



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

Applicant:	Ms H
Agency:	Transport for NSW
OIC reference:	11-209
Date review request received:	13 July 2011
Date of this report:	28 March 2012

Summary of this report

1. Ms H seeks access to information held by Transport for NSW (Transport) about a decision not to compulsorily acquire properties in Leamington Avenue, Holdsworth Street and Pine Street, Newtown as part of the Western Express Project.
2. This review has raised issues about Cabinet information, sufficiency of searches, and the way in which Transport dealt with Ms H's application. Her original request for information was quite extensive and Transport advised her that she would need to reduce the scope of her request so that it could deal with it. With Transport's assistance, Ms H reduced the scope of her application. The result was that three documents were found to contain information related to the application. Transport decided that there is a conclusive presumption against any releasing of the information to Ms H because it is Cabinet information.
3. For the reasons outlined in this report, we cannot be independently satisfied that the information is Cabinet information and therefore subject to a conclusive presumption against disclosure. Further, while the original searches are well documented, we cannot see how Transport came to the conclusion that the only information it holds in relation to Ms H's rescope application is the information contained in the Cabinet documents.
4. We therefore recommend that Transport make new searches for information in relation to Ms H's application. It is also open to Transport to meet with Ms H and assist her to scope a new access application.
5. We note that Transport has prepared a letter for Ms H that may help to address some of her questions and concerns. We encourage Transport to give the letter to Ms H as a way of providing her with additional information.

Background

6. Ms H belongs to a not for profit association that campaigns on behalf of owners and residents of the Pines Estate Heritage Conservation Area in relation to existing and future rail and other infrastructure projects. She made her access application on behalf of her association.
7. In February 2010, the former NSW Government released the Metropolitan Transport Plan. Part of that plan was the Western Express Project, which considered potential realignments for the City Relief Line. Confidential government information about the possible acquisition of properties in Leamington Avenue was given to residents through an anonymous letter-box drop in June 2010. In response to concerns raised by residents, Transport assessed various options and concluded that Leamington Avenue would not be required for the project.
8. The association was notified of this decision in two ways:
 - a. a letter from the then Member for Marrickville, Carmel Tebbutt, dated 30 August 2010; and
 - b. a letter from the former Minister for Transport, John Robertson, dated 8 September 2010.
9. The association is looking for information that shows the reasons for, and basis on which, the decision was made not to acquire properties in Leamington Avenue, Pine Street and Holdsworth Street. According to Ms H and the association, owners and residents of properties in those streets were directly affected by the decision and the uncertainty that preceded it. They are financially impacted by continued uncertainty about whether the new Government will acquire the properties, and purchasers have been hesitant to buy homes in the area given the lack of documented evidence that the homes will not be acquired.
10. On 11 March 2011, Ms H made an informal application to Transport for information about the decision.
11. On 28 March 2011, on Transport's request, Ms H submitted a formal access application for the same information. Transport acknowledged her request as a valid access application on the same day. Ms H asked for:

The following information is requested (being information that came into existence between 3 June 2010 and 30 September 2010):

- 1 All information relating to the investigations, analyses, engineering and design work referred to in the attached correspondence from Minister Robertson and Minister Tebbutt or otherwise related to the CRL [Central Relief Line] and NED [North Eveleigh Dive], including but not limited to:
 - a. the scope of work of such investigations, analyses, engineering and design work;
 - b. any reports or other documents recording the outcomes of such investigations, analyses, engineering and design work (including preliminary and final versions of such reports or documents);
 - c. any advice and or recommendations prepared as a result of such investigations, analyses, engineering and design work; and
 - d. any advice and or recommendations prepared in respect of property requirements and implications arising from the CRL and NED.

- 2 All information concerning the compulsory acquisition (or possible or proposed compulsory acquisition) of properties in Leamington Avenue and Pine and Holdsworth Streets, Newtown, including information that concludes the properties are not required to be acquired.
 - 3 All communications between TNSW/Railcorp and the Redfern Waterloo Authority concerning the NED and rail infrastructure/corridor requirements for the CRL and WEP on the North Eveleigh Site.
12. Transport decided that dealing with Ms H's access application would require an unreasonable and substantial diversion of its resources. In accordance with section 60(4) of the GIPA Act, Transport gave Ms H a reasonable opportunity to amend the scope of her application. In a letter dated 20 April 2011, Transport outlined the estimated work involved to deal with the application and asked Ms H to reduce the scope so that Transport could process it.
13. Following conversations between Transport and Ms H, they agreed to a new scope for the application:
- 1 Documents that record the decision and detail the reasons why the properties (Leamington Avenue) no longer need to be acquired; and
 - 2 Documents that detail where the preferred rail alignment is for the Western Express/City Relief Line.
14. On that basis, and with an agreed extension of time, Transport decided Ms H's application. In a notice of decision dated 30 May 2011, Transport informed Ms H of its decision. Three documents were identified as containing information that falls within the revised scope of the application. Transport decided that none of the information could be released, as it is all Cabinet information and therefore subject to a conclusive presumption against disclosure.

Our review

15. On 13 July 2011, Ms H asked us to review Transport's decision, including:
- a. the decision to refuse to deal with her application (this is a reviewable decision under section 80(c) of the GIPA Act)
 - b. the decision to refuse to provide access to information in response to her access application (this is a reviewable decision under section 80(d) of the GIPA Act), and
 - c. the way in which Transport dealt with her application, in particular its role in narrowing the scope of her application.
16. We note that Transport did not make a decision to refuse to deal with Ms H's decision. Asking Ms H to reduce the scope of her application did not of itself constitute a decision to refuse to deal with the application, rather it satisfied the requirement to allow an applicant an opportunity to amend an application before making such a decision.
17. We have therefore not reviewed the decision that the original application would constitute an unreasonable and substantial diversion of Transport's resources. We have, however, looked at how Transport dealt with Ms H's access application.
18. In line with our mandate to act in an informal manner as far as is possible (section 15(a) of the GIIC Act), we first tried to resolve this matter informally by proposing a facilitated meeting between the parties. However, it became evident that the matter would not be resolved informally and that we would need to take a more formal approach. For

example, unforeseen issues arose about verifying information as Cabinet information. Further, we understand that Transport has faced some difficulties in responding to our requests for information, given that the staff who were involved in making the original decision are no longer working in those roles.

19. This report therefore addresses three main issues:

- a. whether there is a conclusive presumption against the disclosure of all of the information,
- b. the sufficiency of the searches conducted by Transport, and
- c. the way that Transport handled Ms H's application, in particular the way in which her application was rescoped.

Conclusive presumption against disclosure of Cabinet information

20. Under section 14(1) and clause 2 of schedule 1 to the GIPA Act, it is to be conclusively presumed that there is an overriding public interest against disclosure of Cabinet information.

Cabinet information generally

21. Clause 2 of schedule 1 to the GIPA Act sets out the types of documents that contain Cabinet information. If information falls within one of those categories, then it may be that there is a conclusive presumption against its disclosure. However, before deciding that a conclusive presumption applies, an agency must first consider whether the information contained in such documents is solely factual in nature. Clause 2(4) of schedule 1 to the GIPA Act provides:

- (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.

22. An agency must also consider the contents of any attachments to Cabinet information. Information is not Cabinet information merely because it is contained in a document attached to a document referred to in clause 2(1) of schedule 1 to the GIPA Act (clause 2(3) of schedule 1 to the GIPA Act).

23. Under section 97 of the GIPA Act, it is an agency's responsibility to justify a decision that information is Cabinet information. Before we can uphold a decision to refuse access to the information, or make recommendations against a decision, we must be independently satisfied that information has been properly categorised by the agency. There are three ways in which agencies can show us that information is Cabinet information:

- a. by providing the information to the Information Commissioner;
- b. by providing the Information Commissioner with a Cabinet certificate, as described in section 30(2) of the *Government Information (Information Commissioner) Act 2009* (GIIC Act); or

- c. by providing the Information Commissioner with a detailed description of the information and evidence to show that it falls within clause 2 of schedule 1 to the GIPA Act.
24. The Information Commissioner cannot require the production of Cabinet information (section 30(1) of the GIIC Act). If an agency chooses to provide Cabinet information to the Information Commissioner for the purposes of a review, the information will not be disclosed, in accordance with section 91 of the GIPA Act.
25. The Information Commissioner can, however, require the production of a Cabinet certificate.

Transport's decision

26. Transport decided that there is a conclusive presumption against disclosure of the information in the three documents because it is Cabinet information. Transport categorised the information in those records as information of the type described in clause 2(1)(b) of Schedule 1 to the GIPA Act, being:
 - 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).
27. To show that the conclusive presumption against disclosure applies in this instance, we need to be satisfied that:
 - a. the information in the documents was prepared for the dominant purpose of its being submitted to Cabinet;
 - b. the information in the attachments was prepared for the dominant purpose of its being submitted to Cabinet; and
 - c. the information is not purely factual, or if it is, that its release would have the effect outlined in clause 2(4)(a) or (b) of schedule 1 to the GIPA Act.
28. We agree that Cabinet minutes are prepared for the dominant purpose of being submitted to Cabinet. However, we do not know enough about the contents of the minutes, or the attachments, to be independently satisfied that all of the information is Cabinet information.
29. We asked Transport to provide us with the information, on a confidential basis, or with a certificate issued by the Director-General or Deputy Director-General (General Counsel) of the Department of Premier and Cabinet (DPC), as conclusive evidence that the records contain or would reveal Cabinet information (section 30(2) of the GIIC Act).
30. Transport decided not to provide us with the information. As previously stated, the Information Commissioner cannot require the production of Cabinet information. We respect Transport's decision not to allow us to see the information.
31. Transport was unable to obtain a Cabinet certificate from DPC. DPC has also told us that it will not be issuing Cabinet certificates for the purpose of all of our reviews. We note that the fact that DPC will not provide Transport with the necessary certificate does not of itself show that the information is not Cabinet information.
32. We have therefore reached a point where we cannot make an independent assessment of the information and whether the conclusive presumption applies. In the absence of a Cabinet certificate, and not having viewed the information or been provided with sufficient information about, and evidence of, the nature of the information, we cannot be independently satisfied that the information is in fact Cabinet information.

33. We therefore cannot uphold, or recommend against, Transport's decision that there is a conclusive presumption against release of all of the information. This is not a particularly satisfactory outcome for Ms H and it highlights ongoing issues involving Cabinet information and the extent to which the Information Commissioner can independently review such information.
34. We have decided to proceed with this review based on the information currently available to us, without the withheld information or a Cabinet certificate. However, we will follow up the issue of DPC refusing to provide Cabinet certificates to government agencies through a separate process.

Searches for information

35. We are satisfied that Transport performed adequate and reasonable searches for information relating to Ms H's original access application. Transport provided her with a detailed outline of the searches performed and the results that came back. This showed the extent of the searches done and the large number of documents that would need to be reviewed by Transport staff in order to ascertain whether the information related to her application. It was also set out to help her to reduce the scope of the application to a more manageable size that would not result in an unreasonable and substantial diversion of Transport's resources.
36. One of the main issues that arose on review was how Transport narrowed the original search results to just three documents. Following discussions between Transport and Ms H, the scope of the access application was reduced to two key points. From the original searches, Transport identified only three documents that contain information relating to the revised application.
37. We asked Transport to provide us with evidence of the way in which the large number of search results was narrowed following the amendment of Ms H's application, and of any searches done after the date of the revised application. We understand that this was difficult for Transport to do, given that the officers who dealt with Ms H's access application are no longer working in those roles. Transport gave us an outline of what is assumed to have happened: that the new scope of the application was conveyed verbally to the Principal Manager, Program Governance, Infrastructure Division. In response, the Principal Manager provided the relevant information to the Information Officers. The information provided is the three sets of 'Cabinet Minutes and attachments', as identified in the final decision.
38. From the information we have, it is not clear how Transport decided that only three documents contain information that relates to Ms H's amended access application. There is no evidence that demonstrates how the original search results were assessed in order to narrow the results to three documents. We cannot be satisfied that Transport has identified all information that it holds that falls within the scope of the application and we therefore recommend that Transport redo the searches based on the revised scope.
39. We understand that the outcome of the searches may well be the same, which would not be particularly helpful for either party. If that is the case then we encourage Transport to speak with Ms H about the application and the information she is looking for. In particular, it may be useful for Ms H to speak with someone from the Infrastructure Division. It would then be open to Ms H to make a new access application.

Rescoping Ms H's application

40. Agencies have a general obligation to provide advice and assistance to a person who seeks access to information that is or may be made publicly available, under section 16 of the GIPA Act. They are also required to provide an applicant with a chance to amend the scope of an access application before deciding to refuse to deal with the application because it would constitute an unreasonable and substantial diversion of the agency's resources (section 60(4) of the GIPA Act). However, the GIPA Act does not provide guidance on the extent to which an agency should assist an applicant to word or scope an access application.
41. In this instance, Transport helped Ms H to reduce the scope of her request so that it could deal with the application. It appears that Ms H relied on Transport's assistance, in particular the fact that Transport suggested an amended scope for the application, as a representation that the new scope would result in her being given access to the information. She therefore did not expect to receive a decision that refused to provide access to any information. Agencies should be careful when assisting applicants to ensure that they do not create false expectations about what information will and will not be released.
42. We are satisfied that Transport acted in good faith in trying to help Ms H to reduce the scope of her access application. The outcome is unfortunate, in that no information could be released to her, however we do not consider that Transport intended or foresaw that result.
43. Transport's assistance is also reflected in the thorough notices of decision that were given to Ms H, and Transport's recognition of the numerous public interest considerations in favour of disclosure of the information. We also understand that Transport has drafted a letter to Ms H that addresses some of her concerns and reasons for requesting the information. Transport has not yet sent the letter to Ms H, as this review was ongoing. We recommend that it now be provided to her.

Our recommendations

44. As discussed, we can neither uphold nor recommend against the decision that there is a conclusive presumption against disclosure of the information because it is Cabinet information.
45. We recommend:
 - a. Transport conduct new searches for information that relates to Ms H's revised access application.
 - b. Transport consider meeting with Ms H to discuss the information she is looking for. It may be beneficial for her to speak with someone from the Infrastructure Division, as that Division holds the information and an officer from there may be able to assist her to identify documents, other than Cabinet documents, that hold the information she seeks. It would then be open to Ms H to make a new access application.
 - c. Transport provide Ms H with the letter that it drafted addressing some of her concerns.
46. We ask that Transport advise Ms H and us by **4 April 2012** of the actions it intends to take in response to our recommendations.

Review rights

47. Our recommendations are not binding and are not reviewable under the GIPA Act. However a person who is dissatisfied with a reviewable decision of an agency may apply to the Administrative Decisions Tribunal (ADT) for a review of that decision.
48. If Ms H is dissatisfied with:
- a. our recommendations, or
 - b. Transport's response to the recommendations,
- then Ms H may ask the ADT to review the original decision of the agency.
49. An application for ADT review can be made up to 20 working days from the date of this report (that is by **30 April 2012**). After this date, the ADT can only review the decision if it agrees to extend the deadline.
50. For information about the process and costs associated with a review by the ADT, please contact the ADT. The ADT's contact details are:
- Administrative Decisions Tribunal
Level 10, 86 Goulburn Street,
Sydney, NSW, 2000
Telephone (02) 9377 5711
Facsimile (02) 9377 5723
TTY (02) 9377 5859
Internet <http://www.lawlink.nsw.gov.au/adt>
e-mail ag_adt@agd.nsw.gov.au
51. If Transport makes a new reviewable decision as a result of our review, Ms H 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 OIC or ADT.

Closing our file

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