



Guide to section 121 of the GIPA Act for private sector contractors

The *Government Information (Public Access) Act 2009* (GIPA Act) applies to information held by contractors that provide services to the public on behalf of agencies. Section 121 of the GIPA Act requires agencies to include provisions in their contracts that provide for an immediate right of access to certain information held by contractors, which is deemed to be government information subject to the Act.

What does section 121 require?

Section 121 of the GIPA Act applies where an agency enters into a contract with a private sector entity (the contractor), where the contractor is to provide services:

- to the public
- on behalf of the agency.

Under section 121(1), contracts to provide services to the public on behalf of an agency must provide for the agency to have an immediate right of access to the following information contained in records held by the contractor:

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

These are mandatory requirements for contracts that fall under section 121(1).

What is the effect of a contractual provision under section 121?

Any reference in the GIPA Act to government information held by an agency includes information that is contained

in a record held by a private sector entity to which the agency has an immediate right of access.¹

Where contractual arrangements are in place for an immediate right of access to information, the information is deemed to be government information for the purposes of the GIPA Act. This means an access application can be made to the agency for the information.

Under the GIPA Act citizens have a legally enforceable right to be provided with access to government information in accordance with Part 4 of the GIPA Act unless there is an overriding public interest against disclosure of the information.²

Contractors who hold government information need to be aware of the operation of the GIPA Act and its objects of opening government information to the public by:

- authorising and encouraging the proactive public release of government information by agencies
- giving members of the public an enforceable right to access government information
- providing that access to government information is restricted only when there is an overriding public interest against disclosure.³

As the custodians of government information, contractors have obligations to undertake adequate searches and deliver the information to the agency upon request.⁴

Contractors should be aware of the strict statutory timeframes for the agency to process access applications⁵ and work with agencies to ensure compliance with the GIPA Act.

Contractors should also know that the GIPA Act contains offence provisions at sections 116 to 120, these include an offence of concealing or destroying government information.⁶

What is a 'private sector entity'?

A private sector entity is defined in the GIPA Act as any person or body (whether incorporated or unincorporated) who or which is not an agency.⁷

¹ Clause 12(1)(b) of Schedule 4 to the GIPA Act

² Section 9 of the GIPA Act

³ Section 3(1) of the GIPA Act

⁴ See IPC resources [Searches for information under the GIPA Act](#)

⁵ See section 57 for the required period for deciding an application and [IPC Fact Sheet – Timeframes and extensions for deciding access applications under the GIPA Act](#)

⁶ Section 120 of the GIPA Act

⁷ Clause 1 of Schedule 4 to the GIPA Act

The definition therefore extends to any person or entity contracting with government (other than another ‘agency’ under the GIPA Act), including non-government organisations and not-for profits.⁸

‘Person’ is also defined in the GIPA Act to include the government of another jurisdiction (including a jurisdiction outside Australia) and an agency of the government of another jurisdiction.⁹

What are ‘services’ to the public?

The concept of ‘services’ is broad and has no special meaning under the GIPA Act.¹⁰ If in doubt as to whether a particular contract is affected, agencies should seek legal advice.

What are the exceptions to the requirement to contractually provide for a right of access?

Section 121(2) of the GIPA Act sets out exceptions to the requirement to contractually provide for the immediate right of access. A government contract is not required to provide for the agency to have an immediate right of access to any of the following information:

- information that discloses or would tend to disclose the contractor’s financing arrangements, financial modelling, cost structure or profit margins
- information that the contractor is prohibited from disclosing to the agency by provision made by or under any Act (of this or another State or of the Commonwealth)
- information that, if disclosed to the agency, could reasonably be expected to place the contractor at a substantial commercial disadvantage in relation to the agency, whether at present or in the future.

What if the agency receives an access application for information I hold?

Where an access application is made for information held by a contractor to which an agency has an immediate right of access, the GIPA Act applies as it would to the agency’s other government information.

This means that the access application will be managed in accordance with the procedures in the GIPA Act. Generally, any information that falls within the scope of the access application will need to be quickly made available to the agency’s decision maker.

It is the government agency’s responsibility to determine the application and decide whether it should include information in its disclosure log.

In deciding whether or not access should be provided to the information, the government agency will generally apply a public interest test in which it will consider public interest considerations in favour of and against the release of the information.

The agency may ask you for your view on release of the information.¹¹ It will then balance these public interest considerations and come to a decision about whether or not to release the information.¹²

What is the time frame in which I need to provide the information?

Section 121 requires an ‘immediate right of access’. You are required to appropriately manage and store the government information so that all relevant information may be promptly accessed.

You must use your best efforts to provide the information to the government agency as quickly as possible. You should speak to the government agency or seek legal advice if you are unclear of what is required of you.

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

The IPC can give general information on compliance with the GIPA Act but cannot give legal advice. Contractors should seek their own legal advice about these issues.

⁸ See *IPC Fact Sheet – What is an agency?*

⁹ Clause 1 of Schedule 4 to the GIPA Act

¹⁰ In *IW v City of Perth* (1997) 191 CLR 1 at 11, the High Court of Australia observed that the term ‘services’ has a wide meaning and considered its

dictionary definition, in the context of Western Australian anti-discrimination laws

¹¹ See *IPC Fact Sheet – Why consult third parties*

¹² See *IPC Fact Sheet – What is the public interest test?*