

The Auditor-General
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Performance Audit

Confidentiality in Government Contracts: Senate Order for Departmental and Entity Contracts (Calendar Year 2014 Compliance)

[Across Entities](#)

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Canberra ACT
30 September 2015

Dear Mr President
Dear Mr Speaker

The Australian National Audit Office has undertaken an independent performance audit across entities titled *Confidentiality in Government Contracts: Senate Order for Departmental and Entity Contracts (Calendar Year 2014 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, which appears to read 'Rona Mellor', is positioned below the 'Yours sincerely' text.

Rona Mellor PSM
Acting 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

Abbreviations and Glossary	8
Summary and Recommendations	9
Summary	11
Introduction	11
Audit objectives and scope	12
Overall conclusion	12
Summary of entity response	15
Recommendations	17
Audit Findings	19
1. Introduction	21
Senate Order guidance	23
Previous audits of Senate Order compliance	24
Audit approach	24
Report structure	26
2. Entities' Senate Order Contract Listings	27
Background	27
Entities' Senate Order contract listings	28
Ministers' letters of advice	34
Conclusion	38
3. The Use of Confidentiality Provisions in Contracts	39
Background	39
The reported use of confidentiality provisions in Australian Government contracts over time	40
Use of confidentiality provisions by audited entities	41
Parliamentary disclosure and ANAO access clauses	52
Conclusion	53
4. The Senate Order and AusTender	55
Background	55
Compiling Senate Order and AusTender information	56
Consistency and accuracy of reporting	57
Conclusion	61

Appendices	63
Appendix 1 Entities' Responses	65
Appendix 2 Senate Procedural Order of Continuing Effect 13: Departmental and Agency Contracts	69
Appendix 3 Previous ANAO audit reports on the Senate Order	72
Index.....	77
Series Titles.....	78
Better Practice Guides	79

Tables

Table 1.1: Summary of contract information reported by the audited entities in the 2014 calendar year Senate Order listings	26
Table 2.1: Template for contract listings.....	27
Table 2.2: Assessment of entities' contract lists against the requirements of the Senate Order for the 2014 calendar year.....	29
Table 2.3: Frequency of reporting errors in entities' Senate Order contract listings.....	30
Table 2.4: Description of the two specific confidentiality provision types.....	31
Table 2.5: Cost of complying with the Senate Order.....	33
Table 2.6: Compliance with Senate Order paragraph (2)(a)–(d): audited entities	37
Table 3.1: Number and value of contracts, and the reported use of confidentiality provisions, as published in entity contract listings 2011–14.....	40
Table 3.2: Examples of specific and general confidential requirements in contracts	42
Table 3.3: The Confidentiality Test.....	43
Table 3.4: Parliamentary and ANAO access clauses.....	53
Table 4.1: Consistency of reporting in Senate Order contract listings and on AusTender for the 2014 calendar year reporting period	58
Table 4.2: Comparison of reported confidentiality provision types and reasons in the Senate Order and AusTender.....	59
Table 4.3: Accuracy of reported contract information.....	60

Figures

Figure S.1:	Contract analysis result: appropriateness of the use and reporting of confidentiality provisions	14
Figure 2.1:	Entities with Ministers' letters tabled by the due date, 2008–2014 calendar years	35
Figure 3.1:	Proportion of contracts reported as containing confidentiality provisions: calendar years 2002–14.....	41
Figure 3.2:	Contract analysis result: appropriateness of the use and reporting of confidentiality provisions	44
Figure 3.3:	Trends in the appropriate use of confidentiality provisions in contracts over time	49

Abbreviations and Glossary

AusTender	The Australian Government's web-based procurement information system.
Confidentiality provisions	The clauses of a contract that operate to create contractual confidentiality obligations for the parties to the contract in respect of information that is specified in the contract.
DSS	Department of Social Services
DVA	Department of Veterans' Affairs
Finance	Department of Finance
FMA Act	<i>Financial Management and Accountability Act 1997</i>
RMG 403	Resource Management Guide No. 403— <i>Meeting the Senate Order on Entity Contracts</i> (formerly Financial Management Guidance No. 8, <i>Listing of Contract Details on the Internet</i> (Meeting the Senate Order on Departmental and Agency Contracts))
PGPA Act	<i>Public Governance, Performance and Accountability Act 2013</i>
PM&C	Department of the Prime Minister and Cabinet
The Confidentiality Test (the Test)	The Confidentiality Test, as set out in Finance's <i>Buying for Australian Government, Confidentiality throughout the Procurement Cycle</i> guidance, establishes four criteria to assist entities determine whether contractual information should be treated as confidential.

Summary and Recommendations

Summary

Introduction

1. The *Senate Procedural Order of Continuing Effect: Departmental and Agency Contracts* (the Senate Order/the Order) was introduced in 2001 to improve public access to information about government contracting. At the 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.

2. Successive governments have agreed to comply with the Senate Order and its subsequent amendments. Under the Order, Ministers must table letters of advice that all entities which they administer have placed on the Internet lists of contracts valued at \$100 000 or more, by no later than two calendar months after the end of each financial and calendar years. These lists are to:

- include the details of each contract¹ which has not been fully performed or which has been entered into during the previous 12 months; and
- indicate whether the contracts contain confidentiality provisions or other requirements of confidentiality, and a statement of the reasons for the confidentiality.

3. The Department of Finance is responsible for providing entities with policy guidance on procurement, including confidentiality in procurement and compliance with the Order. This guidance is set out in:

- Resource Management Guide No. 403 (RMG 403)—*Meeting the Senate Order on Entity Contracts* which articulates the rationale for the Order, outlines its requirements and is designed to provide guidance to support entities in developing their Senate Order Internet listings; and
- *Buying for the Australian Government, Confidentiality Throughout the Procurement Cycle* (the Guidance) which contains advice on managing confidentiality throughout the procurement process, and includes the

1 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.

Confidentiality Test that is designed to assist entities to determine the appropriate inclusion of confidentiality provisions in contracts.

4. To support the Order, the Senate also requested in 2001 that the Auditor-General annually examine a number of the contracts reported to contain confidentiality provisions, and report any inappropriate use.

Audit objectives and scope

5. 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 criteria were:

- entities published contract listings on their websites and Ministers' letters were tabled in accordance with the content and timing requirements of the Order;
- confidentiality provisions were used appropriately in a sample of contracts which were reported to contain confidentiality provisions by the selected entities; and
- the selected entities accurately reported contract information, including the use of confidentiality provisions, in the contract listings and on AusTender.

6. The selected entities for the audit were: Department of Finance (Finance); Department of the Prime Minister and Cabinet (PM&C); Department of Social Services (DSS); and Department of Veterans' Affairs (DVA). The sample of contracts was taken from the selected entities' Senate Order listings for the 2014 calendar year and AusTender. Two entities DSS and PM&C had significant machinery of government changes during 2014.

Overall conclusion

7. The Senate Order was introduced to improve public access to information about government contracting. The results of this audit indicate that while the reported use of confidentiality provisions is low, entities' reporting practices are not always adequate or reliable enough to meet the requirements of the Order. Transparency of contract information can be affected as a result.

8. The 2014 Senate Order listings contained 41 469 contracts for goods and services totalling \$216.3 billion, of which 1 855 contracts (4.5 per cent) valued at

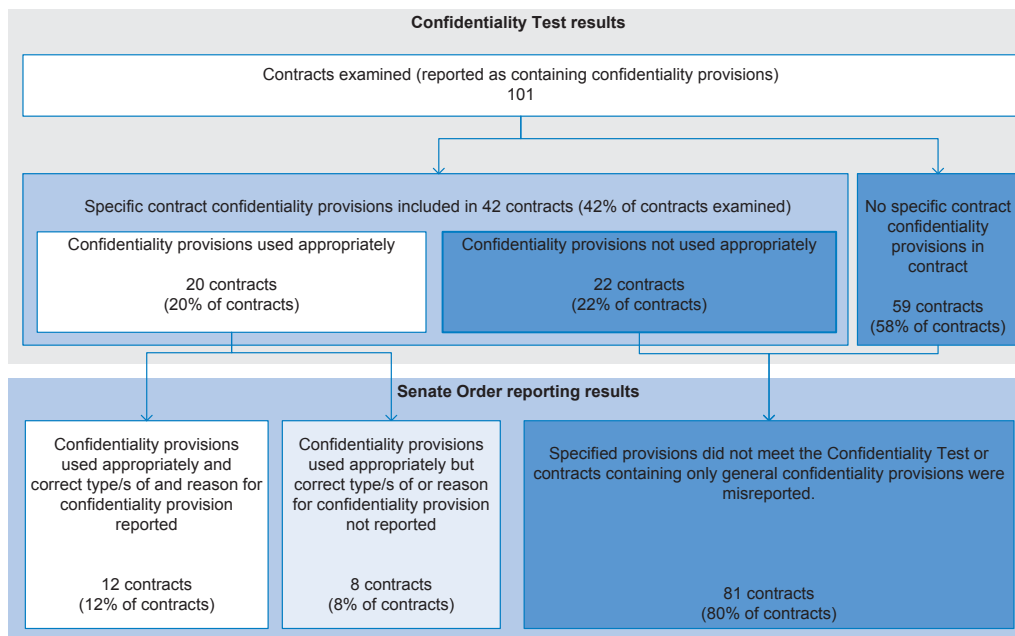
\$30.1 billion (13.9%), were reported as containing confidentiality provisions. The reported use of confidentiality provisions by entities was in keeping with 2013 levels, and continues to reflect a significant decline from the 24 per cent of contracts reported in 2001, the year the Order was introduced.

9. Entities are expected to support their Ministers to comply with the Senate Order though publishing contract listings in accordance with content and timing requirements. This audit found that entities did not always meet these requirements and Ministers could be better supported through entities publishing lists by the due date and verifying that contract details are accurately reported. In this respect in 2014, the ANAO observed:

- overall entity performance in meeting the content requirements of the Order had declined in comparison to 2013—only 24 per cent of entities were fully compliant;
- for the four entities examined in detail by the ANAO, none of the contract listings fully complied with the Order's publishing requirements. The main reason for non-compliance was the reporting of contracts outside the relevant contract period; and
- a small number of entity listings (15 per cent) were published late (within one month of the due date), and as at 30 June 2015 one entity, had not published a listing or a notice that no relevant contracts had been entered into.

10. Despite the low proportion of contracts reported as containing confidentiality provisions, specific confidentiality provisions in contracts continue to be incorrectly used and reported in 2014. The ANAO's examination of a sample of 101 contracts reported to contain confidentiality provisions, found that for 80 per cent of the contracts the use of confidentiality provisions did not comply with the Guidance or was misreported. The level of inappropriate use has increased by 17 per cent compared to the 2013 Senate Order compliance audit. The result of the analysis of the sample of contracts is shown in Figure S.1.

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



Source: ANAO analysis.

11. Confidentiality provisions in government contracts can impede accountability and transparency in government purchasing. A request for specific information to be kept confidential must be assessed against the Confidentiality Test criteria and entities should make sure decisions to include confidentiality provisions are documented. In this respect, the audited entities were not able to provide documentation supporting their assessment of suppliers' claims against the Confidentiality Test, and reasons for agreeing for the information to remain confidential.

12. The results of this audit indicate that processes to capture information about basic contract details and the reporting of existence of confidentiality provisions needs to improve. Entities currently must report on procurement contracts for the purposes of the Senate Order and separately on AusTender to meet requirements of the Commonwealth Procurement Rules.² Of the 2 171

2 Going forward given the changes to the Senate Order made in May 2015, entities will be able to satisfy the requirements of the Senate Order which relate to procurement contracts through AusTender.

procurement contracts listed in the audited entities' Senate Order listings, 1 936 (89 per cent) had a corresponding entry in AusTender.³ In the ANAO's sample only 17 per cent of contracts were found to be accurately reported, taking into account the basic contract information and the correct type and reason for confidentiality provisions.

13. The ANAO has previously observed shortcomings both in the application of the Confidentiality Test and in the accuracy of Senate Order and AusTender reporting. The results of this audit show that there continues to be scope for entities to improve their assessment of suppliers' claims for confidentiality of contractual information and implement more rigorous quality assurance processes for reporting confidentiality provisions in contracts.

14. The Department of Finance supports entities to comply with the Senate Order through providing whole-of-government procurement guidance and communicating the key requirements of the Order. Opportunities exist for Finance to improve advice through direct reference to the Confidentiality Test in the Commonwealth Procurement Rules, and disseminating better practice examples of entity assurance mechanisms.

15. The ANAO has made three recommendations to assist improving the use and reporting of confidentiality provisions.

Summary of entity response

Department of Finance

16. The Department of Finance acknowledges the findings of this report and supports the recommendations. The audit process was a valuable exercise and the feedback provided by the ANAO will assist Finance to implement measures to improve future compliance with the Senate Order.

³ Due to machinery of government changes some contracts were not aligned on AusTender at the time of testing.

Department of the Prime Minister and Cabinet

17. The Department acknowledges the findings in the audit report and as a result of this audit will continue to work towards strengthening knowledge and governance measures when assessing confidentiality provisions.

Department of Social Services

18. The Department of Social Services agrees with the ANAO's recommendations. The Department has already completed, or is in the process of completing, a range of enhancements to the ESSentials procurement system, guidance and training materials which will address a number of issues raised within the report.

Department of Veterans' Affairs

19. The Department of Veterans' Affairs (DVA) agrees with the overall findings and recommendations of the ANAO report. While the Department has procedures in place, it will take further measures to ensure compliance.

Recommendations

These recommendations are based on findings at the audited entities and are likely to be relevant to other Australian Government entities. Therefore, all Australian Government entities 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

Para 3.16

To improve the appropriate use and reporting of confidentiality provisions in contracts by entities, the ANAO recommends the Department of Finance revises guidance for confidentiality in procurement by including:

- (a) reference to the Confidentiality Test in the Commonwealth Procurement Rules; and
- (b) strengthening current guidance to include examples of entity assurance mechanisms.

Department of Finance response: *Agreed*

Recommendation No. 2

Para 3.20

When considering requests to keep information contained in a contract confidential, the ANAO recommends that entities implement procedures that require:

- (a) a case-by-case assessment of supplier requests against the Confidentiality Test; and
- (b) adequate documentation of the reasons for agreeing to keep specific information in contracts confidential.

Responses from audited entities: *Agreed*

Recommendation No. 3
Para 4.17

To improve the quality of information on AusTender, the ANAO recommends that entities implement appropriate quality assurance processes upfront at the point of contract creation to confirm the completeness and accuracy of reported contract information.

Responses from audited entities: *Agreed*

Audit Findings

1. Introduction

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

1.1 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.⁴ The main principle on which the Senate 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. Successive governments have agreed to comply with the Senate Order and have required entities to put in place suitable procedures to support Ministers to comply with it.⁵

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

- a) each contract⁶ entered into by the entity 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 duration of the contract, the relevant reporting period and the twelve-month period relating to the contract listings;

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

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

6 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, pp. 16 and 36.

- 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.

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

1.4 Where an entity 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 entity's website. Where an entity has excluded contracts from its listing⁷, or has not fully complied with the requirements of the Senate Order, the Minister's letter is to advise the basis for the exclusion and when (where applicable) full compliance will be achieved.⁸

1.5 The Senate made amendments to the Senate Order in May 2015, following an inquiry by the Finance and Public Administration References Committee. These amendments, amongst other things, address the duplication in reporting of procurement contracts in Senate Order listings and on AusTender. From 1 September 2015, entities will be able to use an AusTender report to satisfy their Senate Order requirements with respect to procurement contracts.

1.6 To support the Order, the Senate requested the Auditor-General examine a number of the contracts reported to contain confidentiality provisions, and report any inappropriate use of these provisions annually. In addition, the Senate also requested the Auditor-General examine a number of contracts reported to have been excluded from entities' Senate Order contract listings and report on whether those contracts were appropriately excluded.

7 There are circumstances where the Senate Order allows for certain contractual arrangements to be excluded from contract listings including due to disclosure being contrary to public interest or the *Privacy Act 1988* or statutory secrecy provisions. The ANAO did not examine excluded contracts as the Ministers' letters did not report any excluded contracts for the selected entities (listed in paragraph 1.12).

8 The Senate Order for *Departmental and Agency Contracts* (the Senate Order), paragraph (3).

Senate Order guidance

1.7 The Department of Finance (Finance) is responsible for providing entities 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 *Resource Management Guide No. 403 (RMG 403)—Meeting the Senate Order on Entity Contracts*⁹ provides guidance to support entities in developing and presenting their Senate Order contract listings. Further, Finance’s whole-of-government guidance *Buying for the Australian Government, Confidentiality Throughout the Procurement Cycle* (the Guidance)—contains the Confidentiality Test, which is designed to assist entities to determine the appropriate inclusion of confidentiality provisions in contracts. 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.¹⁰

1.8 The Senate Order is one of a number of mechanisms to promote transparency in Australian Government contracting. Other mechanisms include the reporting on AusTender¹¹ of procurement and consultancy contracts, the production of lists of grants—as well as the publication of grants on entities’ websites, and the presentation of summary contract information in entities’ annual reports.¹²

9 RMG 403 was issued in August 2015 and replaced the Senate Order guidance: Financial Management Guidance No. 8, *Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*

10 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 June 2015].

11 Introduced in September 2007, AusTender is the Australian Government’s web-based procurement information system for the centralised publication of Australian Government business opportunities, annual procurement plans, multi-use lists, contracts and entity agreements, available from <<https://www.tenders.gov.au/>> [accessed June 2015].

12 Australian Government, *Requirements for Annual reports - for Departments, Executive Agencies and other non-corporate Commonwealth entities*, PM&C, 2015.

Previous audits of Senate Order compliance

1.9 This audit is the eighteenth in a series of audits and fulfils the Senate's request for the Auditor-General to provide an annual report on entities' compliance with the Order. Previous audits of Senate Order compliance and audit recommendations since 2002–03 are listed in Appendix 3. These recommendations have commonly encouraged entities 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.

1.10 The annual audit of Senate Order compliance is to be phased out following amendments made to the Senate Order in May 2015. The Auditor-General will conduct two further audits on entity compliance with the Senate Order, by 30 September 2016 and 30 September 2018.

Audit approach

Audit objective, criteria and scope

1.11 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) entities published contract listings on their websites and Ministers' letters are tabled in accordance with the timing and content requirements of the Senate Order;
- (b) confidentiality provisions were used appropriately in a sample of contracts which were reported to contain confidentiality provisions by the selected entities; and
- (c) the selected entities accurately reported contract information, including the use of confidentiality provisions, in the contract listings and on AusTender.

1.12 As at 1 February 2015, there were 93¹³ entities to which the Senate Order applied. All of these entities were included for the purposes of the overall audit analysis (part (a)). The entities selected for detailed contract analysis (parts (b) and (c)) were the:

- Department of Finance (Finance);
- Department of the Prime Minister and Cabinet (PM&C);
- Department of Social Services (DSS); and
- Department of Veterans' Affairs (DVA).

1.13 To assess the audited entities' compliance with the Senate Order, the ANAO had regard to Finance's guidance. In particular, RMG 403—*Meeting the Senate Order on Entity Contracts* was used as the basis of review for the timeliness and content of the letters tabled by Ministers and entities' contract listings. The Confidentiality Test contained in the Guidance was applied to assess whether confidentiality provisions were used appropriately for a sample of contracts reported to contain specific confidential information. The ANAO also reviewed entities' documentation of reasons for agreeing to confidentiality provisions.

1.14 Entity selection took into account entities' involvement in previous Senate Order audits and the size and nature of the entities' 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 entities' 2014 contract listings and the percentage of those contracts reported as containing confidentiality provisions.

13 As at 1 February 2015, there were 101 *Public Governance, Performance and Accountability Act 2013* (PGPA Act) non-corporate Commonwealth entities. 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 Departments of State (or part of a portfolio) administered by a minister but these entities can voluntarily publish listings. A number of former *Financial Management and Accountability Act 1997* agencies ceased operation or had their status altered during 2014. As a result two entities were not required to publish a listing in 2014.

Table 1.1: Summary of contract information reported by the audited entities in the 2014 calendar year Senate Order listings

	Finance	PM&C	DSS	DVA	All entities ^(a)
Total number of contracts reported	475	2 199	6 777	661	41 469
Total value (\$ millions) of contracts	2 648	3 671	15 402	613	216 272
Percentage of contracts (by number) reported as containing confidentiality provisions	9.9	0.6	3.5	2.7	4.5

Source: ANAO analysis.

Note: (a) Represents the total number of contracts reported by 92 of the 93 PGPA Act entities that were subject to the Senate Order for the 2014 calendar year reporting period as at 30 June 2015. One entity omitted publishing a Senate Order Listing.

1.15 The audit was conducted in accordance with the ANAO’s auditing standards at a cost to the ANAO of approximately \$265 000.

Report structure

1.16 The remaining chapters are structured as follows:

Chapter 2 Entities’ Senate Order Contract Listings	Examines the timeliness of the publication of entities’ Senate Order contract listings and the tabling of Ministers’ letters. The extent to which the content aligned with the requirements of the Senate Order is also examined.
Chapter 3 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.
Chapter 4 The Senate Order and AusTender	Examines the consistency of the audited entities’ reporting of contract information in the Senate Order listings and on AusTender and the accuracy of reported information for a sample of contracts.

2. Entities' Senate Order Contract Listings

This chapter examines the timeliness of the publication of entities' Senate Order contract listings and the tabling of Ministers' letters. The extent to which the content of the listings and letters aligned with the requirements of the Senate Order is also examined.

Background

2.1 To support entities in complying and presenting their contract listings, Finance has developed specific guidance for the Senate Order. Finance guidance (RMG 403 see paragraph 1.7) explains the basis and the objective of the Government's policy. RMG 403 also provides clarification of the terms and requirements of the Senate Order and templates to assist entities 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 RMG 403.

Table 2.1: Template for contract listings

Contract details								
Contractor	Subject matter	Amount of consideration	Start date	Anticipated end date	Whether contract contains provisions requiring the parties to maintain confidentiality of any of its provisions (Y/N)	Reason(s)	Whether contract contains other requirements of confidentiality (Y/N)	Reason(s)

Source: Department of Finance, RMG 403, p 15.

2.2 For the 93 entities subject to the Senate Order for the 2014 calendar year reporting period, the ANAO assessed whether:

- contract listings were published on entity 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 Order.

Entities' Senate Order contract listings

Timeliness of entities' Senate Order contract listings

2.3 For the 2014 calendar year reporting period, 78 of the 93 entities (84 per cent) published a contract listing, or advice that no relevant contracts had been entered into, by the due date of 28 February 2015. A further 14 entities published contract listings, or advice that no relevant contracts had been entered into within one month of the due date. One entity¹⁴ had not published a listing as of 30 June 2015. These results represent a decrease from the 2013 calendar year reporting period, where the ANAO found 91 per cent¹⁵ of entities had published contract listings by the due date.

Comprehensiveness of published contract listings

2.4 The ANAO examined the content of the 92 available contract listings¹⁶ to assess the extent to which the published data aligned with the information requested by the Order (paragraph 1.2). The results of the ANAO's analysis against each of the Order's elements are summarised in Table 2.2 and discussed in the following sections.

14 The Australian Skills Quality Authority.

15 ANAO Audit Report No. 1 2014–15, *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2013 Compliance)*, p. 34.

16 Or notice that no relevant contracts had been entered into.

Table 2.2: Assessment of entities' contract lists against the requirements of the Senate Order for the 2014 calendar year

Description of requirement	Number of entities that fully met the requirement ^(a)	Number of entities that did not fully meet the requirement ^(b)
Paragraph (2)(a) of the Order <i>Lists only contracts that are over \$100 000 and that have not been fully performed or that have been entered into during the previous 12 months</i>	37	56
Paragraph (2)(b) of the Order <i>Lists provided all required basic contract details as specified in the Order</i>	86	7
Paragraph (2)(c) of the Order <i>Lists identify whether contracts contain provisions for confidentiality and a valid statement of the reasons for the inclusion of the provision</i>	63	30
Paragraph (2)(d) of the Order <i>Entities provided an estimate of the cost of complying with the Order and a statement of the method used to make the estimate</i>	72	21

Source: ANAO analysis.

Note (a): The results include five entities that advised no relevant contracts were entered into.

Note (b): Includes one entity that did not publish a listing or advice.

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

2.5 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 number and types of unnecessary entries identified in the listings are shown in Table 2.3 and amount to around 2.5 per cent of total contracts listed.

Table 2.3: Frequency of reporting errors in entities' Senate Order contract listings

Description	Number of unnecessary entries in published listings ^(a)
Number of entity agreements	181
Number of entries outside the calendar year reporting period	868
Number of entries below the \$100 000 value threshold	5

Source: ANAO analysis of published contract listings for the 2014 calendar year reporting period covering 41 469 contracts.

Note (a): 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.

2.6 The most common reason for errors was the inclusion of contracts that had start or end dates outside the required date range for the 2014 calendar year reporting period. There were twice as many errors in this regard than identified in the audit for the 2013 calendar year.¹⁷ In this respect, the Department of Veterans' Affairs included a large number of contracts (238) outside the relevant reporting period.

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

2.7 Under paragraph (2)(b) of the Senate Order, entities 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. Of the 92 entities that published contract listings or advice, 86 entities included all the basic contract details as required by the Senate Order. As observed in previous ANAO audits, the higher level of compliance with this element may be attributed to the widespread use of Finance's contract listing template, which encourages entities to include the required contract details.

17 Entities' Senate Order listings for the 2013 calendar year reporting period contained 413 contracts that had start or end dates outside the stipulated reporting period. ANAO Audit Report No. 1 2014–15, *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2013 Compliance)*, p. 36.

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

2.8 Entities are required to identify in their contract listings whether any of the listed contracts contain confidentiality provisions. The two types of provisions entities are to identify are described in RMG 403 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').¹⁸

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

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 supplier's profit margin. Senate Order contract listing details: <ul style="list-style-type: none"> • 'Yes' for 'provisions requiring the parties to maintain confidentiality of any of its provisions' provision type; and • 'internal costing/profit information' as the stated reason.
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. Contract listing details: <ul style="list-style-type: none"> • 'Yes' for 'other requirements of confidentiality' provision type; and • 'intellectual property' as the stated reason.

Source: ANAO representation of information contained in RMG 403.

18 Finance, *Buying for the Australian Government, Confidentiality throughout the Procurement Cycle, Principles, Additional reporting on confidentiality* [Internet], Finance, paragraphs 1–2, available from <<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/reporting-requirements/reporting-confidentiality/principles.html>> [accessed June 2015]

2.10 Where possible, entities are to identify the reasons for the inclusion of confidentiality provisions under specific categories in the contract listings. Should a contract contain a confidentiality provision that does not fall within a specific category, entities are to identify the provision as ‘other’ and provide a reason for the inclusion of the provision. The standard reasons are provided in RMG 403 and include:

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

2.11 Of the 92 entities that published listings or advice, 39 reported that none of their contracts contained specific confidentiality provisions. Of the remaining 53 entities that identified the use of specific confidentiality provisions in their contracts, only 24 entities provided reasons that aligned with the categories set out in RMG 403 for all the confidentiality provisions identified.

2.12 Twenty nine entities provided reasons for confidentiality provisions that did not align with the standard categories detailed in RMG 403. In addition, eight of these entities included reasons such as ‘commercial-in-confidence’ and ‘protection of Commonwealth material’ which are specifically excluded from use by the Senate.¹⁹ Entities should check that the reasons recorded for the use of confidentiality provisions clearly align with the standard categories detailed in RMG 403 to avoid potential misreporting. The misreporting of confidentiality provisions is discussed in further detail in Chapter 3.

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

2.13 The Senate Order requires entities to report the cost of complying with the Order and the method used to calculate the cost. For the 2014 calendar year reporting period, 72 entities reported both the cost of compliance and the

¹⁹ *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.

method used to calculate the cost. Three entities reported the cost of compliance but not the methodology. The remaining 17 entities did not report the cost of compliance or the method used to calculate the cost. The number of entities that reported these details and the total, average and median reported costs of compliance, for the 2012 to 2014 calendar year reporting periods, are shown in Table 2.5.

Table 2.5: Cost of complying with the Senate Order

Description	Number of entities compliant with paragraph (2)(d) of the Senate Order, and the reported estimated cost of compliance		
	2012	2013	2014
Number of entities that reported both the cost of compliance and method used to calculate the cost of compliance	76	82	72
Number of entities that reported the cost of compliance	81	87	75
Total cost reported	\$168 699	\$274 607	\$237 124
Average cost for each entity	\$2 082	\$3 156	\$3 162
Median cost for each entity	\$971	\$1 000	\$1 100
Estimated average cost per contract	\$6	\$9	\$5.85

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

2.14 The total estimated cost of compliance with the Senate Order, as reported by 75 entities, covered approximately 98 per cent of all contracts reported on the listings. Extrapolating the reported average cost for each contract of \$5.85 to the total of 41 469 contracts reported by entities indicates a total cost of compliance for the 2014 calendar year reporting period in the order of \$242 594.

Ministers' letters of advice

2.15 Ministers'²⁰ letters of advice are intended to provide an accountability mechanism—informing the Parliament that entities have published lists of contracts in accordance with the requirements of the Senate Order.²¹ Ministers are reliant on their departments for the provision of accurate advice with respect to these letters, including specifically identifying where entities 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 entity compliance as recorded in the Ministers' letters.

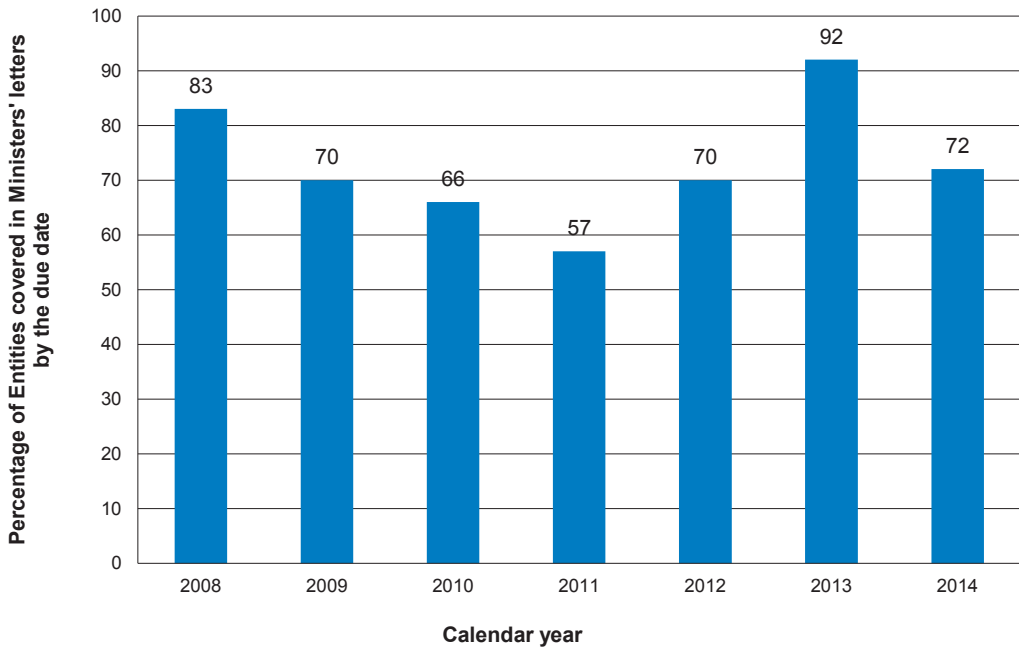
Timeliness of Ministers' letters

2.16 For the 2014 calendar year reporting period, 13 Ministers' letters covering 67 entities (72 per cent) were tabled by 28 February 2015 as required by the Senate Order. Ministers' letters covering an additional 26 entities across five portfolios were tabled within one week of the due date. Ministers' letters included all entities relevant to each Minister's responsibilities. Figure 2.1 shows the percentage of entities whose Ministers' letters were tabled by the due date for the calendar year reporting periods since 2008. The result for the 2014 reporting period represents a decrease compared to the 2013 reporting period.

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

21 'The Minister's letter of Compliance should identify all non-corporate Commonwealth entities which are administered by the Minister, including entities that have not listed any contracts. It is anticipated that portfolio departments will coordinate the preparation and tabling of their Minister's letter'. Finance, RMG 403, p 3.

Figure 2.1: Entities with Ministers' letters tabled by the due date, 2008–2014 calendar years



Source: ANAO analysis.

Statements of compliance

2.17 Ministers' letters of advice serve to inform the Parliament that the entities they administer have met all the requirements of the Senate Order. As noted in paragraph 1.4, where an entity has not 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.²² For the 2014 calendar year reporting period:

- Ministers' letters indicated that six entities had excluded contracts²³ from their listings and did not state when full compliance was expected to be achieved²⁴;

22 Examples of non-compliance include: an entity may have excluded contracts; the list is not up to date; the list is incomplete; or not all relevant entities have published a listing.

23 There are circumstances where the Senate Order allows for certain contractual arrangements to be excluded from contract listings, including due to disclosure being contrary to public interest or the *Privacy Act 1988* or statutory secrecy provisions.

- one Minister's letter identified an entity as compliant with the requirements of the Senate Order, however, as noted in paragraph 2.3, that entity had not published a Senate Order listing as at 30 June 2015; and
- for the audited entities (included in the ANAO's detailed testing), the respective Ministers' letters indicated that no contracts had been excluded from its Senate Order listing.

2.18 Overall entity performance in 2014 has declined with regard to timeliness and content requirements compared to 2013. Only 24 per cent of the entities were fully compliant—16 per cent did not publish a listing by the due date.

Timeliness and accuracy of audited entities' contract listings

2.19 The ANAO examined the four audited entities' contract listings to assess the alignment of the published contract information with the information requested by the Senate Order. The ANAO's review was based on the initial publication, and does not reflect any subsequent corrections by entities. This examination found that:

- all four audited entities' contract listings were published on their websites by the due date, with Ministers' letters confirming the publication of the listings for three of the entities also tabled by the due date;
- each of the audited entities' listings contained entries outside the requirements of paragraph (2)(a) of the Senate Order, due to the inclusion of entity agreements or contracts outside the reporting period or under the reporting threshold;
- three of the audited entities' published listings contained the required basic contract details for the reported contracts and clearly identified the relevant reporting period; and
- one entity did not report the method used to calculate the cost of compiling its listing.

24 Finance, RMG 403, 'Indicating whether internet listings are non-compliant', provides entities the explanations to indicate the reasons for non-compliance as appropriate.

The results of the ANAO examination are summarised in Table 2.6.

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

Paragraph	Finance	PM&C	DSS	DVA
2(a) <i>(correct inclusion of contracts)</i>	Included two contracts outside the relevant reporting period, one entity agreement and one contract under \$100 000	Included one contract outside the reporting period	Included 16 entity agreements and seven contracts that were outside the relevant reporting period	Included 238 contracts outside the relevant reporting period, 17 entity agreements (three of which were outside the reporting period)
2(b) <i>(all basic contract details)</i>	Met	Met	Included seven contracts with no reported start date	Met
2(c) <i>(valid reasons)</i>	Included free text reasons that did not align with RMG 403 and category 'Other' was not always used in accordance with RMG 403	Met	The category 'Other' was not always used in accordance with RMG 403	Met
2(d) <i>(cost of compliance)</i>	Met	Did not report method used to estimate cost of compliance	Met	Met

Source: ANAO analysis of entities' 2014 calendar year contract listings as initially published.

Conclusion

2.20 The Senate Order requires entities to support their Minister by publishing listings of contracts, which include basic contract details and note the use of and reasons for confidentiality provisions, in a timely manner. Entities are expected to make sure that the reporting requirements of the Senate Order are met. In this regard, most entities (84 per cent) published a listing on time. One entity did not publish a listing. Despite Finance guidance (RMG 403) setting out the reporting requirements, overall compliance with the content requirements was low—only 24 per cent of entities fully met all aspects. Ministers' letters covering 72 per cent of entities were tabled on time—a decline compared to last year's result.

2.21 For the four entities examined in detail by the ANAO, none of the contract listings fully complied with the Order's publishing requirements. The most common error was the inclusion of contracts that had start or end dates outside the required date range for the 2014 calendar year reporting period. There were twice as many errors in this regard than identified in the audit for the 2013 calendar year. In this respect, the Department of Veterans' Affairs included a large number of contracts (238) outside the relevant reporting period. Entities need to provide better support to their Ministers by ensuring that their listings are published by the due date and comply with the requirements of the Order.

3. The Use of Confidentiality Provisions in Contracts

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 entity has determined and identified in the contract that specific information is to be kept confidential.²⁵ The need for confidentiality in contracts should be assessed on a case-by-case basis and balanced against public accountability requirements. An entity's assessment of a supplier's claims against the Confidentiality Test and the reasons for agreeing to the inclusion of confidentiality provisions should be documented.²⁶

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 entity's Senate Order listings; and
- the use of confidentiality provisions in a sample of the audited entities' contracts.

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

25 Finance, *Commonwealth Procurement Rules*, July 2014, p. 21.

26 Finance, *Buying for the Australian Government, Confidentiality throughout the Procurement Cycle, Practice, Awarding a contract* [Internet], Finance, paragraphs 9–13, available from <<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/contract-issues/confidentiality-procurement-cycle/practice.html>> [accessed June 2015].

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

3.3 The unjustified use or incorrect reporting of confidentiality provisions in government contracts can reduce transparency through: preventing the release of contract information; and potentially misinforming the Parliament and the public about government contract information that they can access. A summary of the number and value of contracts and the reported use of confidentiality provisions in entities' contract listings for the 2011–14 calendar years are provided at Table 3.1.

Table 3.1: Number and value of contracts, and the reported use of confidentiality provisions, as published in entity contract listings 2011–14

	2011	2012	2013	2014
Number of FMA Act/PGPA Act entities that published a contract listing or advice no relevant contracts had been entered in to ^(a)	93	98	101	92
Total number of contracts listed	39 223	42 536	30 696	41 469
Total value of contracts listed (billion)	\$156.5	\$199.7	\$189.2	\$216.3
Total number of contracts identified as containing confidentiality provisions	2 391	1 703	1 369	1 855
Total value of contracts with identified confidentiality provisions (billion)	\$21.90	\$21.87	\$16.90	\$30.86
Percentage of contracts with identified confidentiality provisions	6.1	4.0	4.5	4.5

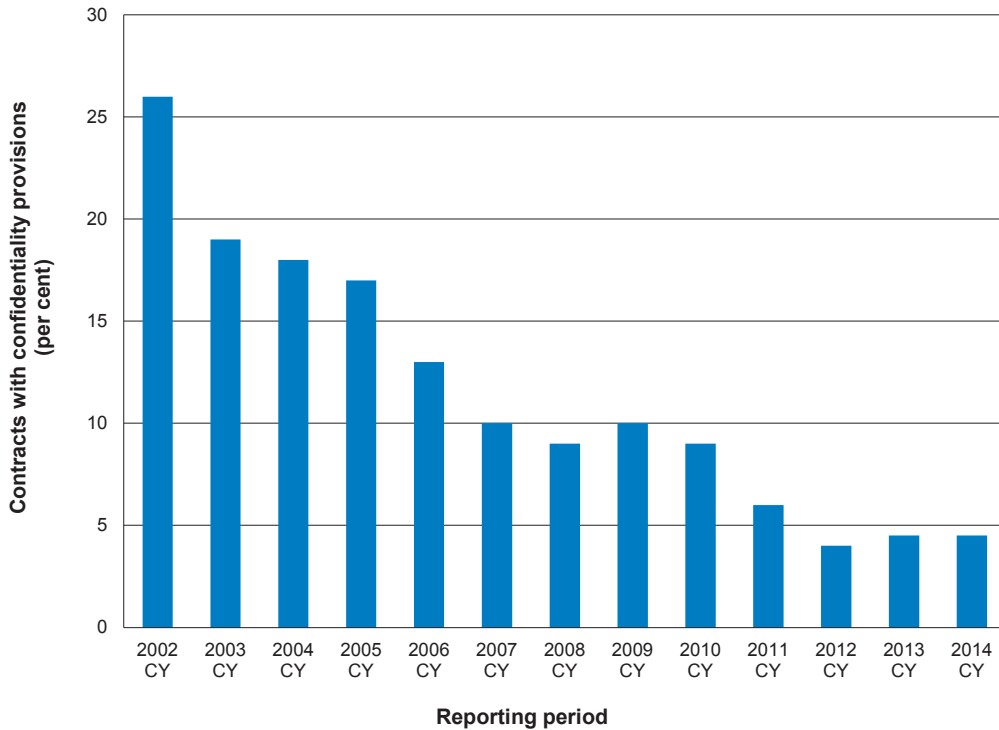
Source: ANAO analysis.

Note (a): Number of agencies/entities 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; for the 2013 calendar year reporting period as at 14 March 2014; and for 2014 calendar year reporting period as at 27 May 2015.

3.4 Across all entities' contract listings, the proportion of contracts reported to contain confidentiality provisions for the 2014 calendar year has remained low at 4.5 per cent. This is in keeping with the 2013 calendar year reporting period and the broader downward trend since the commencement of the Senate Order, as shown in Figure 3.1. 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.

Figure 3.1: Proportion of contracts reported as containing confidentiality provisions: calendar years 2002–14



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

Use of confidentiality provisions by audited entities

Types of confidentiality provisions

3.5 There are 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').

3.6 Most government contracts contain general confidentiality provisions and entities publish an overarching statement with their Senate Order listing²⁷ advising of the existence of, and reasons for, the inclusion of such provisions.²⁸ General confidentiality provisions are not required to be reported where an overarching statement is supplied. Table 3.2 provides examples of the differences between specific and general confidential information.

Table 3.2: Examples of specific and general confidential requirements in contracts

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

Source: ANAO from audited entities’ contracts.

The appropriate use of confidentiality provisions in a sample of contracts

3.7 To assess the appropriateness of the use of confidentiality provisions for the purposes of this audit the ANAO reviewed 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 throughout the Procurement Cycle* (the Guidance). The Confidentiality Test outlined in the 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.

27 The statement is also published on AusTender.

28 To assist in the simplification of reporting, RMG 403 provides an example of an overarching statement that entities may use to report on the existence of, and the reasons for, the use of standard confidentiality provisions of a general nature in contracts. Finance, RMG 403, Sections 47 and 81, pp. 8 and 13.

Table 3.3: The Confidentiality Test

<p>Criterion 1: The information to be protected must be specifically identified</p> <p>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 entity contract may be used for future cooperative procurements entities generally should not include provisions that would prevent other Commonwealth entities from accessing the terms and conditions, including pricing of the contract.</p>
<p>Criterion 2: The information must be commercially 'sensitive'</p> <p>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.</p>
<p>Criterion 3: Disclosure would cause unreasonable detriment to the owner of the information or another party</p> <p>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.</p>
<p>Criterion 4: The information was provided under an understanding that it would remain confidential</p> <p>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 entity has agreed to accept information on the understanding that it would remain confidential.</p>

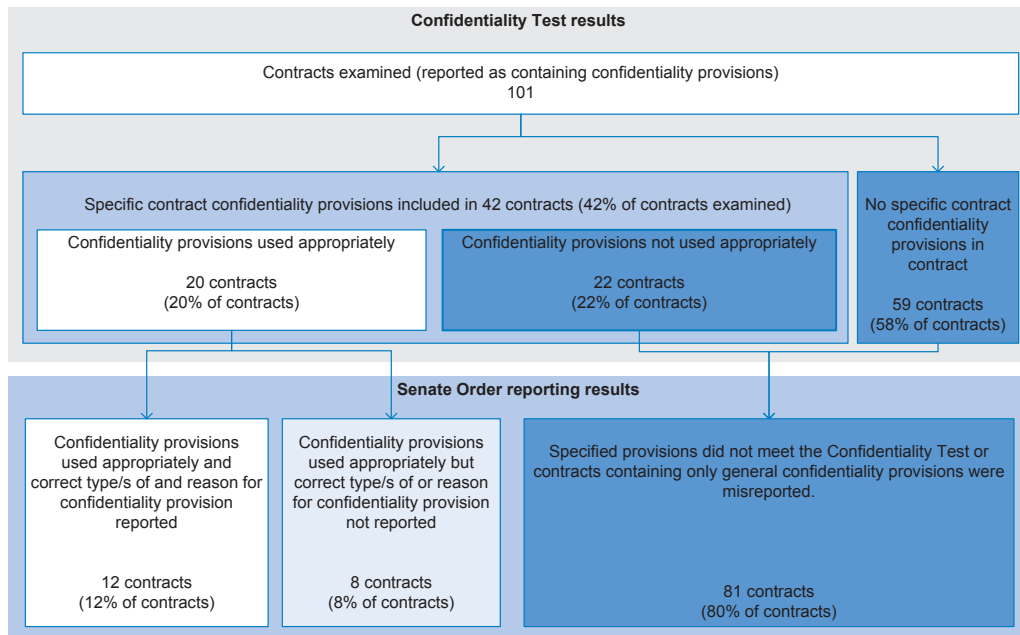
Source: Finance.²⁹

29 Finance, *Buying for the Australian Government, Confidentiality Throughout the Procurement Cycle, Practice*, [Internet], Finance, paragraph 13, available from <<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/contract-issues/confidentiality-procurement-cycle/practice.htm>>[accessed June 2015].

Appropriateness of the use and reporting of confidentiality provisions

3.8 The ANAO selected a sample of 101 contracts that had been reported by the four audited entities in their contract listings or on AusTender as 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. Of the 101 contracts examined, 20 per cent used confidentiality provisions appropriately.

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.

Note: Percentages are rounded.

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

3.9 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.³⁰ However, as shown in Figure 3.2 above, only 42 of the 101 contracts examined contained provisions that specifically identified the information that was to be protected. The remaining 59 contracts were found on ANAO's examination to have no specific confidentiality provisions that identified information within the contract which was required to remain confidential. 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', 'not applicable' or 'none specified', 29 of these 59 contracts had still been reported as containing confidentiality provisions. The remaining 30 contracts either contained only general confidentiality provisions or confidentiality provisions relating to information which was to be obtained or generated as part of the delivery of the contract.

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

3.10 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 supplier's cost or profit margins;
- unique industrial processes, formulae, product mixes, customer lists, engineering and design drawings and diagrams, and accounting techniques;

30 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.

- 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.³¹

3.11 The ANAO assessed the 42 contracts (from the sample of 101) 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 42 contracts, 20 were assessed as meeting Criteria 2 and 3 of the Confidentiality Test. The 22 contracts assessed as not meeting these criteria displayed the following characteristics:

- 14 contracts claimed protection of supplier internal costing/profit information, but the contracts did not contain pricing information which revealed the suppliers' internal costs or profit margins;
- five 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
- three contracts claimed confidentiality under the *Privacy Act 1988*, but did not contain information of a personal nature as described by the Act.

3.12 The Guidance advises that the entity's assessment of the supplier's claims and the reasons for agreeing to the inclusion of confidentiality provisions should be documented. The audited entities were not able to provide documentation supporting their assessment of suppliers' claims against the Confidentiality Test, and reasons for agreeing for the information to remain confidential. However, in two cases, some discussion of the request from the supplier was captured in tender assessment documents, but did not extend to consideration of the Confidentiality Test, nor was the delegate required to make a decision regarding the inclusion of confidentiality provisions in the contract. In one further case, a procurement advisor provided clear advice about the Confidentiality Test and the need to document the assessment. This advice was provided after the contract was executed and was sought in relation to reporting the contract on AusTender.

31 Finance, RMG 403, 'Standard categories of confidentiality information,' pp. 9–10.

Other issues noted with the use of confidentiality provisions

3.13 Nearly half the contracts (48 per cent) in the sample from the four entities stipulated the period of confidentiality as ‘perpetual’, ‘ongoing’, ‘unlimited’, or ‘indefinite’ for either or both contract and contract-related information. According to the Guidance, information should generally not be kept confidential for an unlimited period.³² At most, the time period should be in line with entities’ records authorities or the general records authorities under the *Archives Act 1983*.

The role of Department of Finance

3.14 The results of this audit indicate that the guidance on the Confidentiality Test is deficient or its application by individuals undertaking procurement is deficient—confidentiality provisions in 80 per cent of contracts in the sample were inappropriately used or misreported. As noted in paragraph 1.7, entities’ primary reference for confidentiality is the Guidance, however, when undertaking procurement an entity’s first port of call is the Commonwealth Procurement Rules (CPRs). While there are references to the treatment of confidential information within the CPRs, these references are not prominent and could be easily overlooked. Furthermore, there is no direct reference to the Confidentiality Test within the CPRs. Greater prominence needs to be given to the Confidentiality Test in the Commonwealth Procurement Rules and Department of Finance should amend the CPRs to include the Confidentiality Test or refer more directly to the requirement for its use.

3.15 The results also highlight that the audited entities in 2014 had little or no assurance processes to oversight the use of confidentiality provisions. Department of Finance could do more in its role as the procurement policy owner to strengthen current guidance to include examples of entity assurance mechanisms including better practice approaches.

32 Finance, *Buying for the Australian Government, Confidentiality Throughout the Procurement Cycle, Practice*, paragraph 13.

Recommendation No.1

3.16 To improve the appropriate use and reporting of confidentiality provisions in contracts by entities, the ANAO recommends the Department of Finance revises guidance for confidentiality in procurement by including:

- (a) reference to the Confidentiality Test in the Commonwealth Procurement Rules; and
- (b) strengthening current guidance to include examples of entity assurance mechanisms.

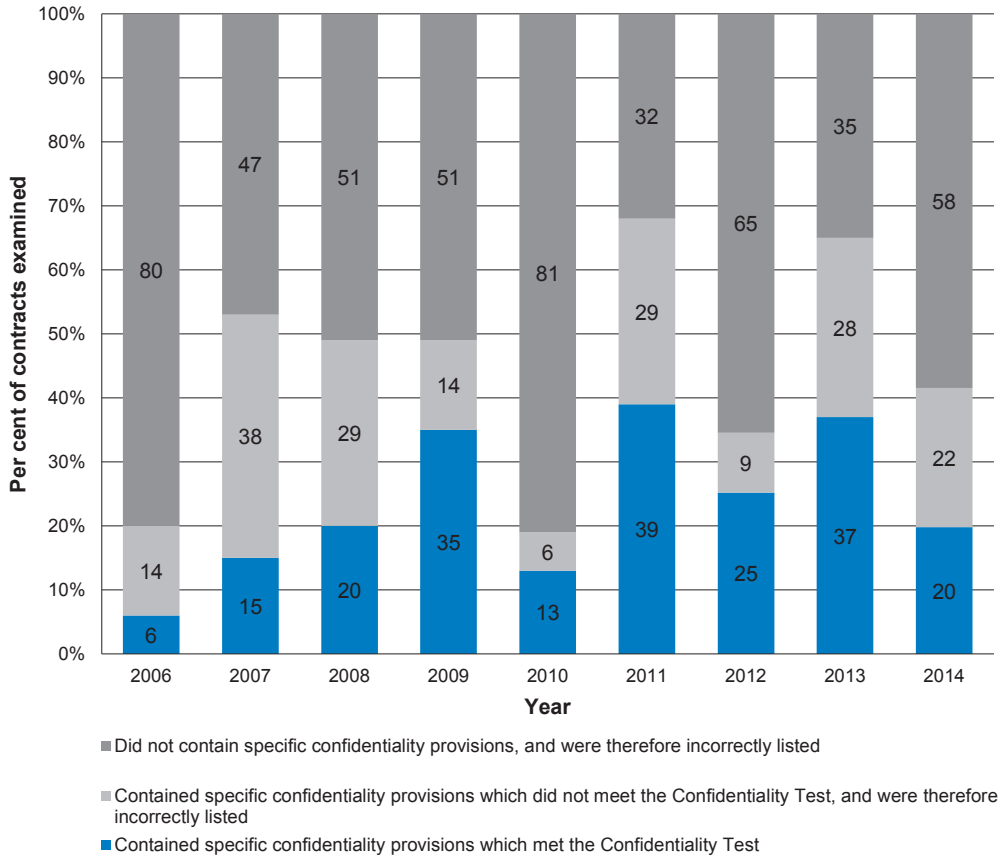
Department of Finance response:

3.17 *Agreed. As part of the next review of the Commonwealth Procurement Rules, Finance will expand on the reference to the guidance Confidentiality Throughout the Procurement Cycle to note it includes a 'Confidentiality Test' and will continue to encourage entities to implement appropriate quality assurance processes when uploading data to AusTender.*

Trends in the use of confidentiality provisions

3.18 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. In 2014, that percentage dropped to 20 per cent. 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.

3.19 Transparency in procurement activities is achieved through appropriate reporting of procurement activity, and the use of confidentiality provisions in contracts only where justified.³³ The results of this audit of the Senate Order indicate that there continues to be a high degree of inappropriate use and misreporting by entities of the types of confidentiality provisions and reasons for their use. Errors in application and reporting relate to insufficient assessment of contracts. Suppliers' claims for contract information to be kept confidential must

³³ Finance, *Buying for the Australian Government, Confidentiality Throughout the Procurement Cycle, Principles*, paragraph 1.

be assessed against the four criteria of the Confidentiality Test on a case-by-case basis. For the contracts sampled, there were no documented assessments of suppliers' claims against the Confidentiality Test. Entities need to pay greater attention to this aspect of procurement. Requiring staff to document the assessment of and decisions made in respect to suppliers' claims for contract information to remain confidential, would assist in this regard.

Recommendation No.2

3.20 When considering requests to keep information contained in a contract confidential, the ANAO recommends that entities implement procedures that require:

- (a) a case-by-case assessment of supplier requests against the Confidentiality Test; and
- (b) adequate documentation of the reasons for agreeing to keep specific information in contracts confidential.

Department of Finance response:

3.21 *Agreed. The Confidentiality Test plays an important role in assisting entities in complying with the Senate Order. In addition, Finance supports entities implementing case-by-case assessments of claims of confidentiality and documenting reasons.*

Department of the Prime Minister and Cabinet

3.22 *Agreed.*

Department of Social Services

3.23 *Agreed, the Department of Social Services (DSS) has implemented the above recommendations as follows:*

- (a) *DSS guidance on confidentiality has been strengthened to include specific advice and examples by which DSS business areas can make informed decisions on a case by case basis against the Department of Finance 'Confidentiality Test'; and*
- (b) *The DSS centralised procurement unit (CPU) now reviews proposed reasons for agreeing to keep specific information in contracts confidential for each individual arrangement. The CPU will ensure that documented reasons for agreement are recorded in the procurement IT system.*

In addition, the delivery of internal procurement training will assist to strengthen the process by which DSS manage requests to keep contract information confidential.

Department of Veterans' Affairs

3.24 *Agreed. While the Department has procedures in place, it will take measures to ensure the procedures are followed.*

Implementation of previous recommendations

3.25 In the 2013 calendar year audit into Senate Order compliance³⁴, the ANAO included a recommendation for entities to improve practical support provided to staff to more accurately assess and report on confidentiality provisions in contracts. This recommendation was supported by the results for the Australian Federal Police (AFP) an entity included in the 2013 calendar year sample, which obtained a 100 per cent compliance result for its use of confidentiality provisions. The AFP routinely reviewed the internally reported use of confidentiality provisions by divisions and line areas to determine whether the use of provisions was appropriate and accurately reported.

3.26 All four entities included in the 2014 calendar year audit formally acknowledged the recommendations from the previous ANAO audit through their audit committees. However, the assurances provided to the audit committees were not supported by the results of this audit.

3.27 During the course of the audit, DSS had introduced a quality assurance process to assess the appropriateness of the use of confidentiality provisions and improve record keeping. These new processes should assist DSS to meet Senate Order requirements in the future and are outlined in case study 1.

34 ANAO Audit Report No. 1 2014–15, *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2013 Compliance)*.

Case study 1

At the commencement of the audit, DSS advised that it had encountered issues with contract reporting, which had led to a high number of contracts being reported as containing confidentiality provisions. DSS' procurement processes at the time were supported by an IT system that allowed the central procurement unit to review key points in the procurement process. During the audit, DSS introduced a new quality assurance review point to identify when staff undertaking procurement intend to include specific confidentiality provisions within contracts. The review point involved the procurement IT system sending an alert to the central procurement unit. The unit then provided oversight and advice in relation to any confidentiality provisions before the contract was executed or a purchase order raised.

Parliamentary disclosure and ANAO access clauses

3.28 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 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, entities 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.³⁵ 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.³⁶

3.29 Of the 101 contracts examined by the ANAO, 98 per cent contained appropriately worded³⁷ parliamentary disclosure clauses, and 97 per cent included ANAO access clauses (see Table 3.4).

35 Finance, *Buying for the Australian Government, Transparency in Australian Government Procurement, Traps*, paragraph 1.

36 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

Entity	No. of contracts examined	Parliamentary disclosure clauses		ANAO access clauses	
		No.	%	No.	%
Finance	30	28	93	27	90
PM&C	17	17	100	17	100
DSS	45	45	100	45	100
DVA	9	9	100	9	100
Total	101	98	97	97	96

Source: ANAO analysis.

3.30 All four of the audited entities’ standard contract templates contained appropriately worded parliamentary disclosure clauses and ANAO access clauses. Consistent with the findings of previous ANAO audits, where disclosure clauses were not included in the contracts examined, the entity’s standard contract template had generally not been used. There can be various reasons entities may use non-standard contract templates. However, entities 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.

Conclusion

3.31 The proportion of contracts reported as containing confidentiality provisions in the 2014 calendar year across all non-corporate Commonwealth entities was low (4.5 per cent) and in keeping with 2013 levels. Despite this, specific confidentiality provisions in contracts have continued to be incorrectly used and reported. For example, in 80 per cent of the contracts sampled by the ANAO, the use of confidentiality provisions did not comply with the Guidance or was misreported.

3.32 Confidentiality provisions in government contracts can impede accountability and transparency in government purchasing. A request for specific information to be kept confidential must be assessed against the Confidentiality Test criteria and entities should make sure decisions to include

37 The ANAO assessed contracts as containing appropriately worded clauses where they contained clauses that were similar to the model clauses provided in the Guidance.

confidentiality provisions are documented. Entities should also provide adequate training and oversight of this activity.

3.33 Finance supports entities to comply with the Senate Order, however the result of this audit indicate that more support is required to improve entity performance with respect to assessing and reporting on the use of confidentiality provisions. Finance should improve procurement guidance through placing direct reference to the Confidentiality Test within the Commonwealth Procurement Rules. Finance should also clarify and strengthen current guidance to include examples of entity assurance mechanisms, including better practice approaches.

4. The Senate Order and AusTender

This chapter examines the consistency of the audited entities' reporting of contract information in the Senate Order listings and on AusTender and the accuracy of reported information for a sample of contracts.

Background

4.1 In addition to the Senate Order, entities have a number of other reporting requirements for Australian Government contracts and grants.³⁸ In particular, since September 2007, entities have been required to publish on AusTender details of all procurement contracts and entity 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 entities to identify the existence of confidentiality provisions in contracts and to categorise the reason for the inclusion of the provisions.

4.2 While AusTender reporting covers procurement contracts and entity agreements (the majority of government contracts fall under these categories), the Senate Order also requires entities 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.

4.3 The contract information reported by entities on AusTender provides the basis of Finance's *Statistics on Australian Government Procurement Contracts*, published on Finance's website each year.³⁹ This information is also used by suppliers and other stakeholders to monitor government business opportunities.

4.4 AusTender can generate various reports drawing on the contract information reported by entities. As noted in paragraph 1.5, from 1 September 2015 entities can use AusTender to satisfy the requirements of the Senate Order listing for procurement contracts. To give effect to the arrangement

38 These requirements are set out in the Australian Government, *Requirements for Annual reports - for Departments, Executive Agencies and other non-corporate Commonwealth entities*, PM&C, 2015.

39 Finance, *Statistics on Australian Government Procurement Contracts* [Internet], Finance, available from <<http://www.finance.gov.au/procurement/statistics-on-commonwealth-purchasing-contracts/>> [accessed June 2015].

Finance will produce the *Senate Order on Confidentiality in Procurement Contracts* Report for all non-corporate Commonwealth entities. Entities will then need to provide a link from their website to the report page where their report will be listed.

4.5 Reliance on AusTender places emphasis on entities ensuring the information is correct and up-to-date. To assess the reliability of the procurement contract information reported in entities' contract listings and on AusTender, the ANAO examined the consistency of the four audited entities' reporting of contract information, including the reporting of confidentiality provisions, across both reporting arrangements. The ANAO also examined the accuracy of the contract information reported for the 101 contracts included in the audit sample by comparing that information to the actual contracts and supporting documentation.

Compiling Senate Order and AusTender information

4.6 Each of the audited entities had a decentralised approach to procurement, whereby procurement and contract management were the responsibility of individual divisions or business areas. The entities also had central procurement units (or equivalent), which were responsible for the provision of procurement advice and the coordination and publication of the entities' contract information in the contract listings and on AusTender. One entity's central procurement unit used an IT system to support the oversight and application of key approvals. Each entity maintained procurement guidance and templates available through their Intranet sites, and referenced Finance guidance as appropriate and entity specific Senate Order reporting procedures.

Entities' compilation of Senate Order contract listings

4.7 At each of the audited entities, the compilation of the contract listings was a manual process using data extracted from the entity's Financial Information Management Systems (FMIS), grant management systems 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.

4.8 Each of the audited entities had established procedures for recording and reporting contract information, including the information required by the Senate Order. Generally, the central procurement units compiled and proofread the list

to identify obvious errors, and relied on business areas to confirm the accuracy of contract listings prior to publication. However, despite these procedures the ANAO's testing of the sample of contracts indicates that processes were not sufficiently effective to meet the requirements of the Order.

Reporting contract information on AusTender

4.9 As with the reporting requirements of the Senate Order, for each contract reported on AusTender, the entity must report the supplier, subject matter, period and total value (or estimated value) of the contract. Where contracts do not contain a total specified value, for example demand driven contracts that may span several years, entities are required to report the total estimated whole-of-life value of the contract, not the annual value or the value of individual invoices or purchase orders.⁴⁰ This approach applies even where, following a single approach to market, an entity enters into multiple contracts with multiple suppliers for the provision of the particular goods or services sought.

Consistency and accuracy of reporting

4.10 The ANAO compared the procurement contract information reported by the audited entities' in their 2014 calendar year Senate Order listings with the procurement contract information reported on AusTender covering the same reporting period. The examination included three aspects:

- analysis of whether all the procurement contracts included in the entities' 2014 calendar year contract listings were also published on AusTender (Table 4.1 refers);
- a comparison of whether the use of confidentiality provisions as reported in entities' 2014 calendar year contract listings had been similarly identified and reported on AusTender (Table 4.2 refers); and
- an assessment of the audit sample to determine the accuracy and consistency of reporting in contract listings and on AusTender compared to the details in the respective contracts (Table 4.3 refers).

40 For example, an entity 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 and 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 entity 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.

Consistency of reporting contract details

4.11 The four audited entities reported a total of 10 112 entries in their Senate Order listings. Of these contracts 2 171 were procurement contracts that were required to be reported on AusTender and of these 1 936 had a corresponding AusTender entry. The combined value of these contracts was \$4.9 billion (54 per cent of the total value reported).

4.12 Of the remaining 235 procurement contracts which did not have a corresponding AusTender entry, 204 contracts with a combined value of approximately \$4 billion were DSS contracts. The majority of these contracts had been transferred to DSS as part of the December 2014 machinery of government changes and had not yet been moved to the DSS profile in AusTender at the time of the audit testing.

Table 4.1: Consistency of reporting in Senate Order contract listings and on AusTender for the 2014 calendar year reporting period

	Finance	PM&C	DSS	DVA	Total	%
Number of procurement contracts with a corresponding AusTender entry	446	184	645	661	1 936	89 ^(a)
Number of procurement contracts with no corresponding AusTender entry	28	3	204	—	235	11
Total number	474	187	849	661	2 171	100
Value of procurement contracts with a corresponding AusTender entry (millions)	\$2 599	\$370	\$1 286	\$614	\$4 869	54
Value of procurement contracts without a corresponding AusTender entry (millions)	\$50	\$0.7	\$4 079	—	\$4 130	46
Total value (millions)^(b)	\$2 649	\$371	\$5 365	\$614	\$8 999	100

Source: ANAO analysis.

Note (a): Taking into account contracts that were not yet moved to DSS' AusTender profile, the number of contracts reported in the Senate Order listing with a corresponding entry in AusTender would increase to 98 per cent.

Note (b): Figures are rounded.

Consistency of reporting of confidentiality provisions

4.13 The ANAO analysed the audited entities' reported use of confidentiality provisions across each corresponding contract entry in the entities' contract listings and on AusTender to determine the extent to which the existence of, and the types and reasons for, the confidentiality provisions were consistently reported.

4.14 As shown in Table 4.2, the reporting in relation to provision types in the contract listings and on AusTender matched for 1 926 (99.5 per cent) of the corresponding contracts. The reporting of the reasons for the inclusion of confidentiality provisions matched for 1 914 (99 per cent) of the contracts.

Table 4.2: Comparison of reported confidentiality provision types and reasons in the Senate Order and AusTender

	Finance	PM&C	DSS	DVA	Total	
					No.	%
The type of confidentiality provision(s) matched for:						
Both provision types	440	181	644	661	1 926	99.5
One provision types	4	3	1	0	8	<1
Neither provision type	2	0	0	0	2	<1
Total	446	184	645	661	1 936	100
The reported reasons for confidentiality provision(s) matched for:						
Both provision types	432	177	644	661	1 914	99
One provision types	12	6	1	0	19	<1
Neither provision type	2	1	0	0	3	<1
Total	446	184	645	661	1 936	100

Source: ANAO analysis of Senate Order and AusTender reporting.

Accuracy of reporting

4.15 In addition to the comparisons of the data reported in Senate Order listings and on AusTender, the ANAO examined the accuracy of the four audited entities' reporting of the 101 contracts by comparing the listed information to the actual contracts and other supporting documentation. 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 contracts reviewed. Based on these criteria, as shown in Table 4.3, only 17 per cent of the 101 contracts were considered to be correctly reported on the Senate Order listings and only 16 per cent were correctly reported on AusTender.

Table 4.3: Accuracy of reported contract information

	Finance	PM&C	DSS	DVA	No.	%
Number of contracts examined	30	17	45	9	101	–
Number of contracts with basic contract details and confidentiality provisions correctly reported in the Senate Order contract listing	6	6	5	0	17	17%
Number of contracts with basic contract details and confidentiality provisions correctly reported on AusTender	8	3	5	0	16	16%

Source: ANAO analysis.

4.16 The results shown in Table 4.3, reflect errors in reporting for both the basic contract details (contractor, subject matter, amount and period) and the existence of, and the type and reasons for, confidentiality provisions in the contracts examined. This is despite entities only being required to correctly transcribe information contained in contracts and supporting documentation into their FMIS or into AusTender.

Recommendation No.3

4.17 To improve the quality of information on AusTender, the ANAO recommends that entities implement appropriate quality assurance processes upfront at the point of contract creation to confirm the completeness and accuracy of reported contract information.

Department of Finance response:

4.18 *Agree. Finance has, and will continue to, encourage entities to implement appropriate quality assurance processes when uploading data to AusTender.*

Department of the Prime Minister and Cabinet

4.19 *Agreed.*

Department of Social Services

4.20 *Agreed, DSS considers that implementation of this recommendation will support the work already undertaken within the department to improve reporting of confidentiality in contracts.*

As noted in your case study 1, DSS has already recognised the importance of improving the quality of confidentiality information reported on AusTender. DSS has introduced new quality assurance measures into its procurement IT system to better control the use of confidentiality in contracts. This will address a number of issues raised within the report.

Department of Veterans' Affairs

4.21 *Agreed. Since the audit, the Department has reinforced existing quality assurance processes to ensure the completeness and accuracy of reported contract information.*

Conclusion

4.22 The results of this audit indicate that processes to capture information about basic contract details and the reporting of existence of confidentiality provisions needs to improve. In the ANAO's sample only 17 per cent of contracts were found to be accurately reported, taking into account the basic contract information and the correct type and reason for confidentiality provisions.

4.23 The use of AusTender to meet the Senate Order requirements for procurement contracts, from 1 September 2015, will assist in streamlining reporting requirements for entities. However, if AusTender is to be relied upon by the Parliament, entities will need to improve the accuracy of contract reporting. Entities need to implement assurance mechanisms to ensure the accuracy of reported information. Central procurement units may be well placed to assist in this regard, particularly in supporting staff to understand and correctly apply confidentiality provisions in contracts.



Rona Mellor PSM
Acting Auditor-General

Canberra ACT
30 September 2015

Appendices

Appendix 1 Entities' Responses



Australian Government
Department of Finance

Jane Halton AO PSM
Secretary

Our Ref: SEC0012383

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

Dear Dr Pope

Thank you for your letter dated 24 August 2015, regarding the audit of Confidentiality in Government Contracts.

Finance is pleased to receive the section 19 report and thanks the Australian National Audit Office (ANAO) for the opportunity to respond to the matters raised.

The Department of Finance's comments are provided at [Attachment A](#).

I appreciate the professional approach the ANAO adopted in dealing with Finance business groups during the audit process. The discussions between Finance staff and ANAO officers in the course of the audit will assist this Department to further refine its approach in meeting the requirements of the Senate Order.

Should you have any queries please do not hesitate to contact Mr Steve O'Loughlin, Assistant Secretary, Enterprise Management Office on 6215 2757.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J Halton', written over a horizontal line.

Jane Halton
Secretary
(7) September 2015



Australian Government

Department of the Prime Minister and Cabinet

ANDREW FISHER BUILDING
ONE NATIONAL CIRCUIT
BARTON

Reference:EC15/460

8 July 2015

Dr Andrew Pope
Australian National Audit Office
GPO Box 707
CANBERRA ACT 2601

Dear Dr Pope

Thank you for your letter of 3 July 2015 regarding Australian National Audit Office - Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2014 Compliance).

The Department of the Prime Minister and Cabinet notes the ANAO's observation that processes can be strengthened to classify and report confidentiality provisions and we will look for continued improvements in this area.

The Department provides the following formal entity response for inclusion in the audit report:

The Department acknowledges the findings in the audit report and as a result of this audit will continue to work towards strengthening knowledge and governance measures when assessing confidentiality provisions.

Yours sincerely

A handwritten signature in black ink that reads 'A. McIntyre'.

Amanda McIntyre
Chief Financial Officer

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Australian Government
Department of Social Services

Finn Pratt AO PSM
Secretary

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

Dear Dr Pope

Thank you for your letter of 24 August 2015 providing a copy of the ANAO's proposed audit report on Confidentiality in Government Contracts: Senate Order for Departmental and Entity Contracts (Calendar Year 2014 Compliance), issued under s19 of the *Auditor-General Act 1977*.

The Department of Social Services welcomes the findings of this report, and agrees with the ANAO's recommendations.

Attachment A to this letter details the Department's overall response to the proposed report and to each of the ANAO's recommendations.

If you would like to discuss the Department's response, please do not hesitate to contact John Reardon, A/g Branch Manager, Property, Environment, Procurement & Security Branch on 02 6146 2925 - john.reardon@dss.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Finn Pratt'.

Finn Pratt

16 September 2015

PO Box 7576 Canberra Business Centre ACT 2610
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Australian Government
Department of Veterans' Affairs
OFFICE OF THE SECRETARY

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

Dear Dr Pope

Thank you for your letter of 24 August 2015, reference PARI2739, seeking the Department of Veterans' Affairs (DVA) comments for inclusion in the final report on the Performance Audit: Confidentiality in Government Contracts: Senate Order for Departmental and Entity Contracts (Calendar Year 2014 Compliance).

I have responded to your request in two parts:

- this covering letter, not to be included in the report;
- Appendix 1 – DVA's response to each recommendation for inclusion in the final report; and
- Appendix 2 – DVA's summary response to be included in the report summary.

Please contact Ms Narelle Dotta, First Assistant Secretary, Corporate Division, on 6289 4777 if you require further information.

Yours sincerely

S. Lewis PSM
Secretary

21 September 2015

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Saluting Their Service

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

There be laid on the table, by each Minister in the Senate, in respect of each entity 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) a list of contracts in accordance with paragraph (2) has been placed on the Internet, with access to the list through the entity's home page; and
- (b) includes an assurance by the entity head that the listed contracts do not contain any inappropriate confidentiality provisions.

(1A) order 1(b) takes effect from 1 July 2017.

(2) The list of contracts referred to in paragraph (1) indicate:

(a) each contract entered into by the entity 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.

(2A) For the purposes of paragraph (1)(a) as it applies to procurement contracts only, access from an entity's home page may include a link to a complying report on AusTender. If an entity has contracts to report other than procurement contracts, there must be a dedicated link to a list of such contracts from the entity's home page in addition to any link to AusTender.

(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 entities are included; and

(c) contracts all of which are confidential are not included.

(4) Where no contracts have been entered into by an entity, 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 2016 and 30 September 2018, a report indicating that the Auditor-General has examined a number of such contracts selected by the Auditor-General, and indicating whether any inappropriate use of such provisions was detected in that examination.

(6) In respect of letters including matter under paragraph (3), the Auditor-General be requested to indicate in a report under paragraph (5) that the Auditor-General has examined a number of contracts, selected by the Auditor-General, which have not been included in a list, and to indicate whether the contracts should be listed.

(7) The Finance and Public Administration References Committee consider 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:

“complying report on AusTender” means a report in respect of an individual entity that meets the requirements of this order in respect of procurement contracts;

“entity” means a Commonwealth entity within the meaning of the *Public Governance, Performance and Accountability Act 2013*, but does not include a trading Public Non-financial Corporation as classified by the Australian Bureau of Statistics;

“inappropriate confidentiality provision” means a confidentiality provision that is not in accordance with the guidance issued by the Department of Finance on compliance with this order and approved by the Finance and Public Administration References Committee; and

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

(9A) Until 1 July 2017, entity is taken to mean a non-corporate Commonwealth entity within the meaning of the *Public Governance, Performance and Accountability Act 2013*.

(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, 15 May 2015.)⁴¹

41 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> [to be updated. Amendment taken up from Hansard 14 May 2015].

Appendix 3 Previous ANAO audit reports on the Senate Order

Audit Report	Recommendation(s)
<p>Audit Report No. 1 2014–15 (Calendar Year 2013 Compliance)</p>	<p>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.</p> <p>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.</p>
<p>Audit Report No.4 2013–14 (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"> • identification and reporting on the use of confidentiality provisions, particularly pricing information and the difference between general and specific confidentiality provisions; • implement enhanced processes to support data capture, reporting; and • quality assurance of contract information.
<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"> • 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 • implement enhanced processes to support data capture, reporting and quality assurance.
<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>

Audit Report	Recommendation(s)
Audit Report No.7 2010–11 (Calendar Year 2009 Compliance)	<p>Recommendation No.1 Paragraph 3.29</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>Recommendation No.2 Paragraph 4.40</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 No.6 2009–10 (Calendar Year 2008 Compliance)	<p>Recommendation No. 1 Paragraph 2.22</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"> • 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 • provide suitable training and guidance to staff on these policies and procedures.
Audit Report No.5 2008–09 (Calendar Year 2007 Compliance)	<p>Recommendation No. 1 Paragraph 2.25</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>Recommendation No.1 Paragraph 4.23</p> <p>The ANAO recommends that agencies improve the accuracy and completeness of their Internet listings by:</p> <ul style="list-style-type: none"> • 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 • developing quality assurance processes to improve the accuracy of the Internet listing.

Audit Report	Recommendation(s)
<p>Audit Report No.5 2006–07 (Calendar Year 2005 Compliance)</p>	<p>Recommendation No.1 Paragraph 2.35 The ANAO recommends that agencies improve the accuracy and completeness of their contract listings by:</p> <ul style="list-style-type: none"> • 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 • developing quality assurance processes to improve the accuracy of the contract listing. <p>Recommendation No.2 Paragraph 3.38 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>
<p>Audit Report No.11 2005–06 (Calendar Year 2004 Compliance)</p>	<p>Recommendation No. 1 Paragraph 2.35 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>Recommendation No. 2 Paragraph 3.20 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>Recommendation No. 3 Paragraph 3.58 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>

Audit Report	Recommendation(s)
Audit Report No.5 2003–04 (Autumn 2003 Compliance)	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’.
Audit Report No.32 2002–03 (Spring 2002 Compliance)	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.
Audit Report No.8 2002–03 (Autumn 2002 Compliance)	<p>Recommendation No. 1 Paragraph 2.42</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"> • give priority consideration to establishing contract registers where the number of contracts makes it a practicable solution; and • implement quality assurance processes, as necessary, to ensure the completeness and accuracy of the contract information listed on the Internet. <p>Recommendation No. 2 Paragraph 3.24</p> <p>The ANAO recommends that all FMA agencies, as appropriate:</p> <ul style="list-style-type: none"> • 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; • implement procedures which require a case-by-case consideration of requests for information in, or associated with, contracts to be treated as confidential; • provide guidance and training for procurement officers to assist them determine the appropriateness of claims of confidentiality made by potential contractors; and • establish a training and staff awareness program covering the new governance and accountability framework for contracting for all relevant staff.
Audit Report No.33 2001–02 Senate Order of 20 June 2001 (February 2002)	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.

Audit Report	Recommendation(s)
<p>Audit Report No.38 2000–01 The Use of Confidentiality Provisions in Commonwealth Contracts</p>	<p>Recommendation No. 1 Paragraph 5.24</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>Recommendation No. 2 Paragraph 5.36</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

A

Archives Act 1983, 47

Audit Committees, 51

B

Buying for the Australian Government,
Confidentiality Throughout the
Procurement Cycle (the Guidance),
11, 23, 46

C

Commonwealth Procurement Rules,
14, 15, 47, 48, 52, 54

Confidentiality Test, 12, 14, 15, 23, 25,
39, 43, 44, 45, 46, 47, 48, 50, 53, 54

Contracts as defined by the Order, 29

D

Department of Finance (Finance), 11,
12, 15, 23, 25, 26, 37, 38, 47, 48, 53, 54,
56, 58, 59, 60, 73

Department of Social Services (DSS),
12, 25, 26, 37, 51, 52, 53, 58, 59, 60

Department of the Prime Minister and
Cabinet (PM&C), 8, 12, 25, 26, 37, 53,
58, 59, 60

Department of Veterans' Affairs
(DVA), 12, 25, 26, 30, 37, 38, 53, 58,
59, 60

F

Finance and Public Administration
References Committee, 21, 22, 70, 71

P

Public Governance, Performance and
Accountability Act 2013, 25, 26

Q

Quality assurance, 51

R

Reporting requirements for
government contracts and grants, 23,
55

Resource Management Guide No. 403
(RMG 403), 11, 23, 25, 27, 31, 32, 37,
38, 42

S

Standard reasons for confidentiality, 32

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Across Entities*

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Australian Communications and Media Authority*

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