



16 July 2020

Cowra Shire Council

By email only to: [council@cowra.nsw.gov.au](mailto:council@cowra.nsw.gov.au)

Dear

On 3 June 2020, the Information and Privacy Commission received a request from (the Applicant) for an external review by the Information Commissioner of a decision made by Cowra Shire Council (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA).

The Applicant sought access to the following information:

1. *Require copy of document revealing how and when Cowra Council identified and became aware of the need for the Review of Environmental Factors described by the Director of Infrastructure and operations on 12th December 2016 as the current REF with a revised Executive summary*
2. *Require copy of document which positively gives the official council definition of terminology separately of terms "Review" and "Environmental Factors" as voted upon compliant with recommendation from the relevant director. 12/2/16*
3. *Re statement of fact from Mayor West 14th July 16 "sic the subdivision certificate and associated plans were signed by M. Devery as an Authorised Officer of Council as per the relevant legislation." cc Acting General Manager  
Require documentation of the extent of "authorisation" which would have made it possible for him to certify the document in one of the three rankings available for him to choose and the particular legislation described as "relevant"*
4. *Require copy of documentation to positively affirm that "PAUL DEVERY" had been delegated/appointed as an "authorised officer" of the Council as stated by Mayor West in reciprocal correspondence dated 14th July 2016*
5. *Re statement of fact from Mayor West to the applicant dated 8 May 2013 which conveyed inter alia sic*

*Require documentation of Council policy and/or official legal advice to Council or Mayor West to vindicate the expressed opinion that there is "no impact" on the legal ownership of the subject despite an official document of Cowra Council clearly identifying the subject*

6. *The applicant refers to correspondence dated 8 May 2015 from the Acting Director Environmental Services which stated inter alia “Council RECORDS indicate that the subdivision Certificate relating to DA 131/2004 was issued on 11th July 2007.” Require a copy of documentations confirming that the subdivision certificate was infact included in the Council records systems prior to issue of the quoted correspondence from the Acting Director*
7. *Require copy of copyright documentation relating to the map of Cowra Shire presently exhibited on the wall of Council’s customer service area as well as documentation regarding the preparation of the chart revealing what if any physical features were to be omitted  
Re reciprocal correspondence from Mayor West dated 9 May 2018 , I require a copy of documentation to confirm what was “noted” in official Council files in relation to “your correspondence”, referring especially to*

The decision under review was made by the Agency on 8 April 2020 and advised the Applicant:

*Items 1-6 have previously been requested (in some case numerous times) and accordingly Council rejects your request on the basis that the matter has previously been dealt with  
Item 7 – Your request is too broad and does not relate to a specific record*

On this basis, the decision under review is a reviewable decision in accordance with section 80(c) of the GIPA Act. However, the application for review raises issues including the deficiencies of the Agency’s notice of decision in response to the GIPA application.

This correspondence sets out my recommendations and some guidance arising from this review. I have also sent a copy of this letter to the Applicant so that they are aware of the outcome of the request for review.

Please be advised that I am satisfied that I have sufficient information to determine this application and for these purposes the review period under section 92A of the GIPA Act commenced on 6 July 2020. Accordingly, this review has been finalised within the review period as required under the GIPA Act.

## **The Agency’s decision**

### Refuse to deal with an application

In its decision, the Agency appears to have refused to deal with the application in part on the basis that it had already decided a previous application for the information concerned. The Agency also found that the access request in relation to item 7 was invalid on the basis that the Agency could not identify the government information applied for.

I further note that the Agency has advised in its notice of decision:

*Accordingly Council declines your request based on a lack clarity on what record you are seeking and the nature of the request is too broad [sic]. Please feel free to provide more information as to the specific document or record you are after.*

During the course of this external review, the Agency advised the IPC that it had made its decision on the access request to refuse to deal with the application, stating the following:

- In relation to Items 1-6, these items had previously been provided or dealt with in previous GIPA applications - Section 60(1)(b); and
- In relation to Item 7 the request is too broad and does not relate to a specific record and would involve substantial resources - Section 60(1)(a)

With respect to Item 7 in the Applicant's request, it is unclear whether the Agency is making a decision as to the validity of the request, or if it considers the information sought to be an unreasonable diversion of resources. Notwithstanding this, it does not appear that the Agency has provided any evidence to support its finding that dealing with the application would require an unreasonable and substantial diversion of the Agency's resources.

Section 60(1) of the GIPA Act relevantly provides the following:

*(1) An agency may refuse to deal with an access application (in whole or in part) for any of the following reasons (and for no other reason)—*

- a) dealing with the application would require an unreasonable and substantial diversion of the agency's resources,*
- b) the agency has already decided a previous application for the information concerned (or information that is substantially the same as that information) made by the applicant and there are no reasonable*

...

Notably, section 60(1)(a) provides that an Agency can refuse to deal with an access application in part if dealing with the application would require an unreasonable and substantial diversion of the Agency's resources. Section 60(1)(a) does not relate to the validity of an access application with respect to whether an Applicant has sufficiently identified the government information that they are seeking access to.

Accordingly, given the deficiencies in the Agency's decision, I cannot be satisfied that the Agency's decision to refuse to deal with the access application is justified.

#### Validity of an Access Application

As I discussed above, it is unclear whether the Agency has made a decision to refuse to deal with the access application, or if it has found the application invalid on the basis that it cannot identify the government information that the Applicant is seeking access to.

Section 41 of the GIPA Act provides the formal requirements to make a valid access application. Section 41(1) relevantly states the following:

*(1) An application or other request for government information is not a valid access application unless it complies with the following requirements (the **formal requirements**) for access applications—*

- (a) it must be in writing sent by post to or lodged at an office of the agency concerned or made in the manner approved by the agency under subsection (2),*
- (b) it must clearly indicate that it is an access application made under this Act,*
- (c) it must be accompanied by a fee of \$30,*
- (d) it must state the name of the applicant and a postal or email address as the address for correspondence in connection with the application,*
- (e) it must include such information as is reasonably necessary to enable the government information applied for to be identified.*

Section 41(1)(e) of the GIPA Act provides that an access application is not valid if the Agency is unable to identify the government information that the Applicant has requested.

I note that it is an express requirement under section 16 of the GIPA Act that an Agency provide advice and assistance to a person who requests access to government information. It is also an express requirement under section 52 of the GIPA Act that an Agency provide assistance with invalid applications. Section 52(1) relevantly provides:

*52 Agency assistance with invalid applications*

*(1) The notification of an agency's decision that an application is not a valid access application must—*

- (a) include a statement of the reason why the application is not a valid access application (including reference to the relevant provisions of this Act), and*  
...
- (c) if a reason is failure to provide required information, invite the applicant to provide the information, and*  
...

I further note that under section 51(1)(b) of GIPA Act, when an Agency receives an access application, the Agency is to decide whether the application is a valid access application. If the Agency forms the view that the access request is not valid, it should then notify the applicant that the application is not valid. This notification is required to be completed as soon as practicable after or within 5 working days of the Agency receiving the application (section 51(2)).

Based on the information before me, there is no indication that the Agency notified the Applicant that part of the request was invalid. Furthermore, there is no indication that the Agency contacted the Applicant to invite them to provide further information in order to identify the government information sought. Alternatively, in the case that the request was considered to be in an unreasonable diversion of resources, there is no evidence of correspondence to revise the scope of the request.

The notice of decision invited the Applicant to a meeting with the Mayor, General Manager to resolve any issues or question the Applicant may have, however I note that this opportunity is given at the time that the decision is made and it

does not appear that this was offered to the Applicant during the processing of the access request. Noting the Agency's experience with dealing with numerous GIPA Applications, it should be aware of the requirements under the GIPA Act with respect to the decision making process and requirements of the notice of decision.

Based on the information before me, I cannot be satisfied that the Agency provided assistance to the Applicant in order to clarify the scope of the request with respect to Item 7 of the access application as would be reasonable for the purposes of section 16 of the GIPA Act. Accordingly, I am not satisfied that the Agency has satisfied the requirements under sections 52(1) and 16(1) of the GIPA Act to provide advice and assistance to the Applicant.

Furthermore, the Agency's notice of decision does not comply with the requirements under section 126 of the GIPA Act. Specifically, the decision does not include a statement that gives details of any right of review under the GIPA as required under section 126(1)(c). I have included additional information below to assist the Agency with the requirements of a notice of decision.

### **Recommendations**

In light of the information above, I recommend that the Agency reconsider its decision by way of an internal review. This recommendation is made under section 93 of the GIPA Act. Please note that there is no fee payable for the internal review. The decision of the internal review cannot be carried out by someone who is less senior than the original decision maker.

I make this recommendation because the decision does not demonstrate that the Agency determined this access application in a manner consistent with the GIPA Act, particularly in relation to its obligations under sections 16, 51 and 52(1) of the GIPA Act with respect to the validity of an access application.

I also recommend under section 92 of the GIPA Act that the Agency review and as appropriate implement staff training in relation to decision-making under the GIPA Act. The IPC provides free online training for decision makers under the GIPA Act which can be accessed using the following link: <https://www.ipc.nsw.gov.au/about-us/ipc-e-learning>

I ask that the Agency advise the Applicant and the IPC within 10 working days of the actions to be taken in response to our recommendations.

I have also included some information in this letter about the requirements for notices of decisions and applying the public interest test, which I hope will be helpful to the person who conducts the internal review.

### **Additional Information to guide the conduct of reconsideration of the decision by the Agency**

To assist Agency in drafting notices of decisions, I have included some additional guidance, below.

#### Notices of decisions

When making a decision about an access application, an agency must issue a notice of decision that meets the requirements prescribed by section 126 of the GIPA Act:

Level 17, 201 Elizabeth Street, Sydney NSW 2000 | GPO Box 7011, Sydney NSW 2001  
t 1800 ipc nsw (1800 472 679) | f 02 8114 3756 | e [ipcinfo@ipc.nsw.gov.au](mailto:ipcinfo@ipc.nsw.gov.au)

[www.ipc.nsw.gov.au](http://www.ipc.nsw.gov.au)



- it must be in writing;
- it must include the date of the decision;
- it must include a statement of the review rights attached to the agency's decision, including details of the time period within which the review rights must be exercised;
- it must include the contact details of an officer to whom inquiries about the decision can be directed; and
- it must not disclose information for which there is an overriding public interest against disclosure.

Section 61 of the GIPA Act provides that when an agency refuses to provide access to information because there is an overriding public interest against disclosure, its notice of decision must include the following:

- the reasons for its decision to refuse access;
- the findings on any key questions of fact, and the source of the information on which the findings are based; and
- the general nature and format of the records that contain the information sought.

As good practice a notice of decision for formal applications should include:

- details of the searches conducted by the agency to locate the information asked for;
- the reasons for the agency's decision to withhold the information including:
  - public interest considerations in favour of disclosure and why the agency considers them relevant to the information sought;
  - public interest considerations against disclosure and why the agency considers them relevant to the information sought; and
  - the agency's decision after balancing the public interest considerations for and against disclosure;
- details of relevant consultations as required under section 54 of the GIPA Act;
- details of any personal factors of the application under section 55 of the GIPA Act that the agency has taken into account in making its decision;
- details about the access period (under section 77 of the GIPA Act) and forms of access to any information released under the agency's notice of decision;
- details about whether any processing charges will be payable for access to the information and how those charges have been calculated (as required by section 62 of the GIPA Act);
- whether the agency will record details about the access application in its disclosure log (as required by sections 25 and 26 of the GIPA Act); and
- where relevant, a schedule of documents itemising the documents falling within the scope of the access application, including a description of the record, location of the

record within the agency, format of the record, public interest considerations in favour of, or against disclosure, the corresponding GIPA Act sections for any such considerations, and whether the information was released.

### **Review rights**

These 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.

This means that if the Applicant is dissatisfied with my recommendation, or with the Agency's response to my recommendation, then they may ask the NCAT to review the original decision.

An application for NCAT review can be made up to 20 working days from the date of this letter. After this date, the NCAT can only review the decision if it agrees to extend this deadline. For information about the process and costs associated with a review by the NCAT, please contact the NCAT. The NCAT's contact details are:

NSW Civil and Administrative Tribunal  
Level 10, 86 Goulburn Street,  
Sydney, NSW, 2000  
Phone: (02) 9377 5711  
Facsimile: (02) 9377 5723  
Website: <http://www.ncat.nsw.gov.au>

If the Agency makes a new reviewable decision as a result of this 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**

This review is now complete.

I trust that the information in this letter is helpful to you in any reconsideration of the decision.

Yours sincerely

Yoko Morimoto  
**Regulatory Officer**