



**Department of Defence and ‘W’ [2013] AICmr 2  
(17 January 2013)**

**Declaration and reasons for declaration made by Australian  
Information Commissioner, Professor John McMillan**

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<b>Applicant:</b>	<b>Department of Defence</b>
<b>Respondent:</b>	<b>‘W’</b>
<b>Decision date:</b>	<b>17 January 2013</b>
<b>Application number:</b>	<b>RQ12/01889</b>
<b>Catchwords:</b>	<b>Freedom of information — Vexatious applicant declaration — Whether applicant should be declared a vexatious applicant — Whether applicant has repeatedly engaged in access actions that involve an abuse of process — (CTH) <i>Freedom of Information Act 1982</i> ss 89K, 89L, 89M</b>

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## Declaration

In accordance with section 89K(1) of the *Freedom of Information Act 1982*, I declare 'W' 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. The Department of Defence is not required to consider:
  - any request by 'W' under s 15 of the FOI Act for access to a document
  - any application by 'W' under s 48 of the FOI Act to amend or annotate a record of information
  - any application by 'W' under s 54B of the FOI Act for internal review of an access refusal decision,unless 'W' has applied in writing to the Information Commissioner to make the request or application and the Information Commissioner has granted written permission for the request or application to be made.
2. The Office of the Australian Information Commissioner will not consider any request by 'W' under s 15 of the FOI for access to a document relating to any matter between 'W' and the Department of Defence, unless the terms of the request are submitted in writing by 'W' and approved by the Information Commissioner as a request that meets the requirements of s 15(2)(b) of the FOI Act and is not vexatious in nature.
3. The Department of Defence may, at the request of an agency or Minister to which the FOI Act applies, disclose to that agency or Minister, in connection with the performance of functions or the exercise of powers under the FOI Act, the identity of 'W' as the person to whom this declaration applies.

Prof. John McMillan  
Australian Information Commissioner

17 January 2013

## Background

1. The Department of Defence (the **Department**) applied to the Office of the Australian Information Commissioner (OAIC) by letter dated 7 December 2012 to have Mr W declared a vexatious applicant under s 89K of the *Freedom of Information Act 1982* (FOI Act). The Department submits that Mr W, in the course of making requests and applications under the FOI Act, has repeatedly harassed, intimidated and abused staff of the Department. The Department did not specify the terms in which the declaration should be cast, other than requesting that it be 'in the broadest sense'.
2. Mr W's requests to the Department under the FOI Act relate mostly to his earlier service as a member of the Australian Defence Force in the late 1960s. The requests convey his unresolved grievances against the Department and other Australian Government agencies relating to his previous military service and entitlement to benefits. He has requested access since 2010 to a broad range of documents that include documents relating to his military service, entitlement to benefits, handling of his complaints, contact between him and military personnel and Departmental staff, access to his records by military personnel, requests concerning him from Ministers and other officials and agencies and unions, file notes of conversations, and documents concerning his family and property.
3. The Department has responded to Mr W's requests by providing access to documents, wholly or partially, both under the FOI Act and on an administrative basis in relating to personal information requests (see s 15AA of the FOI Act). The Department has declined to process some of Mr W's requests on the basis that they did not meet the requirement of s 15(2)(b) of the FOI Act, or because the workload involved in processing the requests would involve a substantial and unreasonable diversion of resources (s 24AA).

## Vexatious applicant declarations

4. Section 89K(1) of the FOI Act provides that the Information Commissioner may, by written instrument, declare a person to be a vexatious applicant. The declaration may be made on the application of an agency or Minister or on the Information Commissioner's initiative (s 89K(2)). An agency that applies for a declaration bears the onus of establishing that it should be made (s 89K(3)). Before making a declaration, I must notify a person (s 89K(4)) and give them an opportunity to make a written or oral submission (s 89L(3)).
5. Section 89L of the FOI Act outlines the grounds for making a vexatious applicant declaration. The first requirement is that a person must have engaged in one or more 'access actions'. That term means a request for access to documents; an application to amend or annotate a record of personal information; an application for internal review of an access refusal or access grant decision; or an application for Information Commissioner (IC) review of an agency's or Minister's decision (s 89L(2)).

6. The next requirement is that I must be satisfied of one or more of the following:
  - the person has repeatedly engaged in access actions that involve 'an abuse of process for the access action' (s 89L(1)(a)) (a term defined below)
  - the person has engaged in a particular access action that involves an abuse of process (s 89L(1)(b))
  - the person has engaged in a particular access action that is 'manifestly unreasonable' (s 89L(1)(c)) (a term that is not defined).
7. The term 'abuse of process', which is relevant to the first two of those requirements, is defined in s 89L(4):

***Abuse of the process for an access action*** includes, but is not limited to, the following:

  - (a) harassing or intimidating an individual or an employee of agency
  - (b) unreasonably interfering with the operations of an agency
  - (c) seeking to use the Act for the purpose of circumventing restrictions on access to a document (or documents) imposed by a court.
8. It is clear that that definition is inclusive and not exhaustive. 'Abuse of process' can include behaviour of another kind.
9. The Information Commissioner is to set the terms and conditions that form part of a vexatious applicant declaration (s 89M(1)). This may include a term that an agency or Minister may refuse to consider a person's request or application under the FOI Act without the written permission of the Information Commissioner (s 89(2)(a)). Another term can be that the Information Commissioner may refuse to consider a person's IC review application (s 89M(2)(b)). There is an unstated overlap between a term so framed and s 54W(a)(i) of the FOI Act, which provides that the Information Commissioner may decline to undertake an IC review if satisfied that a person's IC review application is 'frivolous, vexatious, misconceived, lacking in substance or not made in good faith'.
10. A person against whom a declaration is made may apply for review of the Information Commissioner's decision by the Administrative Appeals Tribunal (s 89N).
11. The power conferred on the Information Commissioner to make a vexatious applicant declaration was inserted into the FOI Act by the amendments that commenced on 1 November 2010. The reason for this new power was not explained, other than a comment in the Minister's second reading speech that it was one of many new functions conferred on the Information Commissioner 'designed to ensure the objects of the Act are achieved with as minimal contest,



and therefore cost, as possible'.<sup>1</sup> The power is apparently based on a similarly-worded power enacted in the Queensland *Right to Information Act 2009* (s 114).<sup>2</sup>

12. The policy that underlies this new Information Commissioner function is apparent, to some extent, from the terms in which it is conferred by the FOI Act. The FOI Act confers an important legal right upon members of the public to obtain access to government information. However, that legal right should not be abused by conduct that harasses or intimidates agency staff, unreasonably interferes with the operations of agencies, circumvents court imposed restrictions on document access, or is manifestly unreasonable.
13. The function can be seen in context as supplementing other changes made to the FOI Act in 2010. An FOI applicant is no longer required to pay an application fee, no charge is payable for the first five hours of decision-making time,<sup>3</sup> no charge is payable for providing access to a person's personal information,<sup>4</sup> and an FOI request can be sent to an agency by electronic communication (email).<sup>5</sup> In short, it is nowadays relatively easy for a person to make one or multiple FOI requests. There is no form specified in the Act, other than that the request must be in writing, state that it is an FOI request, provide a return address, and adequately identify the documents that a person is requesting (s 15(2)).
14. An agency can impose an access charge for the time spent searching for or retrieving a document and for decision-making time after the first five hours.<sup>6</sup> However, no charge is payable if an applicant is not notified of an agency's decision on a request within the statutory time limits in the Act (including any authorised extension).<sup>7</sup> It is therefore important to agencies (and, ultimately, to applicants) that an agency can be clear that an applicant has made an FOI request that must be processed under the Act within the statutory timeframes. This may not be clear if, for example, an FOI request is a minor or obscure element of correspondence that ranges broadly, or an agency receives multiple requests from an applicant in a short timeframe and fails to differentiate between them. An agency that overlooks the FOI component of a request and fails to respond within the statutory time limits will be unable either to impose an FOI charge for time spent processing the request or to rely upon that option to initiate discussion with the applicant to clarify or limit the scope of the request. This can work against provisions in the FOI Act that aim to strike a balance between facilitating public access to government information and

<sup>1</sup> Second Reading Speech, Freedom of Information Amendment (Reform) Bill 2010, Senator the Hon Joe Ludwig, 13 May 2010.

<sup>2</sup> The power was also a feature of the former Queensland *Freedom of Information Act 1992* (Qld) s 42. The Guidelines on *Vexatious Applicant Declarations* published by the Information Commissioner (Queensland) refer to declarations made under that power, and summarises some leading common law cases on vexatious proceedings.

<sup>3</sup> *Freedom of Information (Charges) Regulations 1982* (Charges Regulations) Part 1, Item 1.

<sup>4</sup> FOI Charges Regulations, reg 5(1).

<sup>5</sup> FOI Act s 15(2A)(c).

<sup>6</sup> FOI Charges Regulations, Part 1, Items 1, 5.

<sup>7</sup> FOI Charges Regulations, reg 5(2),(3).

abating the workload pressure on government agencies that can arise when requests are poorly or expansively framed.

15. The vexatious declaration function is discussed in the Guidelines that I have issued under s 93A of the FOI Act. The Guidelines note that 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'.<sup>8</sup> An agency that applies for a declaration must establish a 'clear and convincing case'.<sup>9</sup> The agency may also be expected to explain if it has used other provisions of the FOI Act to resolve requests that pose a practical difficulty, such as the 'practical refusal' power (ss 24, 24AA).
16. I have applied that guidance in this case. I have also worked from the premise that a vexatious applicant declaration should ordinarily permit the person to whom the declaration applies to approach the OAIC for approval to make an FOI application to an agency or Minister. In that way a person may still have the opportunity to exercise the legal right of access to documents conferred by the FOI Act.
17. I note that there is an extensive body of case law on the power of courts and tribunals to declare either proceedings or a litigant to be vexatious.<sup>10</sup> There is general legislation in some Australian jurisdictions,<sup>11</sup> and specific provisions in most statutes that regulate civil proceedings.<sup>12</sup>
18. The case law and legislative prescription provides valuable examples of behaviour that has been treated as vexatious or an abuse of process. However, caution is required in applying to FOI requests principles developed in another context. A request for access to documents held by a government agency can be different in nature to legal proceedings commenced by one individual against another. Questions that can arise in the civil litigation context — to do with a person's motive in commencing proceedings, their relationship with or attitude towards the other party, the legal merit of a claim, and the utility of the proceedings — are not usually relevant in an FOI context (for example, FOI Act s 11(2)). The FOI Act also enables agencies to limit the administrative cost or burden of access requests by imposing an access charge (s 11A(1)(b)) or denying access on a practical refusal ground (s 24(1)(b)). On the other hand as noted above in [13], it is now relatively easy and can be cost-free for a person to make multiple FOI requests that can be disruptive and resource-intensive for agencies.

<sup>8</sup> Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*, [12.7].

<sup>9</sup> *Guidelines*, [12.7].

<sup>10</sup> See *Attorney-General of NSW v Wentworth* (1988) 14 NSWLR 481; *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256.

<sup>11</sup> See *Vexatious Proceedings Act 2005* (Qld); *Vexatious Proceedings Act 2008* (NSW); *Vexatious Proceedings Restriction Act 2002* (WA).

<sup>12</sup> See *Federal Magistrates Court Rules 2001* (Cth) reg 13.11; *Administrative Appeals Tribunal 1975* (Cth) s 42B.

## Procedure followed in this case

19. The application by the Department on 7 December 2012 annexed a large amount of correspondence from and to Mr W, as well as summaries of telephone contact between officers and Mr W. Also annexed was earlier Departmental correspondence to the OAIC in which the Department foreshadowed that an application may be made under s 89K for a declaration applying to Mr W. The Department's application and the annexed correspondence was provided by the OAIC to Mr W by letter dated 10 December 2012. Mr W was invited to make a written or oral submission about the application.
20. A written submission from Mr W was received by the OAIC on 18 December 2012, though addressed to parties other than the OAIC. He did not directly address the Department's application that he be declared vexatious or the statutory criteria that he was advised the Information Commissioner would apply. He alleged that the Commissioner and the OAIC were corruptly assisting a vendetta against him; he made general complaints of unlawful and corrupt behaviour by named officers of the Department; and he stated that there is no case for him to answer. His submission also referred to general categories of documents (ostensibly, documents that, if they existed, would be held by the Department) that he requested be provided to him 'under FOI'.
21. Mr W also had a lengthy telephone conversation with an OAIC officer about the Department's application on 7 January 2013. He asked that the Department's request for a declaration not be further considered until a request to the OAIC under the FOI Act for all documents held about him was dealt with, so that he could defend himself against false allegations and false charges. I have considered this matter. Taking into account that the OAIC has provided Mr W with its records of communications with other agencies, I am satisfied that no prejudice to him arises from considering the Department's application at this time.

## Has the respondent repeatedly engaged in access actions?

22. The ground on which the Department has applied for a declaration applying to Mr W is that he 'has repeatedly engaged in access actions; and the repeated engagement involves an abuse of the process for the access action' (s 89L(1)(a)).
23. The first requirement of which I must be satisfied is that Mr W has repeatedly engaged in access actions relevant to the Department. It has submitted, and I accept, that between 2 September 2010 and 3 April 2012 Mr W made 13 requests to the Department for access to documents. Some of those requests contained multiple requests for various categories of documents, and asked that the Department's records be amended. He has also made one application to the Department for internal review of an access refusal decision. The Department has also provided information about later requests received from Mr W in October and December 2012.



24. I am satisfied that Mr W has repeatedly engaged in access actions.

### **Does the repeated engagement involve an abuse of process?**

25. The second requirement of which I must be satisfied is that Mr W's repeated access actions involve an abuse of process. As noted in [6], the FOI Act gives a non-exhaustive list of three examples of behaviour that may constitute an abuse of process.

26. The Department's application alleged specifically that Mr W's conduct fitted one of those examples: 'harassing or intimidating an individual or an employee of an agency' (s 89L(4)(a)). As explained below, I have not confined myself to that specific example, but have considered the concept of abuse more broadly. I will first address the specific allegation of harassment and intimidation.

27. 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.<sup>13</sup>

28. The Department's application to the OAIC pointed to correspondence from Mr W and to the Department's record of oral communication with him. It claimed that Mr W was 'offensive and abusive' and that his comments had reached an 'unacceptable level' that should not have to be tolerated by staff. The Department has advised Mr W on a number of occasions that his communication tone was unacceptable and that he would be restricted to communicating in writing.

29. Mr W's correspondence to the Department requested access to documents under the FOI Act, but at times ranged more broadly and included complaints against the Department and particular officers. These comments were sometimes framed as demands to be met. Comments by an FOI applicant that go beyond making an FOI request can nevertheless be taken into account in deciding whether there has been an abuse of process.

30. Examples of the offensive language in Mr W's correspondence are descriptions of Departmental officers as 'dumb and corrupt', 'weak bastards' 'retarded criminals', 'morons', 'gutless weak turd', 'lower than [sic] sea snake shit', 'child molesters', 'two bit criminals', 'liars and cheats and vile persons' and 'crooked acting lawyers'.<sup>14</sup> Serious allegations are made by Mr W that are not substantiated, for example, 'all in defence know that FOI have created deliberate false file notes' and 'the foul acts of Defence FOI would include stopping information coming out on military scum some now very high up that have [molested] children'.<sup>15</sup> Demands are made that border upon threats — for example, 'get on with it and remember it is you that started this now know you will pay dearly for your gutlessness'; and that two officers 'should be taken down

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<sup>13</sup> Macquarie Online Dictionary 2012.

<sup>14</sup> Letters received by the Department on 27 March, 3 April, 11 October and 2 December 2012.

<sup>15</sup> Letter received by the Department 2 December 2012.



the paddock and shot through the back of the head'.<sup>16</sup> There are many other equally distasteful comments in the correspondence.

31. The question of harassment or intimidation must be approached objectively. In doing so it must be borne in mind that an agency officer can, as in fact occurred in this case, terminate a phone call, or not respond to written abuse. The Department has not suggested that its officers were fearful that Mr W would resort to physical intimidation. There was little change over time in the way he addressed the Department. Nor was all his communication coloured by verbal abuse. It was, it seems, the continuation, accumulation and disruptive impact of abusive conduct that prompted the Department to apply for a vexatious applicant declaration against Mr W.
32. After considering the content, tone and language of Mr W's correspondence, I am, on balance, satisfied that his conduct constitutes harassment, and an abuse of process under the FOI Act. Both his written correspondence and oral communication with officers of the Department was insulting and offensive, and could understandably be distressing to those officers. Unnecessarily and without satisfactory explanation he has directly impugned the personal and professional integrity of officers in the FOI section of the Department. This was calculated behaviour that bore no rational connection with the exercise of access rights under the FOI Act. The making of allegations that are defamatory, unsubstantiated and inflammatory is more likely to impede the efficient processing of access requests, as frequently occurred in relation to Mr W.
33. The Department has acted reasonably in meeting some of Mr W's access requests and inviting him to change the way that he communicates with the Department. There has been no apparent change in Mr W's behaviour following different strategies adopted by the Department. I am also satisfied that it has appropriately relied on other mechanisms in the FOI Act to handle his requests, such as the practical refusal provisions in ss 24 and 24AA that can be used to initiate consultation with an applicant to clarify or reduce the scope of a request.
34. I am further satisfied that there is a basis for making a vexatious applicant declaration against Mr W, additional to the three listed examples of abuse of power in s 89L(4).
35. An objective of the FOI Act is 'to facilitate and promote public access to information, promptly and at the lowest reasonable cost' (s 3(4)). That objective can only be met if both applicants and agencies act sensibly and cooperatively in making and processing requests.
36. There are many provisions in the FOI Act that are directed to that mutual responsibility. After declaring that 'every person has a legally enforceable right to obtain access' to documents (s 11(1)), the Act requires an applicant to 'provide such information concerning the document as is reasonably necessary to enable

<sup>16</sup> Letter received by the Department on 3 April 2012; and record of telephone conversation on 1 June 2011.

a responsible officer of the agency ... to identify it' (s 15(2)(b)). An agency has a duty 'to take reasonable steps to assist the person making the request' to meet the requirements of the Act (s 15(3)), bearing in mind that the applicant may not have a close knowledge of the documentary or information holdings of an agency. Before rejecting a request on the ground that it does not sufficiently identify documents, or that the request 'would substantially and unreasonably divert the resources of the agency from its other operations', an agency is required to commence a 'request consultation process' with an applicant under the practical refusal mechanism in the Act (ss 24, 24AA, 24AB).

37. Those requirements and processes are important in themselves, but have as well a broader relevance in the FOI scheme. As I noted earlier in [14], the statutory timeframes in the FOI Act depend on agencies knowing at an early stage whether correspondence from a person is to be treated as an FOI request. Furthermore, the legal duty upon agencies to process requests under the FOI Act is externally reviewable. When questions of legal right and duty are to be balanced, it is important that the parties involved pay heed to the legal standards that are to be applied.
38. The Department's application for a declaration against Mr W, in addition to alleging offensive and abusive language, further alleged that he purported to engage in access actions that did not comply with the requirements of the FOI Act, and that he did not cooperate reasonably in pursuing his access requests.
39. The FOI request element of Mr W's correspondence was sometimes a minor portion of a longer message of complaint that included abusive language. After he was advised that he could only communicate in writing with the FOI section of the Department, some of the Department's correspondence to Mr W was returned unopened and marked 'refused'. I am satisfied that the Department took reasonable steps to assist Mr W to understand the requirements of the FOI Act for making requests, and that he was alerted to the vexatious applicant provisions of the FOI Act. These requirements were also explained in a letter to Mr W from the Freedom of Information Commissioner, Dr Popple, dated 14 November 2012, following the receipt of correspondence that contained derogatory statements and vaguely-expressed demands.
40. An example of the irregular style of the FOI requests from Mr W<sup>17</sup> was one headed 'Complaints and new FOI', and addressed 'And the Commonwealth Ombudsman and Com Super/DFRDB ... Secretary of Executive of DVA, and the State Deputy Commissioners. The Minister for Veteran Affairs, the Minister for Defence Smith. ... Secretary of Defence as well.' After referring to an earlier FOI request the letter read: 'A Fresh FOI, Supply all RAP records relating to me for the period I served in the Army in defence of this country. Next supply the records of when I was attacked at Liverpool by Military Police when I went on leave 2 Military hospital. ... You will immediately hand over the files regarding the false bastard charge against me the day before I was discharged.' Understandably, the

<sup>17</sup> Letter received by the Department on 3 April 2012.

Department would face difficulty in deciding whether that request enlivened its obligations under the FOI Act, and if so, the scope of the request, to whom it was addressed, the location of the records, and whether they had already been released in response to earlier requests.

41. Another two page request to the Department<sup>18</sup> described as 'Complaints and new Freedom of Information applications', and addressed also to the Australian Information Commissioner and the Commonwealth Ombudsman, could be construed as containing as many as 13 different FOI requests, two requests to amend records and one request for a statement of reasons. As an illustration, one of the requests in that letter stated: 'Under FOI also supply enough documents to show how many FOI applications have been made for documents related to the Defence Sex Scandal and other foul acts. Show your response to each by producing enough documents'.

## Conclusion

42. I am satisfied that Mr W has engaged in repeated access actions that involve an abuse of process, on the following basis: that in the course of undertaking those access actions he has harassed staff of the Department; and that he has not cooperated reasonably with the Department in making access requests that do not contain offensive language and that endeavour to comply with the requirements of the FOI Act. Accordingly, I make a vexatious applicant declaration against Mr W in the terms stated at the beginning of these reasons.
43. I will add a note of explanation of the three terms in the declaration. The first term states that the Department is not required to consider three types of access action initiated by Mr W under the FOI Act unless he has first obtained the written permission of the Information Commissioner. The three types of access action are a request for access to documents, an application to amend or annotate a personal record, and an application for internal review of an access refusal decision. Although it was primarily access actions of the first type (FOI requests) that were referred to in the Department's application for a declaration, I think it important that a declaration can be fully effective by applying to all three types of access action. Mr W can engage in an access action by first obtaining the Information Commissioner's written permission to do so. It is also open to the Department to dispense with that formality.
44. The second term of the declaration provides that the OAIC will not consider an FOI request from Mr W relating to the Department without first agreeing that it is a request that meets the requirements of s 15(2)(b) of the FOI Act and is not vexatious in nature. The OAIC is an agency that is subject to the FOI Act, and has received FOI requests from Mr W relating to the Department. Again, it is important in making a declaration that it is effective to control potentially vexatious behaviour.

<sup>18</sup> Letter received by the Department on 12 October 2012.

45. The third term of the declaration relates to the decision I made to use a pseudonym to refer to Mr W in the published version of the declaration and reasons. It is not necessary to give effect to this declaration to name him in this declaration. Other Australian Government agencies and Ministers may, however, have a relevant interest in knowing his identity. Some of the correspondence that I have considered in this case refers to other agencies and Ministers, and suggests that they may have received requests from Mr W, including requests that may qualify for transfer to the Department under s 16 of the FOI Act. By including this third term in the declaration it will be clear, lest there be any doubt, that the disclosure of Mr W's name to other agencies would be a disclosure of personal information 'authorised by or under law' for the purposes of the *Privacy Act 1988* (Cth) Information Privacy Principle 11.1(d). I do not foreclose the possibility that it may, in any case, be open to the Department to disclose Mr W's name to another person or organisation without breaching the Information Privacy Principles.

Prof. John McMillan  
Australian Information Commissioner  
17 January 2013

#### **Review rights**

An application may be made to the Administrative Appeals Tribunal 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. The current application fee is \$816, which may be reduced or may not apply in certain circumstances. Further information is available on the AAT's website ([www.aat.gov.au](http://www.aat.gov.au)) or by telephoning 1300 366 700.