Australian Government
Office of the Australian Information Commissioner

Our reference: s 22 [redacted]

s 22 [redacted]
Commonwealth Scientific And Industrial Research Organisation
PO Box 225
DICKSON ACT 2602

Dear s 22 [redacted]

## CSIRO application for vexatious applicant declaration

I am writing regarding the application of the Commonwealth Scientific and Industrial Research Organisation (CSIRO) of 6 August 2015 that s 22 [redacted] 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 s 22 [redacted] a vexatious applicant. My reasons for this decision follow.

### Background

s 22 [redacted]

s 22 [redacted] made his first FOI request to CSIRO in January 2010, and has since made 62 access actions to the CSIRO to date, representing approximately 31% of the FOI workload for the period of 2010 to 2015.

On 9 September 2011, CSIRO applied to the Information Commissioner to declare s [redacted] a vexatious applicant under s 89K of the FOI Act. The application was refused, s 22 on the grounds that CSIRO had not adequately demonstrated an abuse of process or harassment by s 22 [redacted].

I note that s 22 [redacted] currently has three access actions on foot with the CSIRO.

I further note that s 22 [redacted] has also corresponded with CSIRO staff outside of the FOI process multiple times, and that these communications contained messages 'threatening physical unwanted contact, making insulting and derogatory remarks to s 22 [redacted]'. Additionally, CSIRO submits that s 22 [redacted] made attempts 'to contact s

s 22 daughter via social media' and that he further 'contacted organisations at which s 22 volunteers making derogatory remarks about s 22 '.

**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 s 22 access actions, as described above, and the surrounding circumstances constitute and abuse of process under s 89L(1)(a)(ii) for the following reasons:

- s 22 62 FOI requests have interfered with the normal operations of CSIRO, accounting for 31% of CSIRO's FOI line area workload from 2010 to date;
- s 22 repeated requests for similar or related documents are resulting in an unreasonable interference with its operations;
- The nature of s 22 request s 22 s a deliberate intent to harass or intimidate CSIRO staff; and

- s 22 emails to CSIRO 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. 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 is seeks to have s 22 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. CSIRO 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**

CSIRO submits that s 22 has targeted and harassed individual employees of the agency repeatedly by correspondence, sending 'threats of self-harm to CSIRO Officers...including a picture of himself in a rope noose', and an email to s 22 stating 'I tried to kill myself – will do a better job next time'.

They have additionally claimed that s 22 access action FOI 2015/17 constitutes harassment as it 'is targeted to harass individual employees and unreasonably interferes with CSIRO's operations, especially in the context of s 22 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 s 22 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. CSIRO 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 CSIRO (Attachment A). The requests did not attempt to repeatedly seek documents to which access had been denied.

While I note that s 22 made regular contact which could be considered disturbing or harassing with CSIRO officers, particularly s 22, 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 CSIRO 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 s 22, 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 CSIRO 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 s 22 requests satisfy the requirements of s 89L(4)(a).

**b) Unreasonably interfering with the operations of an agency:**

While I appreciate that s 22 has made more than 62 access actions from January 2010 to date, accounting for 31% 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 from Attachment A that a large number 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:

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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 CSIRO, it is evident that s 22 access requests have decreased in number over time. More significantly, s 22 made one access request in 2013, one in 2014 and four in 2015. Thus, while in the past, s 22 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 CSIRO's 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 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, 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 Ms Michele Bahari, the case officer in charge of this matter, on (02) 8231 4270 or email michele.bahari@oaic.gov.au . In all correspondence on this matter, please quote the reference number s 22

Yours sincerely

Timothy Pilgrim
Acting Information Commissioner
22 October 2015