



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

Applicant:	Paul Scully MP
Agency:	Transport for NSW
Report date:	12 January 2018
IPC reference:	IPC17/R000558
Agency reference	TRA000515
Keywords:	Government information – prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency’s functions – prejudice the effective exercise by an agency of the agency’s functions – found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence – undermine competitive neutrality in connection with any functions of an agency – diminish the competitive commercial value of any information to any person – prejudice business interests – expose any person to an unfair advantage or disadvantage as a result of premature disclosure of information
Legislation cited:	<i>Government Information (Public Access) Act 2009</i>
Cases cited:	<i>Applicants v Commissioner of Police</i> [2015] NSWCATAD 22 <i>Camilleri v Commissioner of Police (NSW)</i> [2013] NSWADT 80 <i>Watt v Forests NSW</i> [2007] NSWADT 197 <i>Richards v Commissioner, Department of Community Services</i> (2011) NSWADT 98 [40]

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 Paul Scully MP (the Applicant) applied for information from Transport for NSW (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act). The Applicant is seeking access to a final business case.

The Agency refused access to the requested information.

The Applicant applied for external review on 19 October 2017. 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 not justified.

The reviewer recommends the Agency make a new decision.

Background

1. The Applicant applied under the GIPA Act to the Agency for access to the following information:

A copy of the document referred to in media reports by ABC Illawarra on 7 August 2017 as the Maldon to Dombarton Final Business Case.
2. The Agency undertook searches and located one document entitled 'Maldon to Dombarton Rail Link Final Business Case, June 2014' as falling within the scope of the application.
3. In its decision at first instance issued on 13 October 2017, the Agency refused to provide the requested information to the Applicant.
4. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that he is seeking release of the refused information.

Decision under review

5. The Information Commissioner has jurisdiction to review the decision made by the Agency pursuant to section 89 of the GIPA Act.
6. The decision under review is the Agency's decision to refuse access to the information.
7. This is a reviewable decision under section 80(d) of the GIPA Act.

The public interest test

8. 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.

Public interest considerations in favour of disclosure

9. In its notice of decision, the Agency listed the following public interest considerations in favour of disclosure of the information in issue:
 - a. The general public interest in favour of disclosing government information;
 - b. 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; and
 - c. Disclosure of the information could reasonably be expected to inform the public about the operations of agencies.

Public interest considerations against disclosure

10. 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. prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency's functions (clause 1(d) of the table to section 14 of the GIPA Act);
 - b. prejudice the effective exercise by an agency of the agency's functions (clause 1(f) of the table to section 14 of the GIPA Act);
 - c. found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence (clause 1(g) of the table to section 14 of the GIPA Act);
 - d. undermine competitive neutrality in connection with any functions of an agency (clause 4(a) of the table to section 14 of the GIPA Act);
 - e. diminish the competitive commercial value of any information to any person (clause 4(c) of the table to section 14 of the GIPA Act);
 - f. prejudice any person's legitimate business, commercial, professional or financial interests (clause 4(d) of the table to section 14 of the GIPA Act); and
 - g. expose any person to an unfair advantage or disadvantage as a result of premature disclosure of information (clause 5(e) of the table to section 14 of the GIPA Act).
11. I will discuss each of these considerations in turn.

Consideration 1(d) – prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency functions

12. For guidance on the application of clause 1(d) of the table at section 14 of the GIPA Act as a public interest consideration against disclosure, see the information sheet attached to this report.
13. This public interest consideration against disclosure requires a consideration of whether the information a) facilitates the effective exercise of the respondent's functions and b) whether its disclosure could reasonably be expected to prejudice the supply of such information in future.
14. In its notice of decision the Agency states:

Further, having regard to the small group of industry stakeholders, the release of the Document could prejudice the supply of further confidential information to TfNSW in the future as these stakeholders would be less inclined to provide this type of information to TfNSW for future projects.
15. In its notice of decision the Agency does not address whether the age of the information affects this consideration or how it would affect the future supply of the information. It also does not address whether the Agency relies on the information being voluntarily provided or whether the Agency has other means of obtaining the information. In the matter of *Applicants v Commissioner of Police* [2015] NSWCATAD 22 the NSW Civil and Administrative Tribunal of NSW ('NCAT') determined that this consideration did not apply where obligations under another Act required persons to provide the information.

16. On this basis I am not satisfied that the Agency has justified its use of this consideration.

Consideration 1(f) – prejudice the effective exercise by an agency of the agency's functions

17. For guidance on the application of clause 1(f) of the table at section 14 of the GIPA Act as a public interest consideration against disclosure, see the information sheet attached to this report.
18. In its notice of decision the Agency states:

I understand that this particular rail line has not been constructed, and that no decision has necessarily been made about its construction. As such, I understand that the information contained within the document could be relied upon to assess a Registration of Interest or Request for Tender for external service providers, or to measure or assess internal costings and procurement by a government agency for its construction.
19. In *Camilleri v Commissioner of Police (NSW)* [2013] NSWADT 80 the Tribunal held ‘...the test is not whether a particular person whose confidential information is being considered for disclosure could reasonably be expected to refuse to supply such information in future, but whether the agency would be able to obtain such information in future.’ Having reviewed the information I consider that this appears to be a relevant public interest consideration.
20. However there is insufficient analysis in relation to whether the release of the information ‘could reasonably be expected’ to have this effect given the age of the information, whether predicted construction costs are already in the public domain, and where sensitive information could possibly be redacted.
21. On this basis I am not satisfied that the Agency has justified its use of this consideration.

Consideration 1(g) – found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence

22. For guidance on the application of clause 1(g) of the table at section 14 of the GIPA Act as a public interest consideration against disclosure, see the information sheet attached to this report.
23. The Agency determined that some of the information contained within the document was obtained from ‘private rail operators’ and ‘freight owners.’ This information is said to have been provided to the Agency in confidence. Furthermore, the Agency identified that this information relates directly to the business activities of private rail operators and freight owners.
24. The Agency also identified the document contains information which was received from ‘other government agencies’ which was provided on a confidential basis. The identity of the other government agencies is not disclosed, nor is the nature of the information further described. Specific terms of confidentiality deeds were not analysed as part of the decision.
25. I have located information within the document which appears to have been provided to the Agency by ‘private rail operators’, ‘freight owners’ and ‘other government agencies.’ There is no information before me to indicate whether the release of this information ‘could reasonably be expected to’ found an action against the Agency. Relevant considerations to establish this causal relationship include, but are not limited to: whether the information remains

current or is out of date, whether it has already been publicly released and whether it is subject to a confidentiality contract or deed.

26. On this basis I am not satisfied that the Agency has justified its use of this consideration.

Consideration 4(a) – undermine competitive neutrality in connection with any functions of an agency

27. Clause 4(a) of the table at section 14 of the GIPA Act states:

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) *undermine competitive neutrality in connection with any functions of an agency in respect of which it competes with any person or otherwise place an agency at a competitive advantage or disadvantage in any market*

28. In order to establish that this consideration applies, the Agency must demonstrate that:

- a. the Agency competes with another person in a market, and
- b. disclosing the information would either
 - i. undermine competitive neutrality in connection with a function of the Agency in the market, or
 - ii. place the Agency at a competitive advantage or disadvantage in the market.

29. The Agency notes the release of the document:

...could reasonably place TfNSW at a competitive disadvantage through the premature release of the government information and prejudice its business interests. The public interest considerations contained in 4(a), (c) and (d) would seem to apply.

30. This reasoning does not sufficiently address the elements of this public interest consideration against disclosure as outlined above, in that this consideration only 'seem to apply.' Additionally, it is unclear which information consider 4(a) applies to. Given the size of the document this can be achieved by describing the category or type of information this public interest consideration is said to apply to.

31. On this basis I am not satisfied that the agency has justified this decision.

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

32. For guidance on the application of clause 4(c) of the table at section 14 of the GIPA Act as a public interest consideration against disclosure, see the information sheet attached to this report.

33. The Agency's reasoning as to how this public interest consideration applies is as follows:

...release of the Document could reasonably place TfNSW at a competitive disadvantage through the premature release of the government information and prejudice its business interests. The public interest considerations contained in 4(a), (c) and (d) would seem to apply.

34. Having read the information I consider that this public interest consideration could apply to parts of the document. However, given the project has not been implemented and the information is over three years old, the notice of decision needs to assess the current competitive commercial value of any information currently. In the matter of *Watt v Forests NSW [2007] NSWADT 197* the Tribunal noted that royalty rates which were more than 3 years old were not current so disclosure would not impact on its commercial value.
35. On this basis I am not satisfied that the agency has justified this decision.

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

36. For guidance on the application of clause 4(d) of the table at section 14 of the GIPA Act as a public interest consideration against disclosure, see the information sheet attached to this report.
37. Having carefully reviewed the document I accept that some of the information contained within the document would appear to reveal the criteria which the Agency uses to determine costings and procurement. I accept that consideration 4(d) is a relevant consideration.
38. Nevertheless the decision does not sufficiently describe the information this public interest consideration applies to the prejudice that would be caused by the release of the information.
39. On this basis I am not satisfied that the Agency has justified its use of this consideration.

Consideration 5(e) – expose any person to an unfair advantage or disadvantage as a result of premature disclosure of information

40. I consider this public interest consideration against disclosure relates to the commercial value of information contained within the document. In its notice of decision the Agency identifies a scenario where analysis of predicted construction costs could give an unfair advantage or disadvantage to a person. A person in this case is likely to be a person competing in a tender process.
41. I accept that some of the information contained within the document would appear to reveal cost estimates which a person could use to their advantage. In non-specific terms, if a government agency estimates a cost for a product or service as falling within a range a contractor could take advantage of this information to secure the maximum amount the agency was willing to pay. This could obviously disadvantage other prospective contractors.
42. Nevertheless the Agency has not established how this consideration applies to the information. The analysis also does not address the issue of the age of the information and how this affects the usefulness of construction cost estimates currently.
43. On this basis I am not satisfied that the Agency has justified its use of this consideration.

Concerns of the Applicant

44. The Agency is reminded to consider whether information contained within the document can be deleted or redacted, particularly in relation to considerations consideration (1)(f), (1)(g), (4)(d) and (5)(e) of the table to section 14 of the GIPA Act.

45. Section 74 of the GIPA Act provides:

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.

46. The Applicant has raised concerns with the Information and Privacy Commission (IPC) regarding the possibility that information contained in the report has already been publicly released.
47. I consider this to be a valid concern. I note in this regard the document contains information concerning the authors of the project, the long history of the project, information provided by other government agencies, photographs and maps which may already be in the public domain. On page 163 of the document I note a photograph is publicly available at <http://australianmuseum.net.au>.
48. The Applicant refers to a news article in the Sydney Morning Herald on 14 July 2017 (which I have located as being dated 13 July 2017) which would also appear to reveal the costings of the project.
49. If information in a record has already been disclosed, it cannot then be "revealed", as defined in clause 1 of Schedule 4 GIPA Act, by giving access under the GIPA Act. In *Richards v Commissioner, Department of Community Services* (2011) NSWADT 98 [40] the Tribunal decided that the issue to be considered regarding whether release of information is likely to 'reveal' information, is whether the 'information' had been publicly disclosed. The Tribunal formed the view that if the information contained in a record has been disclosed, it cannot be "revealed" by giving access under the GIPA Act.
50. The Applicant has also raised the concern that some of the information contained in the document is now out of date.
51. This is potentially relevant to an assessment of the current and future commercial and confidential value of the information. Information which was once confidential or commercially valuable can lose this character over time, increasing the weight to be given to public interest considerations in favour of release.
52. The Applicant has also expressed concern that NSW government has relied upon or may be relying upon out-of-date information. In this regard the Applicant has indicated concerns being raised about the age of the information during Budget Estimates Committee hearings recorded in Hansard on 6 September 2017. I note the Agency is not limited in the matters it may take into account in favour of disclosure. This would appear to be a relevant consideration raised by the Applicant on external review. In any future review undertaken by the Agency I recommend the Agency take into account such considerations.

Conclusion

53. On the information available, I am not satisfied that the Agency's decision to refuse access to the information is justified.

Recommendation

54. I recommend under section 93 of the GIPA Act that the Agency make a new decision in relation to each of the identified public interest considerations against disclosure.
55. I ask that the Agency advise the Applicant and the IPC within 10 working days of the actions to be taken in response to our recommendations.

Applicant review rights

56. 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.
57. The Applicant has the right to ask the NCAT to review the Agency's decision.
58. 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>

59. 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

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

Bronwyn Veselovsky

Senior Investigation and Review Officer