Australian Government
Office of the Australian Information Commissioner

Our reference: s 22

s 22
FOI Coordinator
CSIRO
PO Box 225
DICKSON ACT 2612

Sent via email to: FOI@csiro.gov.au

Dear s 22

CSIRO application for vexatious applicant declaration

I am writing regarding the application of the Commonwealth Scientific and Industrial Research Organisation (CSIRO) of 7 September 2011 that s 22 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 s 22 a vexatious applicant. My reasons for this decision follow.

Background

I understand that s 22 from December 2008 to February 2009. Following this, I understand s 22 .

On 18 January 2010, s 22 made his first FOI request to CSIRO for correspondence and reports regarding s 22 . Following this request, s 22 made a further 21 FOI requests to CSIRO in 2010. He also made 4 internal review requests for review of charges decisions and 1 internal review request for review of a decision. Following the establishment of this office on 1 November 2010, s 22 made a further 12 FOI requests and 2 internal review requests to CSIRO up to 7 September 2011. In total, s 22 made 33 FOI requests and 7 internal review requests to CSIRO up to 7 September 2011, comprising 40 access actions.

s 22 requests to CSIRO relate typically to grievance investigations conducted by CSIRO, documents in relation to s 22 , CSIRO reports and copies of correspondence between CSIRO officers, with three officers in particular referenced.

On 9 September 2011, CSIRO applied to the Information Commissioner to declare s 22 a vexatious applicant under s 89K of the FOI Act. CSIRO submitted that s 22 *has repeatedly engaged in access actions that involve an abuse of process'*. I understand that since CSIRO made its vexatious applicant declaration application to this office s 22 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 CSIRO has provided evidence that s 22 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:

- s 22 33 FOI requests have interfered with the normal operations of CSIRO, accounting for 60% of CSIRO's FOI line area workload
- s 22 repeated requests for similar or related documents are resulting in an unreasonable interference with its operations
- s 22 directs FOI requests to CSIRO employees rather than CSIRO's 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 s 22 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.

CSIRO bears the onus of establishing that there is an abuse of process (s 89K(3)). CSIRO has not made explicit submissions that s 22 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 s 22 access requests may have been inconvenient and a burden upon the resources of the CSIRO 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 s 22 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 s 22 has made more than 30 access actions in the period from January 2010 accounting for 60% of CSIRO's FOI workload, I am not satisfied that the volume of requests generated by s 22 is sufficient to be an unreasonable interference with the operations of the agency (s 89L(4)(b)).

I note that the majority of s 22 requests cited by the CSIRO 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, s 22 has made 20 access actions to CSIRO in a period approaching two years and I am not satisfied that this number is an unreasonable interference on CSIRO's operations.

s 22 failure to direct his FOI requests to the CSIRO's FOI section and the subsequent time and effort expended by CSIRO staff to search for documents similarly cannot be characterised as neither 'harassment' and 'intimidation' nor an unreasonable interference on CSIRO's operations. If CSIRO 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 CSIRO to consider using the practical refusal mechanism (s 24AB) in the FOI Act to more effectively deal with future requests from s 22.

CSIRO also argued that s 22 has made requests for documents that are the same or similar to documents previously requested under the FOI Act. From the evidence provided by CSIRO, two requests by s 22 were for similar documents previously requested (CSIRO 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 CSIRO 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 CSIRO's resources such that applying a restriction on s 22 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 CSIRO's application for a vexatious applicant declaration. I appreciate that you will be disappointed with my decision and I encourage the CSIRO to consider using other provisions in the Act to more effectively deal with future requests from s 22. 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 s 22, the case officer in charge of this matter, on s 22 or email s 22 In all correspondence on this matter, please quote the reference number s 22

Yours sincerely

James Popple
Freedom of Information Commissioner
7 September 2012