s47F and the Department relating to his access actions, complaints and other matters.

The OAIC invited s47F on 14 February 2014 to respond to the Department's application by a written or oral submission. He advised by telephone on 4 March 2014 that he intended not to lodge further FOI applications until the vexatious applicant application was resolved. He also indicated a willingness to be guided by the OAIC's view as to the appropriateness of requests before submitting them to the Department.

On 14 March 2014, s47F made a written submission. He requested an opportunity to make oral submissions and proposed to provide further evidence. He requested the OAIC to consider mediation to resolve the matter; and advised that no new access actions had been initiated by him since he was made aware of the Department's application.

s47F written submission was forwarded to the Department on 7 April 2014.
On 16 April 2014, I met with s47F and s47F. At that meeting he made oral submissions and I raised with him issues in the Department's submission and questioned him about aspects of his written submission.

On 8 May 2014, I met with you to outline my preliminary views following the Department's application and the response received from s47F

Legislative framework

You are aware: of the terms of s 89K(1) of the FOI Act that enable me to declare a person to be a vexatious applicant, the grounds on which I may make a declaration (s 89L); and my discussion of this power in *Department of Defence and 'W'* [2013] AICmr2 (17 January 2013). These matters are also discussed in Guidelines that I have issued under s 93A of the FOI Act.

An agency that has applied under s 89K(2)(a) bears the onus of establishing that I should make a declaration (s 89K(3)). A clear and convincing case should be established, having regard to the affect that a declaration may have on limiting a person's opportunity to exercise the legal right of access to documents conferred by the FOI Act.

The decision to make a vexatious applicant declaration involves an exercise of discretion. Other factors relevant to that discretion that I have noted in previous cases are that the FOI Act does not otherwise limit the number of FOI requests that a person can make in a given period; an agency cannot have regard to its belief as to a person's reasons for seeking access (s 11(2)(b)); and the FOI Act contains procedures that can be used by an agency to reduce a substantial and unreasonable impact of a person's requests on its operations. A person's response to an application to have them declared vexatious can also be a relevant factor in deciding whether a declaration should be made.

I must also bear in mind that any declaration I make can be reviewed on the merits by the Administrative Appeals Tribunal, following an application by a person against whom a declaration is made (s 89N). In reviewing a declaration the Tribunal can have regard to fresh evidence submitted in the proceedings by an agency or the person against whom the declaration was made.

The Department's application

The Department submitted that s47F has repeatedly engaged in access actions that constitute an abuse of the process for an access action under ss 89L(1)(a) and 89L(4). The Department's application summarised s47F use of the FOI Act over a three year period. This included 110 access actions, associated FOI complaints (IC review applications and complaints to the OAIC) and other interactions with the Department. It was submitted that these access actions were an abuse of process for the following reasons:

- the high volume and repetitious nature of the access actions
- using the FOI Act to relentlessly pursue perceived grievances with the Department
- using the FOI Act to engineer new grievances, and
- lodging a high volume of complaints against the Department that are designed to annoy, harass and criticise staff.

The Department submitted that the cumulative impact of those access actions and related activities *'demonstrates a deliberate attempt by* s47F *to disrupt and interfere with the operations of the Department'*.

The Department did not seek specific terms or conditions for a declaration, other than to have s47F declared vexatious in the broadest possible sense.

Analysis

My preliminary view, upon considering the Department's application, was that it made a case that required further consideration. The information provided by the Department suggested that s47F had 'repeatedly engaged in access actions', as required by s 89L (1)(a)(i). As to whether that repeated engagement involves 'an abuse of the process' for access actions (s 89L(1)(a)(ii)), my preliminary view was that there were three particular areas of concern:

- s47F continued to make regular FOI applications even though a substantial volume of documents (said by the Department to be over 8,000 folios) had already been provided to him under the FOI Act
- Many of the more recent FOI applications appeared to be directed to obtaining documents that may have been created in response to his earlier FOI requests and complaints to the Department, and
- Steps taken by the Department to settle his apparent grievances seemed not to have lessened his continued use of the FOI Act.

I took note also of the Department's comment that s47F had requested access to documents that had earlier been provided to him.

I have nevertheless decided, after considering s47F written and oral submissions, that I should not exercise the discretion in this case to make a declaration at this time. This is based principally on three considerations.

First, many of s47F access actions occurred at a time when there were apparent defects and shortcomings in the Department's FOI administration. These were raised by the FOI Commissioner, s47F, in a meeting between OAIC and Departmental staff on 12 December 2012, and in letters dated 25 November 2013 from s47F to yourself and s47F. The discussion and letters referred specifically to the handling of Mr s47F matters. Among the preliminary findings conveyed by s47F in the letter to s47F were that the Department had consistently failed to adhere to statutory timeframes in managing and responding to s47F requests, it had not appropriately managed deemed decisions on his applications, it had not communicated effectively with him in relation to his FOI requests, and the Department's processing of his requests had not significantly improved in the year following the meeting in December 2012.

Having regarding to the Department' response to the specific issues raised in the 25 November 2013 letter and the consequent meeting with you on 18 December 2013, on 23 January 2014, s47F made recommendation under s 88 of the FOI Act.

The Department's letter of 1 November 2013 applying for a declaration 'acknowledges that due to high staff turnover in the FOI area, together with the complex and voluminous nature of these requests, that errors have been made in processing some past applications from s47F A similar finding that errors occurred in processing s47F FOI applications

were made in an independent review undertaken by s47F in 2011-12. Recommendations for revising the contact arrangements between s47F and the Department were made in another report by s47F in 2012. The s47F also wrote to s47F on 25 May 2011 to express disappointment at Departmental delays in processing s47F requests.

The former s47F of the Department wrote to s47F on 8 May 2013, following the s47F reviews, to establish the foundation for an improved relationship between him and the Department. The letter apologised in general terms for mistakes that had been identified by the s47F review in the Department's FOI administration and complaint handling.

It is probable that the pattern of s47F repeated FOI requests was a contributing factor to the FOI administration difficulties the Department was facing. Nevertheless, it is problematic to declare a person to be a vexatious applicant when the administrative burden which their repeated requests may have imposed on an agency stems as well from that agency's handling of the requests. The frank and repeated acknowledgement of the Department's administrative shortcomings makes it more difficult to make a vexatious applicant declaration until it is clearly apparent that the defects have been rectified and are no longer a contributing factor to unsatisfactory FOI processing.

Secondly, s47F has given a plausible alternative explanation for at least some of the instances referred to in the Department's submission. Among the points he makes in his submission of 14 March 2014 (substantiated at times by extracts from Departmental documents and his own record of dealings with the Department) are: that some of his FOI requests were made at the suggestion of the Department; some requests were made because of the Department's failure to act in a timely manner upon receipt of a request for administrative access to information; the Department had consistently failed to comply with the FOI Act statutory timeframes; his telephone contact with Departmental officers was often brief and undertaken either to follow up on an FOI processing delay or at the initiative of the Department; no evidence had been provided that he had engaged in overtly harassing, intimidating or disrespectful behaviour; and that some of his access actions and complaints stemmed from the Department's tardiness in correcting an erroneous statement that he and s47F.

He referred also to instances in which he had cooperated with the Department, for example, by agreeing to the Department's requests for an extension of the FOI processing period, narrowing the scope of some requests, withdrawing some other requests following consultation with the Department or at the OAIC's suggestion, and directing his communication through the Client Liaison Unit.

I appreciate that the Department may not agree fully or at all with the explanation that s47F has proferred. However, I could not make a vexatious applicant declaration based on these disputed issues without further consulting the parties to enable me to make a correct (or defensible) finding of fact on each disputed issue. If the result of further consultation was that I preferred s47F account on some of the disputed issues, the strength of the Department's application would be correspondingly reduced.

With that in mind, and as explained below, I have decided that the more productive path at this point in time is to monitor whether the changed circumstances that have arisen following the Department's application resolve the concerns expressed in that application.

Thirdly, my current assessment is that the burden of s47F FOI requests upon the Department has lessened since the current application was made to the OAIC and provided to s47F Partly this is due to the arrangements put in place between the Department and the Australian Government Solicitor for administering s47F matters.

Partly too it is due to a change in s47F request pattern in the last few months. I noted above that s47F has not initiated new access actions following the Department's application, and that he expressed a willingness to undertake mediation and to receive advice from the OAIC to address the issues raised by the Department. He confirmed at our meeting that he did not anticipate that he would be making as many FOI requests as previously.

While not agreeing with the Department's assessment of his FOI request pattern, he acknowledged that it was important to note and reflect upon the Department's serious step of applying for a vexatious applicant declaration. (He also offered to agree to a process of making requests only when doing so was approved by the OAIC, however we explained that this would not be a viable role for the OAIC in routine FOI processing.)

The way a person responds to an application to have them declared vexatious is, as noted above, a relevant matter in deciding whether a declaration should be made. I have also taken into account that the OAIC has not encountered the same difficulty as the Department in dealing with s47F The OAIC has had more frequent contact with him than with most other complainants and IC review applicants, but a constructive and respectful working relationship has nevertheless been established.

Decision

For those reasons I have decided not to make a vexatious applicant declaration as requested by the Department. I acknowledge that the Department's application raised serious issues that required further consideration, and these have in fact been taken up with s47F As foreshadowed, I have attached a copy of my proposed response to s47F The OAIC will indicate to s47F that it will maintain a continuing interest in the pattern of his FOI requests to the Department. You will note that I propose to provide s47F with a copy of this letter, any comment that the Department wishes to make, for inclusion or otherwise, should be provided by **cob Friday 27 June 2014**.

Should the Department in future decide to make a fresh application for a vexatious applicant declaration, the OAIC would expect it to be based primarily on the pattern of access actions hereafter. It is of course open to an agency in making an application to refer to and rely upon prior access actions, as noted in the FOI Guidelines at para [12.6]. However, the OAIC expects that the consultation that has occurred with s47F and the Department in response to the current application will draw a line between prior and subsequent FOI access actions.

If you would like to discuss this matter please contact s47F, the case officer in charge of this matter, on s47F or email s47F @oaic.gov.au. In all correspondence on this matter, please quote the reference number **RQ13/01721.**

Yours sincerely

s47F

Prof John McMillan
Australian Information Commissioner
23 June 2014

Australian Government
Office of the Australian Information Commissioner

Our reference: **RQ14/01512**
Your reference: **LS50**

s47F
s47F
s47F

Dear s47F

s47F application for vexatious applicant declaration

I refer to the s47F application of 4 July 2014 that s47F be declared a vexatious applicant under s 89K of the *Freedom of Information Act 1982* (the FOI Act).

I am writing to inform you that I have decided not to declare s47F a vexatious applicant. My reasons for this decision follow.

Background

The grounds for making a declaration specified in s 89L of the FOI Act relate to an 'access action' engaged in by a person. The s47F application refers to two access actions by s47F and a third by s47F:

- s47 FOI Request No. LS4849 by s47F on 4 October 2013 for access to the s47F Software source code (**first access action**)
- s47 FOI Request No. LS4912 by s47F on 11 December 2013 for the 'original machine readable document' of the s47F access refusal decision on internal review in relation to the first access action (**second access action**), and
- s47 FOI Request No. LS5069 by s47F on 13 June 2014 for Attachment B (described as a 'schedule of the relevant documents') to a letter dated 17 April 2014 from the s47 to the OAIC concerning s47F application for IC review of s47 decision on the first access action (**third access action**).

The relevant timeline of events is as follows:

- 9 December 2013: the s47 made an access refusal decision on internal review in relation to the first access action

- 10 December 2013: s47F asked if he could have a word or PDF of the access refusal decision (effectively by administrative release)
- 11 December 2013: the s47 refused s47F request on the basis that providing the decision in the original format 'completes the s47F obligations' under the FOI Act
- 11 December 2013: s47F initiated the second access action, seeking access to the document which the s47 had refused to provide to s47F
- 10 January 2014: the s47 decided to grant s47F access to the document
- 5 February 2014: s47F applied to the OAIC for IC review of the s47 decision on the first access action. As part of the IC review process, the s47 wrote to this office on 17 April 2014 and provided a schedule of the documents that fell within the scope of the original access action
- 13 June 2014: s47F initiated the third access action, seeking access to that schedule of documents, either by administrative release or if necessary under the FOI Act
- 26 June 2014: the s47 notified s47F of its intention to refuse access to the schedule under s 24AA for a practical refusal reason, initiated a request consultation process under s 24AB, and foreshadowed its view that the third access action was vexatious
- 26 June 2014: s47F declined to revise the scope of his request
- 25 June 2014: the OAIC closed its IC review of the decision on the first access action under s 54W(b) of the FOI Act, to allow s47F to apply to the AAT for review of the s47F access refusal decision. (I understand that s47F applied to the AAT for review on 30 June 2014.)
- 4 July 2014: the s47 made an access refusal decision on the third access action
- 4 July 2014: the s47 applied under s 89K(2)(a) of the FOI Act to the Information Commissioner to declare s47F a vexatious applicant.

Grounds for declaration (s 89L)

Section 89L sets out the grounds on which a vexatious applicant declaration can be made:

> (1) The Information Commissioner may make a vexatious applicant declaration in relation to a person only if the Information Commissioner is satisfied of any of the following:

(a) that:
  (i) the person has repeatedly engaged in access applications; and
  (ii) the repeated engagement involves an abuse of the process for the access application;
(b) a particular access action in which the person engages involves, or would involve, an abuse of the process for that access application;
(c) a particular access action in which the person engages would be manifestly unreasonable.

The s47 did not specify which of the grounds under s 89L(1) should form the basis of my declaration, but appears to be relying on s 89L(1)(a) or s 89L(1)(b). The scope of those grounds is discussed in Guidelines that I have issued under s 93A of the FOI Act, Part 12.[1] Those Guidelines have been substantially revised in the period following the receipt of the s47F application.

Under s 89K(3), the s47 bears the onus of establishing that I should make the declaration.

s47F submissions

The s47 application for a declaration on 4 July 2014 contends that 's47F has made or caused to be made collateral requests' in furtherance of his first access action, and refers to the second and third access actions. Additional points made in the application include:

- the circumstances relating to the first and second access actions 'indicate a degree of collusion' between s47F and s47F in relation to the second access action
- the third access action is inappropriate in that it overlaps with the first access action and canvasses the same issues relating to the application of the trade secrets exemption (s 47 of the FOI Act) that are before the AAT
- s47F correspondence with the s47 contains contentions that are fanciful, argumentative and distort the s47F position, and cause unnecessary and substantial work for the s47 in response
- s47F email of 26 June 2014 (as part of the request consultation process) raises an irrelevant consideration, misconceives the law relating to vexatious proceedings and creates unnecessary work for the s47 to respond to fanciful contentions.

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1 Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*.

Similar points were made by the s47 in its letter to s47F dated 4 July 2014 in relation to the third access action, including that:

- the action is inappropriate by raising the same exemption issues that are before the AAT
- it is 'an abuse of process' for s47F to 'seek to achieve indirectly that which [he has] been informed by OAIC cannot be achieved by [him] directly'
- it is 'vexatious' to involve the s47 in separately canvassing issues arising in relation to the then foreshadowed AAT review, and will require 'considerable effort' by the s47 to make a fresh decision, including several days' work to prepare and consider a recommendation
- processing the third access action would unreasonably divert the resources of the s47 from its other operations.

Repeatedly engaging in access actions that involve an abuse of process (s 89L(1)(a))

A declaration may be made on the basis that a person has 'repeatedly engaged' in access actions that involve an abuse of process (s 89L(1)(a)).

The FOI Guidelines note that the FOI Act does not define or specify a number for 'repeatedly', and that the number of requests required to establish a pattern of repeated requests will in part depend on the nature of the abuse of process that is said to be involved (see [12.15-16]).

I consider below whether any of the three access actions individually or jointly constitutes an abuse of process. However, independently of that discussion, I would not regard the three access actions as establishing that s47F has repeatedly engaged in access actions.

The first access action was a standard FOI request that was processed and is being externally reviewed in a regular manner and contains no features that give rise to abuse of process concerns. The second access action was successful, and was directly referable to the s47F refusal to provide administrative access to the document in the form requested politely by s47F in his email dated 10 December 2013. The third access action gives rise to different considerations that are discussed below, but does not support a finding (individually or in combination with the other two access actions) that s47F has 'repeatedly engaged' in access actions as required by s 89L(1)(a)(i).

For the purposes of this analysis I have accepted that the three access actions are connected. However, I do not think it accurate, for the purpose of deciding whether

there has been an abuse of process that warrants the making of a vexatious applicant declaration, to describe the second access action as an indication of 'collusion' between s47F and s47F The broader FOI context in which these matters are to be decided is that the objects of the FOI Act include facilitating scrutiny, comment and review of government activity. It is to be expected that this will sometimes occur between two or more people on a group or coordinated basis.

Engaging in a particular access application that is an abuse of process (s 89L(1)(b))

A declaration may be based on a single access action that involves an abuse of the process for an access action (s 89L(1)(b)). It is only the third access action that warrants consideration under this heading.

On its face, there is nothing untoward about the third access action. It is a specifically framed request for access to a particular document. The s47 was of the view that a practical refusal existed for refusing the request, and initiated a request consultation process under s 24AB.

This was an appropriate course of action by the s47 if it had concerns about the workload impact of the third access action. Agencies are expected to consider action of that kind before applying for a vexatious applicant declaration. As explained in the FOI Guidelines, a relevant consideration in considering a declaration is whether an agency has had recourse to options such as this to regulate or reduce the impact of an FOI request on the workload or operations of the agency (see [12.11]).

I place no weight on the s47F contentions that s47F submissions were misconceived, fanciful or distorting. I would not have characterised the submissions in that way, and in any case an agency should allow some latitude for a member of the public to frame submissions in a way that does not persuade the agency.

I nevertheless acknowledge the s47F central concern, that the third access action ostensibly sought access to documents that were at that time the subject of an IC review and later an AAT review. An OAIC submission to a review of the Act conducted by Dr Allan Hawke AC drew attention to this as a problem in the operation of the FOI Act and made two proposals for reform.[2] One was to provide in the FOI Act that a party involved in litigation against an agency cannot make an FOI request for documents relating to issues in contention in the litigation until the conclusion of that litigation (at [156]). The other was to provide a partial exemption

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2 Office of the Australian Information Commissioner, 'Review of freedom of information legislation: Submission to the Hawke Review, December 2012', by Prof John McMillan and Dr James Popple.

for the OAIC from the FOI Act for documents regarding its merit review and complaints functions (at [169]).

Those recommendations have not been implemented and it is presently open to a person to make an FOI request for documents that are the subject of other proceedings. It would consequently be wrong to base a vexatious applicant declaration on the existence of such a request.

Discretion to make a declaration

The decision to make a vexatious applicant declaration is discretionary (FOI Guidelines at [12.9]). Assuming I was satisfied that a ground existed for making a declaration, a discretionary factor that would count against that step being taken is that the s47 has made a final decision on the three actions.

The purpose of a vexatious order is to regulate the future actions of a person that can interfere with the operations of an agency. The s47 has not pointed to any present or potential conduct by s47F that warrants regulation by a declaration.

Decision

For the reasons set out above, I have decided not to declare s47F to be a vexatious applicant. I am not satisfied that his access actions involved an abuse of process.

The contact officer for this matter is s47F, who can be contacted on s47F. Alternatively you should feel free to contact me directly on s47F In all correspondence in this matter, please quote the reference number **RQ14/01512.**

I have forwarded a copy of this letter to s47F as he was informed in your letter of 4 July 2014 that you would be applying for a declaration and therefore has a relevant interest in knowing the outcome.

s47F

Prof John McMillan
Australian Information Commissioner

20 October 2014

Australian Government
Office of the Australian Information Commissioner

Our reference: RQ15/03796:TS

s47F
Senior Executive Lawyer
s47F
Sent by email to: s47F .gov.au

Dear s47F

Application for a vexatious applicant declaration by the s47F

I refer to the application made by the s47F (the Department) on 23 July 2015, in which the Department requested that s47F be declared a vexatious applicant under s 89K of the *Freedom of Information Act 1982* (FOI Act).

Summary

I have considered your application, and I have decided not to declare s47F a vexatious applicant, as I am not satisfied that there are adequate grounds for a declaration to be made.

In making this decision, I have considered the following material:

- the Department's application;
- the FOI Act, in particular ss 89L, 89K;
- the Guidelines issued under s 93A to which agencies must have regard in performing a function or exercising a power under the FOI Act, in particular paragraphs [12.1-12.17], [12.24-12.26], and [12.30-12.32];
- the relevant case law, in particular *Australian Taxation Office and Garret* [2015] AICmr 33, *Department of Defence and Ronald Francis* [2014] AICmr 68, *Comcare and Price* [2014] AICmr 24.

My reasons for this decision are outlined below.

Application

On 23 July 2015, the Department applied to the Office of the Australian Information Commissioner (OAIC) to have s47F declared a vexatious applicant under s 89K of the FOI Act, on the basis that:

> ...the volume and nature of s47F applications [since 14 December 2012] have had an unreasonable detrimental impact on the Department's resources.

In its application, the Department outlined that between 14 December 2012 and 17 July 2015, s47F had made 27 applications under the FOI Act, as well as 16 applications under the *Privacy Act 1988* (Cth) (Privacy Act). The Department advised this was in addition to a number of other Departmental enquiries and complaints made by s47F

On 3 September 2015, the Department proposed that the following terms and conditions be included in a vexatious applicant declaration against s47F

1. *The* s47F *is not required to consider:*
   a. *any request from* s47F *under section 15 of the FOI Act for access to a document;*
   b. *any application by* s47F *under section 48 of the FOI Act to amend or annotate a record of information; or*
   c. *any application by* s47F *under section 54B of the FOI Act for internal review of an access refusal decision*

   where the request or application is received within six months of another request or application made by s47F *under one of the above sections of the FOI Act.*
2. s47F *is not required to consider any request which relates to a document which has previously been the subject to a request or application from* s47F *under the FOI Act; and*
3. s47F *may apply in writing to the Information Commissioner to make a request or application under the FOI Act where one of the circumstances in paragraphs [1] or [2] exist, outlining her reasons for making the request. The Information Commissioner may grant written permission for the request or application to be made. If written permission is given by the Information Commissioner,* s47F *must process the request or application as if this declaration was not in force.*

On 29 October 2015 and 10 November 2015, the Department provided the OAIC with further details, outlining that s47F had engaged the Department in an additional four access actions since its application, as well as a further ten requests under the Privacy Act.

Legislation

Under s 89K(1) of the FOI Act, the Information Commissioner may, by written instrument, declare a person to be a vexatious applicant. An agency may apply to the Information Commissioner to make a declaration (s 89K(2)(a)), as in this case, and the agency bears the onus of establishing that the Information Commissioner should make the declaration (s 89K(3)).

There is a significant public interest in a person having and exercising a right to access information held by government agencies. But there is also significant public interest that in the giving of access to information, government agencies are not burdened to such an extent that the efficiency of their operations is hampered. Given that the practical effect of a vexatious applicant declaration is to affect a person's access rights under the FOI Act, I must carefully balance these factors.

Section 89L(1) of the FOI Act outlines the grounds on which the Information Commissioner may make a declaration. Before such a declaration can be made, I must be satisfied of one of the following grounds:

- a person has engaged or repeatedly engaged in access actions that would involve an abuse of process (s 89L(1)(a));
- a particular access action by a person involves an abuse of process (s 89L(1)(b));
- a particular access action in which the person engages would be manifestly unreasonable (s 89L(1(c)).

The Department's application relies on the first of those grounds, repeated engagement in access actions that involve an abuse of process.

An *access action* is defined as making an FOI request, a request for the amendment or annotation of records under the FOI Act, an application for internal review or an IC review application (s 89L(2)). An abuse of process for an access action is defined in s 89L(4) and is explained further below.

Reasons for decision

Repeated engagement in access actions

The term 'repeated engagement' is not defined in the FOI Act. The Guidelines advise that whether a pattern of repeated requests exists, will depend in part on the nature of the abuse of process that is said to be involved.[1] The Department has advised that, as at 10 November 2015, s47F has made a total of 31 access actions since 14 December 2012.

The Department advises that this is in addition to 26 separate requests and complaints under the Privacy Act made by s47F (excluding privacy enquiries she has made), as well as four complaints she has made about the Department with the Commonwealth Ombudsman, and other Departmental enquiries.

For the purpose of deciding whether a vexatious declaration should be made, I can only consider whether s47F has repeatedly engaged in 'access actions', which is defined above. This excludes any actions engaged in by s47F outside of the FOI Act, such as the complaints and requests she has made under the Privacy Act.

Of those 31 access actions, I note that 20 were made in the 2014-15 financial year. This presents a significant increase from one in the 2013-14 financial year, and six in the period 14 December 2012- 30 June 2013. As at 10 November 2015, s47F has engaged in a further four access actions this financial year, which is on par with this time last year (where the bulk of requests were received between December and February).

[1] Guidelines [12.16].

Based on the number of access actions made by s47F in the 2014-15 financial year, and an early indication of a continuing patter this financial year, I am satisfied that s47F has repeatedly engaged the Department in access actions.

Abuse of process

The Department considers that this repeated engagement involves an abuse of process, because it is unreasonably interfering with the operations of the Department for the following reasons:

- it has taken the Department's Information Law Team in excess of 700 hours to process s47F 27 access requests for the period 14 December 2012-30 June 2015 (which excludes at least another 250 hours of Departmental processing time in responding to her other requests and complaints outside of the FOI Act),
- in many cases s47F has made multiple access actions on the same day, and sought information that has been released to her under previous access actions, and
- s47F access actions are all similar in scope and nature, all relating to her involvement in the Department's s47F s47F programme.

The number of access actions made by s47F in the 2014-15 financial year represents approximately 11% of the total number of access requests received by the Department in the 2014-15 financial year,[2] which I acknowledge represents a substantial proportion of the total requests received by Department.

However, having reviewed the information provided by the Department, I am not satisfied that these access actions constitute an abuse of process, on the basis that:

- s47F access requests do not appear complex in nature, in particular they consistently relate to her own personal information.
- s47F does not appear to be requesting voluminous amounts of information, and in most cases the Department has released the information requested by s47F in full, and in under 60 pages.
- It is unlikely that the Department would be required to conduct any substantial or extensive third party consultation in relation to the personal information sought by s47F
- s47F has only made multiple access actions on three dates between 14 December 2012 and 29 October 2015: twice on 26 November 2014; four times on 4 December 2014, and four times on 12 February 2015. It does not appear, based on the terms of her requests, that she made the same request more than once on these occasions.
- It is not evident that s47F has requested access to, or amendment of, the same information, and in most cases, the terms of s47F request do not appear poorly-framed or difficult to discern.

[2] s47F .

- Any overlap in the information sought by s47F between 14 December 2014 and 29 October 2015 appears minor (in most cases involving less than 10 pages of duplicated information) and non-deliberate, as the terms of her requests differ.

Further, the FOI Act does not limit the number of FOI requests that a person can make in a given period, nor the number or type of documents that a person can seek in an individual request to an agency that is subject to the Act.[3]

In light of the personal non-complex nature and relatively limited scope of s47F access actions, as well as the time the Department estimates to have spent responding to these requests (which equates to approximately 28 hours per access action), these access actions do not, in my view, constitute an unreasonable interference with the operations of the Department.

In any case, the FOI Act enables an agency to take other steps (aside from 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. Under s 24, an agency can require an applicant to engage in a request consultation process if it believes there may be a practical refusal reason for refusing a particular request that substantially and unreasonably diverts the resources of the agency from its other operations, or does not adequately identify the documents requested (ss 24, 24AA, 24AB).

In recent Information Commissioner (IC) review matters,[4] I have considered whether the work involved in processing a particular request would constitute unreasonable diversion of the agency's resources, in deciding whether a practical refusal reason exists in accordance with s 24 of the FOI Act. In *Aloysia Brooks and Department of the Prime Minister and Cabinet* [2015] AICmr 66, I found that a processing time of 41 hours would not unreasonably divert the resources of the department (which is similar in size to the Department),[5] in the circumstances.

The Department may wish to refer to these decisions in deciding whether a particular request is likely to be subject to a practical refusal reason in future.

Other measures available to an agency include: seeking an applicant's or the OAIC's agreement to an extension of processing time (ss 15AA, 15AB) and consulting with an applicant about the nature of a request (s 15(3)) and other means of satisfying the applicant's desire to obtain government information,[6] including provision of information administratively (outside of the FOI Act) wherever possible.

Furthermore, under s 24(2), the Department may treat 2 or more requests as a single request if it is satisfied that (a) the requests relate to the same document or documents; or (b) the requests relate to documents, the subject matter of which is substantially the same.

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[3] Guidelines [12.10].

[4] *Aloysia Brooks and Department of the Prime Minister and Cabinet* [2015] AICmr 66; *'FX' and Department of the Prime Minister and Cabinet* [2015] AICmr 39; *'GD' and Department of the Prime Minister and Cabinet* [2015] AICmr 46.

[5] As at 30 June 2015, the Department of Employment had 1805 ongoing employees according to its 2014-15 Annual Report.

[6] Guidelines [12.11].

The Department may also like to give further consideration to how it could proactively manage s47F FOI and privacy matters, for example, through facilitating an automatic release of records where appropriate following s47F interviews s47F and making her personal information, as with all its clients, available informally and through direct customer access wherever possible, for example personal tax invoices and payment details.

Conclusion

The Guidelines explain that 'a clear and convincing case' must be established before a declaration will be made.[7] This is because a declaration has the practical effect of preventing a person from exercising an important legal right conferred by the FOI Act.

For the reasons set out above, I have decided not to declare s47F a vexatious applicant, as I am not satisfied that s47F access actions constitute an abuse of process.

If you would like to discuss this matter, please contact s47F, the case officer in charge of this matter, on s47F. In all correspondence in this matter, please quote the reference number **RQ15/03796.**

Yours sincerely

s47F

Timothy Pilgrim
Acting Australian Information Commissioner

3 December 2015

[7] Guidelines [12.7].

Australian Government
Office of the Australian Information Commissioner

Our reference: RQ15/04109

s47F
s47F
s47F

Dear s47F

s47F application for vexatious applicant declaration

I am writing regarding the application of the s47F s47F of 6 August 2015 that s47F be declared a vexatious applicant under s 89K of the *Freedom of Information Act 1982* (the FOI Act).

I am writing to inform you that, after consideration of the material you have provided to the Office of the Australian Information Commissioner (OAIC), I have decided not to declare s47F a vexatious applicant. My reasons for this decision follow.

Background

s47F

s47F made his first FOI request to s47F in January 2010, and has since made 62 access actions to the s47F to date, representing approximately 31% of the FOI workload for the period of 2010 to 2015.

On 9 September 2011, s47F applied to the Information Commissioner to declare s47F a vexatious applicant under s 89K of the FOI Act. The application was refused, on the grounds that s47F had not adequately demonstrated an abuse of process or harassment by s47F

I note that s47F currently has three access actions on foot with the s47F

I further note that s47F has also corresponded with s47F staff outside of the FOI process multiple times, and that these communications contained messages 'threatening physical unwanted contact, making insulting and derogatory remarks to s47F'. Additionally, s47F submits that s47F made attempts 'to contact s47F

s47F via social media' and that he further 'contacted organisations at which s47F volunteers making derogatory remarks about s47F'.

Legislative framework

Under s 89K(1) of the FOI Act, the Information Commissioner may, by written instrument, declare a person to be a vexatious applicant. An agency may apply to the Information Commissioner to make a declaration (s 89K(2)(a)) and the agency bears the onus of establishing that the Information Commissioner should make the declaration (s 89K(3)).

Section 89L of the FOI Act outlines the grounds on which the Information Commissioner may make a declaration. Before such a declaration can be made, I must be satisfied that a person has engaged or repeatedly engaged in access actions that would involve an abuse of process (s 89L(1)(a)).

An access action is defined as making an FOI request, a request for the amendment or annotation of records, an application for internal review or an IC review application (s 89L(2)). An abuse of process for an access action is defined in s 89L(4) and is explained further below.

Paragraph 12.3 of the Guidelines issued by the Information Commissioner under s 93A of the FOI Act states that relevant in considering an abuse of process is whether an applicant has made repeated requests for documents which have been provided earlier or to which access has been refused. The Guidelines also note the decision by the Federal Court of Australia in *Ford v Child Support Registrar* [2009] FCA 328, which stated that a series of FOI applications of a repetitive nature and apparently made with the intention of annoying or harassing agency staff could be classified as vexatious.

Vexatious applicant declaration application

I note from your submissions that s47F access actions, as described above, and the surrounding circumstances constitute and abuse of process under s 89L(1)(a)(ii) for the following reasons:

- s47F 62 FOI requests have interfered with the normal operations of s47F accounting for 31% of s47F FOI line area workload from 2010 to date;
- s47F repeated requests for similar or related documents are resulting in an unreasonable interference with its operations;
- The nature of s47F request FOI 2015/17 is a deliberate intent to harass or intimidate s47F staff; and

- s47F emails to s47F staff outside of the FOI process coupled with his requests for access constitute harassment within the meaning of the Act.

Decision

There is a significant public interest in a person having and exercising a right to access information held by government agencies. But there is also significant public interest that in the giving of access to information, government agencies are not burdened to such an extent that the efficiency of their operations is hampered. Given that the practical effect of a vexatious applicant declaration is to affect a person's access rights under the FOI Act, I must carefully balance these factors.

Before making a declaration under s 89K, I must be satisfied that one of the grounds for declaration in s 89L(1) is made out. s47F has made a number of repeated access requests and therefore would meet the first part of the test set out at s 89L(1)(a). However, an abuse of process for an access action is defined in s 89L(4) as including, but not being limited to, the following:

(a) harassing, or intimidating an individual or an employee of an agency
(b) unreasonably interfering with the operations of an agency
(c) seeking to use the FOI Act for the purpose of circumventing restrictions on access to a document (or documents) imposed by a court.

s47F is seeks to have s47F declared a vexatious applicant on grounds (a) and (b), that is, harassing or intimidating an individual or an employee of an agency, and unreasonably interfering with the operations of an agency. s47F bears the onus of establishing that there is an abuse of process (s 89K(3)).

a) Harassing or intimidating an individual or an employee of an agency

s47F submits that s47F has targeted and harassed individual employees of the agency repeatedly by correspondence, sending 'threats of self-harm to s47F Officers...including a picture of himself in a rope noose', and an email to s22 stating 'I tried to kill myself – will do a better job next time'.

They have additionally claimed that s47F access action FOI 2015/17 constitutes harassment as it 'is targeted to harass individual employees and unreasonably interferes with s47F operations, especially in the context of s47F previous access actions and court proceedings'.

The ordinary meaning of the words 'harassment' and 'intimidation' involve a person being troubled by repeated attacks, persistently disturbed or forced into or deterred from some action by inducing fear.[1]

[1] *Macquarie Oxford Dictionary*, 2nd edition.

I have examined a history of s47F access requests and their content. In my opinion, these requests cannot be characterised as an abuse of process because they did not involve 'harassment' and 'intimidation'[2] as defined by the Act. s47F made no submissions to the effect that the requests themselves contained abusive or threatening language, nor did I see any evidence of such in the samples provided or the history of FOI requests provided by s47F (Attachment A). The requests did not attempt to repeatedly seek documents to which access had been denied.

While I note that s47F made regular contact which could be considered disturbing or harassing with s47F officers, particularly s47F, I also note that this contact was external to the FOI process. While I accept that the content of these emails was disturbing and intimidating, there is no evidence to suggest that the FOI process or requests were used as a vehicle to harass or intimidate s47F staff. It is clear that this correspondence, while admittedly confronting, does not fall within the jurisdiction of the FOI Act.

In relation to FOI request FOI 2015/17, while I concede that the request is seemingly intrusive and direct in its content and expression, I do not discern in it any intent to harass or intimidate. The request, for example, does not contain any abusive or derogatory remarks or comments, nor does it make any threat against any person, nor request documents repeatedly denied to the FOI applicant. It simply asks for documents, and the s47F is at liberty to refuse this request in the event that the documents fall within the exemptions specified in the FOI Act. I do not believe that the Act permits access requests to be defined as 'harassing' simply because their content may be intrusive or distasteful.

Therefore, in view of the evidence, I am not satisfied that s47F requests satisfy the requirements of s 89L(4)(a).

b) Unreasonably interfering with the operations of an agency:

While I appreciate that s47F has made more than 62 access actions from January 2010 to date, accounting for 31% of s47F FOI workload, I am not satisfied that the volume of requests generated by s47F is sufficient to be an unreasonable interference with the operations of the agency (s 89L(4)(b)).

I note from Attachment A that a large number of s47F requests cited by the s47F were made before the reforms to the FOI Act in November 2010. As the Guidelines explain at paragraph 12.6:

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[2] *Price and Queensland Police Service, Unreported, Queensland Information Commissioner 29 June 2007*. In this decision the Information Commissioner found that a person's right to access information would not automatically be lost if they annoyed a public official or used abusive or offensive language.

Because this power is a new one, the Information Commissioner will not consider making a vexatious applicant declaration based only on a person's FOI access actions prior to 1 November 2010. A declaration must relate to a person's access actions under the law that applies from 1 November. A prior access action may, however, be relevant, particularly if it was pursued through all stages of the review process and relates to the same documents or issues arising in a fresh access application.

In examining the breakdown of requests received by s47F it is evident that s47F access requests have decreased in number over time. More significantly, s47F made one access request in 2013, one in 2014 and four in 2015. Thus, while in the past, s22 has submitted a considerable number of access requests, he has lodged only six requests in the past three years, which required a combined total of 63 hours processing time. This cannot reasonably be considered a disruption or drain on s47F resources. I also note that the requests do not seek documents to which access has been refused.

For the reasons I have outlined above, I have decided not to make a declaration under s 89K(1) and refuse s47F application for a vexatious applicant declaration. I appreciate that you will be disappointed with my decision and I encourage the s47F to consider using other provisions in the Act to more effectively deal with future requests from s47F or, where necessary other jurisdictions. The OAIC is happy to provide agencies with further guidance on the use of such provisions in the FOI Act to deal with challenging and difficult FOI requests.

If you would like to discuss this matter please contact s47F the case officer in charge of this matter, on (s47F or email s47F i@oaic.gov.au . In all correspondence on this matter, please quote the reference number **RQ15/04109.**

Yours sincerely

s47F

Timothy Pilgrim
Acting Information Commissioner
22 October 2015

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ABN 85 249 230 937

Our reference: RQ16/00567

s47F
Director
Compliance and Governance Branch
s47F

By email: s47F gov.au

Dear s47F

s47F **application for vexatious applicant declaration**

I am writing regarding the application of the s47F of 27 January 2016 that s47F be declared a vexatious applicant under s 89K of the *Freedom of Information Act 1982* (FOI Act)

On 7 December 2016, s47F spoke with you and informed you of his preliminary view that, in light of recent vexatious applicant declarations made by the Information Commissioner, it did not appear from the facts that s47 has sufficiently justified that a vexatious applicant declaration should be made in this case. You advised that you would like to consider the recent vexatious applicant declarations made by the Information Commissioner before deciding whether s47 wished to withdraw its application.

On 15 December 2016, s47F followed up with you as to whether s47 wished to proceed with its application.

On 16 December 2016, you advised that s47 would like to continue with its application and will provide the OAIC with a summary of distinguishing features between the recent vexatious declarations made by the Information Commissioner and the present application.

On 16 December 2016, s47F requested that s47 provide its further submissions by 13 January 2017.

On 18 December 2016, s47F advised the OAIC by email that he will not be making any further FOI requests to the s47F

On 19 December 2016, s47F sent you a copy of s47F email and requested a response by 23 December 2016. We did not receive a response from s47 to this email.

On 4 January 2017, s47F sent a follow up email to you and requested confirmation as to whether s47 wished to proceed with its application by 13 January 2017. We did not receive a response from s47 to this email.

On 16 January 2017, s47F tried to contact you by telephone and left a voicemail to request a return call. s47F also sent an email requesting confirmation as to how s47 wished to proceed in this matter. s47F also highlighted that if s47 does not respond by 30 January 2017, we will consider that s47 no longer wished to proceed with its application to declare s47F as a vexatious applicant.

I note that this date has now passed and no further response was received from s47F

Accordingly, we note that this matter is now closed on the basis that s47 no longer wishes to continue with its application to declare s47F as a vexatious applicant under s 89K of the FOI Act.

If you would like to discuss this, please contact s47F the case officer handling this matter on s47F or s47F @oaic.gov.au. In all correspondence please quote RQ16/00567.

Yours sincerely

s47F

Rocelle Ago
Director – FOI Dispute Resolution
Office of the Australian Information Commissioner

31 January 2017

Review rights

Judicial review

You can apply to the Federal Court of Australia or the Federal Circuit Court for a review of a decision of the OAIC if you think that a decision by the OAIC not to review or not to continue to undertake review of your IC review application under the *Freedom of Information Act 1982* (the FOI Act) is not legally correct. You can make this application under the *Administrative Decisions (Judicial Review) Act 1977*.

The Court will not review the merits of your case but it may refer the matter back to the OAIC for further consideration if it finds the decision was wrong in law or the OAIC's powers were not exercised properly.

An application for review must be made to the Court within 28 days of receiving the decision. You may wish to seek legal advice as the process can involve fees and costs. Please contact the Federal Court registry in your state or territory for more information, or visit the Federal Court website at http://www.fedcourt.gov.au/.

Making a complaint to the Commonwealth Ombudsman

If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman). The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated unfairly.

If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the Commonwealth Ombudsman's website at http://www.ombudsman.gov.au.

Australian Government
Office of the Australian Information Commissioner

Our reference: RQ16/01591

s47F
s47F
s47F
s47F

By email: s47F .gov.au

Dear s47F

s47F application for vexatious applicant declaration

I am writing regarding the application of the s47F (the Department) of 9 May 2015 that s47F be declared a vexatious applicant under s 89K of the *Freedom of Information Act 1982* (the FOI Act).

I am writing to inform you that, after consideration of the material you have provided to the Office of the Australian Information Commissioner (OAIC), I have decided not to declare s47F a vexatious applicant. My reasons for this decision are below.

Background

On 27 April 2016, s47F made five FOI requests to the Department. Prior to that, three FOI requests had been made by s47F in 2015 and 2016.

On 9 May 2016, the Department made an application to the OAIC for a vexatious applicant declaration under s 89K of the FOI Act. The application specifies that the application relates to the requests of 27 April 2016 and 'the Department is not seeking any declaration in relation to any other FOI applications from s47F

The Department submits in the application that 'the Current Access Actions are an abuse of process for the purposes of 89L(4)(a) of the FOI Act and having regard to the paragraph 12.22 of the FOI Guidelines', which provide:

> 12.22 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, and especially if language is used that is insulting, offensive or abusive; unsubstantiated, derogatory and inflammatory allegations against agency staff; requests that are targeted at personal affairs information of agency employees; requests that are designed to overawe agency staff and force them to capitulate on another issue; requests of a repetitive nature that are apparently made with the intention of annoying or harassing agency staff; and a person's refusal or failure to alter dubious conduct after being requested by an agency to do so.

The application further provides:

> The Department considers the Current Access Actions are not genuine, but have been made because s47F objected to the Department's approach of publishing the documents released in response to s47F 20 January 2016 request on its disclosure log at the same time as those documents were released to s47F The basis on which the Department has formed this view as a result of the telephone conversation referred to above particularly given that, prior to the Current Access Actions, the Department had received only three FOI requests from s47F over a three year period.

Submissions from s47F

provided submissions in response to the Department's application.

s47F submits:

s47F

s47F [redacted]

I have considered s47F submissions in making my decision.

Legislative framework and analysis

Section 89K of the FOI Act provides that I may, by written instrument, declare a person to be a vexatious applicant. In making the application for a declaration, an agency bears the onus of establishing that a declaration should be made (s 89K(3)).

A declaration has the practical effect of preventing a person from exercising an important legal right conferred by the FOI Act, and will not be lightly made. A 'clear and convincing case' must be established (see Guidelines at [12.7]).

I may make a vexatious applicant declaration only if I am satisfied of any of the following:

- a person has repeatedly engaged in access actions and the repeated engagement involves an abuse of the process for the access action (s 89L(1)(a))
- a particular access action by a person involves an abuse of process (s 89L(1)(b))
- a particular access action by a person would be manifestly unreasonable (s 89L(1)(c)).

In relation to whether s47F has 'repeatedly engaged in access actions', I note no fixed number of access actions is required to establish a pattern of repeated requests and whether a pattern exists will depend in part on the nature of the abuse of process involved (Guidelines [12.16]). In my view however, five FOI requests would generally not be sufficient to establish the grounds for a declaration under s 89L(1)(a).

Paragraph 89L(4)(a), to which the application referred, defines 'abuse of the process for an access action' to include 'harassing or intimidating an individual or an employee of an agency'.

In *Comcare and Price* [2014] AICmr 24 at [15], the then Australian Information considered the meaning of these terms:

> 'Applying the dictionary definition, to 'harass' a person is to disturb them persistently, or torment them. To 'intimidate' a person is to use fear to force or deter the actions of the person, or to overawe them.'

The Department's application does not refer to the individual or employee it contends has been harassed or intimidated. I have had regard to the file note of the staff member and the access actions themselves and I consider that the Department has provided no evidence to substantiate this serious claim.

The interpretation by the Department of the reasons for s47F application is speculative and is not supported by the small number of requests made, even if they were made on the same day. I find that the tone of the requests is cooperative and courteous.

Decision

Based on the information provided, none of the grounds under s 89L(1) of the FOI Act has been established. I have decided this is not an appropriate matter to make a declaration under s 89K.

Processing current FOI requests

In the application, the Department advised the OAIC that it would notify s47F that it would cease processing the current FOI requests in line with paragraphs 12.35-36 of the Guidelines.

The Guidelines state:

> 12.35 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 Commissioner was considering the application.
>
> 12.36 Where the agency or minister's application is in respect of a 'particular access action' under s 89L(b) or (c), it would be reasonable (subject to any contrary ruling from the Information Commissioner) to cease processing the particular access action until the Commissioner has decided whether to make a declaration. Where the application is in respect of a repeated number of requests, the agency or minister should consult the OAIC as to whether existing or fresh access actions must be processed. The Commissioner may approve a suspension of FOI processing on the basis that a declaration subsequently made by the Commissioner could include a term providing that the agency or minister is not required to process access actions commenced after a particular date. The Commissioner may also discuss the processing of those actions with the person during consideration of the application for a declaration.

The Department's application was not framed under ss 89L(b) or (c) but under s 89L(1)(a) (repeated engagement in access actions that involve an abuse of process). The Guidelines provide that I may approve an extension in these circumstances, 'on the basis that a declaration subsequently made by the Commissioner could include a term providing that the agency or minister is not required to process access actions commenced after a particular date'.

The Department's application seems to be framed to say that if I do not contact you to tell you to process the request, you will essentially assume that I have approved the suspension.

That approach is not adequate to show that I have exercised a discretion to approve a suspension of the FOI requests on foot.

Given the significance of suspending the legal rights of a person conferred by the FOI Act, the Department should not have assumed that I had done so.

If you would like to discuss this matter please contact s47F the case officer in charge of this matter, on s47F or email s47F @oaic.gov.au. In all correspondence on this matter, please quote the reference number **RQ16/01591.**

Yours sincerely

s47F

Timothy Pilgrim
Acting Australian Information Commissioner

26 May 2016

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Our reference: RQ16/02544

s47F
s47F
s47F

By email: s47F gov.au

Dear s47F

s47F application for a vexatious applicant declaration

I am writing regarding the application of s47F of 15 July 2016 that s47F be declared a vexatious applicant under s 89K of the *Freedom of Information Act 1982* (the FOI Act).

I am writing to inform you that, after consideration of the material you have provided to the Office of the Australian Information Commissioner (OAIC), I have decided not to declare s47F a vexatious applicant. My reasons for this decision are set out below.

Background

On 15 July 2016, you made an application to the OAIC on behalf of s47F for a vexatious applicant declaration under s 89K of the FOI Act. The application relates to FOI requests s47F made to s47F between 2009 and 2012; and recent requests he made to s47F and the s47F during 2016. Your application indicates that s47F made approximately five FOI requests to s47F in 2012, and that he has made approximately eight FOI requests and four applications for internal review in 2016.

On 8 August 2016, you submitted that in 2016 s47F has:

- made six FOI requests to s47F
- made one application[1] for internal review to s47F
- made one FOI request to s47
- made one application for internal review to s47 and
- written to s47F internal reviewer.

1 You advised on 20 October 2016 that an application for internal review of two access refusal decisions had been treated as a single application.

On 12 December 2016, you submitted that since 20 October 2016 s47F has sent further correspondence to s47F and you provided a copy of letters dated 9 November 2016 and 22 November 2016. In the letter dated 9 November 2016, s47F made an FOI request.

Legal framework and analysis

Section 89K of the FOI Act provides that I may, by written instrument, declare a person to be a vexatious applicant. In making the application for a declaration, an agency bears the onus of establishing that a declaration should be made (s 89K(3)).

A declaration under s 89K has the practical effect of preventing a person from exercising an important legal right conferred by the FOI Act, and will not be lightly made. A 'clear and convincing case' must be established.[2]

I may make a vexatious applicant declaration only if I am satisfied of any of the following (s 89L(1)):

(a) that:

(i) the person has repeatedly engaged in access actions; and

(ii) the repeated engagement involves an abuse of the process for the access action;

(b) a particular access action in which the person engages involves, or would involve, an abuse of the process for that access action;

(c) a particular access action in which the person engages would be manifestly unreasonable.

An access action is where the person makes (s 89L(2)):

- a request
- an application under section 48
- an application for internal review, or
- an IC review application.

s47F contends that s47F had repeatedly engaged in access actions, and that the repeated engagement amounts to an abuse of process. An abuse of process includes unreasonably interfering with the operations of an agency (s 89L(4)). s47F further contends that certain of the specific access actions, such as repeated requests for the same documents, could be seen as involving an abuse of process for that access action or as manifestly unreasonable.

Considerations

I consider that in this case the FOI requests made prior to 2016 are largely irrelevant to the question of whether s47F has engaged in an access / repeated access actions that involve an abuse of process; and whether a particular access action, from that time, would be manifestly unreasonable. In my view, a hiatus of nearly four years between the last 2012 FOI request, and the first 2016 FOI request does not reasonably allow the 2012 and 2016 requests to be combined to form a 'repeated' pattern of access actions for the purposes of s 89L(1)(a).

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2 Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* at [12.7].

Similarly, given the passage of time, I am not satisfied that any of the earlier requests could properly be characterised as an abuse of process for the access action (s 89(1)(b)), or as an access action that is manifestly unreasonable (s 89(1)(c)) such that it would justify now making of a vexatious applicant declaration.

In regards to s47F request, application and communication with s47 it is not clear how, if at all, these would interfere with the operations of s47F submits that it is merely 'aware through correspondence that s47F has copied to s47F that he has made...requests to the s47F '. For this reason, I am not satisfied that s47F has discharged its onus of establishing that that s47F engagements with the s47 are relevant considerations in deciding whether or not I should make the declaration sought by s47F

Accordingly, there are eight access actions that s47F has made to s47F in 2016. I have listed these in a summary table based on s47F submissions at Appendix A. I note that in regards to three of the access actions, s47F appears to have not provided s47F with a response.

No fixed number of access actions is required to establish a pattern of repeated requests and whether a pattern exists will depend in part on the nature of the abuse of process involved.[3] In my view however, even noting that s47F generally receives a very low volume of FOI requests, eight access actions, even it all had been processed, would generally not be sufficient to establish the grounds for a declaration under s 89L(1)(a).

s47F considers that s47F repeated engagement involves an abuse of process by unreasonably interfering with its operations. In support of that contention it has provided the following reasons:

- s47F FOI requests, particularly those made in 2016, seek identical or very similar information to that sought in previous requests
- s47F engages in repeated correspondence with s47F in relation to previous or outstanding requests under the FOI Act, in which he challenges decisions, but rarely utilises available avenues of review or appeal
- s47F is a small agency with less thars47F , and responding to and processings47F FOI requests and FOI related correspondence is detrimentally affecting its ability to carry out its statutory functions
- s47F has consistently corresponded with s47F staff using 'intemperate, sometime rude and offensive language', and making threats or accusations against individual employees. This has caused s47F to restrict consideration of s47F correspondence to senior staff, in particular the CEO and Head of Legal Services, diverting them from carrying out their other work
- s47F FOI requests outnumber the total number of FOI requests made by all other applicants

[3] *Guidelines* [12.16].

- s47F requests are generally embedded within lengthy correspondence addressed to multiple parties often raising extraneous matters, such as general complaints about past decisions, unreasonable demands, and criticisms of s47F operational direction
- s47F FOI requests are seeking to re-agitate his long-standing grievances against s47F which s47F claims to have comprehensively resolved, and
- s47F has not cooperated with s47F to enable efficient FOI processing, by moderating his request pattern.

After giving careful consideration to s47F reasons, and having considered the number and the scope of s47F 2016 access actions, I do not agree with s47F that s47F has engaged in an abuse of process in this case.

From the information before me, it is apparent that the documents he seeks might reasonably be expected to provide information on a number of s47F decisions that have relate to him both s47F I do not agree that s47F has demonstrated illegitimate motives in making the requests. Rather, it appears that s47F is seeking to understand s47F decision to extend a 'ban' on him, and to understand its decision to 'never again' allow him to make an application for s47F.

The FOI Act provides that every person has a legally enforceable right to obtain access to a document of an agency in accordance with the FOI Act, other than an exempt document (s 11). The objects of the FOI Act include, increasing scrutiny, discussion, comment and review of the Australian Government's activities.

With regards to s47F contention that s47F requests are embedded in lengthy correspondence and they are sometimes not being sent to the dedicated s47F FOI email mailbox, two of the formal requirements for a valid request are that the request must state that is an application for the purposes of the FOI Act (s 15(2)(aa)) and that it may be sent by electronic communication to an electronic address specified by the agency or Minister (s 15(2A)(c)).

If the formal requirements are not being met, then the relevant correspondence might not constitute an application for the purposes of s 15. However, s47F has a duty to take reasonable steps to assist s47F to make the request in a manner than complies with the formal requirements (s 15(3)). I note your submissions are silent on what reasonable steps s47F has taken to assist s47F in the instances you have described.

Likewise, where the FOI request does not satisfy the formal requirements, the agency must undertake a request consultation process (s 24(1), s 24AB) before refusing to give access to the documents in accordance with the request.

Further, I note in your correspondence of 12 December 2016 that you say that s47F recent correspondence of 22 November 2016 is 'difficult to interpret', and this claim is consistent with s47F contention that s47F requests are generally embedded within correspondence which makes them difficult to identify and interpret. However, I think the recent correspondence is a poor example of this. It is clear to me from the letter of 9 November 2016, that s47F intended to make an FOI request, and his letter of 22 November 2016 was intended to make that clear to s47F It is also apparent to me that the scope of the request is not difficult to interpret.

My view is that s47F could do much more to assist s47F to obtain access to the information he is seeking by providing assistance and undertaking appropriate consultation to advise

him of the documents that might be of interest to him and available through FOI. Documents that might throw some light on s47F decisions that have affected him, including its relatively recent decision to extend its 'ban' on him.

While I acknowledge s47F concerns regarding the tone of much of s47F correspondence, including accusations of improper conduct against s47F officers, inappropriate as that is, I am not satisfied that s47F tone and manner at this time would involve an abuse of the process for the access action or would make the access action manifestly unreasonable.

Decision

Based on the information provided, none of the grounds under s 89L(1) of the FOI Act have been established. I have decided this is not an appropriate matter to make a declaration under s 89K.

Processing current FOI requests

I note that s47F appears not to have processed the requests of 29 June 2016, 4 July 2016 and 9 November 2016. While you contend that the request of 29 June 2016 is for the same documents sought in the requests of 12 April 2016 and 14 April 2016, and the request of 9 November 2016 is for document previously sought, this is not clear from the scope of the requests.

I note that the OAIC informed you on 1 September 2016 that s47F retains an obligation to provide s47F with a substantive decision in relation to each FOI request in accordance with the statutory timeframe, including any relevant extensions of time.

Given the significance of suspending the legal rights of a person by the FOI Act, agencies should continue to process any FOI requests on hand even if the agency applies to the OAIC for a vexatious applicant declaration until it has my approval for a suspension of processing in writing.[4] Agencies should not proceed on the assumption that a vexatious application declaration will be made.

If you would like to discuss this matter, please contact s47F, the case officer in charge of this matter, on s47F or by email s47F@oaic.gov.au. In all correspondence on this matter, please quote reference number RQ16/02544.

Yours sincerely

s47F

Timothy Pilgrim
Australian Information Commissioner

14 December 2016

4 Consistent with the guidance provided by the *Guidelines* [12.35]-[12.36].

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Our reference: RQ16/02635

s47F
Executive Director
s47F
s47F

By email: s47F gov.au

Dear s47F

s47F application for vexatious applicant declaration

I am writing regarding the application of the s47F of 22 July 2016 that s47F s47F and s47F be declared vexatious applicants under s 89K of the *Freedom of Information Act 1982* (the FOI Act).

After consideration of the material you have provided to the Office of the Australian Information Commissioner (OAIC), I have decided not to declare s47F or s47 as vexatious applicants. My reasons for this decision are below.

Background

s47F application outlines that between 28 August 2014 and 23 June 2016, s47F made 12 FOI requests under s 15 of the FOI Act to s47F Of those:

- one request was withdrawn by the applicant
- one request was treated as withdrawn in the course of a request consultation process under s 24AB
- four requests were processed as one request under s 24(2)(b) of the FOI Act
- five further requests have been processed, and
- one request is outstanding, pending the outcome of this decision.

Between 19 February and 6 August 2015, s47 made five FOI requests under s 15 of the FOI Act to s47F Of those, all requests were processed and a decision provided to the applicant.

On 4 September 2015, s47 requested internal review of a decision of s47F of 10 August 2015 under s 54 of the FOI Act.

On 21 December 2015, s47F requested Information Commissioner (IC review) of a decision of s47F of 7 December 2015 under s 54L of the FOI Act.

On 22 July 2016, s47F made the application for a vexatious applicant declaration against s47F and s47 on the basis that these entities have repeatedly engaged in access actions that involve an abuse of process pursuant to s 89L(1)(a) of the FOI Act. The application identifies the abuse of process for the access actions as 'unreasonably interfering with the operations of an agency' under s 89L(4)(b).

Together with its application, s47F provided the OAIC copies of requests from the respondents, its decisions on access, related correspondence and a table setting out the access actions.

Legislative framework and analysis

Section 89K of the FOI Act provides that I may, by written instrument, declare a person to be a vexatious applicant. In making the application for a declaration, an agency bears the onus of establishing that a declaration should be made (s 89K(3)).

A declaration has the practical effect of preventing a person from exercising an important legal right conferred by the FOI Act, and will not lightly be made. A 'clear and convincing need for a declaration' must be established (*Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (the Guidelines) at [12.7]).

I may make a vexatious applicant declaration only if I am satisfied of any of the following:

- a person has repeatedly engaged in access actions and the repeated engagement involves an abuse of the process for the access action (s 89L(1)(a))
- a particular access action by a person involves an abuse of process (s 89L(1)(b))
- a particular access action by a person would be manifestly unreasonable (s 89L(1)(c)).

As outlined above, s47F application for a vexatious applicant declaration relies on s 89L(1)(a) of the FOI Act.

Person who is the subject of the application

s47F application states that s47F and s47 are 'jointly referred to as s47F however both entities are referred to throughout the application letter. The application also states that the application involves the 'joining of these two entities'. The application provides:

s47F

s47F

There is no legislative basis to treat two separate entities as one person under s 89K of the FOI Act. While there may be a link between the two entities, including that they may have worked together in relation to the s47F or one has provided funding to the other, there is nothing before me to suggest otherwise than that s47F and s47 are two separate entities, or that access actions by one should adversely impact upon the other in my consideration of whether one of the grounds under s 89L(1) of the FOI Act has been established.

I will therefore consider whether there are grounds to make a declaration in relation to each entity separately.

Repeated engagement in access actions that involve an abuse of process

The term 'repeated engagement' is not defined within the FOI Act but may be interpreted within the ordinary meaning of the words: 'done, made, or said again and again' (See *Sweeney and Australian Information Commissioner and Australian Prudential Regulation Authority (Joined Party)* [2014] AATA 539 at [43]). No fixed number of access actions is required to establish a pattern of repeated requests and whether a pattern exists will depend in part on the nature of the abuse of process involved (Guidelines at [12.17]).

As discussed above, s47F submits that the access actions of s47F and s47 amount to an abuse of process through 'unreasonably interfering with the operations of an agency' (s 89L(4)(b)).

I have had regard to s47F submissions that discussed the factors listed in the Guidelines at [12.27]. Those include:

- s47F is small agency and staff have been diverted to processing the access actions
- high level staff have been involved in processing the requests because of the complexity of the subject matter
- the time taken to process access actions has led to delays in other projects and in processing FOI requests from other applicants
- s47F was the applicant for approximately a third of s47F FOI requests in the financial years of 2014-2015 and 2015-2016, and almost half of requests were made by s47 or s47F
- s47F is immoderately prolonging its grievances against s47F arising from the s47F
- the nature of the requests demonstrates an attempt to uncover as much information as possible about the s47F and
- preparation of other correspondence in relation to the s47F to s47F took over 220 hours.

s47F

s47F submits that s47 made five FOI requests within a six-month period, and a request for internal review, which involved a processing time of 173 hours. I am satisfied, given the time period and number of requests, that in the circumstances there has been repeated engagement in access actions.

I have examined the documents provided by s47F and note the following:

- s47F processed three of the requests; with the remaining two being a practical refusal under s 24AA and a release of documents outside of the FOI process
- the requests that were processed do not appear overly complex
- one request reduced the scope of an earlier request that was refused as a practical refusal decision, and
- s47 has revised requests when consulted by s47F and excluded information such as the identity of contractors.

I have also considered that while the five FOI requests were made in a short space of time, and I have not been made aware of any further FOI requests being made by s47 since 6 August 2015. I am not satisfied that the access requests have unreasonably interfered with the operations of the agency.

Based on the information currently before the OAIC, I am not satisfied the access actions amount to an abuse of process.

s47F

In relation to the 12 FOI requests and one application for IC review by s47F over one year and 10 months, s47F estimates the access actions have taken 323 hours of processing time. I am satisfied there has been repeated engagement in access actions.

I acknowledge that s47F is a small agency and the processing time has been significant, however, for the purposes of s 89L(4)(b), an agency must demonstrate that any interference with its operations is also unreasonable. Significantly, I have not been made aware of any further requests beingmade by s47F since 23 June 2016.

As outlined above, s47F has indicated that s47F was responsible for approximately a third of its FOI requests over a two-year period. I acknowledge that this is a high proportion of the total number of access requests received by s47F however, when considering the relationship between s47F as a government agency reviewing an area central to s47F core business, specifically s47F this does not seem unreasonable. In these circumstances, it also does not appear unreasonable that s47F would 'attempt to uncover as much information as possible about the conduct of the s47F as submitted by s47F

I have examined the access actions by s47F and I do not find they demonstrate the immoderate prolongation of a grievance. It appears that s47F has made reasonable attempts to limit the administrative impact of the requests. This has been demonstrated in the following ways:

- s47F has cooperated with s47F to revise the scope of the requests during consultation periods
- s47F has stated in at least five requests that it did not seek personal information
- in the request of 28 August 2014, s47F limited the scope by identifying the documents it knew to already be publicly available
- the requests of 7 June and 23 June 2016 state that s47F does not require duplicate copies of emails
- the request of 23 June 2016 also removes from scope any emails 'relating to the commercial, business and financial affairs of either s47F or s47F'
- s47F requests do not appear to be poorly-framed, for documents that are non-existent, for documents that have earlier been provided or to which access was refused, or difficult to discern and distinguish from other complaints a person has against the agency (Guidelines at [12.27]), and
- the tone of the correspondence is appropriate, for example at the end of each request, s47F invites the FOI coordinator to contact them, if there were any questions, in relation to the request.

In submitting that s47F is immoderately prolonging its grievance against the agency, s47F referred to the decision of the former Information Commissioner in *Australian Taxation Office and Garrett* [2015] AICmr 33 at [22]-[23]:

> Mr Garrett's use of the FOI Act in relation to the ATO is neither responsible nor moderate. It is clear from the pattern of requests and the way the requests are framed that he has not made reasonable attempts to moderate his request pattern or limit the administrative impact that his requests are likely to cause. Some of Mr Garrett's requests could more appropriately be made through the procedures that are available to him in relation to litigation in which he is engaged.
>
> Mr Garrett has not demonstrated any awareness of these issues in his response to the ATO's application for a declaration. Nor do I accept, on the information he provided, his assertion that his FOI requests have been necessitated by the failure of the Commissioner of Taxation to act responsibly in responding to his litigation and other complaints.

In *ATO and Garrett*, the respondent made multiple simultaneous requests, repeatedly requested access to the same information, requested information about other individuals and entities to which he was not authorised to receive, and failed to engage with the ATO in relation to the FOI process. I disagree, based on the information provided, that these paragraphs apply to this case.

In its submissions, s47F also referred to the decision in *Department of Defence and 'W'* [2013] AICmr 2, which considered whether the access actions made by the individual involved harassing or intimidating an individual or an employee of an agency' under s 89L(4)(a) of the FOI Act, which has not arisen in this case.

s47F also made submissions as to the impact on the agency of the preparation of other correspondence with s47F I note that the time s47F has spent in relation to preparation of correspondence that is not part of an access action cannot be considered in deciding whether a ground for s 89L has been established (Guidelines at [12.14], see also *Sweeney and Australian Information Commissioner and Australian Prudential Regulation Authority* [68]).

Having reviewed the information provided by s47F and considering the factors listed in the Guidelines at [12.27], I am not satisfied that s47F access actions amount to a pattern of behaviour that has unreasonably interfered with the operations of s47F

I am not satisfied the access actions amount to an abuse of process within the meaning of s 89L of the FOI Act.

Other considerations

In relation to the access action of 19 August 2014 by s47F of s47F, which s47F contends in its submissions at [17] was made by s47F I have examined the correspondence provided.

I have noted your submission that s47F 'has been acting for s47F in relation to some of its dealings with s47F however, the client is not identified in the request. Based on the information currently before me, there is no evidence to attribute the request to s47F or s47F

Even if I were to consider the request made by s47F together with the requests of either s47 or s47F this would not establish the type of repeated engagement in access actions that would amount to an abuse of process within the meaning of the FOI Act.

Decision

Based on the information provided and the reasons set out above, the grounds under s 89L(1) of the FOI Act have not been established. I have decided this is not an appropriate matter to make a declaration under s 89K.

If you would like to discuss this matter please contact s47F, the case officer in charge of this matter, on s47F or email s47F @oaic.gov.au. In all correspondence on this matter, please quote the reference number **RQ16/02635.**

Yours sincerely

s47F

Timothy Pilgrim
Australian Information Commissioner

17 January 2017

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Office of the Australian Information Commissioner

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Our reference: RQ16/03388

s47F
Acting Chief Executive Officer
s47F

By email: s47F s47F gov.au

Dear s47F

s47F application for vexatious applicant declaration

I write regarding the application of the s47F of 9 September 2016 that s47F be declared a vexatious applicant under s 89K of the *Freedom of Information Act 1982* (the FOI Act).

After consideration of the material you have provided to the Office of the Australian Information Commissioner (OAIC), I have decided not to declare s47F a vexatious applicant. My reasons for this decision are below.

Background

s47F application and submissions outline that between 19 March 2015 and 26 September 2016, s47F made 11 FOI requests under s 15 of the FOI Act to s47F Of those:

- two requests were withdrawn by s47F
- two requests were refused in part under s 24 following a request consultation process under s 24AB, and
- seven requests were processed in full and decisions were provided to s47F

Between July and September 2016 s47F sought IC review of five decisions of s47F of 4 July, 13 July (two decisions), 18 August and 6 September 2016.

On 21 July 2016, s47F requested that s47F not make any further FOI requests until his (then) current requests had been finalised. s47F made another FOI request on 18 August 2016 while five other FOI requests were on foot.

On 9 September 2016, s47F made the application for a vexatious applicant declaration against s47F on the basis that he has repeatedly engaged in access actions that involve an abuse of process pursuant to s 89L(1)(a) of the FOI Act. The application identifies the abuse

of process for the access actions as 'unreasonably interfering with the operations of an agency' under s 89L(4)(b).

Together with its application, s47F provided the OAIC with copies of requests from the respondent, its decisions on access, related correspondence and a table setting out the access actions.

Legislative framework and analysis

Section 89K of the FOI Act provides that I may, by written instrument, declare a person to be a vexatious applicant. In making the application for a declaration, an agency bears the onus of establishing that a declaration should be made (s 89K(3)).

A declaration has the practical effect of preventing a person from exercising an important legal right conferred by the FOI Act, and will not lightly be made. A 'clear and convincing need for a declaration' must be established (*Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (the Guidelines) at [12.7]).

I may make a vexatious applicant declaration only if I am satisfied of any of the following:

- a person has repeatedly engaged in access actions and the repeated engagement involves an abuse of the process for the access action (s 89L(1)(a))
- a particular access action by a person involves an abuse of process (s 89L(1)(b))
- a particular access action by a person would be manifestly unreasonable (s 89L(1)(c)).

As outlined above, s47F application for a vexatious applicant declaration relies on s 89L(1)(a) of the FOI Act.

Repeated engagement in access actions

The term 'repeated engagement' is not defined within the FOI Act but may be interpreted within the ordinary meaning of the words: 'done, made, or said again and again' (See *Sweeney and Australian Information Commissioner and Australian Prudential Regulation Authority (Joined Party)* [2014] AATA 539 at [43]). No fixed number of access actions is required to establish a pattern of repeated requests and whether a pattern exists will depend in part on the nature of the abuse of process involved (Guidelines at [12.17]).

I am satisfied, particularly given the frequency and the number of requests in 2016, that in the circumstances there has been repeated engagement in access actions.

Abuse of process

As discussed above, s47F submits that the access actions of s47F amount to an abuse of process through 'unreasonably interfering with the operations of an agency' (s 89L(4)(b)).

I have had regard to s47F submissions that discuss the factors listed in the Guidelines at [12.27]. Those include:

- s47F is a small agency and the team of three legal staff has been diverted to processing the access actions
- the time taken to process access actions has led to delays in other tasks requiring legal advice and input from the legal team
- the nature of the requests has required involvement of senior staff including the Chief Executive Officer, National Manager Operations and National Manager Legal and Support Services
- s47F made almost a third of s47F FOI requests in 2016
- s47F
- s47F is using the FOI Act to express his dissatisfaction with the outcome of his complaint s47F prolong his grievance about s47F by seeking to frustrate and annoy those who he sees as responsible and complain about the outcome of past FOI requests
- s47F has requested documents that have previously been released by s47F and are publicly available, for instance on the disclosure log
- the content of the requests shows that the real purpose behind the requests is to agitate matters that have been determined by the courts including the Full Court of the Federal Court and the s47F, and
- processing s47F FOI requests between 1 June and 9 September 2016 took 120 to 130 hours, while processing other FOI requests made in the same period took 30 hours in total.

I have examined the documents provided by s47F and note the following:

- three requests were made in and around mid-2015
- s47F processed seven requests in full and processed two requests in part (with some aspects of two requests refused for practical refusal reasons)
- the applicant withdrew two requests
- the requests were for different documents on each occasion
- the requests that were processed do not appear overly complex
- the applicant agreed to an extension of time to process two FOI requests
- no documents were found within scope of two requests
- s47F access requests are courteous and he frequently expresses gratitude and understanding
- s47F has revised requests when consulted by s47F and

- some of s47F correspondence adopts a critical tone with respect to s47F the processing of the FOI requests and alleges possible misconduct on the part of officers processing the FOI request.

I have had regard to the nature and volume of s47F requests for IC review and note that:

- s47F lodged 5 requests for IC review between July and September 2016
- s47F did not make any out-of-time applications for IC review of access refusal decisions of s47F and
- four of the five requests for IC review take issue with how s47F processed the requests (two requests for IC review concern decisions that no documents exist (s 24A), and two requests for IC review concern decisions that a practical refusal reason exists (s 24)).

Processing burden

s47F has indicated that s47F was responsible for approximately a third of its FOI requests in 2016. I acknowledge that this is a high proportion of the total number of access requests received by s47F and that s47F is a small agency, such that the processing time has been significant. However, for the purposes of s 89L(4)(b), an agency must demonstrate that any interference with its operations is also unreasonable.

When considering the role of s47F as a s47F s47F it does not appear unreasonable that individuals would attempt to obtain information with respect to s47F decision in order to remedy s47F In addition, while eight FOI requests and five requests for IC review were made in a short space of time of about four months, no FOI requests or requests for IC review were made after September 2016.

Nature of requests

I have examined the access actions by s47F and I do not find they demonstrate the immoderate prolongation of a grievance.

s47F appears to have made reasonable attempts to limit the administrative impact of the requests as demonstrated by the following:

- s47F has cooperated with s47F to revise the scope of the requests
- s47F has agreed to s47F requests for extensions of time to process his requests
- s47F withdrew a request of 19 March 2015 on the basis that the documents within scope were publicly available
- s47F withdrew a request of 19 July 2016 on the basis that the documents would fall within the scope of another revised FOI request, and

- s47F requests do not appear to be poorly-framed, for documents that have earlier been provided or to which access was refused, or difficult to discern and distinguish from other complaints he has against s47F (Guidelines at [12.27]) and only two requests were for documents that are non-existent.

In submitting that s47F is immoderately prolonging his grievance against the agency, s47F referred to the decision of the former Information Commissioner in *Australian Taxation Office and Garrett* [2015] AICmr 33 at [22]-[23]:

> Mr Garrett's use of the FOI Act in relation to the ATO is neither responsible nor moderate. It is clear from the pattern of requests and the way the requests are framed that he has not made reasonable attempts to moderate his request pattern or limit the administrative impact that his requests are likely to cause. Some of Mr Garrett's requests could more appropriately be made through the procedures that are available to him in relation to litigation in which he is engaged.
>
> Mr Garrett has not demonstrated any awareness of these issues in his response to the ATO's application for a declaration. Nor do I accept, on the information he provided, his assertion that his FOI requests have been necessitated by the failure of the Commissioner of Taxation to act responsibly in responding to his litigation and other complaints.

In *ATO and Garrett*, the respondent made multiple simultaneous requests, repeatedly requested access to the same information, requested information about other individuals and entities to which he was not authorised to receive, and failed to engage with the ATO in relation to the FOI process. Based on the information provided, I disagree that these paragraphs apply to this case.

s47F refers to correspondence as becoming 'increasingly abusive, directing threatening and derogatory comments to s47F and as seeking to frustrate and annoy the s47F CEO. In its submissions, s47F also referred to the decision in *Department of Defence and 'W'* [2013] AICmr 2, which considered whether the access actions made by the individual involved harassing or intimidating an individual or an employee of an agency' under s 89L(4)(a) of the FOI Act. s47F also referred to the decision in *Commonwealth Ombudsman and 'S'* [2013] AICmr 31 where the majority of the FOI applicant's requests were for personal information of Ombudsman staff and documents relating to the processing of his previous FOI requests.

After considering the content, tone and language of s47F correspondence, I am on balance satisfied that his conduct is not sufficient to constitute harassment or intimidation for the purposes of s 89L(4)(a) of the FOI Act.

Having reviewed the information provided by s47F and considering the factors listed in the Guidelines at [12.27], I am not satisfied that s47F access actions amount to a pattern of behaviour that has unreasonably interfered with the operations of s47F

I am not satisfied the access actions amount to an abuse of process within the meaning of s 89L of the FOI Act.

Other considerations

s47F refers to:

- the insulting and abusive tone and contents of non-FOI correspondence between s47F and s47F or s47F CEO, in which s47F raises allegations of corruption against s47F in its investigation into the s47F and
- correspondence and documents prepared by s47F which misuse or misrepresent the outcome of the FOI requests such as by altering the terms of the FOI requests and indicating that no documents were provided in response.

However, as referred to in s47F submissions, in deciding whether a ground has been established under s 89L, I cannot consider correspondence between a person and an agency that is not part of an access action (for example, complaints and general correspondence) (Guidelines at [12.14], see also *Sweeney and Australian Information Commissioner and Australian Prudential Regulation Authority* [68]).

Decision

Based on the information provided and the reasons set out above, the grounds under s 89L(1) of the FOI Act have not been established. I have decided this is not an appropriate matter to make a declaration under s 89K.

If you would like to discuss this matter please contact s47F, on s47F or email s47F@oaic.gov.au. In all correspondence on this matter, please quote the reference number **RQ16/03388**.

Yours sincerely

s47F

Timothy Pilgrim
Australian Information Commissioner

2 February 2017

Australian Government
Office of the Australian Information Commissioner

Our reference: RQ18/03535
Your references: FOI 18-19-0039, 18-19-0040 and 18-19-0041

s47F

s47F
s47F

By email: s47F gov.au

Vexatious applicant declaration application about s47F

Dear s47F

I write in relation to the s47F 27 November 2018 application for a vexatious applicant declaration (a declaration) about s47F under s 89K of the *Freedom of Information Act 1982* (the FOI Act).

After consideration of the material you have provided to the Office of the Australian Information Commissioner (OAIC), I have decided not to declare s47F a vexatious applicant. My reasons for this decision are below.

Background

s47F is a former employee of s47F and has ongoing proceedings in the Federal Circuit Court pursuant to the provisions of the *Fair Work Act 2009* (Cth).

On 24 October 2018, s47F made three requests for access to documents under the FOI Act to s47F

On 23 November 2018, s47F decisions on s47F three requests of 24 October 2018 became deemed decisions under s 15AC of the FOI Act.

On 26 November 2018, s47F applied for IC review of s47F deemed decisions of 23 November 2018.

On 27 November 2018, s47F applied to the Office of the Australian Information Commissioner (OAIC) for a vexatious applicant declaration about s47F on the basis that the three FOI requests made by her on 24 October 2018 are access actions which involve an abuse of process for those access actions.

On 19 December 2018, the review officer handling this matter, s47F, wrote to s47F to explain her preliminary view that s47F had not discharged its onus of establishing that a declaration should be made about s47F and invited further submissions.

On 16 January 2019, s47F provided submissions in response to s47F letter of 19 December 2018.

On 24 January 2019, s47F wrote to s47F to provide her with a copy of s47F application and submissions, and invited submissions in response.[1]

On 26 January 2019, s47F made submissions to the OAIC. s47F was copied into s47F email providing her submissions.

Legislative framework

Section 89K of the FOI Act provides that I may, by written instrument, declare a person to be a vexatious applicant. In making the application for a declaration, an agency bears the onus of establishing that a declaration should be made (s 89K(3)).

The FOI Guidelines explain:

> 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. [emphasis added]
>
> 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. ...[2]

I may make a vexatious applicant declaration only if I am satisfied of any of the following:

- a person has repeatedly engaged in access actions and the repeated engagement involves an abuse of process for the access action (s 89L(1)(a))
- a particular access action by a person involves an abuse of process (s 89L(1)(b))
- a particular access action by a person would be manifestly unreasonable (s 89L(1)(c)).

In its application, s47F submits that s47F has engaged in particular access actions that involve an abuse of process for those access actions (s 89L(1)(b)).

---

[1] Under s 89K(4), the Information Commissioner must, as soon as practicable, give written notice to the person in relation to whom the vexatious applicant declaration is made. Under s 89L(3), the Information Commissioner must not make a declaration in relation to a person without giving the person an opportunity to make written or oral submissions.

[2] See, Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (FOI Guidelines) [12.7].

A person engages in an 'access action' if the person does any of the following:

- makes a request (s 89L(2)(a))
- makes an application under s 48 (s 89L(2)(b))
- makes an application for internal review (s 89L(2)(c))
- makes an IC review application (s 89L(2)(d)).

I am satisfied that s47F has engaged in 'access actions' as defined under s 89L(2) of the FOI Act.

Section 89L(4) of the FOI Act provides that 'abuse of the process for an access action' includes, but is not limited to, the following:

- harassing or intimidating an individual or an employee of an agency
- unreasonably interfering with the operations of an agency
- seeking to use the Act for the purposes of circumventing restrictions on access to a document (or documents) imposed by a court.

s47F submits that s47F FOI requests of 24 October 2018 and the associated applications for IC review involve an abuse of process because the access actions seek to use the FOI Act for the purpose of circumventing restrictions on access to a documents imposed by a court (s 89L(4)(c)).

Whether the access actions involve an abuse of process

s47F submissions

In its application, s47F said:

> On 24 October 2018; s47F made three separate FOI requests outlined below:
>
> FOI 18-18-0039
> *Under the Freedom of Information Act 1982 (the FOI Act), I hereby make application for access to a copy of:*
> *i)* s47F
> *ii)*
>
> FOI 18-19-0040
> *Under the Freedom of Information Act 1982 (the FOI Act), I hereby make application for access to a copy of all documents, created or received by* s47 *between 1 July 2015 and 30 June 2017, in relation*

s47F

FOI 18-19-0041

Under the Freedom of Information Act 1982 (the FOI Act), I hereby make application for access to a
s47F

Court Order

s47F

In its further submissions, s47F compares the subject matter of the documents requested by s47F from s47F in the discovery process[3] and the documents requested by s47F under the FOI Act on 24 October 2018. s47F submits that the 24 October 2018 FOI requests seek to use the FOI Act for the purpose of circumventing restriction on access to a document (or documents) imposed by a court.

s47F

[3] s47F

s47F



s47F



s47F submissions

I have also had regard to s47F submissions in response to s47F application. In summary, s47F submits that the following considerations are relevant to my decision on whether to declare her a vexatious applicant under s 89K:

- Whether s47F application for discovery would have been decided differently had it been before the Federal Court.
- Whether the decision in s47F constitutes 'restrictions on access to a document (or documents) imposed by a court' for the purposes of s 89L(4)(c). In particular, s47F submits:

> There must be a court *order* restricting access to a document or documents. For example, there may be a document before a court in relation to which a judge orders that one or more parties not have access in part because the particular part is irrelevant and scandalous in nature. That is not the case in s47F *v* s47F The documents sought by me were not before the court. There was no order restricting my access to any specific document or documents. The decision of the court was to dismiss my application for additional discovery.

- Even if I do accept that there has been an abuse of process, whether it is appropriate for me to exercise my discretion to make a declaration in this case. In particular, s47F submits:

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[4] s47F submissions footnote [92] of s47F

[5] s47F submissions footnote [108] of s47F

s47F has pointed to "no clear and convincing need" for the declaration. That the declaration may be convenient for s47F is not sufficient.

That the declaration may be advantageous to s47F in its defence of my legal action against it does not constitute a 'clear and convincing need' for the declaration.

- s47F actions in relation to the Federal Circuit Court proceedings and related dispute.
- Whether access to the documents would likely adversely affect the fair and expeditious conduct of the court proceedings between s47F and s47F as claimed.

s47F has not provided any submissions in response to s47F submissions.

Analysis

In making my decision, I have had regard to previous decisions in which an Information Commissioner or the Administrative Appeals Tribunal has decided to declare a person vexatious on the basis that they have engaged in an access action that involves an abuse of process for that action.[6]

Based on the information before me, I am not satisfied that s47F has established that there is a clear and convincing need for a declaration in this case.

It is not disputed that s47F seeks access to the documents for potential use in court proceedings and that the Federal Circuit Court refused an application for discovery of similar documents.

Although the Federal Circuit Court has decided not to grant s47F access to the documents through the discovery process, the Federal Circuit Court's decision in s47F does not have the effect of placing restrictions on access to the documents by other means.

In my understanding, documents obtained under the FOI Act are often used during court proceedings. Although s47F submits that allowing the applicant to have access to the documents under the FOI Act may adversely affect the fair and expeditious conduct of the court proceedings between the applicant and s47F it appears that the Federal Circuit Court has the power to refuse to accept a document for filing if the Registrar is satisfied that this would be an abuse of process.[7] Further, s47F application and submissions do not identify 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 has been refused during the discovery process.

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[6] *Department of Defence and Ronald Francis* [2014] AICmr 68; *Francis and Australian Information Commissioner (Freedom of information)* [2015] AATA 936; *Morris and Australian Information Commissioner (Freedom of information)* [2017] AATA 363 [36]-[41]; and *Australian Taxation Office and Andrew Garrett (Freedom of information)* [2017] AICmr 50 [31]-[36].

[7] Rule 2.06 of the *Federal Circuit Court Rules 2001*.

Decision

Based on the information before the OAIC, for the reasons set out above, the grounds under s 89L(1) of the FOI Act have not been established. I have therefore decided not to make a vexatious applicant declaration under s 89K about s47F in relation to the three FOI requests made by her on 24 October 2018.

A copy of this decision letter will be provided to s47F

IC review applications

s47F has sought IC review of s47F deemed access refusal decisions of 23 November 2018.

Please find attached notices issued under s 55E of the FOI Act which require s47F to provide an adequate statement of reasons as mentioned in s 26(1) of the FOI Act in relation to s47F three FOI requests of 24 October 2018 within 28 days.

The OAIC will contact s47F to ask whether she wishes to proceed with the applications for IC review once the statements of reasons have been provided to her.

If you would like to discuss this matter, please contact s47F on s47F or s47F @oaic.gov.au. In all correspondence on this matter, please quote the reference number **RQ18/03535**.

Yours sincerely

s47F

Angelene Falk
Australian Information Commissioner

12 June 2019

Review rights

Judicial review

Administrative decisions of the Information Commissioner may be reviewable by the Federal Court of Australia or the Federal Circuit Court under the *Administrative Decisions (Judicial Review) Act 1977*.

An application for review must be made to the Court within 28 days of the OAIC sending the decision to you. Please contact the Federal Court registry in your state or territory for more information, or visit the Federal Court website at http://www.fedcourt.gov.au/.

Australian Government
Office of the Australian Information Commissioner

Our reference: RQ19/00690 and RQ19/00691
Your references: 17-18-0053, 17-18-0089 and 17-18-0091

s47F

s47F
s47F

By email: foi@s47F gov.au

Vexatious applicant declaration application about s47F and s47F

Dear s47F

I write in relation to s47F 20 February 2019 application for a vexatious applicant declaration (a declaration) about s47F and s47F (the respondents) under s 89K of the *Freedom of Information Act 1982* (the FOI Act).

After consideration of the material you have provided to the Office of the Australian Information Commissioner (OAIC), I have decided not to declare the respondents vexatious applicants. My reasons for this decision are below.

Background

s47F

s47F FOI requests and IC review applications

On 19 December 2017 and 4 June 2018, s47F applied to s47F for access to documents under the FOI Act. The 4 June 2018 request was for:

s47F

s47F

Part (ii) of this request is in identical terms to the request made by s47F on 19 December 2017.

On 11 January 2018 and 4 July 2018, s47F made access refusal decisions in relation to the s47F requests of 19 December 2017 and 4 June 2018 respectively.

On 12 January 2018 and 7 August 2018, s47F applied for IC review of s47F decisions of 11 January 2018 and 4 July 2018.

s47F FOI request and IC review application

On 4 June 2018, s47F made a request for access to documents about s47F in similar terms as the request made by s47F on 4 June 2018.

On 2 August 2018, s47F made an access refusal decision in relation to s47F 4 June 2018 request.

On 8 August 2018, s47F applied for IC review of s47F decision of 2 August 2018.

IC review applications

The status of the respondents' relevant IC review applications can be summarised as follows:

OAIC reference and applicant	**Date and scope of FOI request**	**s47F decision**	**Date of IC review, issues and status**
MR18/00028	19 Dec 2017	11 Jan 2018	12 Jan 2018
s47F	Request for documents relating to s47F s47F.	Access refusal decision – three documents identified – refused in full under s 42.	Searches and s 42 – s47F submits it is not obliged to respond to the OAIC's request for information of 21 September 2018.[1]

[1] By letter from the Acting Chief Commissioner and s47F 7F, dated 7 November 2018.

OAIC reference and applicant	Date and scope of FOI request	s47F decision	Date of IC review, issues and status
MR18/00578 s47F	4 June 2018 Request for emails and documents relating to s47F s47F.[2]	11 Jan 2018 Access refusal decision – three documents identified – refused in full under s 42.	12 Jan 2018 Searches and ss 42 and 47C - s47F submits it is not obliged to respond to the OAIC's request for information of 18 October 2018.[3]
MR18/00579 s47F	4 June 2018 Request for emails and documents relating to s47F s47.[4]	2 August 2018 Access refusal decision – four documents identified – three documents refused in full under s 42; one document refused in part under s 47C.	12 Jan 2018 Searches and ss 42 and 47C - s47F submits it is not obliged to respond to the OAIC's request for information of 18 October 2018.[5]

Vexatious application declaration application

On 20 February 2019, s47F applied for a vexatious applicant declaration about the respondents on the basis that the respondents' FOI requests and related IC review applications involve an abuse of process for those access actions and are manifestly unreasonable.

On 27 February 2019, the OAIC provided the respondents with a copy of s47F application and gave the respondents the opportunity to make a written or oral submission.[6]

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[2] Repeats part of s47F request of 19 December 2017.

[3] By letter from you dated 29 November 2018.

[4] Similar to s47F request of 19 December 2017, and identical to his request of 4 June 2018.

[5] By letter from you dated 29 November 2018.

[6] Under s 89K(4), the Information Commissioner must, as soon as practicable, give written notice to the person in relation to whom the vexatious applicant declaration is made. Under s 89L(3), the Information Commissioner must not make a declaration in relation to a person without giving the person an opportunity to make written or oral submissions.

On 28 February 2019, s47F provided submissions objecting to the application. On 1 March 2019, s47F confirmed that she relies on s47F submissions. s47F was copied into s47F email providing submissions.

Legislative framework

Section 89K of the FOI Act provides that I may, by written instrument, declare a person to be a vexatious applicant. In making the application for a declaration, an agency bears the onus of establishing that a declaration should be made (s 89K(3)).

The FOI Guidelines explain:

> 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. [emphasis added]
>
> 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. ...[7]

I may make a vexatious applicant declaration only if I am satisfied of any of the following:

- a person has repeatedly engaged in access actions and the repeated engagement involves an abuse of process for the access action (s 89L(1)(a))
- a particular access action by a person involves an abuse of process (s 89L(1)(b))
- a particular access action by a person would be manifestly unreasonable (s 89L(1)(c)).

In its application, s47F submits that the respondent has engaged in particular access actions that involve an abuse of process for those access actions (s 89L(1)(b)) and that the respondent has engaged in access actions that are manifestly unreasonable (s 89L(1)(c)).

The term 'manifestly unreasonable' is not defined in the FOI Act. The factors that will be relevant in applying this ground are likely to be similar to those relevant to whether a particular access action or series of actions would be an abuse of process under the FOI Act.[8]

Although s47F submissions include information about other access actions made by s47F in recent times and the amount of time s47F has spent processing those requests, s47F has not submitted that the respondent has repeatedly engaged in access actions and

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[7] See, Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (FOI Guidelines) [12.7].

[8] *FOI Guidelines* [12.31].

that the repeated engagement involves an abuse of process for the access actions. Accordingly, I have not considered s 89L(1)(a) in this decision.

A person engages in an 'access action' if the person does any of the following:

- makes a request (s 89L(2)(a))
- makes an application under s 48 (s 89L(2)(b))
- makes an application for internal review (s 89L(2)(c))
- makes an IC review application (s 89L(2)(d)).

I am satisfied that the respondents have engaged in 'access actions' as defined under s 89L(2) of the FOI Act.

Section 89L(4) of the FOI Act provides that 'abuse of the process for an access action' includes, but is not limited to, the following:

- harassing or intimidating an individual or an employee of an agency
- unreasonably interfering with the operations of an agency
- seeking to use the Act for the purposes of circumventing restrictions on access to a document (or documents) imposed by a court.

s47F application does not rely on one of the behaviours identified in s 89L(4), but submits that the respondent is using the FOI Act to continue to pursue information with a nexus to the already resolved Fair Work Commission proceedings and that the access actions therefore involve an abuse of process or are manifestly unreasonable.

Whether the access actions involve an abuse of process or are manifestly unreasonable

In IC reviews MR18/00028, MR18/00578 and MR18/00579, s47F advised the OAIC that due to a 'confidentiality agreement' reached between s47F and s47F does not consider that it has an obligation to provide the respondents with any further information or correspondence in relation to those matters.[9] In essence, s47F advised the OAIC that it did not consider it was under an obligation to participate in the IC review process.

s47F vexatious applicant declaration application was made in response to the OAIC's request for submissions to further explain why it considers that it is not obliged to participate in the process relating to respondents' IC review applications.

In its application, s47F referred to the Deed agreed between s47F and s47F and said:

> The terms of the Deed are clearly intended to put an end to the dispute between the parties and, from s47F perspective, the workload associated with managing the issue. Analysis of the

[9] See footnotes 1, 3 and 5 above.

relationship between s47F claim and the access actions under consideration – [reference to attachment] – shows the correlation between the FOI requests and the Fair Work Commission claim settled via the Deed of Release. s47F submits that while the Deed is not an order of the Tribunal, it was intended to finalise the claim brought in the Tribunal and that it follows that the continuing pursuit of information under the FOI Act is an abuse of process and manifestly unreasonable (FOI Act s 89L(1)(b)&(c)).

s47F acknowledges that under section 11(2) of the FOI Act, a person's right of access is not affected by the reasons for seeking access; however, the applicant has entered into a Deed of Release under which he agreed that he would make no further claim against the agency and received a monetary settlement. For the applicant to continue to pursue information with a clear nexus to the substance of the Deed is manifestly unreasonable and arguably an abuse of process.

s47F notes that in his submission s47F claims that s47F is estopped from relying upon the Deed of Release by virtue of the fact that it processed both s47F and s47F FOI applications (your references MR18/00578 and MR18/00579). s47F submits that this is irrelevant to the OAIC's consideration as this is a matter of administrative rather than contract law; s47F simply proceeded to process the FOI requests in accordance with the FOI Act. However, the fact that s and s47F made requests for identical information suggests that they contemplated that s47F might refuse s47F access based on the Deed of Release. This goes to whether s47F s47F request in relation to this material should also be considered vexatious due to abuse of process.

Based on the above, s47F submits that there are grounds for the Information Commissioner to make declarations under section 89K of the FOI Act and seeks that the Information Commissioner makes a declaration that:

1. s47F is a vexatious applicant in relation to the matters under review by the Information Commissioner and in relation to any future applications that relate to the substance of the Deed of Release
2. s47F is a vexatious applicant in relation to matter MR180079 and in relation to any future applications that relate to the substance of the Deed of Release entered into by s47F

s47F requests that, while the Information Commissioner considers s47F request, the three reviews in question be placed on hold. s47F does not seek to have the applicant named in the published decision. s47F would accept the inclusion of a term to allow the applicant to make a future request with the permission of the Information Commissioner.

s47F provided the OAIC with a copy of the Deed and refers to the following extract in its application:

> The Employee will release and forever discharge the Commonwealth, its past and present officers, employees, agents and representatives from all Claims which the Employee may have against them.
>
> 4.2 The Employee agrees that the release and discharge in clause 4.1.1 may be pleaded as a bar to any Claim commenced by the Employee (or on their behalf) against the Commonwealth, its past and present officers, employees, agents and representatives.
>
> 4.3 The Settlement Sum is paid with an express denial of liability by the Commonwealth.

The respondents' submissions

I have also had regard to the respondents' submissions in response to s47F application. In summary, the respondents submit:

- s47F has not provided any authority for its assertion that issue estoppel applies to "contract law" but not to "administrative law".
- The Deed of Release that s47F refers to in its s 89K application was finalised before s47F processed the FOI requests of 4 June 2018. Despite this, s47F advised the respondents of their review rights at the time it made its decisions on the FOI requests in July and August 2018 and the respondents sought IC review accordingly.
- The Deed did not prevent the s47F from making an application under the FOI Act because he was not making any "Claim" or "Claims" as defined in the Deed.
- s47F has not sought, and is not able to, 'enforce the Deed'.
- The purpose of the FOI requests is to seek access to documents that may be relevant to s47F ongoing dispute with s47F rather than re-open the dispute resolved by the s47F between s47F and s47F In particular, s47F submissions say:

  > ... As a matter of fact, I made the application which is the subject of MR18/00578 in support of s47F in her ongoing disputation with s47F s47F In s47F application s47F , s47F enquired as to my intentions s47F . My "Claim" against s47F has been resolved. I will not be making any further monetary claim of s47F (other than in relation to litigation costs, if any, incurred in obtaining access to the documents the subject of the Review Applications – noting that I have not incurred any such costs to this point in time). But for s47F ongoing disputation with s47F s47F would not have to deal with me any more. The documents in issue may be relevant to s47F Federal Circuit Court action against s47F and s47F belligerent approach to the Review Applications "suggests" that they are very relevant indeed.

- The grounds under s 89L(1)(a) (that a person has repeatedly engaged in access actions and the repeated engagement involves an abuse of the process for the access action) are not made out.
- s47F has pointed to no 'clear and convincing need' for the declaration and that the declaration may be convenient or advantageous for s47F is not sufficient.
- The impact that a declaration would have on the respondents in light of s47F ongoing proceedings against s47F must be balanced against the interests that s47F is seeking to protect.

Analysis

In making my decision, I have had regard to previous decisions in which an Information Commissioner or the Administrative Appeals Tribunal has decided to declare a person

vexatious on the basis that they have engaged in an access action that involves an abuse of process for that action or that is manifestly unreasonable.[10]

Based on the information before me, I am not satisfied that s47F has established that there is a clear and convincing need for a declaration in this case.

s47F contends that the intent behind the respondents' FOI requests and related IC review applications is for s47F to have access to documents for the purpose of pursuing a dispute between s47F and s47F that has already been resolved in the Fair Work Commission by the Deed.

The respondents submit that s47F has no intention of using the documents sought for the purposes of seeking further monetary compensation from s47F in relation to the matter resolved in the Fair Work Commission by the Deed. It therefore appears that the respondents do not intend to use the documents sought for the purposes of a commencing a 'Claim' as discussed in Clauses [1] and [4.2] of the Deed.

In my view, s47F has not established that the FOI requests or related IC review applications are an abuse of process for those access actions, or that they are manifestly unreasonable.

Decision

Based on the information before the OAIC, for the reasons set out above, the grounds under s 89L(1) of the FOI Act have not been established. I have therefore decided not to make a vexatious applicant declaration under s 89K about s47F in relation to the three FOI requests made by her on 24 October 2018.

A copy of this decision letter will be provided to the respondents.

IC review applications

An officer of the OAIC will contact you separately to progress the respondents' IC review applications. Under s 55D of the FOI Act, s47F has the onus of establishing that the decisions under review are justified or that I should give a decision adverse to the respondents. Under s 55DA, s47F must use its best endeavours to assist me to make my decision in relation to the IC reviews.

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[10] *Department of Defence and Ronald Francis* [2014] AICmr 68; *Francis and Australian Information Commissioner (Freedom of information)* [2015] AATA 936; *Morris and Australian Information Commissioner (Freedom of information)* [2017] AATA 363 [36]-[41]; and *Australian Taxation Office and Andrew Garrett (Freedom of information)* [2017] AICmr 50 [31]-[36].

If you would like to discuss this matter, please contact s47F on s47F or s47F @oaic.gov.au. In all correspondence on this matter, please quote the reference numbers **RQ19/00690** and **RQ19/00691**.

Yours sincerely

s47F

Angelene Falk
Australian Information Commissioner

12 June 2019

Review rights

Judicial review

Administrative decisions of the Information Commissioner may be reviewable by the Federal Court of Australia or the Federal Circuit Court under the *Administrative Decisions (Judicial Review) Act 1977*.

An application for review must be made to the Court within 28 days of the OAIC sending the decision to you. Please contact the Federal Court registry in your state or territory for more information, or visit the Federal Court website at http://www.fedcourt.gov.au/.

Australian Government
Office of the Australian Information Commissioner

Our reference: RQ19/01598

s47F

s47F
s47F
On behalf of s47F
Sent by email: s47F .gov.au cc: s47F .gov.au;
s47F .gov.au

Vexatious applicant declaration variation application about persons making FOI requests as s47F

Dear s47F

I write in relation to the s47F s47F application for a variation to a vexatious applicant declaration (declaration) made in relation to s47F under s 89K of the *Freedom of Information Act 1982* (the FOI Act). The s47 has requested that the declaration be varied to clarify that a request by an agent of s47F will be subject to the declaration in the same way as a request from s47F directly.

After consideration of the material provided to the Office of the Australian Information Commissioner (the OAIC) I have decided not to vary the current declaration. I am satisfied that any requests made by a person acting as the agent of the subject of a declaration are included in the declaration.

Background

On 11 June 2019, the s47 applied to the OAIC for a variation to the Information Commissioner's decision in s47F to extend that declaration to persons making FOI requests to the s47 on s47F behalf.

On 19 July 2019 and 23 March 2020 the s47 provided further submissions to support its application, including proposed amendments to the terms of the s 89K declaration.

On 7 May 2021, the OAIC notified s47F about the s47F application to vary the terms of the declaration[2].

[1] s47F

[2] s47F

The OAIC has not received submissions from s47F in response to that notification.

Power to vary a vexatious applicant declaration

It is open to me to consider whether a declaration under s 89K of the FOI Act should be varied (s 33(3) of the *Acts Interpretations Act 1901* (Cth)).[3] In determining that a variation should be made, I would need to be satisfied that there are grounds supporting the variation and that the requirements of s 87L have been satisfied. The information relied on in making the declaration dated 29 April 2019 would be a relevant consideration, as would any new information relevant to those grounds that has arisen since that time.

The s47 bears the onus of establishing that a variation to the current declaration is warranted.

s47F Submissions

The s47 provided submissions in support of its application (see **Attachments A and B** for submissions in full). The submissions stated, in part:

s47F

On 5 March 2020, the OAIC sought an update from s47 as to whether any further access actions had been received from either s47F.

[3] See also FOI Guidelines [12.52].

On 23 March 2020, the s47 advised that since 14 June 2019 the s47 had received a number of faxes and telephone calls from s47F . In summary, the s47 had received:

- 6 faxes from s47F , which are addressed to multiple agencies and include general commentary and access actions[4]
- 46 faxes from s47F which are addressed to multiple agencies and include general commentary and access actions[5] and
- 3 telephone calls from s47F [6]

Consideration

I have considered the declaration made in s47F and the grounds for variation which have been set out in the submissions made by s47F

In relation to whether a variation to the declaration is required in cases such as this, the s47F submissions of 19 July 2019 relevantly state:

> Strictly speaking, it is unnecessary to expressly declare that a declaration includes access actions made through an agent. This is already so by operation of law. Where a person acts through an agent, as a matter of law the actions of the agent are the actions of the principal. Even if a declaration is silent on the point, where as a matter of law the vexatious applicant is engaging in access actions via an agent, the declaration operates to curtail that exercise. Put another way, the vexatious applicant cannot re-enlarge their access rights by engaging in the access action through an agent.

I agree with this submission. I consider that access actions made by an agent on behalf of a person who is the subject of a declaration are included, by operation of law, in the terms of the declaration.

The question of whether a person making an access request is acting as the agent of a person about whom a declaration has been made is a question of fact to be determined in light of the particular circumstances of each matter. In the event the agency has determined that an agency arrangement exists in relation to a particular request, it is open to them to apply the declaration applicable to the principal to that request and process the request in accordance with that declaration.

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[4] On 20 September, 10 October, 13 and 16 November, 16 December 2019 and 31 January 2020.

[5] On 18 June, 2 July, 18 and 27 August, 4 and 5 September, 14, 20, 21, 26 and 29 October, 6, 10, 13, 15, 17, 21 and 27 November, 4, 11, 12, 18, 22 and 27 December 2019, 7, 11 and 23 January, 4, 7, 9, 10, 11, 15, 19, 20, 21, 24, 25, 26 and 27 February, 5, 6, 8, 13 and 14 March 2020.

[6] On 11 and 14 November 2019, and 5 March 2020.

If the person that the agency considers to be an agent believes their right to access has been unfairly denied, it is open to them to contact this office.

I consider that the current declaration sufficiently covers the circumstances described by the s47F submissions and as such, I am not satisfied that a variation to the current declaration is warranted at this time.

Decision not to vary the vexatious applicant declaration

Based on the information before the me, and for the reasons set out above, I am not satisfied that it is necessary to vary the declaration made under s 89K of the FOI Act in relation to s47F and the s47F

A copy of this decision letter will be provided to s47F

If you would like to discuss this matter, please contact s47F on s47F or by email s47F @oaic.gov.au. In all correspondence on this matter, please quote the reference number RQ19/01598.

Your sincerely

s47F

Elizabeth Hampton
Acting Freedom of Information Commissioner

19 August 2021

Review rights

Judicial review

You can apply to the Federal Court of Australia or the Federal Circuit Court for a review of a decision of the Information Commissioner if you think that a decision by the Information Commissioner not to review or not to continue to undertake review of your IC review application under the *Freedom of Information Act 1982* (the FOI Act) is not legally correct. You can make this application under the *Administrative Decisions (Judicial Review) Act 1977*.

The Court will not review the merits of your case but it may refer the matter back to the Information Commissioner for further consideration if it finds the decision was wrong in law or the Information Commissioner's powers were not exercised properly.

An application for review must be made to the Court within 28 days of the OAIC sending the decision or determination to you. You may wish to seek legal advice as the process can involve fees and costs. Please contact the Federal Court registry in your state or territory for more information, or visit the Federal Court website at http://www.fedcourt.gov.au/.

Making a complaint to the Commonwealth Ombudsman

If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman). The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated unfairly.

If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the Commonwealth Ombudsman’s website at http://www.ombudsman.gov.au

Australian Government
Office of the Australian Information Commissioner

Application for vexatious applicant declaration

Decision and reasons for decision of Acting Freedom of Information Commissioner, Elizabeth Hampton

Applicant	s47F
Respondent	s47F
Decision date	28 March 2022
Application number	RQ22/00644
Catchwords	Freedom of Information — Vexatious applicant declaration — Whether person should be declared a vexatious applicant — Whether person has repeatedly engaged in access actions that involve an abuse of process — Whether the access actions harass or intimidate an individual or an employee of an agency — Whether the access actions unreasonably interfere with the operations of an agency — (CTH) *Freedom of Information Act 1982* ss 89K, 89L, 89M

Decision

1. Under s 89K(1) of the *Freedom of Information Act 1982* (the FOI Act), I decline to extend the existing vexatious application declaration in relation to 's4 '[1] (the respondent).

[1] s47F

OAIC

Background

s47F

2. Between 25 September 2017[2] and 21 October 2019 (a period of 24 months and 27 days), the respondent engaged in 102[3] separate 'access actions' with s47F under the FOI Act,[4] comprising:
    - 64 requests for access to documents made under s 15 of the FOI Act
    - 14 internal review applications made under s 54B of the FOI Act, and
    - 24 applications for Information Commissioner review (IC review) made under s 54L of the FOI Act.[5]
3. In addition to the access actions noted in [2], the respondent has submitted over 60 external enquiries to s47F FOI team and 7[6] FOI complaints about s47F to the Office of the Australian Information Commissioner (the OAIC) for the same period.[7]
4. On 29 October 2019, s47F applied to the OAIC for a vexatious applicant declaration about the respondent under s 89K of the FOI Act (the s 89K application).
5. On 13 November 2019, an officer of the OAIC provided the respondent with a copy of s47F application and gave the respondent the opportunity to make a written or oral submission in response (ss 89K(4) and 89L(3)).[8] Between 28 November 2019 and 16 December 2019, the OAIC received 36 pieces of correspondence plus attachments from the respondent.
6. On 16 December 2019, an officer of the OAIC gave the respondent a further opportunity to make submissions in response to the issues raised in s47F s 89K application. The officer of the OAIC also responded to the respondent's request for

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[2] The respondent's FOI request is dated 25 September 2017 and was received by s47F on 26 September 2017.

[3] Including two invalid applications for internal review and two Information Commissioner reviews closed as invalid under s 54N.

[4] Under s 89L(2) of the FOI Act, 'access action' includes a request for access to a document under s 15 of the FOI Act, an application for amendment or annotation under s 48, an application for internal review and an application for IC review.

[5] The total number of IC reviews is extracted from the OAIC's records. Manual calculations of the matters listed in Attachment A of s47F application provide the values as follows:
- 64 access requests
- 14 Internal reviews
- 10 IC reviews

In its application, s47F advises that the respondent has lodged 21 IC reviews and that the total number of access actions amounts to over 95 access actions in the past 24 months. This value does not include further applications for IC review received by the OAIC on 21 October 2019.

[6] s47F submits that the respondent also lodged '9 complaints and inquiries to the IC'.

[7] The *FOI Guidelines* [12.14] provides that I 'cannot consider contact between a person and an agency that is not part of an access action (for example, complaints and general correspondence). 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' (footnotes omitted).

[8] Under s 89K(4), the Information Commissioner must, as soon as practicable, give written notice to the person in relation to whom the vexatious applicant declaration is made. Under s 89L(3), the Information Commissioner must not make a declaration in relation to a person without giving the person an opportunity to make written or oral submissions.

OAIC

information and provided a copy of Part 12 of the FOI Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the FOI Guidelines) and the relevant case law cited in Part 12 of the FOI Guidelines.

7. Between 17 December 2019 and 7 February 2020, the OAIC received 23 pieces of correspondence plus attachments from the respondent. Accordingly, since being notified of the s 89K application, the OAIC has received a total of 59 pieces of correspondence plus attachments.

8. On 5 February 2020, s47F advised that since lodging the s 89K application, the respondent has made a further 20 access actions and 27 FOI related pieces of correspondence to s47F [9] The respondent has therefore made 122 access actions in relation to s47F between 25 September 2017 and 5 February 2020.

9. On s47F the Australian Information Commissioner made a declaration under s 89K(1) of the FOI Act in the following terms:

s47F

10. The period of this declaration expired on 24 February 2022.

s47F

11. On 17 February 2022, prior to the expiration of the earlier declaration, s47F applied for an extension to the then existing vexatious applicant declaration about the respondent, which is permitted under s 94L of the FOI Act and s 33 of the *Acts Interpretation Act 1901* (AI Act). Section 33 of the AI Act provides:

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[9] s47F advised that the respondent has made at least 20 access actions, including two internal review requests and 27 pieces of FOI related correspondence to s47F The statistics provided in s47F application under s 89K of the FOI Act in relation to the number of access actions and FOI related correspondence from the respondent to s47F was calculated up to 9 September 2019. Accordingly, the further statistics provided in s47F correspondence of 5 February 2020 were access actions received after the s 89K application was lodged with the OAIC.

[10] s47F

OAIC

33 Exercise of powers and performance of functions or duties

Power to make instrument includes power to vary or revoke etc. instrument

(3) Where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

(3AA) If a condition (the ongoing condition):

(a) must be satisfied before the making, granting or issuing of an instrument; and

(b) is capable of ceasing to be satisfied after the making, granting or issuing of the instrument;

subsection (3) has effect, in relation to the repeal, rescission or revocation of the instrument, as if the reference to like conditions (to the extent that the reference relates to the ongoing condition) were a reference to the ongoing condition ceasing to be satisfied.

Example: A Minister may give a person a written permission if, among other things, the Minister is satisfied the person is of good character.

This condition is capable of ceasing to be satisfied after the giving of the permission.

The Minister may repeal, rescind or revoke the permission in the like manner if the Minister ceases to be satisfied that the person is of good character.

12. As noted in the FOI Guidelines[11], the power to 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 and I must be satisfied that the grounds in s 89L for making a vexatious applicant declaration exist at the time of the variation.

13. In its application, s47F submitted that the respondent continues to repeatedly engage in access actions involving an abuse of process in satisfaction of s 89L(1)(a) of the FOI Act, and that the respondent has engaged in a particular access action which would be manifestly unreasonable in satisfaction of s 89L(1)(c) of the FOI Act.

14. On 25 February 2022, the OAIC provided the respondent with a copy of s47F application for a declaration and gave the respondent an opportunity to make a submission in response until 18 March 2022 (ss 89K(4) and 89L(3)).

15. The respondent provided a response to the application on 22 March 2022, which consisted of a series of pamphlets regarding a range of issues, including the COVID-19 pandemic and vaccinations and personal family events. The respondent did not address the matters raised by the Department in the vexatious applicant declaration application.

Issues

16. The issues I will consider in this decision are:

1. whether the respondent has repeatedly engaged in access actions (s 89L(1)(a)(i)), and if so, whether the repeated engagement involves an abuse of process for the access action (s 89L(1)(a)(ii)) by either:

[11] *FOI Guidelines* at [12.57]

- access actions that harass or intimidate an employee of s47F (s 89L(4)(a))
- access actions that unreasonably interfere with the operations of s47F (s 89L(4)(b)), or

2. whether the respondent has engaged in a particular action which would be manifestly unreasonable (s 98L(1)(c)).

17. If I do decide to extend the vexatious applicant declaration in respect of the respondent under s 33 AI Act, I must also consider what terms and conditions should be included in the declaration.

18. In making my decision, I have had regard to the following:

- s47F application for an extension to the vexatious applicant declaration s47F
- the FOI Act, in particular ss 89K, 89L and 89M
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard in performing a function or exercising a power under the FOI Act, in particular Part 12
- relevant case law, in particular, s47F *Minister for Immigration and Citizenship v Li* (2013) 139 ALD 181, *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 66 ALR 299, *National Archives Australia and Ronald Price* (Freedom of information) [2019] AICmr 16, *Commonwealth Ombudsman and 'S'* [2013] AICmr 31 and *Morris and Australian Information Commissioner (Freedom of information)* [2017] AATA 363, and
- the parties' submissions.

Vexatious applicant declarations

19. Under s 89K of the FOI Act, I may, by written instrument, declare a person to be a vexatious applicant. In making an application for a declaration, an agency bears the onus of establishing that a declaration should be made (s 89K(3)). Given that the power to extend a vexatious applicant declaration through variation under s 33 of the AI Act must be exercised in the like manner and subject to the like conditions as the original decision, I consider that the agency also bears the onus of establishing that the declaration should be extended.

20. The FOI Guidelines explain:

> 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]

21. I may make a vexatious applicant declaration in relation to a person only if I am satisfied of any of the following:

- that the person has repeatedly engaged in access actions and the repeated engagement involves an abuse of process for the access action (s 89L(1)(a))

[12] *FOI Guidelines* [12.7].

- that a particular access action in which the person engages involves, or would involve, an abuse of the process for that access action (s 89L(1)(b))
- that a particular access action in which the person engages would be manifestly unreasonable (s 89L(1)(c)).

22. In its request for an extension to the current vexatious applicant declaration, s47F relies on ss 89L(1)(a) and s 89L(1)(c).

The respondent's submissions

Has the respondent repeatedly engaged in access actions?

23. The first ground on which s47F has relied in its application for a declaration is that the respondent 'has repeatedly engaged in access actions; and the repeated engagement involves an abuse of the process for the access action' (s 89L(1)(a)).

24. A person engages in an 'access action' if the person does any of the following:

- makes a request (s 89L(2)(a))
- makes an application under s 48 (s 89L(2)(b))
- makes an application for internal review (s 89L(2)(c))
- makes an IC review application (s 89L(2)(d)).

25. The FOI Guidelines explain:

> ... 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'.
>
> 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, 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. [13]

26. I have examined s47F submissions and the list of access actions provided by s47F in support of its application. s47F has submitted, and I accept, that since the original vexatious applicant declaration was made on s47F the respondent has made 2 access actions: the first dated 2 October 2020 and received by s47F on 30 November 2020 (***the first access action***), the second dated 30 December 2020 and received by s47F on 11 January 2021 (the ***second access action***).

27. In the first access action, the respondent sought 'a full copy of the department's file without any redactions what-so-ever' in relation to a family matter. The respondent also outlined an hourly rate he intended to charge s47F for his 'terms of engagement' with the agency in relation to entering into a payment arrangement for s47F

28. s47F responded to this correspondence on 14 December 2020, referencing the vexatious applicant declaration made on s47F and declining to process the first access action. This, in turn, resulted in a series of letters from the respondent in

[13] *FOI Guidelines* [12.16] – [12.17] (footnotes omitted).

OAIC

relation to the first access action, including correspondence dated 30 December 2020 in which the respondent contested s47F reference to the s47F vexatious applicant declaration, made a further access request for 'a copy of the document on which you base your understanding' (***second access action***) and asserted defamation and stalking by agency staff. The respondent sent 32 letters or pamphlets to s47F between 30 November 2020 and 29 September 2021 following those access actions:

a. Correspondence dated 30 December 2020 to an FOI officer in s47F referencing earlier correspondence dated 7 October 2019 and advising the officer of an increase in the hourly rate the respondent intended to charge the agency for the preparation of a document, including the respondent's intention to pursue debt recovery for the amount 'against you personally through the court system, at my pleasure, if payment of any invoice is not made'

b. Correspondence dated 26 January 2021 to an FOI officer in s47F referencing the agency's correspondence in response to the first access request

c. Correspondence dated 27 January 2021 to an FOI officer in s47F referencing the agency's correspondence in response to the first access request, and including articles about vaccinations, abortions and birth control

d. Correspondence dated 18 June 2021 addressed to an FOI officer in s47F referencing correspondence dated 30 December 2020 (the second access action)

e. Correspondence dated 22 June 2021 addressed to an FOI officer in s47F referencing correspondence dated 30 December 2020 (the second access action)

f. Various undated documents, apparently prepared by the respondent, alleging corruption by various members of the Family Court, associating COVID-19 vaccinations with poison and infanticide, copies of correspondence to the Attorney-General's Department regarding the respondent's allegations of criminal activity in the Family Court and perjury in proceedings within that court.

29. It appears that this correspondence was sent to s47F repeatedly, amounting to 34 separate pieces of correspondence being provided between 30 November 2020 and 29 September 2021, a period of approximately 10 months.

30. The respondent's submissions do not address s47F submissions that they have repeatedly engaged in access actions, nor does the respondent dispute the figures provided in s47F application.

Consideration

31. In this matter, the number of separate access actions are low: 2 in approximately 10 months. I note that s 89L(1)(a)(i) provides that a declaration can be made where a respondent 'repeatedly' engages in access actions. As noted above (at [19]), while 'repeatedly' is not defined in the FOI Act, it clearly requires a number of requests.

32. In this case, a significant proportion of the correspondence outlined above relates to – either direct reference to the correspondence containing the access requests, or by attaching those letters containing the access requests to subsequent correspondence – those access requests. In *National Archives Australia and Ronald Price* (Freedom of information) [2019] AICmr 16, the Australian Information Commissioner made a vexatious applicant declaration in respect of the respondent, who had engaged in 12 access actions

between 1 January 2017 and 9 August 2018, not including invalid FOI requests or FOI requests that were sent to the applicant but addressed to other Commonwealth agencies and related correspondence. In that decision, the Commissioner referenced the FOI Guidelines and noted that:

> 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. 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 89L[14].

33. I have considered the correspondence sent to s47F by the respondent. While there appear to be 32 letters sent by the respondent to the agency between 30 November 2020 and 29 September 2021 that may be tangentially related to the 2 access actions outlined above, they cannot reasonably be construed, and are not submitted by s47F to be further access actions. Consequently, I am satisfied that, for the purpose of this application, there are only relevant 2 access actions.

34. The threshold issue for making a vexatious applicant declaration under s 89L(1)(a) is that the person has 'repeatedly' engaged in access actions. As noted above at [19], a small number of requests may establish a pattern. In the matter of *Commonwealth Ombudsman and 'S'* [2013] AICmr 31, a vexatious applicant declaration was made following 7 FOI requests and additional internal review requests.

35. However, I am not satisfied that 2 access actions in the course of approximately 10 months can constitute 'repeated' access actions. In *Morris and Australian Information Commissioner (Freedom of information)* [2017] AATA 363 (22 March 2017), Senior Member Walsh noted that 'repeatedly' is not defined in the FOI Act, and consequently takes its ordinary meaning[15]. SM Walsh considered the definition of 'repeated' found in the Macquarie Dictionary, as:

> done, made or said again and again.

36. In the context of an application for a vexatious applicant declaration, where the consequences of the declaration 'has the practical effect of preventing a person from exercising an important legal right conferred by the FOI Act… and will not be lightly made'16, I am not satisfied that 2 access actions are sufficient to satisfy the first limb of s 89L(1)(a)(i), that the person has 'repeatedly engaged in access actions'. Consequently, I am not required to consider whether those access actions also involve an abuse of the process for the access action (s 89L(a)(ii)).

Is a particular access action in which the person engages manifestly unreasonable?

37. A vexatious applicant declaration may also be made if a particular access action in which the person engages would be manifestly unreasonable (s 89L(1)(c)). The FOI Guidelines note that 'manifestly unreasonable' is not defined in the FOI Act, but that:

> The factors that are relevant in applying this ground are likely to be similar to those… in relation to whether a particular access action or series of actions would be an abuse of process under the FOI Act.

[14] At para 28, referencing FOI Guidelines at [12.14]
[15] At para 19
[16] FOI Guidelines at [12.7]

38. s47F submits that the respondent's first access action is manifestly unreasonable. In that request, the respondent sought access to:

s47F

s47F

Consideration

40. The first access request was made at a time when there was an existing vexatious applicant declaration in place which relieved s47F of the obligation to process the request. I consider this access action to be 'unreasonable' given that the respondent was aware that s47F was not required to process the request. However, the statute requires something beyond simple 'unreasonableness' by the inclusion of the word 'manifestly'. This amplification has not been judicially considered in the context of s 89L(1)(c) of the FOI Act. However, in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 66 ALR 299 at 310, referencing Lord Green MR in Wednesbury Corporation[17] (at pp 230, 233-4), the court agreed that a matter would be manifestly unreasonable if the decision was 'so unreasonable that no reasonable person could have come to it.' Other caselaw refers to manifest unreasonableness as involving 'an obviously disproportionate response' or a decision 'which lacks an evident and intelligible justification'[18].

41. s47F different from the access requests that resulted in the previous vexatious applicant declaration. Those earlier requests related to the s47F While s47F has submitted that the first access request was made for information 'that he would be aware he is not entitled to access', there is no evidence before me of circumstances in which the limitations of providing personal information of third parties without their consent was put to the respondent.

42. Consistent with the FOI Guidelines[19], I have considered whether the first access request could constitute an abuse of process for an access action under s 89L(4) of the FOI Act. s47F submits that the respondent's access actions constitute harassment and intimidation – consistent with s 89L(4)(a) of the FOI Act - as a result of the content, tone and language or the correspondence, unsubstantiated and derogatory or inflammatory allegations against agency staff, designed to intimidate, and repetitive requests intended to annoy or harass staff. While it is apparent that a significant amount of the correspondence sent by the respondent to s47F is rude, derogatory, inflammatory and repetitive, the question before me is whether the first access request

[17] *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223
[18] *Minister for Immigration and Citizenship v Li* (2013) 139 ALD 181, at 74 and 76
[19] FOI Guidelines at [12.31]

constitutes an abuse of process on the grounds that it is 'harassing or intimidating an individual or an employee of the agency'.

43. In the first access request, the respondent wrote:

> Given that your department has been involved in interfering with the progression of matters through the courts and money laundering and fraud and more through actions including bias and sex discrimination and negligence and indifference to duty then I s47F

The respondent then references a 'minimum fee' and 'hourly rate' of $1000, which I presume he advises he will charge the agency for unspecified activity. He concludes the correspondence with 'Please feel assured that any account issued in this matter will be pursued by me or by the executor(s) of my estate.'

44. The first access action also includes a 'notice' in small font, which appears to be a standard inclusion in all of the respondent's correspondence with the agency. In that 'notice' the respondent writes:

> Failure to report questionable or unlawful practice or the reasonable suspicion thereof within government.
>
> As the greatest threat to the welfare of the people of Australia comes from the activities of the government in its many forms and this is permitted to continue to occur through active concealment or failure to report such then let it be known that whosoever replies to this correspondence without including a report thereof is making a declaration that they have no knowledge of questionable or unlawful practice or the reasonable suspicion thereof within government and in default shall be deemed to be an accessory thereto.

45. This correspondence clearly makes generalised and unsubstantiated accusations about 'your department' and threatens that failing to report suspected wrongdoing to an unnamed person or agency will result in the recipient being considered an accessory to that wrongdoing.

46. s47F submits that the respondent's access requests and written correspondence are both subjectively and objectively harassing and intimidating. I understand from the application that this is due, at least in part, to the 'voluminous bundled nature of … the correspondence, along with the person nature of correspondence and repetitive, threatening and offensive content'. The agency advises that it has made efforts to limit the impact of the respondent's access actions, but they 'continue.. to make access actions and send significant volumes of correspondence to the FOI team'. From this, I understand that the subjective feelings of harassment and intimidation experienced by agency staff is significantly attributable to the nature and volume of correspondence and pamphlets sent to the agency by the respondent, rather than the particular nature of the first access action which constitutes the 'particular access action' under s 89L(1)(c).

Conclusions

47. While making an access action while a vexatious applicant declaration is in place is unreasonable, I am not satisfied that it is manifestly unreasonable. Similarly, while seeking a 'full copy' of the file relating to third parties may also be considered to be unreasonable in circumstances where the applicant is aware or has been advised that such information is unlikely to be forthcoming, may be unreasonable, such evidence is not before me. In circumstances where only one such application is made, I am also not satisfied that this request would constitute a 'manifestly unreasonable' access action.

OAIC

48. I accept the submissions of the agency that the nature and volume of correspondence sent to s47F by the respondent is offensive, threatening and is 'harassing or intimidating' for agency staff. However I am required to consider whether the first access request is manifestly unreasonable on the basis that it is 'harassing or intimidating'. Taken in isolation as I consider I am required to do by the terms of s 89L(1)(c) of the FOI Act, while the first access request makes generalised and far-fetched allegations of 'the department' being engaged in money laundering and other vague, improper behaviours, I consider that, by itself, it does not constitute harassment or intimidation. Consistent with the agency's submissions, I consider that it is the cumulative effect of the respondent's correspondence that is likely to detrimentally affect agency staff. However, the FOI Act cannot address the broader issues arising from correspondence that does not constitute an access action.

49. Based on the information before me, I am not satisfied that the respondent has repeatedly engaged in access actions as required for a vexatious applicant declaration pursuant to s 89L(1)(a), nor that the first access request is manifestly unreasonable for the purposes of s 89L(1)(c). For these reasons, I have decided not to extend the vexatious applicant declaration in the terms requested.

Elizabeth Hampton
Acting Freedom of Information Commissioner

28 March 2022

Review rights

Review by the Administrative Appeals Tribunal

An application may be made to the Administrative Appeals Tribunal (AAT) for a review of a decision under s 89K of the Information Commissioner to make a vexatious applicant declaration.

An application to the AAT must be made within 28 days of the day on which the applicant is given the s 89K decision (s 29(2) of the *Administrative Appeals Tribunal Act 1975).* An application fee may be payable when lodging an application for review to the AAT. Further information is available on the AAT's website (www.aat.gov.au) or by telephoning 1300 366 700.

Making a complaint to the Commonwealth Ombudsman

If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman). The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated unfairly.

If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the Commonwealth Ombudsman's website at http://www.ombudsman.gov.au.

Accessing your information

If you would like access to the information that we hold about you, please contact FOIDR@oaic.gov.au. More information is available on the **Access our information** page on our website.

Australian Government
Office of the Australian Information Commissioner

Our reference: RQ20/01051

s47F

Freedom of Information Officer
s47F
Sent by email: s47F s47F .gov.au

Vexatious applicant declaration application about s47F

Dear s47F

I write in relation to the s47F application for a vexatious applicant declaration about s47F under s 89K of the *Freedom of Information Act 1982* (the FOI Act).

After consideration of the material you have provided to the Office of the Australian Information Commissioner (OAIC) and submissions received from s47F I have decided not to declare s47F a vexatious applicant. My reasons for this decision are below.

Background

s47F application outlines that between 12 August 2019 and 3 February 2020, s47F made 15 access requests under s 15 of the FOI Act to s47F **Attachment A** provides information about each request and the outcome. In summary:

- s47F has made 15 FOI requests between 12 August 2019 and 3 February 2020.
- s47F engaged in a request consultation process under s 24AB in relation to 13 requests.
- s47F released documents to s47F in relation to five requests.
- s47F notified s47F during the request consultation process under s 24AB, that it intended to treat seven of his requests as one request under s 24(2)(b) of the FOI Act. During the request consultation process three of the seven requests were withdrawn by the applicant.
- s47F decided to refuse four of s47F requests, including the combined request, under s 24(1).
- s47F sought internal review in relation to one request.

- s47F has sought IC review in relation to two FOI decisions made by s47F including the combined request. One of the IC reviews was sought following s47F notice to s47F that it was applying under s 89K of the FOI Act.

On 28 February 2020, s47F notified s47F that it intended to apply under s 89K for a declaration that he is a vexatious applicant.

On 12 March 2020, s47F lodged an application for a vexatious applicant declaration with the OAIC in relation to s47F on the basis that he had repeatedly engaged in access actions that involve an abuse of process pursuant to s 89L(1)(a) of the FOI Act.[1] The application identifies the abuse of process for the access actions as 'unreasonably interfering with the operations of an agency' under s 89L(4)(b).

In its application, s47F sought the following terms:

a. The applicant is not permitted to submit more than one access request each calendar month

b. The applicant is not permitted to submit an access request within 14 days of his last access request

c. The scope of the applicant's requests may seek specified documents and no more than three documents for each access request

d. The applicant will not seek access to documents that are already in his possession (including as a result of earlier access requests and court proceedings)

e. The applicant may not seek access to documents under the Act through an agent.[2]

On 28 April 2020, the OAIC review adviser with carriage of this matter, s47F, wrote to s47F to seek his submissions in response to s47F s 89K application.[3]

On 16 May 2020, s47F provided submissions in response to s47F application.

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[1] s47F application refers to 16 access requests made by s47F However, the access action summary contained in s47F application and the evidence provided indicates that 15 access actions were made by s47F

[2] In correspondence received 24 June 2020, s47 clarified that it has not sought to have the declaration apply to s47F IC review of its decision dated 14 November 2019 (MR20/00031) because s47F sought IC review before s47 notified him that it intended to apply for a declaration that he is a vexatious applicant. However s47 has requested that the declaration apply in relation to the IC review application of s47F decision made on 10 March 2020 (MR20/00466), because s47F sought IC review after he was notified that s47 intended to apply for a declaration, and because the reasoning provided in relation to this application relates substantially to the pattern followed by s47F in relation to the requests encompassed by this IC review.

[3] Under s 89K(4), the Information Commissioner must, as soon as practicable, give written notice to the person in relation to whom the vexatious applicant declaration is made. Under s 89L(3), the Information Commissioner must not make a declaration in relation to a person without giving the person an opportunity to make written or oral submissions.

On 10 June 2020, s47F wrote to s47F to explain his preliminary view that s47F had not discharged its onus of establishing that a declaration should be made about s47F and invited further submissions. s47F was also provided a copy of s47F submissions of 16 May 2020.

On 24 June 2020, s47F responded to s47F preliminary view, submitting that:

- s47F wished to proceed with the application
- s47F intended that the proposed declaration have effect in relation to MR20/00466, but not MR20/00031
- s47F denied s47F contention that it advised him to split his requests
- s47F would be willing to reduce the timeframe during which the proposed declaration would take effect.

On 27 July 2020, s47F notified the OAIC that the respondent made a further FOI request.[4]

On 25 August 2020, s47F notified the OAIC that the respondent had made a further FOI request.[5]

Legislative framework

Section 89K of the FOI Act provides that I may, by written instrument, declare a person to be a vexatious applicant. In making the application for a declaration, an agency bears the onus of establishing that a declaration should be made (s 89K(3)).

The FOI Guidelines explain:

> 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. [emphasis added]
>
> 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

[4] The request is in relation to '[a}ll s47 staff conflict of interest declarations and associated documents'. The request is not about the same subject matter as the 15 requests relied on in s47F application, which are for emails between named s47 employees about the respondent or s47F

[5] The request is in relation to '[a]ll Emails to or from s47F to any other member of s47 in relation to s47F and or s47F Between the dates 1 March 2020 – 21 August 2020.

> access to government documents while ensuring that access requests do not interfere unreasonably with agency operations... [6]

I may make a vexatious applicant declaration only if I am satisfied of any of the following:

- a person has repeatedly engaged in access actions and the repeated engagement involves an abuse of the process for the access action (s 89L(1)(a))
- a particular access action by a person involves an abuse of process (s 89L(1)(b))
- a particular access action by a person would be manifestly unreasonable (s 89L(1)(c)).

In its application, s47F relies on s 89L(1)(a) of the FOI Act, contending that s47F has repeatedly engaged in access actions and that repeated engagement involves an abuse of the process for the access action.

A person engages in an 'access action' if the person does any of the following:

- makes a request (s 89L(2)(a))
- makes an application under s 48 (s 89L(2)(b))
- makes an application for internal review (s 89L(2)(c))
- makes an IC review application (s 89L(2)(d)).

I am satisfied that s47F has engaged in 'access actions' as defined under s 89L(2) of the FOI Act.

Subsection 89L(4) of the FOI Act provides that 'abuse of the process for an access action' includes, but is not limited to, the following:

- harassing or intimidating an individual or an employee of an agency
- unreasonably interfering with the operations of an agency
- seeking to use the Act for the purposes of circumventing restrictions on access to a document (or documents) imposed by a court.

s47F submits that s47F requests involve an abuse of process because the access actions unreasonably interfere with the operations of s47F (s 89L(4)(b)).

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[6] Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982 (the FOI Guidelines) at [12.7]).

Whether the access actions involve an abuse of process

s47F submissions

In its application, s47F said:

> s47F has made 16 access requests[7] between 12 August 2019 and 3 February 2020 of a similar nature or concerning the same subject matter. This included 7 recent concurrent access requests (6 received on 31 January 2020 and 1 received on 3 February 2020) for emails between specified s47 officers in relation to himself. Three of these access requests were withdrawn during the practical refusal process.
>
> s47F has made multiple (subsequent and concurrent) access requests in a short period of time. The majority of these applications involved seeking access to documents that had been processed and decided under earlier applications.

s47F also submits that s47F requests involve an abuse of process because the access actions unreasonably interfere with the operations of s47F (s 89L(4)(b)). In its application, s47F said:

> … This application primarily relies on section 89L(4)(b), as s47 submits that s47F is abusing the process by separating his requests as a mechanism to avoid a practical refusal decision, while duplicating the effort of s47 to conduct searches and to repeatedly review the same documents.
>
> In summary, s47F is making access requests that produce a volume of duplicative results, inappropriately impact agency resources, while now creating a pattern in order to avoid practical refusal decisions. s47F has encouraged him to include parameters in the scope of his requests, however, he failed to do so until receiving notification of s47F intention to apply for a section 89K declaration. Prior to this notification, the applicant had only reduced the date range of the scope of his requests, which had also resulted in him submitting separate and ongoing requests for the dates relinquished. Since this notification, s47F has created more work for agency resources by increasing parameters at the same time as removing parameters, as discussed further below.
>
> s47F access requests require ongoing email vault searches, impacting s47F information technology, technical and legal staff, as well as printing more than 5,000 pages and potentially reviewing more than 900 documents to determine the scope of the documents and the relevant exemptions for a number of the applicant's access request [sic]. Several of the access requests required more than five hours assessment, and at times this has involved reviewing duplicative ranges of documents under separate access requests. The circumstances of the access requests are diverting s47 resources from its statutory and

[7] s47F application refers to 16 access requests made by s47F However, the access action summary contained in s47F application and the evidence provided indicates that 15 access actions were made by s47F I note that s47F has made two further access requests to s47 since being notified of s47F s 89K application. s47 is undergoing a request consultation process under s 24AB in relation to one of the request. s47 finalised the other request, giving s47F partial access to documents.

> general duties, causing distress amongst those staff with other regulatory and administrative obligations having to dedicate their capacity to s47F He is also creating a demand which interferes with the time available for s47F FOI decision maker, to fairly devote consideration to other applicants.
>
> …
>
> s47F [sic] access requests alone, equate to 11 % of the access requests received by s47 in a 12-month period. Since the applicant submitted his first access request in August 2019, 23% of requests received up until his last request on 3 February 2020 has been from him. On average, s47F receives 130 requests a year. s47F FOI officer is required to dedicate a considerable volume of time to the applicant daily to consider his individual applications.

In its further submissions, s47F said:

> I confirm that s47F application for a declaration under section 89K was on the basis that section 89L(1)(a) of the FOI Act is satisfied. While the facts support that s47F has repeatedly engaged in access actions, s47F maintains that the repeated engagement involves an abuse of process for the access action. The later distinguishes the requirement for a vexatious applicant declaration rather than continuing to issue practical refusal decisions.
>
> To accept that only practical refusal mechanisms apply would not address the primary issue that s47F abused process as explained in my letter dated 12 March 2020. Issuing ongoing practical refusal decisions for the same or similar requests will continue to burden s47F resources by having to run duplicative searches and make initial assessments to continue to develop a substantiated argument for practical refusal grounds.

s47F submissions

I have also had regard to s47F submissions in response to s47F application. s47F submits:

> By two emails on 12 March, s47F makes an application to the Information Commissioner to have me declared vexatious with a large list of alleged offences and somewhat erroneous material. It must be noted with concern, s47F has failed to provide supportive evidence for stated facts that must be only considered as 'suppositions and hypotheses'. Further, again it would appear s47 has intentionally omitted facts for example s47F 28 Feb notice, necessary for them to support their narrative.
>
> …
>
> We assert s47F has made numerous erroneous and false statements and we have substantiated this with supporting evidence and it can therefore be shown as damaging s47F credibility in this matter and further can be clearly asserted as a pattern of behaviour even as far as s47 assuming the role and powers of the Australian Information Commissioner.

On 23 June 2020, s47F provided further submissions stating:

> At this time we do not wish to engage directly to the false 89K accusation by s47F that is erroneous and far-fetched, as s47 have yet to provide supportive evidence. That said, we do wish to highlight some key points and matters of concern, along with supportive evidence for your understanding regarding this matter:
>
> 1. Directed by legal counsel, I have only ever made FOI requests of s47 and they occurred between the period of 12 August 2019 and 31 January 2020. As directed by s47F my FOIs were split into multiple requests and or amended and resubmitted (details in my 16 May email below).
>
> 2. FOI requests were due to s47F declining our legal counsels requests to provide as was required, documents and evidence they used to consider and impose enforcement actions. Notably, s47F enforcement actions occurred out an [sic] investigation instigated and party to by a disgruntled ex-employee ([Named individual]) subsequently employed by s47F
>
> 3. … . Further, it must be noted with concern, that by s47F alleging my being a vexatious applicant is also in keeping with their pattern of behaviour of threats, intimidation and other conduct that can be reasonably, objectively construed to block or delay IC review (we refer you to 16 May email below and attached s47 letter 28 Feb).
>
> …
>
> It must be noted this 89k application with recommendations, have at their core, a reliance upon OAIC acceptance of s47F assertions unsupported by evidence, as being truthful and meeting the statutory threshold for imposing conditions is met. We would respectfully suggest that it is unsafe to place reliance on s47F assertions given the facts herein and previously provided to the OAIC for the IC review of s47F Facts that would give the Information Commissioner significant concern about s47F credibility and reliability and it is respectfully submitted that you would not proceed on their untested allegations.

Considerations

I have had regard to previous decisions in which an Information Commissioner or the Administrative Appeals Tribunal has decided to declare a person vexatious on the basis that they have engaged in an access action that involves an abuse of process for that action.[8]

Before making a declaration under s 89K, I must be satisfied that one of the grounds for making a declaration in s 89L(1) is made out. I must also be satisfied that there is a 'clear and convincing need for a declaration' (FOI Guidelines at [12.7]). In response to s47F submissions, I have also had regard to whether s47F actions may have contributed to or

[8] *Department of Defence and Ronald Francis* [2014] AICmr 68; *Francis and Australian Information Commissioner (Freedom of information)* [2015] AATA 936; *Morris and Australian Information Commissioner (Freedom of information)* [2017] AATA 363 [36]-[41]; and *Australian Taxation Office and Andrew Garrett (Freedom of information)* [2017] AICmr 50 [31] –[36].

might explain the respondent's access actions and may be a factor weighing against making a declaration in this case.

Has the respondent repeatedly engaged in access actions and has the repeated engagement involve an abuse of the process for the access action?

Repeated engagement in access actions

The term 'repeated engagement' is not defined within the FOI Act but may be interpreted within the ordinary meaning of the words: 'done, made, or said again and again' (See *Sweeney and Australian Information Commissioner and Australian Prudential Regulation Authority (Joined Party)* [2014] AATA 539 at [43]). No fixed number of access actions is required to establish a pattern of repeated requests and whether a pattern exists will depend in part on the nature of the abuse of process involved (Guidelines at [12.17]).

As discussed above, I am satisfied that s47F has engaged in 'access actions' as defined in s 89L(2) of the FOI Act. s47F has made 15 requests for access under s 15 of the FOI Act between 12 August 2019 and 3 February 2020. s47F also made two further FOI requests on 27 July 2020 and 25 August 2020. I find that 15 requests for access in almost six months amounts to 'repeated' access actions for the purpose of s 89L(1)(a)(i).

Abuse of process

In relation to the second limb of the test in s 89L(1)(a), s47F contends that s47F requests constitute an abuse of process on the basis that he has engaged in a pattern of requests that unreasonably interfere with the operations of the agency (s 89L(4)(b)).

I have had regard to s47F submissions that discuss the factors listed in the Guidelines at [12.27]. Those include:

- s47F is a small agency with one dedicated FOI officer
- s47F requests equate to 11% of the access actions received by s47F in a 12 month period. Between 12 August 2019 and 3 February 2020, 23% of all requests received by s47F were from s47F
- The nature of the requests has required involvement from s47F information technology, technical and legal staff.
- Processing the requests has diverted s47F resources from its other regulatory and general duties, as well as the time the FOI decision maker has had to consider requests made by other FOI applicants.
- Several of the documents require more than five hours to assess.

I have reviewed the submissions provided by s47F and I note the following:

- In its practical refusal decision of 10 March 2020, made with respect to the combined requests, s47F identified 512 documents comprised of in excess of 3000 pages as potentially falling within the scope of the requests.

- s47F withdrew three FOI requests during the s 24AB request consultation period.

- s47F cooperation with s47F in revising the scope of his request has led to agreement in relation to a scope that s47F was able to process in relation to three requests.

- However, during the request consultation process, s47F has also sought to increase the date range of three other requests, including to dates after the date his FOI request was received by s47F

- s47F has not provided estimates in relation to the time that would be required to process s47F requests, and the basis of its assessment that some documents require more than five hours to assess is unclear.

- All the documents requested appear to be in relation to decisions made by s47F in relation to s47F and the s47F

Processing Impact on the agency

s47F has indicated that almost a quarter of all FOI requests between 12 August 2019 and 3 February 2020 were from s47F I acknowledge that this is a high proportion of the total number of access requests received by s47F and that s47F is a small agency. However, for the purposes of s 89L(4)(b), an agency must demonstrate that any interference with its operations is also unreasonable.

s47F submissions indicate that s47F agreed to revise the scope of three of his requests after being issued with request consultation notices under s 24AB of the FOI Act. s47F also agreed to withdraw three other requests in response to a request consultation notice issued by s47F on 20 February 2020.

s47F

Have s47F *'s actions contributed to* s47F *access requests?*

I note s47F submissions above regarding the advice that he received from s47F in relation to the lodging of the FOI requests which s47F asserts were 'split up' and lodged on the basis of s47F 'recommendation.[9]

In relation to s47F contention that he was instructed by s47F to split his FOI request, s47F submits:

> As directed by s47F my FOIs were split into multiple requests and or amended and resubmitted (details in my 16 May email below).

s47F was provided a copy of s47F submission, including in relation to his claim that s47F approach in relation to his FOI requests was based on s47F recommendations (related IC review MR20/00466).

In response to s47F claims, s47F said:

> I have reviewed s47F email dated 16 May 2020 and contend that his assertions are not accurate and have been discredited by the facts and supporting documentation that s47F provided to the OAIC on 12 March 2020.
>
> Particularly, s47F stated in his email of 16 May 2020 that s47F recommended that he split the scope of his requests to avoid a practical refusal. This was referenced in your letter dated 10 June 2020. In accordance with section 24AB of the Act, s47 took reasonable steps to assist s47F to revise his requests so that the practical refusal reason would no longer exist. s47 was provided with multiple parameters to be able to reduce the likelihood of a practical refusal decision. As explained in my letter dated 12 March 2020, s47F refused to apply the parameters suggested, and continued to split dates and submit separate access requests for different named s47F staff. Therefore, following revised searches, practical refusal reasons still existed.
>
> Moreover, the parameters suggested to s47F were explained to be guidance. It was also explained that by applying s47F suggestions, it was not a guarantee that the decision of a practical refusal would no longer exist. This was particularly the case for later decisions when s47F record of requests had increased to a volume considered to be of a repetitive nature. Copies of all practical refusal notices supporting s47F position were provided to the OAIC as supporting documentation on 12 March 2020.

I have reviewed the correspondence provided by s47F in response to s47F assertions about the assistance provided to s47F to revise his requests. On 15 October 2019, s47F said:

> You would have seen from your last request that there were numerous documents captured that involved fortnightly updates from s47F . These documents involve a range of operators and individuals. I suggest that if your request was

[9] s47F submissions of 16 May 2020.

> modified as follows, to eliminate such documents from this request, then the practical refusal reason specified in my letter will not exist:
>
> s47F
>
> Do you agree to the removal of the names of any s47 officers from the documents you are seeking? No
>
> Do you agree to the removal of the names of any third parties from the documents you are seeking? Yes

On 18 November 2019, s47F further wrote to s47F s47F said:

> I am refusing access to the documents you are requesting on practical refusal grounds. You are free to make a new request for documents, and I encourage you to carefully consider both the type of documents you are seeking and the date range, so that you can potentially seek specific documents within a relevant date range that will not be prohibitive to process.

On the information before me, I am satisfied that s47F correspondence of 15 October 2019 and 18 November 2019 could be interpreted as an attempt to provide assistance to s47F to revise his request, including suggesting a scope that it could process rather than as a directive, as s47F submits.[10]

I am satisfied that s47F actions have not contributed to the access actions made by s47F in the manner alleged in his submissions.

Is there a 'clear and convincing' need for a declaration'

Based on the information available to me, since notification that s47F asked me to make a vexatious applicant declaration in relation to him and subsequent exercising of his review rights in relation to s47F practical refusal decision (MR20/00466), s47F has only made two further access actions to s47F I am satisfied that one of these requests is for documents that are different from those requested previously. s47F other recent request is for similar documents to his previous request, however there has been an interval of over six months in between his last request about this subject matter and the recent request and the recent request specifically excludes documents that have been previously provided under FOI. This suggests that s47F has modified his approach to access actions.

The power to make a declaration under s 89L is discretionary, and, in light of the fact that it operates to reduce an individual's statutory right to access information in some circumstances, must be applied only where there is a clear and convincing need to balance

[10] The steps taken by s47 during the consultation process to assist s47F in relation to the FOI request will be considered in s47F related IC review (MR20/00466).

the potential abuse of a right of access to government documents with unreasonable interference with agency operations. I am satisfied that while a clear and convincing need may have been satisfied in February 2020, given the modification of s47F approach to access actions since that time, that is no longer the case.

I am satisfied that s47F has since modified the volume of access actions lodged with s47F since the notification of s47F application. I am not satisfied that s47F has demonstrated an ongoing pattern of behavior which warrants a vexatious applicant declaration be made at this time.

Based on the information before me, I am not satisfied that s47F has discharged its onus in establishing that a 'clear and convincing need for a declaration' is required.

Decision

Based on the information before the OAIC, for the reasons set out above, I am not satisfied that there is a clear and convincing need for a declaration to be made under s 89L of the FOI Act in relation to s47F

I note that this decision to refuse to declare s47F a vexatious applicant at this time, does not prevent s47F from making a further application in the future.

A copy of this decision letter will be provided to s47F

If you would like to discuss this matter please contact s47F, the review adviser with carriage for this matter, on s47F or email s47F @oaic.gov.au. In all correspondence on this matter, please quote the reference number RQ20/01051.

Your sincerely

s47F

Angelene Falk
Australian Information Commissioner

29 October 2020