Office of the Information Commissioner
Queensland

Decision and Reasons for Decision

Citation:	***Moreton Bay Regional Council and Respondent* [2020] QICmr 21 (8 April 2020)**
Application Number:	**431003**
Applicant:	**Moreton Bay Regional Council**
Respondent:	**'Respondent'**
Date	**8 April 2020**

REASONS FOR REFUSING APPLICATION FOR DECLARATION UNDER SECTION 114 OF THE *RIGHT TO INFORMATION ACT 2009* (QLD)

Background

1. The Respondent, a resident within the local government area administered by Moreton Bay Regional Council (**Council**), has been in dispute with Council in relation to residential plumbing matters.

2. The Respondent has applied to Council under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to information concerning these matters.

3. By application dated 19 July 2019, Council applied to me for a declaration under section 114(1) of the RTI Act that the Respondent is a vexatious applicant. Council sought a declaration in terms that would prohibit the Respondent from applying to Council under the RTI Act, for a period of three years, for access to information concerning:[1]

    a. *Plumbing and/or drainage matters at* [the Respondent's]*,…including any current legal proceedings or complaints still on foot regarding plumbing and/or drainage matters at* [the Respondent's] *property;*

    b. *Plumbing and drainage matters of any other property (residential or commercial) in Council's region, including the plumbing and drainage files of other properties and any show cause notices, rectification notices and enforcement orders issued in relation to plumbing and drainage;*

    c. *Information regarding Council's plumbing and drainage officers; and*

    d. *Council's plumbing and drainage procedures, methods, and statistics.*

4. For the reasons explained below, I am not satisfied that grounds exist for the making of the requested declaration. I therefore refuse Council's application.

[1] Council's application also asked that the requested declaration include a condition requiring an existing RTI application be withdrawn.

Relevant law

5. Section 114 of the RTI Act relevantly provides as follows:

> *(1) The information commissioner may, on the commissioner's own initiative or on the application of 1 or more agencies, declare in writing that a person is a vexatious applicant.*
>
> *(2) The commissioner may make the declaration in relation to a person only if the commissioner is satisfied that—*
>
> *(a) the person has repeatedly engaged in access actions; and*
>
> *(b) 1 of the following applies—*
>
> *(i) the repeated engagement involves an abuse of process for an access action;*
>
> *…*

6. Section 114(8) of the RTI Act sets out relevant definitions:

> *(8) In this section—*
>
> ***abuse of process**, for an access action, includes, but is not limited to, the following—*
>
> *(a) harassing or intimidating an individual or an employee of an agency in relation to the access action;*
>
> *(b) unreasonably interfering with the operations of an agency in relation to the access action;*
>
> *(c) seeking to use the Act for the purpose of circumventing restrictions on access to a document or documents imposed by a court.*
>
> ***access action** means any of the following—*
>
> *(a) an access application;*
> *(b) an internal review application;*
> *(c) an external review application.*
>
> *…*
>
> ***engage**, for an access action, means make the access action.*

7. Other grounds for abuse of process may be established at common law.[2]

Council's application for the making of a declaration

8. Council contends that the Respondent has engaged in repeated access actions, and that his doing so has resulted in all three of the statutory abuse of process grounds stated in section 114(8) of the RTI Act, ie:

- harassing or intimidating Council employees,
- unreasonably interfering with Council operations, and

[2] *Applicant - University of Queensland - Declaration date 27 February 2012*, at [13]. See also *Applicant - Cairns and Hinterland Hospital and Health Service - Declaration date 26 October 2017*, at [14].

- seeking to use the RTI Act for the purpose of circumventing court-imposed restrictions.[3]

9. It was apparent early in my Office's consideration of Council's application that the first and third grounds summarised above – harassment/intimidation and evading court-imposed restrictions – were unlikely to be made out. I have explained why neither is established later in these reasons.

10. Consideration therefore focussed on Council's case for a declaration based on abuse of process arising from unreasonable interference with Council operations.

11. On this ground, Council's case as originally put was not that the number of access actions engaged in by the Respondent was, of itself, unreasonable.[4] Rather, Council submitted that the nature of those access actions was unreasonably interfering with Council operations. As Council argued:

> *… more so than the frequency of requests, the extensive scope and the nature of these requests and reviews indicate a pattern of obsessive and unreasonable behaviour by* [the Respondent]*.*
>
> *…* [the Respondent] *began by making various access applications in relation to his property and plumbing dispute with Council. The scope of these applications became far broader and accusatory as time passed, to the extent that it has become an avenue for* [the Respondent] *to air his complaints and make allegations. Once* [the Respondent] *had exhausted all possible scopes for applying for documents about his property and the plumbing dispute, he began requesting documents in relation to Council's plumbing procedures and statistics, along with the schedules and work of targeted staff members.*
>
> *In recent years,* [the Respondent] *has started making access applications for the plumbing and drainage files of other properties in the region, and continues to request, with slight variations, documents about Council's plumbing procedures and statistics. It is noted that, with only one exception, the scope of all* [the Respondent's] *requests over the last three and a half years have not related to his property. His recent applications appear to be attempts to waste Council's resources, to harass, and to scrutinise Council's plumbing procedures and recordkeeping, down to an unreasonable level of detail, in order to expose what he seems to believe is some kind of misconduct or cover-up by Council.*

12. On the issue of unreasonable interference specifically, Council contended that:

> [The Respondent's] *repeated engagement with Council has substantially and unreasonably diverted Council's resources and will likely continue to do so unless he is declared a vexatious applicant. Council does not consider the conduct will abate with the passage of time, given that* [the Respondent] *has been repeatedly engaging with Council for almost a decade and that his requests seem to have been increasing and becoming broader of late (with six requests for information and five reviews in 2018 alone).*

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[3] Council's application also uses the language '*manifestly unreasonable*', which appears in section 114(2)(b)(iii) of the RTI Act, as a further criterion on which a declaration may be based, ie, '*a* ***particular*** *access action in which a person engages* ***would be*** *manifestly unreasonable*' [emphasis added]. This criterion requires an agency to identify a specific access action, which, in view of the words '*would be*', is either proposed or on foot, and which would be '*manifestly unreasonable*'. Council's application and supporting submissions have, however, been addressed to the Respondent's prior history of access actions – rather than any particular, present, access action – and their substance directed toward establishing 'abuse of process' as defined section 114(8) of the RTI Act. Accordingly, I do not understand it to be relying on section 114(2)(b)(iii) of the RTI Act. It has not sought to argue to the contrary (despite preliminary correspondence from the Right to Information Commissioner making clear the basis on which it was understood Council's application to have been put), and there is, in any event, insufficient information in its submissions that would allow a conclusion that this particular criterion was met.

[4] See also supplementary submissions from Council dated 24 September 2019, conceding that the total number of access and review applications lodged by the Respondent '*do not represent an unreasonably large proportion of total applications*' and '*are not significant*'.

> *Over the course of* [the Respondent's] *engagement with Council, Council's Regulatory Services Department (the Department) has expended a significant and unreasonable amount of time searching for and providing documents in response to* [the Respondent's] *repeated access applications. The Department has advised they often struggle with the large size of many of the requests and processing applications that are very broad and vague in nature (particularly recently) and have stated that these ongoing applications "are causing significant disruption and concern within the Regulatory Services Department in general."*
>
> *In addition, as many of* [the Respondent's] *requests for information are followed by extensive review requests, the Department has expended countless further hours assisting in the resolution of lengthy sufficiency of search reviews.*
>
> *Council's RTI Unit, which is made up of one full-time Governance Information Officer and one decision-maker, whom is a Legal Officer with other duties, has similarly struggled to cope with [the Respondent's] repeated applications and review requests, which often impact on the processing time of other access applications Council has on foot. This is due to the size of most of the applications and the extremely detailed nature of* [the Respondent's] *review requests. In addition, and perhaps the source of the most frustration, is the great deal of time the RTI Unit expends determining which parts of new access applications reflect documents previously applied for.*

Respondent's case in reply

13. Council's initial case for a declaration was put to the Respondent by letter from the RTI Commissioner dated 18 September 2019. That letter set out salient parts of Council's application as extracted above, together with the RTI Commissioner's preliminary view that there may exist grounds for the making of a declaration by the Information Commissioner,[5] and her reasons for forming that preliminary view.

14. By reply dated 2 October 2019, the Respondent resisted the making of any declaration, relevantly submitting that:

- the various access actions in which he has engaged have been initiated in an effort to access information to assist him in progressing a civil claim against Council;
- in dealing with those applications, Council availed itself of the processing charge regime in the RTI Act, assessing $2,236.16 in charges, which the Respondent has fully paid; and
- he has sought from and accepted any advice from Council as to how his applications might be framed in a manageable form.

Council's further submissions

15. Having considered the Respondent's reply, the RTI Commissioner wrote again to Council, summarising the Respondent's position and conveying a revised preliminary view: essentially, that the making of the requested declaration would not be appropriate.

16. By letter dated 24 January 2020,[6] Council made further submissions in support of its application, maintaining its position that the making of a declaration under section 114(1) of the RTI Act was justified. Council relied on its 19 July 2019 submissions, and further submitted that:

[5] For a period of 12 months, rather than three years as initially applied for by Council. Council did not contest this shortened period.
[6] Received 28 January 2020.

- contrary to his submissions, the Respondent has not cooperated with Council in negotiating the scope of various access applications
- '*comparative*' to the total number of applications received by Council in any given year, the time expended on the Respondent is '*excessive and manifestly unreasonable when one considers that Council engages one (1) Governance Information Officer to deal with the totality of RTI/IP applications across Council'*
- the proposition that the Respondent's access actions justified on public interest grounds is without merit, and/or insofar as information is required for ongoing legal proceedings, this should be pursued through curial processes, and not via applications under the RTI Act; and
- processing charges paid by the Respondent do not adequately reflect resources expended by Council in dealing with:

    - 'post-application' inquiries made by the Respondent following receipt of a decision or documentation; and
    - review actions initiated by the Respondent, many of which Council contends have lacked merit.

Consideration

17. The requirements of section 114 of the RTI Act have been previously considered by the Information Commissioner in two published decisions.[7]

18. Additionally, section 114 of the RTI Act is substantially the same as sections 89K and 89L of the Commonwealth *Freedom of Information Act 1982*. Accordingly, in considering Council's application I have obtained considerable guidance on the interpretation of section 114 of the RTI Act from:

    - guidelines on the operation of those analogous Commonwealth sections, prepared by the Office of the Australian Information Commissioner (**OAIC Guidelines**);[8] and
    - several declarations made by the Australian Information Commissioner[9]

19. The power to make a declaration under section 114(1) of the RTI Act is discretionary. This means that in addition to considering the grounds for a declaration specified in section 114, the Information Commissioner may consider other relevant features of a person's access actions or RTI administration in the agency that has applied for a declaration.[10] When such additional considerations are taken into account, it may be that it is not appropriate to exercise the discretion to make a declaration, notwithstanding that the grounds enlivening that discretion are made out.

Repeated engagement in access actions

20. The first issue to address is whether the Respondent has repeatedly engaged in access actions.

[7] See footnote 2.
[8] Available at https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-12-vexatious-applicant-declarations/.
[9] A list of these declarations is accessible at https://www.oaic.gov.au/freedom-of-information/information-commissioner-decisions/vexatious-applicant-declarations/).
[10] Paraphrasing OAIC Guidelines, at [12.9].

21. I have identified 38 access actions made by the Respondent: 18 access applications, six internal review applications,[11] and 14 external review applications to OIC.[12]

22. 'Repeatedly' is not defined in the RTI Act and can be interpreted within its ordinary meaning: '*done, made, or said again and again*'.[13]

23. I consider that in making these 38 access actions the Respondent has repeatedly – *'again and again'* – engaged in access actions.[14]

Abuse of process

24. The next question is whether the Respondent's repeated engagement in access actions amounts to an abuse of process.

25. As noted above, Council originally submitted that the Respondent's access actions satisfied all three categories of abuse of process nominated in section 114(8) of the RTI Act.

26. In her letter to Council dated 28 November 2019, the RTI Commissioner set out a preliminary view rejecting any argument that the access actions involved circumvention of court-imposed access restrictions, or harassment/intimidation.

Circumventing court restrictions on access

27. Council, correctly in my view, did not press this claim. This is a very specific ground, requiring a determination of fact as to whether a person has engaged in access applications to circumvent restrictions on access to documents imposed by a court. As the OAIC Guidelines note in relation to the equivalent Commonwealth ground, in assessing whether it is established '[i]*t will be necessary to compare the terms of a person's request with the terms of a court order.'*[15]

28. There is no evidence before me that a court has imposed any restrictions on the Respondent at all, let alone in relation to documents he has requested of Council via the RTI Act. This ground cannot be established.

Harassment/intimidation

29. As for harassment/intimidation arguments, Council did in its 24 January 2020 submissions refer to the *'added effect'* of the Respondent's access actions on Council staff, '*who feel the* [Respondent] *is abusing the RTI process and questioning their integrity as public officers*…'; language arguably suggesting it continued to rely on this ground. I do not accept that it is established.

30. The terms '*harassing*' and '*intimidating*' are not defined in the RTI Act, and therefore have their ordinary meaning. To 'harass' a person is to disturb them persistently or

[11] Particularised in a schedule forming part of Council's application; Council did also include additional dealings with the Respondent in this schedule, however for reasons explained in the RTI Commissioner's letter to Council dated 18 September 2019, these dealings do not comprise access actions that may be taken into account under section 114 of the RTI Act.
[12] Set out in a list accompanying the RTI Commissioner's letter to the Respondent dated 18 September 2019.
[13] *Sweeney and Australian Information Commissioner & Ors* [2014] AATA 531 (4 August 2014) (***Sweeney***) at [53], quoting the Macquarie Dictionary.
[14] I note that the Respondent did not contest the figures set out in paragraph 21, nor the RTI Commissioner's preliminary view that they amount to a repeated engagement for the purposes of section 114(2)(a) of the RTI Act.
[15] OAIC Guidelines, at [12.29].

torment them; and to 'intimidate' a person is to use fear to force or deter the actions of the person, or to overawe them.[16]

31. The OAIC Guidelines state:[17]

> *12.23 The occurrence of harassment or intimidation must be approached objectively. The issue to be resolved is whether a person has engaged in behaviour that could reasonably be expected on at least some occasions to have the effect, for example, of tormenting, threatening or disturbing agency employees. An agency will be expected to explain or provide evidence of the impact that a person's access actions have had on agency employees, though this evidence must be considered in context with other matters. …*
>
> *12.24 Harassment and intimidation may be established by a variety of circumstances that include:*
>
> - *the content, tone and language of a person's correspondence with an agency, especially if language is used that is insulting, offensive or abusive*
> - *unsubstantiated, derogatory and inflammatory allegations against agency staff*
> - *requests that are targeted at personal information of agency employees*
> - *requests that are designed to intimidate agency staff and force them to capitulate on another issue*
> - *requests of a repetitive nature that are apparently made with the intention of annoying or harassing agency staff*
> - *a person's refusal or failure to alter dubious conduct after being requested by an agency to do so.*
>
> *12.25 Those circumstances, if present in an individual case, must nevertheless be assessed objectively in a broader FOI context. It is not contrary to the requirements or spirit of the FOI Act that an FOI request will contain additional commentary or complaints by the FOI applicant. These may provide context for a request, or be compatible with the stated objects of the FOI Act of facilitating scrutiny, comment and review of government activity.*

32. Council submits:[18]

> *Similar to the case of* UQ and R*, Council is of the view that* [the Respondent's] *repeated engagement with Council is motivated by a desire to seek retribution against Council, and particular Council staff, whom* [the Respondent] *believes have wronged him. In particular,* [the Respondent] *appears to have an ongoing unresolved issue with …* [several named Council officers]*.*
>
> *In the early years of* [the Respondent's] *engagement with Council, he made serious and repeated allegations against Council's plumbing officers, including* [named officers]*, such as complaints about corrupt conduct to the Crime and Corruption Commission and complaints about perjury to Queensland Police.* [The Respondent's] *complaints have all since been dismissed, however his repeated requests for documents continue to persistently disturb, torment and cause a great deal of stress to these officers. The requests appear to be continued attempts by* [the Respondent] *to harass Council and to substantiate unfounded allegations that these employees have engaged in inappropriate conduct.*

33. The material before me does not justify a finding that the Respondent's repeated engagement in access actions involves an abuse of process in the nature of harassing or intimidating Council employees.

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[16] OAIC Guidelines, at [12.22], citing Macquarie Online Dictionary.
[17] Footnotes omitted.
[18] Application dated 19 July 2019 (footnotes omitted).

34. There is no evidence of the Respondent having persistently adopted insulting, offensive or abusive language in his access actions or more broadly. Further, his access actions do not appear to have been motivated by a 'desire to seek retribution' but, as noted above and discussed further below, to obtain information for use in legal proceedings.

35. Council asserts that the Respondent did, at some point, raise allegations against certain staff. It is, however, the right of any member of the community to raise with appropriate agencies what the individual honestly suspects to be inappropriate or delinquent conduct on the part of public officers – absent exceptional circumstances, the making of such an approach would not, of itself, amount to inappropriate conduct.

36. Further, there is no evidence that the Respondent's access actions have specifically targeted the personal, rather than simply operational, information of nominated staff. The underlying issue motivating his repeated actions concerns, as I understand, plumbing and plumbing compliance issues. In this context, it is not unusual that those actions will affect or require the attention of the several operational officers identified in Council's submissions – this being an incidental consequence of the roles they occupy. While I appreciate the Respondent's focus on this issue may annoy or inconvenience affected staff, I am not able to conclude his actions in this regard amount to harassment or intimidation.

37. Similarly, on the information before me, it is not possible to conclude that the Respondent has engaged in access actions in an attempt to 'overawe' agency staff or for a collateral purpose of having them capitulate or concede on other issues.

Unreasonable interference with agency operations

38. It remains, then, to consider whether the Respondent's repeated engagement in access actions involves an abuse of process, on the basis that that repeated engagement has unreasonably interfered[19] with Council's operations.

39. The OAIC Guidelines[20] list various factors relevant to assessing this issue, which I consider may be usefully applied when considering section 114(2)(b)(i) of the RTI Act:

- *the total number of a person's access actions to the agency in a specific period, and in particular, whether a high number of access actions has led to a substantial or prolonged processing burden on the agency or a burden that is excessive and disproportionate to a reasonable exercise by an applicant of the right to engage in access actions*
- *the impact of the person's access actions on* [RTI] *administration in the agency, and in particular, whether a substantial workload impact has arisen from the nature of a person's access actions, such as multiple* [RTI] *requests that are poorly-framed or for documents that do not exist, requests for documents that have already been provided or to which access was refused, or requests that are difficult to discern and distinguish from other complaints a person has against the agency. It is nevertheless important to bear in mind that an individual, who may lack both expertise in dealing with government and a close knowledge of an agency's records management system, may make access requests that are poorly framed, overlapping or cause inconvenience to an agency*
- *the impact of the person's access actions on other work in the agency, and in particular, whether specialist or senior staff have to be redeployed from other tasks to deal with* [RTI] *requests, or the requests have caused distress to staff or raised security concerns that required separate action*

[19] 'Unreasonable' is relevantly defined as meaning '*exceeding the bounds of reason; immoderate; exorbitant*'. 'Interfere' is defined as '*to interpose or intervene for a particular purpose*' (Macquarie Dictionary, 7th edition). I note that the use of the phrase *'unreasonably interfering'* indicates a degree of interference with agency operations is permissible, before it will be regarded as unreasonable.
[20] Paragraph [12.27].

- *whether the agency has used other provisions under the [RTI] Act to lessen the impact of the person's access actions on its operations …*
- *the size of the agency and the resources that it can reasonably allocate to [RTI] processing*
- *whether the person has cooperated reasonably with the agency to enable efficient [RTI] processing, including whether the person's access actions portray an immoderate prolongation of a separate grievance the person has against the agency, or the continued pursuit of a matter that has already been settled through proceedings in another dispute resolution forum*

  …
- *whether deficiencies in an agency's* [RTI] *processing or general administration have contributed to or might explain a person's access actions...*

40. The first point to note is that the number of access actions initiated by the Respondent – while repeated – is not particularly excessive.[21] Nor is the time expended by Council in dealing with those actions.[22] These are important considerations telling against a finding of unreasonable interference.

41. Nevertheless, as the factors listed in paragraph 39 make clear, the number of actions and time spent dealing with them are not the only matters to be considered in assessing whether those access actions unreasonably interfere with agency operations.

42. As noted above, Council's position is that it is the nature of the Respondent's access actions, rather than number alone, that unreasonably interferes with Council operations:[23] that the Respondent's repeated engagement in complex and repetitive access actions excessively – unreasonably – interferes with Council's operations in relation to the access actions.[24]

43. In this regard, I note particularly Council's submissions that many of the Respondent's applications to access information are very detailed and composed of multiple categories – '*difficult to discern*' – requiring considerable effort on Council's part to ascertain what exactly it is the Respondent has requested, and the extent to which a given application overlaps with earlier applications.[25]

44. Further, as the RTI Commissioner pointed out to the Respondent in her letter dated 18 September 2019, it appears that he has at times:

    - directly requested material his entitlement to which Council has previously resolved
    - brought external review applications in which he has essentially sought to have Council 'prove a negative'; and
    - on occasion demonstrated an attitude that may be considered uncooperative or unhelpful.[26]

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[21] On the figures available to me, I note, for example, that the Respondent made three of the 92 access applications finalised by Council in the 2017/18 year. See also footnote 43.

[22] Submissions dated 19 July 2019, supporting Council's application for a declaration. I acknowledge this is not a complete account of time spent by Council in dealing with relevant access actions, a fact recognised in the RTI Commissioner's letter to the Respondent dated 18 September 2019. As discussed further below, however, I consider that an agency seeking a declaration under section 114 of the RTI Act on the basis of unreasonable interference with operations should carefully articulate and quantify the type and extent of that interference.

[23] In dealing with similar requests for individuals to be declared vexatious litigants, courts have determined that a person can have engaged *'frequently'* in proceedings so as to amount to an abuse of process, even though the number of proceedings is quite small: *Registrar of the Supreme Court v Jenkins* [2019] NTSC 51 (21 June 2019) at [15], citing *HWY Rent Pty Ltd v HWY Rentals (in liq) (No. 2)* [2014] FCA 449 at [112]; *Fuller v Toms* [2013] FCA 1422 at [77]; *Conomy v Maden* [2019] HCA Trans 49 (20 March 2019).

[24] Paraphrasing the RTI Commissioner's characterisation of Council's case, as set out in her letter to the Respondent dated 18 September 2019.

[25] The RTI Commissioner's letter to the Respondent dated 18 September 2019 included a table of sample applications, at least three of which requested the same or substantially the same information.

[26] On all three points, see examples cited in the RTI Commissioner's letter to the Respondent dated 18 September 2019.

45. Another point made by the RTI Commissioner was the fact that through his access actions, the Respondent has sought to pursue access to questions or explanations from Council about certain of its processes,[27] or press for access to information which appears to have already been released. Similarly, on occasion he has asserted that Council has failed to identify and deal with all relevant documents, when in fact it had already disclosed several relevant documents to him: Council was therefore required to expend resources in dealing with his queries as to the adequacy of its searches, when the answers to some of those queries were in the material it had disclosed to him.[28]

46. Of some further relevance is the fact that, of the 14 applications for external review of Council decisions the Respondent has made to OIC – a process that, as noted, consumes Council time and resources – the majority of these have not resulted in the Respondent obtaining an outcome more favourable than that decided by Council.

47. Council's case, in summary, is that the Respondent's repeated access actions have impacted on its ability to both undertake core service delivery in the building compliance area, and expeditiously process information action requests, potentially to the disadvantage of other members of the community seeking to exercise their right to access information from Council under the RTI Act. It further submits that it has attempted to manage individual applications according to the mechanisms afforded it under the Act where appropriate.[29] Additionally, and while the Respondent disputes this,[30] it is not clearly obvious to me that any deficiencies on its part have contributed to the number of access actions made by the Respondent, which might otherwise tend against a finding of unreasonableness.

48. Taking all of the above circumstances into account – including the scope, complexity and repetitive subject-matter of the Respondent's repeated applications to Council – the RTI Commissioner was initially inclined to the view that the Respondent's repeated access actions did not constitute a '*moderate and reasonable*' exercise of the right of access to government-held documents under the RTI Act.[31] Rather, the RTI Commissioner concluded, on a preliminary basis, that the nature of the majority of the Respondent's access actions – arising, as noted, from a domestic plumbing issue – instead suggested '*an immoderate prolongation of a separate grievance*', of a kind that may warrant a declaration in terms as requested by Council (apart from duration).

49. Of course, the RTI Commissioner's view as summarised in the preceding paragraph was only preliminary, and formed prior to considering the Respondent's perspective, as summarised in paragraph 14 above. When those key matters are taken into account, the question of whether the Respondent's repeated access actions *unreasonably interfere* with Council operations becomes much more contested.

50. Firstly, as the RTI Commissioner's 28 November 2019 letter to Council noted, obtaining information to pursue or evaluate a legal remedy is a recognised public interest.[32] The Respondent's 2 October 2019 submissions annexed several court pleadings from an

[27] Beyond the right conferred by section 23 of the RTI Act: *Hearl and Mulgrave Shire Council* (1994) 1 QAR 557 at [30], which considered the equivalent section 21 of the repealed *Freedom of Information Act 1992* (Qld).
[28] See generally the file correspondence referred to in footnote 16 of the RTI Commissioner's letter to the Respondent dated 18 September 2019.
[29] Such as by way of the substantial and unreasonable diversion provisions in sections 41 and 42 of the RTI Act, relied on by Council in application RTI 2014-114.
[30] In his 2 October 2019 submissions, the Respondent contended that Council has failed to comply with disclosure obligations relevant to the court proceedings brought by him against Council, pointing to claims made by him in associated pleadings. In the absence of an objective determination of this contention (ie, by the court dealing with those proceedings), I am reluctant to take it into account.
[31] See *Indigenous Business Australia and 'QB' (Freedom of information)* [2019] AICmr 14 (29 April 2019).
[32] *Willsford and Brisbane City Council* (1996) 3 QAR 368.

action to which Council is a party. These documents do appear to establish that he has been seeking information through his various access actions to assist him in pursuit of these proceedings. This militates, in my view, against a finding of unreasonableness.

51. So, too, does the payment by the Respondent of more than $2,000 in processing charges: remuneration that, while unlikely to reflect cost recovery on Council's part,[33] nevertheless tends to mitigate or offset the inconvenience incurred or interference suffered by Council in dealing with relevant actions.

52. The Respondent also submits that he has sought to cooperate with Council in negotiating the scope of his access applications.

53. Council, in its final submissions, strongly rejects this latter contention. This particular point strikes me in many ways as a matter of perspective – what the Respondent sees as an attempt to engage cooperatively, the Council perceives as an excessive or unreasonable call on its resources. Ultimately, I do not think resolving Council's application turns on this point, and I have not taken it into account in making my decision.[34]

54. What is important, however, is something I consider to be a shortcoming in Council's case: the absence of firm evidence substantiating its assertions that dealing with the Respondent's access actions unreasonably interfere with its operations – time-wise, financially or in any other fashion. As the OAIC Guidelines stress, a declaration of the kind provided for under section 114 of the RTI Act will not '*be lightly made, and an agency that applies for a declaration must establish a clear and convincing need for a declaration*'.[35] Council's case, however, largely falls short in this regard. The materials it has supplied do not, as noted above, demonstrate an unreasonable or 'immoderate' interference.[36]

55. Obviously, it can[37] be accepted that Council has been required to commit resources to dealing with the Respondent's access actions, including on external review. The effects of a declaration under section 114(1) of the RTI Act are, however, profound, depriving an individual of a statutory right intended by Parliament to, among other things, increase '*the participation of members of the community in democratic processes…*'.[38]

56. In these circumstances, an agency applying for such a declaration on the basis of unreasonable interference with operations should be careful to ensure that its claims can be substantiated by clear evidence as to the quantum and extent of the interference with its operations it contends arises from dealing with a given individual's access actions (such as records of officer time spent or agency monies expended, for example – particularly relevant in this case, given the emphasis in Council's final submissions on resources expended beyond those reflected in charges recovered from the Respondent).

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[33] Which a charges regime of the kind contained in the RTI Act is neither able nor intended to achieve – as the FOI Independent Review Panel noted in the report that lead to the enactment of the RTI Act, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (June 2008), '*full cost recovery will never be possible. Indeed it can be argued…that it is not desirable*' (page 192).

[34] Nor have I taken into account apparent administrative or other releases of information by Council to the Respondent that may have occurred outside formal access application framework under the RTI Act (a matter raised in both Council's application and the Respondent's reply), given these would not comprise 'access actions' – see also footnote 11 above.

[35] OAIC Guidelines, at [12.7].

[36] On this point, in her letter dated 18 September 2019 the RTI Commissioner invited Council to supply more information in this regard. Its reply, dated 24 September 2019, did not greatly assist Council's case – indeed, as canvassed at paragraph 61 below, to the extent this reply states firm figures, they reflect favourably on the Respondent.

[37] And, indeed, was by the RTI Commissioner in forming her initial preliminary view.

[38] Preamble to the RTI Act, clause 1(e).

57. On this point, even if Council had better substantiated the interference it submits arises from handling the Respondent's access actions, there is one category of expense I would still nevertheless need to treat with caution in assessing whether that interference is unreasonable: those that Council states have been incurred in dealing with the Respondent 'post-decision'.

58. This is because such liaison is not technically required under the RTI Act – while not wishing to discourage agencies from entertaining such queries from applicants, they are, on having discharged their decision-making powers,[39] not strictly required to take any further action in relation to an access application (subject only, in the case of initial decisions, to dealing with any application for internal review).

59. Given this, I would be hesitant to consider work or expenditure of this kind, in assessing whether dealing with access actions unreasonably interferes with agency operations.[40]

60. Nor, in the absence of firm evidence, am I persuaded by Council's 28 January 2020 submission that the time and resources spent on access actions brought by the Respondent is '*excessive and manifestly unreasonable*', '*comparative*' to other applicants. In assessing reasonableness for the purposes of section 114(8) of the RTI Act, it may be relevant to have regard to the interference with agency operations caused by an individual applicant, relative to the total number of access actions dealt with by the agency.[41]

61. In this case, however, the only concrete figures that are available – number of access actions – reflect favourably on the Respondent including when assessed comparatively: his applications to Council for access to information[42] are consistently a relatively low number of applications per annum across the eight year period provided by Council. Further, as a proportion of the total of information access applications fielded by Council, the Respondent's access applications have never exceeded more than 3.73% in a given financial year.[43]

62. As for Council's complaint that the Respondent should avail himself of curial processes in his pursuit of information, rather than the RTI Act, access applicants are not required to justify or explain why it is they are making an application for access to documents under the latter. Information access rights of the kind provided for in the RTI Act are generally regarded as '*applicant and motive blind*',[44] and while the Act recognises the potential for abuse of that right – via, for example, the very existence of section 114 – I am not persuaded that merely electing to use that right, in preference to others that may be available – is of itself a matter demonstrating abuse.[45] This is particularly so, given the significant limitations ordinarily applying to use of information obtained via court disclosure processes. It is also the case that such routes of access are often relatively narrow or circumscribed, and of little to no assistance to an individual who may be

[39] Including advising applicants of their rights of review.
[40] Although persistent contact from a given applicant may be something to be taken into account in evaluating whether to exercise the discretion to make a declaration under section 114 (assuming it is enlivened).
[41] OAIC Guidelines, at [12.36].
[42] A category of access action: section 114(8) of the RTI Act.
[43] Comprising a total of 5 applications in that case: Council's submissions dated 24 September 2019, accompanied by the acknowledgement quoted at footnote 4 above. These figures cover eight full financial years, from 2011/12 to 2018/2019, and that part of 2019/2020 up to the date of the submissions. Relevant submissions also cover internal and external review applications made by the Respondent – the most ever made in a year has been five, out of a total of 17 (2013/14) and 33 (2018/19). This does not, of itself, appear unreasonable.
[44] *S v the Information Commissioner* [2007] UKIT EA/2006/0030, at [19]. Applicant identity and motive are irrelevant considerations: *State of Queensland v Albietz* [1996] 1 Qd R 215 and *Australian Workers' Union and Queensland Treasury; Ardent Leisure Limited (Third Party)* [2016] QICmr 28 (28 July 2016), at [40]-[41] and Schedule 4, part 1 items 2 and 3 of the RTI Act.
[45] Noting, too, that where other access is available to a document within the meaning of section 53 of the RTI Act, an agency may refuse access under the RTI Act: section 47(3)(f).

seeking to explore the merits of claims or the scope or viability of potential legal action (or an expansion of existing legal action).

63. Finally, I note Council's submissions as to the merit or otherwise of the Respondent's review applications. The merits of certain of these applications was a matter raised in the RTI Commissioner's initial preliminary view, and taken into account by her in forming that view. Casting this as these applications 'lacking merit', however, is to perhaps go too far: an external review application[46] genuinely without merit or lacking substance would be liable to an exercise of the discretion conferred on me by section 94(1) of the RTI Act,[47] action I have not taken in relation to any of the Respondent's external review applications to date.

64. It must be remembered that the Respondent has a statutory right to seek review of Council's decisions – to have those decisions 'tested' by an internal review officer within Council, or the independent review body in OIC. While he has, as I have noted above, obtained no better outcome as a result of a considerable number of those applications, it is also the case that in the vast majority, he has been prepared to accept OIC's independent preliminary assessments, and settle or resolve reviews informally rather than put Council and OIC to the expense of requiring formal decisions.

Conclusion

65. I accept that the Respondent has repeatedly engaged in access actions. However, when the considerations discussed in the paragraphs above are taken into account, I am not, on the information before me, prepared to find that this engagement unreasonably interferes with Council operations, as required by sections 114(2) and (8) of the RTI Act.

66. As I am not satisfied that Council has established the Respondent's repeated engagement in access actions amounts to an abuse of process, there is no basis to consider making a declaration under section 114(1) of the RTI Act against him. The discretion to do so is not enlivened.

67. Given this, it is not strictly necessary that I consider whether, assuming Council had established abuse of process, this would be an appropriate case in which to exercise the discretion to make the requested declaration.

68. Nevertheless, in the interests of completeness, I record my findings that I do not consider that exercising that discretion would, on the information available to me, comprise a reasonable and proportionate response to those access actions.[48]

69. I acknowledge Council's sincere frustration with the Respondent, and, from my Office's own experience with both him and Council over a number of years, accept that his use of the RTI Act may aggravate or exasperate Council.

70. There are, however, a number of tools and mechanisms available to Council under the RTI Act to manage individual applications brought by applicants in such circumstances,

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[46] Council in these submissions also refers to the merits of the Respondent's internal review applications – he has, however, made very few of these (six in some eight years, from a total of 38 access actions – see paragraph 21, based in turn on submissions supporting Council's application under section 114 of the RTI Act). Given this, even if all of these internal review applications were entirely unmeritorious, I am not persuaded that the Respondent's engaging in them suggests unreasonableness amounting to an abuse of process.

[47] Which empowers me to decide not to deal with, or not to further deal with, all or part of an external review application if I am satisfied it is frivolous, vexatious, misconceived or lacking substance.

[48] As noted at paragraph 19, the power to make a declaration under section 114(1) of the RTI Act is discretionary. That discretion must be exercised reasonably, and when exercising discretionary power which impacts on an individual, the impact should be proportionate to the interests which the decision-maker is seeking to protect: *Sweeney*, at [82]-[84].

such as noncompliance with statutory requirements for a valid application, refusing to deal with repeat applications for the same documents[49] or applications that would substantially and unreasonably divert Council resources[50] or even, as regards external review applications, inviting my office to consider not dealing or not further dealing with an application under section 94(1)(a) of the RTI Act.

71. While I acknowledge that Council has in the past used some of these mechanisms,[51] it still strikes me that relevant measures – intended to deal with applications – would comprise a more proportional response, than a declaration under section 114 precluding the making of applications altogether, even in the somewhat confined terms requested by Council.[52]

Decision

72. I refuse Council's application for a declaration that the Respondent is a vexatious applicant under section 114(1) of the RTI Act.

Rachael Rangihaeata
Information Commissioner

Date: 8 April 2020

[49] Section 43 of the RTI Act.
[50] Section 41 of the RTI Act.
[51] The 'substantial and unreasonable diversion' provisions, for example, and by levying processing charges against the Respondent.
[52] Noting the OAIC's observation that an agency's recourse to other mechanisms in relation to a particular applicant may be a relevant consideration in deciding whether to make a declaration against that person, (OAIC Guideline, at [12.11]), with which I agree.

APPENDIX

Significant procedural steps

Date	Event
19 July 2019	OIC received the application for a declaration from Council.
25 July 2019	OIC notified Council that the application had been received.
18 September 2019	OIC wrote to the respondent, advising him of the declaration application, conveying the preliminary view that the declaration may be justified, and inviting submissions. OIC also wrote to Council, explaining OIC's preliminary view.
24 September 2019	Council provided written submissions to OIC.
2 October 2019	The respondent provided written submissions to OIC.
28 November 2019	OIC wrote to Council, conveying the revised preliminary view that the declaration may not be justified. OIC wrote to the respondent, notifying him of same.
28 January 2020	Council provided written submissions to OIC (dated 24 January 2020.