Civil and Administrative Tribunal

New South Wales

Case Name:	Fearnley v Health Care Complaints Commission
Medium Neutral Citation:	[2020] NSWCATAD 30
Hearing Date(s):	On the papers
Date of Orders:	24 January 2020
Decision Date:	24 January 2020
Jurisdiction:	Administrative and Equal Opportunity Division
Before:	P H Molony, Senior Member
Decision:	The Tribunal will: (1) refuse to deal further with the application for administrative review under s 109 of the GIPA Act because it is misconceived and lacking in substance; and (2) dismiss that application for administrative review under s 55(1)(b) of the CAT Act because it is misconceived and lacking in substance.
Catchwords:	ADMINISTRATIVE LAW — Freedom of information — Access to information – application for Tribunal to refuse to deal with administrative review application under s 109 of the Government Information (Public Access) Act 2009– access application seeking access to excluded information – access application invalid - Tribunal refused to deal with and dismissed administrative review application
Legislation Cited:	Administrative Decisions Review Act 1997 Civil and Administrative Tribunal Act 2013 Government Information (Public Access) Act 2009 Strata Schemes Management Act 1996
Cases Cited:	Assal v Department of Health Housing and Community Services, (1992) EOC 92-409

	Attorney-General v Wentworth (1988) 14 NSWLR 481 Attorney-General [2011] NSWADT 59 Alchin v Rail Corporation NSW [2012] NSWADT 142 Ballarto Pastoral Pty Ltd v Department of Primary Industries [2006] VCAT 478 BDK v Department of Education and Communities [2015] NSWCATAP 129 Gauci v Kennedy [2006] FCA 869 Keogh v Higgins (Civil Claims) [2014] VCAT 1256 Kyriakidis v State of Victoria (Human Rights List) [2014] VCAT 1039 Margan v University of Technology, Sydney [2003] NSWADTAP 65 McDonald v Central Coast Community Legal Centre [2008] NSWADT 96 Owners Corporation of Strata Plan 4521 v Zouk & Anor [2007] NSWCA 23 Pertsinidis v Illawarra Shoalhaven Local Health District [2014] NSWCATAD Rana v University of South Australia [2004] FCA 559 Rosser v Health Care Complaints Commission [2014] NSWCATAD 214 Sinclair v Psychology Council [2017] NSWCATAD 8 Stanborough v Woolworths Ltd [2005] NSWADT 203 State Electricity Commission of Victoria v Rabel [1998] 1 VR 102 The Owners – Strata Plan No. 92334 v Piety Capital Pty Ltd
Category:	Procedural and other rulings
Parties:	Scott Fearnley (Applicant) Health Care Complaints Commission (Respondent)
Representation:	Counsel: A Flecknoe-Brown (Respondent) Solicitors: Applicant (Self Represented) Health Care Complaints Commission (Respondent)
File Number(s):	2019/00301288
Publication Restriction:	Nil

REASONS FOR DECISION

Introduction

1 On 17 August 2019 Scott Fearnley (the applicant) made an access application under the *Government information (Public Access) Act 2009* (NSW) (the GIPA Act) to the Health Care Complaints Commission (the HCCC). In that application he wrote:

> Regarding HCCC Complaint File [file number] Decision letter dated 24/01/2017 stating "yours sincerely" but without a HCCC officer or HCCC persons name attached. Sent to Mr Scott Fearnley.
>
> 2nd paragraph of the above letter, line 2, second sentence states that: "[The health practitioners] indicated that your complaint appears to have arisen from a family dispute and that you have engaged in threatening, harassing and abusive behaviour towards them." I strongly deny this accusation.
>
> Under the Government information (Public Access) Act 2009 Please supply myself Scott Fearnley all correspondence from [the health practitioners] to the HCCC from Jan 2016 to this day, to substantiate the statements made in the HCCC Complaint File [file number] letter (including Complaint file No [different file number]). No private medical records were involved.

2 On 6 September 2019 the HCCC wrote to the applicant with respect to complaints he had made against two health practitioners: only one of whom had been a subject of his access application. In that letter the HCCC wrote:

> I also understand that you are frustrated the Commission is unable to provide you with particular information and documents, but can only reiterate that the Commission does not have consent to release these to you and must adhere to privacy obligations.

3 It is apparent that the applicant considered this to be an access decision in respect of his access application. It is to be noted that this decision, on its face, was in respect of his complaints about health practitioners, rather than in response to the access application. The HCCC letter did not contain any reference to his access application. Most of the elements that the GIPA Act requires agencies to include in its decisions, when either refusing access under the Act (s 61), refusing to deal with an access application (s 60), or finding an access application invalid (s 51) were absent.

4 On 26 September 2019 the applicant lodged an application for administrative review of the decision of 6 September 2019 under the GIPA Act.

5 If the decision was not in fact made under the GIPA Act, then the HCCC was required by s 57(1) to decide within 20 days of the access application, failing which s 63 provides it would be –

> … deemed to have decided to refuse to deal with the application and any application fee paid by the applicant is to be refunded.

6 On 3 October 2019 the HCCC decided with respect to the applicant's access application that:

> Under section 43 of the Government information (Public Access) Act 2009 certain information of various agencies is deemed "excluded information". Clause 2 of Schedule 2 of the Act specifies that complaints handling and investigative functions of particular agencies, which includes the Health Care Complaints Commission, is excluded information.
>
> …
>
> As a result of the above, your access application is not a valid application.

7 It is to be noted that this decision was made very late: substantially outside the 5 working days specified by s 51(2) of the GIPA Act, and after the GIPA Act provides that a deemed decision to refuse to deal with the application had occurred. It is not the decision that the applicant sought to administratively review.

8 The application for administrative review was listed before Senior Member Montgomery on 29 October 2019 when the HCCC made an oral application for the Tribunal not to deal with applicant's administrative review application as his original access application invalid. The Tribunal made directions for the filing of an application for dismissal with submissions by the HCCC; for the applicant to file submissions in reply; and then for the matter to be decided without the need for the parties to be present.

9 The parties have since complied with those directions and the matter has been allocated to me to determine.

Material before the Tribunal

10 In considering this matter I have had regard to the following material:

(1) from the HCCC:

(a) application for the Tribunal to refuse to deal with the application for administrative review under s 109 of the GIPA Act; and

(b) supporting submissions (5 pages) with attachments A to F;

(2) from the applicant:

(a) application for administrative review received 26 September 2019 and attachments;

(b) letter from the applicant to the Tribunal dated 27 September 2019 and marked received on 2 October 2009, with 4 attachments; and

(c) bundle of documents received from the applicant on 7 November 2019 containing:

(i) 16 pages of submissions in reply; and

(ii) 123 pages of attachments;

(3) Directions made by the Tribunal on 29 October 2019.

11 Section 109 of the GIPA Act provides:

> NCAT may refuse to review or to deal further with a review of a decision of an agency if NCAT is satisfied that the application for review is frivolous, vexatious, misconceived or lacking in substance.

What is in dispute?

12 A consideration of the matters outlined in the introduction to these reasons points to there being a degree of confusion as to what actual decision has been made by the HCCC under the GIPA Act: which of the decisions made on 6 September 2019 and 3 October 2019 is operative, or is there a deemed decision under s 57(1)?

13 I did contemplate seeking the party's submissions on this issue but decided not to do so for the following reasons:

(1) the nature of administrative review - section 63 of the *Administrative Decisions Review Act 1997* (NSW) (the ADR Act) says that in determining an application for review the Tribunal is to make the correct and preferable decision having regard to the material before it, and any applicable written or unwritten law. The Tribunal stands in the shoes of the administrator and makes the decision again;

(2) the guiding principles laid out by s 36 of the *Civil and Administrative Tribunal Act 2013* (NSW) (the NCAT Act) - this relevantly provides:

> (1) The guiding principle for this Act and the procedural rules, in their application to proceedings in the Tribunal, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.
>
> (2) …
>
> (4) In addition, the practice and procedure of the Tribunal should be implemented so as to facilitate the resolution of the issues between the parties in such a way that the cost to the parties and the Tribunal is

> proportionate to the importance and complexity of the subject-matter of the proceedings.
>
> (5) However, nothing in this section requires or permits the Tribunal to exercise any functions that are conferred or imposed on it under enabling legislation in a manner that is inconsistent with the objects or principles for which that legislation provides in relation to the exercise of those functions.

(3) the instruction in s 38(4) of the NCAT Act that:

> The Tribunal is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.

(4) my view that:

(a) no matter what decision is operative, the Tribunal would have to deal with the HCCC's application to refuse to deal with the application; and

(b) to require the parties to make submissions on which decision is operative would not be quick, efficient or cheap and would involve the Tribunal looking at technicalities and legal formalities, which are not necessary in the circumstances and do not address the real issue (i.e. the validity of the access application).

14 Instead, I decided to proceed to consider the s 109 application.

Can the HCCC's s 109 application be determined without a hearing?

15 Having clarified what is in dispute and considered the all materials relied on by the parties I am satisfied that:

(1) neither party has objected to the application being determined on the papers; and,

(2) the issues for determination in this can be adequately determined in the absence of the parties based upon a consideration of the materials relied on by the parties.

16 Consequently, under s 50(4) of the NCAT Act I determine that a hearing is not necessary in this matter. I will order that a hearing be dispensed with.

The Government Information (Public Access) Act 2009

17 The GIPA Act commenced operation on 1 July 2010. The objects of the Act are set out in (s 3(1) -

> In order to maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective, the object of this Act is to open government information to the public by:

> (a) authorising and encouraging the proactive public release of government information by agencies, and
>
> (b) giving members of the public an enforceable right to access government information, and
>
> (c) providing that access to government information is restricted only when there is an overriding public interest against disclosure.

18 In exercising functions under the Act s 3(2) instructs that -

> "It is the intention of Parliament:
>
> (a) that this Act be interpreted and applied so as to further the object of this Act, and
>
> (b) that the discretions conferred by this Act be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, access to government information."

19 "Government information' is given a wide meaning (s 4) being 'information contained in a record held by an agency.'

20 The Act establishes a presumption in favour of the disclosure of government information unless there is an overriding public interest against disclosure (s 5). Applicants for access to government information have a legally enforceable right to be provided with access to that information, unless there is an overriding public interest against disclosure (s 9). The GIPA Act overrides other statutory provisions that prohibit disclosure, apart from the 'overriding secrecy laws' that are set out in Schedule 1. In the case of overriding secrecy laws it is conclusively presumed that there is an overriding public interest against disclosure (s 11 and s 14).

21 Section 14(1) provides that:

> (1) It is to be conclusively presumed that there is an overriding public interest against disclosure of any of the government information described in Schedule 1.

22 Information of the kind specified in Sch 1, is therefore the subject of a conclusive presumption that there is an overriding public interest against disclosure (“a conclusive presumption”). Sch 1 is not short. Among the information it provides is the subject of a conclusive presumption is excluded information.

23 Cl 4 of Sch 1 provides:

> (1) It is to be conclusively presumed that there is an overriding public interest against disclosure of information that is excluded information of an agency, other than information that the agency has consented to the disclosure of.
>
> (2) Before an agency decides an access application by refusing to provide access to information on the basis that it is excluded information of another agency, the agency is required to ask the other agency whether the other agency consents to disclosure of the information.
>
> (3) A decision that an agency makes to consent or to refuse to consent to the disclosure of excluded information of the agency is not a reviewable decision under Part 5

24 Schedule 2 - Excluded information of particular agencies - specifies what constitutes excluded information by reference to whether the information relates to specified functions of nominated agencies. The opening note to the Schedule says:

> Note. Information that relates to a function specified in this Schedule in relation to an agency specified in this Schedule is excluded information of the agency. Under Schedule 1 it is to be conclusively presumed that there is an overriding public interest against disclosure of excluded information of an agency (unless the agency consents to disclosure). Section 43 prevents an access application from being made to an agency for excluded information of the agency.

25 With respect to the HCCC cl 2 of Sch 2 provides:

> The Health Care Complaints Commission—complaint handling, investigative, complaints resolution and reporting functions (including any functions exercised by the Health Conciliation Registry and any function concerning the provision of information to a registration authority or a professional council (within the meaning of the Health Care Complaints Act 1993) relating to a particular complaint).

26 Where a person seeks access to excluded information, s 43 of the GIPA Act provides that:

> (1) An access application cannot be made to an agency for access to excluded information of the agency.
>
> Note. Information is excluded information of an agency if it relates to any function specified in Schedule 2 in relation to the agency.
>
> (2) An application for government information is not a valid access application to the extent that the application is made in contravention of this section.

27 In the present case the HCCC says it decided that the information sought is excluded information of the office of the HCCC specified in schedule 2 of the GIPA Act; i.e. “information that relates to any function specified in that Schedule in relation to the agency.” (see the interpretive provisions in Schedule

4). The functions in issue are its "complaint handling, investigative, complaints resolution and reporting functions."

28 That is the central issue in contention in this case.

29 In *DNM v Ombudsman* [2019] NSWCATAP 77 an Appeal Panel explained:

> 51. The statutory purpose of the definition of excluded information is to restrict or prohibit access to government information when there is an overriding public interest against disclosure such as the public interest in delivering responsible and effective government.
>
> 52. The "complaint handling, investigative and reporting" functions are generic descriptions. When the Ombudsman monitors compliance with legislation by public authorities, he is gathering information to ensure that the public authority is fulfilling its functions. That information is excluded information because it is sufficiently related to Ombudsman's "complaint handling, investigative and reporting functions.

30 With respect to other government information, which is not subject to a conclusive presumption, the GIPA establishes a principle that there is pubic interest in favour of disclosure (s 12(1)). Section 13 then provides that –

> There is an overriding public interest against disclosure of government information for the purposes of this Act if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure.

31 Section 14 (2) then provide –

> (2) The public interest considerations listed in the Table to this section are the only other considerations that may be taken into account under this Act as public interest considerations against disclosure for the purpose of determining whether there is an overriding public interest against disclosure of government information

32 It is not necessary to discuss how the provisions relating to the identifying and weighing of competing public interests for and against disclosure work, because in this case the issue for the Tribunal on administrative review is whether or not the applicant's access application is invalid because it sought access to excluded information.

33 It is not clear from the applicant's submissions that he understands this. In his submissions he did not directly respond to the HCCC's claim that he is seeking excluded information. Rather, he sought to advance various public interests, particularly those relating to the welfare of children (his children specifically)

and the accountability of health professionals for their conduct, as enough to justify the release of the information he seeks in the public interest.

34 Part 5 of the GIPA Act (s 80 – 112A) is concerned with the various forms of review of decisions available under the GIPA Act, from internal review through to administrative review by the Tribunal under the *Administrative Review Act 1997 (*NSW).

35 Section 80 sets out a series of decisions that are reviewable decisions under the Act. It relevantly provides -

> "The following decisions of an agency in respect of an access application are *reviewable decisions* for the purposes of this Part:
>
> (a) a decision that an application is not a valid access application,
>
> (b) …

36 Persons aggrieved by reviewable decisions have several options available to press their access applications. First, they may ask the agency to conduct an internal review under s 82 within 20 days of the original decision (s 83). The internal review is to be completed within 15 working days of receipt (s 86), failing which the agency is deemed to have made the original decision again (s 86(5)). A decision made on internal review is itself a reviewable decision, although it is not possible to seek an internal review of an internal review (s 88).

37 Secondly, an access applicant who is aggrieved by a reviewable decision may seek review of the decision by the Information Commissioner under s 89. A review by the Information Commissioner must be sought within 8 weeks of notice of decision being given to the access applicant. The Information Commissioner may then make a recommendation to the agency (s 92), including a recommendation that the agency reconsider the matter and make a new decision (s 93(1)), and a recommendation that there is not an overriding public interest against disclosure (s 94). Reconsideration following a recommendation is by way of internal review, where there has been no previous internal review, or by means of new decision where there had been a previous internal review (s 93).

38 Thirdly, a person aggrieved may seek a review by the Tribunal (s 100). When this provision is read with s 28 and s 30 of the *Civil and Administrative Tribunal Act 2013* (NSW) (the CAT Act), they confer jurisdiction on the Tribunal to review reviewable decisions under the GIPA Act. Such applications are to be made within 8 weeks of the decision (s 101(1)) or within 4 weeks of the completion of a review by the Information Commissioner (s 101(2)).

39 Once a decision is subject to review before the Tribunal it cannot be the subject of a review by the Information Commissioner (s 98). In the present case the applicant has sought administrative review by the Tribunal.

40 In any review of a reviewable decision s 105 places the burden of justifying the decision on the agency concerned. It provides -

> "(1) In any review under this Division concerning a decision made under this Act by an agency, the burden of establishing that the decision is justified lies on the agency, except as otherwise provided by this section.
>
> (2) If the review is of a decision to provide access to government information in response to an access application, the burden of establishing that there is an overriding public interest against disclosure of information lies on the applicant for review.
>
> (3) If the review is of a decision to refuse a reduction in a processing charge, the burden of establishing that there is an entitlement to the reduction lies on the applicant for review."

41 The Tribunal's function on review under is to make the correct and preferable decision: s 63 of the ADR Act.

Should the Tribunal refuse to deal with the application under s 109 of the GIPA Act?

42 If a review under the GIPA Act is “frivolous, vexatious, misconceived or lacking in substance” then the Tribunal may refuse to deal with it under s 109.

43 Under s 55(1)(b) of the CAT Act the Tribunal may dismiss proceedings that are, “frivolous or vexatious or otherwise misconceived or lacking in substance”. In the present case the HCCC has asked the Tribunal to exercise its powers under s 109.

44 The words “frivolous, vexatious, misconceived or lacking in substance” are well recognised legal terms that can be found in a broad spectrum of statutes dealing with summary dismissal. in a wide variety of forums. In each case, it is

important that the legal and legislative context in which those proceedings arise be taken into consideration.

45 Various meanings attached to the phrase were discussed in *BDK v Department of Education and Communities* [2015] NSWCATAP 129 at [59-62], in the context of an appeal against a summary dismissal of anti-discrimination proceedings on the grounds that they were vexatious under s 55 (1)(b) of the CAT Act . The Appeal Panel wrote:

> 63 In *Alchin v Rail Corporation NSW [*2012] NSWADT 142 Judicial Member Wright SC (as he then was) examined the meaning of the predecessor provision to s 55(1)(b) - s 73(5)(g)(ii) of the Administrative Decisions Tribunal Act 1977. As to the meaning of 'misconceived' and 'lacking in substance', he said:
>
> > 25 The expressions used in s 92(1)(a)(i) of the ADA, namely "misconceived" and "lacking in substance" are found not only in the ADA but also in s 73(5)(g) of the ADT Act and similar legislation in other states. With respect to a similar provision found in the Equal Opportunity Act 1984 (Vic), Ormiston JA in *State Electricity Commission of Victoria v Rabel* [1998] 1 VR 102 at [14] said:
> >
> > > "misconceived" and "lacking in substance" have not, so far as I am aware, been used in this context before though each expression is commonly used by lawyers, the one connoting a misunderstanding of legal principle and the other connoting an untenable proposition of law or fact. If one may discern, in these provisions, an attempt to express the powers of tribunals in non-technical language, then "misconceived" would represent a claim which did "not disclose a cause of action" ..., whereas "lacking in substance" might be seen to represent a claim where the defendant could obtain summary judgment ...
> >
> > 26 This approach of construing "misconceived" as including a misunderstanding of legal principle and "lacking in substance" as encompassing an untenable proposition of fact or law has been applied by the Tribunal in many decisions including, for example, K*eene v Director-General, Department of Justice and Attorney-General* [2011] NSWADT 59 at [14], *McDonald v Central Coast Community Legal Centre* [2008] NSWADT 96 at [22] and *Stanborough v Woolworths Ltd* [2005] NSWADT 203 at [50].
>
> 64 In the present case, the Tribunal referred to the frequently cited explanation of this term by Roden J in *Attorney-General v Wentworth* (1988) 14 NSWLR 481 at 491:
>
> > 1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.
> >
> > 2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.

> 3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.
>
> 65 It will be seen that Roden J's first category covers conduct that falls within the meaning of 'frivolous', while his third category embraces the kind of cases to which the expressions 'misconceived' and 'lacking in substance' are directed (or, in the case of the UCPR categories, cases not disclosing a reasonable cause of action).
>
> 66 In our view a reasonably broad connotation should be given to the meaning of the four categories of conduct identified by s 55(1)(b). The intent of the provision, as we see it, is to seek to give the Tribunal a broad power to deal with abuses of its processes, and for them to be interpreted and applied in a power which captures any kind of abuse of process, that can reasonably be seen to fall within their compass. While 'misconceived' and 'lacking in substance' may be seen as relatively specific terms, we think a flexible, purposive interpretation can be adopted in determining whether proceedings are 'frivolous' or 'vexatious', conscious always of the gravity for an applicant or plaintiff of summary dismissal of proceedings

46 In The Owners – Strata Plan No. 92334 v Piety Capital Pty Ltd [2019] NSWCATCD 22 Principal Member Rosser noted with respect to the word misconceived that:

> 33 The meaning of "misconceived" in an equivalent provision to s 55(1)(b): s 75(1)(a) of the Victorian Civil and Administrative Tribunal Act 1998 has been considered in a number of cases by the Victorian Civil and Administrative Tribunal (VCAT).
>
> 34 For example, in *Ballarto Pastoral Pty Ltd v Department of Primary Industries* [2006] VCAT 478, VCAT stated at [32] that "misconceived" in the context of s 75(1)(a) means "obviously untenable or groundless …. or means that the applicant has brought an incorrect type of application". In *Kyriakidis v State of Victoria (Human Rights List)* [2014] VCAT 1039 (21 August 2014), VCAT characterised as misconceived an application in which the complaint as articulated was not capable as a matter of law of enlivening VCAT's power to make the order sought. This conclusion was also reached in *Keogh v Higgins (Civil Claims)* [2014] VCAT 1256 (3 October 2014).

47 Reviews under the GIPA Act are a good example of the nature of the proceedings, and applicable legislation, having a significant impact on whether proceedings are frivolous, misconceived or lacking in substance. This is so because the GIPA Act has among its objects the conferral on members of the public of a right to access government information; restricted only when there is an overriding public interest against disclosure: see s 3. In aid of that right s 105(1) of the GIPA Act provides:

> In any review under this Division concerning a decision made under this Act by an agency, the burden of establishing that the decision is justified lies on the agency, except as otherwise provided by this section.

48 As a consequence, applications for summary dismissal based on an argument that reviews of valid access applications are without merit and destined to fail (and therefore frivolous, misconceived or lacking in substance) are unlikely to succeed, as the burden of justifying that the decision is correct lies with the respondent agency.

49 In *Walker v Pittwater Council* [2016] NSWCATAD 78, Hennessy DP (as she then was) considered the provisions of s 110(5A)(b) of the GIPA Act. This provides that when considering whether to approve an access application being made by a person who is the subject of a restraint order the Tribunal may:

> … have regard to whether the proposed application is frivolous, vexatious, misconceived or lacking in substance.

The Tribunal wrote:

> 22. The term "lacking in substance" is not defined in the GIPA Act but has been interpreted in many cases including under the various federal and state anti-discrimination statutes: *State Electricity Commission (Vic) v Rabel* [1998] 1 VR 102 [31] – [45]; *Rana v University of South Australia* [2004] FCA 559; (2004) 136 FCR 344 at [10]; *Gauci v Kennedy* [2006] FCA 869 at [32]; *Margan v University of Technology, Sydney [*2003] NSWADTAP 65. See the discussion of these cases in Rees Rice and Allen, Australian Anti-Discrimination Law (2nd ed 2014, The Federation Press) at 776 to 781. The most commonly quoted definition is that an application will be lacking in substance if it is based on "an untenable proposition of law or fact": *State Electricity Commission of Victoria v Rabel* [1998] 1 VR 102 at 108-109 per Ormiston J.
>
> 23. Sir Ronald Wilson said in *Assal v Department of Health Housing and Community Services, (1992) EOC 92-409*, 78,897 at 78,900 that:
>
> > ... it is unwise postulate any rules intended to guide the exercise of the power in question. That exercise must be governed by the words of the statute itself in the context of the particular circumstances of the case.
>
> 24. In the context of the GIPA Act, if the Tribunal does not have jurisdiction or the application lacks merit because of a restriction or qualification on the applicant's rights under the GIPA Act, then the application will be lacking in substance. For example, an application will be lacking in substance if it meets any of the tests in s 110(2), if there is an overriding public interest against disclosure or if the information is not held by the agency. But it must always be borne in mind that an applicant has an enforceable right to access government information and the discretions conferred by the Act are to "be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, access to government information": GIPA Act, s 3(2)(b).

50 With respect to the term "lacking in substance" the Court of Appeal in *Owners Corporation of Strata Plan 4521 v Zouk & Anor* [2007] NSWCA 23 with respect

to a similar phrase in the *Strata Schemes Management Act 1996* (since repealed) said , at 45, per Ipp JA with whom the rest of the Court agreed, that:

> 45 The powers of the Tribunal to dismiss an application by way of an informal investigation are far-reaching. It is in this context that the phrase "lacking in substance" must be understood. It would be inappropriate, given the extraordinary powers triggered by a finding that an application is lacking in substance, to attribute to the phrase a meaning other than "not reasonably arguable". That is, a meaning not dissimilar to "frivolous, vexatious, misconceived", the words which precede the phrase.

51 The HCCC argued that the access application in this case is and has always been invalid, and that, therefore, the application for administrative review is not reasonably arguable and is lacking in substance. The HCCC relied on the decision in in *Rosser v Health Care Complaints Commission* [2014] NSWCATAD 214 as confirming that requests for information such as the access application in this case are invalid as they seek excluding information.

52 In *Pertsinidis v Illawarra Shoalhaven Local Health District* [2014] NSWCATAD 130, at [59] and *Sinclair v Psychology Council* [2017] NSWCATAD 8 at [71] the Tribunal decided that the words the words 'relates to a function" in the note to sch 2 should be given it usual wide meaning.

53 In the present case the access application sought –

> … all correspondence from [the health practitioners] to the HCCC from Jan 2016 to this day, to substantiate the statements made in the HCCC Complaint File [file number] letter (including Complaint file No [different file number]).

54 That is clearly a request for information relating to the complaint handling, investigative, complaints resolution and reporting functions of the HCCC. That information is excluded information under Schedule 1 and 2 of the GIPA Act and as such it is subject to a conclusive presumption that there is an overriding public interest against disclosure. Section 43 makes it clear that such an access application is invalid.

55 This is so irrespective of the merits of any public interest considerations advanced by the access applicant in favour of granting access to the information sought. Parliament has decided that there is a conclusive presumption of an overriding public interest against disclosure of such information and has provided that such access applications are therefore

invalid. Neither the HCCC nor the Tribunal on review has power to reach any other decision.

56 As the applicant's access application is invalid, his application for administrative review is bound to fail. It is misconceived and lacking in substance.

Conclusion

57 As such, I think the Tribunal should refuse to deal with it further in accordance with s 109.

58 Because I consider that the applicant's administrative review application is misconceived and lacking in substance, I also think that it should also be dismissed under s 55(1)(b) of the NCAT Act. No purpose will be served by having it sitting as an open file in the Tribunal's registry, unable to be dealt with.

59 The Tribunal will:

(1) refuse to deal further with the application for administrative review under s 109 of the GIPA Act because it is misconceived and lacking in substance; and

(2) dismiss that application for administrative review under s 55(1)(b) of the CAT Act because it is misconceived and lacking in substance.

****

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar