



information
and privacy
commission
new south wales

Clarence Valley Council

Compliance with the Open Access requirements of the
GIPA Act – September 2020



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Abbreviations

The following table lists the commonly used abbreviations within this report.

Acronyms or abbreviation	Explanation
CVC	Clarence Valley Council
GIIC Act	<i>Government Information (Information Commissioner) Act 2009</i>
GIPA Act	<i>Government Information (Public Access) Act 2009</i>
IPC	Information and Privacy Commission
LGA	<i>Local Government Act 1993</i>
NCAT	NSW Civil and Administrative Tribunal
OLG	Office of Local Government
OPIAD	Overriding public interest against disclosure

1 Purpose

This audit examines the compliance by Clarence Valley Council (CVC) with the *Open Access* requirements of the *Government Information (Public Access) Act 2009* (GIPA Act) and related guidance set out in Information Access Guideline 1 issued by the NSW Information Commissioner pursuant to section 12(3) of the GIPA Act. The decision to undertake this audit was informed by publicly available information reporting that CVC did not intend to comply with the requirements of Guideline 1 to publish the returns of pecuniary interests of Councillors' and designated persons.¹

The Information Commissioner engaged, over a number of months, with CVC to inform a decision as to the regulatory engagement that would be appropriate and effective in circumstances. Having regard to the engagement with CVC, its response and the importance of open access requirements under the GIPA Act, it was determined that it would be appropriate to undertake this audit to ensure compliance with the open access requirements of the GIPA Act.

The audit was undertaken in accordance with section 21 of the [Government Information \(Information Commissioner\) Act 2009](#) (GIIC Act). Section 21 of the GIIC Act provides that the Information Commissioner may investigate and report on the exercise of any function by an agency under an Information Act including the systems, policies and practices of that agency. The Information Commissioner's reporting requirements are provided for in section 21(2) of the GIIC Act. Additionally, section 24 of the GIIC Act is also relevant to the Information Commissioner's reporting functions in circumstances where the Information Commissioner finds any conduct of an agency the subject of an investigation is conduct that constitutes a failure to exercise its functions properly in accordance with any provision of an Information Act.

Section 17(g) of the GIPA Act recognises the Information Commissioner's role in monitoring, auditing and reporting on the exercise by agencies of their functions under, and in compliance with, the GIPA Act.

Accordingly, the purpose of the audit was to assess the compliance of CVC with the GIPA Act in fulfilling its open access responsibilities under section 6 and Part 3 of the GIPA Act described in Information Access Guideline 1 – For Local Councils on the disclosure of information (returns disclosing the interest of councillors and designated persons). Specifically, this audit is limited to the specific compliance arrangements adopted by the Council in complying with the open access requirements for the disclosure of information for returns of Councillors and other designated persons.

This audit considered:

- reporting responsibilities under disclosure of pecuniary interests of councillors and designated persons
- Open access requirements in relation to responsibilities under returns disclosures; and
- training and procedures for officers reporting disclosures.

¹ Council resolutions of November and December 2019 contained in Ordinary Minutes of Meetings of November and December 2019.

2 Background

In 2009, the GIPA Act replaced section 12 of the *Local Government Act 1993* (NSW) (LGA) with the mandatory proactive release provisions in sections 6 and 18 of the GIPA Act, and the GIPA Regulation. Part 4 of the *Model Code of conduct for Local Councils in NSW (2018)* (Model Code) requires a councillor or a designated person to complete and lodge with the general manager a return disclosing his or her pecuniary interests. The Model Code is made under section 440 of the LGA and Part 8 the *Local Government Regulation 2005*. All Councils were required to adopt the Model Code by 14 June 2019 and revised in August 2020. The revision is not material to the findings of this report.

Information Commissioner Guideline 1 was made pursuant to the GIPA Act, specifically to assist local councils to determine the public interest considerations for and against disclosure of information contained in the returns disclosing the interests of councillors and designated persons as required by clause 1(2)(a) of Schedule 1 of the *Government Information (Public Access) Regulation 2018 (NSW)* ('the GIPA Regulation').

The Guideline supplements the provisions of the GIPA Act and set out the Information Commissioners expectations in respect of compliance. Agencies must have regard to them in accordance with section 15(b) of the GIPA Act.

Relevantly, Guideline 1 was developed in consultation with regulated entities and their representative associations, the Office of Local Government (OLG), and the NSW Privacy Commissioner. Guideline 1 was promoted by both the IPC and the OLG.

The mandatory proactive release provisions of the GIPA Act and the GIPA Regulation apply to the disclosure of information contained in returns disclosing the interests of councillors and designated persons. The combined effect of the GIPA Act and the GIPA Regulation is that the information in the returns need to be disclosed on the website of each local council, unless to do so would impose *unreasonable additional* costs on the council, or if the council determined there was an overriding public interest against disclosing the information. In those cases, there is a mandatory obligation placed upon Councils to facilitate open access by deleting a matter from the record to be made publicly available.²

In November 2019, the CVC resolved during a council meeting not to comply with the Information and Privacy Commission's (IPC's) Information Access Guideline 1 – For Local Councils on the disclosure of information (returns disclosing the interest of councillors and designated persons) and open access requirements under section 6 and Part 3 of the GIPA Act. The IPC identified publicly available resolutions and media representations by the CVC relevant to the deliberate non-compliance with these provisions and a motion to rescind this decision declared lost at a council meeting on 17 December 2019.³

As at August 2020, the IPC had not been advised by CVC of any commitment to rescind the motion to adopt noncompliant practices. CVC's noncompliance offends both the GIPA Act and the requirements of the Model Code. Accordingly, on 29 January 2020, the Information Commissioner referred this noncompliance to the OLG pursuant to section 33(2) of the GIC Act.

² Section 6 GIPA Act

³ Ordinary Minutes of December 2019

In this context, the IPC identified risks to the openness, transparency and accountability of the CVC. It also identified risks present in the identification and management of potential or perceived conflicts of interest that might arise in the decision making of the CVC. A demonstrated pro-compliance commitment by management to support transparency practices is integral to a robust compliance environment and essential to maintaining and advancing a *system of responsible and representative democratic government that is open, accountable, fair and effective*⁴.

Importantly these statutory requirements maintain integrity and combat corruption in our democratic system of government. Disclosure of pecuniary interests not only ensures transparency and accountability it also provides a necessary assurance that elected officials and other publicly funded senior decision makers, place the public interest above their private interests as demanded by, and expected of, public office.

The IPC's engagement with CVC took place over approximately 7 months and during this time the IPC provided guidance, support and assistance to promote understanding, awareness and compliance by CVC. That timeframe of regulatory engagement is significant in the context of the findings of this report. In particular, notwithstanding prolonged and direct engagement by the IPC, CVC have demonstrated that its compliance remains immature and its systems provide limited effect as evidenced by the draft and incomplete status of many of the policies, procedures and systems developed by CVC during the IPC's regulatory engagement. Likewise, the application of information access systems, policies and practices by CVC are inconsistent and therefore of limited effect in achieving compliance.

However in finalising this report, the IPC acknowledges that during this period of engagement with CVC, that by resolution of a meeting of Council on 25 February 2020, (sometime after the IPC initiated its engagement), the Council passed a resolution noting the CVC's procedure for compliance with *Information Access Guideline 1: For Local Councils on the Disclosure of Information (returns disclosing the interest of councillors and designated persons)*. That resolution also confirmed the decision to place on Council's website in accordance with the GIPA Act and Information Access Guideline, the returns of designated persons with redacted information.

Conduct of the audit and prior regulatory reports

In conducting the audit, representatives of the IPC requested information of the CVC, and assessed the CVC's policies and guidelines in respect of its compliance with Guideline 1. The IPC acknowledges that CVC was responsive to the IPC's requests for information in the lead up to and during the course of this audit. This report outlines the audit observations and proposed recommendations.

CVC provided a response to the draft report on 28 August 2020.

The draft report was also provided to the Minister for the OLG (the Minister) in accordance with section 23(3) of the GIC Act. The Minister provided a response on 8 September 2020.

The responses provided by CVC and the Minister have informed the finalisation of the report and have been referred to where relevant to the findings and recommendations. CVC's overall response to the recommendations made by this report are summarised at Table 5.3 of this report. In its response to the draft report, CVC *noted* the recommendations made and the IPC has interpreted this response as fully adopting the recommendations and implementation is occurring.

⁴ Section 3 GIPA Act

In so doing, the IPC notes that in respect of recommendation 6, CVC has identified some limitations to its website which is being reviewed in the current financial year. This program will address information access requirements. The IPC also notes that its response CVC advised that in respect of recommendations 5, 9 and 10 the requisite actions were completed.

The IPC welcomes the response by CVC and will continue to engage with CVC in relation to the implementation of the recommendations made.

The IPC will work with the CVC and monitor its progress through the provision of annual reporting by the CVC commencing November 2020 to assist in their implementation of the recommendations contained in this report.

3 Methodology

In addition to an assessment of CVC's overall performance in complying with the mandatory proactive release of certain government information under the GIPA Act, and disclosures under Guideline 1, the IPC requested information from the CVC and was provided with access to material responsive to Notices to Produce issued upon CVC.

The IPC conducted a desktop audit to assess compliance with Guideline 1 and ensure that its policies and procedures are in line with promoting practices consistent with the disclosure of pecuniary interests and the requirements of Guideline 1.

During the course of this audit, the CVC provided additional information concerning policies, procedures, processes, templates and material relevant to this function. In its assessment the IPC relied on the material provided, information obtained in consultations with CVC staff, as well as an assessment of CVC's public website, to inform its findings.

3.1 Assessment criteria

The IPC assessed CVC's compliance with Guideline 1 against discrete criteria to reflect the issues identified. The criteria are set out in the table below.

Assessment criteria
Documented Policy and Procedures
Open Access
Form of Return
Governance

3.2 Conduct of analysis

The findings of the review are presented in two parts:

- assessment against select criteria that assist examination of CVC's compliance with legislated requirements. The results of individual audit assessments provide objective findings and, in some instances, inform further findings or commentary;
- specific comments, findings and recommendations to assist CVC in achieving compliance with legislated requirements.

The IPC recorded and retained data in relation to the assessment, and for the purposes of this report deems it unnecessary to provide a breakdown of each document as the findings and recommendations are applicable generally and not specifically.

4 Observations

4.1 Documented Policy and Procedures

While a manual on how to manage returns disclosing the interest of councillors and designated persons is not a legislative requirement, agencies often have documentation in place in the form of policies and procedures. These are beneficial to agencies to support the effective exercise of this function and provide a useful reference for staff and others subject to this requirement by providing a consistent approach to the compliance requirements for the agency.

Maintaining currency of policies and procedures assists staff in the exercise of their GIPA functions exercised on behalf of the principal officer.

Criterion		Result
a	Documented policy and procedure for the collection of interests and publication	Disclosure of Interests – Reporting Responsibilities procedure document present, recommendations to enhance compliance (section 23)
b	Definition of designated persons	Definition of designated persons present within part 2 and part 5.1 of draft procedure document
c	Collection and completion of return	Provision present in draft procedure document, recommendations to enhance compliance

Comments, findings and recommendations

Comment: On 13 January 2020, the IPC sought a copy of the CVC's Policy and (draft) Procedures in order to determine the appropriate regulatory approach to the CVC's stated non-compliance with the GIPA Act.

CVC subsequently provided the IPC with a code of conduct policy document for the 'Code of meeting practice', adopted by the CVC on 28 May 2019 and which is available on the CVC's public website. The CVC also provided a draft procedure document for reporting responsibilities of their disclosures of interest which was drafted in December 2019.

In correspondence to the IPC dated 24 January 2020, the CVC stated its intention to report the issue of compliance with GIPA legislation to the February Council meeting. It was also stated that significant effort had already been made toward this, including finalisation and implementation of the Procedure.

The IPC acknowledges the efforts made so far by the CVC in working to achieve compliance with the provisions of the GIPA Act in respect of disclosures of interests. However, given the stated non-compliance by CVC and the responsibilities for a principal officer under the GIPA Act, the IPC would expect that the progress for finalisation and implementation of the procedure would be a priority for CVC following the IPC's engagement and the level of regulatory information, advice and assistance provided by the IPC.

Observation: The Disclosure of Interests – Reporting Responsibilities procedure document (the Procedures document) is currently not available on the CVC's public website. The purpose of the procedure is to ensure statutory compliance for the collection and handling of Disclosure of Interest Returns for CVC's 'designated persons'. The production of this procedure satisfies the criteria of having a documented policy and procedure for the collection of interests and publication.

The CVC also defines 'designated persons' in part 2 of the Procedures document in accordance with section 441 of the LGA. In addition, the CVC lists at part 5.1 of the Procedures document the number of designation persons, or positions, it identifies within its structure.

Comments, findings and recommendations

Part 5.2 of the Procedures document details the requirement for those falling under the definition of a designated person of the Council to complete and submit returns of interest within 3 months of becoming a designated person (primary return), as well as in the 30 June annual return, and from the point of becoming aware of a new interest that must be disclosed in the return (updated returns). The CVC has developed proformas for the completion of primary returns, annual returns, updated returns and also exit returns upon vacation of a designated position. The Procedures document provides that these forms are available on the CVC's intranet for access by designated personnel and the process is to be managed by the Governance Officer of the CVC.

The Procedures document outlines the management of this process including the provision of guidance in completing the returns as provided by the Model Code. According to the Procedures document it will be the responsibility of the Governance Officer to: distribute the return forms upon employee onboarding and offboarding; call for submissions for update returns quarterly and maintain the register of Disclosure of Interest returns for each financial year.

Whilst the Procedures document refers to guidance as provided by the Model Code for the completion of forms, the document does not go so far as to detail what categories of information the returns should contain in accordance with Part 2 of Schedule 1 of the Model Code. It also does not define pecuniary interests of a designated person including what is not considered a pecuniary interest. In this regard the Procedures document may be viewed as incomplete particularly in circumstances where although the definition of *designated persons* is included the Procedures do not identify the relevant categories of information that are required to be completed for the identified designated persons.

The OLG has published specific guidance to assist councils with the publication of pecuniary interests which includes the *Model Code of Conduct for Local Councils in NSW: A guide to completing returns of interest and Release of IPC Guideline 1 Returns of Interests*.⁵ This guidance provides an explanation about the completion of the returns in conjunction with additional details about the applicable definitions for relevant categories of the required return. CVC refers generally to this guidance in its Procedures.

Part 5.3 of the Procedures document describes the CVC's use of a 'check box' system to allow a designated person to request that their personal information not be made publicly available on Disclosure of Interest return forms. Whilst the CVC states that this is in accordance with Guideline 1 and Guideline 4: Personal information as a public interest consideration under the GIPA Act, and that the return submissions will be routinely redacted for personal contact information, signatures and any information that may contravene section 14 of the GIPA Act, this initiative does not accurately reflect the intent of the legislation and application of the Act consistent with the objects of section 3(2) of the GIPA Act.

The GIPA Act provides that there is a presumption in favour of disclosure of government information unless there is an overriding public interest against disclosure (section 5).

⁵ See <https://www.olg.nsw.gov.au/wp-content/uploads/2020/07/Model-Code-of-Conduct-Completing-returns-of-interests.pdf> and <https://www.olg.nsw.gov.au/council-circulars/19-21-release-of-ipc-guideline-1-returns-of-interests/>

Comments, findings and recommendations

In order to determine if there is an overriding public interest against disclosing information in the returns of the interests of councillors and designated persons, councils need to apply the public interest test under Part 2 of the GIPA Act.

The fact that a return of interests is open access information is an important factor in favour of disclosure which must be balanced against any applicable considerations against disclosure. This interpretation is also well established in case law.⁶

To establish an overriding public interest against disclosure a decision maker must be satisfied on the information provided that the public interest considerations against disclosure of government information outweigh the public interest considerations in favour of disclosure.⁷ The use of a check box for designated persons to elect to have their personal information withheld from public access does not demonstrate compliance with the conduct of the public interest test under the GIPA Act. Additionally, reliance upon a tick box may not in itself be sufficient to inform consideration of any overriding public interest considerations against disclosure. Further, the language in the Procedures document describing that certain information will be “routinely redacted” does not evidence that a public interest test will or has been conducted prior to the redaction occurring.

Disclosure of the returns protects the integrity of councils’ decision-making processes by allowing scrutiny of potential or perceived conflicts of interests that may arise which is an important element in promoting public accountability.

In applying the public interest test factors of privacy should be considered. Clause 3 in the Table in section 14 of the GIPA Act lists as a consideration against disclosure the fact that information may reveal someone’s personal information or would contravene an information privacy principle under the *Privacy and Personal Information Protection Act 1998 (NSW)* (PPIP Act). While a return may reveal personal information, which is a public interest consideration against disclosure, this is not a conclusive presumption against disclosure. It is just one of the relevant factors that need to be weighed against other factors for and against disclosure. In this regard the considerations must be weighed in conducting the public interest test and this balancing should be informed by section 5 and section 20(5) of the PPIP Act which provide that the GIPA Act is not limited by the PPIP Act.

A further consideration against disclosure listed in clause 3 of the Table in section 14 is where release of the information may expose a person to a risk of harm or of serious harassment or serious intimidation. However, the NSW Civil and Administrative Tribunal has determined that the risk needs to be considerable and current.⁸

Where information is deleted from a return, council is required to maintain a record indicating, in general terms, the nature of the information redacted in accordance with section 6(5) of the GIPA Act.

⁶ *McEwan v Port Stephens Council* [2018] NSWCATAP 211 (an appeal from *McEwan v Port Stephens Council* [2017] NSWCATAD 269)

⁷ Section 13 GIPA Act

⁸ See [AEZ v Commissioner of Police \(NSW\)](#) [2013] NSWADT 90; [Jenkinson v Department of Education and Communities \(NSW\)](#) [2013] NSWADT 280

Comments, findings and recommendations

In the circumstances where council decides that there is an overriding public interest against disclosure, consideration should then be given to whether it is practicable to release an edited copy of the record (for example redacting the individual's signature or residential address) in accordance with section 6(4) of the GIPA Act.

Recommendation 1: The CVC to finalise and publish the Disclosure of Interests – Reporting Responsibilities procedure document by 14 September 2020.⁹

Recommendation 2: The CVC should ensure the public interest test is conducted in relation to information that is claimed to attract an OPIAD prior to redacting information contained within the returns.

Recommendation 3: The CVC is encouraged to actively promote the location and circulate copies of the Procedures document and return forms within the Council on commencement of employment, quarterly and annually.

Recommendation 4: The CVC is encouraged to include within its Procedures document the categories of information the returns should contain in accordance with Part 2 of Schedule 1 of the Model Code including defining the pecuniary interests of a designated person.

4.2 Open Access

Section 6 of the GIPA Act requires agencies to make certain information publicly available. This information is known as open access information. Section 18 contains a list of the open access information that all agencies must make publicly available. Schedule 1 to the GIPA Regulation lists additional open access information relevant only to local councils. This includes the returns of the interests of councillors and designated persons (see clause 1(2)(a) of Schedule 1).

Criterion		Result
a	Disclosure of interests by Councillors or designated persons publicly available	Provision present, inconsistencies identified, improvements suggested to ensure publicly available as required by the GIPA Act (sections 3, 6, 16, 20 and GIPA Regulations)
b	Live Chat capability as an additional non-legislated means of promoting public access	Provision present, improvements suggested
c	Open access information freely available on website and easily accessible	Provision present, improvements to ensure accessibly as required by the GIPA Act (sections 3, 6, 16, 20)

⁹ The IPC notes CVC's advice that the procedure was adopted on 25 February 2020.

Criterion		Result
d	Record of open access information not available	Partial compliance, improvements to ensure compliance with the GIPA Act requirements (sections 6, 13, 15, 20)
e	Facilitate release of information by redaction	Present, improvements to ensure compliance with the GIPA Act requirements (sections 6, 13, 15, 18).

Comments, findings and recommendations

Comment: Mandatory proactive release, also known as open access information, is one of the four information access pathways under the GIPA Act. Proactive release advances the object of the GIPA Act to “maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective ...”.

The GIPA Act contributes to the building of an integrity culture through the establishment of a framework based around the principles of proactive disclosure and a presumption in favour of public interest disclosure. The mandatory proactive release provisions of the GIPA Act and the GIPA Regulation apply to the disclosure of information contained in returns disclosing the interests of councillors and designated persons.

The combined effect of the GIPA Act and the GIPA Regulation is that the information in the returns needs to be disclosed on the website of each local council, unless to do so would impose *unreasonable additional* costs on the council, or if the council determined there was an overriding public interest against disclosing the information.

At the time of conducting the desktop audit, the CVC had published Disclosure of Interests returns on their public website. Enquiries with the CVC determined that this element of compliance came into effect on 26 February 2020.

To investigate practical compliance CVC’s website was assessed for availability and accessibility broadly. Importantly, information may be available on a website, but it may not, in practice be readily accessible. Consideration of accessibility is also an indicator of a culture of compliance and a demonstrated commitment by senior management to adopt the legislative requirements together with the intent of the GIPA Act.

Observations:

Designated persons (identified positions) and the current Disclosure of Interests returns for staff can be located on the CVC’s webpage of ‘Registers’ which contains a list of registers available for viewing or downloading. A list of designated persons within a document titled ‘Identified Designated Persons positions’ matching that contained within the Procedures document is hyperlinked to ‘Designated persons’ within this section. The hyperlinked documents within these sections prompt downloading upon click. Individual Councillor disclosures are located on the ‘Our Councillors’ webpage under Council & Engagement > About Council & Councillors > Elected Council > Our Councillors. Each Councillor has a ‘Disclosure of Interests return’ linked to their individual contact information. As such, the Disclosure of interests by Councillors or designated persons appear to be publicly available in accordance with the provisions in sections 6 and 18 of the GIPA Act, and Part 2 of the GIPA Regulation.

Comments, findings and recommendations

This appears to be the case for all currently elected Councillors. However, the navigation through two different pathways increases complexity and decreases accessibility. Greater accessibility could be improved through a single readily identifiable pathway that enables members of the public to view this information in the same way as other open access information is provided for example development applications and associated documents.

The CVC website appears to have a live chat service which states its availability from between 8:45am and 4:15pm Monday to Friday, however in the 'Contact Us' section at the bottom of each webpage, the 'Live Chat' operating hours appears to be stated as 8:30am - 4:30pm.

There is a link to all open access information under Council & Engagement > About Council & Councillors > Access to information & documents webpage. From here, all open access information is accessible under the 'Open Access Information' heading via a link which directs to 'Council reports and documents'.

The information to which access is open includes information about the Council including annual and audit reports; plans and policies including strategic management plans and disclosures; Development Applications and approvals.

However, within this section the 'Returns of the interests of councillors, designated persons and delegates' is displaying 'Available on request' from Executive Support services which appears to be inconsistent with its availability within the 'Registers' and 'Our Councillors' pages of the website. This statement is not consistent with the requirements of the GIPA Act (section 6) and represents effective non-compliance.

Within the 'Access to information & documents' webpage there is a link to 'Minutes of council and committee meetings' that appears to be disabled.

However, this information is also accessible through the 'Council Meetings' tab on the home page. Within this area, there is a link to meeting attachments which have been categorised by item date in annual folders, however the attachments appear to be notated by numeric code and are not accompanied by any logical descriptor to indicate what they relate to including the dates of particular meetings. There may be some benefit in adding descriptive identifiers to these document links to improve usability of the information contained within them.

Within the 'Access to information & documents' webpage, some items are listed as being 'available on request'. Whilst it may be CVC's intention that this statement satisfies the requirement of being a record of open access information not available, there does not appear to be a centralised table of this information or explanation of why it may be unavailable or only available on request.

Section 6(4) of the GIPA Act requires agencies 'must facilitate public access to open access information contained in a record by deleting matter from a copy of the record if disclosure of the matter would otherwise be prevented due to an overriding public interest against disclosure, and it is practicable to delete the matter'. The CVC has made publicly available disclosures of interest with redacted information including the residential addresses and signatures of the individuals making the returns.

Where information is deleted from a return, council should keep a record indicating, in general terms, the nature of the information redacted in accordance with section 6(5) of the GIPA Act. Whilst the CVC does appear to utilise redactions in order to facilitate the release of this information, it is unclear whether this record is held or where, if held it is held or how such information could be accessed in compliance with open access provisions of section 6(5) and section 18(f) of the GIPA Act.

Comments, findings and recommendations

Although section 6(4) of the GIPA Act envisages a process in which open access information may be facilitated by deletion of matter from a copy of the record it is not apparent who is authorised on behalf of the Council to undertake this function and what processes are in place to be satisfied that any deletion appropriately balances the public interest test under the GIPA Act.

Recommendation 5: CVC to update Live Chat operating hours information for consistency.

Recommendation 6: CVC to promote consistency and accessibility in relation to returns of interest by establishing a single readily identifiable open access pathway for access available under 'Returns of the interests of councillors, designated persons and delegates' section of the 'Council reports and documents' page so as to improve consistency with accessibility of this information.¹⁰

Recommendation 7: CVC to consider the addition of descriptive identifiers to meeting attachment documents to improve their usability as open access information.¹¹

Recommendation 8: The CVC to implement procedures to comply with section 20 of the GIPA Act and publicly identify the kinds of information for which a charge is (or will be) imposed including instructions on how this information may be accessed.

Recommendation 9: The CVC to keep a record of the open access information (if any) that it does not make publicly available on the basis of an overriding public interest against disclosure in compliance with s18(f). The record is to indicate only the general nature of the information redacted in accordance with section 6(5) of the GIPA Act.

4.3 Form of Return

Part 2 of Schedule 1 of the Model Code sets out the matters that must be disclosed in the returns of interests in the following categories:

- interests in real property: clauses 5 - 8
- gifts: clauses 9-11
- contributions to travel: clauses 12-14
- interests and positions in corporations: clauses 15-18
- interests as a property developer or a close associate of a property developer: clauses 19-20
- positions in trade union and professional or business associations: clauses 21-22
- dispositions of real property: clauses 23-25
- sources of income: clauses 26-30
- debts: clauses 31 - 33

¹⁰ CVC advised in their response to the draft report current limitations with its website which is being upgraded in the current financial year which would address access.

¹¹ CVC have advised that in their response to the draft report that it was currently reviewing how reports/minutes/attachments is being presented on its website.

- discretionary disclosures: clause 34 (A person may voluntarily disclose in a return any interest, benefit, advantage or liability, whether pecuniary or not, that is not required to be disclosed under another provision of the Schedule).

Criterion		Result
a	Required inclusions	Partial provision in place, inconsistencies identified, improvements recommended

Comments, findings and recommendations

Comment: Part 4 of the Model Code requires a councillor or a designated person to complete and lodge with the general manager a return disclosing his or her pecuniary interests. For the purposes of the Model Code, a pecuniary interest is one held by the councillor and designated person, or his or her spouse, de facto partner, relative, partner or employer, or a company or other body of which the person, or a nominee, partner or employer of the person, is a shareholder or member. The form of the return is set out in Schedule 2 of the Model Code.

The returns are designed to promote openness and transparency in local government, and to avoid a conflict of interest on the part of councillors and senior council staff who exercise decision-making functions. The Independent Commission Against Corruption (ICAC) has highlighted the importance of reporting pecuniary interests in line with the Model Code as a means of mitigating the risk of inappropriate lobbying and undermining public confidence in impartial decision making¹².

The Model Code is made under section 440 of the *Local Government Act 1993* (NSW) (LGA) and Part 8 the *Local Government Regulation 2005*. Part 4 of the Model Code replicates and replaces the requirements previously set out in sections 441 - 449 of the LGA.

Observations: Whilst Guideline 1 is primarily concerned with the principle of disclosure in relation to the interests of councillors and designated persons, a requisite element of whether this information is disclosed in accordance with the GIPA Act is the effective completion of the returns in accordance with the Model Code. The CVC appears to have differing return forms with some including the section K 'Request for privacy of personal information' check box option and some without this section.

As set out above the check box approach absent a demonstration of application of the public interest test does not evidence compliance with the requirements of the GIPA Act.

Further the contents of section K do not appear to be prescribed by the form set out in Schedule 2 of the Model Code resulting in an inconsistent application of the requirements for completion of the prescribed form by those who are required to complete the return. In our review, we observed that Section K which is not a requirement of Schedule 2 of the Model Code was included in the forms that were required to be completed by one Councillor and all CVC designated persons but was not included for any other Councillors Whilst section K is additional to the requirements it appears to introduce a reliance upon a tick box outcome for the purpose of conducting the public interest test under the GIPA Act.

¹² 'Lobbying local government councillors, A guide for councillors, constituents and other interested parties', ICAC August 2006.

Comments, findings and recommendations

Any inclusion of additional information to the form should not have the undesirable effect of potentially negating the agency's responsibilities under the GIPA Act by creating an assumption that any information that may include personal information will be deleted from the published record as a result of checking the box.

Any redactions should be as a result of the application of the public interest test as opposed to applying routine redactions to personal information. The GIPA Act requires the application of the public interest to the different types of information contained in returns provided by designated persons.

Where the forms appear to adopt a differential approach, the Agency should review its forms so that they are consistent and comply with the requirements of the Model Code and better reflect the intent of the GIPA Act.

The Procedures document provided by CVC indicates that a review of the personal information is to be in accordance with the definition of personal information as defined under the *Privacy and Personal Information Protection Act 1998*. However, the review of the personal information under the GIPA Act should be in accordance with the definition as set out under the GIPA Act.

CVC's form appears to have encapsulated the following required fields as set out by Part 2 of Schedule 1 of the Model Code:

- A. Real property
- B. Sources of income
- C. Gifts
- D. Contributions to travel
- E. Interests and positions in corporations
- F. Property developer
- G. Positions in trade unions or professional or business associations
- H. Debts
- I. Dispositions of real property
- J. Discretionary disclosures

Whilst all reporting sections are present, there appears to be a lack of consistency in the information found in these sections. Returns lodged by elected councillors appear to be more fully completed than those of other designated persons. In addition, some sections in the 'primary returns' form such as those designated for reporting gifts, contributions to travel and disposition of real property have been marked as 'not required for primary returns'. It is not apparent why this is the case and whether the intent is to confirm that there is no information to be declared under the relevant category. If this is the case, then adherence to the intent of the legislation would be best achieved by the inclusion of a statement that makes clear that the response under each category is that there is no information to be declared. Inclusion of additional guidance in the Council's Procedures may be of benefit to those tasked with the requirement to complete a return and ensure that CVC is able to demonstrate compliance.

Compliance with the Model Code is a matter for consideration by the OLG and accordingly the Information Commissioner has referred this matter to the OLG in accordance with section 33(2) of the GIPA Act.

Comments, findings and recommendations

Recommendation 10: The CVC should review its prescribed form for consistency with the requirements of the Model Code.

Recommendation 11: The CVC to ensure the application of the public interest test prior to redaction or omissions as opposed to applying routine redactions to personal information to ensure that it is able to demonstrate the application of the public interest test to the different types of returns and information provided by designated persons.

Recommendation 12: CVC should review its Procedures to ensure that the assessment of *personal information* accords with the definition of *personal information* under the GIPA Act.

4.4 Governance

Disclosure of information contained in the returns of the interests of councillors and designated persons is an important public accountability measure. Accordingly, the threshold to displace Parliament's intent that it is open access is set at a high level. Releasing the information contained in the returns of councillors and designated persons in this manner facilitates the legitimate public interest in having access to the information, while respecting other considerations against disclosure including privacy.

Importantly, disclosing pecuniary interests also facilitates the identification and management of potential conflicts of interest that might arise where councillors and staff participate in decisions from which they may derive, or be perceived to derive, personal or financial benefit. Disclosures provide an assurance mechanism for Councils to assist in combatting corruption.

Similarly, complaints provide a further tool to assist Council governance processes. Complaints provide evidence and it is that evidence that enables Councils to take decisive action to enable manage potential and actual corruption.

Section 12 of the GIPA Act recognises the right to access information as an antidote to corruption in codifying the public interests in favour of disclosure including that:

Disclosure of the information could reasonably be expected to reveal or substantiate that an agency (or a member of an agency) has engaged in misconduct, negligent, improper or unlawful conduct.

Accordingly, the IPC also considered complaints management by CVC in the context of compliance with its open access obligations.

Criterion		Result
a	Established governance including self-audit of outstanding returns	Not evidenced/available in the course of the audit.
b	Promote pro-disclosure culture	Not evidenced/available in the course of the audit.
c	Process to escalate non-disclosure	Not evidenced/available in the course of the audit.

Comments, findings and recommendations

Comment: Governance arrangements including those described in the audit criterion above operate to satisfy the compliance requirements of clause 4.21 of the Model Code of Conduct and as such care should be taken to ensure the integrity of any material particular (see clause 4.23 of the Model Code).

Complaints about breaches of these requirements are to be referred to the OLG and may result in disciplinary action by the council, the Chief Executive of the OLG or the NSW Civil and Administrative Tribunal (NCAT).

The general manager of a council is required to table all returns at a council meeting and maintain a register of all returns. There is an obligation to keep the information contained in returns up to date with any new interest, or previously undisclosed interest must be submitted in an updated return within three months of becoming aware of the previously undisclosed interest. As referenced earlier, the CVC provided the IPC with a code of conduct policy document for the 'Code of meeting practice', (Procedures) adopted by the CVC on 28 May 2019 which includes details about the governance arrangements applicable to the management of the returns. The governance of the returns is described in the Procedures as the responsibility of the Governance Officer.

These Procedures set out the requirements for collection, updating and submitting a designated return. However, the Procedures are absent any audit mechanism for checking that the returns are completed or updated or indeed that they have been completed according to the requirements and time frames set out by CVC's own procedures. There is no information contained in the Procedures which explains, how the General Manager will or can be satisfied that the process outlined in the Procedures is occurring or indeed that all returns have been completed and returned when and as required.

The Procedures indicates that a register of the designated persons and returns will be retained in CVC's electronic records system and updated annually. However, the retention of such a record does not provide the type assurance that CVC's processes are being consistently applied and are operating effectively.

The Procedures do not provide any mechanism that addresses how the Governance Officer will by way of audit or other process demonstrate that the procedures have been met, including in circumstances where noncompliance with a request for completion of a return occurs.

Information contained in returns made and lodged under clause 4.21 is to be made publicly available in accordance with the requirements of the GIPA Act and Regulation as well as any guidelines issued by the Information Commissioner.

Guidance regarding the role and responsibilities of principal officers relevant to GIPA act compliance, in this case the General Manager has been produced by the IPC and is contained in the Fact Sheet: *The role of principal officers and senior executives in supporting the object of the GIPA Act*.

This information was provided to the General Manager during the course of this regulatory engagement. CVC submitted no evidence to demonstrate that steps have been taken to demonstrate the principal officer's commitment to compliance or culture of openness.

During the course of the regulatory engagement and in response to CVC's advice that policies and procedures for compliance could not be adopted absent authorisation by Councillors the IPC clarified and confirmed, in writing the responsibilities of the General Manager.

Dealing with complaints

Comments, findings and recommendations

CVC's procedures for the review of designated returns in response to enquiries was made in accordance with a Council resolution of 26 November 2019 providing that: the returns would be made available on request at the Grafton and Maclean office of Council.

This approach is inconsistent with the open access requirements envisaged by the GIPA Act and was therefore noncompliant with the GIPA Act and Guideline 1. However, the publication of the designated returns on CVC's website from 26 February 2020 is significant for the purposes of achieving compliance with the GIPA Act.

For the purposes of this audit, the IPC required CVC to furnish information about any complaints or enquiries it had received relevant to the disclosure of interests.

CVC advised that it had for the period 1 January 2019 to 31 March 2020 a total of four enquiries/complaints about the disclosure of interests and provided the details of those requests and its responses.

CVC also provided a copy of its register of persons who had sought access to the register of returns. This register includes the name of the person who requested access, the date of access, the scope of the returns that were viewed and identified either Councillors only or Councillors and Senior staff. The register included only two entries for the period requested.

In reviewing the complaints, the IPC identified a concerning practice adopted by CVC in response to one complaint. That practice involved:

- management of a complaint made in relation to declarations of interest by a Councillor;
- an absence of evidence of the application of any complaints handling policy/process to assist in identifying the issues and most effective way to deal with the complaint;
- the provision of a response from the Councillor involved absent any further action from the General Manager or any person authorised by the General Manager or acting on his behalf to deal with complaints; and
- the provision of a response to the complainant by the Councillor which does not accord with complaint handling processes implemented by the Council. The response includes language such as: *It's a big call to say you're defending the rights of other citizens by viewing the disclosures.*

This response together with the processes for managing the complaint fail to demonstrate a recognition of the object of the GIPA Act and a pro-disclosure, integrity-based culture.

The CVC's complaint management policy defines a complaint as an expression of dissatisfaction with Council's policies, procedures, charges, employees, agents or quality of service provided.¹³ It is apparent that the correspondence to the General Manager meets the definition of a complaint under CVC's policy. CVC confirmed that no further correspondence was entered into with the complaint outside of that was provided to the IPC. Accordingly, CVC failed to apply its procedures and failed to provide a response from the General Manager to the correspondence. There is no evidence to suggest that the complaint was addressed in any way that reflects CVC's procedures.

¹³ CVC Complaints Management Policy

Comments, findings and recommendations

The second entry was a request for access made on 17 October 2019. Council responded by way of a discussion with the individual who made the request and the following advice was provided by a member of staff:

- CVC could organise a time to view Council Disclosure of Interests returns.
- CVC is currently collecting new returns to reflect the recently resolved updated Model Code regarding disclosure of property developer information.
- the new returns would be submitted to CVC (November 2019) and then available on CVC's website shortly thereafter.

On the basis of the advice provided, it appears that the individual who made the request was satisfied to wait until the publication to the website.

CVC confirmed that it had made no further contact with the individual since the response it provided in October 2019. Given the significance of the declarations of interest and the very small numbers of specific inquiries, it would not have been unreasonable for the CVC to have taken steps in February to alert the individual of the publication of the register of returns.

Observations: Whilst the CVC's Procedures document includes section 6: Appeal/objections process, this section appears to be incomplete. It would also benefit from the inclusion of an escalation model for instances of non-disclosure, deliberate or otherwise.

The complaints management processes applied in practice by CVC appear to not align with the procedures set out in its own complaints management policy. The complaints policy would benefit from a review to align the actual practice with the policy.

The information made available to the IPC indicates that the approach adopted by the CVC up until the regulatory engagement by the IPC was incompatible with the requirements of the GIPA Act in the purpose and practice. The information available to the IPC does not demonstrate that the General Manager as principal officer of the CVC took adequate steps to ensure that the CVC approach to its compliance obligations for open access were as required by the GIPA Act.

In this regard the Information Commissioner has formed the view that the systems, policies and practices of CVC in dealing with information access complaints are inadequate and require immediate remediation.

Recommendation 13: The CVC to finalise the Procedures document by 14 October 2020 and include:

- a model for escalation in cases of non-disclosure
- an express statement that only the General Manager or an officer duly authorised by the General Manager who is independent of the complaint may exercise functions under an Information Act (as defined by the GIPA Act) and in doing so provide an assessment of and take any action in relation to the complaint.

Recommendation 14: The CVC to maintain a register of all designated persons required to submit an interest return including the date of making the return publicly available.

Recommendation 15: The General Manager, CVC as principal officer to approve all final Procedures and all other CVC policies and procedures to reflect the recommendations made in this report and achieve compliance with the open access requirements of the GIPA Act and ensure distribution and promotion of the Procedures to staff and Councillors by 2 November 2020.

5 Conclusions and recommendations

5.1 Conclusions

This audit was informed by:

- CVC information provided as a consequence of the audit including policies, procedures, and details of complaints and enquiries about the disclosure of interests
- Information obtained during the course of the audit from the CVC's public website.

The findings in this report observe that despite the extensive regulatory engagement undertaken by the IPC in advance of this audit, the practices adopted by CVC demonstrated noncompliance or inadequate compliance with the requirements of the GIPA Act.

A fundamental threat to the right to access open access information was also identified during the course of this audit. That threat manifests as evidence of a failure to properly apply the public interest test set out at section 12 of the GIPA Act. In particular there was no evidence provided during the course of this audit that decisions to establish an overriding public interest against disclosure applied the principles required in accordance with section 15 of the GIPA Act.

Indeed, the evidence provided to this audit supports a finding that redactions made in accordance with section 6(5) of the GIPA Act reflected the outcome of a tick box approach to a claim of an overriding public interest against disclosure and that any such claim would result in the redaction of information absent the application of the public interest test as required under the GIPA Act. Of utmost concern is that the draft processes containing the tick box approach absent any evidence of the requirement to conduct the public interest test appear to have been developed by CVC following regulatory engagement and guidance regarding the requirements of the GIPA Act.

The findings also reflect a pressing need to adopt a culture of compliance. Leadership and commitment by leaders and those in positions of power is instrumental in achieving cultural change. Accordingly, whilst all of the recommendations contained in this report are designed to support CVC in achieving compliance one recommendation expressly recognises the role and responsibility of the General Manager, CVC as principal officer with ultimate responsibility for compliance under the GIPA Act.

In summary, CVC systems, policies and procedures to give effect to the *open access* requirements of the GIPA Act tested with respect to the assessment criteria provided the following results:

Assessment criteria

Documented Policy and Procedures:

a. Documented policy and procedure for the collection of interests and publication

Disclosure of Interests – Reporting Responsibilities procedure document present (in draft at the time of submission) , recommendations to enhance compliance (section 23)

b. Definition of designated persons

Definition of designated persons present within part 2 and part 5.1 of draft procedure document

c. Collection and completion of return

Provision present in draft procedure document, recommendations to enhance compliance.

Open Access:

a. Disclosure of interests by Councillors or designated persons publicly available

Assessment criteria	
Provision present, inconsistencies identified, improvements suggested to ensure publicly available as required by the GIPA Act (section 3,6,16, 20 and GIPA Regulations)	
b. Live Chat capability as an additional non-legislated means of promoting public access	
Provision present, improvements suggested	
c. Open access information freely available on website and easily accessible	
Provision present, improvements to ensure accessibility as required by the GIPA Act (sections 3, 6, 16 and 20)	
d. Record of open access information that is not available	
Partial compliance, improvements to ensure compliance with the GIPA Act requirements (sections 6, 13, 15 and 20)	
e. Facilitate release of information by redaction	
Present, improvements to ensure compliance with the GIPA Act requirements (sections 6, 13, 15 and 18)	
Form of Return:	
Required inclusions	
Partial provision in place, inconsistencies identified, improvements recommended	
Governance:	
a. Established governance including self-audit of outstanding returns	
Not evidenced/available in the course of the audit.	
b. Promote pro-disclosure culture	
Not evidenced/available in the course of the audit.	
c. Process to escalate non-disclosure	
Not evidenced/available in the course of the audit.	

5.2 Recommendations

Based on the findings of this audit, it is recommended that the CVC implement the following recommendations within the timeframes specified.

Recommendations	
Recommendation 1	The CVC to finalise and publish the Disclosure of Interests – Reporting Responsibilities procedure document by 14 September 2020.
Recommendation 2	The CVC should ensure the public interest test is conducted in relation to information that is claimed to attract an OPIAD prior to redacting information contained within the returns.
Recommendation 3	The CVC is encouraged to actively promote the location and circulate copies of the Procedures document and return forms within the Council on commencement of employment, quarterly and annually.

Recommendations	
Recommendation 4	The CVC is encouraged to include within its Procedures document the categories of information the returns should contain in accordance with Part 2 of Schedule 1 of the Model Code including defining the pecuniary interests of a designated person.
Recommendation 5	CVC to update Live Chat operating hours information for consistency.
Recommendation 6	CVC to promote consistency and accessibility in relation to returns of interest by establishing a single readily identifiable open access pathway for access available under 'Returns of the interests of councillors, designated persons and delegates' section of the 'Council reports and documents' page so as to improve consistency with accessibility of this information.
Recommendation 7	CVC to consider the addition of descriptive identifiers to meeting attachment documents to improve their usability as open access information.
Recommendation 8	The CVC to implement procedures to comply with section 20 of the GIPA Act and publicly identify the kinds of information for which a charge is (or will be) imposed including instructions on how this information may be accessed.
Recommendation 9	The CVC to keep a record of the open access information (if any) that it does not make publicly available on the basis of an overriding public interest against disclosure in compliance with s18(f). The record is to indicate only the general nature of the information redacted in accordance with section 6(5) of the GIPA Act.
Recommendation 10	The CVC should review its prescribed form for consistency with the requirements of the Model Code.
Recommendation 11	The CVC to ensure the application of the public interest test prior to redaction or omissions as opposed to applying routine redactions to personal information to ensure that it is able to demonstrate the application of the public interest test to the different types of returns and information provided by designated persons.
Recommendation 12	CVC should review its Procedures to ensure that the assessment of <i>personal information</i> accords with the definition of <i>personal information</i> under the GIPA Act.
Recommendation 13	The CVC to finalise the Procedures document by 14 October 2020 and include: <ul style="list-style-type: none"> • a model for escalation in cases of non-disclosure • an express statement that only the General Manager or an officer duly authorised by the General Manager who is independent of the complaint may exercise functions under an Information Act (as defined by the GIPA Act) and in doing so provide an assessment of and take any action in relation to the complaint.
Recommendation 14	The CVC to maintain a register of all designated persons required to submit an interest return including the date of making the return publicly available.

Recommendations	
Recommendation 15	The General Manager, CVC as principal officer to approve all final Procedures and all other CVC policies and procedures to reflect the recommendations made in this report and achieve compliance with the open access requirements of the GIPA Act and ensure distribution and promotion of the Procedures to staff and Councillors by 2 November 2020.

5.3 CVC Response to Implementation of Recommendations

Table 1 summarises the response by CVC to the recommendations. The explanation for the status is explained at Table 2 below.

Table 1

Recommendation	Status			
	*Adopted in Full	Adopted in part	Alternate action adopted	Not Adopted
1	X			
2	X			
3	x			
4	x			
5	x			
6		X		
7	X			
8	X			
9	X			
10	X			
11	X			
12	X			
13	X			
14	X			
15	X			

***Note:** In its response to the draft report, CVC noted the recommendations made and the IPC has interpreted this response as fully adopting the recommendations and implementation is occurring.

Table 2 – Implementation and status ratings

Rating	Description
Adopted in full	The agency has accepted the recommendation in its entirety and will implement in full.
Adopted in part	The agency has accepted the recommendation in part. However, it has not fully realised the intent of the recommendation or only proposes to implement part of the recommendation.
Alternate action adopted	The agency has addressed the underlying issue by taking action different to the recommended action and that action is deemed acceptable to the IPC.
Not accepted	The agency has not accepted the recommendation.

5.4 Monitoring

The IPC will continue to assist CVC as it adopts these recommendations. The IPC proposes to monitor CVC's compliance with Guideline 1 and their open access requirements under section 6 by conducting a follow up audit within 12 months from the date of this report.

The CVC is asked to report to the Information Commissioner quarterly, pursuant to section 24(3) of the GIIC Act, on the implementation of the recommendations made arising from this audit, commencing 9 November 2020.

6 Audit chronology

Date	Event
13 January 2020	Section 25 Notice to CVC
24 January 2020	CVC response to IPC Section 25 Notice
29 January 2020	IPC referral to Office of Local Government
7 February 2020	Correspondence to CVC and request for further information
20 February 2020	CVC Response to letter of 8 February 2020
3 March 2020	CVC Correspondence on Council resolution to publish returns
15 April 2020	IPC Notification of audit to CVC in accordance with section 22(1) of the GILC Act and Notice
21 April 2020	Correspondence from the CVC responding to audit notification
May 2020	Conduct of audit by IPC
10 June 2020	Section 25 Notice to CVC
18 June 2020	CVC response to Section 25 Notice
17 August 2020	Provision of draft compliance report to the CVC (requesting response to the IPC by 31 August 2020) and to the Minister of the OLG
28 August 2020	CVC's response to the draft compliance report
8 September 2020	Minister's response to the draft compliance report
15 September 2020	Provision of final report

7 Legislation

The following legislation is relevant to the conduct of this audit.

Government Information (Information Commissioner) Act 2009 – relevant sections

- Section 21- Investigation of agency systems, policies and practices
- Section 24 – Report on compliance with Information Act

Government Information (Public Access) Act 2009 – relevant sections

- Section 6(3) – Mandatory proactive release of certain government information
- Section 15(b) – Principles that apply to public interest determination
- Section 17 (g) – Role of Information Commissioner
- Section 18 – What constitutes open access

Government Information (Public Access) Regulation 2018 – relevant sections

- Part 2 – Open access information for local authorities
- Schedule 1 - Schedule 1 Additional open access information—local authorities

Local Government Act 1993

- Section 440 – Codes of conduct

Local Government (General) Regulation 2005

- Division 4, Part 8 - Conduct