

How was the public interest test applied?

This section examines:

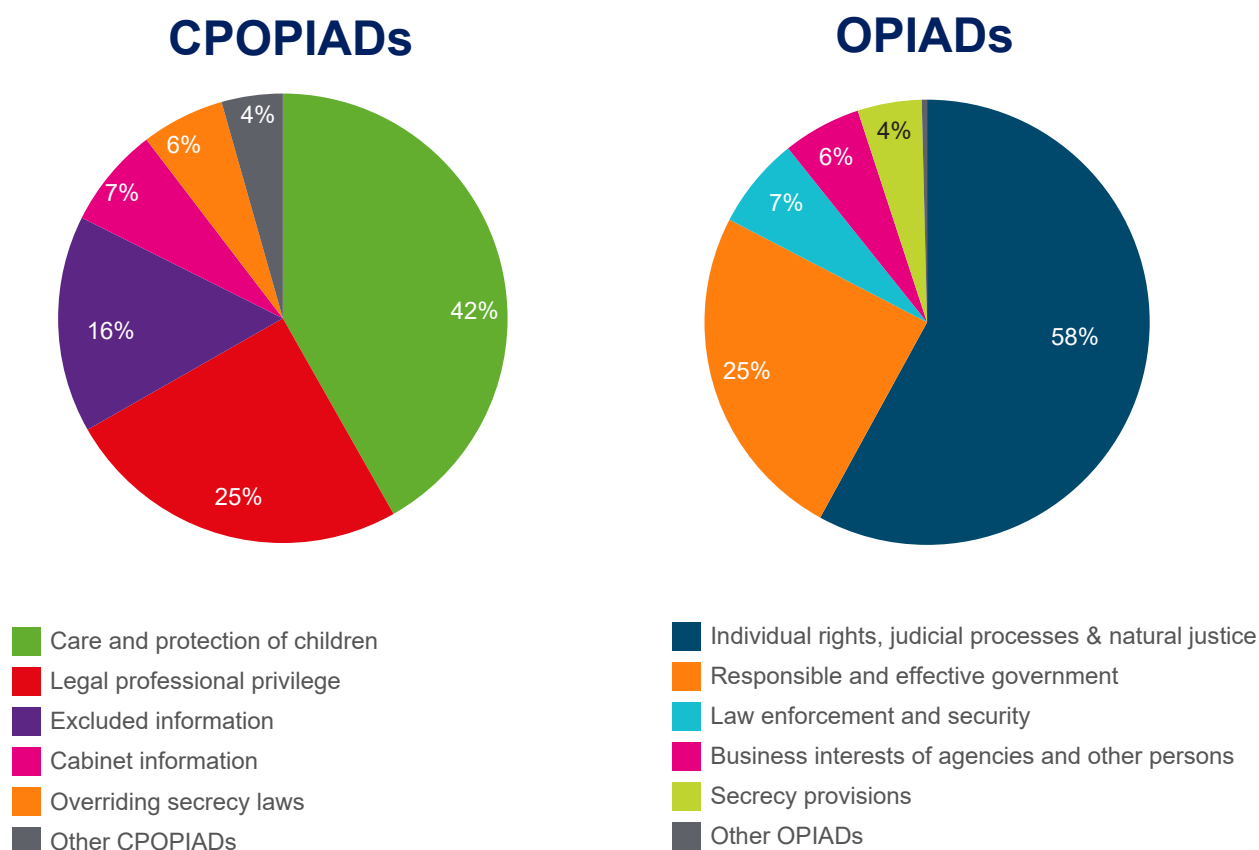
- the number of applications that were refused because of a conclusive presumption of an overriding public interest against disclosure (CPOPIAD)
- which categories of CPOPIADs were applied
- the use of categories of considerations for which there is an overriding public interest against disclosure of 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 2022/23, 1,060 applications (4% of total applications received) were refused wholly or partly because of a CPOPIAD. This is consistent with 2021/22.

Figure 27: A snapshot of the use of CPOPIADs and OPIADs, 2022/23



'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 2022/23, the care and protection of children was the most applied CPOPIAD across all sectors (Figure 28). The care and protection of children CPOPIAD was applied 42% of all the times that CPOPIADs were applied. This is consistent with 38% in 2021/22.

The legal professional privilege consideration was the second most applied CPOPIAD, being applied 25% of the time, consistent with 22% in 2021/22.

The excluded information consideration was the third most applied CPOPIAD, being applied 16% of all the times that CPOPIADs were applied, a moderate decline from 24% in 2021/22.

The use of the Cabinet information consideration was applied on 7% of occasions in 2022/23, consistent with 8% in 2021/22.

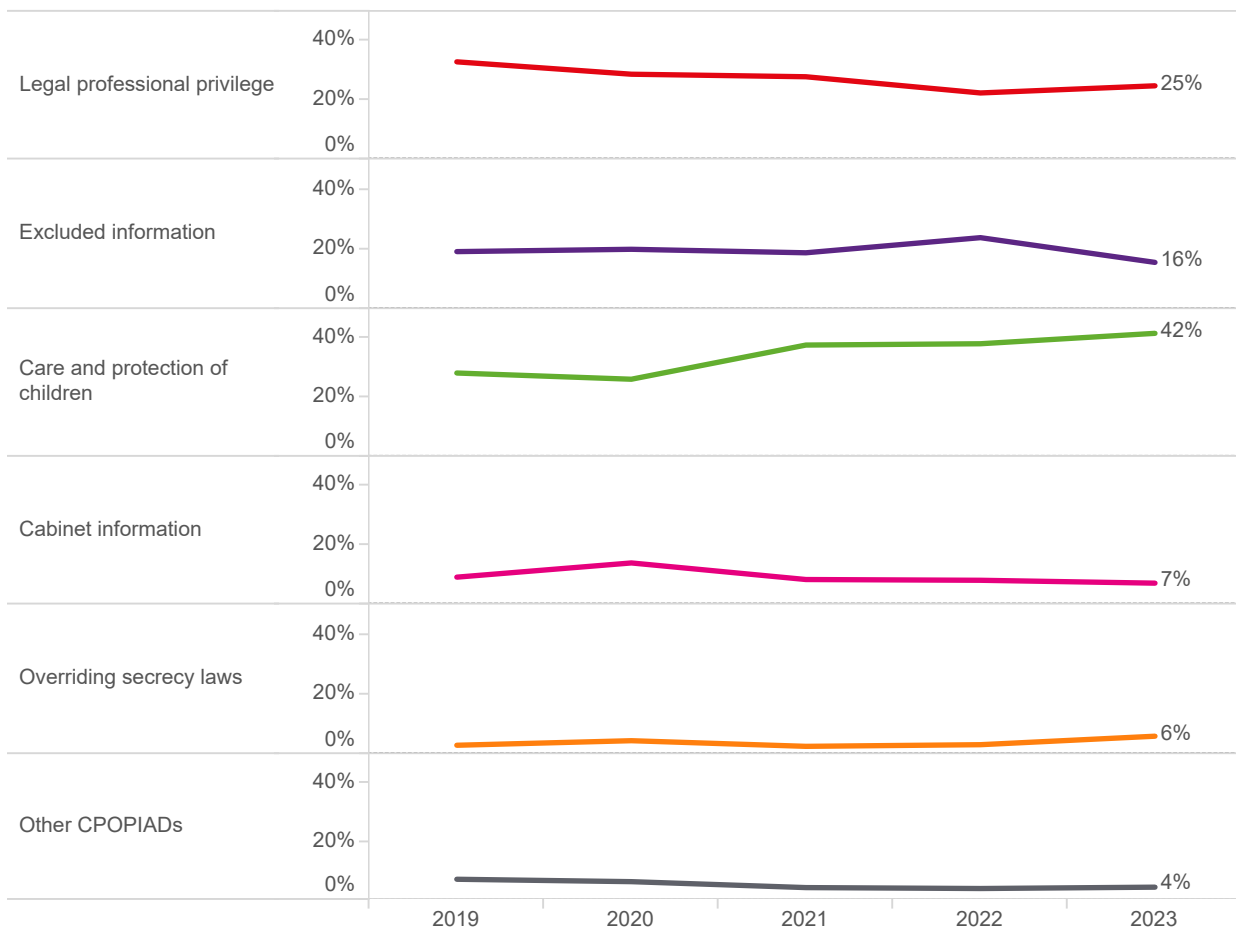
The application of the legal professional privilege CPOPIAD declined in the Council and State-Owned Corporations sectors and increased in the University and Government sectors

Consistent with the three previous reporting periods, the most applied CPOPIAD across the Council, University and State-Owned Corporations sectors in 2022/23 was legal professional privilege, accounting for 68% of cases in the Council sector, 83% in the University sector, and 63% in the State-Owned Corporations sector (Figure 29).

The use of this CPOPIAD remained stable in the University sector from 79% in 2021/22 to 83% in 2022/23 and the Government sector from 18% in 2021/22 to 22% in 2022/23.

There was a moderate decline in the use of this CPOPIAD in both the Council sector from 83% in 2021/22 to 68% in 2022/23, and the State-Owned Corporations sector from 78% in 2021/22 to 63% in 2022/23.

Figure 28: Percentage distribution of the use of CPOPIADs, 2018/19 to 2022/23



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 and icare and the Department of Education were the main agencies that applied the legal professional privilege CPOPIAD.

In the State-Owned Corporations sector, reliance upon the Cabinet information CPOPIAD moderately increased from 11% in 2021/22 to 25% in 2022/23.

Figure 29: Percentage distribution of CPOPIADs applied, by sector, 2018/19 to 2022/23



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

Consistent with the last five years, the most frequently applied OPIAD in 2022/23 was individual rights, judicial processes and natural justice with 58%. 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.

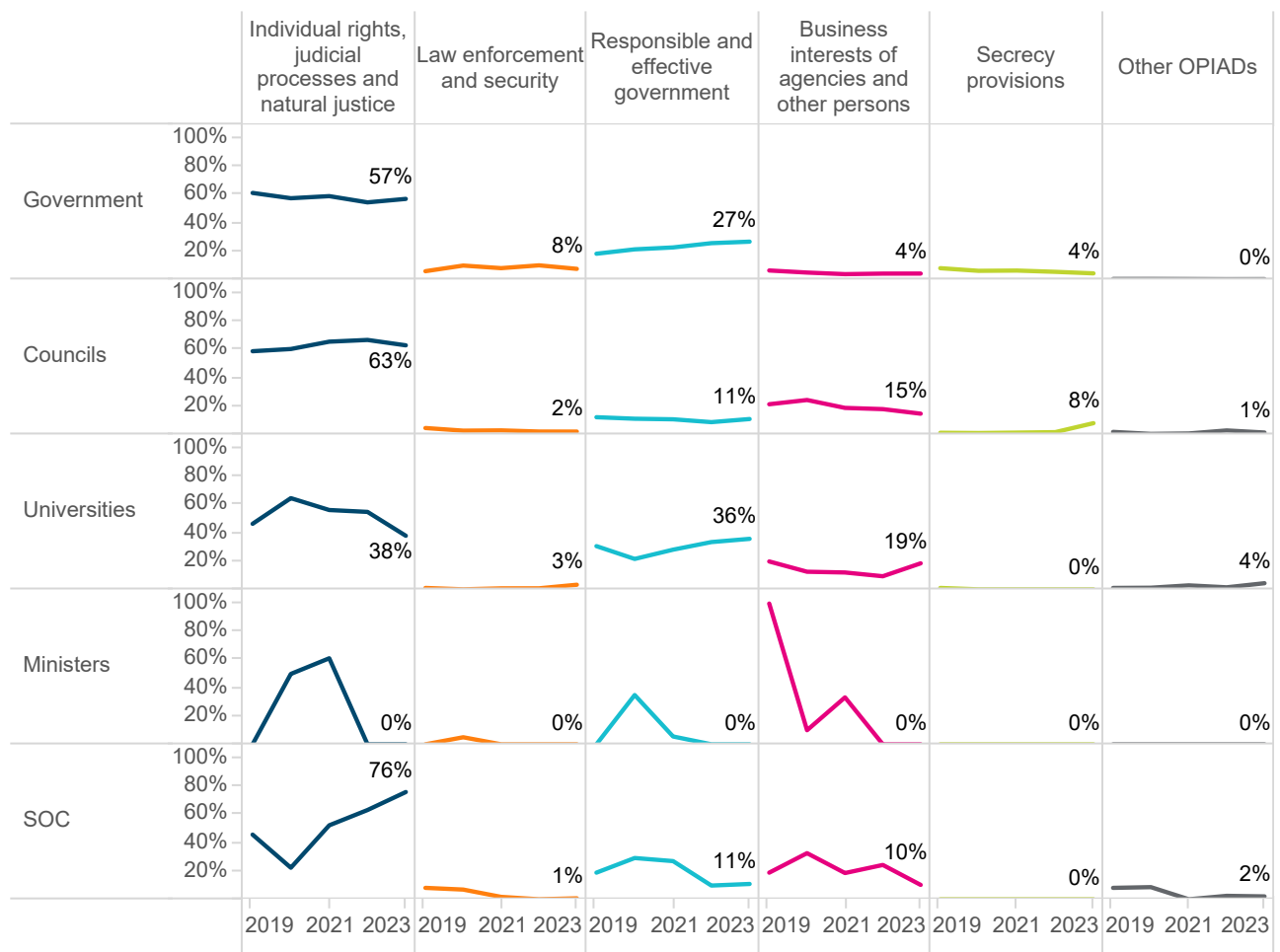
This OPIAD was applied on 63% of occasions in the Council sector, 76% of occasions in the State-Owned Corporations sector, 57% in the Government sector and 38% in the University sector.

These patterns mostly remained consistent with those reported in 2021/22, except the Minister sector, where there was no data on any decisions in 2022/23 following the State general election on 25 March 2023. As a result, this Report cannot provide analysis on the performance of the Minister sector as compared to previous years.

For agencies that received more than 40 applications, this OPIAD was most often considered and applied 100% of the time by the SAS Trustee Corporation, 96% by the Sydney Water Corporation, 88% by the State Emergency Services, 86% by the Ministry of Health and 71% by the Department of Regional 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.

Figure 30: Percentage distribution of OPIADS applied, by sector, 2018/19 to 2022/23



Issue Highlight: Personal factors under section 55 inform the public interest test but are themselves not public interest considerations

In *Snape v Commissioner of Police No 2* [2022] NSWCATAP 244, the Appeal Panel of the NCAT dealt with whether the balancing exercise required by the public interest test was properly applied and how personal factors are to be considered in the balancing test.

The GIPA Act requires the agency to balance the public interest considerations in favour of disclosure against the public interest considerations against disclosure. The general public interest in access to information always applies when an agency decides an access application. An agency is also required to identify any specific public interests in favour of disclosure, assign them weight, and balance them against the public interest considerations against disclosure.

The Appeal Panel said that the personal factors of an access applicant may be taken into account in conducting the balancing test. They may be factors supporting considerations in favour of or against disclosure.

The Appeal Panel also said, however, that while personal factors may coincide with or highlight a public interest in favour of disclosure, they do not of themselves constitute a public interest.