

The Auditor-General
Audit Report No.4 2013–14
Performance Audit

Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2012 Compliance)

[Across Agencies](#)

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Canberra ACT
26 September 2013

Dear Mr President
Dear Madam Speaker

The Australian National Audit Office has undertaken an independent performance audit across Agencies 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. The report is titled *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2012 Compliance)*.

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



Ian McPhee
Auditor-General

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

AUDITING FOR AUSTRALIA

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

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Abbreviations

AGD	Attorney-General's Department
ANAO	Australian National Audit Office
AUSTRAC	Australian Transaction Reports and Analysis Centre
CPU	Central Procurement Unit
DoHA	Department of Health and Ageing
Finance	Department of Finance and Deregulation
FMA Act	<i>Financial Management and Accountability Act 1997</i>
FMG 8	<i>Financial Management Guidance No. 8, Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)</i>

Glossary

Agencies	Agencies include Departments of State, Departments of the Parliament and 'prescribed agencies' for the purposes of the <i>Financial Management and Accountability Act 1997</i> .
AusTender	The Australian Government's web-based procurement information system.
Confidentiality provisions	The clauses of a contract that operate to create the contractual confidentiality obligations for the parties to the contract in respect of information that is specified in the contract.
The Confidentiality Test (the Test)	The Confidentiality Test, as set out in Finance's <i>Confidentiality throughout the Procurement Cycle</i> guidance, establishes four criteria to assist agencies to determine whether contractual information should be treated as confidential.

Summary

Summary

Introduction

1. The Senate Order for Departmental and Agency Contracts (the Senate Order/the Order)¹ was introduced in 2001 to improve public access to information about Australian Government contracting. 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.² Supporting this principle, successive governments have agreed to comply with the requirements of the Senate Order and its subsequent amendments.

2. The Senate Order requires that each Minister in the Senate, in respect of each agency³ administered by that Minister, or by a Minister in the House of Representatives represented by that Minister, table a letter of advice confirming that these agencies have published a list of contracts on their websites containing the following information:

- a) each contract entered into by the agency which has not been fully performed or which has been entered into during the previous 12 months, and which provides for a consideration to the value of \$100 000 or more;
- b) the contractor, the amount of the consideration, 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

1 The Senate Order for Departmental and Agency Contracts is reproduced at Appendix 2.

2 Department of Finance and Deregulation, *Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts) - The Financial Management Guidance Series of Publications No. 8* (FMG 8), January 2004. [Internet] available from <<http://www.finance.gov.au/publications/fmg-series/08-listing-of-contract-details.html>> [accessed 19 September 2013].

3 Agencies meaning those 'agencies' subject to the *Financial Management and Accountability Act 1997*.

- d) an estimate of the cost of complying with [the] order and a statement of the method used to make the estimate.

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

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

4. The Senate Order further requests that the Auditor-General annually examine a number of the contracts listed with confidentiality provisions, and report any inappropriate use of these provisions.

5. The Department of Finance and Deregulation (Finance)⁴ is responsible for providing agencies with guidance on complying with the Senate Order as part of its broader responsibility for procurement policy, including the appropriate use of confidentiality provisions. The Finance publication, *Financial Management Guidance No. 8—Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts) (January 2004)* (FMG 8)⁵ provides guidance to support agencies in developing their Senate Order Internet listings.

6. Finance's whole-of-government guidance—*Buying for the Australian Government*⁶—provides guidance on the use of confidentiality provisions in contracts and includes the Confidentiality Test (the Test). The Test consists of four criteria, all of which must be met for a supplier's commercial information to be considered confidential. These are:

- the information to be protected must be specifically identified;
- the information must be commercially 'sensitive';

4 In line with changes to the Administrative Arrangements Order issued 18 September 2013, the Department of Finance and Deregulation became the Department of Finance.

5 Department of Finance and Deregulation, FMG 8.

6 Department of Finance and Deregulation, *Buying for the Australian Government, Confidentiality throughout the Procurement Cycle: Principles*. [Internet], available from <<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/contract-issues/confidentiality-procurement-cycle/principles.html>> [accessed 19 September 2013].

- disclosure would cause unreasonable detriment to the owner of the information or another party; and
- the information was provided under an understanding that it would remain confidential.⁷

7. The Senate Order is one of several mechanisms to promote transparency in Australian Government contracting. Other mechanisms include the reporting on AusTender⁸ of procurement and consultancy contracts, the production of lists of grants—as well as the publication of grants on agency websites, and the presentation of summary contract information in agencies' annual reports, as set out in the Department of the Prime Minister and Cabinet's *Requirements for Annual Reports*.⁹

Audit objective, criteria and scope

8. This audit is the fifteenth¹⁰ in a series of audits and fulfils the Senate's request for the Auditor-General to provide an annual report on the use of confidentiality provisions in Australian Government contracts.

9. The audit objective was to assess the appropriateness of the use and reporting of confidentiality provisions in Australian Government contracts for the 2012 calendar year reporting period. To form a conclusion against the objective the ANAO considered whether:

- Financial Management and Accountability Act 1997* (FMA Act) agencies published contract listings in accordance with the requirements of the Senate Order and the extent to which the published content aligned with the information requested by the Order;

7 Department of Finance and Deregulation, *Buying for the Australian Government, Confidentiality throughout the Procurement Cycle: Practice*. [Internet], available from <<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/contract-issues/confidentiality-procurement-cycle/practice.html#tes>> [accessed 27 August 2013].

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

9 Department of the Prime Minister and Cabinet - *Requirements for Annual Reports*, 28 June 2012. [Internet] available from <http://www.dpmc.gov.au/guidelines/docs/annual_report_requirements_2011-12_markedup.pdf> [accessed 27 August 2013].

10 In 2003, the Senate Order was amended to request that the Auditor-General provide an annual report to the Senate (by no later than 30 September each year) rather than twice-yearly as specified in the original Order. A list of previous audits and recommendations (where applicable) is provided at Appendix 3.

- b) confidentiality provisions were used appropriately in a sample of contracts, selected from the audited agencies' Senate Order listings, reported to contain confidentiality provisions; and
- c) the audited agencies' guidance and procedures supported the accurate and timely reporting of contract information in the Senate Order listings and on AusTender.

10. As at 28 February 2013, there were 106 FMA Act agencies subject to the Senate Order's reporting requirements.¹¹ All of these agencies were included for the purposes of the overall audit analysis (part (a) of the audit criteria). The agencies selected for detailed contract analysis in the audit (parts (b) and (c) of the audit criteria) were:

- the Attorney-General's Department (AGD);
- the Australian Transaction Reports and Analysis Centre (AUSTRAC);
- ComSuper; and
- the Department of Health and Ageing (DoHA).¹²

11. Agency selection took into account agencies' involvement in previous Senate Order audits and the size and nature of the agencies' contract listings (particularly the proportion of contracts listed as containing confidentiality provisions). Table S.1 shows the number and value of the contracts reported in the audited agencies' 2012 Senate Order listings, and percentage of those contracts reported as containing confidentiality provisions.

11 As at 28 February 2013, there were 112 FMA Act agencies. The Senate Order is not applicable to the Australian Secret Intelligence Service or the Australian Security Intelligence Organisation for reasons of national security. The Order is also not applicable to the Department of the House of Representatives, the Department of the Senate, the Department of Parliamentary Services and the Parliamentary Budget Office as they are not administered by a Minister.

12 In line with changes to the Administrative Arrangements Order issued 18 September 2013, the Department of Health and Ageing became the Department of Health.

Table S.1: Summary of contract information reported by the audited agencies

	AGD	AUSTRAC	ComSuper	DoHA
Total number of contracts reported in the 2012 calendar year Senate Order listings	206	120	74	6 798
Total value of contracts reported in 2012 calendar year Senate Order listings	\$852.8 m	\$99.4 m	\$124.2 m	\$23.2 b
Percentage of contracts (by number) reported in 2012 calendar year Senate Order listings as containing confidentiality provisions	16.5	74.2	21.6	6.3

Source: ANAO analysis.

12. To assess agencies' compliance with the Senate Order, the ANAO had regard to relevant procurement guidance prepared by Finance. In particular, FMG 8 was used to review agencies' contract listings and the Confidentiality Test contained in the *Buying for the Australian Government Guidance* was followed to assess whether confidentiality provisions were used appropriately for a sample of contracts reported to contain confidentiality information.

Overall conclusion

13. The primary aim of the Senate Order is to reduce the unjustified inclusion of confidentiality provisions in government contracts. Reporting by agencies through Senate Order listings indicates that the use of confidentiality provisions in contracts has continued to reduce over time. When the Senate Order was introduced in 2001, 24 per cent of relevant Australian Government contracts were reported to contain confidentiality provisions. In contrast, the 2012 calendar year Senate Order listings contained 42 536 contracts, of which 1703 (4 per cent), were reported as containing confidentiality provisions.

14. For the 2012 calendar year reporting period, 89 of the 106 (84 per cent) FMA Act agencies to which the Senate Order applied, published a contract listing, or advice that no relevant contracts had been entered into, by the due date. This was a similar result to 2011 when 91 per cent of agencies achieved timely publication. Ministers' letters confirm to the Parliament that agency contract listings have been published in accordance with the Order. Ministers' letters covering 74 of the 106 agencies (68 per cent) were tabled within two months of the end of the reporting period as required. This was an improvement over the 2011 calendar year reporting period when letters covering only 55 of the 97 agencies (57 per cent) had been tabled by the due date.

15. Although there was a decline in the proportion of contracts reported as containing confidentiality provisions, specific confidentiality provisions in contracts continue to be incorrectly applied and reported. The ANAO's examination of a sample of 107 contracts reported by agencies as containing confidentiality provisions showed that only 37 contracts (35 per cent) contained specific confidentiality provisions. Of these 37 contracts, 10 (nine per cent) contained provisions that were assessed by the ANAO as not meeting the Confidentiality Test. Primarily, these contracts had been reported as containing pricing/cost information or intellectual property requiring protection through the use of specific confidentiality provisions. When considered against the criteria of the Confidentiality Test these contracts were found not to contain pricing information which revealed internal supplier cost margins, or information on particular technical or business solutions that would be considered to constitute intellectual property.

16. Over the last five years, the proportion of contracts in the ANAO's samples that have included provisions which did not meet the Confidentiality Test has ranged from 6 per cent to 29 per cent. Similarly, the proportion of contracts that did not contain specific confidentiality provisions and were therefore incorrectly listed has ranged between 32 per cent and 81 per cent since 2008. For the 2012 reporting period 65 per cent of contracts were incorrectly listed in this respect.

17. Overall, while the results indicate that the intent of the Senate Order is being addressed, some portfolio departments and agencies need to implement improved arrangements to support the timely publication of contract lists on their websites and the tabling of Ministers letters of advice. There is also scope for agencies to improve their reporting by only identifying in their Senate Order listings the use of specific confidentiality provisions. Finance providing clearer guidance to agencies about the application of the reporting requirements of the Senate Order is likely to assist in addressing this issue.

18. As noted in paragraph 7, Australian Government agencies are also required to report information for procurement contracts, including whether the contract contains confidentiality provisions, on AusTender. To determine whether contract information was consistently reported between the two media, the ANAO compared the procurement contract information reported by the audited agencies in their 2012 calendar year Senate Order listings to the contract information reported on AusTender for the same period. The analysis showed gaps and inconsistencies between data reported in the Senate Order

listings and on AusTender. For example, the audited agencies reported a combined total of 1076 procurement contracts on their Senate Order listings. Of these contracts, 801 (74 per cent) were found to have a corresponding AusTender entry, of which the reported type of confidentiality provision(s)¹³ matched for 711 (89 per cent) of the entries.

19. The ANAO has previously observed that the need for agencies to comply with multiple procurement reporting requirements is a factor influencing the integrity of publicly reported contract information.¹⁴ Since the inception of AusTender in September 2007, Finance has advocated for its use as the authoritative source of information on Australian Government procurement so as to simplify contract reporting. In 2007, the Senate Standing Committee on Finance and Public Administration recommended in its second report on the operation of the Senate Order, that the Order be retained while AusTender was implemented, with departments and agencies advising through their Ministers' letters that they had fulfilled the requirements of the Senate Order by placing details of their relevant contracts on AusTender.¹⁵ While this recommendation was agreed by the Government, the Senate Order guidance has not been updated to reflect the availability of this reporting option for agencies. As AusTender reporting is limited to procurement type contracts, agencies would still need to complete a Senate Order listing covering their non-procurement contracts and none chose this reporting method for their 2012 calendar year listings.

20. The 2012 Finance discussion paper on the Commonwealth Financial Accountability Review observed that 'there are numerous reporting requirements for grants and procurements that require nearly the same

13 When identifying confidentiality provisions in contracts, agencies are required to identify the 'type' of provision, that is, whether the provision(s) deal with information contained in the contract (provisions requiring the parties to maintain confidentiality of any of its provisions), or provision(s) that deal with other requirements of confidentiality (other requirements of confidentiality).

14 ANAO Audit Reports: No. 27 2005—06, *Reporting of Expenditure on Consultants* p. 18; No.7 2010—11 *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2009 Compliance)* pp. 20–22; No. 2 2011–12, *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2010 Compliance)* p. 63; and No.4 2012–13 *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2011 Compliance)*, p. 68.

15 The Senate, Standing Committee on Finance and Public Administration, *Department and agency contracts, Second report on operation of the Senate order for the production of lists of departmental and agencies contracts (2003–06)*, February 2007, Recommendation 1, p. ix.

information to be provided through different channels'.¹⁶ The review also raised as an issue the cost for agencies in meeting overlapping reporting requirements and suggested that it may be timely to undertake a cost-benefit analysis of existing requirements to inform a possible rationalisation. Finance informed the ANAO that planning for this activity has commenced. More broadly, the enactment of the *Public Governance, Performance and Accountability Act 2013*¹⁷ is expected to require amendments to be made to Australian Government procurement policies and guidance where these policies relate to a type of entity as defined by this new Act. In this context, there are likely to be opportunities to consolidate contract reporting requirements in a manner which retains the expected transparency requirements.

21. The Senate Order has now been in place for 12 years, and while substantially fewer contracts have been reported as containing confidentiality provisions, agencies still experience difficulties in meeting all of its requirements. This is in part due to the lack of clarity created by various reporting requirements and the differing versions of guidance available. In particular, specific guidance for the Senate Order FMG 8 has not been updated since 2004 and as such does not clearly align to changes made in Commonwealth procurement policies and other guidance, such as Finance's *Buying for the Australia Government* online material. Nevertheless, consistent with recommendations¹⁸ made by the ANAO in previous audits, agencies could improve the:

- identification and reporting on the use of confidentiality provisions, particularly pricing information and the difference between general and specific confidentiality provisions; and
- implement enhanced processes to support data capture, reporting and quality assurance of contract information.

16 Department of Finance and Deregulation, *Commonwealth Financial Accountability Review: Is Less More? Towards Better Commonwealth Performance: Discussion Paper*, March 2012, p. 76

17 The *Public Governance, Performance and Accountability Bill 2013* gained assent on 29 June 2013. Parts 1–5 took effect from 1 July 2013, with Sections 6–10 to take effect 1 July 2014 (or earlier if a proclamation is issued). This new Act will replace the current model for Commonwealth financial management established through the *Financial Management and Accountability Act 1997* (FMA Act) and the *Commonwealth Authorities and Companies Act 1997* and provides new definitions for agencies and bodies as Commonwealth entities.

18 A list of previous audits and recommendations (where applicable) is provided at Appendix 3.

In addition, Finance updating relevant guidance on the Senate Order would support more complete and accurate public reporting on the use of confidentiality provisions.

Key findings

Agencies' Senate Order contract listings (Chapter 2)

22. The ANAO's assessment of agencies' Senate Order lists found that the majority of contract listings (84 per cent) were published on agency websites by the due date, although Ministers' letters covering only 70 per cent of agencies were tabled by the due date. In some instances, portfolio departments need to better communicate the requirements of the Senate Order across their portfolio agencies, and implement improved arrangements to achieve the prescribed timeframes for both the publication of the contract lists and the tabling of Ministers' letters.

23. As illustrated in Table S.2, the ANAO's review of the contract listings found that a high proportion of the listings included information consistent with three requirements of the Senate Order, namely paragraphs 2(b) contract details, 2(c) confidentiality information and 2(d) compliance information. However, 72 agencies included contracts that did not meet the information requirements of 2(a) of the Order. Errors in this area included listing agency agreements¹⁹, contracts outside the reporting period, and contracts valued under \$100 000.

19 FMG No.8 states that one of the elements that must be present for a contract to exist is 'an intention to create legal relations'. An agency agreement is an agreement between Australian Government agencies that articulates respective agency responsibilities but is not legally enforceable due to both agencies being part of the same legal entity, that is, the Commonwealth.

Table S.2: Assessment of agencies' contract listings against the requirements of the Senate Order

Description of requirement	Number of agencies that met the requirement ^(a)	Number of agencies that did not meet the requirement ^(b)
Paragraph 2(a) of the Order <i>Contracts as defined by the Order, over \$100 000, within the specified reporting period</i>	34	72
Paragraph 2(b) of the Order <i>Contract details, the relevant reporting period and the twelve month period relating to the contract listings^(c)</i>	95	11
Paragraph 2(c) of the Order <i>Whether contracts contain 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</i>	72	34
Paragraph 2(d) of the Order <i>Estimate of the cost of complying with this order and a statement of the method used to make the estimate</i>	76	30

Source: ANAO analysis.

Note (a): Includes seven agencies that advised that no relevant contracts had been entered into.

Note (b): Includes one agency that listing was published post the completion of analysis.

Note (c) In assessing compliance against paragraph 2(b), the ANAO focused on the reporting of the required contract details by agencies for each contract.

24. Previous ANAO audits have noted that the accuracy of agency contract reporting would be supported by improved communication of key requirements, and by more rigorous quality assurance procedures. The results of this audit show that there remains a need for agencies to have quality assurance processes in place to identify errors such as incorrect contract details, contracts under \$100 000 and agency agreements. Such processes will assist in the identification of these types of errors and enhance the accuracy of agencies' contract information before publication on their websites.

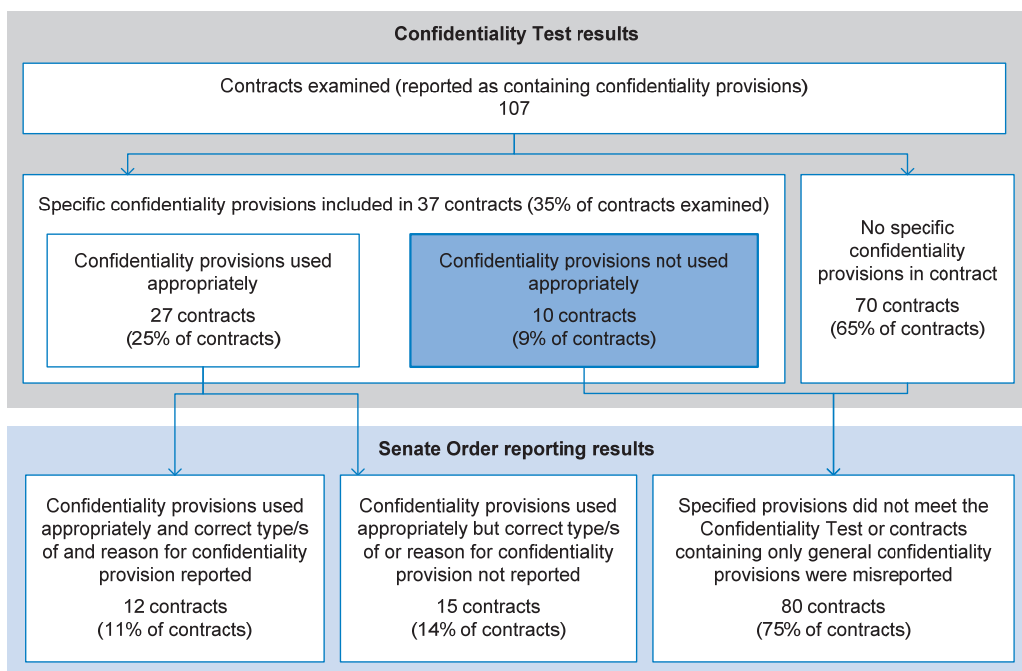
The use of confidentiality provisions in contracts (Chapter 3)

25. Since the Senate Order was introduced in 2001, the proportion of contracts reported as containing confidentiality provisions has declined from 24 per cent to 4 per cent in 2012. In line with the central focus of the Senate Order, the reduction in the reported use of confidentiality provisions indicates that access by Parliament and the public to government contract information is now less likely to be impeded by unwarranted assertions of commercial sensitivity or confidentiality.

26. The ANAO examined 107 of the 1703 contracts reported by the four audited agencies as containing confidentiality provisions. Of the 107 contracts examined, 37 contained specific confidentiality provisions. The remaining 70 contracts contained only general provisions and had either been incorrectly reported as containing specific provisions, or the agency had unnecessarily identified use of general provisions.

27. Of the 37 contracts identified as containing specific confidentiality provisions, 10 contained confidentiality provisions which, when considered against the criteria of the Confidentiality Test, had not been applied appropriately. The results of the ANAO’s analysis of the application of the Confidentiality Test and the reporting of confidentiality provisions in agencies’ Senate Order listings are shown in Figure S.1.

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



Source: ANAO analysis.

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

28. The results of the ANAO's analysis indicate that agencies need to improve their approaches for identifying and reporting the use of confidentiality provisions in contracts. Consistent with recommendations made by the ANAO in previous audits²⁰, agencies could:

- improve the identification and reporting on the use of confidentiality provisions, particularly pricing information and the difference between general and specific confidentiality provisions; and
- implement enhanced processes to support data capture, reporting and quality assurance of contract information.

29. Agencies strengthening their data input and quality assurance processes prior to the publication of contract information would support more complete and accurate public reporting on the use of confidentiality provisions.

30. The inclusion of confidential provisions in a contract does not prevent an agency being required to disclose confidential contract-related information where a matter is before the courts, to a parliamentary committee or to the ANAO. The inclusion of relevant disclosure clauses and access clauses in contracts assists agencies in informing contractors about the fact that there is no absolute guarantee of confidentiality of information.

31. A high proportion of the contracts sampled contained appropriately worded parliamentary disclosure clauses (92 per cent) and reference to ANAO access clauses (94 per cent). A factor which contributed to this result was the inclusion of these disclosure and access clauses in the audited agencies' standard contract templates. Where disclosure clauses were not included in the contracts examined, the agency's standard contract template had generally not been used. While there can be various reasons for using non-standard contract templates, agencies should have in place procedures and guidance to make certain that disclosure and, where appropriate, access clauses are included in the contract terms and conditions of all contracts issued.

The Senate Order and AusTender (Chapter 4)

32. The ANAO's comparison of the audited agencies' contract reporting in their 2012 calendar year Senate Order listings and on AusTender found

20 A list of previous audits and recommendations (where applicable) is provided at Appendix 3.

discrepancies in relation to the contracts reported and the use of confidentiality provisions attributed to the contracts reported. These discrepancies reflected weaknesses in the contract data entry and quality assurance processes used by agencies. The ANAO has previously observed that the need for agencies to comply with multiple procurement reporting requirements is a factor influencing the integrity of publicly reported contract information. Finance updating the relevant Senate Order guidance to fully inform agencies of their contract reporting options, in addition to agencies strengthening their data input and quality assurance processes prior to the publication of contract information, would support more complete and accurate reporting on the use of confidentiality provisions.

Summary of agencies' responses

33. The audited agencies provided the following summary responses, with each agency's full response included at Appendix 1.

Attorney-General's Department

The department considers that the audit highlights the complexities of both applying the confidentiality policy and the comparison of two sources of information produced at different points-in-time (AusTender and Senate Order).

Australian Transaction Reports and Analysis Centre

AUSTRAC agrees with the findings outlined in the proposed audit report. AUSTRAC has implemented changes to address these findings and will continue to refine its processes to improve performance in this area.

ComSuper

ComSuper found the audit to be beneficial. The audit identified areas where ComSuper can improve its reporting processes. ComSuper accepts and agrees with the audit findings and is updating internal processes and procedures to continue to improve the quality and accuracy of its reporting.

Department of Health and Ageing

The department agrees with the audit conclusions relating the Senate Order Contract Listing, the use of confidentiality provisions in contracts and AusTender Listing.

In order to further improve compliance with the requirements of Senate Order Listing, the department undertook a review of the reports and processes necessary for compliance following the publication of the 2011–12 financial year listings. The improvements made include automation of reports, staff awareness sessions, staff training and instituting a more robust control environment.

Audit Findings

1. Introduction

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

The Senate Order

1.1 The Senate Order for Departmental and Agency Contracts was introduced by the Senate in 2001 to improve openness and transparency in relation to the expenditure of public funds through contractual arrangements. In particular, as noted by the Standing Committee on Finance and Public Administration in its second report on the operation of the Senate Order, ‘increased outsourcing, through contract arrangements with private sector organisations, had created an environment in which the scrutiny of government expenditure had become more challenging’.²¹

1.2 The main principle on which the Senate Order is 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.²² Supporting this principle, successive governments have agreed to comply with the requirements of the Senate Order and its subsequent amendments since its introduction.

1.3 The Senate Order requires ‘each Minister in the Senate, in respect of each agency administered by that Minister, or by a Minister in the House of Representatives represented by that Minister table in the Parliament, by not later than two calendar months after the last day of the financial and calendar year, letters of advice confirming that those agencies have published on their websites, the required list of contracts’.²³ Paragraph 2 (a)–(d) of the Senate Order defines the contract reporting parameters of the Order and sets out the information to be included in the contract lists as follows:

21 The Senate, Standing Committee on Finance and Public Administration, *Departmental and agency contracts, Second report on the operation of the Senate order for the production of lists of departmental and agency contracts (2003–06)*. Canberra, February 2007, para. 1.1.

22 Department of Finance and Deregulation, *Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts) - The Financial Management Guidance Series of Publications No. 8 (FMG 8)*, January 2004. [Internet] available from <<http://www.finance.gov.au/publications/fmg-series/08-listing-of-contract-details.html>> [accessed 19 September 2013].

23 Department of Finance and Deregulation, FMG 8.

- a) each contract²⁴ entered into by the agency which has not been fully performed or which has been entered into during the previous 12 months, and which provides for a consideration to the value of \$100 000 or more;
- b) the contractor, the amount of the consideration, the subject matter of each such contract, the commencement date of the contract, the duration of the contract, the relevant reporting period and the twelve-month period relating to the contract listings;
- c) whether each such contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether there are any other requirements of confidentiality, and a statement of the reasons for the confidentiality; and
- d) an estimate of the cost of complying with [the] order and a statement of the method used to make the estimate.

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

1.5 The Senate Order further requests that the Auditor-General annually examine a number of the contracts listed with confidentiality provisions, and report any inappropriate use of these provisions.

Senate Order guidance

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

24 For the purposes of the Senate Order, the term 'contract' applies to all forms of Government agreements, based on their legal status, rather than the name given to the arrangement. This includes procurement contracts, lease arrangements, sales contracts and certain grants, funding agreements and employment contracts. The Senate, Finance and Public Administration References Committee, *Departmental and Agency Contracts, Report on the on the first year of operation of the Senate order for the production of lists of departmental and agency contracts*, 12 December 2002, pages 16 and 36. [Internet] available from <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=fapa_ctte/completed_inquiries/1999-02/acnt_contract/index.htm> [accessed 12 August 2013].

- Financial Management Guidance No. 8 (FMG 8)—*Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*²⁵, which outlines the rationale for the Order, describes its requirements and is designed to support agencies in developing their Senate Order listings; and
- *Confidentiality Throughout the Procurement Cycle (the Guidance)*²⁶, which contains advice on managing confidentiality issues throughout the procurement process, and includes the Confidentiality Test (the Test) which is designed to assist agencies to determine the appropriate inclusion of confidentiality provisions to protect supplier information in contracts.

Reporting requirements for Government contracts

1.7 The Senate Order is one of several mechanisms to promote transparency in Australian Government contracting. In addition to the Senate Order, agencies have a number of other reporting requirements for government contracts and grants. These requirements include the reporting of procurement and consultancy contracts on AusTender²⁷, the production of lists of grants—as well as the publication of grants on agency websites—and the inclusion of summary information on contracting in agencies’ annual reports, as set out in the Department of the Prime Minister and Cabinet’s *Requirements for Annual Reports*.

1.8 Agencies are required to publish on AusTender details of all procurement contracts and agency agreements entered into valued at \$10 000 or above (compared to contracts of \$100 000 and above for the Senate Order). Similar to the Senate Order, AusTender’s reporting requirements also require agencies to identify the existence of confidentiality provisions in contracts and provide reasons for the inclusion of the provisions.

25 Department of Finance and Deregulation, FMG 8.

26 Department of Finance and Deregulation, *Confidentiality throughout the Procurement Cycle: Principles*. [Internet], available from <<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/contract-issues/confidentiality-procurement-cycle/principles.html>> [accessed 27 August 2013].

27 AusTender is the Australian Government’s web-based procurement information system which provides an online repository for the centralised publication of Government business opportunities, annual procurement plans, multi-use lists, procurement contracts and agency agreements.

Previous Senate Order audits

1.9 This audit is the fifteenth²⁸ in a series of audits and fulfils the Senate's request for the Auditor-General to provide an annual report on the use of confidentiality provisions in Australian Government contracts. A list of previous audit reports on the Senate Order and associated audit recommendations is provided at Appendix 3. In the main, these recommendations encouraged agencies to improve their use of, and reporting on, confidentiality provisions in contracts by:

- better communicating the key requirements of the Senate Order to staff;
- strengthening approaches used to identify and record confidential contract information; and
- implementing controls to confirm that the contract information reported is complete and accurate.

Audit approach

Audit objective, criteria and scope

1.10 The audit objective was to assess the appropriateness of the use and reporting of confidentiality provisions in Australian Government contracts for the 2012 calendar year reporting period. To form a conclusion against the objective the ANAO considered whether:

- FMA Act agencies published contract listings in accordance with the requirements of the Senate Order and the extent to which the published content aligned with the information requested by the Order;
- confidentiality provisions were used appropriately in a sample of contracts, selected from the audited agencies' Senate Order listings, reported as containing confidentiality provisions; and
- the audited agencies' guidance and procedures supported the accurate and timely reporting of contract information in the Senate Order listings and on AusTender.

28 In 2003, the Senate Order was amended to request that the Auditor-General provide an annual report to the Senate (by no later than 30 September each year) rather than twice-yearly as specified in the original Order.

Audit methodology

1.11 The audit consisted of four main components:

- (a) an assessment of all FMA Act agencies' 2012 calendar year published contract listings and tabled Ministers' letters of advice for compliance with the requirements of the Senate Order;
- (b) an examination of a sample of 107 contracts reported as containing confidentiality provisions across the four audited agencies to determine whether confidentiality provisions were used appropriately and reported correctly;
- (c) a review of the guidance and procedures used by the audited agencies to capture and report their contract information in Senate Order listings and on AusTender; and
- (d) a comparison of whether all the procurement contracts included on the audited agencies' 2012 Senate Order listings were also published on AusTender, and whether the use of confidentiality provisions as reported on the Senate Order listings had been similarly identified and reported on AusTender.

Agency selection

1.12 As at 28 February 2013, there were 106 FMA Act agencies to which the Senate Order applied.²⁹ All of these agencies were included for the purposes of the overall audit analysis (part (a) of the audit methodology). The agencies selected for detailed contract analysis in the audit were:

- the Attorney-General's Department (AGD);
- the Australian Transaction Reports and Analysis Centre (AUSTRAC);
- ComSuper; and
- the Department of Health and Ageing (DoHA).

1.13 Agency selection took into account agencies' involvement in previous Senate Order audits and the size and nature of the agencies' contract listings

²⁹ As at 28 February 2013, there were 112 FMA Act agencies. The Senate Order is not applicable to the Australian Secret Intelligence Service or the Australian Security Intelligence Organisation for reasons of national security. The Order is also not applicable to the Department of the House of Representatives, the Department of the Senate, the Department of Parliamentary Services and the Parliamentary Budget Office as they are not administered by a Minister.

(particularly the proportion of contracts listed as containing confidentiality provisions). Table 1.1 shows the number and value of the contracts reported in the audited agencies' 2012 Senate Order listings and percentage of those contracts reported as containing confidentiality provisions.

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

	AGD	AUSTRAC	ComSuper	DoHA
Total number of contracts reported in the 2012 calendar year Senate Order listings	206	120	74	6 798
Total value of contracts reported in 2012 calendar year Senate Order listings	\$852.8 m	\$99.4 m	\$124.2 m	\$23.2 b
Percentage of contracts (by number) reported in 2012 calendar year Senate Order listings as containing confidentiality provisions	16.5	74.2	21.6	6.3

Source: ANAO analysis.

1.14 Compliance with the requirements of the Senate Order was assessed in relation to timeliness of the tabling of Ministers' letters, and the content of agencies' contract listings as set out in FMG 8. The Confidentiality Test outlined in Finance's *Buying for the Australian Government* guidance was also applied to assess whether the confidentiality provisions had been used appropriately for a sample of contracts reported to contain specific confidential information.

1.15 The audit was conducted in accordance with the ANAO's auditing standards at a cost to the ANAO of \$279 910.34.

Report structure

1.16 The remaining chapters are structured as follows:

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

2. Agencies' Senate Order Contract Listings

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

Background

2.1 To support agencies in complying and presenting their Senate Order listings, Finance developed specific guidance for the Senate Order in January 2004. Financial Management Guidance No. 8 (FMG 8)—*Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*³⁰—explains the basis and the objectives of the Senate Order policy, and provides clarification of the terms and requirements of the Order. FMG 8 also provides templates to assist agencies in presenting their listings and for the presentation of Ministers' letters of compliance. Figure 2.1 shows the template for contract listings, as presented in FMG 8.

Figure 2.1: Template for contract listings

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

Source: Department of Finance and Deregulation, *Financial Management Guidance No. 8—Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*.

2.2 For the 106 agencies subject to the Senate Order for the 2012 calendar year³¹ reporting period, the ANAO assessed whether:

- contract listings were published on agency websites by the due date and met the listing requirements; and

30 Department of Finance and Deregulation, FMG 8.

31 As at 28 February 2013, there were 112 FMA Act agencies. The Senate Order is not applicable to the Australian Secret Intelligence Service or the Australian Security Intelligence Organisation for reasons of national security. The Senate Order is also not applicable to the Parliamentary Budget Office or the three Parliamentary Departments as they are not administered by a Minister.

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

2.3 The ANAO also examined the four audited agencies' Senate Order listings, and their procedures for complying with the Order. These procedures included the agencies' guidance materials; their approach to capturing, collating and reporting Senate Order information; and the quality assurance of contract listings. The ANAO's analysis was based on the information contained in agencies' 2012 calendar year Senate Order listings as initially published. It does not reflect any subsequent amendments or corrections that may have been made by agencies to their initial listings.

Agencies' Senate Order contract listings

Timeliness of agencies' Senate Order listings

2.4 For the 2012 calendar year reporting period, 89 of the 106 agencies (84 per cent) published a contract listing, or advice that no relevant contracts had been entered into, by the due date of 28 February 2013.³² A further 10 agencies published contract listings within the following month. The ANAO contacted the portfolio departments³³ of the remaining seven agencies that had not published a 2012 calendar listing as at 10 April 2013 to inquire as to why contract listings had not been published in accordance with the Senate Order.³⁴ The responses received advised that due to administrative oversight, the listings had not been published within the required timeframe.

2.5 Subsequent to the ANAO contacting the portfolio departments, five more agencies published a listing or a notification of no relevant contracts by 1 May 2013. One of the remaining agencies was a new agency whose staff were unaware that the Senate Order required agencies to publish contract listings on both a financial and calendar year basis. The agency subsequently published its listing on 14 June 2013 and informed the ANAO that amendments had been

32 Eighty-five agencies posted listings and four posted statements on their websites that no relevant contracts had been entered into by the due date. This is a similar result to the 2011 calendar year listings when 88 of the 97 (91 per cent) agencies subject to the Order published Internet listings or advice of no relevant contracts by the due date.

33 In order to meet the requirement that a Minister's letter covers all the agencies administered by a Minister, portfolio departments will generally coordinate the preparation and tabling of their Minister's letter.

34 Including one agency that had not published a listing from calendar year 2010 onwards, and another from the 2009–10 financial year onwards.

made to its internal processes to support future compliance. A Minister's letter advising that no relevant contracts had been entered into by the final agency was tabled on 25 June 2013 and the agency's website was updated to that effect.³⁵

Comprehensiveness of published contract listings

2.6 As at 1 June 2013, a total of 98 agencies had published Senate Order listings and another seven agencies had advised that no relevant contracts had been entered into. The ANAO examined the published content of these 98 Senate Order listings to assess the extent to which the published data aligned with the information requested by the Order as set out in paragraph 2 (b)–(d) of the Order below. The remaining agency's Senate Order listing was published on 14 June 2013, and was not included in the analysis. All 106 agencies were included in the analysis of timeliness of publication and reporting of the cost of compliance as set out in paragraph 2 (a) and (d).

2.7 Paragraph 2 (a)–(d) of the Senate Order describes the information that agencies are to include in their contract listings. The lists are to indicate:

- a) each contract entered into by the agency which has not been fully performed or which has been entered into during the previous 12 months, and which provides for a consideration to the value of \$100 000 or more;
- b) the contractor, the amount of the consideration and the subject matter of each such contract, the commencement date of the contract, the duration of the contract, the relevant reporting period and the twelve-month period relating to the contract listings;
- c) whether each such contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether there are any other requirements of confidentiality, and a statement of the reasons for the confidentiality; and
- d) an estimate of the cost of complying with this order and a statement of the method used to make the estimate.³⁶

35 The agency advised the ANAO that internal processes had been established to support future compliance, and that the relevant Minister would be notified accordingly.

36 Parliament of Australia, *Procedural Orders of Continuing Effect, No. 11, Departmental and Agency Contracts*. 20 June 2001 [Internet], J.4358, as amended 1 March 2007, J.3527, available from http://www.aph.gov.au/Senate/pubs/standing_orders/d05.htm [accessed 19 September 2013].

2.8 The results of the ANAO's analysis of the listings against each of the elements set out in paragraph 2 of the Senate Order are summarised in Table 2.1 and discussed in the following sections. Overall a high proportion of the listings included information consistent with the requirements of the Senate Order. However, a number of agencies' listings included agency agreements, contracts outside the reporting period and contracts valued under \$100 000. The errors in listings reviewed comprised:

- 72 agencies including contracts that did not meet the information requirements of the Senate Order (paragraph 2(a)); ,
- 34 agencies not providing a valid statement of the reasons for the confidentiality (paragraph 2(c)); and
- 30 agencies not reporting both the cost and method of compliance (paragraph 2(d)).

Table 2.1: Assessment of agencies' contract listings against the requirements of the Senate Order

Description of requirement	Number of agencies that met the requirement ^(a)	Number of agencies that did not meet the requirement ^(b)
Paragraph 2(a) of the Order <i>Contracts as defined by the Order, over \$100 000, within the specified reporting period</i>	34	72
Paragraph 2(b) of the Order <i>Contract details, the relevant reporting period and the twelve month period relating to the contract listings^(c)</i>	95	11
Paragraph 2(c) of the Order <i>Whether 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 valid statement of the reasons for the confidentiality</i>	72	34
Paragraph 2(d) of the Order <i>Estimate of the cost of complying with this order and a statement of the method used to make the estimate</i>	76	30

Source: ANAO analysis.

Note (a): Includes seven agencies that advised that no relevant contracts had been entered into.

Note (b): Includes one agency that listing was published post the completion of analysis.

Note (c) In assessing compliance against paragraph 2(b), the ANAO focused on the reporting of the required contract details by agencies for each contract.

Assessment against paragraph 2(a) of the Senate Order

2.9 The Senate Order sets out which contracts agencies are to include in their contract listings. This includes contracts as defined by the Senate Order³⁷ that are over the value of \$100 000 and that have not been fully performed or have been entered into during the specified reporting period. The ANAO's examination of the 98 published contract listings noted that there were 2682 contracts (from the 42 536 contracts reported) which were outside the contract reporting criteria for the 2012 calendar year reporting period. Table 2.2

37 For the purposes of the Senate Order, the term 'contract' applies to all forms of Government agreements, based on their legal status, rather than the name given to the arrangement. This includes procurement contracts, lease arrangements, sales contracts and certain grants, funding agreements and employment contracts. The Senate, Finance and Public Administration References Committee, *Departmental and Agency Contracts, Report on the on the first year of operation of the Senate order for the production of lists of departmental and agency contracts*, 12 December 2002, pages 16 and 36. [Internet] available from <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=fapa_ctte/completed_inquiries/1999-02/acnt_contract/index.htm> [accessed 23 July 2013].

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

Table 2.2: Frequency of reporting errors in agencies' Senate Order listings

Description	Frequency of error(s) found in published listings
Included entries for arrangements that are not required by the Senate Order	234
Included entries outside the stipulated reporting period	2 428
Included entries below the \$100 000 value threshold	20

Source: ANAO analysis of published Senate Order listings for the 2012 calendar year reporting period.

2.10 The most common error was the inclusion of contracts by agencies that had start or end dates outside the required date range for the 2012 calendar year reporting period. Overall, while one agency accounted for 1032 incorrect entries, 72 agencies included information on their contract listings which was not required by the Senate Order. There would be merit in all agencies reviewing Senate Order information before publication to identify instances of:

- agency agreements³⁸;
- contracts which do not fit the reporting period; and
- contracts below the value threshold.

Assessment against paragraph 2(b) of the Senate Order

2.11 Under paragraph 2(b) of the Senate Order, agencies are to provide basic details for each contract in their listing including the contractor's name, contract amount, subject matter, 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 98 agencies that published a Senate Order listing, 95 agencies included all the contract details as required by the Senate Order. As noted in previous

38 FMG 8, section 6 states 'An agreement between Australian Government agencies that are all part of the Commonwealth of Australia will not be legally enforceable because it is not possible for different parts of the same legal entity to enter into a legally enforceable agreement. Such an agreement is often called a Memorandum of Understanding (but this term is also used for other arrangements that are legally enforceable)'.

audits of agency compliance with the Senate Order, the high level of compliance with this element may be attributed to the widespread use of Finance’s Senate Order listing template, which encourages agencies to include the required contract details.³⁹

Assessment against paragraph 2(c) of the Senate Order

2.12 Agencies are to identify in their Senate Order listings whether any of the included contracts contain provisions requiring the parties to maintain confidentiality of any of its provisions, or whether there are any other requirements of confidentiality. These two types of provisions are described in the Senate Order guidance (FMG 8) as:

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

2.13 Provisions that protect the confidential information of the parties that may be obtained or generated in carrying out the contract are generally in the form of standard confidentiality provisions of a general nature.⁴⁰

2.14 As mentioned in paragraph 2.1, FMG 8 also provides agencies with templates that agencies may use to meet their Senate Order listing requirements. As most government contracts contain confidentiality provisions of a general nature, these templates include an overarching statement that agencies may wish to use to report the existence of, and reasons for, standard confidentiality provisions of a general nature. FMG 8 also notes that ‘if agencies elect to use this overarching statement, it is anticipated that the “other requirements of confidentiality” (and associated reasons for confidentiality) columns [of the Senate Order listings] will be blank for most contracts. Agencies will only need

39 ANAO Audit Report No. 4 2012–13, *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2011 Compliance)*, p. 56, and ANAO Audit Report No.2 2011–12 *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2010 Compliance)*, p. 50.

40 Department of Finance and Deregulation, *Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts) - The Financial Management Guidance Series of Publications No. 8 (FMG 8)*, January 2004, section 7. [Internet] available from <http://www.finance.gov.au/publications/fmg-series/08-listing-of-contract-details.html> [accessed 9 August 2013].

to include entries in these columns when a contract contains [specific] provision(s) that make information obtained or generated in carrying out the contract confidential, but which are not covered by the overarching statement'.⁴¹

2.15 Agencies are to provide reasons for the inclusion of confidentiality provisions in their contracts on their Senate Order listings. Table 2.3 outlines the differences between the two specific confidentiality provision types and provides examples of how they may be used.

Table 2.3: Description of the two specific confidentiality provision types

Confidentiality provision type	Description	Example of the use and reporting of the provision type
Provisions requiring the parties to maintain confidentiality of any of its provisions	Relates to specific confidential information that is actually contained in the contract.	The contract specifies that pricing information contained in the contract is to remain confidential. The pricing information contained in the contract provides sufficient information to make a reasonable estimate of the prospective supplier's profit margin. Senate Order contract listing details: <ul style="list-style-type: none"> • 'Yes' for 'provisions requiring the parties to maintain confidentiality of any of its provisions' provision type; and • 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 to a third party. 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 Finance's, *Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts) - The Financial Management Guidance Series of Publications No. 8*.

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

41 Department of Finance and Deregulation, *Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts) - The Financial Management Guidance Series of Publications No. 8* (FMG 8), January 2004, section 7. [Internet] available from <<http://www.finance.gov.au/publications/fmg-series/08-listing-of-contract-details.html>> [accessed 9 August 2013].

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

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

2.18 Of the 98 agencies that had published listings by 1 June 2013, 39 reported that none of their contracts contained confidentiality provisions. Of the remaining 59 agencies that identified the use of confidentiality provisions in their contracts, 26 provided reason(s) that aligned with the categories set out in FMG 8. The ANAO observed that the reasons for the inclusion of confidentiality provisions provided by the remaining 33 agencies did not clearly align to the wording of standard categories detailed in FMG 8. Of particular note was the use of descriptors such as ‘commercial-in-confidence’⁴² and ‘confidentiality of business information’ which did not clearly categorise the nature of the information to be kept confidential.

2.19 The ANAO also noted that six agencies incorrectly used the category ‘internal costing/profit information’ in the ‘other requirements of confidentiality column’ of their listings. As mentioned in paragraph 2.17, costing/profit information is not identified in FMG 8 as a valid reporting category for this provision type. The results of the examination of the contract listings suggest that many agencies need to exercise greater care in the compilation of the listings so that the reasons reported for the inclusion of confidentiality provisions are accurate and valid.

42 In 2003 the Senate passed a resolution to the effect that ‘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’. *Senate Orders of Continuing Effect, Senate and Senate committees – claims of commercial confidentiality*, 30 October 2003, J.2654. [Internet] available from <http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/standingorders/~link.aspx?id=AA41D3E1D37041DDA695BA346C599C4E&z=z> [accessed 31 July 2013].

Assessment against paragraph 2(d) of the Senate Order

2.20 The Senate Order requests agencies to report the cost of complying with the Order and the method used to calculate the cost. For the 2012 calendar year reporting period, 76 agencies reported both the cost of compliance and the method used to calculate the cost. A further five agencies reported the cost of compliance but not the methodology. The remaining 25 agencies did not report either the cost of compliance or the method used to calculate the cost. Table 2.4 shows the number of agencies that reported these details and the total, average and median reported costs of compliance, for the 2011 and 2012 calendar year reporting periods.

Table 2.4: Cost of complying with the Senate Order

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

Source: ANAO analysis of estimated cost of compliance as reported by agencies.

2.21 The total estimated cost of compliance with the Senate Order, as reported by 81 agencies, covered approximately 63 per cent of all contracts reported on the Senate Order listings.⁴³ Applying the reported average cost per contract of \$6, the total cost of compliance with the Senate Order for 2012 reporting period was approximately \$255 216.

43 Over half of the remaining contracts reported belonged to the Defence Material Organisation and the Department of Defence. A total compliance cost of \$9065 was published by these two agencies for the 2011–12 financial year period; available from http://www.defence.gov.au/dmo/id/cic_contracts/cic_contracts.cfm.

2.22 The 2012 Finance discussion paper on the Commonwealth Financial Accountability Review observed that ‘there are numerous reporting requirements for grants and procurements that require nearly the same information to be provided through different channels’.⁴⁴ The review also raised as an issue the cost for agencies in meeting overlapping reporting requirements, and suggested that it may be timely to undertake a cost-benefit analysis of existing requirements to inform a possible rationalisation. Finance informed the ANAO that planning for this activity has commenced.

Ministers’ letters of advice

2.23 The Ministers’⁴⁵ letters of advice create an official record in the Parliament and establish accountability for the completeness, accuracy and timeliness of agencies’ contract listings. FMG 8 states that the tabling letter should identify all FMA Act agencies which are administered by the Minister, including agencies that have not listed any contracts.⁴⁶ The Ministers’ letters are also to indicate if any of their agencies have not complied with the Senate Order, and when it is expected compliance will be achieved. The ANAO reviewed the timeliness of the tabling of Ministers’ letters and whether the letters covered all agencies administered by the Minister. The ANAO also assessed whether the Ministers’ letter accurately reflected observed instances of non-compliance with the Senate Order based on the results of the ANAO’s examination of agencies’ contract listings.

Timeliness of Ministers’ letters

2.24 For the 2012 calendar year reporting period, 13 Ministers’ letters covering 74 agencies (70 per cent) were tabled within the prescribed reporting period. Of these 13 letters, nine included all agencies relevant to the Minister’s responsibilities. Ministers’ letters covering an additional 10 agencies across four portfolios were tabled within a month of the due date. While the 2012

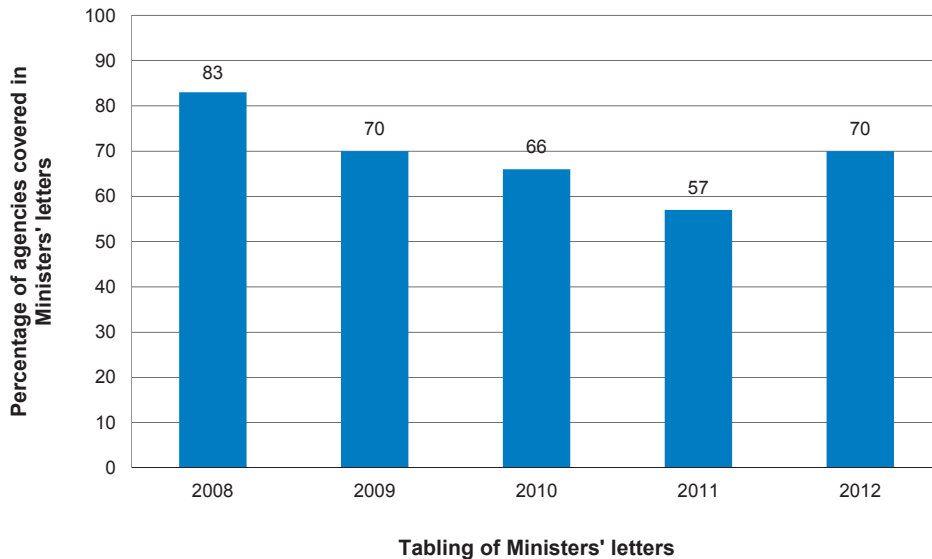
44 Department of Finance and Deregulation, Commonwealth Financial Accountability Review: *Is Less More? Towards Better Commonwealth Performance: Discussion Paper*, March 2012, p. 76

45 The Senate Order defines the term Minister as ‘each Minister in the Senate, in respect of each agency administered by that Minister, or by a Minister in the House of Representatives represented by that Minister’.

46 ‘The tabling letter should identify all FMA Act agencies which are administered by the Minister, including agencies that have not listed any contracts. It is anticipated that portfolio departments will coordinate the preparation and tabling of their Minister’s letter’. Department of Finance and Deregulation, FMG 8, section 8.

result was an improvement from the previous three years, it is still less than in 2008 when 83 per cent of Ministers' letters were tabled by the due date. Figure 2.2 shows the timeliness of the tabling of Ministers' letters for the calendar year reporting periods since 2008.

Figure 2.2: Tabling of Ministers' letters on or before the due date, 2008 to 2012 calendar years



Source: ANAO analysis.

2.25 In April 2013, the ANAO contacted the six portfolio departments of the remaining 22 agencies to enquire as to why these agencies had not been covered by a Minister's letter.⁴⁷ The departments advised that the delays in the tabling of the Ministers' letters, and the non-inclusion of some agencies in Ministers' letters, had been due to a lack of clarity as to the roles and responsibilities of the departments and the portfolio agencies in relation to the Senate Order. Portfolio agencies were generally only included in Ministers' letters where formal arrangements between the departments and the agencies were in place. After being contacted by the ANAO, Ministers' letters covering

⁴⁷ In September 2001 the Senate Finance and Public Administration References Committee noted in its *Commonwealth Contracts: A new framework for accountability Final report on the inquiry into the mechanism for providing accountability to the Senate in relation to Government contracts ...* 'that Ministers' letters must report on compliance by each and every agency for which they are responsible', p. 20. [Internet] available from <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=fapa_ctte/completed_inquiries/1999-02/dept_agency_contracts/report2/index.htm> [accessed 27 August 2013].

an additional 12 agencies were tabled by 1 May 2013. By 7 August 2013, Ministers' letters for another eight agencies had been tabled. However, as at 14 August 2013, Ministers' letters covering the remaining two agencies were yet to be tabled.

Statements of compliance

2.26 Ministers' letters of advice serve to inform the Parliament that the agencies they administer have met all the requirements of the Senate Order. Where an agency may not have met the requirements of the Senate Order in full, the corresponding Minister's letter is to indicate the extent of, and reasons for, non-compliance, and when full compliance is expected to be achieved. Examples of non-compliance include that an agency's contract list is not up to date, is incomplete or that not all relevant agencies have published a listing. As previously discussed in paragraph 2.4, 89 of the 106 agencies met the prescribed timeframe for the tabling of their 2012 calendar year listings, and not all agencies' listings met all of the content requirements of paragraph 2(a)–(d) of the Senate Order. None of the Ministers' letters reviewed by the ANAO advised of non-compliance by agencies.

2.27 Ministers are reliant on their departments for the provision of accurate advice. The ANAO's analysis highlights that some portfolio departments and agencies need to implement improved arrangements to achieve the prescribed timeframes for both the publication of their contract lists and to facilitate the tabling of Ministers' letters that accurately reflect the extent of agency compliance with the Senate Order.

Audited agencies' contract listings and guidance materials

2.28 The ANAO also examined in detail the four audited agencies' Senate Order listings against the requirements of the Senate Order, and their guidance and procedures for capturing, collating and verifying the completeness and accuracy of the contract information included in the contract listings.

Timeliness and accuracy of audited agencies' contract listings

2.29 All four audited agencies' contract listings were published on their websites by the due date, with Ministers' letters confirming the publication of the listings also tabled by the due date. The ANAO examined the four audited agencies' contract listings to assess the alignment of the published contract

information with the information requested by the Senate Order. The results do not reflect any subsequent corrections or variations that may have been made by the agencies since the initial publication of their listings. The results of the ANAO's review are summarised in Table 2.5.

Table 2.5: Compliance with Senate Order paragraph 2(a)–(d): audited agencies

Para	AGD	AUSTRAC	ComSuper	DoHA
2(a)	Included two contracts outside the relevant reporting period, one contract under \$100 000 and four agency agreements	Included six contracts outside the relevant reporting period and three agency agreements (one of which was outside the reporting period)	Included 14 contracts outside the relevant reporting period	Included eight contracts outside the relevant reporting period and two agency agreements
2(b)	Met	Met	Met	Met
2(c)	Met	Met	Met	The use of the category 'other' was not in accordance with FMG 8 guidance
2(d)	Met	Met	Met	Met

Source: ANAO analysis of agencies 2012 calendar year Senate Order listings as initially published.

2.30 All of the audited agencies' published listings contained the required basic contract details and clearly identified the relevant reporting period. All four agencies reported both the cost of compliance and a statement of the method used to calculate the cost in their listings. However, each of the audited agencies' listings contained entries outside the requirements of paragraph 2(a) of the Senate Order, largely due to the inclusion of contracts or agency agreements outside the reporting period.

Audited agencies guidance and procedures

2.31 A recurring theme across recent ANAO Senate Order audits has been the importance of agencies embedding the requirements of the Senate Order in their procurement policies and practices.⁴⁸ Clear agency guidance, which includes references to Finance's guidance materials and the Confidentiality

48 ANAO Report No. 2 2011–12, *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2009 Compliance)*, p. 55 and ANAO Report No. 7 2010–11, *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2009 Compliance)*, pp. 63–64.

Test, assists agency staff to assess the legitimate need for, and the appropriate use of, confidentiality provisions in contracts. The ANAO examined whether the four audited agencies maintained effective guidance and procedures for managing and reporting contract information, including the information required by the Senate Order.

2.32 Overall, the available guidance was sufficient to inform business area contract managers and reporting staff of the requirements of the Senate Order, and provided clear links to Finance's procurement guidance on the use of confidentiality provisions. While readily available, discussions with some agency staff revealed that the available guidance was not always clearly understood. In particular, as the guidance for the Senate Order as set out in FMG 8 had not been updated by Finance since 2004, agency staff tended to refer to Finance's later guidance *Buying for the Australian Government* and its associated AusTender reporting guidance. However, this later guidance relates only to agencies reporting requirements under the *Commonwealth Procurement Rules* and does not advise officials on reporting against their Senate Order or Annual Report requirements.⁴⁹

2.33 The guidance material used by the audited agencies varied in accordance with the procurement arrangements in place in each agency. The extent to which the materials used included specific information regarding the requirements of the Senate Order is summarised in Table 2.6.

49 Department of Finance and Administration, *Buying for the Australian Government, Transparency in Government Procurement, Principles*. [Internet] available from <<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/accountability-and-transparency/transparency-procurement/principles.html>> [accessed 31 July 2013].

Table 2.6: Coverage of the Senate Order in the agencies' guidance materials

Policy/ Guidance	AGD	AUSTRAC	ComSuper	DoHA
Publishing obligations				
References the requirement to publish a contract listing	Yes	Yes	Yes	Yes
Documents procedures for collation and quality assurance of the listing	Partially	Partially	Yes	Yes
Confidentiality in government procurement				
Includes or refers to the Confidentiality Test	Yes	Yes	Yes	Yes
Includes guidance on how to identify and record/capture confidential information	Yes	Yes	Yes	Yes
References relevant Finance guidance materials	Yes	Yes	Yes	Yes

Source: ANAO analysis of audited agencies' procurement policies and guidance material.

Note: ComSuper's intranet directs agency officers to Department of Finance and Deregulation's online procurement guidance.

2.34 AGD and DoHA had a devolved approach to procurement, whereby contract management, reporting on contracts and the identification of the use of confidentiality provisions was the responsibility of divisions or business areas, with guidance made available through the agencies' intranet. Staff could also contact the agency's Central Procurement Unit (CPU) for additional information if required. In both these agencies, the CPU had limited involvement with procurement functions, but retained responsibility for the coordination and publication of the agencies' Senate Order listings. This involved the CPU compiling a report containing details of contracts from the agencies' various information systems that may be relevant to the Senate Order. These reports were subsequently distributed to business areas with a request to advise the CPU of any variations or amendments required.

2.35 In contrast, at AUSTRAC and ComSuper the procurement functions were more centralised. AUSTRAC maintained a procurement manual available through their intranet, with reference to Finance guidance as appropriate, and local Senate Order reporting procedures. In AUSTRAC, the CPU was involved in, or conducted all, procurements over \$10 000. ComSuper advised that given the small number of procurements undertaken by the agency, the knowledge and experience of procurement staff was relied on to conduct and report on

procurements. As a small agency, rather than develop separate internal procurement guidance materials, the procurement section of ComSuper's Intranet site linked directly to Finance's guidance. This approach was adopted so that a single, up-to-date, source of information would be consistently used.

2.36 Each of the audited agencies had established procedures for recording and reporting contract information, including the information required by the Senate Order. However, there would be benefit in agencies also verifying the accuracy of information being recorded on their Senate Order listings prior to publication. In this regard, each of the audited agencies has recently taken steps to improve their contract data.

2.37 To improve the integrity of information recorded in its published listing, DoHA conducted a review of its processes for the compilation of its Senate Order listing following the publication of the 2011–12 financial year listing. This review identified a number of weaknesses in the agency's processes. Subsequently, a number of voluntary awareness sessions relating to the requirements of the Senate Order were provided to staff in December 2012.

2.38 During March 2013, AGD cross-checked the information that had been reported in its 2012 calendar year Senate Order listing with the information contained in its new contracting software program, and the information reported on AusTender. This process highlighted a number of issues with the accuracy of the reported data. AGD subsequently made changes to the contract information reported in its Senate Order listing and on AusTender.

2.39 AUSTRAC has documented a quality assurance process to support the publication of contract data, and ComSuper has also commenced an update of its contract reporting processes.

Conclusion

2.40 The ANAO's assessment of agencies' Senate Order lists found that the majority of contract listings (84 per cent) were published on agency websites by the due date, although Ministers' letters covering only 70 per cent of agencies were tabled by the due date. In some instances, portfolio departments need to better communicate the requirements of the Senate Order across their portfolio agencies, and implement improved arrangements to achieve the prescribed timeframes for both the publication of the contract lists and the tabling of Ministers' letters.

2.41 Overall, a high proportion of the published listings included information consistent with the requirements of the Senate Order. However, a large number of agencies' listings included agency agreements, contracts outside the reporting period and contracts valued under \$100 000. The errors in reviewed listings comprised:

- 72 agencies including contracts that did not meet the information requirements of the Senate Order (paragraph 2(a));
- 34 agencies not providing a valid statement of the reasons for the confidentiality (paragraph 2(c)); and
- 30 agencies not reporting both the cost and method of compliance (paragraph 2(d)).

2.42 Previous ANAO audits have noted that the accuracy of agency contract reporting would be supported by improved communication of key requirements, and by more rigorous quality assurance procedures. The results of this audit show that there remains a need for agencies to have quality assurance processes in place to identify errors such as incorrect contract details, contracts under \$100 000 and agency agreements. Such processes will assist in the identification of these types of errors and enhance the accuracy of agencies' contract information before publication on their websites.

3. The Use of Confidentiality Provisions in Contracts

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

Background

3.1 The Senate Order is underpinned by the principle that the Parliament and the public should not be prevented from accessing contract information unless there is a sound reason to do so. Once a contract has been awarded, the terms of the contract including parts of the contract drawn from the supplier's submission are not confidential unless the agency has determined and identified in the contract that specific information is to be kept confidential.⁵⁰ The need for confidentiality in contracts should be assessed on a case-by-case basis and balanced against public accountability requirements.

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

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

The inclusion of parliamentary and ANAO access clauses in the sample of contracts was also examined.⁵¹

50 Department of Finance and Deregulation, *Commonwealth Procurement Rules*, July 2012, p. 22.

51 'Agencies should inform potential suppliers that disclosure of information may be required, regardless of any contractual requirements to maintain confidentiality, to parliamentary committees, the Auditor-General, the public under the provisions of the FOI Act (unless exempted) and, if required, the courts. Request documentation and any draft contract should have clauses specifying that agencies are required to disclose information in these circumstances. Contracts should contain appropriate clauses to make sure information can be disclosed to Parliament, its committees or the Auditor-General to comply with accountability obligations'. Department of Finance and Deregulation, *Buying for the Australian Government, Confidentiality throughout the Procurement Cycle: Practice*. [Internet] available from <<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/contract-issues/confidentiality-procurement-cycle/practice.html>> [accessed 27 August 2013].

Trends in the reported use of confidentiality provisions

3.3 Table 3.1 provides a summary of the number and value of contracts, and the reported use of confidentiality provisions, in agencies' Senate Order listings for the 2011 and 2012 calendar years.

Table 3.1: Number and value of contracts, and the reported use of confidentiality provisions, in published Senate Order listings

	2011	2012
Number of FMA Act agencies that published a contract listing	93 ^(a)	98 ^(b)
Total number of contracts	39 223	42 536
Total value of contracts	\$156.5 billion	\$199.7 billion
Total number of contracts reported as containing confidentiality provisions	2 391	1 703
Total value of contracts reported as containing confidentiality provisions	\$21.90 billion	\$21.87 billion
Percentage of contracts reported as containing confidentiality provisions	6.1	4.0

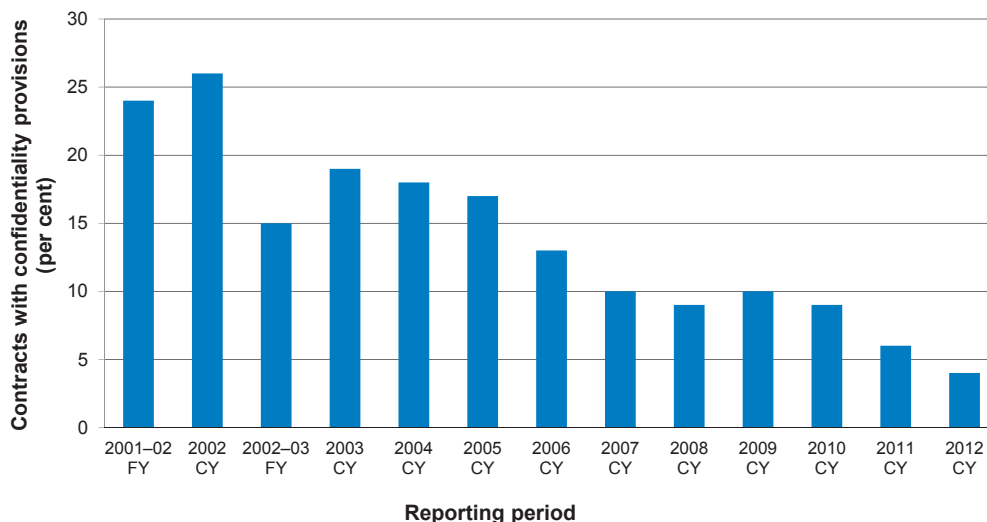
Source: ANAO Audit Report No.4, 2012–13, *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2011 Compliance)*, pp.32 and 53–54, and ANAO analysis of agencies' 2012 calendar year Senate Order contract listings.

Note (a): Number of agencies that had published contract listings for the 2011 calendar year as at 30 April 2012.

Note (b): Number of agencies that had published contract listings for the 2012 calendar year as at 1 June 2013.

3.4 The ANAO has now conducted 15 audits of agencies' compliance with the Senate Order since its introduction in 2001. Over this period, the proportion of contracts reported as containing confidentiality provisions has declined significantly from 24 per cent for the 2001–02 financial year to four per cent for the 2012 calendar year. This trend is depicted in Figure 3.1.

Figure 3.1: Proportion of contracts reported as containing confidentiality provisions



Source: ANAO analysis of agencies' 2012 listings and previous ANAO audit reports.

Note: FY: Financial Year; CY: Calendar Year.⁵²

3.5 The reduction in the reported use of confidentiality provisions indicates that access by Parliament and the public to Australian Government contract information is now less likely to be impeded by assertions of commercial sensitivity or confidentiality.

Use of confidentiality provisions

Types of confidentiality provisions

3.6 As discussed in paragraph 2.12, there are broadly two types of confidentiality provisions:

- those that make specific information contained in the contract confidential (referred to in the Order as 'provisions requiring the parties to maintain confidentiality of any of its provisions'); and

⁵² The 2009–2012 figures represent the contracts of all FMA Act agencies that published Senate Order contract listings on the Internet. The 2001–02 to 2008 figures are based on the content of the audited agencies' Senate Order contract listings.

- 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’).⁵³

Table 3.2 provides some examples of the differences between specific and general confidentiality information.

Table 3.2: Examples of specific and general confidentiality information in contracts

Specific	General
<ul style="list-style-type: none"> • Price discount information • Specific contract information, related to statutory secrecy provisions • Agency’s 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 terms and conditions of contract/all contract material • 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 agencies’ contracts.

The appropriate use of confidentiality provisions in a sample of contracts

3.7 The Senate Order requests that the Auditor-General provide a report to the Senate, on the appropriateness of the use of confidentiality provisions in a sample of contracts identified as containing confidentiality provisions. In order to undertake this assessment, the ANAO had regard to Finance’s current guidance, *Confidentiality throughout the Procurement Cycle*. The Confidentiality Test outlined in this guidance establishes four criteria, all of which must be met for a supplier’s information to be considered confidential as shown in Table 3.3.

53 To assist in the simplification of reporting, FMG 8 provides an example of an overarching statement that agencies may use to report on the existence of, and the reasons for, the use of standard confidentiality provisions of a general nature in contracts. FMG 8 also advises that ‘if agencies elect to use this overarching statement, it is anticipated that the ‘other requirements of confidentiality’ (and associated reasons for confidentiality) columns on agencies’ Senate Order listings (see Figure 2.1) will be blank for most contracts. Agencies will only need to include entries in these columns when a contract contains provision(s) that make information obtained or generated in carrying out the contract confidential, but which are not covered by the overarching statement’. Department of Finance and Deregulation, *Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)* FMG 8, Section 7.

Table 3.3: The Confidentiality Test

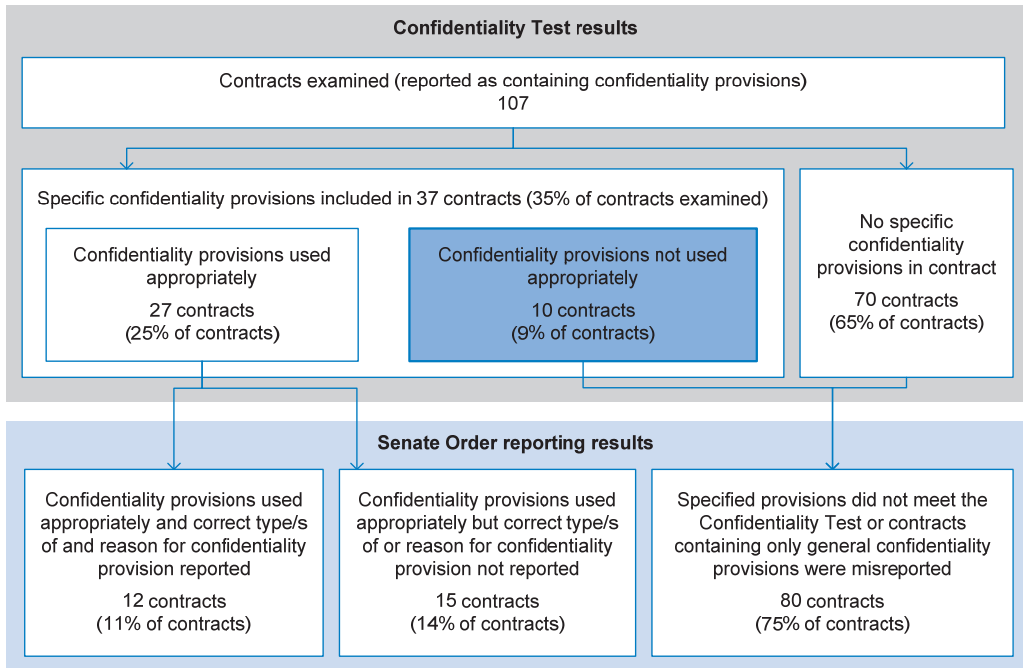
<p>Criterion 1: The information to be protected must be specifically identified.</p> <p>A request for inclusion of a provision in a contract that states that all information is confidential does not pass this test. Individual items of information, for example pricing, must be separately considered. However, where an agency contract may be used for future cooperative procurements agencies generally should not include provisions that would prevent other Commonwealth agencies from accessing the terms and conditions, including pricing of the contract.</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 agency has agreed to accept information on the understanding that it would remain confidential.</p>

Source: Department of Finance and Deregulation, *Confidentiality Throughout the Procurement Cycle*.⁵⁴

3.8 The ANAO examined 107 of the 1703 contracts reported by the four audited agencies as containing confidentiality provisions. Of the 107 contracts examined, 37 contained specific confidentiality provisions. Of these 37 contracts, 10 contained confidentiality provisions which, when considered against the criteria of the Confidentiality Test, had not been applied appropriately. The results of the ANAO’s analysis of the application of the Confidentiality Test and the reporting of confidentiality provisions in agencies’ Senate Order listings are shown in Figure 3.2 and discussed in the following sections of this chapter.

54 Department of Finance and Deregulation, *Buying for the Australian Government, Transparency in Procurement, Confidentiality Throughout the Procurement Cycle, Practice, Awarding a contract*. [Internet] available from <<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/contract-issues/confidentiality-procurement-cycle/practice.html#test>> [accessed 9 August 2013].

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



Source: ANAO analysis.

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

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 to be protected.⁵⁵ While many contracts deal with confidential information or matters, where agencies have not specifically identified the information to be protected, the parties to the contract may not have a clear understanding of confidentiality requirements. Of the 107 contracts reviewed, only 37 contracts specifically identified information to be protected. The remaining 70 contracts contained only general provisions and had either been incorrectly reported as containing specific provisions (that is provisions which make specific

55 The ANAO considers Criterion 4 to be met if Criterion 1 is met. This is based on an assumption that where a contract is signed by both parties and the information to be protected is specifically identified, both parties understand that the information is to remain confidential.

information in the contract confidential), or the agency had unnecessarily identified the use of general provisions.

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.⁵⁶ 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:

- unique industrial processes, formulae, product mixes, customer lists, engineering and design drawings and diagrams, and accounting techniques;
- pricing information that would reveal a suppliers' cost or profit margins; and
- information of a nature that should be protected on the basis of public interest.⁵⁷

3.11 From the ANAO's sample of 107 contracts, 37 contracts specifically identified information that the agencies' considered warranted protection through the use of specific confidentiality provisions. These 37 contracts were assessed by the ANAO against criteria 2 and 3 of the Confidentiality Test. Of these 37 contracts, 27 were assessed as meeting criteria 2 and 3 of the Confidentiality Test. The 10 contracts that were assessed as not meeting criteria 2 and 3 of the Test displayed the following characteristics:

- four contracts claimed protection of supplier costing/profit information however the contracts did not contain pricing information which revealed the supplier's internal costs or profit margins;
- three contracts claimed protection of intellectual property but did not contain information on particular technical or business solutions that would be considered to constitute intellectual property;

56 Assessment of the commercial sensitivity of 'other requirements of confidentiality' provisions was not within the scope of the audit.

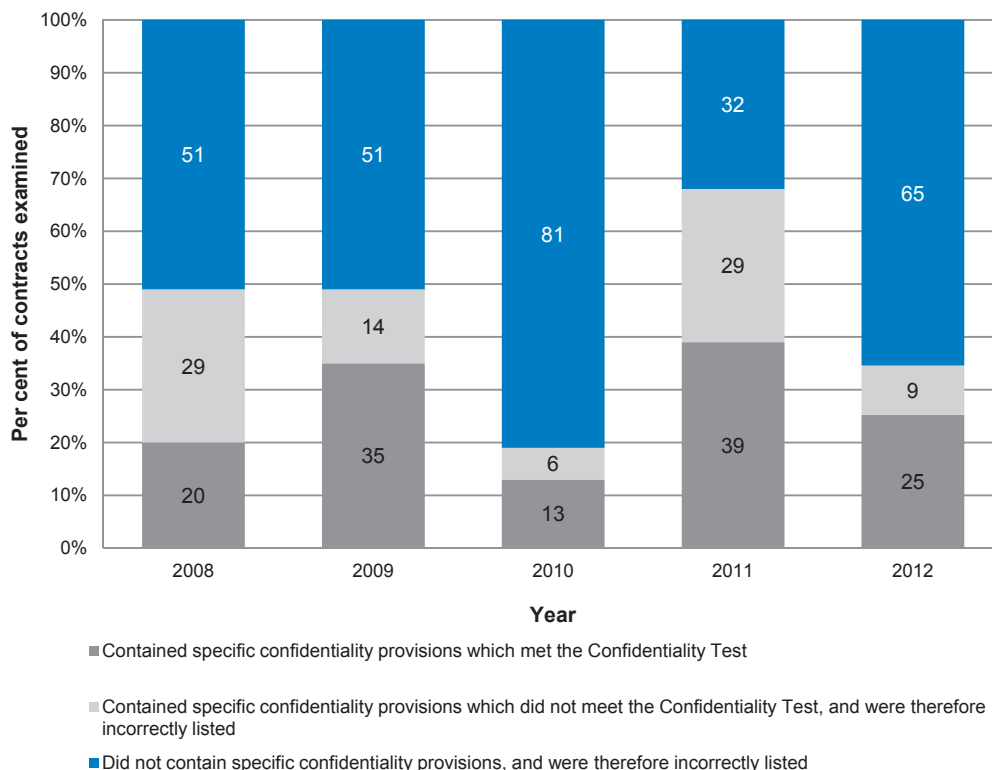
57 Department of Finance and Deregulation, FMG 8.

- one contract claimed confidentiality on the basis that it contained information requiring protection under the *Privacy Act 1988* but did not contain sensitive information of a nature dealt with under the *Privacy Act 1988*;
- one contract claimed confidentiality on the basis that it contained commercial-in-confidence information but no commercially sensitive information was contained in the contract; and
- one contract claimed confidentiality on the basis of public interest but did not contain information that met the criteria established by the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*.⁵⁸

3.12 Most of the contracts examined were prepared using agency templates that contained a section to separately list the confidentiality requirements of the contract. The ANAO's review of the contracts identified examples where even though the confidentiality requirements section of the contract was correctly completed as 'nil' or 'none specified', the contract had been reported as containing confidentiality provisions. There were also examples of the confidentiality section being completed using phrases such as 'all Commonwealth' or 'all agency data'. These types of phrases do not sufficiently specify the information to be kept confidential and are considered to be general in nature. As shown in Figure 3.3 recent ANAO Senate Order audits have identified that each year fewer than 40 per cent of contracts included in the ANAO's contract samples have contained specific confidentiality provisions that met the Confidentiality Test criteria.

58 Parliament of Australia, *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*, November 1989. [Internet] available from <http://www.aph.gov.au/parliamentary_business/committees/senate_committees?url=wit_sub/gov_full.htm> [accessed 20 August 2013].

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



Source: ANAO analysis.

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

3.13 When the results of the ANAO’s testing were discussed with relevant agency staff, it became apparent that the application of the Confidentiality Test and, in particular, the distinction between specific and general confidentiality provisions was often not clearly understood. For example, staff incorrectly considered that the inclusion of a general provision in a contract, such as obligations in respect to the *Privacy Act 1988*, warranted reporting of the contract as containing a specific confidentiality provision.

Parliamentary and ANAO access clauses

3.14 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 complying with the requirements under the *Freedom of Information Act 1982* and where a matter is before the courts. In addition, agencies may be required to facilitate the disclosure of or access to contractual information by the Parliament, its committees, and the Auditor-General to comply with accountability obligations.⁵⁹ These obligations help ensure agencies conduct procurements in a manner that supports the Australian Government's commitment to accountability and transparency in procurement activities.⁶⁰

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

- disclosure of contract-related information to the Parliament or parliamentary committees; and
- access by the ANAO to a contractor's records and premises.⁶¹

3.16 Of the 107 contracts examined by the ANAO, 92 per cent contained appropriately worded⁶² parliamentary disclosure clauses, and 94 per cent included ANAO access clauses (see Table 3.4).

59 Department of Finance and Deregulation, *Buying for the Australian Government, Transparency in Australian Government Procurement*. [Internet] available from <<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/accountability-and-transparency/transparency-procurement/tips.html>> [accessed 19 September 2013].

60 Department of Finance and Deregulation, *Procurement Connected Policies: Principles*. [Internet] available from <<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/policy-framework/procurement-policies/principles.html>> [accessed 19 September 2013], and Department of Finance and Deregulation, *Confidentiality Throughout the Procurement Cycle: Practice*. [Internet] available from <<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/accountability-and-transparency/transparency-procurement/practice.html>>.

61 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. Department of Finance and Deregulation, *Commonwealth Procurement Rules*, 1 July 2012, p. 23, and the *Financial Framework Legislation Amendment Act (No. 1) 2012*.

62 The ANAO assessed contracts as containing appropriately worded clauses where they contained clauses that were similar to the model clauses provided in Department of Finance and Deregulation's guidance.

Table 3.4: Parliamentary and ANAO access clauses

Agency	No. of contracts examined	Parliamentary disclosure clauses		ANAO access clauses	
		No.	%	No.	%
AGD	18	14	72	14	72
AUSTRAC	49	46	94	48	98
ComSuper	15	15	100	15	100
DoHA	25	23	92	24	96
Total	107	98	92	101	94

Source: ANAO analysis.

3.17 All four of the audited agencies' standard contract templates contained appropriately worded parliamentary disclosure clauses and also included ANAO access clauses. Where disclosure clauses were not included in the contracts examined, the agency's standard contract template had generally not been used. While there can be various reasons for using non-standard contract templates, agencies should have in place procedures and guidance to make certain that disclosure and, where appropriate, access clauses are included in the contract terms and conditions of all contracts issued.⁶³

Conclusion

3.18 Since the Senate Order was introduced in 2001, the proportion of contracts reported as containing confidentiality provisions has declined from 24 per cent to 4 per cent in 2012. In line with the central focus of the Senate Order, the reduction in the reported use of confidentiality provisions indicates that access by Parliament and the public to government contract information is now less likely to be impeded by unwarranted assertions of commercial sensitivity or confidentiality.

3.19 The ANAO examined 107 of the 1703 contracts reported by the four audited agencies as containing confidentiality provisions. Of the 107 contracts examined, 37 contained specific confidentiality provisions. The remaining 70 contracts contained only general provisions and had either been incorrectly

63 Agencies are required to provide details in their Annual Reports regarding contracts over \$100 000, which do not provide for the Auditor-General to have access to the contractor's premises, and the reason why the standard access clause was not included: Department of the Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies And FMA Act Bodies*, 28 June 2012, p. 15.

reported as containing specific provisions, or the agency had unnecessarily identified use of general provisions.

3.20 Of the 37 contracts identified as containing specific confidentiality provisions, 10 contained confidentiality provisions which, when considered against the criteria of the Confidentiality Test, had not been applied appropriately. Primarily, in these cases the contracts had been reported as containing pricing/cost information or intellectual property requiring protection through the use of specific confidentiality provisions.

3.21 This indicates that agencies need to improve their approaches for identifying and reporting the use of confidentiality provisions in contracts. Consistent with recommendations made by the ANAO in previous audits⁶⁴, agencies could:

- improve the identification and reporting on the use of confidentiality provisions, particularly pricing information and the difference between general and specific confidentiality provisions; and
- implement enhanced processes to support data capture, reporting and quality assurance of contract information.

3.22 Agencies strengthening their data input and quality assurance processes prior to the publication of contract information would support more complete and accurate public reporting on the use of confidentiality provisions.

3.23 The inclusion of confidentiality provisions in a contract does not prevent an agency being required to disclose confidential contract-related information where a matter is before the courts, to a parliamentary committee or to the ANAO. The inclusion of relevant disclosure clauses and reference to access clauses in contracts assists agencies in informing contractors about the fact that there is no absolute guarantee of confidentiality of information.

3.24 A high proportion of the contracts sampled contained appropriately worded parliamentary disclosure clauses (92 per cent) and ANAO access clauses (94 per cent). A factor which contributed to this result was the inclusion of these disclosure and access clauses in the audited agencies' standard contract templates. Where disclosure clauses were not included in the

64 A list of previous audits and recommendations (where applicable) is provided at Appendix 3.

contracts examined, the agency's standard contract template had generally not been used. While there can be various reasons for using non-standard contract templates, agencies should have in place procedures and guidance to make certain that disclosure and, where appropriate, access clauses, are included in the contract terms and conditions of all contracts issued.

4. The Senate Order and AusTender

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

Background

4.1 In addition to the Senate Order, agencies have a number of other reporting requirements for Australian Government contracts and grants. These requirements are set out in the Department of the Prime Minister and Cabinet's *Requirements for Annual Reports*.⁶⁵ Table 4.1 shows the various reporting mechanisms through which agencies are currently required to report contractual and grant arrangements. In particular, since September 2007, FMA Act agencies have been required to report planned and actual procurement activity on AusTender, the Australian Government's web-based procurement information system.⁶⁶

4.2 AusTender provides an online repository for the centralised publication of Australian Government business opportunities, annual procurement plans, multi-use lists, procurement contracts and agency agreements. Agencies are required to publish on AusTender details of all procurement contracts and agency agreements entered into valued at \$10 000 or above, compared to contracts of \$100 000 and above for the Senate Order. Similar to the Senate Order, AusTender's reporting requirements oblige agencies to identify the existence of confidentiality provisions in contracts and the reason(s) for the inclusion of the provisions.

4.3 While AusTender reporting covers procurement contracts, the Senate Order also requires agencies to report on non-procurement contracts such as sales contracts, and, when executed in the form of a contract, certain grants and funding agreements. While these cover slightly different data sets, there is a degree of overlap between the two systems.

4.4 The Department of Finance and Deregulation has advocated the effective use of 'AusTender as the authoritative source of procurement information for

65 Department of the Prime Minister and Cabinet - *Requirements for Annual Reports*, 28 June 2012. [Internet] available from <http://www.dpmc.gov.au/guidelines/docs/annual_report_requirements_2011-12_markedup.pdf> [accessed 19 September 2013].

66 The AusTender Internet page is <<https://www.tenders.gov.au/>>.

the Government'.⁶⁷ Previous ANAO Senate Order audits have identified that inconsistencies in the information published in the Senate Order listings and on AusTender were partly the result of multiple reporting requirements with slightly different reporting criteria.⁶⁸ In 2007, the Senate Standing Committee on Finance and Public Administration's second report on the operation of the Senate Order 2007 suggested that Finance also develop a system comparable to AusTender to facilitate the reporting of non-procurement contracts by agencies. The report also recommended that the Senate Order be retained while AusTender was implemented, with departments and agencies advising through their Ministers' letters, that they had fulfilled the requirements of the Senate Order by placing details of their [procurement] contracts on AusTender.⁶⁹ This recommendation was agreed by the Government, but Finance has not updated the Senate Order guidance FMG 8 to reflect the availability of this reporting option for agencies. Agencies would, however, still need to provide the details of relevant non-procurement contracts on their Senate Order listings. No agencies chose this reporting method for their 2012 calendar year listings.

4.5 More broadly, the enactment of the *Public Governance, Performance and Accountability Act 2013*⁷⁰, is expected to require amendments to be made to Australian Government procurement policies and guidance, including the Senate Order, where these policies relate to a type of entity. In this context there is likely to be opportunities to consolidate contract reporting requirements, in a manner which retains the expected transparency requirements.

67 Department of Finance and Deregulation response to ANAO Audit Report No. 4 2012–13, *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2011 Compliance)*, p.85.

68 ANAO Audit Report No.27 2005–06, *Reporting of Expenditure on Consultants*, p. 24; ANAO Audit Report No.7 2010–11, *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2009 Compliance)*, p. 51; and ANAO Audit Report No.4 2012–13 *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2011 Compliance)*, p. 16.

69 The Senate, Standing Committee on Finance and Public Administration, *Department and agency contracts, Second report on operation of the Senate order for the production of lists of departmental and agencies contracts (2003–06)*, February 2007, Recommendation 1, p. ix.

70 The *Public Governance, Performance and Accountability Bill 2013* gained assent on 29 June 2013. Sections 1–5 took effect from 1 July 2013, with Sections 6–10 to take effect 1 July 2014 (or earlier if a proclamation is issued). This new Act will replace the current model for Commonwealth financial management established through the *Financial Management and Accountability Act 1997* (FMA Act) and the *Commonwealth Authorities and Companies Act 1997* and provides new definitions for agencies and bodies as Commonwealth entities.

Table 4.1: Government contract and grant reporting requirements

Type of contract	Senate Order 11 (contracts)	Senate Order 14 (grants)	AusTender	Annual reports
Procurement contracts	Over \$100 000	–	Over \$10 000	Summary information referring to AusTender
Consultancy contracts	Over \$100 000	–	Over \$10 000	Summary information referring to AusTender
Lease arrangements	Over \$100 000	–	Over \$10 000	–
Sales contracts	Over \$100 000	–	–	–
Exempt contracts	To be advised in Minister's letter	–	–	Summary information ^(c)
Grants	If over \$100 000 and executed as a contract	All grants approved ^(b)	–	Summary information
Funding agreements	If over \$100 000 and executed as a contract	–	Over \$10 000	–
Employment contracts (common law contracts)	Over \$100 000	–	Over \$10 000	Summary information
Agency agreements ^(a)	If over \$100 000 and executed as a contract	–	Over \$10 000	–

Source: ANAO analysis.

Note (a): Agency agreements should only be reported for agreements with non-Commonwealth bodies, if executed in the form of a contract.

Note (b): Agencies must also publish, on their websites, information on individual grants no later than fourteen working days after the grant agreement takes effect, including whether a grant agreement contains confidentiality provisions.⁷¹

Note (c): Refers to contracts in excess of \$10 000 (inclusive of GST) or a standing offer has been exempted by the Chief Executive from being published in AusTender.

71 Parliament of Australia, *Senate Procedural Orders of Continuing Effect, No. 14, Senate Order on Departmental and Agency Grants*. [Internet], last amended March 2007, available from <http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/standingorders/d05> [accessed 19 September 2013], and Department of Finance and Deregulation, *Commonwealth Grant Guidelines*, p. 27. [Internet] available from <<http://www.finance.gov.au/publications/fmg-series/docs/FMG-3-Commonwealth-Grant-Guidelines-June-2013.pdf>> [accessed 2 July 2013].

4.6 To gain insight into the reliability of the procurement contract information reported in agencies' Senate Order listings and on AusTender, the ANAO examined the consistency of the four audited agencies' reporting of confidentiality information across both reporting media.

Compiling Senate Order and AusTender information

4.7 The audited agencies extracted and collated data from multiple sources to prepare their Senate Order listings. The main sources included internal contract registers, financial management information systems, previous Senate Order listings and AusTender. While there were similarities in contract data stored across these systems, their design, functionality and the type of information captured varied, depending on the purposes for which each system was established. Due to system limitations and the specific reporting requirements of the Senate Order, preparing the required listing necessitated agency staff:

- matching information across multiple data-sets;
- filtering information;
- cross-checking across data-sets to identify reportable contracts; and
- re-arranging data into the required reporting format.

4.8 Contract information for reporting on AusTender was primarily sourced from the agencies' financial management information systems but this process was not automated. This generally required agency staff to manually extract the data from the financial management information system to create a file to upload the information into AusTender.

Consistency of reporting

4.9 The ANAO compared the procurement contract information reported by the audited agencies' in their 2012 calendar year Senate Orders listings with the procurement contract information reported on AusTender covering the same time period. The examination included two aspects:

- analysis of whether all the procurement contracts included in the agencies' 2012 calendar year Senate Order listings were also published on AusTender; and

- a comparison of whether the use of confidentiality provisions as reported in agencies' 2012 calendar year Senate Order listings had been similarly identified and reported on AusTender.

The analysis was completed on the information contained in audited agencies' 2012 Senate Order listings as initially published by the agencies, and data extracted from AusTender on 1 March 2013 covering the same reporting period.

Consistency of reporting of contract details

4.10 Of the 1703 contracts reported by the four audited agencies, 1076 of these were procurement contracts. Of the 1076 contracts, 74 per cent had a corresponding AusTender entry (Table 4.2). The remaining 26 per cent of contracts, with a combined value of \$2.3 billion, did not have a corresponding AusTender entry. Most of the contracts without corresponding AusTender entries were administered by the Department of Health and Ageing (DoHA). DoHA has informed the ANAO that it has conducted a review into its AusTender reporting in line with changes to Certificate of Compliance⁷² reporting requirements for AusTender reporting and has now initiated a process to capture contract information for publication on AusTender in a more complete and timely manner.

72 Each year, chief executives of FMA Act agencies are required to provide a Certificate of Compliance to the relevant portfolio Minister and the Minister for Finance and Deregulation reporting on compliance with the Australian Government's financial management framework. From the 2012–13 reporting period onwards, agencies must report in their Certificate of Compliance instances of non-compliance with the requirement to report contracts valued at \$10 000 and above on AusTender within 42 days of entering the contract.

Table 4.2: Consistency of contract reporting in Senate Order listings and on AusTender for the 2012 calendar year reporting period

	AGD	AUSTRAC	ComSuper	DoHA	Total	
					No.	%
Number of procurement contracts with a corresponding AusTender entry	165	116	74	446	801	74
Number of procurement contracts with no corresponding AusTender entry	25	4	0	246	275	26
Total number	190	120	74	692	1 076	100
Value of procurement contracts with a corresponding AusTender entry (\$ millions)	390	97	124	943	1 554	41
Value of procurement contracts without a corresponding AusTender entry (\$ millions)	33	2	0	2 233	2 268	59
Total value (\$ millions)	423	99	124	3 176	3 822	100

Source: ANAO analysis of Senate Order and AusTender reporting.

Note: Contracts identified as corresponding had sufficiently similar details to determine that they were referring to the same contract. Corresponding Senate Order and AusTender contract entries were identified on the basis of contracts having the same vendor name and at least one of: subject matter, start date or total contract value in the Senate Order and AusTender listings.

Consistency of reporting of confidentiality provisions

4.11 The ANAO analysed the reported use of confidentiality provision types(s) and reason(s) across each corresponding entry in the agencies' Senate Order listings and on AusTender, to determine the extent to which confidential information was consistently reported. As shown in Table 4.3, the reporting in relation to provision type(s) in the Senate Order listings and on AusTender matched for approximately 711 (89 per cent) of the corresponding contracts. The reporting of the reason(s) for the inclusion of confidentiality provisions matched for approximately 692 (86 per cent) of the contracts.

Table 4.3: Comparison of reported confidentiality provision types and reasons

	AGD	AUSTRAC	ComSuper	DoHA	Total	
					No.	%
The type of confidentiality provision(s) matched for:						
Both provisions types	149	45	74	443	711	89
One provision type	13	70	0	1	84	10
Neither provision type	3	1	0	2	6	1
Total	165	116	74	446	801	100
The reported reason(s) for confidentiality provisions matched for:						
Both provision types	148	29	73	442	692	86
One provision type	10	86	1	2	99	12
Neither provision type	7	1	0	2	10	1
Total	165	116	74	446	801	100

Source: ANAO analysis of Senate Order and AusTender reporting.

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

4.12 The ANAO's analysis of the reported contracted information showed gaps and inconsistencies between the contract information reported in Senate Order listings and on AusTender. As a consequence, there would be merit in agencies strengthening data input and quality assurance processes to support more complete and accurate contract reporting. It may be beneficial for agencies to review contract data for a small sample of contracts each year, to identify any discrepancies and inform improvements in data input and reporting.

Conclusion

4.13 The ANAO's comparison of the audited agencies' contract reporting in their 2012 calendar year Senate Order listings and on AusTender found discrepancies in relation to the contracts reported and the use of confidentiality provisions attributed to the contracts reported. These discrepancies reflected weaknesses in the contract data entry and quality assurance processes used by agencies. The ANAO has previously observed that the need for agencies to comply with multiple procurement reporting requirements is a factor influencing the integrity of publicly reported contract information. Finance updating the relevant Senate Order guidance to fully inform agencies of their contract reporting options, in addition to agencies strengthening their data input and quality assurance processes prior to the publication of contract information, would support more complete and accurate reporting on the use of confidentiality provisions.



Ian McPhee
Auditor-General

Canberra ACT
26 September 2013

Appendices

Appendix 1: Agencies' responses



Australian Government
Attorney-General's Department

Secretary

13/3994

2 September 2013

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

Dear Mr Pope

Performance Audit of Confidentiality in Government Contracts: Senate Order for Department and Agency Contracts (Calendar Year 2012 Compliance)

The Attorney-General's Department (AGD) has prepared a brief agency response to the proposed audit report on the *Confidentiality in Government Contracts: Senate Order for Department and Agency Contracts (Calendar Year 2012 Compliance)* provided to me on 15 August 2013.

Formal agency response

The Department acknowledges the findings in the audit report and reiterates that the results of this audit and past audits reflect the complexity of interpreting and applying the guidance material and the effort required to gather, verify and maintain data quality across multiple systems to meet this requirement.

The Attorney-General's Department welcomes the ANAO's observation that the process for preparing and publishing separate Senate Order reports may be made redundant through more effective use of the AusTender system to meet this requirement and calls for updated policy around this.

Summary of formal response

The Department considers that the audit highlights the complexities of both applying the confidentiality policy and the comparison of two sources of information produced at different points-in-time (AusTender and Senate Order).

The action officer for this matter is David O'Brien who can be contacted on 02 6141 3543.

Yours sincerely


Roger Wilkins AO

**Australian Transaction Reports
and Analysis Centre**

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Australian Government

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OFFICE OF THE CHIEF EXECUTIVE OFFICER

Ref: 781656

27 August 2013

Dr Andrew Pope
Group Executive Director
Performance Audit Services Group
Australian National Audit Office
19 National Circuit
BARTON ACT 2600

Dear Dr Pope

**Proposed audit report on Confidentiality in Government Contracts: Senate Order for
Departmental and Agency Contracts (Calendar Year 2012 Compliance)**

I am writing in response to the proposed audit report on *Confidentiality in Government
Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2012
Compliance)*.

AUSTRAC agrees with the findings outlined in the proposed audit report.

The agency has implemented changes to address these findings and will continue to refine its
processes to improve performance in this area.

I wish to take this opportunity to thank you for the professional conduct of your team during
the course of the audit.

Yours sincerely

A large, stylized handwritten signature in black ink, appearing to read 'John L Schmidt'.

John L Schmidt
CHIEF EXECUTIVE OFFICER



Australian Government
ComSuper

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

Dear Dr Pope

**CONFIDENTIALITY IN GOVERNMENT CONTRACTS: SENATE ORDER FOR
DEPARTMENTAL AND AGENCY CONTRACTS (CALENDAR YEAR 2012
COMPLIANCE)**

Thank you for the opportunity to comment on the proposed audit report on the Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2012 Compliance), pursuant to section 19 of the *Auditor-General Act 1997*.

ComSuper welcomes the ANAO report and supports the findings contained within the proposed audit report. Please find ComSuper's comments below:

ComSuper found the audit to be beneficial. The audit identified areas where ComSuper can improve its reporting processes. ComSuper accepts and agrees with the audit findings and is updating internal processes and procedures to continue to improve the quality and accuracy of its reporting.

Should you have any enquiries please contact me on 02 6272 9501 or via e-mail at richard.bridge@comsuper.gov.au.

Yours Sincerely

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

Richard Bridge
Acting Chief Executive Officer

5 September 2013



Australian Government
Department of Health and Ageing

SECRETARY

Mr Ian McPhee
Auditor-General for Australia
Australian National Audit Office
19 National Circuit
BARTON ACT 2600

Dear Mr McPhee 

**PROPOSED AUDIT REPORT ON CONFIDENTIALITY IN GOVERNMENT
CONTRACTS: SENATE ORDER FOR DEPARTMENTAL AND AGENCY
CONTRACTS (CALENDER YEAR 2012 COMPLIANCE)**

I refer to your letter dated 15 August 2013 requesting written comments on the above report within 28 days of receipt.

The Department notes the conclusions raised in the audit report.

The report acknowledges the efforts undertaken by the Department such as automation of reports, staff awareness sessions, staff training and maintenance of a robust control environment.

A short summary of our departmental response for inclusion in the report summary is provided at Attachment A.

Yours sincerely



Jane Halton PSM
Secretary

9 September 2013

Attachment A

**PROPOSED AUDIT REPORT ON THE CONFIDENTIALITY IN
GOVERNMENT CONTRACTS: SENATE ORDER FOR DEPARTMENTAL
AND AGENCY CONTRACTS (CALENDER YEAR 2012 COMPLIANCE)**

The short summary of the Department of Health and Ageing's response to the above report is as follows:

'The department agrees with the audit conclusions relating to Senate Order Contract Listing, the use of confidentiality provisions in contracts and Austender Listing.

In order to further improve compliance with the requirements of Senate Listing, the department undertook a review of the reports and processes necessary for compliance following the publication of the 2011-12 financial year listings. The improvements made include automation of reports, staff awareness sessions, staff training and instituting a more robust control environment.'

Appendix 2: Senate Procedural Order of Continuing Effect 11: Departmental and Agency Contracts

(1) There be laid on the table, by each Minister in the Senate, in respect of each agency administered by that Minister, or by a Minister in the House of Representatives represented by that Minister, by not later than 2 calendar months after the last day of the financial and calendar year, a letter of advice that a list of contracts in accordance with paragraph (2) has been placed on the Internet, with access to the list through the department's or agency's home page.

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

(a) each contract entered into by the agency which has not been fully performed or which has been entered into during the previous 12 months, and which provides for a consideration to the value of \$100 000 or more;

(b) the contractor, the amount of the consideration and the subject matter of each such contract, the commencement date of the contract, the duration of the contract, the relevant reporting period and the twelve-month period relating to the contract listings;

(c) whether each such contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether there are any other requirements of confidentiality, and a statement of the reasons for the confidentiality; and

(d) an estimate of the cost of complying with this order and a statement of the method used to make the estimate.

(3) If a list under paragraph (1) does not fully comply with the requirements of paragraph (2), the letter under paragraph (1) indicate the extent of, and reasons for, non-compliance, and when full compliance is expected to be achieved. Examples of non-compliance may include:

(a) the list is not up to date;

(b) not all relevant agencies are included; and

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

(4) Where no contracts have been entered into by a department or agency, the letter under paragraph (1) is to advise accordingly.

(5) In respect of contracts identified as containing provisions of the kind referred to in paragraph (2)(c), the Auditor-General be requested to provide to the Senate, by not later than 30 September each year, a report indicating that the Auditor-General has examined a number of such contracts selected by the Auditor-General, and indicating whether any inappropriate use of such provisions was detected in that examination.

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

(7) The Finance and Public Administration Committee consider the ongoing operation of the order and report on relevant developments from time to time.

(8) This order has effect on and after 1 July 2001.

(9) In this order:

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

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

(20 June 2001 J.4358, amended 27 September 2001 J.4994, 18 June 2003 J.1881, 26 June 2003 J.2011, 4 December 2003 J.2851, 1 March 2007 J.3527)⁷³

73 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> [accessed 19 September 2013].

Appendix 3: Previous ANAO audit reports on the Senate Order

Audit Report	Recommendation(s)
<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>
<p>Audit Report No.7 2010–11 (Calendar Year 2009 Compliance)</p>	<p>Recommendation No.1 Paragraph 3.29 To assist agencies to provide more accurate, timely and complete procurement reporting, the ANAO recommends that the Department of Finance and Deregulation 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 The ANAO recommends that agencies assess whether their contract preparation processes support adequate consideration of the appropriate use of confidentiality provisions in contracts.</p>
<p>Audit Report No.6 2009–10 (Calendar Year 2008 Compliance)</p>	<p>Recommendation No. 1 Paragraph 2.22 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.
<p>Audit Report No.5 2008–09 (Calendar Year 2007 Compliance)</p>	<p>Recommendation No. 1 Paragraph 2.25 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>
<p>Audit Report No.7 2007–08 (Calendar Year 2006 Compliance)</p>	<p>Recommendation No.1 Paragraph 4.23 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</p> <p>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</p> <p>The ANAO recommends that agencies provide guidance to those staff responsible for negotiating contracts and completing the Senate Order contract listing, to improve the level of understanding of the Senate Order, particularly relating to the use of confidentiality provisions.</p>
<p>Audit Report No.11 2005–06 (Calendar Year 2004 Compliance)</p>	<p>Recommendation No. 1 Paragraph 2.35</p> <p>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</p> <p>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</p> <p>The ANAO recommends that agencies ensure adequate documentation of the reasons for agreeing to identify specified information in contracts as being confidential.</p>
<p>Audit Report No.10 2004–05 (Calendar Year 2003 Compliance)</p>	<p>The report did not contain any recommendations however noted a number of contracts had been inappropriately listed as there was no information that satisfied the criteria for protection as confidential information. In addition agencies should make sure that the policies are known, and acted upon, at all levels within the agency.</p>
<p>Audit Report No.31 2003–04 (Financial Year 2002-03 Compliance)</p>	<p>The report did not contain any recommendations however noted that agencies had difficulty identifying what information should be protected as confidential information, and found many instances where information was inappropriately identified as confidential information.</p>
<p>Audit Report No.5 2003–04 (Autumn 2003 Compliance)</p>	<p>The report did not contain any recommendations however noted that 'although agencies have made changes to their policies and procedures to address the issue of protecting contractual information as confidential, all agencies must continue efforts to ensure that their policies are both regularly reviewed to accord with Government policy, and reflected in their practices'.</p>
<p>Audit Report No.32 2002–03 (Spring 2002 Compliance)</p>	<p>The report did not contain any recommendations however noted that some claims of confidentiality were not appropriate as the information claimed to be confidential was not specified, or where it was specified, it did not satisfy the established criteria to make it confidential. In addition better communication of the established policies and procedures was required.</p>

Audit Report	Recommendation(s)
<p>Audit Report No.8 2002–03 (Autumn 2002 Compliance)</p>	<p>Recommendation No. 1 Paragraph 2.42 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 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.
<p>Audit Report No.33 2001–02 Senate Order of 20 June 2001 (February 2002)</p>	<p>The report did not contain any recommendations but noted that development of processes and guidance by agencies underway at that time would assist in promoting the appropriate use of confidentiality provision in contracts.</p>
<p>Audit Report No.38 2000–01 The Use of Confidentiality Provisions in Commonwealth Contracts</p>	<p>Recommendation No. 1 Paragraph 5.24 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 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>

Source: ANAO Audit Reports.

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Department of Infrastructure and Transport

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Administration of the Agreements for the Management, Operation and Funding of the Mersey Community Hospital

Department of Health and Ageing

Department of Health and Human Services, Tasmania

Tasmanian Health Organisation – North West

ANAO Audit Report No.3 2013–14

AIR 8000 Phase 2 – C-27J Spartan Battlefield Airlift Aircraft

Department of Defence

ANAO Audit Report No.4 2013–14

Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2012 Compliance)

Across Agencies

Current Better Practice Guides

The following Better Practice Guides are available on the ANAO website.

Preparation of Financial Statements by Public Sector Entities	Jun 2013
Human Resource Management Information Systems – Risks and Controls	Jun 2013
Public Sector Internal Audit	Sep 2012
Public Sector Environmental Management	Apr 2012
Developing and Managing Contracts – Getting the right outcome, achieving value for money	Feb 2012
Public Sector Audit Committees	Aug 2011
Fraud Control in Australian Government Entities	Mar 2011
Strategic and Operational Management of Assets by Public Sector Entities – Delivering agreed outcomes through an efficient and optimal asset base	Sep 2010
Implementing Better Practice Grants Administration	Jun 2010
Planning and Approving Projects – an Executive Perspective	Jun 2010
Innovation in the Public Sector – Enabling Better Performance, Driving New Directions	Dec 2009
SAP ECC 6.0 – Security and Control	Jun 2009
Business Continuity Management – Building resilience in public sector entities	Jun 2009
Developing and Managing Internal Budgets	Jun 2008
Agency Management of Parliamentary Workflow	May 2008
Fairness and Transparency in Purchasing Decisions – Probity in Australian Government Procurement	Aug 2007
Administering Regulation	Mar 2007
Implementation of Program and Policy Initiatives – Making implementation matter	Oct 2006

