

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

Applicant: Applicant
Agency: Transport for NSW
Report date: 9 June 2016
IPC reference: IPC16/R000180
Keywords: Government information – decision to refuse access – CCTV footage – reveal personal information – prejudice effective exercise of agency’s functions – secrecy provisions – forms of access – personal factors of the application

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Summary

1. The Applicant applied for information from Transport for NSW (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided to provide access to some information, decided to refuse access to some other information because of an overriding public interest against its disclosure and decided that some information is not held.
3. The Applicant confirmed that her request for external review is in relation to the decision to refuse access to CCTV footage only.
4. The Information Commissioner concludes that the decision of the Agency is justified pursuant to section 97(1) of the GIPA Act.
5. The Information Commissioner recommends that the Agency note and adopt the guidance in this report when dealing with future GIPA applications, pursuant to section 95 of the GIPA Act.

Background

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

CCTV and related incident reports in relation to video footage that is in the possession of the State Transit Authority – eg, the first 20 incidents where CCTV is captured that is locatable, along with the relevant incident reports. Please exclude those that have legal action pending.
7. The Agency sought clarification from the Applicant with respect to the type of incident and timeframe required. On 10 February 2016, the Applicant submitted that:

There would be an officer who would be responsible for retaining CCTV following requests within your agency. I suggest asking them for the last 20 incidents that have been retained as that is the basis of my request. And then follow up with them in relation to the incident reports. Not all 20 incidents that were last retained would necessarily still be available, but I'm sure at least some of it is.
8. In its decision issued on 08 March 2016, the Agency identified 32 separate incidents within the scope of the application and decided:
 - a. to provide access to some information in 32 incident summaries pursuant to section 58(1)(a) of the GIPA Act;
 - b. to refuse access to some information contained in 32 incident summaries because of an overriding public interest against its disclosure pursuant to section 58(1)(d) of the GIPA Act;
 - c. to refuse access to CCTV footage for incidents 6, 19, 23, 24, 25, 26 and 27 because of an overriding public interest against its disclosure pursuant to section 58(1)(d) of the GIPA Act and
 - d. that some CCTV footage is not held pursuant to section 58(1)(b) of the GIPA Act.

9. On 17 March 2016, the Applicant requested external review by the Information Commissioner of the decision to withhold CCTV of incidents. The Applicant asserts that:
 - a. this is footage that is regularly released in other states; and
 - b. the documents captured and CCTV should have been released with the exempt material redacted or pixelated as per section 74 of the GIPA Act.
10. On 8 June 2016, the Applicant confirmed that her request for review is in relation to the decision at paragraph 8(c) only.

Decisions under review

11. The decision under review is the Agency's decision to refuse access to CCTV footage for incidents 6, 19, 23, 24, 25, 26 and 27 because of an overriding public interest against its disclosure. This is reviewable under section 80(d) of the GIPA Act.
12. In undertaking this review, we have had access to the information to which access was refused, together with relevant parts of the Agency's GIPA working file.

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.
14. 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.
15. 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

16. 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).
17. In its notice of decision, the Agency took into account the general public interest in favour of disclosure of government information at section 12(1) of the GIPA Act and identified that disclosure could reasonably be expected to enhance government accountability.
18. We are satisfied these are relevant considerations in favour of disclosure of the information in question. Other considerations which may be relevant are that:

- a. disclosure could reasonably be expected to inform the public about the Agency's policies and practices for dealing with bus incidents; and
- b. disclosure could reasonably be expected to raise awareness with respect to public safety on buses.

Public interest considerations against disclosure

- 19. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
- 20. 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.
- 21. 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.
- 22. In its notice of decision the Agency raised three public interest considerations against disclosure of the information in issue, 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);
 - b. constitute a contravention of a provision of any other Act or statutory rule that prohibits the disclosure of information (clause 6(1) of the table to section 14 of the GIPA Act); and
 - c. 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).
- 23. I will discuss each of these considerations in turn.

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

- 24. 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.
- 25. 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]
- 26. 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.
- 27. 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.

28. 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.
29. The term 'reveal' is defined in schedule 4, clause 1 of the GIPA Act to mean:

To disclose information that has not already been publicly disclosed (otherwise than by lawful means).
30. The notice of decision submits that:
 - a. the CCTV footage contains personal information of clearly discernible passengers, from which their identity can be reasonably ascertained;
 - b. it would be unreasonable to disclose the CCTV footage, as personal affairs of members of the travelling public is not a matter of public interest.
31. We have examined the CCTV footage and affirm that it does contain personal information of both passengers and drivers, which would be revealed if the information was disclosed under the GIPA Act. We are therefore satisfied that this is a relevant consideration against disclosure.
32. The notice of decision would benefit from more thoroughly addressing the second limb of this consideration, by contemplating whether disclosure of the information in this instance would reveal individuals' personal information.
33. We note that the Agency contemplated consultation with third parties with respect to disclosure of their personal information pursuant to section 54 of the GIPA Act and decided that in the circumstances of this case, it was not practicable to do so. We make no recommendations regarding the decision not to consult.
34. However, we recommend pursuant to section 95 of the GIPA Act that when dealing with future GIPA applications, the Agency ensures that its notices of decision address each element of those considerations against disclosure which are raised.

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

35. Clause 1(f) of the table at section 14 states:

There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to prejudice the effective exercise by an agency of the agency's functions.
36. To show that this is a relevant consideration against disclosure, the agency must establish:
 - a. the relevant function of the agency; and
 - b. that it is or would be prejudiced by release of the information.
37. The meaning of the word prejudice is to 'cause detriment or disadvantage'.
38. The notice of decision states that:

- a. unauthorised disclosure of CCTV footage can reasonably be expected to prejudice the effective exercise of the Agency's function;
 - b. the Agency's key function is to provide a bus network which is safe for both passengers and drivers;
 - c. CCTV surveillance on buses substantially contributes to the safety of the bus network, by recording unsafe incidents for the purposes of investigation and where necessary, disciplinary action or referral to relevant authorities, and acting as a deterrent for unsafe, criminal or anti-social behaviour;
 - d. the legislative requirement to maintain a CCTV system on buses, including appropriate use and management of footage recorded is predicated on this basis;
 - e. unauthorised disclosure of CCTV footage could reasonably be expected to provoke a claim from employees regarding the inappropriate use of that footage; and
 - f. it can reasonably be expected that such concerns could lead to industrial action and to service disruption.
39. We are satisfied that the Agency has demonstrated the reasonably expected prejudice to one of its key functions and therefore, that it has established the relevance of this consideration against disclosure of CCTV footage.

Consideration 6 – secrecy provisions

40. Clause 6 of the table at section 14 states:
- (1) There is a public interest consideration against disclosure if disclosure of the information by any person could (disregarding the operation of this Act) reasonably be expected to constitute a contravention of a provision of any other Act or statutory rule (of this or another State or of the Commonwealth) that prohibits the disclosure of information, whether or not the prohibition is subject to specified qualifications or exceptions.*
- (2) The public interest consideration under this clause extends to consideration of the policy that underlies the prohibition against disclosure.*
41. This clause provides that secrecy provisions in any other law are a public interest consideration against disclosure, and that the policy behind the provision is relevant to the weight of the public interest test.
42. The notice of decision states that the Agency must ensure that each bus in its fleet is fitted with a security camera system as required by clause 82 of the *Passenger Transport Regulation 2007*. Clause 2 of Schedule 1 to the Regulation provides:
- A person must not use a video recording made by a security camera system for a purpose other than an authorised purpose.*
43. The notice outlines that authorised purposes set out in Schedule 1 include uses in relation to the prosecution of, or the issue of a penalty notice, under the *Passenger Transport Act 2007*, ensuring an operator's compliance with the operator's conditions of accreditation, ensuring a driver's compliance with the driver's conditions of authorisation, or ensuring a passenger's compliance with any approved scheme of subsidised travel. The notice also submits that

disclosure pursuant to a GIPA Act application is not an authorised purpose in the Regulation and that any such disclosure would constitute an offence, which has an affixed penalty.

44. We are satisfied that the Agency has established that this provision in the *Passenger Transport Regulation 2007* constitutes a consideration favouring non-disclosure under clause 6 of the table to section 14 of the GIPA Act.
45. The notice also submits that under section 18 of the *Workplace Surveillance Act 2005* there are restrictions on use and disclosure of surveillance records and that disclosure of CCTV footage is not an authorised purpose under this Act. Any such disclosure would constitute an offence, which has an affixed penalty.
46. We are also satisfied that the Agency has established that this provision in the *Workplace Surveillance Act 2005* constitutes a consideration favouring non-disclosure under clause 6 of the table to section 14 of the GIPA Act.
47. However, we recommend under section 95 of the GIPA Act that when making future decisions involving this consideration against disclosure, the Agency take the step articulated in clause 6(2) of the table at section 14, and consider the policy underlying the prohibition against disclosure, as this goes to the weight of the public interest test and demonstrates a more thorough examination of the legislation relied upon.

Forms of access

48. Section 74 of the GIPA Act provides that an agency can delete information from a copy of a record to which access is to be provided in response to an access application, which operates to mitigate considerations against disclosure. However, there is no requirement for an agency to do so.
49. In keeping with the object of the GIPA Act to open government information to the public, where editing is available to enable access to information, the Information Commissioner would expect to see that the Agency has turned its mind to whether this is a viable option. This is regardless of which format in which the information is held.
50. The notice of decision does not contemplate editing or redaction of personal information from the CCTV footage.
51. During the course of this review, we had access to the Agency's GIPA working file, which explains the Agency's internal procedures for accessing, handling and retaining the Agency's CCTV footage. The Agency also provided us with additional information which explains that as the video files are encrypted, they cannot be readily edited, pixelated or otherwise obscured of any personal information contained in the footage.
52. The notice of decision would have benefited from addressing the issue of redaction or pixilation of personal information contained in the CCTV footage.
53. Under section 95, we recommend that in dealing with future GIPA applications requesting CCTV footage, the Agency communicate with the Applicant before it issues its notice of decision, about whether or not it is possible to edit the requested information and if so, any processing charges that may apply.

Personal factors of the application

54. An Agency is entitled to take into account the personal factors of an application under section 55 of the GIPA Act, such as:
 - a. the applicant's identity and relationship with any other person;
 - b. the applicant's motives for making the access application; and
 - c. any other factors particular to the applicant.
55. These factors can be considered as factors in favour of providing the Applicant with access to the information.
56. They can also, pursuant to section 55(3) of the GIPA Act, be considered as factors against providing access if (and only to the extent that) they are relevant to whether disclosure could reasonably be expected to have any of the effects referred to in clauses 2-5 of the table to section 14 of the GIPA Act.
57. Pursuant to section 95 of the GIPA Act, we recommend that in future notices of decision, the Agency take into account to the extent available under section 55, the personal factors of the application when conducting the public interest test, as these may go towards the weight attributed to the respective considerations for and against disclosure.

Balancing the public interest

58. 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.
59. Notwithstanding our comments with respect to additional considerations in favour of disclosure at paragraph 17, we are satisfied that the Agency has carried out the public interest test in keeping with the requirements of the GIPA Act.

Recommendations

60. The Information Commissioner concludes that the decision of the Agency is justified pursuant to section 97(1) of the GIPA Act.
61. The Information Commissioner recommends that the Agency note and adopt the guidance in this report when dealing with future GIPA applications, pursuant to section 95 of the GIPA Act.

Review rights

62. 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.
63. The Applicant has the right to ask the NCAT to review the Agency's decision.

64. 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

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

Elizabeth Tydd
Information Commissioner