

# **Bellamy v Transport for NSW**

**NCAT 2018/189716**

## **Submission for the Applicant John Bellamy**

**13 August 2018**

1. The applicant makes the following submissions.
2. That the NSW Civil and Administrative Tribunal (**NCAT**) determine the application as originally made by the applicant to TfNSW on 16 December 2016 and responded to by TfNSW in determinations made on 23 January 2017, 21 July 2017 and 31 January 2018.

3. Specifically that the NCAT review the decision on the following grounds;

**Ground 1:** Review the limited access provided to Document 1

**Ground 2:** Review the determination of Document 2 being 'out of scope'

**Ground 3:** Review the applicability of the 'cabinet in confidence' claim for documents 3,4, 6,7, 8 and 9.

**Ground 4:** Review whether adequate searches have been conducted.

4. The 16 December 2016 application was in the following terms:

*1. Information revealing:*

*a. The licensed and forecast average operational loadings for the light rail vehicles in the morning peak hour from 8am-9am on the CSELR*

*b. The number of buses to be replaced by the light rail vehicles in the morning peak hour from 8am-9am*

*c. The licensed and average operational capacities of those buses*

*2. Documents revealing the details of any traffic modelling undertaken for the CSELR project. In this respect I specifically seek information which is not subject to cabinet-in confidence provisions, which contains any of the following information:*

*a. Cost/benefit analysis between light rail and electric buses*

*b. Cost/benefit analysis between light rail and business-as-usual (eg. our current buses)*

*c. Forecast likely average light rail journey time from Kingsford to the City and Randwick to the City*

## Timeline

16 December 2016	Applicant makes an access application to TfNSW for information relating to, in summary, the traffic modelling for the CBD Light Rail
23 January 2017	Determination made by TfNSW to release nothing and refer application to documents on the respondent's webpage. <b>Attached as Appendix 1</b>
24 February 2017	Applicant seeks review by the IPC
6 April 2017	IPC finds that the respondent should make further searches <b>Attached as Appendix 2</b>
21 July 2017	Respondent identifies 9 documents, 6 of which are cabinet in confidence. However access is refused to all information. <b>Attached as Appendix 3</b>
31 July 2017	Applicant seeks review of second decision by the IPC
12 December 2017	IPC find second decision by TfNSW not justified and requests review. <b>Attached as Appendix 4</b>
31 January 2018	Respondents releases 157 pages of 758 page SCATISM report, finds another document out of scope, another publicly available, and 6 documents which are all said to be Cabinet in confidence <b>Attached as Appendix 5</b>
31 January 2018	Applicant requests further review by IPC
14 May 2018	IPC finds the TfNSW decision to be justified and declines to make a recommendation.

	<b>Attached as Appendix 6</b>
19 June 2018	Applicant files for an external review by NCAT
23 July 2018	NCAT case conference sets submissions and hearing dates

**Summary of information released/not released.**

5. The documents referred to in this submission have been numbered in accordance with the table released on 21 July 2017 – and replicated below.

Document 1	End State SCATISM Modelling Transport Modelling Assessment (GTA Consultants) August 2016	Overriding public interest against disclosure. Access to the document is refused (see Schedule B and C and Paragraph 9)
Document 2	Strategic Plan – Options Identification Report (Booz&Co) January 2016	This document considers several different alignments, resulting in a short list route of options and does not fall within the terms of your request. This document is out of scope.
Document 3	Strategic Plan – Integrated Transport and Land Use Milestone 5: Option Assessment (Booz&Co) July 2012	Cabinet information. Document out of scope (see Schedule A)
Document 4	Strategic Plan – Integrated Transport and Land Use Milestone 5: Options Assessment Volume II Appendices (Booz&Co) July 2012	Cabinet information. Partly out of scope. Access to information that is in scope has been refused (see Schedule A).
Document 5	Transport Operations Report (Booz&Co) June 2013	This document is publicly available at <a href="http://sydneylightrail.transport.nsw.gov.au/library">http://sydneylightrail.transport.nsw.gov.au/library</a> - go to 'Environment and Planning Documents' / 'Environmental Impact Statement Modifications and

		Approvals' / 'Technical Papers 1 & 2'
Document 6	Strategic Plan – Transport Network Context (Trevor Townson Consulting) November 2011	Cabinet information. This document is out of scope (see Schedule A)
Document 7	Rapid Economic Appraisal Addendum Report 2: Bus Comparator (PWC) July 2012	Cabinet information. This document is out of scope (see Schedule A)
Document 8	CBD Bus and Traffic Network Plan for Light Rail – Discussion Paper (TfNSW) July 2012	Cabinet information. Access refused (see Schedule A)
Document 9	CBD Bus and Traffic Paramics Modelling (SKM) July 2012	Cabinet information. This document is out of scope (see Schedule A)

6. On 31 January 2018 (**Appendix 5**) in response to the IPC's second review, TfNSW releases 157 pages (some of which are redacted) of a 756-page document. NO further information is released.

Page Ref.	Information	Act Ref.	Access
5-46, 53-114 and 731-756	<i>Sydney CBD and South East Light Rail End State SCATSIM Modelling Transport Modelling Assessment</i> dated 26 August 2016 (ref 16S1465000), (identified by the IPC as pages 1-42, 50-115 and 731-756)	s14 Table 4(c)(d)	Partial

7. The above document is summarized in the 31 January decision as containing;

#### *4.4 Characteristics of the information*

*4.4.1 I understand that the report and modelling results represent an initial forecast of light rail travel times and network performance. The report is based on a model developed in 2013 and incorporates traffic demand assumptions from that time. Accordingly, the background assumptions for traffic volume demands across the network do not reflect current network performance and traffic volume demand.*

*4.4.2 The modelling report does not take into account the reduction in traffic demand and congestion since 2015. I understand that this is due to the Travel Choices Program which TfNSW launched in 2015, which has achieved an 11 per cent*

*reduction in the number of inbound vehicles to the CBD and a 9.4 per cent increase in public transport use for trips into the Sydney CBD during the morning peak period.*

*4.4.3 For this reason, the forecast traffic impacts are higher than they are expected to be after construction. I understand that the light rail travel time and network performance will be revised after detailed design work on intersections has been completed.*

*4.4.4 I have not taken the characteristics of the information into account when deciding whether to grant access to the information.*

### **Framework of consideration under the *Government Information (Public Access) Act 2009***

8. *D'Adam v New South Wales Treasury* [2014] NSWCATAD 68 provides a convenient summary of the statutory framework when considering the overriding presumption against disclosure if a document has been prepared predominantly for presentation to Cabinet.
9. The object of the GIPA Act is to “maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective” by providing access to government information and, relevantly, restricting such access “only when there is an overriding public interest against disclosure” (s 3). The term “government information” means information contained in a record held by an agency and an “agency” includes a government department.
10. Section 5 of the GIPA Act establishes a presumption in favour of disclosure of government information *unless* there is an overriding interest against disclosure [*emphasis added*]. Section 14(1) provides that it is to be conclusively presumed there is an overriding public interest against disclosure of any of the government information described in Schedule 1. Schedule 1 details the government information to which s 14 applies and includes “Cabinet information” (cl 2). Because of the relevance of this provision to the issues in dispute between the parties, it is convenient to extract this provision in its entirety. Clause 2 provides as follows:

2 Cabinet information

(1) It is to be conclusively presumed that there is an overriding public interest against disclosure of information (referred to in this Act as "**Cabinet information**") contained in any of the following documents:

- (a) a document that contains an official record of Cabinet,
- (b) a document prepared for the dominant purpose of its being submitted to Cabinet for Cabinet's consideration (whether or not the document is actually submitted to Cabinet),
- (c) a document prepared for the purpose of its being submitted to Cabinet for Cabinet's approval for the document to be used for the dominant purpose for which it was prepared (whether or not the document is actually submitted to Cabinet and whether or not the approval is actually given),
- (d) a document prepared after Cabinet's deliberation or decision on a matter that would reveal or tend to reveal information concerning any of those deliberations or decisions,
- (e) a document prepared before or after Cabinet's deliberation or decision on a matter that reveals or tends to reveal the position that a particular Minister has taken, is taking, will take, is considering taking, or has been recommended to take, on the matter in Cabinet,
- (f) a document that is a preliminary draft of, or a copy of or part of, or contains an extract from, a document referred to in paragraphs (a)-(e).

(2) Information contained in a document is not Cabinet information if:

- (a) public disclosure of the document has been approved by the Premier or Cabinet, or
- (b) 10 years have passed since the end of the calendar year in which the document came into existence.

(3) Information is not Cabinet information merely because it is contained in a document attached to a document referred to in subclause (1).

(4) Information is not Cabinet information to the extent that it consists solely of factual material unless the information would:

- (a) reveal or tend to reveal information concerning any Cabinet decision or determination, or
- (b) reveal or tend to reveal the position that a particular Minister has taken, is taking or will take on a matter in Cabinet.

(5) In this clause,

**"Cabinet"** includes a committee of Cabinet and a subcommittee of a committee of Cabinet.

11. Section 106 of the GIPA Act establishes a special procedure for the review of decisions about Cabinet and executive council information and provides as follows:

***106 Decisions about Cabinet and Executive Council information***

(1) On an NCAT administrative review of a decision by an agency that there is an overriding public interest against disclosure of information because the information is claimed to be Cabinet or Executive Council information (as described in Schedule 1), NCAT is limited to deciding whether there were reasonable grounds for the agency's claim and is not authorised to make a decision as to the correct and preferable decision on the matter.

(2) If NCAT is not satisfied, by evidence on affidavit or otherwise, that there were reasonable grounds for the claim, it may require the information to be produced in evidence before it.

(3) If NCAT is still not satisfied after considering the evidence produced that there were reasonable grounds for the claim, NCAT is to reject the claim when determining the review application and may then proceed to make a decision as to the correct and preferable decision on the matter.

(4) NCAT is not to reject the claim unless it has given the Premier a reasonable opportunity to appear and be heard in relation to the matter.

(5) The Premier is a party to any proceedings on an application under this section.

12. The burden in establishing that a decision is justified lies with the agency (s 105(1) of the GIPA Act).

13. *Mannix v Department of Education and Communities* [2014] provides a convenient overview of the statutory framework for matters not involving the conclusive presumption against disclosure for matters identified in Schedule 1 of the GIPA Act.

*8. With respect to government information not covered by overriding secrecy laws, the Act establishes a principle that there is a public interest in favour of disclosure: s12(1). The category of public interest considerations in favour of disclosure is not limited: s 12(2). That subsection then sets out several examples of public interest considerations in favour of disclosure.*

*9. There can be an overriding public interest against disclosure only when the public interest test in s 13 is satisfied. It provides that "There is an overriding public interest against disclosure of the government information for the purposes of this Act if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure".*

*10. In considering whether there is an overriding public interest against disclosure, the tribunal is to be guided by s 15, which provides, relevantly for present purposes, that agencies must exercise their functions so as to promote the objects of the GIPA Act and must have regard to any relevant guidelines issued by the Information Commissioner.*

**Ground 1: With regard to Document 1, TfNSW failure to properly balance the public interest against the claimed adverse affectation on competitive commercial value of information or prejudice a person legitimate business interests.**

14. Document 1 as provided by TfNSW is attached as **Appendix 7**.
15. Page 4 of TfNSW 31 January determination (**Appendix 5**) claims that the considerations found in Clause 4 of the Table in s14 override the presumption for disclosure.
16. The consideration is quoted as:

*4 Business interests of agencies and other persons*

*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: ...*

*(c) diminish the competitive commercial value of any information to any person,*

*(d) prejudice any person's legitimate business, commercial, professional or financial interests,*

17. The third party claimed;

*The third party claims that the disclosure of this information would place it at an unfair disadvantage on other similar projects for which it is competing because it would reveal the journey time methodology, operating parameters and technical principles which are based on its own pre-existing intellectual property. It would also reveal the risk tolerance of the third party.*

18. TfNSW attributed significant weight to these objections.
19. While the factors in s14 are reasons which may be weighed against disclosure the balancing exercise required by s13 must be undertaken.
20. There is significant public interest in the CSELR project.
21. In November 2016 the NSW Auditor General released a report into the City and South East Light Rail (**Attached as Appendix 8**).
22. A quote from the summary of the audit report from the Auditor General's website is copied below:

*Transport for NSW did not effectively plan and procure the CBD and South East Light Rail (CSELR) project to achieve best value for money according to a report released today by NSW Auditor-General, Margaret Crawford.*



*Transport for NSW is on track to deliver the project, but it will come at a higher cost with lower benefits than in the approved business case.*

*The project's business case summary was published in November 2013, estimating a cost of \$1.6 billion. However, the budget had increased by \$549 million to \$2.1 billion when Transport signed the main works public private partnership contract in December 2014. Some of this increase was due to scope changes and planning modifications, but the majority - \$517 million - was due to mispricing and omissions in the business case.*

23. The Auditor General's recommendations were:

**Recommendations**

1. For the CSELR project, Transport for NSW should, by December 2016:
  - a. finalise outstanding design and scope issues
  - b. ask the project Advisory Board to confirm that controls over the budget and use of contingency funds are consistent with NSW Government decisions and NSW Treasury guidelines
  - c. update and consolidate information about project costs and benefits and ensure that it is readily accessible to the public
  - d. ensure the Sydney Light Rail Project Director provides six-monthly briefings to the TfNSW Audit and Risk Committee.
2. For all capital projects, Transport for NSW should comply with the Infrastructure Investor Assurance Framework.

24. It is the updated information regarding costs and benefits referred to in Recommendation 1(c) which the applicant is seeking.

25. Evaluation of costs and benefits necessarily includes information on estimated journey times and the capacity of the light rail and buses.

26. The applicant submits that it is open to the Tribunal to release information which may prejudice a person's legitimate business interest if after conducting the balancing test, it finds the public interest outweighs those private interests.

27. In *Nature Conservation Council of NSW v Department of Trade and Investment, Regional Infrastructure and Services* [2012] NSWADT 195 at [196 - 198], the Tribunal found in relation to 4(c) & (d) that the public interest in the sale of NSW's forest assets merited the disclosure of contract prices for timber. The decision found;

*196. I have found that there are public interest considerations both in favour of disclosure and against disclosure. The public interest considerations*

*against disclosure are to be weighed against the public interest considerations in favour of disclosure.*

*197. I consider that there is a strong public interest consideration favouring disclosure of the redacted information in order to increasing the financial accountability of the First Respondent. I agree with the Applicant that there is a clear public interest in an agency that is dealing with public assets being accountable for the manner in which it contracts to sell those assets. This interest is strengthened by the fact that the Agreements were entered under a system that did not involve an open tender.*

*198. I also consider that there is a strong public interest consideration favouring disclosure of the redacted information in order to further public policy development around the management of the publicly owned hardwood forest estate in NSW.*

28. Nature Conservation Council was also a case in which a NSW Auditor General's report (on NSW Forestry) was brought to the attention of the Tribunal. At [138] the Tribunal found:

*I agree that the possibility that disclosure of the redacted information may result in critical scrutiny of the issues highlighted by the NSW Auditor-General's report is a consideration in favour of disclosure.*

29. It is the applicant's submission that that substantially more of Document 1 should be released after conducting a proper balancing of the public interest of a \$2.1bn project about which there is doubt and confusion regarding the estimated travel times and capacity; against the private interest of prejudice to legitimate business interests.

30. With regard to Clause 4(c) *diminish the competitive commercial value of any information to any person*, Nature Conservation Council found, at [200] that there was an argument against disclosure as a result of the potential commercial disadvantage to the relevant businesses.

31. However Judicial Member Montgomery went on to say that the public interest outweighed those factors [204].

32. The applicant submits that even if disclosure of modelling techniques or other technical data would place a third party at a competitive disadvantage the resulting forecast could still be disclosed.

## Ground 2: Is Document 2 out of scope?

33. If the Document 2 has been identified by the respondent during searches for material answering the original application it does not follow that it is out of scope.
34. The applicant requests the Tribunal review the determination that Document 2 is out of scope.

## Ground 3: Cabinet documents

35. An overriding presumption against disclosure is claimed for documents 3,4, 6,7,8 and 9. In addition documents 3,4, 6, 7,and 9 are claimed to be out of scope or partly out of scope.

Document 1	End State SCATISM Modelling Transport Modelling Assessment (GTA Consultants) August 2016	Overriding public interest against disclosure. Access to the document is refused (see Schedule B and C and Paragraph 9)
Document 2	Strategic Plan – Options Identification Report (Booz&Co) January 2016	This document considers several different alignments, resulting in a short list route of options and does not fall within the terms of your request. This document is out of scope.
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Document 4	Strategic Plan – Integrated Transport and Land Use	Cabinet information. Partly out of scope. Access to information that is in

	Milestone 5: Options Assessment Volume II Appendices (Booz&Co) July 2012	scope has been refused (see Schedule A).
Document 5	Transport Operations Report (Booz&Co) June 2013	This document is publicly available at <a href="http://sydneylightrail.transport.nsw.gov.au/library">http://sydneylightrail.transport.nsw.gov.au/library</a> - go to 'Environment and Planning Documents' / 'Environmental Impact Statement Modifications and Approvals' / 'Technical Papers 1 & 2'
Document 6	Strategic Plan – Transport Network Context (Trevor Townson Consulting) November 2011	Cabinet information. This document is out of scope (see Schedule A)
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Document 8	CBD Bus and Traffic Network Plan for Light Rail – Discussion Paper (TfNSW) July 2012	Cabinet information. Access refused (see Schedule A)
Document 9	CBD Bus and Traffic Paramics Modelling (SKM) July 2012	Cabinet information. This document is out of scope (see Schedule A)

36. The applicant accepts the extent of the conclusive presumption against disclosure as found in *D'Adam v New South Wales Treasury and the Premier of New South Wales* [2015] NSWCATAP which said regarding cl 2 (1) (b).

*60. We are persuaded by the construction contended by the appellant. In our view, it is clear from the language of cl 2(1)(b) that the information protected is the information contained in "a document prepared for the dominant purpose of its being submitted to Cabinet for Cabinet's consideration" [emphasis added]. As stated by the appellant at para [20] of his written submissions in the appeal,*

*The word “its” can only refer to the “document”. Therefore, for clause 2(1)(b) to operate, the document containing the information must have been submitted or prepared for submission to Cabinet. In turn, the “information” referred to in the chapeau must be contained within that document. Had the legislature intended the protection in clause 2 to cover information appearing in documents other than those referred to in clauses 2(1)(a)-(e), it would have been expected that the clause would refer (relevantly) to “information prepared for the dominant purpose of its being submitted to Cabinet for Cabinet’s consideration”.*

37. However given the tortured history of this application and the initial reluctance of TfNSW to even find these documents existed the applicant requests the Tribunal to review whether or not they are out of scope; and if they have been created for the dominant purpose of informing Cabinet.

38. Given the technical titles of the majority of the documents for which a conclusive presumption against disclosure is claimed the applicant seeks the Tribunal view on the application of Schedule 1 (3) & (4) of the GIPA Act as copied below:

- (3) Information is not Cabinet information merely because it is contained in a document attached to a document referred to in subclause (1).
- (4) Information is not Cabinet information to the extent that it consists solely of factual material unless the information would:
  - (a) reveal or tend to reveal information concerning any Cabinet decision or determination, or
  - (b) reveal or tend to reveal the position that a particular Minister has taken, is taking or will take on a matter in Cabinet.

**Ground 4: Adequacy of searches. Are there only two documents which are not Cabinet in confidence which are within the scope of the application?**

39. In the first Review conducted by the IPC it was found that TfNSW had not conducted adequate searches for the material requested.

40. The IPC found that the two publicly available documents the applicant was referred to themselves referenced a long process engaged in by TfNSW to arrive at the resulting strategy (of light rail).

41. The IPC founded their recommendations in the following way:

*11. When the Information Commissioner reviews whether an agency’s search for information was sufficient, we consider two questions, derived from Smith v Commissioner of Police [2012] NSWADT 85: In making a decision as to the sufficiency of an agency’s search for documents which an applicant claims to exist, there are two questions:*

(a) *Are there reasonable grounds to believe that the requested documents exist and are the documents of the agency; and if so*

(b) *Have the search efforts made by the agency to locate such documents been reasonable in all the circumstances of a particular case*

42. In total TfNSW has found 9 documents, 8 of which are said to be out of scope and/or cabinet in confidence.
43. The applicant submits that it is unusual for a project so large and of such public importance as the CSELR that no emails, memos or other notes have been generated regarding key issues such as journey times and passenger capacity.
44. It would seem to be more logical to assume there would be too much information rather than less than 10 documents.
45. The applicant submits that contrary to the recommendations made by the IPC on 6 April 2017 TfNSW have not made sufficient searches in a way which would enable the Agency and the applicant to understand the extent of information available within the scope of the application.
46. The applicant requests the Tribunal to review the adequacy of the searches conducted by TfNSW in order to arrive at the correct and preferable decision as required by s63 of the *Administrative Decisions Review Act 1997*.
47. **Appendix 9** contains the information still sought and the reasons the applicant believes that TfNSW have the information.

John Bellamy

Date: Tuesday, 14 August 2018