



Review report under the
Government Information (Public Access) Act 2009

Applicant: Mr John Bellamy
Agency: Transport for NSW
Report date: 12 December 2017
IPC reference: IPC17/R000430
Agency reference: TRA-000335
Keywords: Government information – prejudice any persons legitimate
business interests – Cabinet information
Legislation cited: *Government Information (Public Access) Act 2009*
Cases cited: nil

This review has been conducted under delegation by the Information Commissioner pursuant to Section 13 of the *Government Information (Information Commissioner) Act 2009*.

Summary

Mr John Bellamy (the Applicant) applied for information from Transport for NSW (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act). The information sought by the Applicant relates to the light rail including average operational loadings, replacement buses and cost benefit analysis and journey times.

The Agency decided to provide access to some information and refused access to some information because of a conclusive presumption against disclosure and because of an overriding public interest against disclosure.

The Applicant applied for external review on 31 July 2017. The reviewer obtained information from the Agency including the notice of decision and the Agency's GIPA file. The reviewer also viewed Cabinet information at the Agency's office.

The review of the Agency's information and decision concluded that its decision is not justified.

The reviewer recommends the Agency make a new decision in relation to pages 1-42, 50-115 and 731-756 of item 1 in the schedule of documents.

Background

1. The Applicant applied under the GIPA Act to the Agency for access to the following information:
 - 1) *Information detailing:*
 - 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 capacity of those buses.*
 - 2) *Documents revealing the details of any traffic modelling undertaken for the CSELR project. In this respect I specifically seek information seek information which is not subject to cabinet-in-confidence provisions, which contain 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 (e.g our current buses);*
 - c. *Forecast likely average light rail journey time from Kingsford to the City and Randwick to the City.*
2. In its decision on internal review issued on 21 July 2017, the Agency decided to refuse access to some information because of a conclusive presumption against disclosure (cabinet-in-confidence) and to refuse access to some information because of an overriding public interest against disclosure.
3. In seeking a review of the decision by the Information Commissioner, the Applicant stated that he requires:

...the current information and not information from 2011 and 2012. All of these documents would clearly be out of date.

Decision under review

4. The Information Commissioner has jurisdiction to review the decision made by the Agency pursuant to section 89 of the GIPA Act.
5. The decision under review is the Agency's decision to:
 - a. Refuse access to some information because of a conclusive presumption against disclosure; and
 - b. To refuse access to some information because of an overriding public interest against disclosure.
6. These are reviewable decisions under section 80(d) of the GIPA Act.
7. The issues that arise in this review are in relation to the application of the conclusive presumption against disclosure (Cabinet information), searches, and the application of the public interest test.

Conclusive presumption against disclosure

8. In the notice of decision the Agency refused access to documents numbered 3,4,6,7,8 and 9 in the schedule of documents because it decided that the information is cabinet information.
9. In this regard the Agency relies on Schedule 1 clause 2 of the GIPA Act which provides:

*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)
10. On 3 November 2017 two officers from the Information and Privacy Commission attended the office of the Agency to view the documents to which the claim of Cabinet information has been made.
11. Based on the information provided by the Agency at this meeting and careful inspection of the documents I am satisfied that the information was prepared for the dominant purpose of being submitted to Cabinet for Cabinet's consideration.
12. In this regard the report (Sydney Light Rail Strategic Plan) was prepared as a step in the planning process to confirm feasibility of the light rail route. This would be put to Cabinet. The report would form the foundation for the ongoing work on the light rail and inform the next phase of development. It was used by senior staff to develop a further proposal for cabinet. The appendices to the report matched those identified in the notice of decision's schedule of documents.

The public interest test

13. The Applicant has a legally enforceable right to access the information requested, unless there is an overriding public interest against disclosing the information (section 9(1) of the GIPA Act). The public interest balancing test for determining whether there is an overriding public interest against disclosure is set out in section 13 of the GIPA Act. For further information on the public interest test, see the information resource sheet at the end of this report.

Public interest considerations in favour of disclosure

14. In its notice of decision, the Agency listed the following public interest considerations in favour of disclosure of the information in issue:
 - a. The presumption in favour of disclosure of government information (section 5 of the GIPA Act);
 - b. Promoting open discussion of public affairs or contributing to positive and informed debate on issues of public importance;
 - c. Enhancing government accountability;

15. I remind the Agency that there is the general right of persons to access government information (section 12(1) of the GIPA Act) that must always be considered in the application of the public interest test.

Public interest consideration against disclosure

16. In its notice of decision the Agency raised the following public interest consideration against disclosure of the information, deciding that its release could reasonably be expected to prejudice any person's legitimate business, commercial or financial interests.

Consideration 4(d) – prejudice any person's legitimate business, commercial professional or financial interests

17. For guidance on the application of clause 4(d) of the table at section 14 as a public interest consideration against disclosure, see the information resource sheet at the end of this report.
18. This consideration has been applied to item 1 in the schedule of documents titled Sydney CBD and South East Light Rail End State SCATISM Modelling Transport Modelling Assessment.
19. This document is a 756 page report regarding signal processing and timetables for the Sydney Light Rail project. It includes key summaries, comments and questions from other agencies such as Roads and Maritime Services, traffic flow plans and operational controller information.
20. In the notice of decision the Agency states:
I am of the view that if the information were to be disclosed competitors would have the opportunity to use the operational model to their advantage to diminish ALTRAC's competitiveness in the marketplace.
21. In my view this concern is diminished given that this is an extremely large contract which has already been awarded to Altrac. Altrac is a consortium of businesses awarded to deliver Sydney's new light rail line from Circular Quay to Kensington. The project has commenced with significant infrastructure and increases the consortium's stakes in the light rail business within Sydney after it took over operation of the Inner West Light Rail network. This makes it less likely that a competitor could use the information to an advantage, at least in regards to the current projects managed by Altrac which are the only current light rail projects within the city.
22. In the notice of decision the Agency states:
To the extent ALTRAC's Operational Model is proprietary information and relevant elements can be discerned or reverse engineered from the Modelling Assessment, revealing that information could diminish the commercial value of ALTRAC's intellectual property in its Operational Model.
23. The applicable consideration regarding diminishing commercial value is consideration 4(c) of the table to section 14 of the GIPA Act. This consideration has not been raised by the Agency in its internal review. In any event much of the information contained in the report is information of a general nature or is information which summarises findings. I am not satisfied that information of this nature could be discerned or reverse engineered in the manner suggested by the Agency or that this action could be reasonably expectable.
24. I have reviewed the information and I am not satisfied that consideration 4(d) applies to the entire document. In particular I am not satisfied that consideration

4(d) of the table to section 14 of the GIPA Act applies to pages 1-42, 50-115 and 731-756.

25. In relation to the pages referred to above I recommend the Agency make a new decision.

Balancing the public interest

26. In its balancing of the public interest test the Agency has afforded a medium weighting to considerations it identified in favour of disclosure.
27. In relation to considerations identified against disclosure the Agency attributed a high weighting.
28. Given the significant infrastructure and tax payer capital investment in a project like the Sydney light rail project I am not satisfied the Agency's application of these weightings is justified.
29. In my view it is reasonable to assert that the significant investment and public interest in this project ought to suggest a weighting more significant than medium regarding to the promotion of open discussion of public affairs as well as the enhancement of government accountability.
30. The object of the GIPA Act is to open government information to the public (section 3) unless there is an overriding public interest against disclosure.
31. Taking section 3 of the GIPA Act into consideration I am not satisfied that the Agency's application of the public interest test in this instance is justified.

Concerns of the Applicant

32. The Applicant voiced concerns with the Information and Privacy Commission (IPC) regarding the currency of the information identified by the Agency. In this regard I requested information from the Agency regarding the updated figures being sought by the Applicant.
33. In particular I asked the Agency regarding any updates to the Cabinet information (including where this information may be held) because the Cabinet documents identified by the Agency are a number of years old.
34. I also asked about information regarding any updated modelling that may have been relied on because of comments made in the legislative council (30 August 2016).
35. The Agency advised it did not request information regarding any updates to the Cabinet information because this information would attract the conclusive presumption against disclosure regarding Cabinet information. I accept that any such updates would be information subject to the provisions found under Schedule 1 clause 2 of the GIPA Act relating to Cabinet information.
36. The Agency also advised that there is no updated modelling information held. I am satisfied that no updated modelling information is held because in my view the comments made in the legislative council on 30 August 2016 I referred to above relate to information contained within item 1 in the schedule of documents provided with the notice of decision.

Conclusion

37. On the information available, I am not satisfied that the Agency's decision under review is justified in its entirety.

Recommendation

38. I recommend under section 93 of the GIPA Act that the Agency make a new decision in relation to pages 1-42, 50-115 and 731-756 of the Sydney CBD and South East Light Rail End State SCATISM Modelling Transport Modelling Assessment.
39. I ask that the Agency advise the Applicant and the IPC by 21 December 2017 of the actions to be taken in response to our recommendation.

Applicant review rights

40. This review is not binding and is 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.
41. The Applicant has the right to ask the NCAT to review the Agency's decision.
42. An application for a review by the NCAT 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
Administrative and Equal Opportunity Division
Level 10, John Maddison Tower
86-90 Goulburn Street,
Sydney NSW 2000

Phone: 1300 006 228

Website: <http://www.ncat.nsw.gov.au>
43. 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 NCAT.

Completion of this review

44. This review is now complete.
45. If you have any questions about this report please contact the Information and Privacy Commission on 1800 472 679.

Lee Fisher
Investigation and Review Officer



What is the public interest test?

Fact sheet
January 2016

The right to information system in New South Wales aims to foster responsible and representative government that is open, accountable, fair and effective.

Under the *Government Information (Public Access) Act 2009* (GIPA Act), all government agencies must disclose or release information unless there is an overriding public interest against disclosure. When deciding whether to release information, staff must apply the public interest test. This means, they must weigh the factors in favour of disclosure against the public interest factors against disclosure.

Unless there is an overriding public interest against disclosure, agencies must provide the information. There are some limited exceptions to this general rule, for example where dealing with an application would constitute a significant and unreasonable diversion of an agency's resources.

Applying the public interest test

The public interest test involves three steps:

1. Identify the relevant public interest considerations in favour of disclosure
2. Identify the relevant public interest considerations against disclosure
3. Determine the weight of the public interest considerations in favour of and against disclosure and where the balance between those interests lies.

Step 1: Identify the relevant public interest considerations in favour of disclosure

The GIPA Act (section 12) provides examples of factors that agencies may consider in favour of disclosure. These are:

- promoting open discussion of public affairs, enhancing government accountability or contributing to positive and informed debate on issues of public importance;
- informing the public about the operations of agencies and, in particular, their policies and practices for dealing with members of the public;
- ensuring effective oversight of the expenditure of public funds;

- the information is personal information of the person to whom it is to be disclosed; and
- revealing or substantiating that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.

This is not an exhaustive list and agencies may identify other factors in favour of disclosure.

The Information Commissioner may also issue guidelines on additional considerations favouring disclosure.

Step 2: Identify the relevant public interest considerations against disclosure

The GIPA Act (section 14) provides an exhaustive list of public interest considerations against disclosure. These are the **only** considerations against disclosure that agencies may consider in applying the public interest test.

Considerations are grouped under the following headings:

- Responsible and effective government
- Law enforcement and security
- Individual rights, judicial processes and natural justice
- Business interests of agencies and other persons
- Environment, culture, economy and general matters
- Secrecy provisions specifically provide in other legislation
- Exempt documents under interstate Freedom of Information legislation.

The GIPA Act says that in applying the public interest test, agencies are **not** to take into account:

- that disclosure might cause embarrassment to, or loss of confidence in, the government or an agency
- that any information disclosed might be misinterpreted or misunderstood by any person.



SECTION 14: Public interest consideration against disclosure

Consideration 4(d) – prejudice business interests

Clause 4(d) of the table to section 14 of the GIPA Act provides:

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice any person's legitimate business, commercial, professional or financial interests

In order to establish the relevance of this consideration, the agency must:

- a. identify the relevant legitimate interest; and
- b. explain how the interest would be prejudiced if the information was disclosed.

The meaning of the word prejudice is to “cause detriment or disadvantage”.

Our view is that the relevant meaning of “legitimate” for the purposes of this consideration is its ordinary meaning; that is genuine and not spurious.¹

In particular, an agency must identify the party whose interests would be prejudiced, and the relevant interest/s. In order to justify the application of the consideration, an agency must demonstrate the causal nexus between the disclosure of the information and the prejudice to that interest.

¹ Macquarie Dictionary, 6th edition, October 2013