



Australian Taxation Office and Andrew Garrett (Freedom of information) [2017] AICmr 50 (29 May 2017)

Declaration and reasons for declaration of
Australian Information Commissioner, Timothy Pilgrim

Applicant:	Australian Taxation Office
Respondent:	Mr Andrew Garrett
Decision date:	29 May 2017
Application number:	RQ16/04727
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 unreasonably interfere with the operations of an agency — (CTH) <i>Freedom of Information Act 1982</i> ss 89K, 89L, 89M — (CTH) <i>Acts Interpretation Act 1901</i> s 33

Declaration

I revoke the declaration in *Australian Taxation Office and Garrett* [2015] AICmr 33 of 1 May 2015.

In accordance with s 89K(1) of the *Freedom of Information Act 1982* (the FOI Act), I declare Mr Andrew Garrett to be a vexatious applicant on the basis that he has repeatedly engaged in access actions that involve an abuse of process.

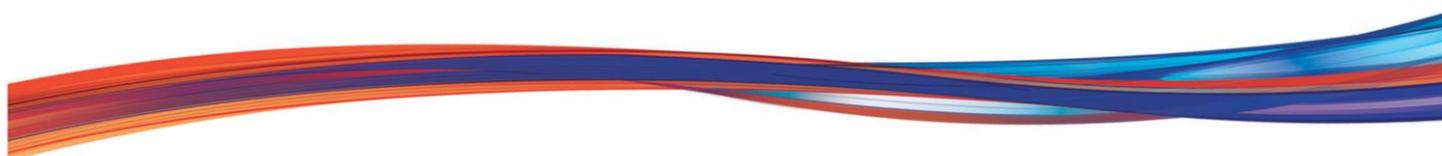
I make this declaration in the following terms:

1. For a period of five (5) years commencing on the date of this declaration, the Australian Taxation Office (ATO) is not required to consider any request made, or caused to be made by Mr Garrett, for access to a document under s 15 of the FOI Act, unless:
 - the Mr Garrett has applied in writing to the Information Commissioner for permission to make the request to the ATO

- the Information Commissioner has granted Mr Garrett written permission to make the request to the ATO
 - Mr Garrett has provided to the ATO a document from the Office of the Australian Information Commissioner (OAIC) evidencing that permission has been granted, and
 - Mr Garrett directs the request only to the ATO at its nominated electronic address for FOI requests, currently FOI@ato.gov.au, and does not address, carbon copy (CC), blind carbon copy (BCC), or direct or forward the request or application to any other ATO officer, any other individual, or any other government or non-government entity.
2. The Information Commissioner will not consider any application by Mr Garrett for permission to make a request unless:
 - the request meets the requirements of s 15(2)(b) of the FOI Act, and
 - is not vexatious in nature.
 3. The Information Commissioner is not required to consider any application for permission received from Mr Garrett by the OAIC within ninety (90) days of a prior application.

Timothy Pilgrim
Australian Information Commissioner

29 May 2017



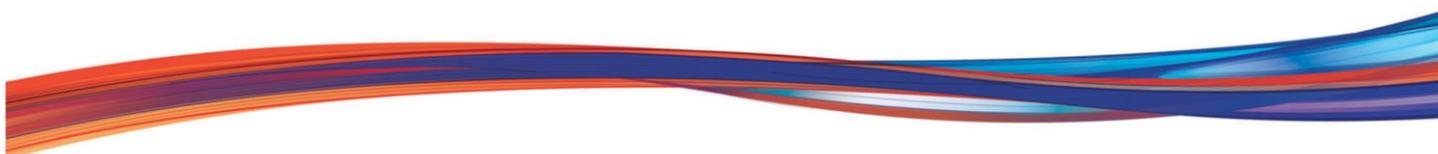
Background

1. This matter relates to an existing vexatious applicant declaration (the existing declaration) made by the former Australian Information Commissioner in *Australian Taxation Office and Garrett* [2015] AICmr 33, on 1 May 2015. The relevant stages of that matter are summarised at [7]:
2. Between 14 July 2015 and 5 October 2016, subsequent to the date of the existing declaration, the ATO received 15 access actions from Mr Garrett, comprising 14 FOI requests under s 15 of the FOI Act and one application for internal review under s 54B.
3. During this period, on 2 September 2015 and 1 November 2015, Mr Garrett made two applications to the OAIC for Information Commissioner (IC) review of the ATO's decisions to refuse his requests, made under s 54L of the FOI Act.
4. On 15 July 2015 and 7 March 2016, Mr Garrett made applications to the OAIC for permission to make an FOI request to the ATO, in accordance with the declaration.
5. On 2 November 2016, the ATO applied to the OAIC for the existing declaration to be varied,¹ imposing additional restrictions on Mr Garrett's access rights under the FOI Act in relation to the ATO. Together with its application, the ATO provided the OAIC a table setting out Mr Garrett's access actions and copies of requests made since the vexatious applicant declaration of 1 May 2015.
6. Between 20 November 2016 and 30 April 2017, Mr Garrett made a further four FOI requests and an application for internal review. Two of the FOI requests and the application for internal review were made after Mr Garrett was notified of the ATO's application to vary the declaration.

Existing declaration

7. The following is the relevant background to the existing declaration:
 - Between May 2012 and November 2013, Mr Garrett made 51 FOI requests, and an internal review application, to the ATO.
 - Between March and September 2014, Mr Garrett made a further 20 FOI requests.
 - On 5 September 2014, the ATO applied to the OAIC to have Mr Garrett declared a vexatious applicant under s 89K of the FOI Act.
 - On 15 December 2014, the ATO revised its application to the OAIC, incorporating a further 13 access actions that Mr Garrett had engaged in since the application in September 2014. These comprised 10 FOI requests, and three IC review applications.
 - Between 19 January and 30 April 2015, Mr Garrett made a further 10 FOI requests, including a request that was transferred to the ATO under s 16 of the FOI Act.

¹ Section s 33(3) of the *Acts Interpretation Act 1901* provides, '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.'



- On 1 May 2015, the former Australian Information Commissioner declared Mr Garrett to be a vexatious applicant under s 89K of the FOI Act on the basis that he had repeatedly engaged in access actions that involve an abuse of process. That declaration was made in the following terms:
 1. The Australian Taxation Office (ATO) is not required to consider any request by Mr Garrett made under s 15 of the FOI Act:
 - that duplicates or substantially duplicates any earlier request made by Mr Garrett
 - where the documents requested by Mr Garrett relate to current proceedings involving Mr Garrett before a court or tribunal and it would be reasonable for Mr Garrett to use the procedures of the court or tribunal to seek access to those documents
 - where the documents requested by Mr Garrett relate to the taxation affairs of some other individual or entity and Mr Garrett has not provided an authority or consent from that other individual or entity for Mr Garrett to be granted access to those documents under the FOI Act
 - where the documents relate to the administration of a prior FOI request or the investigation of a complaint Mr Garrett has made against the ATO, until that request or complaint has been finalised
 - where Mr Garrett has made a request to the ATO within the previous 14 days.
 2. Mr Garrett may apply in writing to the Information Commissioner to make a request to the ATO under s 15 of the FOI Act where one of the circumstances listed in paragraph [1] exist, outlining his reasons for making the request. The Information Commissioner may grant written permission for the request to be made. If written permission is given by the Information Commissioner, the ATO must process the request as if this declaration was not in force.

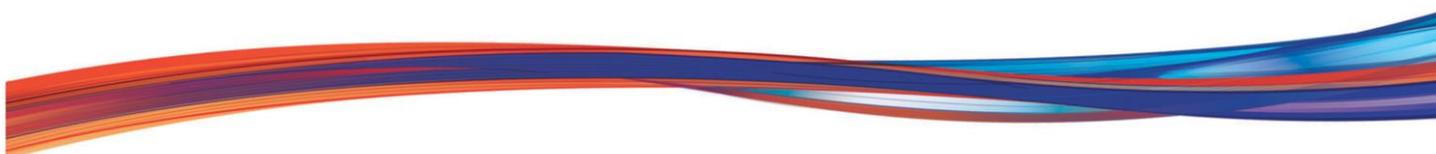
8. The existing declaration allows Mr Garrett to make access actions to the ATO with limited restrictions. The Information Commissioner explained in *Australian Taxation Office and Garrett* at [16]:

The ATO application specified in relatively narrow terms the declaration requested. The ATO explained that it did not seek a declaration expressed more broadly as it recognised the need to provide taxpayers with information about decisions it has made about their tax affairs. ATO policy requires ATO officers, upon request, to furnish taxpayers with information enabling taxpayers to understand their tax affairs without needing to make an FOI request.

Power to make vexatious applicant declarations

9. 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)).
10. 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.²

² *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982 Part 12, [12.7].*

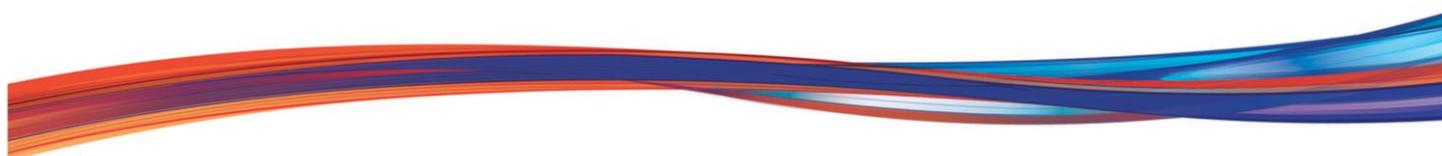


11. Before making a declaration I must notify the person in relation to whom the declaration is made (s 89K(4)) and give them an opportunity to make a written or oral submission (s 89L(3)).
12. I may make a vexatious applicant declaration only if I am satisfied of at least one of the following:
 - a 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)).
13. The ATO submits that each of these grounds is satisfied in this case.
14. The terms now sought for the declaration by the ATO are more expansive and are directed to what the ATO contends to be the ongoing impact of access requests by Mr Garrett on the agency.
15. As outlined above, I may revoke or vary an existing declaration under s 89K. In the circumstances, and given the passage of time, I have considered that it would be more appropriate to revoke the existing declaration and make a declaration in different terms, if warranted, rather than to vary the existing declaration.
16. On that basis, I have considered whether there remains a clear and convincing case for a declaration and if so, terms that would be appropriate in the circumstances. I have considered the access actions which were the subject of the existing declaration and the subsequent access actions made by Mr Garrett since the existing declaration was made in deciding:
 - whether one of the grounds under s 89L has been established, and
 - whether this is an appropriate matter in which to exercise my discretion to make a declaration.

Submissions by the respondent

17. In accordance with s 89L(3) of the FOI Act, Mr Garrett was provided a copy of the ATO's application and asked to provide submissions as to whether a declaration should be made or the existing declaration varied, and as to the terms of the declaration.
18. On 22 December 2016, Mr Garrett advised that he had no submissions in respect of the ATO's application and required access to documents 'as is my rights in respect to the actions of the Commissioner of Taxation.'
19. Further submissions provided did not address the existing application but contained various criticisms of the OAIC, including that it has 'misinterpreted its role and that its role is to facilitate an open and transparent system of government', in relation to a separate vexatious applicant declaration.³ The submissions also alleged bias, maladministration, misconduct and criminal conduct by the OAIC.

³ *Federal Court of Australia and Garrett* [2015] AICmr 4.



Has the respondent repeatedly engaged in access actions?

20. Under s 89L(2) of the FOI Act ‘access action’ relevantly includes a request for access to a document under s 15, an application for internal review under s 54B and an IC review application under s 54L. The term ‘repeatedly engaged’ is not defined in the FOI Act but may be interpreted within the ordinary meaning of the words: ‘done, made, or said again and again.’⁴
21. In addition to the 95 access actions made by Mr Garrett prior to the declaration of 1 May 2015, Mr Garrett has made a further 20 access actions to the ATO and two IC review applications, totalling 117 access actions over five years.
22. I am satisfied that Mr Garrett has repeatedly engaged in access actions. I am also satisfied that there has been repeated engagement in access actions since the date of the original declaration.

Has there been an abuse of process?

23. The term, ‘abuse of the process for an access action’ includes but is not limited to the factors listed in s 89L(4) of the FOI Act. Here, the ATO relies upon the following grounds:
 - harassing or intimidating an individual or an employee of an agency under s 89L(4)(a)
 - unreasonably interfering with the operations of an agency under s 89L(4)(b).
24. It will be sufficient for the purposes of s 89L(1)(a) if ‘some of the access actions can be characterised as “an abuse of process for an access action”’.⁵
25. In making the existing declaration in *Australian Taxation Office and Garrett*, the former Information Commissioner considered the access actions engaged in by Mr Garrett between 24 May 2012 and 7 April 2015 and discussed at [22]-[23]:

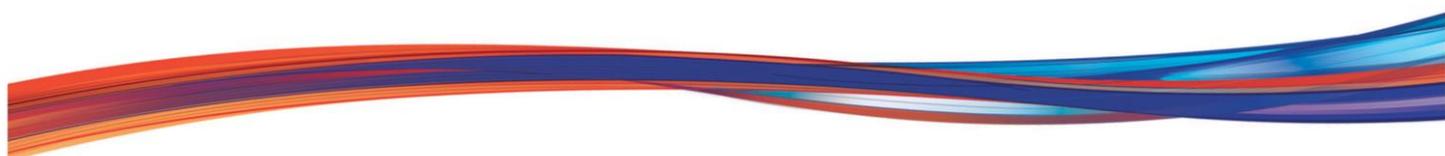
Mr Garrett’s use of the FOI Act in relation to the ATO is neither responsible nor moderate. It is clear from the pattern of requests and the way the requests are framed that he has not made reasonable attempts to moderate his request pattern or limit the administrative impact that his requests are likely 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.

26. The ATO submits that in the intervening time, Mr Garrett has made access actions that are:
 - contrary to the vexatious applicant declaration issued 1 May 2015

⁴ *Sweeney and Australian Information Commissioner and Australian Prudential Regulation Authority (Joined Party)* [2014] AATA 539 at [43].

⁵ *Sweeney and Australian Information Commissioner and Australian Prudential Regulation Authority (Joined Party)* at [47].



- predicated upon unsupported, unfounded and unreasonable assertions of illegality, fraud and misconduct against ATO officers specifically and the government, judiciary, and private enterprises more broadly
- for the purpose of harassing ATO officers, and prolonging a separate grievance against the ATO specifically and the government, judiciary, and private enterprises more broadly, and
- an abuse of process, and manifestly unreasonable, including the access action dated 26 August 2016.

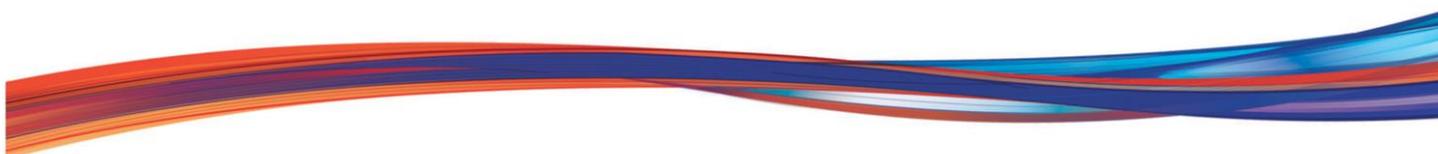
27. I have examined documents relating to the access actions made during the term of the declaration and observe the following:

- the requests are broadly framed, in many cases seeking 'a copy of any document or thing relating to' decisions by officials in various legal and agency processes
- certain requests are clearly repetitive, such as the requests of 5 October 2016 for 'any document or thing ... in your (the Commissioner of Taxation) possession and control related to me that has not been previously provided by the Commissioner under prior FOI applications' and of 30 April 2017 for 'any document or thing related to me pursuant to the provisions of *the Freedom of Information Act 1982 (Cth)*'
- two requests seek 'any document or thing relating to the tax affairs of' nine specified entities without authority or consent of those entities for Mr Garrett to be granted access to the documents under the FOI Act (12 May 2016 requests)
- various requests are embedded in other correspondence, for example, an email containing a request of 26 August 2015 also makes a claim under a separate legal process, requests reasons in respect of a decision, and advises that a fraud report about the recipient of the email had been lodged
- multiple requests also contain complaints of corruption, illegal conduct and correspondence regarding other legal processes
- multiple requests are directed to individual officers, rather than the ATO's designated FOI mailbox, and
- various requests to the FOI mailbox are also sent to ATO officers, the Commissioner of Taxation or are copied into individuals external to the ATO.

28. The ATO provided the OAIC with a copy of an email dated 19 August 2016, one of the occasions that Mr Garrett was advised that FOI requests needed to be sent to the nominated FOI email inbox. However, on 20 September and 5 October 2016, Mr Garrett sent two requests to an individual officer of the ATO, embedded in complaints and allegations of misconduct, and not to the FOI mailbox. A request of 28 March 2017 was also directed to an individual officer.

29. The nature of these requests must be assessed in light of the existing declaration. While broad requests, requests accompanied by complaints or requests to the incorrect recipient may not of themselves involve an abuse of process in ordinary circumstances, here they clearly complicate the processing of Mr Garrett's requests in accordance with the declaration and are apparently targeted to a wider audience within and external to the ATO.

30. In my view, Mr Garrett's recent access actions demonstrate a continued use of the FOI Act that is neither responsible nor moderate, as described in *Australian Taxation Office and Garrett*.



FOI request of 26 August 2016

31. I have examined a request of 26 August 2016 addressed to the Commissioner of Taxation, which appears to have been emailed to both the Commissioner of Taxation and the FOI mailbox. The request contains various attachments and is copied to an address at the Department of Finance and the Department of Prime Minister and Cabinet.
32. The request itself is in the final of five paragraphs of the email and is preceded by a detailed complaint containing various allegations of wrongdoing.
33. The requests itself contains two parts:
- a request for any document or thing 'related to the protection of Ill Gotten revenue', and
 - a request for any Memorandum of Understanding executed between the ATO and any other Commonwealth, State or Territory government agency or non-government agency, and/or legal entity.
34. The ATO submits that the first part of the request would not provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, to identify it as required under s 15(2)(b) of the FOI Act and that the second part of the request would substantially and unreasonably divert the resources of the agency from its other operations:
- At the current time, the ATO has entered into 119 MOUs with government entities. The ATO has further entered into innumerable MOUs with private entities. These MOUs are held across a number of different BSLs, and it would require the attention of a significant number of different officers in order to ensure that all MOUs are identified.
35. The ATO submits that this request involves or would involve an abuse of process under s 89L(1)(b) or would be manifestly unreasonable under s 89L(1)(c):
- Furthermore, the applicant's request is, in our view, not directed towards obtaining information or documents under the FOI Act, but rather directed towards prolonging a separate grievance against the ATO. Specifically, we consider the request is directed towards demonstrating to the Commissioner of Taxation, and ATO officers generally, that the applicant intends to continue to make unfounded allegations of fraud and misconduct against, and impugn the integrity of, those officers – and direct those unfounded allegations to other government and non-government entities. This is particularly the case as this FOI request has been received in close temporal proximity to numerous other communications that do not purport to make a FOI request, but that make similar complaints and similarly were sent by the applicant to other government and non-government entities.
36. In the circumstances and based on an examination of the correspondence, I consider this request of itself to be an abuse of process on the basis that it would not appear directed towards obtaining documents, but rather to prolonging a separate grievance against the ATO and its personnel.

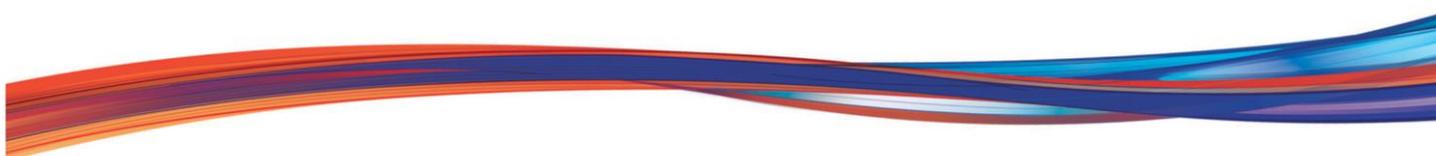
Compliance with the current declaration

37. As outlined above, I have taken the relatively narrow terms of the declaration of 1 May 2015 into account in considering the nature and volume of recent requests, and whether Mr Garrett's access actions have unreasonably interfered with the operations of an agency.
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38. Of the access actions made since the declaration, 15 FOI requests and two internal review requests have been treated by the ATO as invalid because Mr Garrett has not complied with the terms of the original declaration or the FOI Act. This includes:
- seven requests that duplicate or substantially duplicate an earlier request made by Mr Garrett
 - two requests where the documents requested by Mr Garrett relate to the taxation affairs of some other individual or entity without authority or consent
 - five requests that did not meet the requirements of s 15(2A)(c) of the FOI Act of being sent to an electronic address specified by the agency or Minister, and
 - two internal review requests where the underlying FOI requests were not valid.
39. Mr Garrett had the right to apply to the information Commissioner to make a request where one of the circumstances listed in the original declaration applied, such as where a request duplicates or substantially duplicates any earlier request, and did so on two occasions. In one instance permission was declined and in another instance, Mr Garrett declined to provide adequate information as to the basis of the application, and whether he had the authority or consent of the entity the request was made about. That application was also declined.
40. Three further FOI requests to the ATO were subject to a request consultation process under s 24AB of the FOI Act on the basis of a practical refusal under s 24AA(1)(a)(i): that the work involved would substantially and unreasonably divert the resources of the agency from its other operations. In those matters, it appears Mr Garrett declined to engage with the consultation and the requests were treated as withdrawn under s 24AB(7).
41. I accept that the work undertaken by the ATO on these requests has been significant, requiring the officers to assess the request against the declaration, and consult with Mr Garrett and the OAIC. In my view, the lack of compliance with the existing declaration and the number of invalid requests mean the processing burden has been disproportionate to a reasonable exercise by an applicant of the right to engage in access actions.

Analysis and findings

42. Taking into account the history of this matter, the volume and nature of requests over time, the number of requests made that do not comply with the existing declaration or the FOI Act, and the use of the FOI Act to ventilate grievances with the ATO rather than to seek access to documents, I find that Mr Garrett has repeatedly engaged in access actions that involve an abuse of process under s 89L(1)(a).
43. I find that it is appropriate in this case to revoke the existing declaration and make a declaration in broader, more restrictive terms, but to set a defined period the declaration will remain in force.
44. In making a declaration, I have balanced the right of access to documents under the FOI Act against the principle that the legal right of access should not be repeatedly abused, in particular by conduct that unreasonably interferes with the operations of an agency. I particularly consider that Mr Garrett's pattern of requests that involve significant abuse of process necessitates the making of a proportionally restrictive declaration.

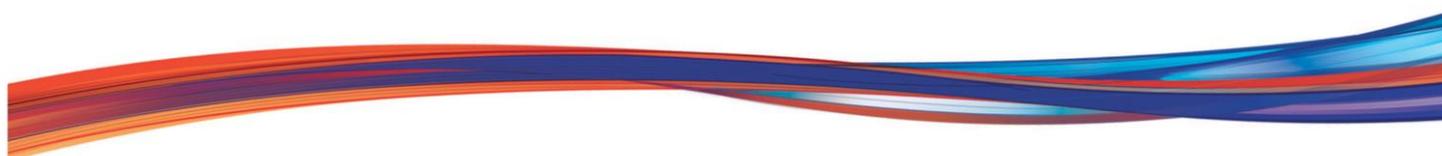


45. The terms in which I have made the vexatious applicant declaration continue to enable Mr Garrett to apply to the Information Commissioner for permission to make a request to the ATO and do not limit the subject matter of the requests he may make, provided a request:
- meets the requirements of s 15(2)(b) of the FOI Act⁶, and
 - is not vexatious in nature.
46. Given the nature of the abuses of process identified in this matter, and in *Australian Taxation Office and Garrett*, some of the factors the Information Commissioner may have regard to in determining whether a request is vexatious in nature include whether:
- the documents requested by Mr Garrett relate to the taxation affairs of some other individual or entity and Mr Garrett has not provided the OAIC an authority or consent from that other individual or entity for Mr Garrett to be granted access to those documents under the FOI Act
 - the request duplicates or substantially duplicates any earlier request or complaint made by the applicant
 - the request is for documents which relate to current, past or envisaged proceedings involving the applicant before a court or tribunal, where it would be, or would have been, reasonable for the applicant to use the procedures of the court or tribunal to seek access to those documents, or
 - the documents relate to the administration of a prior FOI request or the investigation of a complaint the applicant has made against the ATO, unless that request or complaint has been finalised.
47. I consider that the terms of the declaration are appropriate, balanced and proportionate in the circumstances.
48. In relation to the duration of the declaration, the pattern of repeated engagement in access actions by Mr Garrett dates from 2012, as considered in detail in the existing decision. I consider that a substantial length of time for the declaration is warranted in this matter given the volume of requests made (117 access actions), but particularly taking into account the nature of the access actions made during the two year period of the existing declaration.
49. I have had regard to the three recent, invalid access actions made since Mr Garrett was advised that this application was being considered by the OAIC and notified of the reasons for the declaration being sought by the ATO, to support the need for a declaration of substantial length.
50. The period of the declaration is five years from the date of this decision.

Publication of name of vexatious applicant

51. I have decided to publish Mr Garrett's name in this declaration, consistent with the former information Commissioner's declaration in *Australian Taxation Office and Garrett* not to use a pseudonym. I too consider that other Australian Government agencies have a relevant interest in knowing the identity of the person against whom this declaration is made.

⁶ Section 15(2)(b) of the FOI Act provides an FOI request must 'provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, to identify it'.



Timothy Pilgrim
Australian Information Commissioner

29 May 2017

Review rights

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.

