

Guide to section 121 of the GIPA Act for agencies

Who is this information for?

NSW public sector agencies who are contracting to third parties.

Why is this information important?

This Fact Sheet provides information on what a NSW public sector agency must include in contracts with a private sector entity.

Relevant legislation

Government Information (Public Access) Act 2009 (GIPA Act) s 121, sch 4 cl 12

Overview

The purpose of s 121, in combination with cl 12 of sch 4, is to bring certain information held by private contractors contracting with a government agency within the reach of the provisions of the GIPA Act.

Under pt 4 of the GIPA Act, individuals have a legally enforceable right to be provided with access to government information unless there is an overriding public interest against disclosure of the information: s 9.

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: sch 4 cl 12(1)(b).

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 your agency for the information.

This Fact Sheet outlines the requirements of s 121 in relation to your agency's contracting arrangements with private sector entities.

When does s 121 apply?

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

- to the public; and

- on behalf of the agency.

What is a 'private sector entity'?

A private sector entity is defined as any person or body (whether incorporated or unincorporated) who or which is not an agency: sch 4 cl 1.

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. See [IPC Fact Sheet – What is an agency?](#)

'Person' is also defined to include the government of another jurisdiction (including a jurisdiction outside Australia) and an agency of the government of another jurisdiction: sch 4 cl 1.

What are 'services' to the public?

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

What does s 121 require?

Contracts to provide services to the public on behalf of your agency must provide for an immediate right of access by your agency 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.

Your agency has the responsibility to ensure the contract provides for this immediate right of access.

Are there exceptions to the requirement to contractually provide for a right of access?

Under s 121(2), a government contract is not required to provide for your 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 is the effect of a contractual provision under s 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 your agency has an immediate right of access: sch 4 cl 12(1)(b).

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 your agency for the information.

Before entering a contract to provide services to the public, you should plan and be prepared for the kinds of government information that will be acquired and generated by contractors. Your agency should establish clear procedures for searches and delivery of the information to your agency upon request. See IPC resources [Searches for information under the GIPA Act](#).

Your agency should also consider the obligations as to the content of your agency information guide in relation to government information held by contractors: s 20.

It is best practice to take proactive steps to assist contractors to understand the requirements of the GIPA Act generally, their respective obligations to ensure compliance with the Act and the offence provisions: sections 116 to 120 of the GIPA Act, particularly the offence of concealing or destroying government information.

What if I receive an access application for information held by a contractor?

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

A contractor may have a right to be consulted under s 54 before you decide to release the requested information, however, it is up to you to determine the application: see [IPC Fact Sheet – Why consult third parties](#).

If the contractor objects to information being disclosed in the course of consultation, you must take that objection into account in determining if there is an overriding public interest against disclosure, and review rights exist for third party objectors: see IPC Fact Sheet – Your Review Rights under the GIPA ACT.

What assistance is available?

The Information and Privacy Commission (IPC) has published the following templates that agencies may consider in preparing their contracts:

- [Template Contract Clause – Access to information](#)
- [Template Contract Clause – Consultation with third parties](#)

We encourage agencies to provide contractors with a copy of the fact sheet, [Guide to s 121 of the GIPA Act for private sector contractors](#), and other IPC guidance on the operation of the GIPA Act.

Other useful resources

Other resources that may be useful on this topic include:

- [IPC Fact Sheet – What is an agency?](#)
- IPC resources: [Searches for information under the GIPA Act](#)
- [IPC Fact Sheet – Timeframes and extensions for deciding access applications under the GIPA Act](#)
- [IPC Fact Sheet – Why consult third parties](#)
- [IPC Fact Sheet – Guide to section 121 of the GIPA Act for private sector contractors](#)

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

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.