



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

For the benefit and protection of both citizens and agencies, the *Government Information (Public Access) Act 2009 (GIPA Act)* incorporates several mechanisms to safeguard against its misuse.

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

This fact sheet explains what those discretionary powers are and how they serve to address misuse of the GIPA Act, promote the objects of the Act¹ and protect agencies and citizens. The fact sheet also identifies the offences created by the GIPA Act and the bodies empowered to prosecute them.

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 the review of an agency's decision 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.²
- 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 these powers is exercised in accordance with and in furtherance of the object of the GIPA Act, being, 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 may have a significant impact on an individual's right of access to government information. As such, the Tribunal must exercise its discretion such that there is proportionality between the impact on the individual and the interests the decision-maker is seeking to protect.³

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

In *Zonneville v Department of Justice*,⁴ the Appeal Panel examined section 112 and identified four elements to be addressed when deciding whether a report of improper conduct should be made:

- 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

¹ GIPA Act section 3.

² See generally, *Taylor v Destination NSW* [2020] NSWCATAD 137

³ *Sweeney v Australian Information Commissioner* [2014] AATA 539 at [76] citing *Edelsten v Wilcox and Federal Commissioner of Taxation* (1988) 15 ALD 546.

⁴ [2019] NSWCATAP 44

- 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 Appeal Panel found that neither section 111 nor 112 granted the Tribunal the power to carry out an inquiry into an agency's or officer's conduct that is separate from or additional to the administrative review proceedings.⁶

The Appeal Panel went on to observe that:

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 111.⁷

The Appeal Panel has stated that a report for improper conduct under section 112 is a very grave step, reserved for very rare cases.⁸ NCAT has also previously determined that the test of 'good faith' for the purposes of section 112 is predominantly subjective.⁹ The Tribunal has also expressed the view 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.¹⁰

NCAT have identified a number of steps associated with the processing of access applications that are subject to the 'good faith' requirement.¹¹ These include:

1. determining whether an access application is valid,
2. the obligation to provide advice and assistance to applicants,
3. the requirement to undertake reasonable searches,
4. the decision to refuse to deal with an access application, and

5. making a decision with respect to an access application within the timeframe set up by the GIPA Act and conducting any necessary consultations.

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. That said, section 112 only concerns functions conferred or imposed on officers by or under the GIPA Act.

An assertion or allegation of poor record-keeping within an agency or by an officer cannot be a basis for a referral under section 112 as any obligation to keep records is not one imposed by or under the GIPA Act.¹²

Systemic Issues

Under section 111 of the GIPA Act, NCAT may refer matters to the Information Commissioner that it considers are indicative of a systemic issue in relation to the determination of access applications by a particular agency or by agencies generally. In respect of this power, in *Taylor v Destination NSW*¹³ the Tribunal stated:

The referral to the Information Commissioner is not a punishment. The Information Commissioner's monitoring and audit functions under the GIPA Act are directed to assisting agencies in connection with the exercise of their functions under the GIPA Act (section 17(c)); and to monitor, audit and report on the exercise by agencies of their functions under, and compliance with, the GIPA Act (section 17(g)).¹⁴

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.

The maximum penalty for each offence is 100 penalty units, which is \$11,000.¹⁵

⁵ *Zonneville v Department of Justice* [2019] NSWCATAP 44 at [49].

⁶ *Ibid* at [50] - [52].

⁷ *Above n 6* at [58].

⁸ *Warren v Trustee and Guardian (NSW)* [2014] NSWCATAP 20 at [41].

⁹ *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].

¹⁰ *Ibid* at [44].

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

¹² *Saggers v Environment Protection Authority* [2013] NSWADT 109 at [55].

¹³ [2020] NSWCATAD 137

¹⁴ *Ibid* at [35].

¹⁵ Section 17 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that a penalty unit is \$110.

The offences each involve an act of knowingly contravening the GIPA Act or directing or influencing a person to act in way that they know contravenes the GIPA Act. It would therefore be impossible for an officer to accidentally commit an offence under the Act.

NCAT does not have the power to investigate or prosecute offences under the GIPA Act. Offences are prosecuted in the Local Court¹⁶ and the decision to prosecute is made by either the DPP or the Attorney General.¹⁷

For more information about Offences under the GIPA Act and, in particular, the elements of those offences, see the IPC's fact sheet – Offences under the GIPA Act www.ipc.nsw.gov.au/fact-sheet-offences-under-gipa-act.

Neither a failure to comply with the GIPA Act generally nor the commission of a GIPA Act offence give rise to a right to compensation in any person.

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

¹⁶ GIPA Act section 128(1); *Zonneville v Department of Justice* [2019] NSWCATAP 44 at [57].

¹⁷ GIPA Act section 128(2)