



information
and privacy
commission
new south wales

Local Government Sector – GIPA Compliance Report

Disclosure of Information (return disclosing the interest of
councillors and designated persons)

July 2021

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1. Purpose

The *Government Information (Public Access) Act 2009* (GIPA Act) encourages the building of an integrity culture through the establishment of a framework based around the principles of:

1. *proactive disclosure*
2. *a presumption in favour of public interest disclosure, and*
3. *oversight by an independent champion of open government in the form of a new Information Commissioner.*¹

The legislators tailored mandatory proactive disclosure of *open access information* to address risks of corruption and serve a pro-integrity purpose unique to the sectors regulated under the GIPA Act. Agencies must make *open access information* publicly available unless there is an overriding public interest against disclosure of the information. 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”.

Open access information includes:

- details of an agency's structure and functions
- policy documents to assist members of the public in understanding the decision made by government about the services they will receive and/or their rights and obligations
- specific disclosures to combat corruption such as pecuniary and other interests in the Local Council Sector.²

Local Council sector open access requirements also provide a tool to combat corruption through the identification and management of potential conflicts of interests that might arise.

The requirement for councillors and designated persons to complete and lodge returns of interests is prescribed under the *Model Code of Conduct for Local Councils in NSW* (the Model Code of Conduct). However, the requirement for councils to publish information in returns on their websites as *open access information*, arises under the GIPA Act and the *Government Information (Public Access) Regulation 2018* (GIPA Regulation).

In September 2019, the Information Commissioner released the revised Information Commissioner's *Guideline 1: For Local Councils on the disclosure of information (returns disclosing the interest of councillors and designated persons)* (Guideline 1), to better reflect the Model Code of Conduct and provide additional guidance in relation to the disclosure of interests requirements under the GIPA Act.

Guideline 1 was the subject of extensive consultation with the sector and with the Office of Local Government (OLG). The OLG endorsed the Guideline stating it: “*fully supports the public policy objectives that are served by the requirement for information in returns of interests to be published on council websites and expects all councils to comply with this requirement. OLG shares the Information Commissioner's view that the publication of information in returns operates as an important accountability mechanism ensuring the transparency of interests of councillors and other key decisions makers in councils that may potentially give rise to conflicts of interest in the performance of their public duties.*”³

¹ Government Information (Public Access) Bill 2009 Agreement in Principle Speech June 2009

² GIPA Act s18(c) GIPA Regulation Sch 1 cl.1(2)(a)

³ Correspondence of the Office of Local Government, 23 March 2021

Complimentary to Guideline 1, the OLG provided guidance to the local government sector on the matters to be considered by councils when identifying “designated persons” and the assessment councils should undertake. Collectively Guideline 1 and the OLG guidance provide a framework to enable Councils to achieve their responsibilities in the mandatory disclosure of returns.

The importance and accountability of the disclosure of interests most recently noted in proceedings before the NSW Civil and Administrative Decisions Tribunal (NCAT) with the Judicial member observing that the reporting of proceedings were “in my view, a matter of public interest, that is the behaviour and conduct of elected councillors to local government”.⁴

In this context, the decision to undertake this audit was informed by a number of complaints and enquiries received by the IPC about the local government sector’s compliance with Guideline 1 and media reporting of non-compliance. The audit is designed to identify and assess the levels of compliance within the local government sector. The audit was undertaken in accordance with section 21 of the *Government Information (Information Commissioner) Act 2009* (GIIC Act), which 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 agencies. The Information Commissioner’s reporting requirements in relation to an investigation are provided for in section 21(2) of the GIIC Act.

Summary of Findings

The results of this desktop audit of 52 local councils identified that there is inadequate compliance across the local government sector and the categories of councils.

Overall, there were inadequate systems, policies and practices to support compliance.

Significantly non-compliance overall was highest in rural areas including large rural areas.

- 61% (32) of councils were fully compliant with the requirement to publish the returns of the interests of councillors, designated persons and delegates.
- 10% (5) of councils were partially compliant with the requirement to publish the returns of the interests of councillors, designated persons and delegates.
- 29% (15) of councils failed to comply with the requirement to publish the returns of the interests of councillors, designated persons and delegates.
- 52% (27) of councils complied with both the requirement that the returns are available and published, and that they are also easily accessible to members of the public.
- Of the councils that were partially/fully compliant with the requirement to publish the returns of interests, 97% (36 of 37) demonstrated that there was no general/automatic application of the public interest test to information contained in the returns.
- 5% (2) of councils were fully compliant with the requirement to include a record of redacted information on the council’s website in accordance with section 6(5) of the GIPA Act. 90% (47) of councils failed to comply with this requirement.
- 36% (19) of councils had policies and procedures in place to support the exercise of functions under the GIPA Act.
- 63% (33) of councils did **not** have systems, policies and practices to support the exercise of functions under the GIPA Act.
- Only 10% (5) of councils had policies and procedures for the completion and collection of returns of interests.

⁴ Reported in *Mayor Apologises for ‘false and misleading’ disclosures*, The Daily Telegraph, 6 June 2021

Summary of legislative requirements

Together with the mandatory proactive release provisions of the GIPA Act and the GIPA Regulation require:

- information in the returns 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 determines that there is an overriding public interest against disclosure of the information
- in circumstances where a council finds that there is an overriding public interest against disclosure of the open access information, the council must facilitate public access to the information by deleting matter from the record to be made publicly available in accordance with section 6(4) of the GIPA Act.
- section 6(5) of the GIPA Act also requires councils to keep a record of the open access information that it does not make publicly available, and
- such a record must indicate the general nature of the information not made publicly available.

2. Background

The Local Government Sector in New South Wales consists of 128 councils⁵ that provide services for local communities. According to the OLG, the sector employs more than 48,000 people and spends over \$12 billion annually on infrastructure, facilities and provision of services generally to local communities. Given the vital role the sector plays in serving local communities, there is a need to ensure openness, transparency and accountability within local government and that effective measures are put in place to maintain integrity and combat corruption. The disclosure of pecuniary interests assists in ensuring that these principles are met and assures the public 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.

Accordingly, Guideline 1 was issued by the Information Commissioner specifically to supplement the provisions of the GIPA Act and GIPA Regulations, and to assist Local Councils to understand their obligations with respect to the disclosure of information contained in the returns disclosing the interests of councillors and designated persons (the returns) as required by clause 1(2)(a) of Schedule 1 of the GIPA Regulation.

Relevantly, Guideline 1 was developed in consultation with regulated entities and their representative associations, the OLG, and the NSW Privacy Commissioner. Guideline 1 also sets out the Information Commissioner's expectations with respect to compliance by the sector.

Following the issuance of Guideline 1, the Information Commissioner committed to a 12-month timeframe to ensure that local councils had adequate time to comply and give effect to Guideline 1. During this 12-month period, the IPC received complaints and enquiries about non-compliance by various local councils. The IPC also became aware that a small subset of local councils had passed resolutions, confirming that they will not be complying with Guideline 1.

⁵ Office of Local Government at <https://www.olg.nsw.gov.au/councils/>

This audit examined and considered:

1. the level of compliance with Guideline 1 by the local government sector and
2. whether councils are making information about the interests of councillors and designated persons available as open access information, and
3. whether councils have adequate systems, processes and governance frameworks in place to manage the requirements relating to the disclosure of interests about councillors and designated persons.

2.1 Formal audit notification

Councils included in this audit were formally notified of their inclusion in the audit on 10 December 2020 and requested to provide the Information and Privacy Commission (IPC) with information. Councils were required to respond to the IPC by 23 December 2020.

The desktop audit was undertaken over the end of January 2021 and early February 2021.

During the course of the audit, the IPC was notified by some councils of additional steps that had been taken subsequent to the audit notice and the provision of information responsive to the audit. In this regard, we acknowledge that in some cases the point in time nature of the audit may not reflect the subsequent steps taken by some councils to improve their compliance with the requirements of section 6 of the GIPA Act.

3. Methodology and Sample Selection

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 the GIPA Act.

A desktop audit was determined to be the most effective and expeditious method to inform a baseline assessment of the local government sector's compliance with the mandatory open access requirements of the GIPA Act, and to provide recommendations and ongoing monitoring in order to assist the local government sector to progress and achieve compliance. The results of this report are presented in aggregate form.

As a regulatory tool, a desktop audit is generally applied in areas of small to moderate risk of non-compliance and may also form the basis of a preliminary assessment. The methodology of a desktop audit should be recognised as constrained by factors including:

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

On that basis it is distinguishable from an onsite audit which can allow for a more direct inquisitorial approach. Accordingly, in general the IPC conducts desktop audits to elevate compliance by way of guidance, raising awareness and, in some cases, providing recommendations to an agency. However, poor results or lack of cooperation by an agency may result in further engagement and escalated compliance action.

Accordingly, this review did not include an assessment as to the accuracy or completeness of the returns that have been published, or whether the assessment processes undertaken by individual councils with respect to its obligations were adequate.

Councils included in this audit were selected by taking into consideration, the following:

- Councils identified in media reports as being non-compliant with open access requirements with respect to the availability of returns for councillors and designated persons; and

- councils about which a number of complaints and enquiries were received by the IPC with respect to their compliance with Guideline 1.

Additionally, there was a selection of random councils included in the audit to give a broad representation of councils against the ratings (council category type) for local council provided by the OLG. In total, 52 councils were selected and notified of their inclusion in this audit.

For this audit councils were grouped into Metropolitan, Regional Town/City, Metropolitan Fringe, Rural and Large Rural. The categorisation followed the approach of Australian Classification of Local Government and OLG group numbers and the classification applied by the OLG. This means that for each measure there is also a representative result by council type.

The issues that were considered in this audit were whether the audited councils:

- make information about the interests of councillors and designated persons available as open access information as required under the GIPA Act, and
- have in place adequate systems, processes and governance frameworks to manage the requirements of the GIPA Act relating to the disclosure of interests about councillors and designated persons.

4. Performance Overview

Each year the Information Commissioner publishes an annual report – the Section 37 Report on the Operation of the GIPA Act. In publishing the Section 37 Report, the Information Commissioner publishes an associated agency GIPA Dashboard. According to the data available in the section 37 Report and the GIPA Dashboard in 2018-19 the Local Council sector received 2796 formal access applications. The number of applications has steadily increased since reporting first commenced in 2011.

In 2019/20 23% of complaints to the Information Commissioner involved the provision of open access information.

4.1 Assessment Criteria

The IPC assessed each council’s compliance with the open access requirements of the GIPA Act against the following criteria:

Assessment criteria
1. Requirement to publish the returns of the interests of councillors, designated persons and delegates
2. Accessibility, availability, completeness and currency of the returns
3. Application of the public interest test to any withheld information including any policies and/or procedures in place to assess the returns
4. Existence of section 6(5) records
5. Policies and Procedures to support compliance

4.2 Audit sampling and review

At the commencement of the audit, the IPC issued a formal audit notice to all selected councils and invited the councils to furnish it with the following information to assist with the audit:

- Details of how the council makes information about its disclosure of interests of councillors and designated persons publicly available as *open access* information; and
- Copies of any policy or procedure the council has in place that governs the disclosure of its returns in draft or final form.

In addition to the information provided by councils, the IPC conducted a desktop audit between January and February 2021 to ensure that its policies and procedures promote practices consistent with the disclosure of pecuniary interests and the requirements of Guideline 1.

In conducting the audit, a representative of the IPC accessed each council's website to identify the existence and accessibility of disclosures. The audit considered the ease with which disclosures could be located on the council's website and whether they had been published. In making an assessment of compliance with open access requirements under the GIPA Act, all published councillor returns and a random sample of designated persons were obtained.

The random selection of councils is intended to give a broad representation of councils across the ratings for local council provided by the OLG. Accordingly, the IPC considers that the observations and findings made in this report reflect the broader compliance of local government authorities in respect of the open access provisions under the GIPA Act.

4.3 Audit limitations

The scope of this audit is limited to a desktop review of the information provided by the selected councils and information available on its websites in January and February 2021.

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

- independent remote assessment; and
- a focus on identified compliance risks informed by agency responses to enquiries.

4.4 Conduct of analysis

The findings of the review are presented in two parts:

- Assessment against select criteria that assist examination of agencies' compliance with legislated requirements; and
- General comments, findings and recommendations to assist agencies in achieving compliance with legislated requirements.

The IPC recorded and retained data in relation to the assessment of each selected council, and for the purposes of this report deems it unnecessary to provide a breakdown of each council as the findings and recommendations are applicable generally.

5. Observations and findings

5.1 Requirement to publish the returns of the interests of councillors, designated persons and delegates

Criterion		Result
1	Requirement to publish the returns of the interests of councillors, designated persons and delegates	61% (32) fully compliant. 71% (37) fully and partially compliant 29% (15) did not comply
1(a)	Disclosure of interests by councillors and designated persons publicly available	Inconsistencies identified across councils and general improvements would be beneficial to ensure disclosures are publicly available.

Comments, findings and recommendations

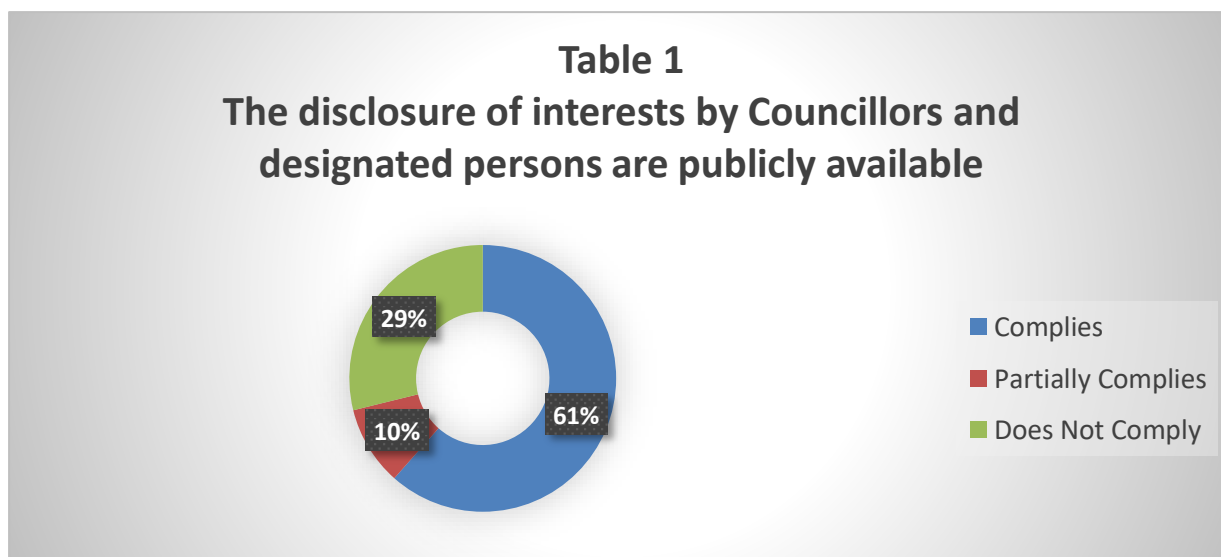
Comment:

To investigate practical compliance, each council’s website was broadly assessed for the availability and accessibility of its returns. Importantly, information may be available on a website, but it may not, in practice be readily located and accessible.

Observations:

Disclosures publicly available

To fully comply with the requirement, it was essential that the disclosure of interests for both Councillors and designated persons are published and publicly available and easily located on the council’s website.



Comments, findings and recommendations

Table 1 shows that the audit found that of the 52 Councils:

- 32 Councils fully complied;
- 5 Councils partially complied; and
- 15 Councils did not comply

with the requirement that the disclosure of interests for both Councillors and designated persons exist and are publicly available.

Of those councils that partially complied with the requirement, it was observed that either not all Councillors returns, and/or not all of the listed designated persons had been made publicly available.

Table 2 provides the breakdown of the level of compliance with the requirement to have disclosures of interests publicly available by council category.

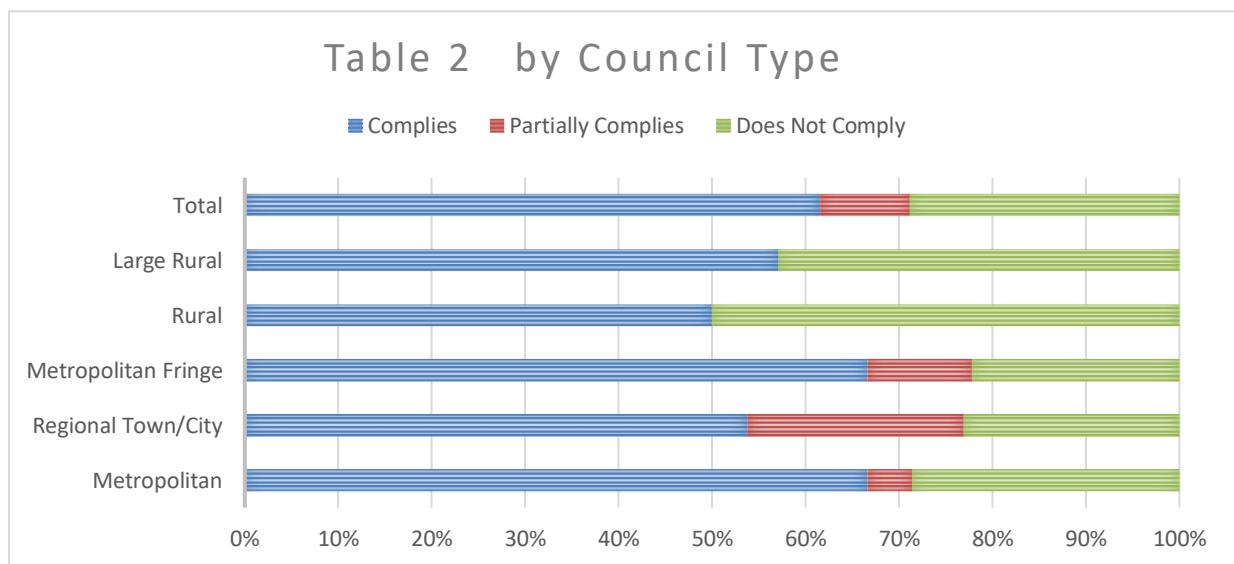


Table 2 demonstrates that the level of non-compliance was highest in the large rural and rural categories of councils. Regional towns also demonstrated lower compliance levels.

5.2 Accessibility, availability, completeness and currency of the returns

Criterion		Result
2	Accessibility, availability, completeness and currency of the returns	Of the 37 councils that fully and partially complied with the requirement to have returns available on their website there were varying levels of compliance
2(a)	Disclosure of interests by councillors and designated persons are easily located on the website	72% (27) councils that had returns available on the website were fully compliant
2(b)	Disclosure of interests by councillors and designated persons are fully accessible to all users on the website without condition	92% (34) councils that had returns available on the website were fully compliant 8% (3) of the councils that had returns available on the website-imposed conditions on access
2(c)	Disclosure of interests by councillors and designated persons are current	86% (32) of the councils that had returns available on the website were fully compliant

Comments, findings and recommendations
<p><u>5.2(a) Disclosure of interests by councillors and designated persons are easily located on the website</u></p> <p>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.</p> <p>Compliance on accessibility was assessed on the basis that the returns were:</p> <ul style="list-style-type: none"> • in a readable format, clearly labelled and well organised; • easily navigated from the Council’s website and locatable through a search of the council’s home page. <p>Of the 32 fully compliant councils only 27 complied with the accessibility requirement.</p> <p>Table 3 demonstrates that 8 councils partially complied and 17 did not comply.</p> <p>It was observed that the councils that fully complied with the accessibility requirement would indicate on their “open access information” page that the returns were available and provided relevant hyperlinks to access the returns. Well organised returns were published on councils’ website with separate pdf documents for each individual Councillor and designated person that could easily be navigated.</p>

Comments, findings and recommendations

Partially compliant councils failed to meet accessibility requirements because they did not provide clear indication or instructions on how to access copies of these returns, and accordingly, were not readily accessible or easily navigable. It was also observed that some councils would make returns available as one single pdf document for all returns. This was accompanied by labelling that was unclear and ineffectively categorised within the returns therefore impeding accessibility.

With respect to those councils that did not comply, it was observed that a number had published the returns. However, they were not easily accessible and no links or instructions on where they could be obtained were provided. Further the returns were not locatable through a search of the council’s homepage. In circumstances where it was so difficult to locate the returns a reconciliation of the publication of the returns against each councillor or designated person was not possible.

It is evident from the data that only 52% (27) of councils complied with both the requirement that the returns are available and published, and that they are also easily accessible to members of the public.

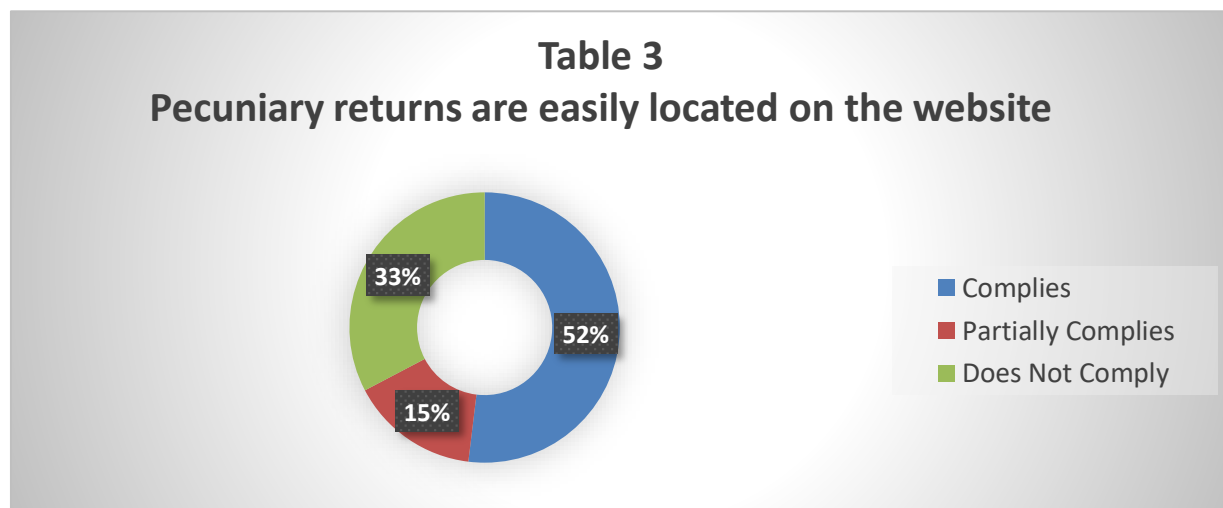
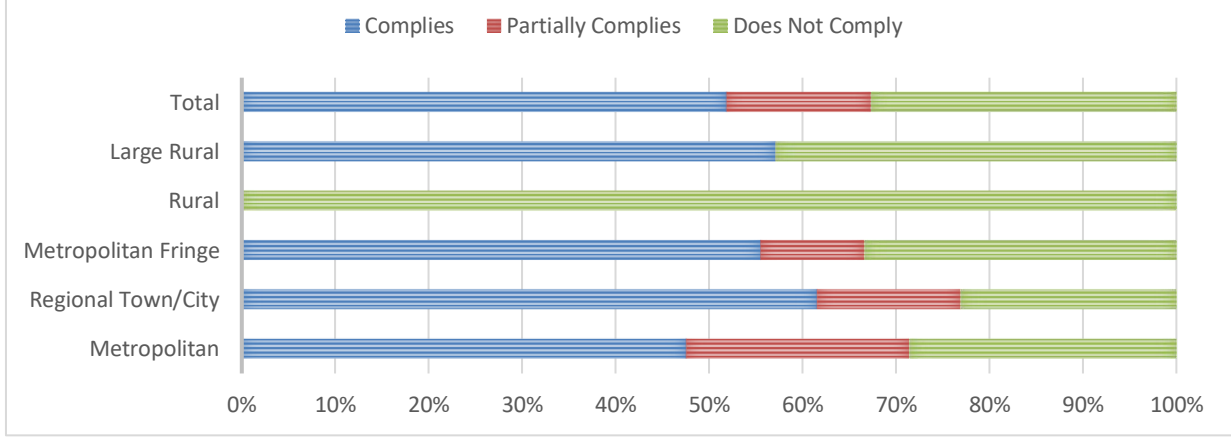


Table 4 further outlines the spread of compliance on this measure according to Council category. Again rural and large rural councils demonstrated the highest level of non-compliance with this requirement.

Comments, findings and recommendations

Table 4
 by Council Type

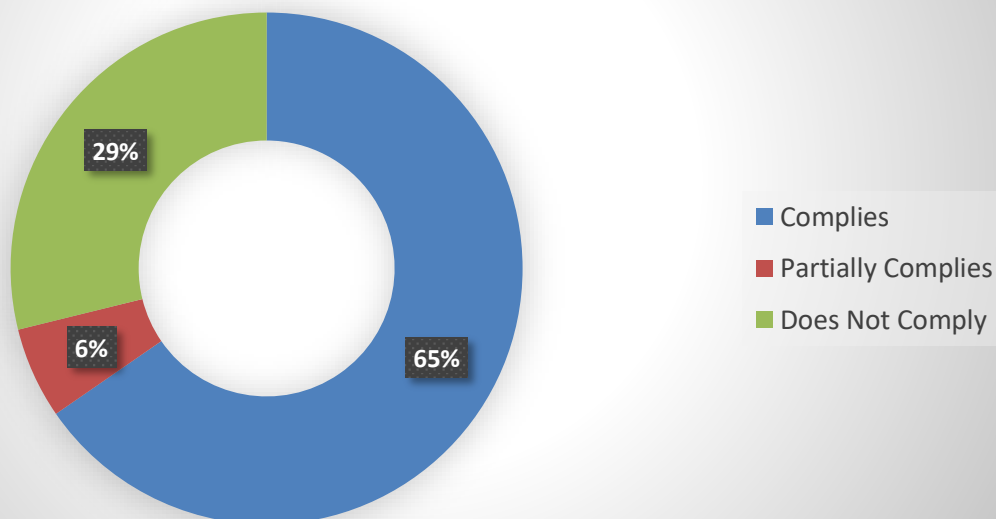


5.2(b) Disclosure of interests by councillors and designated persons are fully accessible to all users on the website without condition

The audit also assessed whether the disclosures were fully accessible to all users of the website without condition. In order to be compliant, it was required that the council needed to be able to demonstrate that there were no barriers to access such as login requirements or access request process (whether formal or informal), or completion of a required form or other written request.

Comments, findings and recommendations

Table 5
The disclosure of interest is fully accessible to all users on the website without condition



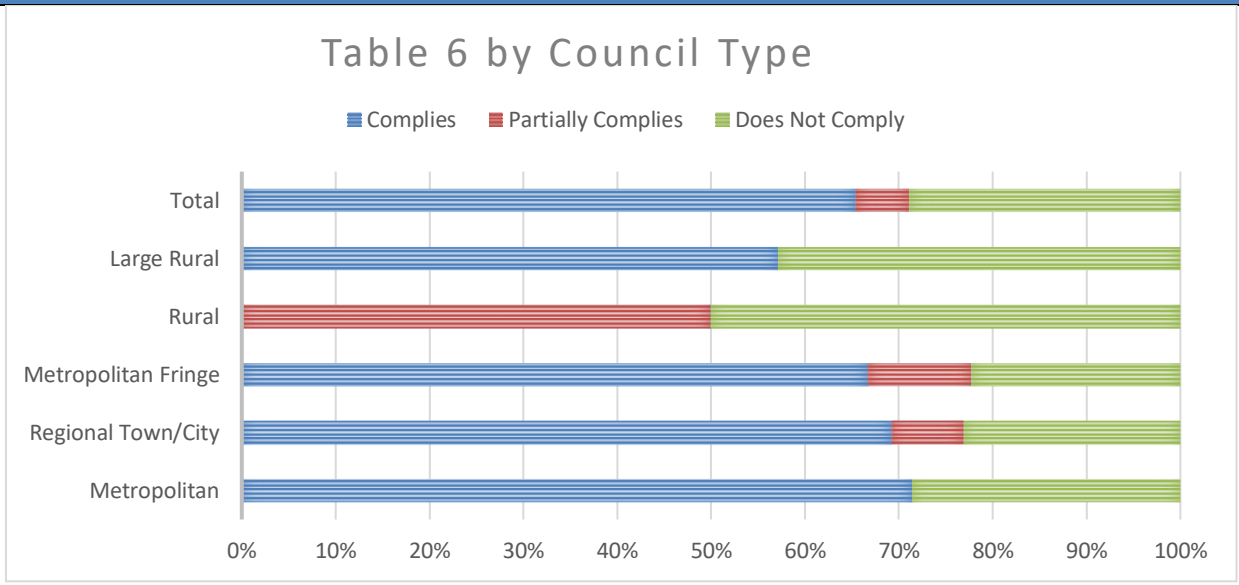
As indicated in **Table 5** above of the 52 Councils:

- 33 Councils complied;
- 4 Councils partially complied; and
- 15 Councils did not comply

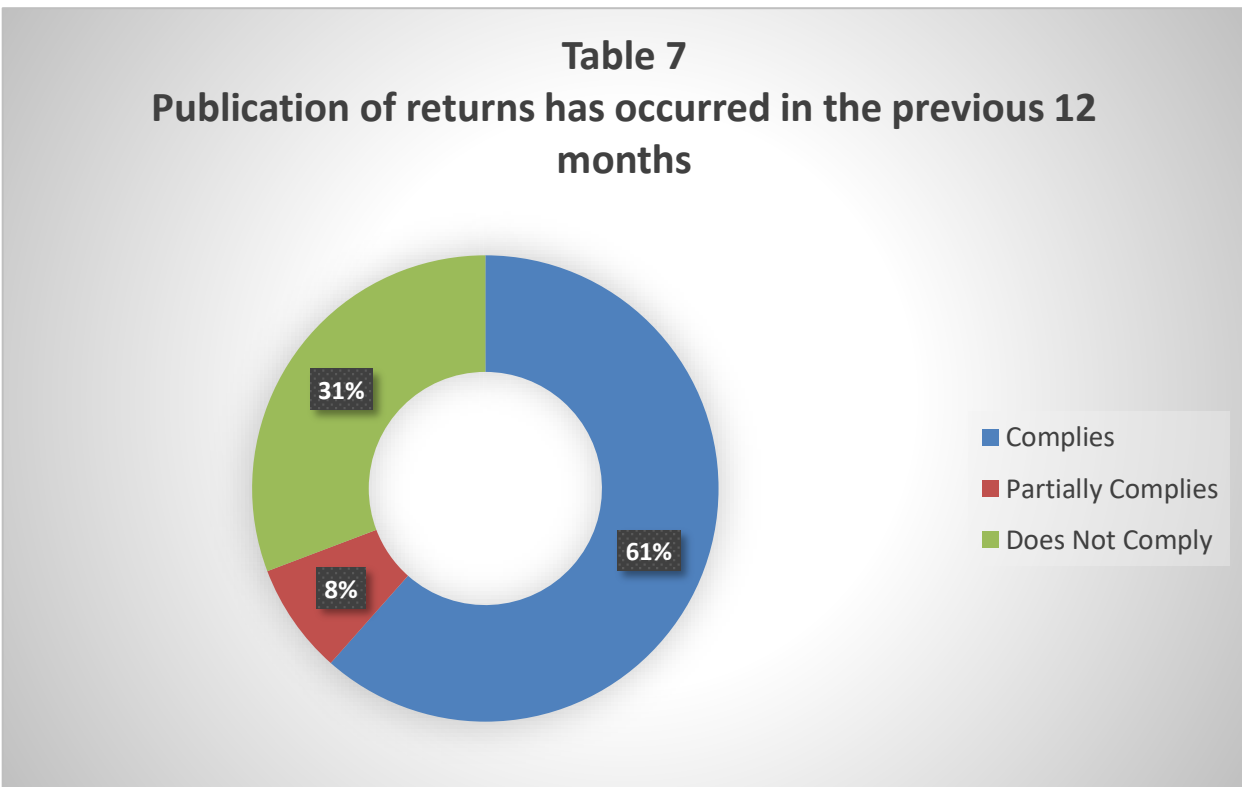
The 15 councils that did not comply with this requirement also did not comply with the requirement that the disclosures are publicly available. It was also observed that a number of councils published the returns and advised that they were also publicly accessible by viewing in person.

Consideration of compliance with section 6 of the GIPA Act is not limited to a finding that the returns are publicly available and published on the council’s website. A further important consideration is that in order to comply with section 6, the returns should be easily navigated and located on the council’s website and therefore available without condition. **Table 6** below demonstrates compliance by council category again the highest levels of non-compliance were in rural and large rural councils.

Comments, findings and recommendations



5.2(c) Disclosure of interests by councillors and designated persons are current



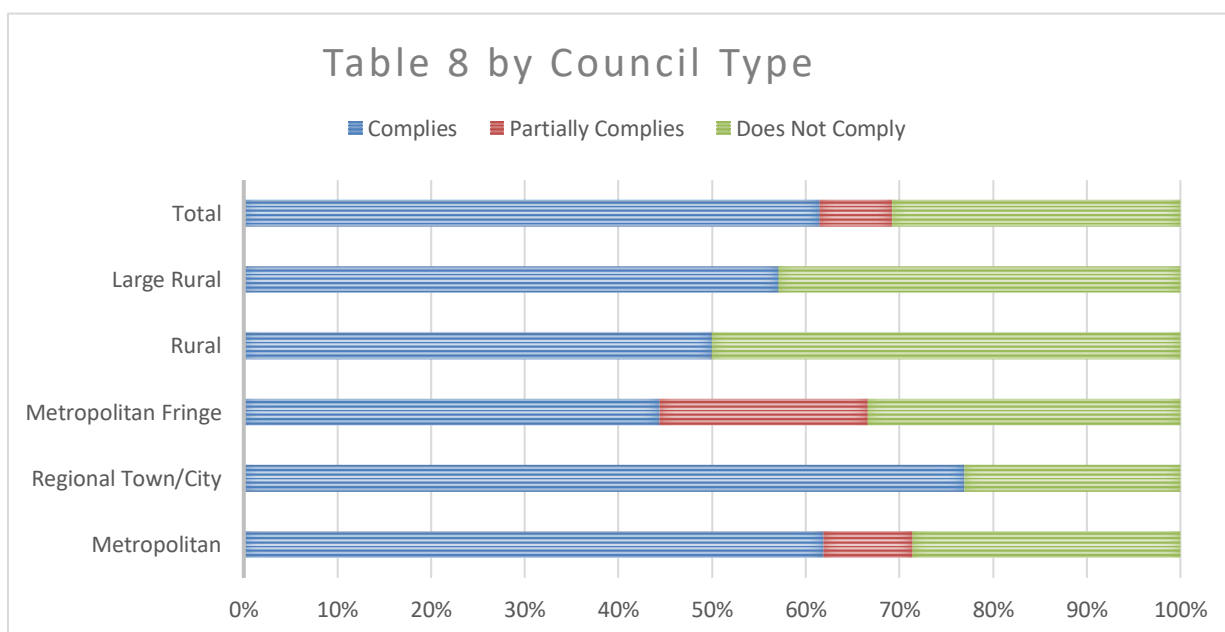
The audit also considered the currency of the published returns. It was observed that those councils that partially complied had published returns for either Councillors or designated persons for the previous 12 months, but not both as required.

Comments, findings and recommendations

Table 7 is instructive in observing a majority of councils had published their returns in the last 12 months.

31% (16) of councils had not updated the published returns with new councillors and designated persons. Accordingly, almost a third of councils did not comply. This finding is exacerbated by the passage of time in that more than 12 months had passed since the revision of Guideline 1, notice of an audit was given and therefore ample opportunity was provided to enable action to achieve compliance.

Table 8 below further observes that while the currency was an issue in rural councils, collectively compliance with currency was also an issue across remaining council categories.



Recommendation 1: Councils should ensure that the disclosure of interest by councillors and designated persons are complete and publicly available.

Recommendation 2: Councils would benefit from promoting consistency and accessibility in relation to returns of interest by establishing a single readily identifiable open access pathway. This should include meaningful labelling of returns by year, type and relevant links. The returns should be easily and prominently located on a council’s website and able to be located from a single search from the main page.

Recommendation 3: Councils should ensure that the disclosures are updated as required consistent with clause 4.21 of the Model Code of Conduct for Local Councils in NSW – 2020.

5.3 Application of the public interest test to any withheld information including any policies and/or procedures in place to assess the returns

Criterion		Result
3	Application of the public interest test to any withheld information including any policies and/or procedures in place to assess the returns	Measured only against a subset of compliant councils (37 of 52)
3(a)	The form does not include any statement that automatic standardised redactions for personal information or other categories of information will be applied	97% (36) of those councils that were compliant with the requirement to publish returns also complied with this assessment criteria.

Comments, findings and recommendations

Comment:

Section 6 of the GIPA Act provides that open access material must be made publicly available unless there is an overriding public interest against disclosure. Section 6(4) requires agencies to facilitate public access to open access information by removing information if it is practicable to do so. This provision allows agencies to delete any information subject to an overriding public interest against disclosure so that the remainder of the information can be released.

When considering whether certain information is to be deleted in a return, the council will need to apply the public interest test. 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). The fact that a return of interest for councillors and designated persons is open access information is an important factor in favour of disclosure.

When balancing the public interest, decision makers should have regard to the intention of the legislature and the objects of the GIPA Act under section 3. In particular, councils should be aware that returns are designed to promote openness and transparency in local government and serve a pro-integrity purpose. Documenting pecuniary and other interests provides an aid to avoiding a conflict of interest (whether actual or perceived) on the part of councillors and senior staff who exercise decision-making functions.

If council or a particular councillor or designated person claims that there is more than one public interest consideration against disclosure of a certain piece of information, then each of those identified considerations are weighed in the balancing test on whether there is an overriding public interest against disclosure. When applying the public interest test, the decision maker should apply the balancing test in section 13 of the GIPA Act in respect of each particular piece of information.

Comments, findings and recommendations

When a decision maker undertakes the public interest test with respect to open access information, there is no requirement to undertake consultation with the individual who completed the returns. This is because section 54 in Part 4 of the GIPA Act in relation to third party consultations deals with access applications made under the GIPA Act.

This means that any claim of a public interest against disclosure must be considered on its face against the recognition of an express legislative intention that the information constitutes *open access information* together with the existing presumption in favour of disclosure under the GIPA Act. The absence of consultation requirements should streamline the task of assessing individual claims of a public interest disclosure.

During the course of this audit, the IPC was approached by some Councils as to the intersection between the silent elector provisions under the *Electoral Act NSW* and the requirements for disclosure of interests under the GIPA Act. The scope of this audit did not lend itself to an analysis of the interface between these two legislative regimes. However, the IPC recognises that there is an intersect between the ability to be a “silent elector” and the requirements for disclosure under the GIPA Act. Consequently, the IPC will develop further guidance for councils.

Recommendation 4: The IPC commits to the development of further guidance to inform the local government sector on the interface of the “silent elector” requirements of the *Electoral Act NSW* and the GIPA Act.

5.3(a) The form does not include any statement that automatic standardised redactions for personal information or other categories of information will be applied automatic standardised redactions of information

The audit also considered whether the disclosure forms of councils included any statement regarding the application of an automatic standardised redaction for personal information or other categories of information.

This assessment has been conducted in respect of a subset of councils (37) that made their disclosures publicly available. Amongst that cohort there was a strong demonstration of compliance.

Table 9 demonstrates that councils did **not** include a statement of automatic standardised redactions. Of the 37 councils who had made disclosures publicly available, only one council did not comply with this requirement. It was observed that this one form had a box available for councillors and designated persons to mark to request redactions of their signature and residential address.

However, while the form itself did not include a standardised redaction, we did observe that as a matter of practice returns would redact certain types of information on the basis that the information was personal information. This information extended to things like signatures and residential addresses or business addresses.

Comments, findings and recommendations

Table 9

The disclosure form does not include any statement that automatic standardised redactions for personal information or other categories of information will be applied



The overriding public interest against disclosure of information contained within the disclosure of returns most relied upon relates to personal information. The NCAT has considered the application of the public interest test relevantly in *McEwan v Port Stephens Council [2021] NSWCATAD 110* and considered the interplay between the GIPA Act and the *Privacy and Personal Information Protection Act 1998 (PPIP Act)*.

In applying the public interest test on the grounds of personal information councils are alerted to the observations of the Tribunal that:

in the balancing of interests under s 13 of the GIPA Act, non-compliance with the PPIP Act is permitted where an agency is complying with its obligations under the GIPA Act. Personal information may be used or disclosed pursuant to an obligation under the GIPA Act even if a provision of the PPIP Act would be breached. The weight to be given to the contravention or non-compliance is significantly reduced and still favours disclosure because nothing in the PPIP Act operates "to lessen any obligations" under the GIPA Act: s 5 (2). [at 106].

The Tribunal further observed that: *"In my view, there is a positive and high onus placed on an agency to establish by cogent and probative evidence that the personal and privacy considerations arising under ss 57 and 58 of the PPIP Act provide a relevant public interest consideration and not a mere personal or private consideration to operate against disclosure.*

I make that observation not only mindful of s 5 of the PPIP Act but this must be even more so where the disputed information is open access information and therefore subject to mandatory and pro-active release obligations imposed on a Council by s 6 of the GIPA Act and the GIPA Regulations" [at 134].

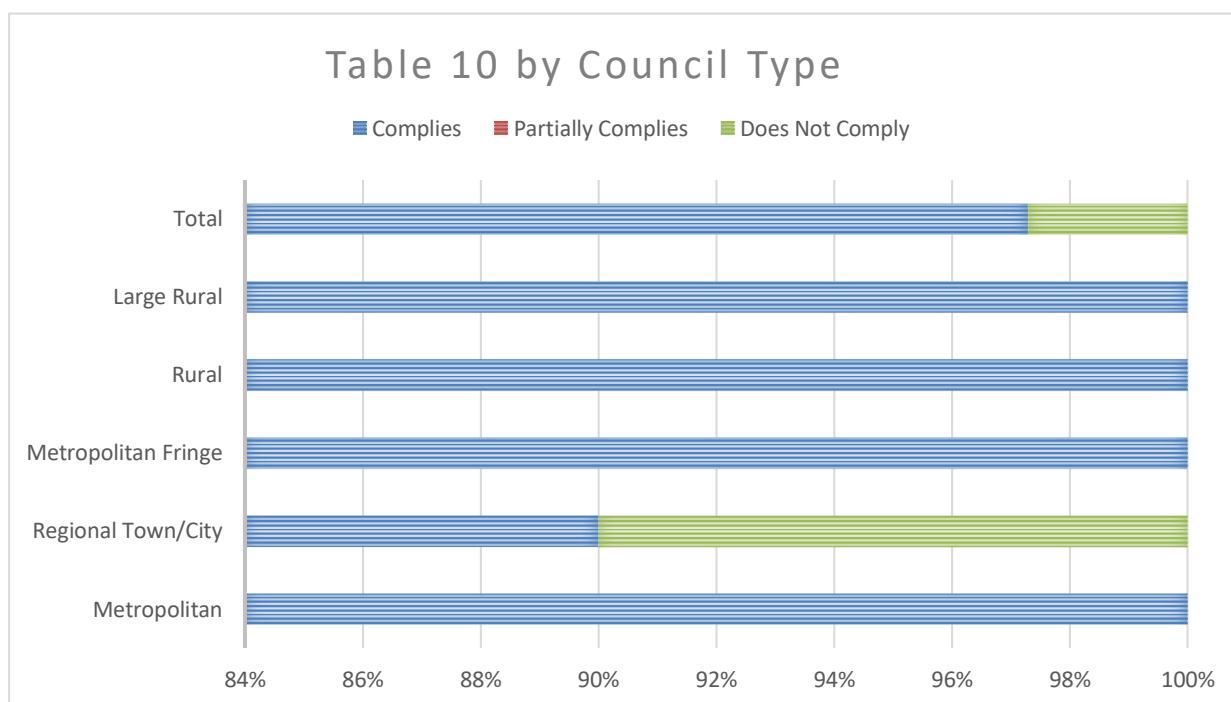
Any policy or practice of Councils should therefore have proper regard to the guidance of the Tribunal on the application of the public interest and the interplay between the GIPA and PPIP Acts for the purposes of informing its application of any redactions that may be applied on the basis of application of the public interest test.

Comments, findings and recommendations

Further any default reliance on the absence of a response from an individual about the publication of their information in a published return as evidence to have not consented to disclosure applies *the wrong inference in the context of the GIPA Act which provides a presumption that there is a public interest in favour of disclosure: s 12.*

A presumption such as that provided by the GIPA Act requires evidence in rebuttal of that presumption: not mere inference.” [at 42]. The Tribunal’s view is that to equate silence with a positive objection, is not sufficient alone to override the statutory presumptions in favour of disclosure of open access information under the GIPA Act.

The single exception to compliance identified was located in a regional town/city as demonstrated by **Table 10** below.



Recommendation 5: Councils should ensure that systems, policies and practices are developed to support application of the public interest test. Those aids should reflect the requirement to establish by cogent and probative evidence that the personal and privacy considerations arising under ss 57 and 58 of the PPIP Act provide a relevant public interest consideration and not a mere personal or private consideration to operate against disclosure.

5.4 Existence of section 6(5) records

Criterion	Result
<p>4 If information has been redacted, a record has been included on the council’s website in accordance with section 6(5) of the GIPA Act.</p>	<p>5% (2) of councils were fully compliant</p> <p>5% (2) of councils were partially compliant</p>

Comments, findings and recommendations
<p>Comment:</p> <p>If, after applying the public interest test, an agency is of the view that information should be deleted with the remaining information released, under section 6(5) of the GIPA Act, the agency is required to keep a record of this, indicating in general terms, the nature of the information that has been redacted. Such a record should include, in general terms, the nature of the information that has been redacted.</p> <p>Clause 10(1) of Schedule 4 to the GIPA Act provides that:</p> <p><i>In this Act – record means any document or other source of information compiled, recorded or stored in written form or by electronic process, or in any other manner or by any other means.</i></p> <p>Compliance with the requirement to maintain a public facing summary record of the information redacted is the best evidence of the application of the public interest test against each individual return considered by the decision maker.</p> <p>Notably of the 37 councils that made the disclosure of interests by Councillors and designated persons publicly available, 33 councils did not provide evidence of compliance with this requirement. In the absence of compliance with section 6(5) of the GIPA Act there is insufficient evidence to demonstrate proper application of the public interest test in respect of each declaration that contains redactions.</p> <p>Further the failure to comply with the requirements of section 6(5) of the GIPA Act provides evidence of immature/inadequate systems, policies and practices to support compliance with the open access requirements of the GIPA Act relevant to disclosures by Councillors and designated persons.</p> <p>As indicated in Table 11 below, it was generally observed that councils overwhelmingly do not comply with the requirement under section 6(5) of the GIPA Act. Only two of the councils subject to this audit fully complied with the requirement.</p> <p>An additional two councils partially complied. Of these two councils that partially complied, one acknowledged the requirement under section 6(5) and offered that it would publish a log to indicate any information withheld confirming that it had no redacted information to date. The council’s advice was at odds with the finding of this audit that redactions have been made to the published disclosure.</p>

Comments, findings and recommendations

Section 6(5) of the GIPA Act provides that the record need only indicate the general nature of the information concerned, councils are not required to provide a detailed log of all information withheld. Accordingly, it would not be sufficient for Councils to merely provide a general statement that “information is withheld”. Councils must describe the nature of the information.

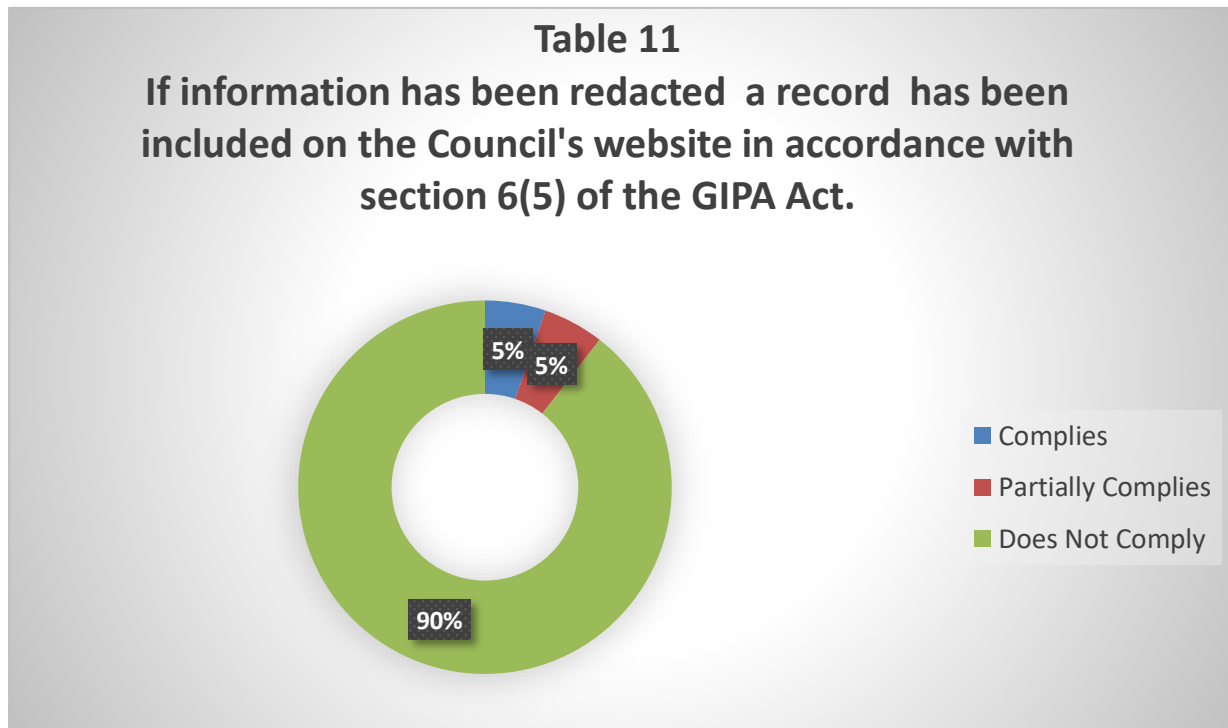
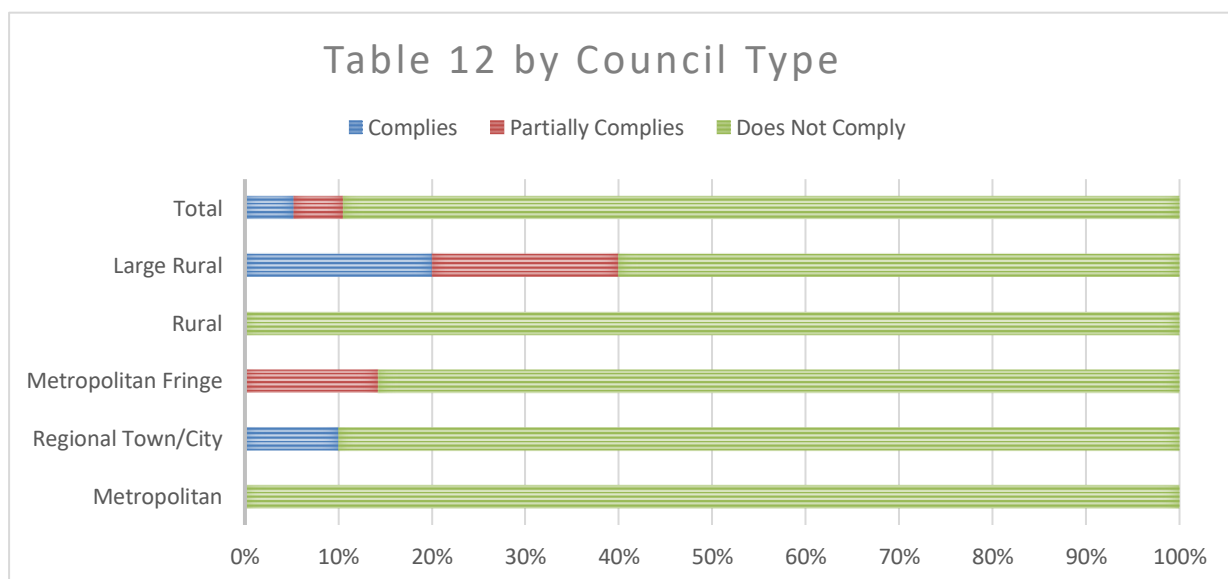


Table 12 below demonstrates high levels of non-compliance with this requirement across all council categories.



Comments, findings and recommendations

Recommendation 6: Councils should maintain a central record of all open access information that has been withheld due to an overriding public interest against disclosure and embed policies and procedures to ensure compliance with section 6(5) of the GIPA Act.

5.5 Policies and procedures

The exercise of functions under the GIPA Act recognises independent decision making on a case by case basis to enable legislated rights to be effected. This significant function requires training together with well documented policies and procedures. In considering compliance the Information Commissioner has regard to the systems, policies and practices of agencies that that relate to functions of agencies under an Information Act.⁶

The availability of policies and procedures would assist council staff to be aware of their obligations and provide a useful reference particularly in circumstances where there are organisational changes such as staffing movements. Further, the existence of policies/procedures would also ensure currency and consistency in the information that is collected and subsequently published.

Criterion		Result
5	Policies and procedures in place that address the disclosure and publication of interests	36% (19) of all councils had policies and procedures
5(a)	There is a documented policy and/or procedure for the completion and collection of interests and publication	10% (5) of all councils (52) were fully compliant
5(b)	Designated persons are clearly defined by the policy and/or procedure	47% (9) of councils that had policies and procedures in place were compliant
5(c)	Where a documented policy and/or procedure is in place, it demonstrates a requirement that redactions or information are withheld on a case by case basis through application of the public interest test to each individual return and is made to facilitate release	26% (5) of councils that had policies and procedures in place were compliant

⁶ GIIIC Act section 21

Criterion		Result
5(d)	The policy and/or procedure makes clear the authorisation process for the approval and publication of returns	37% (7) of councils that had policies and procedures in place were compliant
5(e)	The policy and/or procedure for the publication of returns demonstrates that there is a process for the review and updating of the disclosure of interests	37% (7) of councils that had policies and procedures in place were compliant

Comments, findings and recommendations
<p>Comment:</p> <p>The IPC wrote to audited local councils and requested that each council provide a copy of any policy or procedure in place that governed the disclosure of returns. In particular, the IPC noted that the policy or procedure may be in draft or final form but must be dated.</p> <p>All councils responded to the audit with each council confirming whether they had a policy or procedure in place and where available, provided a copy of the policy or procedure. Where a policy or procedure is in place, the IPC considered whether the information contained in the policy or procedure provided adequate guidance on:</p> <ul style="list-style-type: none"> • the definition of a ‘designated person’ • whether redactions or information that is not disclosed had been withheld on a case by case basis through the application of the public interest test • whether there is an authorisation process for the approval and publication of returns, and • whether there is a process in place for the review and updating of the disclosure of interests. <p>Although some councils advised that they refer to information contained in the Model Code, the Information Commissioner is of the view that the guidance contained in the Model Code does not provide a sufficiently clear framework or process to support compliance with obligations under the GIPA Act regarding open access. Accordingly, where a council only referred to the information contained in the Model Code, the IPC considered that the council did not have a policy or procedure in place to govern the disclosure of returns as required under the open access provisions of the GIPA Act.</p> <p>Policies and procedures provide guidance to council staff responsible for carrying out this important function. They enable a consistent application of process and confirm the exercise of discretion. In the absence of policies and procedures decision making can be arbitrary or vulnerable to extraneous factors and subject to risks including corruption.</p>

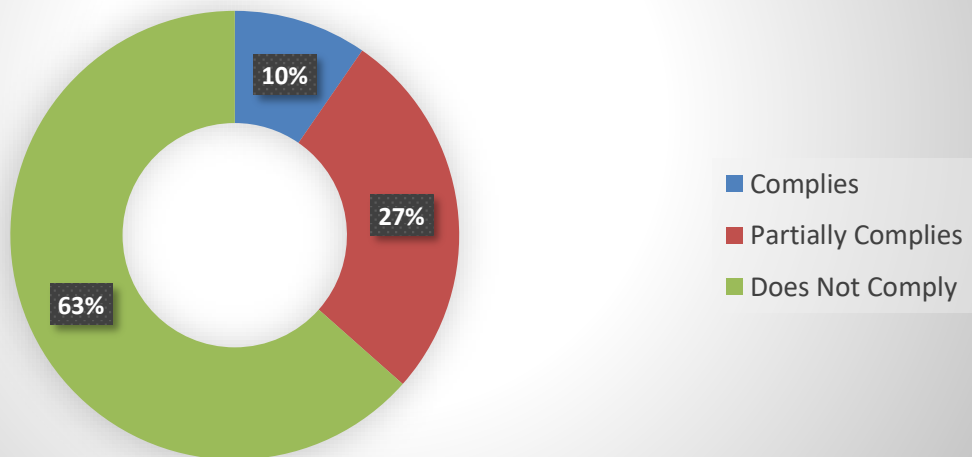
Comments, findings and recommendations

Observations:

5.5(a) There is a documented policy and/or procedure for the completion and collection of interests and publication

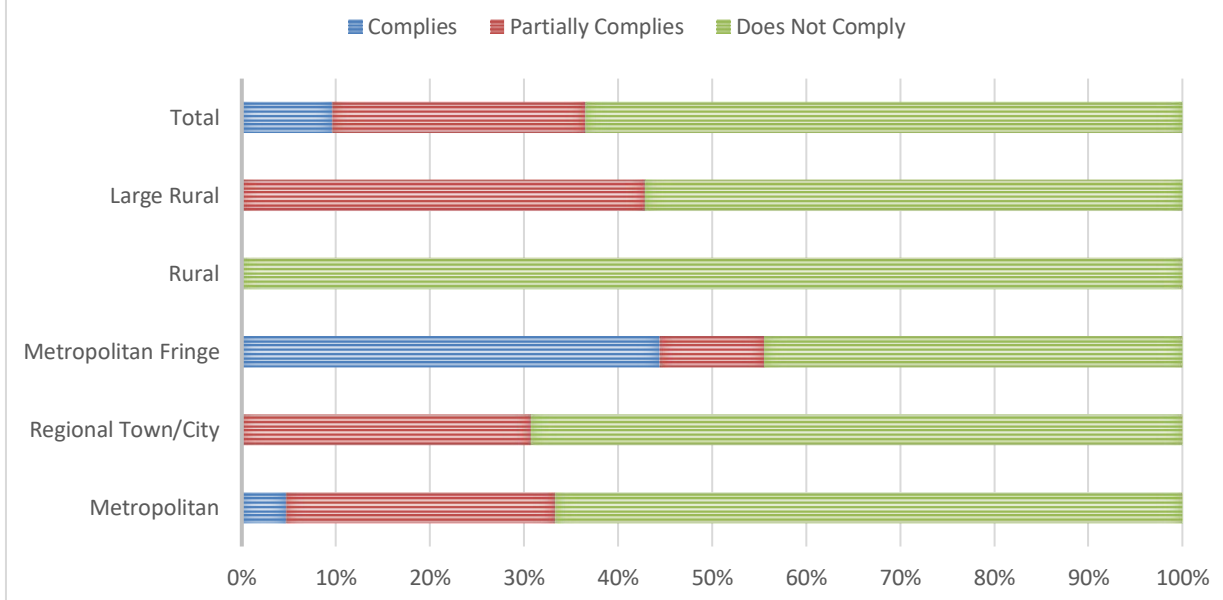
The threshold question of whether each council had a documented policy and/or procedure that pertains to the completion and collection of interests and to the publication of the interests was assessed based on the responses provided by councils to the IPC.

Table 13
There is a documented policy and/or procedure for the completion and collection of interests and publication



Comments, findings and recommendations

Table 14 by Council Type



It was identified that only five councils provided a policy and/or procedure that explained the legislative requirements, addressed the process for collection and addressed the process for publication of returns of interests.

A further 14 councils provided the IPC with a policy and/or procedure, where the policy and/or procedure notionally indicated that the disclosure and publication of interests exist but did not provide a process for collection or the publication of the returns.

The remaining 33 councils reported that they did not have a policy or procedure in place with respect to the completion and collection of interests and publication.

It is apparent from the data that the majority of councils did not have a documented policy or procedure in place which would assist council staff in understanding and exercising functions under the GIPA Act with respect to the disclosure of returns.

5.5(b) Designated persons are clearly defined by the policy and/or procedure

For the councils that did have a policy and/or procedure in place, those policies and procedures were then further considered to determine whether they contained a clear definition of what constitutes a ‘designated person’.

The inclusion of a clear definition as to who constitutes a ‘designated person’ within a policy or procedure would provide certainty as to who among the council staff are required to submit a return to disclose their pecuniary interests.

Comments, findings and recommendations

Table 15
Designated persons are clearly defined by the policy and/or procedure

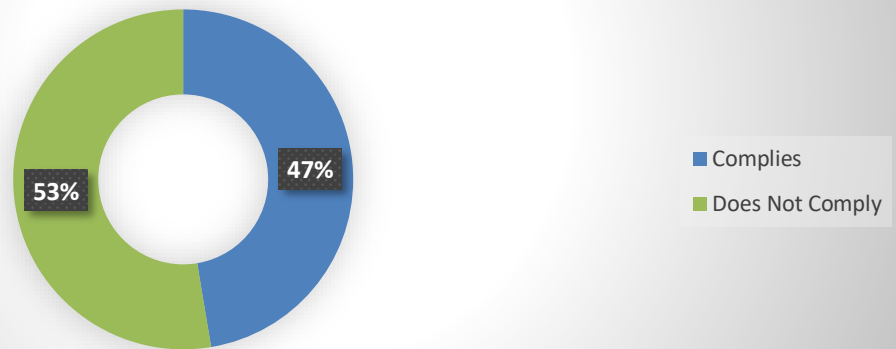
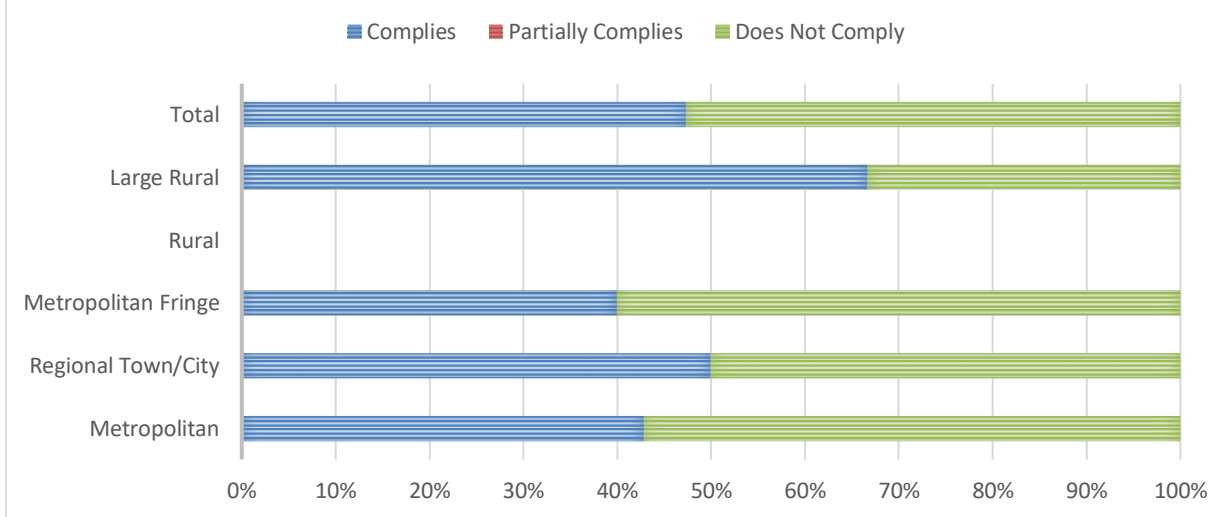


Table 16 by Council Type



It was identified that of the 19 councils that had a policy and/or procedure in place, only nine councils had clearly defined who is a ‘designated person’.

The policies and/or procedures of the remaining 10 councils did not provide an adequate definition of who is a ‘designated person’.

Comments, findings and recommendations

5.5(c) The policy and/or procedure demonstrates a requirement that redactions or information withheld is determined on a case by case basis through application of the public interest test to each individual return

The audit considered whether the policies and/or procedures provide sufficient guidance to council staff about the requirement that redactions or the withholding of information are only contemplated on a case by case basis after the public interest test is applied to each individual return.

Table 17
Provide guidance about redactions being made on case by case basis through application of the public interest test

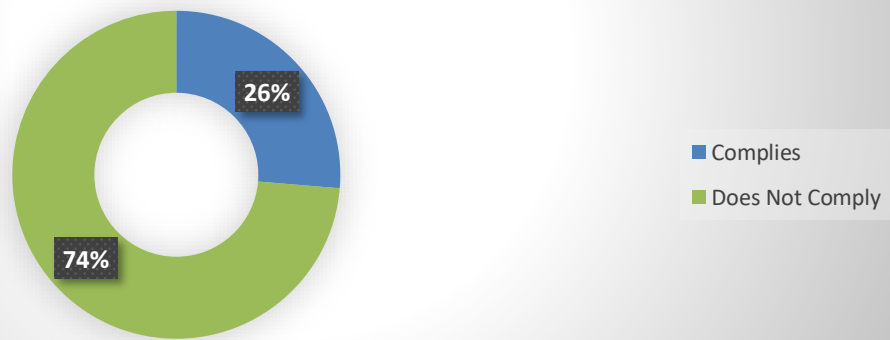
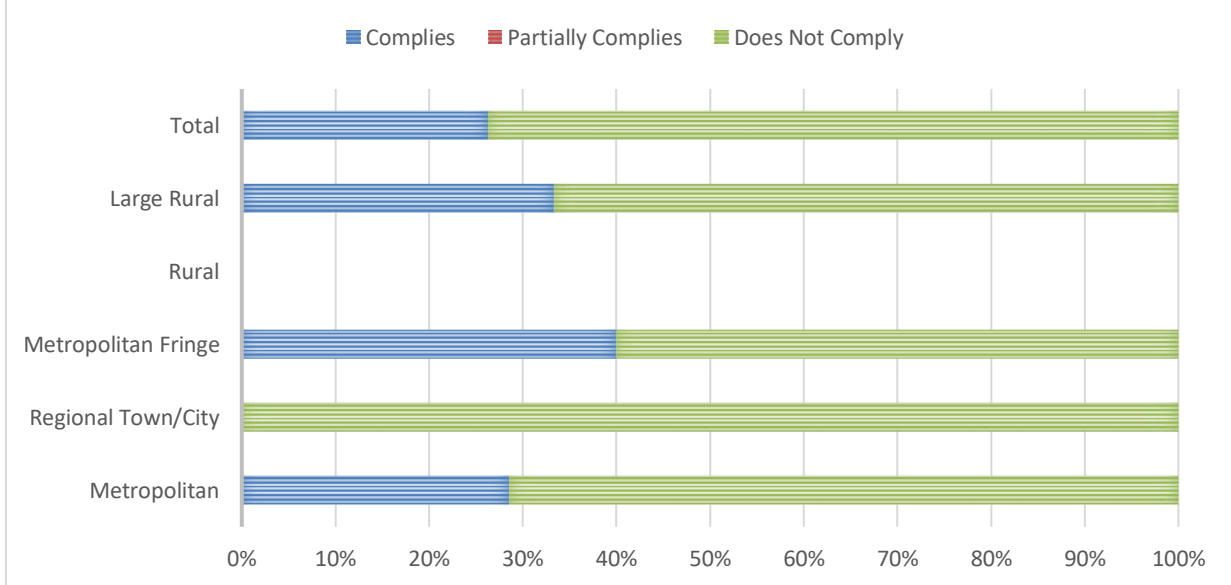


Table 18 by Council Type



Comments, findings and recommendations

Of the 19 councils that had a policy and/or procedures in place, it was identified that only 5 councils included information or guidance about the need to ensure that each individual return was considered on a case by case basis to apply the public interest test when deciding whether redactions should be made or if certain information should be withheld.

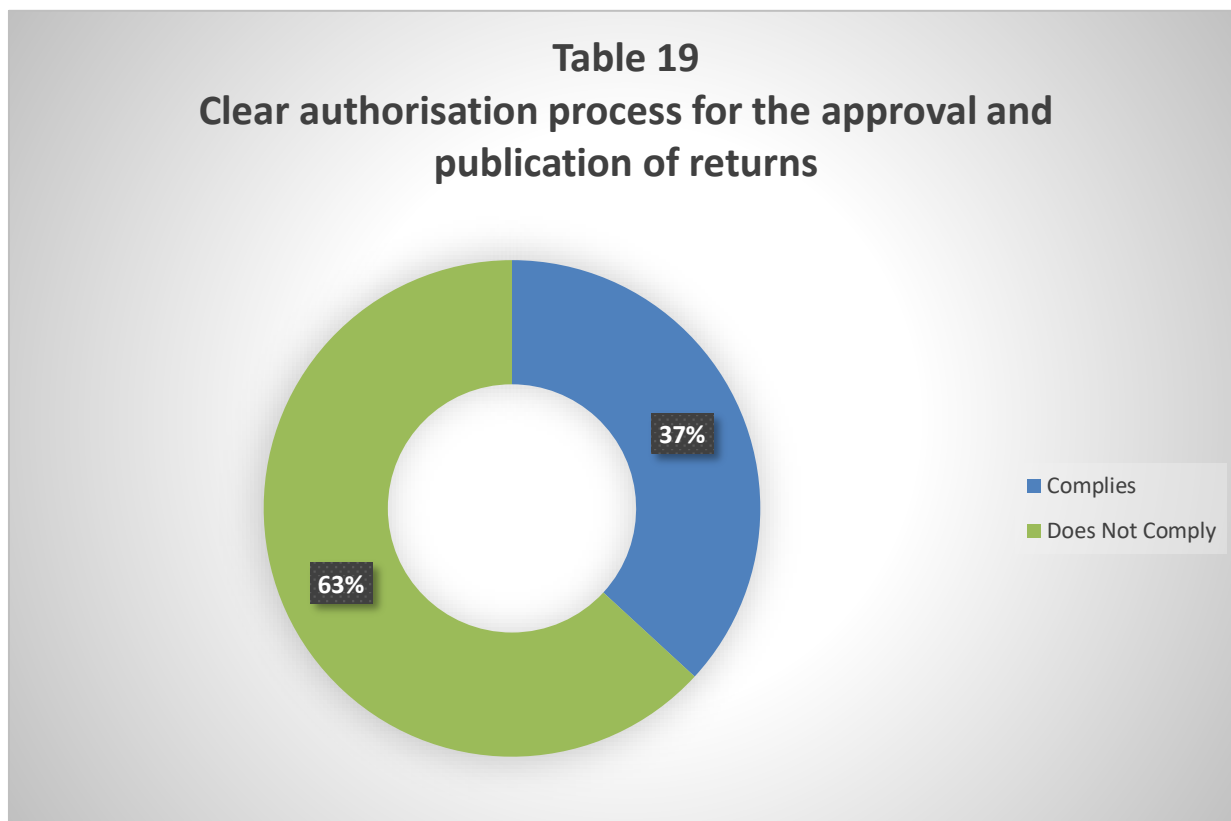
It was found that the policies and/or procedures of these councils contained an express statement about the need to undertake the public interest test for each return.

The policies and/or procedures for the remaining 14 councils did not provide any information or guidance about the need to ensure that redactions are to be made on a case by case basis following the application of the public interest test.

Table 18 demonstrates that non-compliance with this requirement was relatively consistent across all council categories when considering councils that had policies and procedures.

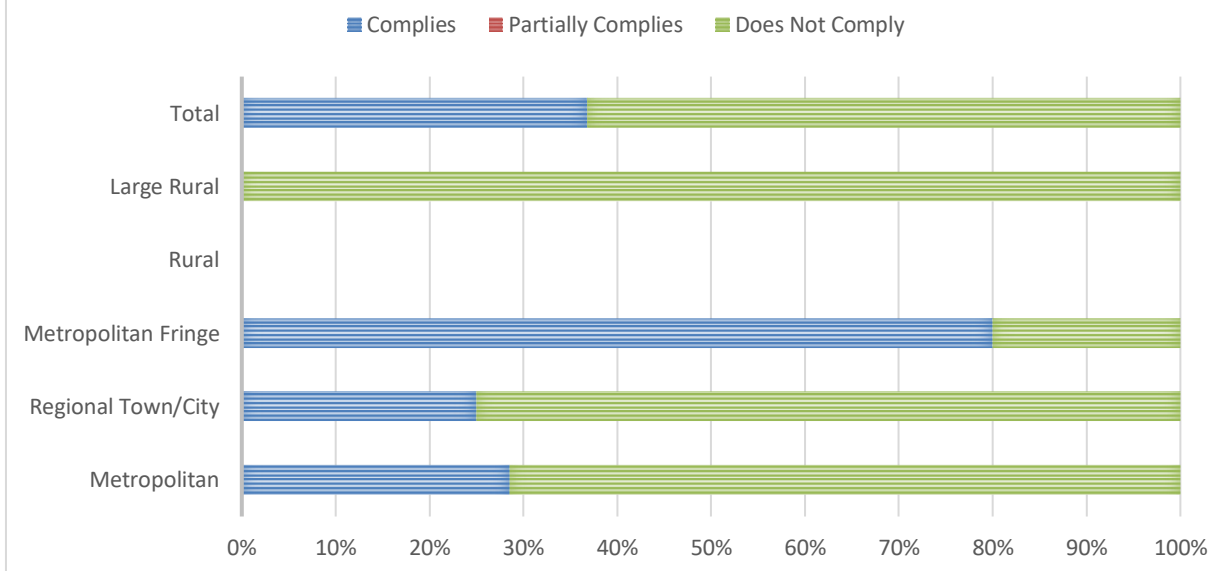
5.5(d) The policy and/or procedure makes clear the authorisation process for the approval and publication of returns

Table 19 (below) represents findings with respect to whether the policies and procedures available contained clear guidance about the authorisation process for the approval and publication of the returns.



Comments, findings and recommendations

Table 20 by Council Type



Only 7 of the 19 councils that had a policy and/or procedure available provided guidance on the authorisation process for the approval and publication of returns. In particular, it was found that these 7 councils included sufficient details of who within the council is authorised to approve and publish the returns.

The policies and/or procedures of the remaining 12 councils did not refer to an authorisation process for the approval and publication of returns.

As **Table 20** demonstrates compliance was highest in Metropolitan Fringe councils and non-compliance was consistent in other council categories.

5.5(e) The policy and/or procedure for the publication of returns demonstrates that there is a process for the review and updating of the disclosure of interests

Table 21 depicts the policies and procedures that contained information and guidance about the process for reviewing, updating and publishing the returns.

Comments, findings and recommendations

Table 21
There is a process for the review and updating and publishing the disclosure of interests

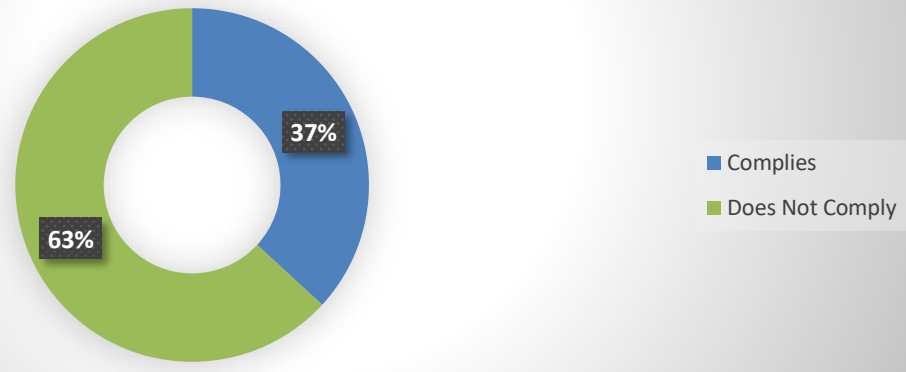
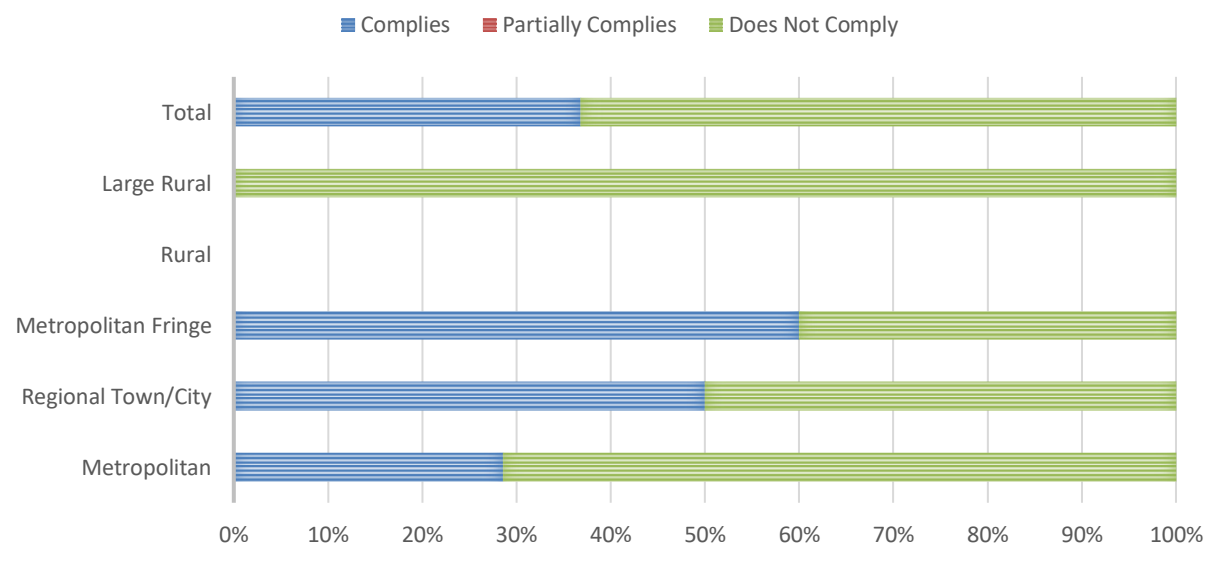


Table 22 by Council Type



Of the councils that had a policy and/or procedure available (19), it was found that the policies and/or procedures of 37% of councils (7) provided adequate information and guidance about the process for reviewing and updating disclosures. In particular, these policies and procedures provided information as to the steps to be taken to collate, review and publish the information contained in the returns. These policies and procedures also included information about the frequency of completion of returns.

The policies and/or procedures of the remaining 12 councils did not contain information about any process for the publication, review or updating of the returns.

Comments, findings and recommendations

Recommendation 7: Councils should have a clear and specific policy or procedure for the completion, collection and publication of the returns of interest within 12 months of this report.

Recommendation 8: The policy or procedure should include appropriate guidance to assist officers within the council to carry out the obligations with respect to the returns of interests. In particular, councils should ensure that the policy or procedure includes adequate information including:

- a clear definition of ‘designated persons’
- guidance about making redactions or withholding information on a case by case basis following application of the public interest test
- setting out the clear authorisation process for the approval and publication of returns, and
- ensuring that there is a clear process for the publication, review and updating of returns.

6. Conclusions

The completion and publication of returns of interests by councillors and designated persons provides an essential aid to councils to ensure that conflicts of interest are identified and managed. Likewise, citizens can only have confidence in elected officials and senior administrators if they are demonstrably transparent and accountable in the exercise of their functions.

There is an inherent and significant power imbalance between administrative officers charged with collecting and managing returns of interest from councillors and senior administrators. To address the resultant vulnerability consistent and visible leadership is required. Within each local council general managers provide that leadership and under the GIPA Act they are the principal officers responsible for implementing effective training, systems and policies. Those policies together with leadership enable the risks associated with the systemic power imbalance to be mitigated so that the public’s right to know is preserved.

In this context it is concerning that:

- 33 (63%) of councils did **not** have systems, policies and practices to support the exercise of functions under the GIPA Act.
- Only 10% of (5) councils had policies and procedures that addressed the requirements for the completion and collection of returns of interests

Policies and procedures provide guidance to council staff responsible for carrying out this important function. They enable a consistent application of process and confirm the exercise of discretion. In the absence of policies and procedures decision making can be arbitrary or vulnerable to extraneous factors and subject to risks including corruption.

These significant failings significantly impede the public’s right to access information and the object of the GIPA Act to maintain and advance a system of responsible and representative democratic government.

In reporting these audit results the rural and large rural council category is considered collectively to ensure parity in the sample size. In these two categories there were no policies in place to assist in the exercise of functions under the GIPA Act. Measured against each of the five-criterion large rural councils failed to achieve any level of compliance with three of the five criteria. These outcomes demonstrate a tangible disadvantage to rural communities in their legislated right to access information.

More broadly the results of this audit demonstrate low levels of compliance by Councils with the open access requirements of the GIPA Act.

In particular:

- 61% of councils (32) were fully compliant with the requirement to publish the returns of the interests of councillors, designated persons and delegates
- 29% of councils (15) failed to comply with the requirement to publish the returns of the interests of councillors, designated persons and delegates.

These low levels of compliance by 52 sampled Councils indicate a fundamental failure by almost a third of the Councils audited to provide citizens with their legislated right to know disclosures of pecuniary and other interests.

The IPC has actively engaged with Councils and the OLG to promote knowledge and awareness of the importance of proactive disclosure of the returns of interests of councillors and designated persons. Whilst this will remain a priority for the IPC, councils must now prioritise compliance with this fundamental aid to advance our democratic system of government.

The guidance provided in this report is both practical and pragmatic. In this context swift and decisive action by councils is required to ensure that they perform their mandate within our democratic system of government.

7. Recommendations

The recommendations made in this report are directed to assisting and supporting the local government sector to achieve and elevate its compliance with the requirements of the mandatory open access requirements for the publication of disclosure of interests of councillors and other designated persons.

Recommendations	
Recommendation 1	Councils should ensure that the disclosure of interest by councillors and designated persons are complete and publicly available.
Recommendation 2	Councils would benefit from promoting consistency and accessibility in relation to returns of interest by establishing a single readily identifiable open access pathway. This should include meaningful labelling of returns by year, type and relevant links. The returns should be easily and prominently located on a Council's website and able to be located from a single search from the main page.
Recommendation 3	Councils should ensure that the disclosures are updated as required consistent with clause 4.21 of the Model Code of Conduct for Local Councils in NSW – 2020.

Recommendations	
Recommendation 4	The IPC commits to the development of further guidance to inform the local government sector on the interface of the “silent elector” requirements of the Electoral Act NSW and the GIPA Act.
Recommendation 5	Councils should ensure that systems, policies and practices are developed to support application of the public interest test. Those aids should reflect the requirement to establish by cogent and probative evidence that the personal and privacy considerations arising under ss 57 and 58 of the PPIP Act provide a relevant public interest consideration and not a mere personal or private consideration to operate against disclosure.
Recommendation 6	Councils should maintain a central record of all open access information that has been withheld due to an overriding public interest against disclosure and embed policies and procedures to ensure compliance with section 6(5) of the GIPA Act.
Recommendation 7	Councils should have a clear and specific policy or procedure for the completion, collection and publication of the returns of interest within 12 months of this report.
Recommendation 8	<p>The policy or procedure should include appropriate guidance to assist officers within the council to carry out the obligations with respect to the returns of interests. In particular, Councils should ensure that the policy or procedure includes adequate information including:</p> <ul style="list-style-type: none"> • a clear definition of ‘designated persons’ • guidance about making redactions or withholding information on a case by case basis following consideration of the public interest test • setting out the clear authorisation process for the approval and publication of returns, and • ensuring that there is a clear process for the publication, review and updating of returns.

8. Monitoring

The IPC will continue to monitor compliance by the sector in light of the findings of this audit and will commence a further snapshot 12 months from the publication of this report.

9. Audit chronology

Date	Event
10 December 2021	Notice of Audit to included Councils
23 December 2021	Response to Audit Due
End Jan 2021 and Begin Feb 2021	Desktop Audit Undertaken
6 July 2021	Report provided to the Minister for Local Government
27 July 2021	Response from Minister for Local Government received
27 July 2021	Report published – OLG and Councils notified

10. Abbreviations

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

Acronym or abbreviation	Explanation
GIIC Act	<i>Government Information (Information Commissioner) Act 2009</i>
GIPA Act	<i>Government Information (Public Access) Act 2009</i>
GIPA Regulation	<i>Government Information (Public Access) Regulation 2018</i>
Guideline 1	<i>Commissioner’s Guideline 1: For Local Councils on the disclosure of information (returns disclosing the interest of councillors and designated persons)</i>
IPC	Information and Privacy Commission, NSW
LG Act	<i>Local Government Act 1993</i>
Model Code	Model Code of Conduct for the Local Government Sector
NCAT	NSW Civil and Administrative Decisions Tribunal
OLG	Office of Local Government
PPIP Act	<i>Privacy and Personal Information Protection Act 1998</i>

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
 - Section 6 - Mandatory proactive release of certain government information
- Part 3 – Open access information
 - Section 18 What constitutes open access information

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

Government Information (Public Access) Regulation 2009

- Part 2 – Open access information of local authorities

Appendix A: Legislation

GIPA Act Mandatory proactive release of certain government information

- (1) An agency must make the government information that is its *open access information* publicly available unless there is an overriding public interest against disclosure of the information.

Note—

Part 3 lists the information that is open access information.

- (2) Open access information is to be made publicly available free of charge on a website maintained by the agency (unless to do so would impose unreasonable additional costs on the agency) and can be made publicly available in any other way that the agency considers appropriate.
- (3) At least one of the ways in which an agency makes open access information publicly available must be free of charge. Access provided in any other way can be charged for.
- (4) An agency must facilitate public access to open access information contained in a record by deleting matter from a copy of the record to be made publicly available if inclusion of the matter would otherwise result in there being an overriding public interest against disclosure of the record and it is practicable to delete the matter.
- (5) An agency must 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. The record is to indicate only the general nature of the information concerned.
- (6) Nothing in this section or the regulations requires or permits an agency to make open access information available in any way that would constitute an infringement of copyright.

Part 3 Open access information

Division 1 Preliminary

18 What constitutes open access information

The following government information held by an agency is the agency's *open access information* that is required to be made publicly available by the agency under section 6 (Mandatory proactive release of certain government information)—

- (a) the agency's current agency information guide (see Division 2),
- (b) information about the agency contained in any document tabled in Parliament by or on behalf of the agency, other than any document tabled by order of either House of Parliament,
- (c) the agency's policy documents (see Division 3),
- (d) the agency's disclosure log of access applications (see Division 4),
- (e) the agency's register of government contracts (see Division 5),
- (f) the agency's record (kept under section 6) of the open access information (if any) that it does not make publicly available on the basis of an overriding public interest against disclosure,
- (g) such other government information as may be prescribed by the regulations as open access information.

GIPA Regulation

Schedule 1 Additional open access information—local authorities

Information contained in the following records (whenever created) is prescribed as open access information—

- (a) returns of the interests of councillors, designated persons and delegates,