



Guide to section 121 of the GIPA Act for agencies

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, 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.

It is the agency's responsibility to ensure the contract provides for the immediate right of access.

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

Before entering a contract to provide services to the public, agencies should plan and prepare for the kinds of government information that will be acquired and generated by contractors. Agencies should establish clear procedures for searches and delivery of the information to the agency upon request.³

Agencies should also consider their obligations as to the content of their agency information guide in relation to government information held by contractors.⁴

It would be prudent for agencies 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 at sections 116 to 120 of the GIPA Act, particularly the offence of concealing or destroying government information.⁵

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.⁶

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.⁷

'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.⁸

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

² Section 9 of the GIPA Act

³ See IPC resources *Searches for information under the GIPA Act*

⁴ Section 20 of the GIPA Act

⁵ Section 120 of the GIPA Act

⁶ Clause 1 of Schedule 4 to the GIPA Act

⁷ See *IPC Fact Sheet – What is an agency?*

⁸ Clause 1 of Schedule 4 to the GIPA Act

What are 'services' to the public?

The concept of 'services' is broad and has no special meaning under the GIPA Act.⁹ 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 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 an agency has an immediate right of access, the GIPA Act applies as it would to the agency's other government information.

Agencies are responsible for deciding on access to information, and should have regard to the obligation to provide advice and assistance to applicants¹⁰ and the statutory timeframes for deciding an application.¹¹

Decision making under the GIPA Act must be independent and undertaken by appropriately authorised officers.¹² In any external review of a decision under the GIPA Act, the agency has the onus to establish its decision is justified.¹³

A contractor may have a right to be consulted under section 54 of the GIPA Act before the agency decides to release the requested information, however, it is up to the agency to determine the application.¹⁴

If the contractor objects to information being disclosed in the course of consultation under section 54, the agency 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.¹⁵

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](#)

The IPC has also produced a fact sheet called the [Guide to section 121 of the GIPA Act for private sector contractors](#), which is also available on the IPC website.

We encourage agencies to provide contractors with a copy of the fact sheet and other IPC guidance on the operation 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

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

⁹ 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

¹⁰ Section 16 of the GIPA Act

¹¹ 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](#)

¹² See [IPC Fact Sheet - Delegation or Authorisation of GIPA Act Functions](#)

¹³ See sections 97 and 105 of the GIPA Act

¹⁴ See [IPC Fact Sheet - Why consult third parties](#)

¹⁵ See [IPC Fact Sheet - Your review rights under the GIPA Act](#)