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Determination

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

Applicant	Mr Brian March
Agency	District Council of Tumby Bay
Ombudsman reference	2021/00210
Agency reference	R21/2326
Determination	The determination of the agency is confirmed.

REASONS

Application for access

1. By application under the *Freedom of Information Act 1991* (the **FOI Act**) the applicant requested access from the agency to documents relating to the Port Spencer project. The terms of the FOI request are stipulated in Appendix One.

Background

2. For ease of reference, procedural steps relating to the application and the external review are set out in Appendix Two.

Jurisdiction

3. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

Provisional determination

4. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 12 February 2021. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to confirm the agency's determination.
5. By email dated 23 February 2021 the agency advised that it had no further submissions to make. On 3 March 2021 my Office received a letter and attached USB from the applicant. The USB contained a letter to me outlining the applicant's submissions and several supporting attachments. I have considered the applicant's submissions in this determination.

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Relevant law

6. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
7. The agency has refused to deal with the application under section 18(2a) of the FOI Act, which states:

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.
8. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
9. 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

10. It is for me to determine whether to confirm, vary or reverse the agency's determination to refuse to deal with the access application.

Submissions

11. Broadly, the agency's notice of determination included the following reasons for its refusal to deal with the access application:
 - since July 2013 the council has received 24 different, and sometimes related, FOI applications, requiring an estimated 100 hours of work by an employee of the agency
 - since July 2013 the agency has received at least 507 further pieces of correspondence from the applicant either in his personal capacity, or purportedly on behalf of various groups, requiring an estimated 600 hours of work by at least five separate employees of the agency
 - the agency has only 11 office-based employees and only one employee tasked with considering FOI applications
 - processing applications under the FOI Act is only part of the other statutory functions of the agency
 - dealing with applications for access and other correspondence of the applicant has detracted from the ability of the agency to meet its statutory functions
 - the application is continuing to utilise the provisions of the FOI Act at an unreasonable length and in a vexatious way
 - it is often difficult to determine the scope of the applicant's FOI applications as they often contain a mixture of questions, complaints, statements, requests for documents and requests for other information
 - the current application relates, in part, to documents which do not exist or information which is not contained in a document
 - the applicant has previously lodged FOI applications with the agency of a similar nature
 - the applicant's level of engagement is well above what is expected by a reasonable member of the community
 - the current application constitutes a 'fishing expedition' that evidences an intention to 'tie up the resources' of the agency

¹ *Freedom of Information Act 1991*, section 12.

- in addition to being appropriately sent to the agency, the current application was also sent to all elected members of the council, despite the applicant being aware that this was not appropriate; the agency considers this to be an attempt to coerce the council to answer the applicant's numerous questions and concerns.
12. The agency also provided submissions and documentation in the course of my external review. It submitted that:
- the current application is part of a pattern of conduct that amounts to an abuse of the right of access
 - the current application was made for a purpose other than to obtain access to documents
 - the above conclusions were reasonably open to the agency at the time of its determination to refuse to deal with the application in light of the available facts
 - in the past the applicant has resorted to the FOI Act when, in his view, the agency had not responded to his questions in a timeframe or manner which he found appropriate
 - the scope of the current application is similar to previous applications, specifically the applicant has previously sought documents relating to the Port Spencer project and impacts on the Council's road networks as a result of particular projects
 - the applicant has not properly requested documents from the agency noting that the request for documents follows three pages of unnecessary 'preamble' and 'discussion' and the application generally contains a mixture of questions, statements and requests for documents
 - the agency's opinion is supported by correspondence from the applicant to the agency's elected members on 24 November 2020 and 7 January 2021.
13. In his application for external review, the applicant submitted that:
- although his level of engagement with the agency may be above what is expected by a reasonable member of the community, his employment history, qualifications and involvement in community affairs renders him qualified to pursue the current matters
 - the agency's refusal to deal with the current FOI application is inconsistent with its principles of transparency, good government and financial management
 - the current application is not a 'fishing exercise', rather the purpose of the application is to access information to ensure the applicant's family is fully informed of the processes regarding assessment of project impacts upon adjacent landowners, and to access information that is considered to be in the public interest.
14. In my provisional determination, I noted that the applicant appeared to be confusing the FOI processes and complaints processes. I also commented on the applicant's inappropriate continued use of the FOI process to dispute or challenge agency decision making. I have made similar comments in my previous determinations also involving this applicant.
15. In response to my provisional determination, the applicant provided 12 pages of submissions with a number of additional supporting documents. Despite the comments in my provisional determination, the applicant has stated:
- I would take the opportunity to provide a counter argument with respect to a pattern of behaviour exhibited by Council over a significant period of time in relation to this and other matters, some of which have been subject to previous applications.
16. The applicant has then proceeded to complain at length about the agency's conduct, the majority of which has nothing to do with this or any other FOI matter. Not only do the applicant's submissions not relate to my provisional determination, but I consider

that the applicant's continued use of the FOI processes to voice his grievances with the agency in fact reinforces my provisional view that this application is part of a pattern of conduct that amounts to an abuse of the right of access.

Consideration

17. 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 phrase in accordance with [the FOI] Act' 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 in limited circumstances.
18. Whilst the FOI Act is beneficial legislation and section 18(2a) 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.
19. In *Gabrielsen v Nurses Board of SA*,² 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.³
20. Her Honour was of the view that the agency's opinion need not be 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.⁴
21. The words 'pattern of conduct' were held to imply 'a number of applications or series of events'.⁵
22. Whilst each case will depend upon its own facts,⁶ Judge Simpson commented that in order to determine if the application was 'part of a pattern of conduct that amounted to an abuse of the right of access ... or was made for a purpose other than to obtain access to information', 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.⁷

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

³ *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'.

⁴ *Gabrielsen v Nurses Board of SA* [2008] SADC 51 (Unreported, SA District Court, Judge Simpson, 2 May 2008), [25].

⁵ *Gabrielsen v Nurses Board of SA* [2008] SADC 51 (Unreported, SA District Court, Judge Simpson, 2 May 2008), [44].

⁶ '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].

⁷ *Gabrielsen v Nurses Board of SA* [2008] SADC 51 (Unreported, SA District Court, Judge Simpson, 2 May 2008), [41].

23. 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 application was 'part of a pattern of conduct that amounts to an abuse of the right of access or ... [was] made for a purpose other than to obtain access to information'. I have had regard to the parties' submissions.
24. I have previously confirmed two past determinations of the agency to refuse to deal with applications in respect of the same applicant in 2014 and 2020. These are referred to by the agency in its determination and submissions.
25. In previous determinations the agency has made similar submissions regarding the number of FOI applications lodged by the applicant, the number of other pieces of correspondence received from the applicant, and the time devoted by the agency to responding to the applicant.
26. It does not follow that just because the applicant engaged in a pattern of conduct of abusing his right of access in previous years, that I therefore must consider all further applications to be a part of this pattern of conduct. It may well be that the applicant has ceased this conduct, whilst still pursuing documents relating to his concerns about the various issues raised in his application.
27. This issue was explored in my 2020 determination, in which I voiced concern about comments made by the agency in its determination that suggested the agency did not consider it was required to respond to further FOI requests by the applicant. I clarified that the effect of my previous determinations was not to prevent the applicant from making further requests.
28. I note that in response to the current application, the agency appears to have given appropriate consideration to the circumstances as they currently exist rather than adopting a position that all further FOI applications received from the applicant will automatically form part of a previously established pattern of conduct.
29. The subject matter of the present application is broad, and I accept that there is some overlap with previous FOI applications lodged by the same application. I also accept the agency's submission that the current application is similar to other FOI applications made by the same applicant.
30. Regardless, where the alleged pattern of abuse of a right is a series of applications for access, there is no requirement that the subject matter be uniform across those applications. Such factor will go instead to the general characterisation of whether the particular application forms part of a pattern of abuse.
31. In my 2014 determination, I particularly noted that the FOI application in question sought not only documents, but also responses to questions and requests for the agency to create documents. I stated that:⁸

The FOI Act confers on members of the public a right of access to the documents of an agency, subject to the FOI Act's provisions. This means that the right of access only pertains to documents held by the agency and is not a right to require the agency to produce documents.⁹ The request for 'detailed explanations' in relation to each of the 'issues' identified by the terms of the application, cannot be construed as a request for documents.

...

⁸ Tumby Bay, District Council of 2018/10576 [2020] SAOmbFOI 10 February 2020.

⁹ Section 3(5) includes within the meaning of a document any information held on computer storage that is capable of being reproduced by the computer on the basis of the information so stored. This, however, is not relevant here.

The right of access provides a means of holding government to account, but it is not a process for complaints. The right to access documents should not be used to amplify pressure on an agency to address concerns.

32. On its face, the current access application gives the impression that the applicant has taken my previous comments into consideration. Although the application commences with three pages of, what appears to be unnecessary, 'preamble' and 'discussion', this is followed by a distinct heading of 'Request for information under provisions of the Freedom of Information Act'. However, upon closer inspection this appears to be a superficial separation.
33. Although the applicant has separated his requests from his commentary, the request portion of the application still clearly confuses requests for documents with requests for information, and anticipates the agency needing to produce documents to provide a response or merely provide information in response to previously asked questions.
34. The confusion surrounding the distinction between documents and information is further evidenced in the application for external review. As outlined above, the applicant has indicated that the purpose of the application is to access information to ensure the applicant's family is fully informed of the processes regarding assessment of project impacts upon adjacent landowners, and to access information that is considered to be in the public interest.
35. I do not consider this to be simple oversight in choice of wording, having particular regard to the following extract of the applicant's letter to the agency dated 7 January 2021:

...For the most part the majority of correspondence relating to invitations to comment upon Business Plans, Budgets, Long Term Financial Plans, Asset Management Plan (inclusive of questions seeking clarification) were not answered, prompting on occasions, FOI's in an attempt to gain access to the information in the public interest.

36. Additionally, the application for external review states that the review is sought on the basis of actions of the agency which are entirely irrelevant to the FOI process. For example:

An External Review is sought on the basis of:-

- (i) Council's lack of consultation with owners of adjacent land in order to determine the 'impact' upon them as required in the Conditions of the DA.
- ...
- (iii) Council's apparent lack of due diligence in the examination of the Response Document...
- ...
- (iv) Council's financial management relating to the project...

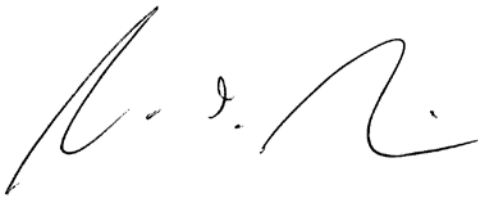
37. The above extract indicates obvious confusion between the FOI process and complaints processes. On 15 January 2020 my Legal Officer contacted the applicant requesting clarification as to whether the applicant was seeking an external review of the agency's refusal to deal with his FOI application, or lodging a complaint in relation to the agency's administrative actions.
38. Although the applicant made clear that he sought an external review, the response provided on 18 January 2021 continued to confuse the two issues.
39. In light of the above, I am satisfied that it was reasonably open to the DA agency to form the opinion that the application was part of a pattern of conduct that was an abuse of the right of access (that I confirmed in 2014 and 2020), taking into account the following factors:

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- the terms of the application are similar in subject matter to previous FOI applications lodged by the applicant
 - the terms of the application are excessively broad
 - the continued use of the FOI process to dispute or challenge agency decision making
 - the continued expectation of responsiveness, regardless of the resourcing of the agency
 - the use of the access application to force agency response where it has refused to respond to the applicant's submissions, confusing the application for access with a complaint process
 - the direct provision of the FOI application to elected members, despite having previously been advised that such communication is not appropriate.

40. Having formed the view that the first limb of section 19(2a) is satisfied, it is not necessary for me to consider whether the application was made for a reason other than to gain access.

Determination

41. In light of my views above, I confirm the agency's determination.



Wayne Lines
SA OMBUDSMAN

9 March 2021

APPENDIX ONE

Terms of the applicant's FOI request

1. A copy of the criteria Council has adopted to allow it to assess proponent documentation to its reasonable satisfaction as required by the Development Authority,
2. A copy of the process by which Council will determine the 'impact upon adjacent landowners', noting to date, that Council has not consulted with owners of adjacent land in order to ascertain such impacts. (Condition 10(t) and Condition 21(u))
3. In the event that documentation has been tendered in respect to the 'impact upon adjacent landowners', a copy of Council's assessment (or advice to the Minister), having regard to:-
 - (i) impact of blasting (noise and vibration) on the business enterprises of owners of adjacent land,
 - (ii) industrial noise inclusive of infrasound generated from machinery (including the crusher) impacting upon residential properties other than the noted SR1 on Lipson Cove Road (3 in all),
 - (iii) industrial noise levels resulting from blasting on the residences identified in (iii) above,
 - (iv) industrial noise arising from traffic associated with the proposed development impacting upon the three residences identified in (iii) above, (note no noise measurements have been taken at the residence on the intersection of Lipson Cove Road) and Coast Road),
 - (v) fugitive dust arising from the construction activities, in particular the crusher, especially in the knowledge that the dust potentially contains free silica and known carcinogenic particulates (etc) from diesel exhausts,
 - (vi) fugitive dust impacts upon crops and the necessity of owners of land to ensure grain delivered meets bio-security requirements,
 - (vii) fugitive dust impacts upon the quality of wool on sheep within paddocks in the immediate vicinity of the construction site,
 - (viii) fugitive dust arising from significant increase in traffic movements on unsealed roadways in the transport network associated with the port,
 - (ix) the impact of spill light arising from the construction activities and traffic on Lipson Cove Road on residences along the roadway and upon stock in roadside paddocks,
 - (x) the loss of visual amenity,
 - (xi) the potential decrease in road safety as a consequence of significant increases in heavy vehicular traffic on a roadway currently not designed to carry such traffic,
 - (xii) the monitoring of impacts on land adjacent to the project (work site and roadway (Cove Road), and
 - (xiii) the potential financial impact of the project on owners of adjacent land.
4. A copy of the proponents Construction Environmental Management Plan (CEMP) (Condition 10) and documentation related to Advisory Note 5 provided to Council for assessment,
5. A copy of Council's assessment of the CEMP and documentation in response to Advisory Note 5 as to its satisfaction and compliance,
6. A copy of the outcome(s) of any public consultation undertaken by Council as to the reasonable satisfaction of the community to what is now formally proposed,
7. Having regard to the upgrade of Lipson Cove Road and the intersection with the Lincoln Highway, it is known that Council has responsibility for the Lipson Cove Road only. An indicative financial exposure to the cost of the road upgrade was disclosed at the November Council meeting.
Access is sought to documentation pertaining to the total financial impact of the proposed project on Council being on the current (and future) budget and upon its

long term financial plan having regard to the fact Council is responsible not only for Lipson Cove Road, but also all other roads which will be impacted by the proposed transport model contained within the Response Document.

8. A copy of the Assessment of Lipson Cove Road in accordance with Advisory Note:-
“16. An important initial step, as outlined in the Heavy Vehicle Access Framework, is to have an assessment of the site access route undertaken by an Authorised Route Assessor, at the proponent’s cost. This process will identify any upgrades required for Lipson Cove Road and the Lincoln Highway to make the route safe and suitable for the type of vehicle access requested. As part of the approval/s, the proponent will be required to prepare a list of final transport infrastructure improvement needs upon completion of a full route assessment. If this is necessary, the list should identify the scope, timing and estimated cost of the required improvements.”
9. Copies of all documentation in regard to the impact upon the road network with the District Council of Tumby Bay and the discussions of funding the accelerated maintenance of said roads, inclusive of the potential imposition of a road tax as suggested by the proponent in the Response Document.

APPENDIX TWO
Procedural steps

Date	Event
24 November 2020	The agency received the FOI application dated 24 November 2020.
22 December 2020	The agency's principal officer determined the application.
15 January 2021	The Ombudsman received the applicant's request for external review dated 15 January 2021.
19 January 2021	The Ombudsman advised the agency of the external review and requested submissions and documentation.
8 February 2021	The agency provided the Ombudsman with its submissions and documentation.
12 February 2021	The Ombudsman issued his provisional determination and invited submissions from the parties.
23 February 2021	The agency advised it had no further submissions to make
3 March 2021	The Ombudsman received the applicant's submissions in response to the provisional determination.