



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

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<b>Applicant:</b>	<b>Mr Kelvin Bissett (Channel 9)</b>
<b>Agency:</b>	<b>NSW Police Force</b>
<b>OIC reference:</b>	<b>11-202</b>
<b>Date review request received:</b>	<b>4 July 2011</b>
<b>Date of report:</b>	<b>21 October 2011</b>

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**A Summary of report**

1. Mr Bissett requested information from the NSW Police Force (the Police) regarding traffic safety breaches by trucking companies. The Police released some statistical information to Mr Bissett but decided that there is an overriding public interest against disclosing a list of the ten trucking companies with the worst traffic safety breaches.
2. We have reviewed the decision made by the Police and are not satisfied that the public interest test was properly applied to the information requested by Mr Bissett as the information was not available to the decision maker at the time of processing the access application.
3. We therefore recommend that the Police review the requested information and make a new decision on Mr Bissett's access application. Our reasons for this are explained in this report.

**B Access application and decision**

4. Mr Bissett made a formal access application to the Police on 16 May 2011. He asked for the following information:
  - 1 "A copy of the list showing the 10 trucking companies with the worst traffic safety breaches.

- 2 Total number of speeding offences issued to heavy vehicles in the 2010 calendar year.
  - 3 Total number of occasions heavy vehicle drivers were found by police to be in excess of the .05 blood alcohol limit in the 2010 calendar year.”
5. The Police made a decision about the access application within the required time period and sent Mr Bissett a notice of decision on 7 June 2011.
  6. The information requested in points 2 and 3 of the application was released to Mr Bissett. The decision to release that information is not disputed and has not been reviewed by our office.
  7. The Police decided that there is an overriding public interest against disclosure of the information requested in point 1. This is a reviewable decision under section 80(d) of the GIPA Act.
  8. Mr Bissett asked our office to review the decision not to release the information from point 1. We received his request on 4 July 2011.
  9. In conducting this review, we spoke with Mr Bissett and with the Police who both provided us with further information.

### **C Authority to make decisions under the GIPA Act**

10. The Police provided us with their file in relation to Mr Bissett’s access application. The information that Mr Bissett requested is not contained in that file.
11. The Police have confirmed that the decision maker, who holds the delegated authority to make decisions under section 9(3) of the GIPA Act, has not seen the list of trucking companies. His decision was made based on recommendations from another unit within the Police. It has also been confirmed that the officers who made the recommendations not to release the information do not have a delegated power to make decisions under the GIPA Act.
12. We are not satisfied that the decision maker was able to properly apply the public interest test without seeing the information that was requested. Mr Bissett has requested a “list showing the ten trucking companies with the worst traffic safety breaches”. This suggests that he is looking for a list of ten company names. However, the Police decision suggests that the list contains other information, such as the names of individuals or information that would reveal the identity of an informant. There is a discrepancy between the information described in the application and in the decision. The decision maker should identify public interest considerations against disclosure based on the information itself and not on recommendations from someone else who is not delegated to make decisions under the GIPA Act.
13. We therefore recommend that the Police make a new decision about Mr Bissett’s access application. The decision maker should see the information before making that decision so that they can identify any public interest considerations against disclosure and properly apply the public interest test. To assist the Police in making a new decision, we have provided a brief overview of the public interest test and the public interest considerations that they have already raised.
14. We do not consider there to have been improper conduct in this instance. However, we are concerned that this practice enlivens a risk of improperly influencing a decision maker to decide an access application in a certain way, which is an offence under section 118 of the GIPA Act. We therefore encourage the Police to address this practice as a matter of priority.

## D The public interest test

15. Pursuant to section 9(1) of the GIPA Act, Mr Bissett has a legally enforceable right to access the information that he requested unless there is an overriding public interest against disclosure of that information.
16. The Police must apply the public interest test to determine whether there is an overriding public interest against disclosure of the information. The test is set out in section 13 of the GIPA Act:

There is an **overriding public interest against disclosure** of 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.
17. When applying the public interest test, NSW Police should begin with the general presumption in favour of the disclosure of government information provided for at section 5 of the GIPA Act.
18. NSW Police should then:
  - a. identify the public interest considerations in favour of disclosure;
  - b. identify any public interest considerations against disclosure;
  - c. determine the weight of the public interest considerations in favour of and against disclosure; and
  - d. determine where the balance between the considerations lies.

## E Public interest considerations in favour of disclosure

19. Section 5 of the GIPA Act provides that there is a general presumption in favour of the disclosure of government information unless there is an overriding public interest against disclosure. There is also a general public interest in favour of the disclosure of government information, from section 12(1) of the GIPA Act.
20. While the GIPA Act does not limit the public interest considerations that may be taken into account in favour of disclosure, the notes to section 12(2) of the GIPA Act set out some examples of such considerations.
21. We agree with NSW Police and Mr Bissett that the disclosure of this 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 (section 12(a) of the GIPA Act).
22. Earlier this year, Assistant Police Commissioner John Hartley made public statements about the existence of a list of the ten trucking companies with the worst traffic safety records. A report published in the *Sunday Telegraph* on 1 May 2011 quoted from Mr Hartley, saying that “[t]he month of May will be a major focus on heavy vehicles for us [the Police]”, with an operation targeting speeding, drug use and fatigue amongst truck drivers.<sup>1</sup> The list of trucking companies was not released to the public.

## F Public interest considerations against disclosure

23. The only public interest considerations against disclosure that may be taken into account when applying the public interest test are those set out in the table to section 14 of the

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<sup>1</sup> <http://www.dailytelegraph.com.au/news/blitz-on-cowboy-truckies/story-e6freuy9-1226047598968> (accessed 14 October 2011)

GIPA Act. To establish that a consideration against disclosure applies, it must be shown that the disclosure of the information "...could reasonably be expected to have ....the effect" outlined in the table.

24. NSW Police raised three public interest considerations against the disclosure of the list of truck companies.

**Section 14 table 2(a) (reveal the identity of an informant)**

25. The Police decided that it could reasonably be expected that the disclosure of the list of trucking companies would:

Reveal or tend to reveal the identity of an informant or prejudice the future supply of information from an informant.

26. Mr Bisset has not asked who provided the information to the Police or how the Police compiled the list. We are not satisfied that just releasing the names of the truck companies could reasonably be expected to reveal or tend to reveal the identity of an informant or prejudice the future supply of information from an informant.

**Section 14 table 2(b) (prejudice law enforcement)**

27. The Police decided that it could reasonably be expected that the disclosure of the list of trucking companies would:

Prejudice the prevention, detection or investigation of a contravention or possible contravention of the law or prejudice the enforcement of the law.

28. The Police said in their decision that the information is part of an ongoing investigation and that its release would prejudice current enforcement operations. In order to apply this consideration, the Police should show *how* the release of the list would prejudice or adversely affect law enforcement or the prevention, detection or investigation of a contravention or possible contravention of the law. If the consideration applies, the weight that it holds will be affected by the likelihood of any prejudice.

**Section 14 table 3(a) (reveal personal information)**

29. The Police decided that it could reasonably be expected that the disclosure of the list of trucking companies would:

"Reveal an individual's personal information" (section 14 table 3(a) of the GIPA Act)

30. We do not consider that the names of companies are personal information for the purposes of the GIPA Act (see definition in section 4 schedule 4).

**G Balancing the public interest**

31. We are not satisfied that NSW Police properly applied the public interest test to the information that Mr Bissett requested.

## **H Final recommendations**

32. The Information Commissioner makes the following recommendations:

- a. pursuant to section 93 of the GIPA Act, that the Police review the requested information and make a new decision on the access application by way of internal review, within 15 days of the date of this report;
- b. that the Police waive the fee payable for an internal review by exercising their discretion under section 127 of the GIPA Act;
- c. that the Police consider the issues raised in this report when making the new decision; and
- d. that the Police release the information to Mr Bissett unless it can be shown that there is an overriding public interest against its disclosure.

## **I Review rights**

33. Our recommendations are not binding and are not reviewable under the GIPA Act.

34. If Mr Bissett is dissatisfied with:

- a. our recommendations, or
- b. NSW Police's response to the recommendations,

then he may ask the ADT to review the original decision made by NSW Police.

35. An application for ADT review can be made within four weeks of this report, that is by 18 November 2011.

36. If NSW Police makes a new reviewable decision as a result of our review, Mr Bissett will have new review rights attached to that decision. He will have eight weeks from the date of the new decision to request an external review by the OIC or ADT.

## **J Questions?**

37. This review is now closed.

38. If you have any questions about this report please contact us on 1800 472 679.

