



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

Applicant: Mr James Bright  
Respondent: Eurobodalla Shire Council  
Report date: 17 June 2016  
IPC reference: IPC16/R000179  
Catchwords: Government Information – period for deciding application –  
deemed refusal – legal professional privilege

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## Summary

1. Mr James Bright (the Applicant) applied for particular information about the Independent Review of the Report “Huntfest Review July 2015” from Eurobodalla Shire Council (the Agency) under the *Government Information (Public Access) Act 2009 (GIPA Act)*.
2. The Agency decided to provide access to some information and to refuse to provide access to some information. It also decided that it did not hold some information.
3. The Information Commissioner is not satisfied that the Agency justified its decision to withhold Attachment 3 (item 1) and that it made its decision within the statutory timeframe.
4. The Information Commissioner makes the following recommendations in relation to the Agency’s decision:
  - a. pursuant to section 92, the Agency refund the application fee as required by section 63(1) of the GIPA Act; and
  - b. pursuant to section 93, reconsider its decision to refuse to provide access to Attachment 3 (item) in reliance of legal professional privilege; and
  - c. pursuant to section 95, review its current process for dealing with applications received before and during periods of extended closure; and
  - d. pursuant to section 95, in dealing with future application turn its mind to the question of waiving privilege in compliance with clause 5(2) of Schedule 1 to the GIPA Act.

## Background

5. On 15 December 2015 the Applicant applied under the GIPA Act for access to:

*A copy of Attachment 3 to the document ‘Independent Review of the Report “Huntfest Review July 2015” by Independent Audit Committee Members – 19 October 2015’. This report, without Attachment 3, was tabled in the Eurobodalla Shire Council on 8 December 2015.*

*A copy of any correspondence between the Eurobodalla Shire Council and the Review Panel on the question of whether any part of the Panel’s report would be withheld from the public.*

*A copy of any record of discussions between any ESC official and members of the review Panel on the question of whether any part of the Panel’s report would be withheld from the public.*
6. The Agency categorised each of the items set out in the application as 1, 2 and 3 respectively. According to its notice of decision dated 18 January 2016 the Agency decided to refuse access to Attachment 3 (item 1) in full, on the basis it was subject to legal professional privilege. It also decided to release an email with redactions (item 2) and that it did not hold some information (item 3).

## Our review

7. The Information Commissioner received the Applicant’s request for external review on 18 March 2016. In seeking a review of the Agency’s decision the Applicant told us that it is the Agency’s decision to refuse access to Attachment 3 (item 1) of the *Independent Review of the Report “Huntfest Review July 2015”* by the Independent Audit Committee Members dated 19 October 2015 (the

Independent Review Report), that is the subject of his request for review by the Information Commissioner.

8. On 12 April 2016 the Information Commissioner received further information from the Applicant which included a submission that the Agency made late decisions about his various access applications and he included copies of letters from the Agency acknowledging receipt of these access applications.
9. In conducting this review we have:
  - a. examined the access application made on 15 December 2015; and
  - b. considered the notice of decision dated 18 January 2016; and
  - c. considered the Applicant's request for external review made in the form of a submission and received by the Information Commissioner on 18 March 2016; and
  - d. considered the Agency's submission and examined the information in issue (Attachment 3) received by the Information Commissioner on 22 March 2016; and
  - e. considered the additional information provided by the Applicant and received by the Information Commissioner on 12 April 2016, about the timing of the Agency's decision;
  - f. considered the additional information we requested and received from the Agency about the timing of the Agency's decision.
10. The scope of this review is limited to the Agency's decision to refuse to provide access to Attachment 3 (item 1) based on the claim it is subject to legal professional privilege and the timing of its decision.
11. On external review the burden of establishing that the decision is justified lies on the agency (section 97 of the GIPA Act).

### **Decisions under review**

12. 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.
13. 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**

14. 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.
15. 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.
16. In his letter to the Information & Privacy Commission (IPC) dated 7 April 2016 the Applicant states that he was undertaking research on the subject of legal professional privilege, when he located Review Report IPC14/R000016 dated 27 March 2014, which he said addresses "... the misapplication of the Act by the

ESC in relation to the time-frame.” He also provided the IPC with several letters from the Agency acknowledging receipt of his numerous access applications.

17. On 15 June 2016 we requested the Agency provide us with any communication it had with the Applicant relevant to his assertion the Agency’s decision was late. The Agency responded by providing us with a copy of its notice of decision dated 18 January 2016 and its letter dated 16 December 2016 acknowledging receipt of the access application (Application EUR-000006). Both forms of correspondence confirm the receipt date of the application as 15 December 2015.
18. In its acknowledgement letter the Agency states that the decision due date is 20 January 2016, along with the other requirements provided by section 51(3) of the GIPA Act. It also states that the application was received on 15 December 2015, notes its obligation to decide the application within 20 working days and mentions that the Agency will be closed from 25 December 2015 to 1 January 2016.
19. The Agency provided the additional information about the timing of its decision on 15 June 2016 and in so doing told us that it’s “... offices were closed between 25 December 2015 and 1 January 2016 (inclusive) with no administrative staff working during that time.”
20. In his letter to the Information Commissioner dated 7 April 2016 the Applicant makes reference to and observations about Review Report IPC14/R000016. We note that a similar set of circumstances were address by the Information Commissioner with the same Agency in this report. In particular the Agency was told that in the event of a ‘close down’ period it would be reasonable to seek an extension by agreement from the Applicant in accordance with section 57(4) of the GIPA Act.
21. Consent by agreement is not something that may be inferred. For the benefit of doubt section 57(5) of the GIPA Act provides the agency must as soon as practicable after the decision period is extended (and in any case within 5 working days after it is extended) give the applicant notice of any extension of the decision period (including any extension by agreement with the applicant), indicating the date on which the extended decision period will end.
22. In application of both sections 57(1) and clause 1 of Schedule 4 to the GIPA Act, we calculated the date by which the Agency should have decided the application as 15 January 2016. This calculation factored in the three public holidays falling within the Christmas and New Year holiday period (25 December 2015, 28 December 2015 and 1 January 2016) thereby extending the due date by 3 days.
23. Given the Agency and Applicant did not agree to extend the decision period, it was not open to the Agency to factor in its close down period when determining the decision due date. For these reasons we are of the view that the Agency made a late decision on 18 January 2016, albeit by 1 working day.
24. Under section 95 of the GIPA Act the Information Commissioner recommends that the Agency review its current process for dealing with access applications made under the GIPA Act, before and during periods of extended closure, having regard to the issues identified and raised in this report.

## Deemed refusal if application not decided within time

25. 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.
26. As the Agency did not decide the application within time (by 15 January 2016) and it did not obtain an extension by agreement from the Applicant, it is deemed to have refused to deal with the application.
27. In general terms section 63(2) of the GIPA Act provides that a deemed refusal does not preclude an agency from making a late decision.
28. Section 63(3) of the GIPA Act provides that the obligation to refund an application fee to the applicant is not affected by the making of the late decision and the late decision does not entitle the agency to payment of an application fee.
29. We are of the view the Agency's decision of 18 January 2016 was late and on this basis sections 63(1) & (3) of the GIPA Act were enlivened. Meaning the Agency is not entitled to the payment of the application fee.
30. Under section 92 of the GIPA Act, the Information Commissioner recommends the Agency refund the application fee as required by section 63(1) of the GIPA Act.

## Legal professional privilege – clause 5 of Schedule 1

31. Clause 5(1) of Schedule 1 states that it is to be 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.
32. 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:
  - a. the existence of 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
    - ii. for use in existing or anticipated litigation.
33. The Applicant submits that while it is possible that Attachment 3 contains "... some form of 'legal advice', it is not legal advice that had been provided to the ESC or to any committee, sub-committee or organ of the ESC." He states this is because the information appearing in Attachment 3 "... had been given by a law firm (albeit the same firm that advises the ESC) to an entity (an independent review panel) that was separate from the ESC, and that is now in the possession of the ESC."
34. We examined a copy of the Independent Review Report the Applicant told us was tabled by the General Manager at the Agency's meeting on 8 December

2015 and a copy of Attachment 3 which the Agency claims is subject to legal professional privilege.

35. Based on the Introduction (Independent Members of the Audit Committee) and the Terms of reference appearing in the Independent Review Report, it is evident that the Independent Review Panel are not acting as an agent for the Agency, rather their role and involvement is purposely at arms-length of the Agency.
36. We applied the test for legal professional privilege to Attachment 3 and we are not persuaded that the information appearing in this record satisfies the criteria set out above (paragraph 30). This is because we are not persuaded that the necessary relationship between the Independent Review Panel and Sparke Helmore Lawyers exists and that the communication or document was brought into existence for the dominant purpose.
37. Under section 93 of the GIPA Act, the Information Commissioner recommends that the Agency make a new decision, in light of the elements of privilege which must be established for this conclusive presumption to apply to the information in question. We refer the Agency to our fact sheet on Legal Professional Privilege at <http://www.ipc.nsw.gov.au/legal-professional-privilege>.
38. Under clause 5(2) of Schedule 1 to the GIPA Act, an Agency must consider whether it is appropriate to waive privilege before it decides to refuse access under clause 5(1).
39. There is nothing in the notice of decision to indicate that the Agency has contemplated whether it would be appropriate to waive privilege before it refuses to provide access to government information on the basis of this clause.
40. It is recommended under section 95 of the GIPA Act, that where the Agency satisfies itself that legal professional privilege is applicable, the Agency ensures that it complies with the requirement in clause 5(2) of Schedule 1 to the GIPA Act.

## Recommendations

41. The Information Commissioner recommends under section 92 of the GIPA Act that the Agency refund the application fee as required by section 63(1) of the GIPA Act; and
42. Pursuant to section 93, the Information Commissioner recommends the Agency make a new decision, in so far as its decision to refuse to provide access to Attachment 3 (item 1); and
43. Pursuant to section 95, the Information Commissioner recommends the Agency review its current process for dealing with applications received during extended periods of closure; and
44. Pursuant to section 95, the Information Commissioner recommends where the Agency satisfies itself that legal professional privilege applies, it turn its mind to whether it would be appropriate to waive privilege in accordance with clause 5(2) of Schedule 1 to the GIPA Act.
45. In making a new decision, have regard to the matters raised and guidance given in this report.
46. We ask that the Agency advise the Applicant and us by **1 July 2016** of the actions to be taken in response to our recommendations.

## Review rights

47. 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 New South Wales Civil and Administrative Tribunal (NCAT) for a review of that decision.
48. If the Applicant is dissatisfied with our recommendations or the Agency's response to our recommendations, the Applicant may ask the NCAT to review the Agency's decision
49. 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
50. 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 ADT.

## Closing our file

51. This review is complete and our file is now closed.

Elizabeth Tydd

**Information Commissioner**