



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

Applicant: Garry Miller  
Agency: Sydney Trains  
Report date: 30 September 2014  
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### Contents

Summary .....	2
Background.....	2
Decision under review .....	2
The public interest test.....	2
Public interest considerations in favour of disclosure.....	3
Public interest considerations against disclosure .....	3
Consideration 3(a) – reveal an individual’s personal information.....	4
Consideration 3(b) – contravene an information protection or health privacy principle .....	5
Third Party Consultation .....	5
Notices of decisions.....	6
Recommendations.....	6
Review rights .....	6
Completion of this review .....	7

## Summary

1. Mr Garry Miller (the Applicant) applied for information from the Sydney Trains (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided to provide access to some information in full, provide access to some information with redactions and refuse access to some information in full.
3. The Information Commissioner recommends that the Agency reconsider its decision in relation to Attachment 23 by way of internal review.

## Background

4. The Applicant applied under the GIPA Act to the Agency for access to information about the Agency's investigation of the Applicant for alleged assault.
5. In its decision issued on 12 March 2014, the Agency decided to provide access to some information in full, provide access to some information with redactions and refuse access to some information in full. The information identified as falling within the scope of the application included written documents and CCTV footage.
6. The Agency provided a Schedule of Documents with the notice of decision. The Schedule contained an itemised list of the information considered with brief descriptions of each item. The CCTV footage is numbered Attachment 23 to Document 1 (Attachment 23).
7. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that he presses for access to the Attachment 23 only.

## Decision under review

8. The decision under review is the Agency's decision to refuse access to Attachment 23. This review does not consider the Agency's decisions in relation to other information falling within the scope of the application.

## The public interest test

9. 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.
10. The general public interest consideration in favour of access to government information set out in section 12 of the GIPA Act means that this balance is always weighted in favour of disclosure. Section 5 of the GIPA Act establishes a presumption in favour of disclosure of government information.
11. Before deciding whether to release or withhold information, the Agency must apply the public interest test and decide whether or not an overriding public interest against disclosure exists for the information.
12. Section 13 requires decision makers to:

- a. identify relevant public interest considerations in favour of disclosure,
  - b. identify relevant public interest considerations against disclosure,
  - c. attribute weight to each consideration for and against disclosure, and
  - d. determine whether the balance of the public interest lies in favour of or against disclosure of the government information.
13. The Agency must apply the public interest test in accordance with the principles set out in section 15 of the GIPA Act.

### **Public interest considerations in favour of disclosure**

14. Section 12(1) of the GIPA Act sets out a general public interest in favour of disclosing government information, which must always be weighed in the application of the public interest test. The Agency may take into account any other considerations in favour of disclosure which may be relevant (s12(2) GIPA Act).
15. 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 issues of public importance;
  - 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;
  - c. the information includes the Applicant's personal information;
  - d. the information includes the Applicant's correspondence with the Agency; and
  - e. the information concerns an investigation carried out by the Agency into the Applicant's conduct as an Agency employee which had been finalised at the time the access application was decided.
16. These considerations appear to be relevant to the application and their use is justified. Points c and e appear to be the most relevant to the CCTV footage.

### **Public interest considerations against disclosure**

17. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
18. In order for the considerations against disclosure set out in the table to section 14 of the GIPA Act to be raised as relevant, the Agency must establish that the disclosure of the information *could reasonably be expected to have the effect* outlined in the table.
19. The words "could reasonably be expected to" should be given their ordinary meaning. This requires a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from irrational, absurd or ridiculous, to expect the effect outlined.
20. In its notice of decision the Agency raised two public interest considerations against disclosure of Attachment 23, deciding that its release could reasonably be expected to:

- a. reveal an individual's personal information (clause 3(a) of the table to section 14 of the GIPA Act); and
  - b. contravene an information protection principle under the *Privacy and Personal Information Protection Act 1998* (clause 3(b) of the table to section 14 of the GIPA Act);
21. I will discuss each of these considerations in turn.

**Consideration 3(a) – reveal an individual's personal information**

22. Clause 3(a) of the table at section 14 as a public interest consideration against disclosure states:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to reveal an individual's personal information.*

23. Personal information is defined in the GIPA Act as being:

*...information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual (whether living or dead) whose identity is apparent or can reasonably be ascertained from the information or opinion. [Schedule 4(4)(1) GIPA Act]*

24. Section 15(b) of the GIPA Act provides that agencies must have regard to any relevant guidelines issued by the Information Commissioner when determining whether there is an overriding public interest against disclosure.

25. The Information Commissioner has published *Guideline 4 – Personal information as a public interest consideration under the GIPA Act* in December 2011. This Guideline sets out what is meant by 'personal information' in the GIPA Act and includes (in paragraph 1.2) examples of what should be considered personal information.

26. In order to establish that this consideration applies, the Agency has to:
- a. identify whether the information is personal information; and
  - b. consider whether the information would be revealed by disclosing it under the GIPA Act.

27. Attachment 23 is CCTV footage of an incident that the Applicant was allegedly involved in. Other people are visible in the footage. It is apparent from both the Applicant's application and the investigation documents that the identity of several people in the footage is known to both the Applicant and the Agency. Therefore Attachment 23 contains information of people whose identity is apparent and who are not the applicant. The first limb of the test is satisfied.

28. The Agency considered the issue of revealing information relating to the investigation generally (but not Attachment 23 specifically) and stated that the information had not been made publicly available previously. It supported this by stating that information had been provided to it on a confidential basis and that all information relating to the investigation was kept confidentially. This includes information that was collected from within the Agency. There is no evidence that Attachment 23 has already been disclosed. I am satisfied that the information would be revealed if disclosed under the GIPA Act. The second limb of the consideration is satisfied and the application of consideration 3(a) is justified.

### **Consideration 3(b) – contravene an information protection or health privacy principle**

29. Clause 3(b) 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 have one or more of the following effects:*

...

*(b) contravene an information protection principle under the Privacy and Personal Information Protection Act 1998 or a Health Privacy Principle under the Health Records and Information Privacy Act 2002*

30. If an agency relies on clause 3(b) of the table to section 14 as a consideration against disclosure, it must demonstrate a reasonable expectation that an information protection principle or health privacy principle would be contravened by disclosure of the information.
31. It is not sufficient to simply assert that such a contravention would occur. The agency must identify the principle/s that would be contravened and show how the disclosure would breach the principle.
32. The Agency's notice of decision did not specify which information protection principle/s it has a reasonable expectation would be contravened if the information was disclosed. Without the identification of relevant information protection principles and explanation as to why they could reasonably be expected to be contravened I am not satisfied that the Agency's notice of decision justified its decision to apply consideration 3(b).

### **Third Party Consultation**

33. Under section 54 of the GIPA Act an agency may be required to consult third parties before making a decision about an access application if the information is of a kind requiring consultation. The information the subject of this application appears to be information that requires the Agency to conduct consultation.
34. The Agency does not appear to have conducted consultation as required under section 54 and is therefore not aware whether the third parties whose personal information forms part of Attachment 23 object to the disclosure of the information.
35. In a letter to the Information Commissioner, the Applicant asserts that four people seen in Attachment 23 raise no objections to the disclosure of their personal information. However, it is unknown whether the Agency is aware of the alleged non-objections and presently the non-objections have not been verified.
36. The Agency is aware of the identities of some people depicted in Attachment 23. It should be reasonably practicable for the Agency to conduct consultation with those people to determine whether they object to the disclosure of information. Having conducted consultation the Agency would then be able to accurately attribute weight to considerations 3(a) and 3(b) (if relevant) and factor this in when balancing the public interest test.
37. If there are people depicted in Attachment 23 whose identity is not known and the Agency cannot consult them, the Agency should consider this when weighing the public interest test. The Agency may also consider the forms of

access that can be provided under section 72 of the GIPA Act and deleting information under section 74 of the GIPA Act. For example, it may be reasonably practicable to obscure images in Attachment 23 of people whose identity is not known.

38. The Information Commissioner recently published *Guideline 5: consultation on public interest consideration under section 54 of the GIPA Act*. This Guideline is available on the IPC website. Agencies must have regard to this Guideline pursuant to section 15(b) of the GIPA Act.

### **Notices of decisions**

39. The GIPA Act does not provide a set formula for weighing individual public interest considerations or assessing their comparative weight. Whatever approach is taken, these questions may be characterised as questions of fact and degree to which different answers may be given without being wrong, provided that the decision-maker acts in good faith and makes a decision available under the GIPA Act.
40. Agencies should:
  - a. set out the considerations in favour of disclosure, identify the evidence that affects the weight to be given to each consideration, and give weight to each consideration;
  - b. set out the considerations against disclosure, identify the evidence that affects the weight to be given to each consideration, and give weight to each consideration;
  - c. make a decision about which way the balance lies, in light of the weight in favour and against
41. The Agency's notice of decision identified relevant considerations in favour and against disclosure. However, the Agency did not conduct consultation with third parties and this could affect the weight attributable to considerations 3(a) and 3(b) (if relevant). I am not satisfied that the Agency's decision to refuse access to Attachment 23 is justified.

### **Recommendations**

42. The Information Commissioner recommends under section 93 of the GIPA Act, that the Agency make a new decision with respect to Attachment 23 by way of internal review within 15 working days of the issuing of this report.
43. In making a new decision, have regard to the matters raised and guidance given in this report.
44. We ask that the Agency advise the Applicant and us by **22 October 2014** of the actions to be taken in response to our recommendations.

### **Review rights**

45. Our reviews 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 NSW Civil and Administrative Tribunal (NCAT) for a review of that decision.
46. The Applicant has the right to ask the NCAT to review the Agency's decision.

47. 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>

48. 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**

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

Elizabeth Tydd  
**Information Commissioner**