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Newsletter

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GIPA Restraint Order s made by Tribunal

In two recent decisions, the NSW Civil and Administrative Tribunal (NCAT / Tribunal) has made an order that a person is not permitted to make an access application under the Government Information (Public Access) Act 2009 (GIPA) without the approval of the Tribunal.

These orders are called Restrain Orders and are made under section 110 of the GIPA, which provides as follows:

110 Orders to restrain making of unmeritorious access applications

(1) NCAT may order that a person is not permitted to make an access application without first obtaining the approval of NCAT if NCAT is satisfied that the person has made at least 3 access applications (to one or more agencies) in the previous 2 years that lack merit. Such an order is a restraint order.

(2) An access application is to be regarded as lacking merit if:

(a) the agency decided the application by refusing to deal with the application in its entirety, or

(b) the agency decided the application by deciding that none of the information applied for is held by the agency, or

(c) the access applicant's entitlement to access lapsed without that access being provided (including as a result of failure to pay any processing charge payable).

In the case of Pittwater Council v Walker [2015] NSWCATAD 34 (Walker case), Mr. Walker had made 29 applications to Council over the period of about 1 year.

In Palerang Council, Queanbeyan City Council & Goulburn Mulwaree Council v Powell [2015] NSWCATAD 44 (Powell case), Mr. Powell made 37 access applications, 18 of which were found to lack merit.

While a Restraint Order is in force against a person, any application for government information made to an agency in contravention of the order is not a valid access application (s110(7)).

A Restraint Order has the effect of requiring the person the subject of an Order to satisfy the Tribunal that any future application is reasonable providing a very worthwhile *"safety valve"* (Powell at 14).

The cases establish that s110 proceedings are not an opportunity for the Tribunal to review an agency's decisions including an agency's decision to refuse to deal with an access application because to do so *"would require an unreasonable and substantial diversion of the agency's resources"* (s60(1)(a)) and an agency's decision that documents are not held by the agency (s58(1)(b)).

Section 110 does not contain any description of the factors that might be taken into account by the Tribunal in exercising its discretion to make a Restraint Order. However the Tribunal in the Powell case accepted that the following matters would be relevant:

a) the total number of access applications (including but not limited to applications which lacked merit) that have been made;

b) the fact that the applications are all in one way or another seeking information about the same thing;

c) the amount of information the agency has provided in response to those applications;

d) the resources of the agency;

e) the conduct of the access applicant. In contrast however, in the Walker case the Tribunal found that Restraint Order proceedings do not require a consideration of an access applicant's personal behaviour, character and other conduct.

The Senior Member in the Powell case agreed that the imposition of a Restraint Order may be necessary to protect the operation and use of an agency's resources for the public and community as a whole, not just one individual. However, he noted that the GIPA applications in that case related to the interest of a local community group but, out of necessity under the GIPA Act, were brought by an individual who genuinely believed his access applications were made in the public interest.

The Senior Member in the Powell case concluded that the impacts on an individual were proportionate to the interests, which the decision-maker is seeking to protect.

Section 110(3) provides that a Restraint Order *"may be limited by reference to particular kinds of information or particular agencies"* and the Tribunal in the Powell case found that the Tribunal has power, either expressly under s58 of the *Civil and Administrative Tribunal Act 2013* or impliedly in the power conferred by s110 of the GIPA Act, to make an order subject to conditions. In the Powell case, the Tribunal imposed several conditions on the Restraint Order, including:

a) limiting the timeframe for the Restraint Order to 2 years from the date of the Tribunal's decision;

b) allowing the recipient to lodge a maximum of one access application to each of the three councils every two months;

c) an access application shall not seek more than 3 documents;

d) all correspondence in relation to an access application shall not include any offensive, abusive, threatening or insulting language.

The imposition of conditions on the operation of a Restraint Order may be one way the Tribunal could seek to address the issue of proportionality discussed above.

In the case of Walker however no conditions were imposed.

The decisions in the Walker case and the Powell case are the first time that the Tribunal has made a Restraint Order under s110 of the GIPA Act and provide useful guidance regarding how the Tribunal's discretion to make a Restraint Order will be exercised.