

Determination [Redacted]

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

| | |
|----------------------------|---|
| Applicant | [redacted] |
| Agency | [the Council] |
| Ombudsman reference | 2018/10883 |
| Agency reference | [redacted] |
| 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:

Copy of all documents held by Council regarding [the Business] - [address 1] and [address 2] and [address 3] including but not limited to [the development application] and waste water applications...minutes and correspondence and all written and electronic correspondence, meeting notes, file notes, site inspections, photos etc from 27 July 2018 up to and including 12 September 2018.

Background

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

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 the parties with my tentative views by way of my provisional determination dated 9 November 2018. I advised the parties that subject to my receipt and consideration of further submissions, I proposed to confirm the agency's determination.
5. The agency responded to my provisional determination on 13 November 2018 indicating that it had no further submissions to make.
6. The applicant provided a lengthy response to my provisional determination on 5 December 2018.
7. In their response, the applicant provided further details evidencing that they were acting on behalf of a community group. I note that I have already accepted that the applicant

was acting on behalf of other residents, as expressed in my provisional determination. I note that the FOI Act does not provide for an application to be made by a group, as applications must be made by an individual entity. Therefore whilst the applicant represents a group, the language used throughout this determination necessarily refers to them as the applicant.

8. The applicant's response alleges that the language they used in their various applications for access was initially suggested to them by the agency. The applicant indicates that, with the exception of their first FOI application, the agency did not seek to narrow the scope of any of their further applications for access.
9. I note that the FOI Act does not require an agency to attempt to narrow the scope of an application for access prior to relying on section 18(2a).
10. I have further considered the applicant's submissions, where relevant, in this determination.

Relevant law

11. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
12. An agency may, however, refuse to deal with certain applications.
13. Section 18(2a) of the FOI Act provides:

(2a) 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.
14. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
15. 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

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

Parties' submissions

The agency's determination

17. In its reasons for determination, the agency relevantly stated:

...I have determined that Your Application is part of a pattern of conduct that amounts to an abuse of the right of access for the purposes of Section 18(2a) of the FOI Act. I have further determined that Your Application is made for a purpose other than to obtain access to information for the purposes of Section 18(2a) of the FOI Act.

You have made repeated applications to the Council under the FOI Act. Since November 2016, the Council has received eight applications under the FOI Act from you in relation to [address 1] (the Subject Property). The Council has been required to devote substantial

¹ Freedom of Information Act 1991, section 12.

resources to deal with these applications. I estimate that over 200 (cumulative) hours of work by nine (9) employees of the Council have been devoted to considering and dealing with applications received from you under the FOI Act in relation to the Subject Property. I consider your repeated applications to be excessive and disproportionate to a reasonable exercise by a person of the right under the FOI Act to be given access to the Council's documents.

The applications previously made by you under the FOI Act are in many cases identical and in other cases almost identical and involve the dedication of considerable Council resources...Since 2016 the Council has released to you approximately 432 documents totalling approximately 1781 pages, concerning directly or indirectly the Subject Property.

Further, since November 2016, the Council has received over 29 further pieces of correspondence and/or telephone calls from you in relation to the Subject Property. The Council has been required to devote substantial resources to deal with this correspondence. I estimate that at least 150 (cumulative) hours of work by at least seven (7) employees of the Council have been devoted to considering and dealing with correspondence received from you, including in the preparation of responses to questions raised by you in that correspondence relating to the Subject Property and/or previous applications made by you under the FOI Act and documents previously provided to you.

In many instances, the additional correspondence received by the Council from you has sought copies of documents previously provided to you.

The work involved in dealing with the volume of your correspondence and other communication to the Council involves a considerable amount of additional time.

Based on the volume, nature and content of both your correspondence, telephone calls and your applications under the FOI Act received by the Council since November 2016, I have determined that you are utilising the provisions of the FOI Act not to legitimately access documents under the FOI Act but to pursue one specific issue at unreasonable length and in a vexatious manner, namely your grievances about the owners/occupiers of the Subject Property and approvals relating to the Subject Property.

You have previously engaged in a pattern of behaviour of making applications under the FOI Act and receiving the Council's determination, with further correspondence seeking further copies of documents provided to you with the determination of your applications.

When all your applications under the FOI Act and all your correspondence to the Council are examined as a whole, it is clear that you are using the FOI Act to pursue an apparent grievance with the owners/occupiers of the Subject Property.

The Council provides 168 services to its residents. It has a population of 21,836 in its area and is required to provide equitable access to its services to all those residents...

Your Application constitutes a 'fishing expedition' in relation to the owners/occupiers of the Subject Property to advance your specific issues at the expense of the Council dealing with other residents' concerns and issues.

[The Council made reference to and quoted the objects of the FOI Act]

Council encourages engagement by members of the community in its affairs. This determination recognises that there is a balance between an individual's legally enforceable right to be given access to an agency's documents and the principle that the legal right of access should not be abused...The level of engagement by you in relation to documents held by the Council regarding the Subject Property is well above and beyond that of a reasonable member of the community...

The applicant's submissions

18. When applying for external review, the applicant made a number of submissions, including that:
- they are the representative for a community group and the agency is aware that they are acting on behalf of the community group
 - their application for access relates to a development application which has been submitted by a Business which provides housing and services to people with a disability
 - historically the Business has failed to comply with conditions of previous development approvals, a matter that they have brought to the attention of the agency
 - they deny the agency's allegation that they have a personal vendetta against the Business, stating that the community group is motivated to ensure that the Development Act is being complied with
 - their motivation for making the application for access was to determine what conditions applied to any development approval, so that they could substantiate a complaint to the agency if the Business was breaching a condition of its development approval
 - they believe their previous approaches to the agency have been helpful to the agency, as the agency has advised them that it does not have the resources to audit development issues, so the agency relies on development compliance issues being brought to its attention by residents
 - previously the agency has taken action based on their complaints, which they feel makes the complaints validated
 - whilst they acknowledge that they have put in many FOI applications since 2016, this has been because development approval processes have been protracted, so they have submitted new applications in order to get the latest information
 - it is not their intent to be inappropriate or to waste the agency's time
 - whilst they acknowledge that there was a dispute between the community group and the Business in 2011, they deny that this is relevant to their latest FOI application
 - they feel strongly that the agency should process their latest FOI application, noting that the agency processed their last FOI application which related to the same development application
 - they consider that their latest FOI application has a small scope because it only covers the point in time from their last application to the current date (a period of approximately seven weeks)
 - this was the last FOI application they had been planning to submit
 - they anticipate that the development approval issue will be appealed to the Environment, Resources and Development Court, and they consider that the documents they may obtain through FOI would assist them.
19. The applicant also emphasised that they appreciated the time and effort that the agency's staff members had put in, both in relation to their previous FOI applications and the enforcement action that had been taken in the past against the Business.

The agency's submissions

20. In response to my external review, the agency provided the following additional submissions:

[The applicant], through the access to information process under the Act has sought All Information relating to two properties owned by [the Business] namely, [address 1] and [address 2]. Through discussion with [the applicant] and the Council's accredited FOI Officers the scope of [their] applications were reduced and [the applicant] limited [their]

applications by specifying a date range for the documents for which access was sought. As [the applicant] holds a valid concession card, [they are] entitled to a fee waiver under the Freedom of Information (Fees and Charges) Regulations 2003.

In reviewing the FOI Application consideration was given to the number of contacts [the applicant] has made with the Council and concerns raised by staff, in the context of S18(2a) of the Act.

The repeated requests for similar and in some cases identical information by [the applicant] was being monitored by Council staff due to a concern that [the applicant] was using [their] right under the Act to access information held by the Council to harass [the Business]. There has been a concern that the Council may be seen as facilitating that alleged harassment in circumstances where the Council ought to consider if the Act was being used by [the applicant] for an improper purpose constituting an abuse of [the applicant's] right under the Act. A review of issues raised with the Council in relation to [the Business] by persons other than [the applicant] shows that [the applicant] is the only person that appears to have ongoing issues with [the Business].

The increasing burden on staff to deal with requests and correspondence from [the applicant] in relation to [the Business] and its activities has been a concern to the Council and was, in my opinion, diverting Council resources.

In reviewing the FOI Application consideration was given to the number of contacts [the applicant] has made with the Council in relation to the same issues and concerns raised by staff. Accordingly I considered a determination in accordance with S18(2a) of the Act was appropriate.

In addition to the matters set out in the Council's Determination, I consider the following matters support the Council's Determination:

- In my opinion the Council and the Act is being used by two parties in a civil dispute to leverage their various positions.
- I consider that there is a basis to conclude that [the applicant] is using the Act as part of a pattern of conduct that amounts to an abuse of the right of access. I consider that it is also reasonable to conclude that [the applicant] is using the Act for a purpose other than to obtain access to information, namely to leverage [their] position in what is clearly a dispute with [the Business]. While the Act is to provide for public access to documents held by the Council, [the applicant] has made eight (8) applications seeking information concerning one organisation. The provision of the documents sought by [the applicant] does not further the objects of the Act. [The applicant] is a concession card holder whilst [the Business] is not.
- Continued third party consultation with [the Business] in relation to information sought by [the applicant] comes at a financial cost to [the Business].
- [The applicant] is not an adjoining landowner and purports to represent [their] parents...
- There has not been a significant sustained number of complaints against the operations of [the Business] received by Council from other persons.
- The various applications made by [the applicant] under the Act relate for the most part to Development Applications which are assessed and determined pursuant to the *Development Act 1993* and *Development Regulations 2008*.

That legislation sets the framework for the planning system in South Australia and provides that applications should be assessed against the relevant provisions of the [Council's] Development Plan.

That legislation also enables an applicant to seek retrospective Development Approval for development works that are undertaken without having the benefit of Development Approval.

In accordance with the legislative requirements, 6 [development] applications have been received by Council relating to [address 1] and [address 2]. A decision in relation to those

applications (other than where they have been placed on hold by the [development] applicant or superseded by additional applications) has been made.

All applications were assessed through the appropriate planning process. Some of these applications involved public notification at a Category 3 level (where so stipulated by the Development Plan or *Development Regulations 2008*), providing [the applicant] with the opportunity to voice any concerns or other matters relevant to the planning merits of the proposal.

The Category 3 process also provides [the applicant], where [they] made a valid representation as part of the category 3 process, with a right of appeal against the decision of the relevant authority. This provides [the applicant] with an appropriate mechanism to challenge the decision of the relevant authority in relation to the planning merits of the proposal.

In addition [the applicant] is able to challenge the decision of the relevant authority to classify a development application as either complying, merit or non-complying and to categorise it as either category 1, 2 or 3. To date these appeal rights have not been pursued.

The appeal rights constitute the appropriate mechanism with which to challenge a relevant authorities (sic) decision with respect to the planning merits of the proposal. An FOI application provides information about the content of a development application, but does not enable the recipient of the information to challenge the merits of the proposal...

[The Business is] an accredited disability service provider. The [Council] does not provide this accreditation and therefore review of management of the services sit with Department of Families and Communities² and not Council...

I believe the evidence before [me] demonstrates a clear pattern of conduct by one party against which will not be resolved on planning grounds or any Local Government process.

The concerns raised by [the applicant] sit outside the request for ongoing information under [the] Freedom of Information Act and [are] more aligned to the Development Act and ERD Court proceedings which also provide for a conciliation process in relation to the application process or at State Government Agency level over the continued funding of [the Business].

The [Council] has a responsibility to treat all ratepayers equally and fairly and [is] empathic to [the applicant] and [their] perceived issues but cannot provide [them] the answers or solutions [they are] seeking.

21. In support of its submissions, the agency provided the following documentation:
- copies of the eight applications submitted by the applicant
 - copies of previous determinations and internal review determinations
 - a summary of the calculation of costs to the agency in dealing with the applicant's previous applications (totalling \$8372.70)
 - contact logs recording correspondence, communications and meetings between the applicant and the agency.

Consideration

22. 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'. This 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 documents, and access will be granted unless the documents can correctly be categorised as an 'exempt document' under Schedule 1 to the FOI Act.

² I understand this to be a reference to the Department of Human Services.

23. 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 section 18(2a) is not to be used lightly, this section serves to strike a balance between the right of access and the resources utilised by an agency in dealing with an application in certain circumstances.
25. In *Gabrielsen v Nurses Board of SA*,³ Judge Simpson stated 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.⁴

26. Her Honour stated that the agency's subjective 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.⁵

27. The words 'pattern of conduct' were held to imply 'a number of applications or series of events'.⁶

28. Whilst each case will depend on its own facts,⁷ in *Gabrielsen* the agency was entitled to rely on the following factors in considering whether the pattern of conduct is an abuse of the right of access:

- 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 behaviour generally of the applicant 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.⁸

29. The pattern of conduct may be established not only by reference to the FOI applications lodged by the applicant, but by other conduct of the applicant. In applying *Gabrielsen*, Her Honour Justice Hughes made the following comments regarding the conduct of the applicant in *Knight v University of Adelaide*:

...I am satisfied that the making of the fifth FOI application was part of a pattern. The bringing of the application was the last of five in succession over several months, and there is overlap and common elements to the five applications. The pattern is established

³ [2008] SADC 51, applied in *Knight v University of Adelaide* [2017] SACAT 44 (Hughes J).

⁴ *Gabrielsen v Nurses Board of SA* [2008] SADC 51 at [21].

⁵ *Gabrielsen v Nurses Board of SA* [2008] SADC 51 at [25].

⁶ *Gabrielsen v Nurses Board of SA* [2008] SADC 51 at [44].

⁷ *Gabrielsen v Nurses Board of SA* [2008] SADC 51 at [43].

⁸ *Gabrielsen v Nurses Board of SA* [2008] SADC 51 at [41].

if viewed solely in terms of the FOI applications but even more so if viewed as part of the totality of the communications between Mr Knight and the University...⁹

30. 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 amounted to an abuse of the right of access, or were made for a purpose other than to obtain access to information.
31. I have had regard to the parties' submissions.
32. In my provisional determination, I stated that I accepted that the applicant has an interest in the Business, particularly in ensuring that the Business is complying with the conditions of its development approvals. I acknowledged that if the Business fails to comply with certain conditions of its development approvals, this may have a negative impact on the residents living nearby, many of whom the applicant represents.
33. However, I expressed that I had difficulty accepting that the applicant's motivation for submitting FOI applications was to gain knowledge of development conditions, stating that it seemed there is no utility in submitting an FOI application whilst a development application is still under consideration, as the conditions would not yet have been set by the planning authority.
34. In their response, the applicant submitted that my provisional determination mischaracterised their reasons for lodging the FOI applications. The applicant indicated that some development applications submitted by the Business were put on hold at the request of the Business, thus preventing the community group from having any further input into those development applications. By way of example, the applicant indicated that in October 2016 local residents were notified of a Category 3 development application and many residents provided submissions. After following up with the Council in July 2017 the applicant was advised that the development application was yet to go before the Development Assessment Panel. There was no further communication from the council about this development application, so in May 2018¹⁰ the applicant decided to lodge another FOI application, but that only one of their reasons for doing so was to find out exactly what was happening with the development application. The documents received through this application indicated that the Business had put the October 2016 development application on hold and had lodged a new development application in February 2018.
35. The applicant's submissions do not explicitly specify other reasons for lodging the FOI applications, except to state:

Over the last 2 years our Mayor, some Councillors, the CEO, the Planning Manager, the Senior Planning Officer, Planning Staff & Staff in Waste water & Building area have advised many of us including [the applicant] that they do not have the infrastructure to engage an Enforcement Officer and that the main way for Council to follow up on [breaches] of the Development Act, illegal waste water and building works was via Community notification. Many of us in our area have knowledge and concerns with works, land use etc that have occurred at [address 1] & [address 2]. However we felt it was best for us not to just advise Council without actual proof and thus hopefully avoid a potential situation with the Owners [of] the business operating on these properties [the Business] of a we said... they said!

The Director of [the Business] and another Board member own [address 1] & [address 2]. Both state on [the Business's] website that they are experienced Property Developers. We are not. For many reasons we felt strongly that we needed accurate information and all relevant documentation before we discussed any of our concerns with Council. Some

⁹ *Knight v University of Adelaide* [2017] SACAT 44 at [65].

¹⁰ I understand the applicant to be referring to their application for access dated 7 June 2018.

of this documentation was only available to us through a FOI Application and as Council required an extremely lengthy time with their handling of some matters this then necessitated numerous FOI Applications from us. FYI - we have raised many of our valid concerns, which we had proof of, with Council.

In 2011 there was a [development application] lodged for [address 1]. It was Determined by Council and there were a number of Conditions to Approval. As the [Development] Applicant denied our neighbourhood the right to Respond when this DA came out for Public notification, we were also subsequently later denied our right of any Appeal through the ERD Court. Since 2011 we have raised our concerns with Council on numerous occasions that some of these DA Conditions have not been complied with and we have sought [Council's] help with enforcement. It was through a FOI Application that we were able to establish exactly what happened with this issue. Fyi - this matter is continuing to be addressed.

In closing We are very concerned that Council has attributed this matter entirely to [the applicant] and made some very serious allegations against [them]. We are extremely concerned with [Council's] lack of communication with [the applicant] over a number of years. We are extremely concerned with [Council's] handling of many issues at [address 1] & [address 2] over many years and We are extremely concerned with [Council's] time frames in dealing with many of our issues - which have consequently resulted in us needing to lodge further FOI Applications.

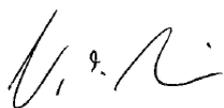
36. It appears that the applicant is submitting that their reasons for seeking access to documents were to enable them to compile evidence in order to support complaints to the council about the Business. I accept that such complaints were often about matters relating to development approval (such as a failure to comply with a condition of approval) but also often extended to other matters.
37. It also appears to me that the applicant also sought access to documents in instances where they perceived that the Council was taking an excessive amount of time to either process a development application or to action complaints they had previously made about the Business.
38. I note the broad scope of the applicant's applications, many of which have similar or identical wording, seeking all documents relating to the Business at two particular addresses.¹¹
39. Since November 2016 the applicant has made a number of FOI applications. The contact logs provided by the agency also indicate that the applicant has corresponded extensively with the agency during that time. The agency has responded to this correspondence and has also provided 1781 pages of documentation under the FOI Act. I consider this to be a significant volume of information.
40. Notwithstanding the fact that the applicant was representing other persons and not just their own interests, I consider that this latest request for access could be regarded as excessive according to reasonable standards.
41. I am mindful that it is not my role to determine whether, objectively, the applications form part of a pattern of conduct which amounts to an abuse of the right of access. As was clearly set out in *Gabrielson*, it is my role to determine whether it was reasonably open to the agency to reach the subjective view that the applications form part of a pattern of conduct which amounts to an abuse of the right of access.
42. I do not consider that the agency, in reaching its decision, acted in a way that was illogical in reasoning, or was capricious or irrational.

¹¹ I refer to the applications dated 9 November 2016, 3 March 2017, 28 March 2017, 7 June 2018, 27 July 2018 and 12 September 2018.

43. In all of the circumstances, I consider that there are sufficient grounds for the agency to reasonably form the subjective opinion that the applicant's applications form part of a pattern of conduct, and that pattern of conduct amounts to an abuse of the right of access.
44. Having reached the view that the applicant's conduct amounts to an abuse of the right of access, it is not necessary for me to consider whether the application was also made for a purpose other than to access information.¹²

Determination

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



Wayne Lines
SA OMBUDSMAN

10 December 2018

¹² *Knight v University of Adelaide* [2017] SACAT 44 at [64] and [77].

APPENDIX

Procedural steps

| Date | Event |
|------------|--|
| 12/09/2018 | The agency received the FOI application. |
| 11/10/2018 | The agency's Principal Officer determined the application. |
| 12/10/2018 | The Ombudsman received the applicant's request for external review. |
| 15/10/2018 | The Ombudsman advised the agency of the external review and requested submissions and documentation. |
| 30/10/2018 | The agency provided the Ombudsman with its submissions and documentation. |
| 09/11/2018 | The Ombudsman provided the parties with his provisional determination for comment. |
| 13/11/2018 | The agency provided a response to the Ombudsman's provisional determination. |
| 21/11/2018 | The applicant sought and was granted an extension of time to respond to the Ombudsman's provisional determination. |
| 30/11/2018 | The applicant sought and was granted a second extension of time to respond to the Ombudsman's provisional determination. |
| 05/12/2018 | The applicant provided a response to the Ombudsman's provisional determination. |