GIPA Act: Restraint of access applicants in the public interest

Monday, 11 May 2015

The object of the Government Information (Public Access) Act 2009 (**the Act**) is to encourage the proactive release of government information and provide the public with an enforceable right to access that information.

In what circumstances can this object be defeated by the making of an application for access to information?

In Department of Defence and 'W' [2013] AICmr2, the Court noted that it is now relatively easy and can be cost-free for a person to make multiple disruptive and resource-intensive access requests. However, as the Court observed at [12], the legal right to obtain access to government information should not be abused by conduct that harasses or intimidates agency staff, unreasonably interferes with the operations of agencies or is manifestly unreasonable.

The recent New South Wales Civil and Administrative Tribunal (**NCAT**) decision Pittwater Council v Walker [2015] NSWCATAD 34 affirmed that in certain circumstances, public interest considerations favour orders restraining persistent and unmeritorious applications requiring an unreasonable and substantial diversion of resources by an agency.

In Walker, Pittwater Council made an application to restrain Mr Walker from making further applications for information under the Act without the leave of the Tribunal. NCAT has a discretion to restrain an access applicant through the operation of section 110 of the Act if it is satisfied that:

1. There is a history of applications to the agency by the relevant individual under the Act;

2. The application lacks merit because the documents are not held by the agency, or to deal with them would require an unreasonable and substantial diversion of resources, or access entitlements have lapsed; and

3. Three or more such applications have been received in the two years prior to the application for the restraining order.

Mr Walker had made 29 access applications in the 15 months prior to Council's application for relief. Council contended that Mr Walker’s applications were lacking in merit and tendered evidence going to the burdensome nature of the applications which formed an unreasonable diversion of Council’s resources and resulted in delaying the processing of other applications.

The Tribunal accepted Council's submission that exercising discretion under section 110 involves a balancing act. The balance lies between meeting the objects under section 3 of the

Act, to open government information to the public, against conduct that unreasonably interferes with the operations of agencies. Council also submitted that the restraining order was necessary to protect the operation and use of the Council's resources for the public and local community as a whole, not just one individual.

Mr Walker submitted that in respect of the number of instances where the access application resulted in a nil find of material, then Council was either not complying with record keeping requirements, or was not properly searching for documents which should exist. Senior Member McAteer empathised with Mr Walker's frustration in respect of the number of 'no information' results and identified the way in which an applicant particularises their request and how the agency interprets and understands that request as a potential cause for these responses.

By way of illustration, J McAteer referred to two access applications in which Mr Walker requested copies of information relating to the removal of the Queen's portrait in Council chambers and the issuing of a parking permit to a local business being material that would ordinarily be held in some form by Council.

Council was successful in obtaining an order restraining Mr Walker from making any access application without first obtaining the approval of the Tribunal.

This case is significant in that it was the first case to consider section 110 of the Act and illustrates that there is no public interest served in agencies using considerable resources to deal with a small number of persistent individuals. The Tribunal recognised the need to balance competing interests of the objects of the Act and the restraint provisions of section 110.

This case therefore serves as a reminder to applicants for access to information to carefully craft their applications to better their chances of capturing the information requested and reminds Councils of their obligations to assist applicants in narrowing their requests.

NCAT also confirmed that the discretion conferred on Councils under section 60 of the Act to refuse to deal with an application is described as a powerful one that should only be used as a last resort after making every attempt to assist the applicant [57]. This case gives a warning to agencies that they should not rely on the power to refuse to process an application simply because their information management systems are poorly organised.

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