

The Auditor-General  
ANAO Report No.1 2014–15  
Performance Audit

# **Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2013 Compliance)**

[Across Agencies](#)

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Canberra ACT  
18 September 2014

Dear Mr President  
Dear Madam Speaker

The Australian National Audit Office has undertaken an independent performance audit across agencies titled *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2013 Compliance)*. The audit was conducted in accordance with the authority contained in the *Auditor-General Act 1997*. Pursuant to Senate Standing Order 166 relating to the presentation of documents when the Senate is not sitting, I present the report of this audit to the Parliament.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's website—<http://www.anao.gov.au>.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ian McPhee', is positioned above the printed name.

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

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# Contents

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Abbreviations and Glossary .....	8
<b>Summary and Recommendations .....</b>	<b>9</b>
Summary .....	11
Introduction .....	11
Senate Order guidance .....	12
Potential changes to Senate Order .....	13
Audit objective, criteria and scope .....	14
Overall conclusion .....	15
Key findings by chapter .....	16
Summary of agencies' responses .....	20
Recommendations .....	22
<b>Audit Findings .....</b>	<b>23</b>
1. Introduction .....	25
Senate Order guidance .....	27
AusTender .....	28
Potential changes to the Senate Order .....	28
Previous Senate Order audits .....	29
Audit approach .....	30
Report structure .....	32
2. Agencies' Senate Order Contract Listings .....	33
Background .....	33
Agencies' Senate Order contract listings .....	34
Ministers' letters of advice .....	40
Conclusion .....	43
3. The Use of Confidentiality Provisions in Contracts .....	45
Background .....	45
The reported use of confidentiality provisions in Australian Government contracts over time .....	46
Use of confidentiality provisions by audited agencies .....	47
Parliamentary disclosure and ANAO access clauses .....	56
Conclusion .....	58
4. The Senate Order and AusTender .....	59
Background .....	59
Compiling Senate Order and AusTender information .....	60
Conclusion .....	68

<b>Appendices</b> .....	<b>71</b>
Appendix 1: Agencies' responses .....	73
Appendix 2: Senate Procedural Order of Continuing Effect 13: Departmental and Agency Contracts .....	82
Appendix 3: Previous ANAO audit reports on the Senate Order .....	84
Index.....	88
Series Titles.....	89
Better Practice Guides .....	90

## Tables

Table 1.1: Summary of contract information reported by the audited agencies .....	31
Table 2.1: Template for contract listings .....	33
Table 2.2: Assessment of agencies' contract listings against the requirements of the Senate Order .....	35
Table 2.3: Frequency of reporting errors in agencies' Senate Order contract listings.....	36
Table 2.4: Description of the two specific confidentiality provision types.....	37
Table 2.5: Cost of complying with the Senate Order.....	39
Table 2.6: Compliance with Senate Order paragraph (2)(a)–(d): audited agencies .....	43
Table 3.1: Number and value of contracts, and the reported use of confidentiality provisions, as published in agency contract listings 2011–13.....	46
Table 3.2: Examples of specific and general confidential requirements in contracts .....	48
Table 3.3: The Confidentiality Test.....	49
Table 3.4: Parliamentary and ANAO access clauses.....	57
Table 4.1: Consistency of reporting in Senate Order contract listings and on AusTender for the 2013 calendar year reporting period .....	64
Table 4.2: Comparison of reported confidentiality provision types and reasons.....	65
Table 4.3: Accuracy of reported contract information.....	66

## Figures

Figure S.1	Contract analysis result: appropriateness of the use and reporting of confidentiality provisions .....	18
Figure 2.1:	Tabling of Ministers' letters on or before the due date, 2008 to 2013 calendar years .....	41
Figure 3.1:	Proportion of contracts reported as containing confidentiality provisions: calendar years 2002–13.....	47
Figure 3.2	Contract analysis result: appropriateness of the use and reporting of confidentiality provisions .....	50
Figure 3.3:	Trends in the appropriate use of confidentiality provisions in contracts over time .....	54

# Abbreviations and Glossary

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AFP	Australian Federal Police
ANAO	Australian National Audit Office
ASIC	Australian Securities and Investment Commission
AusTender	The Australian Government's web-based procurement information system.
Communications	Department of Communications
Confidentiality provisions	The clauses of a contract that operate to create the contractual confidentiality obligations for the parties to the contract in respect of information that is specified in the contract.
DIBP	Department of Immigration and Border Protection
DoC	Department of Communications (alternative short form used in figures and tables)
Finance	Department of Finance
FMA Act	<i>Financial Management and Accountability Act 1997</i>
FMG 8	<i>Financial Management Guidance No. 8, Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)</i>
PGPA Act	<i>Public Governance, Performance and Accountability Act 2013</i>
The Confidentiality Test (the Test)	The Confidentiality Test, as set out in Finance's <i>Confidentiality throughout the Procurement Cycle</i> guidance, establishes four criteria to assist agencies determine whether contractual information should be treated as confidential.



# Summary and Recommendations



# Summary

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## Introduction

1. The *Senate Procedural Order of Continuing Effect: Departmental and Agency Contracts* (the Senate Order/the Order) was introduced in 2001 and sought to improve public access to information about government contracting. At that time, the level of information available to the Parliament and to the public about government contracting had not kept pace with the increased rate of contracting out—in particular, contracts dealing with the outsourcing of functions previously performed by Australian Government agencies.<sup>1</sup>

2. Since 2001, successive governments have agreed to comply with the Senate Order and have required agencies to put in place suitable arrangements to support Ministers in complying with it. Under the Order, Ministers in the Senate must table letters of advice for agencies they administer as well as for agencies administered by a Minister in the House of Representatives whom they represent in the Senate. The letters of advice are to confirm that these agencies have published on their websites lists (contract lists) containing the following information as set out in paragraph (2)(b) of the Order:

- a) each contract<sup>2</sup> 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, the subject matter of each such contract, the commencement date of the contract, the

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1 The current version (1 March 2007) of the Senate Order defines 'agency' to mean an agency within the meaning of the *Financial Management and Accountability Act 1997* (FMA Act). On 1 July 2014 the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) replaced the FMA Act and the *Commonwealth Authorities and Companies Act 1997* (CAC Act). Under the PGPA Act entities are now defined as either non-corporate or corporate entities. Agencies as previously defined by the FMA Act are now primarily non-corporate entities. As this audit covers the 2013 calendar year—prior to the full implementation of PGPA Act, this report uses the term agency/ies as was applicable during 2013.

2 For the purposes of the Order, the term 'contract' applies to all forms of Government agreements, based on their legal status, rather than the name given to the arrangement. This includes procurement contracts, lease arrangements, sales contracts and certain grants, funding agreements and employment contracts. The Senate, Finance and Public Administration References Committee, *Departmental and Agency Contracts, Report on the first year of operation of the Senate order for the production of lists of departmental and agency contracts*, 12 December 2002, pp. 16 and 36.

duration of the contract, the relevant reporting period and the 12-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 [the] order and a statement of the method used to make the estimate.<sup>3</sup>

3. Agency contract lists are to be published twice a year to cover the respective financial and calendar year reporting periods. Ministers' letters are to be tabled no later than two calendar months after the end of the respective reporting period.

4. Where an agency has not entered into any relevant contracts, the Minister's letter is to advise accordingly and a statement to that effect is to be published on the agency's website. Where an agency has excluded contracts from its listing, or has not fully complied with the requirements of the Senate Order, the Minister's letter is to advise the basis for exclusion of any contracts and when, where applicable, full compliance will be achieved.

5. The Senate Order requests that the Auditor-General annually examine a number of the contracts reported to contain confidentiality provisions, and report any inappropriate use of these provisions.<sup>4</sup>

## Senate Order guidance

6. The Department of Finance (Finance) is responsible for providing agencies with guidance on complying with the Senate Order as part of their broader responsibility for providing advice on procurement policy, including confidentiality in procurement. Relevant guidance includes:

- Financial Management Guidance No.8 (FMG 8)—*Listing of Contract Details on the Internet Meeting the Senate Order on Departmental and*

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3 The Senate Order for *Departmental and Agency Contracts* (the Senate Order) can be found at [http://www.aph.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/~::~link.aspx?id=E09AEB5B759B4E55955A8F00B6D7C017&z=z](http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/~/~/~link.aspx?id=E09AEB5B759B4E55955A8F00B6D7C017&z=z) and is reproduced at Appendix 2.

4 On 14 May 2014, the Senate Finance and Public Administration References Committee recommended changes to the frequency of the Auditor-General's audits. See paragraph 11 of this report.

*Agency Contracts*<sup>5</sup>, which outlines the rationale for the Order, describes its requirements and is designed to support agencies in developing their contract listings; and

- *Confidentiality Throughout the Procurement Cycle (the Guidance)*<sup>6</sup>, which contains advice on managing confidentiality issues throughout the procurement process, and includes the Confidentiality Test (the Test), which is designed to assist agencies to determine the appropriate inclusion of confidentiality provisions to protect supplier information in contracts.

## Other reporting and disclosure obligations

7. The Senate Order is one of several mechanisms to promote transparency in Australian Government contracting. Other mechanisms include the reporting on AusTender<sup>7</sup> of procurement contracts and agency agreements, the production of lists of grants—as well as the publication of grants on agencies’ websites, and the presentation of summary contract information in agencies’ annual reports, as set out in the Department of the Prime Minister and Cabinet’s *Requirements for Annual Reports*.<sup>8</sup> Agencies may also be required to disclose contractual information to the Parliament and its committees (as appropriate), in accordance with requests consistent with the *Freedom of Information Act 1982*, or information deemed discoverable and relevant to a case before a court.

## Potential changes to Senate Order

8. The Senate is expected to consider changes to the Senate Order following an inquiry by the Finance and Public Administration References

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5 Department of Finance, January 2004, [Internet] available from <<http://www.finance.gov.au/publications/fmg-series/08-listing-of-contract-details.htm>>.

6 Finance, *Buying for the Australian Government, Confidentiality throughout the Procurement Cycle: Practice, Awarding a Contract*, paragraph 9 [Internet], available from <<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/contract-issues/confidentiality-procurement-cycle/practice.html>> [accessed July 2014].

7 Introduced in September 2007, AusTender is a web-based facility for the publication of Australian Government procurement information, including business opportunities, annual procurement plans and contracts awarded. Agencies must report details of all contracts over \$10 000 awarded (including reporting the existence of, and the reasons for the use of confidentiality provisions) on AusTender. Finance [Internet], available from <<https://www.tenders.gov.au/>> [accessed July 2014].

8 Department of the Prime Minister and Cabinet—*Requirements for Annual Reports, for Departments, Executive Agencies and FMA Act Bodies*, PM&C, Canberra, 29 May 2014.

Committee (the Committee). The Committee's report was released in May 2014.<sup>9</sup>

9. In its report on the inquiry, the Committee reiterated its strong support for the continuation of the Senate Order, noting the need to maintain the culture of transparency and openness in relation to government contracts, which had developed since the Order's introduction.

10. The Committee noted some concern with the integrity of contract data reported on AusTender. In this respect, the Committee observed that the introduction of the *Public Governance, Performance and Accountability Act 2013* would strengthen the legislative obligations on an entity's accountable authority with respect to the accuracy of reporting of data, and that a reduced reporting burden may assist in improving data quality.<sup>10</sup>

11. In relation to ANAO audits, the Committee recommended that the annual audit of Senate Order compliance be phased out and that, following the tabling of a final annual audit report in 2014 (this report), the Auditor-General conducts two subsequent biennial reports, by 30 September 2016 and 30 September 2018 respectively.<sup>11</sup> Consistent with the Committee's recommendations, it is anticipated that these audits would take into consideration any changes to agencies' reporting and compliance responsibilities under the Senate Order.

## Audit objective, criteria and scope

12. This audit is the seventeenth in a series of audits and fulfils the Senate's request for the Auditor-General to provide an annual report on agencies' compliance with the Order.

13. The objective of the audit was to assess the appropriateness of the use and reporting of confidentiality provisions in a sample of Australian Government contracts. To conclude on this objective the ANAO's broad

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9 Senate Finance and Public Administration References Committee report, *Senate order for departmental and agency contracts*, 14 May 2014 [Internet], available from <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Finance\\_and\\_Public\\_Administration/Senate\\_order/Report/~media/Committees/Senate/committee/fapa\\_ctte/senate\\_order/report/report\\_t.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Senate_order/Report/~media/Committees/Senate/committee/fapa_ctte/senate_order/report/report_t.pdf)> [accessed July 2014].

10 The Committee has also recommended (Recommendation 3) that the Senate Order be amended 'to reflect legislative changes as a result of the PGPA Act, so the Senate order applies to Commonwealth entities'. *ibid.*, p.26.

11 *ibid.*

criteria included an assessment of whether relevant agencies<sup>12</sup> adhered to the requirements of the Senate Order and whether the reported use of confidentiality provisions in a sample of contracts was appropriate.

14. The scope of the audit included an examination of the timeliness and content of all published contract listings relating to the 2013 calendar year as at 14 March 2014. In addition, the ANAO examined whether selected agencies accurately reported contract information, including the use of confidentiality provisions, in the contract listings and on AusTender. The four agencies included in this part of the audit were the:

- Australian Federal Police (AFP);
- Australian Securities and Investment Commission (ASIC);
- Department of Communications (Communications/DoC); and
- Department of Immigration and Border Protection (DIBP).

## Overall conclusion

15. The unwarranted inclusion of confidentiality provisions in government contracts has the potential to impede scrutiny and accountability of government expenditure. The Senate Order aims to address these concerns by making details of significant contracts accessible and requiring that any use of confidentiality provisions is soundly based. Since the Senate Order's introduction, the proportion of contracts reported as containing confidentiality provisions across all Government agencies (subject to the Order) has declined significantly from 24 per cent for the 2001–02 financial year to 4.5 per cent for the 2013 calendar year.

16. Although the proportion of contracts reported as containing confidentiality provisions in 2013 was low (in keeping with 2012 levels), specific confidentiality provisions in contracts continued to be incorrectly applied and reported. To assess the appropriateness of the use of confidentiality provisions, the ANAO examined a sample of 95 contracts across four agencies. Consistent with the results of previous audits, fewer than 40 per cent of the contracts

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12 As at 28 February 2014, there were 108 FMA Act agencies. The Senate Order is not applicable to the Australian Secret Intelligence Service or the Australian Security Intelligence Organisation for reasons of national security. The Order is also not applicable to the Parliamentary departments or the Parliamentary Budget Office as they are not administered by a Minister.

examined contained confidentiality provisions that had been correctly reported—with most of the issues primarily relating to misreporting of contract information rather than with the contracts themselves. Where there was inappropriate use of confidentiality provisions, it was generally due to a lack of understanding of how to distinguish between the various types of confidentiality provisions.

17. The ANAO also examined the consistency and accuracy of the audited agencies' procurement contract reporting in their 2013 calendar year Senate Order contract listings and on AusTender. There were some inconsistencies in the contract details reported between the two listings, partly reflecting the differences in Senate Order and AusTender reporting requirements. However, the ANAO's examination of the sample of 95 contracts identified that fewer than 35 per cent had been accurately reported in either the Senate Order contract listings or on AusTender.

18. The main focus of the ANAO audits of the Senate Order is the appropriateness of the use of confidentiality provisions. Overall, the results of this audit, consistent with previous audit findings, indicate that the intent of the Senate Order—to provide transparency in government contracting—is being addressed. However, as explained above, the application and reporting of specific confidentiality provisions remains problematic and agencies should take steps to improve staff understanding around when and how the provisions apply. The quality of data reported in the Senate Order listings and AusTender also requires attention. The recommendations from the Finance and Public Administration References Committee's recent inquiry into the Senate Order, if implemented, can be expected to assist in streamlining the reporting requirements for agencies. Nonetheless, agencies should take steps to implement stronger quality assurance processes to support accurate data capture and reporting of contract information. This should also include providing staff with practical support, such as decision flow charts and examples relevant to their agency's work, and encouraging staff to apply them.

## Key findings by chapter

### Agencies' Senate Order Contract Listings (Chapter 2)

19. There has been an overall improvement in relation to the timeliness of the tabling of Ministers' letters and the publication of agency contract listings since 2008. The 2013 published contract listings contained only a small number



of entries (such as agency agreements, contracts outside the reporting period and/or valued under \$100 000) that were outside the information requirements of the Senate Order. These entries represented 3.6 per cent of the total number of contracts reported by agencies for the reporting period.<sup>13</sup> While this is an improvement over previous years, some agencies still included reasons for the inclusion of confidentiality provisions (such as ‘commercial-in-confidence’ or ‘protection of Commonwealth material’) which did not clearly categorise the information to be protected as set out in Finance’s guidance.

20. The number of agencies that have fully met other requirements of the Senate Order also improved in 2013. All agencies provided basic contract details consistent with the Order and 81 per cent of agencies provided an estimate of the cost of complying (compared with 76 per cent in 2012). The average cost of complying with the Order in 2013 was \$3156 per agency (\$9 per contract).

21. While the results of this audit show an overall improvement in compliance with the Senate Order, there remains a need for agencies to check Senate Order contract listings for completeness, accuracy and timeliness prior to the publication of the listings and the tabling of Ministers’ letters.

### **The Use of Confidentiality Provisions in Contracts (Chapter 3)**

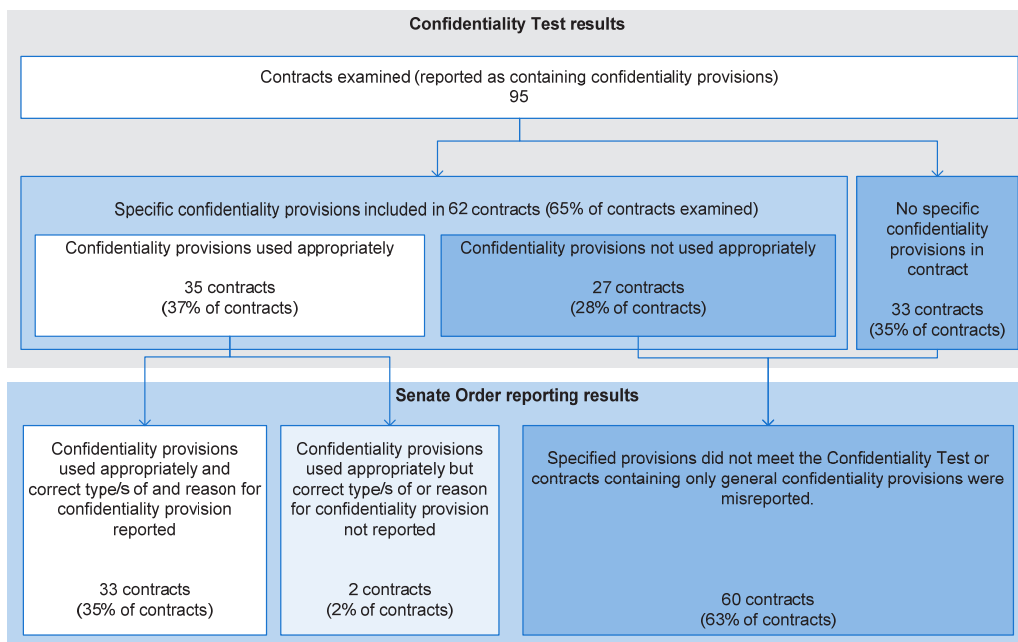
22. The Senate Order is underpinned by the principle that the Parliament and the public should not be prevented from being able to obtain access to contract information unless there is a sound reason to do so. Once a contract has been awarded, the terms of the contract including parts of the contract drawn from the supplier’s submission are not confidential unless the agency has determined and identified in the contract that specific information is to be kept confidential. An examination of the Senate Order contract listings indicates that the reported use of specific confidentiality provisions in contracts is low—of the 30 696 contracts listed in the 2013 calendar year, only 1369 contracts were identified as containing confidentiality provisions. However, the ANAO’s examination of a sample of 95 contracts in four audited agencies found that confidentiality provisions in three of the agencies were often misreported or not

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13 The ANAO’s examination of the 101 published agency contract listings found that only 537 of the 15 073 contracts reported by 40 agencies were outside the information requirements of the Senate Order.

applied correctly.<sup>14</sup> Fewer than 40 per cent of the contracts contained specific confidentiality provisions that had been correctly reported. When misreporting occurred, it was generally due to a lack of understanding of how to distinguish between and apply the various types of provisions. The results of the ANAO’s analysis of the application of the Confidentiality Test and the reporting of confidentiality provisions in the audited agencies’ contract listings are shown in Figure S.1.

**Figure S.1 Contract analysis result: appropriateness of the use and reporting of confidentiality provisions**



Source: ANAO analysis. Areas of incorrect reporting and/or use of confidentiality provisions are shown with dark blue shading.

23. The results of this audit indicate that there continues to be a high level of misunderstanding and misreporting by agencies of the type(s) of confidentiality provisions and reason(s) for their use. While each of the audited agencies maintained sufficient guidance in this regard (including providing clear links to Finance’s guidance), it is apparent that the level of staff

14 All 20 AFP contracts examined specifically identified the information to be protected and were assessed as meeting the criteria of the Confidentiality Test.

understanding of the requirements in three of the four agencies could improve.<sup>15</sup>

### **The Senate Order and AusTender (Chapter 4)**

24. As with previous audits of the Senate Order, the ANAO's comparison of the audited agencies' contract reporting in their 2013 calendar year contract listings and on AusTender found some inconsistencies in relation to the contract details reported and the use of confidentiality provisions attributed to those contracts. Of the 1455 procurement contracts reported, 1374 (94 per cent) were found to have a corresponding AusTender entry, of which the reported type of confidentiality provision(s) matched for 92 per cent of the entries. These inconsistencies partly reflect the differing reporting requirements of each arrangement. However, of the 95 contracts examined in detail, fewer than 35 per cent had been correctly reported in either the contract listings or on AusTender.<sup>16</sup>

25. The contract information reported by agencies on AusTender is used to compile a number of government reports and provides statistics on the actual goods and services purchased by government.<sup>17</sup> It is also used by suppliers and other stakeholders to monitor government business opportunities. This audit highlights that agencies need to improve the quality of data they report to make sure that it is accurate and reliable. The need for agencies to comply with multiple procurement reporting requirements is a factor which influences the integrity of the information reported. The Senate Finance and Public Administration Committee recently proposed a trial of AusTender to fulfil agency obligations pursuant to the Senate Order. While this trial is a positive step, designed to reduce the reporting burden, agencies will still need to ensure that the contract data published on AusTender is accurate and conforms to the requirements of the Senate Order.

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15 Of the four audited agencies only the AFP's central procurement unit routinely checked on the reported use of confidentiality provisions by divisions or business areas to verify the appropriateness of the use of confidentiality provisions.

16 In order to be assessed as being correctly reported the contract details (contractor, subject matter, amount and period) and the correct identification of the type and reasons for confidentiality provisions were all required to match the information contained in the contracts reviewed.

17 Finance, *Statistics on Australian Government Procurement Contracts*, [Internet] available from <<http://www.finance.gov.au/procurement/statistics-on-commonwealth-purchasing-contracts/>>.

## Summary of agencies' responses

26. The audited agencies' summary responses to the audit are provided below. Appendix 1 contains the agencies' full response to the audit report.

### Australian Federal Police

The AFP agrees with the recommendations arising from the audit as they relate to the AFP.

The AFP has a number of controls in place designed to ensure the correct use of confidentiality provisions, such as the central procurement unit as acknowledged in the report. This unit also has a key role in monitoring and ensuring the accuracy of reported contract information.

The AFP embraces the commentary provided within the report and agrees with the recommendations arising from the audit as they relate to the AFP.

### Australian Securities and Investment Commission

Overall ASIC accepts the ANAO's findings and agrees with the key recommendations contained in the report.

While ASIC currently has comprehensive instructions on how to deal with confidentiality in contracts, the audit has highlighted the need to remind staff of the policy and process with respect to reporting confidentiality. ASIC's Central Procurement Unit (CPU) has commenced providing face to face information sessions to key staff in business units responsible for reporting. ASIC has also put in place a process for ASIC's CPU to review AusTender reporting information before it gets published both in AusTender and in the Senate Order report and has updated its counsel engagement template to include the parliamentary and ANAO access clauses. In addition, ASIC has recently implemented a Contract Management System (CMS) that will improve ASIC's ability to capture and report on information.

ASIC fully supports the trial to expand the use of AusTender to support the Senate Order report which in our view will not only reduce the administrative effort associated with reporting but also reduce inconsistencies currently experienced across the two reports by having a single source of information on government contracts.

### Department of Communications

The Department of Communications (the Department) agrees with Recommendation No. 1 in the Australian National Audit Office's (ANAO) report on Confidentiality in Government Contracts: Senate Order for

Departmental and Agency Contracts (Calendar Year 2013 Compliance). The Department will continue to pursue ongoing improvements including awareness raising and training to improve data captured for reporting purposes. Additionally, the Department has implemented a change to the Financial Management Information System to increase visibility of proposed confidentiality provisions by appropriate senior officers before those provisions are published.

The Department agrees with Recommendation No.2 and considers that the steps proposed for Recommendation No.1 will also address this recommendation.

### **Department of Immigration and Border Protection**

The department agrees with the ANAO's recommendation that support provided to staff when determining and reporting on confidentiality provisions in contracts should be improved and is currently developing such materials.

The department is committed to ensuring that contract information is accurately reported both within our Senate Order listing and on AusTender.

# Recommendations

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*These recommendations are based on findings at the audited agencies and are likely to be relevant to other Australian Government agencies. Therefore, all Australian Government agencies are encouraged to assess the benefits of implementing these recommendations in light of their own circumstances, including the extent to which the recommendations, or parts thereof, are addressed by practices already in place.*

**Recommendation No.1**  
**Paragraph 3.22**

To provide for greater transparency and accountability in reporting on the use of confidentiality provisions in Australian Government contracts, the ANAO recommends that agencies improve practical support provided to staff to more accurately assess and report on confidentiality provisions in contracts.

**Responses from agencies:** *Agreed.*

**Recommendation No.2**  
**Paragraph 4.21**

To increase accuracy in reporting of contract information, the ANAO recommends that agencies improve data capture and reporting for their Senate Order contract listings and on AusTender.

**Responses from agencies:** *Agreed.*

# Audit Findings





# 1. Introduction

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*This chapter provides background information about the Senate Order, outlines the rationale for this audit and explains the audit approach.*

**1.2** The *Senate Procedural Order of Continuing Effect: Departmental and Agency Contracts* (the Senate Order/the Order) was introduced in 2001 and sought to improve public access to information about government contracting.<sup>18</sup> At that time, the level of information available to the Parliament and to the public about government contracting, had not kept pace with the increased rate of contracting out, particularly in the outsourcing of functions previously performed by Australian Government agencies.

**1.3** A motion by (then) Senator Murray, which was passed in 2001, led to the establishment of the Senate Order. The main principle on which the Order was based is that parliamentary and public access to government contract information should not be prevented, or otherwise restricted, through the use of confidentiality provisions, unless there is sound reason to do so. Supporting this principle, successive governments have agreed to comply with the Senate Order and its subsequent amendments.<sup>19</sup>

**1.4** The Senate Order requires that Ministers in the Senate table letters of advice for agencies they administer and for agencies administered by a Minister in the House of Representatives who they represent in the Senate. The letters of advice are to confirm that these agencies have published on their websites lists containing the following information as set out in paragraph (2)(b) of the Order:

- a) each contract<sup>20</sup> entered into by the agency which has not been fully performed or which has been entered into during the previous

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18 The Senate Order for *Departmental and Agency Contracts* (the Senate Order) is reproduced at Appendix 2.

19 Commonwealth of Australia, Senate Hansard, *Senate Order on Government and Agency Contracts: Government Response*, P26355, Monday 27 August 2001.

20 For the purposes of the Senate Order, the term 'contract' applies to all forms of Government agreements, based on their legal status, rather than the name given to the arrangement. This includes procurement contracts, lease arrangements, sales contracts and certain grants, funding agreements and employment contracts. The Senate, Finance and Public Administration References Committee, *Departmental and Agency Contracts, Report on the on the first year of operation of the Senate order for the production of lists of departmental and agency contracts*, 12 December 2002, pages 16 and 36.

12 months, and which provides for a consideration to the value of \$100 000 or more;

- b) the contractor, the amount of the consideration, 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 [the] order and a statement of the method used to make the estimate.<sup>21</sup>

**1.5** Agency contract lists are to be published twice a year to cover the respective financial and calendar year reporting periods. Ministers' letters are to be tabled no later than two calendar months after the end of the respective reporting period.

**1.6** Where an agency has not entered into any relevant contracts, the Minister's letter is to advise accordingly and a statement to that effect is to be published on the agency's website. Where an agency has excluded contracts from its listing, or has not fully complied with the requirements of the Senate Order, the Minister's letter is to advise the basis for exclusion of any contracts and when, where applicable, full compliance will be achieved.<sup>22</sup>

**1.7** The Senate Order requests that the Auditor-General examine annually a number of the contracts reported to contain confidentiality provisions, and report any inappropriate use of these provisions.<sup>23</sup> In addition, the Order also requests the Auditor-General, based on the examination of a number of contracts reported to have been excluded from agencies' Senate Order contract listings, to report on whether those contracts were appropriately excluded.

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21 Senate Order, paragraph (2).

22 *ibid.*, paragraph (3).

23 On 14 May 2014, the Senate Finance and Public Administration References Committee recommended changes to the frequency of the Auditor-General's audits as discussed in paragraph 1.16.

## Senate Order guidance

**1.8** The Department of Finance (Finance) is responsible for providing agencies with guidance on complying with the Senate Order as part of its broader responsibility for procurement policy, including the appropriate use of confidentiality provisions. The Finance publication, *Financial Management Guidance No.8 (FMG 8)—Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*, provides guidance to support agencies in developing and presenting their Senate Order contract listings.<sup>24</sup>

**1.9** Finance's whole-of-government guidance, *Buying for the Australian Government, Confidentiality Throughout the Procurement Cycle*<sup>25</sup> (the Guidance), sets out the Australian Government's procurement policy framework as established by the *Commonwealth Procurement Rules* (CPRs). This framework governs how agencies procure property or services. The Guidance advises agencies on the use of confidentiality provisions in contracts and includes the Confidentiality Test (the Test). The Test consists of four criteria, all of which must be met for a supplier's commercial information to be considered confidential. These are:

1. the information to be protected must be specifically identified;
2. the information must be commercially 'sensitive';
3. disclosure would cause unreasonable detriment to the owner of the information or another party; and
4. the information was provided under an understanding that it would remain confidential.<sup>26</sup>

**1.10** The Senate Order is one of several mechanisms to promote transparency in Australian Government contracting. Other mechanisms include the reporting on AusTender<sup>27</sup> of procurement and consultancy

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24 Finance, *Financial Management Guidance No.8—Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)* (January 2004).

25 Finance, *Buying for the Australian Government, Confidentiality throughout the Procurement Cycle: Principles* [Internet] available from <<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/contract-issues/confidentiality-procurement-cycle/practice.html#test>>.

26 Finance, *Buying for the Australian Government, Confidentiality throughout the Procurement Cycle: Practice, Awarding a Contract*, paragraph 9 [Internet].

27 Introduced in September 2007, AusTender is the Australian Government's web-based procurement information system [Internet], available from <<https://www.tenders.gov.au/>>.

contracts, the production of lists of grants—as well as the publication of grants on agencies’ websites, and the presentation of summary contract information in agencies’ annual reports, as set out in the Department of the Prime Minister and Cabinet’s *Requirements for Annual Reports*.<sup>28</sup>

## AusTender

**1.11** In addition to the Senate Order contract listings, under the CPRs, agencies are required to report planned and actual procurement activity on AusTender. AusTender is the Australian Government’s web-based procurement information system. It provides an online portal for the centralised publication of Australian Government business opportunities, annual procurement plans, multi-use lists, contracts and agency agreements.

**1.12** Agencies are required to report on AusTender all contracts entered into valued at \$10 000 or above (compared to \$100 000 or more for the Senate Order contract listings). As with the Senate Order contract listings, agencies must indicate on AusTender whether a contract contains confidentiality provisions and provide the reasons for their use.

## Potential changes to the Senate Order

**1.13** The Senate is expected to consider changes to the Senate Order following an inquiry by the Finance and Public Administration References Committee (the Committee). The Committee’s report was released in May 2014.<sup>29</sup>

**1.14** In its report on the inquiry, the Committee reiterated its strong support for the continuation of the Senate Order, noting the need to maintain the culture of transparency and openness in relation to government contracts which had developed since the Order’s introduction. The Committee also expressed its support for initiatives which would remove the duplication of agencies’ reporting functions.<sup>30</sup> The Committee proposed an 18-month trial

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28 Department of the Prime Minister and Cabinet—*Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies*, PM&C, Canberra, 29 May 2014.

29 Senate Finance and Public Administration References Committee report, *Senate order for departmental and agency contracts*, 14 May 2014.

30 Previous ANAO audits have identified that shortcomings in Senate Order contract reporting and inconsistency in contract information across the Senate Order and AusTender were partly due to the various reporting requirements.

using AusTender to fulfil agency obligations (for procurement contracts) pursuant to the Senate Order. The Committee considered that the trial, which is subject to the caveat that AusTender is able to produce reports which comply with the Senate Order, could assist in addressing issues of completeness and accuracy in publicly available contract information.<sup>31</sup>

**1.15** The Committee also noted concerns with issues highlighted by previous ANAO audits, particularly with the integrity of contract data reported on AusTender by agencies. Finance advised the Committee that the integrity of data in AusTender is the responsibility of individual agencies. In this respect, the Committee observed that the introduction of the *Public Governance, Performance and Accountability Act 2013* would strengthen the legislative obligations on an entity's accountable authority with respect to the accuracy of reporting of data, and that a reduced reporting burden may assist in improving data quality.<sup>32</sup>

**1.16** In relation to the frequency of the ANAO's audits of Senate Order compliance, the Committee recommended that the annual audit of Senate Order compliance be phased out and that, following the tabling of a final annual audit report in 2014 (this report), the Auditor-General conduct two subsequent biennial reports, by 30 September 2016 and 30 September 2018 respectively. Consistent with the Committee's recommendations, it is anticipated that these audits would take into consideration any changes to agencies' reporting and compliance responsibilities under the Senate Order.

## Previous Senate Order audits

**1.17** This audit is the seventeenth in a series of audits and fulfils the Senate's request for the Auditor-General to provide an annual report on agencies' compliance with the Order. Previous audit reports on agencies' compliance with

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31 Finance advised the Committee that AusTender would be modified so that single reports which meet the requirements of the Order could be generated. The report further noted that, if it can be demonstrated that AusTender can provide the required reports, the Committee may support agencies being able to use AusTender for a trial period of 18 months from 1 January 2015 to meet Senate Order reporting obligations. The Committee recommended that Finance 'provide a link to a prototype of the AusTender website with agencies' compiled Senate Order reports for the 2013–14 financial year'. Senate Finance and Public Administration References Committee report, *Senate order for departmental and agency contracts*, 14 May 2014, Recommendation 1, p. 22.

32 The Committee has also recommended (Recommendation 3) that the Senate Order be amended 'to reflect legislative changes as a result of the *Public Governance, Performance and Accountability Act 2013*, so the Senate order applies to Commonwealth entities'. *ibid.*, p.26.

the Senate Order and audit recommendations since 2002–03 are listed in Appendix 3. In the main, these recommendations encouraged agencies to improve their use and reporting of confidentiality provisions in contracts by:

- better communicating the key requirements of the Order to staff;
- strengthening approaches used to identify and record confidential contract information; and
- improving the accuracy and quality of publicly reported contract information.

## Audit approach

### Audit objective, criteria and scope

**1.18** The objective of the audit was to assess the appropriateness of the use and reporting of confidentiality provisions in a sample of Australian Government contracts. The ANAO's assessment was based on the following criteria:

- (a) agencies, subject to the Senate Order, published contract listings in accordance with the timing and content requirements of the Order;
- (b) confidentiality provisions were used appropriately in a sample of contracts which were reported to contain confidentiality provisions by the selected agencies; and
- (c) the selected agencies accurately reported contract information, including the use of confidentiality provisions, in the contract listings and on AusTender.

**1.19** As at 28 February 2014, there were 101<sup>33</sup> agencies to which the Senate Order applied. All of these agencies were included for the purposes of the overall audit analysis (part (a)). The agencies selected for detailed contract analysis (parts (b) and (c)) were the:

- Australian Federal Police (AFP);

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33 As at 28 February 2014, there were 108 *Financial Management and Accountability Act 1997* agencies. The Senate Order is not applicable to the Australian Secret Intelligence Service or the Australian Security Intelligence Organisation for reasons of national security. The Order is also not applicable to the Parliamentary departments or the Parliamentary Budget Office as they are not administered by a Minister.

- Australian Securities and Investment Commission (ASIC);
- Department of Communications (Communications/DoC); and
- Department of Immigration and Border Protection (DIBP).

**1.20** To assess the audited agencies' compliance with the Senate Order, the ANAO had regard to Finance's guidance. In particular, FMG 8 *Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)* was used as the basis of review for the timeliness of the tabling of Ministers' letters and the content of agencies' contract listings. The Confidentiality Test contained in Finance's online guidance *Buying for the Australian Government* was applied to assess whether confidentiality provisions were used appropriately for a sample of contracts reported to contain specific confidential information.

**1.21** Agency selection took into account agencies' involvement in previous Senate Order audits and the size and nature of the agencies' contract listings (particularly the proportion of contracts listed as containing confidentiality provisions). Table 1.1 shows the number and value of the contracts reported in the audited agencies' 2013 contract listings and the percentage of those contracts reported as containing confidentiality provisions.

**Table 1.1: Summary of contract information reported by the audited agencies**

	AFP	ASIC	DoC	DIBP	All agencies <sup>(a)</sup>
Total number of contracts reported in the 2013 calendar year Senate Order contract listings	366	251	315	885	30 696
Total value (\$ millions) of contracts reported in 2013 calendar year Senate Order contract listings	\$177	\$207	\$1 568	\$9 823	\$189 183
Percentage of contracts (by number) reported in 2013 calendar year Senate Order contract listings as containing confidentiality provisions	5.2%	21.5%	14%	8.5%	4.5%

Source: ANAO analysis.

Note: (a) Represents the total number of contracts reported by the 101 FMA Act agencies that were subject to the Senate Order for the 2013 calendar year reporting period as at 14 March 2014.

1.22 The audit was conducted in accordance with the ANAO’s auditing standards at a cost to the ANAO of \$ 201 944.00.

## Report structure

1.23 The remaining chapters are structured as follows:

<b>Chapter 2</b> Agencies’ Senate Order Contract Listings	Examines the timeliness of the publication of agencies’ Senate Order contract listings, the extent to which the listings’ content aligned with the requirements of the Senate Order, and the timeliness and completeness of tabled Ministers’ letters.
<b>Chapter 3</b> The Use of Confidentiality Provisions in Contracts	Examines the reported use of confidentiality provisions in Australian Government contracts over time, and the appropriateness of the use and reporting of specific confidentiality provisions in a sample of contracts.
<b>Chapter 4</b> The Senate Order and AusTender	Examines the consistency of the audited agencies’ reporting of contract information in the Senate Order contract listings and on AusTender.



## 2. Agencies' Senate Order Contract Listings

*This chapter examines the timeliness of the publication of agencies' Senate Order contract listings, the extent to which the listings' content aligned with the requirements of the Senate Order, and the timeliness and completeness of tabled Ministers' letters.*

### Background

**2.1** The Senate Order requires agencies to compile and publish listings of contracts, as specified by the Order, for each financial and calendar year reporting period. If an agency has not entered into any relevant contracts for the relevant reporting period, the agency is required to publish an advice to that effect on their website. To support agencies in complying and presenting their contract listings, Finance has developed specific guidance for the Senate Order. Financial Management Guidance No. 8 (FMG 8)—*Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*, January 2004, explains the basis and the objectives of the Government's policy, and provides clarification of the terms and requirements of the Senate Order.

**2.2** FMG 8 also provides templates to assist agencies in presenting their listings and for the presentation of Ministers' letters of compliance. Table 2.1 shows the template for contract listings, as presented in FMG 8.

**Table 2.1: Template for contract listings**

Contract details					Confidentiality information			
Contractor	Subject matter	Amount of consideration	Start date	Anticipated end date	Provisions requiring confidentiality Y/N	Reason(s)	Other requirements of confidentiality Y/N	Reason(s)

Source: Finance, FMG 8, section 11.2.

**2.3** For the 101 agencies subject to the Senate Order for the 2013 calendar year reporting period, the ANAO assessed whether:

- contract listings were published on agency websites by the due date and provided information consistent with the requirements of the Senate Order; and

- Ministers' letters were tabled in the Senate by the due date and included a statement of compliance with the requirements of the Senate Order.

## Agencies' Senate Order contract listings

### Timeliness of agencies' Senate Order contract listings

2.4 For the 2013 calendar year reporting period, 92 of the 101 agencies (91 per cent) published a contract listing, or advice that no relevant contracts had been entered into, by the due date of 28 February 2014. The remaining nine agencies published contract listings, or advice that no relevant contracts had been entered into, within the following two weeks. This result was an improvement from the audit of the 2012 calendar year reporting period where only 84 per cent of agencies had published contract listings by the due date.

### Comprehensiveness of published contract listings

2.5 The ANAO examined the published content of all 101 contract listings to assess the extent to which the published data aligned with the information requested by the Order. Paragraph (2)(a)–(d) of the Senate Order describes the information that agencies are to include in their contract listings. The lists are to 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.

2.6 The results of the ANAO's analysis of the listings against each of the elements set out in paragraph (2)(a)–(d) of the Senate Order are summarised in Table 2.2 and discussed in the following sections.

**Table 2.2: Assessment of agencies' contract listings against the requirements of the Senate Order**

Description of requirement	Number of agencies that fully met the requirement <sup>(a)</sup>	Number of agencies that did not fully meet the requirement
Paragraph (2)(a) of the Order <i>Lists only contracts (as defined by the Order), that are over \$100 000, that have the specified reporting period</i>	61	40
Paragraph (2)(b) of the Order <i>Lists provided all basic contract details as specified in FMG 8</i>	101	0
Paragraph (2)(c) of the Order <i>Lists identify whether contracts contain provisions and a valid statement of the reasons for the inclusion of the provision</i>	79	22
Paragraph (2)(d) of the Order <i>Agencies provided an estimate of the cost of complying with the order and a statement of the method used to make the estimate</i>	82	19

Source: ANAO analysis.

Note (a): Includes 43 agencies that published an advice that no relevant contracts had been entered into.

### *Assessment against paragraph (2)(a) of the Senate Order*

2.7 The Senate Order sets out which contracts agencies are to include in their contract listings.<sup>34</sup> This includes contracts that are over the value of \$100 000 and that had not been fully performed or that have been entered into during the specified reporting period. The ANAO's examination of the 101 published agency contract listings observed that only 537 of the 15 073 contracts reported by 40 of the agencies were outside the contract reporting criteria. Table 2.3 shows

34 For the purposes of the Senate Order, the term 'contract' applies to all forms of Government agreements, based on their legal status [legally enforceable], rather than the name given to the arrangement. This includes procurement contracts, lease arrangements, sales contracts and certain grants, funding agreements and employment contracts. The Senate, Finance and Public Administration References Committee, *Departmental and Agency Contracts, Report on the first year of operation of the Senate order for the production of lists of departmental and agency contracts*, 12 December 2002, pages 16 and 36.

the number and types of unnecessary entries identified in the listings, noting that individual entries may have been outside the requirements of the Senate Order for one or more reasons. For example, an entry may have been both under the reporting value and outside the reporting period.

**Table 2.3: Frequency of reporting errors in agencies’ Senate Order contract listings**

Description	Number of unnecessary entries in published listings
Number of agency agreements <sup>(a)</sup>	85
Number of entries outside the stipulated reporting period	413
Number of entries below the \$100 000 value threshold	39

Source: ANAO analysis of published contract listings for the 2013 calendar year reporting period.

Note (a): FMG 8, section 6 states ‘An agreement between Australian Government agencies that are all part of the Commonwealth of Australia will not be legally enforceable because it is not possible for different parts of the same legal entity to enter into a legally enforceable agreement’. As such, agency agreements are not contracts for the purposes of the Senate Order and should not be reported.

**2.8** The most common error was the inclusion of contracts that had start or end dates outside the required date range for the 2013 calendar year reporting period. However, there were significantly fewer errors in this regard than identified in the audit for the 2012 calendar year reporting period.<sup>35</sup>

*Assessment against paragraph (2)(b) of the Senate Order*

**2.9** Under paragraph (2)(b) of the Senate Order, agencies are to provide basic details for each contract in their listing, including the contractor’s name, subject matter, contract amount, commencement date and duration (or end date). The listing is also to identify the relevant reporting period (calendar or financial year) and the 12-month period (date range) of the contract listing. All of the published contract listings contained the basic contract details as required by the Senate Order. As noted in previous audits, the high level of compliance with this element may be attributed to the widespread use of Finance’s contract listing template, which encourages agencies to include the required contract details.

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35 Agencies’ Senate Order contract listings for the 2012 calendar year reporting period contained 2428 contracts that had start or end dates outside the stipulated reporting period. ANAO Audit Report No. 4 2013–14, *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2012 Compliance)* p. 41.

*Assessment against paragraph (2)(c) of the Senate Order*

**2.10** Agencies are required to identify in their contract listings whether any of the listed contracts contain confidentiality provisions. The two types of provisions agencies are to identify are described in FMG 8 as:

- those that make specific information contained in the contract confidential (referred to in the Order as 'provisions requiring the parties to maintain confidentiality of any of its provisions'); and
- those that protect the confidential information of the parties that may be obtained or generated in carrying out the contract but cannot be specifically identified when the contract is entered into (referred to in the Order as 'other requirements of confidentiality').

**2.11** Table 2.4 outlines the differences between the two types of specific confidentiality provisions and provides examples of how they may be used.

**Table 2.4: Description of the two specific confidentiality provision types**

Confidentiality provision type	Description	Example of the use and reporting of the provision type
Requires the parties to maintain the confidentiality of any contract provisions	Relates to specific confidential information that is actually contained in the contract	The contract specifies that pricing information in the contract is to remain confidential. The pricing information in the contract provides sufficient information to make a reasonable estimate of the prospective supplier's profit margin. Senate Order contract listing details: <ul style="list-style-type: none"> <li>• 'Yes' for 'provisions requiring the parties to maintain confidentiality of any of its provisions' provision type; and</li> <li>• 'costing/profit information' as the stated reason.</li> </ul>
Other requirements of confidentiality	Relates to confidential information obtained or generated in performing the contract	The contract specifies that the results of a survey (or a research report) to be generated as part of the contract's performance are to remain confidential as disclosure would cause detriment to a third party. Contract listing details: <ul style="list-style-type: none"> <li>• 'Yes' for 'other requirements of confidentiality' provision type; and</li> <li>• 'intellectual property' as the stated reason.</li> </ul>

Source: ANAO representation of information contained in FMG 8.

**2.12** Where possible, agencies are to identify the reason(s) for the inclusion of confidentiality provisions under specific categories in the contract listings. These standard reasons are provided in the 'Contractual Provisions Matrix' contained in FMG 8 and include:

- trade secrets (includes intellectual property);
- internal costing/profit information;
- public interest;
- statutory secrecy provisions; and
- the *Privacy Act 1988*.

**2.13** With the exception of ‘internal costing/profit information’, all categories may be used to describe the reason for the inclusion of either type of confidentiality provision. Should a contract contain a confidentiality provision that does not fall within a ‘standard category’, agencies are to identify the provision as ‘other’ and provide a reason for the inclusion of the provision.

**2.14** Of the 101 agencies that published listings, 43 reported that none of their contracts contained specific confidentiality provisions. Of the remaining 58 agencies that identified the use of specific confidentiality provisions in their contracts, 35 agencies provided reasons that aligned with the categories set out in FMG 8 for all the confidentiality provisions identified.

**2.15** A small number of the contracts included in the listings of 22 agencies provided reasons for the use of confidentiality provisions (such as ‘commercial-in-confidence’<sup>36</sup> and ‘protection of Commonwealth material’), which do not clearly align to the standard categories detailed in FMG 8. This result, however, is an improvement on the results for the 2012 calendar year reporting period where 33 agencies had imprecisely reported reasons for the use of confidentiality provisions. There would be merit in agencies checking that the reasons recorded for the use of confidentiality provisions clearly align with the standard categories detailed in FMG 8 to avoid potential misreporting. The misreporting of confidentiality provisions is discussed in further detail in Chapter 3.

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36 *Senate Procedural Order of Continuing Effect Senate and Senate committees – claims of commercial confidentiality* states ‘the Senate and Senate committees shall not entertain any claim to withhold information from the Senate or a committee on the grounds that it is commercial-in-confidence, unless the claim is made by a minister and is accompanied by a statement setting out the basis for the claim, including a statement of any commercial harm that may result from the disclosure of the information’ (30 October 2003 J.2654).

*Assessment against paragraph (2)(d) of the Senate Order*

**2.16** The Senate Order requires agencies to report the cost of complying with the Order and the method used to calculate the cost. For the 2013 calendar year reporting period, 82 agencies reported both the cost of compliance and the method used to calculate the cost. A further five agencies reported the cost of compliance but not the methodology. The remaining 14 agencies did not report either the cost of compliance or the method used to calculate the cost. Table 2.5 shows the number of agencies that reported these details and the total, average and median reported costs of compliance, for the 2011 to 2013 calendar year reporting periods.

**Table 2.5: Cost of complying with the Senate Order**

Description	Number of agencies compliant with paragraph (2)(d) of the Senate Order, and the reported estimated cost of compliance		
	2011	2012	2013
Number of agencies that reported both the cost of compliance and method used to calculate the cost of compliance	74	76	82
Number of agencies that just reported the cost of compliance	83	81	87
Total cost reported	\$250 566	\$168 699	\$274 607
Average cost for each agency	\$3 043	\$2 082	\$3 156
Median cost for each agency	\$1 224	\$971	\$1 000
Number of contracts reported by agencies that reported the cost of compliance	35 650	27 004	30 147
Average reported cost for each contract	\$7	\$6	\$9

Source: ANAO analysis of estimated cost of compliance for each of the calendar year reporting periods as reported by agencies.

**2.17** The total estimated cost of compliance with the Senate Order, as reported by 87 agencies, covered approximately 98 per cent of all contracts reported on the listings. Extrapolating the reported average cost for each contract of \$9 to the total of 30 696 contracts reported by agencies indicates a total cost of compliance for the 2013 calendar year reporting period of approximately \$276 264.

## Ministers' letters of advice

**2.18** Ministers'<sup>37</sup> letters of advice are intended to provide an accountability mechanism—informing the Parliament that agencies have published lists of contracts in accordance with the requirements of the Senate Order.<sup>38</sup> Ministers are reliant on their departments for the provision of accurate advice with respect to these letters, including specifically identifying where agencies have not fully complied with the requirements of the Senate Order, the reasons for non-compliance and when full compliance is expected to be achieved. The ANAO reviewed the timeliness of the tabling of Ministers' letters and agency compliance as recorded in the Ministers' letters.

### Timeliness of Ministers' letters

**2.19** For the 2013 calendar year reporting period, 15 Ministers' letters covering 93 agencies (92 per cent) were tabled by 28 February 2014 as required by the Senate Order. Of these 15 letters, 12 included all agencies relevant to the Minister's responsibilities. Ministers' letters covering an additional eight agencies across four portfolios were tabled within two weeks of the due date. Figure 2.1 shows the timeliness of the tabling of Ministers' letters for the calendar year reporting periods since 2008.

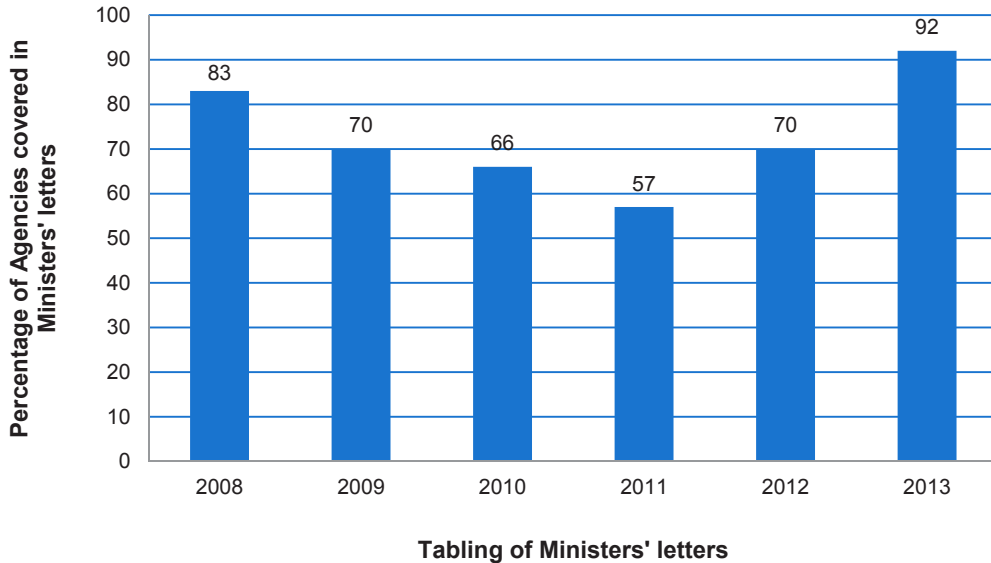
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37 Paragraph 1 of the Senate Order defines the term Minister as 'each Minister in the Senate, in respect of each agency administered by that Minister, or by a Minister in the House of Representatives represented by that Minister'.

38 'The tabling letter should identify all FMA Act agencies which are administered by the Minister, including agencies that have not listed any contracts. It is anticipated that portfolio departments will coordinate the preparation and tabling of their Minister's letter'. Finance, FMG 8, Section 8: *The Minister's Letter of Compliance, Agencies Covered by the Minister's Letter*.



**Figure 2.1: Tabling of Ministers' letters on or before the due date, 2008 to 2013 calendar years**



Source: ANAO analysis.

**2.20** The results for the 2013 reporting period indicate an improvement in timeliness. In addition, with the exception of one portfolio, the Ministers' letters tabled covered all the agencies administered by the Minister, including agencies that had not listed any contracts.

**Statements of compliance**

**2.21** Ministers' letters of advice serve to inform the Parliament that the agencies they administer have met all the requirements of the Senate Order. Where an agency may not have met the requirements of the Senate Order in full, the corresponding Minister's letter is to indicate the extent of, and reasons for, non-compliance, and when full compliance is expected to be achieved. Examples of non-compliance include: an agency may have excluded contracts; the list is not up to date; the list is incomplete; or not all relevant agencies have published a listing.

**2.22** The Senate Order allows for the details of certain contracts to be excluded from an agency's contract listing with notification of exclusion to be included in the Minister's letter of compliance. The Senate Order requests that the Auditor-General examine a number of the contracts identified as being excluded from agencies' contract listings and determine whether the exclusion

of those contracts was appropriate. For the 2013 calendar year reporting period the Ministers' letters indicated that eight agencies had excluded contracts from their listings. None of the Minister's letters for these agencies stated when full compliance was expected to be achieved.<sup>39</sup>

**2.23** Of the audited agencies, only the AFP had excluded contracts from its Senate Order contract listing. The ANAO reviewed the contract data and exclusion approvals for a sample of 20 of these contracts. The exclusion of these contracts was in accordance with the parameters set out in FMG 8.

**2.24** While performance has generally improved over previous years, some portfolio departments and agencies need to implement improved arrangements to support Ministers in their tabling of letters that accurately reflect the extent of agency compliance with the Senate Order.

### **Timeliness and accuracy of audited agencies' contract listings**

**2.25** The ANAO examined the four audited agencies' contract listings to assess the alignment of the published contract information with the information requested by the Senate Order. All four audited agencies' contract listings were published on their websites by the due date, with Ministers' letters confirming the publication of the listings for three of the agencies also tabled by the due date.<sup>40</sup> The ANAO's review is based on the initial publication, and does not reflect any subsequent corrections by agencies. The results of the ANAO examination are summarised in Table 2.6.

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39 FMG 8 Section 8 *The Minister's Letter of Compliance, Indication of Whether the Listing Does not Include Details of all Relevant Contracts*, provides the following example of the wording to be used in relation the exclusion of contracts and the advice required of when listings will be compliant: *The list for agency B is incomplete as two contracts have been excluded because listing would be against the public interest. Full compliance is expected to be achieved on [xx month year]—the first Internet listing that the contracts would not qualify for inclusion, in terms of the dates of the contracts. The Minister's Letter of Compliance, Indication of Whether the Listing Does not Include Details of all Relevant Contracts.*

40 DIBP advised that it was operating on the understanding that the Minister's letter was to be tabled by 'not later than the tenth day of the spring and autumn sittings' as stated in the 2001 version of the Order. Upon advice from the ANAO the process was corrected and the Minister's letter was tabled on 19 March 2014.

**Table 2.6: Compliance with Senate Order paragraph (2)(a)–(d): audited agencies**

Para	AFP	ASIC		DIBP
2(a) <i>(correct inclusion of contracts)</i>	Met	Included 17 contracts outside the relevant reporting period	Included four agency agreements	Included one contract under \$100 000
2(b) <i>(all basic contract details)</i>	Met	Met	Met	Met
2(c) <i>(valid reasons)</i>	Met	Met	Met	Not all reasons listed aligned with FMG8—for example 'commercially sensitive'
2(d) <i>(cost of compliance)</i>	Met	Met	Met	Met

Source: ANAO analysis of agencies 2013 calendar year contract listings as initially published.

**2.26** All of the audited agencies' published listings contained the required basic contract details for the reported contracts and clearly identified the relevant reporting period. All four agencies reported both the cost of compliance and a statement of the method used to calculate the cost in their listings. However, three of the four audited agencies' listings contained entries outside the requirements of paragraph (2)(a) of the Senate Order, due to the inclusion of agency agreements or contracts outside the reporting period or under the reporting threshold. A comparison of the four audited agencies contract listings with contract information reported on AusTender identified 88 'contracts' that had not been included in the audited agencies' 2013 contract listings. These 'contracts' turned out to be purchase orders, invoices or duplicate contract entries on AusTender. These discrepancies in reporting are discussed in further detail in Chapter 4.

## Conclusion

**2.27** The Senate Order aims to provide transparency in government contracting through making accessible the details of significant contracts. The timely tabling of Ministers' letters and contract lists facilitates this. This audit has found an overall improvement in relation to the timeliness of the tabling of Ministers' letters and the publication of agencies contract listings. Only a small number of entries were outside the information requirements of the Senate Order. The audit also observed that some agencies continue to publish reasons for the inclusion of confidentiality provisions in contracts that do not appropriately categorise the information to be protected.

**2.28** While the results of this audit show an overall improvement in compliance with the Senate Order, some agencies need to exercise additional care when compiling their listings to make sure that each of the requirements of the Order are addressed. In particular, agencies should check that the listings do not contain contracts outside the reporting period, and that the identification of and reasons provided for the use of confidentiality provisions are accurate prior to publication.

## 3. The Use of Confidentiality Provisions in Contracts

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*This chapter examines the reported use of confidentiality provisions in Australian Government contracts over time, and the appropriateness of the use and reporting of specific confidentiality provisions in a sample of contracts.*

### Background

**3.1** The Senate Order is underpinned by the principle that the Parliament and the public should not be prevented from accessing contract information unless there is a sound reason to do so. Once a contract has been awarded, the terms of the contract including parts of the contract drawn from the supplier's submission are not confidential unless the agency has determined and identified in the contract that specific information is to be kept confidential.<sup>41</sup> The need for confidentiality in contracts should be assessed on a case-by-case basis and balanced against public accountability requirements. The agencies' assessment of the suppliers' claims and the reasons for agreeing to the inclusion of confidentiality provisions should be documented.<sup>42</sup>

**3.2** To determine whether confidentiality provisions in contracts had been used appropriately and reported correctly, the ANAO examined:

- the reported use of confidentiality provisions in contracts over time based on each agencies' Senate Order contract listings; and
- the use of confidentiality provisions in a sample of the audited agencies' contracts.

**3.3** The inclusion of parliamentary disclosure and ANAO access clauses in the sample of contracts was also examined.

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41 Finance, *Commonwealth Procurement Rules*, July 2012, p. 22.

42 Finance, *Buying for the Australian Government, Confidentiality throughout the Procurement Cycle, Practice, Awarding a contract*, paragraph 13 [Internet].

## The reported use of confidentiality provisions in Australian Government contracts over time

3.4 The unjustified inclusion of confidentiality provisions in government contracts can have unintended consequences and reduce transparency through: unduly affecting agency decisions to release contract information; and misinforming the Parliament and the public about government contract information that they can or cannot access.

3.5 A summary of the number and value of contracts, and the reported use of confidentiality provisions, in agencies' contract listings for the 2011–13 calendar years is provided at Table 3.1.

**Table 3.1: Number and value of contracts, and the reported use of confidentiality provisions, as published in agency contract listings 2011–13**

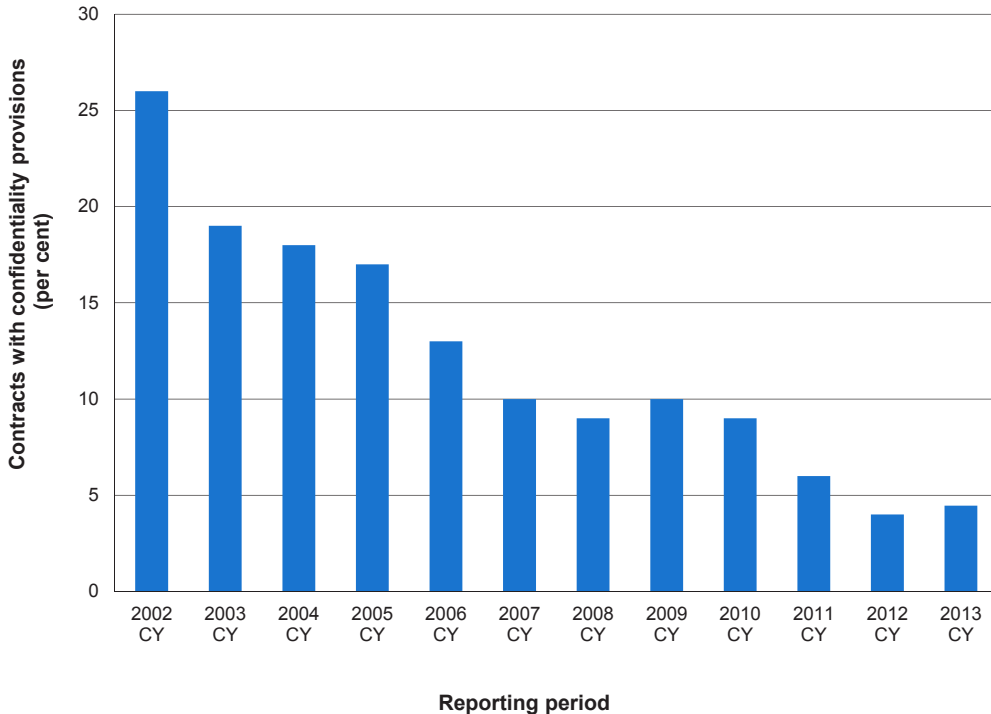
	2011	2012	2013
Number of FMA Act agencies that published a contract listing <sup>(a)</sup>	93	98	101
Total number of contracts listed	39 223	42 536	30 696
Total value of contracts listed (\$ billion)	\$156.5	\$199.7	\$189.2
Total number of contracts identified as containing confidentiality provisions	2 391	1 703	1 369
Total value of contracts with identified confidentiality provisions (\$ billion)	\$21.90	\$21.87	\$16.9
Percentage of contracts with identified confidentiality provisions	6.1%	4.0%	4.5%

Source: ANAO analysis.

Note (a): Number of agencies that had published contract listings for the: 2011 calendar year reporting period as at 30 April 2012; for the 2012 calendar year reporting period as at 1 June 2013; and for the 2013 calendar year reporting period as at 14 March 2014.

3.6 Reporting by agencies through contract listings indicates that the use of confidentiality provisions in contracts in the 2013 calendar year has remained low at 4.5 per cent. This is in keeping with the 2012 calendar year reporting period. This trend is depicted in Figure 3.1.

**Figure 3.1: Proportion of contracts reported as containing confidentiality provisions: calendar years 2002–13**



Source: ANAO analysis of agencies' Senate Order contract listings.

3.7 The low level of reported use of confidentiality provisions indicates that scrutiny and accountability of government expenditure is less likely to be impeded by assertions of commercial sensitivity or confidentiality than when the Order was first introduced.

## Use of confidentiality provisions by audited agencies

### Types of confidentiality provisions

3.8 There are broadly two types of confidentiality provisions:

- those that make specific information contained in the contract confidential (referred to in the Order as 'provisions requiring the parties to maintain confidentiality of any of its provisions'); and
- those that protect the confidential information of the parties that may be obtained or generated in carrying out the contract but cannot be

specifically identified when the contract is entered into (referred to in the Order as ‘other requirements of confidentiality’).<sup>43</sup>

**3.9** Provisions that protect the confidential information of the parties that may be obtained or generated in carrying out the contract are generally in the form of standard or model provisions (clauses). These standard provisions establish general expectations in relation to how any confidential information of the parties will be handled. As most government contracts contain standard confidentiality provisions, agencies generally use an overarching statement advising of the existence of, and reasons for, the inclusion of such provisions.<sup>44</sup> Table 3.2 provides examples of the differences between specific and general confidential information.

**Table 3.2: Examples of specific and general confidentiality requirements in contracts**

Specific	General
<ul style="list-style-type: none"> <li>• Price discount information</li> <li>• Specific contract information, related to statutory secrecy provisions</li> <li>• Agency security arrangements, including floor plans</li> <li>• The contractor’s tools, proprietary methodologies and processes</li> </ul>	<ul style="list-style-type: none"> <li>• All information and Commonwealth material</li> <li>• All the agencies policies, instructions or business strategies</li> <li>• All pre-existing intellectual property of the contract</li> <li>• Information or documents that are marked confidential or are by their nature confidential</li> </ul>

Source: ANAO from audited agencies’ contracts.

### The appropriate use of confidentiality provisions in a sample of contracts

**3.10** The Senate Order requests that the Auditor-General provide an annual report to the Senate on the appropriateness of the use of confidentiality provisions in a sample of contracts identified as containing confidentiality provisions. In order to undertake this assessment, the ANAO had regard to Finance’s current guidance, *Buying for the Australian Government, Confidentiality*

43 To assist in the simplification of reporting, FMG 8 provides an example of an overarching statement that agencies may use to report on the existence of, and the reasons for, the use of standard confidentiality provisions of a general nature in contracts. Agencies will only need to include entries contract provision(s) are not covered by the overarching statement’. Finance, FMG 8, Section 7 *Identification and Treatment of Confidential Contract Information, Presentation of Confidentiality—Related Information on the Internet Listing* [Internet].

44 *ibid.*



throughout the Procurement Cycle. The Confidentiality Test outlined in this guidance establishes four criteria (as shown in Table 3.3), all of which must be met for a supplier’s information to be considered confidential.

**Table 3.3: The Confidentiality Test**

<b>Criterion 1: The information to be protected must be specifically identified</b>
A request for inclusion of a provision in a contract that states that all information is confidential does not pass this test. Individual items of information, for example pricing, must be separately considered. However, where an agency contract may be used for future cooperative procurements agencies generally should not include provisions that would prevent other Commonwealth agencies from accessing the terms and conditions, including pricing of the contract.
<b>Criterion 2: The information must be commercially ‘sensitive’</b>
The information should not generally be known or ascertainable. The specific information must be commercially ‘sensitive’ and it must not already be in the public domain. A request by a potential supplier to maintain the confidentiality of commercial information would need to show that there is an objective basis for the request and demonstrate that the information is sensitive.
<b>Criterion 3: Disclosure would cause unreasonable detriment to the owner of the information or another party</b>
A potential supplier seeking to maintain confidentiality would normally need to identify a real risk of damage to commercial interests flowing from disclosure which would cause unreasonable detriment. For example, disclosure of Internet price lists would not harm the owner, but disclosure of pricing information that reveals a potential supplier’s profit margins may be detrimental.
<b>Criterion 4: The information was provided under an understanding that it would remain confidential.</b>
This 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 would be maintained. The terms included in request documentation and in draft contracts will impact on this. For example, a request for tender and draft contract which included specific confidentiality provisions would support an assertion by a potential supplier that the agency has agreed to accept information on the understanding that it would remain confidential.

Source: Finance, *Confidentiality throughout the Procurement Cycle*.<sup>45</sup>

## Appropriateness of the use and reporting of confidentiality provisions

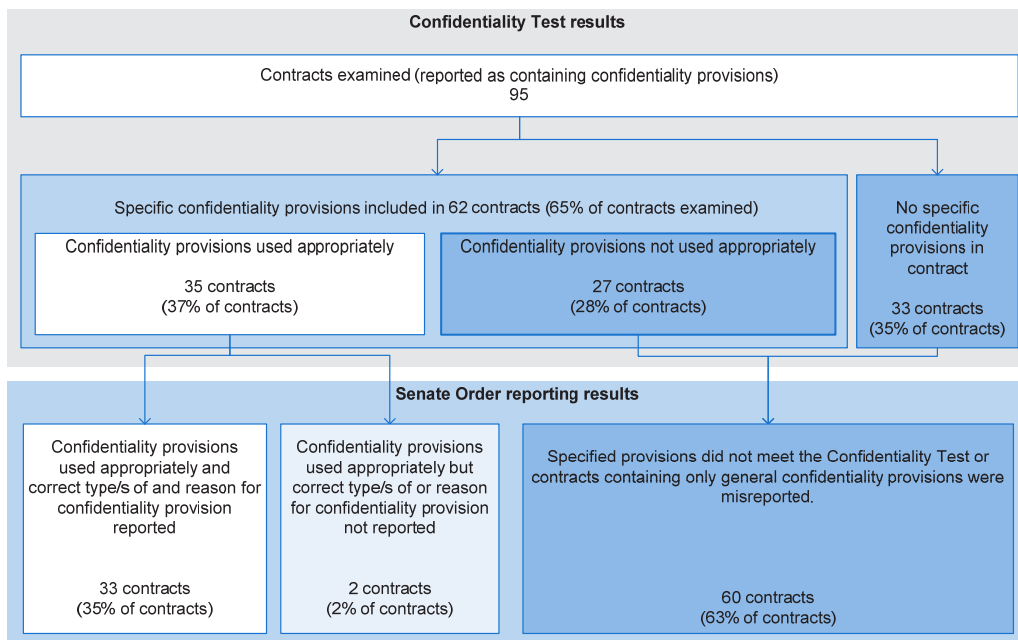
**3.11** The ANAO selected a sample of 95 contracts that had been reported by the four audited agencies in their contract listings or on AusTender as

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45 Finance, *Buying for the Australian Government, Transparency in Procurement, Confidentiality Throughout the Procurement Cycle, Practice, Awarding a contract*, paragraph 9 [Internet].

containing confidentiality provisions. The results of the ANAO’s analysis, based on the application of the Confidentiality Test to the reported confidentiality provisions, are shown in Figure 3.2 and discussed in the following sections of this chapter.

**Figure 3.2 Contract analysis result: appropriateness of the use and reporting of confidentiality provisions**



Source: ANAO analysis. Areas of incorrect reporting and/or use of confidentiality provisions are shown with dark blue shading.

**3.12** Of the total of 95<sup>46</sup> contracts examined, 33 had no specific confidentiality provisions identified within them although the agencies had reported they did. Of the remaining 62 contracts which did have specific confidentiality provisions identified, 27 contained confidentiality provisions which, when considered against the criteria of the Confidentiality Test, had not been used appropriately.<sup>47</sup> Specific examples are discussed in the next two sections.

46 These 95 contracts were in addition to the 20 AFP contracts that were examined to determine the appropriateness of their exclusion from the agency’s 2013 calendar year Senate Order contract listing.

47 The confidentiality provisions contained in all 20 of the APF contracts examined were assessed as meeting the criteria of the Confidentiality Test and were therefore considered to be used appropriately.

### **Confidential information in the contract is specifically identified (Criterion 1 and Criterion 4 of the Confidentiality Test)**

**3.13** For a contract to be assessed as meeting Criterion 1 of the Test, at least one contract provision must specifically identify the information that is to be protected.<sup>48</sup> However, as shown in Figure 3.2 above, only 62 of the 95 contracts examined contained provisions that specifically identified the information that was to be protected. The remaining 33 contracts had no specific confidentiality provisions identified. Most of the contracts examined were prepared using templates that contained a section to separately list the confidentiality requirements of the contract. Despite the confidentiality requirements section stating 'nil' or 'none specified', 14 of these 33 contracts had still been reported as containing confidentiality provisions.

**3.14** The ANAO's sample of contracts also contained six contracts for the provision of legal services that were assessed as not meeting Criterion 1 of the Test. These six contracts provide an example of how the existence and use of provisions is commonly misunderstood and/or misreported by agencies. Most of the information relating to the legal matters covered by the contracts would be confidential and subject to legal professional privilege as and where appropriate. This type of information is generally covered by standard confidentiality provisions that protect the confidential information of the parties that may be obtained or generated in carrying out the contract. Each of the contracts examined was reported to contain confidential information requiring protection on the basis of public interest or national security. None of the six contracts specified the information that was to be protected in accordance with Criterion 1 of the Confidentiality Test. The ANAO's examination did not identify any information in the contracts that would warrant protection on the basis of public interest or national security as reported.

**3.15** The ANAO has previously observed that agencies having an internal review process in place, such as the examination of a small number of contracts each year, to verify the appropriateness and accuracy of recorded contract information prior to publication, would assist detect areas where further

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48 The ANAO considers Criterion 4 to be met if Criterion 1 is met. This is based on an assumption that where a contract specifically identifies the information to be protected and has been signed by both parties then both parties understand and agree that the information is to remain confidential.

education on the identification and use of confidentiality provisions may be required.

### **Information is commercially sensitive and would cause detriment if made public (Criterion 2 and Criterion 3 of the Confidentiality Test)**

**3.16** The Confidentiality Test states that for information to be considered confidential it must be commercially sensitive and the disclosure of the information would cause detriment to the owner of the information or another party. This type of information would not normally be in the public domain. Examples of information that may be included in contracts requiring protection through the use of confidentiality provisions include:

- pricing information that would reveal a suppliers' cost or profit margins;
- unique industrial processes, formulae, product mixes, customer lists, engineering and design drawings and diagrams, and accounting techniques;
- personal information requiring protection under the *Privacy Act 1988*; and
- information of a nature that should be protected on the basis of public interest or under statutory secrecy provisions.<sup>49</sup>

**3.17** The ANAO assessed the 62 contracts (from the sample of 95) which had specifically identified the information to be protected through the use of confidentiality provisions against Criteria 2 and 3 of the Confidentiality Test. Of these 62 contracts, 35 were assessed as meeting Criteria 2 and 3 of the Confidentiality Test. The 27 contracts assessed as not meeting these criteria displayed the following characteristics:

- fifteen contracts claimed protection of supplier costing/profit information, but the contracts did not contain pricing information which revealed the supplier's internal costs or profit margins;

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49 Finance, FMG 8 Section 7: *Identification and Treatment of Confidential Contract Information, Standard Types of Confidential Information* [Internet].

- three contracts claimed protection of intellectual property but did not contain information on particular technical or business solutions that would be considered to constitute intellectual property; and
- nine contracts claimed confidentiality under the *Privacy Act 1988*, but did not contain information of a personal nature as described by the Act.

**3.18** The assessment of the contracts showed a high incidence of contracts being incorrectly reported as containing confidential information where no such information was present and, in particular, listing costing/profit information as the reason for confidentiality. In relation to claims for the confidentiality of pricing information Finance's guidance observes:

Each request for confidentiality of pricing information should be considered on its merits.

Generally, the fact that disclosing pricing information would make life more difficult for the supplier is not sufficient reason. For example, a potential supplier may claim confidentiality on the basis that it does not want its competitors to know its prices. However, transparency of such information could, potentially, lead to increased competition and better value for money outcomes for the Government.<sup>50</sup>

**3.19** If the elements of the pricing contained in the contract would, however, disclose underlying costs and profit on the goods and services or other commercially sensitive information such as special discounts, a potential supplier may legitimately claim that the information is confidential.<sup>51</sup> The ANAO considered that the rates and prices contained in the 16 contracts assessed as not meeting Criteria 2 and 3 of the Test did not reveal the supplier's internal costs or profit margins. Finance's guidance advises that the agency's assessment of the supplier's claims and the reasons for agreeing to the inclusion of confidentiality provisions should be documented. The audited agencies were not able to provide documentation supporting their assessment of, and reasons for, agreeing to the suppliers' claims for the contract prices or rates to remain confidential in these instances.

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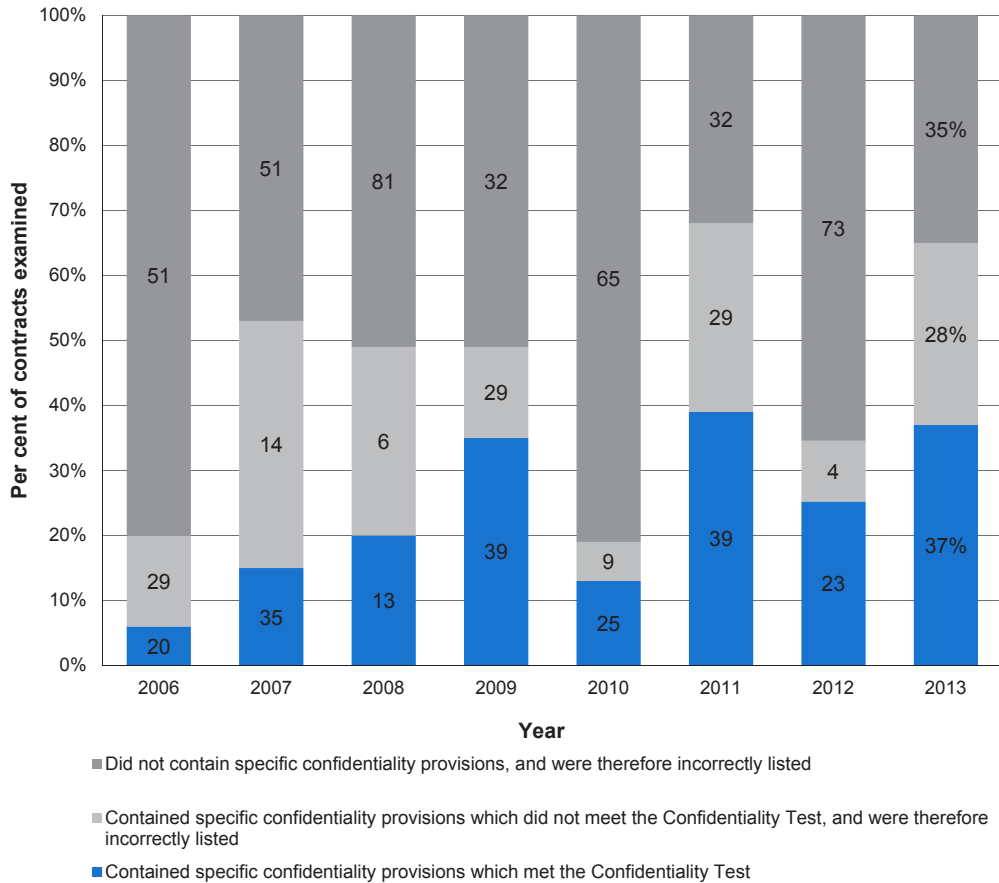
50 Finance, *Buying for the Australian Government, Confidentiality Throughout the Procurement Cycle, Tips, Pricing Information*, paragraphs 8 and 9 [Internet].

51 Finance, *Buying for the Australian Government, Confidentiality Throughout the Procurement Cycle, Tips, Price of individual items or groups of items*, paragraph 13 [Internet].

## Trends in the use of confidentiality provisions

3.20 Each of the ANAO’s audits of the Senate Order since 2006 have identified that fewer than 40 per cent of contracts examined have contained specific confidentiality provisions that met the Confidentiality Test criteria. The trends in the use of confidentiality provisions are shown in Figure 3.3.

**Figure 3.3: Trends in the appropriate use of confidentiality provisions in contracts over time**



Source: ANAO analysis.

Note: Percentages may not add up to 100 per cent due to rounding.

3.21 The results of this audit of the Senate Order indicate that there continues to be a high level of misunderstanding and misreporting by agencies of the type(s) of confidentiality provisions and reason(s) for their use. While each of the audited agencies maintained sufficient guidance in this regard

(including providing clear links to Finance's guidance), it is apparent that the level of staff understanding of the requirements in three of the four agencies could improve. In accordance with Finance's guidance, decision makers documenting their assessment of suppliers' claims against the Confidentiality Test, and their reasons for agreeing to the inclusion of confidentiality provisions would assist in this regard.<sup>52</sup> Agencies should improve practical support for staff, such as providing decision flow charts and examples relevant to their agency's work, and encouraging staff to apply them.

## Recommendation No.1

**3.22** To provide for greater transparency and accountability in reporting on the use of confidentiality provisions in Australian Government contracts, the ANAO recommends that agencies improve practical support provided to staff to more accurately assess and report on confidentiality provisions in contracts.

### Australian Federal Police

**3.23** *Agreed.*

### Australian Securities and Investment Commission

**3.24** *Agreed, while ASIC currently has comprehensive instructions on how to deal with confidentiality in contracts, as a result of the ANAO audit has commenced providing face to face information sessions to key staff in business units responsible for reporting to help them better understand the requirements. ASIC has also put in place a process for the CPU to review AusTender reporting information before it gets published in AusTender and in the Senate Order report.*

### Department of Communications

**3.25** *Agreed.*

### Department of Immigration and Border Protection

**3.26** *Agreed. The department considers that the audit has been useful in focusing attention on aspects of contract reporting where improvements can be made through better procedures, training and guidance. The department is currently developing*

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52 *Financial Management Guidance No.8 (FMG 8)—Listing of Contract Details on the Internet Meeting the Senate Order on Departmental and Agency Contracts* requires agencies to have regard to Finance's web-based guidance, *Buying for the Australian Government, Confidentiality Throughout the Procurement Cycle, Practice*, which advises that [t]he reasons for agreeing to any confidentiality provisions should be documented by the agency', paragraph 13.

guidance material for staff to more accurately understand, implement, and report on confidentiality provisions in contracts. This material will be supported by advice and support on confidentiality provisions by specialists within the department.

## Parliamentary disclosure and ANAO access clauses

**3.27** In entering into a contract, the Australian Government cannot provide an absolute guarantee of confidentiality. This is due to a number of obligations whereby the Government is required to disclose information, regardless of any contractual obligations to maintain confidentiality. These may include for example, disclosure of information consistent with the *Freedom of Information Act 1982* or disclosure of discoverable information that is relevant to a case before a court. In addition, agencies may be required to facilitate the disclosure of, or access to, contractual information by the Parliament, its committees, and the Auditor-General to comply with accountability obligations.<sup>53</sup> These obligations help ensure agencies conduct procurements in a manner that supports the Australian Government's commitment to accountability and transparency in procurement activities.

**3.28** The inclusion of information disclosure and access clauses in contracts assists agencies in informing contractors about the fact that there is no absolute guarantee of confidentiality of information. Accordingly, Australian Government contracts should contain clauses that provide, regardless of contract confidentiality, for:

- disclosure of contract-related information to the Parliament or parliamentary committees; and
- access by the ANAO to a contractor's records and premises.<sup>54</sup>

**3.29** Of the 95 contracts examined by the ANAO, 82 per cent contained appropriately worded<sup>55</sup> parliamentary disclosure clauses, and 83 per cent included ANAO access clauses (see Table 3.4).

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53 Finance, *Buying for the Australian Government, Transparency in Australian Government Procurement, Traps*, paragraph 1 [Internet].

54 Division One of the *Commonwealth Procurement Rules* provides that where relevant, contracts include a provision to enable the Australian National Audit Office to access contractors' records and premises. The *Auditor-General Act 1997* (section 18B), gives the Auditor-General the authority to audit Commonwealth Partners, including state and territory bodies and contractors that receive money for a Commonwealth purpose. Finance, *Commonwealth Procurement Rules*, 1 July 2012, p. 23, and the *Financial Framework Legislation Amendment Act (No. 1) 2012*.



**Table 3.4: Parliamentary and ANAO access clauses**

Agency	No. of contracts examined	Parliamentary disclosure clauses		ANAO access clauses	
		No.	%	No.	%
AFP	20	20	100	20	100
ASIC	25	14	56	13	52
DoC	25	20	80	22	88
DIBP	25	24	96	24	96
<b>Total</b>	<b>95</b>	<b>78</b>	<b>82</b>	<b>79</b>	<b>83</b>

Source: ANAO analysis.

**3.30** All four of the audited agencies’ standard contract templates contained appropriately worded parliamentary disclosure clauses and also included ANAO access clauses. Consistent with the findings of previous ANAO audits, where disclosure clauses were not included in the contracts examined, the agency’s standard contract template had generally not been used. The low proportion identified at ASIC was primarily due to the inclusion of a large number of contracts for the provision of legal services in the ANAO’s contract sample. These contracts were generally in the form of legal briefing letters. While stating agency obligations in relation to publishing the contract details on the Senate Order contract listings and requirements under the *Legal Services Directions 2005*, the letters did not routinely contain disclosure or access clauses. There can be various reasons agencies may use non-standard contract templates. However, agencies should have in place procedures and guidance to make certain that disclosure and, where appropriate, access clauses are included in the contract terms and conditions of all contracts issued.

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55 The ANAO assessed contracts as containing appropriately worded clauses where they contained clauses that were similar to the model clauses provided in Finance’s guidance.

## Conclusion

**3.31** Confidentiality provisions in Government contracts can impede scrutiny and accountability of government expenditure and they should only be used when there is a sound basis for doing so. The proportion of contracts reported as containing confidentiality provisions in the 2013 calendar year was low and in keeping with 2012 levels. Nevertheless, where confidentiality provisions were applied it was not necessarily on a sound basis.

**3.32** The ANAO's audits have shown that the level of quality assurance of the contract information and the use of confidentiality provisions varies from agency to agency. Agencies' Central Procurement Units could take a more active role in checking the use or application of confidentiality provisions prior to publication. Such processes would assist in informing where additional training and support is required and would enable corrections to be made where necessary to contractual information prior to publication.

## 4. The Senate Order and AusTender

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*This chapter examines the consistency of the audited agencies' reporting of contract information in the Senate Order contract listings and on AusTender.*

### Background

**4.1** In addition to the Senate Order, agencies have a number of other reporting requirements for Australian Government contracts and grants.<sup>56</sup> In particular, since September 2007, agencies have been required to publish on AusTender details of all procurement contracts and agency agreements entered into valued at \$10 000 or above. This reporting threshold is much lower than the \$100 000 or above threshold for the Senate Order. AusTender's reporting requirements also oblige agencies to identify the existence of confidentiality provisions in contracts and the reason(s) for the inclusion of the provisions.

**4.2** While AusTender reporting covers procurement contracts and agency agreements (the majority of government contracts fall under these categories), the Senate Order also requires agencies to report on non-procurement contracts such as lease arrangements, sales contracts and, when executed in the form of a contract, certain grants and funding agreements. While the two reporting mechanisms have differing requirements, there is a degree of overlap in the information reported creating the need for a duplication of effort by agencies.

**4.3** The contract information reported by agencies on AusTender provides the basis of Finance's *Statistics on Australian Government Procurement Contracts*, published on Finance's website each year,<sup>57</sup> and is also used as a basis for policy development based on the actual goods and services purchased by government.<sup>58</sup>

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56 These requirements are set out in the Department of the Prime Minister and Cabinet—*Requirements for Annual Reports, for Departments, Executive Agencies and FMA Act Bodies*, PM&C, Canberra, 24 May 2014.

57 Finance, [Internet] available from <<http://www.finance.gov.au/procurement/statistics-on-commonwealth-purchasing-contracts/>>.

58 For example, an analysis of the government procurement market's impact on the Australian economy using AusTender data for 2010–11 and 2011–12 was published on the Australian Government open data website, data.gov.au. See Department of Finance, Data Mining and Analysis of AusTender Data 2011–12, February 2013 [Internet], available from <<http://www.finance.gov.au/sites/default/files/austender-data-analysis-2011-12.pdf>> [accessed July 2014].

This information is also used by suppliers and other stakeholders to monitor government business opportunities. Previous ANAO audits have identified that shortcomings in Senate Order contract reporting and inconsistencies in contract information across the Senate Order and AusTender were partly the result of the differing procurement reporting requirements.

**4.4** As noted in Chapter 1 (paragraphs 1.12 to 1.15), the Senate is expected to consider changes to the Senate Order following an inquiry by the Finance and Public Administration References Committee (the Committee). These considerations include potential amendments to the Order to address the duplication of reporting of procurement contracts on AusTender and the Order.<sup>59</sup> AusTender provides users with a facility to generate various reports drawing on the contract information reported by agencies. One of these is the *Senate Order on Confidentiality in Procurement Contracts* report. Finance has proposed to the Committee that, through this reporting function, agencies could fulfil their Senate Order contract reporting requirements for procurement contracts.

**4.5** To assess the reliability of the procurement contract information reported in agencies' contract listings and on AusTender, the ANAO examined the consistency of the four audited agencies' reporting of contract information, including the use confidentiality provisions, across both reporting arrangements. The ANAO also examined the accuracy of the contract information reported for the 95 contracts included in the audit sample.

## Compiling Senate Order and AusTender information

**4.6** Each of the four audited agencies had a decentralised approach to procurement, whereby procurement and contract management were the responsibility of individual divisions or business areas. The agencies also had Central Procurement Units (or equivalent), which were responsible for the provision of procurement advice and the coordination and publication of the agencies' contract information on the contract listings and on AusTender. The agencies maintained procurement guidance and templates available through their Intranet sites, and referenced Finance guidance as appropriate and local Senate Order reporting procedures.

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59 The Senate, Finance and Public Administration References Committee report, *Senate order for departmental and agency contracts*, May 2014 pp. 2 and 21.

## Compiling Senate Order contract listings

4.7 At each of the audited agencies, the compilation of the contract listings was a manual process using data extracted from the agencies' Financial Information Management System (FMIS), grant management system and/or AusTender. The data was usually entered into the FMIS (or provided for entry into the FMIS) by the division or business area responsible for the procurement. The data from these systems was combined into a spreadsheet and manually sorted to identify contracts which met the Senate Order's reporting criteria. The processes reviewed at three of the four audited agencies did not include a mechanism to capture and report on sales or employment type contracts in their listings as required by the Order.<sup>60</sup>

4.8 While each of the audited agencies had established procedures for recording and reporting contract information, including the information required by the Senate Order, three of the four audited agencies did not have formal processes in place to verify the accuracy or completeness of the information reported. At each of the audited agencies, the Central Procurement Units performed only a limited check in terms of reviewing contract details and, due to resource limitations, would only look into the details of a contract if expressly requested by the line area or if an obvious error was observed. With the exception of the AFP, none of the audited agencies routinely reviewed the internally reported use of confidentiality provisions by divisions or line areas to determine whether the use of the provisions was appropriate or accurately recorded.

## Reporting contract information on AusTender

4.9 As with the reporting requirements of the Senate Order, for each contract reported, the agency must report the supplier, subject matter, period and total value (or estimated value) of the contract on AusTender. Where contracts do not contain a total specified value, for example demand driven contracts that may span several years, agencies are required to report the total estimated whole-of-life value contract, not the yearly value or the value of

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60 The AFP advised it does not have revenue or employment contracts that it needs to capture.

individual invoices or purchase orders.<sup>61</sup> This approach applies even where, following a single approach to market, an agency enters into multiple contracts with multiple suppliers for the provision of the particular goods or services sought.

**4.10** The ANAO observed that, in some instances, rather than agencies entering the total (or estimated whole-of-life value) of the contract, they relied on data from the agency’s FMIS (or equivalent) to create a file to ‘batch’ upload to AusTender. As a result multiple ‘contract’ notices reflecting purchase order or invoice values were published on AusTender distorting the actual number and value of the contracts reported. An example of the types of discrepancies observed is shown in Box 4.1.<sup>62</sup>

**Box 4.1**  
**Discrepancies in contract reporting in Senate Order contract listings and on AusTender**

Following an open approach to market, one of the audited agencies entered into multi-year contracts with 22 individual suppliers with a combined estimated value of \$55 million. The agency did not estimate or report on AusTender the value of each individual contract.

The agency’s reporting of the contracts on AusTender was a combination of estimated yearly contract amounts and payments against purchase orders or invoices as uploaded from the agency’s FMIS. The various reporting approaches resulted in multiple and duplicated contract notices being published on AusTender—none of which clearly showed the actual values of the contracts entered into. The ANAO observed that:

- in AusTender (partially through batch uploads), the agency created a total of 119 individual contract notices across the 22 individual suppliers with a combined value of approximately \$146 million; whereas
- in the 2013 calendar year Senate Order contract listing, the agency reported 27 individual contracts (each over \$100 000 with a combined value of \$155 million), across 18 suppliers.

In a number of instances, the contracts were reported as containing confidentiality provisions on one but not the other reporting mechanism, or different type(s) or reason(s) for the provisions were reported.

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61 For example, an agency may enter into a contract for the provision of cleaning services or similar. The contract may specify a monthly or yearly value for standard daily services; but also contain options for additional or as needed services, with an agreed fee or rate for each additional service specified in the contract. In this instance the agency would be required to estimate how often such additional services are likely to be required, and factor in the approximate additional cost when reporting the total estimated value of the contract.

62 In some instances, contract notices may be linked through the agencies' approach to market identification number or through an agency reference identification number where available. It is not mandatory however, for agencies to provide these references when publishing contract notices.

## Consistency and accuracy of reporting

**4.11** The ANAO compared the procurement contract information reported by the audited agencies' in their 2013 calendar year Senate Order contract listings with the procurement contract information reported on AusTender covering the same reporting period. The examination included two aspects:

- analysis of whether all the procurement contracts included in the agencies' 2013 calendar year contract listings were also published on AusTender; and
- a comparison of whether the use of confidentiality provisions as reported in agencies' 2013 calendar year contract listings had been similarly identified and reported on AusTender.

**4.12** The analysis was of the information contained in the audited agencies' 2013 contract listings (as initially published), and data extracted from AusTender on 4 March 2014 covering the same reporting period.<sup>63</sup> As discussed in paragraph 2.26, a number of the published entries on AusTender were later identified as purchase orders, invoices or duplicate contracts. The ANAO also examined the reporting of the 95 contracts included in the audit sample to determine whether the contract details were accurately and consistently reported in the contract listings and on AusTender. However, the results of this audit are not directly comparable to previous years' results as each audit has examined a different sample of contracts from different agencies.

## Consistency of reporting contract details

**4.13** Of the 1817 contracts reported in the Senate Order contract listings by the four audited agencies, 1455 were procurement contracts and as such, were required to be reported on AusTender. Of these 1455 contracts, 1374 (94 per cent) with a combined value of \$1.05 billion (98 per cent of the total value reported) had a corresponding AusTender entry (see Table 4.1).

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63 The audited agencies' Senate Order contract listings were published between 21 January 2014 and 28 February 2014. Agencies have 42 days from the commencement of a contract to report the detail of the contract on AusTender. Agencies may also make retrospective changes to AusTender data.

**Table 4.1: Consistency of reporting in Senate Order contract listings and on AusTender for the 2013 calendar year reporting period**

	AFP	ASIC	DoC	DIBP	Total	
					No.	%
Number of procurement contracts with a corresponding AusTender entry	359	228	133	664	1 374	94%
Number of procurement contracts with no corresponding AusTender entry	5	2	2	72	81	6%
<b>Total number</b>	<b>364</b>	<b>230</b>	<b>135</b>	<b>736</b>	<b>1 455</b>	<b>100%</b>
Value of contracts with a corresponding AusTender entry (\$ millions)	\$172	\$185	\$515	\$9 647	\$10 519	98%
Value of procurement contracts without a corresponding AusTender entry (\$ millions)	\$2	\$1	\$1	\$162	\$166	2%
<b>Total value (\$ millions)</b>	<b>\$174</b>	<b>\$186</b>	<b>\$516</b>	<b>\$9 809</b>	<b>\$10 685</b>	<b>100%</b>

Source: ANAO analysis.

Note: As discussed in paragraph 2.26, a number of the published entries on AusTender were later identified as purchase orders, invoices or duplicate contracts entries.

## Consistency of reporting of confidentiality provisions

**4.14** As previously discussed, there are broadly two types of confidentiality provisions: those that make specific information contained in the contract confidential; and those that protect the confidential information of the parties that may be obtained or generated in carrying out the contract. The ANAO analysed the audited agencies' reported use of confidentiality provisions across each corresponding contract entry in the agencies' contract listings and on AusTender to determine the extent to which the existence of, and the type(s) and reason(s) for, the confidentiality provisions was consistently reported. As shown in Table 4.2, the reporting in relation to provision type(s) in the contract listings and on AusTender matched for 1465 (92 per cent) of the corresponding contracts. The reporting of the reason(s) for the inclusion of confidentiality provisions matched for 1442 (90 per cent) of the contracts.



**Table 4.2: Comparison of reported confidentiality provision types and reasons**

	AFP	ASIC	DoC	DIBP	Total	
					No.	%
<b>The type of confidentiality provision(s) matched for:</b>						
Both provision types	353	217	116	779	<b>1465</b>	<b>92%</b>
One provision types	6	10	0	15	<b>31</b>	<b>2%</b>
Neither provision type	5	3	19	75	<b>102</b>	<b>6%</b>
<b>Total</b>	<b>364</b>	<b>230</b>	<b>135</b>	<b>869</b>	<b>1598</b>	<b>100%</b>
<b>The reported reasons for confidentiality provision(s) matched for:</b>						
Both provision types	351	199	92	800	<b>1442</b>	<b>90%</b>
One provision types	10	27	29	48	<b>126</b>	<b>8%</b>
Neither provision type	3	4	14	21	<b>49</b>	<b>3%</b>
<b>Total</b>	<b>364</b>	<b>230</b>	<b>135</b>	<b>869</b>	<b>1598</b>	<b>101%</b>

Source: ANAO analysis of Senate Order and AusTender reporting.

Note 1: Percentages may not add to 100 per cent due to rounding.

Note 2: As discussed in paragraph 2.26, a number of the published entries on AusTender were later identified as purchase orders, invoices or duplicate contract entries.

**4.15** As with previous audits, the ANAO's analysis of the reported contract information showed gaps and inconsistencies between the number and value of contracts reported in the contract listings and on AusTender.<sup>64</sup> Similarly the types of confidentiality provisions, and the reported reasons for their use, were not always consistently reported. The ANAO considers there would be merit in agencies strengthening data input and quality controls to support more complete and accurate contract reporting. It may be beneficial for agencies to review contract data for a small sample of contracts each year, to identify any discrepancies and inform improvements in data input and reporting.

## Accuracy of reporting

**4.16** In addition to the comparisons of the data reported on Senate Order contract listings and on AusTender, the ANAO examined the accuracy of the four audited agencies' reporting of the 95 contracts examined as part of the

64 As the ANAO's audits on agencies' compliance with the Senate Order have covered different agencies and different contracts it is not possible to provide a year on year or trend comparison of these results.

audit. Each of the contracts in the sample had been reported in either the agencies' contract listing or on AusTender to include specific confidentiality provisions to protect information contained in the contracts.

4.17 In order to be assessed as being correctly reported the basic contract details (contractor, subject matter, amount and period) and the correct identification of the type and reasons for confidentiality provisions were all required to match the information contained in the contracts reviewed. Based on these criteria, as shown in Table 4.3, less than 35 per cent of the 95 contracts were considered to be correctly reported.

**Table 4.3: Accuracy of reported contract information**

	AFP <sup>(a)</sup>	ASIC	DoC	DIBP	No.	%
Number of contracts examined	20	25	25	25	95	–
Number of contracts correctly reported in the Senate Order contract listing	20	4	6	2	32	34%
Number of contracts correctly reported on AusTender	20	4	2	1	27	28%

Source: ANAO analysis.

Note (a): Where deeds of standing offer are used to establish a panel, those deeds are collectively reported on AusTender as a standing offer arrangement. Agencies are not required to report a value against standing offers reported in AusTender, however, individual contracts over \$10 000 entered into under the arrangements must be reported. The AFP advised that as the majority of the individual procurements under the standing offer arrangement would be under the reporting threshold of \$10 000, an estimate of whole-of-life value of the contracts was reported on AusTender to enhance transparency. These estimated amounts were appropriately not included on the Senate Order contract listings as they were not actual contracts over \$100 000.

4.18 These results reflect errors in both the contract details reported and the misreporting of the existence of, and the type and reasons for, confidentiality provisions in the contracts examined. Differences between the guidance for the Senate Order, and that for AusTender are likely to be a contributing factor in some cases—for example, amendments made to contracts where these contracts are valued at or above the reporting threshold<sup>65</sup> must be reported on AusTender. Amendments under the thresholds—even if such amendments add up to or above the relevant threshold—are not required to be reported. If the cumulative values of contract amendments are not reported, the current total value of the contract would not be shown on AusTender. For example, an agency may enter into a contract for \$95 000 which would not be required to be

65 Finance, *Commonwealth Procurement Rules* 2012, section 7.16, p. 22.

included on the agency's Senate Order contract listing. The contract is subsequently amended by \$9 000. The agency is not required to publish this amendment on AusTender. However, as the total value of the contract is now \$104 000 the contract should be included on the agency's Senate Order contract listing for the relevant period.

**4.19** The Guidance also states 'agencies are encouraged to use their discretion to determine whether other changes in contract details (these may include start/end dates or supplier details) will be of sufficient interest to stakeholders to warrant amendment'. These variances in contract reporting requirements may account for differences noted by the ANAO in relation to the published contract values and/or start and end dates between agencies' Senate Order contract listings and on AusTender.

**4.20** Finance is currently developing a reporting function designed to allow AusTender to automatically generate reports in line with the requirements of paragraph (2) of the Senate Order. As shown by the examples above, however, agencies will need to address their AusTender reporting processes to make sure that the correct contract information is being uploaded into AusTender to meet their contract reporting requirements for both AusTender and in terms of the Senate Order.

## **Recommendation No.2**

**4.21** To increase accuracy in reporting of contract information, the ANAO recommends that agencies improve data capture and reporting for their Senate Order contract listings and on AusTender.

### **Australian Federal Police**

**4.22** *Agreed.*

### **Australian Securities and Investment Commission**

**4.23** *Agreed, as noted above [see paragraph 3.24], ASIC has put in place a process for the CPU to review AusTender reporting information before it gets published in AusTender and in the Senate Order report. ASIC has also recently implemented a Contract Management System (CMS) that includes the key AusTender reporting information on each contract record which will improve ASIC's ability to capture and report its contracts.*

**4.24** ASIC fully supports the trial to expand the use of AusTender to support the Senate Order report which in our view will not only reduce the administrative effort associated with reporting but also reduce inconsistencies currently experienced across the two reports by having a single source of information on government contracts.

### **Department of Communications**

**4.25** Agreed.

### **Department of Immigration and Border Protection**

**4.26** Agreed. The department is committed to ensuring that contract information is accurately reported both within their Senate Order listing and on AusTender. The department will continue to review and amend, if required, contract information published on AusTender weekly including the reporting of confidentiality provisions.

**4.27** The department has also undertaken a project to review all contract data previously published on AusTender including supplier names, reporting of confidentiality provisions, contract dates and ensuring that all contracts are reported under parent contract notices.

**4.28** The project, which is expected to be completed by the end of October 2014, and ongoing review activities will place the department in a good position to fulfil its contract reporting obligations pursuant to the proposed changes to the Senate Order (paragraph 1.13).

## **Conclusion**

**4.29** The ANAO's comparison of the audited agencies' contract reporting in their 2013 calendar year Senate Order contract listings and on AusTender found some inconsistencies in relation to the contract details reported and the use of confidentiality provisions attributed to the contracts reported. These inconsistencies partly reflected differences in reporting requirements of both reporting mechanisms and weaknesses in data management systems used to compile the contract listings and identify data for publication on AusTender.

**4.30** The ANAO has previously observed that the need for agencies to comply with multiple procurement reporting requirements is a factor influencing the integrity of publicly reported information. The recommendation from the Senate Finance and Public Administration Committee, which includes a trial of AusTender to meet the Senate Order requirements for procurement contracts, if implemented, will assist in streamlining reporting requirements for agencies. However, if the information

recorded in AusTender is to be relied upon to meet Senate Order reporting requirements, agencies will need to address their AusTender reporting to make sure that the contract information recorded is accurate and meets the requirements of the Senate Order. Agencies' Central Procurement Units may be well placed to assist in this regard.

---



Ian McPhee  
Auditor-General

Canberra ACT  
18 September 2014



# Appendices





## Appendix 1: Agencies' responses




COMMISSIONER

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Our Reference: CMS/13734

25 August 2014

 Mr Ian McPhee PSM  
Auditor-General  
Australian National Audit Office  
19 National Circuit  
BARTON ACT 2601

Dear Mr McPhee *lan.*

I refer to correspondence from the Australian National Audit Office of 31 July 2014, under the signature of Dr Andrew Pope, which provided the Australian Federal Police (AFP) with the proposed audit report on *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2013 Compliance)*.

The report contains two recommendations likely to be relevant for all agencies, relating to improving the practical support for staff in assessing and reporting on confidentiality provisions; and increasing the accuracy of contract reporting.

The AFP has a number of controls in place designed to ensure the correct use of confidentiality provisions, such as the central procurement unit acknowledged in the report. This unit also has a key role in monitoring and ensuring the accuracy of reported contract information.

The AFP embraces the commentary provided within the report and agrees with the recommendations arising from the audit as they relate to the AFP.

Yours sincerely

  
T.W. Negus APM  
Commissioner



## **Appendix B**

### Summary of formal response for inclusion in report

The AFP agrees with the recommendations arising from the audit as they relate to the AFP.

The AFP has a number of controls in place designed to ensure the correct use of confidentiality provisions, such as the central procurement unit as acknowledged in the report. This unit also has a key role in monitoring and ensuring the accuracy of reported contract information.

The AFP embraces the commentary provided within the report and agrees with the recommendations arising from the audit as they relate to the AFP.



**ASIC**

Australian Securities & Investments Commission

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26 August 2014

Dr Andrew Pope  
Group Executive Director  
Performance Audit Services Group  
Australian National Audit Office  
GPO Box 707  
CANBERRA ACT 2601

Dear Dr Pope

**Re: Confidentiality in Government Contract: Senate Order for Departmental and Agency Contracts (Calendar Year 2013 Compliance)**

Thank you for your letter dated 31 July 2014 inviting comments from the Australian Securities and Investments Commission (ASIC) on the proposed audit report on Confidentiality in Government Contract: Senate Order for Departmental and Agency Contracts (Calendar Year 2013 Compliance). I am pleased to provide the following comments on behalf of ASIC:

General Comments:

ASIC is pleased that there have been some overall improvements in reporting compliance and agrees there is further work required in some specific aspects of reporting. ASIC notes that a high percentage of the contracts reviewed were counsel engagement which all had the same process and template issues, which was not reflected at the same rate across the entire population of ASIC contracts.

ASIC has taken steps to improve its reporting compliance by better educating staff on reporting of confidentiality provisions in contracts, expanding the role of the Central Procurement Unit (CPU) to review the use of confidentiality provisions and has updated its

counsel engagement template to include the parliamentary and ANAO access clauses as well as providing more clarity on how to treat confidential information.

ASIC agrees that timing issues and variations in publishing requirements between AusTender and the Senate Order have led to some mismatches between the two reports. ASIC fully supports the trial to expand the use of AusTender to support the Senate Order report which in our view will not only reduce the administrative effort associated with reporting but also reduce inconsistencies currently experienced across the two reports by having a single source of information on government contracts.

Comments on Recommendations:

**Recommendation 1** - Agreed, while ASIC currently has comprehensive instructions on how to deal with confidentiality in contracts, as a result of the ANAO audit has commenced providing face to face information sessions to key staff in business units responsible for reporting to help them better understand the requirements. ASIC has also put in place a process for the CPU to review AusTender reporting information before it gets published in AusTender and in the Senate Order report.

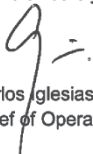
**Recommendation 2** - Agreed, as noted above, ASIC has put in place a process for the CPU to review AusTender reporting information before it gets published in AusTender and in the Senate Order report. ASIC has also recently implemented a Contract Management System (CMS) that includes the key AusTender reporting information on each contract record which will improve ASIC's ability to capture and report its contracts.

ASIC fully supports the trial to expand the use of AusTender to support the Senate Order report which in our view will not only reduce the administrative effort associated with reporting but also reduce inconsistencies currently experienced across the two reports by having a single source of information on government contracts.

Finally, please find enclosed a summary of our response for inclusion in the report summary.

If you wish to discuss any of our comments further please contact our Senior Procurement Manager, Tony Solano on (02) 9911 2895, or [tony.solano@asic.gov.au](mailto:tony.solano@asic.gov.au).

Yours sincerely,



Carlos Iglesias  
Chief of Operations

### **Summary of ASIC's formal response for inclusion in Report Summary**

Overall ASIC accepts the ANAO's findings and agrees with the key recommendations contained in the report.

While ASIC currently has comprehensive instructions on how to deal with confidentiality in contracts, the audit has highlighted the need to remind staff of the policy and process with respect to reporting confidentiality. ASIC's Central Procurement Unit (CPU) has commenced providing face to face information sessions to key staff in business units responsible for reporting. ASIC has also put in place a process for ASIC's CPU to review AusTender reporting information before it gets published both in AusTender and in the Senate Order report and has updated its counsel engagement template to include the parliamentary and ANAO access clauses. In addition, ASIC has recently implemented a Contract Management System (CMS) that will improve ASIC's ability to capture and report on information.

ASIC fully supports the trial to expand the use of AusTender to support the Senate Order report which in our view will not only reduce the administrative effort associated with reporting but also reduce inconsistencies currently experienced across the two reports by having a single source of information on government contracts.



**Australian Government**  
**Department of Communications**

**Drew Clarke**

Secretary

Dr Andrew Pope  
Group Executive Director  
Performance Audit Services Group  
Australian National Audit Office  
GPO Box 707 Canberra ACT 2601

Dear Dr Pope

I refer to your letter of 31 July 2014 enclosing the proposed audit report for *the Confidentiality in Government Contract: Senate Order for Departmental and Agency Contracts (Calendar Year 2013 Compliance)* and seeking agency comments by 28 August 2014.

The Department of Communications (the department) accepts the two recommendations of the Australian National Audit Office (ANAO) audit report on the *Confidentiality in Government Contract: Senate Order for Departmental and Agency Contracts (Calendar Year 2013 Compliance)*. Our formal responses to the recommendations are attached (Attachment A).

I would like to thank the ANAO for the professional and capable manner in which this audit was undertaken. I would appreciate being advised, in advance, of the tabling date for the report.

Yours sincerely

Drew Clarke

24 August 2014

## Attachment A

### Formal Response to the Report

The Department of Communications (the Department) agrees with Recommendation No.1 in the Australian National Audits Office's (ANAO) report on Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2013 Compliance). The Department will continue to pursue ongoing improvements including awareness raising and training to improve data captured for reporting purposes. Additionally, the Department has implemented a change to the Financial Management Information System to increase visibility of proposed confidentiality provisions by appropriate senior officers before those provisions are published.

The Department agrees with Recommendation No.2 and considers that the steps proposed for Recommendation No.1 will also address this recommendation.

### Summary of Response

#### Recommendation No.1

To provide for greater transparency and accountability in reporting on the use of confidentiality provisions in Australian Government contracts the ANAO recommends that agencies improve practical support provided to staff to more accurately assess and report on confidentiality provisions in contracts.

**The Department of Communications response: Agreed**

#### Recommendation No.2

To increase accuracy in reporting of contract information the ANAO recommends that agencies improve data capture and reporting for their Senate Order contract listings and on AusTender.

**The Department of Communications response: Agreed**



**Australian Government**  
**Department of Immigration and Border Protection**

**SECRETARY**

19 August 2014

Dr Andrew Pope  
Group Executive Director  
Performance Audit Services Group  
Australian National Audit Office  
19 National Circuit  
BARTON ACT 2601

Dear Dr Pope

**Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2013 Compliance)**

I refer to your letter of 31 July 2014 concerning the proposed Australian National Audit Office (ANAO) audit report on Confidentiality in Government Contract: Senate Order for Departmental and Agency Contracts (Calendar Year 2013 Compliance).

You seek the Department of Immigration and Border Protection's response to the proposed report and to each of the recommendations contained within the report. A short summary of our response has also been requested for inclusion in the report summary.

The department acknowledges the findings of the ANAO audit of the Senate Order for Departmental and Agency Contracts (Calendar Year 2013 Compliance) and will continue to work on implementing the recommendations proposed in this audit.

**Recommendation No.1**

Agreed.

The department considers that the audit has been useful in focusing attention on aspects of contract reporting where improvements can be made through better procedures, training and guidance. The department is currently developing guidance material for staff to more accurately understand, implement, and report on confidentiality provisions in contracts. This material will be supported by advice and support on confidentiality provisions by specialists within the department.

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- 2 -

**Recommendation No.2**

Agreed.

The department is committed to ensuring that contract information is accurately reported both within their Senate Order listing and on AusTender. The department will continue to review and amend, if required, contract information published on AusTender weekly including the reporting of confidentiality provisions.

The department has also undertaken a project to review all contract data previously published on AusTender including supplier names, reporting of confidentiality provisions, contract dates and ensuring that all contracts are reported under parent contract notices.

The project, which is expected to be completed by the end of October 2014, and ongoing review activities will place the department in a good position to fulfil its contract reporting obligations pursuant to the proposed changes to the Senate Order (paragraph 1.13).

**Summary**

The department agrees with the ANAO's recommendation that support provided to staff when determining and reporting on confidentiality provisions in contracts should be improved and is currently developing such materials.

The department is committed to ensuring that contract information is accurately reported both within our Senate Order listing and on AusTender.

For any further discussions regarding this letter or the audit report please contact Sanaz Mirzabegian, Assistant Secretary, Procurement and Contracts Branch on (02) 6264 4030.

Yours sincerely



Martin Bowles PSM

## Appendix 2: Senate Procedural Order of Continuing Effect 13: Departmental and Agency Contracts

(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 12-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, by not later than 30 September each year, 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 Committee consider the ongoing operation of the order and report on relevant developments from time to time.

(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.

(20 June 2001 J.4358, amended 27 September 2001 J.4994, 18 June 2003 J.1881, 26 June 2003 J.2011, 4 December 2003 J.2851, 1 March 2007 J.3527)<sup>66</sup>

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66 Parliament of Australia, *Senate Procedural Orders of Continuing Effect, No. 11, Departmental and Agency Contracts* [Internet], last amended March 2007, available from <[http://www.aph.gov.au/About/Parliament/Senate/Powers\\_practice\\_n\\_procedures/standingorders/d05](http://www.aph.gov.au/About/Parliament/Senate/Powers_practice_n_procedures/standingorders/d05)> [accessed July 2014].

## Appendix 3: Previous ANAO audit reports on the Senate Order

Audit Report	Recommendation(s)
<p>Audit Report No.4 2012–13 (Calendar Year 2012 Compliance)</p>	<p>The report did not contain any recommendations but emphasised the need for agencies to improve the:</p> <ul style="list-style-type: none"> <li>• identification and reporting on the use of confidentiality provisions, particularly pricing information and the difference between general and specific confidentiality provisions;</li> <li>• implement enhanced processes to support data capture, reporting; and</li> <li>• quality assurance of contract information.</li> </ul>
<p>Audit Report No.4 2012–13 (Calendar Year 2011 Compliance)</p>	<p>The report did not contain any recommendations but emphasised the need for agencies to:</p> <ul style="list-style-type: none"> <li>• better tailor guidance and training materials to help ensure that key processes, such as identifying the appropriate use of confidentiality provisions (particularly pricing information and the difference between general and specific confidentiality provisions), are commonly understood and applied; and</li> <li>• implement enhanced processes to support data capture, reporting and quality assurance.</li> </ul>
<p>Audit Report No.2 2011–12 (Calendar Year 2010 Compliance)</p>	<p>The report did not contain any recommendations but emphasised the need for agencies to improve the appropriate use and reporting of confidentiality provisions through better communication of the key requirements to agency staff and improving processes to support the accurate reporting of contract information.</p>
<p>Audit Report No.7 2010–11 (Calendar Year 2009 Compliance)</p>	<p><b>Recommendation No.1 Paragraph 3.29</b></p> <p>To assist agencies to provide more accurate, timely and complete procurement reporting, the ANAO recommends that the Department of Finance review opportunities to consolidate procurement reporting requirements, in conjunction with the department’s continuing focus on improving AusTender functionality.</p> <p><b>Recommendation No.2 Paragraph 4.40</b></p> <p>The ANAO recommends that agencies assess whether their contract preparation processes support adequate consideration of the appropriate use of confidentiality provisions in contracts.</p>

Audit Report	Recommendation(s)
Audit Report No.6 2009–10 (Calendar Year 2008 Compliance)	<p><b>Recommendation No. 1 Paragraph 2.22</b></p> <p>To assist agencies to meet the requirements of the next and any subsequent Senate Orders, the ANAO recommends that they:</p> <ul style="list-style-type: none"> <li>• embed in their relevant policies and practices, the guidance and instructions in Financial Management Guidance 3, including the details of the four criteria test for confidentiality; and</li> <li>• provide suitable training and guidance to staff on these policies and procedures.</li> </ul>
Audit Report No.5 2008–09 (Calendar Year 2007 Compliance)	<p><b>Recommendation No. 1 Paragraph 2.25</b></p> <p>The ANAO recommends agencies implement review measures to assess the appropriateness of decisions to include confidentiality provisions in contracts and provide suitable feedback to staff involved in procurement.</p>
Audit Report No.7 2007–08 (Calendar Year 2006 Compliance)	<p><b>Recommendation No.1 Paragraph 4.23</b></p> <p>The ANAO recommends that agencies improve the accuracy and completeness of their Internet listings by:</p> <ul style="list-style-type: none"> <li>• implementing controls to assist in confirming that Internet listings are complete and accurate. This could include, for example, reconciling the Internet listing details to AusTender and other relevant sources of information such as Financial Management Information System records; and</li> <li>• developing quality assurance processes to improve the accuracy of the Internet listing.</li> </ul>
Audit Report No.5 2006–07 (Calendar Year 2005 Compliance)	<p><b>Recommendation No.1 Paragraph 2.35</b></p> <p>The ANAO recommends that agencies improve the accuracy and completeness of their contract listings by:</p> <ul style="list-style-type: none"> <li>• implementing controls to assist in confirming that contract listings are complete and accurate. This could include, for example, reconciling the contract listing details to other relevant sources of information, such as Financial Management Information System records or to AusTender; and</li> <li>• developing quality assurance processes to improve the accuracy of the contract listing.</li> </ul> <p><b>Recommendation No.2 Paragraph 3.38</b></p> <p>The ANAO recommends that agencies provide guidance to those staff responsible for negotiating contracts and completing the Senate Order contract listing, to improve the level of understanding of the Senate Order, particularly relating to the use of confidentiality provisions.</p>

Audit Report	Recommendation(s)
<p>Audit Report No.11 2005–06 (Calendar Year 2004 Compliance)</p>	<p><b>Recommendation No. 1 Paragraph 2.35</b> The ANAO recommends that agencies, that have not already done so, implement additional controls designed to ensure the completeness and accuracy of their Internet listings. These controls could include reconciling the Senate Order listing to AusTender information and/ or contract details include in their Financial Management Information System.</p> <p><b>Recommendation No. 2 Paragraph 3.20</b> The ANAO recommends that agencies provide further guidance, together with training and/ or awareness raising sessions on the requirements of the Senate Order to all staff responsible for negotiating contracts.</p> <p><b>Recommendation No. 3 Paragraph 3.58</b> The ANAO recommends that agencies ensure adequate documentation of the reasons for agreeing to identify specified information in contracts as being confidential.</p>
<p>Audit Report No.10 2004–05 (Calendar Year 2003 Compliance)</p>	<p>The report did not contain any recommendations however noted a number of contracts had been inappropriately listed as there was no information that satisfied the criteria for protection as confidential information. In addition agencies should make sure that the policies are known, and acted upon, at all levels within the agency.</p>
<p>Audit Report No.31 2003–04 (Financial Year 2002–03 Compliance)</p>	<p>The report did not contain any recommendations however noted that agencies had difficulty identifying what information should be protected as confidential information, and found many instances where information was inappropriately identified as confidential information.</p>
<p>Audit Report No.5 2003–04 (Autumn 2003 Compliance)</p>	<p>The report did not contain any recommendations however noted 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'.</p>
<p>Audit Report No.32 2002–03 (Spring 2002 Compliance)</p>	<p>The report did not contain any recommendations however noted that some claims of confidentiality were not appropriate as the information claimed to be confidential was not specified, or where it was specified, it did not satisfy the established criteria to make it confidential. In addition better communication of the established policies and procedures was required.</p>

Audit Report	Recommendation(s)
<p>Audit Report No.8 2002–03 (Autumn 2002 Compliance)</p>	<p><b>Recommendation No. 1 Paragraph 2.42</b></p> <p>To assist with the compilation of the Internet listing, the ANAO recommends that all FMA agencies, as appropriate:</p> <ul style="list-style-type: none"> <li>• give priority consideration to establishing contract registers where the number of contracts makes it a practicable solution; and</li> <li>• implement quality assurance processes, as necessary, to ensure the completeness and accuracy of the contract information listed on the Internet.</li> </ul> <p><b>Recommendation No. 2 Paragraph 3.24</b></p> <p>The ANAO recommends that all FMA agencies, as appropriate:</p> <ul style="list-style-type: none"> <li>• review the standard forms of request for tender and contract to ensure contractors are made fully aware of the Commonwealth’s governance and accountability requirements;</li> <li>• implement procedures which require a case-by-case consideration of requests for information in, or associated with, contracts to be treated as confidential;</li> <li>• provide guidance and training for procurement officers to assist them determine the appropriateness of claims of confidentiality made by potential contractors; and</li> <li>• establish a training and staff awareness program covering the new governance and accountability framework for contracting for all relevant staff.</li> </ul>
<p>Audit Report No.33 2001–02 Senate Order of 20 June 2001 (February 2002)</p>	<p>The report did not contain any recommendations but noted that development of processes and guidance by agencies underway at that time would assist in promoting the appropriate use of confidentiality provision in contracts.</p>
<p>Audit Report No.38 2000–01 The Use of Confidentiality Provisions in Commonwealth Contracts</p>	<p><b>Recommendation No. 1 Paragraph 5.24</b></p> <p>The ANAO recommends that agencies should include provisions in tender documentation that alert prospective tenderers or contractors to the implications of the public accountability responsibilities of agencies. The principle to be applied is that contractual provisions (and related matters) should be disclosed to Parliament and its committees unless there is a sound basis for their confidentiality.</p> <p>The effectiveness of this recommendation would be enhanced if high level advice to this effect is included in the next edition of the Commonwealth Procurement Guidelines</p> <p><b>Recommendation No. 2 Paragraph 5.36</b></p> <p>In the case of contracts that contain performance measures, the ANAO recommends that agencies have available data that would allow them, if requested, to provide summarised performance information on progress against relevant measures in contracts to parliamentary committees.</p>

# Index

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## A

- AusTender, 28
  - reporting requirements, 28, 59, 60
  - reporting, accuracy of, 43, 60, 62, 63, 67
- Australian Federal Police (AFP), 30, 55, 67
- Australian Securities and Investment Commission (ASIC), 31, 55, 67

## C

- Confidentiality provisions, 58
  - appropriateness of use, 50, 54
  - commercial sensitivity, 52
  - identification of, 27
  - reasons for, 38
  - types of, 37, 47, 64
- Confidentiality Test (the). *See* Guidance

## Contracts

- as defined by the Order, 25, 35
- exclusion of, 26, 42

## D

- Department of Communications (Communications/DoC), 31, 55, 68
- Department of Finance (Finance), 27
- Department of Immigration and Border Protection, 55, 68
- Department of Immigration and Border Protection (DIBP), 31

## F

- Finance and Public Administration
  - References Committee, 28, 60

## G

### Guidance

- Buying for the Australian Government, Confidentiality Throughout the Procurement Cycle*, 27
- Confidentiality Test (the), 27, 49
- Senate Order reporting guidance (FMG 8), 27, 33

## L

### Legislation

- Commonwealth Procurement Rules*, 27
- Financial Management and Accountability Act 1997*, 11
- Public Governance, Performance and Accountability Act 2013 (PGPA Act)*, 29

## R

### Reporting

- requirements, 59, 67
- templates, 33

## S

### Senate Order

- agency contract lists, 26
- compliance requirements, 25
- cost of compliance, 39
- guidance. *See* Guidance
- ministers' letters of advice, 25, 40
- reporting, accuracy of, 43, 60, 63, 66



# Series Titles

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## **ANAO Report No.1 2014–15**

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