



Vexatious Applicants

Section 96A of the *Freedom of Information Act 1992* (FOI Act) gives the Information Commissioner discretion to declare that a person is a vexatious applicant.

What does section 96A say?

Section 96A(3) states that before an FOI applicant can be declared vexatious, the Commissioner must be satisfied that:

- (a) *the person has made repeated applications under this Act in relation to the agency...; and*
- (b) *the repeated applications involve an abuse of the right of access, amendment or review under this Act.*

Section 96A(4) provides an example of repeated applications that may involve an abuse of the right of access as:

Applications (which) were made for the purpose, or have had the effect, of—

- (a) *harassing or intimidating an individual or an employee or employees of the agency or agencies; or*
- (b) *unreasonably interfering with the operations of the agency or agencies.*

For a person to be declared a vexatious applicant, the Information Commissioner must be satisfied that each of the elements of section 96A(3) are met. Examples of the types of applications that may involve an abuse of process are given in section 96A(4) but they do not exhaust the circumstances in which an abuse of the right of access may be found.

What is the purpose of section 96A?

The FOI Act confers on citizens a legally enforceable right to access or amend information held by public authorities to the greatest extent possible without prejudicing certain interests. The FOI Act also requires particular information and documents concerning government operations to be made available to the public. This right can enhance scrutiny, transparency and accountability in government.

Most citizens exercise their FOI rights responsibly, however a small number of applicants abuse these rights. The purpose of section 96A is to prevent abuse of the FOI scheme.

Who is a 'vexatious applicant' ?

A vexatious applicant is a person who is restrained from making further FOI applications without the consent of the Information Commissioner or on the conditions imposed by the Commissioner. This means agencies are not obliged to process an FOI application from the vexatious applicant or will only process the application in accordance with the conditions set out by the Information Commissioner.

Who can apply for a declaration that an FOI applicant is vexatious?

A Government agency or agencies can apply to the Information Commissioner to have an applicant declared vexatious, or the Commissioner may make a declaration on her own initiative.

What happens when an application is made?

- Step 1 The Commissioner will decide whether the application for declaration of a vexatious applicant complies with requirements.
- Step 2 After the Commissioner is satisfied the application is complete, the FOI applicant will be advised the application has been made, be provided a copy and will be given the opportunity to respond in writing.
- Step 3 The Commissioner may conduct an oral hearing or issue directions for the parties to follow.
- Step 4 The Commissioner will decide whether or not to declare the person a vexatious applicant.

When will the Commissioner consider an FOI applicant vexatious?

Because most people exercise their rights responsibly very few applications for a declaration of a vexatious applicant are made. The ability to exercise rights under the FOI Act is fundamentally important, so the Commissioner will be very cautious about declaring a person vexatious.

The Commissioner may declare a person vexatious if more than one FOI application or external review application has been made **AND** at least one of the following has occurred:

- the applications are for documents already requested, decided on or obtained
- the applications are made for the purpose of harassing or intimidating
- the applications have the affect of harassing or intimidating
- the applications were made for the purpose of unreasonably interfering with the operations of the agency
- the applications have had the effect of unreasonably interfering with the operations of the agency
- the applications were made for a wrongful or illegitimate purpose
- the applicant has not complied with or has disregarded the procedures and processes of the FOI Act
- the applications are submitted without reasonable grounds
- the applicant has made unsubstantiated or defamatory allegations
- the applicant conducts the application to cause delay or detriment to the agency
- applications are habitually and persistently instigated

Previous declarations

No declarations of vexatious applicants have been made to date. The Information Commissioner has however dismissed individual external review applications under section 77 of the Act, on the basis that the **specific application** is vexatious, and under

section 29(1)(a), on the basis that the application would result in substantial and unreasonable diversion of resources.

Examples:

Price and Local Government Association of Queensland Inc.

S 111/01, 29 June 2001, Qld IC

Multiple hearings of the same issues between parties

Four consecutive FOI applications to LGAQ sought '*all documents of your agency related to myself, my family and/or my property et cetera*'. LGAQ decided the documents had already been dealt with under previous FOI applications and thereby limited the scope of the last application to documents that came into its possession or control after the date of the applicant's prior application in the same terms dated 10 April 2001.

The applicant sought external review of this decision and also submitted that because he had again applied for access to all documents, this entitled him to a further review of matters that had already been decided on external review. The delegate of the Information Commissioner decided not to deal with the applicant's application on the basis that it was vexatious. The reasons given were that any documents responsive to the terms of the applicant's FOI earlier access applications, including 10 April 2001, had been dealt with in finalised form or soon-to-be finalised reviews by the Information Commissioner. Secondly the request for a review of a review decision was 'contrary to the principle that a decision by a court or tribunal resolves the issues in dispute between the parties' and that a 'litigant seeking multiple hearings for the same issues between the parties ... was vexatious and oppressive to the other party and to the relevant court or tribunal, and unfair to other citizens waiting their turn to use the dispute resolution services, provided from public funds, by courts and tribunals.

Price and Queensland Police Service

2005/F0442, 29 June 2007, Qld IC

Twelve external review applications for access to documents held by the QPS were made to the Information Commissioner from 18 December 2000 to 26 July 2004. In this external review, the applicant sought to initiate another 'hearing' of the issues previously addressed in the earlier external reviews by the Information Commissioner. Under section 77(1) of the FOI Act, the delegate of the Information Commissioner decided not to deal with the application on the basis that it was vexatious to the extent that it revisited matters previously addressed in external reviews. The delegate considered that it was vexatious and oppressive to the other party and to the relevant decision-making body for an applicant to seek multiple hearings of the same issues between parties.

Hearl and Mulgrave Shire Council

1994 1 QAR 557 at [36]

The applicant's initial FOI access requests were framed so as to seek answers to questions rather than access to documents. The Information Commissioner considered that while there was nothing to prevent the agency from answering the questions, the FOI Act conferred a right of access to information on citizens, not a right of answers to questions. The application was considered to be misconceived and lacking in substance in the context of FOI law.

Mr Hearl also made applications for documents that he knew did not exist, namely, applications by himself to Council as well as approvals extended by Council to change Fisheries Habitat Reserve to freehold. The object of his request seemed to be to make a

point to Council that no such documents existed. The Information Commissioner considered that the term 'vexatious' is used in the context of section 77 of the FOI Act in the sense illustrated by the Shorter Oxford Dictionary when it says '*Of legal actions: instituted without sufficient grounds for the purpose of causing trouble or annoyance to the defendant*' (cf. *Aspar Autobarn Co-operatives Society v Dovala Pty Ltd* (1987) 74 ALR 550 at p 554, where this meaning was approved by the Federal Court of Australia in a comparable statutory context). The Information Commissioner decided not to deal with the application under section 77(1)(a) on the basis that Mr Hearl's actions were instituted without sufficient grounds for the purpose of causing trouble or annoyance to the defendant.

Mulder and Centrelink 2005 AATA 1022

Eight matters were characterised by the Tribunal in the following terms:

- Four applications under the FOI Act (Cth) were lodged in respect of substantially the same subject matter
- procedurally invalid requests for review by the AAT, including one without an internal review completed, one in which fees remained payable, one seeking documents Mr Mulder already had and another with an utterly hopeless prospect of success
- one application for documents which Mr Mulder had been previously told did not exist and another despite advice that there would be no practical value in proceeding to a hearing
- a lack of co-operation with Centrelink in their efforts to respond to his request(s) and an intention to annoy the officers of that agency.

The history of Mr Mulder's applications to the Tribunal clearly demonstrated a pattern of behaviour in which he sought to annoy the officers of Centrelink. Having abused his rights under the FOI Act and the AAT Act, the Tribunal dismissed each of the applications on the grounds that they were frivolous or vexatious and directed that Mr Mulder must not, without leave of the Tribunal, make any subsequent application to the Tribunal in relation to Freedom of Information requests by him to the agency concerned.

Preliminary View - section 29 **a substantial and unreasonable diversion of Agency resource**

In a finalised external review, a preliminary view was expressed in relation to what amounted to a substantial and unreasonable diversion of resources. The application requested 'any documents requested but not previously provided' referring to over 80 prior applications made by the same applicant. The preliminary view in the matter stated that dealing with the first, and therefore each subsequent, application would result in a substantial and unreasonable diversion of resources.

In that case the Office of the Information Commissioner estimated that dealing with the application would require all the resources of the FOI Unit of the agency for a period of approximately 5 weeks, resulting in the agency not dealing with approximately 30 other FOI applications, causing delay and backlog and affecting the rights of those applicants. Further, substantial resources of the IT personnel and archives officers would also be required and therefore diverted from performing other agency functions.

The agency had stated that of the 80+ previous applications made by the applicant:

- documents were released in full in 25 applications
- the applicant requested 73 internal reviews
- the applicant requested 67 external reviews

- 50 of the 67 applications for external review made claims that the agency searches had not been sufficient.

It was considered that it was unreasonable to divert such resources to processing one FOI application, particularly when:

- there was little prospect of many responsive documents being located
- any responsive documents located may also be duplicates of documents already disclosed to the applicant, and provided to the agency by the applicant.

Further reading

FOI Concepts on related topics are available at www.oic.qld.gov.au.

See: FOI Concepts: 'Agency'
Considerations for agencies: Vexatious applicant

FOI decisions of the Information Commissioner are reproduced at www.oic.qld.gov.au.

Decisions are listed in the following indexes:

- applicant index – sorted alphabetically by applicant name
- agency index – sorted alphabetically by agency name
- year index – sorted by the year of the decision, grouped by financial year
- section index – sorted using the relevant section of the FOI Act

For more information:

- Relevant Decisions in the FOI context
 - *A and Department of Human Services (unreported, VCAT, Davis PM, 4 Nov 1998)*
 - *Cianfrano v Department of Commerce [2005] NSWADT 297*
 - *Chapman and Victoria Parks (unreported, VCAT, Ball SM, 6 December 1999)*
 - *Cunningham and Rural Adjustment and Finance Corporation, Re [1996] WAICmr 29 (27 May 1996)*
 - *Hearl and Mulgrave Shire Council (1994) 1 QAR 557*
 - *Duncan v Fayle [2002] FMCA 79*
 - *Ford and Child Support Registrar [2007] AATA 1242*
 - *Miriani v Commissioner for Fair Trading [2005] NSW ADT 99*
 - *Mulder and Centrelink [2005] AATA 1022*
 - *Price and Crime and Misconduct Commission (unreported, S0102, 28 March 2002)*
 - *Price v Local Government of Queensland Inc S 111/01, 29 June 2001. QldIC*
 - *Seal and Queensland Police Service (unreported, F0619, 26 June 2007)*
 - *Secretary, Dept Treasury and Finance v Kelly [2001] 4 VR 595*

Other resources

The Supreme Court has a similar statutory definition of vexatious proceedings and can be found in [Vexatious Proceedings Act 2005 \(Qld\)](#).

FOI Concepts are introductory only. They deal with issues in a general way. Additional factors may be relevant in particular cases. Detailed consideration of the issues can be found in the cases referred to above. The Information Commissioner considers each case on its merits.