



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

Applicant: Mr John Bellamy
Agency: Transport for NSW
Report date: 14 May 2018
IPC reference: IPC18/R000065
Agency reference: TRA-000335
Keywords: Government information - Diminish the competitive commercial value of any information to any person - Prejudice any person's legitimate business, commercial, professional or financial interests
Legislation cited: *Government Information (Public Access) Act 2009; Freedom of Information Act 1989*
Cases cited: *Hall v Department of Premier and Cabinet (NSW)* [2012] NSWADT 46

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 CBD and South East Light Rail (CSELR) project.

The Agency decided to provide access to some information with redactions.

The Applicant applied for external review on 10 February 2018. The reviewer obtained information from the Agency including the notice of decision and the Agency's GIPA file.

The review of the Agency's information and decision concluded that its decision is justified.

The reviewer makes no recommendation to the Agency.

Background

1. The Applicant applied under the GIPA Act to the Agency for access to the following information:
 - “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 CSLELR 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”.*
2. In its decision at first instance dated 23 January 2017, the Agency decided that the information had been made publicly available and was therefore already available to the Applicant.
3. In its external; review report dated 6 April 2017, the IPC found that there were reasonable grounds to believe further information exists and recommended under section 93 of the GIPA Act that the Agency make a new decision. The IPC recommended that the Agency conduct further reasonable searches to locate any government information falling within the scope of the Applicant’s request.
4. In its internal review dated 21 July 2017 the Agency decided to refuse access to some information due to a conclusive presumption against disclosure (cabinet-in-confidence) and to refuse access to some information due to an overriding public interest against disclosure (clause 4(d) of the table to section 14 of the GIPA Act).
5. In its external review report dated 12 December 2017 the IPC found the Agency’s application of clause 4(d) was not justified. The IPC recommended under section 93 of the GIPA Act that the Agency make a new decision in relation to the *Sydney CBD and South East Light Rail End State SCATSIM Modelling Transport Modelling Assessment* (SCATSIM report), pages 1-42, 50-115 and 731-756.
6. In its decision dated 31 January 2018 the Agency states it limited its decision to the recommendations made by the IPC on 12 December 2017 in relation to the SCATSIM report. In its decision the Agency decided to provide access to some information with redactions.
7. On 10 February 2018 the Applicant sought a further review of the Agency’s decision by the Information Commissioner. In seeking a review the Applicant raised concerns relating to the adequacy of the Agency’s searches. In submissions made to the Information Commissioner, the Applicant also raised concerns relating to information over which a conclusive presumption against

disclosure had been claimed on the basis that the requested information was classified as cabinet information.

8. It is not the purpose of this review to contend previous determinations made by the IPC or reconsider any matters previously considered by the IPC in earlier reports. The purpose of this review is to consider the Agency's current decision of 31 January 2018.
9. On this basis, the IPC's review has been limited to the Agency's decision to refuse access to information contained in pages 1-42, 50-115 and 731-756 of the *Sydney CBD and South East Light Rail End State SCATSIM Modelling Transport Modelling Assessment*, hereon referred to as the SCATSIM report.

Decisions under review

10. The Information Commissioner has jurisdiction to review the decision made by the Agency pursuant to section 89 of the GIPA Act.
11. The decision under review is the Agency's decision to refuse to provide access to information in response to an access application.
12. This is a reviewable decision under section 80(d) of the GIPA Act.

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 resource sheet at the end of this report (Annexure A).

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. 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 matters of public importance; and
 - b. Disclosure of the information could reasonably be expected to inform the public about the operations of agencies and, in particular, their policies and practices for dealing with members of the public.
15. I agree that these are valid considerations in favour of public disclosure.

Public interest considerations against disclosure

16. In its notice of decision the Agency raised the following public interest considerations against disclosure of the information, deciding that its release could reasonably be expected to:
 - a. Diminish the competitive commercial value of any information to any person (clause 4(c) of the table to section 14 of the GIPA Act); and
 - b. Prejudice any person's legitimate business, commercial, professional or financial interests (clause 4(d) of the table to section 14 of the GIPA Act).

17. I will discuss each of these considerations in turn.

Consideration 4(c) - diminish the competitive commercial value of any information to any person

18. For guidance on the application of clause 4(c) of the table at section 14 as a public interest consideration against disclosure, see the Public Interest Consideration (PIC) Resource attached to this report (Annexure B).
19. In its notice of decision the Agency states that in response to this access application it conducted consultation with third party entities pursuant to section 54 of the GIPA Act.
20. Under section 54 of the GIPA Act, the Agency may also be required to consult third parties if the information is of a kind requiring consultation. The Information Commissioner has issued a guideline about consultation under section 54 of the GIPA Act, which is available on our website at www.ipc.nsw.gov.au.
21. The Agency states that a third party objected to the disclosure of Part 4.3 of the SCATSIM report as disclosure of this information would reveal its journey time methodology, operating parameters and technical principles thereby diminishing its competitive commercial position. The Agency states that the third party also objected to disclosure of Part 4.5 of the SCATSIM report as information contained therein represents in part, commercial arrangements that the third party was considering accepting at the time of the report. The third party submits that if details of its proposed journey times and associated risk tolerance were released, it would diminish its competitive commercial position.
22. In its analysis of the third party's views and in its balancing of the public interest test, the Agency states it considered advice provided by the third party which indicates it is currently competing for other similar projects where the operating parameters and technical principles will be a factor in its bid for those projects. The Agency found that if this information were disclosed it could be used by competitors to tailor bids thereby posing an unfair disadvantage to the third party.
23. Based on the above, the Agency determined to redact information contained in pages 24-27, 29-31 and 36 of the SCATSIM report. The Agency also determined to redact information contained in pages 728-730 of the SCATSIM report as information contained in those pages relates to information contained in Part 4.3 and Part 4.5 of the SCATSIM report.
24. In the case of *Hall v Department of Premier and Cabinet (NSW)* [2012] NSWADT 46 ("*Half*"), the Tribunal held that in connection with the previous *Freedom of Information Act 1989* (FOI Act), for information to have a "commercial value" there should be "*some uniqueness attaching to the information that justifies it being treating it as exclusive, secret or confidential*".
25. I have reviewed the information in issue and I am satisfied that the information contains details of operating parameters and technical principles used by the third party to analyse and assess the light rail and road network performance. After considering the information in issue I am satisfied that, as recognised in the case of *Hall*, there is a uniqueness attached to the information which provides the third party with a competitive edge and justifies it being treated as exclusive, secret or confidential.
26. I am further satisfied that disclosure of the information could be reasonably be expected to diminish the competitive commercial value of this information. This

is because the information could be used by the third party's competitors to tailor bids for similar or competing projects thereby diminishing the competitive edge this information provides to the third party.

27. Based on the above, I am satisfied consideration 4(c) is a valid consideration against disclosure of the information.

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

28. For guidance on the application of clause 4(d) of the table at section 14 as a public interest consideration against disclosure, see the PIC Resource attached to this report (Annexure C).
29. In its notice of decision the Agency states that after consultation under section 54 of the GIPA Act, a third party objected to the disclosure of Part 4.3 and Part 4.5 of the SCATSIM report. The third party states that disclosure of the information would place it at an unfair disadvantage on other similar projects for which it is competing as journey time methodology, operating parameters, risk tolerance and technical principles (which are based on the third party's own pre-existing intellectual property) would be revealed.
30. In its analysis of the third party's views and in its balancing of the public interest test, the Agency states it considered advice provided by the third party which indicates it is currently competing for other similar projects where the operating parameters and technical principles will be a factor in its bid for those projects. The Agency found that if this information were known to competitors it could be used to tailor bids to make them more competitive thereby posing an unfair disadvantage to the third party.
31. Based on the above, the Agency determined to redact information contained in pages 24-27, 29-31 and 36 of the SCATSIM report. The Agency also determined to redact information contained in pages 728-730 of the SCATSIM report as it relates to information contained in Part 4.3 and Part 4.5.
32. Under the previous FOI Act, the reference to business affairs of a person or Agency was held to relate to the affairs of a business undertaking which is carried on in an organised way (whether it be full-time or only intermittent) with the purpose of obtaining profits or gains (whether or not they actually be obtained).
33. Although commissioned by the Agency for the purpose of analysing and assessing the light rail and road network performance, I am satisfied that information contained within the SCATSIM report relates to the legitimate business affairs of the third party. I am further satisfied that the prejudicial effect described by the third party and supported by the Agency, could reasonably be expected to occur. In that, if details of the third party's operating parameters and technical principles were disclosed, it could be used by competitors to tailor bids in competing projects. This in turn could have an adverse effect on the Agency's ability to successfully compete for similar projects, thereby affecting its ability to obtain profits or gains (whether or not actually obtained).
34. Based on the above, I am satisfied consideration 4(d) is a valid consideration against disclosure of the information.

Conclusion

35. On the information available, I am satisfied that the Agency's decision under review are justified in relation to its application of clause 4(c) and 4(d) of the table at section 14.

Recommendation

36. I make no recommendations to the Agency.

Applicant review rights

37. 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.
38. The Applicant has the right to ask the NCAT to review the Agency's decision.
39. 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>

Completion of this review

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

Tihara Clayton

Investigation and Review Officer