Part 8: Access to information

Case study: Macquarie Marshes Environmental Landholders' Association and floodplain harvesting

1. This case study concerns a request to access information under the *Government Information (Public Access) Act 2009* (NSW) (**GIPA Act**) regarding floodplain harvesting in the Macquarie catchment of NSW. This request was made on behalf of our client, the Macquarie Marshes Environmental Landholders' Association, the members of which are directly affected by decisions regarding the management of overland flows in this catchment and are concerned about the ecological character of the Ramsar-listed Macquarie Marshes.

2. Our client sought access to information falling into seven categories. The original and revised applications will also be made available to the Commission. In the meantime, the chronology is essentially as follows:

    - On 22 June 2018, the Information and Privacy Coordinator within the Department of Industry (**Officer**) acknowledged receipt of the request for information.
    - On 29 June, the Officer contacted me indicating that the request constituted an unreasonable and substantial diversion of resources, as per s. 60(1)(a) of the GIPA Act and noted that I would be provided with four weeks to amend the scope of the application on behalf of my client, as per s. 60(4) of the Act. During this time, the clock stopped vis a vis the making of a decision.
    - In the same letter, it was suggested that I provide a specific list of questions for the relevant members of staff, who could then meet with me to discuss narrowing the scope of the application. It was suggested that this would allow the matter to be dealt with on an informal basis and that no fee would be incurred.
    - On 29 June, I was contacted by the Officer requesting initial questions (to be addressed by staff at a meeting) and confirming that a stakeholder engagement officer would coordinate the same. I was somewhat perplexed by the question as the information sought by our client was contained in the original GIPA Act application. To my mind, the point of the meeting was to narrow the scope of the application, not to engage in a parallel stakeholder engagement process.
    - To that end (and having received instructions from my client), I replied on the same day proposing that the focus of the meeting be the 7 items listed in the original application.
    - On 11 July, I was contacted by a stakeholder engagement officer (**SEO**) who proposed setting up two separate meetings with two members of staff to discuss three of the seven issues. While I believe the stakeholder engagement officer was acting in good faith, I became immediately alarmed that a statutory process was being rebadged as a stakeholder engagement matter, and as a consequence further delaying our client's access to information under the GIPA Act. This was compounded by the fact that the best meeting time proposed for one of the matters was 7

August – despite the statutory deadline to refine the scope of the application being 24 July.

- I sought instructions from my client, and on 17 July wrote to the SEO indicating that it was unusual for a statutory process to be treated as a stakeholder engagement matter. I also noted that the manner in which they were proposing to deal with the request – via a not insignificant number of meetings – was difficult to reconcile with a determination under s 60(1)(a) – i.e. that the request itself constituted an unreasonable and substantial diversion of resources. I accordingly proposed that one meeting take place to determine why each element of the request fell under s 60(1)(a) and then to discuss the most appropriate way to refine its scope.
- On 18th July, I was contacted by the SEO, who indicated that the information sought crossed a few portfolios and that staff were located throughout the state. As such, it would apparently be difficult to coordinate one meeting.
- On 19th July, I replied and suggested that the relevant information be communicated to one person within the Department, who could then meet with me with a view to assisting me refine the scope of the application. I welcomed further, general consultation with respect to floodplain harvesting after my client's GIPA Act request had been dealt with.
- On 19th July, the SEO contacted me indicating that a nominated member of staff had been appointed to collate information regarding the request with a view to assisting me to refine its scope of the request on behalf of my client. I was also told on that day that no other action or decision would be made in relation to the application whilst informal discussions took place. As almost a month had elapsed since lodging the application, I became increasingly concerned that progress would continue to be very slow, particularly given the time sensitive nature of the application (as the licensing of floodplain harvesting is imminent).
- On 27th July – almost five weeks after the application had been lodged – I had not received any further information regarding the status of the application or information regarding the most appropriate means to refine its scope. I wrote to the Department expressing the same.
- On Friday, 29 July I was contacted by the nominated member of staff (**Nominated Officer**) who provided detailed information explaining how long it would take to access the information sought (up to 70 to700 hours).
- Several more emails were exchanged in which I sought clarification regarding the length of time it would take to retrieve the information and seeking further assistance to refine the scope of the application.
- On 3rd August, the Nominated Officer provided further particulars as to how to refine the scope of the application to reduce the search, review and redaction time.
- On 13 August, I sent a revised application on behalf of my client,[1] taking into consideration the advice provided by the Nominated Officer.
- After one week, no reply had been received. I therefore sought clarification as to its status on 20 August.

[1] Note the letter is dated 16 August, but was sent on 13 August.

- Some more emails were exchanged. Relevantly, on 27 August I was informed by the Officer that on the basis of information provided to him by the relevant members of staff, the amended application could still not be processed. I was told that three of the seven items would take 14 hours to 'extract the information', which in and of itself constituted an unreasonable and substantial diversion of agency resources. The Officer was still awaiting a response from another member of staff regarding another of the items.
- In this email, the Officer cut and pasted a response from another member of staff regarding one of the other items. That staff member stated that it would take some time and resources to undertake the search, and in any case public consultation would occur shortly in which information about floodplain harvesting would be made public. The imputation was that this rendered the request for information by my client redundant. However, it was and is clear that my client's request extends to documents that would most certainly not be put on public exhibition by the Department.

3. It is 25th September, approximately three months since the Department of Industry acknowledged receipt of the application, and I am no closer to obtaining the information sought on behalf of my client under the GIPA Act. Nor have I received any further correspondence since 27 August regarding the status of the application or the other items sought as part of the request.

4. Furthermore, relevant case law does not appear to support the suggestion that 14 hours in and of itself gives rise to an unreasonable and substantial diversion of departmental resources (assuming it would take 14 hours to undertake the work in question). In making this comment, I note the size of the agency (that is, it is a State agency, not a local council in a small country town) and the fact that it employs dedicated staff to manage requests for information under the GIPA Act.[2]

END

[2] See for example: *NY and Australian Building and Construction Commission (Freedom of information)* [2018] AICmr 19 (2 February 2018). While the decision to refuse access on the basis of an unreasonable and substantial diversion of agency resources, this was based on the size of the agency (the ABCC is small) and the hours required to process the application (120, which is well in excess of 14 hours).