



information
and privacy
commission
new south wales

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

Applicant: Michael Sheely

Respondent: Eurobodalla Shire Council

Report date: 27 March 2014

IPC reference: IPC14/R000016

Catchwords: Deemed refusal – period for deciding application –
open access information

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Summary

1. Mr Michael Sheely applied to Eurobodalla Shire Council (**Council**) under the *Government Information (Public Access) Act 2009 (GIPA Act)* for access to information about vehicular access to the St Peters Anglican College from Caitlin Crescent. The information in issue forms part of DA325/05.
2. Council did not decide Mr Sheely's valid access application within the statutory timeframe provided for by the GIPA Act. Council did however, make a late decision. The decision made by Council was to release the information Mr Sheely applied for.
3. The Information Commissioner is satisfied that the late decision to provide access to the information and refund the application fee is justified. However, having considered the relevant circumstances preceding this decision the Information Commissioner recommends Council improve its compliance with the open access requirements in Part 3 of the GIPA Act.

Background

4. On 29 November 2013, Mr Sheely applied under the GIPA Act to Council for access to the following information:
 - a. Any document or relevant parts of documents/ that specifically state or highlight that the DA was seeking approval to allow general vehicular access to the college from Caitlin Crescent (this does not relate to construction vehicles);
 - b. Any document prepared by ESC for the ESC Local Traffic Committee and any written advice or comments from the committee (DA 325/05 referred to the committee on 26/09/04);
 - c. Any document or relevant parts of document/s that brought to the attention of decision-maker/s or those required to make assessments during the approval process of the contents of the Assessment of Traffic & Parking Implications report of 06 June 2001 prepared by Project Planning associates Pty Ltd;
 - d. Any document or relevant parts of document/s that brought to the attention of decision-maker/s or those required to make assessment during the approval process of plans for the college to establish a service road to carparks established in the northern precincts of the college;

He also included two questions about the general vehicular access from Caitlin Crescent and stated that he was seeking answers to these questions.
5. Council made a late decision on 15 January 2014 and in so doing was deemed to have refused to deal with Mr Sheely's access application. The late decision made by Council was to release all of the information Mr Sheely applied for and provide answers to the two questions included in his access application.
6. In conducting this review we have:
 - a. examined Mr Sheely's formal access application dated 28 November 2013;
 - b. examined the notice of decision dated 16 January 2014;
 - c. noted the submission made by Mr Sheely as part of his application for external review by the Information Commission;
 - d. noted the submission made to the Information Commission by Council on 16 January 2014 and a copy of the cheque requisition processed in Mr Sheely's favour by Council on 17 January 2014.

7. In his application for external review by the Information Commissioner, Mr Sheely told us that he "... made informal requests for access commencing in September 2013".

Decisions under review

8. A decision to refuse to deal with an access application (including such a decision that is deemed to have been made), is a reviewable decision under section 80(c) of the GIPA Act.
9. A decision to provide or refuse to provide access to information in response to an access application, is a reviewable decision under section 80(d) of the GIPA Act.

Required period for deciding application

10. Section 57(1) of the GIPA Act provides:

An agency must decide an access application and give the applicant notice of the agency's decision within 20 working days (the *decision period*) after the agency receives the application.
11. In its letter to Mr Sheely dated 5 December 2013, Council stated that it had received an access application from Mr Sheely on 29 November 2013. Council also stated that as it was a valid access application, they were required to decide it "...within 20 working days of receipt, that is, by 4 January 2014".
12. A working day is defined in clause 1 of schedule 4 to the GIPA Act to mean:

any day that is not a Saturday, Sunday or public holiday.
13. Applying the decision period as provided by section 57(1) of the GIPA Act, we calculated the date by which Council should have decided Mr Sheely's access application, as 31 December 2013.
14. In its submission to the Information Commissioner dated 16 January 2014 Council told us that "... due to end of year pressures, a response [internal response] was not received in a timely manner" and "Council was closed from 24 December until 2 January 2014".
15. Given that Council planned to be closed over the Christmas period, it would have been reasonable in the circumstances for Council to have sought an extension of the decision period, by agreement with the applicant, in accordance with section 57(4) of the GIPA Act.

Deemed refusal if application not decided within time

16. Section 63(1) of the GIPA Act provides:

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 paid by the applicant is to be refunded.
17. Council did not decide Mr Sheely's access application within time, that is, by 31 December 2013. Mr Sheely's access application was decided by Council on 16 January 2014, which was 11 working days out of time. In so doing Council made a late decision, as is provided for by section 63(2) of the GIPA Act.
18. The late decision made by Council was to release the information Mr Sheely applied for in full.

19. In general terms section 63 of the GIPA Act provides that regardless of whether an agency makes a late decision or not, if it is a deemed refusal because the application was not decided within time, the agency is not entitled to the application or processing fees. Consequently fees cannot be imposed and any such fees that have already been paid by the applicant must be refunded.
20. In its notice of decision Council states “A refund for fees paid is being prepared and will be sent under separate cover”. For the purpose of this review Council provided us with a copy of the cheque requisition drawn in favour of Mr Sheely in the amount of \$30.00 (application fee). As a result we are satisfied that Council has complied with the requirements set out in section 63 of the GIPA Act. However we are not satisfied that Council has complied with section 6 of the GIPA Act, our reasons are explained in the remaining section of this report.

Mandatory proactive release of certain government information

21. In both his access application lodged with Council and his request for external review by the Information Commissioner Mr Sheely stated that since September 2013 he had made several informal requests for the information but only ever received a copy of the Assessment of Traffic & Parking Implications report of 06 June 2011. It is for this reason, Mr Sheely explained, he felt it necessary to lodge a formal access application to in order to obtain the open access information.
22. Section 6(1) of the GIPA Act provides:

An agency must make the government information that is its **open access information** publicly available unless there is an overriding public interest against disclosure of the information.
23. Part 3 of the GIPA Act sets out the forms of open access information and the provisions that govern them.
24. Section 18(g) of the GIPA Act provides that the regulations to the GIPA Act may prescribe information that is required to be made publicly available by the agency under section 6, as open access information. For local councils, development application information (and any associated documents received in relation to a proposed development) forms part of a council’s open access information pursuant to clause 3 of Schedule 1 to the GIPA Regulation.
25. It is apparent from the terms of Mr Sheely’s access application (see paragraph 4 of this report) that the information he applied for, forms part of Council’s open access information.
26. Section 4(1) of the GIPA Regulation provides:

A local authority must make its open access information publicly available by:

 - a. making the information available for inspection free of charge by any person at the office of the local authority during ordinary office hours, and
 - b. providing a copy of a record containing the information (or providing the facilities for making a copy of a record containing the information) to any person either free of charge or for a charge not exceeding the reasonable cost of photocopying.
27. In his letter, included with his access application, Mr Sheely states “I am forced to make a formal application and pay an application fee” and “... I am requesting that I be reimbursed for the cost of this application and not be

charged for work undertaken by ESC staff to provide copies of documents and answer questions as requested.”

28. While we are satisfied that Mr Sheely has since been provided with the information he applied for and that the application fee has since been refunded. We are not satisfied that Council has complied with its obligations under section 6 of the GIPA Act. That it was necessary for Mr Sheely to lodge a formal access application and the manner in which his request for open access information was processed by Council is inconsistent with the object of the GIPA Act.
29. The mandatory release of this type of government information (open access information) promotes the consistent and transparent information sharing practices across NSW government agencies, as well as providing members of the public with an immediate right of access to important government information. It also helps foster responsible and representative government that is open, accountable, fair and effective.

Recommendations

30. Pursuant to section 92 of the GIPA Act, the Information Commissioner recommends Council review its processes to improve compliance with Part 3 of the GIPA Act. The IPC’s resources, including the *Open access information* Fact sheet published on the IPC’s website (under Resources) and the Own motion investigation report into Manly Council (under Reports & Decisions), may assist Council in this regard.

Review rights

31. Our recommendations 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.
32. An application for NCAT review 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
Level 9, 86 Goulburn Street,
Sydney, NSW, 2000

Phone: 1300 003 228

Closing our file

33. This review is complete and our file is now closed.
34. If you have any questions in relation to this report or the review process, please contact the Information and Privacy Commission on 1800 472 679.

Elizabeth Tydd
Information Commissioner