

INQUIRY INTO IMPACT OF THE WESTERN HARBOUR TUNNEL AND BEACHES LINK

Name: Mr Ted Nye
Date Received: 1 November 2021

E J Nye & Associates Pty Ltd

ABN 21 616 137 716

Legislative Council
Public Works Committee

21 October 2021

Dear Members of the Legislative Council,

Daniel Mookhey(Chair), Mark Banasiak(Deputy Chair), Abigail Boyd, Sam Farraway, Trevor Khan, Shayne Mallard and Tara Moriarty

**Supplementary Submission No, 2.
Submission – Inquiry into the impact of the Western Harbour Tunnel and Beaches Link.**

This is a covering letter has numerous attachments marked as Appendices from A to F. These appendices contain the decisions/correspondence related to my GIPA submissions.

These can be summarised as follows.

Appendix A – GIPA - 21T-1281

“Justification for not including a rail option assessment in the BLRT EIS”.

Also taken forward to NCAT. Had 2 telephone meetings in the NCAT process. Terminated the process – principally because those acting for TFNSW did not have “appropriate knowledge” of the EIS process. Please also find attached an email with legal advice to me (which I did not reveal to the government representatives throughout this process).

NSW Transport have stated that the proposal was to be a road solution and that rail alternatives were dismissed on that basis. Irrespective of that statement the EIS legislation requires a full assessment of alternatives. This was not done.

Appendix B – GIPA – 21T-1273

“Request for Traffic Information”

Related to the Lane Cove Tunnel and the Pacific Highway. Answered Lane Cove Tunnel query but not Pacific Highway. This relates to my concern about the Pacific Highway through Chatswood and beyond and to “road safety and delay” caused by traffic incidents in the Gore Hill and Warringah Expressways.

Appendix C – GIPA – 21T-1518

“Percent of State and Federal Funding”

Appendix D – GIPA - 21T-1514 (also letter correspondence)

“Cost estimate of project (both WHC and BLRT”

Appendix E – GIPA -22T-0150

“Failure to access public transport in the EIS because directed to by Cabinet”

Rather than provide reference document sent back newspaper article as evidence.

Appendix F – GIPA – 22T-0194

“Limited study area – this was not a strategic study of alternative corridors”

Supplementary Submission No.2

Did not provide documents requested supporting a strategic study in the WHC EIS. Just one figure with alternative alignments (see attached). Not one alignment heading north to Chatswood by the way. Please refer to my alternative alignments the two tunnels given in my first submission.

Conflict of Interest (the following makes a joke of the whole EIS process.)

"7 News 6 October 2021"

NSW Planning Minister Rob Stokes is set to take over the transport portfolio with the new premier saying it makes perfect sense.

While he had his eye on the top job, Dominic Perrottet beat him 39-5 in Tuesday's leadership ballot at Parliament House.

Following the win, Mr Perrottet said he had the highest regard for Mr Stokes who had 10 years of experience as a cabinet minister.

"When I called him this morning, he was very happy to take it on and I think balancing both planning, transport, and infrastructure

makes perfect sense," Mr Perrottet told reporters on Wednesday.

Herd Mentality (the WHC and the BLRT projects are full of it)

My experience includes providing advice, many years ago, on the Cross City Tunnel, Melbourne, to the tunnel design consultants that the road tunnel invert would fail under 36m head external water pressure (connected to the Yarra River through a gravel bed) because the concrete invert was flat and not arched. It failed; subsequently \$90 million repair bill was required for ground anchors to hold down the tunnel invert down.

For the Lane Cove Road Tunnel, I was engaged by Connector Motorway (when at SKM) to provide high level advice for both design and construction. Advised that there was insufficient detail for me to do a high-level review for one section of complex tunnelling. Connector Motorway choose not to follow up my concerns with the contractor. 12 months later this section of the tunnel collapsed.

What is my opinion of the WHC and BLRT development process and actual design given the \$14 billion price tag?

"Childlike" because it has been led by politicians that have no idea about what they are doing (and the instigators have all jumped ship in recent weeks). Delusional might be even more appropriate.

With the recent revelations about the former NSW Premier from the ICAC proceedings, I rest my case.

Finally, the work undertaken by Transport's consultants follows Transport's instructions without question. Accordingly, the EIS is contrived to match Transport's and the Government's political desired outcomes

Yours sincerely,

Ted Nye

Director – Underground Engineering
Dip. Eng(Civil), B. Eng(Civil), NER, FIEAust

ted.nye@nyeconsulting-eng.com.au

enc. Appendices

Appendix A – GIPA – 21T-1281

Submitted – 13 April 2021

Decision - 11 May 2021

“Justification for not including a rail option assessment in the BLRT EIS”

Dear Ted,

Thank you for meeting with _____ and myself this afternoon. To summarise our discussion:

Proceedings for False or misleading information

- It is difficult to prove the offence of whether a person knew, or ought reasonably to have known, that they were giving false or misleading information relating to a planning matter (in this instance to the Beaches Link Tunnel (BLT) Environmental Impact Statement (EIS)). Any matter which is alleged to be false or misleading must be more than minor.
- Amongst other things, you will need to know what documentation was before the person(s) preparing the EIS to determine whether they knew, or ought to have known, that the EIS included information was false or misleading.
- Further, as this is a criminal offence per [Part 10](#) of the *Environmental Planning and Assessment Act 1979*, only a specified authority can commence criminal proceedings against the 'person' who gave false or misleading information, or a 'person' who [aided and abetted that offence](#). We would need to consider in more detail with the detailed documentation, but in this circumstance, the 'person' would most likely be Transport for NSW (TfNSW) (and/or their contractors who prepared the EIS, Jacob and Arcadis, being the 'persons' who aided and abetted the offence).
- The specified authority who can prosecute would be the Minister for Planning and Public Spaces (**Minister**). The Minister has the discretion to commence criminal proceedings, and may not be inclined to do so due to the capital investment in the project and the overtly political nature of it.
- You should immediately lodge a formal access to information application pursuant to the *Government Information (Public Access) Act 2009* with TfNSW and request copies of all documents held by TfNSW in relation to both the BLT and the Western Harbour Tunnel (WHT).

Class 4 challenges

- As to a Class 4 challenge to the approval, the BLT has not yet been determined, nor has the Response to Submissions report been released. The submission that you lodged in relation to the BLT EIS will need to be responded to by TfNSW, and TfNSW's response to your submission will largely guide what next steps you should take. You would, of course, await the approval before commencing such a challenge.
- Further, it is likely that TfNSW will commission a peer review of the traffic report prepared by Jacob and consideration will be given to whether or not alternatives were reasonably explored ([as was done with the WHT EIS](#)).
- In the meantime, you should write to the Minister with your concerns regarding the EIS and the fundamental basis upon which you believe it is flawed, i.e. inadequate consideration given to alternative solutions such as rail, and note that such a fundamental error would leave the project open to challenge in Class 4 proceedings. In that respect, we strongly recommend that you consider [Part 4 of the BLT EIS](#) (pp82 and following).
- We are happy to settle your correspondence to the Minister and will provide you with a fee proposal for that additional work.
- You would need to commence Class 4 proceedings challenging the validity of the WHT within three weeks, and we strongly recommend against doing so without having the relevant documentation at hand.
- We also recommend that you contact North Sydney Councillors, and others, as the threat of a Class 4 challenge would be substantially heightened with community groups, Councillors and the like behind it –

which in turn, will mean that TfNSW/the Minister are more likely to take it seriously. It will also allow you to pool resources.

Regards,

| Hones Lawyers
Level 4 | 66 Berry Street | North Sydney NSW 2060

Postal PO Box 1989, North Sydney NSW 2059



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11 May 2021

Our ref: 21T-1281

Mr Ted Nye
E J Nye & Associates

By email: ted.nye@nyeconsulting-eng.com.au

Dear Mr Nye,

**Notice of decision on your access application under the
Government Information (Public Access) Act 2009 (GIPA Act)**

Applicant:	E J Nye & Associates
File reference:	21T-2181
Decision maker:	
Received date:	13 April 2021
Due date:	11 May 2021
Date of decision:	11 May 2021

1 Your access application

- 1.1 On 8 April 2021 Transport for NSW (TfNSW) received your access application under the GIPA Act for the following information:

'Justification for not including a rail option assessment in the BLRT EIS.

Page 4-13, para 4 has the words "The physical and urban geography of the Northern Beaches region presents barriers to the consideration of rail based solutions in addressing the transport challenges faced by the area".

The same paragraph also contains false information regarding the feasibility of tunnelling under Middle Harbour. Where are the station locations as evidence to support concern for steep gradients? In 1996, using old tunnelling technology, the Northside Storage bored tunnel traversed Middle Harbour.

A rail tunnel can also be constructed in an immersed tube, as is currently proposed for the BLRT crossing of this harbour. Hence tunnels are higher than if bored tunnel.

If there has been any work carried out to substantiate any of the above claims please provide it.

Also refer to my EIS submission which includes an alternative rail alignment which crosses Sydney Heads. This paper also includes a light rail "underground" between Chatswood and Brookvale (refer to more misleading information given in para 6).

We already have recent direct evidence of a successful crossing the Harbour with a bored tunnel using a slurry TBM for Sydney Metro Stage II.

Para 5 ignores population growth and the potential to develop a commercial centre on the Northern Beaches e.g. at Brookvale (which already has a major retail centre as a seed for future development). Refer also to ABS projected growth in population of Sydney to 10 million by 2066.

Also refer to a report commissioned by Northern Beaches Council dated 2017 which states that rail is required to ensure a diversity of employment opportunities on the Northern Beaches.

In conclusion, it is a criminal offence to provide false or misleading information in an EIS as per Part 10 of the Environmental Planning and Assessment Act 1979. This is against the "person" who gave this information or a "person" who aided and abetted that offence.'

- 1.2 On 13 April 2021 you provided the following clarification concerning the terms of your request:

'Please provide: "The report(s), working papers and analysis that support the EIS statements which refer to why rail access is dismissed in the BLRT EIS (refer to Page 4-13, para 4, of the EIS for example)."

This is the link. <https://www.planningportal.nsw.gov.au/major-projects/project/10456>

Go down this webpage that comes up to a further link: -BL EIS Part 2 - Executive Summary to Chapter 4. I have extracted Page 4-13 (attached) and also Chapter 4 (compressed down from 13M to 4MB). You can see my interest in the topic (and hopefully knowledge) from the attached paper published in Sep 2020, but with the initial paper published in 2017.'

- 1.3 In your access application you indicated a preference for receiving correspondence by email at ted.nye@nyeconsulting-eng.com.au

2 Searches for information

- 2.1 Under the GIPA Act, we must conduct reasonable searches to locate the government information for which you have applied.

- 2.2 The following areas of TfNSW have conducted searches:

- Infrastructure and Place
 - Sydney Infrastructure Development

- 2.3 Information has been identified as falling within the scope of your application.

- 2.4 The Infrastructure and Place division has advised that some information falling within the scope of your application, may be held by Infrastructure NSW (**INSW**) rather than TfNSW. This information pre-dates any information held by TfNSW in respect of the subject of your GIPA application. Accordingly, I suggest that you also approach INSW regarding this matter.

3 Decision

- 3.1 I am authorised by the Principal Officer, for the purposes of section 9(3) of the GIPA Act, to decide your access application.
- 3.2 I have decided to refuse to provide access to the information under section 58(1)(d).
- 3.3 Please see below a summary of my decision:

Page Ref.	Information	Act Ref.	Access
N/A	Western Harbour Tunnel and Beaches Link Strategic Business Case 2015	s58(1)(d); Sch. 1 cls. 2(1)(b), 2(1)(e)	Refused

4 Reasons for Decision

- 4.1 Under section 9(1) of the GIPA Act, you have a legally enforceable right to access the information you asked for, unless there is an overriding public interest against its disclosure.
- 4.2 Under section 5 of the GIPA Act, there is a presumption in favour of disclosing government information unless there is an overriding public interest against its disclosure.

Conclusive presumption of an overriding public interest against disclosure

- 4.3 Section 14(1) of the GIPA Act provides:

It is to be conclusively presumed that there is an overriding public interest against disclosure of any of the government information described in Schedule 1.

- 4.4 Clause 2 of Schedule 1 of the GIPA Act relevantly provides:

2 Cabinet information

- (1) *It is to be conclusively presumed that there is an overriding public interest against disclosure of information (referred to in this Act as "**Cabinet information**") contained in any of the following documents:*

- (a) ...
- (b) *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),*
- (c)
- (d) ...
- (e) *a document prepared before or after Cabinet's deliberation or decision on a matter that reveals or tends to reveal the position that a particular Minister has taken, is taking, will take, is considering taking, or has been recommended to take, on the matter in Cabinet,*
- (f) ...

- (2) *Information contained in a document is not Cabinet information if:*

- (a) *public disclosure of the document has been approved by the Premier or Cabinet, or*
 - (b) *10 years have passed since the end of the calendar year in which the document came into existence.*
- (3) *Information is not Cabinet information merely because it is contained in a document attached to a document referred to in subclause (1).*
- (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.*
- (5) *In this clause, "**Cabinet**" includes a committee of Cabinet and a subcommittee of a committee of Cabinet.*

Application of Clause 2(1)(b)

- 4.5 The Infrastructure and Place division informs me that information meeting the description of *"report(s), working papers and analysis that support the EIS statements which refer to why rail access is dismissed in the BLRT EIS"* is contained in the Western Harbour Tunnel and Beaches Link Strategic Business Case (**WHTBLSBC**), which was prepared by TfNSW in 2015. The WHTBLSBC included, among other things, an options analysis for the Beaches Link tunnel component, and required the approval of Cabinet. The WHTBLSBC was the subject of a Cabinet submission in late 2015.
- 4.6 Therefore, I consider that the WHTBLSBC, which falls into the scope of your application terms, was prepared for the dominant purpose of its being submitted to Cabinet for its consideration. Accordingly, I find that the document meets the definition of clause 2(1)(b) of Schedule 1 of the GIPA Act.

Application of Clause 2(1)(e)

- 4.7 The Infrastructure and Place division has further informed me that the WHTBLSBC suite of documents was prepared for the purpose of informing and advising Cabinet, and contains information that may reveal or tend to reveal the position of a Minister in relation to the content of Cabinet submissions and attachments.
- 4.8 I have reviewed each document relevant to your application, and I am satisfied that each contains options, recommendations and analysis as well as project updates about a major project undertaken by TfNSW. Accordingly, these documents would reveal or tend to reveal the position that a Minister has taken, is taking, will take, is considering taking, or has been recommended to take on the matters in Cabinet.
- 4.9 Have regard to the above, I am satisfied that the documents fall within the category of documents to which clause 2(1)(e) of Schedule 1 of the GIPA Act applies.
- In view of the above, I have decided that the WHTBLSBC is a document to which a conclusive presumption of an overriding public interest against disclosure applies.
- 4.10 I must also consider whether the information is captured by clauses 2(2), 2(3) or 2(4) of Schedule 1 of the GIPA Act. I have considered the application of clause 2(2) of Schedule 1 of the GIPA Act in respect of the documents and have concluded that they have not been subject to approval by the Premier or Cabinet for public disclosure. I note with reference to clause 2(2)(b) that the information is less than 10 years old. For the purposes of clause 2(4) of Schedule 1, I am satisfied that the document contains more than solely factual material.

Indivisibility of cabinet documents

- 4.11 As addressed in the decision of *Robinson v Transport for NSW; Robinson v Roads and Maritime Services* [2017] NSWCATAD 353 at [81], a document which meets the description of information under clauses 2(1)(a) to (f), is subject to an overriding public interest against disclosure of all of the information contained in the document.
- 4.12 Having regard to all of the above, I have decided that there is a conclusive presumption of an overriding public interest against disclosure of this document.
- 4.13 Accordingly, I have decided to refuse access under section 58(1)(d) of the GIPA Act.
- 4.14 As a conclusive presumption of an overriding public interest against disclosure applies, I do not need to perform the public interest test in respect of this information.

5 Processing Charges

- 5.1 Under section 64 of the GIPA Act, we may require you to pay processing charges, at a rate of \$30 per hour, for the time spent dealing with your access application. The application fee of \$30 counts as payment of one hour of the processing charges.
- 5.2 I have decided not to impose any additional processing charges for dealing with your application.

6 Disclosure Log

- 6.1 If information that would be of interest to other members of the public is released in response to a formal access application, an agency must record certain details about the application in its 'disclosure log' (under sections 25 and 26 of the GIPA Act).
- 6.2 In the letter acknowledging receipt of your application, you were told about the disclosure log. You were also advised of your right to object to the inclusion of details about your access application in the disclosure log.
- 6.3 I note that you have not objected to such disclosure.
- 6.4 I have decided not to include details about your access application in the disclosure log.

7 Review rights

- 7.1 If you disagree with my decision, you may apply for this decision to be reviewed by seeking:
- an internal review by another officer of TfNSW, who is no less senior than me;
 - an external review by the NSW Information Commissioner; or
 - an external review by the NSW Civil and Administrative Tribunal (NCAT).
- 7.2 You have 20 working days from the date of this letter to apply for an internal review and 40 working days to apply for an external review by the NSW Information Commissioner or the NCAT.

8 Further information

- 8.1 For your information and assistance, I have enclosed a fact sheet explaining your rights to have my decision reviewed.

8.2 Please do not hesitate to contact _____ by email at _____ if you have any questions about this letter.

Yours sincerely,

Manager, Information Access

16 August 2021

Our ref: 21T-2181

top here
should be
21T-1281

Mr Ted Nye
E J Nye & Associates Pty Ltd

By email: ted.nye@nyeconsulting-eng.com.au

Dear Mr Nye,

**Notice of remitted decision on your access application under the
Government Information (Public Access) Act 2009 (GIPA Act)**

Applicant:	E J Nye & Associates
File reference:	21T-2181
Decision maker:	
Received date:	13 April 2021
Remitted decision due:	16 August 2021
Date of remitted decision:	16 August 2021

1 Your access application

- 1.1 On 13 April 2021, Transport for NSW (TfNSW) received your valid access application under the GIPA Act which sought access, relevantly, to the following information:
"... The report(s), working papers and analysis that support the [Environmental Impact Statement] statements which refer to why rail access is dismissed in the BLRT EIS (refer to Page 4-13, para 4, of the EIS for example)..."
- 1.2 In your access application you indicated a preference for receiving correspondence by email at ted.nye@nyeconsulting-eng.com.au.
- 1.3 The Western Harbour Beaches Link and Gore Hill Freeway Connection (**Beaches Link**) is a major road transport project being undertaken by TfNSW, linking the Northern Beaches with the Warringah Freeway and North Sydney, the inner west via the Western Harbour Tunnel, and Macquarie Park via the Gore Hill Freeway connection.
- 1.4 As part of that project, the NSW Government has published the Environmental Impact Statement (**EIS**) as part of the public consultation process, which is publicly available.¹ The

¹ <https://caportal.com.au/rms/bl/documents#eisChapters>

EIS includes analysis about the challenges associated with a rail option to the Northern Beaches, which can be summarised as:

- Physical geography (including topology and established rural areas) presenting challenges
- Large implications for cost and amenity during construction, with a long lead time for development.
- The low density of the Northern Beaches means demand would not be high enough.
- The development of high-speed bus is preferable.
- The complexity of origin and routes to travel to the CBD suggests a road development is preferable.

1.5 The access application essentially seeks any analysis or reports which supports this material in the EIS.

1.6 On 11 May 2021, TfNSW identified the Western Harbour Tunnel and Beaches Link Strategic Business Case 2015 (**SBC**) as the information within scope and refused access to that information under s. 58(1)(d) of the GIPA Act. That document is a cabinet document. However on further review of this document it has now been determined that it does not, in fact, fall within the scope of information you seek by this access application (see further at [4.14] below).

1.7 On 26 July 2021, the NSW Civil and Administrative Tribunal remitted the decision to TfNSW pursuant to s. 65(1) of the *Administrative Decisions Review Act 1997* (NSW), such decision to be made by 16 August 2021.

1.8 This is the decision made pursuant to that order.

2 Searches for information

2.1 Under the GIPA Act, TfNSW must conduct reasonable searches to locate the government information for which you have applied.

2.2 The following divisions of TfNSW have conducted searches:

- Infrastructure and Place
- Safety, Environment and Regulation
- Customer Strategy & Technology
- Greater Sydney

3 Decision

3.1 I am authorised by the Principal Officer, for the purposes of section 9(3) of the GIPA Act, to decide your access application.

3.2 I have decided that some of the information:

- is already available to you under section 58(1)(c);
- is not held under section 58(1)(b).

3.3 Please see below a summary of my decision:

Para ref.	Information	Act Ref.	Access
4.21	Land Use Forecast Data	58(1)(c)	Information already available

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4.21	Journey to Work Data	58(1)(c)	Information already available
4.26	No further information held	58(1)(b)	Not applicable

Information already available to you (point 1)

- 3.4 Under section 59 of the GIPA Act an agency can decide that information is already available to an applicant, if the information is of a kind described in that section. The information listed at [3.3] is publicly available information. As this information can be accessed via the links provided in this decision, section 59(1)(e) of the GIPA Act applies. As such, I have decided under section 58(1)(c) that this information is already available to you.

4 Reasons for Decision

- 4.1 Under section 9(1) of the GIPA Act, you have a legally enforceable right to access the information you asked for, unless there is an overriding public interest against its disclosure.
- 4.2 Under section 5 of the GIPA Act, there is a presumption in favour of disclosing government information unless there is an overriding public interest against its disclosure.
- 4.3 In reaching the decision that no further information is held, I must consider whether TfNSW has sufficiently conducted a reasonable search under section 53 of the GIPA Act.
- 4.4 Two issues arise for consideration:

- (i) *Are there reasonable grounds to believe that the requested documents exist and are the documents of the agency; and*
- (ii) *Have the search efforts made by the agency to locate such documents been reasonable in all the circumstances of a particular case?*

(i) Are there reasonable grounds to believe that the requested information is held by the Agency?

- 4.5 On 1 December 2012, the NSW Government published the NSW Long Term Transport Master Plan (**Master Plan**), which remains publicly available.² It was signed by the Minister for Transport and the Minister for Roads and Ports. That document deals with proposed bus transport to the Northern Beaches and includes the following, without reference to any underlying reports or analysis:

“[Bus Rapid Transit] usually involves very frequent services, exclusive bus roadways and high quality stations and vehicles. BRT can deliver fast travel times when demand is high, but not high enough to make investing in a mass transit such as heavy rail a viable alternative.”

- 4.6 The Master Plan was updated in 2013 and 2014, both of which remain publicly available.³ That records the following at page 5:

“Released the *Northern Beaches Transport Action Plan*, a \$633 million package of public transport and roads improvements including the \$233 million Northern Beaches kerbside Bus Rapid Transit project. \$25 million was committed in the 2014-15 Budget to commence Bus Rapid Transit development and delivery, including traffic projects for faster and more reliable buses, five new public transport interchanges, modern bus stops and up to 800 commuter car parking spaces. Additional funding was also allocated to

² This document is publicly available: TfNSW, NSW Long Term Transport Master Plan (<https://www.transport.nsw.gov.au/newsroom-and-events/reports-and-publications/nsw-long-term-transport-master-plan>)

³ TfNSW, NSW Long Term Transport Master Plan (<https://www.transport.nsw.gov.au/newsroom-and-events/reports-and-publications/nsw-long-term-transport-master-plan>)

feasibility studies on a motorway tunnel connection between the Northern Beaches and the Warringah Freeway and the CBD.”

- 4.7 The 2014 Update to the Master Plan again records the position that improvements to the Northern Beaches were road and bus improvements. There is no reference to any feasibility studies to be conducted as to rail to the Northern Beaches.
- 4.8 In June 2012, TfNSW released the Northern Beaches Bus Rapid Transit (BRT) Pre-Feasibility Study. That Pre-Feasibility study did not refer to any commissioned analysis regarding rail to the Northern Beaches, and assessed the value of a road connection which connected to rail at North Sydney (see section 3.4, page 13).
- 4.9 Significantly, in 2014 Infrastructure NSW developed its State Infrastructure Strategy (**SIS**) which is also publicly available.⁴ Infrastructure NSW is a NSW government agency which is responsible to the Premier, and provides advice to Government as to the development of infrastructure strategy.
- 4.10 The SIS discusses transport solutions for the Northern Beaches being road and bus projects, but does not refer to any feasibility work or analysis undertaken in relation to rail options, or otherwise suggest that it is being considered by Infrastructure NSW or the NSW government.
- 4.11 In June 2014, the NSW Government developed the Northern Beaches Transport Action Plan. That Plan identifies the action being taken by the NSW government to deliver transport improvements to the Northern Beaches, and planning for future growth in the area. The plan identifies road improvements (including feasibility studies for a Northern Beaches Motorway Tunnel), faster and more frequent ferries to the CBD, and the development of a Kerbside Bus Rapid Transit from Mona Vale to the Sydney CBD (see pages 1, 4, 7 in particular). The Transport Action Plan does not identify rail as an option being considered or pursued.
- 4.12 Accordingly, leading up to the development of the SBC TfNSW (at the time, Roads and Maritime Services (**RMS**)) was not commissioned to consider or develop a rail option to the Northern Beaches.
- 4.13 The understanding of TfNSW is that the decision for the Beaches Link to be developed as a motorway tunnel was made prior to the project being transferred to RMS. Accordingly, there is no real expectation that TfNSW would prepare a feasibility report in relation to a government decision which has already been made.
- 4.14 Consistently with this position, the SBC, which TfNSW prepared, is only directed to the development of road transport. It does not contain the information sought by the access application and it is outside the scope of the access application.
- 4.15 As noted above at [1.4], the EIS developed as part of that project included brief analysis as to why a rail option to the Northern Beaches presents challenges. Before identifying the reasonable searches which have been undertaken by TfNSW for any analysis or work underlying those statements, I note the following by way of summary:
- There is no reference to any feasibility work being required from TfNSW for a rail link to the Northern Beaches
 - At least since 2012, there is no suggestion that the NSW Government has been considering a rail option to the Northern Beaches
 - Infrastructure NSW, which advises the NSW Government on major infrastructure strategy, has not publicly referred to any work or priorities relating to a rail link to the Northern Beaches.
- 4.16 Having regard to the above, I consider it unlikely that TfNSW holds any reports or detailed analysis beyond the statements in the EIS.

⁴ Accessible:

https://www.infrastructure.nsw.gov.au/media/1090/inf_j14_871_sis_report_book_web_new.pdf

4.17 In circumstances where the SIS was released in 2014 identifying road and bus transport solutions for the Northern Beaches (as discussed in [4.9] above), it could be speculated that either the Department of Premier and Cabinet or Infrastructure NSW could hold information within the scope of this access application request. If held, such information would probably be dated prior to 2014, when the SIS was developed. There is no evidence available to me that Infrastructure NSW has considered any rail options since 2014, and as noted above at [4.10], the SIS does not refer to a rail option being considered.

(ii) Have the search efforts made by the agency to locate such documents been reasonable in all the circumstances of a particular case?

4.18 TfNSW conducted internal searches to identify, review and record the matters identified in paragraphs [4.5] to [4.17] which involved the review of many thousands of pages of documents. Those documents did not refer to any information which would be within scope of the access application, and tended to confirm the position that no further information is held.

4.19 *First*, five separate senior employees in TfNSW have been consulted as to whether they have any knowledge of any reports prepared or any underlying analysis. Each person confirmed that they have no knowledge of such a report held by TfNSW, and expected that one would not exist given the government priority for road transport development to the Northern Beaches.

4.20 *Second*, the searches have included a review of the SBC, including its annexures, which confirmed the position at [4.14].

4.21 *Third*, TfNSW understands that the analysis in the EIS was likely drafted based on pre-existing available raw data including:

- Land use forecasts to 2056, which are published by TfNSW.⁵ That data would have informed the EIS analysis that there is unlikely to be sufficient population growth or demand to justify a rail line to the Northern Beaches. The data is accessible by a Travel Zone Explorer – Visualisation, whereby a user can identify an area and access the data on population projection (as at 2016, 2021, 2026, 2031, 2036, 2041, 2046, 2051, and 2056). That data supports the EIS analysis.
- Journey to work data. That data is derived from the five-yearly Census of Population and Housing conducted by the Australian Bureau of Statistics.⁶ It is published as part of an Open Data Catalogue. The data also tends to confirm the EIS analysis.⁷ Section 4.2.1 of the EIS confirms that Journey to work data for the Warringah Freeway was analysed to determine travel patterns for residents and workers in the project generally
- Household Travel Survey (HTS) data, which is published by TfNSW.⁸ The HTS collects information on personal travel behaviour in the Sydney Greater Metropolitan Area.⁹

⁵ As this information is available in an interactive format, I do not attach it to this decision. It can be accessed via the following link: <https://www.transport.nsw.gov.au/data-and-research/forecasts-and-projections>

⁶ <https://www.transport.nsw.gov.au/data-and-research/passenger-travel/surveys/journey-to-work> (Infosheet)

⁷ As this information is available in an interactive format, I do not attach it to this decision. It can be accessed via the following link: https://opendata.transport.nsw.gov.au/search/type/dataset?query=%22journey+to+work%22&sort_by=changed&sort_order=DESC

⁸ <https://www.transport.nsw.gov.au/data-and-research/passenger-travel/surveys/household-travel-survey-hts>

⁹ As this information is available in an interactive format, I do not attach it to this decision. It can be accessed via the following link: <https://opendata.transport.nsw.gov.au/search?query=household%20travel%20survey>

- 4.22 These data inputs would allow a qualified analyst to understand the future demand to the Northern Beaches and produce the kind of analysis which is the subject of this access application.
- 4.23 Similarly, a qualified analyst is unlikely to require bespoke internal analysis or the commission of a separate, detailed report in order to make the statements in the EIS about the challenging physical geography of the Northern Beaches and longer lead time for new rail development.
- 4.24 After consultation with the five employees referred to above at [4.19], TfNSW has not identified further information which is held and would be expected to have informed the drafting of Section 4.3 of the EIS.
- 4.25 *Fourth*, for completeness, TfNSW has undertaken searches of the following divisions which have each confirmed that no information is held which is within scope:
- Safety, Environment and Regulation
 - Customer Strategy and Technology
 - Greater Sydney
- 4.26 Taking into account the searches undertaken by TfNSW, I am of the view that there are no reasonable grounds to believe that further information is held by TfNSW. I am satisfied that reasonable searches have been undertaken to identify whether there is any information within scope of the access application held by TfNSW.

5 Disclosure Log

- 5.1 If information that would be of interest to other members of the public is released in response to a formal access application, an agency must record certain details about the application in its 'disclosure log' (under sections 25 and 26 of the GIPA Act).
- 5.2 In the letter acknowledging receipt of your application, you were told about the disclosure log. You were also advised of your right to object to the inclusion of details about your access application in the disclosure log.
- 5.3 As this decision is not releasing any information, I have decided not to include details about your access application.

6 Review rights

- 6.1 I note that you have commenced proceedings in the NSW Civil and Administrative Tribunal and will have the opportunity to elect to review this decision in those proceedings.

7 Further information

- 7.1 If you have any difficulty accessing the links in this decision, or have any questions in relation to it, please do not hesitate to contact the Crown Solicitor's Office
if you have any questions in relation to this letter.

Yours sincerely,

Senior Lawyer, Government Regulatory & Prosecutions

OFFICIAL

Appendix B – GIPA – 21T-1273

Submitted – 7 April 2021

Decision - 11 May 2021

“Request for Traffic Information”

11 May 2021

Our ref: 21T-1273

Mr Ted Nye
E J Nye & Associates Pty Ltd

By email: ted.nye@nyeconsulting-eng.com.au

Dear Mr Nye,

**Notice of decision on your access application under the
Government Information (Public Access) Act 2009 (GIPA Act)**

Applicant:	E J Nye & Associates Pty Ltd
File reference:	21T-1273
Decision maker:	
Received date:	7 April 2021
Due date:	11 May 2021
Date of decision:	11 May 2021

1 Your access application

- 1.1 On 7 April 2021 Transport for NSW (TfNSW) received your access application under the GIPA Act for the following information:

Original terms:

'Beaches Link Road Tunnel EIS

Request for traffic information

a) Average weekday traffic load and relief volume plots and tables for the modelled network for:

1) 2037 with and without BLRT - untolled

2) 2037 with and without BRRT - tolled

b) Traffic AM and PM peak hourly volumes on the Lane Cove Tunnel and Gore Hill motorway with and without BLRT - untolled.

c) Please explain why there is the reported difference in traffic relief at Spit Bridge

(27,000 vehicles per average weekday) and at Spit Junction on Military Road (10,000 vehicles per average weekday) in 2037 with the BLRT in the network. '

- 1.2 On 13 April 2021, we sought clarification in relation to some of the terms of your application.
- 1.3 On 14 April 2021, you amended the terms of your request as follows:

Amended terms:

'Please refer to the Forecast traffic volume difference plots taken from Appendix F, Annexure B. attached.

1. *Requested forecast 2037 traffic volumes on which roads in the study area which have an increase (load) and reduction (relief) from the introduction of Beaches Tunnel compared with the Base Case (no Beaches Tunnel in the network).*
2. *We request a full network plot. Particularly both AM and PM peak volumes (load/relief) and average daily volumes for the Gore Hill freeway and Lane Cove Tunnel.*

It is not clear that what has been presented in Annexure B is representative the actual traffic volumes, particularly in the Lane Cove Tunnel given the traffic volume changes on the Gore Hill Expressway.

3. *Could you please explain why there are significant changes in traffic volumes on the Gore Hill Expressway and not in either the Lane Cove Tunnel or the Pacific Highway?*
4. *Could you also please provide traffic volumes table for the Lane Cove Tunnel, 1) now, 2) with the WHC and 3) with the WHC and B & G Hill Freeway. We are particularly interested in the capacity of the Lane Cove Tunnel at peak times.*
5. *Does the Lane Cove Tunnel have the capacity to take increased traffic volumes (only 2 lanes at the east portals) and is this lack of capacity one of the reasons for the small changes in traffic volumes in the tunnel'*

- 1.4 On 19 April 2021, we notified you that the period within which the application is required to be decided stopped running as of 14 April 2021 while we were seeking confirmation from the business area that the amended clarification provides sufficient information to identify the government information applied for.
- 1.5 On 20 April 2021, we confirmed the validity of the application and notified you that we had restarted the clock to reflect this. The new decision date of this matter became **11 May 2021**.
- 1.6 In your access application you indicated a preference for receiving correspondence by email at ted.nye@nyeconsulting-eng.com.au.

2 Searches for information

- 2.1 Under the GIPA Act, we must conduct reasonable searches to locate the government information for which you have applied.
- 2.2 The following areas of TfNSW have conducted searches:
- Infrastructure and Place
 - Development
 - Sydney Infrastructure Development
- 2.3 The Sydney Infrastructure Development (SID) team within Infrastructure and Place conducted searches within Outlook and its relevant project folders for information falling within the scope of your application terms and information within the scope of your application was identified in this search.

2.4 I have been advised by the SID team that the traffic plot information extracted from traffic modelling undertaken for the Beaches EIS requested in **points 1 and 2** of the amended terms of your application are categorised as follows:

- 2037_M0808: Do Minimum (No Western Harbour Tunnel or Beaches Link)
- 2037_M1402: Do something (Beaches Link)
- 2037_M1406: Do something cumulative (Western Harbour Tunnel and Beaches Link)

3 Decision

3.1 I am authorised by the Principal Officer, for the purposes of section 9(3) of the GIPA Act, to decide your access application.

3.2 I have decided:

- to provide access to some information under section 58(1)(a);
- to refuse to provide access to some information under section 58(1)(d);
- that some of the information is not held under section 58(1)(b); and
- that some of the information is already available to you under section 58(1)(c).

3.3 Please see below a summary of my decision:

ITEM (Page Ref)	Information	Act Ref.	Access
ITEM 1 (Points 1&2) (1-90)	2037 M0808 (WestConnex only) Western Harbour Tunnel _ Beaches Link EIS Base Case Date: 19 November 2017 1. AM Peak HCV Hourly Volumes – 10 pdf 2. Average Weekday Daily HCV Volumes – 10 pdf 3. PM Peak HCV Hourly Volumes – 10 pdf 4. AM Peak Light Vehicle Hourly Volumes – 10 pdf 5. Average Weekday Daily Light Vehicle Volumes -10 pdf 6. PM Peak Light Vehicle Hourly Volumes – 10 pdf 7. Total AM Peak Hourly Vehicle Volumes – 10 pdf 8. Total Daily Vehicle Volumes – 10 pdf 9. Total PM Peak Hourly Vehicle Volumes – 10 pdf	s58(1)(d) s14 Table cl 1(f) cl 4(c)(d)	Refused
ITEM 2 (Points 1&2) (1-90)	2037 M1402 (WestConnex + Beaches Link +Warringah Freeway Upgrade) Western Harbour Tunnel and Beaches Link EIS Beaches Link plus Warringah Freeway Upgrade Case Date:17 December 2018 1. AM Peak HCV Hourly Volumes -10 pdf 2. Average Weekday Daily HCV Volumes – 10 pdf 3. PM Peak HCV Hourly Volumes – 10 pdf 4. AM Peak Light Vehicle Hourly Volumes 5. Average Weekday Daily Light Vehicle Volumes – 10 pdf 6. PM Peak Light Vehicle Hourly Volumes- 10 pdf 7. Total AM Peak Hourly Vehicle Volumes – 10 pdf 8. Total Daily Vehicle Volumes – 10 pdf 9. Total PM Peak Hourly Vehicle Volumes – 10 pdf	s58(1)(d) s14 Table cl 1(f) cl 4(c)(d)	Refused

ITEM 3 (Points 1&2) (1-90)	2037 M1406 (WestConnex + Gateway +F6E(ABC) + Western Harbour Tunnel + Beaches Link + Warringah Freeway Upgrade) Western Harbour Tunnel and Beaches Link Cumulative Case Date: 17 December 2018 1. AM Peak HCV Hourly Volumes – 10 pdf 2. Average Weekday Daily HCV Volumes – 10 pdf 3. PM Peak HCV Hourly Volumes – 10 pdf 4. AM Peak Light Vehicle Hourly Volumes – 10 pdf 5. Average Weekday Daily Light Vehicle Volumes – 10 pdf 6. PM Peak Light Vehicle Hourly Volumes – 10 pdf 7. Total AM Peak Hourly Vehicle Volumes – 10 pdf 8. Total Daily Vehicle Volumes – 10 pdf 9. Total PM Peak Hourly Vehicle Volumes – 10 pdf	s58(1)(d) s14 Table cl 1(f) cl 4(c)(d)	Refused
N/A (Point 2)	AM and PM peak volumes (load/relief) and average daily volumes for the Gore Hill freeway and Lane Cove Tunnel.	s58(1)(b) s75(2)	Not held
ITEM 4 (Point 3) (Included in Notice of Decision)	New record created to respond to point 3 query: <i>Could you please explain why there are significant changes in traffic volumes on the Gore Hill Expressway and not in either the Lane Cove Tunnel or the Pacific Highway</i> Pursuant to section 75 of the GIPA Act	s58(1)(a) s75(1)	Full
ITEM 5 (Point 4) (1-15)	2037 M1406 Cumulative Case VS 2037 M0808 Base Case Date: 18 February 2019 1. Total AM Hourly Volumes Comparison – 5 pdf 2. Total PM Hourly Volumes Comparison – 5 pdf 3. Average Weekday Daily Total Vehicle Volume Comparison – 5 pdf	s58(1)(a) s58(1)(c)	Full
N/A (Point 4)	Traffic volumes table for the Lane Cove Tunnel, 1) now, 2) with the WHC and 3) with the WHC and B & G Hill Freeway. We are particularly interested in the capacity of the Lane Cove Tunnel at peak times	s58(1)(b) s75(2)	Not held
ITEM 6 (Point 5) Pp 1	A new record of information responding to the terms of the request Pursuant to section 75 of the GIPA Act	s58(1)(a) s75(1)	Full

Information not held

- 3.4 In relation to the information requested in point 2 of the amended terms of your application, the SID team has advised that traffic plot information listed in the table at paragraph 3.3 above contains traffic forecasts for all roads in the Sydney Metropolitan area, including but not limited to the Lane Cove Tunnel and Gore Hill Freeway.
- 3.5 SID informs me that, given the specificity of your request, no information was considered, created or is held by the agency that particularly responds to the request for both ‘AM and PM peak volumes (load/relief) and average daily volumes for the Gore Hill Freeway and Lane Cove tunnel’ (**point 2**) or the ‘traffic volumes table for the Lane Cove Tunnel, 1) now, 2) with the WHC and 3) with the WHC and B & G Hill Freeway. We are particularly interested in the capacity of the Lane Cove Tunnel at peak times’ (**point 4**).
- 3.6 To be clear, while the plots provided as Items 1, 2 and 3 do include volumes for the Lane Cove Tunnel and Gore Hill Freeway, these do not exist in isolation. However, these items

may address some or all of your request at point 2 to the extent that the terms of your request ask for the 'full network plot'. The access decision in relation to release of the full network plot identified as Items 1, 2 and 3 is addressed in more detail in paragraphs 4.9 to 4.44 below.

- 3.7 Under section 75(2) of the GIPA Act, an agency is not required to make a new record of information from information it holds, to create new information, or to produce a new record of information, by deduction, inference or calculation from information held by the agency.
- 3.8 As these particular information sets do not already exist and the agency is not required to create them, I am satisfied that information specifically responsive to these points is not held, under section 58(1)(b) of the GIPA Act.
- 3.9 I am informed by the business area that they have already met with you in relation to some of these issues and have offered their continued assistance should you require a more detailed discussion. As such, please feel free to advise our team if you wish to be contacted by the business area and we will convey your request for assistance.

New records of information created

- 3.10 In response to the **point 3** of your application, the business area has advised that:
- the highlighted "increase" you refer to in the plot you provided of the Gore Hill Freeway is the result of technical traffic modelling limitations of plots of this type
 - in this area the road network will be reconfigured; to reflect this in the traffic model "links" need to be added or adjusted in the traffic model.
 - when traffic model links are adjusted, the "difference" in plots of this type shows up as the total traffic on individual links, rather than the change in traffic between scenarios. For this reason for the area of the Gore Hill Freeway area highlighted, the difference plot needs to be considered in combination with other outputs and analysis. It can be misleading when read in isolation, as appears to be the case.
 - The traffic model indicates a relatively small change in traffic volumes and performance in the Gore Hill Freeway and Lane Cove Tunnel as a result of the Beaches Link project. Further information on changes to traffic volumes and performance in this particular area is provided in section 7.5 of Appendix F of the Beaches Link EIS:
<https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=SSI-8862%2120201204T030411.500%20GMT>
- 3.11 I have also been informed that a large number of roads in the study area are forecast to experience some level of change as a result of Beaches Link, although in many cases the change is minor. The plots provide the information requested (i.e. they cover all roads in the study area and across the broader Sydney Metropolitan area). However, as previously noted, the information specifically requested in **point 4** of the amended terms of does not exist.
- 3.12 In response to **point 5** of the amended terms of your application, a new record of information under section 75 of the GIPA Act has been created in order to respond to your application. A copy of the information is being provided to you in PDF format as an attachment to this Notice of Decision.

Information already available to you

- 3.13 Under section 58(1)(c) with reference to section 59 of the GIPA Act, an agency can decide that information is already available to an applicant, only if the information meets one of the listed categories of section 59. Some of the information in **Item 5** listed in the table of paragraph 3.3 above, is publicly available on the Department of Planning, Industry and Environment website at the back of Appendix F(Part 2) of the Beaches Link EIS, please see

the link below:

<https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=SSI-8862%2120201204T030409.731%20GMT>

- 3.14 As such, I have decided under section 58(1)(c) and 59(1)(e) that the information is already available to you.

4 Reasons for Decision

- 4.1 Under section 9(1) of the GIPA Act, you have a legally enforceable right to access the information you asked for, unless there is an overriding public interest against its disclosure.
- 4.2 Under section 5 of the GIPA Act, there is a presumption in favour of disclosing government information unless there is an overriding public interest against its disclosure.

Public interest test

- 4.3 To decide whether or not there is an overriding public interest against disclosure of the information contained in the records identified in the Table at part 3.3 above, I applied the public interest test, which is set out in section 13 of the GIPA Act.
- 4.4 I applied the public interest test by:
- identifying any public interest considerations in favour of disclosure;
 - identifying any relevant public interest considerations against disclosure;
 - attributing weight to each consideration for and against disclosure; and
 - deciding where the balance between them lies.

Public interest considerations in favour of disclosure

- 4.5 Under section 12(1) of the GIPA Act, there is a general public interest in favour of disclosing government information. Section 12(2) of the GIPA Act sets out some examples of other public interest considerations in favour of disclosure. However, I am not limited to those considerations in deciding your application.
- 4.6 I find the following considerations in favour of disclosure are relevant to your application:
- 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.
 - Release of the information provides details on impacts of Western Harbour Tunnel and Beaches link on surrounding areas.

Public interest considerations against disclosure

- 4.7 When applying the public interest test, the only public interest considerations against disclosure that I can take into account are those set out in the table to section 14 of the GIPA Act. I have found no public interest considerations against disclosure of information in **items 5 and 6**.
- 4.8 In relation to the remaining items listed in the table at paragraph 3.3 above (with the exception of those provided to you as a new record of information), I have identified a number of public interest considerations against disclosure as being relevant to your application.

4.9 Clause 1 of the Table to section 14 of the Act relevantly reads:

1 Responsible and effective government

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 (whether in a particular case or generally):

- (a) ...
- (f) *prejudice the effective exercise by an agency of the agency's functions,*
- (g)

Application of clause 1(f)

4.10 To show that this is a relevant consideration against disclosure, I must establish:

1. the relevant function of our agency
2. how release of the information would prejudice that function, and
3. how that prejudice could reasonably be expected to occur.

I will address each of these below.

1. Relevant function

4.11 TfNSW has a range of functions relating to the provision of transport services in NSW. In particular I note the following general functions in the Transport Administration Act 1988 (TA Act):

1 General functions of TfNSW

TfNSW has the following general functions—

(a) Transport planning and policy

Transport planning and policy, including for integrated rail network, road network, maritime operations and maritime transport and land use strategies for metropolitan and regional areas.

...

(e) Contracting for the delivery of transport services

Contracting, on behalf of the State, with public transport agencies or the private sector, for the delivery of transport services, including the setting of performance targets and service standards.

...

4 Road safety, road travel efficiency and road traffic management

(1) *TfNSW may—*

- (b) *develop and implement programs, projects, strategies and campaigns for promoting or improving road safety, road travel efficiency and road traffic management, and*

...

(Schedule 1)

4.12 The Transport website¹ notes that TfNSW facilitates end to end management of the NSW motorways network by overseeing the development, delivery and operations of motorways with valued partners to deliver a faster, easier, safer and more reliable motorways network for people travelling by private vehicles or public transport.

4.13 Toll road operation in NSW is governed through the granting of concessions by TfNSW, on behalf of the State through the requisite Ministerial directions, in respect to each toll road.

¹ <https://caportal.com.au/rms/motorways/tolling>

- 4.14 TfNSW grants a concession to the concessionaire to operate (including by collecting tolls from drivers) and maintain the motorway for a certain period before handing the motorway back to TfNSW, however TfNSW remains the owner of the motorway at all times.
- 4.15 As the Beaches Link; and Western Harbour Tunnel Warringah Freeway Upgrade are still in development², the concession holder/s for these projects are as yet unconfirmed and will need to undergo a tender process prior to being selected.
- 4.16 The information within **items 1, 2 and 3** contains forecasts of traffic volume data to 2037 for the Sydney Metropolitan road network in its entirety.

2. How release could impact our functions

- 4.17 Having regard to its functions and responsibilities in the TA Act, it would appear incumbent on TfNSW ensure the services that it provides and infrastructure which is built, are delivered in such a way as to provide the best value for money for the benefit of the community, including in its negotiations with tenderers.
- 4.18 Certain concession holders already have access to their own traffic models and forecast data which provides them with an understanding of traffic flow information and the potential costs and benefits attached to it. However, further access to forecast data owned by TfNSW is likely to provide a strong competitive edge in a bidding war, thereby potentially diminishing competition to the detriment of road users
- 4.19 It occurs to me therefore that the disclosure of information in **items 1, 2 and 3** could undermine the government tendering process, which in turn could reasonably be expected to prejudice the effective exercise by TfNSW of its function to contract transport road infrastructure at best value for the people of NSW.
- 4.20 The ability to conduct a competitive tendering or procurement process is crucial to the functions of TfNSW and release of the forecast traffic volume data for 2037 will prejudice TfNSW in any future negotiation and tendering process with the third party toll operators. This is because such information has great value to potential future bidders for this kind of work, as they would be informed of details not otherwise publicly available.

3. How prejudice could reasonably be expected to occur

- 4.21 The disclosure of the information within **items 1, 2 and 3** would negatively impact the effective exercise of agency functions by providing interested parties with advance notice of expected traffic flows on the Beaches Link and Western Harbour Tunnel, thus providing early indication of where to aim their bidding based on projected tolling revenue. This will impede honest and unrestrained bidding and put the agency on the backfoot in its negotiations with tenderers.
- 4.22 Furthermore, since the forecast information covered by **items 1, 2 and 3** relates to the whole Sydney metropolitan area, the potential impact on other concessionaires of having their commercially sensitive and valuable information available to third parties poised to engage in bidding for the new tender would further narrow the competitive advantage to a select few thus making TfNSW's competitive options even slimmer and negatively impacting those third parties' business interests in the same process.
- 4.23 Having regard to the above, I am of the view that disclosure of the information in **items 1, 2, and 3** is reasonably expected to prejudice the effective functions of TfNSW. Accordingly, I consider that clause 1(f) of the Table to section 14 of the GIPA Act applies to these items and I have attributed significant weight to this consideration.
- 4.24 Clause 4 of the Table to section 14 of the Act relevantly reads:

² <https://caportal.com.au/rms/motorways>

4 Business interests of agencies and other persons

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)

...

(c) *diminish the competitive commercial value of any information to any person,*

(d) *prejudice any person's legitimate business, commercial, professional or financial interests,*

Application of clause 4(c)

4.25 To rely on clause 4(c), I must show that:

- a. the information has a competitive commercial value; and
- b. the disclosure of information would adversely affect such value base on substantial grounds.

4.26 The Tribunal has considered the term 'competitive commercial value' in a number of decisions:

- *'For information to have a "commercial value" there should be "some uniqueness attaching to the information that justified treating it as exclusive, secret or confidential."*³
- *"commercial value" in its "primary meaning" refers to information that is "valuable for the purposes of carrying on the commercial activity ..." The information "may be valuable because it is important or essential to the profitability or viability of a continuing business operation, or a pending one-off commercial transaction".*⁴
- *'In its "second meaning", information has a "commercial value to [a] ... person if a genuine arms-length buyer is prepared to pay to obtain that information from that ... person, such that the market value of the information would be destroyed or diminished if it could be obtained ... from a government agency".*⁵
- *"Competitive commercial value" therefore connotes information of commercial value gained in, or relating to, a competitive commercial or business context, including competitive information relating to the competitive purchase and provision of government services'.*⁶

4.27 I consider that 'competitive commercial value' attaches to the forecast information covered by **items 1, 2 and 3** in both its primary and secondary meanings, as it occurs to me that:

- The information is valuable for the purposes of carrying on commercial activity as it provides insight into potential returns related to tolling on the Beaches Link and Western Harbour Tunnel projects, and
- third parties interested in achieving these outcomes would be prepared to pay to obtain

³ *Hall v Department of Premier and Cabinet* [2012] NSWADT 46 at [56]

⁴ *Manning v Bathurst Regional Council* [2018] NSWCATAD 132 at [21]

⁵ *Ibid.*

⁶ *Elf Farm Supplies Pty Ltd v Department of Planning and Environment* [2018] NSWCATAD 277 at [61]; referring to *McKinnon v Blacktown City Council* [2012] NSWADT 44 at [79] - [80]

forecast information prepared by TfNSW..

- 4.28 However, the market value of the information would be destroyed or diminished if it were to be released unconditionally, as there would no longer be any singular value in obtaining the information that would make it worth paying for. Consequently, the intrinsic competitive commercial value of the information itself would be diminished if revealed. For these reasons, I am satisfied that clause 4(c) applies to this information.
- 4.29 To the extent that the information holds a strong commercial value, I consider that clause 4(c) applies in this instance. However, as I am unaware of any current intention by TfNSW to offer the information for purchase, and noting that the information is important but not essential to the viability of future concession holders' continuing business, I have only accorded medium weight to this consideration.

Application of clause 4(d) to items 1, 2 and 3

- 4.30 In order to establish the relevance of this consideration, I must:
- identify the relevant legitimate interest, and
 - explain how the interest would be prejudiced if the information was disclosed.
- 4.31 The geographic scope of information listed in **items 1, 2 and 3** encompasses the Sydney Metropolitan area which includes privately operated toll roads. The release of traffic forecasts pertaining to all toll roads across the Sydney Metropolitan area will impact TfNSW's ability to obtain value for money from any future negotiation and tendering process with third party toll operators. It will also reveal commercially sensitive forecast information that would adversely impact current toll road operators, if released more broadly to their own competitors.
- 4.32 As such, I am of the view that the release of the information in **items 1, 2, and 3** would remove the competitive neutrality of TfNSW's negotiating position in future tendering processes by providing an advantage to tenderers through advance notice of anticipated costs, benefits and estimated revenues, which is key in determining our business strategies, and would be used for commercial profit at the agency's expense and by extension, the expense of the NSW public.
- 4.33 Additionally, as release of the forecast data would also apprise tenderers of estimated revenues from these roads, release of the information could also prompt an increase to toll costs to generate revenue if the information called for it.
- 4.34 I am satisfied that the release of such sensitive traffic forecasts information could reasonably be expected to prejudice TfNSW's, other prospective tenderers' and third parties' legitimate business interests for the reasons outlined above. It also occurs to me that revealing the information is reasonably likely to disrupt the positive business relationship between TfNSW and its third party contractors, which would further prejudice its business interests.
- 4.35 For these reasons, the disclosure of the information identified could reasonably be expected to prejudice TfNSW's and third parties' legitimate business and financial interests as set out in clause 4(d) to the Table of section 14.

Balancing the public interest considerations

- 4.36 I have considered the relevant public interest considerations in favour of and against disclosure of the information that you have requested.
- 4.37 There are public interest considerations in favour of disclosure as these are major projects affecting a great number of community members. I have placed substantial weight on these public interest considerations.
- 4.38 In respect of **items 5 and 6**, I have not identified any public interest considerations against disclosure and these documents are released to you in full.

- 4.39 However, in respect of the information in **items 1, 2, and 3** as outlined above, I have found public interest considerations against disclosure. As the disclosure of the information is likely to impact on our functions and undermine a competitive tendering process, I have placed very significant weight on those public interest considerations against disclosure. I also consider that the release of the information is reasonably likely to diminish its competitive commercial value and I have placed medium weight on this consideration.
- 4.40 Additionally, as disclosure of the information listed in **items 1, 2 and 3** is likely to undermine a competitive tendering process and thereby negatively affect TfNSW's legitimate business and financial interests in its representative role on behalf of the NSW public, I have placed significant weight to this public interest consideration against disclosure.
- 4.41 While I note the importance of keeping the public informed about government planning on such projects, it is my view that there is a substantial public interest in ensuring the effective exercise of TfNSW's function to negotiate to its best ability, especially in respect of such major road projects. While I also recognise the importance of transparency in government decision making process, I am of the view that the public interest considerations against release of this information far outweigh those in favour at this particular stage noting that information provided in response to an access application is unconditional and cannot be made subject to any limitations regarding future use or disclosure.⁷
- 4.42 This is particularly relevant in relation to your request for information, given the business area's offer of further information and assistance outside the GIPA process to help address your concerns and queries.
- 4.43 In conclusion, in balancing the public interest considerations for and against release, I have decided that there is an overriding public interest against disclosure of the information within **items 1, 2 and 3** and I have decided to refuse access to this information.
- 4.44 As noted above you can contact us directly or forward your further enquiry informally to SID's communication team, which may give rise to certain information being made available to you, subject to a confidentiality agreement between TfNSW and yourself.

5 Access

Form of access

- 5.1 You will be provided with a copy of the information that has been identified for release.

6 Processing Charges

- 6.1 Under section 64 of the GIPA Act, we may require you to pay processing charges, at a rate of \$30 per hour, for the time spent dealing with your access application. The application fee of \$30 counts as payment of one hour of the processing charges.
- 6.2 Although a number of hours have been spent processing your application. I have decided not to impose any additional processing charges for dealing with your application.

7 Disclosure Log

- 7.1 If information that would be of interest to other members of the public is released in response to a formal access application, an agency must record certain details about the application in its 'disclosure log' (under sections 25 and 26 of the GIPA Act).
- 7.2 In the letter acknowledging receipt of your application, you were told about the disclosure log. You were also advised of your right to object to the inclusion of details about your access application in the disclosure log.
- 7.3 I note that you have not objected to such disclosure.
- 7.4 I have decided not to include details about your access application in the disclosure log.

⁷ Sections 15(e), 73(1), also refer to *Griffin v Sydney Trains* [2020] NSWCATAD 234, at [66])

8 Review rights

- 8.1 If you disagree with my decision, you may apply for this decision to be reviewed by seeking:
- an internal review by another officer of TfNSW, who is no less senior than me;
 - an external review by the NSW Information Commissioner; or
 - an external review by the NSW Civil and Administrative Tribunal (NCAT).
- 8.2 You have 20 working days from the date of this letter to apply for an internal review and 40 working days to apply for an external review by the NSW Information Commissioner or the NCAT.

9 Further information

- 9.1 For your information and assistance, I have enclosed a fact sheet explaining your rights to have my decision reviewed.
- 9.2 Please do not hesitate to contact _____ by phone on _____ if you have any questions about this letter.

Yours sincerely,

Manager, Information Access

Appendix C – GIPA – 21T-1518

Submitted – 3 June 2021

Decision – 1 July 2021

“Percent of State and Federal Funding”

1 July 2021

Our ref: 21T-1518

Mr Ted Nye
E J Nye & Associates Pty Ltd

By email: ted.nye@nyeconsulting-eng.com.au

Dear Mr Nye,

**Notice of decision on your access application under the
Government Information (Public Access) Act 2009 (GIPA Act)**

Applicant:	Mr Ted Nye
File reference:	21T-1518
Decision maker:	
Received date:	3 June 2021
Due date:	2 July 2021
Date of decision:	1 July 2021

1 Your access application

- 1.1 On 3 June 2021 Transport for NSW (TfNSW) received your access application under the GIPA Act for the following information:

*'For the Western Harbour Crossing and Beaches Link Road Tunnel projects please provide the relative percent of State and Federal Government funding (if any) for each project (**point 1**). If there is Federal Government funding, please provide the conditions that the State Government has comply with in order to have obtained this Federal Government funding (**point 2**).'*

- 1.2 In your access application you indicated a preference for receiving correspondence by email at ted.nye@nyeconsulting-eng.com.au.

2 Searches for information

- 2.1 Under the GIPA Act, we must conduct reasonable searches to locate the government information for which you have applied.

- 2.2 The following areas of TfNSW have conducted searches:

- Infrastructure and Place (IP)

- Infrastructure Development
 - Sydney Infrastructure Development (SID)

3 Decision

- 3.1 I am authorised by the Principal Officer, for the purposes of section 9(3) of the GIPA Act, to decide your access application.
- 3.2 I have decided that some of the information:
- is already available to you under section 58(1)(c);
 - is not held under section 58(1)(b).
- 3.3 Please see below a summary of my decision:

Page Ref.	Information	Act Ref.	Access
n/a (Point 1)	<p><i>For the Western Harbour Crossing and Beaches Link Road Tunnel projects the relative percent of State and Federal Government funding (if any) for each project.</i></p> <p>Publicly available link to Federal funding information: One Step Closer to Unlocking the North - James Griffin MP</p>	<p>s58(1)(c) s59 (1)(e)</p> <p>s58(1)(b) s75(2)</p>	<p>Some info already available</p> <p>Some not held</p>
n/a (Point 2)	<i>If there is Federal Government funding, please provide the conditions that the State Government has comply with in order to have obtained this Federal Government funding</i>	s58(1)(b)	Info not held

Information already available to you (point 1)

- 3.4 Under section 59 of the GIPA Act an agency can decide that information is already available to an applicant, if the information is of a kind described in that section. The information listed at Part 3.3, relates to publicly available information. As this information can be accessed via the link provided, section 59(1)(e) of the GIPA Act applies. As such, I have decided under section 58(1)(c) that this information is already available to you.

Agency not required to provide a new record of information (point 1)

- 3.5 In order to provide a relative percent of State and Federal Government funding, a calculation of the amount of Federal funding against State funding would be required. I note in this respect that section 75(2) does not require an agency to create new information, or produce a new record of information by deduction, inference or calculation, which the agency would be required to do in order to arrive at a relative percentage as requested. Moreover, section 75(2) also does not require an agency to verify information, and I understand that both verification and further calculation would be required by the agency in order to come to a figure approximating current State Government funding. Consequently, I have decided that the information responsive to this aspect of your request is not information held by the agency under section 58(1)(b) of the GIPA Act.

4 Reasons for Decision

- 4.1 Under section 9(1) of the GIPA Act, you have a legally enforceable right to access the information you asked for, unless there is an overriding public interest against its disclosure.
- 4.2 Under section 5 of the GIPA Act, there is a presumption in favour of disclosing government information unless there is an overriding public interest against its disclosure.

- 4.3 In reaching the decision that the information is not held in relation to **point 2** of your request, I must consider whether TfNSW has sufficiently conducted a reasonable search under section 53 of the GIPA Act.
- 4.4 Two issues arise for consideration:
- (i) *Are there reasonable grounds to believe that the requested documents exist and are the documents of the agency; and if so*
- (ii) *Have the search efforts made by the agency to locate such documents been reasonable in all the circumstances of a particular case?*
- (i) ***Are there reasonable grounds to believe that the requested information exist and are they documents of the Agency?***
- 4.5 Your application requests information about conditions that the State Government has to comply with in order to have obtained Federal Government funding for the Western Harbour Crossing and Beaches Link Road Tunnel projects.
- 4.6 I have been informed by the Infrastructure Development area within IP that there are no conditions that the State Government has to comply with in order to have obtained Federal Government funding, as this funding was provided unsolicited.
- 4.7 Consequently, there are no reasonable grounds to believe that the information requested exists or is information of the Agency.
- 4.8 It would appear to me therefore that the question of whether search efforts were reasonable is an irrelevant consideration and I discuss this further below.

(ii) ***Have the search efforts made by the agency to locate such documents been reasonable (...)?***

- 4.9 Having determined that there is no reasonable basis to believe that the requested document exists or is a document of the agency, there is no requirement to conduct searches for the information in this instance, and I am satisfied that the information responsive to point 2 of your request is not held by TfNSW under section 58(1)(b) of the GIPA Act.

5 Disclosure Log

- 5.1 If information that would be of interest to other members of the public is released in response to a formal access application, an agency must record certain details about the application in its 'disclosure log' (under sections 25 and 26 of the GIPA Act).
- 5.2 In the letter acknowledging receipt of your application, you were told about the disclosure log. You were also advised of your right to object to the inclusion of details about your access application in the disclosure log.
- 5.3 As this decision is not releasing any information, I have decided not to include details about your access application.

6 Review rights

- 6.1 If you disagree with my decision, you may apply for this decision to be reviewed by seeking:
- an internal review by another officer of TfNSW, who is no less senior than me;
 - an external review by the NSW Information Commissioner; or
 - an external review by the NSW Civil and Administrative Tribunal (NCAT).
- 6.2 You have 20 working days from the date of this letter to apply for an internal review and 40 working days to apply for an external review by the NSW Information Commissioner or the NCAT.

7 Further information

- 7.1 For your information and assistance, I have enclosed a fact sheet explaining your rights to have my decision reviewed.
- 7.2 Please do not hesitate to contact _____ by phone on _____ if you have any questions about this letter.

Yours sincerely,

Manager, Information Access

Appendix D – GIPA – 21T-1514

Submitted – 2 June 2021

Decision – 1 July 2021

“Cost estimate of project (both WHC and BLRT)”

and letter reponse dated 10 Augiust 2021

1 July 2021

Our ref: 21T-1514

Mr Ted Nye
E J Nye & Associates Pty Ltd

By email: ted.nye@nyeconsulting-eng.com.au

Dear Mr Nye,

**Notice of decision on your access application under the
Government Information (Public Access) Act 2009 (GIPA Act)**

Applicant:	E J Nye & Associates Pty Ltd
File reference:	21T-1514
Decision maker:	
Received date:	2 June 2021
Due date:	1 July 2021
Date of decision:	1 July 2021

1 Your access application

- 1.1 On 2 June 2021 Transport for NSW (TfNSW) received your access application under the GIPA Act for the following information:

'Please refer to the attached ABC news article published in Jan 2021. The \$14 billion cost estimate (I have highlighted the text in yellow) appears too high for the Western Harbour Crossing alone, and it may included the Beaches Link Road Project?

*In any case please provide the Governments project cost estimates for both the Western Harbour Crossing and the Beaches Link Road Tunnel (**Point 1**) and also which government department or other organisation prepared these cost estimates (**Point 2**) also please include the underlying basis of these cost estimates. (**Point 3**)*

The cost of the Western Harbour Crossing will of course be significantly higher than for a "typical" Sydney road tunnel excavated in good quality sandstone rock (and would in the range of about \$4 billion and \$ 6 billion, based on my direct

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knowledge of Northconnex, which also happened to be under bid by the contractor). This higher cost (for the WHC) being due the construction of an immersed tube tunnel and also having to work inside the Warringah Expressway Road corridor.'

1.2 As outlined in our acknowledgement letter dated 2 June 2021, TfNSW has understood the terms of your request to be for documents outlining project cost estimates for both the Western Harbour Crossing and the Beaches Link Road Tunnel as of the date of your application, as well as the underlying basis for these cost estimates. Your access request also queries which government department or other organisation prepared these cost estimates.

1.3 In your access application you indicated a preference for receiving correspondence by email at ted.nye@nyeconsulting-eng.com.au.

2 Searches for information

2.1 Under the GIPA Act, we must conduct reasonable searches to locate the government information for which you have applied.

2.2 The following area of TfNSW, as the subject matter experts in this matter, engaged in discussions with the Information Access Unit about the terms of your request and the way in which information is held by the agency in relation to these terms:

- Infrastructure and Place(IP)
 - Development
 - Sydney Infrastructure Development (SID)

3 Decision

3.1 I am authorised by the Principal Officer, for the purposes of section 9(3) of the GIPA Act, to decide your access application.

3.2 I have decided:

- to provide to some information responsive to your request under section 58(1)(a);
- to refuse to provide access to some information under section 58(1)(d);
- that some of the information is not held under section 58(1)(b).

3.3 Please see below a summary of my decision:

Item Ref	Information	Act Ref.	Access
n/a Point 1	<i>Governments project cost estimates for both the Western Harbour Crossing and the Beaches Link Road Tunnel</i>	s58(1)(d) s14 Table 1(e), (f) & 4(d)	Refused
New record Point 2	<i>Which government department or other organisation prepared these cost estimates</i>	s58(1)(a) s75(1)	Full
n/a Point 3	<i>Please include the underlying basis of these cost estimates</i>	s58(1)(b) s75(2) s14 Table 1(e), (f) & 4(d)	Not held

4 Reasons for Decision

- 4.1 Under section 9(1) of the GIPA Act, you have a legally enforceable right to access the information you asked for, unless there is an overriding public interest against its disclosure.
- 4.2 Under section 5 of the GIPA Act, there is a presumption in favour of disclosing government information unless there is an overriding public interest against its disclosure.
- 4.3 Section 3 of the GIPA Act provides that the object of the Act is to open government information to the public by, among other things, giving members of the public an enforceable right to access government information.

Points 1 and 3 – Cost estimates for both the Western Harbour Crossing and the Beaches Link Road Tunnel; and the underlying basis of these cost estimates

Public interest test

- 4.4 To decide whether or not there is an overriding public interest against disclosure of the information contained in the records identified in the Table at part 3.3 above, I applied the public interest test, which is set out in section 13 of the GIPA Act.
- 4.5 I applied the public interest test by:
- identifying any public interest considerations in favour of disclosure;
 - identifying any relevant public interest considerations against disclosure;
 - attributing weight to each consideration for and against disclosure; and
 - deciding where the balance between them lies.

Public interest considerations in favour of disclosure

- 4.6 Under section 12(1) of the GIPA Act, there is a general public interest in favour of disclosing government information, which is significant. Section 12(2) of the GIPA Act sets out some examples of other public interest considerations in favour of disclosure. However, I am not limited to those considerations in deciding your application.
- 4.7 I find the following considerations in favour of disclosure are relevant to your application:
- 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.
 - Disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds.
 - A specific public interest to the surrounding community of being informed of the costs and underlying basis for those costs, as individuals impacted by these projects.
- 4.8 I have attributed considerable weight to these considerations in favour of disclosure.

Public interest considerations against disclosure

- 4.9 When applying the public interest test, the only public interest considerations against disclosure that I can take into account are those set out in the table to section 14 of the GIPA Act.
- 4.10 I have identified the following considerations against disclosure as being relevant to your application:

4.11 Clause 1 of the Table to section 14 of the Act relevantly reads:

1 Responsible and effective government

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 (whether in a particular case or generally):

- (a) ..
- (e) *reveal a deliberation or consultation conducted, or an opinion, advice or recommendation given, in such a way as to prejudice a deliberative process of government or an agency,*
- (f) *prejudice the effective exercise by an agency of the agency's functions,*
- (g) ..

Application of clause 1(e)

4.12 In order for clause 1(e) to apply, the Agency must establish that disclosing the information could reasonably be expected to:

- reveal a deliberation or consultation conducted an opinion or recommendation in such a way as to
- prejudice a deliberative process of the agency.

4.13 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)'*.

4.14 The word 'prejudice' is given its ordinary meaning, that is, *'to cause detriment or disadvantage'* or to *'impede or derogate from.'*¹

4.15 In *Watt v Department of Planning and Environment [2016] NSWCATAD 42*, the Tribunal considered that no prejudice could arise where the relevant deliberation had already concluded.

4.16 The phrase 'deliberative process' has been given its ordinary meaning, including any processes of deliberation or consideration involved in the functions of an agency. More particularly, a deliberative process is a *'careful consideration with a view to a decision.'*²

4.17 With reference to **point 1** of your request, I have been advised that the development of *Warringah Freeway Upgrade, Western Harbour Tunnel and Beaches Link* projects are currently ongoing, so cost estimates associated to these projects have not been finalised and are subject to continuous change.

4.18 Additionally, I am informed the information requested in **point 3** which is the underlying basis for the cost estimates of these projects is also subject to continuous change, review and analysis. I am further informed that several thousand items form the underlying basis of these estimates, which are not readily available in a particular record and would need to be identified by verifying records of the agency. Given the significant number of items that forms the underlying basis of the cost estimates, it would also follow that production of a new record of information by collating information the agency holds in different locations would be required to satisfactorily address point 3 of your request.

4.19 The Information Commissioner's factsheet titled *'Creating new records under the GIPA Act'*³ states that *'an agency may create a new record through these actions but is not obliged or compelled to do so'*. It goes on to say that prior to considering the creation of a new record, agencies will perform a balancing of the considerations in favour of disclosure with those in

¹ *Hurst v Wagga Wagga City Council* [2011] NSWADT 307, [60]

² *Fire Brigade Employees Union v Fire and Rescue NSW* [2014] NSWCATAD 113, [58]

³ Publicly available at https://www.ipc.nsw.gov.au/sites/default/files/2019-02/Fact_Sheet_Creating_new_records_under_the_GIPA_Act_February_2019.pdf

favour of disclosure to establish whether or not an overriding public interest against disclosure of the information applies, which I set out below.

- 4.20 Based on the advice provided from the project team, there are currently of several thousand line items that form the underlying basis for these cost estimates. As the projects you refer to have not yet concluded, the cost estimates themselves, as well as the items upon which they are built, are not static in nature as they are subject to revision and change throughout the life of the matter.
- 4.21 It occurs to me that to reveal any particular figure for cost estimates and particularly, to reveal the underlying basis of these estimates at a time where both these items are subject to further change, would be prejudicial to the deliberative process as it will inhibit the agency's ability to critically consider and plan these project requirements unimpeded.
- 4.22 This is because Transport projects of this significance, which concern and affect a large cross-section of the community, are also reasonably likely to attract strong opinions, commentary and communications from the general public. In anticipation of the significant volume of feedback this is likely to stimulate, a process of community consultation is built in to projects of this kind to provide the public with an opportunity to comment on proposed projects and the processes surrounding them. Agency's time and resources are specifically dedicated to this process for a period spanning several months so that the feedback provided can be reviewed, considered and appropriate action taken to proceed or redirect such projects to provide best outcomes for the community as a whole.
- 4.23 When a course is plotted for the progress of a preferred option following such consultation, agency resources are reallocated to the construction phase of the project. While TfNSW continues to engage with public about concerns, comments and queries in relation to the project, it is no longer able devote the majority of its resources to consultation, as they are focussed on delivery.
- 4.24 As outlined above, there are several thousand items that form the underlying basis for cost estimates and these are not static, nor are the cost estimates themselves. For the reasons outlined above, the premature release of this information to the general public would have the effect of generating discussion and commentary to which the agency would be required to dedicate further time and resources, thus impeding the deliberative process. It would also no doubt primarily attract the attention and comments of dissenting members of the public rather than those who already agree with the direction being taken, which would have the effect of lending greater weight to discussion opposing particular aspects or items. The overall effect of this would be greatly prejudicial to the agency's deliberative process and to its ability to conduct the process with the resources it currently has, were the recommendations and / or opinions of the agency to be revealed at this stage of the process.
- 4.25 In my view, this consideration is a particularly significant one, as I have become aware that staff working on the project often spend 10 to 12 hour working days on the progress of the project. As such, the resources being dedicated to the project, which is still in the deliberative stages, are already being greatly stretched as it is.
- 4.26 In my view therefore, the premature release of these cost estimates and their underlying basis, while the deliberative process is still ongoing would reveal a deliberation or consultation conducted, or an opinion, advice or recommendation given in such a way as to prejudice a deliberate process of an agency. I am satisfied that it is reasonably likely that revealing the information at this stage of the initiative is reasonably likely to have a prejudicial effect on the deliberative process, as it would pre-emptively seek to draw conclusions about a process that is still being considered and is subject to implementation. I have attributed considerable weight to this consideration, for the reasons outlined above.

Application of clause 1(f)

- 4.27 To show that this is a relevant consideration against disclosure, I must establish:
1. the relevant function of our agency
 2. how release of the information would prejudice that function, and

3. how that prejudice could reasonably be expected to occur.

I will address each of these below.

1. Relevant function

- 4.28 TfNSW has a range of functions relating to the provision of transport services in NSW. In particular I note the following general functions in the Transport Administration Act 1988 (TA Act):

1 General functions of TfNSW

TfNSW has the following general functions—

(a) Transport planning and policy

Transport planning and policy, including for integrated rail network, road network, maritime operations and maritime transport and land use strategies for metropolitan and regional areas.

...

(c) Transport infrastructure

The planning, oversight and delivery of transport infrastructure in accordance with integrated transport and land use strategies and available financial resources, including prioritising of expenditure and projects across the transport system.

...

(e) Contracting for the delivery of transport services

Contracting, on behalf of the State, with public transport agencies or the private sector, for the delivery of transport services, including the setting of performance targets and service standards.

...

Schedule 1)

- 4.29 It is implicit in these functions that TfNSW ensures the services that it provides and transport infrastructure which is built, are delivered in such a way as to provide the best value for money for the benefit of the community.
- 4.30 Transport website notes that TfNSW facilitates end to end management of the NSW motorways network by overseeing the development, delivery and operations of motorways with valued partners to deliver a faster, easier, safer and more reliable motorways network for people travelling by private vehicles or public transport.
- 4.31 As the Beaches Link; and Western Harbour Tunnel and Warringah Freeway Upgrade are still in development⁴, the projects team will require to undergo a tendering process in order to select the operators and third party contractors for any additional project work requested in future.

2. How release could impact our functions

- 4.32 Having regard to its functions and responsibilities in the TA Act, it would appear incumbent on TfNSW ensure the services that it provides and infrastructure which is built, are delivered in such a way as to provide the best value for money for the benefit of the community, including in its negotiations with tenderers.
- 4.33 It occurs to me that the disclosure ongoing cost estimates for these projects and underlying basis such as various options and recommendations may be used to inform any potential tenderers about the cost anticipated by TfNSW for the various aspects of these projects. The release of these cost estimates and documents based to evaluate these costs could undermine the government tendering process, which in turn could reasonably be expected

⁴ <https://caportal.com.au/rms/motorways>

to prejudice the effective exercise by TfNSW of its function to contract transport road infrastructure at best value for the people of NSW.

- 4.34 The ability to conduct a competitive tendering or procurement process is crucial to the functions of TfNSW and release of the cost estimates will prejudice TfNSW in any future negotiation and probity bound tendering process with third parties. This is because such information has great value to potential future bidders for this kind of work, as they would be informed of details not otherwise publicly available.
- 4.35 In addition to this, the redirection of resources described in paragraphs 4.22 to 4.24 would also prejudice the TfNSW's ability to effectively exercise its planning and delivery functions as it would be required to refocus its priorities towards managing and responding to community feedback in relation to matters that are still part of the deliberative process, and in some cases reconsidering or double handling issues it had already expended time and resources addressing as part of the process of community consultation. This would cause delay to the planning and delivery aspects of the project, ultimately impeding the Agency's ability to exercise its functions in an effective way by drawing on Agency resources that are already overextended.

3. How prejudice could reasonably be expected to occur

- 4.36 The disclosure of the cost estimates would negatively impact the effective exercise of agency functions by providing interested parties with advance notice of anticipated cost estimates for the Beaches Link and Western Harbour Tunnel, thus providing early indication of where to aim their bidding based on those cost estimates. This will impede honest and unrestrained bidding and put the agency on the backfoot in its negotiations with tenderers.
- 4.37 Furthermore, to the extent that resources are being redirected away from the planning and delivery functions of this Agency, it is to be reasonably expected that this will directly prejudice TfNSW's ability to effectively use its resources to perform those functions it is required to spend time and effort on at this phase of these projects.
- 4.38 Having regard to the above, I am of the view that disclosure of the cost estimates and their underlying basis, is reasonably expected to prejudice the effective functions of TfNSW. Accordingly, I consider that clause 1(f) of the Table to section 14 of the GIPA Act applies to these items and I have attributed significant weight to this consideration for the reasons outlined above.
- 4.39 Clause 4 of the Table to section 14 of the Act relevantly reads:

4 Business interests of agencies and other persons

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)
- (d) *prejudice any person's legitimate business, commercial, professional or financial interests,*
- (e)

Application of clause 4(d)

- 4.40 In order to establish the relevance of this consideration, I must:
- identify the relevant legitimate interest, and
 - explain how the interest would be prejudiced if the information was disclosed.
- 4.41 As detailed above, there are several functions of TfNSW that involve a competitive market. In particular, the cost-effective delivery of Transport infrastructure requires prioritisation of expenditure and projects across the Transport system. This requires TfNSW to ensure that competitive bids are made in response to a tender process so that the people of NSW receive the best possible value. I am of the view that obtaining best value for money and

conducting a fair and competitive tendering process is a legitimate business and financial interest of both TfNSW and the NSW public and hence meets the first criteria of this public interest consideration.

- 4.42 The release of the information requested in **points 1 and 3** for *Warringah Freeway Upgrade, Western Harbour Tunnel and Beaches Link* projects will impact TfNSW's ability to obtain value for money from any future negotiation and probity bound tendering process with potential third parties involved in these projects. It will also reveal commercially sensitive information by revealing the breakdown of TfNSW's cost estimates that would adversely impact potential third party contractors, if released more broadly to their own competitors. The release of whole cost estimate figures, which are still subject to change would also have the effect of exposing the Agency's financial bottom line, which would be prejudicial to TfNSW in its ongoing negotiations with tenderers.
- 4.43 As such, I am of the view that the release of these would remove the competitive neutrality of TfNSW's negotiating position in future tendering processes by providing an advantage to tenderers through advance notice of anticipated cost estimates, which is key in determining our business strategies, and would be used for commercial profit at the agency's expense and by extension, the expense of the NSW public.
- 4.44 In addition to this, as previously described, the potential delays and redirection of resources caused by a premature release of information that is still undergoing a deliberative process would cause further prejudice to the business and financial interest of the agency and the public if NSW as a whole. The more time, resources and cost diverted away from the planning and delivery aspects of the project, the greater the financial and business detriment to both the agency and the public as these resources could have been used to further progress project delivery.
- 4.45 For these reasons, I am satisfied that the release of such commercially sensitive information which is still part of the deliberative process (being the cost estimates and their underlying basis) could reasonably be expected to prejudice TfNSW's, other prospective tenderers' and third parties' legitimate business interests for the reasons outlined above. It also occurs to me that revealing the information is reasonably likely to disrupt the positive business relationship between TfNSW and its third party contractors, which would further prejudice its business interests.
- 4.46 Accordingly, clause 4(d) to the Table of section 14 applies in the current circumstances and I have attributed strong weight to this consideration in light of the significant prejudice that would occur if the requested information for points 1 and 3 were to be released through the GIPA process, which would have the effect of it being disclosed without any conditions being imposed on its release.

Balancing the public interest considerations

- 4.47 I have considered the relevant public interest considerations in favour of and against disclosure of the information that you have requested.
- 4.48 There are public interest considerations in favour of disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds. Additionally, these are major projects affecting a great number of community. I have placed substantial weight on these public interest considerations.
- 4.49 However, in respect of the information requested in **points 1 and 3** of your application as outlined above, I have found that the public interest considerations against disclosure outweigh those favouring disclosure, for the reasons outlined above.
- 4.50 Specifically, it is clear to me that the premature release of the cost estimates of these projects and their underlying basis, while the deliberative process is still ongoing would reveal a deliberation or consultation conducted, or an opinion, advice or recommendation given in such a way as to strongly prejudice TfNSW's deliberative processes.
- 4.51 Further, as the disclosure of the information is likely to impact on the effective exercise of TfNSW's functions by undermining competitive tendering processes and redirecting

resources earmarked for use by the agency in the performance of its planning and delivery functions, I have placed very significant weight on those public interest considerations against disclosure.

- 4.52 Finally, with regard to the prejudice caused to TfNSW itself, to the NSW public and to third party contractors of the agency by revealing a breakdown of current cost estimates and the cost estimates themselves at this stage of the project, I consider the prejudice caused by release and its ensuing effects to be considerable, and I have accorded high weight to these effects.
- 4.53 While I note the importance of keeping the public informed about government planning on such projects, it is my view that there is a substantial public interest in:
- ensuring the effective exercise of TfNSW's functions in relation to such projects
 - limiting the business and financial prejudice caused to the agency, the public and to third parties as a result of releasing commercially sensitive information, and
 - in ensuring the agency's deliberative processes are not impeded as a result of such release.
- 4.54 While I also recognise the importance of transparency in government decision making process, I am of the view that the public interest considerations against release of this information far outweigh those in favour at this particular stage noting that information provided in response to an access application is unconditional and cannot be made subject to any limitations regarding future use or disclosure.
- 4.55 In conclusion, in balancing the public interest considerations for and against release, I have decided that there is an overriding public interest against disclosure of the information requested in **points 1 and 3** of your application. I have decided to refuse access to information that responds to **point 1** of your request. I discuss my decision in relation to **point 3** of your access request at more length in paragraphs 4.57 to 4.59 below.
- 4.56 I have decided to provide you with information in full in response to **point 2** of your request, which I address in paragraphs **5.1 and 5.2** below.

Point 3 – The underlying basis of cost estimates

- 4.57 As outlined in paragraphs 4.18 and 4.19 of this notice of decision, there are several thousand line items relevant to this aspect of your request, which would require that a new record of information be produced to appropriately address **point 3** of your request.
- 4.58 Before deciding whether to create a new record, TfNSW has had regard to the considerations in favour and against the disclosure of the information, and found that an overriding public interest against disclosure applies in relation to information responsive to point 3. This approach is in line with guidance provided by the Information Commissioner, noting that section 15(b) of the GIPA provides that '*agencies must have regard to any relevant guidelines issued by the Information Commissioner*'.
- 4.59 Consequently for the reasons I outlined in paragraphs 4.18 and 4.19 and in keeping with the Information Commissioner's guidance on the subject, since an overriding public interest applies to the information responsive to point 3, TfNSW will not be creating a new record to deal with this aspect of the request, as it would require the agency to verify and extract information TfNSW holds to produce the record, which is not required under section 75(2).
- 4.60 Accordingly, it occurs to me that information responsive to point 3 of your request is not held by the agency in a form that would appropriately address this aspect of the request, as there is no document that contains the underlying basis of the cost estimates. I have therefore decided under section 58(1)(b) of the GIPA Act that the information responsive to **point 3** of your request is not held by the agency.

Point 2 - Which government department or other organisation prepared cost estimates

5 Access

Form of access

- 5.1 A new record of information is provided in this notice of decision in response to **point 2** of your access application, based on the knowledge of TfNSW subject matter experts.
- 5.2 In response to **point 2** of your request, I have been informed by Infrastructure and Place that TfNSW is the relevant government department that prepared the cost estimates for Western Harbour Crossing and the Beaches Link Road Tunnel.

6 Processing Charges

- 6.1 Under section 64 of the GIPA Act, we may require you to pay processing charges, at a rate of \$30 per hour, for the time spent dealing with your access application. The application fee of \$30 counts as payment of one hour of the processing charges.
- 6.2 Although a number of hours have been spent processing your application. I have decided not to impose any additional processing charges for dealing with your application.

7 Disclosure Log

- 7.1 If information that would be of interest to other members of the public is released in response to a formal access application, an agency must record certain details about the application in its 'disclosure log' (under sections 25 and 26 of the GIPA Act).
- 7.2 In the letter acknowledging receipt of your application, you were told about the disclosure log. You were also advised of your right to object to the inclusion of details about your access application in the disclosure log.
- 7.3 I note that you have not objected to such disclosure.
- 7.4 I have decided not to include details about your access application in the disclosure log.

8 Review rights

- 8.1 If you disagree with my decision, you may apply for this decision to be reviewed by seeking:
- an internal review by another officer of TfNSW, who is no less senior than me;
 - an external review by the NSW Information Commissioner; or
 - an external review by the NSW Civil and Administrative Tribunal (NCAT).
- 8.2 You have 20 working days from the date of this letter to apply for an internal review and 40 working days to apply for an external review by the NSW Information Commissioner or the NCAT.

9 Further information

- 9.1 For your information and assistance, I have enclosed a fact sheet explaining your rights to have my decision reviewed.
- 9.2 Please do not hesitate to contact _____ by phone on _____ if you have any questions about this letter.

Yours sincerely,

Manager, Information Access

10 August 2021

Our ref: 21T-1514

Mr Ted Nye
E J Nye & Associates Pty Ltd

By email: ted.nye@nyeconsulting-eng.com.au

Dear Mr Nye,

Informal release of information under the Government Information (Public Access) Act 2009 (GIPA Act)

I refer to our telephone conversation on **3 August 2021** in relation to some additional enquiries that you had about your access application 21T-1514.

In our discussion, I agreed to refer your enquiries to the relevant business area with a view to providing an informal response under the GIPA Act.

As discussed with you on **4 August 2021**, I have now met with the relevant business area and can provide a response to your questions, which are as follows:

1. (...) *Has the above scenario been considered in determining the actual cost when developing the Business Cases for both WHC and BLRT? And if so, what proportion of the WHC capital cost has been transferred over the BLRT in developing its Business Case? and further,*
2. *Has the extra over environmental impact also been considered of an immersed tube tunnel compared to a bored tunnel, as was the case for the Sydney Metro (please refer to the extracted page 74, and highlighted text attached, taken from the Sydney Metro – Chatswood to Sydenham EIS, Chapter 4 “Project Development and Alternatives”)?*

Informal response to your queries

Section 8 of the GIPA Act authorises an agency to release information held by it to a person in response to an informal request by the person unless there is an overriding public interest against disclosure of the information.

I am authorised by the chief officer of TfNSW to respond to your request.

The Infrastructure and Place Division of Transport for NSW (TfNSW) have provided the following response:

1. Terminology

To clarify terminology used in the below response, please note Transport for NSW refers to the projects as:

- Western Harbour Tunnel (WHT)

- Beaches Link (BL)
- Warringah Freeway Upgrade (WFU)

2. *Connectivity of WHT and BL*

The strategic connectivity and assessment of alternative options for WHT is outlined in Sections 4.3 and 4.4 of the WHT/WFU Environmental Impact Statement (EIS), which is available on the major projects portal of Department of Planning, Industry and Environment (DPIE). As outlined in the WHT/WFU EIS, WHT will connect to the existing motorway network at the Warringah Freeway at Cammeray. In addition to providing motorway to motorway connectivity, WHT will also directly connect to and from North Sydney and surrounds via an off-ramp at Falcon Street and on-ramp at the eastern end of Berry Street.

The strategic connectivity of BL is outlined in Sections 4.3 and 4.4 of the BL EIS, also available on the DPIE major projects portal. As outlined in the BL EIS, BL will connect to the existing motorway network in two locations, being at the Warringah Freeway at Cammeray and the Gore Hill Freeway at Artarmon. The proposed design connects Sydney's major strategic centres of Sydney CBD and North Sydney (and surrounds) and strategic centres along the M2 motorway corridor with the Northern Beaches.

Due to the proximity of connections at Cammeray, and a forecast demand for some vehicles to use both WHT and BL, an underground connection between WHT and BL has also been provided at Cammeray (below the Warringah Freeway).

TfNSW acknowledges that you have an alternative proposal for the strategic connectivity – and consequent function/purpose – of WHT and BL.

We understand that you were provided the opportunity to present and discuss this alternative with the Traffic and Transport Lead for WHT and BL.

3. *Tunnelling methodology of WHT*

From your correspondence and previous representations, TfNSW understands that you view the WHT and BL as being mutually exclusive.

TfNSW agrees that WHT and BL can be constructed independently of each other. However, TfNSW notes that the benefits of BL (at least those related to north-south trips) requires downstream capacity enhancements for the crossing of Sydney Harbour. That is, a portion of the benefits of BL require the WHT.

The tunnelling methodology for WHT was determined through a rigorous process of assessing various combinations and permutations of methodologies. The options are summarised in Section 4.5.1 of the WHT/WFU EIS.

A key difference between WHT and Sydney Metro is the size of the tunnel boring machine (TBM) which would be required for the desired tunnel cross-section. Where Sydney Metro uses a TBM with a diameter of approximately 7 metres, the WHT would require a TBM with a diameter of approximately 16 metres.

Furthermore, due to the different geotechnical conditions under land compared to under Sydney Harbour, a different machine would be required for the water crossing. This is evidenced in the methodology adopted by Sydney Metro, which saw the use of a specialist Slurry Shield TBM for

the portion of its tunnels between Barangaroo and Blues Point, with different machines used for the balance of tunnelling in sandstone.

This requirement for a specialised machine coupled with the significant difference in the required tunnel diameter result in significantly different outcomes for tunnelling risk, machine cost, productivity, operational costs, and environmental and community impacts at launch and retrieval sites when compared to the Sydney Metro project. Given these material differences, the conclusions drawn in the Sydney Metro EIS cannot be applied to WHT or BL, including conclusions on the cost relativities between bored and IMT solutions.

A rigorous multi-criteria assessment of the various combinations and permutations considered factors such as constructability, environmental factors, property impacts, programme, cost and risk. As outlined in the WHT/WFU EIS, the preferred method of crossing Sydney Harbour is to use an immersed tube tunnel.

It is noted this decision was not driven by a requirement to connect to BL.

The immersed tube tunnel methodology has been developed with the input of local and international experts. The nature of marine works in Sydney Harbour are well understood, including the removal, handling and management of materials, which has been undertaken several times recently for capital works in Sydney Harbour.

The environmental impacts have been fully assessed in the WHT/WFU EIS. Planning approval was received on 21 January 2021. The Minister's Conditions of Approval are available on DPIE's website.

4. Basis of cost estimate for WHT

The cost estimate for WHT is based on an immersed tube tunnel crossing of Sydney Harbour, including the costs of associated marine works such as cofferdams, dredging and environmental management measures.

5. Tunnelling methodology of BL

The tunnelling methodology for BL was determined through a rigorous process of assessing various combinations and permutations of methodologies. The options are summarised in Section 4.5.1 of the BL EIS.

A rigorous multi-criteria assessment of the various combinations and permutations considered factors such as constructability, environmental factors, property impacts, programme, cost and risk. As outlined in the BL EIS, the preferred method of crossing Middle Harbour is to use an immersed tube tunnel.

The immersed tube tunnel methodology has been developed with the input of local and international experts. The nature of marine works in Middle Harbour are well understood, including the removal, handling and management of materials.

The environmental impacts have been fully assessed in the BL EIS. It is noted planning approval has not yet been received for BL.

6. *Basis of cost estimate for BL*

The cost estimate for BL is based on an immersed tube tunnel crossing of Sydney Harbour, including the costs of associated marine works such as cofferdams, dredging and environmental management measures.

The cost estimate for BL does not include a portion of the WHT cost, because:

- The construction methodologies for WHT and BL are mutually exclusive
- The tunnelling methodology for WHT was not determined by a need to connect to BL.

I trust that the above response provides you with some additional information related to your enquiry and your access application. Please do not hesitate to contact me on _____ if you have any questions about this letter.

Yours sincerely,

Senior Manager, Information Access

Appendix E – GIPA – 22T-0150

Submitted – 10 August 2021

Decision – 15 September 2021

“Failure to assess public transport in the EIS”

15 September 2021

Our ref: 22T-0150

Mr Ted Nye
E J Nye & Associates Pty Ltd

By email: ted.nye@nyeconsulting-eng.com.au

Dear Mr Nye,

**Notice of decision on your access application under the
Government Information (Public Access) Act 2009 (GIPA Act)**

Applicant:	E J Nye & Associates Pty Ltd
File reference:	22T-0150
Decision maker:	
Received date:	10 August 2021
Due date:	15 September 2021
Date of decision:	15 September 2021

1 Your access application

- 1.1 On 10 August 2021 Transport for NSW (TfNSW) received your access application under the GIPA Act for the following information:

'Western Harbour Crossing and Beaches Link EIS - Cabinet Directive (based on the assumption that the attached SMH article is correctly reporting)

The attached SMH article dated 18 July 2017 refers to a NSW State Cabinet Directive "not to consider public transport alternatives when assessing tollway projects". It would appear that TfNSW management and/or the EIS writers were not aware of this directive as a statement to this effect does not appear in the EIS. Or perhaps that the directive is not binding? In any case the EIS does refer to transport alternatives but only provides unfounded reasons as to why they were not assessed.

Please provide a clarification on the legality of Cabinet Directives and why, if they are binding, why it was not included in the EIS. Can a Cabinet Directive such as

this over rule EIS Legislation? Were the writers and management of the EIS documents even aware of the Cabinet Directive?’

1.2 On 13 August 2021, we sent you an email and letter seeking additional information to make your application valid.

1.3 On 18 August 2021 the terms of your request were amended by agreement as follows, making your application valid:

1. *A copy of a document dated September 2016 titled ‘Failure in Critical Options Analysis’, and **(Point 1)***

2. *Any similar document that may exist for the Western Harbour Crossing and/or Beaches Link Road Tunnel projects.**(Point 2)***

1.4 In your access application you indicated a preference for receiving correspondence by email at ted.nye@nyeconsulting-eng.com.au.

2 Searches for information

2.1 Under the GIPA Act, we must conduct reasonable searches to locate the government information for which you have applied.

2.2 The following areas of TfNSW have conducted searches:

- Infrastructure and Place(IP)
 - Development
 - Sydney Infrastructure Development

2.3 Some information has been identified relevant to **point 1** of your request.

3 Decision

3.1 I am authorised by the Principal Officer, for the purposes of section 9(3) of the GIPA Act, to decide your access application.

3.2 I have decided:

- that the information is not held under section 58(1)(b) and;
- that the information is already available to you under section 58(1)(c);

3.3 Please see below a summary of my decision:

ITEM (Page Ref.)	Information	Act Ref.	Access
ITEM 1 (Point 1)	Email Correspondence Subject: Failure in Critical Options Analysis – F6 Extension Date: 26 September 2016	s58(1)(c)	Publicly available
(Point 2)	<i>Any similar document that may exist for the Western Harbour Crossing and/or Beaches Link Road Tunnel projects.</i>	s58(1)(b)	Info not held

4 Reasons for Decision

- 4.1 Under section 9(1) of the GIPA Act, you have a legally enforceable right to access the information you asked for, unless there is an overriding public interest against its disclosure.
- 4.2 Under section 5 of the GIPA Act, there is a presumption in favour of disclosing government information unless there is an overriding public interest against its disclosure.

Information not held

- 4.3 I am informed by Sydney Infrastructure and Development that information responsive to **point 2** of your access request is not held by the agency.
- 4.4 In reaching a decision that information relevant to your request is not held, I must consider whether TfNSW has conducted a reasonable search under section 53 of the GIPA Act.
- 4.5 Two issues arise for consideration:
- *Are there reasonable grounds to believe that the requested documents exist and are they documents of the agency; and if so*
 - *Have the search efforts made by the agency to locate such documents been reasonable in all the circumstances of a particular case?*
- 4.6 The first question is about whether the subject matter of the request raises the possibility that the requested information relates to the agency's functions or other activities. Having regard to TfNSW's functions to develop, deliver and operate the major Transport motorways projects such as Western Harbour Crossing and/or Beaches Link Road Tunnel, I was satisfied that the first question needed to be answered affirmatively.
- 4.7 While I am satisfied that documents relevant to Western Harbour Crossing (WHC) and/or Beaches Link (BL) Road Tunnel project would fit the description of documents of the agency given the agency's responsibilities in relation to these motorways, I also need to determine whether there are reasonable grounds to believe that the document/s requested relevant to point 2 of your request exist.
- 4.8 The Sydney Infrastructure and Development team within IP has advised that the results of the options assessment for the WHC and BL projects were presented in the respective EIS's for these projects.
- 4.9 The information identified within **item 1** suggests that the options assessment you are seeking relates to an assessment of rail vs road options. However, the options assessments were all based on WHC and BL being motorways, consistent with the State Infrastructure Strategy (2014). ¹These projects have been also subject to peer review and independent assurance by Infrastructure NSW. I am informed by the business area therefore that in this instance there are no reasonable grounds to believe that a record/s responding to **point 2** of your request would exist.
- 4.10 Nonetheless, searches for information responding to **Point 2** were conducted within Outlook using key terms such as "Options" and "Critical", which located a technical peer review of construction methodology (not rail vs road), which is not considered within the terms of your request and hence confirmed that no such assessment was identified.
- 4.11 Based on the advice of the relevant business area and the search conducted, I have decided in accordance with section 58(1)(b) of the GIPA Act, that the information requested in **Point 2** is not held by Transport for NSW.
- 4.12 As the information is not held by the agency, I am not required to perform a public interest test in relation to this aspect of the application.

¹ https://www.infrastructure.nsw.gov.au/media/1090/inf_j14_871_sis_report_book_web_new.pdf

Information already available to you

- 4.13 Under section 58(1)(c) with reference to section 59 of the GIPA Act, an agency can decide that information is already available to an applicant, only if the information meets one of the listed categories of section 59.
- 4.14 Section 59(1)(e) relevantly provides that information is already available to an applicant if the information is publicly available on a website.
- 4.15 In relation to the information requested in **Point 1**, the information is already available within the below link of Sydney Morning Herald:

<https://www.smh.com.au/national/nsw/f6-planners-told-to-ignore-public-transport-build-roads-documents-show-20170407-qvqbon.html>

- 4.16 As such, I have decided under sections 58(1)(c) and 59(1)(e) that the information is already available to you for **Point 1** of the terms of your request and have advised how the information can be accessed.

5 Processing Charges

- 5.1 Under section 64 of the GIPA Act, we may require you to pay processing charges, at a rate of \$30 per hour, for the time spent dealing with your access application. The \$30 application fee counts as payment of one hour of the processing charges.
- 5.2 I have decided not to impose any additional processing charges for dealing with your application.

6 Disclosure Log

- 6.1 If information that would be of interest to other members of the public is released in response to a formal access application, an agency must record certain details about the application in its 'disclosure log' (under sections 25 and 26 of the GIPA Act).
- 6.2 In the letter acknowledging receipt of your application, you were told about the disclosure log. You were also advised of your right to object to the inclusion of details about your access application in the disclosure log.
- 6.3 I note that you have not objected to such disclosure.
- 6.4 I have decided not to include details about your access application in the disclosure log.

7 Review rights

- 7.1 If you disagree with my decision, you may apply for this decision to be reviewed by seeking:
- an internal review by another officer of TfNSW, who is no less senior than me;
 - an external review by the NSW Information Commissioner; or
 - an external review by the NSW Civil and Administrative Tribunal (NCAT).
- 7.2 You have 20 working days from the date of this letter to apply for an internal review and 40 working days to apply for an external review by the NSW Information Commissioner or the NCAT.

8 Further information

- 8.1 For your information and assistance, I have enclosed a fact sheet explaining your rights to have my decision reviewed.
- 8.2 Please do not hesitate to contact _____ by phone on _____ if you have any questions about this letter.

Yours sincerely,

Senior Manager, Information Access

This was published 4 years ago

Revealed: The \$14 billion Western Harbour Tunnel Beaches Link price tag

By **Peter Martin**

Updated July 18, 2017 — 6.26am, first published at 6.00am

The proposed 14-kilometre tunnel tollway between Rozelle and Allambie Heights will cost \$14 billion to build, almost as much as the 33-kilometre WestConnex project.

The enormous price tag, in a costing for cabinet seen by Fairfax Media, excludes an extra \$8 billion that would be spent on operation and maintenance of the tunnel over the first 35 years.

The Western Harbour Tunnel and Beaches Link tollway is expected to bypass up to 19 sets of traffic lights and cut the travel time between Brookvale and the CBD by 40 minutes. It will require the erection of six exhaust ventilation stacks for which sites have been identified, [several within metres of schools](#). **It takes less than 30 minutes now, so 40 minutes a fiction**

The \$14 billion price tag includes about \$340 million for property acquisitions, \$5 billion for the direct cost of construction, \$2.3 billion for indirect costs and \$5 billion for contingencies and cost escalation.

As many as 20 houses would need to be acquired and demolished to build the tunnel, as well as 30 multi-occupancy buildings and 20 commercial buildings, most of them near exhaust stacks.

The Wenona School in North Sydney, the Anzac Park Primary School in Cammeray and the Seaforth Public School are each within 200 metres of the sites chosen for smokestacks, as are schools not identified when the Herald identified the proposed locations on Monday.

The Crows Nest TAFE is within 500 metres of the proposed Ridge Street exhaust stack in North Sydney and in 2019 will become [the senior campus of Cammeraygal High](#). Other schools within 500 metres of proposed smokestacks include Marist College North Shore, the North Sydney Boys High School, the Cameragal Montessori School, the KU Cammeray Pre-School, the Balgowlah Boys Campus of the Northern Beaches Secondary College and the KU Bligh Park Pre-School.

Each exhaust stack, up to 35 metres high would be accompanied by a ventilation plant of between 1500 and 2500 square metres.

Premier Gladys Berejiklian said on Monday that locations for exhaust stacks "had not been finalised at all" as geotechnical and design work was still under way.

"It is way too early to make any predictions about where things are going to be," she said.

The costing document seen by Fairfax Media is titled "Final Business Case". A separate cabinet-in-confidence report includes three slightly different routes for the tollway, but only one set of locations for exhaust stacks.

Ms Berejiklian said her government had been "transparent at every level on every project because it's always in our interests to communicate as soon as we know something".

Opposition Leader Luke Foley said the government was treating the people of NSW with contempt. "Have they learnt nothing from WestConnex? Yet again, here is advanced planning for smokestacks, for a big mega-tunnel that will impact on hundreds of thousands of people and yet there's no consultation with the community."

The premier announced the Beaches Link before the March North Shore by-election. In March the government committed \$77 million for geotechnical work along the route and in June a further \$17.6 million for planning the route.

The previously undisclosed total of \$14 billion compares with \$16.8 billion for WestConnex (up from \$10 billion when it was first announced) and \$14.5 billion plus operational and maintenance costs for the proposed F6 Extension to the Illawarra region.

It raises questions about the capacity of the state budget to sustain all three road projects.

Asked whether \$14 billion was the working price for building the Western Harbour Tunnel and Beaches Link a spokesman for roads minister Melinda Pavey said it was too early to determine a final price.

The Western Harbour Tunnel and Beaches Link was going through a process of review and market testing to provide the greatest benefit to the taxpayer.

Roads and public transport projects were not mutually exclusive.

The 36-kilometre Rouse Hill to Chatswood rail upgrade is much cheaper than the Beaches Link at \$8 billion, around \$230 million per kilometre.

An internal Transport for NSW memo released under the Government Information (Public Access) Act refers to a cabinet directive not to consider public transport alternatives when assessing tollway projects. The memo says the Western Harbour Tunnel and Beaches Link [was not benchmarked against a public transport alternative](#).

- with Matt O'Sullivan



Peter Martin



Peter Martin was economics editor of The Age between 2014 and 2018. He is a former Commonwealth Treasury official and a visiting fellow at the Australian National University.

Appendix F – GIPA – 22T-0194

Submitted – 23 August 2021

Decision – 20 September 2021

“Limited study area – this was not a strategic study of alternative corridors”

20 September 2021

Our ref: 22T-0194

Mr Ted Nye
E J Nye & Associates Pty Ltd

By email: ted.nye@nyeconsulting-eng.com.au

Dear Mr Nye,

**Notice of decision on your access application under the
Government Information (Public Access) Act 2009 (GIPA Act)**

Applicant:	E J Nye & Associates Pty Ltd
File reference:	22T-0194
Decision maker:	
Received date:	23 August 2021
Due date:	20 September 2021
Date of decision:	20 September 2021

1 Your access application

- 1.1 On 23 August 2021 Transport for NSW (TfNSW) received your access application under the GIPA Act for the following information:

'For the Western Harbour EIS the defined study area boundary for the corridor alternatives referenced in Section 4.4 - and all the other alignment options assessed within the defined study area boundary not included on Figure 4.5 (attached). (Point 1)

Also any road alignments that were assessed that were not with the defined study area boundary together with their alignment and any associated documentation. i.e. all the 10 strategic corridors referred to in Section 4.4. Corridor Alternatives (these may or may not have been within the defined study area. (Point 2)'

- 1.2 In your access application you indicated a preference for receiving correspondence by email at ted.nye@nyeconsulting-eng.com.au.

2 Searches for information

- 2.1 Under the GIPA Act, we must conduct reasonable searches to locate the government information for which you have applied.
- 2.2 The following areas of TfNSW have conducted searches:
- Infrastructure and Place(IP)
 - Development
 - Sydney Infrastructure Development
- 2.3 The Sydney Infrastructure Development team(SID) conducted searches within Outlook and Objective record management system using key terms as “Options report”, “Tunnel options”, “Options assessment” and information within the scope of your application was identified in this search.

3 Decision

- 3.1 I am authorised by the Principal Officer, for the purposes of section 9(3) of the GIPA Act, to decide your access application.
- 3.2 I have decided to provide access to the information under section 58(1)(a).
- 3.3 Please see below a summary of my decision:

ITEM (Page Ref.)	Information	Act Ref.	Access
ITEM 1 Pp 1 <i>(Points 1 and 2)</i>	Western Harbour Tunnel(WHT) Options Summary Page	s58(1)(a)	Full

- 3.4 Sydney Infrastructure Development team has advised that Item 1 responds to both **Points 1 and 2**, by presenting the road alignment options considered for Western Harbour Tunnel, in addition to those already presented in Figure 4.5 of the Environmental Impact Statement for the Western Harbour Tunnel and Warringah Freeway Upgrade.

4 Reasons for Decision

- 4.1 Under section 9(1) of the GIPA Act, you have a legally enforceable right to access the information you asked for, unless there is an overriding public interest against its disclosure.
- 4.2 Under section 5 of the GIPA Act, there is a presumption in favour of disclosing government information unless there is an overriding public interest against its disclosure.

Public interest test

- 4.3 To decide whether or not there is an overriding public interest against disclosure of the information contained in the records identified in the Table at Part 3.3 above, I applied the public interest test, which is set out in section 13 of the GIPA Act.
- 4.4 I applied the public interest test by:
- a. identifying any public interest considerations in favour of disclosure;
 - b. identifying any relevant public interest considerations against disclosure;
 - c. attributing weight to each consideration for and against disclosure; and
 - d. deciding where the balance between them lies.

Public interest considerations in favour of disclosure

4.5 Under section 12(1) of the GIPA Act, there is a general public interest in favour of disclosing government information. Section 12(2) of the GIPA Act sets out some examples of other public interest considerations in favour of disclosure. However, I am not limited to those considerations in deciding your application.

4.6 I find the following considerations in favour of disclosure are relevant to your application:

- 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.
- A specific public interest to the surrounding community

Public interest considerations against disclosure

4.7 When applying the public interest test, the only public interest considerations against disclosure that I can take into account are those set out in the table to section 14 of the GIPA Act.

4.8 I have not identified any public interest considerations against disclosure as being relevant to your application.

Balancing the public interest considerations

4.9 As I have not identified any relevant public interest considerations against disclosure, I have decided that there is not an overriding public interest against disclosure.

4.10 As such, I have decided, under section 58(1)(a) of the GIPA Act, to provide access to the information.

5 Access

Form of access

5.1 You will be provided with a copy of the information that has been identified for release.

6 Processing Charges

6.1 Under section 64 of the GIPA Act, we may require you to pay processing charges, at a rate of \$30 per hour, for the time spent dealing with your access application. The \$30 application fee counts as payment of one hour of the processing charges.

6.2 I have decided not to impose any additional processing charges for dealing with your application.

7 Disclosure Log

7.1 If information that would be of interest to other members of the public is released in response to a formal access application, an agency must record certain details about the application in its 'disclosure log' (under sections 25 and 26 of the GIPA Act).

7.2 In the letter acknowledging receipt of your application, you were told about the disclosure log. You were also advised of your right to object to the inclusion of details about your access application in the disclosure log.

7.3 I note that you have not objected to such disclosure.

7.4 I have decided not to include details about your access application in the disclosure log.

8 Review rights

8.1 If you disagree with my decision, you may apply for this decision to be reviewed by seeking:

- an internal review by another officer of TfNSW, who is no less senior than me;

- an external review by the NSW Information Commissioner; or
- an external review by the NSW Civil and Administrative Tribunal (NCAT).

8.2 You have 20 working days from the date of this letter to apply for an internal review and 40 working days to apply for an external review by the NSW Information Commissioner or the NCAT.

9 Further information

9.1 For your information and assistance, I have enclosed a fact sheet explaining your rights to have my decision reviewed.

9.2 Please do not hesitate to contact _____ by phone on _____ if you have any questions about this letter.

Yours sincerely,

Senior Advisor, Information Access

