



Review report under the *Government Information (Public Access) Act 2009*

Applicant: Shellharbour City Council
Agency: Planning Assessment Commission
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Summary

1. Shellharbour City Council (the Applicant) applied for information from the Department of Planning and Infrastructure under the *Government Information (Public Access) Act 2009* (GIPA Act). The application was transferred to the Planning Assessment Commission (the Agency). The Agency's decision on the application is the subject of this review.
2. The Agency decided that it does not hold some information, provided access to some information and refused access to other information because of an overriding public interest against disclosure.
3. The Information Commissioner recommends under section 93 of the GIPA Act that the Agency make a new decision about the requested information and the processing charges imposed for dealing with the application.

Background

4. On 8 February 2013, the Applicant applied under the GIPA Act to the Department of Infrastructure and Planning for access to information.
5. On 21 May 2013, after discussions between the Applicant and the Department of Planning and Infrastructure, an amended application was transferred to the Agency.
6. The amended application was for access to the following:
 - a. *All correspondence created or received by the Planning Assessment Commission (PAC) or the Department of Planning on behalf of the PAC for Stage 1 of the Calderwood development between 17 April 2012 and 29 May 2012 that record or relate to the following:*
 - i. *The alleged inconsistency between the timing of the Calderwood development and the delivery of the development as described in the Illawarra Regional Strategy;*
 - ii. *Local Infrastructure contributions for Stage 1 of the Calderwood Development.*
 - b. *All correspondence created or received by the PAC of the Department of Planning on behalf of the APC for Stage 1 of the Calderwood Development between 29 May 2012 and 18 December 2012 that record or related to matters referred to at a(i) and a(ii) above.*
 - c. *All correspondence received by the PAC or the Department as agent of the PAC pertaining to Stage 1 of the Calderwood development from Lend Lease Communities (Australia) or its agents between 17 April 2012 and 18 December 2012 excluding documents that were served on Shellharbour City Council or its lawyers Sparke Helmore in proceedings number 10492/2012.*
7. On 21 May 2013 the Agency wrote to the Applicant requiring it to pay a \$500 advanced deposit. The Applicant paid the advanced deposit on 28 May 2013.
8. On 8 July 2013 the Agency requested an extension of time to 17 July 2013 to determine the access application. On the same day, the Applicant agreed to the requested extension.
9. On 17 July 2013 the Agency issued a notice of decision to the Applicant. The notice stated that the Agency identified 135 items of information that fell within the scope of the application. The notice stated that the \$550 balance of the

advanced deposit was to be paid no later than 24 July 2013. When the payment was received the requested information would be released. The notice did not give the details of the decision, and did not advise that some information is not held and some information is refused.

10. The Applicant paid the balance of the processing fees on 26 July 2013.
11. The Agency issued a second notice of determination on 2 August 2013. In that notice, the Agency advised:
 - a. the Agency does not hold the information requested in item 1 of the application;
 - b. a total of 135 documents were identified as within the scope of the application;
 - c. following third party consultation, objections were received against the release of 21 of the documents, the main reason being disclosure of the document has the potential to prejudice current/future court proceedings;
 - d. some information was released in full, some in part, and some refused.
12. The Agency decided to provide access to 12 items of information in full and partial access to one item of information. The item of information that was provided with partial access was an email. Access was refused to an attachment to the email. The Agency refused to provide access to 123 items of information.
13. On 12 August 2013 the Applicant sought a review by the Information Commissioner. The Applicant raised a number of concerns about the Agency's decision, including:
 - a. the notice did not meet the requirements of section 61 of the GIPA Act both with respect to the information in the notice and the attached list of documents;
 - b. the determination was made outside the required period for deciding an access application and so no processing charge should be imposed;
 - c. the reasons refusing access to parts of records were not explained for each consideration, including with respect to the weight of each consideration or the relevance of the objection provided by the third party;
 - d. the notice did not set out how searches were conducted; and
 - e. the notice did not indicate how processing charges were calculated.

Decisions under review

14. The decisions under review are the Agency's decisions:
 - a. to refuse to deal with an access application, being a deemed refusal under section 63 of the GIPA Act because the decision was not given to the Applicant within the statutory time frame. This is a reviewable decision under section 80(c) of the GIPA Act.
 - b. to refuse access to some information requested by the Applicant. This is a reviewable decision under section 80(d) of the GIPA Act;
 - c. that information is not held. This is a reviewable decision under section 80(e) of the GIPA Act;
 - d. to impose a processing charge. This is a reviewable decision under

section 80(j) of the GIPA Act.

Did the Agency make a deemed refusal decision?

15. Section 63 of the GIPA Act provides that if an agency does not decide an access application within time, the agency is deemed to have decided to refuse to deal with the application and any application fee is to be refunded. An agency can continue to deal with and subsequently decide the application; however no processing charges can be imposed for an access application if it was not decided within time.
16. On 8 July 2013 the Agency requested an extension of time until 17 July 2013 to determine the access application. On the same day, the Applicant agreed to the requested extension. If the application was decided after 17 July 2013, the Agency will not be able to impose a processing charge for the application (section 63(4) of the GIPA Act).
17. On 17 July 2013 the Agency issued a notice of decision to the Applicant. The notice stated that the Agency identified 135 items of information that fell within the scope of the application. The notice stated that the \$550 balance of the advanced deposit was to be paid no later than 24 July 2013 and that when the payment was received the information requested would be released. The notice did not give the details of the decision, including that some information is not held and some information is refused.
18. Section 64(4) provides that access to information may be made conditional on payment of a processing charge. The Agency was entitled to withhold access to the information until the processing charge was paid.
19. The notice provided by the Agency on 17 July 2014 did not comply with section 61 of the GIPA Act. However, it was a notice that indicated that the application was decided. The Agency is not deemed to have refused to deal with the application under section 63 of the GIPA Act.
20. For this reason there is no need to consider whether section 63(4) of the GIPA Act applies.

The Agency's decision that information is not held

21. Section 53 of the GIPA Act sets out the requirement that agencies have to conduct searches for government information requested in an access application. The expression 'government information' is defined in section 4 of the GIPA Act as 'information contained in a record held by an agency.'
22. Before deciding that it does not hold information, an agency must comply with the requirements of section 53(2) of the Act. The requirements are:
 - a. undertake such reasonable searches as necessary to locate the information requested; and
 - b. use the most efficient means reasonably available to the agency.
23. In *Smith v Commissioner of Police* [2012] NSWADT 85, Judicial Member Isenberg said at paragraph 27:

In making a decision as to the sufficiency of an agency's search for documents which an applicant claims to exist, there are two questions:

(a) are there reasonable grounds to believe that the requested documents exist and are the documents of the agency; and if so,

(b) have the search efforts made by the agency to locate such documents been reasonable in all the circumstances of a particular case.

24. The GIPA Act does not require an agency to include details of its searches in a notice of decision. However, it is good practice for written decisions to clearly explain what the search processes were, what was found, an explanation if no records were found, what was released and what was held back. Details of searches should include where and how the agency searched, a list of any records found – and if appropriate a reference to the business centre holding the records, the key words used to search digital records (including alternative spellings used) and a description of the paper records that were searched.
25. The Agency's notice of decision did not provide any information about the searches it conducted, nor other explanation for why it decided it does not hold any information sought in item one of the access application. For this reason the Information Commissioner is not satisfied that the Agency's decision that it does not hold this information is justified.

The public interest test

26. The Applicant has a legally enforceable right to access the information requested, unless there is an overriding public interest against disclosing the information (section 9(1) of the GIPA Act). The public interest balancing test for determining whether there is an overriding public interest against disclosure is set out in section 13 of the GIPA Act.
27. The general public interest consideration in favour of access to government information set out in section 12 of the GIPA Act means that this balance is always weighted in favour of disclosure. Section 5 of the GIPA Act establishes a presumption in favour of disclosure of government information.
28. Before deciding whether to release or withhold information, the Agency must apply the public interest test and decide whether or not an overriding public interest against disclosure exists for the information.
29. Section 13 requires decision makers to:
 - a. identify relevant public interest considerations in favour of disclosure,
 - b. identify relevant public interest considerations against disclosure,
 - c. attribute weight to each consideration for and against disclosure, and
 - d. determine whether the balance of the public interest lies in favour of or against disclosure of the government information.
30. The Agency must apply the public interest test in accordance with the principles set out in section 15 of the GIPA Act.

Public interest considerations in favour of disclosure

31. Section 12(1) of the GIPA Act sets out a general public interest in favour of disclosing government information, which must always be weighed in the application of the public interest test. The Agency may take into account any other considerations in favour of disclosure which may be relevant (s12(2) GIPA Act).
32. In its notice of decision the Agency identified the statutory presumption in favour of disclosing information from section 5 of the GIPA Act. It also listed the following public interest considerations in favour of disclosure of the information

in issue:

- a. disclosure of the information may promote open discussion of public affairs;
 - b. enhance Government accountability or contribute to positive and informed debate on issues of public importance; and
 - c. inform the public about the operations of the Agency
33. The Agency also took into account the personal factors of the application. This is allowed under section 55 of the GIPA Act. The Agency considered that the Applicant has a direct interest in the outcome of a development application and associated litigation. The development application is the source of the information that is the subject of the GIPA application.

Public interest considerations against disclosure

34. Public interest considerations against disclosure are set out in section 14 and schedule 1 to the GIPA Act.
35. In its notice of decision the Agency raised two public interest considerations against disclosure of the information:
- a. disclosure could reasonably be expected to prejudice court proceedings by revealing matters prepared for the purposes of or in relation to current or future proceedings (clause 3(c) of the table to section 14 of the GIPA Act); and
 - b. some of the information would be privileged from production in legal proceedings on the ground of client legal privilege (legal professional privilege) (clause 5 of schedule 1 to the GIPA Act).

Consideration against disclosure – prejudice court proceedings

36. Clause 3(c) of the table at section 14 as a public interest consideration against disclosure states:
- There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice any court proceedings by revealing matter prepared for the purposes of or in relation to current or future proceedings.*
37. In order for the considerations against disclosure set out in the table to section 14 of the GIPA Act to be raised as relevant, the Agency must establish that the disclosure of the information could reasonably be expected to have the effect outlined in the table.
38. In order to establish that this consideration applies, the Agency ought to:
- a. identify the relevant information;
 - b. identify the relevant current or future proceedings;
 - c. establish that the relevant information would be revealed (within the meaning of *reveal* provided in schedule 4) if disclosed through the GIPA Act application; and
 - d. identify the prejudice that would occur if the information was revealed.
39. The Agency identified the 21 items of information that it decided are subject to clause 3(c) and stated that the information was ‘created or received through the

proceedings in the Land and Environment Court which, at the time the decision was made, were not yet determined'. The Agency also notes that the Applicant is a party to the court proceedings.

40. However, the notice of decision does not identify the prejudice to the proceedings that would be reasonably likely to occur if the information was disclosed. The significance of the prejudice is likely to influence the weight of this consideration against disclosure. In the absence of information about the anticipated prejudice that would occur, or other information about why the weight of this consideration would override the public interest considerations in favour of disclosing the information, the decision to withhold the information is not justified.
41. In some circumstances, under section 54 of the GIPA Act, an agency is required to consult third parties. For example, consultation may be required if:
 - a. the information concerns a person's (or entity's) business, commercial, professional or financial interests; and
 - b. the person (or entity) may reasonably be expected to have concerns about the disclosure of the information; and
 - c. those concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure.
42. The Agency's notice of decision refers to third party consultation and the objection received. However an objection is not itself determinative of an overriding public interest consideration against disclosure. Similarly, an agency may decide to release information despite receiving an objection from a third party.
43. The Information Commissioner issued a guideline about consultation under section 54 of the GIPA Act, which is available on the IPC website at www.ipc.nsw.gov.au.

Consideration against disclosure - legal professional privilege

44. If information falls within the scope of one of the clauses in schedule 1 to the GIPA Act, then it is conclusively presumed that it is not in the public interest to release the information. This means that the agency is not required to balance the public interest considerations for and against disclosure before refusing access to the information.
45. Clause 5(1) of schedule 1 to the GIPA Act states that it is conclusively presumed that there is an overriding public interest against disclosure of information:

that would be privileged from production in legal proceedings on the ground of client legal privilege (legal professional privilege), unless the person in whose favour the privilege exists has waived the privilege.
46. This means that in order for an agency to rely on clause 5 of schedule 1 to the GIPA Act, the information must be of a kind that would not be required to be disclosed in legal proceedings in NSW because it is information that attracts client legal privilege and the agency has not waived, either expressly or impliedly that privilege.
47. Under clause 5(2) of schedule 1 to the GIPA Act, an agency must consider whether it is appropriate to waive privilege. An agency's decision about whether

it will waive privilege in order to disclose the information requested in an access application is not a reviewable decision under the GIPA Act. However, if privilege has previously been waived, either expressly or impliedly, by an agency, then clause 5 of schedule 1 to the GIPA Act will not apply.

48. Client legal privilege protects confidential communications between a lawyer and a client made for the dominant purpose of the lawyer providing legal advice or professional legal services to the client or for use in current or anticipated litigation.
49. The existence and maintenance of privilege must always be considered in light of all the facts and circumstances that apply to the information.
50. In order for client legal privilege to attach to the information, each element of client legal privilege must be satisfied. The essential elements of client legal privilege are set out below:
 - a. the existence of a client and lawyer relationship;
 - b. the confidential nature of the communication or document, and
 - c. the communication or document was brought into existence for the dominant purpose of either:
 - i. enabling the client to obtain, or the lawyer to give legal advice or provide legal services, or
 - ii. for use in existing or anticipated litigation.
51. The Agency decided to refuse access to 101 items of information on the basis that they attract legal professional privilege and are subject to clause 5 of schedule 1 to the GIPA Act.
52. The Agency provided the Information Commissioner with a copy of the information that was withheld on the basis of legal professional privilege, along with the other information referenced in the schedule of documents. We have reviewed this information and it is not apparent on the face of the information or from the reasons in the notice of decision that legal professional privilege applies to all of the documents. This is because there is some information for which it is not apparent that the communication or document was brought into existence for the dominant purpose of legal advice, legal services or for use in existing or anticipated litigation.

Processing charges

53. The Agency accepted the transfer of the application from the Department and informed the Applicant of this by letter on 21 May 2013. In the transfer letter the Agency informed the Applicant that it was imposing a processing fee and that it estimated that the total cost would be \$1,050. Imposing a processing charge is allowed under section 64 of the GIPA Act.
54. The Agency also decided to require the Applicant to make an advanced deposit of \$500 towards the processing charge. This is allowed under sections 68 and 69 of the GIPA Act. The Agency's notice of the advanced deposit complied with the requirements of sections 68 and 69 of the GIPA Act.
55. The notice of decision states that processing the application involved identification and retrieval of relevant information held by the Agency and took over 35 hours with a total process cost of \$1,050. However the notice of decision does not indicate how those charges were calculated, as required by section 62 of the GIPA Act.

56. We refer the Agency to the Information Commissioner's *Guideline 2 Discounting charges – special benefit to the public generally*, to which agencies must have regard in accordance with section 15(b) of the GIPA Act.

Recommendation

57. The Information Commissioner recommends under section 93 of the GIPA Act that the Agency make a new decision about the requested information and the processing charges imposed for dealing with the application. This decision should be made by way of internal review within 15 working days of the date of this report.
58. In making a new decision, the Information Commissioner recommends that the Agency have regard to the matters raised and guidance given in this report.
59. We ask that the Agency advise the Applicant and us by **19 September 2014** of the actions to be taken in response to our recommendations.

Review rights

60. Our reviews are not binding and are not reviewable under the GIPA Act. However a person who is dissatisfied with a reviewable decision of an agency may apply to the NSW Civil and Administrative Tribunal (NCAT) for a review of that decision.
61. The Applicant has the right to ask the NCAT to review the Agency's decision.
62. An application for a review by the NCAT can be made up to 20 working days from the date of this report. After this date, the NCAT can only review the decision if it agrees to extend this deadline. The NCAT's contact details are:
- NSW Civil and Administrative Tribunal
Administrative and Equal Opportunity Division
Level 10, John Maddison Tower
86-90 Goulburn Street,
Sydney NSW 2000
- Phone: 1300 006 228
Website: <http://www.ncat.nsw.gov.au>
63. If the Agency makes a new reviewable decision as a result of our review, the Applicant will have new review rights attached to that new decision, and 40 working days from the date of the new decision to request an external review at the IPC or NCAT.

Completion of this review

64. This review is now complete.
65. If you have any questions about this report please contact the Information and Privacy Commission on 1800 472 679.

Elizabeth Tydd
Information Commissioner