information and privacy commission new south wales

Fact Sheet **Updated July 2023**

Restraint orders under the GIPA Act

All persons in NSW are entitled to make an access application for government information held by NSW public sector agencies under the *Government Information (Public Access) Act 2009* (GIPA Act). The GIPA Act provides for how an access application is to be made by a person, and how an agency is to determine access to government information.

The GIPA Act also provides for how a person can be restrained from making an unmeritorious access application to an agency. The Act gives discretion to the NSW Civil and Administrative Tribunal (NCAT) in limited circumstances to make orders to restrain a person from making an unmeritorious access application ("restraint orders").

This fact sheet explains the meaning and effect of a restraint order, the requirement that a person obtains approval from the NCAT to make an access application; as well as the role of the Information Commissioner in relation to restraint orders.

Access applications under the GIPA Act

An access application is defined as an application for government information under Part 4 that is a valid access application.[1] A person who makes a valid access application has a legally enforceable right under section 9 to be provided with access to the information in accordance with the GIPA Act.[2]

Part 4 of the the GIPA Act provides the framework for how agencies are to make decisions on access applications.

Part 5 of the GIPA Act provides for review of decisions made on access applications, including review by the Information Commissioner in Division 3, and administrative review by the NCAT in Division 4.

The GIPA Act gives the NCAT discretionary power under section 110 of the GIPA Act to make an order that a person is not permitted to make an access application without first obtaining approval of the NCAT (**restraint order**).

When a person becomes subject to a restraint order, that person will not be permitted to make an access application to an agency while the restraint order is in force. The person is required to obtain the approval of the NCAT to make an access application.

Who can apply for a restraint order?

Section 110(5) of the GIPA Act permits certain persons to make an application to the NCAT for a restraint order against a person. These are limited to the following:

- an agency that receives an access application from the person (whether or not the agency has decided the application); or
- the Minister; or
- the Information Commissioner.

Can the restraint order be made against more than one person?

The NCAT has stated that section 110 does not give the NCAT power to make an order against a person (the subject of the restraint order) *and* another person "in concert with" the person, such as to prevent the other person from making access applications on their behalf.

In *Webb v Port Stephens Council* [2020] NSWCATAP 152, the Appeal Panel of the NCAT set aside a restraint order which had been made to prohibit the applicant from making an access application to the Council *"whether solely on her own behalf or acting jointly or in concert with any other person without first obtaining the approval of the NSW Civil and Administrative Tribunal".*

What is the effect of a restraint order?

A restraint order restricts or limits a person from making an access application for government information to a particular agency or agencies. When a restraint order is in force, the person who is the subject of the order cannot make an access application to the agency without first being granted approval to do so by the NCAT.

However, a restraint order does not remove the persons' right to seek access to government information altogether.

[1] GIPA Act, section 4(1).

[2] GIPA Act, Division 1, Part 2.

In *Walker v Northern Beaches Council* [2022] NSWCATAD 8, the NCAT was careful to observe that a restraint order made under section 110(1):

… does not extinguish the right conferred on a person by section 9(1) either expressly or by implication. That is apparent from the fact the person subject to the restraint order may apply to the Tribunal for approval to exercise the right. The right must therefore continue in existence despite the regulation of its exercise.

If a person makes an access application to an agency without first obtaining approval from the NCAT, the application will be in contravention of a restraint order. If such an application is made, it is not a valid access application.[3] Therefore, the agency will not deal with the application or make a decision about whether or not to provide access to the information sought by the applicant.

On what bases will the NCAT make a restraint order?

The NCAT may make a restraint order against a person if it is satisfied of both of the following:

- at least 3 access applications in the previous 2 years (to one or more agencies) have been made that **lack merit**; and
- the applications were made by the same person or by any other person acting in concert with the person.[4]

The NCAT has confirmed that the "previous 2 years" is the two-year period calculated from the date of the application for an order under section 110, not from the date of the making of the order by the NCAT.[5]

It is not necessary for the NCAT to be satisfied that the person has acted in a vexatious manner or that the applications that have been made were misconcieved or lacking in substance.[6]

However, the NCAT must be satisfied that the applications lack merit. Section 110(2) of the GIPA Act identifies three reasons why an access application is to be regarded as lacking merit.

How can an access application lack merit?

Section 110(2) of the GIPA Act states that an access application is to be regarded as lacking merit if it was decided by an agency on a basis set out below:

- the agency decided the application by refusing to deal with the application in its entirety; or
- the agency decided the application by deciding that none of the information applied for is held by the agency; or
- the access applicant's entitlement to access lapsed without that access being provided (including as a result of failure by the applicant to pay any processing charge payable).[7]

These are the only circumstances identified by the GIPA Act for which an access application is regarded as lacking merit for the purposes of a restraint order.

The NCAT has said that section 110(2) "deems" the application to lack merit if in fact it was decided or resolved on a basis set out above, but the NCAT does not enquire into or assess the merits of the application.[8]

What is the scope of a restraint order?

The scope of the NCAT's power to make a restraint order is set by section 110(3). The restraint order may be very broad and apply to all access applications made by the person who is the subject of the order.

The scope of the restraint order may also be limited by reference to one or more of the conditions set out by section 110(3) of the GIPA Act:

- a specific time period
- a specific number of applications, whether in total or to particular agencies
- particular kinds of information
- particular agencies
- certain types of information.[9]

When an agency, the Minister or the Information Commissioner apply to the NCAT for a restraint order, they may request specific terms or conditions in the order.

What must a person do to seek approval to make an access application?

The GIPA Act places certain conditions on an application to the NCAT for the approval of the making of an access application. These conditions must be met **before** the application can be accepted by the NCAT and any orders can be made for granting approval to the person to make an access application.

[3] GIPA Act section 110(7)
[4] GIPA Act, section 110(1).
[5] *Webb v Port Stephens Council* [2020] NSWCATAP 152 at [68].
[6] *Port Stephens Council v Webb* [2021] NSWCATAD 180 at [34]
[7] GIPA Act section 110(2)
[8] *Department of Education v Zonnevylle* [2020] NSWCATAD 96 at [3]; *Webb v Port Stephens Council* [2020] NSWCATAP 152 at [70]
[9] GIPA Act section 110(3)

To apply for the NCAT's approval for the making of an access application, the person who is subject to a restraint order must follow the process that is set by section 110(4).

The person must first serve notice of the application for approval on:

- the agency concerned; **and**
- the Information Commissioner.[10]

This prior notice to the agency and to the Information Commissioner is a "jurisdictional fact" that must be in existence at the time that the application to the NCAT is made: *Walker v Northern Beaches Council* [2022] NSWCATAD 8. The NCAT stated that it will not have jurisdiction to grant approval to make an access application if such prior notice has not been given to both the agency and the Information Commissioner.

What does the NCAT consider before approving the making of an access application?

In deciding whether to approve the making of an access application, the NCAT is to consider, without limitation, any of the following:

- whether the proposed application is lacking in merit
- whether the proposed application is frivolous, vexatious, misconceived or lacking in substance
- whether the applicant has engaged in conduct designed to harass, to cause delay or detriment, or to achieve another wrongful purpose.[11]

In *Walker v Northern Beaches Council* [2021] NSWCATAD 277 the NCAT approved the making of an access application where the agency consented to the access application being made, and where the NCAT was satisfied that the application was not a continuation of the access actions that had led to the restraint order being made.

In *Choi v University of Technology Sydney* [2020] NSWCATAD 238 the NCAT did not approve the making of an access application where the applicant sought to obtain evidence to lodge an appeal against previously determined applications and was substantially outside the timeframe to do so and each ground was lacking in substance and lacked merit.

Repeated applications for approval

The NCAT may prevent a person from making repeated applications for approvals for the making of an access application.

Section 110(6) provides the NCAT with a discretion to order that the person who is the subject of a restraint order not be permitted to apply for approval to make an access application if the NCAT is satisfied that the person has repeatedly made applications for approval that are **lacking in substance**.[12]

In *Walker v Pittwater Council* [2016] NSWCATAD 78 the NCAT explained the meaning of "lacking in substance" in the context of restraint orders under the GIPA Act. The NCAT said that an application will be lacking in substance if the NCAT does not have jurisdiction, or the application meets any of the tests for how an application can lack merit in section 110(2) (see, above).

NCAT cases dealing with restraint orders

The NCAT has exercised the discretion to make a restraint order in the following cases:

- an applicant who made 29 access applications to a Council over a 12-month period in *Pittwater Council v Walker* [2015] NSWCATAD 34
- an applicant who made 7 access applications in two years, where the NCAT found the applicant was unable to confine her written evidence and submissions to issues in dispute, but made unfounded or irrelevant allegations of forgery and fraud: *CEU v University of Technology Sydney; University of Technology Sydney v CEU* [2019] NSWCATAD 11
- an applicant who made 24 access applications to the agency between 2010 and 2016 where most of the applications were invalid applications or would require an unreasonable or substantial diversion of resources: *Department of Education v Zonnevylle* [2020] NSWCATAD 96
- an applicant who made 37 applications to a Council and another agency over two years where the NCAT had regard to the fact that all applications related to the same subject matter; the amount of information that the agencies had provided in response to the applications; the resources of the agencies; and the conduct of the applicant: *Palerang Council, Queanbeyan City Council & Goulburn Mulwaree Council v Powell* [2015] NSWCATAD 44

[10] GIPA Act section 110(4)
[11] GIPA Act section 110(5A)
[12] GIPA Act section 110(6)

The NCAT did **not** make a restraint order in the following case:

- while an applicant had made 50 access applications to the agency over 8 years, the NCAT decided that over 80 per cent were not lacking in merit and also noted that the applicant had also obtained access to government information in response to 70 per cent of those applications: *Port Stephens Council v Webb* [2021] NSWCATAD 180. The NCAT confirmed that the applicant was exercising the legally enforceable right to be provided with information and that the effect on the agency in dealing with prior access applications was not a factor suggesting that a restraint order should be made.

What happens if an agency receives an access application that is not permitted by a restraint order?

If a person subject to a restraint order makes an application for government information that is not permitted because of the restraint order, then the application will not be a valid access application.[13] The agency is not required to deal with the application as a valid access application under Part 4 of the GIPA Act.

However, the agency must still notify the applicant of its decision that the application is not a valid access application.[14]

The person is entitled to seek review of a decision that the access application is not a valid access application under Part 5 of the GIPA Act,[15] including external review by the Information Commissioner or by the NCAT.

Can a person under a restraint order make an access application to other agencies without seeking approval from the NCAT?

Yes. The restraint order will set out the conditions which will apply to restrict or limit the person from making access applications.

If the restraint order is limited to a particular agency or agencies, then a person who is the subject of a restraint order is not precluded from making a valid access application under the GIPA Act to an agency which is not named in the restraint order.

A restraint order may also be limited in other ways, such as to apply to particular kinds of information.

This means that the person is not prevented from making an access application to any agency for information that is not of the kind under restraint.

What is the Information Commissioner's role in relation to restraint orders?

The Information Commissioner has three distinct roles in relation to restraint orders, including in NCAT proceedings.

These include:

1. Permission given to the Information Commissioner by section 110(5) to make an application to the NCAT for a restraint order against a person
2. Requirement under section 110(4) that the Information Commissioner is notified of a person's application for the approval of the making of an access application, before the application is made to the NCAT. This also permits the Information Commissioner to notify the NCAT of whether the Commissioner was provided with the notice
3. Right to appear and be heard in administrative review proceedings given by section 104(1) concerning a review of a decision that an access application is not a valid access application.[16]

For more information

Information and Privacy Commission NSW (IPC):

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

NSW Civil and Administrative NCAT (NCAT)

Telephone: 1300 00 NCAT or 1300 006 228 and follow the prompts

Website: www.ncat.nsw.gov.au

Interpreter Service (TIS): 13 14 50

National Relay Service for TTY Users: 1300 555 727

NOTE: The information in this fact sheet is to be used as a guide only. Legal advice should be sought in relation to individual circumstances.

[13] GIPA Act, section 110(7)
[14] GIPA Act, section 51.
[15] GIPA Act, section 80(a).
[16] *Zonnevylle v Department of Customer Service; Zonnevylle v Secretary, Department of Education* [2021] NSWCATAD 35