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and privacy
commission
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icare – GIPA – Compliance Report Phase 1

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Contents

Abbreviations	3
1. Purpose	4
2. Overview.....	4
3. Background	5
4. Methodology	8
5. Acknowledgments.....	10
6. Observations.....	10
7. Conclusions and recommendations	17
8. Audit chronology	21
9. Legislation	22
Appendix A: Legislation Part 3 Division 5 of the GIPA Act.....	23

Abbreviations

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

Acronyms or abbreviation	Explanation
ARC	Audit and Risk Committee
CEO	Chief Executive Officer
GIIIC Act	<i>Government Information (Information Commissioner) Act 2009</i>
GIPA Act	<i>Government Information (Public Access) Act 2009</i>
icare	(Insurance and Care) NSW
IPC	Information and Privacy Commission, NSW
SICG Act	<i>State Insurance and Care Governance Act 2015</i>
SIRA	State Insurance Regulatory Authority, NSW

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 the first phase (Phase 1) of a review examining the compliance of Insurance and Care NSW (icare) with the mandatory requirement to keep a contract register, and the systems and processes in place to ensure compliance with relevant provisions of the GIPA Act.

The first phase of the review has been undertaken as a desktop audit in accordance with section 17(g) of the GIPA Act, to monitor, audit and report on the exercise by agencies of their functions under, and compliance with, the GIPA Act. Its purpose was to review and assess icare's compliance with the requirements of the GIPA Act relating to maintaining a contract register. The review has been limited to a desktop assessment and review of icare's compliance based on information provided by icare, a preliminary assessment of information available on NSW eTendering and other publicly available information.

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

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

On that basis it is distinguishable from an onsite audit which can 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.

This audit commenced with established and acknowledged non-compliance by icare. Accordingly, 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 IPC will continue to engage with icare in relation to the compliance issues discussed in this report and the second phase of this audit (Phase 2) will more specifically examine past and current compliance with relevant requirements of the GIPA Act, as well as the processes and systems that icare has in place to ensure future compliance. This will include an assessment of the effectiveness of the design infrastructure of icare's contract register and the effectiveness of its operation.

2. Overview

The results of this desktop audit together with the icare's self-assessment have demonstrated that icare has not been compliant with the contract register requirements of the GIPA Act. This non-compliance has been ongoing over a number of years.

This report outlines the findings and proposed recommendations as a result of the Phase 1 of this audit and makes findings and recommendations arising from an initial review of icare's compliance with the requirement to keep a contract register.

icare responded to the draft report on 15 October 2020. That response has informed the finalisation of this report. icare's response to the recommendations made by this report are summarised at Table 1 at part 7.3 of this report. icare has advised that it has adopted the recommendations in full and has provided an overview of the steps that icare will take in response to the recommendations.

The draft report was also provided to the Hon. Dominic Francis Perrottet, NSW Treasurer, as the Minister responsible for the agency pursuant to section 23(4) of the *Government Information (Information Commissioner) Act 2009* (GIIC Act). The Treasurer has been informed of the finalisation of this report.

Notwithstanding the findings of long-standing non-compliance with the contract reporting requirements and the public statements of assurance that action was underway to achieve compliance dating back to 2016 I am satisfied that icare has demonstrated, since March 2020 a willingness to engage and take steps to address issues of non-compliance. This commitment to compliance has been demonstrated by icare's acknowledgement of non-compliance, development of a remediation plan during the course of the IPC's regulatory engagement and its response to this audit report.

However, considering the history of non-compliance I have determined that Phase 2 of this audit will involve a more detailed assessment of the scope of non-compliance and the remedial actions that icare has taken or is taking to address the non-compliance and to ensure that mechanisms are in place to support future compliance.

The findings in this report and those made during Phase 2 will inform an assessment of whether an escalation of regulatory action by the IPC may be appropriate.

3. Background

icare was formed in September 2015 through the commencement of the *State Insurance and Care Governance Act 2015* (NSW) (SICG Act).

This Act also enabled the creation of the *State Insurance Regulatory Authority* (SIRA) and *SafeWork NSW* which have regulatory responsibilities in relation to insurance and workplace safety respectively.

The separation of these insurance functions was recommended through reviews and inquiries to create a clear distinction between regulation and operations.¹

3.1 icare structure and governance

The GIPA Act recognises the responsibilities of the principal officer of an agency in respect of compliance and immunities. Likewise, the GIIC Act expressly recognises the responsibilities of the 'principal officer' and the responsible Minister.²

icare operates as a Public Financial Corporation governed by an independent Board of Directors that delivers insurance and care services to the people of New South Wales.

icare's Board is directly accountable to the NSW Treasurer. The Treasurer appoints the Board, who in turn appoints the Chief Executive Officer (CEO) and employs icare staff.³

Under the SICG Act icare acts for and provides services to the Workers Compensation Nominal Insurer (Workers Insurance). icare also administers and provides services to other insurance and care schemes and the statutory bodies operating the schemes, including:

¹ See icare website: <https://www.icare.nsw.gov.au/>.

² GIIC Act section 21(2).

³ See icare website: <https://www.icare.nsw.gov.au/>.

- Self Insurance (Insurance for NSW) which administers:
 - NSW Treasury Managed Fund
 - Construction Risks Insurance Fund
 - Transport Accidents Compensation Fund
 - Pre-Managed Fund Reserve
 - Governmental Workers Compensation Account
 - Residual Workers Compensation Liabilities of the Crown
 - Bush Fire Fighters Compensation Fund
 - Emergency and Rescue Workers Compensation Fund
 - Supplementary Sporting Injuries Fund
 - Home Building Compensation Fund (HBCF)
- Lifetime Care
- Dust Disease Care
- Sporting Injuries insurance
- Building Insurers' Guarantee Corporation.

icare's CEO is also the CEO of these statutory bodies (with the exception of the last two funds, which are not statutory bodies), all of which are governed by the Board.⁴

In response to the IPC's request for a statement of governance arrangements icare stated:

All decisions relating to the functions of icare are made by or under the authority of the icare Board. The constitution of our Board as well as its role and functions are set out in the State Insurance and Care Governance Act 2015.

3.2 Budget Estimates hearing and subsequent engagement

On 9 March 2020, icare's conduct in relation the contract register requirements of the GIPA Act was brought to the Information Commissioner's attention during proceedings before the NSW Parliament Budget Estimates Inquiry before Portfolio Committee No. 6 – Transport and Customer Service.

The Information Commissioner consequently reviewed the NSW eTendering website to assess icare's performance and commenced regulatory engagement with icare seeking further information to inform an assessment of icare's compliance with the GIPA Act. In commencing this engagement, the Information Commissioner noted that a review of the NSW eTendering website at that time indicated that a high volume of contracts (179 contracts) relevant to icare's reporting requirements under the GIPA Act were uploaded on 25 February 2020.

A chronology of regulatory intervention and actions is set out in Part 8 of this report.

3.3 Auditor-General's 2016 Special Report on Agency compliance with the GIPA Act

In October 2016, the NSW Auditor-General published a Special Report which assessed whether thirteen agencies were complying with Part 3 Division 5 of the GIPA Act relating to Government contracts with the private sector.⁵ The review was performed on thirteen agencies covering each cluster within NSW Government. Accordingly, Treasury NSW as a cluster was included in the audit.

⁴ icare Annual Report 2018/19 at pages 98-99.

⁵ New South Wales Auditor-General's Report Special Report Agency compliance with the GIPA Act 2016.

The report reflected low levels of compliance as found in the NSW Auditor-General's Report, Volume One 2016 'Areas of Focus from 2015' which recognised the lack of centralised contract registers was a recurring control issue across the NSW public sector.⁶ It recommended agencies establish centralised contract registers, which are regularly reviewed and updated on a timely basis. Maintaining a compliant contracts register is an important element of an effective contract management framework.⁷

The 2016 Special Report found that although all thirteen agencies had published an adequately designed Government contracts register:

- some contracts valued at \$150,000 or more were not recorded in the contracts register
- some contracts were not entered into the register within 45 working days of the contracts becoming effective
- there were instances where inaccurate information was recorded in the register when compared with the contracts
- additional information required for certain classes of contracts was not disclosed in some registers.

The Special Report made the following recommendations:

- Agencies should implement policies and procedures to ensure they fully comply with the GIPA Act.
- Agencies should implement adequate controls to ensure all contracts valued at \$150,000 or more are recorded in the contracts register.
- All contracts should be regularly reviewed, including those with suppliers on the pre-approved suppliers listing, to ensure they are recorded in the register.
- Where the exact value of a contract is not known at the time the contract becomes effective, the total contract value should be estimated and disclosed in the register.
- Where an agency maintains more than one contracts register, the registers should be reviewed against each other to ensure they are complete.
- Where the execution of a contract that an agency is party to, is managed by another party, the agency that executed the contract should ensure the contract is disclosed in its contracts register.
- Where an agency adopts the commercial-in-confidence provisions of section 32 of the GIPA Act, this should be adequately disclosed in the register.
- To ensure compliance with the GIPA Act agencies should implement processes to ensure qualifying contracts are entered into the Government tenders contracts register within 45 working days of the contract becoming effective.
- Agencies should implement processes to ensure:
 - information entered into the Government tenders contracts register agrees to the contract
 - goods and services tax (GST) is included when estimating the total amount payable over the term of a contract.
- Class 2 and 3 contracts should be identified and the required additional disclosures included in the contract registers.

⁶ New South Wales Auditor-General's Report, Financial Audit, Volume One 2016, Areas of focus from 2015.

⁷ New South Wales Auditor-General's Report Special Report Agency compliance with the GIPA Act 2016 p.7.

- Policies and procedures should be in place to ensure agencies comply with the GIPA Act. These should be formally documented with clearly defined roles and responsibilities.
- The Department of Finance, Services and Innovation should work with Health Share to ensure the Government tenders website is amended to better identify contracts relating to cluster reporting entities.
- The Government tenders website should be reviewed to ensure it reflects the Government's current agency and cluster arrangements.
- The Information and Privacy Commission NSW's (IPC) continued support and guidance to help agencies' understanding of the GIPA Act requirements is necessary and should continue.
- The unit responsible for procurement and/or finance should be responsible for maintaining the contracts register.
- The contracts register should be regularly and independently reviewed by governance functions, such as internal audit.

On 26 March 2020, icare issued a statement on its website relating to the contract register requirements of the GIPA Act following the 2019-20 Budget Estimates hearing.

This statement included the following information relating to the Auditor-General's recommendations:

Our remediation program was initiated after an Audit Office review of agency compliance with the GIPA Act and we accept the delay in uploading contracts to this site, many of which have been cited in our Annual Reports through separate disclosure requirements. Our goal is to ensure full transparency to the community in line with GIPA Act requirements.⁸

This public statement by icare is inconsistent with the acknowledgement provided by icare representatives to the IPC throughout the course of this regulatory intervention that icare was non-compliant with their contracts reporting requirements in March 2020. The remediation actions taken by icare in response to the 2016 Auditor-General's report are discussed further below.

It is significant that the low level of compliance reported by the Auditor General in 2015 and again in 2016 remains a feature of icare's compliance assessment in 2020.

3.4 Audit notification

The Information Commissioner's decision to undertake a compliance audit has been informed by the information provided by icare to the IPC during the informal regulatory engagement which commenced in March 2020.

On 26 August 2020, the Information Commissioner notified icare of her intention to assess and report on icare's compliance with the contract register requirements of the GIPA Act by way of a compliance audit.

4. Methodology

4.1 Review of information provided by icare during regulatory engagement

As part of the informal regulatory engagement, the IPC requested that icare provide information about its compliance with relevant requirements of the GIPA Act and its remediation program.

The IPC reviewed the information provided by icare against information that is publicly available on icare's website as well as relevant legislative provisions under the GIPA Act.

⁸ <https://www.icare.nsw.gov.au/news-and-stories/2020/icare-contracts-disclosure#ref> (accessed 24 September 2020).

4.2 Review of information available on icare’s website

Annual reports

A review has been undertaken of information in icare’s Annual Reports since 2015/16 to consider whether the Annual Reports have included reference to the contracts register relevant to this review.

The 2015/16 Annual Report provides: *Moving forward, icare is focused on streamlining all its service lines and updating its disclosure log, contracts register and open access information.*

Subsequent reports consistently reflect a stated commitment to icare: *building a register of government contracts, as required by the GIPA Act.*⁹

Updates on icare’s website relevant to the contracts register.

icare published the following updates relevant to the contract register since March 2020:

- ‘icare contracts disclosure’ update dated 26 March 2020 on the News part of the website (<https://www.icare.nsw.gov.au/news-and-stories/icare-contracts-disclosure>)
- ‘icare continues to update disclosure of historical contracts’ update dated 13 May 2020 on the Information part of the website (<https://www.icare.nsw.gov.au/news-and-stories/icare-continues-to-update-disclosure-of-historical-contracts>)
- ‘icare’s contract remediation program draws to a close’ update dated 3 July 2020 on the News part of the website (<https://www.icare.nsw.gov.au/news-and-stories/icares-contract-remediation-program-draws-to-a-close>)

4.3 Assessment Criteria

Phase 1 of this audit is limited to a preliminary assessment of icare’s compliance with regard to the mandatory requirement under the GIPA Act to maintain and make publicly available a register of government contracts. The following criteria have been assessed:

Assessment criteria	
1.	Governance, culture and leadership
2.	Requirement to maintain a contract register
3.	Contract register as open access information

4.4 Conduct of the analysis

The analysis of icare’s compliance was conducted by the IPC in August and September 2020. The IPC examined the information provided by icare in conjunction with the publicly available information on icare’s website, and with regard to relevant requirements of the GIPA Act.

The findings and recommendations in this report complete the first phase of regulatory engagement between the IPC and icare and make general observations about compliance with the contract register requirements.

⁹ icare Annual Report 2016/17, 2017/18, 2018/19.

Phase 2 will consider the specific requirements of the GIPA Act with regard to the information that icare has made available on its contract register; the practices, policies and systems that icare has in place; and icare's remediation plan to address any ongoing non-compliance and to ensure future compliance. This will include an assessment of the effectiveness of the design infrastructure of icare's contract register and the effectiveness of its operation.

5. Acknowledgments

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

6. Observations

6.1 General

In response to the IPC's informal regulatory engagement with the IPC, icare has informed the Information Commissioner that it:

- has not been compliant with the requirements of the GIPA Act that agencies enter information about relevant contracts into a register maintained by the agency within 45 working days of the contract becoming effective date; and
- consequently, icare has not been compliant with the requirement to publish a copy of this register on the Government tenders website (NSW eTendering).

As noted at part 4.4 above, this report relates to Phase 1 of this audit and is limited to an initial assessment of icare's compliance with regard to the mandatory requirement under the GIPA Act to maintain and make publicly available a register of government contracts by an assessment of the following criteria:

- Governance, culture and leadership
- Requirement to keep a contract register
- Contract register as open access information.

During the informal regulatory engagement, the IPC asked icare to provide an overview of remediation actions taken after the Auditor-General's Special Report was issued in 2016. In response, icare provided information including a timeline which outlined the following actions:

- Reviews and gap analysis undertaken in 2017 and 2018
- The appointment of a General Manager procurement in 2018
- The approval of updated procedures to achieve compliance by icare Audit and Risk Committee (ARC) in 2018
- Commencement of a remediation plan in 2019
- Documented uploading of contracts to NSW eTendering in May 2019 and again in February 2020 following what is described as "stabilisation" of the remediation plan.

Since commencement of the informal regulatory engagement in March 2020, icare informed the IPC that a remediation program is underway to address historical non-compliance and to ensure future compliance with the contract reporting requirements of the GIPA Act. This includes actions to:

- identify, record and publish historical contracts (contracts dated prior to 1 January 2020), and
- enhance icare's internal processes to ensure icare complies in future with the requirements of the GIPA Act, including the recording of relevant contracts in icare's register and publication of contracts on NSW eTendering within 45 working days of the contract's effective date.

icare reported that as at 10 July 2020, the total number of contracts identified to be uploaded including active contracts was 422 and that it was progressing towards the completion of the upload of historical contracts to the register.

At that time, icare described next steps in its remediation plan as follows:

- completion of remediation of GIPA contract uploads
- continuous monitoring/improvement of ongoing GIPA contracts compliance processes/controls
- communication across icare to ensure ongoing awareness.

icare also informed the IPC that organisational awareness of the contract requirements of the GIPA Act has been prioritised and will be sustained through ongoing communications.

icare provided the IPC with additional information in August 2020 and September 2020 relating to the number of contracts uploaded and ongoing compliance which will be considered during Phase 2 of this audit.

6.2 Governance, culture and leadership

Criterion		Result
I.	Have established governance and systems around the contract register and relevant requirements of the GIPA Act	Partial compliance
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>Comment: 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.</p> <p>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.</p>

Comments, findings and recommendations

As noted in section 3.1 above, icare acts for and provides services to the Workers Compensation Nominal Insurer (Workers Insurance) under the SICG Act and also administers and provides services to other insurance and care schemes and the statutory bodies operating the schemes.

icare informed the IPC that its failure to comply the contract reporting requirements of the GIPA Act has primarily arisen from underdeveloped systems and internal processes and confusion as to icare's disclosure obligations and accountabilities for disclosure of each statutory scheme and the complex nature of their historical arrangements. icare also acknowledged that there was internal confusion as to icare's compliance requirements for the Nominal Insurer.

Observation: icare provided the IPC with a copy of its *Procurement Guidelines* (May 2019) which includes guidance relating to the interaction between icare's procurement process and the disclosure of contract information under the GIPA Act. In relation to procurement governance, these guidelines state that overall responsibility for procurement activities undertaken across icare rests with the icare Board, and the icare ARC reviews and monitors icare's procurement activities to provide advice to the icare Executive and Board that icare is complying with its obligations. However, the guidelines do not specifically explain the responsibilities and accountabilities relating to the contract register requirements of the GIPA Act.

icare has also provided the IPC with a document entitled *Collecting & reporting GIPA Contract Information* (June 2019), which explains that icare's Procurement team is responsible for maintaining its internal contract register (called the 'GIPA Data Base') and ensuring that information is made publicly available on NSW eTendering.

icare also provided other documents which support the procurement and contract reporting processes, such as workflows, checklists and forms.

Based on a review of the documents provided, it appears that the process operates by requiring relevant business units to forward copies of executed contracts to icare's procurement team along with a completed *GIPA Contract Award Notice Form* so that the procurement team can take steps to ensure that the contract is disclosed in line with the requirements of the GIPA Act as required.

Although the *Procurement Guidelines* and *Collecting & reporting GIPA Contract Information* document refer to the 45 day statutory timeframe for contracts to be published on the contract register, they do not explain whether there are any time-specific expectations on business units or the Procurement team to enable the statutory timeframe for publication to be met. Nor do they explain whether there are any internal consequences for non-compliance or the late reporting of contract information, such as review or monitoring by the ARC. Therefore, it does not appear that there are any mechanisms to monitor ongoing compliance and promote accountability at the business unit level, or any quality assurance or internal audit mechanisms in place to monitor ongoing compliance within the procurement team.

It appears that the absence of a clear governance framework relating to the disclosure of contracts has contributed to icare's historical non-compliance with the contract reporting requirements of the GIPA Act.

icare informed the IPC that it has commenced a significant program of work to remediate the historical non-publication of contracts and to refine its ongoing GIPA and procurement systems and processes to clarify accountabilities, including the establishment of an Executive Steering Committee to oversee the remediation program, sponsored by icare's Group Executive, Organisational Performance and Group Executive, Strategy & Governance. icare advised that Executive sponsorship and oversight is also in place to ensure robust delivery of the program.

Comments, findings and recommendations

icare should ensure that its future remediation plan includes actions to ensure that the confusion that led to the historical non-compliance with the contract register requirements has been addressed. In particular, icare should ensure that it has taken steps to clarify accountabilities for compliance requirements for the Nominal Insurer and for each statutory scheme it is responsible for, and ensure that all responsibilities and accountabilities in relation to compliance with the contract requirements in the GIPA Act are clearly communicated to all staff.

icare may also effectively address complexity in the nature and scope of its contract-related activities through increased training and capacity building of icare staff.

Leadership and effective oversight will be key to achieving compliance in circumstances where non-compliance has been entrenched.

In this regard, the requirements of NSW Treasury Policy TPP 15-03 and section 11 of the *Public Finance & Audit Act 1983* makes clear that agencies are required to put in place an effective system of internal control and internal audit arrangements. These requirements are key components of sound financial management governance.

In accordance with TPP 15-03 icare has an Audit and Risk Committee (ARC) which acts as an independent advisory committee providing assistance to the agency head on the agency's governance processes, risk management and control frameworks, and its external accountability obligations.

Importantly TPP 15-03 also provides that:

Where a dispute arises relating to a recommendation made to the agency head by the Audit and Risk Committee in the execution of its role and responsibilities cannot be resolved, the chair of the Audit and Risk Committee may make an oral or written request to Secretary, NSW Treasury for assistance to facilitate resolution of the matter. Where Secretary, NSW Treasury may have a conflict of interest, the matter should be referred to the Secretary, Department of Premier and Cabinet.

Recommendations of the Information Commissioner are non-binding and in general, compliance is best secured through education and assistance. However, in circumstances of historic non-compliance public reporting may be a more effective tool to achieve compliance. Recommendations are made in respect of the Chief Executive Officer and the icare ARC to ensure that those responsible for leadership and governance are accountable for their action or inaction through public reporting of compliance.

Recommendation 1: By 2 November 2020 ownership of the remediation program relevant to this compliance audit is assumed by the CEO and that independent oversight is provided by icare's ARC in accordance with TP 15-03.

Recommendation 2: Commencing 2 November 2020 monthly reports are provided to icare's ARC and CEO detailing:

- systems and policies implementation
- the number of contracts entered into, the number of contracts uploaded on the contracts register and whether the contracts were uploaded within the required timeframe.

Recommendation 3: By 30 June 2021 icare develops and implements a process whereby the CEO makes an annual attestation to icare's compliance with the contract register obligations as part of icare's broader compliance management framework.

Comments, findings and recommendations
<p>Recommendation 4: By 2 March 2021 icare develops and implements a mechanism for unannounced periodic quality assurance and internal auditing of the contract register against the requirements of the GIPA Act. This mechanism should include a process to report the quality assurance and audit findings to the CEO and icare’s ARC, including information relating to instances of non-compliance and actions taken to address non-compliance.</p> <p>Recommendation 5: By 2 November 2020 icare develops and implements a training/communication plan to all staff that includes identification of contract register roles and responsibilities to ensure that there is a clear governance and accountability framework. The plan should include the executive team, senior management, line management and operational staff, across relevant business units.</p>

6.3 Requirement to maintain a contract register

Criterion	Result
II. Requirement to maintain a contract register	Non-compliant
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	Non-compliant To be further assessed during Phase 2
b. Update the register within 45 working days of the contract coming into effect	Non-compliant To be further assessed during Phase 2
c. Ensure that the contract register includes all additional information required for class 2 contracts (see section 30)	Not assessed To be assessed during Phase 2
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)	Not assessed To be assessed during Phase 2
e. 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: <ul style="list-style-type: none"> • the reasons why the contract or provisions have not been included in the register • 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 a general description of the types of provisions that have not been included	Not assessed To be assessed during Phase 2

Criterion	Result
f. Ensure that processes are in place to update the register in the case of material variations to the contract. Material variations should be included in the register within 45 working days after the variation becomes effective.	Not assessed To be assessed during Phase 2.

Comments, findings and recommendations
<p>Comment: 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>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.</p> <p><i>Class 2:</i> A class 1 contract, to which any of the following apply:</p> <ul style="list-style-type: none"> • result in a direct negotiation where there has not been a tender process and the proposed contract has not been publicly available; • there has been a tender process and terms and conditions have been substantially negotiated with the successful tenderer; • involve operation or maintenance obligations for 10 years or more; • involve a privately financed project as defined by relevant Treasury guidelines; or • involve a transfer of land or other asset to a party in exchange for the transfer of land or other asset to an agency. <p><i>Class 3:</i> A class 2 contract, with a value of \$5 million or more. A copy of class 3 contracts must be made available with the register. Reporting requirements for class 1 and 2 contracts, set out in sections 29 and 30 of the GIPA Act, are reproduced in Appendix A. Some confidential information is not required to be included in the contracts register, as set out in section 32 of the GIPA Act.</p> <p>Contracts must be entered in the register within 45 working days of the contract becoming effective.</p> <p>A copy of an agency's government contracts register must be published on the NSW eTendering website (https://tenders.nsw.gov.au).</p> <p>Observation: Based on a review of icare's Annual Reports, icare has repeatedly reported that it has been in the process of building a register of contracts as required by the GIPA since 2016-2017. Successive annual reports to 2019 continue to assert:</p> <p style="text-align: center;"><i>icare is building a register of government contracts, as required by the GIPA Act.¹⁰</i></p>

¹⁰ icare Annual Reports 2016-17; 2017-18, 2018-19.

Comments, findings and recommendations

Although icare has issued a statement on its website that a remediation program was initiated as a result of the 2016 NSW Auditor-General's Special Report, the information provided to the IPC since March 2020 does not provide confidence that the commitments made by management in response to the Auditor General's report of 2016 were acted upon in a timely or effective manner.¹¹

This is also reflected by icare's response to the IPC's regulatory intervention in March 2020 which acknowledged that it has been non-compliant with the contract register requirements of the GIPA, and that this non-compliance resulted in icare uploading a high volume of historical contracts to its contract register outside of the timeframe required under section 27 of the GIPA Act.

icare has provided the IPC with details of a remediation plan it has implemented to:

- identify, record and publish historical contracts in accordance with section 27(2); and
- enhance icare's internal processes to ensure icare complies in future with all requirements under GIPA, including the recording of relevant contracts in icare's register and publication of contracts on NSW eTendering within 45 working days of the contract's effective date.

The plan extends to addressing procurement systems, processes to record and upload contracts and responsible officers. On this basis the plan is adequate to inform action to achieve compliance subject to a commitment by leadership to achieving full compliance. That commitment is essential to achieving systems design and operational effectiveness.

Recommendation 6: That icare provides an update to the IPC by 30 October 2020 on the implementation of its remediation plan, including details of whether all historical contracts have now been uploaded onto its contract register.

Recommendation 7: That icare provides a report to the IPC by 30 October 2020 identifying any instances of non-compliance with the GIPA requirements relating to the contract register since April 2020, including reasons for non-compliance and any actions taken to address non-compliance if relevant.

6.4 Contract register as open access information

Criterion	Result
III. Contract register as open access information	Partial compliance, improvements to ensure compliance with the GIPA Act requirements

Comments, findings and recommendations

Comment: The GIPA Act requires a range of open access information to be made publicly available unless there is an overriding public interest against disclosure of the information. Open access information is to be publicly available free of charge on an agency's website (unless to do so would impose unreasonable additional costs on the agency).

¹¹ See <https://www.icare.nsw.gov.au/news-and-stories/icare-contracts-disclosure> (accessed 29 September 2020).

Comments, findings and recommendations

The mandatory public release of open access information under the GIPA Act promotes consistent and transparent information and helps to foster responsible and representative government that is open, accountable, fair and effective.

An agency's register of government contracts is prescribed as *open access information* under section 18(e) of the GIPA Act.

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.

Observation: In relation to its contracts register, icare's information access webpage states:¹²

The following open access information is available free of charge:

Contract register: major contracts entered into by icare agencies are listed in the Contract Notices section of the Government Information (Public Access) Act 2009 (NSW) (external link). To search for our contract details visit NSW eTendering (external link)

The reference to 'major contracts' and the 'Contract Notices section' of the GIPA Act (which links to an online version of the GIPA Act) does not accurately explain the requirements of the GIPA Act.

Section 35 of the GIPA Act provides that a copy of the agency's government register is to be published on the Government tenders website, or such other internet website authorised by the Premier for the purpose of the section.

In practice the provision operates to ensure that agencies maintain a register of contracts which can be accessed through their website via a link to the NSW eTendering website.

Although icare has made its contract register publicly available via the NSW eTendering website, icare has acknowledged that it has not been keeping its contract register up to date in accordance with the requirements of the GIPA Act.

Recommendation 8: By 2 November 2020 icare updates the information access page on its website to summarise the requirements of the GIPA Act relating to the contract register and explain that the contract register is open access information under the GIPA Act.

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. Online publication of government contracts on government websites occurs in a number of jurisdictions nationally and internationally and has been described as a standard transparency mechanism.¹³

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 the CEO for the systems, policies and procedures, culture and capability that support compliance.

This audit has responded to stated non-con compliance and the IPC's independent findings.

¹² <https://www.icare.nsw.gov.au/right-to-information#gref> (accessed 24 September 2020).

¹³ Mulgan, R. 2015, "Transparency and the performance of outsourced government services", Occasional Paper no. 5, commissioned by Queensland Office of the Information Commissioner and prepared for the Australian and New Zealand School of Government.

This audit was informed by:

- the information provided by icare since March 2020 relevant to the informal regulatory engagement between the IPC and icare
- a desktop audit of icare’s publicly available information on its website
- a preliminary review of information published by icare on the NSW eTendering website
- a preliminary review of the remediation plan provided by icare to the IPC
- the legislative requirements of the GIPA Act.

In summary, this audit has identified:

- non-compliance with the contract register requirements of the GIPA Act
- knowledge of non-compliance by management dating back to 2016
- consideration of non-compliance by the icare Audit and Risk Committee (ARC) in 2018 and approval by that committee in 2018 of revised procedures to achieve compliance
- public statements of action published on icare’s website and successive annual reports dating back to 2015/16 that provide assurances of remedial action to achieve compliance
- an extended period of non-compliance and the absence of any effective remedial plan or action to achieve compliance until 2019
- opportunities for the IPC to support and enable icare in achieving compliance in respect the contract register requirements.

In response to engagement by the IPC, icare demonstrated a commitment to improve compliance through internal remedial actions and engagement with the IPC. In light of historical and apparently entrenched inaction the IPC will continue to engage with, monitor and publicly report compliance with the contract reporting requirements of the GIPA Act by icare.

7.2 Recommendations

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

- the regulatory advice provided throughout the IPC’s regulatory engagement and throughout the course of this audit,
- the remediation plan under implementation and acknowledged non-compliance by icare.

Accordingly, the recommendations acknowledge that policies and processes are instrumental in facilitating the disclosure of contracts by government agencies. Equally important is leadership in establishing a cultural commitment together with the development of the capability and systems required to faithfully implement those processes and policies.

As noted above, recommendations in respect of the CEO and the icare ARC ensure that those responsible for leadership and governance are accountable for their action or inaction through public reporting of compliance.

These recommendations address the fundamental areas of:

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

Based on the findings of this audit, it is recommended that the icare implement the following recommendations within the timeframes specified:

Recommendations	
Governance, culture and leadership	
Recommendation 1	By 2 November 2020 ownership of the remediation program relevant to this compliance audit is assumed by the CEO and that independent oversight is provided by icare's ARC in accordance with TP 15-03.
Recommendation 2	Commencing 2 November 2020 monthly reports are provided to icare's ARC and CEO detailing: <ul style="list-style-type: none"> • systems and policies implementation • the number of contracts entered into, the number of contracts uploaded on the contracts register and whether the contracts were uploaded within the required timeframe.
Recommendation 3	By 30 June 2021 icare develops and implements a process whereby the CEO makes an annual attestation to icare's compliance with the contract register obligations as part of icare's broader compliance management framework.
Recommendation 4	By 2 March 2021 icare develops and implements a mechanism for unannounced periodic quality assurance and internal auditing of the contract register against the requirements of the GIPA Act. This mechanism should include a process to report the quality assurance and audit findings to the CEO and icare's ARC, including information relating to instances of non-compliance and actions taken to address non-compliance.
Recommendation 5	By 2 November 2020 icare develops and implements a training/communication plan to all staff that includes identification of contract register roles and responsibilities to ensure that there is a clear governance and accountability framework. The plan should include the executive team, senior management, line management and operational staff, across relevant business units.
Requirement to keep a contract register	
Recommendation 6	That icare provides an update to the IPC by 30 October 2020 on the implementation of its remediation plan, including details of whether all historical contracts have now been uploaded onto its contract register.
Recommendation 7	That icare provides a report to the IPC by 30 October 2020 identifying any instances of non-compliance with the GIPA requirements relating to the contract register since April 2020, including reasons for non-compliance and any actions taken to address non-compliance if relevant.

Recommendations	
Contract register as open access information	
Recommendation 8	By 2 November 2020 icare updates the information access page on its website to summarise the requirements of the GIPA Act relating to the contract register and explain that the contract register is open access information under the GIPA Act.

7.3 icare’s response to implementation of recommendations

Table 1 summarises the response by icare to the recommendations in this report. The explanation for the status is explained at Table 2 below. In summary, icare has adopted all of the recommendations in full.

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			
8	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.
Not accepted	The agency has not accepted the recommendation.

7.4 Monitoring

The IPC will continue to assist icare as it adopts these recommendations and requests a report back regarding implementation by 1 February 2020.

8. Audit chronology

Date	Event
9 March 2020	Information Commissioner appeared at the NSW Parliament Budget Estimates Inquiry before Portfolio Committee No. 6 – Transport and Customer Service
12 March 2020	Information Commissioner wrote to icare former CEO to request information to inform an assessment of regulatory engagement
27 March 2020	icare provides a response to the Information Commissioner
April 2020	IPC assessed icare response
1 May 2020	Information Commissioner wrote to icare to request additional information
15 June 2020	icare provides a response to the Information Commissioner
13 July 2020	Meeting between icare and IPC to discuss remediation plan during which it was agreed that icare would provide further information
3 August 2020	icare provides further information to the IPC
26 August 2020	Correspondence from IPC to icare to notify of audit
August - September 2020	Phase 1 desktop audit undertaken
1 October 2020	Draft Phase 1 report provided to icare and the NSW Treasurer
15 October 2020	icare response to draft report
21 October 2020	Provision of final report to icare and NSW Treasurer

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: Legislation 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.