



information
and privacy
commission
new south wales

REPORT ON THE OPERATION OF THE GOVERNMENT INFORMATION (PUBLIC ACCESS) ACT 2009

2020 – 2021

Open Government, Open Access, Open Data

Letter of Transmission

The Hon. Matthew Ryan Mason-Cox MLC
President, Legislative Council
Parliament House
Macquarie Street
Sydney NSW 2000

The Hon. Jonathan O'Dea MP
Speaker, Legislative Assembly
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Mr President and Mr Speaker,

In accordance with section 37 of the *Government Information (Information Commissioner) Act 2009*, I am pleased to present the *Report on the Operation of the Government Information (Public Access) Act 2009: 2020 – 2021*.

I recommend that the Report be made public forthwith pursuant to section 39(2) of the *Government Information (Information Commissioner) Act 2009*.

Yours sincerely,



Elizabeth Tydd
IPC CEO, Information Commissioner
NSW Open Data Advocate

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Commissioner's Overview

This year's dramatic and unprecedented increase in applications driven by members of the public, is a most persuasive indicator of political, economic and social action by citizens that must be heard and addressed

This year, we have an unprecedented 30% increase in applications to access government information, representing the largest increase in over a decade of reporting. 82% of that increase was driven by applications from members of the public.

The data is making a powerful and unequivocal statement about the public's exercise of their Right to Know.

This year, my overview gives precedence to this compelling data to ensure that the insights provided are presented and applied by the custodians of government information.

Public sector leaders must respond to the increasing calls for access to information by proactively releasing information. Leaders must reimagine and apply the public interest factors in favour of access to information in a time of immutable change to promote the principles of good governance: transparency; accountability; citizen engagement and effective oversight of public sector funds.

Global and National Trends in Open Government

National and global trends confirm that citizens are increasingly exercising their right to access government information. This year's Report confirms that New South Wales (NSW) is at the vanguard of that increase. In the five years since 2016, when I led the initiative to produce a National Dashboard of Information Access data, there has been a 52% increase in applications for government information in NSW. This outstrips all comparable jurisdictions.¹

This dramatic and unprecedented increase in applications is a most persuasive measurement of political, economic and social action by citizens that must be heard and addressed.

Digital government in NSW has also advanced over the past five years. That transformational agenda has been associated with more effective and efficient services for citizens. However, increasingly, we are witnessing a growing asymmetry in access to information between governments that amass and share information internally and citizens who seek to access that information. Arguably, this asymmetry has, in part, inspired the unparalleled rise in information access requests made by members of the public. As academic commentators have observed *the status of rights of citizens vis-à-vis the state in the technology-centred openness discourse is secondary— in some interpretations even potentially harmful because it encourages an adversarial, litigation-based engagement between citizen and the state.*² This prescient observation has manifested in the reality of a significant increase in the number of applications lodged by legal practitioners on behalf of members of the public.

A stagnation in openness by governments globally is well evidenced in the Open Data Barometer, the recognised less than *unambitious* Open Government Partnership National Action Plans³ and the decline in budget openness reported between 2006 and 2017.⁴

¹ <https://www.ipc.nsw.gov.au/media/2680> NT statistics demonstrate a 55% increase in applications between 2016-2020.

² Noveck, B. S. (2017). Rights-based and tech-driven: Open data, freedom of information, and the future of government transparency. *Yale Human Rights and Development Law Journal*, 19(1), Article 1. Berliner, D., Ingrams, A., & Piotrowski, S. J. (2018). The future of FOIA in an open government agenda for freedom of information policy and implementation. *Villanova Law Review*, 63, Article 867.

³ Under the Open Government Partnership, National Action Plans are required to deliver ambitious commitments to promote open government.

⁴ Vision, Voice, and Technology: Is There a Global "Open Government" Trend? Sabina Schnell.



The situation in NSW

NSW citizens are driving the unprecedented increase in information access applications. In the four years between 2017 and 2021, the percentage of applications made by members of the public increased from 73% of all applications received to 82%; outstripping any other category of applicant. Notably, outcomes for legally represented members of the public comprise 41% of all outcomes. On a numerical basis, this increase in proportion of applications is significant, equating to a 39% increase in applications made by legal representatives. In 2019/20, there were 6,646 applications from legal representatives, and in 2020/21 there were 9,244. In this context, the 39% increase in applications made by legally represented members of the public is arresting.

A further examination of the underlying drivers for this overall increase in applications demonstrates significant increases in two categories of information:

1. Partly personal information and partly other information: this category of outcomes increased by 97% (from 1,828 outcomes in 2019/20 to 3,607 in 2020/21). This continues the trend observed in previous years, resulting in a 141% increase between 2018/19 and 2020/21.
2. Other than personal information: this category of outcomes increased by 40% (5,812 in 2019/20, compared with 8,126 outcomes in 2020/21).

Notably, applications for personal information increased slightly by 5% (10,085 in 2019/20, compared with 10,549 outcomes in 2020/21).

Consistent with previous years, the Government sector continued to account for the great majority (17,870 or 80%) of valid applications. While the overall proportion of valid applications received by the Government sector remained stable, the number of applications significantly increased by 27%, from 14,082 in 2019/20 to 17,870 in 2020/21. The increase in applications was remarkable in two government agencies:

- applications to Transport for NSW increased by 71% (from 955 in 2019/20 to 1,634 in 2020/21)
- applications to the Department of Communities and Justice increased by 58% (from 2,151 in 2019/20 to 3,405 in 2020/21).

Applications to the Council sector also increased significantly, by 47% (2,756 in 2019/20 to 4,055 in 2020/21).⁵

From these statistics, there can be no doubt that applicants are increasingly interested in how government is operating at both a state government agency and local council level, and increasingly using the services of legal representatives to act on their behalf.

Information access is a universal right that must be provided through the least costly means. The number of applications received by the NSW Police Force has increased from 5,997 in 2019/20 to 8,047 in 2020/21 (34% increase). Accordingly, there is a readily identifiable relationship between the increasing number of applications made by legal representatives and the agency that holds information of a type that would be expected to stimulate legal representation. However, the proportion of applications made to the NSW Police Force has declined steadily over time, from 42% of valid applications in 2014/15 to 36% in 2020/21. This decline has also been associated with a remarkable improvement in timeliness by this agency.

Notwithstanding, the relationship between legally represented members of the public, applications to the NSW Police Force and the increasing number of applications made by legal representatives will be monitored and analysed.

Pleasingly, in the majority of cases, applicants are receiving the information they request, represented by a 73% overall release rate, and 92% of applications are decided within the statutory time frames. Whilst these results are similar to previously recorded release rates and time frames, they represent an incremental improvement in both areas. This is a commendable achievement in the face of such a notable increase in applications.

⁵ There has also been an increase in the number of local councils reporting this year (see page 29).

Commissioner's Overview

Serving integrity – Public Sector leaders must acquit their specific proactive release of information obligations

This year, the risk to the right to access information has been exacerbated by continuing non-compliance by Government departments and local councils in respect of their *additional Open Access* requirements. These additional requirements serve a pro-integrity purpose and target areas of high risk in Government departments and local councils. In 2021, I wrote to each Cluster Secretary highlighting the pro-integrity purpose of these specific additional Open Access requirements and the low levels of compliance.⁶ Regrettably, there has been no discernible change in those levels of compliance. In 2020/21:

- 22% (two departments) only partially met the requirement in relation to major assets and acquisitions. This is consistent with 2019/20.
- 33% (three departments) only partially met the requirement in relation to both the total number and the total value of properties the department disposed of during the previous financial year, with this being a moderate increase on 11% in 2019/20; another 67% (five departments) had some information only on the value of properties disposed of, mainly in the department's annual report. This is consistent with 2019/20.
- 22% (two departments) had the department's guarantee of service. This is an increase from 11% (one department) in 2019/20.
- 89% (eight departments) had the department's code of conduct, which is consistent with 2019/20.
- 100% (nine departments) had a number of documents/webpages marked as "standard" or "code" available on the website, compared to 89% in 2019/20.

I will continue to promote compliance with these specific and important integrity serving requirements and commit to a compliance program to better understand and address the extant high levels of non-compliance by Government departments.

In the Council sector there remains an unacceptable level of non-compliance in respect of the specific pro-integrity disclosure requirements. Low levels of compliance were identified in the Information and Privacy Commission's (IPC) targeted compliance audit and subsequent report.⁷ That compliance report found that approximately 30% of audited councils were non-compliant and overall, there were inadequate systems, policies and practices to support compliance. This issue continues to be a focus for the IPC.

General Mandatory Proactive Release requirements

These low levels of compliance with sector specific requirements are contrasted with other general proactive disclosure requirements, which demonstrated overall improvements.⁸ Following lower levels of compliance reported in the 2019/20 Report, I drew this issue to the attention of all Cluster Secretaries. This positive result provides a greater level of confidence in the actions taken by departments and agencies in response to regulatory engagement with the IPC.

Across all departments and sampled smaller agencies, the desktop audit found that compliance with the mandatory proactive release requirements has moderately increased this year to 85%, compared with 72% in 2019/20, and 79% in 2018/19.

⁶ Departments must publish Open Access information including those relating to acquisitions and disposals (cl. 6(2)(a) and (b) of the GIPA Regulation).

⁷ <https://www.ipc.nsw.gov.au/media/3242>

⁸ The GIPA Act requires agencies to publish on its website an Agency Information Guide (AIG), agency policy documents, an agency disclosure log and an agency contracts register.

This result represents the highest level of proactive compliance achieved over the past five years of reporting. Government departments are largely responsible for this outcome and they are commended for their focus on the general mandatory Open Access requirements.

The Future

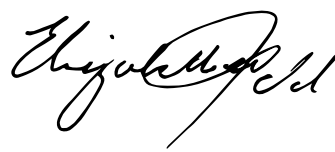
Digital government brings with it new ways of operating that can and should deliver benefits to citizens and government. Access to information at a low cost should be better realised through digital government, but our data does not support this conclusion. Government accountability should be clearer and citizen engagement should be easier in advanced democracies that harness technology, but the dramatic increase in formal information access requests does not readily support this aspiration.

Our focus on technology and digital government should not be seen as inexorably aligned to the principles of open government. There is much to be done in an environment in which governments amass and internally share data if we are to ensure that citizens derive the benefits of digital government and that Open Government is served and not curtailed by these technological advances.

In this regard, specific provisions of the GIPA Act are strained by our digital environment, in which government information is:

- stored in digital archives or separate data silos that require retrieval and/or treatment to render them accessible to citizens
- accessed by agencies under federated models of information sharing, including data portals resulting in information existing but not 'held' by a single responsible and accountable agency
- subject to or derived from machine-enhanced decision-making, rendering it inaccessible as a result of its stewardship; format, contractual relationships and claims of commercial-in-confidence.

In conclusion, the extant threats to open government and the right to know have further galvanised my commitment to promoting these important rights and principles. This year, my focus will be on working to inform change – culturally and systemically – to ensure that NSW remains at the forefront of open government and preserves those principles in this era of digital government.



Elizabeth Tydd
IPC CEO, Information Commissioner
NSW Open Data Advocate

Future Focus

1

MANDATORY PROACTIVE RELEASE

IPC strategies

- Promote the IPC's resources for agencies on mandatory proactive release requirements, including through the Essential Guidance Toolkit, e-learning modules and seek to develop agency maturity around the use of the Agency Self-assessment Tool
- Promote compliance with Council sector-specific Open Access requirements under the GIPA Regulation as set out in the IPC's [Checklist – Open Access requirements under the GIPA Act and GIPA Regulation – agency requirements](#)
- Commit to a compliance program to better understand and address the low levels of compliance with Government Department additional access requirements for proactive release

Agency strategies

- Consider and apply the guidance provided in [Fact Sheet – Open Access Information for Agencies](#), which outlines the types of information that agencies are required to make publicly available
- Undertake action to ensure compliance in advance of the scheduled proactive initiative to examine Government sector compliance with the additional requirements for Open Access under the GIPA Regulation
- Fully and transparently engage with the IPC in the scheduled proactive audit of compliance
- Ensure that citizens are easily able to access up-to-date Open Access information held by the agency on the agency's website

2

AUTHORISED PROACTIVE RELEASE

IPC strategies

- Promote awareness of information access requirements in all projects involving the increase in information holdings by agencies
- Promote compliance with the requirement to publish information regarding the exercise of functions by agencies (sections 20 and 21 of the GIPA Act)

Agency strategies

- Use the Information Governance Agency Self-assessment Tool to conduct an assessment of information access requirements
- Consider and apply the IPC Fact Sheet [Digital Records and the GIPA Act](#)
- Respond to the guidance provided by the IPC in relation to the proactive release of information regarding the exercise of functions by agencies, in particular the use of machine-enhanced decision-making functions by agencies

3

INFORMAL RELEASE

IPC strategies

- Undertake scoping and research with public sector agencies on the use of the informal access pathway to better understand and, where appropriate, promote its use

Agency strategies

- Promote the Open by Design Principles in the [Statement of Principles to support proactive disclosure of government-held information – developed by all Australian Information Commissioners and Ombudsmen](#)
- Fully and transparently engage with the IPC in the research into the use of the informal access pathway
- Engage with citizens requesting information to facilitate informal release

4

FORMAL ACCESS APPLICATIONS

IPC strategies

- Develop enhanced guidance on retrieving digital records from archives and conducting searches
- Review and revise [Information Access Guideline 2 – Discounting Charges](#) and [Information Access Guideline 4 – Personal information as a public interest consideration under the GIPA Act](#)
- Review and revise IPC guidance [Fact Sheet – What is the public interest test?](#)

Agency strategies

- Use the IPC GIPA Tool for managing access applications and for annual reporting purposes
- Consider and apply the guidance provided in the IPC Compliance Report '[Notices of advance deposit and processing charges applied by agencies under the GIPA Act](#)'
- Engage with citizens to provide reasonable advice and assistance

Year in Review

The 2019/20 Report identified a range of priority actions for the IPC and agencies. The outcomes of the IPC actions identified in that Report, as they are aligned with the information access pathways, are outlined below.

Mandatory proactive release

The 2019/20 Report identified that there were opportunities to enhance regulatory guidance and compliance with mandatory proactive release obligations, particularly for Open Access information requirements prescribed in Part 3, Clause 6 of the *Government Information (Public Access) Regulation 2018* (GIPA Regulation).

Action	Outcome
Promote the IPC's Essential Guidance Toolkit, Agency Self-assessment Tool and e-learning modules.	The IPC sent letters in October 2021 to agencies to promote the IPC's Essential Guidance Toolkit, Agency Self-assessment Tool and e-learning modules and encourage Audit and Risk Committees (ARCs) to utilise these tools in assessing information governance compliance. In March 2021, the Information Commissioner presented to the ARC Chairpersons to demonstrate how agencies can use these tools.
Promote compliance with Open Access requirements particularly in the Government sector and Council sector.	The IPC completed a significant proactive audit of the Open Access requirements in the Council sector on the disclosure of interests of councillors and designated persons. A number of recommendations were made to elevate and improve compliance.
Engage with the Department of Communities and Justice and the Department of Customer Service to consider options for legislative change to introduce a power to issue a notice to comply, where there is a failure to meet mandatory proactive disclosure requirements for contracts, pecuniary interest disclosures and management of major assets.	The IPC undertook research into regulatory and compliance models adopted in other jurisdictions and engaged with both the Department of Communities and Justice and the Department of Customer Service to develop options for legislative change.

Authorised proactive release

A priority for the IPC continues to be the publication of guidance on the legislative provisions that support the *Government Information (Public Access) Act 2009* (GIPA Act) 'push' model of information release, including authorised proactive release.

Action	Outcome
Lead the Open Government Partnership National Action Plan commitment to <i>Open by Design</i> .	In 2021, the Information Commissioner led a cross-jurisdictional working group to progress this commitment and on 24 September 2021, all Australian Information Commissioners and Ombudsmen issued a Statement of Principles to support proactive disclosure of government-held information.

Informal release

The GIPA Act authorises agencies to release government information in response to an informal request by an individual unless there is an overriding public interest against disclosure of the information.

Action	Outcome
Undertake research with NSW public sector agencies on the use of the informal access pathway.	The IPC completed desktop research in conjunction with the work undertaken to develop the Statement of Principles to support proactive disclosure of government-held information.

Formal access applications

The GIPA Act provides citizens with an enforceable right to apply for, and access, government information unless there is an overriding public interest against disclosure.

Action	Outcome
Provide agencies with training in the use of the IPC GIPA Tool for managing access applications and for annual reporting purposes.	The IPC provides assistance and training to agencies in the use of the GIPA Tool on an as-needed basis. A user guide and instructions on how to register for access to the GIPA Tool is provided on the IPC website. In November 2021, the IPC provided training to the Right to Information and Privacy Practitioners' Network, equipping them to provide online training to agencies on the use of the GIPA Tool.
Develop resources concerning the personal information consideration in order to increase agency awareness of the definition of personal information as it applies to public officials.	The IPC published a new fact sheet on Public officials and personal information under the GIPA Act .
Engage with the Department of Communities and Justice and the Department of Customer Service to explore options to amend the GIPA Regulation to require agencies to report on: <ul style="list-style-type: none"> access requests for personal information, identifying whether the personal information is of the applicant or of another party partial transfers of applications to another agency. 	Engagement with the Department of Communities and Justice and the Department of Customer Service on legislative reform proposals commenced in 2021, and will continue in 2022.
Engage with the Department of Communities and Justice and the Department of Customer Service to examine a possible additional offence provision or other deterrents to safeguard the public information asset from reckless destruction, concealment or alteration.	As above, the IPC will continue its engagement with the Department of Communities and Justice and the Department of Customer Service on legislative reform proposals, including in relation to offence provisions.

Year in Review

Issue Highlight: NSW community attitudes to information access

During Right to Know Week NSW 2021, the Information Commissioner released the results of research on NSW community attitudes to accessing government information. Citizens were surveyed to gauge the value that they place on the right to access information and assess their experience in exercising that fundamental right.

The research demonstrated that:

- 90% of respondents felt that their right to access government information was important, consistent with 88% in 2020 and 89% in 2019
- 73% of respondents were aware that they had the right to access information from at least one of the agencies under NSW information access laws, an increase from 59% in 2020
- respondents were most aware that they could access information held by local government (56% in 2021, compared with 47% in 2020) and state government agencies (55% in 2021, compared with 50% in 2020)
- citizens are exercising their right to access information with four out of ten respondents reporting that they contacted at least one agency to obtain information in the last three years
- importantly, 56% of respondents who exercised their right to access government information were from the culturally and linguistically diverse (CALD) community
- almost three quarters (74%) of respondents were successful in accessing information from at least one agency, consistent with 74% in 2020 and 77% in 2019:
 - 85% gained full access from universities
 - 80% gained full access from state-owned corporations
 - 77% gained full access from local councils
 - 68% gained full access from state government
- agencies could do more to assist applicants, with 56% of respondents stating that agencies were helpful in providing advice and assistance; although only 16% thought agencies were not helpful.

Respondents answered two questions in the survey regarding government's increased use of data, algorithms and other forms of Artificial Intelligence (AI) to inform decisions. It was found that:

- 80% of respondents agreed that government agencies should be required to publicly report on the AI systems used to inform agency decisions that impact individuals, a slight increase from 78% in 2020.
- 82% of respondents agreed that agencies should publicly report on the information they maintain, consistent with 81% in 2020.

The full results for the 2021 [NSW Community Attitudes Survey](#) and past surveys can be accessed via the IPC website.

Information Release Pathways

Pathway 1: Mandatory proactive release of information

Since 2010/11, the IPC has conducted an annual desktop audit of agency compliance with mandatory proactive release requirements under the GIPA Act (also known as Open Access information).

In 2020/21, the IPC conducted a desktop audit of the nine principal departments and a sample of 20 smaller agencies. The desktop audit identified whether, in compliance with the GIPA Act, each department or sampled smaller agency published on its website:

- an Agency Information Guide (AIG)
- agency policy documents
- an agency disclosure log
- an agency contracts register.

The desktop audit does not examine the comprehensiveness of the information made available, such as whether an agency has published all of its policy documents or whether the information is up to date.

When comparing the audit results from 2019/20 and 2020/21 with past years, it is important to note that the reduction in the number of principal departments has reduced the overall audit sample, which does not allow for accurate direct comparisons. However, the overall increase in compliance provides an objective and valid measure.

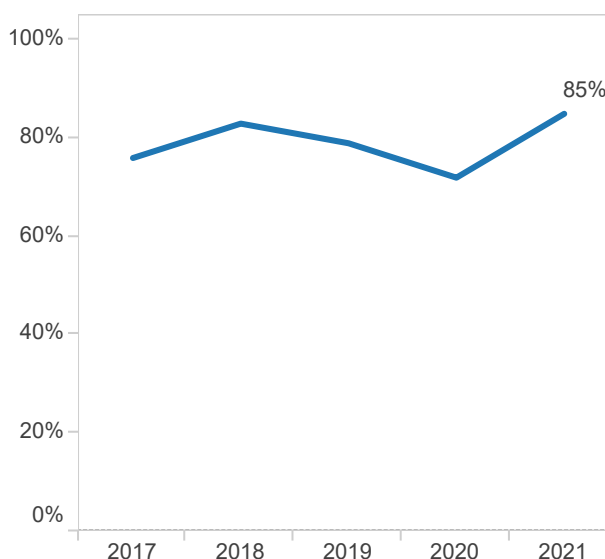
Compliance with Open Access requirements has increased

Across all departments and sampled smaller agencies, the desktop audit found that compliance with the mandatory proactive release requirements has moderately increased this year to 85%, compared with 72% in 2019/20, and 79% in 2018/19 (Figure 1).

This result represents the highest level of proactive compliance achieved over the past five years of reporting. As explained below, Government departments are responsible for this outcome and they are commended for their focus on mandatory Open Access requirements.

Following lower levels of compliance reported in the 2019/20 Report, the Information Commissioner drew this issue to the attention of all Cluster Secretaries. The resultant demonstrably positive result provides a greater level of confidence in the actions taken by Government departments in response to regulatory engagement with the IPC.

Figure 1: Departments and sampled smaller government agency compliance with mandatory proactive release requirements 2020/21



The desktop audit also showed the following:

- 86% of sampled agencies had an AIG, similar to 90% in 2019/20 and 93% in 2018/19
- 90% of sampled agencies had policy documents available, similar to 90% in 2019/20 and 93% in 2018/19
- 86% of sampled agencies had a disclosure log, compared with 76% in 2019/20 and 87% in 2018/19
- 79% of sampled agencies had a contracts register, compared with 69% in 2019/20 and 87% in 2018/19.

Compliance by departments was significantly higher at 100% than the rate for all agencies, which is an increase from 94% in 2019/20 and a return to 100% compliance recorded in 2018/19.

Agencies, other than departments, had a significantly lower overall compliance rate of 79%. This is an improvement compared with the 2019/20 results (74%) for sampled agencies.

The lower compliance by other, often smaller agencies, will continue to be considered by the IPC when developing future regulatory priorities.

Compliance with additional Open Access requirements for departments continues to remain low

The nine principal departments are subject to a number of additional requirements for Open Access as set out in clause 6(2) of the GIPA Regulation. These are to make available:

- (a) *a list of the Department's major assets, other than land holdings, appropriately classified and highlighting major acquisitions during the previous financial year*
- (b) *the total number and total value of properties disposed of by the Department during the previous financial year*
- (c) *the Department's guarantee of service (if any)*
- (d) *the Department's code of conduct (if any)*
- (e) *any standard, code or other publication that has been applied, adopted or incorporated by reference in any Act or statutory rule that is administered by the Department.*

The IPC conducted a desktop audit of compliance by principal departments with these five additional Open Access requirements. The audit found that compliance with these additional requirements remains low.

The following results of compliance varied depending on the requirement:

- 22% (two departments) only partially met the requirement in relation to major assets and acquisitions. This is consistent with 2019/20.¹
- 33% (three departments) only partially met the requirement in relation to both the total number and the total value of properties the department disposed of during the previous financial year, with this being a moderate increase on 11% in 2019/20; another 67% (five departments) had some information only on the value of properties disposed of, mainly in the department's annual report. This is consistent with 2019/20.²
- 22% (two departments) had the department's guarantee of service. This is an increase from 11% (one department) in 2019/20.
- 89% (eight departments) had the department's code of conduct, which is consistent with 2019/20.
- 100% (nine departments) had a number of documents/webpages marked as "standard" or "code" available on the website, compared with 89% in 2019/20.

Compliance with these additional Open Access requirements continues to remain low, with departments either failing to publish the required Open Access information in full on their website or providing it via alternative mechanisms. For example, publication of Open Access information in the department's annual report rather than directly to the department's website.

This result demonstrates a need to continue to promote the checklist [Open Access information under the GIPA Act – agency requirements](#) to inform agencies and departments about Open Access information required to be released and assist them to identify their responsibilities for mandatory proactive release. This low compliance rate with additional Open Access requirements by departments will also be included in the IPC's forward work program.

1 To fully comply with this requirement, a list of major assets, appropriately classified and with major acquisitions highlighted, must be easily found on the department's website. Partial compliance refers to where a complete list of assets is available but only in the annual report (and not published on the department's website), or where an incomplete list is available either on the website or in the annual report but the assets are either not appropriately classified or major acquisitions are not highlighted.

2 To fully comply with this requirement, the total number and total value of properties disposed of by the department during the previous financial year must be easily found on the department's website. Partial compliance refers to where both the total number and the total value of properties disposed of is only available in the annual report (and not published on the department's website) or where only some of the required information is available (that is, only the total number of properties disposed of, or only their total value), either on the website or in the annual report.

Complaints to the IPC about mandatory proactive release

Complaints to the IPC continue to identify concerns regarding compliance with the mandatory requirements for proactive release of information.

In 2020/21, 20.5% of complaints finalised by the IPC were about Open Access information, similar to 23% reported in 2019/20 and 16% reported in 2018/19.

As in previous years, Open Access-related complaints mainly concerned agencies not making Open Access information available.

In the Council sector, Open Access issues interact with other legislative requirements, such as the *Environment Planning and Assessment Act 1979* (NSW) and *Copyright Act 1968* (Cth). Wherever possible, the IPC engages with the agencies that are the subject of a complaint to address the compliance issues relevant to the mandatory proactive release of information requirements. This provides an effective approach to enhancing knowledge of the requirements and objects of the GIPA Act.

To assist councils with meeting their obligations under the mandatory proactive release provisions, the IPC published [Information Access Guideline 1 – For local councils on the disclosure of information contained in the returns disclosing the interests of councillors and designated persons developed under the Government Information \(Public Access\) Act 2009 \(NSW\)](#).

Issue Highlight: The requirement for contract disclosure and iCare

The GIPA Act requires that contract information is made available by government agencies through a publicly available contract register.

iCare's conduct in relation to the contract register requirements of the GIPA Act was brought to the Information Commissioner's attention during proceedings before the NSW Parliament Budget Estimates Inquiry before Portfolio Committee No. 6 – Transport and Customer Service. The Information Commissioner consequently engaged with iCare in relation to their contract register compliance which led to the Information Commissioner undertaking two compliance audits of iCare: Phase One and Phase Two.

Phase One of the audit by the IPC responded to stated non-compliance with recommendations made that acknowledged the significance of policies and processes as instrumental to facilitating the disclosure of contracts by government agencies. Equally important is the establishment of a cultural commitment together with the development of the capability and systems required to implement those policies and processes. The audit recommendations were addressed to the core areas of:

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

Phase Two of the compliance further reviewed the effect of the remedial actions implemented by iCare and the scope of any non-compliance. The compliance audit identified that progress had been made by iCare with the resulting disclosure of an estimated value totalling over \$2 billion for the 422 contracts disclosed as part of the remediation undertaken.

Agencies are reminded of the mandatory reporting requirements for contracts. Mandatory disclosure of contracts provides a necessary pro-integrity purpose that increases government transparency and accountability. Increased transparency with respect to government contracts with the private sector can lead to improved performance of outsourced services, as well as increased efficiency and value for money. The mandatory disclosures required under the GIPA Act are also an important tool to proactively manage potential conflicts of interest and ensure that public value is demonstrably realised.

Case Study: Local council audit summary

Under the GIPA Act, agencies must make Open Access information publicly available unless there is an overriding public interest against disclosure of the information. In the Council sector, under the Model Code of Conduct for Local Councils in NSW, there is a requirement for councillors and designated persons to complete and lodge returns of interests. The requirement for councils to publish information in returns on their websites as Open Access information arises under the GIPA Act and the GIPA Regulation.

[Guideline 1 – For local councils on the disclosure of information \(returns disclosing the interest of councillors and designated persons\)](#) was issued by the Information Commissioner specifically to supplement the provisions of the GIPA Act and GIPA Regulation, 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. This disclosure is a requirement under clause 1(2)(a) of Schedule 1 of the GIPA Regulation.

Following the review of Guideline 1 and its issuance in September 2019, the Information Commissioner committed to a 12-month implementation time frame to ensure that local councils had adequate time to comply and give effect to the requirements of 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 would not comply with Guideline 1.

In December 2020, the IPC formally notified specific councils of their inclusion in a compliance audit of the Council sector. The desktop audit was undertaken over the end of January 2021 and early February 2021, with a final report published in July 2021.

The audit of 52 local councils identified that there is inadequate compliance across the Council sector. Overall, there were inadequate systems, policies and practices to support compliance with the Open Access requirements. The audit identified seven recommendations for the Council sector to elevate their compliance with the mandatory open access requirement of the GIPA Act.

The Council sector is encouraged to have regard to the recommendations made in the compliance audit, in order to facilitate Open Access to information under the GIPA Act, consistent with the objects of the Act. The recommendations serve as an opportunity for all councils to self-assess against the recommendations and identify proactive opportunities to improve and elevate their compliance. The release of Open Access 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.



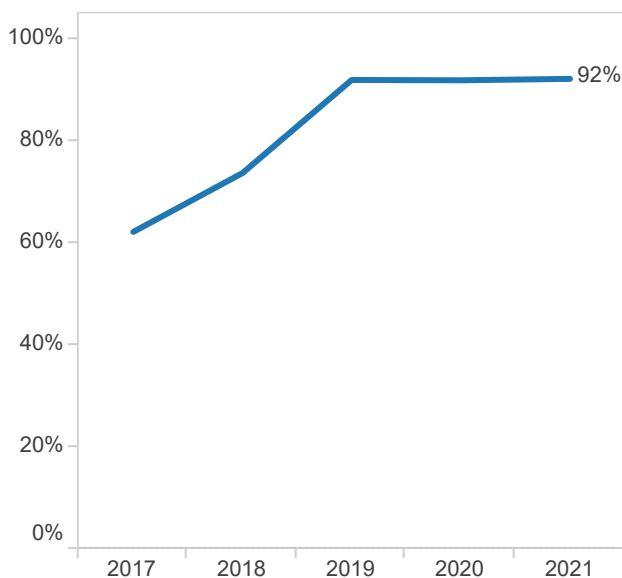
Pathway 2: Authorised proactive release of information

Agency reviews of programs for release of government information are stable

Agencies are required to conduct reviews of their program for the release of government information, at least annually (section 7(3) of the GIPA Act).

In 2020/21, 92% of agencies reported having conducted a review of their program for the release of government information. This is consistent with 93% in both 2018/19 and 2019/20 (Figure 2).

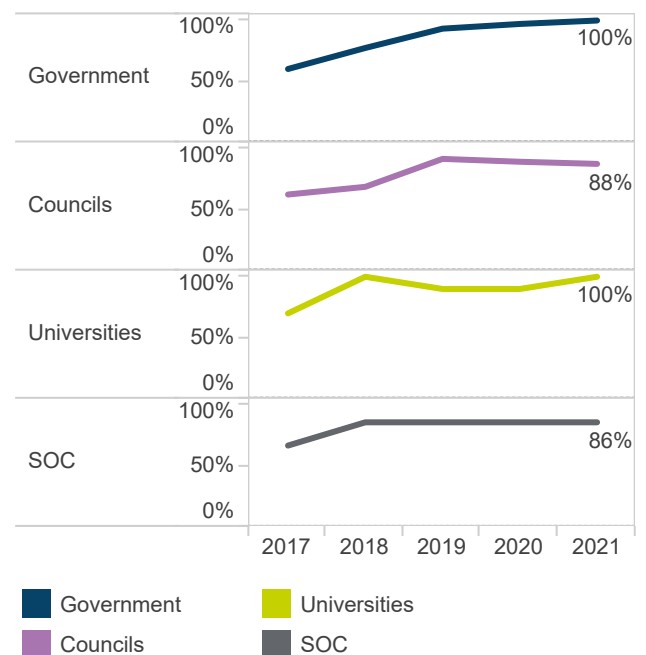
Figure 2: Agencies that conducted annual information release reviews as a percentage of all agencies that reported, 2016/17 to 2020/21



Overall results across the sectors remained relatively stable (Figure 3):

- 100% of agencies in the Government sector conducted reviews, consistent with 97% reported to the IPC in 2019/20.
- 100% of universities conducted reviews, a moderate increase on 90% in 2019/20.
- 88% of councils conducted reviews, similar to 91% in 2019/20.
- 86% of state-owned corporations conducted reviews, consistent with 86% in 2019/20 and 2017/18.

Figure 3: Agencies that conducted annual information release reviews as a percentage of all agencies that reported, by sector, 2016/17 to 2020/21



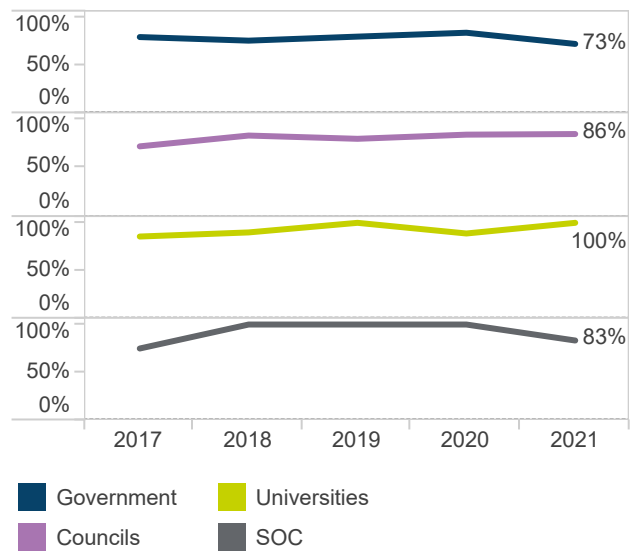
Since July 2015, the IPC has focused on assisting agencies with proactive release programs in recognition of declining compliance with this obligation – first identified in 2013/14. Overall, this initiative has demonstrated success. As part of this initiative, the IPC enhanced the GIPA Tool in 2018/19 to remind agencies that conducting reviews of their program is mandatory. In 2020/21, the IPC’s Essential Guidance Toolkit, Agency Self-assessment Tool and e-learning modules were promoted to agencies to assist them to self-assess their information governance compliance.

Overall release of additional information following a review remained stable, with declines in the Government and State-Owned Corporations sectors

Ideally, all agency information release reviews should result in additional information being released. In 2020/21, 83% of agencies that conducted a review released additional information. This is an increase of 5% on the 78% reported in 2019/20. Figure 4 shows the trends in the percentage of reviews leading to the release of additional information and shows:

- 73% of agencies in the Government sector released additional information following review, a moderate decline from 84% reported in 2019/20
- 86% of councils released additional information following review, consistent with the 83% reported in 2019/20
- 100% of universities released additional information following review, an increase from 89% in 2019/20
- 83% of state-owned corporations released additional information following review, a significant decline from the 100% reported in 2019/20 and 2018/19.

Figure 4: Agencies that released additional information as a percentage of agencies that conducted a review, by sector, 2016/17 to 2020/21



Issue Highlight: Statement of Principles to support proactive disclosure of government-held information

In 2021, the Information Commissioner led a project on behalf of Australian Information Commissioners and Ombudsmen to develop a [Statement of Principles](#) to support a nationally consistent approach to the proactive disclosure of government-held information. The statement authorises and encourages the proactive release of government information.

Information Commissioners and Ombudsmen across Australia oversight and promote citizens' rights to access government-held information and have powers to review agency decisions under the applicable right to information legislation. Beyond formal rights of access, the proactive disclosure of government-held information promotes open government and advances our system of representative democracy. All Australian Governments (Commonwealth, State, Territory and Local) and public institutions are strongly encouraged to commit to being Open by Design by building a culture of transparency and by prioritising, promoting and resourcing proactive disclosure.

The Statement of Principles recognises that:

- information held by government and public institutions is a public resource and, to the greatest extent possible, should be published promptly and proactively at the lowest reasonable cost, without the need for a formal access request;
- a culture of transparency within government is everyone's responsibility requiring action by all public sector leaders and officers to encourage and support the proactive disclosure of information; and
- appropriate, prompt and proactive disclosure of government-held information:
 - informs community – proactive disclosure leads to a more informed community, and awareness raising of government and public institutions' strategic intentions and initiatives, driving innovation and improving standards. Transparent and coherent public communication can also address misinformation
 - increases participation and enhances decision-making – proactive disclosure increases citizen participation in government processes and promotes better informed decision-making through increased scrutiny, discussion, comment and review of government and public institutions' decisions
 - builds trust and confidence – proactive disclosure enhances public sector accountability and integrity, builds public trust and confidence in decision-making by government and public institutions and strengthens principles of liberal democracy
 - improves service delivery – proactive disclosure improves service delivery by providing access to information faster and more easily than formal access regimes, providing the opportunity to decide when and how information is provided, and to contextualise and explain information
 - is required or permitted by law – proactive disclosure is mandated, permitted, or protected by law in all Australian States and Territories and the Commonwealth
 - improves efficiency – proactive disclosure reduces the administrative burden on departments and agencies and the need for citizens to make a formal information access request.

Published with the Statement of Principles is a table containing categories of information for proactive release, including information that is:

- valuable to citizens (e.g. how to access government services, a citizen's own personal information)
- likely to affect citizens' rights (e.g. complaints procedures, information about the use of AI in decision-making)
- important to the digital economy (e.g. datasets for research, statistical information)
- important to government accountability and transparency (e.g. annual reports, contract registers, conflict of interest declarations).

Case Study: New ways to reach citizens – Joint animation by Australian Information Commissioners and Ombudsmen, and IPC animation on the four GIPA pathways, to support the proactive disclosure of government-held information

Citizens throughout Australia experience inconsistent levels of access to valuable and important information from government. This is particularly evident in the differences in proactive release of information between jurisdictions.

For Right to Know Week NSW 2021, Australian Information Commissioners and Ombudsmen released a joint animation which was developed to raise awareness of Australian citizens' right to know and right to access government-held information.

The animation supported the Commissioners and Ombudsmen's [Statement of Principles](#), recognising that information is available free of charge on agency websites, via reports, can be shared securely, and also formally requested from agencies.

In addition to the joint animation, the IPC released a NSW-specific animation during Right to Know Week, which breaks down the four pathways citizens can use to access information from public sector agencies under the GIPA Act in NSW.

The [joint animation by Australian Information Commissioners and Ombudsmen](#) and [GIPA pathways animation](#) are both publicly available on the IPC website and IPC YouTube channel.

Joint animation by Australian Information Commissioners and Ombudsmen



IPC animation on the four ways to access government-held information in NSW





Pathway 3: Informal release of information

The informal release of information provides benefits for agencies and citizens, and helps to increase access to information. The effectiveness of this pathway can be enhanced through sound agency practices and by linking the pathway to broader agency access mechanisms such as AIGs.

Agency practices

Agencies can release government information informally, unless there is an overriding public interest against disclosure of the information.

Informal release under the GIPA Act is a quicker and cheaper access option for both the applicant and the agency. Agencies have flexibility in deciding the means by which information is to be informally released. Conditions can also be imposed on the use of the information released.

By highlighting the role of the informal release pathway, agencies can create opportunities to streamline the handling of common requests for information and ensure that citizens are able to avoid the cost, time and effort required to prepare and lodge a formal access application.

The IPC recommends that agencies exercise their discretion to deal with requests informally, wherever possible, to facilitate and encourage timely access to government information at the lowest reasonable cost. Review rights should also be considered by agencies in discussions with applicants regarding the option to deal with a request for information informally.

There is currently limited data available to the IPC to draw reliable conclusions on the frequency and volume of access requests made via the informal access pathway or the outcomes for applicants.

In 2021/22, the IPC will continue its scoping and research with public sector agencies on the use of the informal access pathway to better understand and, where appropriate, promote its use.

Issue Highlight: Can an agency provide information through informal release after an access application has been made?

Dibb v Transport for NSW [2021] NSWCATAD 340 highlights that the pathway for informal release of information is separate from the formal application pathway. Where an applicant makes a formal access application and then seeks the Tribunal's review of the agency's decision, only the Tribunal can decide to release additional information that is responsive to the application.

The applicant made a formal access application under the GIPA Act to Transport for NSW seeking access to information relating to properties in the Korora area of NSW affected by the construction of the Coffs Harbour Bypass.

Transport for NSW decided the access application by providing access to some of the information under section 58(1)(a) of the GIPA Act and refusing access to some of the information under section 58(1)(d) of the GIPA Act. The applicant sought the Tribunal's review of this decision.

After the first case conference and before the hearing of the Tribunal proceedings, Transport for NSW decided to provide the applicant with copies of the valuation reports for two properties, with the redaction of some personal and financial information. At the hearing, the applicant contested whether Transport for NSW had the power to release the additional documents to him given that its decision on the access application was before the Tribunal for review.

The Tribunal identified key differences between an informal request and an access application including:

- a person who makes an access application has a legally enforceable right to be provided with access to the information in accordance with Part 4 of the GIPA Act, unless there is an overriding public interest against disclosure of the information
- an agency cannot be required to consider an informal request, or to disclose information pursuant to an informal request
- the release of government information in response to an informal request can be made subject to conditions.

The Tribunal outlined the limited circumstances in which an agency can reconsider its decision made in response to an access application and found that none of those circumstances applied in this case. The Tribunal was not satisfied that the informal release of the valuation reports in the context of the proceedings was authorised under the GIPA Act. However, following its consideration of the valuation reports, the Tribunal decided to vary Transport for NSW's decision on the access application and provide access to the reports, subject to the redaction of personal and financial information.

This decision is currently under appeal to the NSW Civil and Administrative Tribunal (NCAT) Appeal Panel.



Pathway 4: Formal applications

For the second consecutive year, valid applications increased to record numbers

In 2020/21, there was a record number of applications: 22,349. That number exceeds the number of applications received in 2019/20 by 30%. This demonstrates the significance citizens place on their right to access information, and that they are increasingly exercising this right.

The GIPA Act provides citizens with a right to access government information, unless there is an overriding public interest against disclosure.

Agencies must assess each application for information that is received. For valid access applications, agencies must apply the public interest test and balance the factors for, and against, the disclosure of the information that is requested.

The main benefits of the formal access pathway:

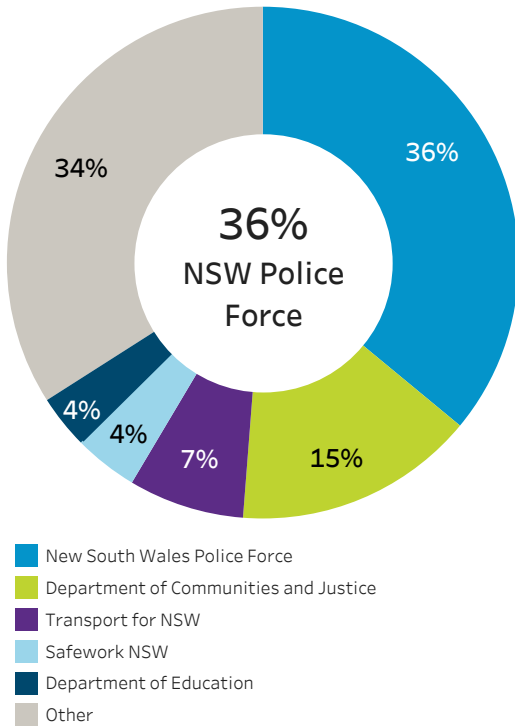
- The right to seek access is legally enforceable.
- Agencies must process applications within statutory time frames.
- Agencies are not subject to the direction or control of any Minister in the exercise of the agency's functions when dealing with an access application.
- Agencies must apply the public interest balancing test and consult with third parties to whom the information relates.
- Applicants have a right to seek review of an agency's decision about the application through a number of review avenues: an internal review by the agency, an external review by the Information Commissioner and an external review by the NCAT.

The IPC continues to publish a publicly available dashboard on its website, enabling easy access and understanding of NSW agencies' operation of the formal pathway. This initiative provides insights for agencies and citizens alike and has been widely commended.

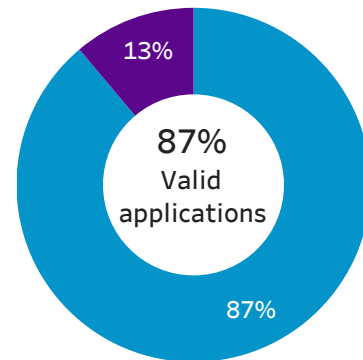
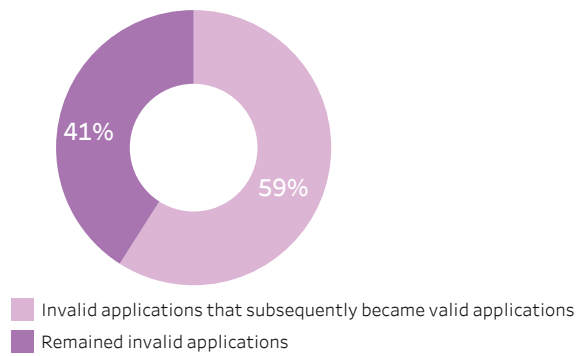
This year we have seen a record number of information access applications.

Year at a glance

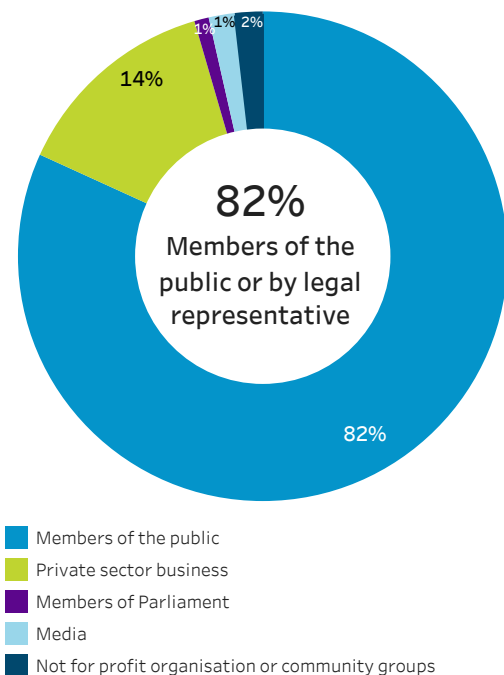
Where were applications lodged? *



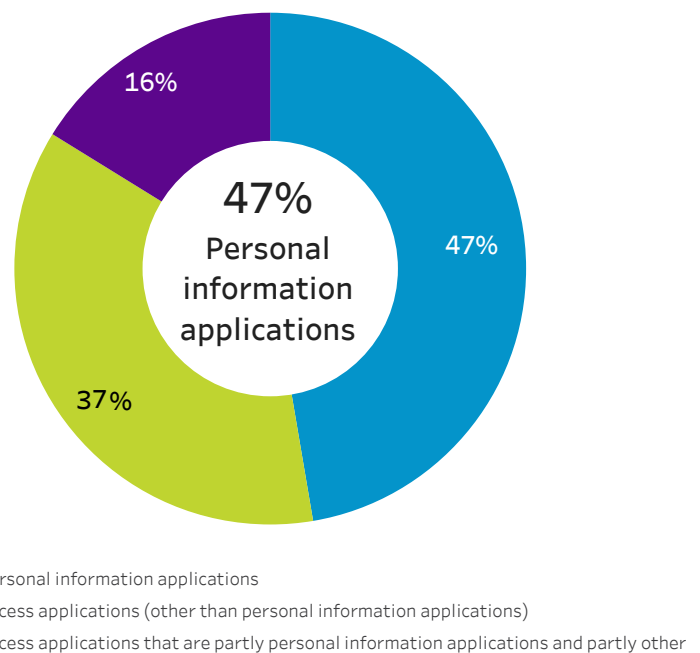
Were applications invalid?



Who applied?

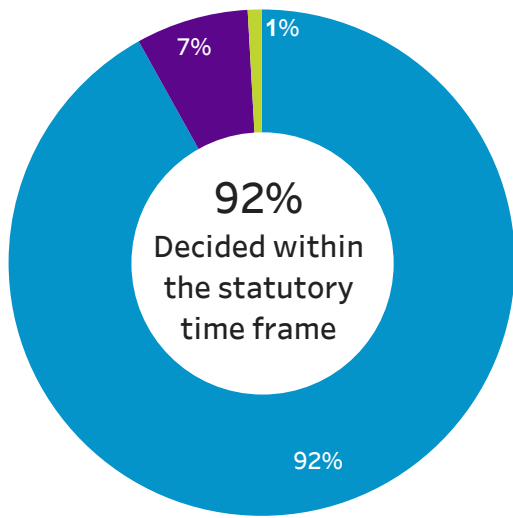


What was asked for?

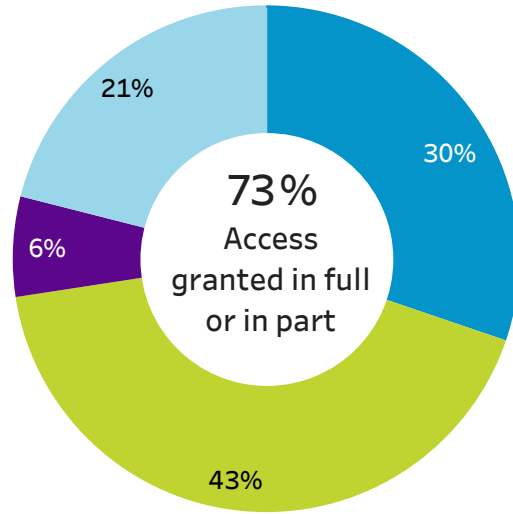


* This graph represents applications lodged to government agencies.

How quickly were decisions made?

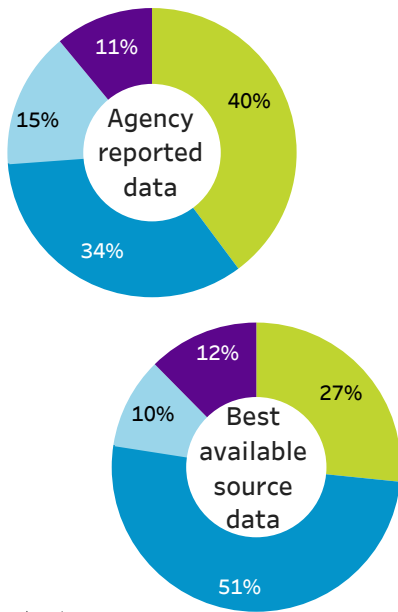


Did applicants get what they asked for?



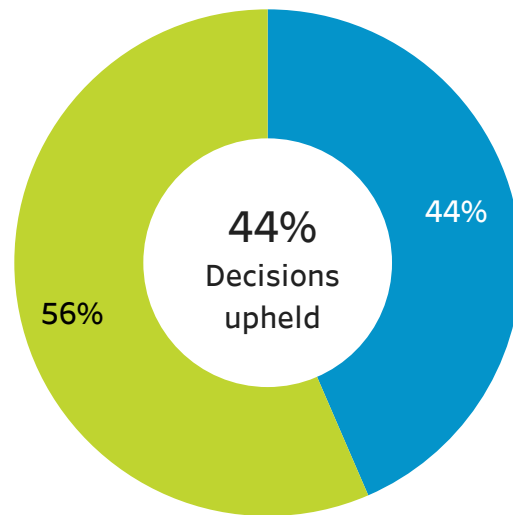
- Decided within the statutory timeframe (20 days plus any extensions)
- Access Granted in Full
- Decided after 35 days (by agreement with applicant)
- Access Granted in Part
- Not decided within time (deemed refusal)
- Access Refused in Full
- Other

How were decisions reviewed?



- Internal review
- Review by Information Commissioner
- Internal review following recommendation under section 93 of Act
- Review by NCAT

What were the main review outcomes?



- Decision upheld
- Decision varied

How many applications were lodged?

The total number of valid applications received increased by 30% in 2020/21, representing the highest recorded number of valid access applications

At the time of reporting, agencies advised that they received 22,349 valid applications during 2020/21. This compares with 17,246 valid applications in the previous financial year and represents a total increase of 5,103 (30%) in valid applications received. This is the largest increase in over a decade of reporting and has resulted in 2020/21 producing the highest number of valid applications received. The trend in applications is shown in Figure 5.

The number of applications received by agencies can be affected by certain factors, such as the type of information sought, the extent to which agencies proactively make information available and the use of the informal access pathway. This year, NSW agencies operated under volatile and unprecedented pandemic conditions. These conditions may also stimulate

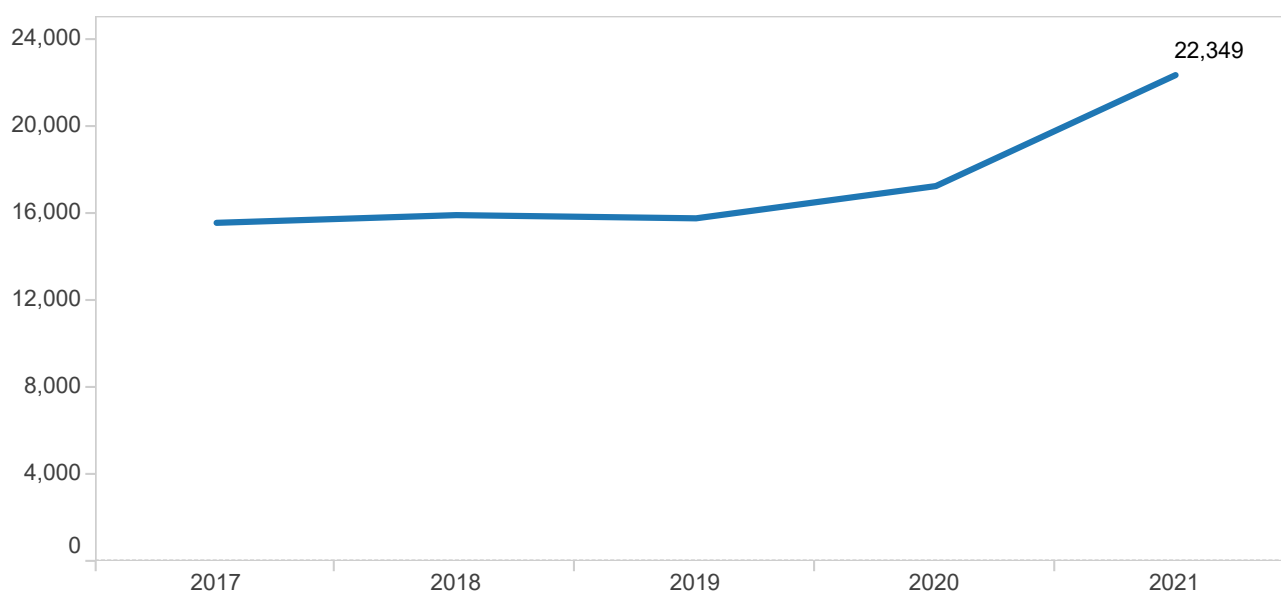
requests for access to government information. This observation is informed by:

- a 33% increase in application outcomes for members of the public (representing an additional 4,539 applications in 2020/21)
- 41% of applications were made by legal representatives on behalf of members of the public (representing an additional 2,598 applications in 2020/21 or a 39% increase from 2019/20), and
- the significant increase in applications that sought information other than personal information and those that sought a combination of partially personal and partly other information.

Most applications were made to the Government sector³

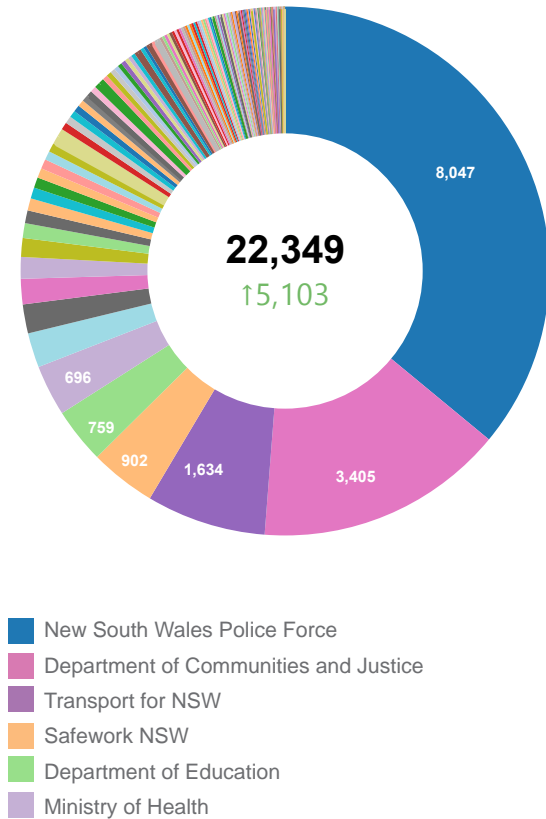
Consistent with previous years, the Government sector continued to account for the great majority (17,870 or 80%) of valid applications (Figure 7). While the overall proportion of valid applications received by the

Figure 5: Total number of valid applications received, 2016/17 to 2020/21



³ Since 2016/17 data is reported across five sectors, including state-owned corporations. This will affect comparisons with the published reports in previous years.

Figure 6: Distribution of valid applications received, by government agency, 2020/21



Government sector remained stable, the number of applications significantly increased by 27% from 14,082 in 2019/20 to 17,870 in 2020/21.

In 2020/21, the NSW Police Force received 36% (8,047) of all valid applications, consistent with 35% in 2019/20 (Figure 6). While the NSW Police Force continued to receive the largest proportion of valid applications across all sectors, this proportion has declined steadily over time from 42% of valid applications in 2014/15 to 36% in 2020/21. The NSW Police Force has also experienced a significant increase in the overall number of valid applications received as set out below.

The top six government agencies by number of applications received is similar to last year (Figure 6).

Notable changes in valid applications received across these agencies were a:

- 71% increase in applications received by Transport for NSW (from 955 in 2019/20 to 1,634 in 2020/21)
- 58% increase in applications to the Department of Communities and Justice (from 2,151 in 2019/20 to 3,405 in 2020/21)
- 34% increase in applications received by the NSW Police Force (from 5,997 in 2019/20 to 8,047 in 2020/21)
- 28% increase in applications received by the Department of Education (from 595 in 2019/20 to 759 in 2020/21)
- 23% increase in applications received by the Ministry of Health (from 567 in 2019/20 to 696 in 2020/21)
- 1% increase in applications received by SafeWork NSW (from 896 in 2019/20 to 902 in 2020/21). This is a change from last year where SafeWork NSW had an 18% increase in applications.

Applications in the Government and Council sectors rose significantly, with declines recorded in the Minister and University sectors

The number of applications received by the Council sector also increased significantly by 47%. This is in part due to 11 more councils reporting in 2020/21 compared with 2019/20. The IPC will work closely with the Council sector in the coming year to ensure that compliance levels are maintained (Figure 7).

The number of applications received by the Government sector increased significantly by 27% compared with the 2019/20 results.

Applications received in the University sector moderately increased by 9% in 2020/21.

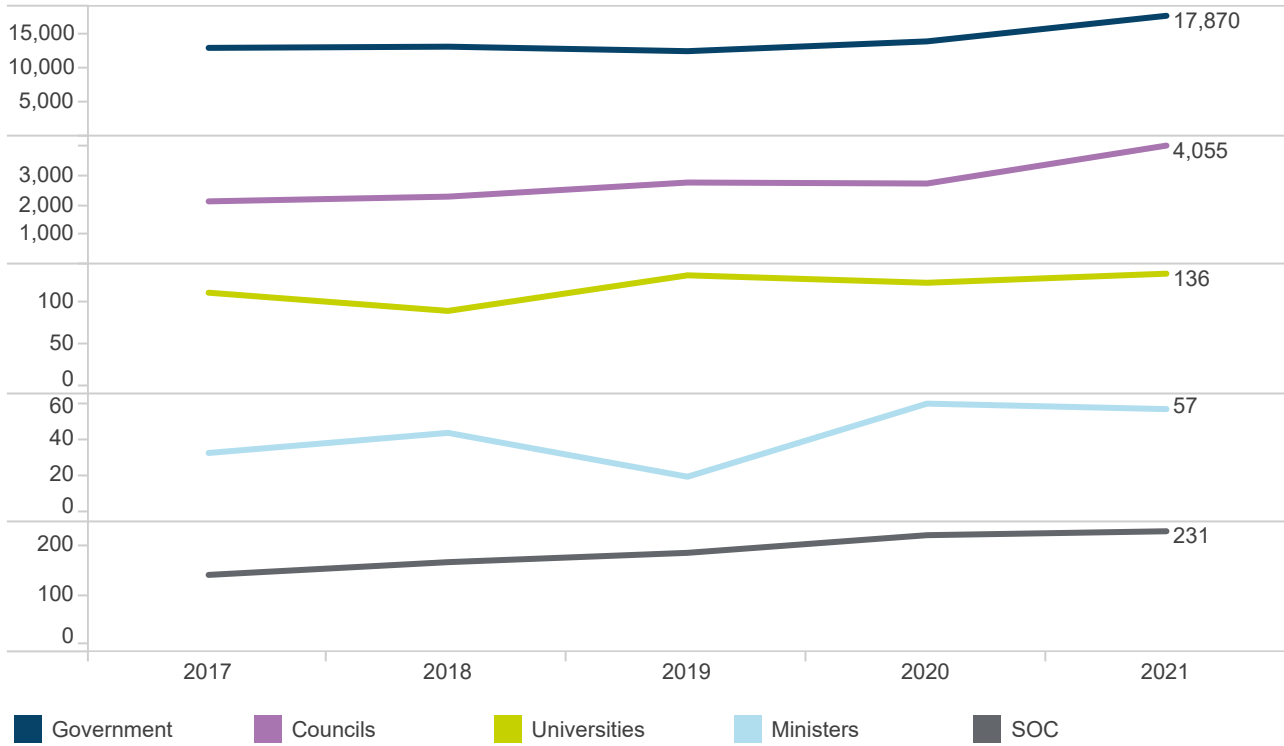
The State-Owned Corporations sector remained stable with an increase of 4%.

Applications received by the Minister sector declined by 5% in 2020/21.

Each of the above three sectors receive relatively few applications and their year-on-year results are therefore more variable.

'How many applications were lodged?' is reported and measured by the requirement for agencies to report on the total number of formal applications received during the year and that were assessed as valid in clause 8(b) of the GIPA Regulation.

Figure 7: Number of applications received, by sector, 2016/17 to 2020/21



Invalid applications

The level and trend in invalid applications is an indicator of the extent to which the GIPA Act is understood by applicants and agencies. It can also be interpreted to measure the flexibility offered to applicants to amend their applications so that they can be considered.

Figure 8 shows the flow of applications from receipt to initial assessment and subsequent processing, together with the number of valid applications received in 2020/21.

Section 52(3) of the GIPA Act requires agencies to provide reasonable advice and assistance to enable applicants to make a valid application.

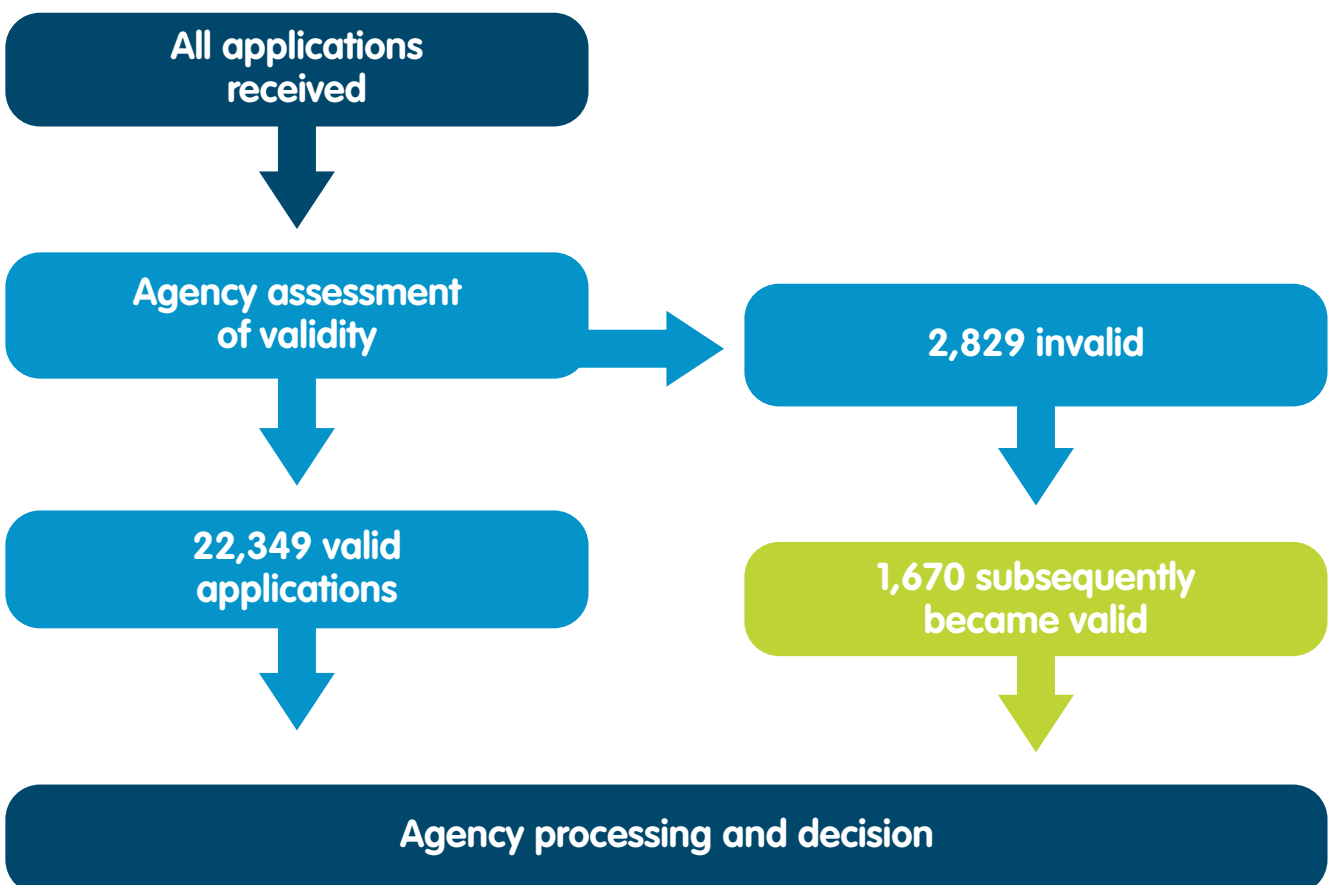
The rate of invalid applications received remains high

In 2020/21, agencies received 2,829 invalid applications, equivalent to 13% of all formal applications received (Figure 9).

This is consistent with the 2,027 or 12% of invalid applications reported in 2019/20.

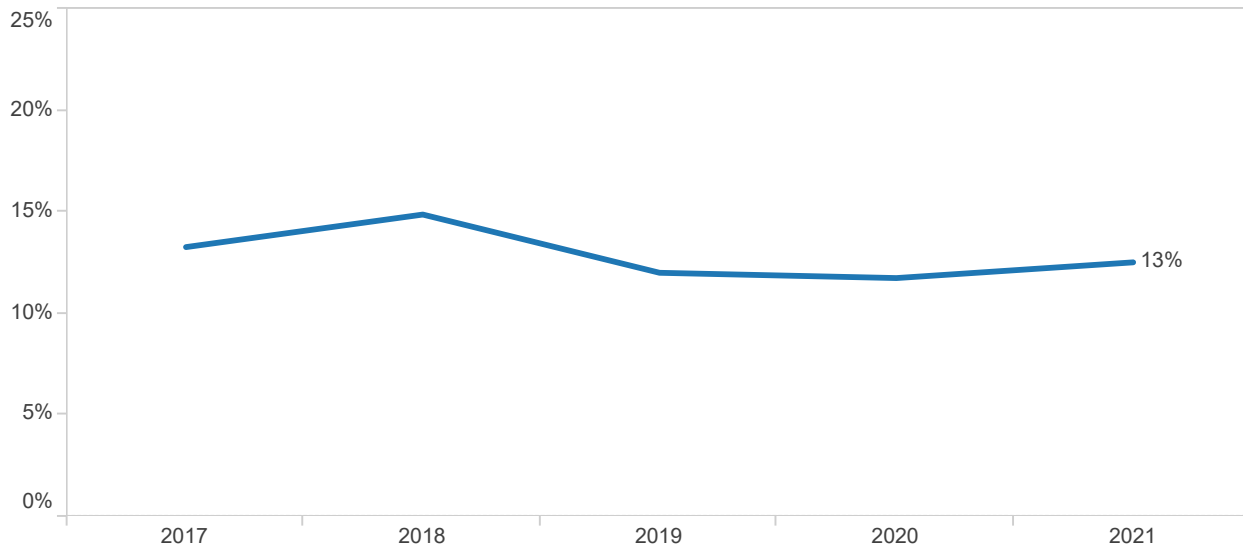
Consistent with previous years, in 2020/21 the most common reason for invalidity (applying in 98% of invalid applications) was that the application did not comply with formal requirements.

Figure 8: Flow of valid and invalid formal applications, 2020/21



'Invalid applications' are reported and measured by the requirement for agencies to report on the number of invalid applications specified in Table C of Schedule 2 to the GIPA Regulation.

Figure 9: Invalid applications as a percentage of all formal applications received, 2016/17 to 2020/21



The continuing high number of applications that were invalid is concerning. As noted in previous reports, clear agency communication can help minimise the number of invalid applications and reduce time and effort that may be spent on preparing or assessing applications.

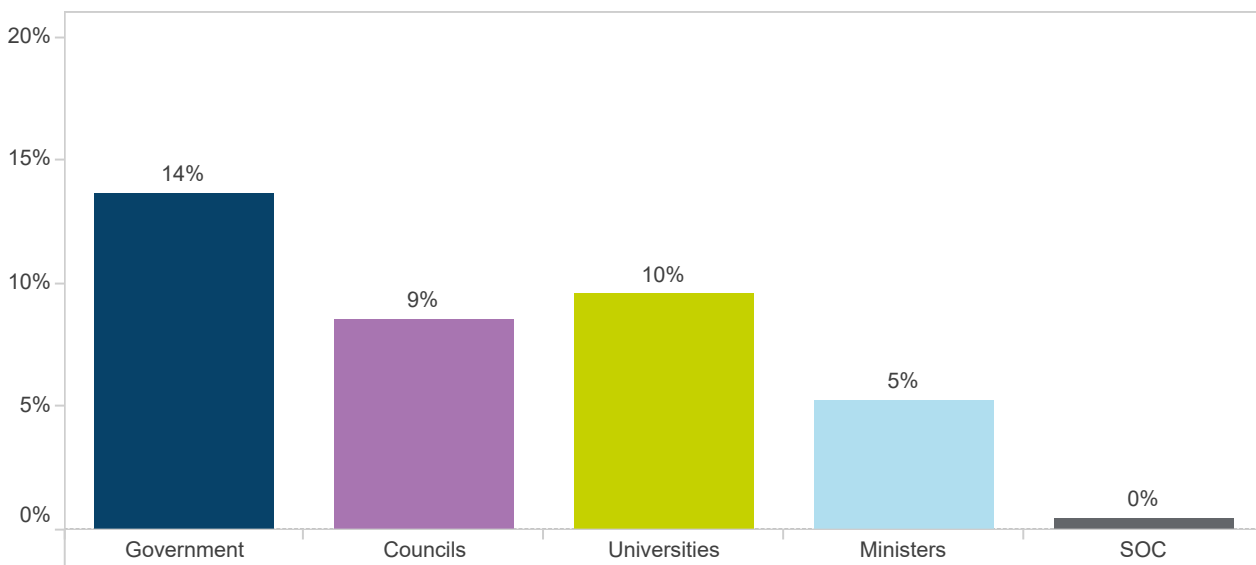
The GIPA Act requires an agency to provide advice and assistance to help an applicant make a valid application. Accordingly, opportunities to assist applicants through guided application processes, including electronic lodgement, should be promoted.

The Government sector had the highest percentage of invalid applications. The consistency of the percentage of invalid applications should be viewed in the context of increasing prevalence of online lodgement facilities.

These systems, if designed optimally, have the capacity to increase the number of valid applications by guiding applicants to meet the statutory requirements of a valid application. In response to the data reported for invalid applications in 2019/20, the IPC developed and published the [Simplified guide for information access](#), which provides guidance in a simplified form on how to make an application under the GIPA Act, including outlining the five requirements to make a valid application.

The percentage of invalid applications remained stable across all sectors. Consistent with other years, the Government sector continued to have a high percentage of invalid applications at 14% (Figure 10).

Figure 10: Invalid applications as a percentage of all formal applications received, by sector, 2020/21



There was a decline in invalid applications in the University sector from 14% in 2019/20 to 10% in 2020/21. The Minister sector also recorded a decline with invalid applications, falling from 10% in 2019/20 to 5% in 2020/21.

The number of invalid applications received remained largely stable

The number of invalid applications remained stable for most agencies, however, some government agencies experienced a moderate decline in the percentage of applications that were invalid compared with 2019/20. This included:

- the Department of Communities and Justice, from 38% in 2019/20 to 27% in 2020/21
- the Department of Customer Service, from 22% in 2019/20 to 12% in 2020/21
- the Department of Planning, Industry and Environment, from 10% in 2019/20 to 3% in 2020/21.

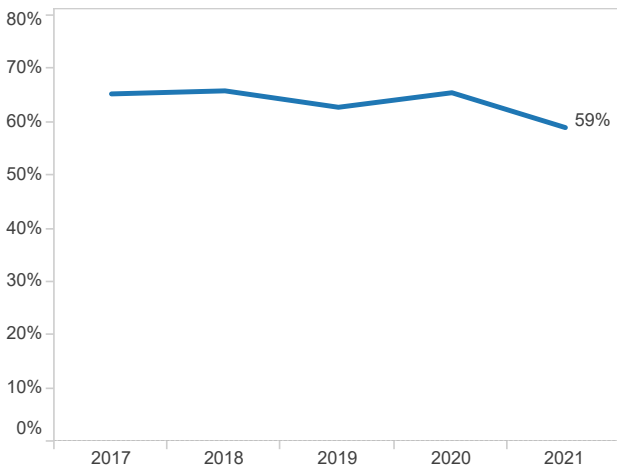
It should be noted that many invalid applications subsequently became valid.

Invalid applications that have subsequently become valid have declined this year

Agencies are required to assist applicants to make a valid access application, and compliance with this requirement of the GIPA Act is reflected in the percentage of applications that subsequently become valid.

In 2020/21, 59% of invalid applications subsequently became valid. This represents a moderate decline from 66% in 2019/20 (Figure 11). This decrease is a change from the relatively stable numbers of applications that subsequently became valid which had remained stable at over 60% across the previous four years.

Figure 11: Invalid applications that became valid as a percentage of all invalid applications, 2016/17 to 2020/21

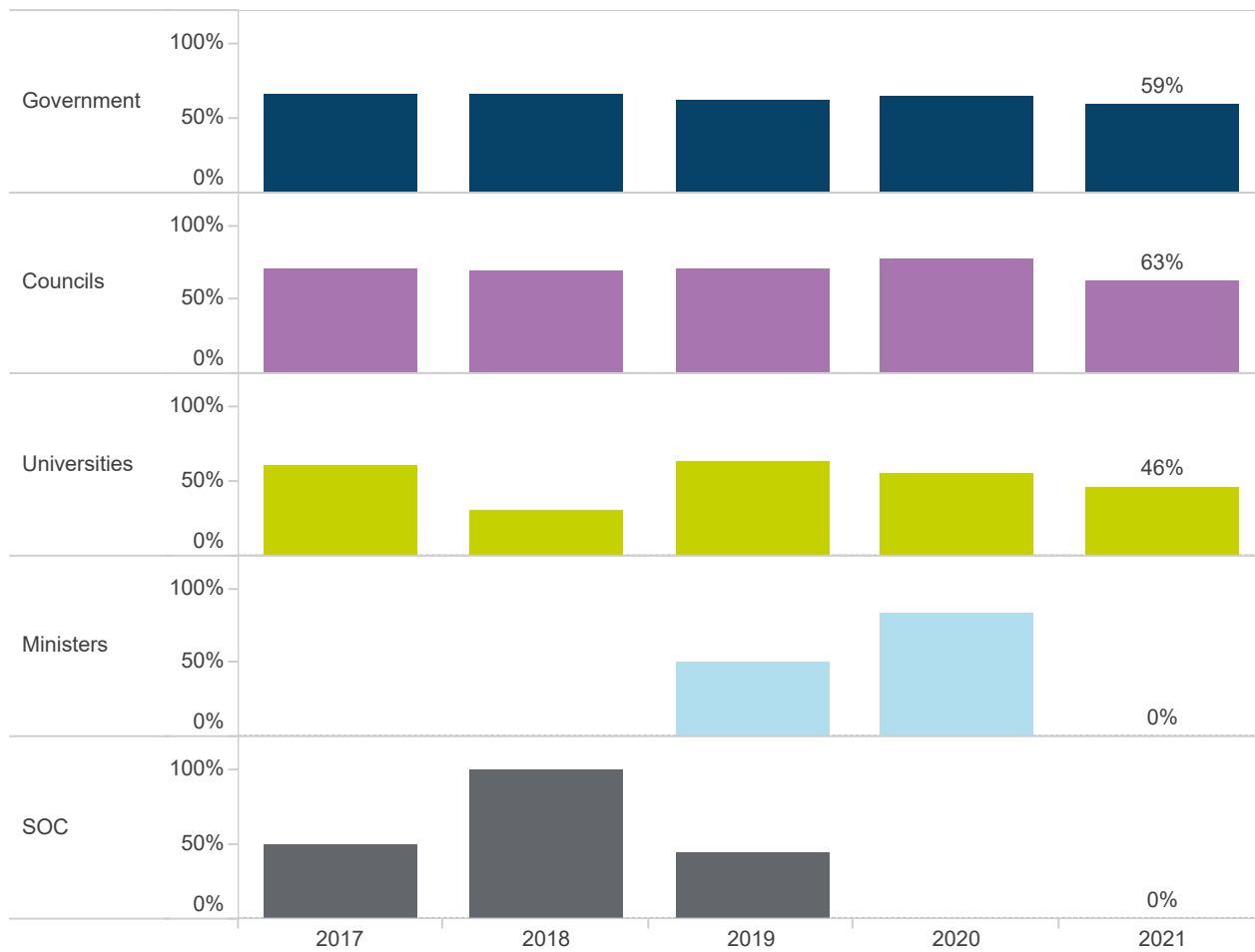


As Figure 12 shows, the percentage of invalid applications that subsequently became valid has:

- remained relatively stable in the Government sector, with a slight decline from 64% in 2019/20 to 59% in 2020/21
- significantly declined in the Council sector, from 78% in 2019/20 to 63% in 2020/21
- moderately declined in the University sector, from 56% in 2019/20 to 46% in 2020/21
- has been consistent in State-Owned Corporations sector over the past two years with 0% in both 2019/20 and 2020/21.

The overall decline this year in the rate of invalid applications that subsequently became valid will continue to be monitored to consider for inclusion in IPC’s forward work program.

Figure 12: Invalid applications that became valid as a percentage of all invalid applications, by sector, 2016/17 to 2020/21



Case Study: *Zonneville v Department of Customer Service; Zonneville v Secretary, Department of Education* [2021] NSWCATAD 35 – when is an access application ‘actually received’?

This case dealt with the issue of when an access application made under the GIPA Act is ‘actually received’ by an agency pursuant to section 41(3) of the GIPA Act.

This question arose because the applicant was subject to a restraint order made on 3 April 2020 under section 110 of the GIPA Act and made an application for information to each agency by emails on 2 April 2020, sent at 6:29pm and 10:50pm.

Both agencies decided that the applications were invalid by section 110(7) because a restraint order was in force against the applicant and that any application for government information made to an agency in contravention of the order is not a valid access application.

The Tribunal did not agree that the applications were invalid.

In determining the review application, the question before the Tribunal was whether the access applications sent by the applicant were invalid because they were received at a time when the applicant was prohibited from making an access application by the restraining orders and section 110(7). The Tribunal considered when the applications were made according to the words ‘actually received’ in section 41(3).

The Tribunal found that the words ‘actually received’ in section 41(3) should be given their ordinary meaning and be construed as meaning actual receipt. The Tribunal rejected the agencies’ contention that receipt required the agencies to be able to act upon the application, which would be on 3 April 2020. The Tribunal determined that the access applications were made and actually received by the agencies on 2 April 2020, not on 3 April 2020.

The Tribunal was not required to determine the question of when the restraint order against the applicant would take effect.

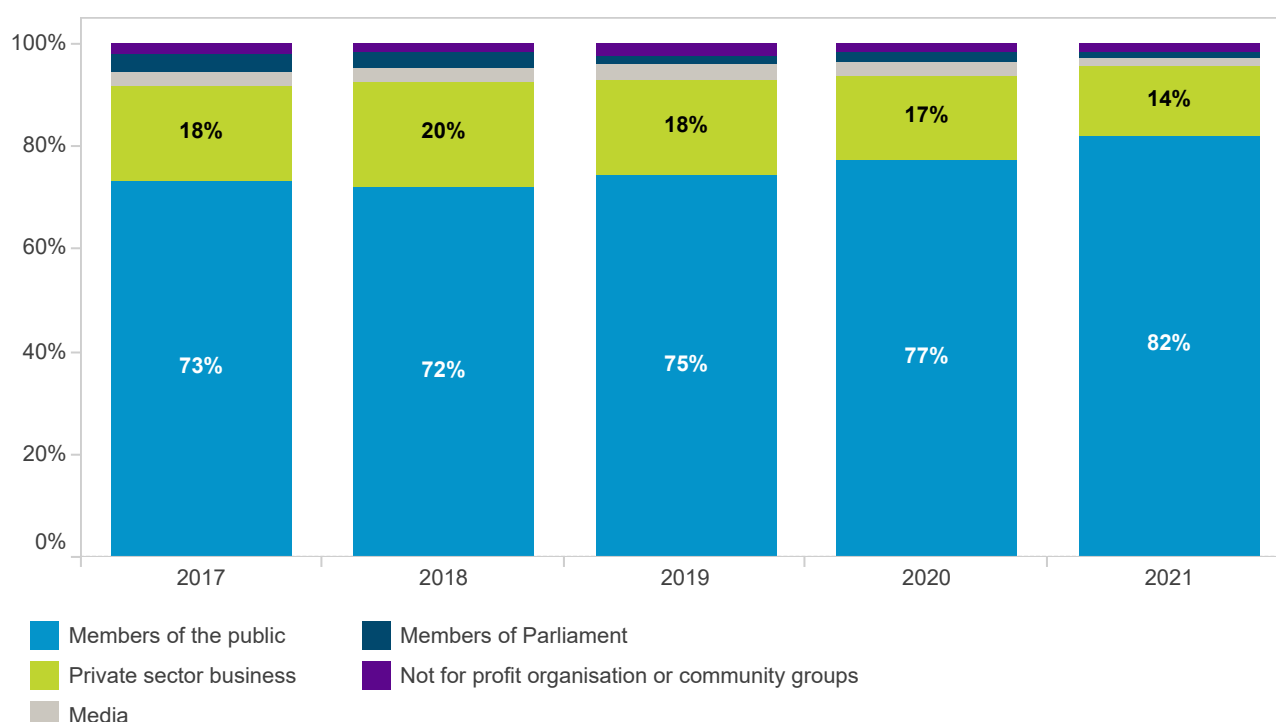
See [IPC Case Notes](#) for more information about this case.

Who applied?

Application outcomes for members of the public continue to increase to a record high

In 2020/21, 82% of all outcomes were related to applications from either a member of the public or their legal representative. This is an increase from the 77% reported in 2019/20. Within this group, the largest single applicant type (51%) was members of the public represented legally. In 2019/20, legally represented members of the public represented only 37% of the total outcomes of applications.

Figure 13: Trend in the proportion of outcomes, by type of applicant, 2016/17 to 2020/21



There was a significant increase in outcomes for members of the public and a moderate increase in outcomes for legally represented members of the public

In 2020/21 (as in all years), the greatest number of outcomes was for applications by members of the public, which significantly increased by 33%, compared with 2019/20 (from 13,690 in 2019/20 to 18,229 in 2020/21) (Figure 14). This should be seen in the overall context of a 30% increase in valid applications in 2020/21.

Outcomes for legally represented members of the public (41%) is consistent with the results recorded in 2019/20 (37%).

The number of outcomes for not-for-profit organisations or community groups also increased significantly by 49% (from 272 in 2019/20 to 404 in 2020/21), following a significant decline of 26% reported in 2019/20.

The number of outcomes for members of Parliament declined significantly by 39% (from 348 in 2019/20 to 213 in 2020/21), following an increase of 16% in 2019/20.

The number of outcomes for media declined significantly by 18% (from 468 in 2019/20 to 382 in 2020/21).

The number of outcomes for private sector businesses remained stable, with an increase of 4% (from 2,931 in 2019/20 to 3,054 in 2020/21).

'Who applied?' is reported and measured by the requirement for agencies to report on the number of outcomes for applications by type of applicant. As an application can have multiple outcomes, the total number of outcomes reported in this section will usually be higher than the number of applications reported. This section draws on data from Table A of Schedule 2 to the GIPA Regulation.

Figure 14: Number of outcomes by type of applicant, 2016/17 to 2020/21

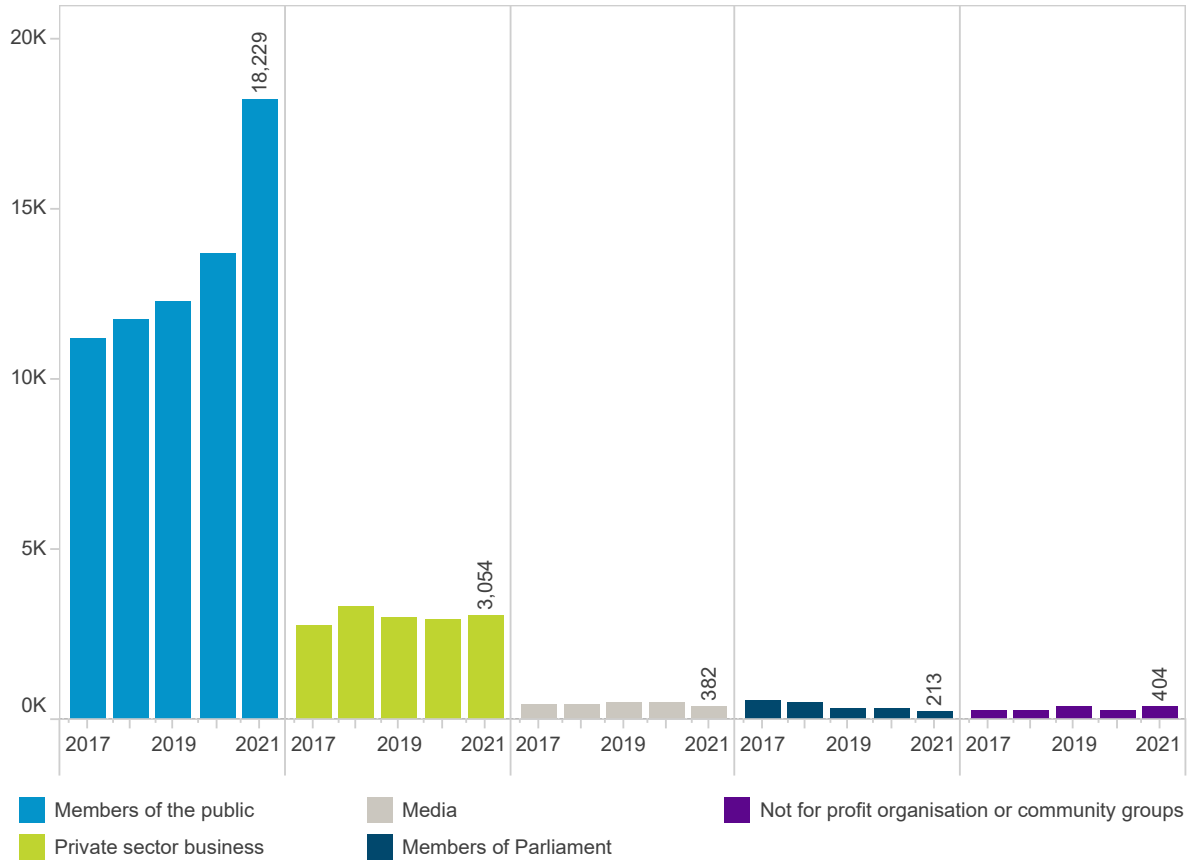
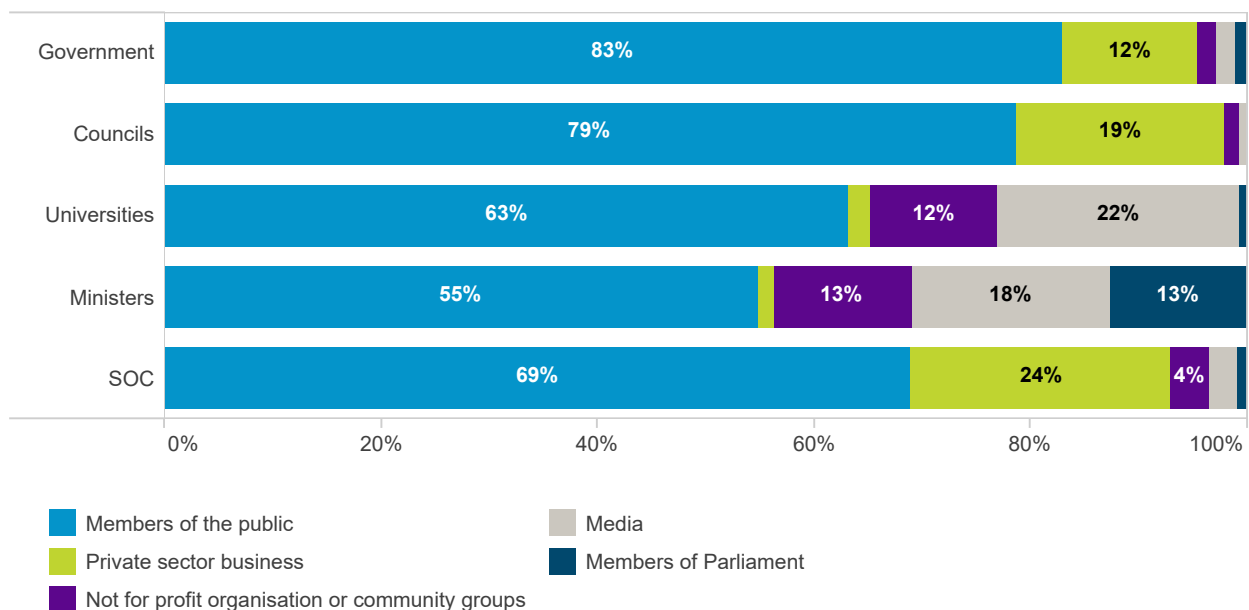


Figure 15: Percentage of outcomes by sector and type of applicant, 2020/21



Overall percentages remained largely stable for applicant type, with changes in applicant type across the Minister and State-Owned Corporations sectors

Similar to 2019/20, in 2020/21 the distribution of applicant types varied markedly across sectors (Figure 15). Percentages remained stable in the Government, Council and University sectors.

Notable changes by sector since 2019/20 were the:

- Minister sector – a significant increase for both the percentage of outcomes related to members of the public, from 38% to 55%, and private sector business, from 9% to 1% and a moderate decline for media from 28% to 18%
- State-Owned Corporations sector – a moderate increase in outcomes related to private sector business, from 16% to 24%.

Issue Highlight: Accessing a deceased person's information under the GIPA Act

In September 2021, the Information Commissioner released the fact sheet [Accessing a deceased person's information under the GIPA Act](#). The fact sheet is designed to assist citizens by explaining the process for seeking access to information and the factors that may be relevant to an application for a deceased person's records under the GIPA Act.

Under section 5 of the GIPA Act, there is a general presumption in favour of disclosing information, unless there is an overriding public interest against disclosure. When a person applies to access a deceased person's information, the following factors may be considered by an agency considering an application:

- their identity and relationship with any other person (including the deceased person)
- their motives for making the access application, and
- any other personal factors particular to them.

The fact sheet highlights that where a close family member is seeking access to information about a deceased relative (for example, to better understand their relative's death and to gain closure), this is likely to be a factor in favour of disclosure.

Under section 12 of the GIPA Act, there are some examples of public interest considerations in favour of disclosure, including where disclosure of the information could reasonably be expected to:

- promote open discussion of public affairs, enhance government accountability or contribute to positive and informed debate on issues of public importance
- inform the public about the operations of agencies and, in particular, their policies and practices for dealing with members of the public
- ensure effective oversight of the expenditure of public funds, and
- reveal or substantiate that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.

In addition to these examples in the GIPA Act, an agency may take into account any other relevant public interest considerations in favour of disclosure. These may include considerations unique to the circumstances of the application, such as to enable the exercise of a further legal right, or broader public interest considerations, such as the adequacy of aged care.

The fact sheet also outlines considerations against the disclosure of a deceased person's information where there is an overriding public interest against disclosure of government information if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure. Under section 15(b), when making a determination about whether there is an overriding public interest against disclosure of information, agencies must exercise their functions so as to promote the object of the GIPA Act and must have regard to any relevant guidelines issued by the Information Commissioner.

What information was asked for?

There has been a 141% increase in outcomes for applications that sought partly personal information and partly other information over the three years since 2018/19; all other outcomes increased

As Figure 16 shows, in 2020/21:

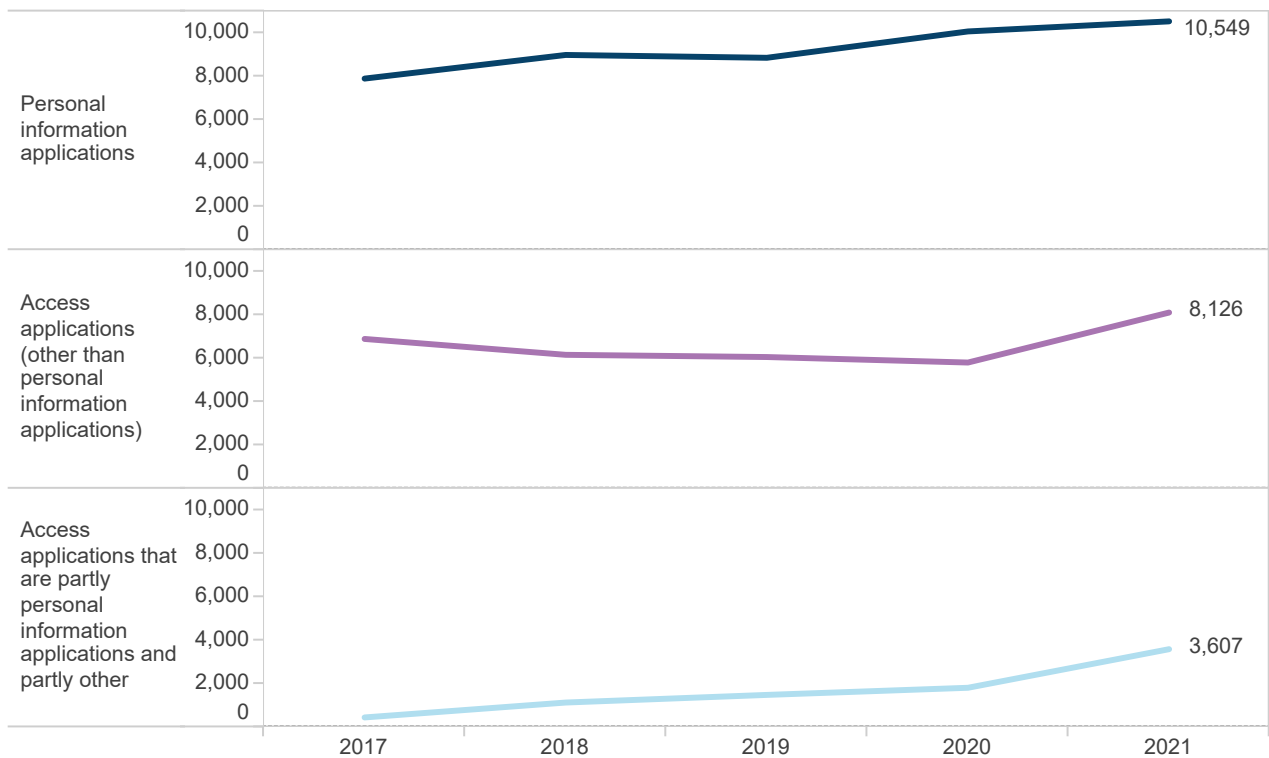
- outcomes that were partly personal information and partly other information increased significantly by 97% (from 1,828 outcomes in 2019/20 to 3,607 in 2020/21). This continues the trend observed in previous years, resulting in a 141% increase between 2018/19 and 2020/21

- ‘other than personal information’ outcomes increased significantly by 40% (5,812 in 2019/20, compared with 8,126 outcomes in 2020/21)
- personal information application outcomes increased by 5% (10,085 in 2019/20, compared with 10,549 outcomes in 2020/21).

The type of information sought varied across sectors

The percentage of outcomes changed from previous years, with a moderate decrease for outcomes relating to personal information and a moderate increase for applications for both types of information.

Figure 16: Number of outcomes by type of information applied for, 2016/17 to 2020/21



‘What information was asked for?’ is reported and measured by the requirement for agencies to report on the number of outcomes for applications made for personal information, other than personal information, or a combination of both types of information from Table B, Schedule 2 to the GIPA Regulation.

In 2020/21:

- 47% of outcomes related to applications for personal information, compared with 57% in 2019/20
- 37% of outcomes related to applications for 'other than personal information', compared with 33% in 2019/20
- 16% of outcomes related to applications for both types of information, compared with 10% in 2019/20 (Figure 17).

All sectors experienced different patterns of outcomes by type of information applied for in 2020/21, however these patterns remained consistent with those reported in 2019/20, except the Minister and State-Owned Corporations sectors which experienced significant changes in the outcomes by type of information applied for. Both of these sectors receive relatively small numbers of applications and are subject to more variability than other sectors (Figure 18).

In 2020/21:

- In the Minister sector, 83% of outcomes related to applications for 'other than personal information', a moderate decline from both 2019/20 and 2018/19 (94% and 100% respectively) and a significant increase for outcomes related to applications for 'partly personal information and partly other information' from 1% in 2019/20 to 17% in 2020/21
- In the State-Owned Corporations sector, 83% of outcomes for 'other than personal information' compared with 94% in 2019/20 and outcomes related to applications for 'partly personal information and partly other information' moderately increased from 2% in 2019/20 to 12% in 2020/21

- In the University sector, 32% of outcomes related to applications for personal information, compared with 22% in 2019/20. A corresponding decline was reported in outcomes related to applications for 'other than personal information', from 57% in 2019/20 to 51% in 2020/21, and for outcomes related to applications that are 'partly personal information and partly other information' from 21% in 2019/20 to 17% in 2020/21
- In the Government sector, 58% of outcomes related to applications for personal information, a moderate decline from 2019/20 and 2018/19 (69% and 65% respectively) and outcomes related to applications for 'partly personal information and partly other information' increasing from 10% in 2019/20 to 18% in 2020/21
- In the Council sector, 86% of outcomes related to applications for 'other than personal information', an increase from the prior two years 2019/20 and 2018/19 (81% respectively).

Figure 17: Outcomes by type of information applied for, 2020/21

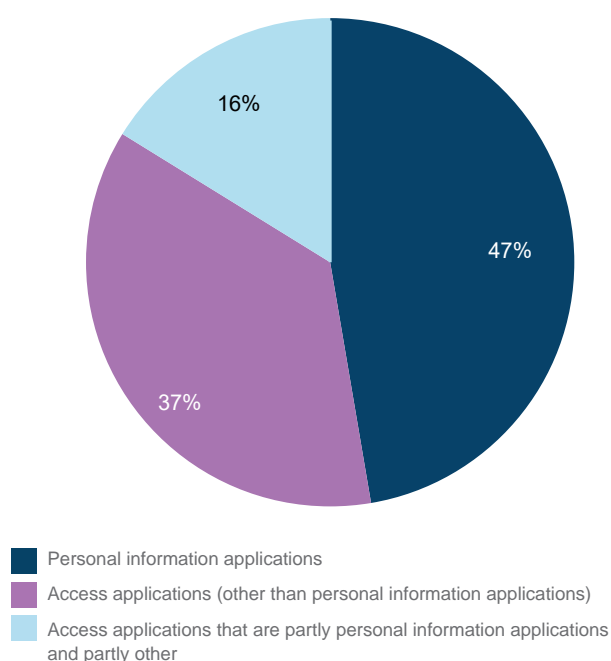
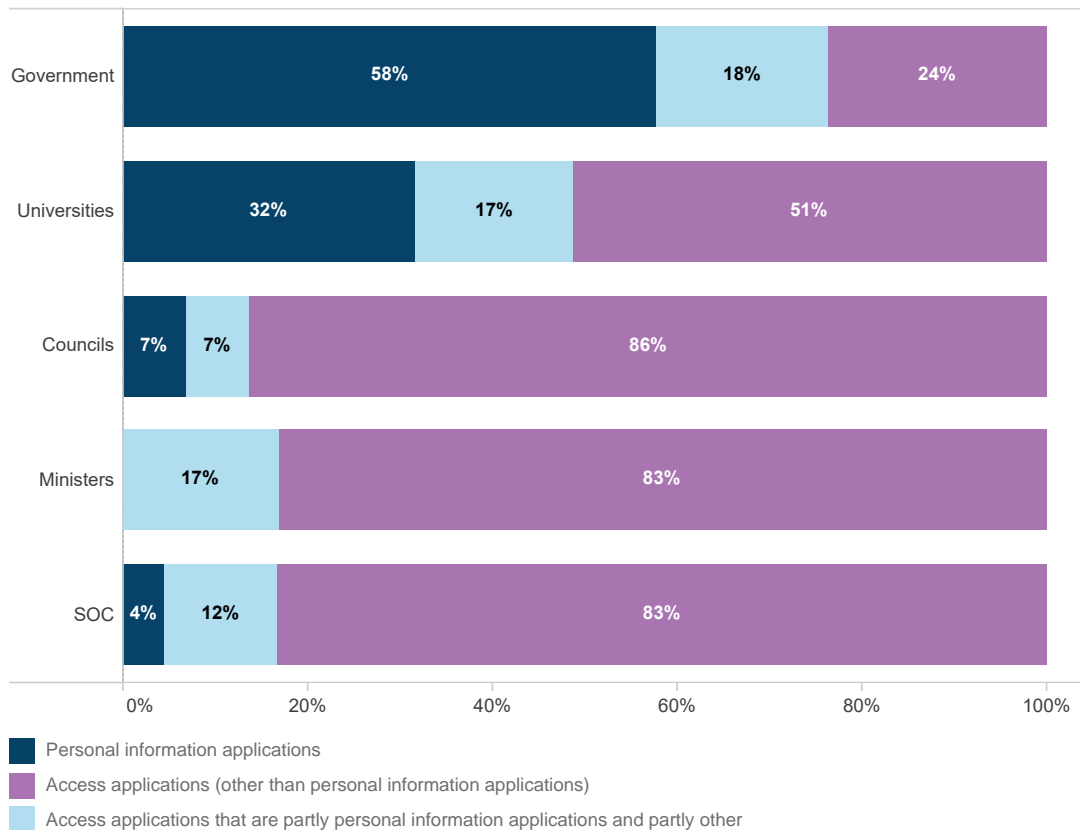


Figure 18: Percentage of all outcomes, by type of information applied for, 2020/21



Case Study: Redfern Legal Centre v Commissioner of Police [2021] NSWCATAD 288

This case involved an application for information about strip searches conducted by the NSW Police Force (NSWPF) in the 2018/19 and 2019/20 financial years.

In 2019, the University of New South Wales (UNSW) made an access application for information similar, but not identical to, the information sought by the access application. The NSWPF responded to that application by running a bespoke Structured Query Language (SQL) program over data held by the NSWPF.

The Respondent decided that information in these proceedings was not held under section 58(1)(b) on the basis that it would be required to create a new record under section 75 to bring the information into existence. The Respondent provided evidence that, in order to respond to the access application, it would need to write a new code in SQL. It was not possible to simply run the SQL program created in 2019 for the UNSW Application to obtain the information.

The Tribunal constructed “government information” narrowly and held that government information is limited to information which exists at the time of the access application. The Tribunal therefore found that, at the time of the access application, the NSWPF did not hold a record which contained the information sought by the access application, although it was possible to bring such a record into existence by the creation and application of a bespoke computer program (an SQL code). Accordingly, the Tribunal held that the information was not “government information”.

Government information is now largely held in digital form. Additionally, agencies are utilising new technologies and digital platforms to carry out their business, exercise decision-making functions and/or in providing services to the public. Most of the information held by government is held in digital form and therefore requires some ‘treatment’ to bring it into a readable or accessible form. Consequently, access to government information stored in electronic form often requires a level of manipulation to produce usable information.

The Information Commissioner encourages agencies to consider whether they can provide information responsive to access applications by utilising section 75 of the GIPA Act to create a new record to bring digital information into existence.

See [IPC Case Notes](#) for more information about this case.

Did applicants get what they asked for?

Overall 'release rates' trending upwards

In 2020/21, the overall release rate was 73%, representing the combined access granted in full and in part outcomes (Figure 19). Whilst similar to the combined release rate of 69% in 2019/20 and 70% in 2018/19, this incremental increase is pleasing in the context of a significant increase in applications. The increase also demonstrates steady progress from the stagnation in release rates at 69% previously reported.

Consistent with 2019/20, release rates for 2020/21 were stable across all sectors except for a moderate increase in the Minister sector.

At the sector level (Figure 20), in 2020/21, the State-Owned Corporations sector had the highest overall release rate of 84%, similar to the 82% reported in 2019/20.

For the Council sector, 79% of outcomes granted access in full and in part in 2020/21, similar to the previous two years with 77% in 2019/20 and 78% in 2018/19.

For the Government sector, 71% of outcomes resulted in access being granted in full and in part in 2020/21. This is consistent with the 68% reported for both 2019/20 and 2018/19.

For the University sector, 65% of outcomes granted access in full and in part in 2020/21, compared with 61% in 2019/20.

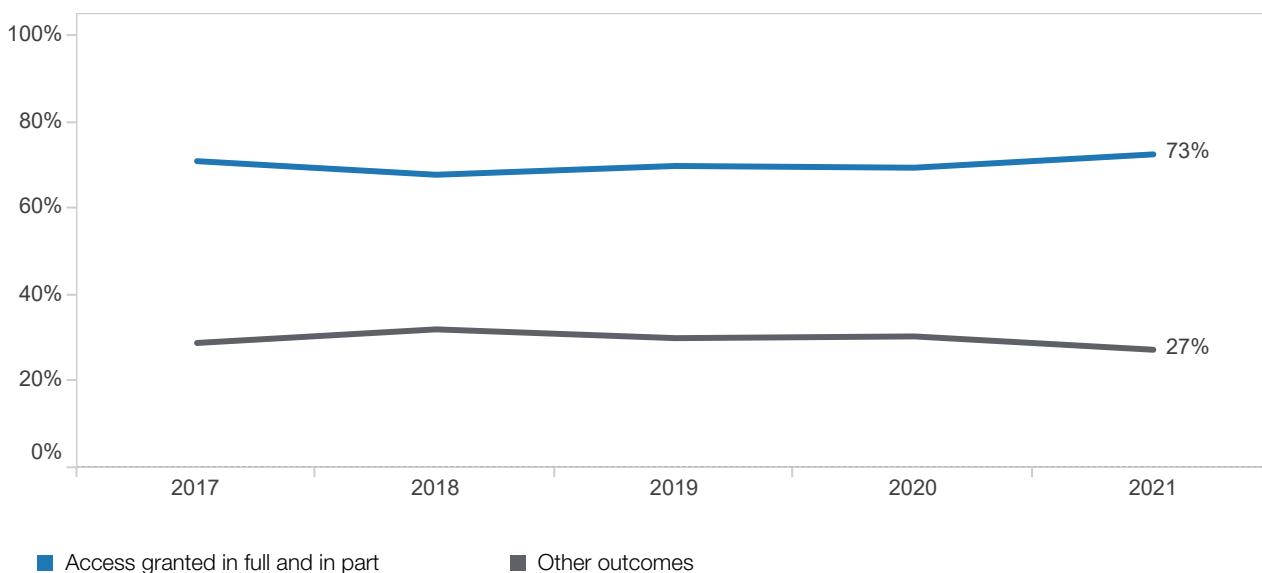
For the Minister sector, 52% of outcomes resulted in access being granted in full and in part in 2020/21, a moderate increase from 46% in 2019/20. This positive outcome should also be considered in the context of information holdings and the overall low numbers of applications (57) received by the Minister sector.

Applicants were more likely to be granted access in part than access in full

In 2020/21, 30% of all outcomes granted access in full (Figure 21). This rate continues to remain stable since 2014/15, with an average 29% of all outcomes granted access in full across the seven years to 2020/21.

Access granted in part outcomes were similar to previous years at 43%. For each year since 2012/13, there have been more outcomes granting access in part than granting access in full.

Figure 19: Overall release rate across all sectors, 2016/17 to 2020/21



'Did applicants get what they asked for?' is reported and measured by the requirement for agencies to report on the outcomes of applications for information by the type of applications (listed in Table A of Schedule 2 to the GIPA Regulation) and the type of information that is applied for (listed in Table B of Schedule 2 to the GIPA Regulation). The term 'other outcomes' refers to the following outcomes – access refused in full, information not held, information already available, refuse to deal with application, refuse to confirm or deny whether information is held, and application withdrawn.

Figure 20: Overall release (access granted in full and in part) rate, by sector, 2016/17 to 2020/21

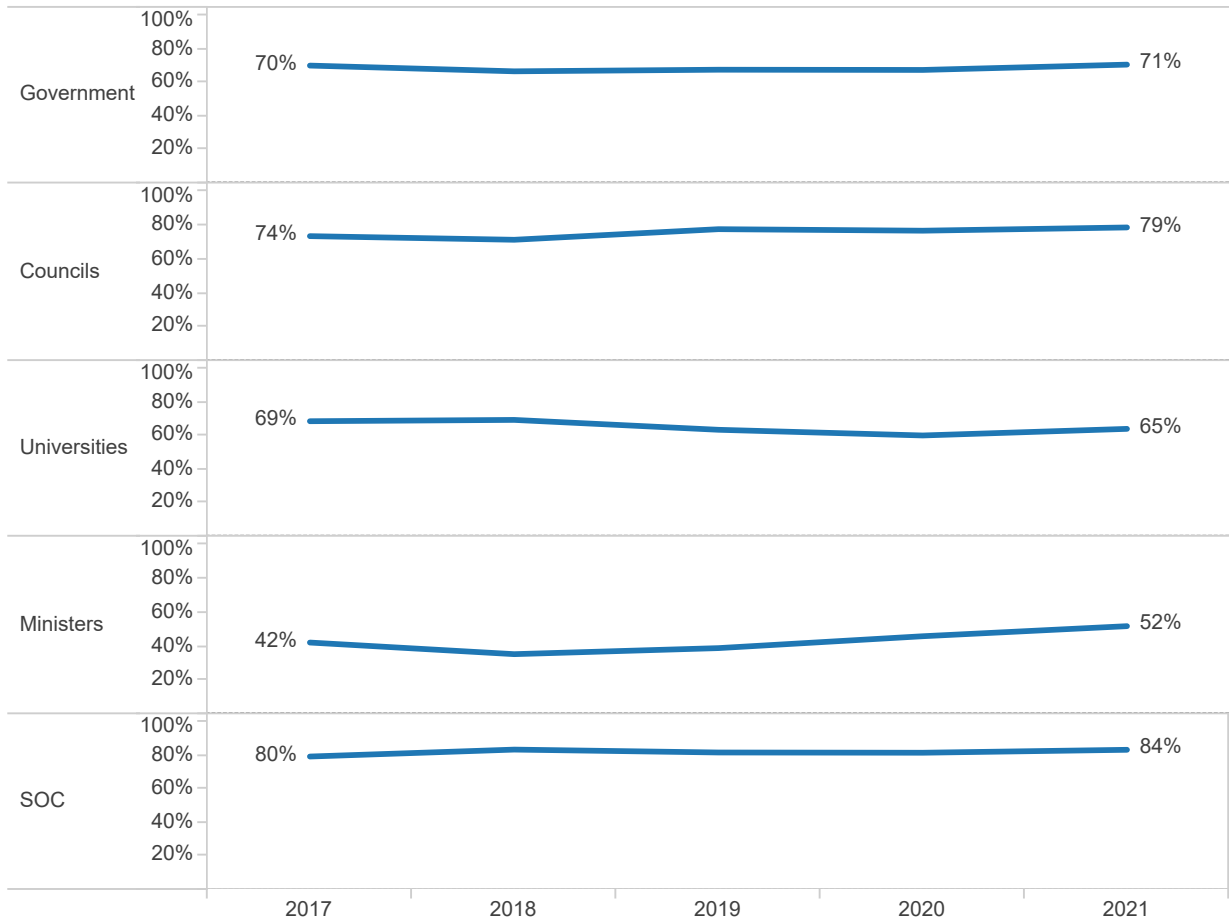


Figure 21: Release outcomes across all sectors, 2016/17 to 2020/21

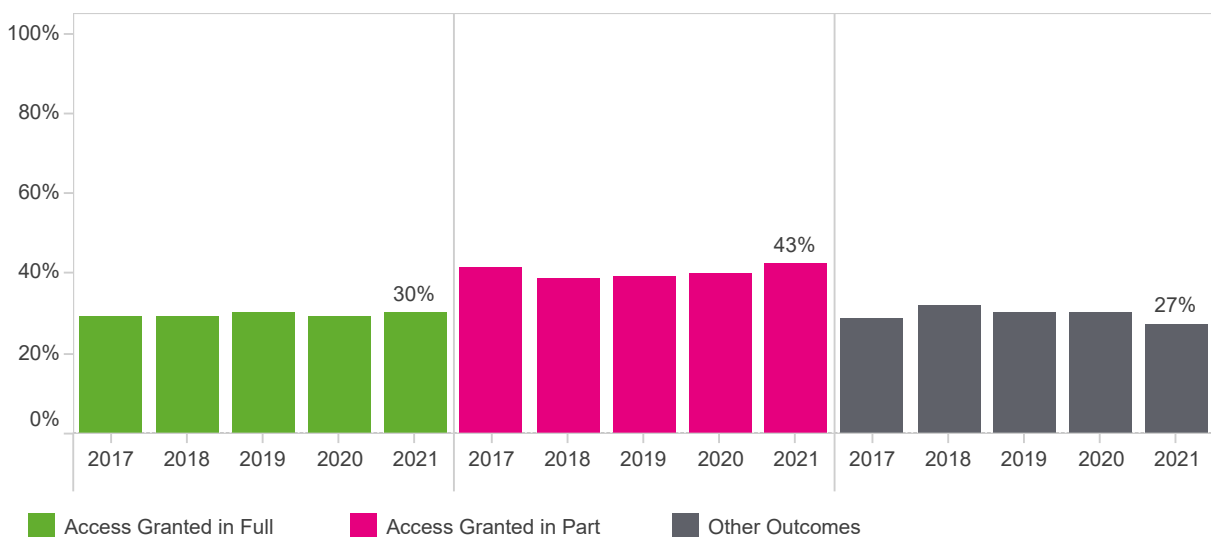
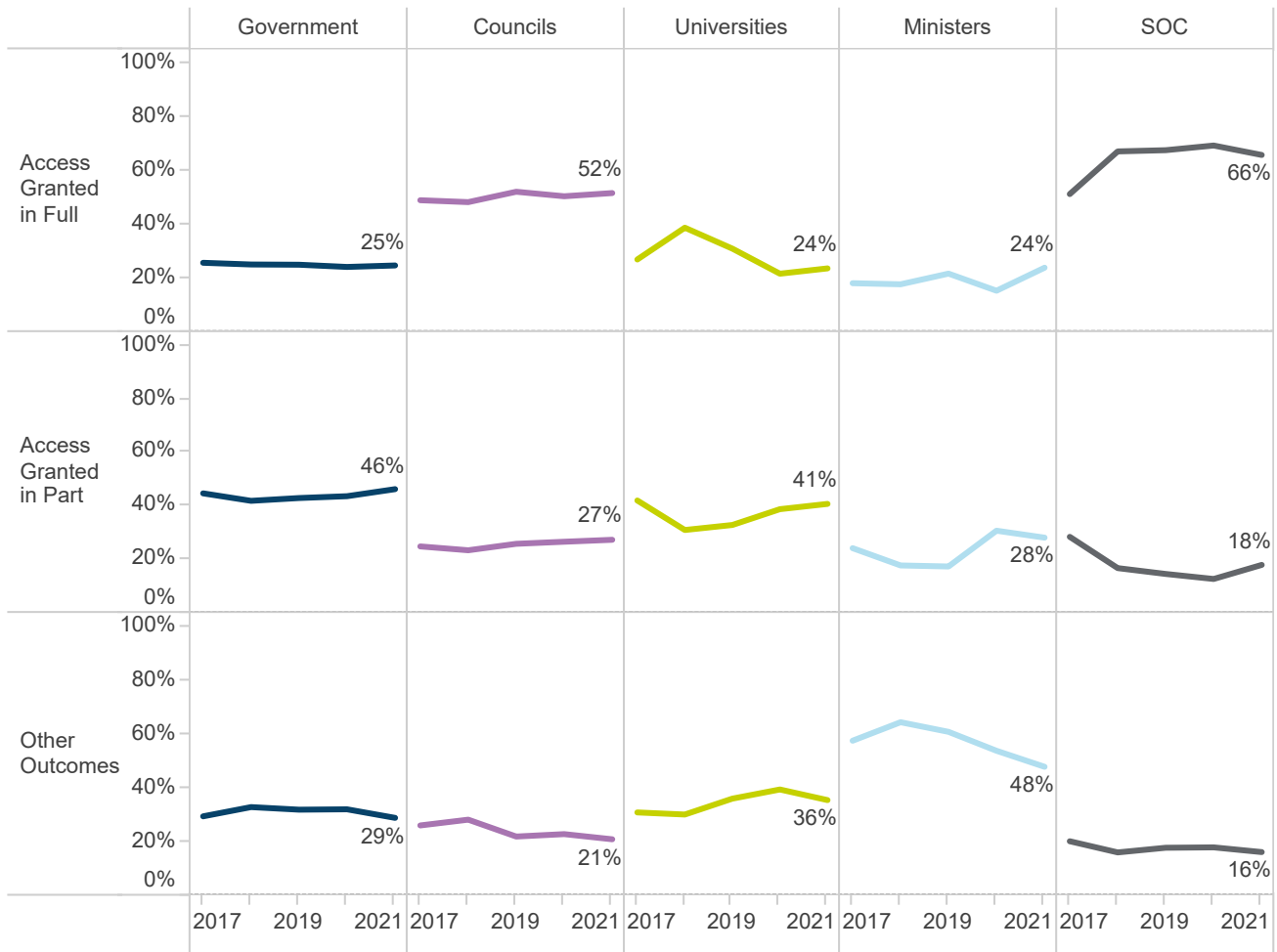


Figure 22: Release outcomes, by sector, 2016/17 to 2020/21



The overall release rate across most application types was stable, with a moderate increase for partly personal and partly other information

The overall release rates remained stable for both application types: personal information and ‘other than personal information’.

The overall release rate for ‘other than personal information’ was stable at 71% in 2020/21, compared with 69% in 2019/20 and 71% in 2018/19. The overall release rate for applications for personal information remained stable at 74% in 2020/21, compared with 71% in 2019/20 and 70% in 2018/19.

The overall release rate for applications that sought partly personal and partly other information moderately increased to 71% in 2020/21, compared with 63% in 2019/20 (Figure 23).

Release rates by applicant type remain stable

The lowest overall release rate (55%) was for applications made by the media, which is consistent with 56% reported in 2019/20. This is a change from 2019/20, where applications made by members of the Parliament had the lowest release rate of 53% (Figure 24).

The highest release rate in 2020/21 was for applications made by private sector business (76%), consistent with results for 2019/20 (75%) and 2018/19 (76%).

The release rate for members of the public was 72%, consistent with 70% in 2019/20 and 70% in 2018/19.

Consistent with overall release rates, the composition of outcomes remained relatively stable in 2020/21:

- For members of the public, 29% of outcomes granted access in full and 43% granted access in part. This is consistent with outcomes reported in 2019/20 and 2018/19

- For private sector business, 35% of outcomes granted access in full, and 41% granted access in part. This is consistent with outcomes reported in 2019/20 and 2018/19
- For not-for-profit organisations or community groups, 33% of outcomes granted access in full, and 36% granted access in part, consistent with results for 2019/20
- For members of Parliament, 30% of outcomes granted access in full, and 27% of outcomes granted access in part, consistent with results for 2019/20
- For media, 30% of outcomes granted access in full, and 25% granted in part, consistent with outcomes reported in 2019/20.

Figure 23: Release outcomes by application type, 2016/17 to 2020/21

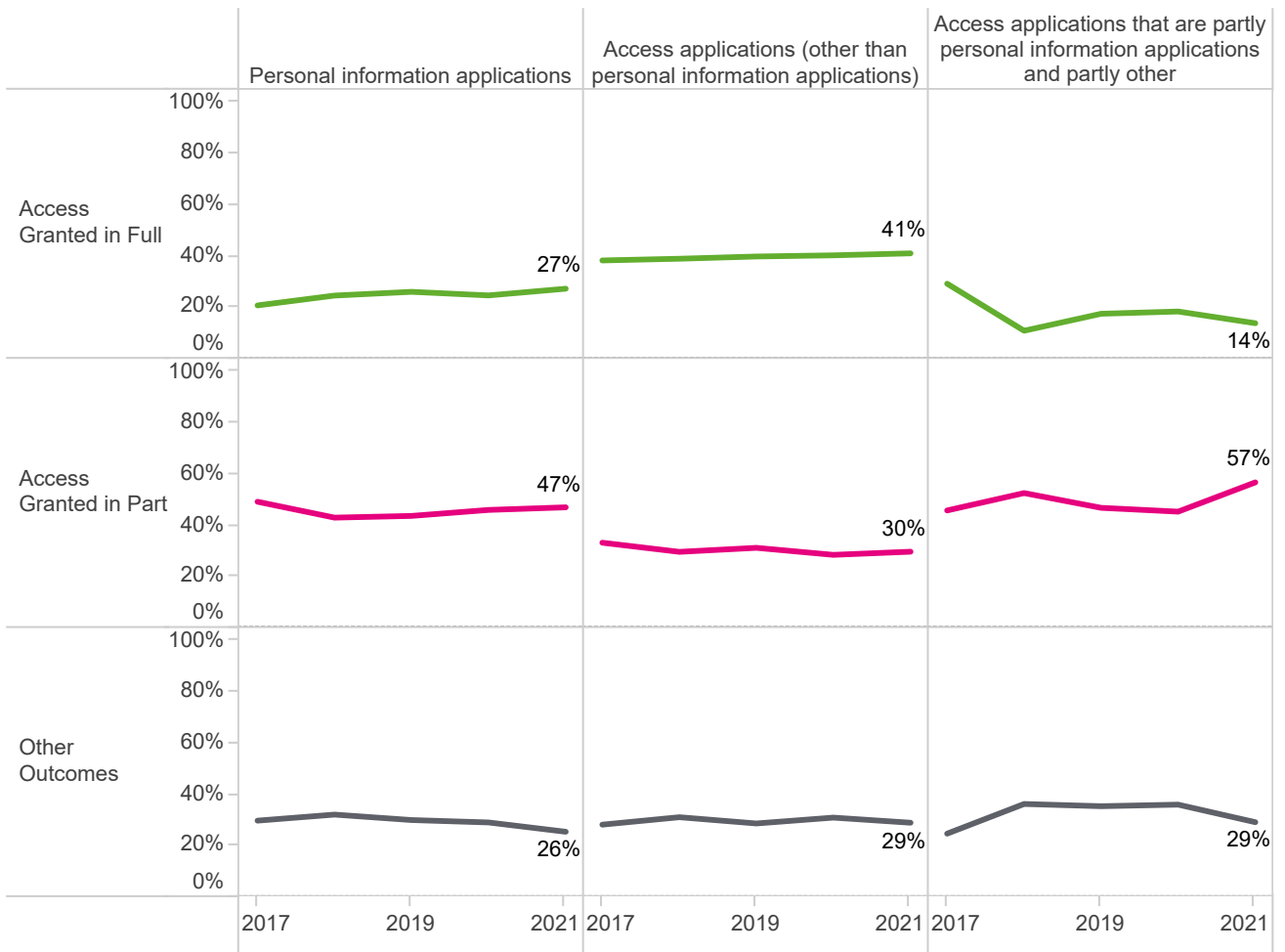
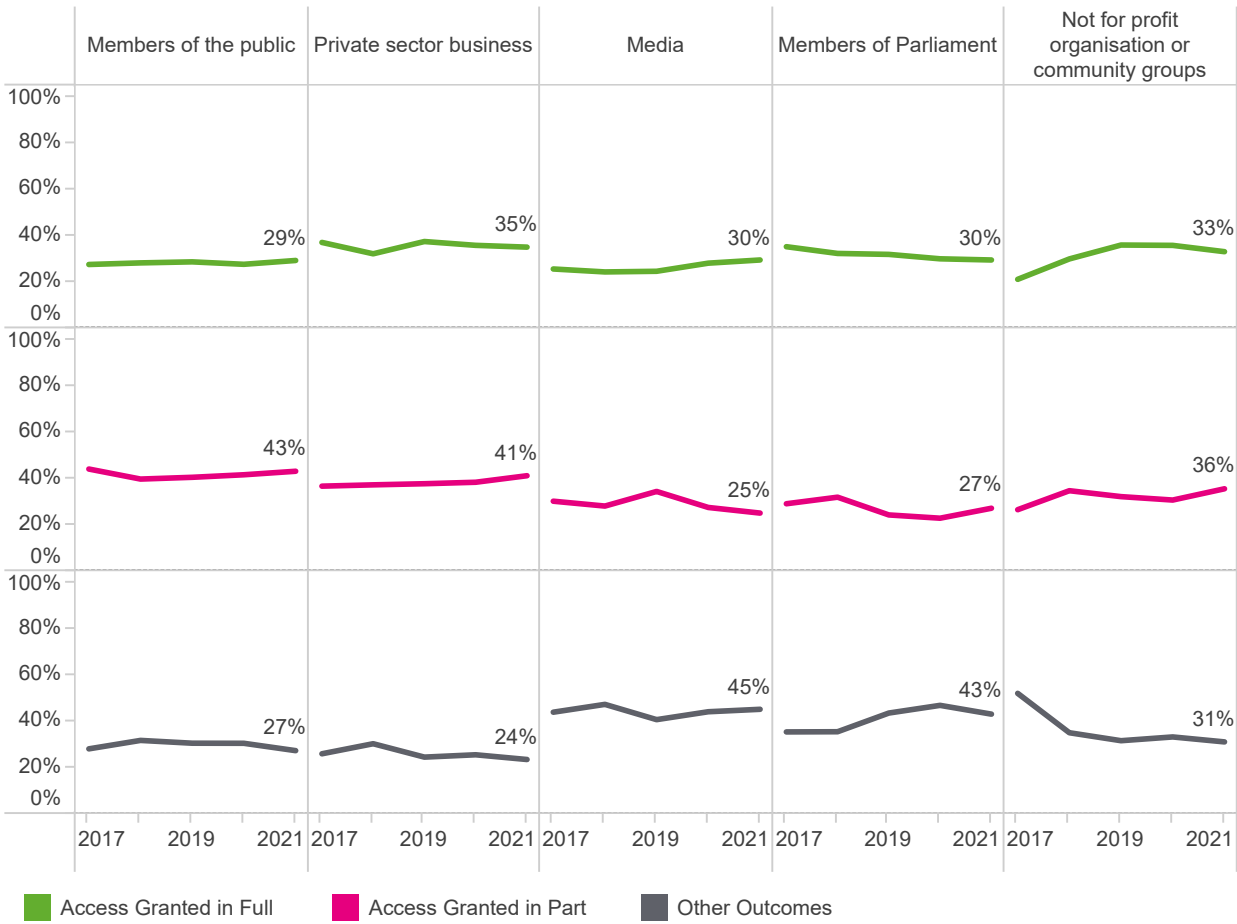


Figure 24: Outcomes by applicant type, 2016/17 to 2020/21



How quickly were decisions made?

Overall timeliness of decisions has remained relatively stable and deemed refusals continued to decline

In 2020/21, 92% of decisions by agencies were made within the statutory time frame (Figure 25). This result is consistent with timeliness in 2019/20 (91%). For the second consecutive year, application rates increased and timeliness incrementally improved. The increase in application rates was moderate at 9% in 2019/20 and significant at 30% in 2020/21.

Accordingly, this incremental improvement in timeliness in the context of an unprecedented 30% increase is commendable.

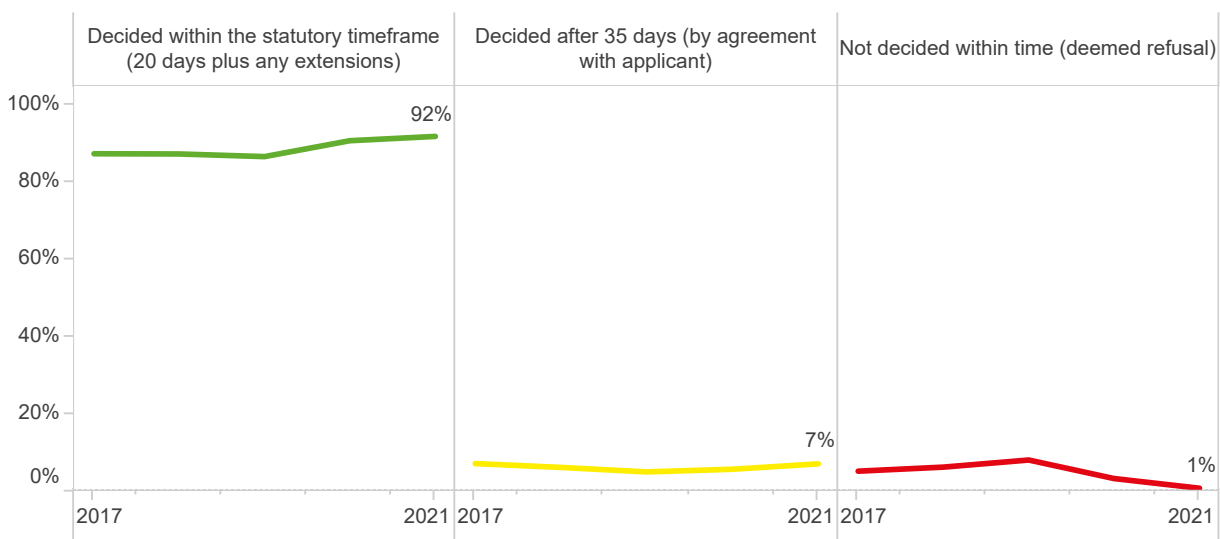
The rate of deemed refusals in 2020/21 was 1%, compared with the 3% reported in 2019/20. This continued decline is of note, given the steady increase in deemed refusals previously reported between 2015/16 and 2018/19 and in the context of the 30% increase in valid applications received in 2020/21.

Timeliness is stable across most sectors

In 2020/21 (Figure 26) the:

- Government sector decided 92% of applications within the statutory time frame, consistent with 91% reported in 2019/20
- Council sector decided 94% of applications within the statutory time frame, consistent with 94% reported in 2019/20, with this sector consistently deciding 90% or more applications within the time frame since 2010/11
- University sector decided 69% of applications within the statutory time frame, a slight decline in timeliness from the 74% reported in 2019/20
- Minister sector decided 93% of applications within the statutory time frame, consistent with 93% reported in 2019/20
- The State-Owned Corporations sector decided 97% of applications within the statutory time frame, a significant increase from the 59% reported in the previous year. This result may be in part due to the number of applications received by this sector being stable this year (4% increase in 2020/21) after a 19% increase in applications received by this sector reported in 2019/20.

Figure 25: Applications that were decided within the statutory time frame as a percentage of all applications decided, 2016/17 to 2020/21



After a sustained period of declining timeliness between 2015/16 (92%) and 2018/19 (73%), the NSW Police Force has again reported an increase in timeliness from 91% in 2019/20 to 98% in 2020/21. It is noted that this pleasing improvement has occurred within the context of a 34% increase in the number of valid applications received by the agency.

Timeliness was maintained at high levels for the Department of Communities and Justice, Department of Education, SafeWork NSW, Transport for NSW and NSW State Emergency Service.

Timeliness also improved for:

- Department of Regional NSW, which reported a significant increase in timeliness from 77% in 2019/20 to 95% in 2020/21
- Ministry of Health, which reported a moderate increase in timeliness from 85% in 2019/20 to 94% in 2020/21
- Department of Customer Service, which reported a significant increase in timeliness from 71% in 2019/20 to 94% in 2020/21.

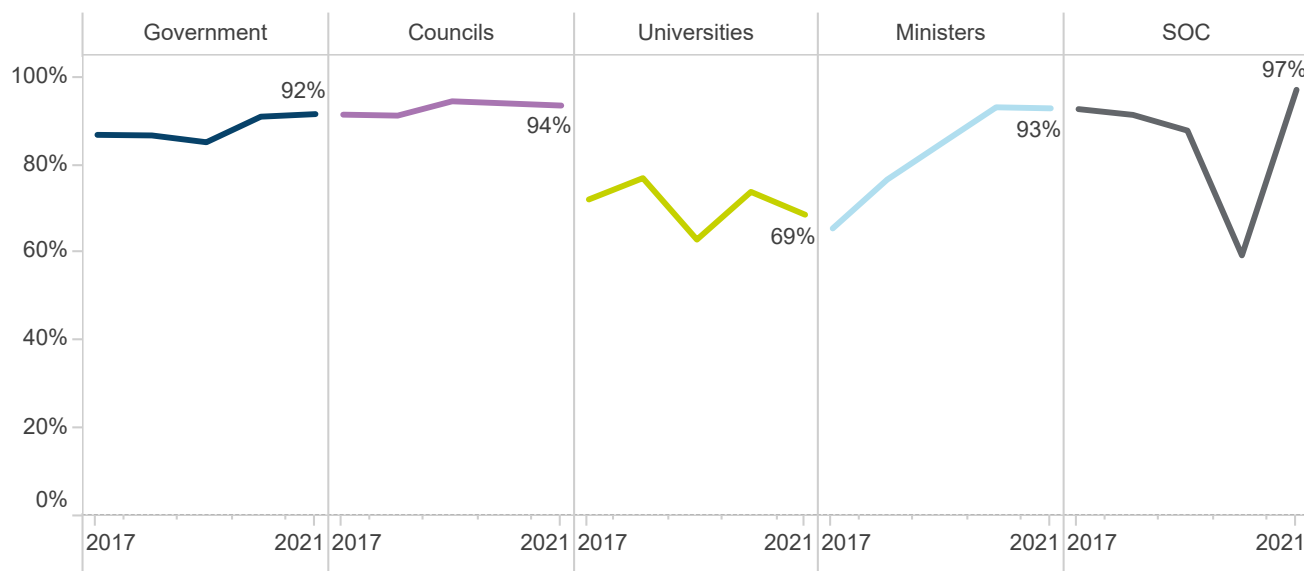
Of the principal departments, two departments reported a moderate decline in timeliness. In 2020/21:

- Department of Premier and Cabinet reported 73% of applications were decided within the statutory time frame, compared with 85% in 2019/20
- NSW Treasury reported 85% of applications were decided within the statutory time frame, compared with 96% in 2019/20. This decline contrasts with the improvement in timeliness in 2019/20, from 89% in 2018/19.

Overall, the improvements in timeliness may also be reflective of the continued improved processes for dealing with applications. In particular, the implementation of electronic lodgement and automated management systems by some larger agencies may have resulted in the efficiencies envisaged by investment in technology. Additionally, the review of business processes prior to deployment of technology may also facilitate process improvement.

It is important that agencies apply the data available to them, together with regulatory guidance and the good practices demonstrated by other agencies, to elevate compliance with statutory time frames. Better practice will ensure that agencies are able to meet statutory time frames when faced with increasing volumes and complexity of applications.

Figure 26: Applications that were decided within the statutory time frame, as a percentage of all applications decided, by sector, 2016/17 to 2020/21



'How quickly were decisions made?' is reported and measured by the requirement for agencies to report on how quickly they dealt with access applications that they received. The data used in this section draws on Table F, Schedule 2 to the GIPA Regulation.

Issue Highlight: Guideline 10 – Obligations of Ministers and Ministerial officers under the GIPA Act

In September 2021, the Information Commissioner released [Guideline 10 – Obligations of Ministers and Ministerial Officers under the Government Information \(Public Access\) Act 2009](#).

The GIPA Act defines ‘agency’ to include a Minister and a person employed by a Minister under Part 2 of the *Members of Parliament Staff Act 2013*. Under the GIPA Act, Ministers’ offices receive and deal with a number of formal access applications requesting access to government information held by the office. The Information Commissioner identified that guidance to Ministers and Ministerial officers was required to assist them in the exercise of their functions under the GIPA Act. Guideline 10 now provides a resource to assist and guide Ministers and their officers when exercising functions under the GIPA Act.

Guideline 10 supplements the provisions of the GIPA Act and assists Ministers and their officers in satisfying their obligations to receive and process formal access applications effectively and efficiently under the GIPA Act. The Guideline focuses on the key areas applicable to public interest determinations necessary to process an access application and provides relevant links to other resources and case law.

As a Guideline made under section 15(b) of the GIPA Act, Ministers and their officers are to have regard to the Guideline. In summary, the Guideline addresses:

- good governance and principles
- what constitutes an access application
- how to determine if an access application is valid
- the required period for deciding an access application
- the types of reviewable decisions
- searches for information
- unreasonable and substantial diversion of resources
- fees and charges
- applying the public interest test
- rights of review.

In developing Guideline 10, the IPC consulted with the Department of Premier and Cabinet.

How was the public interest test applied?

This section examines:

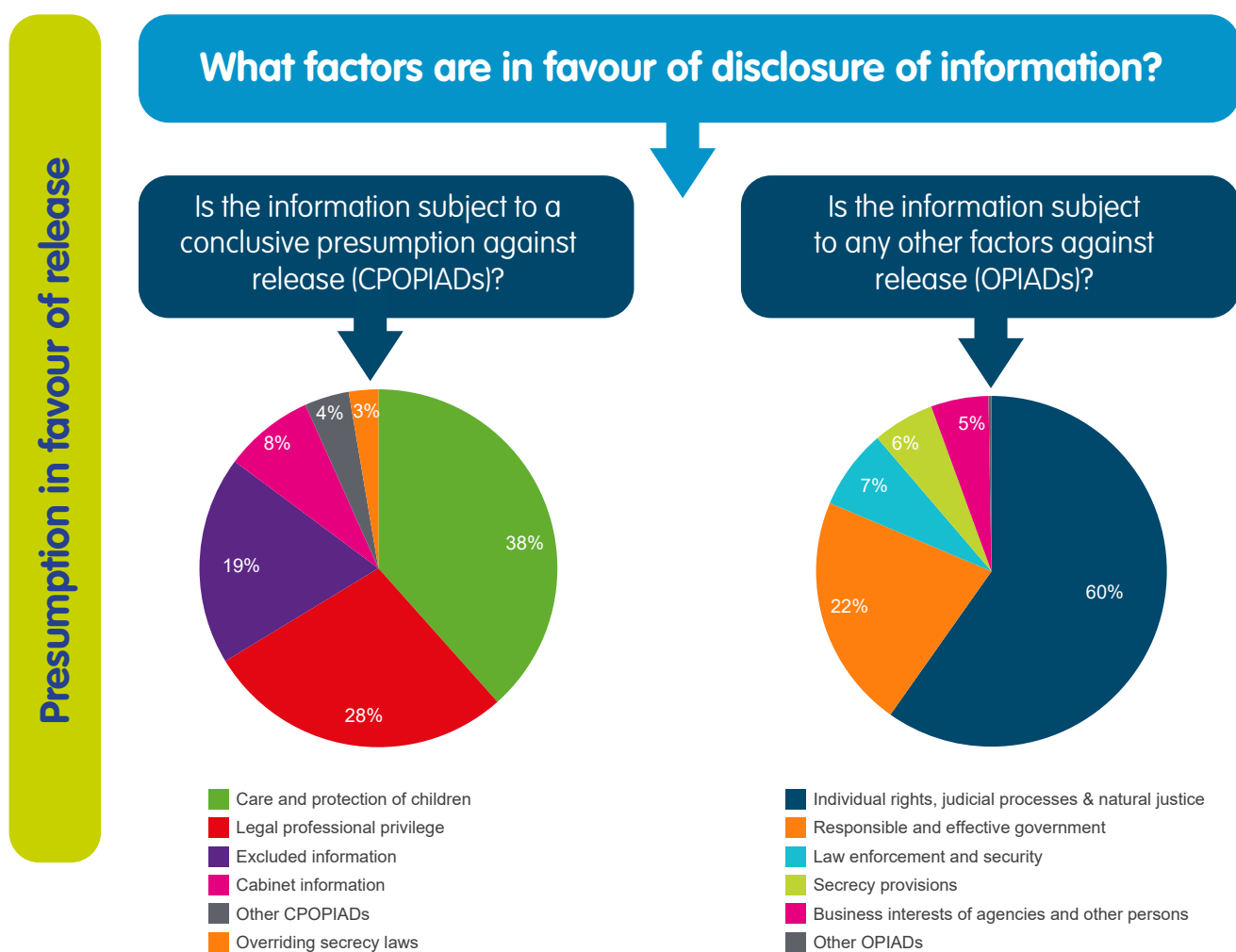
- the number of applications that were refused because of a conclusive presumption of overriding public interest against disclosure (CPOPIAD)
- which categories of CPOPIADs were applied
- the use of categories of considerations for which there is an overriding public interest against disclosure of information (OPIAD).

More than one CPOPIAD and OPIAD may apply in respect of an application. Each consideration is recorded only once per application.

Only a small number of applications were refused because of a CPOPIAD

In 2020/21, 1,337 applications (or 4% of total applications received) were refused wholly or partly because of a CPOPIAD. This is consistent with previous years.

Figure 27: A snapshot of the use of CPOPIADs and OPIADs 2020/21



'How was the public interest test applied?' is reported in Tables D and E of Schedule 2 to the GIPA Regulation.

Care and protection of children was the most applied CPOPIAD

In 2020/21, the care and protection of children was the most applied CPOPIAD across all sectors (Figure 28). This differs from previous years where legal professional privilege was the most applied CPOPIAD. The care and protection of children CPOPIAD was applied 38% of all the times that CPOPIADs were applied. This is a moderate increase from 26% in 2019/20.

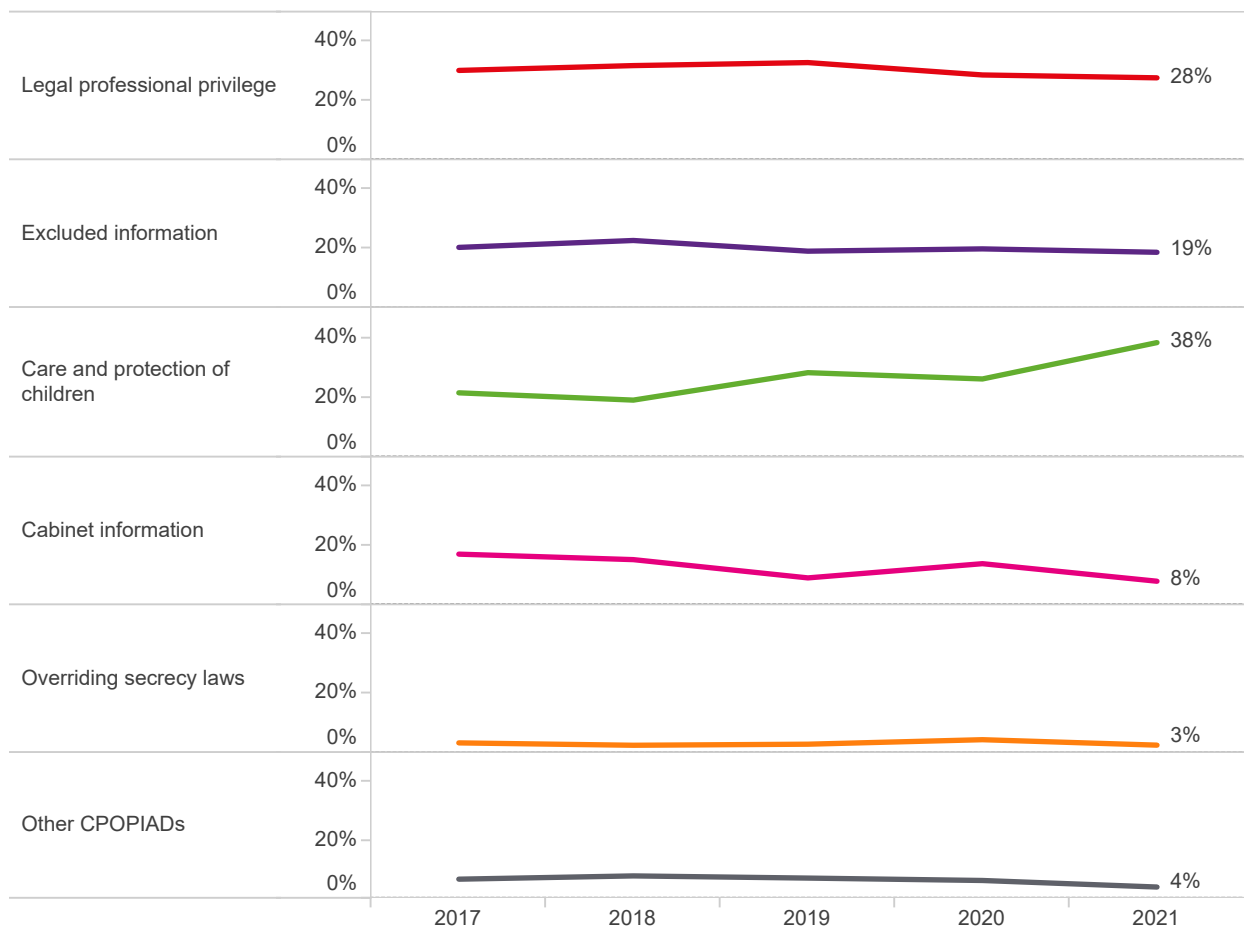
The legal professional privilege consideration was the second most applied CPOPIAD, being applied 28% of the time, consistent with 29% in 2019/20.

The excluded information consideration was the third most applied CPOPIAD, being applied 19% of all the times that CPOPIADs were applied, consistent with 20% in 2019/20.

The use of the Cabinet information consideration was applied on 8% of occasions in 2020/21, which is a moderate decline on 14% in 2019/20.

In the State-Owned Corporations sector, reliance upon the Cabinet information CPOPIAD significantly declined from 67% in 2019/20 to 25% in 2020/21, and in the Government sector it moderately declined from 14% to 8% (Figure 29). However, there was an increased reliance upon the Cabinet in Confidence consideration in the Minister sector which significantly increased from 43% to 64%.

Figure 28: Percentage distribution of the use of CPOPIADs, 2016/17 to 2020/21



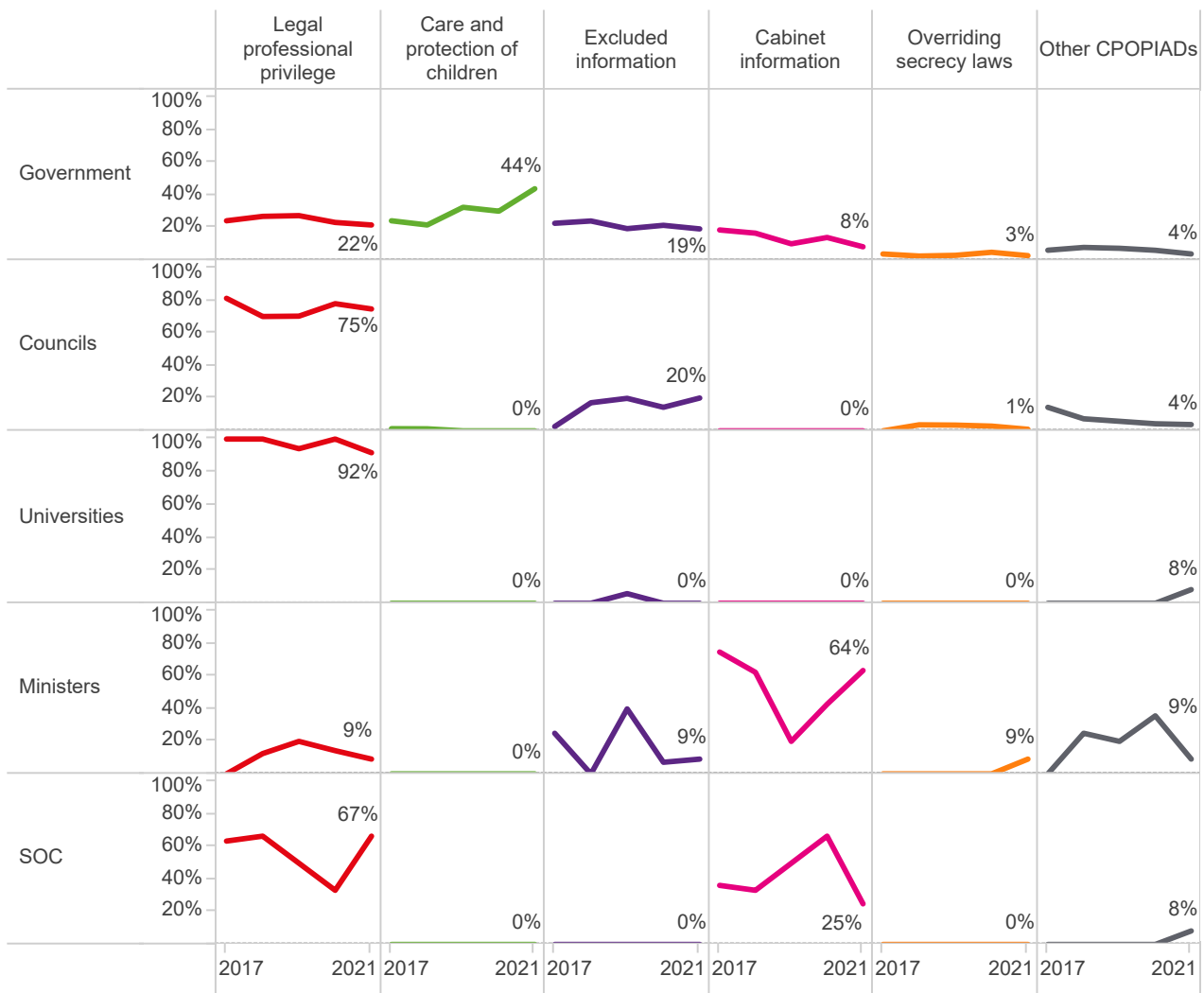
The application of the legal professional privilege CPOPIAD remained high in the Council and University sectors

Consistent with 2019/20, the most applied CPOPIAD across the Council and University sectors in 2020/21 was legal professional privilege, accounting for 75% of cases in the Council sector and 92% in the University sector (Figure 29). There was a moderate decline in the use of this CPOPIAD by the University sector from 100% in 2019/20 to 92% in 2020/21, and a slight decrease in the Minister sector from 14% in 2019/20 to 9% in 2020/21. The use of this CPOPIAD in the State-Owned Corporations sector increased significantly from 33% in 2019/20 to 67% in 2020/21.

In the Government sector, there was a greater diversity of CPOPIADs applied: the care and protection of children (44%), legal professional privilege (22%) and excluded information CPOPIAD (19%). The Department of Communities and Justice primarily applied the care and protection of children CPOPIAD. The NSW Police Force was the main agency that applied the excluded information CPOPIAD.

The Minister sector reported a significant increase in the use of Cabinet information CPOPIAD (64% in 2020/21, compared with 43% in 2019/20). In contrast, the use of Other CPOPIADs declined significantly (9% in 2020/21, compared with 36% in 2019/20).

Figure 29: Percentage distribution of CPOPIADs applied, by sector, 2016/17 to 2020/21



Individual rights, judicial processes and natural justice was the most applied OPIAD

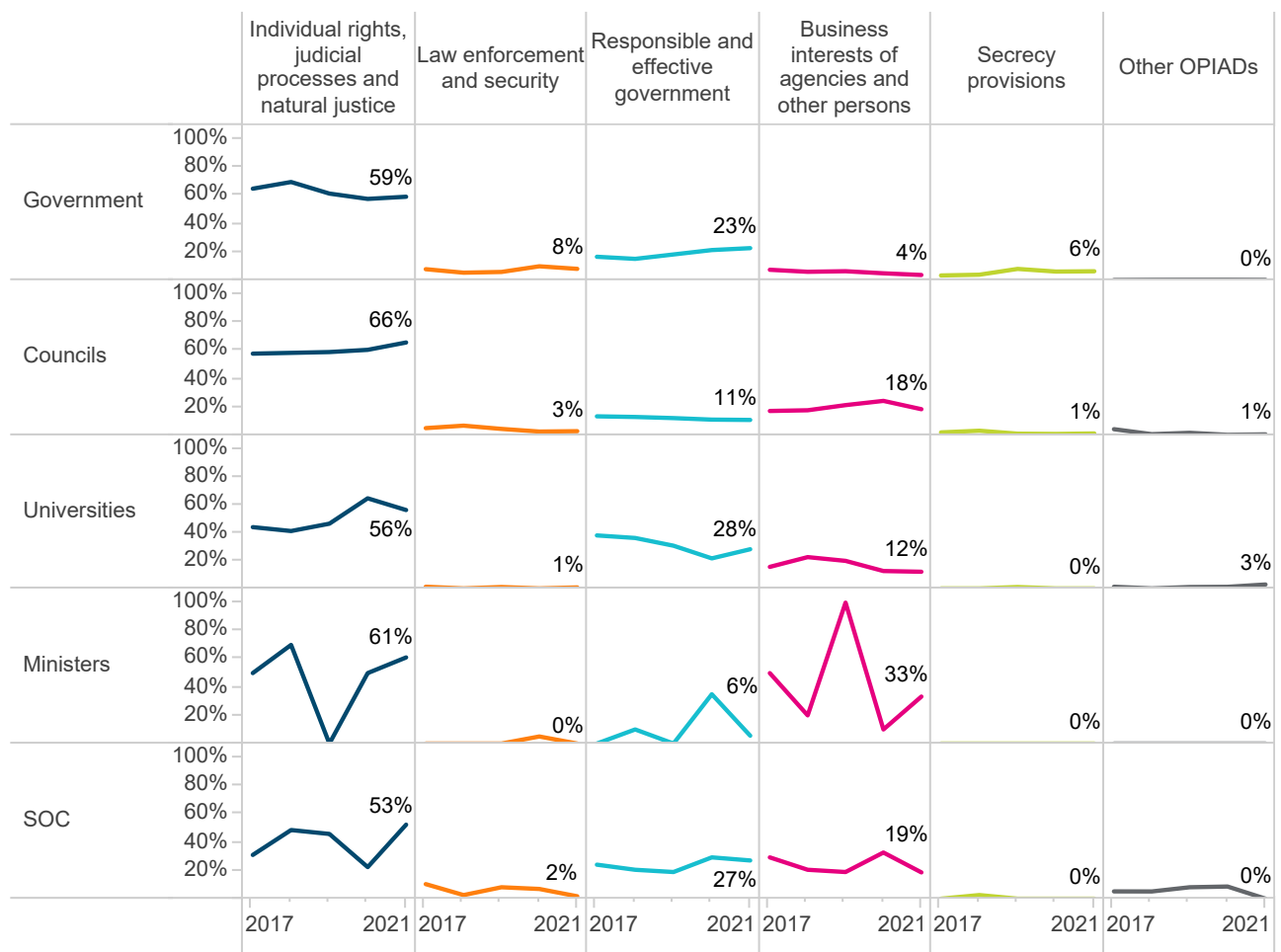
Consistent with the last three years, the most frequently applied OPIAD in 2020/21 was individual rights, judicial processes and natural justice. This year, it was the most applied OPIAD for all sectors (Figure 30). Reliance on this OPIAD is consistent with all previous years since 2016/17.

This OPIAD was applied on 66% of occasions in the Councils sector and 61% of occasions in the Ministers sector. It was applied on 59% of occasions in the Government sector. This OPIAD was most

often considered and applied 64% of the time by the Department of Education, 59% by the NSW Police Force, 58% by the Department of Communities and Justice, 56% by SafeWork NSW and 52% by Transport for NSW.

This category of OPIAD contains a broad range of specific considerations, from personal information and privacy through to court proceedings, a fair trial, and unsubstantiated allegations. As such, the application of this OPIAD by agencies could have been related to any of these specific considerations in this category and is likely to reflect the nature of the information held by these agencies.

Figure 30: Percentage distribution of OPIADS applied, by sector, 2016/17 to 2020/21



Issue Highlight: A new five-step approach when undertaking searches in *Wojciechowska v Commissioner of Police* [2020] NSWCATAP 173

The Appeal Panel considered the Tribunal's determination in *Wojciechowska v Commissioner of Police, NSW Police Force* [2020] NSWCATAD 1 in its administrative review of the agency's decision under section 58(1)(b) that the information sought under the GIPA Act was not held by the agency.

The Appeal Panel concluded that the Tribunal correctly applied the established principles of review which derived from the two-question *Shepherd* test for determining whether the information is held. That test placed the onus on the applicant for the information to first establish that the information exists and is held by the agency.

The new approach

However, the Appeal Panel stated that those principles 'are plainly wrong', and the onus on the applicant 'sits uncomfortably' with the obligation imposed by section 53 which deals with search obligations on agencies. The Appeal Panel also expressed its view that an agency's familiarity with its record management and retrieval systems generally makes the agency best placed to assess whether the information exists and is held.

The Appeal Panel proposed a five-step approach to the Tribunal's task on administrative review in determining whether the agency has satisfied the onus under section 105 that the requested information is not held by the agency.

This approach requires:

- (1) identifying on the basis of the agency's reasons and the applicant's submissions, any relevant factual issues
- (2) determining whether the agency has proved any relevant factual issues on the balance of probabilities
- (3) considering any evidence that may have emerged since the agency made its decision which might tend to prove that the requested information is held by the agency
- (4) deciding what the correct or preferable decision is
- (5) affirming, setting aside or varying the agency's decision under section 63(3) of the *Administrative Decisions Review Act 1997*.

Case Study: *McEwan v Port Stephens Council* [2021] NSWCATAD 110 – applying the public interest test to a public register

This case dealt with information sought about the local council's Secondary Employment Register and its Pecuniary Interests Register (PIR). The council did not contest that the information contained in the PIR is 'Open Access information' as prescribed by the GIPA Regulation, and therefore, subject to the mandatory release obligation under section 6 of the GIPA Act.

However, the council decided that the information in the PIR contained personal information and should not be released because it was also subject to the secrecy provisions in sections 57 and 58 of the *Privacy and Personal Information Protection Act 1998* (PPIIP Act) which prohibit the disclosure of personal information on public registers.

The Tribunal varied the council's decision and ordered council to release the information to the applicant.

The Tribunal applied the public interest test in section 13 and weighed the public interest considerations against disclosure in clauses 3(a) and 3(b) (individual rights concerning personal information), and the secrecy provision in clause 6 of the Table to section 14. The Tribunal was satisfied that the evidence in favour of disclosure overwhelmingly overrode the evidence relied upon by the council. The Tribunal rejected the council's argument that information about a person's employment outside of the council is only of tangential relevance to their responsibilities as council employees.

The Tribunal also confirmed that a strong weight is to be given to 'Open Access information' when applying the section 13 public interest test and stated that maintaining a public register is of fundamental importance to the public accountability of councils' decision-making, and the conduct of officers and employees of councils who may be involved in such decision-making.

In making its determination, the Tribunal drew upon regulatory guidance prepared by the Information Commissioner to assist agency decision-making under the GIPA Act, in her functions under section 17 of the Act. This included [Guideline 1 - For local councils on the disclosure of information \(returns disclosing the interest of councillors and designated persons\)](#).

The decision also confirms that personal information may be used or disclosed even if this disclosure would breach a provision of the PPIIP Act because section 5 of the PPIIP Act operates so that nothing in the PPIIP Act operates "to lessen any obligations" under the GIPA Act. Any weight to be given to the contravention or non-compliance under the PPIIP Act is significantly reduced because of the 'Open Access' requirements of the GIPA Act.

See [IPC Case Notes](#) for more information about this case.

How were decisions reviewed?

The right of review can be exercised by the original information access applicant or by third parties whose information is the subject of the application

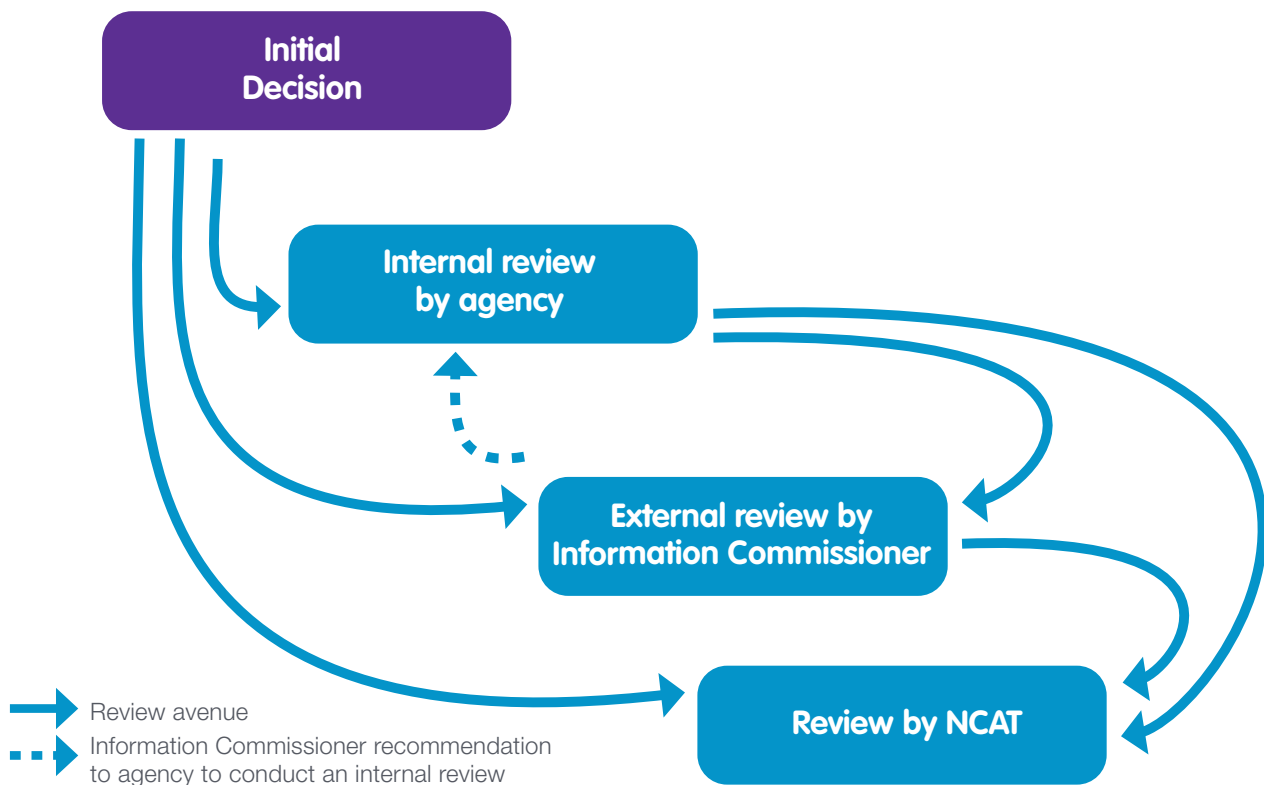
This section reports on the:

- number of reviews as a percentage of the number of relevant applications – a ‘review rate’
- number of reviews by type of review
- composition of reviews by type of review.

The distribution of reviews across all review avenues as reported by agencies is shown in Figure 33. If the most reliable source for each review avenue is used to calculate the total number of reviews, a total of 1,023 reviews were conducted in 2020/21. This is consistent with 1% from the 1,018 reviews conducted in 2019/20.

The distribution of reviews is shown in Figure 34. This is a significantly higher number of reviews than reported by agencies, particularly in respect of external reviews by the Information Commissioner and external reviews by NCAT.

Figure 31 shows the different pathways available for reviews in the GIPA Act



'How were decisions reviewed?' is reported and measured by the requirement for agencies to report on the number of applications reviewed under Part 5 of the GIPA Act in Tables G and H of Schedule 2 to the GIPA Regulation.

Figure 32: Agency, IPC and NCAT data on internal and external reviews, 2020/21

Review type	A: Agency reported data for all reviews closed	B: Using agency, IPC and NCAT data on reviews closed
Agency internal review of initial decision	344	344
External review by the Information Commissioner	294	388
Review by NCAT	95	160
Agency internal review/reconsideration following a recommendation by the Information Commissioner	131	131
Total	864	1023

Figure 33: Distribution of reviews by type, as reported by agencies, 2020/21

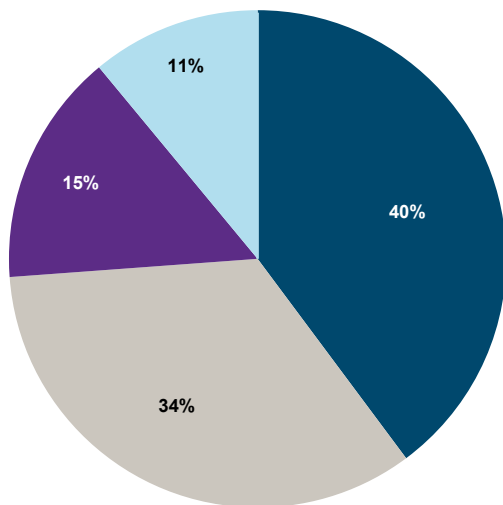
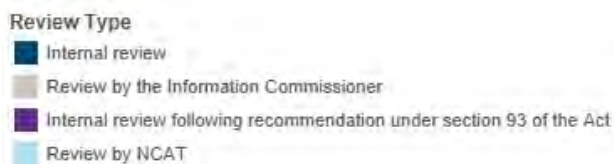
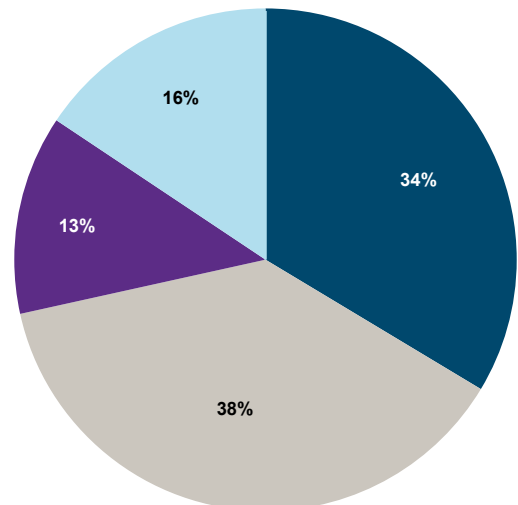


Figure 34: Distribution of reviews by type, using agency, IPC and NCAT data, 2020/21



Source: Agency, IPC and NCAT data. Note this data applies to cases reported as closed in the year.

The completion of reviews during this reporting period that were received in the previous financial year may be a factor contributing to under-reporting of external reviews by the Information Commissioner. The IPC has engaged with agencies across all sectors to improve the reporting of GIPA Act data. Since 2013/14, the under-reporting has declined from 81% to 28% in 2020/21, a further decline from 45% in 2019/20 and 37% in 2018/19, but a small increase on the lowest level of 26% reported in 2016/17.

Using IPC internal data, the number of external reviews conducted by the Information Commissioner were consistent in 2020/21 with 388 reviews, compared with 386 reviews in 2019/20.

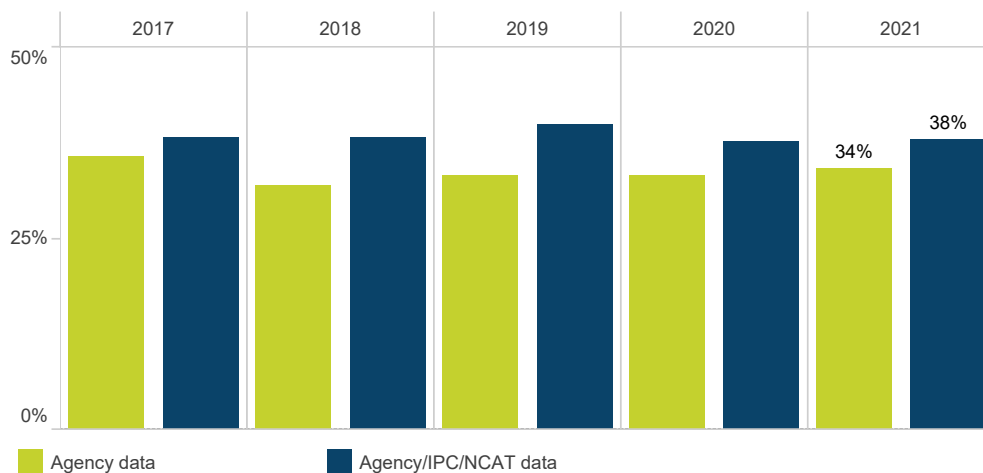
External reviews by the Information Commissioner remain consistent as a proportion of all reviews conducted

Due to ongoing disparity between agency reported data and the IPC data over the past 10 years, only IPC data will now be used for this section of the report.

Using the more reliable IPC data, external reviews by the Information Commissioner accounted for 38% of all reviews conducted, consistent with 38% in 2019/20 (Figure 35).

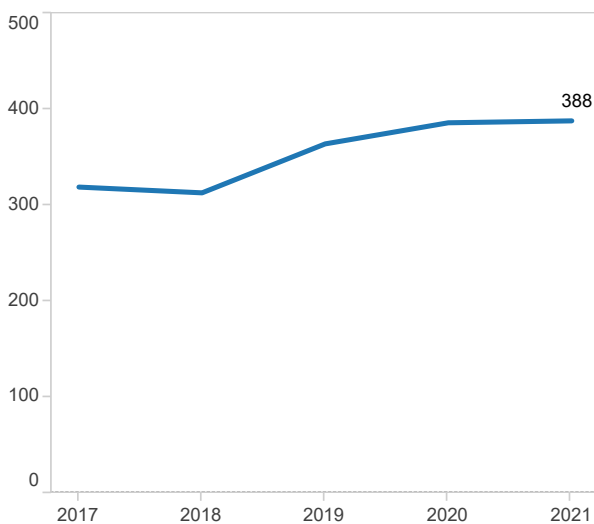
Accordingly, the review pathway most frequently used is external review by the Information Commissioner.

Figure 35: External reviews by the Information Commissioner as a percentage of all reviews, 2016/17 to 2020/21



Source: agency, NCAT and IPC data

Figure 36: Number of external reviews conducted by the Information Commissioner, 2016/17 to 2020/21



Source: IPC data

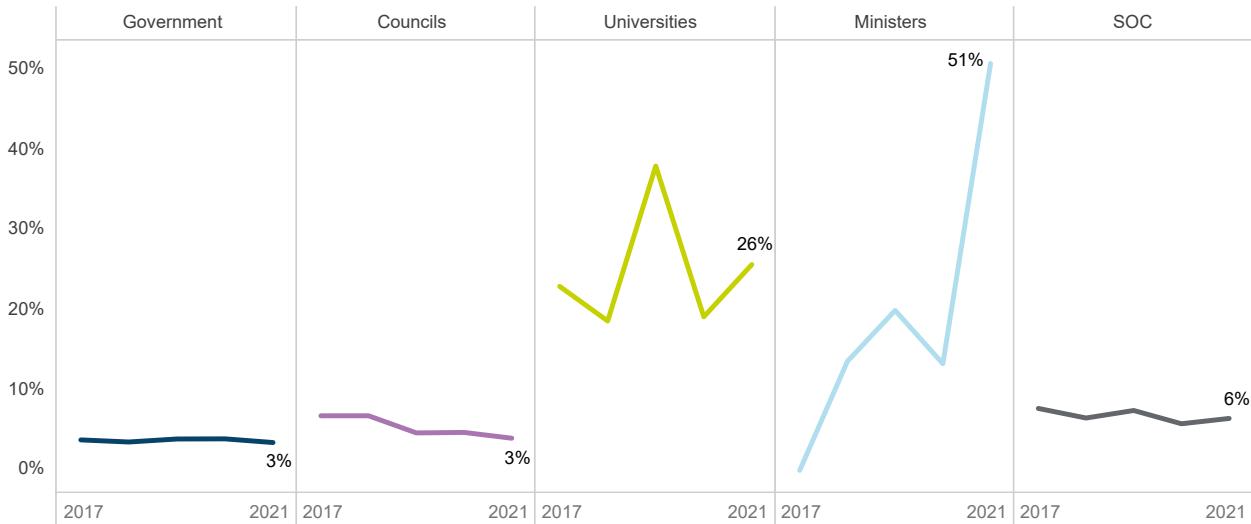
Similarly, the 160 review applications reported by NCAT is significantly higher than the 95 reviews reported by agencies.

For reporting purposes, the remainder of this section only uses data reported by agencies to allow for comparison across review avenues, across sectors and to examine changes over time.

Review rates have remained stable in the Government, Council and State-Owned Corporations sectors

The percentage of applications for review received by the Government sector, as a percentage of all applications to that sector, remained stable at 3% in 2020/21, consistent with 4% in 2019/20, 2018/19 and 2017/18. The Council (3%) and State-Owned Corporations (6%) sectors also remained stable (Figure 37). However, a 1% decline in review rates is noteworthy in the context of such a significant increase in application numbers.

Figure 37: Total number of reviews, as a percentage of all applications received, by sector, 2016/17 to 2020/21



Source: agency data

The percentage of applications for review received by the Minister sector, as a percentage of all applications to that sector, increased significantly to 51% in 2020/21, from 10% in 2019/20. For universities, the percentage moderately increased from 20% in 2019/20, to 26% in 2020/21.

These two sectors received relatively small numbers of applications and are subject to more variability than other sectors. These trends will continue to remain under observation to ensure that an appropriate sector-specific regulatory response is implemented if required.

The majority of applications for review were made by the original applicant for information

In 2020/21, 93% of applications for review were made by the original applicant. This is consistent with levels observed in 2019/20, when 90% of applications for review were made by the original applicant.

The number of applications made by third party objectors was 7% in 2020/21, compared with 10% in 2019/20.

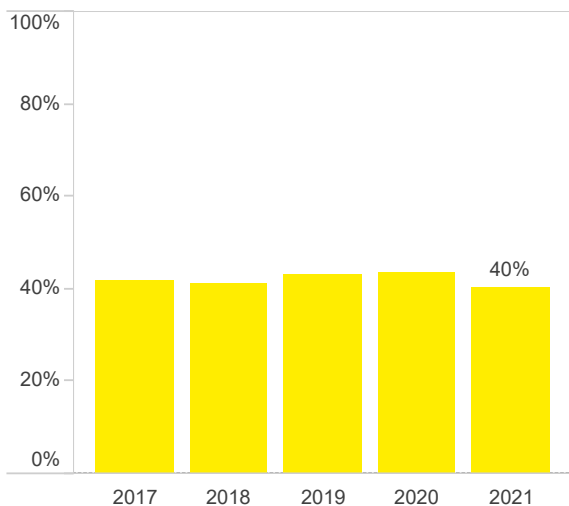
Internal reviews as a percentage of all reviews conducted remained stable

Internal reviews represented 40% of all reviews conducted in 2019/20 (Figure 38), consistent with 44% of all reviews conducted in 2019/20.

Reviews by NCAT remained stable

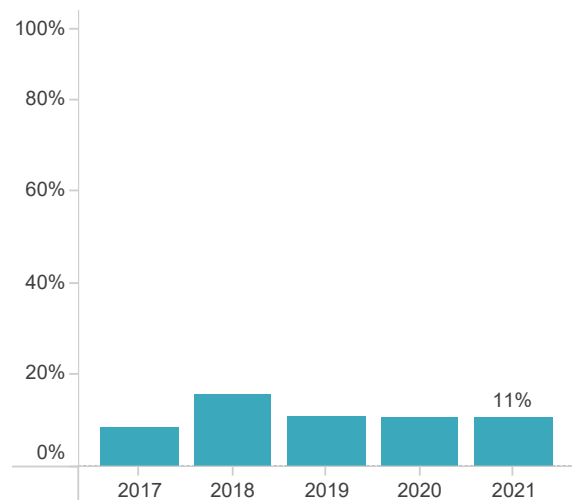
Using data reported by agencies, reviews by NCAT represented 11% of all reviews conducted in 2020/21 (Figure 39). This is consistent with 11% in both 2019/20 and 2018/19.

Figure 38: Internal review as a percentage of all reviews, 2016/17 to 2020/21



Source: agency data

Figure 39: NCAT reviews as a percentage of all reviews, 2016/17 to 2020/21

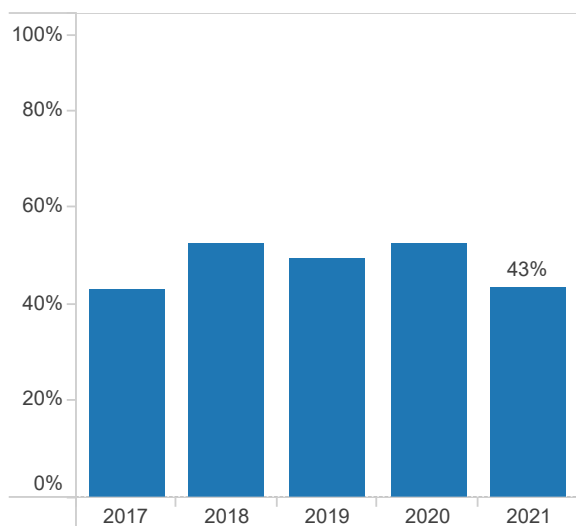


Source: agency data

There has been a change in the balance between decisions upheld and overturned on review

In 2020/21, 43% of all internal and external reviews conducted upheld agencies' decisions. This is a moderate decline from 52% in 2019/20, and 50% in 2018/19 of reviews upheld the agencies' decisions (Figure 40). This year, the decline in the total number of decisions upheld on both internal and external review is noteworthy, given that the percentage of all reviews that upheld the original decision had been relatively stable across the prior six years.

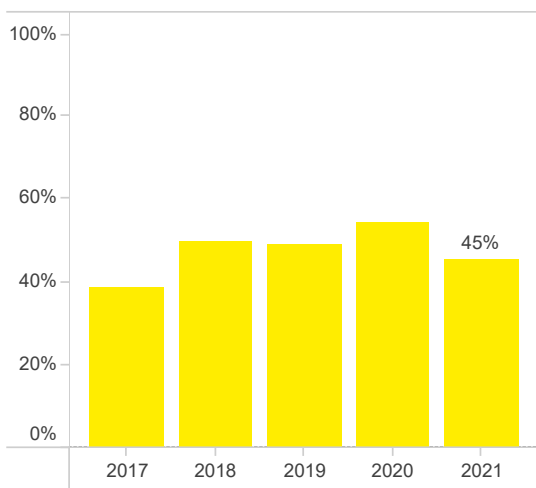
Figure 40: Percentage of all reviews that upheld the original decision, 2016/17 to 2020/21



Internal reviews were closely balanced between upholding and overturning the original decision

In 2020/21, 45% of all internal reviews upheld agencies' decisions, a moderate decline on the 54% reported in 2019/20. This is similar to 49% in 2018/19 (Figure 41).

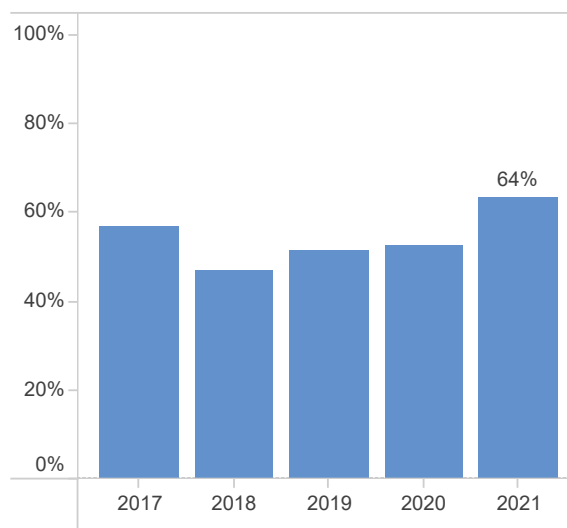
Figure 41: Internal reviews where the decision was upheld as a percentage of all internal reviews, 2016/17 to 2020/21



Reviews by the Information Commissioner were more likely to recommend that agencies reconsider their decision

In 2020/21, agencies reported that 64% of reviews by the Information Commissioner recommended that agencies reconsider their decisions, a moderate increase on the 53% reported in 2019/20 and the 52% reported in 2018/19 (Figure 42).

Figure 42: Reviews by the Information Commissioner where there was a recommendation to reconsider the decision as a percentage of all reviews by the Information Commissioner, 2016/17 to 2020/21

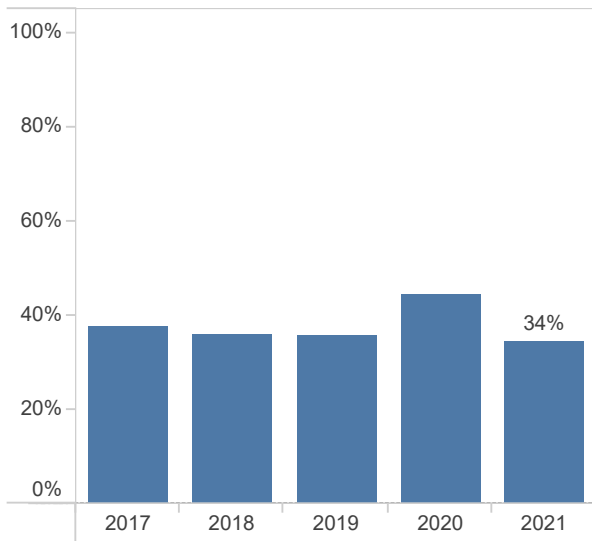


Internal reviews following a section 93 recommendation by the Information Commissioner which upheld the original decision declined

In 2020/21, agencies reported 34% of internal reviews that followed a section 93 GIPA Act recommendation (a recommendation from the Information Commissioner that the agency reconsider its decision) upheld agencies' original decisions. This is a moderate decline on the 44% reported in 2019/20 (Figure 43).

Accordingly in 2020/21, in 66% of internal reviews, agencies modified their decision in response to a recommendation by the Information Commissioner.

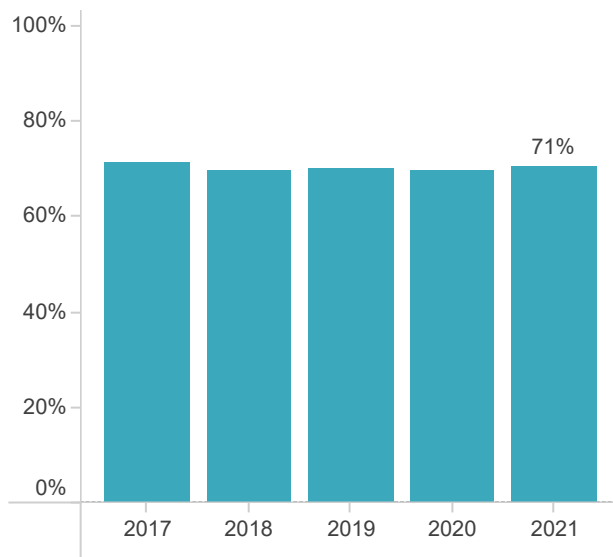
Figure 43: Internal reviews following a section 93 recommendation that upheld agencies' original decisions as a percentage of all internal reviews, 2016/17 to 2020/21



Reviews by NCAT of agency decisions

In 2020/21, agencies reported that 71% of reviews by NCAT upheld agency decisions, consistent with 70% in both 2019/20 and 2018/19 (Figure 44).

Figure 44: Reviews by NCAT where the decision was upheld as a percentage of all reviews by NCAT, 2016/17 to 2020/21



External review by the Information Commissioner of agencies' use of CPOPIADs and OPIADs

The IPC's internal data provides further insight into external reviews by the Information Commissioner in relation to the application of the considerations against disclosure by agencies.

The Information Commissioner conducts external reviews that cover a range of different issues that go to the process for dealing with applications and agencies' decisions to provide or refuse access to information.

The proportion of all reviews conducted by the Information Commissioner relating to CPOPIADs remained consistent with the previous year at 11% in 2020/21.

The proportion of all reviews conducted by the Information Commissioner relating to OPIADs remained relatively stable at 49% in 2020/21, consistent with 49% in 2019/20. Other issues that were the subject of review by the Information Commissioner include:

- personal information
- searches
- effective exercise of agency functions.

Reviews regarding these more administrative or mechanical matters can provide insights into the operational and cultural environment in which access decisions are made within agencies. Accordingly, intelligence gathered through conducting these reviews is collected and analysed to inform the Information Commissioner's forward work program.

CPOPIADs: Legal professional privilege remains the primary CPOPIAD subject of external review by the Information Commissioner

In 2020/21, the top three CPOPIADs that were relied on by agencies that were subject to the Information Commissioner's review were:

- legal professional privilege (51%) a significant increase on the 36% reported in 2019/20
- Cabinet information (30%), an increase from the 25% in 2019/20
- overriding secrecy laws (9%), which displaces complaints handling and investigation as the third most relied upon CPOPIAD 2019/20.

CPOPIADs: There has been significant changes for the top three CPOPIADs in number of external reviews by the Information Commissioner of CPOPIADs that resulted in a recommendation to agencies to reconsider the decision

In 2020/21, 35% of all the CPOPIADs that were the subject of review by the Information Commissioner resulted in a recommendation to agencies to reconsider the decision, compared with 46% in 2019/20, 38% in 2018/19, 45% in 2017/18 and 62% in 2016/17.

Following a review, the Information Commissioner's findings in respect of the top three CPOPIADs were for reviews of the:

- legal professional privilege consideration: 45% resulted in a recommendation to agencies to reconsider the decision, a significant decrease from 85% in 2019/20
- Cabinet information consideration: 23% resulted in a recommendation to agencies to reconsider the decision, a significant increase from 8% in 2019/20
- overriding secrecy laws consideration: 25% resulted in a recommendation to agencies to reconsider the decision. This CPOPIAD was not represented in the top three CPOPIADs in 2019/20.

OPIADs: Responsible and effective government was the main OPIAD subject of external review by the Information Commissioner

The top three OPIADs that were relied on by agencies and subject to the Information Commissioner's review were:

- individual rights, judicial processes and natural justice (40%)
- responsible and effective government (37%)
- business interests of agencies and other persons (18%).

OPIADs: The number of external reviews by the Information Commissioner of OPIADs that resulted in a recommendation to agencies to reconsider overall has increased

In 2020/21, 68% of all the OPIADs that were the subject of review by the Information Commissioner resulted in a recommendation to agencies to reconsider the decision, a moderate increase on the 59% in 2019/20.

Following a review, the Information Commissioner's findings in respect of the top three OPIADs were for reviews of the:

- individual rights, judicial processes and natural justice consideration: 59% resulted in a recommendation to agencies to reconsider the decision, consistent with 59% in 2019/20
- responsible and effective government consideration: 74% resulted in a recommendation to agencies to reconsider the decision, representing a significant increase compared with 59% in 2019/20
- business interests of agencies and other persons consideration: 76% resulted in a recommendation to agencies to reconsider the decision, representing a moderate increase compared with 65% in 2019/20.

Were applications transferred between agencies?

Decline in transfers between agencies

During 2020/21, agencies reported that 664 applications were transferred to another agency (Figure 46). This is a 9% decrease from the 727 transfers reported in 2019/20.

Figure 45 shows that the Government sector accounted for most transfers (97%), which is consistent with 2019/20. Most transfers were agency-initiated (77%), which is a moderate decrease from 88% in 2019/20.

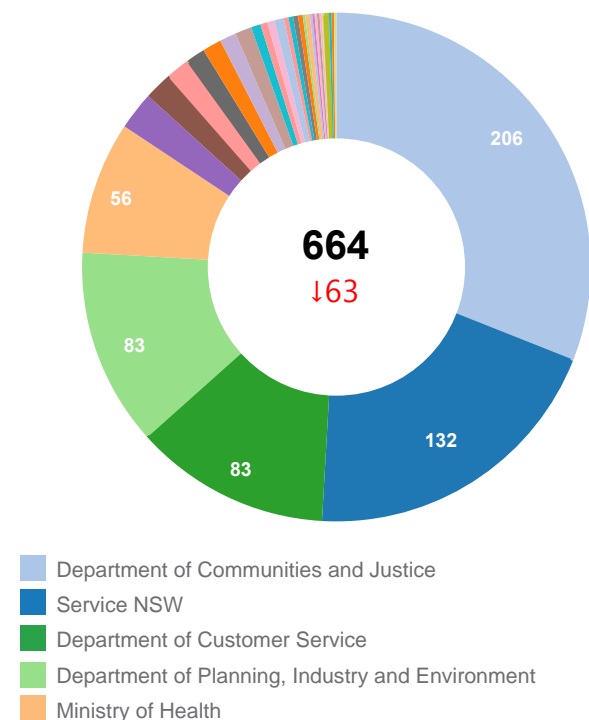
Figure 45: Number of applications that were transferred, by sector and by whether agency or applicant initiated, 2020/21

Sector	Agency initiated transfers	Applicant initiated transfers	Total
Government	499	146	645
Council	9	4	13
University	0	0	0
State-Owned Corporations	5	0	5
Minister	1	0	1
Total	514	150	664

In 2020/21, the Department of Communities and Justice accounted for 206 (31%) of transferred applications, which is a continued moderate increase from 20% in 2019/20 and 14% in 2018/19. The second highest number of transfers was reported by Service NSW with 132 transferred applications (20%), which continues a decline from 30% in 2019/20 and 51% in 2018/19. The third highest was the Department of Customer Service (13%), followed by the Department of Planning, Industry and Environment (13%) and the Ministry of Health (8%) (Figure 46).

The continuing reduction in transfers by Service NSW will be observed in the context of that agency's identified role as the 'shop front' for many NSW government agencies.

Figure 46: Distribution of applications transferred, by agency, 2020/21



Importantly, the transfer mechanism facilitates a whole-of-government, citizen-centric approach to information access. The inclusion of this data provides a means of examining the assistance provided by agencies to applicants.

Issue Highlight: Transfer of applications between agencies

The GIPA Act enables two types of transfers of an access application to be made to facilitate access to information consistent with the objects of the Act:

- an agency-initiated transfer, or
- an applicant-initiated transfer.

Following the legislative amendments to the GIPA Act, in 2018, a transfer of an access application may be made in full or in part (section 44).

The key difference between the types of transfers is that an applicant-initiated transfer cannot be undertaken unless both the applicant and the agency to which the access application was made agree that the access application should be transferred. The consent of the other agency is not required. Unlike an applicant-initiated transfer, an agency-initiated transfer, in full or in part does not require the consent of the applicant but does require the consent of the agency that the transfer is intended to be made to.

Agency-initiated transfer was considered on external review in relation to an access application made to NSW Treasury. An agency that decides to transfer an application has no obligation to decide the application, but it does require the agency to make a decision that it does not hold the information. There is no express search obligation under the GIPA Act for an agency that is considering transferring an application to undertake searches in the same way as there is for an agency when dealing with an access application (section 53). However, an agency must show that its decision to transfer demonstrates an evident and intelligible justification.

Agencies are encouraged to include sufficient information in the notice of transfer to explain the reasons for the agency-initiated transfer. Under the GIPA Act, only an agency-initiated transfer is a reviewable decision (section 80(b)).

Appendices

Appendix 1

Notes on data sources and previous reports

The IPC's annual report on the Operation of the *Government Information (Public Access) Act 2009* is based on information submitted by NSW public sector agencies and analysed within the IPC. Data has been collected since 2010/11.

For the first four years, data was submitted by agencies in a variety of formats, and then manually entered into a database within the IPC.

In mid-2015, the IPC introduced a new online GIPA Tool as a way for agencies to manage their applications, provide their annual reports to the IPC and directly upload data.

The data analysed for this Report should be considered as a snapshot of agencies' compliance as of 3 February 2022 (the date when the IPC commenced downloading agencies' reported data from the GIPA Tool). It should be noted that not all agencies had submitted their annual reports to the IPC by this time. This means their data is not included in the Report.

Data updates by agencies may affect historical data and future reports. This is particularly relevant to data regarding timeliness reported in the 2017/18 Report. On 29 April 2019, the Information Commissioner tabled an erratum notice to correct data reported by an agency.

Since 2016/17, data has been reported from the following sectors:

- government
- councils
- universities
- ministers
- state-owned corporations (SOCs).

Previously, SOC data had been included with that of the Government sector. SOC data has now been separately identified in order to give greater insight into their GIPA operations and those of the Government sector. Accordingly, data for the Government sector reported in previous years is not comparable to data in this Report.

In March 2018, the IPC published an online, interactive [Agency GIPA Dashboard](#) to facilitate agency and community access to this data. This online data may be updated to take account of changes advised by agencies. Accordingly, the online GIPA Dashboard will represent the most up-to-date and accurate source of data on agency GIPA operations.

The annual reporting period for universities and the Department of Education is a calendar year. This calendar year data is included in the relevant financial year to assist with cross-sector comparability. For example, GIPA data from universities' 2020 annual reporting has been treated as for the 2020/21 financial year.

Data reported for 2020/21 reflects the structure of agencies after the machinery of government changes which commenced on 1 July 2019 and further. For some agencies, this has the result that data may not be directly comparable with previous years. For example:

- from 1 July 2019, the previous Department of Justice and Department of Families and Community Services were amalgamated to form the Department of Communities and Justice
- the former Roads and Maritime Services was dissolved on 1 December 2020 by the *Transport Administration Amendment (RMS Dissolution) Act 2019*. Any access application received after that date was received by Transport for NSW and dealt with as an application to that agency
- the Department of Customer Service was established on 1 July 2019, replacing the former Department of Finance, Services and Innovation
- the Department of Regional NSW was established on 2 April 2020.

Appendix 2

The Legislative Framework

Government Information (Public Access) Act 2009

The object of the *Government Information (Public Access) Act 2009* (GIPA Act) is to maintain and advance a system of responsible and representative government that is open, accountable, fair and effective by:

- authorising and encouraging the proactive public release of government information by agencies
- giving members of the public an enforceable right to access government information
- ensuring that access to Government information is restricted only when there is an overriding public interest against disclosure.

The GIPA Act applies to Government departments and agencies, local councils, universities, ministers and their staff, and state-owned corporations.

The guiding principle of the GIPA Act is to make information more accessible to the public. The Act embodies the general presumption that the disclosure of information is in the public interest unless there is a strong case to the contrary.

1. Mandatory proactive release

The mandatory proactive release of information is one of the GIPA Act's four pathways for information release and access. Through this pathway, the GIPA Act requires NSW public sector agencies to release a prescribed set of information to the public, known as Open Access information. This information must be made publicly available online and free of charge. Open Access information of ministers may be made available on the website of the relevant department.

The benefit of mandatory proactive release is that the pathway ensures that a minimum, consistent set of information that is regularly reviewed and updated to maintain relevance and currency, is freely available to the public. Mandatory proactive release is an important vehicle in achieving better service delivery through information access, transparency and increased citizen input to government policy and service delivery.

2. Authorised proactive release

The GIPA Act authorises and encourages agencies to make information available unless there is an overriding public interest against disclosure.

Agencies (except ministers) are required under the GIPA Act to review their program for the proactive release of information at least annually, and identify additional kinds of information that should be made publicly available. These agency reviews are not merely a reporting obligation. They provide the tool to drive the continuous release of information under this pathway. This information can be made publicly available in any manner that the agency considers appropriate either free or at the lowest reasonable cost.

Through this pathway, agencies have a responsibility to promote policies and practices that ensure as much information as possible is made publicly available.

The aim of proactive release is to maximise the amount of information that is released by agencies. This requires creating a culture where information release is a matter of course. The proactive release of information has many benefits, including a more informed community that is better able to engage and influence the development and delivery of services, agency operations and broader policy and community debates.

3. Informal release

The GIPA Act enables agencies to release government information in response to an informal request for information, unless there is an overriding public interest against disclosure.

This pathway promotes the transition to a system which will result in the general release of government information.

4. Formal access applications

The GIPA Act provides citizens with a right to apply for, and access most government information, unless there is an overriding public interest against disclosure (section 9). The GIPA Act outlines a formal process that must be followed by applicants and agencies. The steps for applicants include:

- putting an application in writing
- stating that the application is seeking information under the GIPA Act
- including a postal address or email address
- explaining clearly the information that is being requested
- paying an application fee of \$30.

Agencies must assess each application that is received. For valid access applications, agencies must apply the public interest balancing test and consider the factors for and against the disclosure of the information that is being requested.

The main benefits of the formal access pathway include:

- the right to seek access is legally enforceable
- agencies are not subject to the direction or control of any Minister in the exercise of the agency's functions when dealing with an access application
- agencies must apply the public interest balancing test and consult with third parties to whom the information relates, and also may consult with other agencies
- applicants have a right to seek review of an agency's decision about the application through an internal review by the agency, an external review by the Information Commissioner or an external review by NCAT.

Section 125 of the GIPA Act requires agencies to report to Parliament annually on their obligations under the GIPA Act, including reporting on GIPA data. A copy of the Report is to be provided to the Information Commissioner after the Report has been tabled in Parliament. This mandated information is set out in clause 8(a), (b), (c) and (d) of the GIPA Regulation. Schedule 2 of the GIPA Regulation sets out the prescribed form for clause 8(d) reporting through Tables A – I.

Government Information (Public Access) Regulation 2018

The Government Information (Public Access) Regulation 2018 (GIPA Regulation):

- prescribes additional Open Access information that local authorities, ministers, departments and statutory bodies must make publicly available
- sets out the statistical information regarding formal applications that agencies must include in their annual reports
- in the case of an access application relating to a school, extends the period in which the application must be decided if the usual 20-day period for deciding the application occurs during the school holidays
- specifies the corresponding access to information laws of other Australian jurisdictions under which information may be exempt (this is a relevant public interest consideration against disclosure under section 14)
- declares certain bodies to be public authorities for the purpose of the GIPA Act
- declares certain entities to be sub-agencies and parent agencies for the purpose of access applications
- provides that records held by the Audit Office or the Ombudsman's Office that were originally created or received by another agency, are taken to be held by the original agency.

Government Information (Information Commissioner) Act 2009

The system of public access to information is overseen by the Information Commissioner, established under the *Government Information (Information Commissioner) Act 2009* (GIIC Act). Under the GIIC Act, the Information Commissioner's role includes:

- promoting public awareness and understanding of the Act
- providing information, advice, assistance and training to agencies and the public
- dealing with complaints about agencies
- investigating agencies' systems, policies and practices
- reporting on compliance with the Act.

Under section 37 of the GIIC Act, the Information Commissioner is required to provide an annual report to Parliament on the operation of the GIIPA Act, generally, across all agencies.

This Report fulfils the Information Commissioner's obligation in this regard.



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