



information  
and privacy  
commission  
new south wales

# Transport for NSW – GIPA Compliance Report

January 2021



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## Abbreviations

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

<b>Acronyms or abbreviation</b>	<b>Explanation</b>
GIIC Act	<i>Government Information (Information Commissioner) Act 2009</i>
GIPA Act	<i>Government Information (Public Access) Act 2009</i>
IPC	Information and Privacy Commission
RMS	Roads and Maritime Services
TfNSW	Transport for NSW
TSS	Transport Shared Services

## 1. Purpose

The *Government Information (Public Access) Act 2009* (GIPA Act) requires that contract information is made available by government agencies through a publicly available contract register. Mandating public reporting of contracts serves a pro-integrity purpose that increases government transparency and accountability. Contract registers can also contribute to improved performance of outsourced services, increased efficiency and value for money. They are also an important tool to proactively manage potential conflicts of interest and ensure that public value is demonstrably realised.

This report discusses an assessment of the compliance of Transport for NSW (TfNSW) as the lead agency for the Transport cluster with the mandatory requirement to keep a contract register, and the systems and processes in place to ensure compliance with the relevant contract reporting provisions of the GIPA Act.

Section 17(g) of the GIPA Act recognises the Information Commissioner's role in monitoring, auditing and reporting on the exercise by agencies of their functions under, and in compliance with, the GIPA Act.

In June 2018, TfNSW self-reported to the IPC that it had identified that agencies within the Transport cluster had not fully complied with the contract disclosure requirements of the GIPA Act and that the non-compliance related to the period between 2007 and 2018. This audit was therefore undertaken with acknowledged non-compliance by TfNSW in relation to the requirement that contracts are required to be published in the contract register within 45 working days after the contract becomes effective (section 27(2) of the GIPA Act).

TfNSW undertook a remediation program from June 2018 to address its contract compliance. At the conclusion of the Information Commissioner's monitoring of that remediation program, the Information Commissioner advised that she intended to undertake a compliance audit in accordance with her functions under section 17(g) of the GIPA Act to satisfy herself of the effectiveness of the remediation undertaken and TfNSW's compliance going forward.

A desktop audit was determined to be the most effective and expeditious method to inform a base line assessment, recommendations and ongoing monitoring to progress and achieve compliance. The decision to undertake the desktop audit was further informed by the particular circumstances surrounding COVID-19 which impacted the capacity for onsite review.

This audit commenced following the completion of a comprehensive remediation plan developed and implemented by TfNSW. The purpose of this desktop audit was to assess information provided by TfNSW relating to its contract register compliance and to identify whether the practices together with the systems and policies within TfNSW support and promote ongoing compliance with the contract register requirements of the GIPA Act.

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

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

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

## 2. Overview

The results of this desktop audit together with the TfNSW's self-assessment have demonstrated that TfNSW has made progress in its compliance as a result of the remediation program undertaken. However, this audit has identified further opportunities for improvement.

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

TfNSW responded to the draft report on 24 December 2020. That response has informed the finalisation of this report. TfNSW responded positively to the recommendations and advised that it adopts the recommendations. Recommendations 1 and 2 relate to an internal audit being undertaken by TfNSW following the finalisation of this report. The final form of these two recommendations has been informed by TfNSW's response and does not compromise the effectiveness of the implementation of the recommendations.

TfNSW's response to the recommendations made by this report are summarised at Table 1 at part 7.3 of this report.

Notwithstanding the findings of non-compliance outlined in this report, I am satisfied that TfNSW has demonstrated a commitment to take steps to address the self-identified issues of non-compliance. This commitment to compliance has been demonstrated by the proactive steps taken by TfNSW to report the non-compliance to the IPC, the commitment to training within the cluster and the comprehensive and detailed information provided by TfNSW to the IPC during the implementation of its remediation plan.

The IPC welcomes the response by TfNSW to the draft report and will continue to engage with TfNSW in relation to the implementation of the recommendations.

## 3. Background

### 3.1 Structure

TfNSW was formed in November 2011 and administered through the *Transportation Administration Act 1988 (NSW)*.

TfNSW is the lead agency in the Transport cluster for NSW and is responsible for the coordination, funding allocation, policy and planning and other delivery functions for transport services.

TfNSW<sup>1</sup> identifies the following government transport agencies as within its cluster:

- Sydney Trains
- NSW Trains
- Sydney Metro
- State Transit Authority

On 1 July 2019, the NSW Government announced its intention to integrate Roads and Maritime Services (RMS) into TfNSW. By virtue of the *Transport Administration Amendment (RMS Dissolution) Act 2019*, RMS was dissolved as from 1 December 2019 and all of its functions, assets, rights and liabilities were transferred to TfNSW.

### 3.2 Self-reported non-compliance and remediation plan

In June 2018, TfNSW informed the IPC that it had identified that agencies within the Transport cluster were not fully compliant with the contract disclosure requirements of the GIPA Act. TfNSW had reviewed its disclosure records in the NSW eTendering website against internal contract databases and identified that contracts had not been disclosed by TfNSW, RMS, Sydney Trains, NSW Trains and State Transit Authority since 2007. TfNSW provided the IPC with information about the non-compliance and the remediation plan it had put in place to resolve the non-compliance.

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<sup>1</sup> TfNSW Website at <https://www.transport.nsw.gov.au/about-us/who-we-are/our-organisation>

### 3.3 Informal engagement

After TfNSW reported the non-compliance to the IPC, the Information Commissioner monitored implementation of the remediation actions by TfNSW with quarterly reports and updates from TfNSW.

Between July 2018 and October 2018, TfNSW provided the IPC with progress updates in relation to its remediation plan. In summary, these updates explained that:

- By the end of July 2018, TfNSW had disclosed all active contracts for the Transport cluster that had not been disclosed between 2007 and May 2018, representing a total of 1,505 new disclosures on the NSW eTendering website.
- On 16 August 2018, a list of inactive or expired contracts dating back to 2007 was disclosed in a spreadsheet on the TfNSW website. TfNSW advised that this list would be made available on its website until 31 December 2018.
- Training was provided to the TfNSW Information Access Unit in 2018 on contract disclosure obligations under the GIPA Act and the practical steps to disclose a contract across the cluster. TfNSW also developed and delivered a contract disclosure training module for different roles across the Transport cluster.
- Revised Factsheets were prepared in 2018 outlining contract disclosure obligations as well as practical instructions on how to disclose contracts which have been provided to agency Chief Procurement Officers and Division Heads for communication to teams. Case studies and further guidance materials were also being developed as part of the training modules and in response to questions received in the training sessions.
- By 28 September 2018, following a comprehensive review of its contract holdings across the cluster to identify undisclosed contracts, 9,440 contracts had been disclosed on either NSW eTendering or TfNSW's website.
- Senior officers within the Transport cluster were involved in raising the importance of compliance with the contract register requirements, including through the TfNSW Strategic Operations Committee, the Transport Cluster Leadership Committee, the Divisional Management Council and the Procurement Leadership Group.
- Review and updates to the practices and processes of the Transport Shared Services (TSS) Procurement team and the Infrastructure and Services Division team were undertaken, including:
  - Updating processes to lead to data entry improvements and increase standardisation of the disclosure process.
  - Reviewed and improved reporting and monitoring.
  - Heightened awareness of disclosure obligations amongst Transport cluster procurement and commercial professionals by documentation updates and disseminating stakeholder information.
- In September 2018, TfNSW engaged an external professional services firm to perform an independent review of the program of remediating the non-disclosure of government contracts across the Transport cluster.
- In October 2018, TfNSW disclosed a further 555 expired expenditure contracts. TfNSW also disclosed 497 'revenue' contracts (i.e. contracts where the Transport cluster receives money pursuant to an agreement with a private sector entity). This included expired and active contracts for the period 2009 to 2018. TfNSW provided an update in relation to the small number of disclosures that were yet to be progressed.

In the course of the remediation program, TfNSW identified some qualification to complete contract disclosure in some instances, such as where data integrity and contract age meant that the conduct could not be sufficiently identified for disclosure. TfNSW also noted that in some cases contracts may have been duplicated on its contract register due to peculiarities concerning the identification of relevant contracts for disclosure.

In November 2018, the Information Commissioner wrote to TfNSW to acknowledge that the progress updates provided a comprehensive overview of the compliance activities undertaken and to note the progress that had been made in the disclosure of contracts to address the non-compliance. The Information Commissioner encouraged TfNSW to continue disclosing contracts as part of the remediation plan and provided comments in response to information provided by TfNSW.

In January 2019, TfNSW provided a further progress update which included information about:

- further contract disclosures since October 2018
- the delivery of process improvements
- the implementation of recommendations provided by the external expert in relation to systems, processes and capabilities
- the delivery of TfNSW's cluster-wide contract disclosure training.

In March 2019, the Information Commissioner wrote to TfNSW to acknowledge the further update and to advise of the intention to undertake an audit following the remediation that had been undertaken.

### 3.4 Formal audit notification

TfNSW were on notice of the Information Commissioner's intention to undertake a compliance audit following completion of the remediation program. On 25 May 2020, the IPC provided formal notice of the commencement of the audit to TfNSW.

## 4. Methodology

In addition to the information provided by TfNSW during the informal engagement, at the commencement of the formal audit the IPC issued a request to TfNSW to furnish it with the following information to assist with the audit:

- a list of contracts entered into on each of the first three business days for the months of August, September and October 2019 for TfNSW, Sydney Metro, the former RMS and RailCorp;
- copies of policies and procedures in place across the Transport cluster in support of compliance with section 27(2) of the GIPA Act; and
- a brief overview of the remediation process.

The analysis of TfNSW's compliance was conducted by the IPC between August and December 2020. The IPC examined the information provided by TfNSW in conjunction with the publicly available information on NSW eTendering and with regard to relevant requirements of the GIPA Act.

#### 4.1 Assessment Criteria

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

Assessment criteria	
1.	<b>Requirement to maintain a contract register</b>
2.	<b>Have established systems and processes around the contract register requirements of the GIPA Act</b>

#### 4.2 Audit sampling and review

TfNSW was asked to provide a list of the contracts entered into on each of the first three business days for the months of August, September and October 2019. The IPC randomly selected this date range to allow for a comparison of information provided by TfNSW against data that had been published in the NSW eTendering website. The dates selected were communicated to TfNSW concurrent with the notice of audit.

The list provided by TfNSW included fifty-six (56) contracts and provided information about each contract including the date of publication on NSW eTendering and the number of working days between award / variation date to disclosure. The self-reported information about each of these contracts was taken into account in assessing compliance with the 45 working day publication timeframe under section 27(2) of the GIPA Act.

This audit also reviewed a random sample of thirteen contracts from the list against the requirements of the GIPA Act relating to whether the information published reflected the legislative requirements contained in Part 3, Division 5 of the GIPA Act relating to class 1, class 2 and class 3 contracts.

Despite the small sample size, the IPC considers that the observations and findings made in this report reflect the contract reporting by TfNSW more broadly. The random nature of sampling means that the contracts reviewed in each of the months will differ. This is consistent with our aim of testing overall compliance levels.

#### 4.3 Audit limitations

The scope of this audit is limited to a desktop review of the information provided by TfNSW relating to compliance with the contract reporting requirements of the GIPA Act in August, September and October 2019.

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

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

This audit relied on the information provided by TfNSW and information published by TfNSW on NSW eTendering website as a true representation of fact without reviewing the veracity of the information. This includes reliance on information provided by TfNSW about whether contracts should be classified as class 1, 2 or 3 contracts.

The IPC identified a random sample of twenty contracts from the list of contracts provided by TfNSW. Thirteen of those contracts remained available on NSW eTendering at the time the sampled contracts were reviewed.

The desktop nature of the audit does not enable an assessment of compliance with the requirements relating to the minimum public access period under section 34 of the GIPA Act.<sup>2</sup> It has therefore been assumed that the seven contracts identified for sampling that could not be located on NSW eTendering have been removed from the register because the minimum publication period has expired.<sup>3</sup>

Further, where TfNSW entered “not applicable” or “N/A” in the register in response to a requirement that involves an assessment of relevance, it has been assumed that TfNSW has correctly identified that the information is not applicable / relevant to the particular contract unless it appears from other information on the register that relevant information is likely to exist.

## 5. Acknowledgements

The IPC appreciates the assistance and co-operation provided by TfNSW and its officers during the review and assessment.

## 6. Observations

The observations and recommendations that follow are made based on:

- a review of the information provided by TfNSW relating to compliance with the contract reporting requirements of the GIPA Act in August, September and October 2019;
- publicly available information on NSW eTendering or the TfNSW website relevant to the sampled contracts; and
- a review of the information that TfNSW provided to the IPC relating to its remediation plan together with policies and procedures relevant to the contract reporting requirements of the GIPA Act.

### 6.1 Requirement to maintain a contract register

Criterion		Result
I.	<b>Requirement to maintain a contract register</b>	<b>Partial compliance</b>
a	Maintain a register of all class 1 contracts with a value of \$150,000 (including GST) or more that identifies the name and business address of the contractor, the commencement date and duration of the contract, details of the project, project cost, basis for variations and selection process	Partial compliance, improvements to ensure compliance with the GIPA Act requirements
b	Update the register within 45 working days of the contract coming into effect	Partial compliance, improvements to ensure compliance with the GIPA Act requirements
c.	Ensure that the contract register includes all additional information required for class 2 contracts (see section 30)	Partial compliance, improvements to ensure compliance with the GIPA Act requirements

<sup>2</sup> The minimum public access period is prescribed as whichever is the longer of either 20 working days, or the period until the project to which the contract relates is complete, the goods and services concerned have been provided under the contract, the term of the lease has expired or the real property has been transferred.

<sup>3</sup> This report is based on information that was available on NSW eTendering on 18 November 2020 and 8 December 2020.

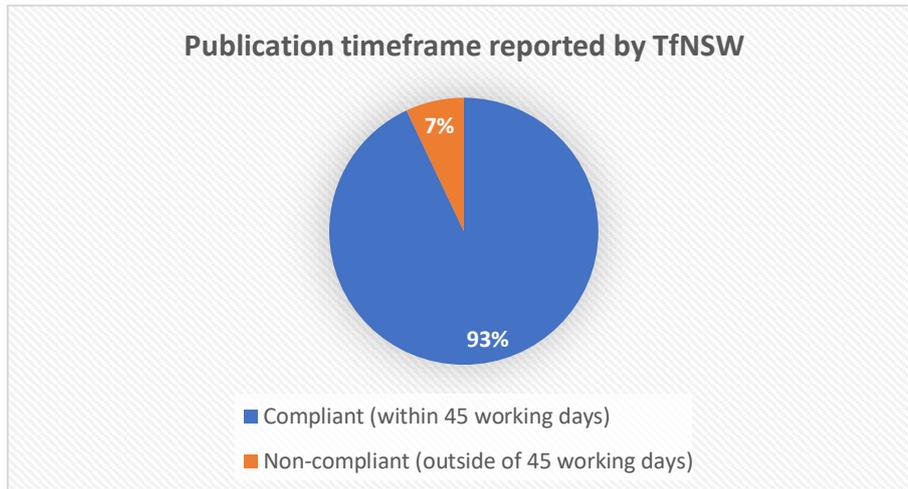
Criterion		Result
d.	Ensure that the register fully meets the requirements for Class 3 contracts (those with a value of \$5 million or more) (see section 31)	Partial compliance, improvements to ensure compliance with the GIPA Act requirements
e.	<p>Ensure that if a copy of a contract is not included on the agency register or only some of the provisions are included because it contains confidential information (see section 32), agencies place on the register:</p> <ul style="list-style-type: none"> <li>- the reasons why the contract or provisions have not been included in the register</li> <li>- a statement as to whether it is intended to include the contract or provisions at a later date, and when this is likely to occur</li> <li>- a general description of the types of provisions that have not been included</li> </ul>	Partial compliance, improvements to ensure compliance with the GIPA Act requirements

Comments, findings and recommendations
<p><b>Comment:</b> Part 3 of the GIPA Act provides for open access information which is required to be made publicly available by agencies. Division 5 provides disclosure requirements for three classes of government contract with the private sector, in the form of a contracts register for those contracts valued at \$150,000 or over.</p> <p>Contracts must be entered in the register within 45 working days of the contract becoming effective (section 27 of the GIPA Act).</p> <p>Three classes of contract are established, each with different mandated requirements for disclosure:</p> <p><i>Class 1:</i> A contract to which the agency is a party that has a value of \$150,000 or more (see section 29).</p> <p><i>Class 2:</i> A class 1 contract, to which any of the following apply (see section 30):</p> <ul style="list-style-type: none"> <li>• result in a direct negotiation where there has not been a tender process and the proposed contract has not been publicly available;</li> <li>• there has been a tender process and terms and conditions have been substantially negotiated with the successful tenderer;</li> <li>• involve operation or maintenance obligations for 10 years or more;</li> <li>• involve a privately financed project as defined by relevant Treasury guidelines; or</li> <li>• involve a transfer of land or other asset to a party in exchange for the transfer of land or other asset to an agency.</li> </ul> <p><i>Class 3:</i> A class 2 contract, with a value of \$5 million or more (see section 31). A copy of class 3 contracts must be made available with the register subject to the application of section 32 of the GIPA Act.</p>

Comments, findings and recommendations

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

**Observation:** The following chart represents information reported by TfNSW about whether the fifty-six (56) contracts relevant to the first three business days of August, September and October 2019 were disclosed on the contract register within the publication timeframe under the GIPA Act:



TfNSW advised that 93% of contracts were disclosed within the 45 working day timeframe for contracts relevant to the nine days selected for this audit and that this reflects the extensive work the Transport cluster has engaged in as part of its remediation program over 2018-2019. This reflects a positive demonstration of the commitment by TfNSW to the remediation program undertaken.

In recognising that there remains a level of non-compliance, TfNSW should take steps to assess and review the causes of non-compliance and implement specific action to address this non-compliance to achieve full compliance with the publication timeframe going forward.

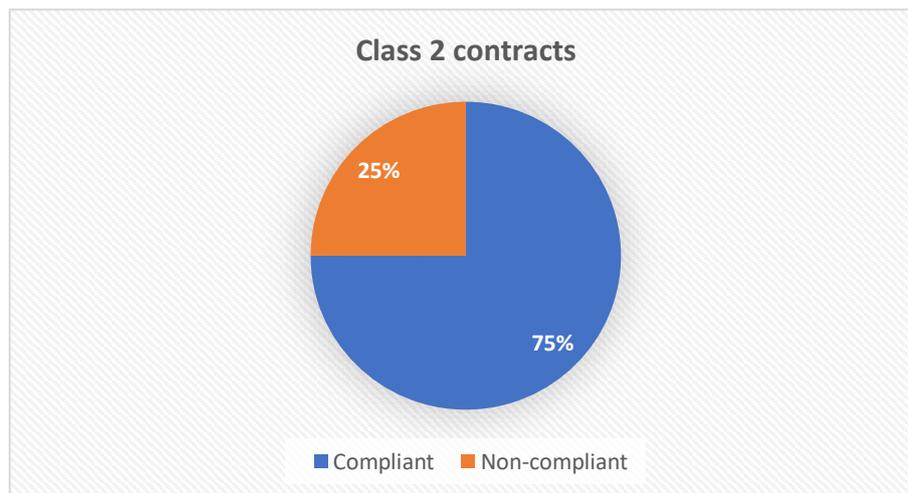
In respect of the sample of thirteen (13) contracts, four were identified by TfNSW as class 2 contracts and one was identified as a class 3 contract. These contracts were assessed by a comparative analysis of the information provided by TfNSW, the information available on the NSW eTendering website or the TfNSW website against the requirements of sections 29 to 32 of the GIPA Act.

The results of this review can be summarised as follows:



### Comments, findings and recommendations

The assessment found that the contract register was incomplete or did not include meaningful and accurate information to address the requirements relating to the disclosure of information for class 1 contracts in relation to four of the thirteen contracts reviewed. For example, in relation to some of the contracts that involved a tendering process the register included a 'N/A' response to the item about the assessment criteria relevant to the tendering process and therefore did not include meaningful information in response to this item. In other instances where a description of information was required to be included, the assessment found that a 'yes' or 'no' response, or reference to provision number within the contract that is not publicly available, did not satisfy the requirement.



In relation to the sampled class 2 contracts:

- three contracts provided a 'N/A' or 'not applicable' response to the requirements under section 30 of the GIPA Act;
- one contract had incomplete information because it did not include responses to most of the questions relevant to class 2 contracts.

As noted in the Audit Limitations at 4.3 above, where TfNSW has stated 'N/A' or 'not applicable' in relation to certain requirements it has not been possible to test the veracity of these responses. Notwithstanding this limitation, TfNSW should ensure that a 'not applicable' response is only included in the contract register when it has been determined that the specific information is not required to be included with regard to the particulars of the relevant contract.

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

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

The assessment of the sampled class 3 contract found that a copy of the contract was not available on NSW eTendering but a redacted version of the contract was available on the TfNSW website.<sup>4</sup>

An inconsistency was identified in this assessment.

<sup>4</sup> A copy of the contract was accessed via the TfNSW website on 2 December 2020 – <https://www.transport.nsw.gov.au/industry/contracts-awarded/sydney-trains-contracts-awarded>.

### Comments, findings and recommendations

The version available on the website includes a cover page which explains the basis for redactions to the contract as required under section 32. This cover page also states that there is no intention to release any of the material redacted in the contract at a later date.

However, the information on NSW eTendering states that no information has been withheld from the contract and does not refer to the contract being publicly available on the TfNSW website. Further, the information on NSW eTendering did not satisfy the requirements of section 32 of the GIPA Act because a “N/A” response was provided to the following criteria:

- a statement as to whether it is intended that the redacted provisions will be included in the register at a later date and if so, when it is likely that they will be included, and
- a general description of the types of provisions that have not been included on the register.

Where a class 3 contract has been published on the TfNSW website, TfNSW should ensure that the information on NSW eTendering refers to the public availability of the contract and how it can be accessed, as well as including accurate and consistent information about the contract.

In summary, the review of the information available on NSW eTendering for the sampled contracts found a lack of consistent practice of ensuring that detailed and relevant information is included in the register to satisfy the mandatory reporting requirements. The review therefore identified that there are opportunities for improvement in relation to the disclosure of accurate, complete and meaningful information in class 1, 2 and 3 contracts on the contract register.

It is noted that in the June 2020 update on its remediation plan, TfNSW advised that it was developing a monthly Contract Disclosure Status Report for distribution to 60 stakeholders across the cluster, to monitor and highlight disclosure compliance and facilitate follow up with the business, where required (including reporting specifically for class 3 contracts).

**Recommendation 1:** TfNSW undertakes an internal audit of compliance with the publication timeframe in relation to contracts that became effective within the twelve months prior to the issuance of this compliance report by assessing a random sample of relevant contracts. If non-compliance occurred, TfNSW should undertake a review to identify the causes for non-compliance and action to be taken (or already taken) to address non-compliance and ensure future compliance.

**Recommendation 2:** TfNSW reports the outcome of its internal audit to the IPC by 31 May 2021 and if relevant, provides details of any remediation program identified.

**Recommendation 3:** By 31 March 2021, TfNSW provides guidance and training across the Transport cluster so that there is a consistent understanding and approach for the type and level of information being recorded in the contract register relevant to the requirements under sections 29 to 32 of the GIPA Act so as to ensure that information disclosed is complete, meaningful and accurate.

**Recommendation 4:** By 31 March 2021, TfNSW finalises the development of monthly reporting processes to monitor and highlight disclosure compliance and facilitate follow up, where required.

## 6.2 Systems and processes

Criterion		Result
II.	<b>Have established systems and processes around the contract register and relevant requirements of the GIPA Act</b>	<b>Partial compliance</b>
a	Established and communicated governance framework	Partial compliance, improvements to ensure compliance with the GIPA Act requirements
b	Documented systems and processes	Partial compliance, improvements to ensure compliance with the GIPA Act requirements

Comments, findings and recommendations	
<p><b>Comment:</b> An agency’s ability to comply with the mandatory contract reporting requirements of the GIPA Act is dependent on the agency developing and implementing procedures to manage the requirements. These procedures should include internal controls to ensure that:</p> <ul style="list-style-type: none"> <li>reliable and timely disclosures occur</li> <li>key responsibilities and accountabilities are clearly communicated</li> <li>instances of non-compliance are monitored and addressed</li> <li>expectations and consequences for non-compliance are clearly communicated.</li> </ul> <p>During its remediation program, TfNSW took steps to identify what caused the historical non-compliance with the contract reporting requirements of the GIPA Act. The causes identified include:</p> <ul style="list-style-type: none"> <li>Absence of accountability framework in relation to compliance.</li> <li>Lack of knowledge and guidance in relation to the contract reporting requirements under the GIPA Act.</li> <li>Contract reporting requirements not being part of core procurement processes.</li> <li>Absence of a centralised disclosure process within contract management systems.</li> <li>Insufficient monitoring of compliance activities.</li> </ul> <p>TfNSW advised that its remediation program included the following actions to drive on-time contract disclosure compliance:</p> <ul style="list-style-type: none"> <li>Enhancing existing guidance material on contract disclosure and developing additional guidance, and training procurement teams as part of achieving a cultural change around on-time disclosure.</li> <li>Developing an updated intranet site for easy access to relevant contract disclosure documentation.</li> <li>Introducing peer and quality reviews across the cluster to facilitate contract disclosure, improve data quality and improve awareness of contract disclosure obligations.</li> <li>Enhanced working relationships across the cluster to support contract disclosure to ensure contract disclosure remains at the forefront of TfNSW practices and process.</li> </ul>	

## Comments, findings and recommendations

Under the GIPA Act, leaders have an important role in promoting awareness and fostering an organisational culture that advances and promotes the objects of the GIPA Act. This can be achieved by adoption of an open access and open data culture by promoting release of information supported by a governance framework that demonstrates a commitment to open access and data. The accountability for ensuring legislative compliance, including in relation to the contract register requirements, rests at the agency head and the senior executive.

Guidance regarding the role and responsibilities of principal officers relevant to GIPA Act compliance, in this case the CEO, has been produced by the IPC and is contained in the [Fact Sheet: The role of principal officers and senior executives in supporting the object of the GIPA Act](#).

**Observations:** As noted in Part 3.1 above, TfNSW is the lead agency for the Transport cluster and manages compliance with the contract reporting requirements of the GIPA Act for the cluster agencies.

TfNSW provided copies of policy documents relevant to the contract register requirements of the GIPA Act for TSS, TfNSW Infrastructure and Place, Sydney Trains, Sydney Metro and the State Transit Authority. The approach adopted reflects a devolved approach to the management of the contracts register reporting requirements across the cluster.

The TSS *Contract Disclosure GIPA Fact Sheet* (April 2020) includes detailed guidance on the contract reporting requirements of the GIPA Act, including clear and concise information about the different classes of contracts, what to disclose, what not to disclose, and the timeframe for disclosure. The Fact Sheet is relevant to TfNSW, Sydney Trains, RailCorp, NSW TrainLink, Sydney Metro and the State Transit Authority and provides information about mandatory GIPA Disclosure Training for Procurement, Contract Managers and TSS Contracts Administration.

The Fact Sheet provides an overview of the internal reporting process for four separate procurement teams that deal with different types of contracts or contract management systems. For example, there appears to be a different process and system relevant to the management of goods and services contracts in comparison to construction-industry related contracts.

The process overview includes the following types of information:

- a description of which documentation should be completed in order to internally report the information required to be disclosed in the contract register, such as the completion of a particular form
- details of when the information should be internally reported and whether it is a mandatory requirement prior to the creation of the contract
- details of role-specific responsibilities relating to the uploading of contracts, and
- details of where further instructions can be found on the disclosure process.

However, the level of detail provided for each procurement team varies and the limited information included does not clearly set out relevant steps in the disclosure process for each procurement team as well as responsibilities and accountabilities in this regard.

Further, the Fact Sheet provided does not clearly explain who is responsible for the disclosure of information on NSW eTendering or the accountability framework for ensuring compliance with the GIPA Act requirements.

TfNSW also provided other documents which are relevant to the procedures within specific agencies or divisions within the TfNSW cluster.

### Comments, findings and recommendations

The contract reporting requirements of the GIPA Act are embedded within the Sydney Trains *Contract Management Procedures* (2020). This document includes information about legislative requirements, business unit responsibilities, the systems in place to assist reporting and mandatory GIPA Disclosure training. It also notes that a compliance culture where behaviours support complete, accurate and timely disclosure of contracts in accordance with the GIPA Act must be maintained. It also appears that reference to the contract reporting requirements have been included in the procurement procedures for Sydney Trains.

TfNSW also provided documents which specifically describe the processes for contract disclosure relevant to the Infrastructure and Place Division, including roles and responsibilities within the processes. This includes a specific process to ensure that class 3 contracts are disclosed accurately and within the required timeframe. It appears that these documents were developed in 2019.

The State Transit Authority *Contract Disclosure GIPA Act Fact Sheet* (2018) provides a basic overview of different procedures for the disclosure of contracts within the State Transit Authority depending on the type of contract and / or team involved.

The Sydney Metro *Contract Mobilisation Procedure* (2018) refers to the requirement to disclose contract information on NSW eTendering but includes very limited detail about the specific requirements of the GIPA Act and any internal systems and processes in place to ensure compliance.

It is encouraging to note that the resources reviewed or developed in 2019/20 include detailed information about the contract reporting requirements of the GIPA Act as well as guidance about how those requirements should be met.

As TfNSW continues to review and develop its contract disclosure procedures across the cluster, it should ensure that responsibilities and the accountability framework relating to compliance with the contract register requirements are clearly defined and communicated to staff. This should include communicating which position/s have overall responsibility for compliance within each agency and within the cluster.

Although the devolved approach to the contract reporting requirements may be appropriate due to the different contract management systems in place across the cluster, clear and consistent messaging within policies and procedures across the cluster will assist TfNSW in managing and monitoring compliance across the cluster. This includes clear communications relating to expectations around the timeliness, completeness and accuracy of reporting contract information, as well as communicating internal consequences for late or incomplete reporting.

While there are some mechanisms to monitor ongoing compliance and promote accountability through agencies like Sydney Trains, this does not seem to be the case across the cluster. TfNSW should ensure that instances of non-compliance are monitored, addressed and analysed to mitigate the risk of future non-compliance. TfNSW should work towards ensuring that all agencies within the cluster have a mechanism in place to monitor ongoing compliance and promote accountability.

**Recommendation 5:** By 30 June 2021 TfNSW develops and implements a mechanism for unannounced periodic quality assurance and internal auditing of the contract register against requirements of the GIPA Act. This mechanism should include a process to report quality assurance and audit findings to the Senior Executive, including information relating to instances of non-compliance and actions taken to address non-compliance.

### Comments, findings and recommendations

**Recommendation 6:** That TfNSW clearly defines and communicates current contract register roles and responsibilities to all staff to ensure that there is a clear governance and accountability framework across the Transport cluster. This includes the executive team, senior management, line management and operational staff, across relevant business units and cluster agencies.

**Recommendation 7:** That TfNSW continues to review and update its internal policies, guidelines and procedures to ensure that the contract register requirements of the GIPA Act are embedded into all relevant systems, policies, processes and procedures and include a clear governance framework and mechanisms to identify, report on and address instances of non-compliance.

## 7. Conclusions and Recommendations

### 7.1 Conclusions

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 contract reporting requirements under the GIPA Act support achieving this outcome. Responsibility for compliance under the GIPA Act rests with the agency head. This reflects the ultimate accountability of TfNSW for the systems, policies and procedures, culture and capability that support compliance.

This audit has responded to stated non-compliance and the IPC's independent findings. This audit was informed by:

- the information provided by TfNSW, including information provided during informal engagement prior to the commencement of this audit
- a desktop review of relevant information published by TfNSW on the NSW eTendering website and on the TfNSW website
- the legislative requirements of the GIPA Act.

In summary, this audit has identified:

- non-compliance with the contract register requirements of the GIPA Act prior to May 2018
- improved compliance with the contract register requirements of the GIPA Act as a result of TfNSW proactively implementing a remediation program to address historical non-compliance and self-reporting non-compliance to the IPC
- opportunities for the IPC to support and enable TfNSW in achieving compliance in respect the contract registers requirements.

In response to engagement by the IPC, TfNSW demonstrated a commitment to improve compliance through internal remedial actions and engagement with the IPC. The IPC will continue to engage with TfNSW to assist its compliance with the contract reporting requirements of the GIPA Act.

### 7.2 Recommendations

The recommendations made reflect the information already available to TfNSW to achieve compliance including:

- the regulatory advice provided throughout the IPC's regulatory engagement
- the acknowledged non-compliance by TfNSW and the remediation program under implementation.

These recommendations address the fundamental areas of:

- mandatory contract register reporting requirements of the GIPA Act
- systems and processes to promote compliance with legislative requirements
- governance and accountability
- staff knowledge and capability
- clearly defined and communicated roles and responsibilities for staff
- quality assurance and internal audit mechanisms to monitor compliance.

Recommendations	
<b>Recommendation 1</b>	TfNSW undertakes an internal audit of compliance with the publication timeframe in relation to contracts that became effective within the twelve months prior to the issuance of this compliance report by assessing a random sample of relevant contracts. If non-compliance occurred, TfNSW should undertake a review to identify the causes for non-compliance and action to be taken (or already taken) to address non-compliance and ensure future compliance.
<b>Recommendation 2</b>	TfNSW reports the outcome of its internal audit to the IPC by 31 May 2021 and if relevant, provides details of any remediation program identified.
<b>Recommendation 3</b>	By 31 March 2021, TfNSW provides guidance and training across the Transport cluster so that there is a consistent understanding and approach for the type and level of information being recorded in the contract register relevant to the requirements under sections 29 to 32 of the GIPA Act so as to ensure that information disclosed is complete, meaningful and accurate.
<b>Recommendation 4</b>	By 31 March 2021, TfNSW finalises the development of monthly reporting processes to monitor and highlight disclosure compliance and facilitate follow up, where required.
<b>Recommendation 5</b>	By 30 June 2021 TfNSW develops and implements a mechanism for unannounced periodic quality assurance and internal auditing of the contract register against requirements of the GIPA Act. This mechanism should include a process to report quality assurance and audit findings to the Senior Executive, including information relating to instances of non-compliance and actions taken to address non-compliance.
<b>Recommendation 6</b>	That TfNSW clearly defines and communicates current contract register roles and responsibilities to all staff to ensure that there is a clear governance and accountability framework across the Transport cluster. This includes the executive team, senior management, line management and operational staff, across relevant business units and cluster agencies.

Recommendations	
<b>Recommendation 7</b>	That TfNSW continues to review and update its internal policies, guidelines and procedures to ensure that the contract register requirements of the GIPA Act are embedded into all relevant systems, policies, processes and procedures and include a clear governance framework and mechanisms to identify, report on and address instances of non-compliance.

### 7.3 TfNSW's response to implementation of recommendations

Table 1 summarises the response by TfNSW to the recommendations in this report. The explanation for the status is explained at Table 2 below.

**Table 1**

Recommendation	Status			
	Adopted in full	Adopted in part	Alternate action adopted	Not adopted
1			X	
2	X			
3	X			
4	X			
5	X			
6	X			
7	X			

**Table 2**

Rating	Description
Adopted in full	The agency has accepted the recommendation in its entirety and will implement in full.
Adopted in part	The agency has accepted the recommendation in part. However, it has not fully realised the intent of the recommendation or only proposes to implement part of the recommendation.
Alternate action adopted	The agency has addressed the underlying issue by taking action different to the recommended action and that action is deemed acceptable to the IPC.

Rating	Description
Not accepted	The agency has not accepted the recommendation.

#### 7.4 Monitoring

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

## 8. Audit chronology

Date	Event
21 June 2018	TfNSW self report non-compliance with the contract reporting requirements of the GIPA Act
June 2018 – January 2019	TfNSW undertake remediation program and IPC monitors remediation
25 May 2020	Correspondence from IPC to TfNSW to notify of audit and request information
26 June 2020	TfNSW response to IPC request for information
August - December 2020	Desktop audit undertaken
10 December 2020	Draft Report provided to TfNSW
24 December 2020	TfNSW response to draft compliance report
19 January 2021	Provision of final report to TfNSW

## 9. Legislation

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

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

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

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

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

## Appendix A: Part 3 Division 5 of the GIPA Act

### Division 5 Government contracts with private sector

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

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

#### 28 Value of contract

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

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

#### 29 Information to be entered in register—class 1 contracts

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

- a) the name and business address of the contractor,
- b) particulars of any related body corporate (within the meaning of the Corporations Act 2001 of the Commonwealth) in respect of the contractor, or any other private sector entity in which the contractor has an interest, that will be involved in carrying out any of the contractor's obligations under the contract or will receive a benefit under the contract,

- c) the date on which the contract became effective and the duration of the contract
- d) particulars of the project to be undertaken, the goods or services to be provided or the real property to be leased or transferred under the contract,
- e) the estimated amount payable to the contractor under the contract,
- f) a description of any provisions under which the amount payable to the contractor may be varied,
- g) a description of any provisions with respect to the renegotiation of the contract,
- h) in the case of a contract arising from a tendering process, the method of tendering and a summary of the criteria against which the various tenders were assessed,
- i) a description of any provisions under which it is agreed that the contractor is to receive payment for providing operational or maintenance services.

#### 30 Additional information for class 2 contracts

- (1) Additional information is required to be entered in the government contracts register for class 1 contracts to which any of the following paragraphs applies (class 2 contracts)—
  - a) there has not been a tender process, the proposed contract has not been made publicly available and the terms and conditions of the contract have been negotiated directly with the contractor,
  - b) the proposed contract (whether or not made publicly available) has been the subject of a tendering process and the terms and conditions of the contract have been substantially negotiated with the successful tenderer,
  - c) the obligations of one or more parties under the contract to maintain or operate infrastructure or assets could continue for 10 years or more,
  - d) the contract involves a privately financed project as defined by guidelines published by the Treasury (as in force from time to time),
  - e) the contract involves a transfer of a significant asset of the agency concerned

to another party to the contract in exchange for the transfer of an asset to the agency.

(2) The additional information required to be entered in the register for class 2 contracts is as follows—

- a) particulars of future transfers of significant assets to the State at zero, or nominal, cost to the State, including the date of their proposed transfer,
- b) particulars of future transfers of significant assets to the contractor, including the date of their proposed transfer,
- c) the results of any cost-benefit analysis of the contract conducted by the agency,
- d) the components and quantum of the public sector comparator if used,
- e) if relevant, a summary of information used in the contractor's full base case financial model (for example, the pricing formula for tolls or usage charges),
- f) if relevant, particulars of how risk, during the construction and operational phases of a contract to undertake a specific project (such as construction, infrastructure or property development), is to be apportioned between the parties, quantified (where practicable) in net present-value terms and specifying the major assumptions involved,
- g) particulars as to any significant guarantees or undertakings between the parties, including any guarantees or undertakings with respect to loan agreements entered into or proposed to be entered into,
- h) particulars of any other key elements of the contract.

### 31 Register to include copy of class 3 contract

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

### 32 Confidential information not required to be included in register

- (1) A requirement of this Division to include information or a copy of a contract in the government contracts register does not require the inclusion of—
  - a) the commercial-in-confidence provisions of a contract, or

- b) details of any unsuccessful tender, or
- c) any matter that could reasonably be expected to affect public safety or security, or
- d) a copy of a contract, a provision of a contract or any other information in relation to a contract that is of such a nature that its inclusion in a record would result in there being an overriding public interest against disclosure of the record.

(2) If an agency does not include a copy of a contract in the register, or includes only some of the provisions of a contract in the register, because of this section, the agency must include in the register—

- a) the reasons why the contract or those provisions have not been included in the register, and
- b) a statement as to whether it is intended that the contract or those provisions will be included in the register at a later date and, if so, when it is likely that they will be included, and
- c) if some but not all of the provisions of the contract have been included in the register, a general description of the types of provisions that have not been included.

### 33 Variations to contracts

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

### 34 Minimum public access period for information on register

- (1) Information (including a copy of a contract) required to be included in the government contracts register in relation to a contract is only required to be made publicly available as open access information for the public access period.

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

### 35 Register to be published on Government tenders website

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

### 36 Disputes

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

- c) a university.

### 37 Agency obligation to find information

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

### 38 Exception for industry support contracts

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

### 39 Exception for SOCs—competitive neutrality

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

### 40 Exception for Landcom—contracts for sale of land

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

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