

Determination

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

Applicant	Mr Brian March
Agency	District Council of Tumby Bay
Ombudsman reference	2018/10576
Agency reference	R18/12034
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 concerning the agency's budget and expenses relating to:
 - a. governance
 - b. administrative expenses
 - c. the Community Wastewater Management Scheme
 - d. various facilities management by the council
 - e. mining and construction, in particular relating to Iron Road Ltd, Eyre Iron Pty Ltd, Lincoln Minerals/Australian Ltd, the Cape Hardy development
 - f. road maintenance
 - g. expenditure on the Ritz Café
 - h. other expenditure.
2. This list is a summary, as the applicant made his application in much longer terms.

Background

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

Jurisdiction

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

Provisional determination

5. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 20 January 2020. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to confirm the agency's determination.

6. The applicant provided submissions in response. I have considered these submissions in this determination.

Relevant law

7. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
8. 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.

9. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
10. 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

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

Submissions

12. The agency's notice of determination included the following reasons for its refusal to deal with the access application:
 - between July 2013 and September 2014, the agency received 91 pieces of correspondence from the applicant
 - since that time the agency has received at least 212 pieces of correspondence from the applicant
 - the agency has 12 staff at its office
 - processing applications under the FOI Act is only part of the 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 applicant is continuing to utilise the provisions of the FOI Act at an unreasonable length and in a vexatious way
 - the applicant's level of engagement is well above what is expected by a reasonable member of the community
 - the applicant's use of the FOI Act has demonstrated an intention to 'tie up the resources' of the agency
 - the applicant's use of the FOI Act is to coerce the agency to answer his numerous and varied questions.
13. The agency also provided submissions and documentation in the course of my external review. It submitted that:
 - the application was a part of a pattern of conduct that amounted to an abuse of a right of access

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

- the 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
 - its opinion was supported by correspondence from the applicant to the agency's elected members on 18 September 2018
14. The agency provided a number of documents in support of its determination, including:
- the applicant's application for access dated 6 August 2018
 - its determination dated 4 September 2018
 - correspondence between the applicant and the agency dated 18 and 25 September 2018
 - a letter containing submissions dated 18 October 2018.
15. The applicant submitted that:
- his FOI application for access sought 'clarification of expenditure proposed by Council in its draft Business Plan 2018-2019' which arose after the agency's 'refusal to respond either at the Public Meeting held on the issue or via a written response, to Questions on Notice provided in advance by the Tumby Bay Residents and Ratepayers Association Inc'
 - 'I, as a Committee Member of [the Tumby Bay Residents and Ratepayers Association] and a bona-fide ratepayer, sought answers, being the appropriate documentation. to the questions through the FOI application'
 - 'The application took the form of a modified version of the Questions on Notice, with a greater depth of clarity of the documentation sought'
 - his submissions had been 'discussed with' the chairman of the Tumby Bay Residents and Ratepayers Association Inc
 - he takes on different roles in his communications to the agency with a role representing the Tumby Bay Residents and Ratepayers Association as well as his personal capacity 'as a ratepayer and advocate for issues related to mining; the environment and expenditure undertaken by Council'
 - to demarcate his role, the applicant signs-off with either 'for and on behalf of the Association' or 'ratepayer'
 - he had not sent 212 documents (i.e. correspondence etc) to council and said that his records did not agree with this
 - if the agency is correct that it has received so much correspondence, then

I request all documents are (a) acknowledged as being received by Council, (b) recorded in the minutes of Council meetings as correspondence received and (c) copies of the responses to all said correspondence to be provided, as it is my contention that very few of said correspondence has actually been acknowledged as received by Council; no record of the correspondence having been included in the Minutes of Meetings and few pieces of correspondence actually being answered contrary to the provisions of the Local Government Act and published policies and practices currently adopted by Council as outlined above
 - 'An examination of the public record of Minutes of Meeting appearing on the Council's website supports the contention that Council fails to follow its own policies in relation to dealing with the community and ratepayers'
 - in response to the claim that his application was vexatious,

The claim of a vexatious attitude towards Council appears to be used as an excuse in order to refuse access to information; to respond to questions asked or to accept advice provided by myself or on behalf of the Association, which may be of significant use/information to Council in its understanding of issues related to mining and the environment.

Further, our attention has been drawn to the fact that a significant expenditure has been directed towards obtaining legal advice on how to respond to the questions asked and FOI applications lodged. Such an expenditure gives rise to the question of efficient and effective expenditure of ratepayers' monies.

- the agency does not recognise the position of the Tumby Bay Residents and Ratepayers Association or himself in matters relating to mining, the environment and financial management despite their long term involvement in those matters
 - the credibility of the Tumby Bay Residents and Ratepayers Association is well established on those matters in contrast to that of the agency.
16. The applicant made a number of further submissions relating to his disagreement with the budget, financial decisions, and environmental management of the agency, many of which are raised in the terms of the application for access.
17. In response to my provisional views, the applicant submitted that:
- most of the issues of concern for the applicant (including when applying on behalf of the Tumby Bay Residents and Ratepayers Association) relate to mining, port developments, council budgets or strategic plans
 - these are issues where ratepayers have an interest or are affected by the decisions of the council
 - 'the problem' arises due to the modus operandi of the council, where it does not respond to the legitimate concerns of ratepayers, even where the council seeks public responses to documents such as budgets, strategic plans and the like
 - the council will often record 'Correspondence -- NIL' in the minutes of meeting, (presumably, the applicant means, that this is despite the correspondence he and the association have sent the council).

Consideration

18. 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 it 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.
19. 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.
20. 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
21. 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

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'.

account irrelevant or inaccurate factual material or because it was subject to illogicality in reasoning or was capricious or irrational.⁴

22. The words 'pattern of conduct' were held to imply 'a number of applications or series of events'.⁵
23. 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
24. 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'.
25. I have had regard to the parties' submissions.
26. Merely because an application arises in a dispute or in relation to advocacy by a person or group, does not satisfy either of the two alternative limbs of section 18(2a). Facilitating participation in government decision making is one of the objects of the FOI Act. If access is being sought so that the documents may be used to affect or scrutinise the government's decision making, then it is consistent with the objects of the FOI Act.
27. I have previously confirmed a past determination of the agency to refuse to deal with an application in respect of the same applicant in 2014. This is referred to by the agency in its determination and submissions. That previous determination related to a number of applications by the applicant to the agency seeking documents concerning issues including:
 - Iron Road mine development, including the mining tenement, rail corridor and port facility
 - Centrex Metals Ltd
 - Lincoln Minerals Ltd/Australian Graphite Ltd
 - Council expenditure and procurement.
28. In that previous determination, it was submitted by the agency that in a 13 month period the applicant had lodged 16 applications for access and sent 91 pieces of other correspondence both personally and for community groups. At least one employee devoted approximately 224 hours of work to deal with his FOI applications and four employees devoted about 100 hours to his correspondence. The agency office was staffed by only 12 'office-based' employees.

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].

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29. The subject matter of the present application is broad, but includes a number of requests relating to mining companies and their operations and developments.
30. It does not follow that just because the applicant engaged in a pattern of conduct in 2013 to 2014 of abusing his right of access by inundating the agency with applications and correspondence, that I therefore must consider all further applications to be a part of this pattern of conduct. It may well be, too, that the applicant has ceased this conduct, whilst still pursuing documents relating to his concerns about the various issues raised in his application.
31. 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 is part of a pattern of abuse.
32. The terms of the present application:
- are broad and cover a number of issues
 - pose questions to the agency
 - often seek 'detailed explanation' of the agency's decisions and policies or a 'detailed breakdown' of certain expenditures
 - often appear to request the creation of documents, such as the request to 'Please provide a detailed brief on the future of Council landbeing located within the boundary of the proposed port at Cape Hardy'
 - at times, request documents relating to the 'issues' identified in it, but largely do not contain requests for documents already held by the agency.
33. 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.⁸ 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.
34. I consider that there is a strong similarity of terms between the previous applications of concern addressed in my 2014 determination and the application relevant to this matter. The matter sought in the application has considerable overlap with the applications under review in my previous decision in 2014. The applications relevant to my 2014 determination were in significantly broad terms in nature, as is the case in the application in this matter.
35. Thus, I consider there is support for the agency's opinion that this current application is a part of the pattern that amounted to an abuse of the right of access that I previously confirmed. The agency has formed the view that the applicant's present application, despite being five years on, is the last of that series of applications and correspondence. I consider that this opinion is reasonably open to the agency.
36. The right of access provides a means of holding government to account, but it is not a vehicle for making complaints. The right to access documents should not be used to amplify pressure on an agency to address concerns.
37. Despite the applicant's submissions and the other qualifications I have stated, I am persuaded that it was reasonably open to the agency to form the opinion that the

⁸ 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.

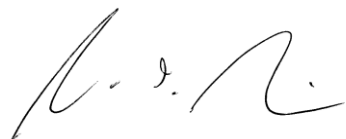
application was part of a pattern of conduct that was an abuse of the right of access (that I confirmed in 2014), taking into account the following factors:

- the terms of the application are similar in subject matter
- the terms of the application are similarly broad
- the continued use of the terms of the application for access 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.

38. The applicant is aware that the agency only has 14 full time in-office staff. I might have arrived at a different conclusion, had the applicant followed a different approach, one that was more specific and narrow, that sought documents rather than responses, that was not intermingled with contentions against the agency. In sum, it is mostly the applicant's unreasonable expectation of the agency that persuades me, not the legitimacy of his interest in documents or the mere fact he is seeking them. The applicant may wish to reconsider his approach.
39. Having formed the tentative view that the first limb is satisfied, I do not need to consider whether the application was made for a reason other than to gain access.
40. I expressed concern in my provisional determination about a comment of the agency in its determination that suggested that the agency did not consider it was required to respond to FOI requests by the applicant and that I 'upheld' this in my 2014 determination. However, the effect of my determination in 2014 and this determination is not to prevent the applicant from making further requests. The agency responded to this concern, acknowledging my comments and confirming it has responded to a number of the applicant's questions and requests for information since 2014.
41. If the agency considers a further application to be a part of this pattern of abuse of a right, or otherwise meets the other terms of a part of section 18 of the FOI Act, then it may consider whether it can decline to deal with the application. This is a case by case decision and is subject on each occasion to external review if the applicant should seek it. Otherwise, the agency must deal with the request.

Determination

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



Wayne Lines
SA OMBUDSMAN

10 February 2020

APPENDIX 1

Procedural steps

Date	Event
6 August 2018	The agency received the FOI application.
4 September 2018	The agency determined to refuse to deal with the application.
18 September 2018	The agency received the invalid internal review application.
25 September 2018	The agency responding confirming the applicants external review rights.
3 October 2018	The Ombudsman received the applicant's request for external review.
8 October 2018	The Ombudsman advised the agency of the external review and requested submissions and documentation.
22 October 2018	The agency provided the Ombudsman with its submissions and documentation.
20 January 2020	The Ombudsman issued his provisional determination and invited submissions from the parties.
21 January 2020	The agency provided submissions.
31 January 2020	The applicant provided submissions.