



information  
and privacy  
commission  
new south wales

# IPC Regulatory Framework

2016



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## About the IPC Regulatory Framework

The *IPC Regulatory Framework* reflects the statutory instruments that govern information access and privacy protection in NSW together with the Information and Privacy Commission's (IPC) plans and activities that support compliance with those laws.

The *IPC Regulatory Framework* also explains our:

- regulatory approach,
- priorities
- activities, and
- performance reporting.

As a matter of good practice and transparency, this Regulatory Framework describes the IPC's regulatory approach to promoting compliance and protecting information access rights and balancing other rights including privacy, secrecy and security in NSW in accordance with the *IPC Strategic Plan* and our regulatory objectives.

Our regulatory priorities and compliance activities are guided by a risk-based and intelligence-informed approach to regulation, focusing our attention and activity upon emerging issues, entities and sectors that pose the greatest risk to achieving our regulatory objectives. In order to do this, we need to:

- have a clear view of sector and IPC performance against our regulatory objectives;
- be able to identify where our most significant risks lie;
- have a graduated set of compliance activities to match to risk; and
- be able to demonstrate that our regulatory actions are both proportionate and effective.

We seek to support compliance with an approach that allows flexibility for regulated agencies to operate freely to achieve the outcomes prescribed by the legislation, and at the same time ensure that risks remain within tolerable levels. We will make the best use of our limited resources to proactively reduce the risks posed to an acceptable level.

Our risk-based and intelligence-informed approach enables us to be flexible and adaptive to ongoing changes, and to adjust our priorities to direct resources where they are most needed.

## Jurisdiction in relation to information access

The IPC reviews the decisions of agencies and investigates and conciliates complaints relating to public sector agencies under the following laws:

- *Government Information (Public Access) Act 2009* (GIPA Act)
- *Government Information (Information Commissioner) Act 2009* (GIIC Act)

In particular, the IPC works on behalf of the Information Commissioner to:

- review decisions of NSW public sector agencies about formal information access applications;
- receive and consider complaints about the conduct of an agency in exercising information access obligations including conduct alleged to be a contravention of information access obligations;
- receive and consider public interest disclosures from public officials about government information contraventions;

- review and advise on NSW public sector Agency Information Guides to address how government information is held and released; and
- develop and deliver resources and assistance to support information access rights and obligations.

In undertaking this work the IPC regulates five main sectors in NSW:

- Public sector agencies
- State-owned Corporations
- Local Councils
- Universities
- Ministers and the staff of Minister's offices.

In addition, where a private sector entity is contracted to provide services to the public, then the contracting public sector agency is obliged to ensure the contract provides an immediate right of access to certain information held by contractors.

The IPC will refer out-of-jurisdiction matters to the appropriate organisation where we are unable to provide the service requested, including where we are asked to:

- review a decision or consider a complaint about a Commonwealth or other state government agency decision about information access rights or obligations
- review a decision or consider a complaint about a non-government organisation or private company in relation to information access rights or obligations, unless it is undertaking a government function on behalf of a government agency in which case there may be a case in relation to the contracting government agency.
- Consider or investigate complaints that are:
  - maladministration (NSW Ombudsman)
  - serious and substantial waste of public money (Auditor General)
  - corrupt conduct (ICAC)
  - misconduct of a public official (the public sector agency where the official is employed)
  - complaints about records management of Government organisations (State Records NSW)
  - prosecute one of the offences in the GIPA Act (DPP)

## Regulatory objectives, approach, principles and services

Our regulatory objectives reflect the strategic objectives set out in the *IPC Strategic Plan* to:

- promote information access;
- protect information access rights; and
- report on and foster agency compliance with information access obligations.

Our regulatory approach is responsive and proportionate with cooperative regulatory engagement to facilitate compliance with escalation to use of statutory powers to enforce compliance only where required.

Our regulatory activities are informed by our regulatory principles:

<b>Constructiveness</b>	We engage with agencies and provide advice and guidance to assist compliance.
<b>Consistency</b>	Similar circumstances lead to similar regulatory responses and outcomes.
<b>Targeted</b>	Compliance activities are focussed on the areas of highest regulatory risk.
<b>Proportionality</b>	Compliance activities are proportionate to the seriousness of the regulatory risk.
<b>Accountability</b>	We explain our decisions and make available avenues of complaint review.
<b>Transparency</b>	We demonstrate our values of independence and integrity in all our dealings with agencies and citizens of NSW.

We achieve our regulatory objectives through the delivery of a range of regulatory services including:

- promoting awareness and understanding of information access rights and obligations;
- providing information and advice on information access rights and obligations;
- delivering training and education to agencies and the public;
- providing regulatory guidance in the form of knowledge updates, fact sheets, statutory guidelines and reports on the operation of the information access laws;
- reviewing and making recommendations on agency decisions and conduct on receipt of individual applications;

- dealing with, conciliating and investigating agency conduct on receipt of individual complaints;
- conducting audits, investigations and inquiries to monitor and report on compliance with information access obligations; and
- advising parliament and the Attorney General on furthering information access in NSW.

The [IPC Service Charter](#) sets out the standard of service agencies and the public can expect from the IPC.

## IPC Regulatory Plan

The annual *IPC Regulatory Plan* focuses upon agency and sector risks (individually and systemically) to ensure we target risks, focus our resources to mitigate risks and promote compliance to achieve our regulatory objectives.

The IPC draws from a range of sources to identify risks to achieving our regulatory objectives, including:

- data from the complaints we have handled and the reviews we have conducted;
- feedback from practitioners and the public;
- Commissioner reports on the operation of the information access laws;
- NCAT decisions, monitoring government initiatives;
- changes in sector operational environments;
- developments in law, governance and technology;
- engagement with other regulators with relevant responsibilities; and
- monitoring community expectations.

In particular, the IPC acknowledges that the agencies affected by compliance activities are the ones best placed to help design and deliver what is needed. Accordingly, a key source each year is the IPC's engagement with agencies to identify risks and compliance activities to target our regulatory effort.

The advantage to taking a risk-based and intelligence-informed approach to regulation is that it enables us to become much more proactive, identifying and tackling risks before or as they occur, rather than only acting retrospectively once harm has arisen. In some cases, risks may already have occurred, meaning that we actually assess and respond to the consequences of the issue rather than to potential harm posed by a risk.

Risks are assessed and then used to prioritise and select our compliance activities and to direct our resource allocation through the annual IPC Business Plan. Our assessment and priorities are communicated in our annual *IPC Regulatory Plan*.

## Compliance activities

Each year our compliance activities are set to promote compliance, remedy individual instances of possible non-compliance, and to detect and correct systemic non-compliance. Compliance activities are designed to:

- facilitate and foster voluntary compliance;
- remediate instances of non-compliance by agencies;
- improve future compliance at both the agency level and, more broadly, at the sector level through selective, targeted action;
- deter conduct that may contravene information access obligations and rights; and
- instil public confidence in the IPC's role to promote and protect information access rights.

The IPC uses a range of approaches to deliver compliance activities to treat the risks to achieving our regulatory objectives and to influence long-term cultural change for better information access by agencies.

	TYPE	REACH	COST	RISK
PROMOTION	Proactive and geared to supporting voluntary compliance	Largest number of regulated agencies/citizens	Low cost per outcome/regulated agency	Low risks
PROTECTION	Reactive and geared to remedying possible non-compliance in individual decisions and conduct	Small to moderate number of regulated agencies/citizens	High cost per outcome/regulated agency	Moderate risks
REPORTING	Proactive and geared to enforcing identified systemic non-compliance	Moderate to large number of regulated agencies/citizens	Moderate cost per outcome/regulated agency	High risks

## Promotion – voluntary compliance

'Promotion' compliance activities focus on guidance to support voluntary compliance across all agencies and sectors. We expect that the vast majority of agencies are willing and able to follow guidance and achieve voluntary compliance without the need for more targeted regulatory force. Assisting and supporting compliance is the IPC's first order regulatory response as it supports agencies achieving compliance consistently and proactively, in accordance with their obligations under information access laws. The IPC's promotion compliance activities include:

- **Consultation and engagement** – all the IPC's regulatory responses are informed by consulting and engaging agencies, either individually or collectively, in developing solutions to identified issues. This involves a range of activities including convening or participating in meetings, forums, practitioner networks, workshops and consultative processes
- **Research and collaboration** – we conduct or commission research and share best practice initiatives aimed at promoting and protecting information access rights
- **Campaigns** – the IPC conducts various activities and events to raise awareness including Right to Know Week annually
- **Resources and information** – a wide range of resources are published to assist agencies and citizens of NSW to understand and use the information access laws. These include checklists, templates, knowledge updates, fact sheets, guides, posters, published decisions, case notes, and newsletters. Our website provides easy access to our resources and information, and we regularly communicate through the IPC Bulletin, e-alerts and knowledge updates
- **Education and training** – the IPC delivers education and training through presentations, workshops, forums, and an online e-learning portal to build awareness, capability and competency in information access rights and protection
- **Guidelines** – the Commissioner has statutory powers to issue guidelines to assist agencies to comply with the information access laws
- **Advice and assistance** – the IPC provides compliance advice and assistance to agencies, including feedback on Agency Information Guides
- **Amicus curiae (friend of the court)** – the Information Commissioner has a role to assist the NSW Civil and Administrative Tribunal. In that role, and by leave of the Tribunal, a Commissioner may make submissions on matters of interpretation or practice. In this way, the jurisprudence may be developed and authority provided that assists agencies to achieve voluntary compliance

- **Performance reporting** – the Information Commissioner monitors and reports on the operation of the information access laws, providing agencies with data that can be used for benchmarking and case studies to inform better practice.

## Protection – remedial compliance

‘Protective’ compliance activities focus on remedying possible non-compliance with information access obligations and possible contraventions of information access rights.

### Commissioner reviews and outcomes

The IPC conducts reviews of the decisions of agencies concerning information access.

The Information Commissioner externally reviews a range of decisions made by agencies on application by the original applicant or third parties. Reviews examine whether the agency’s decision was justified in accordance with the requirements set out in the GIPA Act. Reviews consider the process that the agency followed and the decision made, and whether the agency correctly followed and applied the provisions of the GIPA Act. The outcome of the review is presented in a report or correspondence setting out the issues, findings and any recommendations to the agency to address possible non-compliant aspects of the agencies conduct or decision. In some circumstances, review reports may also be provided to the Minister for the agency and/or published by the IPC, in full or in de-identified format.

### Complaint handling and monitoring

The IPC deals with complaints about the conduct of agencies in meeting information access obligations. We encourage complainants to approach the agency concerned to resolve the complaint in the first instance wherever possible, as all agencies are required to provide complaint processes and these can deliver quick and simple resolutions. However, complaints can be made directly to the IPC at any time.

All complaints are assessed to determine how best to address the concerns raised.

If the complaint is not appropriate for protective action, we may decline to deal with it and/or refer the complainant to a more appropriate process, complaints agency or regulatory authority.

If we can deal with the complaint, our aim is to address the issues as quickly and directly as possible. Most complaints will be dealt with by making preliminary inquiries/assessments and providing information to both the complainant and the agency to ensure information access obligations are met. In a smaller number of complaints, we will facilitate discussion of the complaint with relevant parties to facilitate a resolution, including by conciliation. In complaints that indicate serious non-compliance with information access obligations, the IPC may conduct a compliance investigation.

Importantly, while not all complaints are investigated, all complaints are recorded so further action can be taken if a pattern of complaints or non-compliance emerges in the future in relation to the agency complained about.

The factors the IPC will consider when assessing a complaint and whether or what action is appropriate include:

- whether the agency is within jurisdiction. We will refer complaints to appropriate jurisdictions if we are unable to deal with it;
- whether the complaint is within jurisdiction. We will provide assistance about the options available if we are unable to deal with it;
- whether the complaint is a reviewable decision and should be dealt with by an agency as an internal review or by external review to the Tribunal;
- where the complaint is anonymous we may provide information to the agency on the basis of an anonymous complaint, but we will not be able to conciliate the complaint. We will not normally investigate the complaint unless it raises a serious matter that warrants and is capable of investigation;
- the seriousness of the conduct;
- the number of persons actually or potentially affected by the conduct;
- the harm caused or likely to be caused by the conduct;
- the level of public interest or concern relating to the conduct complained about;
- the history of the agency or sector, willingness and effort to comply, and responses to any previous compliance activities;
- whether the conduct complained about is an isolated instance;
- the time since the conduct occurred. We will not normally investigate a complaint where the conduct occurred more than twelve months ago;
- whether and how the conduct complained about has been dealt with by the organisation concerned, in other processes of the IPC or elsewhere;
- the cost and time to the IPC in order to achieve an appropriate outcome; and
- any other factors which are required to be considered under the legislation.

The outcome of a conciliation or investigation is presented in a report or correspondence setting out the issues, findings and any recommendations to the agency to remedy possible non-compliant or

contravening aspects of the agencies conduct. The report is provided to the complainant/applicant and to the agency. In some circumstances, the report may also be provided to the Minister for the agency and/or published by the IPC, in full or in de-identified format.

## Reporting – enforced compliance

‘Reporting’ compliance activities focus on responding to systemic non-compliance and using statutory powers of recommendation and publication to foster compliance.

Non-compliance may be systemic within a single agency, or more broadly within a sector. Systemic non-compliance may be identified from an incident which is brought to the IPC’s attention by a single complaint or review application, multiple complaints or reviews of a similar nature, from the IPC’s analysis of performance data and intelligence, or through other avenues such as a media report or a referral from another regulator or a Minister.

Not every issue of systemic non-compliance will be subject to a reporting compliance measure. The IPC must work within its available resources to ensure that compliance activities are targeted appropriately. The factors to be considered are set out below. A Commissioner’s weighing of any particular factor in making a decision to conduct a compliance audit, investigation or inquiry will depend on the individual circumstances of the case.

- **Scope** – achieving maximum reach to address non-compliance. Audits, investigations and inquiries will typically be conducted in response to risks identified relating to an issue across a sector, rather than in relation to a specific agency
- **Nature of non-compliance** – the extent and impact of the non-compliance on the agency’s information access obligations, on the objects of the information access regime, and on individual information access rights. The Information Commissioner more likely to take reporting compliance action where the non-compliance is serious, rather than inadvertent and/or of a minor nature with little potential to compromise the achievement of the objects of the information access regime
- **Willingness and effort to comply** – compliance history, willingness to comply with information access obligations, and the level of effort made to comply with these obligations. The Information Commissioner is more likely to take reporting compliance action where an agency or sector has a poor compliance history and has shown little willingness or effort to understand and comply with its obligations. The Information Commissioner will take into account the amount of regulatory guidance available to the agency or sector
- **Expected results** – what the most appropriate regulatory outcome is in the circumstances and whether the compliance measure is proportionate to the risk

- **Deterrence and voluntary compliance effect** – the lessons and messages likely to be sent to other agencies and sectors. Strong, effective compliance activities, especially if accompanied by publicity, can have a powerful effect on other agencies and sectors, either in deterring them from non-complying behaviour or encouraging them to ensure they continue to meet their obligations under the legislation.

The results of compliance audits, investigations and inquiries are reported to the agencies, relevant Ministers and the public. Investigations and inquiries may also be reported to and tabled in Parliament.

## Compliance Committee

Deployment of compliance activities is overseen by the IPC Compliance Committee. The Compliance Committee assesses regulatory risks and determines cases for proactive initiatives, campaigns, compliance audits, compliance investigations, compliance inquiries.

The Compliance Committee comprises:

- Information Commissioner
- Directors
- Principal Review Officer.

The Compliance Committee meets on a needs basis but at least quarterly. The Directors notify the Compliance Committee of cases for potential proactive compliance activities. These proactive initiatives reflect the IPC's risk based and intelligence led approach. Decisions of the Compliance Committee are guided by the regulatory principles and compliance measure factors.

## Public comment and publication

It is generally not appropriate for the Information Commissioner or staff of the IPC to comment on the conduct or decision of an agency that is subject to compliance activities. To do so may:

- cause difficulties for the IPC process;
- be disrespectful of those involved in the process; or
- risk prejudicing compliance outcomes.

However, where a particular compliance activity is of public interest and has already been reported in the media, the IPC may confirm publicly that it is engaged with an agency, but will not comment further until compliance activities are complete.

When a complaint, review, audit, investigation or inquiry has been completed, the Information Commissioner will provide a final report to the agency and applicants/complainants. In some compliance audits, investigations and inquiries a final report may also be required to be provided to a Minister and/or to Parliament. Some reports may also be published by the IPC, in full or in a de-identified format as appropriate.

A decision to make comment publicly or to publish will be guided by the following:

- All public statements and published reports are accurate, fair and balanced
- Are confined to historical matters where the agency is subject to IPC, Tribunal or court proceedings
- IPC's obligation to comply with legal requirements, including information release, privacy, confidentiality and secrecy obligations and Tribunal or court orders
- Minimising the potential for unfounded negative inferences and reputational damage to the parties
- Advising the parties in advance if it is possible and appropriate in the circumstances.

Media statements, audit, investigation, inquiry and review reports which have been published can be found on the [IPC website](#). The [IPC Media Protocol](#) is also available on the IPC website.

## Performance reporting

As an outcomes-focused regulator we monitor and evaluate our own performance and the impact of our regulatory services on agencies and the public. We use data to continuously improve our delivery. The IPC's *Strategic Plan*, *Business Plan* and *Regulatory Plan* set out our objectives and activities. These documents identify what we expect to observe when agencies operate in ways consistent with the intent of the information access laws, and how we measure sector performance and IPC performance against those objectives.

Effective performance reporting by the IPC is important to:

- credibly analyse systemic issues and inform our regulatory activities;
- ensure accountability to our stakeholders;
- apply resources effectively and proportionately; and
- guide the IPC's operations.

A robust performance reporting framework helps ensure that the IPC meets better practice regulatory principles to:

- not unnecessarily impede the efficient operation of agencies;
- communicate with agencies clearly and effectively;
- act in ways that are proportionate to the risk being managed;
- adopt compliance and monitoring approaches that are streamlined and coordinated;
- be open and transparent in dealings with agencies; and
- actively contribute to the continuous improvement of regulatory frameworks.

Performance measurement and reporting is through the *IPC Annual Report* and the annual statutory reports on the operation of the information access laws, as well as through the provision of open access data and dashboards.

## Working with other regulators

The IPC aims to maximise information access by working closely with other regulators who have relevant responsibilities. The IPC works with other regulators in three key ways:

1. Under formal Memorandums of Understanding which outline collaboration and information-sharing strategies
2. Under informal meeting arrangements to identify and coordinate strategic responses to issues of common concern. For example, through the Integrity Agency Working Group
3. Jointly on specific compliance activities.

Our objectives are to:

- facilitate co-operation;
- identify emerging regulatory risks and responses;
- share expertise and experience;
- facilitate the development of aligned regulatory guidance; and
- promote innovation and good practice.

In particular, we work closely with:

- NSW Ombudsman
- Independent Commission Against Corruption
- NSW Auditor General
- Public Service Commissioner
- Office of Local Government

These relationships help us to co-ordinate efforts, to keep up-to-date with how regulated sectors are performing and how emerging issues may affect agency and sector compliance.

There is also an important national and international dimension to our work with other regulators. Information access regulation can be affected by rapidly changing community expectations, experiences, technology and government policy settings. These changes are not unique to NSW or Australia, so we interact with other regulators from across the States, Territories and the Commonwealth, as well as from around the world, to share experiences and good practice.

REGULATOR	WEBSITE LINK
<i>Office of the Australian Information Commissioner</i>	<a href="https://www.oaic.gov.au/">https://www.oaic.gov.au/</a>
<i>Office of the Information Commissioner Queensland</i>	<a href="https://www.oic.qld.gov.au/">https://www.oic.qld.gov.au/</a>
<i>Freedom of Information Commissioner Victoria</i>	<a href="http://www.foi.vic.gov.au/">http://www.foi.vic.gov.au/</a>
<i>Office of the Information Commissioner Western Australia</i>	<a href="http://foi.wa.gov.au/">http://foi.wa.gov.au/</a>
<i>Office of the Information Commissioner Northern Territory</i>	<a href="https://infocomm.nt.gov.au/">https://infocomm.nt.gov.au/</a>
<i>South Australian Ombudsman</i>	<a href="http://www.ombudsman.sa.gov.au/freedom-of-information/">http://www.ombudsman.sa.gov.au/freedom-of-information/</a>
<i>Tasmanian Ombudsman</i>	<a href="http://www.ombudsman.tas.gov.au/right_to_information/process">http://www.ombudsman.tas.gov.au/right_to_information/process</a>
<i>Information Commissioner's Office United Kingdom</i>	<a href="https://ico.org.uk/">https://ico.org.uk/</a>
<i>Information and Privacy Commissioner of Ontario (Canada)</i>	<a href="https://www.ipc.on.ca/english/Home-Page/">https://www.ipc.on.ca/english/Home-Page/</a>
<i>Office of the Information and Privacy Commissioner for British Columbia</i>	<a href="https://www.oipc.bc.ca/">https://www.oipc.bc.ca/</a>
<i>Memorandum of understanding between the NSW Ombudsman and the NSW Information Commissioner</i>	<a href="http://www.ipc.nsw.gov.au/sites/default/files/file_manager/20140430%20memorandum%20of%20understanding.pdf">http://www.ipc.nsw.gov.au/sites/default/files/file_manager/20140430%20memorandum%20of%20understanding.pdf</a>
<i>Public Interest Disclosures Government Information Contravention Assessment and Management Guide</i>	<a href="http://www.ipc.nsw.gov.au/sites/default/files/file_manager/IPC_PID_Assessment_and_Management_Guide_AC_C_0.pdf">http://www.ipc.nsw.gov.au/sites/default/files/file_manager/IPC_PID_Assessment_and_Management_Guide_AC_C_0.pdf</a>
<i>Information sharing and complaint referral arrangements</i>	<a href="http://www.ipc.nsw.gov.au/information-sharing-and-complaint-referral-arrangements">http://www.ipc.nsw.gov.au/information-sharing-and-complaint-referral-arrangements</a>
<i>Office of the Australian Information Commissioner (OAIC) and Information and Privacy Commission NSW – Collaboration Principles</i>	<a href="http://www.ipc.nsw.gov.au/sites/default/files/file_manager/4.%20OAIC-IPC-NSW-collaboration-principles_ACC.pdf">http://www.ipc.nsw.gov.au/sites/default/files/file_manager/4.%20OAIC-IPC-NSW-collaboration-principles_ACC.pdf</a>

## Document information

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<b>Author:</b>	Director Investigation and Reporting
<b>Approver:</b>	CEO/Information Commissioner
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## Document history

Version	Date	Reason for Amendment
1.0	March 2016	Initial Draft
1.1	June 2016	Revision following internal IPC consultation
2.0	July 2016	Final for approval
2.1	July 2016	Approved by CEO/IC
2.2	September 2016	Revision following feedback from Audit Office. Approved by DI&R. Revision 8.