

## Determinations

### External review - section 39 *Freedom of Information Act 1991*

Applicant	Mr Brian March
Agency	District Council of Tumby Bay
Ombudsman references	2014/08201; 2014/08276; 2014/08277; 2014/08278; 2014/08279
Agency references	CTB 118537; CTB 118541; CTB 118542; CTB 118546; CTB 118547
Determinations	The determinations of the agency are confirmed.

## REASONS

### Applications for access

1. The applicant, his wife, and his brother-in-law own property within the council area.
2. The applicant is the Information Officer of the Eyre Peninsula Community Mine to Port Consultative Committee (**the Committee**), which is a subcommittee of the Tumby Bay Residents and Ratepayers Association Inc (**the Association; TBRARA**).
3. The applicant simultaneously made the following five applications (**the applications**) under the *Freedom of Information Act 1991* (**the FOI Act**), in which he requested access from the agency to:<sup>1</sup>

Agency reference	Terms of application
CTB 118537	<i>EPBC referrals</i> Council's responses to the Environmental Protection & Biodiversity Conservation Act (EPBC) referrals, together with briefing notes to Council and motions at Council in relation to the following matters: <ul style="list-style-type: none"> <li>• 2012/6590, Centrex Metals Ltd, Port Spencer</li> <li>• 2013/6919, Eyre Iron Pty Ltd, Project Fusion</li> <li>• 2014/7285, Iron Road Ltd, Central Eyre Iron Project Transport Corridor and Port facility.</li> </ul>
CTB 118541	<i>Asset Management Plan</i> The Asset Management Plan associated with the Tumby Bay CWMS Scheme.
CTB 118542	<i>Lincoln Minerals Ltd/Australian Graphite Ltd</i> 1. It is understood that on or about the 10th July 2014 the Company undertook a consultation session with Council, accordingly, access is sought to the minutes of the meeting and or notes taken during the course

<sup>1</sup> The letters attached to the application for access forms often include background information and questions. I have excluded some background information and questions from the 'Terms of Application' column in the table and, as far as practicable, focussed on the documents requested. It appears that the applicant may have also applied for documents about financial reporting, but this was not dealt with in the agency's determination, and is therefore outside the scope of my external review.

	<p>of the meeting by Council employees attending the meeting in the course of their employment.</p> <p>2. As suggested by the Company, it has received strong support of Council, That being the case, access is sought to all documentation provided by Council that supports the contention of the Company [has the] 'strong support of Council'.</p> <p>3. In respect to the transport route the Company has made the statement it accepts partial responsibility for the Pillaworta/Bratten Way intersection. That being the case access is sought to the correspondence either from the Company and or the Council in confirmation of this acceptance.</p> <p>4. The Company evaded the answer to the remainder of the question, ie the roadway connecting the mine to the Bratten Way. That being the case, access is sought to documentation pertaining to advice given to the Company by Council as to its responsibility with respect to upgrading and future maintenance of the nominated roadway to cater for the anticipated traffic load to and from the mine.</p> <p>5. Given the fact that the road is not one declared suitable for heavy vehicles, access is sought as to what advice Council has provided to the Company with respect to having the roadway assessed by DPTI as a complying road for heavy vehicle use.</p> <p>6. It is understood that mine sites are not rateable entities. That being the case access is sought to all documentation pertaining to the issue of what contribution to rate revenue is Council expecting in the event the Company claims to be a ratepayer? Is this a reference to an hitherto undisclosed ex-gratia payment for "anticipates they (council) will contribute to maintenance of local services (being roads)"? Is this a case of the ratepayers of District Council of Tumbly Bay paying for the road upgrade and maintenance thereby subsidizing the mining company?</p> <p>8. Given that the road verge most likely contains listed EPBC species (EP Blue Gum), access is sought to documentation pertaining to the investigation of this eventuality; the necessity or otherwise of undertaking an EPBC referral in this matter; the necessity to consult with the Native Vegetation Board on the issue et al, either by Council or through advice to the Company from Council to pursue these investigations.</p>
CTB 118546	<p><i>Issues arising from previous FOI</i></p> <p>1. Documentation pertaining to the engagement of Mr Richardson to represent Council as outlined above. (excluding details of contractual arrangements involving remuneration).</p> <p>2. Documentation pertaining to instructions given to Mr Richardson with respect to Council's position in this matter.</p> <p>3. Documentation provided by Mr Richardson to Council as to the outcomes of the meeting of the 23 July 2012, and</p> <p>4. Briefing notes provided to Council outside that identified within the letter of 20 August 2012 addressed to Mr S Brown, Centrex Metals Ltd and that provided in the Agenda to Council Meeting 14 August 2012.</p> <p>[A]ll documentation pertaining to this process [the statutory process to revoke the designation of the site (being Lot 11, Lipson Road) as community land], inclusive of copies of public notices issued, summaries of any public submissions received and reports to Council. In the event that the process has not been completed, a progress report would be appreciated</p> <p>...</p> <p>[E]mail from Mr Steve Brown on 13 Nov 2012 At which Council meeting this matter was discussed and moved to commence the statutory process.</p>
CTB 118547	<p><i>Capital works program and related matters associated with redevelopment</i></p> <p>In respect to the Council Chambers:</p> <p>1. the total cost of design and preparation of tender documents, inclusive of statutory fees</p>

	<p>2. the value of the successful tender</p> <p>3. the total value of variations approved</p> <p>4. the total cost of work undertaken</p> <p>In respect to the Soldiers Memorial Hall:</p> <p>1. the total cost of design and preparation of tender documents, inclusive of statutory fees</p> <p>2. the value of the successful tender</p> <p>3. the total value of variations approved</p> <p>4. the total cost of work undertaken</p> <p>In the event that the tender was for both Council Chambers and the Hall</p> <p>1. the total cost of design and preparation of tender documents, inclusive of statutory fees</p> <p>2. the value of the successful tender</p> <p>3. the total value of variations approved</p> <p>4. the total cost of work undertaken</p> <p>In respect to the Works Depot:</p> <p>1. the cost of the land, inclusive of associated fees and charges</p> <p>2. the total cost of design and preparation of tender documents, inclusive of statutory fees</p> <p>3. the value of the successful tender</p> <p>4. the total value of variations approved</p> <p>5. the total cost of work undertaken</p> <p>6. the costs (if any) associated with the transfer of facilities from the old site to the new</p> <p>7. holding costs associated with the now vacant old works depot.</p> <p>Access by way of inspection was sought to:</p> <p>1. the tender document(s) (if more than one part) for work associated with Council Chambers.</p> <p>2. documentation pertaining to the variations approved during the execution of the works program for Council Chambers</p> <p>3. the tender document(s)(if more than one part) for the Works Depot and</p> <p>4. documentation pertaining to variations approved during the execution of the works program for the new Depot.</p>
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### Background

4. For ease of reference, the procedural steps relating to the applications are set out in the appendix.

### Jurisdiction

5. These external reviews are within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

### Provisional determination

6. I provided my tentative view about the agency's determinations to the parties, by my provisional determinations dated 18 February 2015. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to confirm the agency's determinations.
7. The applicant and the agency provided submissions in response. I have considered these submissions in this determination

## Relevant law

8. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.<sup>2</sup>
9. An agency may, however, refuse to deal with certain applications. For example, section 18(2a) provides:
 

An agency may refuse to deal with an application if, in the opinion of the agency, the application is part of a pattern of conduct that amounts to an abuse of the right of access or is made for a purpose other than to obtain access to information.
10. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
11. Section 39(11) provides that the Ombudsman may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

## Issues in this review

12. It is for me to consider whether the agency has justified its determination to refuse to deal with the applications for access.

## Parties' submissions

### The applicant

13. When applying for external review, the applicant made a number of submissions, including that:
  - he has 'a legitimate right to seek information from and or clarification of the matters before Council' in his capacity as a ratepayer and as Information Officer of the Committee
  - the Committee has conducted regional seminars 'to raise community awareness of the legislative framework within which the mining and development activities were to take place inclusive of the documentation landowners were likely to encounter ...'
  - the agency declined an invitation to participate in a seminar
  - in response to the agency's claim that he was 'pursuing issues "at an unreasonable length"', he submitted evidence obtained under the FOI Act 'demonstrates a failure to act with due diligence as prescribed under Section 8 of the Local Government Act'
  - 'questions relating to the budget reporting processes as outlined in April May June and July where unexplained changes to the budget figures were made, have yet to be answered'
  - he:
    - sought access to the asset management plan pertaining to the Community Waste Water Management Scheme (CWMS), given that about five years ago, the users of the scheme (towns' people only) were levied for the approximate \$1M upgrade to the system. The financial year 2013/14 saw a further approx \$100K spent on the system and in the current financial year a further \$1.1M is to be spent on a new storage pond and associated works
  - he has an interest in asset management, 'especially the future liabilities of the system and its eventual replacement, which will be a direct cost to the users of

<sup>2</sup> *Freedom of Information Act 1991*, section 12.

- the scheme', including him and his wife, as a result of his pre-retirement employment with a government department
- he provided advice to the previous CEO, Mr Tony Irvine, about developing an asset management system
  - he has made representations on the Development Application for the proposed new storage pond for the CWMS
  - his interest in the Coastal Zone is because:
    - the family property was significantly affected by the proposals and advice was provided to assist the family through this traumatic experience. Stemming from this, questions were then asked of Council as to the actual cost to ratepayers over the six years this issue had been before Council. Clearly Council sought not to disclose this figure
  - the agency has refused access to information about the 'cost of redevelopment of Council facilities', despite questions having been asked about 'budget approvals, variation to the project(s), approval mechanisms for the variations and the total expenditure for the project(s) thereby providing a cost overrun figure, being monies raised from rates'.
14. On 4 November 2014 the applicant hand-delivered a detailed letter to my office dated 3 November 2014, along with a number of documents in support of his application. When doing so he indicated that the issues underlying his FOI applications date back to 2008, and the supporting documents were only those most relevant to his FOI applications. Some of the documents include highlighting and comments. Briefly stated, the supporting documents comprise:
- correspondence between the agency and either the applicant, Centrex Minerals, the Minister for Planning or the Premier
  - correspondence between the applicant and the former Ombudsman
  - extracts from the *SA Government Gazette*
  - an article from the *Port Lincoln Times*.
15. In addition to reiterating some of the submissions from his application for external review, the applicant's covering letter dated 3 November 2014 includes further submissions. In summary, he has provided submissions about the history of the matters underpinning his FOI applications for access to documents, along with his questions, observations and conclusions about various matters. It is apparent that the applicant is of the view that on a number of occasions the agency has acted without due diligence; contrary to advice or concerns; or in the absence of relevant information.<sup>3</sup> The applicant has referred to documents that, in his view, have not been provided in response to his FOI applications for access to documents,<sup>4</sup> and to perceived gaps in evidence supporting some of the positions held by the agency.
16. In response to my provisional determination the applicant met with one of my legal officers and provided a letter dated 2 March 2015 containing further submissions; a schedule of exhibits (marked 'A1'); a submission to the agency about its CWMS (Stage 2), excluding photographs (marked 'A2'); and 57 exhibits (many of which include highlighting by the applicant). In addition to reiterating some of his previous submissions, the applicants' covering letter includes the following further submissions:
- the questions posed and advice provided to the agency 'evolved as a result of the increasing complexities members of the Association and Community were being confronted with'. The Committee was formed as a result
  - the agency was 'clearly advised as to the purpose and intent' of the Committee
  - the agency's statement that the applicant is acting 'in his personal capacity or, purportedly, on behalf of various groups' inaccurately represents the situation; his

<sup>3</sup> I am not treating these as complaints under the *Ombudsman Act 1972*, however.

<sup>4</sup> Some of the FOI applications that the applicant has referred to underpin these external reviews.

- representations 'have been clearly within the parameters of a ratepayer and an advocate for the TBRARA and family'
- it is not 'unreasonable' for the applicant to have brought matters to the agency's attention in these 'various capacities'
  - 'a large proportion of the correspondence [the applicant provided to the agency] was by way of providing information ... [or] related to questions ... in relation to mining and finance'; some were in response to 'public calls' from the agency
  - a detailed summary of his background; professional qualifications; and examples of his experience in asset management
  - his background, qualifications and experience are the reasons he sought such detailed information from the agency about 'asset management; demographic data; environmental issues ... and financial management'
  - attempts to obtain the agency's asset management plan have been unsuccessful, despite the agency's claims to have such a plan, which raises the possibility that the agency is unwilling 'to be accountable and or transparent'
  - 'it is not unreasonable to seek and expect answers of Council, when Council is demanding [significant additional costs] of town based ratepayers'
  - his role, and that of the Association and Committee, 'is to provide information to Council on issues of concern' and to 'seek answers ... when issues arise'; the agency has not identified the correspondence providing information compared to the correspondence seeking responses
  - minutes of the Council often, incorrectly in his view, show 'NIL' under the headings 'correspondence' and 'issues brought to the attention of Council and debated in Council by elected members'.<sup>5</sup> In making this point he notes that only limited information is provided to Councillors about mail received during the month
  - 'When issues of concern are apparently ignored by Council, the only recourse is to use the provisions of the FOI Act to seek the information'
  - given his personal and advocacy roles:
    - it is not an abuse of the provisions of the FOI Act, but a bona fide attempt to seek information or explanation of Council under the provisions of the Local Government Act (Section 8 ... and Section 48 ...) and accountability to the community which it serves.
    - ... in the circumstances outlined, ie the pattern of behaviour of Council ..., would lead a reasonable person to conclude that due diligence and accountability are lacking...
  - he 'will continue to make submissions on issues where Council seeks public input'
  - the agency has previously passed some of his responses on to a third party, in which his position was misrepresented. Given this, he placed a caveat over the publication of his submission to the Draft Business Plan. This resulted in the agency not accepting his submission, which in turn prompted him to seek information under the FOI Act
  - the lack of information provided by the agency demonstrates the agency's lack of 'financial accountability'
  - 'To some, the process adopted [by the agency] may also be seen as a way of suppressing public commentary and discouraging ratepayers from seeking information or explanations of the [agency's] actions'
  - where the agency has been shown to be incapable of responding to the 'complexity of the questions/ information sought of it', it has taken the position it has regarding his FOI applications
  - he rejected the agency's claims that:

<sup>5</sup> One such example of this was the Association's invitation to the agency dated 27 November 2013 to attend an Information Seminar, which the Mayor advised would be presented to the agency at its meeting of 10 December 2013 (applicant's exhibit number 17), but the applicant has referred to a number of other examples in his covering letter.

- seeking the information was an ‘abuse of the right of access’, given the ‘various positions of advocacy’ he holds
- that his applications were ‘made for a purpose other than to obtain access to information’, given the absence of evidence ‘tendered to warrant this position being held by the Agency’
- he explained that
  - an offer to withdraw the FOI’s [sic] was made, a meeting arranged with the intent to exercise this option, but Council through the CEO terminated this possibility by handing me the notice of determination (date 22 Sept 2014). No further discussion ensued.
- confirming that my Office could contact the Presidents of the Association and the Port Lincoln Resident & Ratepayers Association Inc<sup>6</sup>
- asking for a copy of this determination to be provided to all elected members of the agency ‘as it has been found in the past, such information has not been made available’
- submissions under the following headings totalling approximately four pages:
  - ‘Matters relating to the Amendment sought to Tumby Bay Development Plan to include a Coastal Zone’
  - ‘Matters relating to Mining’
  - ‘Briefing sessions held by Council with Mining Companies’
  - ‘Water Security’
  - ‘Budget Reporting’
 including that:
  - the agency holds conflicting positions<sup>7</sup>
  - his FOI applications are attempts to obtain information that is not known or not readily ascertainable.

### The agency

17. The agency has submitted that the applications ‘were either part of a pattern of conduct that amounts to an abuse of the right of access ... and/or made for a purpose other than to obtain access to information’.
18. In its notice of determination dated 22 September 2014 the agency provided the following reasons for its refusal to deal with the applications:
  - since July 2013, it has received from the applicant:
    - ‘16 different (and sometimes related), applications under the [FOI] Act’
    - ‘91 further pieces of correspondence’, either in his ‘personal capacity or, purportedly, on behalf of various groups’
  - it has devoted ‘substantial resources’ to responding to the applicant, including approximately:
    - ‘224 (cumulative) hours of work by at least 1 employee’ to consider and deal with his FOI applications
    - ‘100 (cumulative) hours of work by at least 4 employees’ to consider and deal with his other correspondence
  - the agency is small, staffed by ‘only 12 office-based employees’, only one of which deals with FOI applications, and four of which coordinate ‘responses to enquiries received from members of the community’
  - dealing with FOI applications is ‘one very small part of the important work undertaken by Council to fulfil its statutory functions...’
  - work to respond to the applicant’s FOI applications and correspondence since at least July 2013, has inhibited the agency’s ability to perform its statutory functions and to respond to enquiries and FOI applications from other people

<sup>6</sup> I do not consider it necessary to accept this invitation, however.

<sup>7</sup> By way of an example, the applicant notes that the agency has advised that issue of water security is not a matter for the agency, despite being ‘on the Water Security Committee of the local Eyre Peninsula Natural Resource Management Board’.

- the agency formed the view that the applicant was ‘utilising the provisions of the Act to pursue particular issues at unreasonable length and in a vexatious manner’, based ‘on the volume, nature and content’ of his correspondence and FOI applications since July 2013
  - the applicant’s ‘level of engagement ... in a wide variety of issues is well above and beyond that of a reasonable member of the community’
  - the applicant regularly engages ‘in a pattern of behaviour of following-up initial correspondence ... that is not answered by Council in a manner [or timeframe] deemed suitable ... to ... [him], with an [FOI] application’
  - the applicant’s FOI applications ‘often contain a mixture of questions, statements and requests for documents. It is often difficult to determine the scope and nature’
  - the applicant’s FOI applications ‘evidence an intention to unreasonably tie up the [agency’s] resources’ and ‘to coerce’ the agency to answer his ‘numerous and varied questions’
  - by letter dated 20 August 2014<sup>8</sup> the applicant advised the agency that he:
    - would be prepared to withdraw some eight applications if Council responded to questions detailed in previous correspondence. The purpose of the Act is not for Council to answer specific questions, but to provide access to Council documents.
19. In its letter to my office dated 24 November 2014, the agency reiterated its reliance on the above reasons, repeated some of them, and provided a number of further submissions and supporting documentation.
20. The agency’s further submissions included the following:
- the applicant’s FOI applications are vexatious, ‘as that term was understood by Parliament’ when section 18(2a) was inserted into the FOI Act<sup>9</sup>
  - the agency relied on the FOI applications and correspondence (which including attachments totalled more than 556 pages) received since July 2013 as ‘the relevant applications and series of events’
  - having regard to six previous FOI application letters from the applicant dated 17 July 2014 (received by the agency on 23 July 2014), and his email dated 20 August 2014, it is:
    - open to Council to infer that the true purpose of ... [the FOI] applications ... then (and now) was to unreasonably tie up the resources of Council, in an attempt to bully, harass and coerce it into answering ... [his] numerous and varied questions...
  - if the applicant was unhappy with when or how the agency responded to his correspondence ‘it was always open to him to communicate his concerns with respect to specific queries to Council’s elected members or officers, or lodge an internal review ... under section 270 of the *Local Government Act 1999*
  - the agency ‘cannot allow its limited resources to be tied up indefinitely dealing with the particular interest, pursuits and concerns of one individual’
  - the cost in wages of dealing with FOI applications and correspondence from the applicant since July 2013 amounts to almost \$17,000
  - the agency has not been able to recover any costs from the applicant because he holds a concession card and is entitled to a waiver of fees
  - if the applicant is making an FOI application on behalf, or as an agent, of an incorporated group or body, his personal concession card ought not give rise to a waiver of fees; the relevant body ought to be responsible for the fees
  - since July 2013 the agency has provided over 168 documents (comprising 600 pages) to the applicant in response to his FOI applications, and ‘over 106 pages of information, documents and responses to ... [his] many and varied queries’
  - council officers, including the CEO, have also met with the applicant on occasions

<sup>8</sup> It appears that this ‘offer’ was contained in an email dated 20 August 2014.

<sup>9</sup> South Australia, *Parliamentary Debates*, Legislative Council, 25 July 2001, 2062 (Hon RD Lawson (Minister for Disability Services)).

- the format of the applicant's FOI applications (which 'often contain a mixture of questions, statements and requests for documents') 'merely adds to the ... time and effort required ... to effectively deal with each application'
- between 15 February and 24 June 2013 the agency received three FOI applications from two of the applicant's associates (via the Association and/or the Committee), on behalf of the Association and/or Committee, so as to avoid fees that would otherwise have been payable; at the time the applicant did not hold a concession card but the other applicants did<sup>10</sup>
- the agency formed this belief because when it contacted the other applicants about the FOI applications 'they were unaware of the content and directed all enquiries' to the applicant. Additionally, contact telephone numbers were omitted from one of the applications for internal review,<sup>11</sup> which also specified that 'all communications must be in writing'.

21. The supporting documentation from the agency comprised nine folders of documents:

Folder	Summary of contents
1	Applications for access; acknowledgement letters; determination; legal advice relevant to current external reviews
2	Correspondence with the applicant from 5 July 2013 to 5 November 2014
3	Documents relevant to previous FOI applications: <ul style="list-style-type: none"> <li>• CTB 117981 Tumby Bay Development Plan Coastal Zone Amendment (the agency refused to deal with the application under section 18(1))</li> <li>• CTB 117990 Tumby Bay CWMS (the agency refused to deal with the application under section 18(1))</li> <li>• CTB 117983 Budget Reporting April, May &amp; June 2014 (the agency did not locate any documents within the scope of the application)</li> <li>• CTB 117985 Redevelopment of Council Chambers, Memorial Hall &amp; Works Depot (the agency refused to deal with the application under section 18(1))</li> <li>• CTB 117986 Council Obligations Provisional Development Authority Centrex Minerals (the agency advised that it did not hold documents within the scope of most parts of the application, or that documentation had been released in relation to a previous FOI application)</li> <li>• CTB 117987 Koppio Cemetery (the agency did not locate any documents within the scope of the application)</li> <li>• CTB 117972 Documents released from E Krushka External Review (the agency did not locate any documents within the scope of the application that had not already been released under a previous FOI application)</li> <li>• CTB 117970 Draft Business Plan and Finance Committee (the agency refused to deal with the application under section 18(1))</li> </ul>
4	Documents related to previous FOI application CTB 112352 for 'all correspondence related to Council dealings with Lincoln Minerals Limited for the period 20 June 2013 to 20 February 2014' (the agency determined to release some documents in full or in part, and refused access to others)
5	Documents related to previous FOI application CTB 112354 for 'all correspondence related to Council dealings with Centrex Metals Ltd and or Eyre Iron Ltd for the period 20 June 2013 to 20 February 2014' (the agency determined to release documents in full or in part)
6	Documents related to previous FOI application CTB 112354
7	Documents related to previous FOI application CTB 112354
8	Documents related to previous FOI application CTB 112356 for 'all correspondence related to Council dealings with Iron Road Ltd up to and including 20 February 2014' (the agency determined to release documents in full or in part) (the agency determined to release some documents in full or in part, and refused access to others)
9	Documents related to previous FOI application CTB 112356.

<sup>10</sup> The applicant now holds a concession card.

<sup>11</sup> Telephone numbers were provided in the initial application for access.

22. The agency advised that it accepted my provisional determinations, including my finding that its inability to recover costs to deal with the applicant's FOI applications is irrelevant. The agency advised that this factor did not have a bearing on, or form part of, its determinations. Rather, the applicable costs 'if the applicant did not hold the relevant concession card were included by way of background only'.

### Consideration

23. Under section 12 of the FOI Act 'a person has a legally enforceable right to be given access to an agency's documents in accordance with this Act'. The last phrase makes clear that the right to access documents is not absolute. Ordinarily, an agency will process a person's application for access to the agency's document, and access will be granted unless the document can correctly be categorised as an 'exempt document'. However, section 18(2a) of the FOI Act allows an agency to depart from the 'ordinary' course and refuse to deal with an application where, in its opinion, 'the application is part of a pattern of conduct that amounts to an abuse of the right of access or is made for a purpose other than to obtain access to information'.

24. Whilst the FOI Act is beneficial legislation and this section is not to be used lightly, it serves to strike a balance between the right of access on the one hand and the resources utilised by an agency in dealing with an application in certain circumstances.

25. In *Gabrielsen v Nurses Board of SA*,<sup>12</sup> Judge Simpson was of the view that in order to satisfy section 18(2a) of the FOI Act the agency need only be:

of the (subjective) opinion that the application ... was part of a pattern of conduct that amounted to an abuse of the right to access, or was made for a purpose other than to obtain access to information.<sup>13</sup>

26. Her Honour was of the view that the agency's opinion need not be necessarily right, but must be:

reasonably open on the material facts underlying the reasons given for the opinion - that it is not open to criticism on the basis of overlooking relevant material, or taking into account irrelevant or inaccurate factual material or because it was subject to illogicality in reasoning or was capricious or irrational.<sup>14</sup>

27. The words 'pattern of conduct' were held to imply 'a number of applications or series of events'.<sup>15</sup> Whilst each case will depend upon its own facts,<sup>16</sup> in *Gabrielsen* the agency was entitled to rely on the following factors:

- whether it was the last of a number of requests which could be regarded as excessive according to reasonable standards;
- whether the nature and scope of any of the total number of requests were identical or similar;
- whether the timing of the requests appeared to be connected to other proceedings;
- whether the requests appeared to be intended to accomplish an objective other than to gain access to documents;
- whether an inference could be drawn from the behaviour generally of the appellant that he had a purpose other than to gain access to documents, bearing in mind that the purpose of the pattern of conduct is more likely to be established by inference, rather than by a statement from the applicant.<sup>17</sup>

<sup>12</sup> *Gabrielsen v Nurses Board of SA* [2008] SADC 51 (Unreported, SA District Court, Judge Simpson, 2 May 2008).

<sup>13</sup> *Gabrielsen v Nurses Board of SA* [2008] SADC 51 (Unreported, SA District Court, Judge Simpson, 2 May 2008), [21]; owing to the lack of reference to 'reasonable'.

<sup>14</sup> *Gabrielsen v Nurses Board of SA* [2008] SADC 51 (Unreported, SA District Court, Judge Simpson, 2 May 2008), [25].

<sup>15</sup> *Gabrielsen v Nurses Board of SA* [2008] SADC 51 (Unreported, SA District Court, Judge Simpson, 2 May 2008), [44].

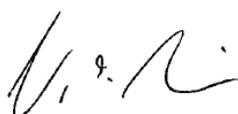
<sup>16</sup> 'There may be other relevant factors in different cases': *Gabrielsen v Nurses Board of SA* [2008] SADC 51 (Unreported, SA District Court, Judge Simpson, 2 May 2008), [43].

<sup>17</sup> *Gabrielsen v Nurses Board of SA* [2008] SADC 51 (Unreported, SA District Court, Judge Simpson, 2 May 2008), [41].

28. To confirm the agency's determination, I must be satisfied that there were sufficient grounds for the agency to reasonably form the view that the applicant's applications were 'part of a pattern of conduct that amounts to an abuse of the right of access or ... [were] made for a purpose other than to obtain access to information'.
29. I have had regard to the parties' submissions.
30. I accept that the applicant has an interest in how the agency conducts its business as both a ratepayer and Committee member.
31. The issues underpinning the applicant's FOI reviews date back more than six years, according to the applicant.
32. Since July 2013, the applicant has made numerous FOI applications and corresponded with the agency extensively. The agency has dealt with a number of these approaches, and provided numerous pages of documents to the applicant in response.
33. I consider that there are sufficient grounds for the agency to reasonably form the view that the applicant's applications form 'part of a pattern of conduct that amounts to an abuse of the right of access or is made for a purpose other than to obtain access to information'.
34. In saying this, I have had particular regard to the applicant's previous FOI applications and correspondence, as well as the three previous FOI applications made by two of his associates between 15 February and 24 June 2013. I have also borne in mind the applicant's stated willingness to withdraw eight FOI applications if the agency 'responded to questions detailed in previous correspondence',<sup>18</sup> and that the agency's failure to respond to questions raised by the applicant to his satisfaction appears to have precipitated other FOI applications.<sup>19</sup>

### Determinations

35. In light of my views above, I confirm the agency's determinations.



Wayne Lines  
SA OMBUDSMAN

8 April 2015

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<sup>18</sup> See email from the applicant to the agency dated 20 August 2014.

<sup>19</sup> See letters from the applicant to the agency dated 17 July 2014.



OmbudsmanSA

**APPENDIX - 2014/08201; 2014/08276; 2014/08277; 2014/08278; 2014/08279**

**Procedural steps**

<b>Date</b>	<b>Event</b>
26 August 2014	The agency received the FOI applications dated 25 August 2014.
18 September 2014	The agency's Chief Executive Officer determined to refuse to deal with the applications.
16 October 2014	The Ombudsman received the applicant's request for external reviews by email.
21 October 2014	The Ombudsman advised the agency of the external review and requested submissions and documentation.
4 November 2014	The applicant hand-delivered a letter to Ombudsman SA dated 3 November 2014 enclosing a bundle of documents in support of his applications.
26 November 2014	The agency provided the Ombudsman with its submissions and documentation.
20 January to 22 January 2015	Ombudsman SA requested and received clarification from the agency.
18 February 2015	The Ombudsman issued his provisional determination.
2 March 2015	Ombudsman SA received the agency's response to the provisional determination.
	Ombudsman SA met with the applicant and received submissions and documentation in response to the provisional determination.