

The Auditor-General
Audit Report No.5 2003-04
Business Support Process Audit

**The Senate Order for
Departmental and Agency Contracts
(Autumn 2003)**

Australian National Audit Office

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of Australia 2003

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Canberra ACT
11 September 2003

Dear Mr President
Dear Mr Speaker

The Australian National Audit Office has undertaken a business support process audit across agencies in accordance with the authority contained in the *Auditor-General Act 1997*. I present the report of this audit and the accompanying brochure to the Parliament. The report is titled *The Senate Order for Departmental and Agency Contracts (Autumn 2003)*.

Following its tabling in Parliament, the report will be placed on the Australian National Audit Office's Homepage—<http://www.anao.gov.au>.

Yours sincerely

A handwritten signature in black ink, appearing to read 'P.J. Barrett'.

P.J. Barrett
Auditor-General

The Honourable the President of the Senate
The Honourable the Speaker of the House of Representatives
Parliament House
Canberra ACT

AUDITING FOR AUSTRALIA

The Auditor-General is head of the Australian National Audit Office. The ANAO assists the Auditor-General to carry out his duties under the *Auditor-General Act 1997* to undertake performance audits and financial statement audits of Commonwealth public sector bodies and to provide independent reports and advice for the Parliament, the Government and the community. The aim is to improve Commonwealth public sector administration and accountability.

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Abbreviations/Glossary

AFP	Australian Federal Police
AGD	Attorney-General's Department
AGO	Australian Greenhouse Office
confidential information	Information that is subject to an obligation of confidence—either under the contract or under general law principles.
Finance criteria for the determination of whether commercial information should be protected as confidential	<ol style="list-style-type: none">1. The information to be protected must be identified in specific rather than global terms2. The information must have the necessary quality of confidentiality3. The disclosure of the information would cause detriment to the contractor or other third party4. The information was provided under an understanding that it would remain confidential Refer to Appendix 5 for more details
confidentiality provisions	The clauses of a contract that operate to create the contractual confidentiality obligations on the parties to the contract in respect of information that is specified in the contract (for example, in a schedule)
Contractual information	Information in, or relating to, the contract
CPGs	Commonwealth Procurement Guidelines
Defence	Department of Defence
DEWR	Department of Employment and Workplace Relations
FaCS	Department of Family and Community Services
Draft Finance <i>Guidance on the listing of contract details on the Internet</i>	Draft <i>Guidance on the listing of contract details on the Internet</i> prepared by the Department of Finance and Administration.
Finance	Department of Finance and Administration
Finance <i>Guidance on confidentiality</i>	Department of Finance and Administration <i>Guidance on Confidentiality of Contractors' Commercial Information</i> February 2003
FMA Act	<i>Financial Management and Accountability Act 1997</i>
FMIS	Financial Management Information System

FOI Act	<i>Freedom of Information Act 1982</i>
Senate FPA Committee	Senate Finance and Public Administration References Committee
GaPS	Gazette Publishing System
NCA	National Capital Authority

Summary

Summary

Introduction

1. This report relates to the fourth audit of *Financial Management and Accountability Act 1997* (FMA Act) agencies' compliance with the *Order of the Senate for Departmental and Agency Contracts*, (the Senate Order) to list, on the Internet, contract details for the reporting period 4 February 2002 to 3 February 2003.
2. The audit was conducted in accordance with the Senate Order request for the Auditor-General to undertake twice-yearly examinations of agency contracts listed on the Internet, and to report whether there had been any inappropriate use of confidentiality provisions.

Audit objectives

3. The objectives of the audit were to assess agency performance in relation to compiling the Internet listings required by the Senate Order and the appropriateness of the use of confidentiality provisions in Commonwealth contracts.

Audit scope and focus

Scope

4. The audit involved a desktop review of all FMA Act agencies to enable the ANAO to report on the information provided on the Internet. In addition, the ANAO selected six agencies for more detailed review of the processes used to make the Internet listings and of the use of confidentiality provisions in contracts.

Selected agencies

5. The six agencies selected for detailed review in this audit were the:
 - Australian Federal Police (AFP);
 - Australian Greenhouse Office (AGO);
 - Department of Defence (Defence);
 - Department of Employment and Workplace Relations (DEWR);
 - Department of Family and Community Services (FaCS);¹ and
 - National Capital Authority (NCA).

¹ The audit of FaCS focused on the contract listing for FaCS only, and did not include the other agencies in the Family and Community Services portfolio (Centrelink, Child Support Agency and the Social Security Appeals Tribunal).

Focus

6. The focus of the audit in relation to confidentiality was on the commercial information that could be protected as confidential information.² The ANAO recognised, however, that agencies might have reported confidentiality for other reasons, for example, because it was information with a national security classification or personal information.

Overall conclusion

7. The ANAO found that, by the time the audit was completed, 78 agencies³ had either placed a list of contracts on their websites, or did not have any contracts that fell within the scope of the Senate Order and, as a result, were not required to list details of contracts on the Internet. The majority of lists generally complied with the requirements of the Senate Order although there was scope for agencies to improve the presentation of the lists.

8. In relation to the six agencies subject to detailed audit, all had placed a list of contracts on their website by the due date.

9. In five agencies, the ANAO concluded that the processes used to compile the Internet listing were generally likely to lead to the lists being complete in terms of the number of contracts listed.

10. In his tabling letter in March 2003, the Minister for Defence advised the Senate that Defence's list of contracts on the website was not a complete list for the relevant period, nor did it identify contracts as containing either confidential provisions or other requirements of confidentiality. However, the ANAO concluded that Defence's establishment of an interim contracts register, and its consideration of the development of an enhanced contract database, will assist Defence to progressively comply with the requirements of the Senate Order.

11. All six agencies audited had revised their general contracting practices, policy guidance, tender documentation and contract templates to reflect changes to Government policy, including the requirements of the Senate Order. However, as identified in previous audits on this topic, the understanding of how to implement these changes was not uniform across, or within, agencies.

12. The audited agencies generally had processes in place to determine whether information in contracts should be protected as confidential and, in

² The actual wording of the Senate Order does not specifically refer to commercial information. However, the basis for the original Senate Motion and the holding of the Senate FPA Committee's inquiry was the Senate's concern that information was being withheld from the Parliament for reasons of commercial confidentiality.

³ At the time of the audit, there were 81 FMA Act agencies. Details of the other three agencies are provided in Chapter 2 of this report.

over half the contracts reviewed, had specifically identified what information was to be protected as confidential information, an essential element for agreeing to protect information.

13. The ANAO selected a sample of 20 contracts of the audited agencies for review. All had been entered into after the Senate Order had been amended in September 2001 and after agencies had started to put in place changes to contracting policies and procedures to meet the requirements of the new accountability framework. The ANAO considered that only six of the contracts reviewed had been appropriately listed on the Internet as containing information that was likely to satisfy the criteria for protection as confidential information.

14. As the contracts were not selected on a statistical basis, the ANAO cannot make a definitive comment on the appropriateness of the listing of contracts with confidential provisions within the selected agencies and across all FMA Act agencies. However, the results from this and previous audits suggest that, although agencies have made changes to their policies and procedures to address the issue of protecting contractual information as confidential, all agencies must continue efforts to ensure that their policies are both regularly reviewed to accord with Government policy, and reflected in their practices.

Comments from the audited agencies

15. The comments provided by each of the audited agencies in response to the audit report are shown in Appendix 6.

Audit Findings and Conclusions

1. Introduction

Background

1.1 On 20 June 2001, the Senate made an Order that required Ministers to table letters advising that each of the agencies,⁴ which they administer, had placed a list of contracts on the Internet by the tenth day of the Spring and Autumn sittings of Parliament. The list of contracts was to include all contracts entered into by the agency which had not been fully performed or which had been entered into during the previous 12 months, and which provided for consideration to the value of \$100 000 or more. In addition, the list of contracts was also required to indicate, amongst other things, whether any of the contracts listed contained confidentiality provisions. The *Order of the Senate for Departmental and Agency Contracts*⁵ (the Senate Order) was varied on 27 September 2001 to require additional information to be reported on the Internet listing and in the Ministers' letters.

1.2 The Senate Order was informed by two reports of the Senate Finance and Public Administration References Committee (Senate FPA Committee) tabled in June 2000⁶ and September 2001,⁷ as well as an Australian National Audit Office (ANAO) report on the use of confidentiality provisions in Commonwealth contracts.⁸ The general principle espoused in these reports was that information in government contracts should not be protected as confidential unless there is a good reason to do so. In its report, the ANAO developed criteria to assist agencies in determining whether information in contracts should be treated as confidential. The Senate FPA Committee endorsed the criteria in its final report.

1.3 The ANAO report also provided guidance on a possible new framework for dealing with the issue of confidentiality in contracts and disclosure of contractual information to parliamentary committees.

1.4 In August 2001, the Government responded⁹ to the original Senate Order and also endorsed the guidance on confidentiality provided in the ANAO's

⁴ Agency means an agency within the meaning of the *Financial Management and Accountability Act 1997*.

⁵ The Order has been reproduced at Appendix 1.

⁶ The Senate Finance and Public Administration References Committee, *Interim report on the inquiry into the mechanism for providing accountability to the Senate in relation to government contracts*, June 2000.

⁷ The Senate Finance and Public Administration References Committee, *Commonwealth Contracts: a New Framework for Accountability*, September 2001.

⁸ Australian National Audit Office, Audit Report No.38 2000-01, *The Use of Confidentiality Provisions in Commonwealth Contracts*, May 2001.

⁹ Department of Finance and Administration, *Murray Motion Key Documents*, August 2001.

report on the use of confidentiality provisions in Commonwealth contracts. The Government responded to the amended Senate Order of 27 September 2001 in June 2002. In essence, the Government agreed to comply with the spirit of the Senate Order and advised that information regarding individual contracts would not be provided where disclosure would be contrary to the public interest, legislative requirements and undertakings given. The Government also indicated that agencies' compliance would be progressive as agencies refined arrangements and processes to meet the requirements.

Commonwealth Procurement Guidelines

1.5 On 3 October 2001, the Department of Finance and Administration (Finance) released updated Commonwealth Procurement Guidelines (CPGs) which, in addition to confirming the requirement to comply with the spirit of the Senate Order, stipulated that agencies should:

- include provisions in tender documentation and contracts that alert prospective providers to the public accountability requirements of the Commonwealth, including disclosure to Parliament and its Committees; and
- consider, on a case-by-case basis, what might be commercial-in-confidence when designing any contract.¹⁰

1.6 The CPGs were reissued in February 2002, with no material changes to these requirements.

1.7 The CPGs also contain a longstanding requirement for agencies to report all agency agreements, Commonwealth contracts and standing offers with an estimated liability of \$2000 or more in the Gazette Publishing System (GaPS) within six weeks of entering into the agreements. GaPS is an electronic service that is available on the Internet.¹¹

Senate FPA Committee

1.8 The Senate FPA Committee reported on the first year of operation of the Senate Order on 12 December 2002.¹² The report made a number of recommendations on such issues as the type of Commonwealth organisations to be covered by the Senate Order, the frequency of reporting and the content

¹⁰ Commonwealth Procurement Guidelines, September 2001, subsection 1.2.

¹¹ The GaPS Internet address is <www.contracts.gov.au>.

¹² The Senate Finance and Public Administration References Committee, *Report on the first year of operation of the Senate order for the production of lists of departmental and agency contracts*, 12 December 2002.

and presentation of agencies' Internet listings, as well as a recommendation that the Senate amend its Order of 27 September 2001.

1.9 The Senate amended the Order in June 2003 in response to the recommendations of the Senate FPA Committee report. The amended Order is at Appendix 2.

1.10 The Government also responded to the Senate FPA Committee report in June 2003 and agreed, or agreed in-principle with the majority of the recommendations.

1.11 The Government also agreed to comply with the spirit of the latest amendment to the Order. In particular, the Government agreed to comply with the Order on the basis that:

- agencies will use the Department of Prime Minister and Cabinet guidelines on the scope of public interest immunity to determine whether information regarding individual contracts will be provided;
- agencies will not disclose information if disclosure would be contrary to the *Privacy Act 1988*, or to other statutory secrecy provisions, or if the Commonwealth has given an undertaking to another party that the information will not be disclosed; and
- compliance with the Senate Order will be progressive as agencies covered by the *Financial Management and Accountability Act 1997* (FMA Act) refine arrangements and processes to meet the requirements.

Guidance on confidentiality in contracts

1.12 Finance issued its *Guidance on Confidentiality of Contractors' Commercial Information* (Finance *Guidance on confidentiality*) in February 2003.¹³

1.13 The purpose of the guidance is to assist FMA Act agencies in ensuring that they enter into appropriate commitments to maintain confidentiality of commercial information in the context of procurement processes.

1.14 The guidance provides agencies with:

- criteria based on legal principle to assist them in deciding if it is appropriate to agree to treat specific commercial information as confidential;
- an approach for agencies to use to resolve with tenderers/contractors whether commercial information will be treated as confidential; and
- advice on the use of appropriate contractual terms for confidentiality purposes.

¹³ Department of Finance and Administration, *Guidance on Confidentiality of Contractors' Commercial Information*, February 2003.

Guidance on the listing of contract details on the Internet

1.15 One of the recommendations of the Senate FPA Committee report was that Finance, in conjunction with the ANAO, develops guidelines for the content, presentation and format of contract listings.

1.16 Finance has developed draft *Guidance on the listing of contract details on the Internet* with a final version due to be issued to all FMA Act agencies later this year.

1.17 The guidance covers such issues as:

- the format and content of the Internet listing;
- what are considered contracts for the purpose of the policy; and
- the identification and treatment of confidential contract information.

Audit requirements

Senate Order request

1.18 The Senate Order requested the Auditor-General to undertake twice-yearly¹⁴ examinations of agency contracts required to be listed on the Internet, and report whether there had been any inappropriate use of confidentiality provisions and whether contracts not included in agency lists should have been listed. The Auditor-General agreed to the request, and tabled three audits in February 2002, September 2002 and March 2003; this is the fourth such audit in response to the Senate Order request.

Previous audit coverage

1.19 The first and second audits found that all agencies had established Internet listings of their contracts and were generally compliant with the requirements of the Senate Order. In agencies subject to detailed review, the processes used in the compilation of the Internet listings provided the ANAO with reasonable assurance as to the completeness of the lists. Nevertheless, the ANAO noted that agencies had difficulty identifying what information should be protected as confidential and found many instances where information was inappropriately identified as confidential. The ANAO concluded, however, that this was not unexpected as the contracts assessed were entered into by agencies prior to the implementation of the new accountability framework and without guidance to determine whether information in a contract should be protected as confidential.

¹⁴ The Senate Order requested the Auditor-General provide a report to the Senate within six months after the tenth day of the Spring and Autumn sittings, which for the Autumn 2003 period is not later than 19 September 2003.

1.20 The third audit generally found that the processes that agencies use for establishing contract lists were improving and that agencies had appropriate policy and procedural documentation in place. However, as in previous audits, the ANAO considered many of the contracts had been inappropriately listed on the Internet as containing confidential provisions because they did not contain information that the ANAO considered was confidential, even though the contracts had been entered into after agencies had had time to implement the new accountability framework.

This report

1.21 This report is the fourth audit in response to the Senate Order, namely, the audit of the contract information associated with the tabling of letters by Ministers by the tenth day of the Autumn 2003 Parliamentary sittings (20 March 2003), and includes contracts entered into or not fully performed in the 12 months ending 3 February 2003.¹⁵

Audit objectives

1.22 As the audit commenced before the Senate had made its latest amendments to the Order, the audit objectives were set against the requirements of the Senate Order of September 2001 and the Government's response of June 2002.

1.23 The audit objectives were to assess agency performance in relation to compiling the Internet listings required by the Senate Order and the appropriateness of the use of confidentiality provisions in Commonwealth contracts. The objectives were as follows:

1. Conduct a desktop review of all FMA Act agencies' Internet sites and determine whether a list of contracts has been placed on the Internet site and whether it was consistent with the requirements of the *Order of the Senate for Departmental and Agency Contracts*.
2. Examine in selected agencies:
 - (a) a selection of contracts listed as containing confidentiality provisions and indicate whether there is any inappropriate use of such provisions;
 - (b) the processes by which agencies Internet listing was made, and assess whether the process was likely to lead to the list of contracts placed on the Internet being complete;

¹⁵ The Senate Order defines the previous 12 months as '... the period of 12 months ending on the day before the first day of sitting of the autumn or spring sittings, as the case may be'. The first sitting day of the Senate Autumn 2003 session was 4 February 2003, so that the previous 12 months refers to the period 4 February 2002 to 3 February 2003.

- (c) the processes by which agencies determined which contracts placed on the Internet contained confidential provisions or were considered to be confidential, and assess whether the process was likely to be appropriate; and
- (d) a selection of contracts which have been excluded from the Internet listing because the whole contract is deemed to be confidential, and assess whether the contract should have been listed.

Audit scope, focus and criteria

Scope

1.24 The audit involved a desktop review of all FMA Act agencies to enable a report on what information had been provided on the Internet. In addition, the ANAO selected six agencies for more detailed review of both the processes used to make the Internet listings and the use of confidentiality provisions in contracts.

1.25 The ANAO's examination of the processes by which agencies determine what information in, or associated with, contracts should be protected as confidential, focussed on the processes being used in the selected agencies now, rather than those used in the past.

1.26 The ANAO examined a selection of contracts in the audited agencies to assess whether there was any inappropriate use of confidentiality provisions in the contracts. Only recent contracts were examined because these contracts were likely to have been entered into after agencies had had sufficient time to introduce revised contracting practices to accord with the new contracting environment.

Focus

1.27 The focus of the audit in relation to confidentiality was on commercial information that could be protected as confidential.¹⁶ However, the ANAO recognised that agencies may have agreed to protect other types of information, for example, information with a national security classification or personal information, as confidential information.

Audit evaluation criteria

1.28 Audit evaluation criteria were developed for each of the audit objectives. In summary, the criteria represented the sound management environment and

¹⁶ The actual wording of the Senate Order does not specifically refer to commercial information. However, the basis for the original Senate Motion and the holding of the Senate FPA Committee's inquiry was the Senate's concern that information was being withheld from the Parliament for reasons of commercial confidentiality.

internal controls that an agency would be expected to have in place to comply with relevant legislative requirements, government policies and accepted management principles applicable to each objective.

Audit coverage and methodology

All FMA Act agencies

1.29 The number of contracts and the number of contracts with confidentiality provisions for each of the FMA Act agencies that had listed contracts on the Internet for Autumn 2003 are shown at Appendix 3.

1.30 In total, there were 20 702 contracts on the Internet websites, of which 5287 were listed as containing confidential provisions and/or other requirements of confidentiality. As discussed in previous audits, the number of contracts listed as containing confidentiality provisions or other requirements of confidentiality was not complete as the Department of Defence (Defence) had not listed those contracts that contain confidential provisions.

1.31 Excluding Defence's contracts (3037) from the total of contracts listed, 30 per cent of the remaining 17 665 contracts on the Internet were recorded as having either a confidential provision or other requirements of confidentiality.

Selected agencies

1.32 The six agencies selected for detailed review in this audit were the:

- Australian Federal Police (AFP);
- Australian Greenhouse Office (AGO);
- Defence;
- Department of Employment and Workplace Relations (DEWR);
- Department of Family and Community Services (FaCS);¹⁷ and the
- National Capital Authority (NCA).

1.33 Table 1.1 shows the total number of contracts and total number of contracts with confidentiality provisions that were listed on the Internet by each of the selected agencies.

¹⁷ The audit of FaCS focused on the contract listing for FaCS only, and did not include the other agencies in the Family and Community Services portfolio (Centrelink, Child Support Agency and the Social Security Appeals Tribunal).

Table 1.1**Number of contracts listed on the Internet—selected agencies**

Agency	Number of contracts	Number of contracts listed as containing confidentiality provisions
Australian Federal Police	103	1
Australian Greenhouse Office	152	139
Department of Employment and Workplace Relations	1118	992
Department of Family and Community Services	2540	574
National Capital Authority	30	26
Sub-Total	3943	1732
Department of Defence	3037	None listed
Total	6980	1732

Source: ANAO analysis of Internet listings for Autumn 2003 Parliamentary sitting.

1.34 The selected agencies reported a total of 6980 contracts, representing 34 per cent of the total number of contracts reported by all FMA Act agencies. In addition, five of the selected agencies reported 1732 contracts with confidentiality provisions, or 33 per cent of the 5287 such contracts listed by all FMA Act agencies.

1.35 Of the 3943 contracts in the selected agencies, which identify contracts with confidentiality provisions, 44 per cent are listed as having either a confidential provision or other requirements of confidentiality.

Audit methodology

1.36 The audit methodology involved:

- accessing all FMA Act agencies' Internet sites and downloading relevant information from the contract listings;
- conducting interviews, and examining files and records relating to the contract listings and the selected contracts at each of the selected agencies; and
- consulting with legal advisers prior to forming an opinion on whether the contracts listed as containing confidentiality provisions contained confidential information.

1.37 The audit was conducted in accordance with ANAO Auditing Standards at an approximate cost of \$270 000. The ANAO engaged a consultant from Courage Partners Pty Ltd to assist with the audit.

Audit findings

1.38 Chapter 2 (Internet Listings) outlines the findings for the first audit objective, while Chapters 3 and 4 (The Processes Used to Create the Internet Listing and Confidentiality Provisions in Contracts, respectively) outline the findings for the second audit objective.

1.39 Each of the selected agencies was provided with a comprehensive management report relating to its particular circumstances, prior to finalisation of this report.

2. Internet Listings

This chapter reports on the Senate Order requirement for agencies to list contracts on the Internet. It relates specifically to audit objective one, that is an assessment as to whether all agencies covered by the Senate Order had placed a list of contracts on the Internet consistent with the requirements of the Order.

Agencies covered by the Senate Order

2.1 During the reporting period, there were 81 FMA Act agencies.¹⁸ The five parliamentary departments,¹⁹ although classified as agencies under the FMA Act, are not Departments of State administered by Ministers and, as a result, are not included in the Senate Order. However, as occurred previously, all the parliamentary departments, except the Department of the House of Representatives, had listed their contracts on the Internet in accordance with the Senate Order.

2.2 The Clerk of the House of Representatives advised the ANAO in the previous audit that, in accordance with Section 49 of the Constitution which provides for the independence of each House of the Parliament of the Commonwealth of Australia, the Department of the House of Representatives cannot comply with the Senate Order unless directed to do so by the House of Representatives.²⁰

2.3 In its report on the first year of operation of the Senate Order, the Senate FPA Committee suggested to the Senate that the ‘...Department of the House of Representatives comply with the Senate Order...’²¹ The Committee also considered that, if the Senate agrees with this suggestion, it be conveyed to the Speaker of the House of Representatives by the President of the Senate.²² In its response to the Committee report, the Government considered that ‘the Department of the House of Representative’s compliance with the Senate Order was a matter for the Senate and the House of Representatives.’²³ The ANAO understands that this matter is still to be resolved.

¹⁸ FMA Act agencies were identified by reference to the FMA Act list on the Finance website: <http://www.finance.gov.au/finframework/docs/FMA_Agencies_List_10_02_03>.

¹⁹ Department of the Senate; Department of the House of Representatives; Department of the Parliamentary Library; Department of the Parliamentary Reporting Staff; and Joint House Department.

²⁰ Australian National Audit Office, Audit Report No.32 2002–03 *The Senate Order for Departmental and Agency Contracts (Spring 2002 Compliance)*, March 2003 p. 26.

²¹ The Senate Finance and Public Administration References Committee *Report on the first year of operation of the Senate order for the production of lists of departmental and agency contracts*, op.cit Recommendation 12.

²² *Ibid.*, Recommendation 12.

²³ *Government Response to Senate and Public Administration References Committee Report Departmental and Agency Contracts*, June 2003.

2.4 As in previous audits, the Australian Security Intelligence Organisation (ASIO) and the Australian Secret Intelligence Service (ASIS) did not list contracts on the Internet because of national security concerns. In its report on the first year of operation of the Senate Order, the Senate FPA Committee requested that ANAO and Finance discuss ASIO and ASIS compliance with the Senate Order with both bodies. At the time that this audit report was being prepared, and in line with the Government's response to the Senate FPA Committee report, the ANAO and Finance were discussing options with ASIO and ASIS for compliance with the Senate Order.

2.5 Accordingly, there were 78 agencies that were required to, or had agreed to, comply with the Senate Order for the Autumn 2003 reporting period.

Audit evaluation criteria

2.6 Agencies would be expected to have listed contracts on their websites in accordance with the Senate Order by the due date (20 March 2003).²⁴ In addition to the specific requirements of the Senate Order, each agency would be expected to have:

- listed all the details as required by the Senate Order;
- made the list available on the Internet by the due date (20 March 2003);
- identified the relevant reporting period (Autumn 2003) and the period in which the contracts were entered into; and
- established a clear and readily accessible path to the listing on its home page.

Assessing compliance with the Senate Order

2.7 The ANAO assessed each of the 78 agencies' compliance with the Senate Order. In conducting the assessment, the ANAO expected that by the time that agencies had to list their contracts on the Internet (March 2003), they would have had sufficient time to adopt practices that would ensure they could comply fully with the requirements of the Senate Order as amended in September 2001.

2.8 However, the ANAO also recognised that the Government's responses to the Senate Order indicated that agency compliance would be progressive. Therefore, it was likely that agencies would be at different stages of achieving compliance with the Senate Order.

²⁴ The due date for the listings to be on the Internet was taken to be the tenth day of the Autumn 2003 Sittings, which was 20 March 2003. (Paragraph (1) of the September 2001 amendment to the Senate Order).

Audit findings

Agencies with a contract listing on the Internet

2.9 For the Autumn 2003 reporting period, 78 agencies had either placed a list of contracts on their websites by the time the audit was completed, or did not have any contracts that fell within the scope of the Senate Order and, as a result, were not required to list details of contracts on the Internet.

2.10 Some agencies' contracts were presented in their own agency list or in a list of an aligned body, as follows:

- The Australian Antarctic Division, part of the Environment and Heritage portfolio, lists its contracts on its own website rather than on the Department of Environment and Heritage's website.
- The Child Support Agency and the Social Security Appeals Tribunal, part of the Family and Community Services portfolio, list their contracts on their own websites rather than on the FaCS's website.

For the purposes of reporting the total number of agency contracts in this report, these organisations' contracts were incorporated with the relevant portfolio list.

2.11 In addition, some agencies presented their contracts in one listing as follows:

- The Classification Board and the Classification Review Board, are administered by the Office of Film and Literature Classification, and do not enter into contracts in their own right.
- As a result of shared administrative arrangements, the PSS and CSS Boards reported their contract details together.

2.12 The Office of the Inspector-General of Intelligence and Security, and the National Competition Council advised that they did not have any contracts of \$100 000 or more, and have placed a note to this effect on their respective websites.

2.13 Two entities, the Aboriginal and Torres Strait Islander Commission (ATSIC)²⁵ and ASIC, although established under the *Commonwealth Authorities and Companies Act 1997* (CAC Act), are prescribed as FMA Act agencies that handle money other than public money.

- ATSIC advised that it is an FMA Act agency only in relation to the management of two Special Accounts: – the Aboriginal and Torres Strait Islander Land Fund Account (Land Fund) and the Aboriginals Benefits

²⁵ From 1 July 2003, the functions of ATSIC were separated, with ATSIC retaining responsibility for what was previously its elected arm, and a new organisation, Aboriginal and Torres Strait Islander Services (ATSIS) was established as the body responsible for the delivery of services to ATSIC and indigenous Australians.

Account (ABA). ATSIC also advised that neither the Land Fund nor the ABA had entered into contracts with any other party. Any contracts in relation to services provided to the Land Fund or the ABA had been entered into by ATSIC and executed under the provisions of the CAC Act. As a result, ATSIC had not listed any contracts on the Internet.

- ASIC advised that expenditure relating to contracts to which ASIC is a party has been made from appropriation under the CAC Act so that no contracts fall within the scope of the Senate Order. As such, ASIC has made a reference on its web site to this effect.

2.14 The ANAO's assessment of each of the 78 agencies compliance with the specific requirements of the Senate Order is detailed at Appendix 4. Agencies confirmed that the ANAO's assessment of each listing was correct.

Summary of Internet listings

Agency compliance with the Senate Order's requirements

2.15 Agency compliance with the requirements of the Senate Order as identified through the ANAO's desktop review of agencies' Internet listing of contracts can be summarised as follows:

- sixty-seven²⁶ of the 78 agencies (86 per cent) presented a list of contracts on their website that provided all the contract information required by the Senate Order;
- sixty-nine²⁷ of the 78 agencies (88 per cent) had placed a list of contracts on the Internet by the due date, 20 March 2003; and
- only four agencies had failed to both post a list of contracts that provided all the contract information required by the Senate Order and to post the list by the due date.

Number of contracts listed as containing confidential provisions

2.16 As mentioned earlier, 26 per cent or 5287 contracts were listed as containing confidential provisions and/or other requirements of confidentiality.²⁸ In the previous reporting period, agencies had listed 20 097 contracts of which 4855

²⁶ This figure includes the four agencies that did not have any contracts that fell within the scope of the Senate Order.

²⁷ This figure includes the four agencies that did not have any contracts that fell within the scope of the Senate Order.

²⁸ Of these contracts, 3351 contracts were listed as containing confidential provisions and 2559 were listed as containing other requirements of confidentiality. Some contracts were listed as containing both confidential provisions and other requirements of confidentiality.

(24 per cent) contained either confidential provisions or other requirements of confidentiality.

2.17 However, as in previous audits, the ANAO was unable to draw any definitive conclusions from these figures on whether the Senate Order has had an impact on reducing the number of contracts containing confidential provisions. This is because compliance with Senate Order is being undertaken progressively, Finance *Guidance on confidentiality* was issued after the reporting period, and agencies are still developing policy and procedures to reflect the requirements of the new contracting environment.

2.18 The ANAO also noted that there are still a large number of contracts that had been entered into before the Senate Order came into effect. As a result, such contracts may have been identified as containing confidential information without consideration as to whether the information was truly confidential.

Defence

2.19 Defence had relied on information captured by GaPS to comply with the Senate Order requirements. On 6 March 2003, the Minister for Defence tabled a letter in the Senate advising that a list of contracts had been placed on the Internet, and that

the information contained in the Commonwealth Gazette Publishing System is deficient in the sense that it does not address the requirement to report the use of confidentiality provisions and it does not specify every contract entered into by Defence. In order to overcome these discrepancies, Defence is developing a comprehensive new system. The first iteration of the new system, the Interim Defence Contracts Register, has been completed and will commence operation in March 2003. Compliance with the Senate order using the contracts register approach will be prospective, rather than retrospective. Subject to resource constraints, the functionality of the Interim Contract Register will be expanded such that it is able to deal with all aspects of the Senate order requirements.

2.20 The listing on the Defence website lists all Defence contracts gazetted for the period 4 February 2002 to 3 February 2003. However, the requirements of the Senate Order are not fully met as the contracts are listed in two separate listings that cover contracts entered into in the 2001–2002 financial year and contracts entered into from 1 July 2002 to 3 February 2003.

DEWR

2.21 Initially, the DEWR listing of contracts on the Internet was not presented in accordance with the requirements of the Senate Order by the date required as only contracts for six of the 12 months were reported. The ANAO noted that

DEWR identified the error and updated the Internet list on 8 May 2003. The figures in this report reflect the updated DEWR figures.

Cost of complying with the Senate Order

2.22 Most agencies have used a method based on the time spent and the cost of labour to estimate the cost of complying with the Senate Order. The estimated total reported cost of all agencies complying with the Senate Order as derived from agencies Autumn 2003 listing was \$573 000. This figure is higher than the total cost of agency compliance with the Senate Order for the previous reporting period for the Spring 2002 Parliamentary Sittings (\$375 000),²⁹ primarily because Defence reported the actual costs incurred in establishing an interim Defence contracts register as well as an estimate of labour hours, totalling \$295 000.

Access to Internet listings

2.23 In line with the previous Senate Order audit, the ANAO found that most of the 78 agencies had an identifiable path on their website to the contract listing. However, some agencies' contract listings were difficult to find.

2.24 Of the agencies audited in detail, all except Defence had established a readily accessible path to their contract listings on their Internet home page. The ANAO was not able to access the Defence listing using links on the home page or through utilising the search function without knowledge of the web address.

2.25 Defence advised that it would ensure that there is a clear and readily accessible path to the listing for the next reporting period on its Industry, Business and Contracting Portal which can be readily accessed from the Defence home page.

2.26 Although the way that an agency organises its website is up to the agency to determine, the ANAO considers that an explicit link from the agency's homepage to its list of contracts would assist readers and users to easily locate the agency's contract listing.

Confidential provisions in contracts and other requirements of confidentiality

2.27 As in the previous audit, the ANAO found that there is some confusion amongst agencies as to the difference between contracts containing 'provisions requiring the parties to maintain confidentiality of any of its provisions', and contracts where there are 'any other requirements of confidentiality'. AGO, NCA,

²⁹ As reported in Australian National Audit Office Audit Report No. 32 2002–03, op.cit p. 29.

DEWR and FaCS had reported contracts as containing confidentiality provisions when the reasons stated on the Internet listing for the contract containing these provisions referred to standard non-disclosure clauses. The agencies indicated that these provisions were standard in most contracts and, in the contracts examined by the ANAO, were not intended to protect any specific information as confidential.

2.28 The ANAO considered that agencies could have listed these contracts as containing 'other requirements of confidentiality' or indicated in some other way that the confidential provisions referred to on the Internet were standard in most contracts and did not always protect specific information in the contract as confidential information.

2.29 The ANAO considers that where the majority of an agency's contracts contain standard non-disclosure provisions, agencies should consider including a note covering their Internet listing stating that most or all contracts contain standard non-disclosure provisions. These standard non-disclosure clauses are generally targeted at specific information, designed to safeguard future confidential information that may be generated during the term of the contract. This could be done as an alternative to individually noting against the contracts that they contain 'other requirements of confidentiality'.

2.30 The Senate FPA Committee report on the first year of operation of the Senate Order discussed the meaning of the clause 'any other requirement of confidentiality' and requested that advice be developed for agencies to indicate the specific nature of confidentiality. The Finance *Guidance on the listing of contract details on the Internet*, to be provided to agencies later in the year, will provide such advice.

Presentation of the Internet listing

2.31 This audit, as in previous audits, found there were varying formats to the presentation of the Internet listing. Two of the presentation methods used are shown below.

Contractor	Subject Matter	Amount of Consideration	Provisions Requiring Confidentiality Y/N	Reason(s)	Other Requirements of Confidentiality Y/N	Reason(s)
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Contractor	Subject Matter	Amount of Consideration	Provisions Requiring Confidentiality Y/N	Other Requirements of Confidentiality Y/N	Reason(s)
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2.32 The ANAO considers that the adoption of one of these two formats by agencies would assist contract managers to distinguish between contracts that contained 'confidential provisions' and those with 'other requirements of confidentiality'. If the second option is used, then the comments in the reasons column should show why the contract contains confidential provisions and/or other requirements of confidentiality.

2.33 The Finance *Guidance on the listing of contract details on the Internet* currently being drafted is likely to provide agencies with options as to how to present on the Internet the information required by the Senate Order. The Guidance will incorporate the requirements of the Senate Order, as amended in June 2003, which include the commencement date of the contract, the duration of the contract, the relevant reporting period and the 12 month period relating to the contract listings.

Conclusion

2.34 The ANAO found that the majority of the 78 agencies covered by the Order had complied with the requirements of the Senate Order, although some had not listed their contracts on the Internet by the due date.

2.35 The ANAO considers there is scope for many agencies to improve the presentation of their Internet listings. The ANAO notes that the soon to be released Finance *Guidance on the listing of contract details on the Internet* may assist agencies to improve the presentation of their Internet listings and provide a level of consistency across all agencies covered by the Senate Order.

3. The Processes Used to Create the Internet List

This chapter is confined to the six agencies selected for detailed review. It relates specifically to Objective 2b, that is, an assessment of the processes used by the agencies to create the Internet listing of contracts to determine whether the process was likely to lead to the list of contracts being complete (in terms of numbers and details provided).

Audit evaluation criteria

3.1 The ANAO expected that, by now, agencies would have:

- adopted/developed appropriate³⁰ policy and procedures for recording contracts;
- allocated responsibility for recording/listing contracts on the agency's website;
- implemented a system for the recording and reporting of the relevant information of all contracts; and
- developed processes to identify those contracts with confidential provisions and other requirements of confidentiality and the reasons for the confidentiality; and
- developed processes to ensure that all contracts have been recorded.

Audit findings

Policy and procedures

3.2 AFP and NCA had appropriate policy, procedures and/or guidance documents in place for the posting of contractual information on the Internet in accordance with the requirements of the Senate Order.

3.3 AGO did not have a formal policy for establishing a contract list on its website. Guidance on the procurement of goods and services was provided in AGO's CEIs, which, at the time of the audit, did not make any reference to the Senate Order or to the Finance *Guidance on confidentiality*.

3.4 As discussed earlier, Defence used the information on GaPS as the basis for the Internet list for the current reporting period. For future reporting periods, Defence has developed a number of departmental instructions to assist officers

³⁰ For the purposes of this audit, appropriate would generally include being consistent with the Finance *Guidance on confidentiality*.

comply with the requirements of the Senate Order for listing contracts on the Internet.

3.5 One of the instructions³¹ specifies the type of contracts to be recorded in the interim contract register. As this instruction specifically excludes certain types of contracts, the ANAO considers the list will remain incomplete until the policy is changed. Defence advised the ANAO that in order to enable it to fully comply with the requirements of the Senate Order, consideration is being given to the development of an improved contracts register that will capture information on all contracts required by the Senate Order, including those that are currently excluded from the interim contracts register.

3.6 At the start of the audit, DEWR had a range of policy guidance to assist staff with procurement and contracting. DEWR advised that a new series of practical guides on procurement, which reflected the Finance *Guidance on Confidentiality* and the requirements of the Senate Order, had been completed in June 2003. The Department's contracts and indemnities register was the chief mechanism for confidentiality reporting, and guidance is available on how to enter items in the register and how to record confidentiality clauses.

3.7 FaCS does not have a formal policy for establishing a contract list on its website. The CFO provides general guidance and direction on the Senate Order in the form of a Minute to all branch heads. FaCS advised that it is in the process of reviewing a number of its documents to take into account Finance *Guidance on Confidentiality* and other requirements of the Senate Order.

Responsibility

3.8 All the agencies had allocated responsibility for the coordination and preparation of the Internet listing to appropriate personnel. In most cases, the responsible area was a specialist contracts advisory or procurement coordination unit or team.

Recording and reporting of contracts

3.9 The AGO uses its financial management information system (FMIS) to generate a purchase order report, which lists all new purchase orders over \$100 000 raised since the last reporting period. This list and the contract listing from the previous reporting period are forwarded to group administrators who are responsible for determining which contracts are to be included in the contract list, and whether the contract contains information considered to be confidential by both parties.

³¹ Defence's Departmental Procurement Policy Instruction (DPPI) No 4/2003 (DPPI 4/2003) Annex A—*contracts to be entered into the interim defence contracts register* issued on 20 February 2003.

3.10 The AFP uses a contract registration process and records contracts into a central contract register, which forms the basis of the Internet listing. Confirmation from the relevant business areas provides assurance that the listing is complete and accurate.

3.11 Defence's process for preparing the Internet list involved listing all of the contracts with a payment value over \$100 000 as published in GaPS in the relevant period. The information flows automatically from its FMIS. As discussed earlier, Defence acknowledged that the information was deficient both in terms of numbers of contracts and details provided, and was developing a comprehensive new system to overcome the deficiencies.

3.12 In DEWR, the basis for the Internet contract listing is the contract and indemnities register. Prior to the Internet list being updated, program areas are asked to review what is listed on the register, and identify and correct any discrepancies. The program area then advises the area responsible for coordinating the production of the Internet list that the list of contracts is complete and accurate. DEWR had conducted an internal audit of its contracts and indemnities register in 2002–2003 to assess (amongst other things) whether the register was being managed to enable DEWR to comply with the requirements of the Senate Order.

3.13 FaCS has two senior staff members responsible for the coordination and compilation of the Internet listing. Six weeks prior to the Senate Order tabling date, a Minute is sent from the CFO to all branch heads requesting them to compile a list of all contracts to the value of \$100 000 or more for the current Senate Order reporting period. Guidance material is also included with the Minute.

3.14 The FaCS branch heads are responsible for signing-off on the contract lists and for forwarding them to the senior staff members responsible for coordinating and compiling the FaCS listing. A check for accurateness and completeness is conducted on the list prior to posting.

3.15 The NCA registers and maintains contract information in a Tower Records Information Management (TRIM) system. The register contains all of the information required for annual reporting and Senate Order requirements.

3.16 The NCA Records Manager is responsible for, amongst other things, running a report from TRIM that details the contracts engaged, to the value of \$100 000 or more, for the 12 month period prior to current Senate Order reporting period.

Processes for identifying contracts with confidential provisions

General

3.17 As mentioned in the previous audit,³² the identification of contract provisions requiring contractual information to be kept confidential was a difficult process for contracts that were entered into prior to the introduction of the new accountability framework.

3.18 For these contracts, agency staff reviewed, at the time that the Senate order came into effect, the content of each contract, in conjunction with the contractor if possible, to determine whether there was any information that should be protected as confidential.

3.19 For the contracts entered into under the new accountability framework, the process of ensuring that contracts containing confidential provisions were listed correctly on the Internet should have become simpler. If there is any confidential information in the contract, it will have been agreed to by both parties to the contract at the time that the contract was entered into, and be identified specifically in the contract.

Audited agencies

3.20 At the AGO, the line areas are responsible for determining which information, if any, in a contract should be protected as confidential. This determination is based on whether parts of the contract were agreed, at the time of negotiation, to be protected as confidential.

3.21 The AFP contract managers are required to complete a contract registration form, which asks if there is a confidentiality clause in the contract, at the time contracts are entered into. The information provided on the contract registration form is then entered into a contracts register, which provides the basis of the Internet list. The AFP advised that to ensure that its listing met the requirements of the Senate Order, the registration form would be enhanced to differentiate between confidential contract provisions and other requirements of confidentiality.

3.22 For the next listing of contracts for the Senate Order, Defence will use the information contained in its interim contracts register to identify those contracts entered into from 1 January 2003 that contain confidential provisions. The identification of confidentiality provisions and other requirements of confidentiality will not be retrospective.

³² Australian National Audit Office, Audit Report No.32 2002–03, op. cit., p. 34.

3.23 Whilst Defence's interim contract register was not used for listing the current reporting period which ended on 3 February 2003, the ANAO examined the processes that were being used from 1 January 2003 to form an opinion on their adequacy. When entering details into the interim contract register, contracting officers are asked two questions about the confidentiality requirements in the contract and are provided with a generic list of reasons to use when entering the contract on the register. Consequently, it is likely that in the future the majority of Defence's confidential contracts should be listed with a consistent set of reasons for claiming confidentiality.

3.24 As these questions and list of reasons, which were developed prior to the release of the Finance *Guidance on Confidentiality*, do not fully reflect the requirements of the Senate Order, Defence advised that they would be reviewed as part of Defence's development of a new system for registering contracts.

3.25 In DEWR, the responsibility for determining whether there is commercial-in-confidence material in contracts and their classification on the Internet listing rests with the relevant contracting areas. Details of contracts entered into (including whether contracts have confidentiality provisions) are recorded in DEWR's contracts and indemnities register. As previously indicated, the various contracting areas are asked to sign-off that reports derived from the register are complete and accurate. Once the process is finalised the details are listed on the Internet.

3.26 In FaCS, individual branches were responsible for identifying contracts with confidential provisions. The area responsible for the coordination and compilation of the Internet listing performs some checks to ensure that claims to confidentiality have been correctly identified.

3.27 NCA procedures require staff to check contract-specific confidentiality clauses with its Executive Governance Unit. NCA advised that, as a general rule, it does not consider any contractual information should be protected as confidential unless there is a good reason to do so. NCA further advised that it has not, as yet, let any contracts that have information that should be protected as confidential.

Conclusion

3.28 The ANAO concluded that the processes used by most agencies provided a reasonable level of confidence that the number of contracts reported on the Internet listings were likely to be complete. Defence recognised that the list was deficient in terms of the numbers of contracts reported and has taken steps to improve the quality of the information on the list.

3.29 In relation to whether the audited agencies' Internet listings were complete in terms of the details provided, the ability to identify whether a contract contained confidential information was enhanced when agencies used a contract registration form, which was completed at the time the contract was entered into.

3.30 All agencies, including those that had appropriate policies and procedures in place for establishing the Internet lists, should implement quality assurance processes, as necessary, to ensure the completeness and accuracy of the contract details on the Internet.

4. Confidential Provisions in Contracts

This chapter reports on the new accountability framework relating to the use of confidential provisions in contracts. It is confined to the six agencies selected for detailed review. It relates specifically to Objective 2a, that is, an assessment of whether a selection of contracts listed on the Internet as confidential had been listed appropriately.

Processes agencies use to determine what information in contracts should be protected as confidential

4.1 In assessing agency performance against this objective, the ANAO used, as the basis for analysis, the contracting governance and accountability environment articulated in the CPGs, the Senate FPA Committee in its final report and Finance guidance, which included the *Guidance on Confidentiality of Contractors' Commercial Information*. While this latter guidance was only published in February 2003, draft versions were made available to agencies and the ANAO expected that the intent of the guidance would be reflected in departmental and agency practice at the time of the audit.

Audit evaluation criteria

4.2 The ANAO expected that, by the time that the audit started in March 2003, agencies would have put in place, or would be in the process of putting in place, a contracting framework that:

- ensured that potential contractors understood at the time of tendering, or if no tender process is undertaken, at the beginning of negotiations:
 - that the Commonwealth's position is that contractual information is not to be protected as confidential unless there is a good reason for confidentiality;
 - that contractual information may be required to be disclosed by law even though the contractor and the Commonwealth have agreed that the information is confidential;
 - the accountability requirements of the Commonwealth, including disclosure to Parliament and its committees and the requirements of the Freedom of Information Act (FOI Act);
 - that they are required to indicate if they considered any information in the tender or the contract to be confidential, and provide the reasons why; and

- that the Commonwealth will treat as confidential any information provided by tenderers/prospective suppliers prior to the award of a contract and, in respect of unsuccessful tenderers, after contract award;
- provided agency officers with confidentiality criteria (based on, or consistent with, Finance guidance) to assist them assess, on a case-by-case basis, normally in conjunction with the contractor, the merits or otherwise of the contractor's claim that particular contractual information is confidential and should be protected;
- ensured that information agreed by the agency to be protected as confidential information is identified as such in the contract; and
- established staff training and awareness activities of the Commonwealth's new accountability framework for relevant staff.

Audit findings

Policy and guidance for agency staff

4.3 All six agencies had CEIs or some other form of policy guidance or instruction available on procurement. However, only the AFP and NCA had included in their documentation references to all of the following:

- the Senate Order for Departmental and Agency Contracts;
- the recent Finance *Guidance on confidentiality*; and
- the recent CPGs (2002).

4.4 The ANAO noted that FaCS, DEWR and Defence were in the process of drafting elements of their policy or other guidance documents to reflect some or all of these requirements. The AGO has undertaken to update its policy documents.

4.5 The ANAO also noted that the AFP guidance documentation stipulates the intent to go beyond the suggestion made within the Finance *Guidance on confidentiality* by releasing all details of any contract (unless there is a sound basis to justify confidentiality) as opposed to releasing contract details only on request. The AFP agreed with the ANAO's view that there is scope to moderate this statement about the release of contract information to ensure it reflects current practice.

4.6 The audited agencies each had slightly different processes in place to determine which contract provisions or information should be protected as confidential. The ANAO found that, in all of the audited agencies, the officers responsible for the preparation or coordination of the Internet listing were aware

of the criteria³³ for determining information to be protected as confidential, but staff responsible for the day-to-day management of contracts generally were not.

4.7 However, in the majority of the audited agencies, staff are advised to seek advice from the area responsible for the coordination of the listing if they are unsure as to whether a particular contract or information within a contract should be protected as confidential.

Tender and contract documentation

4.8 Although all the audited agencies advised the ANAO that the general approach taken to contractual information was that the information or material is not considered confidential unless there is a good reason to do so, the ANAO found that none of the audited organisations had explicitly stated this position within their tender documents.

4.9 The ANAO noted that all the audited agencies had implemented changes to their tender documentation and contract templates in an attempt to accord with the new accountability framework. However, the ANAO considered that the agencies could improve their tender documentation and contract templates by including some or all of the following key elements:

- a statement outlining the various Commonwealth accountability requirements;
- a consistent definition of confidential information across all templates;
- a provision for the inclusion of specific reasons a tenderer may wish to protect certain information in the contract if it is awarded;
- a disclosure of information section that outlines the obligations of confidentiality after the contract has been awarded;
- outlining in more detail, within the general non-disclosure clauses, the exceptions to confidentiality obligations for Commonwealth contracts; and
- adopting the Finance model clauses for tender and contract documentation.

4.10 At the time of the audit the ANAO found that agencies were at various stages of updating their guidance documentation on the confidentiality requirements of the Senate Order and Finance *Guidance on confidentiality*. Defence and DEWR released updated documentation, which incorporates the Finance *Guidance on confidentiality*, in June 2003.

³³ The ANAO assessed each of the contracts selected for examination against the criteria for determining whether information in contracts could properly be protected as confidential, as outlined in the Senate FPA Committee's final report, and the Finance *Guidance on confidentiality*.

Staff training and awareness

4.11 An essential element of entering into contracts is that contract managers are fully aware of the new accountability framework and are able to articulate this to potential contractors.

4.12 All agencies have training programs in place or advised that training was soon to be undertaken to address some of the issues relating to the new contracting environment. Attendance at such courses is generally voluntary for staff and on a needs basis, for example, when there is a change in policy or instruction.

4.13 The ANAO considers that all of the audited agencies would benefit from a review of current course content to ensure that up-to-date Finance guidance and Senate Order requirements are covered.

Conclusion

4.14 The ANAO concluded that the audited agencies had implemented changes to their policy and guidance documentation, tender documents and contract templates, in an attempt to accord with the new accountability framework. However, the agencies needed to review their current guidance to ensure that it includes information and guidance in relation to the latest CPGs, Finance guidance and the Senate Order.

4.15 The ANAO concluded that the audited agencies generally had processes in place to determine whether information in contracts should be protected as confidential. However, not all of the agencies used the criteria derived from the Senate FPA Committee's final report and Finance guidance in determining whether contracts contain any confidential information.

4.16 The ANAO also considers all of the audited agencies would benefit from a review of current contract training courses to ensure that changes to the Senate Order requirements and information in recent Finance guidance is covered.

The use of confidential provisions in contracts

4.17 This section of the Chapter relates to the ANAO's examination, in the six selected agencies, of a number of contracts listed as containing confidential provisions on the Internet to assess whether the contracts had been listed appropriately.

4.18 The ANAO primarily examined contracts entered into during the period covered by the Autumn 2003 Senate Order listing, (4 February 2002 to 3 February 2003) with the expectation that agencies would have had in place, or

would be in the process of putting in place, contracting arrangements that reflect the new accountability framework. This framework includes an expectation that agencies 'consider on a case-by-case basis, what might be commercial-in-confidence when designing any contract'.³⁴

4.19 As with the previous Senate Order audits, the audit findings were influenced by the progress individual agencies had made in adopting the new accountability framework. Where agencies had progressed to the point of discussing and agreeing with contractors whether contracts contained confidential information, the ANAO was able to assess whether the specific provisions identified by the agencies as confidential were appropriate.

4.20 Where agencies had not discussed contractual confidentiality issues with contractors and had relied on the contract managers' judgements as to what information was confidential, the ANAO assessed information in the contract to determine whether the information should have been protected as confidential. In these cases, the ANAO, while recognising the circumstances in which the contracts were negotiated, assessed whether the information would have been agreed to be confidential if the Finance criteria³⁵ for confidentiality had been used by the agency at the time the contract was entered into.

4.21 In making these assessments the ANAO recognised that decisions on contracts entered into before agencies put into place revised procedures for determining what contractual information should be protected as confidential, would generally have been negotiated in circumstances where:

- the principle that contractual information should not be made confidential unless there is a good reason to do so, was not widely applied;
- decisions about the confidentiality of contractual information would have been made without the benefit of general guidance on how to determine whether the information should be protected as confidential information; and
- the parties may have assumed that the information was given and received in confidence, in which case an equitable obligation of confidence may have arisen.

4.22 In addition, the ANAO acknowledges that in making its judgement on whether information has been appropriately identified as confidential information provisions, it did so by examining the information in the contract. The ANAO, generally, did not discuss with the supplier whether there were

³⁴ CPGs September 2001, subsection 1.2.

³⁵ Finance *Guidance on confidentiality*, op.cit, Section 3, p. 5.

any particular circumstances, not obvious from reading the contract, that would make the information confidential.

Audit evaluation criteria

4.23 The ANAO assessed each of the contracts selected for examination against the criteria for determining whether information in contracts could properly be protected as confidential, as outlined in the Senate FPA Committee’s final report, the ANAO’s report on the use of confidentiality provisions in Commonwealth contracts,³⁶ and Finance guidance. These criteria, as presented in the Finance *Guidance on confidentiality*, are described in full in Appendix 5 and are summarised in Table 4.1.³⁷ All of the criteria must be met in order for the information to be treated as confidential.

Table 4.1

Department of Finance and Administration confidentiality criteria

Criterion 1	The information to be protected must be identified in specific rather than global terms.
Criterion 2	The information must have the necessary quality of confidentiality.
Criterion 3	The disclosure of the information would cause detriment to the contractor or other third party.
Criterion 4	The information was provided under an understanding that it would remain confidential.

Source: Department of Finance and Administration *Guidance on Confidentiality of Contractors’ Commercial Information*, February 2003, p. 5.

Examples of what would, or would not, be considered confidential

4.24 The Finance *Guidance on confidentiality* provides examples of commercial information in a contract that may be considered confidential and examples of information that would not generally be considered to be confidential.

4.25 This Guidance suggests that the types of commercial information that may be legitimately protected by a confidentiality clause are:

- trade secrets;
- proprietary information, for example, information about how a particular technical or business solution is to be provided;
- contractor’s internal costing information or information about its profit margin;

³⁶ Australian National Audit Office Audit Report No. 38 2000–01, op.cit.

³⁷ The criteria for determining whether information should be protected as confidential is also discussed in ANAO Audit Report No. 32 2002–03, paragraphs 4.32–4.34.

- pricing structures (where this information would reveal whether a contractor was making a profit or loss on the supply of a particular good or service); and
- intellectual property matters where these relate to a contractor's competitive position.³⁸

4.26 The types of commercial information that would not generally be considered to be legitimately confidential are:

- performance and financial guarantees;
- indemnities;
- the price of an individual item or group of items of goods or services;
- rebate, liquidated damages and service credit clauses;
- performance measures that are to apply to the contract;
- clauses that describe how intellectual property rights are to be dealt with; and
- payment arrangements.³⁹

Selection of contracts

4.27 The number of contracts listed on the Internet by the agencies audited as containing confidential provisions was shown in Table 1.1 in Chapter 1.

4.28 The ANAO selected 37 contracts for review from those listed as containing confidential provisions on the Internet or, in the case of Defence, from its interim contract register.

General audit findings

4.29 During its examination of the contracts, the ANAO found that a number of the contracts had been listed as containing confidential provisions even though the agencies agreed that there was no confidential information in the contract. As stated in Chapter 2, there is still some confusion amongst agencies on the difference between confidentiality provisions and other requirements of confidentiality, and on how these should be reported.

4.30 Two agencies, NCA and FaCS, listed a total of 16 contracts as containing confidential provisions even though the contracts only contained standard non-disclosure clauses. The ANAO examined these contracts and found that

³⁸ Finance *Guidance on confidentiality*, op.cit, p. 11.

³⁹ Finance *Guidance on confidentiality*, op.cit, p. 12.

there was no information that should be protected as confidential and these two agencies had not intended to indicate there was confidential information in the contracts.

4.31 As mentioned in Chapter 2 of this report, the ANAO considers that, where the majority of an agency's contracts contain standard non-disclosure clauses, agencies should consider including in the covering notes to their Internet listing that most or all contracts contain standard non-disclosure clauses.⁴⁰

4.32 AGO included an agreement between two Commonwealth agencies that was not a contract. Finance had advised agencies in August 2001 that agreements between Commonwealth departments and agencies that are all part of the Commonwealth will not be legally enforceable because it is not possible to enter into a legally enforceable agreement between different parts of the same legal entity.⁴¹

4.33 Therefore, the 16 contracts and the agreement between two Commonwealth agencies were not included in any further audit analysis. The remaining 20 contracts were assessed in more detail as discussed below.

Audit findings by agency

Summary

4.34 The results of the ANAO's assessment of contracts for each of the selected agencies are summarised in the Table 4.2.

4.35 The table shows that:

- eleven contracts had provisions that identified specific information as confidential. One of the tests in determining whether information should be kept confidential is that the information to be protected must be identified in specific rather than global terms;
- nine contracts did not have provisions that specifically identified what information in the contract was considered to be confidential information. In these cases the ANAO had to examine the contract, being guided by any reason shown on the Internet listing, to ascertain what information in the contract may have been confidential; and
- the ANAO considered that six contracts had been appropriately listed on the Internet as containing confidential information.

⁴⁰ This could be done as an alternative to individually noting against the contracts that they contain other requirements of confidentiality. The ANAO notes that this approach is consistent with the draft Finance *Guidance on the listing of contract details on the Internet*.

⁴¹ Department of Finance and Administration, *Murray Motion Key Documents*, August 2001.

Table 4.2**ANAO assessment of confidentiality claims for selected contracts—
contract provisions**

Agency	Number of contracts which specifically identified information to be protected as confidential	Number of contracts which <u>did not</u> specifically identify information to be protected as confidential	Number of contracts listed as containing confidentiality provisions considered appropriate by the ANAO
AGO	2	1	2
AFP	1	0	0
FaCS	0	2	0
Defence ⁴²	7	1	3
DEWR	1	5	1
NCA	0	0	0
Total	11	9	6

Source: ANAO analysis

4.36 The results of the ANAO assessment for each of audited agencies are shown in the paragraphs below.

AGO

4.37 The ANAO found two of the sample contracts had specifically identified the information as being confidential and considered that both were appropriately listed on the Internet because they contained proprietary information and intellectual property, which, in the ANAO's view, satisfied the criteria for protecting information as confidential.

4.38 The other contract had not specified what information was confidential in the contract. The contract detailed the contractor's monthly fees which, the ANAO considered would probably not satisfy the criteria for protecting information as confidential.

AFP

4.39 The AFP listed one contract as containing confidential provisions. The contract specified that both parties agreed to protect the contract's pricing information as confidential because detriment to the contractor could be caused if information in the contract was disclosed to competitors.

4.40 The ANAO considered this contract to be inappropriately classified because although the pricing schedule contained unit prices for services, it did

⁴² In the case of Defence, the ANAO selected contracts recorded on the interim contracts register as having a confidential provision.

not reveal the contractor's pricing structure or profit margins. While not agreeing with the decision made by the AFP in relation to the contract, the ANAO notes that the negotiated approach used was consistent with the approach outlined in the Finance *Guidance on confidentiality*.

4.41 However, as both parties had agreed that the specific information had been provided to the AFP on the understanding that it would be protected as confidential, then the AFP should protect it as such. Even though both parties have agreed that the information should be protected as confidential, it can still be disclosed in certain circumstances, such as if required by law or requested by a Parliamentary Committee.

Defence

4.42 Five of the eight contracts listed as having confidentiality provisions were considered by the ANAO to be inappropriately classified.

4.43 Defence agreed with the ANAO that two of these contracts had been inappropriately recorded in the interim contracts register because they contained information regarding price (daily rates) and a standard intellectual property clause, which should not be protected as confidential information.

4.44 Defence disagreed with the ANAO's view on the other three contracts. These contracts contained information on:

- rates for services, goods and administration and profit;
- insurance and indemnity, warranty and price; and
- hourly rates.

4.45 The ANAO's view is although these contracts specified what information had been classified as confidential, they did not have the necessary quality of confidentiality.

4.46 Defence advised that the areas responsible for management of the three contracts believed that the information they had agreed with the contractor to protect as confidential information in the contracts had the necessary quality of confidentiality; that the disclosure of the identified information would cause detriment to the contractor or the Commonwealth; and that the information was communicated on the understanding that it would be suitably protected and, in particular, Defence would appropriately protect the information so identified.

4.47 The ANAO's view is that although the three contracts specified what information had been protected as confidential information, none of the information had the necessary quality of confidence. The ANAO acknowledges

that, in particular circumstances, unit prices could have the necessary quality of confidence. Useful tests to ascertain whether particular information has this quality are whether the information is both 'sufficiently secret' and 'significant': secret in the sense that the information is generally not known, and significant in the sense that the owner of the information would be likely to suffer some detriment if the information were made public. In such cases, the ANAO would expect that the price was not known and could not be readily estimated, and the particular circumstances surrounding the contract are such that the disclosure of the unit prices would be likely to cause significant harm to the owner of the information. The degree of significance could be influenced by such things as the number of suppliers in the market and the timing of the contract.

4.48 The fact that the information was provided on an understanding that it would be protected as confidential is relevant to the overall analysis, but if all the criteria are not met, then the information should not have been protected as confidential information. The ANAO acknowledges that, since the parties have agreed under the contracts to protect this information, it is necessary to abide by those contractual obligations until the parties agree otherwise, or the information is no longer confidential for some other reason.

4.49 Defence also believed that some of the information in the three contracts requires protection to ensure that negotiated positions agreed by Defence are not aggregated across contracts to produce a lowest common denominator outcome. Defence further believes that, if this information is available to Defence industry, this will have a serious impact on Defence's ability to achieve contracts that represent value for money.

4.50 Defence also advised that, occasionally several procurement areas within Defence could negotiate non-standard and unfavourable to Defence outcomes affecting different contract provisions (for example, liability, intellectual property, and warranties). Defence further advised that if this information could be obtained by the Defence industry via a Freedom of Information request where none of the available exemptions applied (for example, the information is confidential), industry may be in the position to use this information in an attempt to obtain the same outcome for themselves - to the Commonwealth's (and taxpayers') overall detriment. As a result, Defence contracts could quickly be reduced to a lowest common denominator outcome.

4.51 The ANAO acknowledges that there may be individual circumstances in which Defence may wish to protect information, such as limitations on liability, liquidated damages provisions or unfavourable intellectual property outcomes, for example, where the market is very limited. It was not apparent from the ANAO's review of the contracts in question that these circumstances applied in

these cases to override the accountability and transparency requirements of Commonwealth contracting policy.

4.52 When a contract is signed between a private sector contractor and a Commonwealth agency, the information in the contract becomes jointly owned by the contractor and the Commonwealth. This means that the interests of both parties need to be considered and weighed. Because courts take the view that government information should not be protected unless it is in the public interest to do so,⁴³ the information should normally not be protected as confidential information unless in fact, its disclosure would not be in the public interest; for example, for national security reasons or where the ordinary business of government would be prejudiced. Consequently, in the absence of any concerns by the other party about disclosure, the onus is on Defence to justify that protecting the schedules, or particular information, as confidential information is in the public interest; for example, because disclosure of the information would prejudice the ordinary business of government.

4.53 Defence also advised that it did, however, accept that some provisions in the contracts reviewed by the ANAO may have been inappropriately protected as confidential information and that it expected that promulgation of the revised Defence guidance and additional training should overcome this problem.

DEWR

4.54 Of the six contracts recorded on the Internet as containing confidential provisions, only one specifically identified information as confidential.

4.55 The ANAO considered that this contract had been inappropriately listed because the information specified in the contract did not have the necessary qualities of confidence (sufficiently secret and significant) nor would it be likely that the contractor would suffer detriment if the information was not protected as confidential.

4.56 None of the other contracts had specifically identified confidential information, although the statement of reasons on the Internet indicated which type of information in the contract was considered confidential.

4.57 Of these contracts, one had information on intellectual property that probably had the necessary quality of confidentiality. The four remaining contracts were listed on the Internet as containing information on:

⁴³ The Senate FPA Committee in its report *Commonwealth Contracts: A New Framework for Accountability* considered that the Senate Order placed the onus on those who wish to keep the information confidential to argue that confidentiality is warranted. This principle, central to open and accountable government, is applicable to all government information. *Commonwealth Contracts: A New Framework for Accountability*, op. cit., paragraphs 2.5 to 2.11, pp. 4–5.

- financial information;
- commercial disadvantage; and
- costing structure.

4.58 On balance, the ANAO considers that the information did not have the necessary quality of confidentiality or contain information that, if disclosed, would cause the contractor or other third party harm. As a result, the ANAO considers that they were inappropriately listed on the Internet.

4.59 Of these five contracts, three had confidentiality obligations that could be regarded as other requirements of confidentiality. These related to standard non-disclosure clauses covering information, including personal information, acquired by the contractor during the performance of the contract.

FaCS

4.60 Of the 12 contracts examined by the ANAO, 10 provided reasons on the Internet indicating that they only contained standard non-disclosure clauses.

4.61 The other two FaCS contracts, which were funding agreements, had not specifically identified information in the contract as being confidential information. FaCS advised that the contracts' total consideration was the reason why these contracts were listed as confidential on the Internet. These agreements had been entered into in 1999 by another department, and it had been agreed, at the time the contract was entered into, that the total consideration should be protected as confidential. FaCS has continued to administer the agreements in the same way the previous department had managed them.

4.62 The ANAO considers this is an appropriate way of handling information that both parties had agreed should be protected as confidential. However, had the Finance criteria for determining whether information should be protected as confidential been available at the time the contract was entered into, it is unlikely that the total consideration would have been considered confidential.

4.63 FaCS has advised that in future the total value of funding agreements will be listed on the Internet.

NCA

4.64 NCA listed all its contracts as containing confidential provisions but the statement of reasons indicated that the contracts only contained standard non-disclosure clauses. NCA advised that none of the contracts contained information that should be protected as confidential.

Conclusion

4.65 In applying the Finance criteria for determining whether information should be protected as confidential information, the ANAO considered that only six of the 20 contracts examined were appropriately identified by agencies as containing confidential information.

4.66 These results emphasise the need, in contract negotiations, for rigorous application of the principle that contractor's information should not be protected as confidential unless there is a good reason do so. The contractor must put a case to the agency for protecting information as confidential based on sound reasons, and the agency must be able to justify the use of confidentiality clause. The fact that contractors wish to protect information as confidential is not sufficient reason for it to be protected.

4.67 The same rigour must be applied in relation to contractual information that agencies wish to protect as confidential. Agencies must be satisfied that that the decision to protect information outweighs the general principle that it is in the public interest for the information not to be protected.

4.68 A number of other contracts, listed as containing confidential provisions, only contained standard non-disclosure clauses, which were not intended to protect any specific information in the contract.

Contracts excluded from the listing

4.69 One element of the Senate Order required the Minister's letter of advice to indicate the extent of, and reasons for, non-compliance with the Senate Order. Examples of non-compliance included:

- the list not being up-to-date;
- not all relevant agencies being included; and
- contracts all of which are confidential not being included.

4.70 The Senate Order also requested that the Auditor-General indicate that he has examined a number of selected contracts that have not been included in the Internet list, and to indicate whether the contracts should have been listed.

4.71 As a general principle, the ANAO expected that the only contracts not listed on the Internet because the whole contract was considered confidential, would be those contracts over \$100 000 that were exempt from being published on GaPS. Conversely, if the contract was listed on GaPS it would also be listed on the Internet.

4.72 Where Ministers' letters had not advised the Senate that contracts had been excluded from the list, the ANAO confirmed with the audited agencies that none of the contracts had been excluded from the list.

4.73 The Ministers' letters for AGO, FaCS, NCA and DEWR had not indicated to the Senate that any contracts had been excluded from the Internet listing. Staff from these agencies confirmed with the ANAO that no contracts had been intentionally excluded from the list.

AFP

4.74 The AFP is an agency of the Attorney General's portfolio. As discussed in Chapter 2, the Attorney-General had advised the Senate that one of the Attorney-General's portfolio agencies, ASIO, had not provided details of contracts on the Internet because of national security concerns.

4.75 During the audit, AFP advised the ANAO that a small number of AFP contracts had been excluded from the Internet because, the existence of the contract should not be revealed for security reasons. The AFP further advised the ANAO, that while it had previously advised the Attorney-General's Department (AGD) that some contracts had been excluded for security reasons, it had not informed AGD on this occasion. The ANAO also notes that, for similar reasons, the contracts had also been excluded from GaPS.⁴⁴ The ANAO considered, and the AFP agreed, that for future listings, the AFP should advise AGD that some contracts have been excluded from the Internet listing (for reasons of security) so that this can be reflected in the Minister's letter of advice to the Senate.

4.76 The ANAO examined some of these contracts and, while recognising that the ANAO did not have specialist knowledge of the security implications of disclosing the existence of the contracts, considered that the basis for excluding them from the Internet listing was likely to be sound.

Defence

4.77 As discussed earlier, the Minister for Defence had informed the Senate that, because of deficiencies in GaPS, which provides the basis for the contract listing, not every contract entered into by Defence was specified on the Internet list.

4.78 Defence subsequently advised the ANAO that a number of contracts have been excluded from GaPS because, for national security reasons, the existence

⁴⁴ The AFP annual report for 2001–2002 stated that in 2001–2002 the AFP has entered into contractual arrangements that have not been published in the Purchasing and Disposals Gazette for security reasons.

of the contract should not be revealed.⁴⁵ The same contracts would, therefore, not be included on the Internet list.

4.79 The ANAO reviewed two contracts excluded from GaPS. The contracts contained both commercially sensitive and secret information, which was identified in specific schedules in compliance with Defence contracting policy.

4.80 Both contracts were for the procurement of equipment, and Defence advised that the contracts were exempted from being listed on GaPS because the disclosure of the existence of the contracts would provide an indication of Defence capability. This in turn would threaten national security.

4.81 Based on its limited knowledge of the equipment being purchased and the reasons given by Defence as to why the existence of the contracts should not be made public, the ANAO considers that Defence had appropriately excluded the two contracts from its Internet listing.

Authority to exempt contracts from being published on GaPS

4.82 The *Gazettal Reporting Requirements Handbook* states that where the Chief Executive of an agency decides that details of a contract or standing offer are exempt matters under the FOI Act, he or she may then direct in writing that the details are not to be notified in GaPS.⁴⁶

4.83 In Defence, the authority to exempt contracts from gazettal had been delegated by the Chief Executive in writing to individuals. In the case of the AFP, it advised that, under its Commissioner's Financial Instructions, the responsibility for gazettal rests with General Managers. AFP intends to give further consideration towards amending its Instructions to ensure greater specificity and clarity in relation to the ultimate responsibility (and, more importantly, the transfer of responsibility) for the gazettal/non gazettal policy.

4.84 While Chief Executives may decide not to personally exercise the power to give written exemptions, they remain ultimately responsible and accountable for agency administration, including ensuring that any exemptions from listing contracts in GaPS and on the Internet are appropriate and consistent across the agency.

⁴⁵ Defence annual report for 2001–2002 states that, in 2001–2002, a total of 301 contracts or standing offers were exempted from publication as it was determined that publication could cause damage to the national security, defence or international relations of the Commonwealth (under section 33(1)(a) of the *Freedom of Information Act 1982*).

⁴⁶ *Gazettal Reporting Requirements Handbook Government Procurement Version 3.1.6 May 2002* p8 < <http://www.govonline.gov.au/publications/GaPSHandbookv3.pdf>>.

Conclusion

4.85 Four agencies had not excluded any contracts from their Internet listings. The ANAO examined a selection of contracts from the two agencies that had excluded contracts from the Internet listing and considered that the contracts should not have been included on the Internet listings.

Canberra ACT
11 September 2003



P.J. Barrett
Auditor-General

Appendices

Appendix 1

Senate Order for Departmental and Agency Contracts (as at 27 September 2001)

As described in Chapter One of this report, the Senate further amended the Senate Order in June 2003. However, as the audit commenced in March 2003 the ANAO set its audit objectives against the requirements of the September 2001 version of the Order, as shown below.

The Senate Order of 27 September 2001 is shown below:

- (1) There be laid on the table, by each minister in the Senate, in respect of each agency administered by that minister, or by a minister in the House of Representatives represented by that minister, by not later than the tenth day of the spring and autumn sittings, a letter of advice that a list of contracts in accordance with paragraph (2) has been placed on the Internet, with access to the list through the department's or agency's home page.
- (2) The list of contracts referred to in paragraph (1) indicate:
 - (a) each contract entered into by the agency which has not been fully performed or which has been entered into during the previous 12 months, and which provides for a consideration to the value of \$100 000 or more;
 - (b) the contractor, the amount of the consideration and the subject matter of each such contract;
 - (c) whether each such contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether there are any other requirements of confidentiality, and a statement of the reasons for the confidentiality; and
 - (d) an estimate of the cost of complying with this order and a statement of the method used to make the estimate.
- (2A) If a list under paragraph (1) does not fully comply with the requirements of paragraph (2), the letter under paragraph (1) indicate the extent of, and reasons for, non-compliance, and when full compliance is expected to be achieved. Examples of non-compliance may include:
 - (a) the list is not up to date;
 - (b) not all relevant agencies are included; and
 - (c) contracts all of which are confidential are not included.

- (2B) Where no contracts have been entered into by a department or agency, the letter under paragraph (1) is to advise accordingly.
- (3) In respect of contracts identified as containing provisions of the kind referred to in paragraph (2)(c), the Auditor-General be requested to provide to the Senate, within 6 months after each day mentioned in paragraph (1), a report indicating that the Auditor-General has examined a number of such contracts selected by the Auditor-General, and indicating whether any inappropriate use of such provisions was detected in that examination.
- (3A) In respect of letters including matter under paragraph (2A), the Auditor-General be requested to indicate in a report under paragraph (3) that the Auditor-General has examined a number of contracts, selected by the Auditor-General, which have not been included in a list, and to indicate whether the contracts should be listed.
- (4) The Finance and Public Administration References Committee consider and report on the first year of operation of this order.
- (5) This order has effect on and after 1 July 2001.
- (6) In this order:

agency means an agency within the meaning of the *Financial Management and Accountability Act 1997*;

autumn sittings means the period of sittings of the Senate first commencing on a day after 1 January in any year;

previous 12 months means the period of 12 months ending on the day before the first day of sitting of the autumn or spring sittings, as the case may be;

spring sittings means the period of sittings of the Senate first commencing on a day after 31 July in any year.

Appendix 2

Senate Order for Departmental and Agency Contracts (as amended June 2003)

The Senate Order as at 26 June 2003 is shown below:

- (1) There be laid on the table, by each minister in the Senate, in respect of each agency administered by that minister, or by a minister in the House of Representatives represented by that minister, by not later than 2 calendar months after the last day of the financial and calendar year, a letter of advice that a list of contracts in accordance with paragraph (2) has been placed on the Internet, with access to the list through the department's or agency's home page.
- (2) The list of contracts referred to in paragraph (1) indicate:
 - (a) each contract entered into by the agency which has not been fully performed or which has been entered into during the previous 12 months, and which provides for a consideration to the value of \$100 000 or more;
 - (b) the contractor, the amount of the consideration and the subject matter of each such contract, the commencement date of the contract, the duration of the contract, the relevant reporting period and the twelve-month period relating to the contract listings;
 - (c) whether each such contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether there are any other requirements of confidentiality, and a statement of the reasons for the confidentiality; and
 - (d) an estimate of the cost of complying with this order and a statement of the method used to make the estimate.
- (3) If a list under paragraph (1) does not fully comply with the requirements of paragraph (2), the letter under paragraph (1) indicate the extent of, and reasons for, non-compliance, and when full compliance is expected to be achieved. Examples of non-compliance may include:
 - (a) the list is not up to date;
 - (b) not all relevant agencies are included; and
 - (c) contracts all of which are confidential are not included.
- (4) Where no contracts have been entered into by a department or agency, the letter under paragraph (1) is to advise accordingly.

- (5) In respect of contracts identified as containing provisions of the kind referred to in paragraph (2)(c), the Auditor-General be requested to provide to the Senate, within 6 months after each day mentioned in paragraph (1), a report indicating that the Auditor-General has examined a number of such contracts selected by the Auditor-General, and indicating whether any inappropriate use of such provisions was detected in that examination.
- (6) In respect of letters including matter under paragraph (3), the Auditor-General be requested to indicate in a report under paragraph (5) that the Auditor-General has examined a number of contracts, selected by the Auditor-General, which have not been included in a list, and to indicate whether the contracts should be listed.
- (7) The Finance and Public Administration References Committee consider and report on the first and second year of operation of this order.
- (8) This order has effect on and after 1 July 2001.
- (9) In this order:

“agency” means an agency within the meaning of the *Financial Management and Accountability Act 1997*; **and**

“previous 12 months” means the period of 12 months ending on **either 31 December or 30 June in any year**, as the case may be;

Appendix 3

Number of contracts listed by agencies in accordance with the Senate Order—Autumn 2003

Agency	Total number of contracts	Total confidentiality provisions	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality
Aboriginal and Torres Strait Islander Commission	0	0	0	0
Administrative Appeals Tribunal	12	6	6	0
Attorney-General's Department	206	57	11	52
AusAID	1016	0	0	0
Australia-Japan Foundation	4	0	0	0
Australian Bureau of Statistics	65	53	40	53
Australian Centre for International Agricultural Research	163	0	0	0
Australian Competition and Consumer Commission	28	3	0	3
Australian Crime Commission	13	5	0	5
Australian Customs Service*	235	22	22	0
Australian Electoral Commission	114	11	11	11
Australian Federal Police*	103	1	0	1
Australian Greenhouse Office	152	139	138	78
Australian Industrial Registry	30	13	13	0
Australian National Audit Office*	45	42	14	42
Australian Office of Financial Management	7	1	1	1
Australian Public Service Commission*	30	6	5	5
Australian Radiation Protection and Nuclear Safety Agency	6	0	0	0
Australian Research Council	8	0	0	0
Australian Securities & Investments Commission	0	0	0	0
Australian Taxation Office*	965	866	849	72
Australian Transaction Reports and Analysis Centre	20	0	0	0
Bureau of Meteorology	27	4	3	2
CentreLink	1050	494	66	428
Classification Board ⁴⁷	N/A	N/A	N/A	N/A

Note: Some contracts were listed as containing confidential provisions and other requirements of confidentiality – the total number of contracts containing confidentiality provisions is not a total of the other columns.

⁴⁷ The Classification Board is administered by the Office of Film and Literature Classification and does not enter into contracts in its own right.

* The ANAO notes that the agency listing of contracts was modified to enhance accuracy or completeness after the original presentation on the website. The updated information is included in the Appendix.

Agency	Total number of contracts	Total confidentiality provisions	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality
Classification Review Board ⁴⁸	N/A	N/A	N/A	N/A
Commonwealth Grants Commission	5	3	3	3
Commonwealth Superannuation Administration (ComSuper)	25	20	5	20
Commonwealth Superannuation Scheme (CSS) ⁴⁹	N/A	N/A	N/A	N/A
CrimTrac	17	13	0	13
Dairy Adjustment Authority	5	0	0	0
Department of Agriculture, Fisheries and Forestry	362	199	63	148
Department of Communications, Information Technology and the Arts	454	44	41	7
Department of Defence	3037	Not Reported	Not Reported	Not Reported
Department of Education, Science and Training	899	313	276	43
Department of Employment and Workplace Relations*	1118	992	992	0
Department of Family and Community Services ⁵⁰	2668	581	348	527
Department of Finance and Administration	307	82	77	76
Department of Foreign Affairs and Trade	208	19	19	0
Department of Health and Ageing	4359	5	1	4
Department of Immigration and Multicultural and Indigenous Affairs	652	426	19	413
Department of Industry, Tourism and Resources	271	144	0	144
Department of the Parliamentary Library	3	1	1	0
Department of the Parliamentary Reporting Staff	54	17	4	13
Department of the Prime Minister and Cabinet	51	24	5	19
Department of the Senate	5	0	0	0
Department of the Treasury	25	5	0	5
Department of Transport and Regional Services	339	97	1	96
Department of Veterans' Affairs	810	277	277	0
Department of Environment and Heritage ⁵¹	132	131	0	131
Equal Opportunity for Women in the Workplace Agency	3	2	0	2

Note: Some contracts were listed as containing confidential provisions and other requirements of confidentiality – the total number of contracts containing confidentiality provisions is not a total of the other columns.

⁴⁸ The Classification Review Board is administered by the Office of Film and Literature Classification and does not enter into contracts in its own right.

⁴⁹ Details included under the Public Sector Superannuation Scheme (PSS) .

⁵⁰ Includes contract details relating to the Child Support Agency and the Social Security Appeals Tribunal.

⁵¹ Includes contract details relating to the Australian Antarctic Division.

* The ANAO notes that the agency listing of contracts was modified to enhance accuracy or completeness after the original presentation on the website. The updated information is included in the Appendix.

Agency	Total number of contracts	Total confidentiality provisions	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality
Family Court of Australia	92	21	21	2
Federal Court of Australia	34	13	1	13
Federal Magistrate Services	5	5	1	5
Geoscience Australia	43	7	0	7
Human Rights and Equal Opportunity Commission	4	4	0	4
Insolvency and Trustee Service Australia	23	4	0	4
IP Australia	127	7	0	7
Joint House Department	29	27	13	14
Migration Review Tribunal	4	0	0	0
National Archives of Australia	37	0	0	0
National Capital Authority	30	26	0	26
National Competition Council	0	0	0	0
National Native Title Tribunal	14	3	3	0
National Oceans Office	5	0	0	0
National Office for the Information Economy*	51	27	2	27
Office of Film and Literature Classification	2	0	0	0
Office of National Assessments*	15	7	2	7
Office of Parliamentary Counsel	3	2	1	2
Office of the Commonwealth Ombudsman	14	5	2	4
Office of the Director of Public Prosecutions	37	1	1	0
Office of the Federal Privacy Commissioner	2	1	1	0
Office of the Inspector-General of Intelligence and Security	0	0	0	0
Office of the Official Secretary of the Governor-General	5	4	1	4
Productivity Commission	6	0	0	0
Professional Services Review	2	2	2	2
Public Sector Superannuation Scheme (PSS) ⁵²	5	3	0	3
Refugee Review Tribunal	5	0	0	0
Total	20702	5287	3362	2548

Note: Some contracts were listed as containing confidential provisions and other requirements of confidentiality – the total number of contracts containing confidentiality provisions is not a total of the other columns.

⁵² This includes contracts for both Commonwealth Superannuation Scheme and Public Sector Superannuation Scheme.

* The ANAO notes that the agency listing of contracts was modified to enhance accuracy or completeness after the original presentation on the website. The updated information is included in the Appendix.

Appendix 4

Agency compliance with the requirements of the Senate Order—Autumn 2003

Agency	Listed by due date (20 March 2003)	Name	Subject	Value	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reasons	Cost of Compliance	Method of calculating cost of compliance
Aboriginal and Torres Strait Islander Commission ⁵³	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Administrative Appeals Tribunal	✓	✓	✓	✓	✓	N/A	✓	✓	✓
Attorney-General's Department	✓	✓	✓	✓	✓	✓	✓	✓	✓
AusAID	✓	✓	✓	✓	N/A	N/A	N/A	✓	✓
Australia-Japan Foundation	✓	✓	✓	✓	N/A	N/A	N/A	✓	✓
Australian Bureau of Statistics	✗	✓	✓	✓	✓	✓	✓	✓	✓
Australian Centre for International Agricultural Research	✓	✓	✓	✓	N/A	N/A	N/A	✓	✓
Australian Competition and Consumer Commission	✓	✓	✓	✓	N/A	✓	✓	✗	✗
Australian Crime Commission	✓	✓	✓	✓	N/A	✓	✓	✓	✓
Australian Customs Service	✓	✓	✓	✓	✓	N/A	✓	✓	✓
Australian Electoral Commission	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian Federal Police	✓	✓	✓	✓	N/A	✓	✓	✓	✓
Australian Greenhouse Office	✓	✓	✓	✓	✓	✓	✗	✓	✓
Australian Industrial Registry	✓	✓	✓	✓	✓	N/A	✓	✓	✗

⁵³ The Aboriginal and Torres Strait Islander Commission had no contracts that fell within the scope of the Senate Order.

Agency	Listed by due date (20 March 2003)	Name	Subject	Value	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reasons	Cost of Compliance	Method of calculating cost of compliance
Australian National Audit Office	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian Office of Financial Management	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian Public Service Commission	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian Radiation Protection and Nuclear Safety Agency	✓	✓	✓	✓	N/A	N/A	N/A	✓	✓
Australian Research Council	✓	✓	✓	✓	N/A	N/A	N/A	✓	✓
Australian Securities & Investments Commission ⁵⁴	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Australian Taxation Office	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian Transaction Reports and Analysis Centre	✓	✓	✓	✓	N/A	N/A	N/A	✓	✓
Bureau of Meteorology	✓	✓	✓	✓	✓	✓	✓	✓	✓
CentreLink	✓	✓	✓	✓	✓	✓	✓	✓	✓
Classification Board ⁵⁵	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Classification Review Board ⁵⁶	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Commonwealth Grants Commission	✓	✓	✓	✓	✓	✓	✓	✓	✓
Commonwealth Superannuation Administration (ComSuper)	✓	✓	✓	✓	✓	✓	✓	✓	✓
Commonwealth Superannuation Scheme (CSS)	✓	✓	✓	✓	N/A	✓	✓	✓	✓

⁵⁴ The Australian Securities & Investments Commission had no contracts that fell within the scope of the Senate Order.

⁵⁵ The Classification Board is administered by the Office of Film and Literature Classification and does not enter into contracts in its own right.

⁵⁶ The Classification Review Board is administered by the Office of Film and Literature Classification and does not enter into contracts in its own right.

Agency	Listed by due date (20 March 2003)	Name	Subject	Value	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reasons	Cost of Compliance	Method of calculating cost of compliance
CrimTrac	✓	✓	✓	✓	N/A	✓	✓	✓	✓
Dairy Adjustment Authority	✓	✓	✓	✓	N/A	N/A	N/A	✓	✓
Department of Agriculture, Fisheries and Forestry	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Communications, Information Technology and the Arts	✓	✓	✓	✓	✓	✓	✗	✓	✓
Department of Defence	✓	✓	✓	✓	✗	✗	✗	✓	✓
Department of Education, Science and Training	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Employment and Workplace Relations	✓	✓	✓	✓	✓	N/A	✓	✓	✓
Department of Family and Community Services ⁵⁷	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Finance and Administration	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Foreign Affairs and Trade	✓	✓	✓	✓	✓	N/A	✓	✓	✓
Department of Health and Ageing	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Immigration and Multicultural and Indigenous Affairs	✗	✓	✓	✓	✓	✓	✓	✓	✓
Department of Industry, Tourism and Resources	✓	✓	✓	✓	N/A	✓	✓	✓	✓
Department of the Parliamentary Library	✓	✓	✓	✓	✓	N/A	✓	✓	✓

⁵⁷ Includes contract details relating to the Child Support Agency and the Social Security Appeals Tribunal.

Agency	Listed by due date (20 March 2003)	Name	Subject	Value	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reasons	Cost of Compliance	Method of calculating cost of compliance
Department of the Parliamentary Reporting Staff	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of the Prime Minister and Cabinet	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of the Senate	✗	✓	✓	✓	N/A	N/A	N/A	✗	✗
Department of the Treasury	✓	✓	✓	✓	N/A	✓	✓	✓	✓
Department of Transport and Regional Services	✗	✓	✓	✓	✓	✓	✓	✓	✓
Department of Veterans' Affairs	✓	✓	✓	✓	✓	N/A	✓	✓	✓
Department of Environment and Heritage ⁵⁸	✓	✓	✓	✓	N/A	✓	✓	✓	✓
Equal Opportunity for Women in the Workplace Agency	✗	✓	✓	✗	N/A	✓	✓	✓	✗
Family Court of Australia	✓	✓	✓	✓	✓	✓	✓	✓	✓
Federal Court of Australia	✓	✓	✓	✓	✓	✓	✓	✓	✓
Federal Magistrate Services	✓	✓	✓	✓	✓	✓	✓	✓	✓
Geoscience Australia	✓	✓	✓	✓	N/A	✓	✓	✗	✓
Human Rights and Equal Opportunity Commission	✓	✓	✓	✓	N/A	✓	✓	✓	✓
Insolvency and Trustee Service Australia	✓	✓	✓	✓	N/A	✓	✓	✓	✓
IP Australia	✗	✓	✓	✓	N/A	✓	✓	✓	✓
Joint House Department	✓	✓	✓	✓	✓	✓	✓	✓	✓
Migration Review Tribunal	✗	✓	✓	✓	N/A	N/A	N/A	✗	✗

⁵⁸ Includes contract details relating to the Australian Antarctic Division.

Agency	Listed by due date (20 March 2003)	Name	Subject	Value	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reasons	Cost of Compliance	Method of calculating cost of compliance
National Archives of Australia	✓	✓	✓	✓	N/A	N/A	N/A	✓	✓
National Capital Authority	✓	✓	✓	✓	✓	✓	✓	✓	✓
National Competition Council ⁵⁹	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
National Native Title Tribunal	✓	✓	✓	✓	✓	N/A	✓	✓	✓
National Oceans Office	✓	✓	✓	✓	N/A	N/A	N/A	✓	✓
National Office for the Information Economy	✓	✓	✓	✓	✓	✓	✓	✓	✓
Office of Film and Literature Classification	✓	✓	✓	✓	N/A	N/A	N/A	✓	✓
Office of National Assessments	X	✓	✓	✓	✓	✓	✓	✓	✓
Office of Parliamentary Counsel	✓	✓	✓	✓	✓	✓	✓	✓	✓
Office of the Commonwealth Ombudsman	✓	✓	✓	✓	✓	✓	✓	✓	✓
Office of the Director of Public Prosecutions	✓	✓	✓	✓	✓	N/A	✓	✓	✓
Office of the Federal Privacy Commissioner	✓	✓	✓	✓	✓	N/A	✓	✓	✓
Office of the Inspector-General of Intelligence and Security ⁶⁰	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Office of the Official Secretary of the Governor-General	✓	✓	✓	✓	✓	✓	✓	✓	✓
Productivity Commission	✓	✓	✓	✓	N/A	N/A	N/A	✓	✓
Professional Services Review	✓	✓	✓	✓	✓	✓	✓	X	X
Public Sector Superannuation Scheme (PSS)	✓	✓	✓	✓	N/A	✓	✓	✓	✓
Refugee Review Tribunal	X	✓	✓	✓	N/A	N/A	N/A	X	X

⁵⁹ The National Competition Council had no contracts that fell within the scope of the Senate Order.

⁶⁰ The Office of the Inspector General of Intelligence and Security had no contracts that fell within the scope of the Senate Order.

Appendix 5

Department of Finance and Administration (February 2003)—Criteria for the determination of whether commercial information should be protected as confidential

<p>Criterion 1:</p> <p>That the information to be protected must be identified in specific rather than global terms</p> <p>Commonwealth officials are required to identify and consider what specific information, if any, is legitimately protected from disclosure. A request for inclusion of a clause in a contract that states that all information is confidential does not pass this test. Individual items of information, for example pricing or intellectual property, must be separately considered.</p>
<p>Criterion 2:</p> <p>That the information must have the necessary quality of confidentiality</p> <p>The specific information must in fact be commercially 'sensitive', that is, it must not already be in the public domain (such as price lists available on the Internet) and its continuing non-disclosure must provide an ongoing commercial benefit to the 'owner' of the information. Parties requesting that the confidentiality of such information be maintained would need to show that there was an objective basis for their request, and not that they simply wished to protect the information.</p>
<p>Criterion 3:</p> <p>That disclosure would cause detriment to the contractor or other third party</p> <p>The information must be such that the disclosure of which would cause harm to the 'owner' of the information, also needs to be established on an objective basis. For example, disclosure of Internet price lists could not harm the owner, but disclosure of pricing information that reveals the contractor's margins may have this effect. The party seeking to maintain confidentiality would normally need to identify some real risk of commercial damage to its interests flowing from the disclosure.</p>
<p>Criterion 4:</p> <p>That the information was provided under an understanding that it would remain confidential</p> <p>That the information was provided on an understanding that it remains confidential requires consideration of the circumstances in which the information was provided and a determination of whether there was a mutual express or implied understanding that confidentiality is to be maintained. The circumstances include such matters as tendering documentation and contract negotiations. For example, a tender condition and draft contract which included specific confidentiality provisions would support an assertion of such an understanding with respect to the information specified.</p>

Appendix 6

Comments from the audited agencies

The comments provided by each of the audited agencies in response to the audit report are shown below.

AFP

The AFP advised that it will:

- moderate its statement regarding the release of contract information to ensure it reflects Finance Guidance (paragraph 4.5);
- review its training course content to ensure that up-to-date Finance Guidance and Senate Order requirements are appropriately addressed (paragraph 4.16);
- for future listings, advise the Attorney-General's Department that some contracts have been excluded from the Internet listing (primarily for security reasons) so that this can be reflected in the Minister's letter of advice to the Senate (paragraph 4.75);and
- give further consideration towards amending its Commissioner's Financial Instructions to ensure greater specificity and clarity in relation to the ultimate responsibility for the gazettal/non gazettal policy (paragraph 4.83).

The AFP also advised that it was satisfied that the report accurately reflected the AFP audit findings and conclusions.

AGO

The AGO confirmed that the report accurately reflected the audit findings and conclusions. In relation to the findings, and consistent with the progressive implementation of the requirements of the Senate Order, the AGO advised that it would be addressing the issues raised within the report over the upcoming months.

Defence

Defence advised that:

- it will ensure that there is a clear and readily accessible path to the listing for the next reporting period on its Industry, Business and Contracting Portal which can be readily accessed from the Defence home page (paragraph 2.24);

- due to current data constraints, Defence will adopt the second presentational mode for the next reporting period. As Defence considers that adoption of the first presentational mode would provide greater clarity it will adopt that presentational mode for the end of calendar year reporting period (paragraph 2.32);
- it is examining options for an enhanced system that will enable Defence to more fully and efficiently meet the requirements of the Senate Order. The assessment and determination of enhanced quality assurance processes will form part of this process (paragraph 3.30);
- it is conducting training sessions in July and August 2003 to ensure that Defence procurement officers understand the new accountability framework and the circumstances in which information should be classified as commercial-in-confidence information. The content of these training sessions reflect all recent developments in the Senate Order and Finance guidance. Information on the Senate Order requirements has also been recently included in the Award Contracts module of the Defence Complex procurement training package (paragraph 4.16); and
- this recommendation cannot be implemented within the current Interim Defence Contracts Register unless significant changes are made to the system. The recommendation will therefore be considered during the requirements analysis phase if a decision is made to develop an enhanced database that will fully meet the requirements of the Senate Order (paragraph 4.31).

DEWR

The Department of Employments and Workplace Relations (DEWR) agreed in principle with the audit findings and conclusions. In response to the issues raised in the audit conclusions, DEWR has implemented a number of the strategies suggested. A further review of processes will be conducted following the release of the final *Finance Guidance on the listing of contract details on the Internet*.

FaCS

FaCS considered the report accurately reflected the audit findings and conclusions and advised that:

- it had no comments in relation to paragraphs (paragraphs 2.9–2.35, 3.2–3.30, 4.4 and 4.63);
- all its commercial contracts guide and template documentation address each of the six elements listed, with the third element being addressed by

referring staff to the Department of Finance and Administration's Guide on Confidential Provisions in Contracts. FaCS was in the process of reviewing its documentation for funding agreements and will ensure that these six elements are included (paragraph 4.9);

- it has reviewed its current course content, policy and guidance, tender and contract documentation for all commercial arrangements to ensure that they fully and appropriately cover all up-to-date Finance Guidance, Senate Order requirements, and the new accountability framework. These issues will be addressed in the next review of Guides and templates for FaCS' funding agreements (paragraphs 4.14 and 4.16);
- appropriate measures will be effected to facilitate compliance (paragraph 4.15);
- it accepted the finding [regarding listing contracts with standard non-disclosure clauses as containing confidentiality provisions] and will put in place proper measures to address the issue (paragraph 4.30);
- it accepted the findings and recommendations regarding the examination of FaCS' funding agreements and FaCS has initiated the remedial action suggested by the ANAO. In addition FaCS has initiated a review of all guidelines for funding agreements and the relevant confidentiality provisions and is exploring the production of appropriate training and education material (paragraphs 4.61–4.62);
- it will ensure that this [the absence of advice to the Minister regarding whether any contracts had been excluded from the Internet list] is addressed in future (paragraph 4.73); and
- it has noted all the findings and is implementing the recommendations contained in the audit report.

NCA

NCA advised that it has no specific comments pursuant to section 19 of the *Auditor-General Act 1977*, and was pleased to note that the Authority has met the requirements of the Senate Order. NCA also advised that it will adopt the suggested presentation as proposed by the ANAO and will provide further guidance to contractors regarding confidentiality provisions in contracts.

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