

Commissioner brief: Vexatious applicant declarations

Key messages

- The Information Commissioner has the power to declare a person to be a vexatious applicant if they are satisfied that the grounds set out in s 89L of the FOI Act exist.
- 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.
- A declaration by the Information Commissioner can be reviewed by the Administrative Appeals Tribunal.
- To date, no Information Commissioner has made a decision to declare a person a vexatious applicant on their own initiative and there would need to be compelling circumstances for the Information Commissioner to consider exercising this discretion.
- [Part 12](#) of the FOI Guidelines provide details of the process undertaken by the Information Commissioner when considering her discretion whether or not to declare a person to be a vexatious applicant.
- [Part 12](#) of the FOI Guidelines were updated in November 2019 to reflect recent Information Commissioner decisions, provide further guidance on the steps agencies and ministers should take before and after making an application for a vexatious applicant declaration and further guidance on the circumstances in which the Information Commissioner declare a person to be a vexatious applicant.

<u>Year s 89L application received</u>	<u>Number received</u>	<u>Number finalised</u>
2017-18	0	2 (from previous year)
2018-19	9	8 (3 made; 3 refused; 2 withdrawn)
2019-20	3	1 (1 made)

See table at **Attachment 1** for details of the declarations made in 2018-19 and 2019-20. All Information Commissioner vexatious applicant declarations are published on AustLII.

Possible questions

When would the Information Commissioner declare a person to be a vexatious applicant?

- [Part 12](#) of the FOI Guidelines explain that the Information Commissioner may declare a person to be a vexatious applicant only if the Commissioner is satisfied that:

- (a) The person has repeatedly engaged in **access actions** that involve an **abuse of process**.
- (b) the person is engaging in a particular access action that would involve an **abuse of process**, or
- (c) a particular access action by the person would be **manifestly unreasonable** (s 89L(1)).

- An **'access action'** is defined under s 89L(2) as:
 - making a request under s 15.
 - making an application for amendment or annotation of a record of personal information under s 48.
 - applying for internal review (s 54B).
 - applying for Information Commissioner review (s 54N).
- An **'abuse of process'** includes but is not limited to:
 - harassing or intimidating an individual or an agency employee.
 - unreasonably interfering with an agency's operations.
 - seeking to use the FOI Act to circumvent access restrictions imposed by a court (s 89L(4)).

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

Key dates

- 1 November 2010 – the *Freedom of Information Amendment (Reform) Act 2010* came into effect. This Act established the Information Commissioner's power to declare a person to be a vexatious applicant.

Document history

Written by	Reason	Approved by	Date
Irene Nicolaou	October 2020 Senate Estimates	Name	

All vexatious applicant declarations made by Information Commissioner Angelene Falk and AAT appeals

	Decisions in 2018/19	Term of declaration	Appeal ¹	Outcome
1	Office of the Registrar of Indigenous Corporations and 'PW' (Freedom of information) [2019] AICmr 6 (13 February 2019)	3 years from date of declaration	No advice from AAT	N/A
2	National Archives of Australia and Ronald Price (Freedom of information) [2019] AICmr 16 (29 April 2019)	5 years from date of declaration	No advice from AAT	N/A
3	Indigenous Business Australia and 'QB' (Freedom of information) [2019] AICmr 14 (29 April 2019)	2 years from date of declaration	Yes ('QB' respondent has appealed)	N/A
4	Services Australia and 'RS' (Freedom of information) [2020] AICmr 6 (24 February 2020) (To be published on AUSTLII)	2 years from date of declaration	No advice from AAT	N/A

¹ Based on the advice received by the OAIC from the AAT as at 23 September 2020. 'Yes' indicates that the AAT has provided advice that an appeal has been received.

Commissioner brief: FOI Regulatory functions [D2020/002736](#)

Key messages

- My office is an independent statutory agency established under the *Australian Information Commissioner Act 2010* (AIC Act). The AIC Act confers the Information Commissioner with power to perform FOI regulatory functions, including:
 - review of FOI decisions of agencies and ministers
 - investigating FOI complaints
 - issuing FOI guidelines
 - monitoring agencies' compliance with the FOI Act
 - making decisions on extension of time requests and vexatious applicant declarations and
 - compiling FOI data and access trends.
- The full-time equivalent allocated to the freedom of information regulatory functions is 18 ASL (19% of the 124 ASL cap). The increased funding in the 2019-20 budget does not apply to freedom of information functions.
- **IC reviews:** the numbers of IC reviews on hand has increased each year for the past four years.
 - The overall increase in IC review applications from 2014-15 to 2019-20 was 186%.
 - At the end of June 2020, the OAIC had 1,088 IC review applications on hand (this had increased to 1,124 by 30 September 2020). While the office continues to look for and implement opportunities to increase productivity in relation to its freedom of information functions, it remains the case that although significant efficiencies have been found and applied the function has not kept pace with incoming reviews.
 - The IC review jurisdiction is complex and many documents subject to IC review are sensitive (including cabinet documents, national security, defence and international relations, legally privileged document, documents affected law enforcement, and confidential documents) and often affect third parties. A high proportion of matters involve consideration of various (more than one) exemptions and hundreds of folios of material that agencies and ministers contend is exempt under the FOI Act.
 - In the absence of supplementary FOI funding, the ability of the OAIC to keep pace with increases to the review caseload will continue to be challenged. (For further information, see Commissioner Briefs [D2020/017446](#) and FOI IC reviews ([D2020/017447](#)) and FOI process review [D2020/000765](#)).

- **FOI complaints:** as the end of June 2020, the OAIC had 129 open complaints (as at 30 September 2020 this was 136).
 - The most complained about issue is delay.
 - On 25 October 2019, I opened a Commissioner Initiated Investigation into delays in the processing of FOI requests in the Department of Home Affairs. This investigation is ongoing. (For further information, see Commissioner Briefs FOI Complaint issues ([D2020/017450](#)) and Department of Home Affairs CII ([D2020/017451](#)).
- **Extension of time applications:** Agencies and ministers may apply to the Information Commissioner for an extension of time (EOT) during the processing of FOI requests.
 - In 2019-20 the OAIC received 4,243 EOT application, a 12% increase on the previous year. Most of these (1,357) were received in the third quarter, when 44% more were received than during the same time the previous year. (For further information, see Commissioner Brief FOI Extension of time applications ([D2020/017457](#)). The OAIC received 1,100 EOT applications in the first quarter of 2020-21, an 11% increase over the previous quarter (quarter 4 2019-20) and a 38% increase over the same period in 2019.
- **FOI Guidelines:** During 2019-20 the OAIC worked on updates to several parts of the FOI Guidelines.
 - On 1 July 2019, my office published a discussion paper on disclosure of public servants' personal information (names and contract details) in response to FOI requests. On 20 August 2020, I issued a position paper outlining my approach to this issue. We are currently revising Part 3 (Processing and deciding requests for access) and Part 6 (Conditional exemptions) of the FOI Guidelines to give effect to the approach outlined in the position paper. (For further information, see Commissioner Briefs Public servants' names and contact details ([D2020/017455](#)) and FOI OAIC engagement and Guidelines update ([D2020/017453](#)).
 - In April 2019, the OAIC consulted agencies in relation to proposed revisions to Part 4 of the FOI Guidelines (Charges). We published an update to Part 4 on 19 June 2020.
 - The OAIC revised and updated Parts 3 (Processing and deciding requests for access), 10 (Review by the Information Commissioner) and 12 (Vexatious applicant declarations)
 - The OAIC is currently updating Parts 3 (Processing and deciding requests for access) and 6 (Conditional exemptions) of the FOI Guidelines to reflect the approach outlined in the position paper on the disclosure of public servants' names and contact details in response to FOI requests.

- We are revising Part 14 of the FOI Guidelines to incorporate the findings of the disclosure log desktop review, which is near finalisation and will be published shortly. We are also revising Part 9 (Internal Review) following publication of a consultation draft in July 2020. Our next priority will be revision of Part 5 (Exemptions).
- **Vexatious applicant declaration:** To date, no Information Commissioner has made a decision to declare a person a vexatious applicant on their own initiative. There would need to be compelling circumstances for me to consider exercising this discretion. 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. A declaration by the Information Commissioner can be reviewed by the Administrative Appeals Tribunal.
 - I have made one vexatious applicant declaration in 2019-20. (For further information, see Commissioner brief Vexatious applicant declarations ([D2020/002344](#))).
- **Monitoring compliance with the FOI Act:** My office is currently reviewing agency compliance with the disclosure log obligations in the FOI Act. A key focus is whether agencies make documents directly available for download to members of the public. The disclosure log desktop review is near finalisation and will be published shortly. (For further information, see Commissioner Briefs FOI Disclosure Logs ([D2020/017452](#)) and Information Publication Scheme ([D2020/017454](#))).
- **FOI request data and trends:** Data collected from Australian government agencies has been reported in the OAIC annual report.
 - The number of FOI requests made to Australian Government agencies in 2019–20 increased by 6% over the previous year.
 - 47% of all FOI requests were granted in full in 2019–20.
 - 81% of all FOI requests received were for documents containing personal information. (For further information, see Commissioner briefs 2019-20 Commonwealth agency FOI statistics ([D2020/017448](#)) and Trends in use of FOI Act exemptions ([D2020/017449](#))).
- **Domestic and international engagement on FOI issues:** I engage with
 - Information Commissioners and Ombudsmen from other Australian jurisdictions and internationally, Association of Information Access Commissioners (AIAC) (bi-annually)
 - The International Conference of Information Commissioners (ICIC) (annually).
 - My office holds twice yearly information sessions for FOI practitioners through our Information Contact Officers Network (ICON) and engages with other

Australian government agencies and civil society in relation to the Open Government Partnership (OGP). (For further information, see Commissioner briefs FOI OAIC engagement and Guidelines update [D2020/017453](#)).

- **Other issues: For further information see** FOI official ministerial documents ([D2020/000760](#)) and FOI Act Reforms ([D2020/000764](#))

Document history

Updated by	Reason	Approved by	Date
Nikki Edwards	October 2020 Senate Estimates	Name Raewyn Harlock	29.9.2020