



Safeguards to address misuse of the GIPA Act – Guidance for agencies

There are mechanisms and safeguards available under the *Government Information (Public Access) Act 2009* (GIPA Act) to address misuse of the Act and provide protection to citizens and agencies.

Part 5 of the GIPA Act provides for review of decisions made under the Act. Administrative review by the NSW Civil and Administrative Tribunal (NCAT) (set out in Division 4) is one of the avenues for review. In respect of its administrative review function, NCAT has discretionary powers that can affect the rights of citizens and agencies under the GIPA Act.

This fact sheet explains what those discretionary powers are and how they serve to address misuse of the GIPA Act, promote the object of the Act¹ and protect agencies and citizens under the Act. The fact sheet also identifies offences under the GIPA Act that may be prosecuted by the Director of Public Prosecutions (DPP).

NCAT's powers to address misuse of the GIPA Act

NCAT has the following discretionary powers under the GIPA Act:

- Section 109 – NCAT may refuse to review or to deal further with a review of a decision of an agency if it is satisfied that the application for review is frivolous, vexatious, misconceived or lacking in substance.
- Section 110 – NCAT may make orders to restrain the making of unmeritorious access applications.
- Section 111 – NCAT may refer any matter to the Information Commissioner that it considers indicative of a systemic issue in relation to the determination of access applications by a particular agency or by agencies generally.
- Section 112 – If NCAT is of the opinion following administrative review that an officer of an agency has failed to exercise in good faith a function conferred on the officer under the GIPA Act, NCAT may on its own initiative bring the matter to the attention of the Minister who appears to NCAT to have responsibility for the agency, or if the Minister responsible for the agency was a party to the proceedings, the Information Commissioner.

NCAT's discretion in respect of the powers listed above is exercised in accordance with and in furtherance of the object of the GIPA Act, which is to maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective.

A restraint order under section 110 has a significant impact on an individual's right of access to government information. In determining the reasonableness of an exercise of discretion that impacts on an individual in this way, the impact on the individual should be proportionate to the interests the decision-maker is seeking to protect.²

For more information about restraint orders, see: IPC Fact Sheet – Restraint Orders under the GIPA Act www.ipc.nsw.gov.au/fact-sheet-restraint-orders-under-gipa-act

Referral by the Tribunal and Reports on Improper Conduct

NCAT has provided guidance regarding the operation of sections 111 and 112 of the GIPA Act.³ In summary the Tribunal determined not to make referral or a report because:

- Departmental officers had exercised their functions under the GIPA Act in response to the access application in a fair and considered way.
- There was no evidence to support a conclusion that the officers failed to exercise their functions or did not act in good faith.
- Even though the decision as to the validity of the application was not made within the five days required by the GIPA Act, the Department apologised for the delay and NCAT found no basis for concluding the delay was the result of any misconduct.

The Tribunal determined that the basis for a report to the Minister is a finding that officers of the Department failed to exercise a function under the Act in good faith.⁴

¹ GIPA Act section 3.

² *Sweeney v Australian Information Commissioner* [2014] AATA 539 at [84].

³ *Zonneville v Department of Justice* [2018] NSWCATAD 158

⁴ *Zonneville v Department of Justice* [2018] NSWCATAD 158 at [44] – [46].

The Appeal Panel examined sections 111 and 112 and identified four elements essential to considering a report on improper conduct:

- the formation of the opinion ('if NCAT is of the opinion');
- the circumstances in which the opinion may be formed ('as a result of an NCAT administrative review');
- the nature of the opinion ('that an officer of an agency has failed to exercise in good faith a function conferred on the officer by or under the GIPA Act'); and
- the fact that bringing the matter to the attention of the Minister is discretionary ('may bring the matter to the attention of the Minister').⁵

The second element concerns the formation of an opinion by NCAT as a result of an NCAT administrative review. The administrative review is the review of any reviewable decision the agency has made under the GIPA Act. The Appeal Panel considered that section 112 does not give the Tribunal power to carry out an inquiry into the officer's conduct that is separate from or additional to the administrative review proceedings.⁶

The Appeal Panel went on to say that the powers in section 111 are analogous to section 112: '[a]s with s 112, the circumstances in which the Tribunal may form the relevant opinion is in relation to "the determination of access applications". Section 111 does not give the Tribunal power to carry out an inquiry into an agency's conduct that is separate from or additional to any administrative review proceedings.'⁷

Further, in this case, the Appeal Panel noted the powers of NCAT under sections 111 and 112 and observed with respect to section 112 that:

...Although s 112 is headed 'improper conduct', headings to these sections are not part of the GIPA Act... The Tribunal does not have power to bring to the attention of the Minister any conduct that the Tribunal may regard as improper. An opinion must be formed that the conduct is 'a failure to exercise in good faith a function conferred on the officer'. Nor does the Tribunal have the power under s 112 to bring to the attention of the Minister an alleged offence under the GIPA Act unless the conduct concerned also meets the test set out in s 112. The same reasoning applies to s 111.'⁸

The Appeal Panel has stated that a report for improper conduct under section 112 is a very grave step, reserved

for very rare cases.⁹ NCAT has also previously determined that the test of 'good faith' for the purposes of section 112 is predominantly subjective.¹⁰

NCAT has identified various aspects of an agency's conduct in processing an access application that are subject to this 'good faith' requirement.¹¹ These aspects include determining whether an access application is valid, the obligation to provide advice and assistance to applicants, the requirement to undertake reasonable searches, the decision to refuse to deal with an access application, and the determination of an access application.

Further, NCAT has considered that the exercise of a power in good faith requires an 'honest and conscientious' approach and before forming an opinion that an officer has failed to exercise a function in good faith, it is necessary to form the view that the officer's conduct was something more than honest ineptitude.¹²

The obligation to act in good faith resides in each officer who deals with an access application, not merely the officer making the final determination. Section 112 only concerns functions conferred or imposed on officers by or under the GIPA Act. In this regard, NCAT has previously declined an applicant's request that a matter be referred pursuant to section 112, as the applicant's assertions of bad faith concerned the agency's record keeping, which was an issue beyond the scope of the section.¹³

Offences under the GIPA Act

GIPA Act also provides for the following offences:

- Section 116 – acting unlawfully under the GIPA Act
- Section 117 – directing unlawful action under the GIPA Act
- Section 118 – improperly influencing an access decision
- Section 119 – unlawful access by knowingly misleading or deceiving an officer of an agency in connection with an access application
- Section 120 – concealing or destroying government information.

⁹ *Warren v Trustee and Guardian (NSW)* [2014] NSWCATAP 20 at [41].

¹⁰ *Zonneville v NSW Department of Finance and Services* [2016] NSWCATAD 47 at [29]; *Shoebridge v Office of the Minister for Police and Emergency Services* [2014] NSWCATAD 189 at [36].

¹¹ *Zonneville v NSW Department of Finance and Services* [2016] NSWCATAD 47 at [32] – [37].

¹² *Ibid* at [44].

¹³ *Saggers v Environment Protection Authority* [2013] NSWADT 109 at [55].

⁵ *Zonneville v Department of Justice* [2019] NSWCATAP 44

⁶ *Ibid* at [50].

⁷ Above n 5 at [52].

⁸ Above n 5 at [58].

The maximum penalty for each of these offences is 100 penalty units, which is \$11,000.¹⁴

The offences all involve acts of knowingly contravening the GIPA Act or directing or influencing a person to knowingly contravene the Act. It would therefore be impossible for an officer to accidentally commit an offence under the Act.

NCAT does not have power to investigate or prosecute offences under the GIPA Act. Offences are prosecuted in the Local Court¹⁵ and the decision to prosecute is made by either the DPP or the Attorney General.¹⁶ NCAT has stated that it does not have power to investigate or prosecute offences under the GIPA Act.¹⁷

To substantiate an offence it is important to examine the elements of the offence and the evidence required.

The elements of the offences described above are detailed in the IPC's fact sheet – Offences under the GIPA Act www.ipc.nsw.gov.au/fact-sheet-offences-under-gipa-act.

Compensation is not an available mechanism under the GIPA Act in respect of the misuse of the GIPA Act.

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

¹⁴ Section 17 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that a penalty unit is \$110.

¹⁵ GIPA Act section 128(1)

¹⁶ GIPA Act section 128(2)

¹⁷ *Zonneville v Department of Justice* [2019] NSWCATAP 44 at [57].