



Agency's guide to section 121 of the GIPA Act

Fact Sheet
February 2017

Section 121 of the *Government Information (Public Access) Act 2009* (GIPA Act) provides government agencies with a mechanism to obtain access to certain information held by contractors when they provide services to the public on behalf of the government agency.

This fact sheet aims to help agencies understand how section 121 of the GIPA Act operates and impacts upon their relationship with contractors who deliver services to members of the public on their behalf.

What contracts are affected?

Not all contracts entered into by agencies will be affected by section 121 of the GIPA Act. Only contracts with private sector bodies entered into after the GIPA Act commenced, where the contractor provides a service to the public on behalf of the agency, will be required to contain a section 121 clause.

This would include, for example, contracts with a waste management company or meals on wheels provider to provide services on an agency's behalf. Other examples can include a contractor's provision of health or human services on the agency's behalf. In these situations, contractors are likely to include private, non-government and not-for-profit organisations.

What do agencies have to do?

Section 121 of the GIPA Act requires agencies to include a term in their contract with the contractor that enables the agency to have an immediate right of access to specified information.

It is common for agencies to already have section 121 as a clause within their standard contracts where the contractor would be delivering a service to the public on their behalf.

If in doubt as to whether a particular contract is affected, it is preferable to include a clause giving a right to immediate access to the specific information listed in section 121.

Relationship with other obligations under the GIPA Act

Information obtained by agencies from private sector contractors through section 121 forms part of the "government information" that agencies hold. This means it could be the subject of an access application under the GIPA Act.

If an access application is made relating to a private sector entity, that entity may have a right to be consulted under section 54 of the GIPA Act before the agency decides to release the requested information. If the private sector contractor objects to information being disclosed, the agency must take that objection into account in determining if there is an overriding public interest against disclosure.

What does section 121 allow access to?

Section 121 allows government agencies an immediate right of access to the following types of information:

- relating directly to the performance of services by the contractor
- collected by the contractor from members of the public to whom it provides, or offers to provide, the services, and
- received by the contractor from the agency to enable the contractor to provide the services.

What benefit would section 121 provide?

Agencies may require access to information for a variety of reasons. It may be for operational reasons to assist the agency to evaluate the performance of the contract or for service delivery reasons. Typically, it will be to enable a response to an access application received by the agency.

Section 121 is a key mechanism to assist agencies to meet the government's commitment towards increased transparency and accountability in decision-making.

Is any information excluded?

Section 121 does not require a contractor to provide access to information that:

- would reveal the contractor's financing arrangements, financial modelling, cost structure or profit margins
- the contractor is prohibited from disclosing under any Australian law, or
- could place the contractor at a substantial commercial disadvantage in present or future dealings with the agency.

However, there may be other terms within the contract or other laws and regulations that may allow the agency to obtain this type of information.

What is the time frame in which information needs to be provided by the contractor?

Section 121 requires that contractors provide agencies with an "immediate right of access". However, this may depend on the circumstances and the contractual terms.

Entities that contract with agencies can vary widely in size and sophistication. This is why we encourage agencies to speak to its contractor when requesting information under section 121 of the GIPA Act.

This will help to facilitate production of the information to the agency, determine suitable and appropriate time frames for production and alleviate any concerns that the contractor may have with the process.

What assistance is available?

The Information and Privacy Commission (IPC) has provided more guidance on this issue, including template contractual terms that agencies may choose to insert into their private sector contracts.

One clause sets out the obligations of private sector contractors to provide immediate access to information, and the consequences of breaching these obligations.

The other clause sets out the rights of private sector contractors to be consulted following an access application.

These templates are available on the [IPC website](https://www.ipc.nsw.gov.au).

Various agencies already use standard contracts that include section 121 as a clause within these contracts. An example of this is NSW ProcurePoint's standard agreement template.

The IPC has also produced a fact sheet called the "Contractor's guide to section 121 of the GIPA Act" that assists contractors to understand how section 121 of the GIPA Act applies to them.

We encourage agencies to provide contractors with a copy of this fact sheet as part of the contracting arrangement.

The fact sheet is available on the IPC website.

For more information

Contact the Information and Privacy Commission NSW (IPC):

Freecall: 1800 472 679
Email: ipcinfo@ipc.nsw.gov.au
Website: www.ipc.nsw.gov.au