OMBUDSMAN TASMANIA

PRELIMINARY DECISION

Right to Information Act Review **Case Reference:** R2202-120

Names of Parties: Andrew McCullagh and Northern Midlands Council

Draft reasons for decision: s48(1)(a)

Provisions considered: s20

Background

1 Mr Andrew McCullagh is a ratepayer in the Northern Midlands Council (Council) municipality who operates a Facebook group entitled *Northern Midlands Council Watch* and takes a keen interest in Council's fiscal management and operations.

2 On 26 May 2020, Mr McCullagh made an application under the *Right to Information Act 2009* to Council for information regarding various projects being undertaken or proposed in the municipality. He paid the relevant fee. Specifically, he sought (verbatim):

> 1. *10 Norfolk St/32 Norfolk St Perth – Please provide all additional costs (direct and indirect) associated with the preparation of these properties since the purchase. Such should include but not be limited to:*
>
> a. *Works under Drummond St for drainage to Sheepwash Creek*
>
> b. *Rehabilitation of site to prevent flooding at rear of proposed blocks*
>
> c. *General works within a 300m proximity undertaken by Council*
>
> d. *Filling in of "WELL" and all other works plus clearing of trees and 'picnic' site.*
>
> 2. *Longford Recreation Ground – I note further works are being undertaken since my last enquiry. Please provide a list of all additional works since last enquiry, the cost of such works, a list of intended works not completed and the estimate for all works to date and all future works.*
>
> 3. *Launceston Airport – Please provide a progress report of where this matter is at, all costs to date, all costs incurred since last enquiry and an estimate of all future costs including appeal hearing*
>
> 4. *Please provide sit* [sic] *map of bridge number 4000 and also bridge number 1469 along with associated reports for supporting replacement of bridge 1469. Please also provide information why bridge 1469 has*

been brought forward from 2021 to 2020. Please provide information how many properties bridge 1469 services. Please confirm the number of bridges NMC has replaced or is set to replace within a 12km radius of Rossarden within the last 3 years or next 18 months.

5. *Please provide ALL costs associated with the redevelopment of the Campbell Town Recreation Oval along with the budgeted amount for that project.*
6. *Please provide details of the Campbell Town Hall sale process.*

3 On 19 June 2020, Ms Maree Bricknell of Council, a delegate under the Act, released a decision to Mr McCullagh. The decision refused to provide the information sought pursuant to s20. She stated this was because:

1. First, pursuant to section 20(a) of the Right to Information Act 2009 (the Act) the information sought in sections 1, 2, 3 and 4 is the same or similar to information sought under a previous application that you have made to the Council and the application does not on its face disclose any reasonable basis for again seeking access to that information.

2. Pursuant to section 20(b) of the Act the application for access to the information you seek is vexatious because:

(a) the request for the information you seek is part of a course of conduct you have embarked upon where in correspondence to Council, Councillors, the Mayor, the General Manager and staff, you engage in bullying, disrespectful and extremely offensive conduct regardless of the issues you have attempted to raise...;

(b) you seek these responses to further your campaign of harassment directed at the Council, Councillors, the Mayor, the General Manager and staff.

4 Mr McCullagh sought internal review of this decision on 22 June 2020, but Mr Des Jennings, the Principal Officer of Council, wrote to Mr McCullagh advising that he would not conduct an internal review as he 'could not act impartially' due to a conflict of interest arising from an ongoing dispute between the men. Mr Jennings has commenced an action against Mr McCullagh claiming damages for defamation in the Supreme Court of Tasmania which remains ongoing. Mr Jennings refused to delegate the internal review to another Council officer and directed Mr McCullagh to instead apply for external review.

5 Mr McCullagh attempted to do so but this could not be accepted until the statutory timeframe had elapsed on 16 July 2020, under s44(1)(b)(ii) of the Act.

6 Council was then directed by my delegated officer, pursuant to s47(1)(f), to undertake an internal review.

7 Ms Samantha Dhillon, of Council, a delegate under the Act, released an internal review decision on 24 July 2020. She set out that she had *no hesitation in affirming the response made by Ms Bricknell in her letter dated 19 June 2020 to you and for the same reasons*.

8 Mr McCullagh confirmed he wished to continue with his external review following this decision and his application was extended under s46(2).

Issues for Determination

9 I must determine whether the application can be refused under s20 of the Act, on the basis that it is a repeat or vexatious application.

Relevant legislation

10 Council has relied on s20 of the Act, a copy of which is Attachment 1 to this decision. I also attach a copy of a guideline issued by the Ombudsman under s49(1)(b) of the Act - Guideline 2/2010 - *Guideline in Relation to Refusal of an Application for Assessed Disclosure under the Right to Information Act 2009, s20*.

Submissions

11 Mr McCullagh provided the following submissions in support of his application for external review:

> *There is no way known I have been vexatious.*
>
> *The Council have squandered millions on flawed activities namely:*
>
> *1) The Longford Recreation Oval*
>
> *2) 10 and 32 Norfolk St Perth*
>
> *3) Bridges in Rossarden x 3*
>
> *4) Court Action against the Launceston Airport Corporation which failed and they subsequently appealed.*
>
> *5) Longford Parklet*
>
> *And much much more.*
>
> *The last RTI was sent in February and was answered without discussion.*
>
> *It was unknown of course to Council how it would resonate through the Community.*
>
> *The result of this was uproar in the Community and these matters made the local media.*
>
> *Subsequent to that date, further works have been done on the Longford Recreation Oval which I estimate would be close to $800k more. Advise* [sic] *received from a Councillor seems too* [sic] *align with this figure.*
>
> *Further works have been done on the Norfolk St site, which one job alone was $150k.*
>
> *They passed a motion at the meeting in June to bring the bridge at Storeys Creek(Rossarden) forward despite it not being due to 2021 and despite it being around 6km from the Mayors house.*
>
> *ALL THESE ISSUES ARE LIVE AND FLUID AND THE WHOLE COMMUNITY HAS THE RIGHT TO KNOW HOW THEIR MONEY IS BEING SPENT.*

The modus operandi of the Councillors council has been to go to ground and not provide information.

I received a private message from a Councillor on the 2 May where this was discussed and my name specifically mentioned…

I (and each and every rate payer in the Community) have [a] *right to information as to how monies are being spent.*

Had no further works in these areas been carried out, then their argument and your query would have credence. That however is simply not the case.

Subsequent to the last email more funds have been spent in these areas that would provide a nail in the coffin of this Council to economic management.

12 In December 2021, I sent a letter to Council expressing a preliminary view on this external review. This outlined that my initial assessment was that Mr McCullagh's application was not a repeat or vexatious request under s20 and should be assessed under the Act.

13 Council instructed David Morris of Simmons Wolfhagen to provide a submission in response to my preliminary view. This is summarised as follows:

> *The Council respectfully disagrees with the preliminary view reached by the Ombudsman concerning the decision of the Council to reject consideration of the McCullagh application on the basis that the application was a vexatious application and could be rejected in reliance on the express discretion to do so afforded by s.20(b) of* the Right to Information Act 2009…
>
> *Having regard to the plain and ordinary meaning of the term "vexatious", the scheme of the RTI Act within which s.20(b) appears and the purpose of s.20(b), it is lawfully permissible to have regard not just to the face of the application itself (i.e. what information it seeks, the language used in the application etc.) but to surrounding circumstances placing the application in context (such as a course of conduct on the part of the applicant for disclosure) where relevant in determining whether or not an application is vexatious.*
>
> *The "Guideline in Relation to Refusal of an Application for Assessed Disclosure Under the Right to Information Act 2009, s.20" published by the Ombudsman as Guideline 2/2010 (the* ***Guideline****) provides express and further support for the above approach. In identifying the factors to be considered under s.20(b), the Guideline expressly states:*
>
> *…in considering whether an application is vexatious within the terms of s.20(b) all the surrounding circumstances should be taken into account (my emphasis added)...*
>
> *It would be contrary to the proper application of fundamental principles of statutory interpretation to confine considerations of whether or not an application is vexatious to the face of the application or documentation which is a part of the RTI process only.*

It follows…that a decision of the Ombudsman which fails to have regard to the material which the Council considered in forming the opinion that the making of the application was part of a course of conduct and therefore vexatious would be a decision infected by an error of law and reviewable as a procedurally unfair decision having failed to take into account relevant considerations.

It further follows from the above that a decision of the Ombudsman which relies (as the preliminary view expressed does) on a narrative which refers to policy considerations, asserted obligations of professionalism, and provision of an appropriate level of access to legal process such as to the RTI process even to the most difficult of individuals would be reviewable as one which is procedurally unfair for taking into account irrelevant considerations rather than applying the proper approach in accordance with the fundamental principles of statutory interpretation.

It is the position of the Council that:

> *(i) It has approached a consideration of whether or not the application should be refused as vexatious in accordance with the proper approach and accordingly the opinion it formed is above reproach and ought not be disturbed on external review.*
>
> *(ii) Conversely, the Ombudsman's approach taken to justify the preliminary view is not the proper approach according to law, places misconceived and erroneous reliance on previous decisions of the Ombudsman, fails to apply and have regard to the Ombudsman's Guidelines and so consequently fails to take into account relevant considerations being the bundle of materials provided by the Council to the Ombudsman which the Council relied on to form the opinion that the application was vexatious.*
>
> *(iii) Furthermore, and perhaps most importantly, the Council takes issue with the implied criticism of it as failing to recognise and maintain obligations of professionalism and to ensure an appropriate level of access to even the most difficult of individuals. This is an unnecessary and disrespectful reliance on a narrative of policy considerations, disrespectful of the Council in circumstances where the Council has very clearly set out the detailed reasons behind the formation of an opinion that an application that it had received was vexatious. It has provided to the Ombudsman a significant amount of material that the Ombudsman has failed to even consider, rather confining consideration to the face of the application itself.*

For all of the above reasons, the Council disputes the findings expressed in the preliminary view, does not accept the preliminary view and submits to the Ombudsman that he should start again and properly apply the law and in so doing, consider as relevant the material that the Council provided to him for the purposes of making a correct and preferable decision according to law.

Analysis

14 Council indicated that it relied on s20(a) and (b) in its refusal to assess Mr McCullagh's application, though focused on 20(b) and Mr McCullagh's allegedly vexatious conduct.

15 The Act gives members of the public the right to obtain information and it is expressly indicated that discretions in the Act are to be exercised to facilitate the provision of the maximum amount of official information. Accordingly, restrictions on the access to information and assessment of applications under the Act should only occur when truly necessary.

Section 20(a) – repeat request for information

16 In relation to Items 1-4 of Mr McCullagh's request being a repeat request for information, these are either restricted to changes since his last enquiry or information outside his previous request, or Council could validly restrict its response to such information. I consider that a request is not a repeat request if it relates to the same type of information but for a different time period.

17 I am not satisfied that this is a repeat request which is able to be refused under s20(a). Council is to assess this part of Mr McCullagh's request under the Act, subject to my assessment of whether his application has been validly refused under s20(b).

Section 20(b) – vexatious application

18 I have been clear in previous decisions (see particularly *Darrell Howlin and the Clarence City Council*[1] and *Lawrence Archer and the Dorset Council*[2]) that s20(b) of the Act requires the *application itself* to be a vexatious one and that other conduct between the applicant and the public authority is not relevant in the assessment of an application under the Act.

19 This is consistent with Guideline 2/2010 - *Guideline in Relation to Refusal of an Application for Assessed Disclosure under the Right to Information Act 2009, s20*, which emphasises that *in view of the objects of the Act, the opinion that an application is vexatious should not be lightly reached.*

20 Council has placed enormous weight on a bundle of documents which comprise correspondence from Mr McCullagh to Council and screenshots of posts Mr McCullagh has authored on Facebook which criticise Council. Mr Morris has submitted that I have made an error in law in not doing likewise and in preferring my own previously expressed reasoning in past decisions I have handed down under the Act.

21 I am entirely unpersuaded by these submissions and consider that I would fall into error if I placed such reliance on this information, particularly comments made on social media. I do not consider that Council has provided information which indicates that Mr McCullagh's application under the Act is vexatious. The actual request under s13 includes no extraneous information besides the

[1] Issued in February 2021 and available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decison.

[2] Issued in June 2021 and available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decison.

information sought and could not be categorised as inappropriate or vexatious in itself. There has also been no suggestion from Council that Mr McCullagh has been making numerous or frequent applications for information under the Act.

22 The Mayor of Council, Ms Mary Knowles, imposed restrictions on Mr McCullagh's contact with Council shortly after his request for information was lodged. This was communicated in terms which included allegations that Mr McCullagh's *correspondence to date has been bullying, disrespectful and extremely offensive and, regardless of the issues you have attempted to raise, grossly exceeds what is acceptable*. Ms Bricknell's decision also references Mr McCullagh's alleged *campaign of harassment*, quotes Ms Knowles' letter and deems his application vexatious.

23 While I do not seek to make a judgement on the appropriateness or otherwise of interactions between the Council and Mr McCullagh outside of the Right to Information process, such comments place Mr McCullagh's letter requesting an internal review to Mr Jennings dated 22 June 2020 in context. Accordingly, the tone and counter-allegations do not appear to be indicative of him using the Right to Information process specifically as a means to abuse or bully individuals, but to respond to issues being contemporaneously raised by Council. Both parties to this dispute have used strong terms to describe the conduct of the other party.

24 Almost all public bodies deal with individuals who may display difficult behaviour, question their integrity and publicly criticise their actions or use of public money. Public bodies maintain obligations of professionalism and to ensure an appropriate level of access to legal processes (such as the Right to Information process) is provided, even to the most difficult of individuals. Refusal of access to information under s20 should not be used a punishment for an applicant's behaviour in other fora or used to suppress critical commentary of a public authority's actions in print, online or social media. When I made similar comments in my preliminary view letter to Council, its response characterised such comments as disrespectful, which is indicative of the elevated tone of its responses on this issue.

25 Council appears to have struggled to dispassionately assess Mr McCullagh's application and to separate its views on the appropriateness of his opinions regarding Council, particularly in relation to his questioning of the integrity of Mr Jennings and Ms Knowles, from this assessment. While I accept that this is somewhat understandable, due to the contemporaneous litigation and ongoing dispute with Mr McCullagh, the two matters need to be considered separately and unemotionally by Council. Any conflict of interest arising from the dispute must be appropriately managed, while still enabling individuals access to legal processes. To refuse to even assess an application under the Act is a significant barrier and it remains my view is that Council has not demonstrated that this is warranted in relation to this application.

26 Accordingly, I consider that Mr McCullagh's application should be assessed under the Act as it does not appear to be a vexatious *application*.

Conclusion

27 For the reasons given above, I determine that ss20(a) and (b) do not apply to Mr McCullagh's application. I direct Council to assess the information requested for disclosure in accordance with the provisions of the Act.

Dated: 6 June 2022

Richard Connock
OMBUDSMAN

ATTACHMENT 1

***Right to Information Act 2009* Section 20 – Repeat or vexatious applications**

If an application for an assessed disclosure of information is made by an applicant for access to information which –

(a) in the opinion of the public authority or a Minister, is the same or similar to information sought under a previous application to a public authority or Minister and the application does not, on its face, disclose any reasonable basis for again seeking access to the same or similar information; or

(b) is an application which, in the opinion of the public authority or Minister, is vexatious or remains lacking in definition after negotiation entered into under section 13(7) –

the public authority or Minister may refuse the application on the basis that it is a repeat or vexatious application.

Guideline No. 2 /2010

Right to Information Act 2009, s 49(1)(b)

GUIDELINE IN RELATION TO REFUSAL OF AN APPLICATION FOR ASSESSED DISCLOSURE UNDER THE RIGHT TO INFORMATION ACT 2009, s 20

This Guideline is issued by the Ombudsman under s 49(1)(b) of the *Right to Information Act 2009*.

The Guideline relates to the factors to be considered when determining to refuse an application under s 20 of the Act.

1. The subject of this Guideline

Section 20 states that an application for the assessed disclosure of information may be refused on the basis that it is a repeat or vexatious application.

The section states that refusal on this basis may occur where the public authority or Minister (which has responsibility for making a decision on the application under the Act) is of the opinion -

1. that the information which is the subject of the application is the same or similar to information sought in a previous application to a public authority or Minister and the application does not on its face

disclose any reasonable basis for again seeking access to the same or similar information - see s 20(a);

2. is vexatious- see s20(b);

3. remains lacking in definition after negotiation entered into under s13(7) – see s20(b).

The factors which need to be considered when determining to refuse an application on grounds 1 and 3 readily appear from the section.

In relation to ground 1, it is first necessary to compare the current application with the former application, and to form an opinion on whether they are the same or significantly similar. If they are the same or similar, it is then necessary to consider whether the current application, on its face, discloses a reasonable basis for again seeking access to the same or similar information. There are no factors which might be usefully put forward to assist in determining these matters.

There are also no factors which might be usefully put forward In relation to ground 3. The only question that arises here is whether the public authority or Minister is of the opinion, following negotiation under s 13(7), that the terms of the application are sufficiently precise for them to know what information the applicant is seeking.

On this reasoning, this Guideline only deals with the factors to be considered when determining to refuse an application on the ground that it is considered to be vexatious.

2. S 20(b) - the factors to be considered

It is to be noted that s 20(b) of the Act requires that the opinion be formed that the application is vexatious, not that the applicant is vexatious.

The notion of a "vexatious application" seems to be similar to that of vexatious proceedings, in litigation. The Macquarie Dictionary defines the word in that context as meaning "instituted without sufficient grounds, and serving only to cause annoyance". Guidance might also be obtained from definitions such as that in the *Vexatious Proceedings Act 2008* (NSW), s 6, where "vexatious proceedings" are defined as -

"*(a) proceedings that are an abuse of the process of* a *court or tribunal, and*

(b) proceedings instituted to harass or annoy, to cause delay or detriment, or for another wrongful purpose, and

(c) proceedings instituted or pursued without reasonable ground, and

(d) proceedings conducted in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose."

In considering whether an application is vexatious within the terms of s 20(b), all of the surrounding circumstances should be taken into account.

The following specific factors should be considered in this process -

(a) the objects of the Act as stated in s 3; and

(b) whether the application might be refused under another, more specific provision, for instance ss 19 and other elements of s 20 - in which case the more specific provision should be applied.

Depending on the circumstances, the factors for consideration may also include -

(c) the wording of the application, and in particular whether it is-

(i) intemperate;
(ii) obscure;
(iii) unreasonably long;
(iv) unreasonably complex –

or otherwise inappropriate;

(d) the stated or apparent purpose of the applicant in making the application, and in particular whether that purpose is consistent with the objects of the Act; and

(e) whether the making of the application is part of a pattern or course of conduct by the applicant.

In view of the objects of the Act, the opinion that an application is vexatious should not be lightly reached.

Simon Allston
Ombudsman

Date of first issue of Guideline : 1 July 2010