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and privacy
commission
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icare – GIPA Compliance Report Phase 2

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Abbreviations

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

Acronym or abbreviation	Explanation
ARC	Audit and Risk Committee
GIIC Act	<i>Government Information (Information Commissioner) Act 2009</i>
GIPA Act	<i>Government Information (Public Access) Act 2009</i>
HRIP Act	<i>Health Records and Information Privacy Act 2002</i>
icare	(Insurance and Care) NSW
IPC	Information and Privacy Commission, NSW
PPIP Act	<i>Privacy and Personal Information Protection Act 1998</i>
SICG Act	<i>State Insurance and Care Governance Act 2015</i>
SIRA	State Insurance Regulatory Authority, NSW

1. Purpose

This report relates to the second phase (Phase 2 Report) of a review examining the compliance of (Insurance and Care) NSW (icare) with the mandatory requirement to keep a contract register in accordance with the *Government Information (Public Access) Act 2009* (GIPA Act), together with the systems and processes in place to ensure compliance with relevant legislative provisions.

Phase 1 of this audit was undertaken in August and September 2020 with the Phase 1 compliance report (Phase 1 Report) issued on 21 October 2020. The Phase 1 Report is available on the IPC's website.¹ In summary, the Phase 1 Report related to a review examining icare's compliance with the mandatory requirement to keep a contract register, and the systems and processes in place to ensure compliance with relevant provisions of the GIPA Act.

The Phase 1 audit commenced with established and acknowledged non-compliance by icare. Accordingly, a desktop audit was determined to be the most effective and expeditious method to inform a base line assessment, recommendations and ongoing monitoring to progress and achieve compliance.

Results of the Phase 1 Report confirmed that icare had not been compliant with the contract register requirements of the GIPA Act for a number of years. The report outlined the Information Commissioner's findings and made eight recommendations arising from an initial review of icare's compliance with the requirement to keep a contract register.

Accordingly, the purpose of Phase 2 of the audit is to undertake a further assessment of the scope of any non-compliance and the remedial actions by icare to address the non-compliance and to ensure that mechanisms are in place to support future compliance.

Phase 2 has been undertaken as a desktop audit in accordance with section 17(g) of the GIPA Act, to monitor, audit and report on the exercise by agencies of their functions under, and compliance with, the GIPA Act. The review has been limited to a desktop assessment and review of icare's compliance with the contract register requirements of the GIPA Act and was based on information provided by icare, an assessment of information available on NSW eTendering and other publicly available information.

2. Overview

The results of this desktop audit have demonstrated that icare made progress in its compliance as a result of the remediation program. However, this audit has identified further opportunities for improvement.

This report outlines the findings and proposed recommendations to icare as a result of the audit.

icare responded to the draft report on 31 May 2021. That response has informed the finalisation of this report. Icare's response to the recommendations made by this report are summarised at Table 1 at part 9 of this report. icare requested additional information relevant to the contract link identified as not working at the time of the audit and suggested re-wording to Recommendation 5 for clarity. Additional information on the relevant contract was provided to icare and the proposed re-wording has been accepted as it does not alter the intent of the recommendation.

On 4 June 2021 icare confirmed its final response to the report.

The draft report was also provided to the Hon. Dominic Francis Perrottet, NSW Treasurer, as the Minister responsible for the agency pursuant to section 23(4) of the *Government Information (Information Commissioner) Act 2009* (GIIC Act).

¹ <https://www.ipc.nsw.gov.au/information-access/gipa-compliance-reports>

Notwithstanding the findings of non-compliance outlined in this report, I am satisfied that icare has demonstrated a commitment to address the self-identified issues of non-compliance. Despite the demonstrated commitment by icare, the achievement of full compliance by icare requires a demonstrated pro-compliance commitment at all leadership levels that embeds and supports transparency practices which are central 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 .

Mandatory disclosure of contracts not only ensures transparency and accountability it also provides a necessary a pro-integrity purpose that increases government transparency and accountability. Contract registers can also contribute to improved performance of outsourced services, increased efficiency and value for money. They are also an important tool to proactively manage potential conflicts of interest and ensure that public value is demonstrably realised.

3. Background

Part 3 of the Phase 1 Report² includes a detailed background relevant to icare’s compliance with the contract register requirements of the GIPA Act, including:

- information about icare’s structure and governance
- an overview of the Auditor-General’s 2016 Special Report on Agency compliance with the GIPA Act³
- the IPC’s regulatory engagement with icare following the March 2020 NSW Parliament Budget Estimates Inquiry, during which icare’s conduct in relation the contract register requirements of the GIPA Act was brought to the Information Commissioner’s attention, and
- formal notification from the IPC to icare in August 2020 that an audit would be undertaken.

Compliance audit Phase 1

The Information Commissioner notified icare of her intention to undertake a formal audit on 26 August 2020.

Phase 1 of the audit was completed on 21 October 2020.

The Phase 1 Report considered the issue of non-compliance with the requirement to keep a contract register and to publish contracts within 45 days in light of icare’s acknowledgement that it was non-compliant in this regard.

The Phase 1 Report broadly referred to the remediation actions taken by icare since the Auditor-General’s report in 2016, and icare’s remediation plan since regulatory engagement between the IPC and icare commenced in March 2020.

The Phase 1 audit considered the following assessment criteria:

1. Governance, culture and leadership
2. Requirement to maintain a contract register
3. Contract register as open access information

The results of the Phase 1 Report demonstrated that icare has not been compliant with the contract register requirements of the GIPA Act for a number of years.

² https://www.ipc.nsw.gov.au/sites/default/files/2020-10/Final_icare_Phase_1_Compliance_Report_October_2020.pdf.

³ New South Wales Auditor-General’s Report Special Report Agency compliance with the GIPA Act 2016.

The report outlined the Information Commissioner’s findings and made eight recommendations arising from an initial review of icare’s compliance with the requirement to keep a contract register.

Prior to finalisation of the Phase 1 Report, icare was given the opportunity to provide a response to the draft report. icare advised that it has adopted the recommendations in full and provided an overview of the steps that icare would take in response to the recommendations.

The recommendations in the Phase 1 Report addressed the fundamental areas of:

- management accountability and its role in the governance and oversight of the process
- staff knowledge and capability
- clearly defined and communicated roles and responsibilities for staff
- quality assurance and internal audit mechanisms to monitor compliance.

The IPC is continuing to assist icare as it adopts these recommendations.

Compliance audit Phase 2

The second phase of this audit more specifically assesses the scope of non-compliance and the remedial actions that icare has taken or is taking to address the non-compliance and to ensure that mechanisms are in place to support future compliance.

4. Methodology

In addition to the information provided by icare during the informal engagement and Phase 1 of the audit, the IPC issued a request to icare to furnish it with the following information to assist with the Phase 2 audit:

- a list of contracts disclosed by icare during the remediation program
- a description of any limitations to the scope of the completed remediation program meaning that historical non-compliance has not been fully addressed, as well as any further remediation action identified by icare necessary to fully address historical non-compliance
- details of specific actions taken to address recent instances of non-compliance
- copies of current versions of the documents relied on by icare in relation to its internal processes and practices relating to the contract register requirements and details of how the processes and practices are adequate to mitigate the risk of recurring non-compliance with regard to the root cause of previous instances of non-compliance.

The IPC has also had regard to information provided by icare regarding implementation of the recommendations made in the Phase 1 Report.

The analysis of icare’s compliance was conducted by the IPC between January and March 2021. The IPC examined the information provided by icare in conjunction with the publicly available information on NSW eTendering and with regard to relevant requirements of the GIPA Act.

4.1 Assessment criteria

The IPC assessed icare’s compliance with the contract register requirements of the GIPA Act against the following criteria:

Assessment criteria
1. Remediation of historical non-compliance
2. Recent compliance with requirement to maintain a contract register
3. Systems and processes around the contract register requirements of the GIPA Act to ensure future compliance

4.2 Audit sampling and review

The list of contracts provided by icare relating to contracts disclosed during its remediation program included 422 contracts and provided information about each contract including the contract class and date of publication on the contract register. The self-reported data in this list was considered in assessing Criterion 1 and 2.

For the purposes of assessing Criteria 2, the IPC also considered lists of published contracts extracted from icare’s contract register on NSW eTendering on 28 September 2020, 19 October 2020 and 19 November 2020. To consider recent compliance with the requirement to maintain a contract register, the IPC undertook a review of a random sample of:

- 10 contracts published by icare on 25 February 2020 as listed in icare’s self-reported data about contracts published during its remediation program, representing 5% of the contracts published by icare that day,⁴
- 3 contracts disclosed during the remediation program identified in icare’s self-reported data as class 3 contracts, representing 50% of the class 3 contracts disclosed during the remediation program that remained in effect at the date of sampling,⁵ and
- 8 contracts published by icare on NSW eTendering during the second quarter of 2020/2021, representing 20% of the contracts published by icare on NSW eTendering during that period.⁶

With regard to the sample size and scope, the IPC considers that the observations and findings made in this report reflect icare’s recent compliance with the contract reporting requirements of the GIPA Act.

4.3 Audit limitations

The scope of this audit is limited to a desktop review of the information provided by icare relating to compliance with the contract reporting requirements of the GIPA Act.

The methodology of a desktop audit should be recognised as constrained by factors including:

- independent remote assessment;

⁴ This sample was cross-referenced with information extracted from the NSW eTendering website on 22 March 2021.

⁵ icare’s list of contracts disclosed during the remediation program identified six class 3 contracts that remained in effect when the sample was extracted from NSW eTendering on 22 March 2021.

⁶ The sample was extracted from the NSW eTendering website on 22 March 2021.

- reduced inquisitorial assessment;
- a focus on identified compliance risks informed by agency responses to enquiries.

This audit relied on the information provided by icare and information published by icare on NSW eTendering website as a true representation of fact without reviewing the veracity of the information contained within the contract disclosures made. This includes reliance on information provided by icare about the contracts relevant to its remediation program, such as the completeness of the list and whether contracts should be classified as class 1, 2 or 3 contracts.

Where the IPC does not have information about whether icare has identified a contract as a class 1, 2 or 3 contract, observations have been made with regard to whether the publicly available information appears to be consistent with the requirements of the GIPA Act.⁷

Where icare entered 'not applicable' or 'nil' in the contract register in response to a requirement of that involves an assessment of relevance, it has been assumed that icare has correctly identified that the information is not applicable / relevant to the particular contract unless it appears from other information on the register that relevant information is likely to exist.

5. Acknowledgments

The IPC appreciates the assistance and cooperation provided by icare and its officers during the review and assessment.

6. Observations

6.1 Remediation of historical non-compliance

Comments, findings and recommendations

Comment: The Phase 1 Report found that icare was non-compliant with the requirement to maintain a contract register and update the register within 45 working days of contracts taking effect.⁸ The report also noted that the non-compliance issues have been ongoing since icare's inception in 2015.

The Phase 1 Report discussed the remediation program implemented and completed by icare prior to the audit which included taking the following actions:

- identify, record and publish historical contracts (contracts dated prior to 31 March 2020), and
- enhance icare's internal processes to ensure icare complies in future with the requirements of the GIPA Act, including the recording of relevant contracts in icare's register and publication of contracts on NSW eTendering within 45 working days of the contract's effective date.

Phase 2 of the audit has considered the information provided by icare about its remediation program in more detail.

The IPC's regulatory engagement with icare was commenced after the Information Commissioner became aware that icare's contract register had been updated with 179 contracts on 25 February 2020.

To assist an initial assessment of the issues, in March 2020, the IPC asked icare to:

⁷ This is particularly relevant to the sampling of contracts published by icare on NSW eTendering during the second quarter of 2020/2021.

⁸ Section 27 of the GIPA Act.

Comments, findings and recommendations

- conduct and document an assessment of each of the 179 contracts uploaded on 25 February 2020 against a self-assessment tool, and
- provide copies of all icare policies and procedures in final or in draft form relevant to the contract disclosure requirements of the GIPA Act.

In response to the IPC's initial correspondence commencing informal regulatory engagement, icare informed the IPC that once it became aware of the non-compliance, it initiated a remediation program which included actions to identify, record and publish historical contracts. icare advised that this led to the publication of 179 contracts on 25 February 2020.

icare acknowledged that it had not complied with the 45 day publication timeframe in relation to historical contracts but explained that it intended to progressively publish historical contracts which remained active on 31 March 2020 or which are commenced between 1 July 2018 and 31 March 2020 (active or expired contracts).

In mid-June 2020, icare informed the IPC that it had published 295 active and historical contracts dated between 1 July 2018 and 31 March 2020, which were published in tranches between May 2019 and May 2020. icare explained that it was continuing to process the remainder of contracts within the 1 July 2018 to 31 March 2020 timeframe. icare also advised that it was separately working to publish active contracts dated prior to 1 July 2018.

In July 2020, icare reported that 325 contracts had been uploaded onto the contract register and that it was aiming to complete the remediation plan by 31 July 2020 by publishing a further 97 contracts, bringing the total number of contracts to 422.

On 30 October 2020, icare reported that the publication on NSW eTendering of historical contracts as identified within their remediation program had been completed. icare reported that the remediation exercise had identified 422 contracts which have now been uploaded to the NSW eTendering website.

Observation:

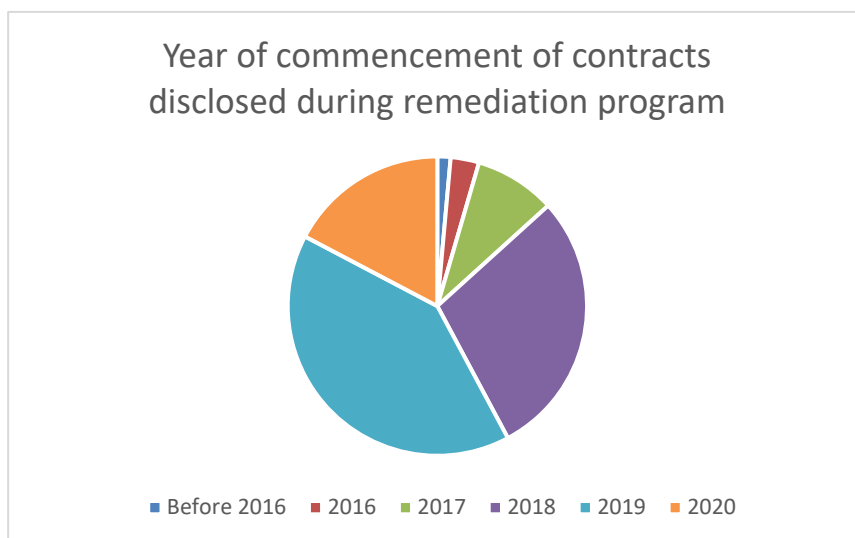
icare informed the IPC that it published information 422 contracts on NSW eTendering during its remediation program in 2019-2020. The majority of these contracts were identified by icare as class 2 contracts.

icare advised that the large volume of historical contracts, the significant manual effort required to collect and verify information relating to these contracts and system issues with eTendering contributed to the timeframe for completion of the remediation program.

The historical non-compliance by icare is significant. The estimated total value of the 422 contracts that were disclosed by icare during the remediation plan is significant, totalling over \$2 billion.

However, it is acknowledged that icare has implemented and completed a remediation plan to publish historical contracts that were not published within the 45 day publication timeframe.

Comments, findings and recommendations

Diagram 1: Disclosures by year of commencement of contract

The data in Diagram 1 indicates that the majority of contracts disclosed during the remediation program commenced between 2018 and 2020. This is consistent with icare's advice that in circumstances where any of icare's projects are now complete, icare considered it most relevant to focus its remediation program on the publication of contracts that are active or were entered into since July 2018, as well as prioritising ongoing compliance.

icare has advised that due to historical record-keeping practices, decentralised procurement processes and departures of key personnel over 5 years, the effort required to recreate a historical contract database for all contracts since icare's inception in 2015 is significant and a substantial investment of time and resources would be required to undertake a discovery, review and remediation exercise going back to icare's inception in 2015.

Under section 34 of the GIPA Act, the minimum public access period for information on an agency's contract register is whichever is the longer of the following periods:

- (a) 20 working days, or
- (b) the period until the project to which the contract relates is complete, the goods and services concerned have been provided under the contract, the term of the lease has expired or the real property has been transferred.

In circumstances where the required contract information is not published while the contract is ongoing, the minimum public access period will be 20 working days.

icare has made a commitment to continue to publish any active contracts entered into prior to 1 July 2018 that have not been made available on its contract register if they become aware of any contracts.

In addition, if icare becomes aware of expired contract information that has not been made publicly available as open access information as required by the GIPA Act, it should take steps to make relevant information available as open access information in accordance with section 34.

Comments, findings and recommendations

icare has advised that significant work has been completed to improve the historical lack of organisational awareness of icare's contract disclosure obligations under the GIPA Act and that these improvements are being sustained through an ongoing training and awareness plan.

Although the remediation program undertaken by icare to date does not completely address the historical non-compliance with the contract reporting requirements of the GIPA Act since icare's inception, it is a matter for icare's CEO and Audit and Risk Committee (ARC) to determine the appropriate allocation of time and resources to the remediation of historical non-compliance. It is noted that icare's procurement and governance processes have been subject to recent scrutiny due to broader concerns about the historic culture and governance within icare.⁹

icare has acknowledged that the historical practices are not acceptable and has advised that it has taken action to address the reporting gaps, including the implementation of systems to improve consistency in process and centralisation of key information to support the remediation program and ongoing contract disclosure requirements. icare has also advised that it is continuing to perform significant work in uplifting its procurement capability and practices through the strengthening of internal controls and processes.

icare's recent compliance with the contract register requirements of the GIPA Act is discussed further below under Part 6.2 of this report. The systems and processes that icare has in place to manage its contract reporting obligations under the GIPA Act are discussed further under Part 6.3 of this report.

The following recommendations are made in addition to the recommendations made in the Phase 1 Report.

Recommendation 1: icare should address instances of non-compliance with the publication timeframe under section 27 of the GIPA Act by including information in its contract register as soon as practicable after it becomes aware of the non-compliance. This recommendation applies to both active and expired contracts where the 45 working day publication timeframe has not been met.

Recommendation 2: icare's CEO and ARC consider whether the remediation program undertaken to date is adequate to address the history of non-compliance with regard to the broader observations that have been made relating to historical governance and accountability within icare.

Recommendation 3: icare's CEO and ARC consider periodic external auditing of icare's compliance with the contract register requirements of the GIPA Act as a mechanism to mitigate the risk of future non-compliance and to promote a culture of transparency and accountability within icare. Any such audit reports should be communicated to icare's ARC.

⁹ See for example, NSW Auditor-General's Report, Financial Audit – Central Agencies 2020, 10 December 2020; PWC Final Report – Independent Review of icare governance, accountability and culture, February 2021; Report by the Hon Robert McDougall QC, icare and *State Insurance and Care Governance Act 2015* Independent Review, 30 April 2021.

6.2 Recent compliance with requirement to maintain a contract register

Criterion		Result
II.	Recent compliance with requirement to maintain a contract register	Compliant / Partial compliance / Non-compliant
a.	Maintain a register of all class 1 contracts with a value of \$150,000 (including GST) or more that identifies the name and business address of the contractor, the commencement date and duration of the contract, details of the project, project cost, basis for variations and selection process	Partial compliance, improvements to ensure compliance with the GIPA Act requirements See also Phase 1 report.
b.	Update the register within 45 working days of the contract coming into effect	Partial compliance, improvements to ensure compliance with the GIPA Act requirements
c.	Ensure that the contract register includes all additional information required for class 2 contracts (see section 30)	Compliant
d.	Ensure that the register fully meets the requirements for Class 3 contracts (those with a value of \$5 million or more) (see section 31)	Partial compliance, improvements to ensure compliance with the GIPA Act requirements
e.	Ensure that if a copy of a contract is not included on the agency register or only some of the provisions are included because it contains confidential information (see section 32), agencies place on the register: <ul style="list-style-type: none"> • the reasons why the contract or provisions have not been included in the register • a statement as to whether it is intended to include the contract or provisions at a later date, and when this is likely to occur • a general description of the types of provisions that have not been included 	Partial compliance, improvements to ensure compliance with the GIPA Act requirements

Comments, findings and recommendations

Comment: Part 3 of the GIPA Act provides for open access information which is required to be made publicly available by agencies. Division 5 provides disclosure requirements for three classes of government contract with the private sector, in the form of a contracts register for those contracts valued at \$150,000 or over.

Contracts must be entered in the register within 45 working days of the contract becoming effective (section 27 of the GIPA Act).

Three classes of contract are established, each with different mandated requirements for disclosure:

Class 1: A contract to which the agency is a party that has a value of \$150,000 or more (see section 29).

Class 2: A class 1 contract, to which any of the following apply (see section 30):

- result in a direct negotiation where there has not been a tender process and the proposed contract has not been publicly available;
- there has been a tender process and terms and conditions have been substantially negotiated with the successful tenderer;
- involve operation or maintenance obligations for 10 years or more;
- involve a privately financed project as defined by relevant Treasury guidelines; or
- involve a transfer of land or other asset to a party in exchange for the transfer of land or other asset to an agency.

Class 3: A class 2 contract, with a value of \$5 million or more (see section 31). A copy of class 3 contracts must be made available with the register subject to the application of section 32 of the GIPA Act.

Reporting requirements for each class of contract under sections 29 to 32 of the GIPA Act is set out in Appendix A.

Observation: In March 2020, the IPC required icare to complete a self-assessment tool to assess whether the contract information relevant to the 179 contracts published by icare on 25 February 2020 was consistent with the requirements of the GIPA Act. icare self-assessed that it was compliant with all of the criteria apart from the requirement to update the contract register within 45 working days.

icare has advised that from 1 April 2020, icare established ongoing processes to publish all relevant contracts in line with GIPA requirements, with any exceptions reported to the IPC on a monthly basis.

At the time of undertaking the sampling for this audit, 39 of the 179 contracts remained available on NSW eTendering.¹⁰ It has been presumed that where a contract is no longer available on NSW eTendering, this is due to the expiration of the prescribed public access period.¹¹

¹⁰ The sampling was undertaken on 22 March 2021.

¹¹ See section 34 of the GIPA Act.

Comments, findings and recommendations

The IPC randomly sampled:

- ten (25%) of the publicly available contracts and compared the information on NSW eTendering with the self-reported data provided by icare¹²
- three (50%) of the six contracts disclosed during the remediation program that were identified by icare as class 3 contracts and remained in effect at the date of sampling, and
- eight contracts published by icare on NSW eTendering during the second quarter of 2020/2021.

The sampled contracts were assessed by a comparative analysis of the information provided by icare and/or the information available on the NSW eTendering website against the requirements of sections 29 to 32 of the GIPA Act. The results of this assessment provide observations about recent compliance with the publication requirements and are summarised below.

Diagram 2: Compliance with requirements of sections 29 to 32 of the GIPA Act



For class 1 contracts, the assessment found that icare had met the requirements for 86% of the sampled contracts. The instances of non-compliance for class 1 contracts included where:

- the contract duration date had been incorrectly entered
- the particulars of the project to be undertaken, the goods or services to be provided or the real property to be leased or transferred under the contract were not described, and
- a summary of the criteria against which the tenders were assessed was not included.

For class 2 contracts, the review concluded that icare was 100% compliant with the requirements.

In relation to class 3 contracts, there are two sets of requirements:

- Placing a copy of the contract on the contract register (section 31), and
- Providing further information if an agency decides not to place a copy of the contract on the contract register, or if provisions within the copy of the contract have been withheld (section 32).

¹² Of the sampled contracts, icare identified three of the contracts as class 1 contracts, and seven of the contracts as class 2 contracts. None of the contracts published on 25 February 2020 were identified by icare as class 3 contracts.

Comments, findings and recommendations

The assessment of the sampled class 3 contracts found that a copy of two of the three sampled contracts was made publicly available on icare's website, accessible via a weblink on NSW eTendering. For one contract, although a weblink was included, the weblink does not work.

The other instances of non-compliance related to not meeting the requirements to include:

- the reasons why the contract or those provisions have not been included in the register
- a statement as to whether it is intended that the contract or those provisions will be included in the register at a later date, and
- a statement on when it is likely that the contract or provisions will be included on the register.

icare has reported that since December 2020 it has updated additional total contract values for service provider contracts disclosed during the remediation program that are part of a Standing Offer Arrangement (SOA) after confirming service provisions and contract spend, as part of its procurement improvement and ongoing practices.

The relevant data indicates that the 422 contracts disclosed during the remediation program included a number of SOAs where icare entered into an agreement with multiple contractors. For example, one of the contracts related to a SOA between icare and a panel of forty-one contractors relating to the provision of case management services in the Lifetime Care scheme administered by icare. The information relevant to the contract reporting requirements of the GIPA Act varies for each contractor under the SOA and therefore a separate entry for each contractor is required on the contract register. However, it is unclear why complete information was not disclosed on the contract register at the time the contracts were initially published during the remediation program. Further, it appears that the contract(s) relevant to 'Dispute Assessors' that icare advised were disclosed during the remediation program were not available on eTendering at the time of our review.

icare acknowledged during Phase 1 of this audit that its historical failure to comply with the contract reporting requirements of the GIPA Act was partly due to confusion as to icare's disclosure obligations and accountabilities for disclosure relating to each of the statutory schemes it administers. While complexity of the schemes administered is acknowledged, it is of concern that it appears that contract information relevant to the administration of statutory schemes was not fully disclosed during the remediation program.

Overall, the analysis of icare's recent compliance with the contract register requirements indicates that icare has developed systems and processes for information to be entered into the contract register in a relevant and consistent manner. However, the data also indicates that there remain reporting gaps arising from a failure to enter data. Accordingly, there are opportunities for improvement in relation to the accurate and complete disclosure of contract information.

In relation to the 45-day publication timeframe, icare reported that between 1 April 2020 and 23 December 2020 there were five instances of non-compliance with the 45 day publication timeframe. icare has provided the following reasons for non-compliance:

- breach of procurement policy and process
- delays in finalising contract details after the contract effective date
- data entry errors, and
- system limitations and procurement process gap relating to contract extensions.

Comments, findings and recommendations

icare advised that it has taken the following actions to address these instances of non-compliance:

- mandatory procurement training, including in relation to GIPA requirements, to icare’s Senior Leadership Team as well as coaching of individual staff relevant to non-compliance
- improvements to contract execution process whereby GIPA forms are required to be returned to the Procurement team prior to full contract execution
- enhancing contract reporting to identify variations on actual spend against total contract value.

icare has demonstrated a commitment to achieving compliance in relation the contract register requirements of the GIPA Act and has made progress in this regard.

As noted in the Phase 1 Report, leadership and effective oversight will be key to achieving compliance in circumstances where non-compliance has been entrenched. icare’s progression towards full compliance will therefore require clear governance arrangements including oversight by the ARC, as well as effective systems and processes.

The following recommendations are made in addition to the recommendations made in the Phase 1 Report.

Recommendation 4: icare should take steps to ensure that accurate and complete information relevant to sections 29 to 32 of the GIPA Act has been included on eTendering NSW in relation to each government contract disclosed during its remediation program, including contracts involving multiple contractors.¹³

Recommendation 5: icare should provide a report to icare’s ARC and CEO by 30 June 2021 to explain how icare systems and processes capture relevant information for contract reporting under the GIPA Act in relation to all government contracts between icare and private sector entities, including contracts relevant to icare’s statutory authorities specifically the Workers Compensation Nominal Insurer, NSW Self Insurance Corporation, Workers Compensation (Dust Diseases) Authority, Lifetime Care and Support Authority of New South Wales, Sporting Injuries Compensation Authority and Building Insurer’s Guarantee Corporation.¹⁴

6.3 Systems and processes around the contract register requirements of the GIPA Act to ensure future compliance

Criterion	Result
III. Systems and processes around the contract register requirements of the GIPA Act to ensure future compliance¹⁵	Compliant / Partial compliance / Non-compliant

¹³ The terms ‘contractors’ and ‘government contract’ are defined in Schedule 4 – Interpretative Provisions of the GIPA Act.

¹⁴ Further information about icare’s structure and governance can be found in Part 1.3 of the Phase 1 Report, including icare’s role in relation to the Workers Compensation Nominal Insurer (Workers Insurance) under the *State Insurance and Care Governance Act 2015* (NSW).

¹⁵ The Phase 1 Report considered whether icare has an established and communicated governance framework and made recommendations in this regard.

Criterion		Result
a	Documented systems and processes	Partial compliance, improvements to ensure compliance with the GIPA Act requirements

Comments, findings and recommendations
<p>Comment: An agency's ability to comply with the mandatory contract reporting requirements of the GIPA Act is dependent on the agency developing and implementing procedures to manage the requirements. These procedures should include internal controls to ensure that:</p> <ul style="list-style-type: none"> reliable and timely disclosures occur key responsibilities and accountabilities are clearly communicated instances of non-compliance are monitored and addressed, and expectations and consequences for non-compliance are clearly communicated. <p>As noted in the Phase 1 Report, icare informed the IPC that its past failure to comply the contract reporting requirements of the GIPA Act primarily arose from underdeveloped systems and internal processes, and confusion as to icare's disclosure obligations and accountabilities for disclosure of each statutory scheme and the complex nature of their historical arrangements. icare also acknowledged that there was internal confusion as to icare's compliance requirements for the Nominal Insurer. The Phase 1 Report considered icare's systems and processes in the context of governance, culture and leadership and made recommendations in this regard.¹⁶</p> <p>As part of the Phase 2 audit, the IPC wrote to icare noting the following history relating to information reported by icare about the systems and processes in place to manage icare's contract reporting requirements:</p> <ul style="list-style-type: none"> In March 2020, icare provided the IPC with copies of documents relevant to internal systems and procedures relevant to managing its contract reporting requirements. In June 2020, icare advised that it was undertaking a review of its current internal procurement systems, policies, procedures and processes relating to contract disclosure requirements under the GIPA Act and the NSW procurement framework more generally, including those provided to the IPC in March 2020. On 3 July 2020, icare publicly reported on its website about a comprehensive review program that has seen the introduction of a new contract management and tracking system which will ensure ongoing improvement in compliance with the GIPA Act.¹⁷

¹⁶ Part 6.2 of the Phase 1 compliance report.

¹⁷ <https://www.icare.nsw.gov.au/news-and-stories/icares-contract-remediation-program-draws-to-a-close#gref> (accessed 17 February 2021)

Comments, findings and recommendations

For the purposes of the Phase 2 audit, icare was asked to provide the IPC with copies of current versions of the documents relied on by icare in relation to its internal processes and practices relating to the contract register requirements and details of how the processes and practices are adequate to mitigate the risk of recurring non-compliance with regard to the root cause of previous instances of non-compliance.

Observation: icare reported that the systems improvements implemented during the remediation program include:

- introduction of a centralised contract register database which covers the data requirements for class 1, 2 and 3 contracts
- functionality for the contract register database to automatically feed information from icare's Finance system and upload information to the NSW eTendering website
- introduction of monthly purchase order reconciliation to the contract register to identify any discrepancies and/or omissions
- requirements for leaders to sign off on contract information collection which is also reviewed by the procurement team
- requirement to report contract information to the Strategic Sourcing Team *prior to* contract execution, to ensure that the 45 day publication timeframe can be met
- instances of non-compliance are recorded in icare's enterprise risk management and compliance system, and are supported by root cause analysis to ensure that appropriate and timely action is taken to resolve the issue and further strengthen and embed controls to prevent reoccurrences. The risk management system is independently monitored by icare's Risk team and any high-rated incidents are reported by the Chief Risk Officer to the Board ARC.
- development of centralised procurement processes and systems around the documentation of the procurement process to make it easier to report contract information
- quarterly updates are provided by the Strategic Sourcing team to the ARC, including matters including GIPA completeness, data quality, compliance and procurement pipeline
- an Enterprise Plan & Source Group has been established to meet monthly to discuss matters including contract register compliance
- delivery of periodic procurement training, including matters relating to GIPA compliance.

icare provided the IPC with a copy of its Procurement Policy which was finalised in November 2020. icare advised that the Procurement Policy is made available on icare's intranet page and requires compliance by all staff procuring goods and services.

The Procurement Policy provides an overview of the contract disclosure requirements of the GIPA Act that apply to icare and its statutory schemes (including the Nominal Insurer), including reference to the publication timeframe. It states that icare's contracts register is maintained by the Strategic Sourcing team and is publicly available on the NSW eTendering website. However, it does not provide any guidance on the practical steps required to be taken to comply with the contract reporting requirements.

Comments, findings and recommendations

Based on the information provided, it appears that icare is still in the process of updating or developing related documentation to provide guidance on the contract disclosure requirements, including its Procurement Guidelines, GIPA Operation Guidelines and templates to assist with the collection of relevant information.

It is encouraging to note that it appears that icare is developing detailed guidelines and related documents to assist relevant staff in understanding and implementing the contract disclosure requirements of the GIPA Act.

However, noting that icare has advised that its remediation program is complete and that it has adequate systems and processes in place to manage ongoing compliance, icare should prioritise the finalisation of its documented policies and guidelines to support the systems and processes in place to achieve ongoing compliance. This is particularly important given icare's acknowledgement that the historic non-compliance primarily arose due to underdeveloped systems and internal processes and confusion as to icare's disclosure obligations and accountabilities.

As icare continues to review and develop its contract disclosure procedures, it should ensure that responsibilities and the accountability framework relating to compliance with the contract register requirements are clearly defined and communicated to staff. This should also include a mechanism for review together with training for new members of staff and refresher training for existing staff.

icare is encouraged to consider having a comprehensive policy / procedure which sets out the contract reporting requirements of the GIPA Act, the process for disclosure of information (from collection of information by contract manager to disclosure on eTendering by the Strategic Sourcing Team), and clearly communicates expectations around the timeliness, completeness and accuracy of the contract information disclosed, as well as communicating internal consequences for late or incomplete reporting. Such policy/procedure should include a mechanism for regular auditing for compliance against the policy for completeness.

The accessibility of one policy document that comprehensively explains relevant requirements and processes will enhance staff understanding and minimise the risk of inconsistent approaches or confusion arising from the existence of different policies and procedures. It also supports transparency and accountability (section 18(c) GIPA Act).

Recommendation 6: icare prioritises the finalisation of documented policies and guidelines to support the systems and processes it has developed during the remediation program to support future compliance with the contract register requirements of the GIPA Act.

7. Conclusions

Responsibility for compliance under the GIPA Act rests with the agency head. This reflects the ultimate accountability of the CEO for the systems, policies and procedures, culture and capability that support compliance.

This audit was informed by:

- the information provided by icare since March 2020
- a review of relevant publicly available information on icare's website
- a review of information published by icare on the NSW eTendering website
- a review of the remediation plan provided by icare to the IPC and updates provided by icare to the IPC in relation to the remediation plan
- the legislative requirements of the GIPA Act
- the Phase 1 Report findings and recommendations

In summary, this audit has identified:

- icare has completed a remediation program which has partially addressed historic non-compliance with the contract reporting requirements of the GIPA Act
- progress relating to icare's compliance with the contract register requirements of the GIPA Act
- a need for icare to prioritise the finalisation of documented policies and guidelines relevant to the systems and processes it has put in place to support ongoing compliance with the contract reporting requirements of the GIPA Act
- opportunities for the IPC to support and enable icare to achieve compliance in respect the contract register requirements.

In response to engagement by the IPC, icare demonstrated a commitment to improve compliance through internal remedial actions and engagement with the IPC.

The IPC will continue to engage with icare and compliance with the contract reporting requirements of the GIPA Act by icare.

8. Recommendations

The following recommendations are made in addition to the recommendations made in the Phase 1 Report.

Recommendations	
Remediation of historical non-compliance	
Recommendation 1	icare should address instances of non-compliance with the publication timeframe under section 27 of the GIPA Act by including information in its contract register as soon as practicable after it becomes aware of the non-compliance. This recommendation applies to both active and expired contracts where the 45 working day publication timeframe has not been met.
Recommendation 2	icare's CEO and ARC consider whether the remediation program undertaken to date is adequate to address the history of non-compliance with regard to the broader observations that have been made relating to historical governance and accountability within icare.
Recommendation 3	icare's CEO and ARC consider periodic external auditing of icare's compliance with the contract register requirements of the GIPA Act as a mechanism to mitigate the risk of future non-compliance and to promote a culture of transparency and accountability within icare. Any such audit reports should be communicated to icare's ARC.
Recent compliance with requirement to maintain a contract register	
Recommendation 4	icare should take steps to ensure that accurate and complete information relevant to sections 29 to 32 of the GIPA Act has been included on eTendering NSW in relation to each government contract disclosed during its remediation program, including contracts involving multiple contractors.
Recommendation 5	icare should provide a report to icare's ARC and CEO by 30 June 2021 to explain how icare systems and processes capture relevant information for contract reporting under the GIPA Act in relation to all government contracts between icare and private sector entities, including contracts relevant to icare's statutory authorities, specifically the Workers Compensation Nominal Insurer, NSW Self Insurance Corporation, Workers Compensation (Dust Diseases) Authority, Lifetime Care and Support Authority of New South Wales, Sporting Injuries Compensation Authority and Building Insurer's Guarantee Corporation.

Systems and processes around the contract register requirements of the GIPA Act to ensure future compliance	
Recommendation 6	icare prioritises the finalisation of documented policies and guidelines to support the systems and processes it has developed during the remediation program to support future compliance with the contract register requirements of the GIPA Act.

9. icare's response to implementation of recommendations

Table 1 summarises the response by icare to the recommendations in this report. 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			

Table 2

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.

10. Monitoring

The IPC will continue to assist icare as it adopts these recommendations and requests a report back regarding implementation by 1 October 2021.

11. Audit chronology

Date	Event
9 March 2020	Information Commissioner appeared at the NSW Parliament Budget Estimates Inquiry before Portfolio Committee No. 6 – Transport and Customer Service
March – August 2020	Information Commissioner undertakes informal regulatory engagement with icare
27 March 2020	icare provides a response to the Information Commissioner
26 August 2020	Correspondence from IPC to icare to notify of audit
August – September 2020	Phase 1 desktop audit undertaken
21 October 2020	Provision of final Phase 1 report to icare and NSW Treasurer
10 December 2020	Correspondence from IPC to icare seeking additional information for Phase 2 of audit
23 December 2020	icare provides a response to the Information Commissioner
February 2021	Phase 2 desktop audit undertaken
20 May 2021	Draft Phase 2 report provided to icare and the NSW Treasurer
31 May 2021	icare response to draft report
2 June 2021	IPC Provision of additional information and response to recommendation
4 June 2021	icare final response to draft report
9 June 2021	Provision of final report to icare and NSW Treasurer

12. Legislation

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

Government Information (Public Access) Act 2009 – relevant sections:

- Section 17 – Role of the Information Commissioner
- Part 2 – Open government information – general principles
 - Division 1 – Ways of accessing government information
- Part 3 – Open access information
 - Division 5 – Government contracts with private sector

Government Information (Information Commissioner) Act 2009 – relevant sections:

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

Appendix A: Part 3 Division 5 of the GIPA Act

Division 5 Government contracts with private sector

27 Register of government contracts valued at \$150,000 or more

- (1) An agency is to keep a register of government contracts (its government contracts register) that records information about each government contract to which the agency is a party that has (or is likely to have) a value of \$150,000 (including GST) or more (class 1 contracts).
- (2) Information about a class 1 contract must be entered in the register within 45 working days after the contract becomes effective.
- (3) A contract becomes effective—
 - a) when it is entered into by or on behalf of the agency concerned, or
 - b) if the contract contains a provision to the effect that one or more conditions are to be met before the obligations of the parties under the contract are enforceable—when the condition or conditions have been met (and not when the contract is entered into by the agency).

28 Value of contract

The value of a contract is whichever of the following values is appropriate to the kind of contract concerned—

- a) the total estimated value of the project,
- b) the total estimated value of the goods or services over the term of the contract,
- c) the value of the real property transferred,
- d) the rent for the term of the lease.

29 Information to be entered in register—class 1 contracts

The following information about a class 1 contract is to be entered in the government contracts register—

- a) the name and business address of the contractor,

- b) particulars of any related body corporate (within the meaning of the Corporations Act 2001 of the Commonwealth) in respect of the contractor, or any other private sector entity in which the contractor has an interest, that will be involved in carrying out any of the contractor's obligations under the contract or will receive a benefit under the contract,
- c) the date on which the contract became effective and the duration of the contract
- d) particulars of the project to be undertaken, the goods or services to be provided or the real property to be leased or transferred under the contract,
- e) the estimated amount payable to the contractor under the contract,
- f) a description of any provisions under which the amount payable to the contractor may be varied,
- g) a description of any provisions with respect to the renegotiation of the contract,
- h) in the case of a contract arising from a tendering process, the method of tendering and a summary of the criteria against which the various tenders were assessed,
- i) a description of any provisions under which it is agreed that the contractor is to receive payment for providing operational or maintenance services.

30 Additional information for class 2 contracts

- (1) Additional information is required to be entered in the government contracts register for class 1 contracts to which any of the following paragraphs applies (class 2 contracts)—
 - a) there has not been a tender process, the proposed contract has not been made publicly available and the terms and conditions of the contract have been negotiated directly with the contractor,
 - b) the proposed contract (whether or not made publicly available) has been the subject of a tendering process and the terms and conditions of the contract have been substantially negotiated with the successful tenderer,

- c) the obligations of one or more parties under the contract to maintain or operate infrastructure or assets could continue for 10 years or more,
 - d) the contract involves a privately financed project as defined by guidelines published by the Treasury (as in force from time to time),
 - e) the contract involves a transfer of a significant asset of the agency concerned to another party to the contract in exchange for the transfer of an asset to the agency.
- (2) The additional information required to be entered in the register for class 2 contracts is as follows—
- a) particulars of future transfers of significant assets to the State at zero, or nominal, cost to the State, including the date of their proposed transfer,
 - b) particulars of future transfers of significant assets to the contractor, including the date of their proposed transfer,
 - c) the results of any cost-benefit analysis of the contract conducted by the agency,
 - d) the components and quantum of the public sector comparator if used,
 - e) if relevant, a summary of information used in the contractor's full base case financial model (for example, the pricing formula for tolls or usage charges),
 - f) if relevant, particulars of how risk, during the construction and operational phases of a contract to undertake a specific project (such as construction, infrastructure or property development), is to be apportioned between the parties, quantified (where practicable) in net present-value terms and specifying the major assumptions involved,
 - g) particulars as to any significant guarantees or undertakings between the parties, including any guarantees or undertakings with respect to loan agreements entered into or proposed to be entered into,
 - h) particulars of any other key elements of the contract.

31 Register to include copy of class 3 contract

If a class 2 contract has (or is likely to have) a value of \$5 million or more (a class 3 contract), the register must include a copy of the class 3 contract.

32 Confidential information not required to be included in register

- (1) A requirement of this Division to include information or a copy of a contract in the government contracts register does not require the inclusion of—
- a) the commercial-in-confidence provisions of a contract, or
 - b) details of any unsuccessful tender, or
 - c) any matter that could reasonably be expected to affect public safety or security, or
 - d) a copy of a contract, a provision of a contract or any other information in relation to a contract that is of such a nature that its inclusion in a record would result in there being an overriding public interest against disclosure of the record.
- (2) If an agency does not include a copy of a contract in the register, or includes only some of the provisions of a contract in the register, because of this section, the agency must include in the register—
- a) the reasons why the contract or those provisions have not been included in the register, and
 - b) a statement as to whether it is intended that the contract or those provisions will be included in the register at a later date and, if so, when it is likely that they will be included, and
 - c) if some but not all of the provisions of the contract have been included in the register, a general description of the types of provisions that have not been included.

33 Variations to contracts

- (1) If a material variation is made to a contract that would affect the particulars that are required to be included in the government contracts register in relation to the contract, the particulars included in the register are to be amended to reflect the variation within 45 working days after the variation becomes effective.

- (2) If a material variation is made to a contract a copy of which is required to be included in the register, a copy of the variation or the varied provisions is to be included in the register within 45 working days after the variation becomes effective.

34 Minimum public access period for information on register

- (1) Information (including a copy of a contract) required to be included in the government contracts register in relation to a contract is only required to be made publicly available as open access information for the public access period.
- (2) The public access period is whichever is the longer of the following periods—
- 20 working days,
 - the period until the project to which the contract relates is complete, the goods and services concerned have been provided under the contract, the term of the lease has expired or the real property has been transferred.

35 Register to be published on Government tenders website

- (1) A copy of an agency's government contracts register is to be published on the Government tenders website (that is, the website with the URL of <https://tenders.nsw.gov.au> or such other internet website as the Premier may authorise for the purposes of this section).
- (2) Each of the following agencies is not required to have a copy of its government contracts register published on the Government tenders website but is required to have a copy of the register published on any website of the agency—
- a State owned corporation or a subsidiary of a State owned corporation,
 - a local authority,
 - a university.
- (3) A copy of an agency's government contracts register is also to be made publicly available in any other manner in which the agency decides to make its open access information publicly available.

36 Disputes

- (1) If a person other than an officer of the agency (including, for example, a party to a government contract) disagrees with the way in which an agency has interpreted its obligations under this Division, the agency is to obtain—
- the opinion of the Chairperson of the NSW Procurement Board in relation to the matter, or
 - if the principal officer of the agency is the Chairperson of the Board—the opinion of the Minister in relation to the matter.
- (2) This section does not apply to—
- a State owned corporation or a subsidiary of a State owned corporation, or
 - a local authority, or
 - a university.

37 Agency obligation to find information

Information is required to be included in an agency's government contracts register only to the extent that the agency holds the information or it is reasonably practical for the agency to obtain the information.

38 Exception for industry support contracts

This Division does not require the Department of Industry to include any information about or a copy of a government contract in its government contracts register if the contract involves the provision of industry support.

39 Exception for SOCs—competitive neutrality

This Division does not require a State owned corporation or a subsidiary of a State owned corporation to include any information about or a copy of a government contract in its government contracts register if the contract relates to activities engaged in by the corporation or subsidiary in a market in which it is in competition with any other person.

40 Exception for Landcom—contracts for sale of land

This Division does not require Landcom to include any information about or a copy of a government contract in its government contracts register if the contract is a contract for the sale of land.

Note— Any exception under this Division from the requirement to include information about or a copy of a contract on a government contracts register does not of itself constitute grounds for refusing an access application.