

Government Information (Public Access) Act 2009

INTERNAL REVIEW - NOTICE OF DECISION

Applicant:	Andrew Cox – Invasive Species Council
File Ref:	21-1557 – Internal review
Decision maker:	Ajanti Gunatillaka – Senior Access to Information and Privacy Officer
Date of decision:	11 May 2021

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1. Summary of access application

On **29 January 2021**, the Department of Planning, Industry and Environment (DPIE) received an access application from you under the *Government Information (Public Access) Act 2009* (GIPA Act) requesting access to the following information:

- 1. Any report(s) produced by the Kosciuszko National Park Wild Horse Community Advisory Panel and/or its chair and provided to NPWS staff.*
- 2. Any report(s) produced by the Kosciuszko National Park Wild Horse Scientific Advisory Panel and/or its chair and provided to NPWS staff.*
- 3. Any meeting minutes produced by the Kosciuszko National Park Wild Horse Community Advisory Panel since November 2019.*
- 4. Any meeting minutes produced by the Kosciuszko National Park Wild Horse Scientific Advisory Panel since November 2019.*
- 5. Any documents that summarise the results of consultation with local Aboriginal Land Councils and other Indigenous interests and representative bodies in relation to the development of a wild horse management plan under the Kosciuszko Wild Horse Heritage Act 2018, excluding information that would be culturally sensitive.*

For all documents specified above, where there are only draft versions available, please provide only the latest draft. Where there are draft versions and a final document, please provide only the final version of the document.

Information to cover the period from: 01/11/2019 to 28/01/2021

On **26 February 2021**, the application was decided. DPIE decided, under s 58(1)(d) to **refuse access** to the information.

DPIE also decided that some of the information is already available to you, under ss 58(1)(c) & 59(1)(e).

On **18 March 2021**, you requested an internal review of the decision to refuse access to the information you requested.

In your application for internal review you made the following submission regarding the refusal of access:

1. We believe there is an over-riding public interest favouring disclosure of this information given this information is critical to understanding the issues impacting the management of Kosciuszko National Park – a popular and highly significant national park – issues that are routinely in the public domain.

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2. The views of the community panel need to be heard by the community. The views of the scientists need to be heard by the community. The work of the panels should not be secretive or hidden from view.
3. There is no certainty that any of this information will be made available, even when the draft horse management plan that is being prepared by the head of the NPWS is released.
4. The process of preparing the Kosciuszko draft horse management plan was due to conclude in February 2020 (NPWS Update 28 Nov 2019). Over a year has elapsed since this deadline and there is a need to reveal progress on the preparation of the management plan.
5. The results of the consultation carried out during the preparation of the 2016 Kosciuszko National Park draft horse management plan and related key documents were publicly released including:
 - the results of the natural cultural heritage values assessment,
 - online survey results (x2),
 - online engagement report,
 - 21st century town hall meeting report,
 - independent technical reference panel report,
 - kitchen table discussion results,
 - focus group report,
 - engagement conclusions report and
 - community engagements report.

This sets an important precedent. A similar commitment to transparency and openness needs to be applied to the process to develop this horse management plan.

You made the following submission about the information already provided:

1. The communiques or meeting summaries for the community advisory panel and scientific advisory panel that are already publicly available are between one to two pages long. This information was used as a reason not to provide the minutes of these panels. The public documents largely summarise the process and mention topics covered in discussions and are on the whole insufficient to determine the deliberations of the panels. The summaries for meetings held in 2020 in particular are shorter, have far less detail and do not reveal the content of discussion or decisions and findings of the group. In most cases, these communiques cannot be regarded as full summaries of the issues discussed at the meetings and the panel's conclusions and decisions.

You made the following submission about the application of item 1(e)-(g) in the table of s 14 of the GIPA Act that deals with responsible and effective government:

1. We do not believe that the disclosure of this information would reveal any decision-making processes of the Department. The documents requested are merely information that feeds into the deliberative process of creating the draft plan.
2. Whether this information will be provided to the minister or not is immaterial to whether the information should be publicly released, especially when the responsibility for preparing the draft plan lies with the head of NPWS, not the minister.
3. One of the reasons for refusal on the grounds that it may prejudice the deliberative decisions of the government is that 'Any premature release of the material still under consideration could create disharmony and confusion among stakeholders'. This matter

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should not be a factor since the GIPA Act specifically provides that taking into account the release of information where 'disclosure of information might be misinterpreted or misunderstood by any person' is irrelevant.

4. The fact that the information may be released to one party and not others at this stage is used as a reason to refuse access on the grounds that it may prejudice the deliberative decisions of the government. This problem can be rectified by making the information available to all parties.

2. Conduct of internal review

This internal review is conducted in compliance with section 84 of the GIPA Act. I have made my decision as if the decision being reviewed had not been made and my decision is made as if it were being made when your access application was originally received. I am no less senior than the person who made the original decision.

3. Decision

I am authorised by the principal officer, for the purposes of section 9(3) of the GIPA Act, to decide your access application.

I have decided, under section 58(1)(a) and (d) of the GIPA Act, to provide partial access to the information as there is an overriding public interest against disclosure of some of the information.

I will provide you with access to the documents, with the information that is being refused, deleted.

In this Notice of Decision I will explain my reasons. To meet the requirements of section 61 of the GIPA Act, I need to tell you:

- a) the reasons for my decision and the findings on any important questions of fact underlying those reasons; and
- b) the general nature and format of the records containing the information you asked for, with reference to the relevant public interest considerations against disclosure (see the attached Schedule of Documents).

You can ask for a review of this decision. For details about how to do so, see part 7 of this Notice.

4. The public interest test

Under section 9(1) of the GIPA Act, you have a legally enforceable right to access the information you asked for, unless there is an overriding public interest against its disclosure.

Further, under section 5 of the GIPA Act, there is a presumption in favour of disclosing government information unless there is an overriding public interest against its disclosure.

To decide whether or not there is an overriding public interest against disclosure of the information you asked for, I applied the public interest test, which is set out in section 13 of the GIPA Act.

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I applied the public interest test by:

- (a) identifying any public interest considerations in favour of disclosure;
- (b) identifying any relevant public interest considerations against disclosure; and
- (c) deciding where the balance between them lies.

I did this in the way required by section 15 of the GIPA Act, which is:

- (a) in a way that promotes the objects of the GIPA Act;
- (b) with regard to any relevant guidelines issued by the Information Commissioner;
- (c) without taking into account the fact that disclosure of information may cause embarrassment to, or a loss of confidence in, the Government (as that fact is irrelevant);
- (d) without taking into account the fact that disclosure of information might be misinterpreted or misunderstood by any person (as that fact is irrelevant); and
- (e) with regard to the fact that disclosure cannot be made subject to any conditions on the use or disclosure of information.

4.1 Public interest considerations in favour of disclosure

Under section 12(1) of the GIPA Act, there is a general public interest in favour of disclosing government information. Section 12(2) of the GIPA Act sets out some examples of other public interest considerations in favour of disclosure. However, I am not limited to those considerations in deciding your application.

I find the following considerations in favour of disclosure are relevant to your application:

- **There is a general public interest in favour of the disclosure of government information.**

The object of the GIPA Act is to advance a system of responsible and representative democratic Government that is open, accountable, fair and effective by releasing government information to the public. Disclosure of information will contribute to achieving this object.

- **Disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government accountability or contribute to positive and informed debate on issues of public importance.**

The information within the scope of your request is one of great public interest, with opinions divided between groups for and against the management, and methods of management, of the wild horse population in the Kosciuszko National Park.

Disclosure of the information will provide the public with the department's plans for managing the issue. Disclosure will allow the public to scrutinise whether all relevant aspects were considered in formulating the plan, enhancing government accountability. Disclosure of information will also place the facts in the public domain allowing for an informed debate, which is always a positive outcome in a participative democracy.

4.2 Consultation

In making its original decision, DPIE did not consult with a third party. However, in conducting this internal review I have consulted with three third parties and received submissions from two. While one party objected to the release of information, the other did not. The objecting third party did so on the basis that the release of information will facilitate the desecration and destruction of Aboriginal cultural and religious objects.

The objection does not mean that I cannot release the information. However, I must take it into account when making my decision. I have therefore considered it when applying and balancing the public interest test.

4.3 Public interest considerations against disclosure

When applying the public interest test, the only public interest considerations against disclosure that I can take into account are those set out in the table to section 14 of the GIPA Act. To show that they are relevant to the information you asked for, I need to consider whether they could reasonably be expected to have the effect outlined in the table.

I have identified the following considerations against disclosure as being relevant to your application:

1 Responsible and effective government

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects (whether in a particular case or generally):

- (d) prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency's functions**
- (e) reveal a deliberation or consultation conducted, or an opinion, advice or recommendation given, in such a way as to prejudice a deliberative process of government or an agency**
- (f) prejudice the effective exercise by an agency of the agency's functions**

Documents 1 to 12 are meeting minutes of both the Community Advisory and Scientific Advisory Panels. These contain information on the discussions, opinions and thoughts of the members. They are deliberative in nature as no final decision has not been taken yet. The outcome of the discussions have been presented to the Minister. If the report presented to the Minister was for mere ratification, the content would not have been considered deliberative. However, this is not the case. The Minister has not decided to ratify the final outcome, and there is a likelihood that the issues will require further discussion and deliberation.

The mere fact that content is deliberative is not reason enough not to disclose information, such disclosure has to be shown to be prejudicial to the public interest.

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"Deliberation" means "The action of deliberating: careful consideration with a view to decision": see The Shorter Oxford English Dictionary. The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action. ...(*Re Waterford and Department of the Treasury (No 2) (1984) 5 ALD 588*).

It has been accepted that the word 'prejudice' in the context of the public interest considerations against disclosure is to be given its ordinary meaning, namely: 'to cause detriment or disadvantage' (*Hurst v Wagga Wagga City Council [2011] NSWADT 307*). The next point to consider is whether it is 'reasonably likely' to cause prejudice, if the information is released.

I am of the view that disclosure is reasonably likely to cause prejudice. If the information is disclosed prematurely, before the Minister has decided whether the issues need further deliberation, it will compromise the ability of panel members and others involved in the formulation of the management plan to offer their opinions and engage in an open and free discussion of the issues.

If free and open discussions are compromised, it will prevent the Department from carrying out its functions effectively.

Document 13 contains the recommendations of the Community Advisory Panel on the Kosciuszko Wild Horse Management Program. As argued above, some of this content is deliberative, because these recommendations have been presented to the Minister, and there is a likelihood that these matters will be deliberated again. As argued above, the Minister has not yet taken a decision that the report submitted should be implemented. If the recommendations and deliberations of the Community Advisory Panel are disclosed, it is reasonably likely to prejudice the effective exercise of the Department to progress in this matter.

The whole of document 14 contains the suggestions of the Scientific Advisory Panel which largely forms the recommendations for the Wild Horse Management Program. The arguments used for the non-disclosure of the above documents apply to document 14 in its entirety.

Document 15 contains advice from the Scientific Advisory Panel on the management of wild horses after the bush fires of 2019. While this document largely is not detrimental to the public if released, it contains some information that overlaps with the Panel's recommendations for the long-term management of wild horses, which have been incorporated into the report presented to the Minister. I therefore consider it against the public interest to disclose this information.

Document 16 contains information about Aboriginal cultural practices and the location of their artefacts. This information is known only to the Aboriginal community on the Kosciuszko National Park and its surrounding areas. The authors of the document as well as the department gave the Aboriginal community an undertaking that this information will remain confidential. Disclosure of this information will breach that undertaking and it will prejudice the supply of any future information that facilitates the effective exercise of the Department. I am therefore of the view that it is against the public interest to disclose this information.

3 Individual rights, judicial processes and natural justice

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects-

(f) expose a person to a risk of harm or of serious harassment or serious intimidation

Documents 1 to 12 contain the names of the panel members of both the Community and Scientific Advisory Panels as well as names of departmental staff working on the Kosciuszko National Park Wild Horse Management Project. Under normal circumstances, revealing the names of panel members would not be considered as a factor against disclosure. However, I am considering it in this situation because members have received threats of harm from members of the public. Defamatory allegations have also been levelled against them. Therefore, revealing the names of these individuals poses as very real risk of exposing them to a risk of harm, serious harassment or serious intimidation.

I am therefore of the view that it is against the public interest to disclose the names of these individuals.

The definition of *personal information* under the GIPA Act excludes the names and non-personal contact details of public sector staff, that reveals nothing more than that the individuals were engaged in the exercise of public functions. However, staff working on the project have also received threats from members of the public and have been exposed to serious harassment and intimidation. I am therefore of the view that releasing this information is against the public interest.

5 Environment, culture, economy and general matters

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects-

(a) prejudice the conservation of any place or object of natural, cultural or heritage value, or reveal any information relating to Aboriginal or Torres Strait Islander traditional knowledge.

Document 16 is a report jointly written by an anthropologist and archaeologist. The authors, the Department and the individual informants have joint copyright to this document. The document comprises a literature survey and analysis of this information as well as individual stories and information provided by Aboriginal members of the community in and around the Kosciuszko National Park.

The document has information that is of Aboriginal cultural relevance and of religious importance to the Aboriginal community. Disclosure of this information will reveal information relating to Aboriginal traditional knowledge and will prejudice its conservation.

It is on record that disclosure of such information has resulted in the desecration and destruction of Aboriginal artefacts and sites. I am therefore of the view that it is against the public interest to disclose this information.

Schedule 1 Information for which there is conclusive presumption of overriding public interest against disclosure:

5. Legal professional privilege

(1) 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.

Document 4 contains legal advice received by the department about the harassment of panel members. The department has not waived this privilege and therefore there is a conclusive presumption against the disclosure of this information.

4.5 Balancing the public interest test

I have considered the relevant public interest considerations in favour of and against disclosure of the information you requested.

I am of the view that the disclosure of some information is against the public interest as factors against disclosure, on balance, override those in favour.

Information that is deliberative in nature and that has been presented to the Minister, if released, can prejudice the finalisation of the Wild Horse Management Project Plan. The Minister has not yet ratified the draft presented, and there is great likelihood that further deliberation will be required. I therefore consider it against the public interest to release this information.

The documents contain the names and titles of both the Community and Scientific Advisory Panels as well as names of staff members. Staff as well as other members of the Panels have been subjected to serious harassment and intimidation. I am therefore of the view that the disclosure of this information is balanced against release.

There is also information, in Document 16, that was provided in confidence by Aboriginal members of the community. This information reveals the locations and significance of Aboriginal cultural artefacts and sites. The disclosure of this information will not only prejudice their conservation, but also poses the threat of their desecration and destruction. I am therefore of the view that on balance, it is against the public interest to release.

Having weighed up the considerations, I have decided that **there is an overriding public interest against disclosure of some of the information**. This is summarised in the attached Schedule of Documents.

5. Access

5.1 Deletion of information from a record

Under section 74 of the GIPA Act, an agency can delete information from a copy of a record to which access is to be provided in response to an access application (so as to provide access only to the other information that the record contains), either because the deleted information is not relevant to the information applied for or because (if the deleted information was applied for) the agency has decided to refuse to provide access to that information.

I have carefully assessed whether any part of the documents sought can be released to you with certain information deleted. I am of the view that some of the documents can be released to you with certain information, as explained under part 4.5 of this Notice of Decision and listed in the Schedule of Documents.

5.2 Third party review rights

As set out earlier in this Notice, I consulted with third parties about your application and one of them objected to the information being disclosed. Since I have decided to give you access to some of the information, despite the objection, they are entitled to ask for a review of the decision to disclose the information (under section 80(d) of the GIPA Act). Please see part 7 for more information about review rights.

The third party has 20 working days to ask for a review and under section 54(6) of the GIPA Act I cannot release the information to you while their review rights are pending, or while the decision is under review.

If a third party asks for a review of the decision, I will let you know.

If a third party does not seek a review, I will release the information to you at the expiration of their review rights.

6 Disclosure log

If information that would be of interest to other members of the public is released in response to a formal access application, an agency must record certain details about the application in its 'disclosure log' (under sections 25 and 26 of the GIPA Act).

In the letter acknowledging receipt of your valid application, you were told about the disclosure log. You were also advised of your right to object to the inclusion of details about your access application in the disclosure log, in certain circumstances (for example, if you seek access to your own personal information).

You did not object to details about your application being included in the disclosure log. Therefore, the following information will be recorded on the disclosure log:

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- the date on which your access application was decided (that is, the date of this notice of decision);
- a description of the information that will be released to you;
- whether that information is or will be available to other members of the public; and
- if so, how it can be accessed.

This decision is reviewable under section 80(m) of the GIPA Act (see part 7 of this notice for information about your review rights).

7 Review rights

If you disagree with any of the decisions in this notice that are reviewable, you may seek a review under Part 5 of the GIPA Act. Before you do so, I encourage you to contact me to discuss your concerns. My contact details are set out below.

You have two remaining review options:

- external review by the Information Commissioner; or
- external review by the NSW Civil and Administrative Tribunal (NCAT).

You have 40 working days from the date of this Notice to apply for a review by the Information Commissioner or NCAT.

To assist you, I have enclosed a fact sheet published by the Information and Privacy Commission NSW (IPC), entitled Your review rights under the GIPA Act. You will also find some useful information and frequently asked questions on the IPC's website: www.ipc.nsw.gov.au.

Note: if you lodge an external review, please notify me as soon as possible. Otherwise documents may be released.

You can also contact the IPC on freecall 1800 IPC NSW (1800 472 679).

8 Further information

If you have any questions about this notice or would like any further information, please do not hesitate to contact me.



Ajanti Gunatillaka
Senior Information Access and Privacy Officer

Schedule of Documents

No.	No of pages	Date	Description	Decision	Relevant public interest consideration(s) against disclosure
1.	05	01.11.2019	Kosciuszko Wild Horse Community Advisory Panel (CAP) – Meeting Minutes	Access granted in part	S 14 cls 1(e)(f) S 14 cls 3(a)(f)
2.	08	09.12.2019	Kosciuszko Wild Horse Community Advisory Panel (CAP) – Meeting Minutes	Access granted in part	S 14 cls 1(e)(f) S 14 cls 3(a)(f)
3.	04	14.02.2020	Kosciuszko Wild Horse Community and Scientific Advisory Panels (CAP & SAP) – Meeting Minutes	Access granted in part	S 14 cls 1(e)(f) S 14 cls 3(a)(f)

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4.	06	14.02.2020	Kosciuszko Wild Horse Community Advisory Panel (CAP) – Meeting Minutes	Access granted in part	Schedule 1 cl 5 S 14 cls 1(e)(f) S 14 cls 3(a)(f)
5.	05	03.03.2020	Kosciuszko Wild Horse Community and Scientific Advisory Panels (CAP & SAP) – Meeting Minutes	Access granted in part	S 14 cls 1(e)(f) S 14 cls 3(a)(f)
6.	04	15.05.2020	Kosciuszko Wild Horse Scientific Advisory Panel (SAP) – Meeting Minutes	Access granted in part	S 14 cls 1(e)(f) S 14 cls 3(a)(f)
7.	08	02.04.2020	Kosciuszko Wild Horse Scientific Advisory Panel (SAP) – Meeting Minutes	Access granted in part	S 14 cls 1(e)(f) S 14 cls 3(a)(f)
8.	06	06.11.2019	Kosciuszko Wild Horse Scientific Advisory Panel (SAP) – Meeting Minutes	Access granted in part	S 14 cls 1(e)(f) S 14 cls 3(a)(f)

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9.	08	17.12.2019	Kosciuszko Wild Horse Scientific Advisory Panel (SAP) – Meeting Minutes	Access granted in part	S 14 cls 1(e)(f) S 14 cls 3(a)(f)
10.	08	13.02.2020	Kosciuszko Wild Horse Scientific Advisory Panel (SAP) – Meeting Minutes	Access granted in part	S 14 cls 1(e)(f) S 14 cls 3(a)(f)
11	07	07.08.2020	Kosciuszko Wild Horse Community Advisory Panel (CAP) – Meeting Minutes	Access granted in part	S 14 cls 1(e)(f) S 14 cls 3(a)(f)
12	05	12.06.2020	Kosciuszko Wild Horse Community and Scientific Advisory Panels (CAP & SAP) – Meeting Minutes	Access granted in part	S 14 cls 1(e)(f) S 14 cls 3(a)(f))
13	176	N/A	Community Advisory Panel Report	Access granted in part	S 14 cls 1(e)(f)

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14	93	September 2020	Final Report of the Kosciuszko Wild Horse Scientific Advisory Panel	Access refused	S 14 cls 1(e)(f)
15	08	February 2020	Post-fire wild horse control in North Kosciuszko	Access granted in part	S 14 cls 1(e)(f)
16	234	December 2020	Aboriginal Cultural Values Report	Access granted in part	S 14 cl5(b)