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Applicants restrained from lodging access applications under GIPA Act

Posted on March 19, 2015 by adam stipcevic

In two recent cases, the New South Wales Civil and Administrative Tribunal (**Tribunal**) has made orders (**Restraint Orders**) restraining individuals from making access applications to Councils, without first obtaining the Tribunal's permission.

The decisions in *Pittwater Council v Walker* [2015] NSWCATAD 34 (**Walker**) and *Palerang Council, Queanbeyan City Council & Goulburn Mulwaree Council v Powell* [2015] NSWCATAD 44 (**Powell**) are the first time that Restraint Orders have been made.

Legislation

The power to make Restraint Orders is contained in s110 of the *Government Information Public Access Act 2009* (**GIPA Act**).

The effect of a Restraint Order is that a person cannot make an access application to an agency without first obtaining the approval of the Tribunal.

If the person makes an application to the agency without obtaining that approval, the application is taken to be invalid and the agency will not have to process it.

A Restraint Order may be made where a person has made at least 3 access applications to one or more agencies in the previous two years that lack merit (GIPA Act, s 110(1)).
An access application 'lacks merit' if:

- the agency has decided the application by refusing to deal with it in its entirety; or
- the agency decided that it did not hold any of the information applied for; or
- an applicant's entitlement to access lapsed without that access being provided (GIPA Act, s 110(2)).

A Restraint Order can apply to all access applications made by a person, or may be limited to particular kinds of information (GIPA Act, s 110(3)).

Background

In *Walker*, the Council applied to the Tribunal for a Restraint Order after receiving 29 access applications from Mr Walker in 13 months.
In *Powell*, three Councils collectively applied for a Restraint Order against Mr Powell, who had made 37 access applications to them and the Office of Environment and Heritage in the prior two years. Of those 37 applications, 18 were said to lack merit.

Discussion

The Tribunal can only make a Restraint Order if a person has made three access applications to an agency in the previous 2 years that 'lack merit'. The Tribunal will need to be satisfied of this precondition, but will not make an assessment of each of the applications relied on. In this regard, establishing this precondition is not onerous (*Powell* at [5]).

What is more important is satisfying the Tribunal that as a matter of discretion, it should make a Restraint Order.

The following factors, relevant to the exercise of the Tribunal's discretion, appear to have been important in the present cases.

- The total number of access applications that have been made by the person, including the applications which lack merit.

- How the agency has dealt with the applications. For example, in *Powell*, the Senior Member rejected the argument that Goulburn Mulwaree Council had been placed at any significant disadvantage by the nine (9) formal access applications it had received, because the Council had not processed any of them.

- The subject matter of the access applications. For example, in *Powell* all of the applications were in one way or another seeking information about the same thing.

- The resources of an agency. The impact of a large number of access applications on an agency with limited resources to deal with the applications appears to have been an important factor in the Tribunal exercising its discretion to make the Restraint Orders.

- Proportionality, in that the impact of the Tribunal's decision to make a Restraint Order should be proportionate to the interests of the agency which are sought to be protected.

The form of NCAT's Orders under s110

Aside from s110(3), the Tribunal's power to condition a Restraint Order is not specified.

In *Walker* the Tribunal proceeded on the basis that a Restraint Order could not be conditioned, unless that power was contained in s58 of the *Civil and Administrative Tribunal Act 2013* which gives the Tribunal a general power to make conditions on orders (but ultimately the Tribunal did not decide that issue).

Accordingly, the orders in *Walker* were simply that Mr Walker was restrained from making any access applications at all to the Council without first obtaining approval from the Tribunal, and this order was to remain in force until further order of the Tribunal.

In contrast, the Tribunal in *Powell* took a much more flexible approach, conditioning the Restraint Order by:

- limiting it to 2 years;
- restricting the number of applications that could be made by the respondent in any two month period;
- restricting the number of applications that could be made by the respondent to any particular Council in a two week period;
- restricting the number of documents which could be sought in a single access application;
- restricting the kinds of information which could be sought;
- prohibiting the inclusion of extraneous material in access applications;
- prohibiting the use of offensive, abusive, threatening or insulting language in access applications;
- restricting the respondent to written communications with the Councils in relation to access applications;
- prohibiting the respondent from using offensive, abusive, threatening or insulting language when writing to the Councils;
- restricting the respondent to making access applications by post.

Comment

The cases are the first consideration of the circumstances in which a Restraint Order may be issued and therefore provide useful guidance about how the Tribunal will approach s110 of the GIPA Act.

Nonetheless, there are some differences in the approaches taken in the two matters, especially in relation to the conduct of applicants, and the kinds of orders that may be made by the Tribunal.

In *Powell* the Tribunal accepted that the conduct of the access applicant, including offensive and insulting behaviour by them, will be relevant to the exercise of its discretion. On the other hand, in *Walker*, the Tribunal appears to have held that a Restraint Order does not require a consideration of an applicant's personal behaviour, character and other conduct.

No doubt, as subsequent cases are handed down, these matters will be brought into sharper focus and agencies will be better placed to assess the prospects of obtaining relief under the section.