



information
and privacy
commission
new south wales

Local Government Sector – Follow-up GIPA Compliance Report

Disclosure of Open Access Information (returns disclosing the
interests of councillors and designated persons)

June 2023



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Abbreviations

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

Acronyms or abbreviation	Explanation
GIIC Act	<i>Government Information (Information Commissioner) Act 2009</i>
GIPA Act	<i>Government Information (Public Access) Act 2009</i>
GIPA Regulation	<i>Government Information (Public Access) Regulation 2018</i>
Guideline 1	<i>Information Commissioner's Guideline 1: For local councils on the disclosure of information contained in the returns disclosing the interests of councillors and designated persons developed under the Government Information (Public Access) Act 2009 (NSW)</i>
IPC	Information and Privacy Commission NSW
LG Act	<i>Local Government Act 1993</i>
LG Regulation	<i>Local Government (General) Regulation 2021</i>
Model Code of Conduct	Model Code of Conduct for the Local Government Sector
NCAT	NSW Civil and Administrative Tribunal
OLG	Office of Local Government
PPIP Act	<i>Privacy and Personal Information Protection Act 1998</i>

1. Executive Summary

One of the greatest risks of corruption in the Local Council Sector is presented by conflicts of interest between the private interests of decision-makers and the public interests those decision-makers are entrusted to serve. These risks manifest in many if not all of the functions undertaken by local councillors and key personnel. Planning and development, the awarding of contracts, dedicated public places and zonings, disputes and service provision all form part of the day-to-day business of councils that impact members of the public living under the exercise of power by councillors and key personnel.

This power and the omnipresent risk to the proper exercise of power is tempered by mandated public reporting under the *Government Information (Public Access) Act 2009* (GIPA Act) and the *Model Code of Conduct for Local Councils in NSW* (the Model Code of Conduct) prescribed under the *Local Government Act 1993* (LG Act) and the *Local Government (General) Regulation 2021* (LG Regulation).

In July 2021, the Information and Privacy Commission (IPC), on behalf of the Information Commissioner, completed an audit in accordance with section 21 of the *Government Information (Information Commissioner) Act 2009* (GIIC Act), which examined the local government sector's compliance with the open access requirement under the GIPA Act to publish returns disclosing the interests of councillors and designated persons (the 2021 compliance audit).

The results demonstrated significant compliance failures. The findings and recommendations of the 2021 compliance audit were published in a report titled 'Local Government Sector – GIPA Compliance Report', which is available on the [IPC's website](#). The Information Commissioner made a range of recommendations to assist councils to achieve compliance in the audit report.

Accordingly, the Information Commissioner committed to undertaking a further audit within 12 months of the publication of that report. Councils have been on notice of this audit since July 2021.

Improvements by the vast majority of councils

The results of this audit demonstrate that the vast majority of councils elevated their compliance with these mandatory reporting requirements. The response by these councils in applying IPC guidance following the previous audit and their demonstrated commitment to improvements testifies to their 'in practice' and 'in spirit' compliance posture which is overwhelmingly positive. These significant improvements are demonstrated in the increase in compliance with:

- public availability of returns of interests by councillors and designated persons - a significant increase from to 61% to 88% (46) fully compliant (+27%)
- the ease of accessibility of their returns of interests - significant improvements from 52% (27) to 88% (46) (+36%)
- making returns of interests fully accessible without conditions – again a significant increase from 65% to 88% (46) (+23%).

Disregard for compliance and a failure to uphold the public's right to know

A significant number of councils, 12% (6), demonstrated their wilful disregard of their duties and the public's right to know. These councils failed to take action to rectify their non-compliance notwithstanding the guidance provided by the IPC and the Office of Local Government (OLG), legislative requirements and the additional training and promotional materials provided. It may be that this non-compliant conduct was inspired by the approach adopted in respect of publication of the 2021 compliance report. That report did not identify the relevant councils but rather categorised councils according to geographical regions.

Disturbingly, with respect to the six (6) councils that were found to have remained non-compliant, it is noted that a significant proportion of these councils simply did not publish the returns of interests on their websites. Rather they advised citizens to make an application or to attend and inspect.

In the case of one council, the disclosures of interest could not be located by officers undertaking this audit.

Additionally, contrary to the requirements of [Information Commissioner Guideline 1](#), Councils relied on a global determination that the disclosures would give rise to an overriding public interest against disclosure without any evidence of individual circumstances or identifying what the overriding consideration was and how it displaced the open access requirements under the public interest test. Concerningly, a number of these councils published policies stating that they complied with the GIPA Act.

These Councils have self-identified non-compliance by statements and or omissions on their website. They are

- Hilltops
- Bayside
- Fairfield
- Hornsby
- Liverpool
- Strathfield

Disappointingly, one of the councils sampled had taken the additional step of purportedly making a determination stating that it will not publish the returns of interests on its website together with the publication of a notice on its website stating that intention.

That council has therefore identified itself as Bayside Council and the relevant link to this information is found on their website: www.bayside.nsw.gov.au/your-council/accessing-council-information. This link is only accessible by working through several other pages on the Council's website and a further click through step to understand Council's reasoning is required from this link. Ultimately, the Council purports to make a determination pursuant to section 6 of the GIPA Act. Relevantly, there is no such decision-making power vested on any agency under section 6 of the GIPA Act. Rather the provision provides inter alia options regarding provision of access to mandated open access information.

Regrettably, the returns of interest of 19% (10) of councils were either not up to date or had not been published at all. This finding is significant as currency of returns of interest is required to combat the risk of corruption. Outdated returns do not serve the objective of the disclosure requirements.

Similarly, 6% (3) of councils were previously assessed as compliant or partially compliant with the requirement to apply the public interest test to redacted information were found to have regressed from their 2021 baseline. The remaining 14% (7) of councils that were previously assessed as non-compliant or had not made their returns publicly available and were found to have either remained non-compliant or continued to not make their returns publicly available.

70% (32) of councils that had published returns on their websites, failed to comply with the requirement to maintain a record of mandatory open access (returns of interests) information it did not make publicly available.

Given the improvements in the governance structures for councils under the LG Act and the mandating of audit, risk, and improvement committees from 4 June 2022, it is expected that these independent oversight arrangements would enhance monitoring of these compliance requirements.

Improvements are also required in respect of accessibility of returns of interests. The lack of accessibility to information contained in the returns is further compounded by the fact that a significant number of the returns were saved in a non-searchable format.

Although returns of interests may be published on a council's website, if they are published in such a way that it would be unlikely that a general member of the public would be able to locate the returns or a particular return, the open access requirement to make returns of interests publicly available would, in essence, be subverted.

Additionally, the imposition of conditions on access such as a request of attendance at the council offices or requirement to make an informal request also undermines the rights of open access enshrined under the GIPA Act.

Reform required

Current regulatory tools and mechanisms available under the GIIC Act do not appear to be sufficient in addressing instances of systemic non-compliance with the mandatory open access requirements as set out in the GIPA Act and GIPA Regulation. Ongoing non-compliance with open access requirements by select councils continues to be the subject of complaints to the IPC, and this has resulted in the need for a consistent application of regulatory engagement and significant resources by the IPC. Further regulatory reform would therefore be welcome to assist the Information Commissioner in directing, referring and/or enforcing compliance across the local government sector.

2. Background and purpose of the audit

The Model Code of Conduct sets out the minimum standards of conduct for council officials and is applicable to councillors, staff members and delegates of councils. Part 4 of the Model Code of Conduct requires councillors and designated persons to complete and lodge a return disclosing their pecuniary interests (returns of interest) with the general manager each year. The *Government Information (Public Access) Regulation 2018* (GIPA Regulation) states that information contained in these returns is prescribed as open access information, which must be published by councils under the GIPA Act.

It is important to note that the proactive disclosure of open access information, such as the returns of interests of councillors and designated persons, advances the objects of the GIPA Act, particularly with respect to the maintenance and advancement of a system of responsible and representative democratic Government that is open, accountable, fair, and effective.

In September 2019, the Information Commissioner released the revised Information Commissioner's *Guideline 1: For Local Councils on the return of information contained in the returns disclosing the interests of councillors and designated persons developed under the Government Information (Public Access) Act 2009 (NSW)* (Guideline 1) to provide the local government sector with additional guidance in relation to the requirements under the GIPA Act pertaining to returns of interests.

The 2021 compliance audit concluded that there were inadequate levels of compliance across the local government sector with respect to the requirement to publish the returns of interests of councillors, designated persons and delegates. The key findings in the 2021 compliance report that are of relevance to this follow-up audit are:

- 61% (32) of councils were fully compliant with the requirement to publish the returns of interests of councillors, designated persons and delegates.
- 10% (5) of councils were partially compliant with the requirements to publish the returns of interests of councillors, designated persons and delegates.
- 29% (15) of councils failed to comply with the requirement to publish the returns of interests of councillors, designated persons and delegates.
- Of the councils that were partially/fully compliant with the requirement to publish returns of interests, 97% (36 of 37) demonstrated that there was no general/automatic application of the public interest test to information contained in the returns.

- 5% (2) of councils were fully compliant with the requirement to include a record of redacted information on the council's website in accordance with section 6(5) of the GIPA Act. 90% (47) of councils failed to comply with this requirement.

In light of the low levels of compliance identified in the 2021 compliance audit, the IPC made a number of recommendations to assist the local government sector with its open access obligations as they relate to returns of interests.

The IPC also committed to monitoring compliance by the sector and to commence a further snapshot after a period of 12 months from the publication of that report.

Accordingly, the purpose of this audit is to follow-up on the findings and recommendations that were made in the 2021 compliance audit, and to assess the levels of improvement (if any) with respect to each criterion.

2.1 Assessment criteria

Following the completion of the 2021 compliance audit, the IPC made eight recommendations to assist the local government sector to achieve and elevate its compliance with requirements for the publication of returns of interests of councillors and designated persons. Of these eight recommendations, four are relevant for the purposes of this follow-up audit and have been set out in Table 1 below.

Recommendations of relevance arising from the 2021 compliance audit	
Recommendation 1	Councils should ensure that the disclosure of interest by councillors and designated persons are complete and publicly available.
Recommendation 2	Councils would benefit from promoting consistency and accessibility in relation to returns of interest by establishing a single readily identifiable open access pathway. This should include meaningful labelling of returns by year, type and relevant links. The returns should be easily and prominently located on a Council's website and able to be located from a single search from the main page.
Recommendation 3	Councils should ensure that the disclosures are updated as required consistent with clause 4.21 of the Model Code of Conduct for Local Councils in NSW – 2020.
Recommendation 6	Councils should maintain a central record of all open access information that has been withheld due to an overriding public interest against disclosure and embed policies and procedures to ensure compliance with section 6(5) of the GIPA Act.

Table 1: Recommendations made in the 2021 compliance audit of relevance to this follow-up audit

In considering whether the recommendations made in the 2021 compliance audit have been adopted by the local government sector more generally, the IPC assessed each council's compliance with the open access requirements of the GIPA Act against the criteria set out below in Table 2.

Assessment criteria
1. Requirement to publish the returns of the interests of councillors, designated persons and delegates
2. Accessibility, availability, completeness and currency of the returns
3. Application of the public interests test to any withheld information
4. Existence of section 6(5) records
5. Extent to which there is evidence of adoption and/or action in response to recommendations, resulting in improvement in compliance levels

Table 2: Assessment criteria

3. Methodology and sample selection

In order to measure any rates of improvement to the baseline assessment of compliance established by the 2021 compliance audit, this follow-up audit examined the same 52 councils that were previously included in the 2021 compliance audit. For similar reasons, a desktop audit was determined to be most appropriate, as it allowed for a direct point-in-time comparison of the relevant data against each criterion.

The 52 councils that were previously assessed in the 2021 compliance audit were formally notified of their inclusion in this follow-up audit on 16 January 2023. Collation and analysis of the data for the desktop audit was undertaken between mid-February 2023 and early March 2023.

In conducting the audit, a representative of the IPC accessed each council's website to identify and assess whether the returns of interests have been published by the council and the ease in which the returns could be located. As part of the assessment, a random sample of the returns for councillors and designated persons was obtained. The sample comprised a minimum of 30% of the returns available and at least six returns from each category of individuals (i.e. councillors and designated persons). These returns were examined to determine whether the forms used by the relevant councils contained the required information as set out in Schedule 2 of the Model Code of Conduct for Local Councils in NSW (2020). The returns were then examined for completeness and currency. Additionally, each council's website was examined to ascertain the existence of a record of the open access information that have not been made publicly available due to an overriding public interest against disclosure in accordance with section 6(5) of the GIPA Act.

3.1 Audit limitations

The scope of this audit is limited to a desktop review of the information available on the selected councils' websites during February 2023.

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

- independent remote assessment
- non-inquisitorial
- focused on identified compliance risks.

This follow-up audit only focused on Recommendations 1-3 and 6, and did not assess recommendations made in the 2021 compliance audit with respect to councils' systems, policies and practices concerning:

- the application of the public interest test with respect to information contained in the returns of interests (Recommendation 5)

- the completion, collection, and publication of the returns of interests (Recommendation 7)
- any guidance provided by councils to assist its staff in carrying out obligations with respect to the returns of interests (Recommendation 8).

In assessing the completeness of the returns of interests, it is also necessary to recognise that this measure is constrained by the accuracy of the information recorded in the returns. That is, the question of whether the returns of interests are complete cannot be meaningfully ascertained without also considering whether the accuracy of the information can be verified. Given the IPC is not in a position to verify each individual's circumstances, the analysis with respect to the measure of completeness is necessarily confined to a more fundamental examination of whether individuals have completed all parts of the returns of interest form. The audit does not examine whether the information provided in the forms are in fact accurate.

3.2 Conduct of analysis

The findings of this follow-up audit are presented in the following two parts:

- assessment against select criteria (as set out in Table 2)
- general comments, findings, and recommendations to assist councils in complying with legislated requirements.

Consistent with the 2021 compliance audit, the IPC recorded and retained data in relation to the assessment of each selected council, and for the purposes of this report, it is unnecessary to identify or provide a breakdown of each council with respect to the findings and recommendations of this follow-up audit.

4. Observations and findings

4.1 Whether the return of interests by councillors and designated persons are complete and publicly available

The 2021 compliance audit report recommended that councils ensure that the returns of interests by councillors and designated persons are complete and made publicly available.

Criterion		Summary of results
1	Requirement to publish the returns of the interests of councillors, designated persons and delegates	There has been a demonstrated improvement in the levels of compliance with the requirement to publish returns.
1(a)	Returns of interests by councillors and designated persons publicly available	88% (46) fully compliant (+27%) 12% (6) did not comply

Comments, findings, and recommendations

In assessing this criterion, each council's website was examined to determine whether the returns of interests have been published and made publicly available.

Findings in the previous audit

The 2021 compliance audit report found that of the 52 councils, only 61% (32) of councils were fully compliant with the requirement to publish the returns of interests of councillors, designated persons and delegates. Of the remaining 39% (20) of councils, 29% (15) did not comply at all with this requirement.

Comments, findings, and recommendations

Given the low levels of compliance with the requirement to publish pecuniary returns, the IPC recommended in the 2021 compliance audit report that councils should ensure that the returns of interests by councillors and designated persons are complete and publicly available.

Findings in this follow-up audit

This follow-up audit observed a significant improvement in the levels of compliance by councils with respect to the requirement to publish returns of interests. This is illustrated in Figure 1 below.

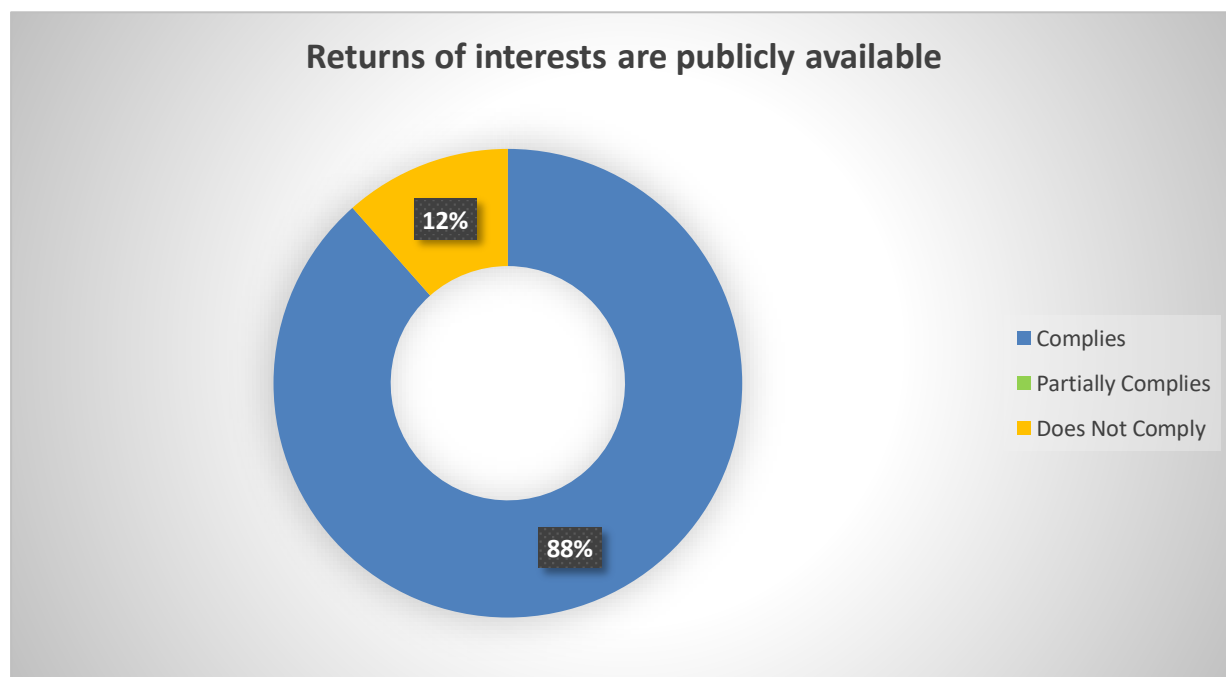


Figure 1: Compliance rates – publication of returns

Of the 52 councils assessed in this follow-up audit, 88% (46) were found to be fully compliant in making the returns of interests of councillors and designated persons publicly available on their websites. The remaining 12% (6) of councils did not comply with this requirement.

Levels of improvement

When compared to the findings in the 2021 compliance audit, this follow-up audit found a significant level of improvement in the rate of compliance with respect to the publication of the pecuniary returns.

Figure 2 illustrates the levels of improvement between the findings in the 2021 compliance audit and this follow-up audit in relation to the publication of the pecuniary returns.

Comments, findings, and recommendations

Level of improvement: Returns of interests are publicly available

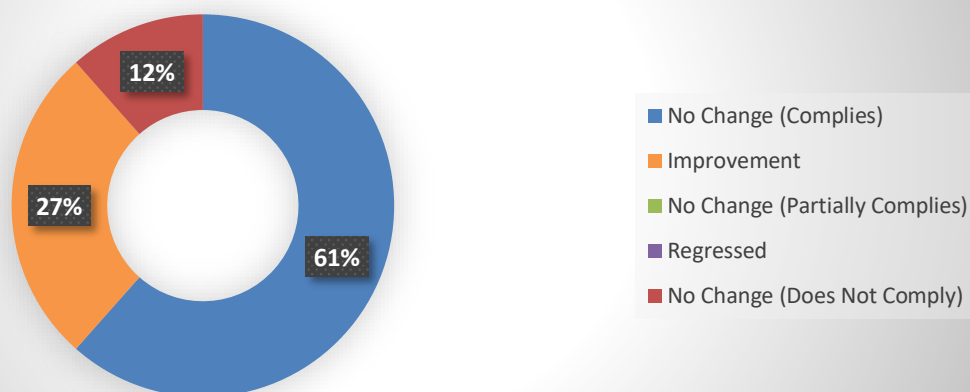


Figure 2: Improvements in compliance levels – publication of pecuniary returns

Of the 52 councils, 61% (32) remained compliant with the requirement to publish pecuniary returns. Encouragingly, 27% (14) of councils which were previously assessed as partially compliant or non-compliant were found to have improved their levels of compliance, while 12% (6) recorded no change and remained non-compliant.

Comments

When compared to the results of the 2021 compliance audit, the findings with respect to this criterion demonstrate a significant improvement in the level of compliance within the local government sector in relation to the requirement for the returns of interests to be made publicly available.

However, it is observed that a cohort of councils continued to demonstrate non-compliance with the requirement. With respect to the councils that were found to have remained non-compliant, it is noted that a significant proportion of these councils simply did not publish the returns of interests on their websites. Disappointingly, one of the councils sampled (Bayside Council) had taken the additional step of making a determination stating that it will not publish the returns of interests on its website together with the publication of a notice on its website stating this intention.

Having regard to the objects of the GIPA Act, such a practice is inconsistent with the mandatory requirement under section 6(2) of the GIPA Act to make open access information publicly available. Further it is also contrary to the requirements set out in Guideline 1. The practice by this council does not demonstrate openness, transparency and public accountability in to provide the public with confidence that potential conflicts of interest are avoided.

The refusal by some councils to publish their returns of interests therefore serves as a barrier to the public in obtaining this information and has the effect of diminishing trust and accountability in the local government sector.

Recommendation 1: Councils should ensure that returns of interests of both councillors and designated persons are published on their websites.

4.2 Accessibility, availability, completeness and currency of the returns

Criterion		Results and comments
2	Accessibility, availability, completeness and currency of the returns	There has been a demonstrated improvement in the levels of compliance by councils in ensuring that their returns of interests accessible, available and current.
2(a)	Returns of interests by councillors and designated persons are easily located on the website	88% (46) fully compliant (+36%) 12% (6) did not comply
2(b)	Returns of interests by councillors and designated persons are fully accessible to all users on the website without condition	88% (46) fully compliant (+23%) 12% (6) did not comply
2(c)	Returns of interests by councillors and designated persons are current	75% (39) fully compliant (+14%) 6% (3) partially compliant 19% (10) did not comply

Comments, findings, and recommendations
<p>Although returns of interests may be published on councils' websites, it is also important to consider whether those returns of interests could, in practice, be readily located, are accessible without being subject to conditions, are complete and are current. The absence of any of these factors essentially diminishes the open access purpose with respect to the requirement for returns of interests to be made publicly available.</p> <p>Findings in the previous audit</p> <p>The 2021 compliance audit found varying levels of compliance with respect to the accessibility, availability, completeness, and currency of the returns. In that audit, it was found that of the 52 councils assessed, only 52% (27) had made their returns of interests easily accessible. With respect to the measure of whether the returns were fully accessible without condition, 65% (34) of councils were fully compliant. Similarly, approximately 62% (32) of councils complied with the requirement to ensure that the returns of interests published are current.</p> <p>In light of these findings, the IPC made the following recommendations in the 2021 compliance audit report:</p> <ul style="list-style-type: none"> • Councils should ensure that the return of interest of councillors and designated persons are complete and publicly available. • Councils would benefit from promoting consistency and accessibility in relation to returns of interest by establishing a single readily identifiable open access pathway. This should include meaningful labelling of returns by year, type and relevant links. The returns should be easily and prominently located on a council's website and able to be located from a single search from the main page. • Councils should ensure that the returns are updated as required consistent with clause 4.21 of the Model Code of Conduct for Local Councils in NSW – 2020.

Comments, findings, and recommendations

Findings in this follow-up audit

The 2021 compliance audit did not specifically examine the completeness of the returns. However, in undertaking this follow-up audit, it was observed that a small number of the returns sampled were not complete. In particular, it was apparent that various fields in these returns were left blank by the individual making the return of interest.

While it is likely that the respective councillors and designated persons had only completed the sections that they considered to be relevant to their circumstances, it is good practice to ensure that all parts of the return are completed. Where the councillor or designated person encounters a field that does not apply to them, councils should encourage the individual to record 'Nil' or 'N/A' to those fields. This makes it clear that the individual has duly considered and completed all parts of the return.

With respect to the remaining measures relevant to this criterion, this follow-up audit observed a significant improvement across these measures. The findings for each of these measures have been set out in further detail below.

3.2(a) Return of interests by councillors and designated persons are easily located on the website

Compliance on this measure was assessed based on whether the returns were:

- in a readable format, clearly labelled and well organised
- easily navigated to or from the council's website and locatable through a search of the council's homepage.

Figure 3 demonstrates that there was a significant increase in the number of councils that had made their returns of interests readily accessible on their websites.

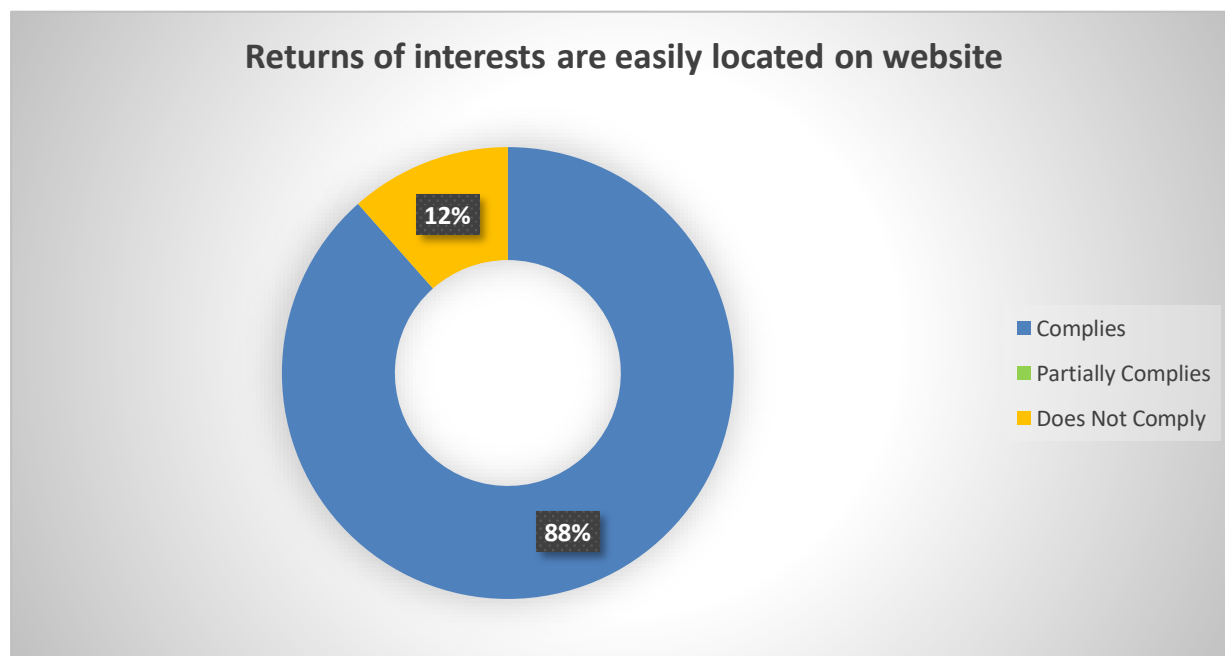


Figure 3: Compliance rates – accessibility of returns

Figure 3 illustrates that the returns of returns for 88% (46) of the 52 councils were easily located on councils' website. The returns for the remaining 12% (6) of councils either could not be found or were only located through considerable effort.

Comments, findings, and recommendations

Levels of improvement

Figure 4 shows the levels of improvement between the findings in the 2021 compliance audit and this follow-up audit with respect to the ease in which the returns of interests were located.

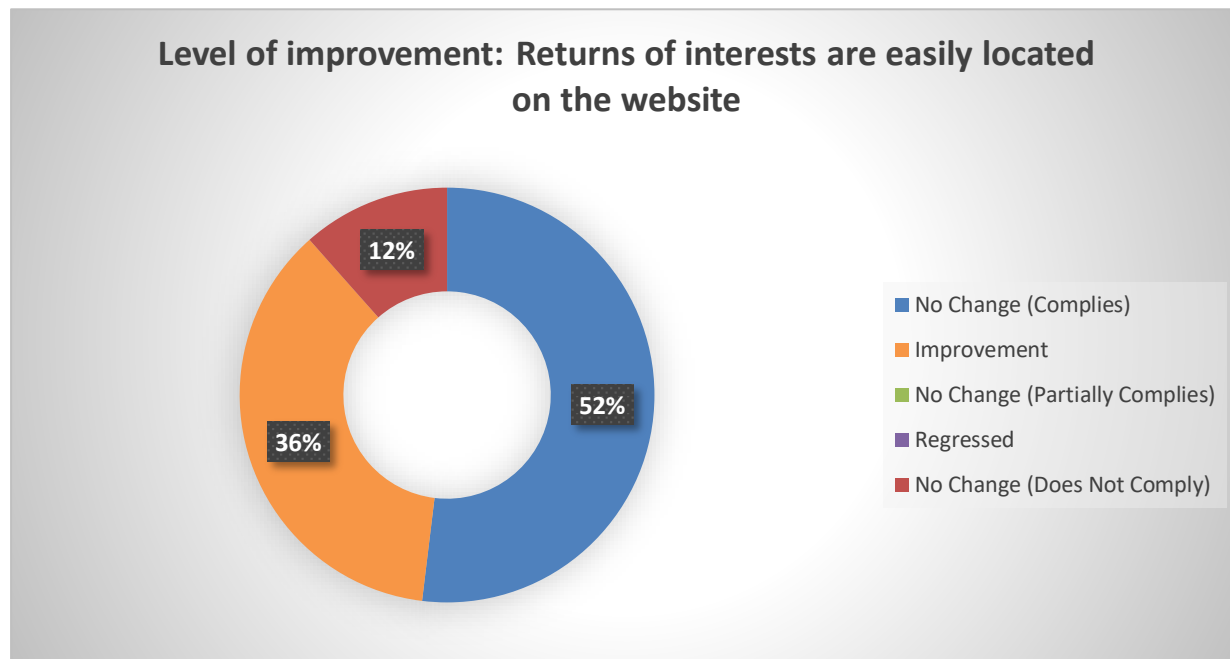


Figure 4: Improvements in compliance levels – accessibility of returns

Of the 52 councils, 52% (27) remained compliant with this measure, whereby the returns were easily located. The ease with which the returns could be found had also improved with respect to a further 36% (19) of councils that were previously assessed as partially compliant or non-compliant. The remaining 12% (6) of councils had previously been assessed as non-compliant and did not demonstrate any level of improvement when compared to their baseline assessment.

Comments

For the purposes of this follow-up audit, councils were considered to have complied with this measure if their returns have been made publicly available and were easily locatable on their websites.

However, it was also observed that the organisation of the returns varied between different councils. While some councils had categorised their returns in a clear and logical manner, other councils adopted a less organised approach to the publication of their returns. For instance, the returns of interests of several councils were handwritten and saved in a single document file in no particular order. The lack of accessibility to information contained in the returns is further compounded by the fact that a significant number of the returns were saved in a non-searchable format.

In an increasingly digital operating environment, it is not enough for councils to simply make their returns of interests publicly available on their website without due consideration as to whether those returns would, in practice, be accessible to a general member of the public. That is, in circumstances where a member of the public is seeking to view a particular councillor or designated person's return, whether it will likely require significant effort in order to identify that individual's return.

Comments, findings, and recommendations

Although returns of interests may be published on a council's website, if they are published in such a way that it would be unlikely that a general member of the public would be able to locate the returns or a particular return, the open access requirement to make returns of interests publicly available would, in essence, be subverted.

It was observed in this follow-up audit that councils that had well organised returns made their returns publicly available on a dedicated webpage containing a list of names comprising each individual councillor and designated person. Alongside each of these names comprised the relevant hyperlinks to which their return could be accessed.

Better practice saw the individual returns being published as an individual link under the profiles of each councillor or designated person. This makes it easy for members of the public to navigate to the page containing information about each individual councillor or designated person and accessing the respective return(s) if they choose to do so.

Recommendation 2: Councils should ensure that the returns of interests for each councillor and designated person are saved as individual files and meaningfully labelled by year, type and the name of the individual to whom the return relates.

3.2(b) Returns of interests by councillors and designated persons are fully accessible to all users on the website without condition

Compliance on this measure is assessed on whether the returns of interests are available to all users on Councils' website without being subject to conditions such as requiring users to login to access the returns of interests, or to make a written request (whether informally or by way of a formal access request).

It is observed that there was a marked improvement in the number of councils that made their returns of interests fully accessible without conditions.

Figure 5 outlines the compliance rates with respect to whether returns of interests are accessible without conditions.

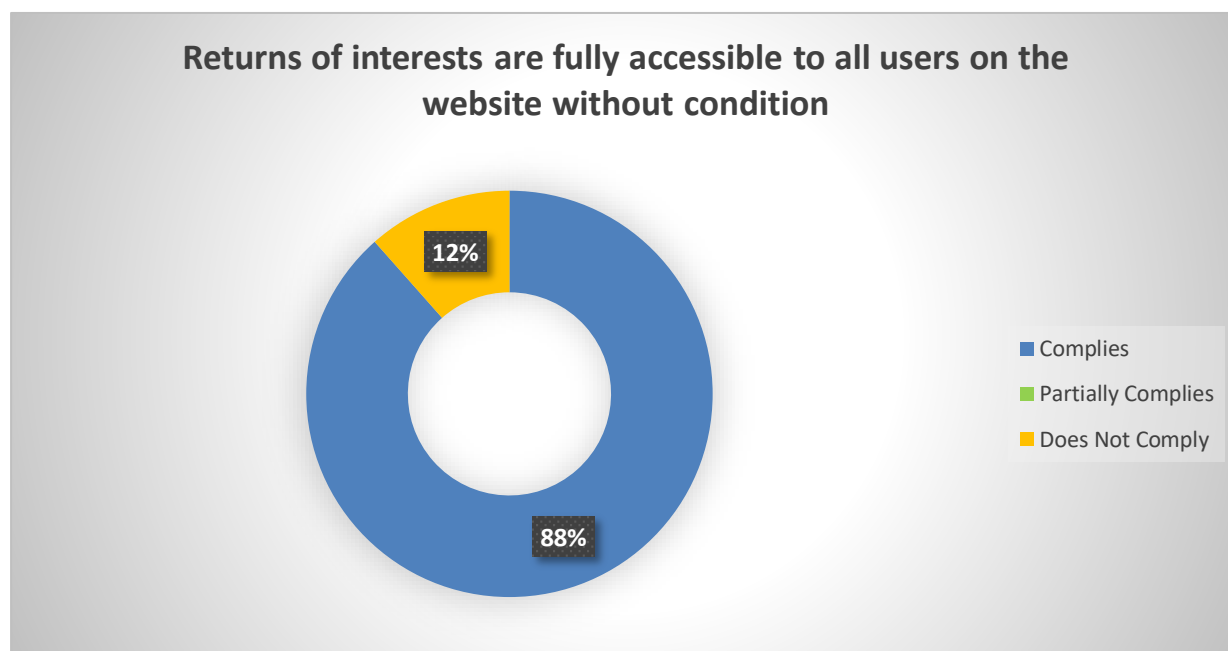


Figure 5: Compliance rates – whether returns of interests are fully accessible without condition

Comments, findings, and recommendations

Figure 5 shows that the returns of interests for 88% (46) of the 52 councils were fully without being subject to conditions. The returns for the remaining 12% (6) of councils were not available on the respective websites. In some instances, a notice was placed on the website stating that the returns were available for inspection at the council's premises or upon written request to the council.

Levels of improvement

Figure 6 shows the level of improvement with respect to this measure as compared to the results in the 2021 compliance audit.

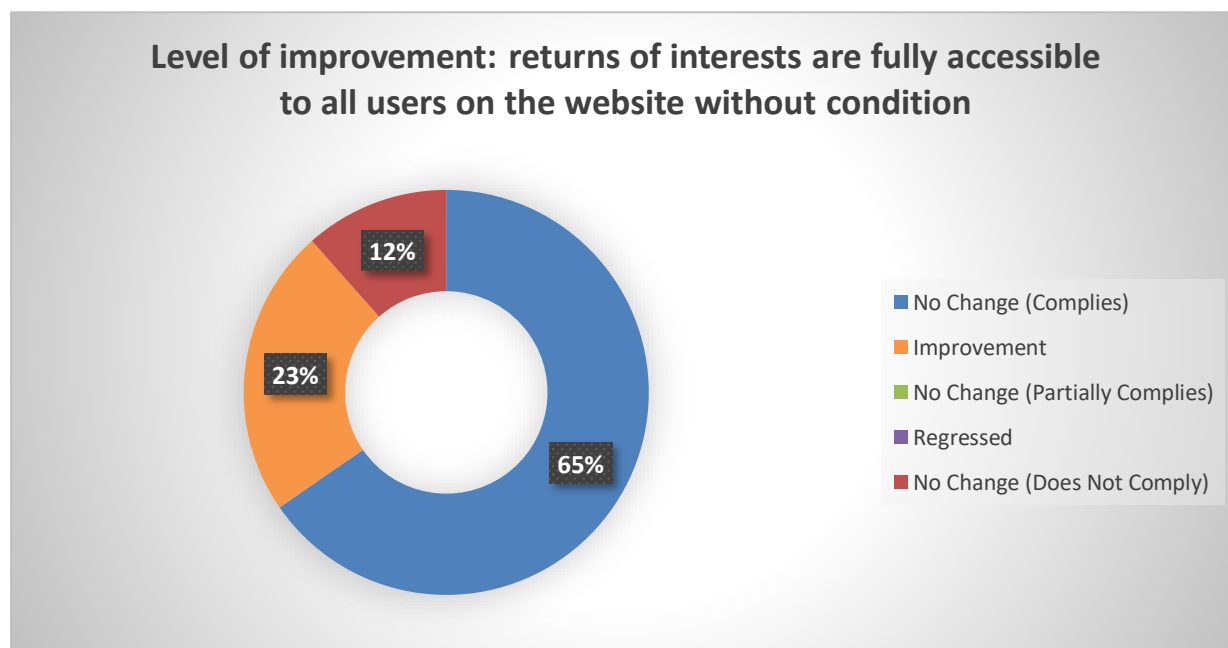


Figure 6: Improvements in compliance levels – whether returns fully accessible without conditions

Of the 52 councils, 65% (34) remained compliant with this measure. A further 23% (12) of councils that were previously assessed as partially compliant or non-compliant were found to have improved from their baseline. The remaining 12% (6) comprised councils that were previously assessed as non-compliant and record no change from their baseline.

Comments

Measures implemented by a small number of councils, such as the requirement for an inspection or a separate application to be made in order to access the return of interests, could potentially discourage members of the public from seeking access to this information. As noted previously, councils are operating in an increasingly digital environment. The imposition of conditions such as requiring members of the public to apply for access to the returns or undertake a physical inspection of the returns serve as additional barriers against access. Doing so undermines the overall public policy objectives associated with the requirement for information in returns of interests to be published on councils' websites as open access information.

Recommendation 3: Councils should ensure that returns of interests are made publicly available on their websites without imposing additional conditions.

Comments, findings, and recommendations

3.2(c) Returns of interests by councillors and designated persons are current

The returns of interests were also examined for their currency. Compliance with this measure was assessed based on whether the returns available on the website were signed and dated within the 12-month period prior to the date the data was collected.

Figure 7 illustrates that, while there was a general increase in the number of councils that had published their most current returns of interests within the previous 12-month period, a number of councils did not publish the returns for councillors and designated persons for the previous 12-month period.

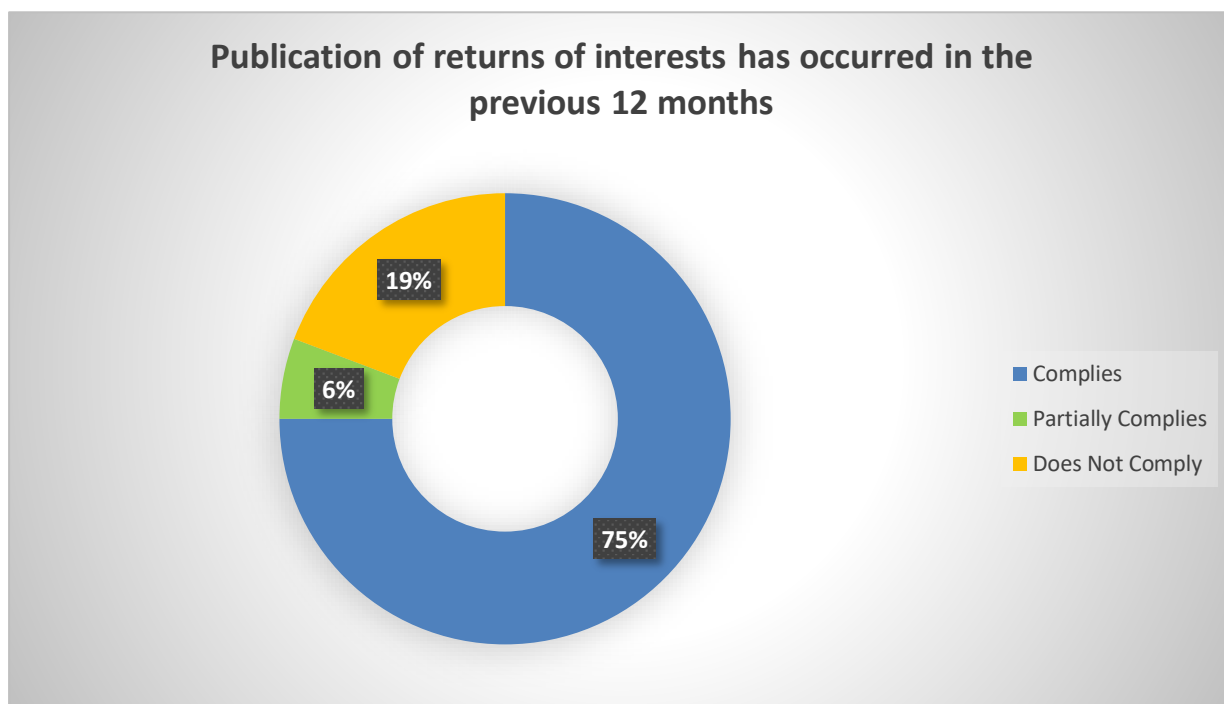


Figure 7: Compliance rates – whether returns of interests are current

As set out in Figure 7, the returns of 75% (39) of councils were current. A further 6% (3) of councils were partially compliant, whereby some, but not all, returns were found to be current. For example, it was observed that some councils only published current returns for its councillors, while the returns for designated persons had not been updated. The returns of interests of the remaining 19% (10) of councils were either not up to date or had not been published at all.

Levels of improvement

Figure 8 shows the level of improvement with respect to the measure concerning the currency of returns of interests for councillors and designated persons as compared to the findings of the 2021 compliance audit.

Comments, findings, and recommendations

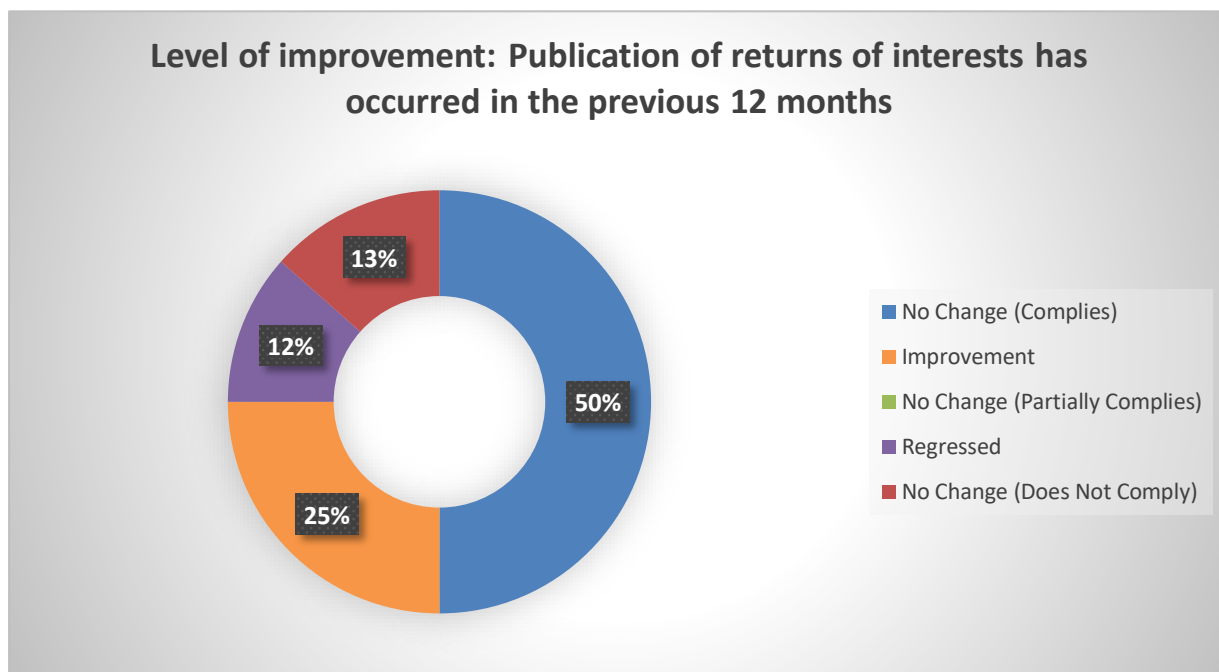


Figure 8: Improvements in compliance levels – whether publication of return occurred within the previous 12 months

Of the 52 councils, 50% (26) remained compliant with the requirement to ensure that returns of interests are current. A further 25% (13) of councils were previously assessed as partially compliant or non-compliant and were found to have improved from their baseline. Another 12% (6) of councils were previously assessed as compliant or partially compliant and were found to have regressed and either did not publish the returns for the preceding 12-month period, or only published current returns for some but not all councillors and/or designated persons. The remaining 13% (7) of councils were previously assessed as non-compliant and recorded no change from their baseline.

Comments

The Model Code of Conduct specifies that returns of interests should be completed within the 12-month period for each financial year. While it is encouraging to see that there has been a general uplift in the level of compliance with ensuring returns are current, based on the findings outlined above, it is concerning that a substantial number of councils have remained non-compliant and/or regressed with respect to this measure.

While the failure to ensure that returns of interests are published on an annual basis may, for some councils, be inadvertent, it is important that all councils have regard to the requirements set out in the Model Code of Conduct and ensure that returns of interests remain current and are updated every 12 months.

Recommendation 4: Councils should give due consideration to the requirements under clause 4.21 of the Model Code of Conduct and ensure that returns are updated and published on councils’ websites every 12 months.

4.3 Application of the public interest test to any withheld information

Criterion		Summary of results
3	Application of the public interest test to any withheld information	The returns of interest forms of most councils did not contain a statement that automatic redactions will be applied to personal information. However, in practice, it is apparent that almost all councils have taken a blanket approach to redacting personal information from the returns.
3(a)	The form does not include any statement that automatic standardised redactions for personal information or other categories of information will be applied	91% (42) fully compliant 9% (4) did not comply

Comments, findings, and recommendations
<p>Section 6(1) of the GIPA Act states that open access information must be made publicly available unless there is an overriding public interest against disclosure of the information. For the purposes of the returns of interests, this requires councils to properly consider the returns on a case-by-case basis when determining whether there is an overriding public interest against return of the information contained in the returns.</p> <p>Compliance on this criterion was assessed based on whether the returns of interest forms completed by councillors and designated persons contained any statement that personal information or other categories of information will be automatically redacted prior to its publication.</p> <p>Findings in the previous audit</p> <p>The 2021 compliance audit examined a subset of councils that had made their returns publicly available and found that there was a strong demonstration of compliance amongst that cohort. Of the 37 councils that had made their returns available on their websites, the returns of interest forms of 97% (36) of the subset of councils did not contain any reference to automatic or standardised redactions.</p> <p>The returns of interest forms of the remaining 3% (1) of the subset of councils provided councillors and designated persons with the option of indicating their preference for their signature and residential address to be redacted.</p> <p>Findings in this follow-up audit</p> <p>Figure 9 illustrates the compliance rates with respect to whether returns of interest forms contain statements with respect to automatic or standardised redaction of information.</p>

Comments, findings, and recommendations

The returns of interest form does not include any statement that automatic, standardised redactions for personal information or other categories of information will be applied

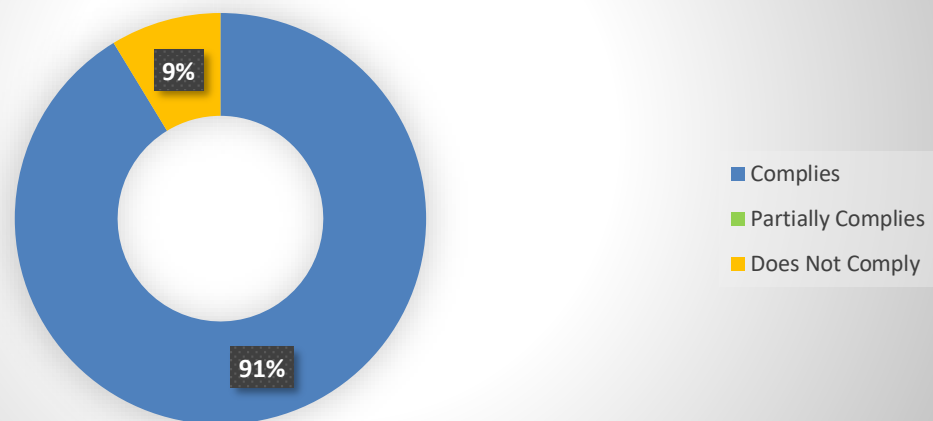


Figure 9: Compliance rates – returns of interest forms do not contain statement of automatic or standardised redactions

Of the 46 councils that had made their returns of interests publicly available on their website, the returns of interest forms of 91% (42) did not contain any statement that automatic or standardised redactions would be made to personal information or other categories of information. The returns of interest forms of the remaining 9% (4) of councils contained a statement that automatic redactions would be applied to personal information and/or other categories of information.

Levels of improvement

Figure 10 shows the levels of improvement between the findings in the 2021 compliance audit, and this follow-up audit with respect to whether the returns of interest forms contain any statement that automatic or standardised redactions will be applied to personal information or other categories of information.

Comments, findings, and recommendations

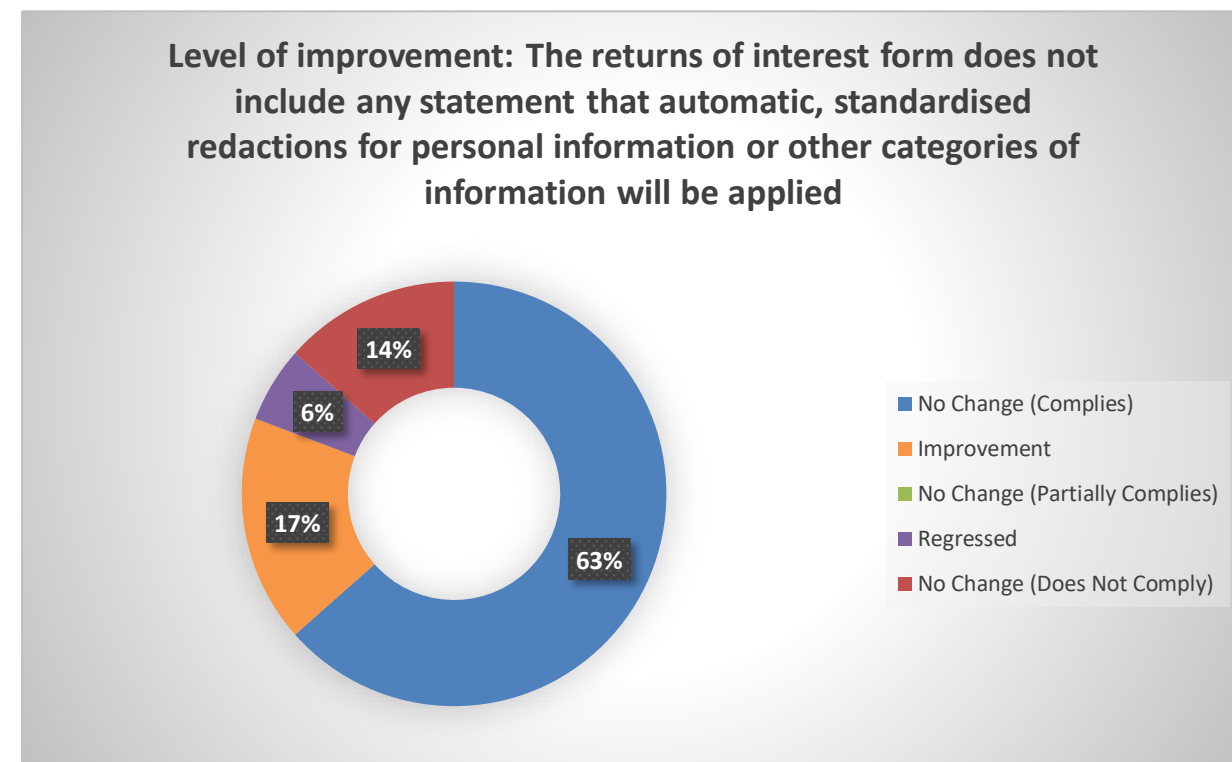


Figure 10: Improvements in compliance levels - whether returns of interest form contains any statement that automatic or standardised redactions will be applied to personal information or other categories of information

Rather than limiting the analysis only to a subset of councils that had made their returns publicly available, in assessing the levels of improvements with respect to this measure, the entire sample of councils was examined. This is to allow for a fair comparison of the results, given the number of councils that have made their returns publicly available since the 2021 compliance audit has increased from 37 to 42.

Of the 52 councils sampled, 63% (33) remained compliant with this measure and recorded no change. A further 17% (9) of councils were previously assessed as being partially compliant or non-compliant and were found to have improved from their baseline. Another 6% (3) of councils were previously assessed as compliant or partially compliant and were found to have regressed from their baseline. The remaining 14% (7) of councils were previously assessed as non-compliant or had not made their returns publicly available and were found to have either remained non-compliant or continued to not make their returns publicly available.

Comments

It was observed that, while there was an overall drop in the percentage of councils complying with this criterion, the actual number of councils complying with this criterion had increased. This can generally be attributed to an increase in the number of councils that had published their returns on their websites following the outcome of the 2021 compliance audit, whereby more councils are now aware of their obligation to publish their returns. However, it is evident that not all of these councils understand their obligations with respect to the application of the public interest test to information contained in the returns.

Comments, findings, and recommendations

As illustrated in Figure 9, most of the returns of interest forms examined in this follow-up audit do not include a statement advising the councillor or designated person that automatic or standardised redactions will be applied to personal information or other categories of information. Notwithstanding this, it is apparent that many councils have taken a blanket approach to the redaction of personal information of its councillors and designated persons in accordance with clause 3(a) and 3(b) of the Table in section 14 of the GIPA Act. In many instances, it is unclear why there would be an overriding public interest against disclosure of this information.

Relevantly, and as discussed in detail in the 2021 compliance report, the NSW Civil and Administrative Tribunal (the Tribunal) considered redactions to personal information contained in returns of interests in the decision of *McEwan v Port Stephens Council* [2021] NSWCATAD 110. The Tribunal identified that the GIPA Regulation places open access obligations on local government authorities which specifically include returns of interests of councillors, designated persons, and delegates. Such information goes to the heart of accountability of local government.

The Tribunal explained that in circumstances where a council seeks to rely on clause 3(a) or 3(b) when deciding to withhold open access information, there must be cogent and probative evidence establishing a public interest against disclosure of the relevant information. In other words, it is not enough for councils to simply rely on an individual's objection to disclosure of the information or a mere assertion that disclosure of the relevant information would infringe an individual's right to privacy. This is because an objection to disclosure by an affected individual is not determinative of where the public interest lies.

In circumstances where disclosure could reasonably be expected to contravene a provision of the *Privacy and Personal Information Protection Act 1998* (PPIP Act), the Tribunal also explained that the weight given to the contravention or non-compliance may be significantly reduced and could still favour disclosure. This is because section 5(2) of the PPIP Act stipulates that nothing in the PPIP Act operates to lessen any obligations under the GIPA Act. In considering the information contained in the returns of interest and whether there is an overriding public interest against disclosure of this information, it is therefore important that councils do not automatically presume that the public interest weighs against disclosure merely because an individual has objected to disclosure or in circumstances where it appears that disclosure may contravene a provision of the PPIP Act.

It was also observed that the returns of interest forms of some councils allowed for councillors and designated persons to indicate whether they would like their personal information redacted. However, the forms do not allow for the individual to provide their reasons for seeking redaction of their personal information. Where such a practice is adopted, it may be beneficial for councils to require individuals to provide any reasons they may have for seeking redaction of their personal information, as this could inform councils' determination of the public interest with respect to the relevant information. Consistent with the discussion above, councils should not treat the objection as determinative of the public interest but should instead take this information into account when considering whether there is an overriding public interest against disclosure of the relevant information.

Recommendation 5: Councils should ensure that returns of interest forms do not contain a statement that personal information or other categories of information will be automatically redacted.

Comments, findings, and recommendations	
<p>Recommendation 6: Councils should ensure that they do not take a blanket approach to the redaction of personal information or other categories of information from returns. Instead, councils should assess the returns on a case-by-case basis to determine whether there is an overriding public interest against disclosure of the information contained in the returns that is supported by evidence.</p>	

4.4 Existence of section 6(5) records

Criterion		Summary of results
4	Existence of section 6(5) records	There is a general lack of compliance across the sector with respect to the requirement to maintain a section 6(5) record.
4(a)	If information has been redacted, a record has been included on the council's website in accordance with section 6(5) of the GIPA Act	13% (6) fully compliant 17% (8) partially compliant 70% (32) did not comply

Comments, findings, and recommendations	
<p>Section 6(5) of the GIPA Act requires agencies to keep a record of the open access information that it does not make publicly available because of an overriding public interest against disclosure (section 6(5) record).</p> <p>Compliance on this criterion was assessed based on whether those councils that have published their returns of interests on their websites have also made a section 6(5) record available on their website. Partial compliance was recorded where a section 6(5) record was found to exist but had not been updated or does not record information that had been withheld on the basis of an overriding public interest against disclosure.</p> <p>Findings in the previous audit</p> <p>The 2021 compliance audit found that councils overwhelmingly did not comply with the requirement to maintain a section 6(5) record. Of the 37 councils that had made their returns of interests publicly available on their website, only 5% (2) of councils fully complied with the requirement to keep a section 6(5) record. A further 5% (2) of councils partially complied with the requirement, while the remaining 90% (33) of councils did not comply.</p> <p>Findings in this follow-up audit</p> <p>Figure 11 highlights the general lack of compliance with the requirement to maintain a section 6(5) record.</p>	

Comments, findings, and recommendations

If information has been redacted, a record has been included on the Council's website in accordance with section 6(5) of the GIPA Act.

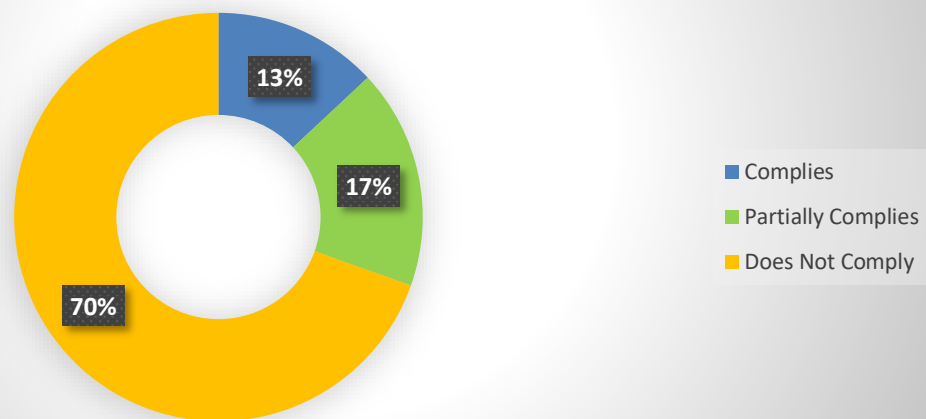


Figure 11: Compliance rates – whether a record has been included on website in accordance with s 6(5) of the GIPA Act

Of the 46 councils that had published returns on their websites, only 13% (6) fully complied with the requirement to maintain a section 6(5) record. A further 17% (8) of this cohort of councils had partially complied with the requirement, while the remaining 70% (32) did not comply.

Levels of improvement

Figure 12 shows the levels of improvement between the findings in the 2021 compliance audit, and this follow-up audit in relation to the requirement to maintain a record under section 6(5) of the GIPA Act.

Comments, findings, and recommendations

Level of improvement: If information has been redacted, a record has been included on the Council's website in accordance with section 6(5) of the GIPA Act.

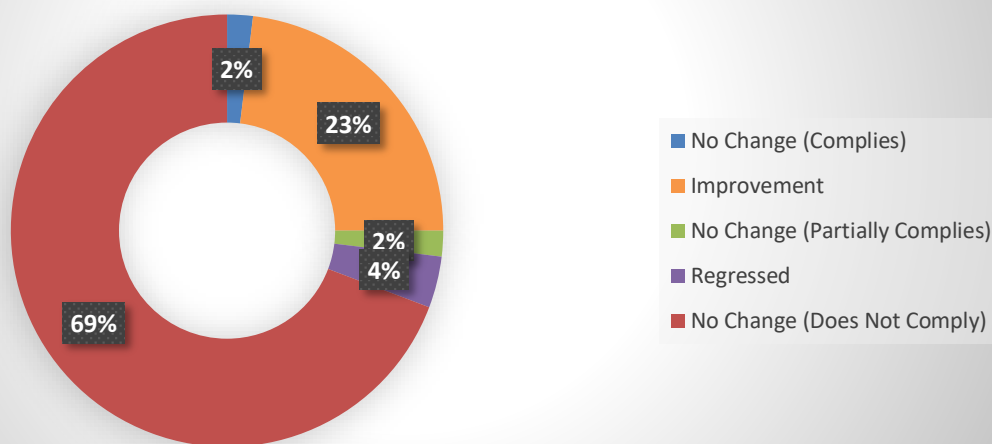


Figure 12: Improvements in compliance levels – whether a record has been included on website in accordance with s 6(5) of the GIPA Act

In order to ensure a fair comparison between the findings in the 2021 compliance audit and this follow-up audit with respect to this criterion, the entire sample of councils was examined.

Of the 52 councils, 2% (1) remained compliant with the requirement to maintain a record in accordance with section 6(5). Another 23% (12) comprised councils that were previously assessed as partially compliant or non-compliant and have since shown improvement in their levels of compliance with this criterion. A further 2% (1) comprised councils that were previously assessed as partially compliant and have remained partially compliant with this criterion. Another 4% (2) comprised councils that were previously assessed as compliant or partially compliant but have since regressed from their baseline assessment. The remaining 69% (36) of councils were previously assessed as non-compliant and remained non-compliant with this criterion.

Comments

It is apparent that there remains a general lack of understanding within the local government sector as to what is required in maintaining a record under section 6(5) of the GIPA Act. This is evidenced by the overwhelming number of councils (70%) that did not maintain any record in accordance with section 6(5).

It was also observed that although the remaining 30% (14) of councils made a section 6(5) record publicly available, the records of more than half of these councils either noted that there were no items to be included in the record or did not refer to redactions made to information contained in the returns. This is inconsistent with the findings set out in Part 3.3 of this follow-up audit, given the returns of almost all councils sampled contained redactions to personal information such as signatures and addresses.

Comments, findings, and recommendations

Having regard to the wording of section 6(5), information of this nature evidently comprises open access information not made publicly available on the basis of an overriding public interest against disclosure and should therefore be included in a record under section 6(5).

In contrast, the councils that fully complied with the requirement set out their section 6(5) record in table format using the following headings:

- Description of record containing open access information
- General nature of the information not made available, and
- Reasons for not making the information available.

Entries were then inserted into the table, which clearly identified the general nature of the types of information contained in the returns that have been withheld, and the reasons why they were withheld. Better practice saw councils include the date that the section 6(5) record was last reviewed and updated.

Recommendation 7: Councils should ensure that section 6(5) records are published on their website and updated on a regular basis. In circumstances where information is redacted from the returns, councils should ensure that this is accurately reflected in the section 6(5) record.

Recommendation 8: The IPC commits to the development of guidance to assist councils in their compliance with section 6(5) of the GIPA Act.

5. Conclusions

The 2021 compliance audit report explained in detail that the completion and proactive disclosure of returns of interests of councillors and designated persons are fundamental to the principles of transparency and accountability within the local government sector. Importantly, the publication of returns of interests minimises the risk of fraud and corruption by assisting in the identification and management of potential conflicts of interests that might arise from decision-making processes involving councillors and designated persons.

As previously noted, the 2021 compliance audit report had identified low levels of compliance across the local government sector with respect to the open access requirements under the GIPA Act. However, the results of this follow-up audit indicate a demonstrated improvement in the levels of compliance with those requirements.

The findings of this follow-up audit identified:

- a significant improvement across the local government sector with respect to its compliance with the requirement to publish returns of interests
- a significant improvement across the local government sector with respect to the accessibility of the returns of interests on councils' websites
- a general increase in the overall number of councils whose returns of interest forms did not contain any statement that automatic or standardised redactions would be made to personal information or other categories of information
- a slight increase in the number of councils complying with the requirement to maintain a record of open access information that they do not make publicly available in accordance with section 6(5) of the GIPA Act.

It is evident that the guidance and subsequent engagement provided to the local government sector following the 2021 compliance audit have assisted councils in understanding their open access obligations under the GIPA Act. Although the overall increase in the levels of compliance across all relevant criteria is encouraging, the findings in this follow-up audit also indicate that further work is required to ensure full compliance across the sector.

In particular, the findings indicate that:

- there is a lack of consistency between councils with respect to the organisation and accessibility of their returns of interests on council websites
- some councils have imposed additional conditions on the accessing of their returns of interests such as requiring an application to be made or an inspection to be undertaken, which may discourage members of the public from seeking access to this information
- some councils failed to ensure their returns of interests are up to date and current
- a significant number of councils were observed to have automatically redacted personal information and other categories of information in the returns of interests without proper consideration of the public interest test
- a significant number of councils did not appear to maintain a record under section 6(5) of the GIPA Act setting out the open access information that they do not make publicly available on the basis of an overriding public interest against disclosure.

Notwithstanding the completion of the 2021 compliance audit and this follow-up audit, it is apparent that a small number of councils continue to demonstrate an entrenched resistance to compliance with their open access obligations. Current regulatory tools and mechanisms available under the GIC Act do not appear to be sufficient to address instances of systemic non-compliance with the mandatory open access requirements as set out in the GIPA Act and GIPA Regulation. Ongoing non-compliance with open access requirements by select councils continue to be the subject of complaints to the IPC, and this has resulted in the need for a consistent application of regulatory engagement and significant resources by the IPC. Further regulatory reform would therefore be welcome to assist the Information Commissioner in elevating and/or enforcing compliance across the local government sector.

6. Recommendations

This report makes additional recommendations to assist the local government sector to continue improving its compliance with the mandatory proactive release provisions of the GIPA Act pertaining to the requirement to make returns of interests by councillors and designated persons publicly available.

These recommendations have been set out in the table below.

Recommendations	
Recommendation 1	Councils should ensure that returns of interests of both councillors and designated persons are published on their websites.
Recommendation 2	Councils should ensure that the returns of interests for each councillor and designated person are saved as individual files and meaningfully labelled by year, type and the name of the individual to whom the return relates.
Recommendation 3	Councils should ensure that returns of interests are made publicly available on their websites without imposing additional conditions.

Recommendations	
Recommendation 4	Councils should give due consideration to the requirements under clause 4.21 of the Model Code of Conduct and ensure that returns are updated and published on councils' websites every 12 months.
Recommendation 5	Councils should ensure that returns of interest forms do not contain a statement that personal information or other categories of information will be automatically redacted.
Recommendation 6	Councils should ensure that they do not take a blanket approach to the redaction of personal information or other categories of information from returns. Instead, councils should assess the returns on a case-by-case basis to determine whether there is an overriding public interest against disclosure of the information contained in the returns that is supported by evidence.
Recommendation 7	Councils should ensure that section 6(5) records are published on their website and updated on a regular basis. In circumstances where information is redacted from the returns, councils should ensure that this is accurately reflected in the section 6(5) record.
Recommendation 8	The IPC commits to the development of guidance to assist councils in their compliance with section 6(5) of the GIPA Act.

Table 3: Recommendations

7. Monitoring

The IPC will continue to monitor compliance by the local government sector and, where relevant, assist the sector in its implementation of the recommendations set out in this follow-up audit report.

Although this follow-up audit has identified some improvement with respect to the number of councils found to have maintained a section 6(5) record, given the lack of understanding across the sector as to the requirements in maintaining such a record, there appears to be benefit in the IPC undertaking further regulatory work to elevate practice across the local government sector and the NSW Government more generally.

Accordingly, the IPC intends to conduct a further audit to examine compliance by NSW Government agencies more generally with respect to their obligations under section 6(5) of the GIPA Act within the next 12 months from the date of this report.

8. Audit chronology

Date	Event
16 January 2023	Notice of follow-up audit sent to included councils
Mid-February to early March 2023	Desktop audit undertaken
31 May 2023	Report provided to the Minister for Local Government
2 June 2023	Report extract to six (6) named councils for consultation
13 June 2023	Response from the Minister for Local Government received

14 June 2023	Final response from three (3) of councils received and considered. Only 1 council requested amendment of the Report.
15 June 2023	Response to three (3) councils provided
16 June 2023	Report published – OLG notified

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
- Section 6 – Mandatory proactive release of certain government information
 - Part 3 – Open access information
- Section 18 – What constitutes open access information

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

Government Information (Public Access) Regulation 2009

- Part 2 – Open access information of local authorities