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Performance Audit

The Use of Confidentiality Provisions in Commonwealth Contracts

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Australian National
Audit Office

Canberra ACT
24 May 2001

Dear Madam President
Dear Mr Speaker

The Australian National Audit Office has undertaken a performance audit in accordance with the authority contained in the *Auditor-General Act 1997.* I present this report of this audit, and the accompanying brochure, to the Parliament. The report is titled *The Use of Confidentiality Provisions in Commonwealth Contracts.*

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

Yours sincerely

P. J. Barrett
Auditor-General

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

AUDITING FOR AUSTRALIA

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

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Abbreviations

ACT	Australian Capital Territory
ANAO	Australian National Audit Office
CEIs	Chief Executive's Instructions
CPCs	Commonwealth Procurement Circulars
CPGs	Commonwealth Procurement Guidelines: Core Policies and Principles
CTC	Competitive Tendering and Contracting
FMA Act	*Financial Management and Accountability Act 1997*
FOI Act	*Freedom of Information Act 1982*
FMARs	Financial Management and Accountability Regulations
GaPS	Gazette Publishing System
GITC3	Government Information Technology and Communications contracting framework version 3
JCPAA	Joint Committee of Public Accounts and Audit
PSM	Protective Security Manual

Summary and Recommendations

Summary

Background

1. In early 2000, the Senate Finance and Public Administration References Committee considered a draft Senate motion that sought to provide greater transparency in relation to government contracts. The motion proposed that ministers table in the Senate confirmation that agencies, for which they are responsible or which they represent in the Senate, had placed onto their Internet websites, an indexed list of contracts (to a value of $10 000 or more) entered into by the agency that had not been fully performed, or which had been entered into during the previous 12 months. The list was to indicate the contractor, the matters covered by each contract, and whether the contracts contained confidentiality provisions and, if so, the reason for them. The motion also proposed that the Auditor-General would provide independent verification of the confidentiality claims.[1] A copy of the motion is at Appendix 1.

2. At the Committee's hearing on 12 May 2000, the ANAO advised that it would consider including in the 2000–2001 Audit Work Program a performance audit that would look at agencies' use of confidentiality provisions in contracts. The Committee's report, which was tabled on 26 June 2000, suggested a range of matters (see Appendix 2) that the Auditor-General might take into consideration in such an audit, and undertook to report again to the Senate following the tabling of the Auditor-General's performance audit report. The Committee also observed that the level of information available to the Parliament and the public about government contracting has not kept pace with the increased rate of contracting out, particularly in the outsourcing of many functions previously performed by government agencies. Further, the Committee reiterated the general principle it had made in previous reports on government contracting that information should be made public unless there are good grounds for withholding it.

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[1] The motion was subsequently amended, in September 2000, to increase the dollar limit to $100 000 and for the Auditor-General to provide the Senate with a report twice a year indicating that a number of contracts with confidentiality clauses have been reviewed and if there had been any inappropriate use of confidentiality provisions.

3. Against this background, the ANAO commenced an audit in October 2000 to examine agencies' use of confidentiality provisions in a sample of contracts and to outline how agencies should be approaching the inclusion of confidentiality provisions in contracts. For the purpose of the audit, the term confidential includes commercial-in-confidence information, but does not include information protected with a national security classification.[2]

Public accountability

4. The Commonwealth operates within a governance and accountability framework which requires agencies to:

- ensure efficient, effective and ethical use of Commonwealth resources;
- maintain adequate systems for recording processes and decisions;
- ensure openness and transparency through a public reporting process, including the gazettal of certain information;
- allow for external scrutiny, for example, by the Auditor-General and the Ombudsman;
- protect personal information in accordance with Commonwealth legislation;
- identify and protect official information in accordance with Commonwealth security requirements;
- on behalf of ministers provide evidence to the Parliament, acting through its various committees; and
- respond to freedom of information requests in the interests of open government.

5. This framework is established through a combination of legislation, and policy requirements that cover financial and resource management, procurement and contracting, service delivery and standards of behaviour.

6. The primary accountability obligation of public servants is to the Government of the day. Public servants are accountable to ministers for the exercise of delegated authority while ministers are accountable to the Parliament for '*…their actions and their policies by, for example, answering questions, providing documents and appearing before committees*'.[3]

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2 National security information is defined as '*…any official resource that records information about, or is associated with, Australia's security, defence, international relations or national interest*'.

3 Odgers' *Australian Senate Practice (9th Edition)* page 459.

7. Government reforms in recent years have been designed to make the Australian Public Service more effective and efficient through greater devolution of responsibility to agencies for a wide range of administrative matters, the adoption of an accrual-based outcomes and outputs framework, and increased emphasis on the outsourcing of functions where the private or non-profit sector can provide better value for money for the Commonwealth.

8. Agency Chief Executive Officers are now more clearly responsible and accountable for agency administration under the *Financial Management and Accountability Act 1997* (FMA Act) and the *Public Service Act 1999*, including for the provision of goods and services which are subject to outsourcing arrangements. Even though agencies may contract out service delivery, agency management remains accountable for the delivery of the Government's objectives in a cost-effective manner.

9. The increased emphasis on outsourcing has led to situations whereby parliamentary committees have requested agencies, on behalf of ministers, to provide information on contract related matters.

Audit objectives, scope and focus

10. The objectives of the audit were to:

- assess the extent of guidance on the use of confidentiality clauses in the context of contracts at a government wide level or within selected agencies;
- develop criteria that could be used to determine whether information in (or in relation to) a contract is confidential, and what limits should apply;
- assess the appropriateness of agencies' use of confidentiality clauses in the context of contracts to cover information relating to contracted provisions of goods and services, and the implications of existing practices of applying the criteria that have been developed; and
- assess the effectiveness of existing accountability and disclosure arrangements for the transparency of contracts entered into by the Commonwealth, and whether agencies are complying with the arrangements.

11. The audit reviewed current guidance available in relation to contracting and the use of confidentiality provisions specifically, and, in a more general sense, the reporting requirements for agencies. *Confidential Information Guidelines* were developed in conjunction with the Australian Government Solicitor and in consultation with agencies. The audit also examined current agency practice on the use of confidentiality clauses, and adherence to the reporting requirements in relation to contracts established pursuant to the FMA Act.

12. To provide some background on the arrangements under which agencies may be requested to provide information to Parliament, the audit sought advice from the Australian Government Solicitor on how parliamentary committees and the Government have traditionally approached questions relating to the provision of information.

13. Selected industry groups and contractors were consulted during the audit in order to gauge industry opinion and priorities in relation to issues of confidentiality and disclosure of information.

Parliamentary committee powers

14. Members of Parliament, as individuals, have the same access rights to government information, through the *Freedom of Information Act 1982,* as the public generally. However, parliamentary committees have significantly greater authority than the public to seek access to particular information held by agencies.

15. Each House may establish a committee for the purpose of inquiring into any matter necessary to enable Parliament to carry out its functions, including any matter which is capable of being the subject of valid federal legislation.

16. The power which a committee has available to require a person to produce information and documents, is usually very broad. However, there may be circumstances in which a person may not consider it appropriate to disclose information or documents to a committee and when a committee will agree not to seek information or documents where the disclosure is not in the public interest (public interest immunity). The fact that particular information is confidential does not, by itself, provide grounds for refusing disclosure on the basis of public interest immunity.

17. In the absence of any exercise of penal powers by either House of Parliament, conflicts between the Executive Government and the Senate have in practice been resolved in the political arena rather than the courts. In recent times it seems that the predominant view, of both the Executive Government and the Senate, has been that the resolution of these disputes is essentially a matter of political judgment, not a question of legal rights and obligations.

Overall conclusion

18. There is a lack of consolidated government-wide guidance available to agencies on the use of confidentiality provisions in contracts. There is little guidance available within the agencies examined on how

the issue of confidentiality provisions in contracts should be addressed. It is clearly an issue in which there is a need for greater awareness among public sector agencies.

19. There are weaknesses in how agencies generally deal with the inclusion of confidentiality provisions in contracts. The weaknesses include:

- consideration of what information should be confidential is generally not addressed in a rigorous manner in the development of contracts;
- where there are confidentiality provisions in contracts, there is usually no indication of what specific contractual information in the contract is confidential; and
- there is uncertainty among officers working with contracts over what information should properly be classified as confidential.

20. There is no simple rule for classifying information in, or in relation to, a contract as confidential which can be unilaterally applied in all circumstances. As part of the audit, comprehensive criteria were drawn up to assist agencies in dealing properly with confidentiality provisions in contracts and will form part of a preventative approach that relies on agencies agreeing to the use of confidentiality clauses in contracts only when they can be justified against the criteria. These criteria draw heavily on broad principles expressed in existing legislation and on what courts and tribunals have held to be confidential information, and could be applied equally in cases where the Commonwealth has a particular commercial interest it wishes to protect.

21. Agencies' approach should provide for contractors to indicate what information they consider should be classified as confidential and for agencies to explicitly consider these in terms of the above mentioned criteria. Further, agencies should seek to include provisions in contracts which allow information to be disclosed to parliamentary committees. Where confidentiality of certain information is considered to be appropriate in either, or both, parties' interests, agencies should, as a matter of course, seek to include a provision which provides an exception with respect to disclosure to a parliamentary committee, if only on a confidential basis. To give effect to such an approach, the ANAO considers there would be considerable benefit in high level advice being provided in the *Commonwealth Procurement Guidelines*: *Core Policies and Principles*, with detailed guidance included in a related toolkit, or other better practice documentation, which is readily accessible by agencies and contractors.

22. Using the criteria developed during the audit, the ANAO assessed certain past instances where parliamentary committees had sought information in contracts, and were refused it on grounds of commercial confidentiality. The results of the analysis suggest that application of the criteria set out in this report, together with a suggested approach that encourages dialogue with committees to assess how the request for information can best be met, is likely to have led to different decisions being made by agencies as to whether the information should reasonably be treated as confidential. In turn, it is likely that committees would have been provided with the information they sought or information, which in large measure, would have met their needs. This assessment by the ANAO on the confidentiality of certain information does not take into account the power of a parliamentary committee to require a person to produce information as set out earlier in paragraphs 14–17.

23. The principal accountability and disclosure measure used for reporting contracts is the Gazette Publishing System (GaPS). Adherence by agencies to the GaPS reporting requirements is mixed and, as a result, GaPS, in its current state, cannot always be relied upon to provide comprehensive and accurate information on agency contracting activities. In this light, the ANAO considers that the review of the gazettal arrangements, which was commenced by the Department of Finance and Administration during the course of the audit, should cover issues such as who uses the information, and for what purpose, to assist in enhancing the quality and utility of the data. In addition, consideration should be given to the costs and benefits of changes proposed to the gazettal of, or the introduction of any other disclosure method for, Commonwealth contractual information.

Key Points

Existing Guidelines for Determining Whether Information Relating to Contracts is Confidential (Chapter 2)

24. The current *Commonwealth Procurement Guidelines* do not provide guidance on how to determine whether information in, or in relation to, a contract is confidential, either from the Commonwealth's or the contractor's point of view. Nor do they provide guidance on the rights of access by the Parliament or the public, and how this is to be dealt with in contracts. However, the Department of Finance and Administration's Competitive Tendering and Contracting website contains some limited guidance on what information could be considered as confidential from a contractor's perspective and suggests that information identified as confidential by the provider is not usually publicly released.

25. Draft revisions to the *Commonwealth Procurement Guidelines* being developed at the time of the audit, indicate that confidentiality of information should be considered on a case-by-case basis when developing a contract, and provide some examples of categories of information that could be construed as confidential.

26. Guidance developed by individual agencies on how to determine whether information in, or in relation to, a contract is confidential is limited, and does not highlight the need for agencies and contractors to determine, during the contract development stage, what information in, or in relation to, a contract is confidential.

27. While not addressing the classification of information at the time of contract development, the *Protective Security Manual* and the current version of the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters—November 1989* do address the issues of protection and disclosure of information respectively. Further, the *Protective Security Manual* requires that appropriate security procedures, based on the nature of the function and the classification of information, need to be negotiated with the contractor and settled before finalising the contract.

Current Agency Practice Regarding the Use of Confidentiality and Related Contractual Provisions (Chapter 3)

28. There is uncertainty among agencies over what information should properly be classified as confidential, and what should not. The question of what information in, or in relation to, a contract would be considered confidential was generally not addressed in any specific manner in the development of the contract.

29. The provisions in the contracts examined would suggest that there had not been any detailed consideration of what should properly be classed as confidential. Contractors expressed the view that certain elements of their contracts should be confidential, but many of them also accepted Parliament's need to have access to contractual information.

30. There was generally little reference in contract related material to the powers of parliamentary committees to require persons to produce information and documents. Including clear statements in contracts that allow for agencies to disclose information to parliamentary committees, when required, would be a positive response to concerns expressed by parliamentary committees.

The Legal Framework and Guidelines Related to Confidential Information (Chapter 4)

31. Guidance on how to deal with confidential information in, or in relation to, contracts should be consistent with the broad principles in legislation, as well as with what courts and tribunals have held to be confidential information and what this implies for access by various parties. Desirably, this would be reflected in, or referenced by, the guidance that is available to agencies responsible for developing contracts with private sector firms. This guidance could be applied equally in cases where the Commonwealth has a particular commercial interest it wishes to protect. Overall, the reverse onus principle should apply, that is, that disclosure is the expected approach unless there is good reason for confidentiality.

32. The ANAO notes that the terms of a government contract will rarely contain information of the type held by the courts to be confidential.

Suggested Approach to the Implementation of Guidelines Relating to Confidential Information (Chapter 5)

33. The ANAO considers that agencies should explicitly consider the criteria outlined in Chapter 4 to determine which information in, or in relation to, a contract, if any, should be classified as confidential in the development of a contract. Agencies' approach should also provide for contractors to indicate what information they consider should be classified as confidential.

34. To give effect to this changed approach in considering confidential information in contracts, the ANAO considers that agencies should include provisions in tender documentation that alert prospective tenderers or contractors to the public accountability responsibilities of agencies.

35. The ANAO also considers there would be considerable benefit in high level advice on the public accountability responsibilities of parties when contracting with the Commonwealth being provided in the *Commonwealth Procurement Guidelines,* with detailed guidance being included in a related toolkit, or other better practice documentation, which is readily accessible by agencies and contractors. It is also proposed that, in the preparation of such guidance material, relevant parliamentary committees be consulted.

36. Bearing in mind that it is open to parliamentary committees to pursue the provision of any contractual information, the ANAO proposes that agencies should work cooperatively with both contractors and with parliamentary committees to ensure that contractual information is provided to the maximum extent possible, and that the needs of all parties are appropriately recognised. This would instil greater trust and confidence in the process and a more general sharing of culture and values in public contracting.

Reporting (Chapter 6)

37. Although many agencies may be diligent in their approach to the gazettal process, there are significant discrepancies in GaPS data, partly as a result of differing gazettal practices among agencies. Consequently, GaPS, in its current state, cannot always be relied upon to provide comprehensive and accurate information on agency contracting activities.

38. In addition, the low threshold for reporting means that there is a large number of small to medium transactions on the database. Not only does that make the information difficult for the public to access, but it also imposes a significant administrative burden on agencies in relation to inputting the data and ensuring data quality. Raising the threshold would ensure a focus on the more significant contractual arrangements in the Commonwealth.

39. In recent years, the way in which agencies meet their outcomes has changed considerably and the reporting framework does not readily reflect this change in practice, as has been observed in the Parliament. The ANAO found that, partly as a result of a lack of clear guidance, agencies were not fully aware as to what types of contractual arrangements have to be gazetted and for what reason.

40. Clarification is required as to exactly what should be reported through the gazettal process and appropriate definitions are needed to support improved consistency in reporting by agencies. In addition, consideration should be given to the costs and benefits of changes proposed to the gazettal of, or the introduction of any other disclosure method for, Commonwealth contractual information.

Recommendations

Recommendation No.1 Para. 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.

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*.

Agency responses:

The Australian Taxation Office; the Department of Employment, Workplace Relations and Small Business; the Department of Health and Aged Care; the Department of Defence; the Department of Family and Community Services; the Department of Communications, Information Technology and the Arts; and Centrelink agreed with the recommendation.

Two agencies did not agree fully with the recommendation:

- The Department of Finance and Administration agreed with the recommendation but could not agree to high level advice being included in the next edition of the *Commonwealth Procurement Guidelines.*
- The Department of Agriculture, Fisheries and Forestry—Australia agreed with qualification.

Recommendation No.2 Para. 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.

Agency responses:

The Australian Tax Office; the Department of Employment, Workplace Relations and Small Business; the Department of Health and Aged Care; the Department of Finance and Administration; and the Department of Defence agreed with the recommendation.

The Department of Family and Community Services and the Department of Communications Information Technology and the Arts agreed in principle;

Centrelink and the Department of Agriculture, Fisheries and Forestry—Australia agreed with qualification.

Recommendation No.3 Para. 6.33

The ANAO recommends that, in its current review of the mandatory reporting requirements for the gazettal of contracts, the Department of Finance and Administration includes the following:

- clarification of stakeholders' information needs;
- clarification of the scope of information that should be collected in relation to individual contracts;
- consideration of the appropriate data presentation, including differentiating the categories of information to be published; and
- the appropriate threshold for reporting.

The outcome of the review should be the promulgation of clear guidance on gazettal requirements in relation to procurement.

Agency responses:

All agencies except the Department of Finance and Administration agreed with the recommendation.

Audit Findings and Conclusions

1. Introduction

Background

1.1 In early 2000, the Senate Finance and Public Administration References Committee considered a draft Senate motion that sought to provide greater transparency in relation to government contracts. The motion proposed that ministers table in the Senate confirmation that agencies for which they are responsible or which they represent in the Senate had placed onto their Internet websites, an indexed list of contracts (to a value of $10 000 or more) entered into by the agency that had not been fully performed, or which had been entered into during the previous twelve months. The list was to indicate the contractor, the matters covered by the contract, and whether the contracts contained confidentiality provisions and, if so, the reason for them. The motion also proposed that the Auditor-General would provide independent verification of the confidentiality claims.[4] A copy of the motion is at Appendix 1.

1.2 At the Committee's hearing on 12 May 2000, the ANAO advised that it would consider including in the 2000–2001 audit work program a performance audit that would look at agencies' use of confidentiality provisions in contracts. The Committee's report, which was tabled on 26 June 2000, suggested a range of matters (see Appendix 2) that the Auditor-General might take into consideration in such an audit, and undertook to report again to the Senate following the tabling of the Auditor-General's performance audit report. The Committee also observed that the level of information available to the Parliament and the public about government contracting has not kept pace with the increased rate of contracting out, particularly in the outsourcing of many functions previously performed by government agencies. Further, the Committee reiterated the general principle it had made in previous reports on government contracting that information should be made public unless there are good grounds for withholding it.[5]

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4 The motion was subsequently amended, in September 2000, to increase the dollar limit to $100 000 and for the Auditor-General to provide the Senate with a report twice a year indicating that a number of contracts with confidentiality clauses have been reviewed and if there had been any inappropriate use of confidentiality provisions.

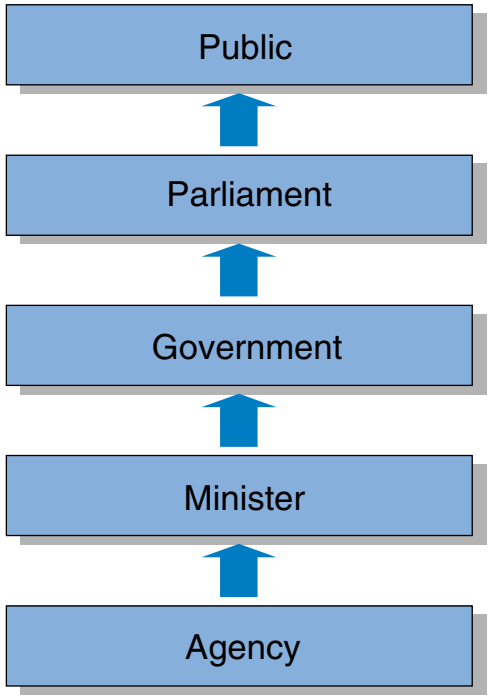
5 In April 2001, the Committee, as part of its Inquiry into the Government's information technology outsourcing initiative, tabled an interim report on accountability in a commercial environment to '*…highlight the apparent lack of understanding in the Australian Public Service about parliamentary accountability…*'. The Committee's view was '*…that more guidance on openness and transparency is needed for departments and agencies and this should translate into better informed contractual partners*'.

1.3 Against this background, the audit commenced in October 2000 to examine agencies' use of confidentiality provisions in a sample of contracts and to outline how agencies should be approaching the inclusion of confidentiality provisions in contracts. For the purpose of the audit, the term confidential includes commercial-in-confidence information, but does not include information protected with a national security classification.[6]

Public accountability

1.4 The primary accountability obligation of public servants is to the government of the day. Public servants are accountable to ministers for the exercise of delegated authority while ministers are accountable to the Parliament for '*… their actions and their policies by, for example, answering questions, providing documents and appearing before committees*'.[7] Figure 1.1 illustrates the Commonwealth accountability structure.

Figure 1.1
Commonwealth Accountability Structure



Source: ANAO interpretation of MAB–MIAC *Accountability on the Commonwealth Public Sector* – June 1993

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6 National security information is defined as '*…any official resource that records information about, or is associated with, Australia's security, defence, international relations or national interest*'.

7 Odgers' *Australian Senate Practice (9th Edition)* page 459.

1.5 The Commonwealth operates within a governance and accountability framework which requires agencies to:

- ensure efficient, effective and ethical use of Commonwealth resources;
- maintain adequate systems for recording processes and decisions;
- ensure openness and transparency through a public reporting process, including the gazettal of certain information;
- allow for external scrutiny, for example, by the Auditor-General and the Ombudsman;
- protect personal information in accordance with Commonwealth legislation;
- identify and protect official information in accordance with Commonwealth security requirements;
- on behalf of ministers, provide information to the Parliament, acting through its various committees; and
- respond to freedom of information requests in the interests of open government.

1.6 This framework is established through a combination of legislation and policy requirements that cover financial and resource management, including the procurement of goods and services:

- *Financial Management and Accountability Act 1997;*
- *Financial Management and Accountability Regulations 1997;*
- *Commonwealth Authorities and Companies Act 1997;*
- *Freedom of Information Act 1982;*
- *Auditor-General Act 1997;*
- *Public Accounts and Audit Committee Act 1952;*
- *Public Service Act 1999;*
- *Public Works Committee Act 1969;*
- *Privacy Act 1988;*
- *Commonwealth Procurement Guidelines: Core Polices and Principles*, which cover mandatory reporting of Commonwealth contracts and agency agreements of $2000 and over via the Gazette Publishing System;
- *Protective Security Manual*; and
- Agency Chief Executive's Instructions.

1.7 Government reforms in recent years have been designed to make the Australian Public Service more effective and efficient through greater devolution of responsibility to agencies for a wide range of administrative matters, the adoption of an accrual-based outcomes and outputs framework and increased emphasis on the outsourcing of functions where the private or non-profit sector can provide better value for money for the Commonwealth.

1.8 Agency Chief Executive Officers are now more clearly responsible and accountable for agency administration under the *Financial Management and Accountability Act 1997* (FMA Act) and the *Public Service Act 1999*, including for the provision of goods and services which are subject to outsourcing arrangements. Even though agencies may contract out service delivery, agency management remains accountable for the delivery of the Government's objectives in a cost-effective manner.

1.9 Under the accrual-based outcomes and outputs framework, the Government principally reports to the Parliament on its actions in terms of results, impacts or consequences (outcomes) and the goods and services produced by agencies on behalf of Government (outputs).[8] As part of their overall scrutiny of agency operations, parliamentary committees may seek information concerning contracts to help inform their overall assessment of Government performance. Their ability to have access to such information should not be eroded because certain information in contracts is claimed to be confidential.

1.10 The Australasian Council of Auditors-General has stated that, '… *where the Parliament has delegated its powers to the Government to enter arrangements with budgetary implications, Parliament must retain the right to scrutinize the arrangements after the event*'.[9]

1.11 The accountability framework in which the Government operates means that contractual conditions for the protection and disclosure of information when the private sector deals with the Government will be different from the conditions that apply in the private sector. This is discussed in more detail in Chapter 4.

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8 Department of Finance and Administration, *Specifying Outcomes and Outputs*, October 1998.

9 Australasian Council of Auditors-General, *Statement of Principles—Commercial Confidentiality and the Public Interest*, June 2000.

Audit objectives, scope, focus and methodology

Audit objectives

1.12 The objectives of the audit were to:

- assess the extent of guidance on the use of confidentiality clauses in the context of contracts at a government wide level or within selected agencies;
- develop criteria that could be used to determine whether information in (or in relation to) a contract is confidential, and what limits should apply;
- assess the appropriateness of agencies' use of confidentiality clauses in the context of contracts to cover information relating to contracted provisions of goods and services, and the implications of existing practices of applying the criteria that have been developed; and
- assess the effectiveness of existing accountability and disclosure arrangements for the transparency of contracts entered into by the Commonwealth, and whether agencies are complying with the arrangements.

1.13 In addition the audit, to the extent possible, addressed specific matters (see Appendix 2) raised by the Senate Finance and Public Administration References Committee during its inquiry into the *Mechanism for Providing Accountability to the Senate in Relation to Government Contracts*.

Audit methodology

1.14 The audit reviewed current guidance available in relation to contracting and the use of confidentiality provisions specifically, and in a more general sense the reporting requirements for agencies. *Confidential Information Guidelines* were developed, in conjunction with the Australian Government Solicitor and in consultation with agencies, to assist with the adoption of a preventative approach whereby agencies agree to the use of confidentiality clauses in contracts only when they can be justified against clearly specified criteria. The audit also examined current agency practice on the use of confidentiality clauses, and adherence to the reporting requirements in relation to contracts as established through the FMA Act.

1.15 In each agency, standard operating procedures in relation to contracting were reviewed along with a selection of contracts. Contracts reviewed covered the different activities of the agencies; major outsourcing contracts were included in the sample where such contracts were in place.

1.16 To provide some background on the arrangements under which agencies may be requested to provide information to Parliament, the audit sought advice from the Australian Government Solicitor on how parliamentary committees and the Government have traditionally approached questions relating to the provision of information.

1.17 Selected industry groups and contractors were consulted during the audit in order to gauge industry opinion and priorities in relation to issues of confidentiality and disclosure of information.

1.18 The audit was conducted using a sample of nine agencies as follows:

- Australian Taxation Office;
- Centrelink;
- Department of Agriculture, Fisheries and Forestry—Australia;
- Department of Communications, Information Technology and the Arts;
- Department of Defence;
- Department of Employment, Workplace Relations and Small Business;
- Department of Finance and Administration;
- Department of Family and Community Services; and
- Department of Health and Aged Care.

1.19 In addition, the Gazette Publishing System (GaPS) reporting activities of prescribed agencies was reviewed.[10]

1.20 A consultant, Mr Pat Farrelly, was engaged as a member of the ANAO audit team. His contribution covered all elements of the audit. The Australian Government Solicitor was consulted in relation to Chapters 4 and 5, as was Dr Nick Seddon, formerly of the Law Program, Research School of Social Sciences, Australian National University.

1.21 The audit was conducted in conformance with ANAO auditing standards at a cost of approximately $325 000.

Previous consideration of the issue

1.22 As the Commonwealth's use of contracts for the delivery of services has increased, so has the level of debate on transparency and accountability of information in contracts. A number of reviews and inquiries conducted in recent years have considered contracting, contract management, and reporting and accountability issues. Summaries of three such Commonwealth reviews and inquiries are included at Appendix 3.

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[10] The Financial Management and Accountability Regulations identify 52 prescribed agencies at Schedule 2. The FMA Act states that prescribed Agency means a body, organisation or group of persons prescribed by the regulations for the purposes of this definition.

1.23 The common finding of these reviews was that the level of accountability should not be eroded by the increased use of contracts to achieve public goals.

1.24 Appendix 4 details the approaches taken in the Australian Capital Territory (ACT), Victoria and the United States in relation to the classification, treatment and disclosure of contractual information which is deemed to be confidential for commercial reasons. In relation to the disclosure of information in contracts, the ACT and Victorian governments require that the full text of contracts (except for those parts that are considered confidential) over a certain financial threshold be made publicly available. The ACT has developed a mechanism whereby parliamentary committees are informed of the contracts that have confidentiality clauses included.

Parliamentary committee powers

1.25 In its consideration of the operation and the powers of parliamentary committees, the ANAO took advice from the Australian Government Solicitor.

1.26 Members of Parliament, as individuals, have the same access rights to government information, through the *Freedom of Information Act 1982,* as the public generally. However, parliamentary committees have significantly greater authority than the public to seek access to particular information held by agencies.

1.27 One of the principal functions of a House of the Parliament is the capacity to inquire into various matters so that it can then debate those matters and pass legislation in respect of them.[11]

1.28 Each House may establish a committee for the purpose of inquiring into any matter necessary to enable Parliament to carry out its functions including any matter which is capable of being the subject of valid federal legislation. The estimates process through Senate legislative committees provides the major opportunity for the Senate to assess the performance of the public service and its administration of government programs.[12]

1.29 In addition to the power to require persons to attend before it, a committee is generally conferred with the power to order the production of information and documents to it. Although as a general rule, a parliamentary committee will be conferred with the power to require persons to attend or produce documents, the committees usually proceed by way of requests to witnesses to attend or produce documents.

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11 Odgers' *Australian Senate Practice (9th Edition)* page 54.

12 ibid, page 373.

1.30 The power which a committee has available to it to require a person to produce information and documents, is usually very broad. However, there may be circumstances in which a person may not consider it appropriate to disclose information or documents to a committee and when a committee will agree with the request, such as claims of public interest immunity.[13]

1.31 Generally, the kinds of information which could form the basis of a public interest immunity claim could include documents or information obtained in confidence from other governments, material disclosing any deliberations or decision of the Cabinet or of the Executive Council, and advice and recommendations which are part of the deliberative processes of government. The fact that particular information is confidential, for example, because it relates to the commercial activities of a person or body with which the Executive Government is contracting, does not, by itself, provide grounds for resisting disclosure on the basis of public interest immunity.

1.32 Disputes about claims that certain information should be the subject of public interest immunity are unlikely to arise between the Government and the House of Representatives or its committees given that the Government has the majority in the House. However, disputes between the Government and the Senate or its committees about public interest immunity are not uncommon.[14]

1.33 The Senate accepts that public interest immunity may be claimed by ministers (and officials can refuse to answer questions pending an opportunity for a Minister to make such a claim). However, the Senate does not accept claims by Executive Government are a conclusive answer. The position adopted by the Senate has been that the claim may be determined by the Senate and, if determined against the Executive Government, that the Senate has the legal right to the information.

1.34 The position taken by the Senate[15] is that:

> *While the Senate has not considered that claims of public interest immunity by the executive are anything more than claims, and not established prerogatives, it has not sought to enforce demands for evidence or documents against a ministerial refusal to provide them.*[16]

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13 In certain circumstances public servants, with the authority of the Minister, may claim public interest immunity and seek to decline to provide information on the grounds that its disclosure to a committee would not be in the public interest.

14 Examples of such disputes are set out in Odgers' *Australian Senate Practice (9th Edition)* pages 469–480.

15 The *House of Representative Practice* provides similar guidance from the perspective of the House of Representatives.

16 Odgers' *Australian Senate Practice (9th Edition)* page 465.

1.35 In the absence of any exercise of penal powers of either House of Parliament, conflicts between the Executive Government and the Senate have in practice been resolved in the political arena rather than the courts. In recent times it seems that the predominant view, of both the Executive Government and the Senate, has been that the resolution of these disputes is essentially a matter of political judgement, not a question of legal rights and obligations.

2. Existing Guidelines for Determining Whether Information Relating to Contracts is Confidential

This chapter addresses the audit's objective to assess the extent of guidance available at a government wide level and within selected agencies for determining whether information in, or relating to, contracts is confidential for commercial reasons.

Introduction

2.1 Guidance on the procurement of goods and services through Commonwealth contracts[17] is provided in the Financial Management and Accountability Regulations (FMARs), made under the FMA Act.

2.2 Under the authority of the FMARs, the Minister for Finance and Administration has issued *Commonwealth Procurement Guidelines: Core Policies and Principles* (CPGs) for the procurement of goods and services by Commonwealth agencies.[18] These Guidelines are the authoritative source for agency staff undertaking procurement activities and form the foundation for agency specific guidance on procurement.

2.3 In addition to the guidance available to agencies in relation to procurement, the *Protective Security Manual* (PSM) provides general guidance in relation to the protection of information. Further, the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters—November 1989* gives advice on the issue of disclosure of information to parliamentary committees.

Government wide guidance

Commonwealth Procurement Guidelines and associated documents

2.4 The current version of the CPGs was released in March 1998 following enactment of the FMA Act. The CPGs clarify what is required and expected in Commonwealth procurement activity, and allow agencies to decide how best to handle their affairs taking account of their own

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17 Commonwealth contract is defined as an agreement for the procurement of goods and services under which the Commonwealth is obliged, or may become obliged, to make a payment of public money. (FMARs para 3).

18 FMARs para 7.

circumstances and the nature of the markets in which they are operating. The model is one in which agencies use the CPGs as a basis for their own decision making.[19]

2.5 The CPGs do not provide guidance on how to assess or treat information that is confidential, from either the Commonwealth's or the contractors' perspective. Neither do the CPGs provide reference to the rights of access by the public, Parliament and courts, and how this is to be dealt with in contracts.

2.6 Commonwealth Procurement Circulars (CPCs) are used to maintain the currency of the CPGs and are designed to advise of changes in procurement policy and administration requirements. Information in CPCs may be reflected in the next revision of the CPGs.

2.7 To further support the CPGs, the Department of Finance and Administration has developed toolkits to assist contracting staff in agencies and advise potential contractors on a variety of issues. The toolkits are designed to provide additional detail to the information that is covered in the CPGs. The issues of the classification of information because it is confidential for commercial reasons, and the disclosure of information to the public, Parliament and the courts are not addressed in the toolkits.

2.8 The Competitive Tendering and Contracting (CTC) Branch[20] of the Department of Finance and Administration places question and answer papers on the Internet to address regularly asked questions on CTC activity. One of the papers, 'Accountability and Privacy', addresses the classification of confidential information from a contractor's position as follows:

> *The types of material that would normally fall within the scope of a claim of commercial-in-confidence would include:*
>
> - *A company's costs or prices.*
> - *Intellectual property.*
> - *Information that could benefit competitors.*

Further, this paper suggests that information identified as confidential by the provider is not usually publicly released.

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19 CPGs 1998 page 1.

20 The role of the CTC Branch is to encourage:

- greater and more effective use of CTC;
- a streamlined Government purchasing framework;
- improved SME access to the Government market place; and
- improved quality of service for customers of the Australian Public Service.

2.9 The ANAO notes that there is no further guidance in the current version of the CPGs or related documents to define the categories of information that might be considered to be confidential because of commercial reasons.

2.10 The Department of Finance and Administration is in the process of revising the CPGs. An early draft of the guidelines, released in July 2000, covers the issue of commercial-in-confidence information as follows:

> *Agencies should consider, on a case-by-case basis, what might be commercial-in-confidence when designing any contract. Typically, things that may be commercial-in-confidence may include a company's cost or prices,*[21] *intellectual property, or information that could benefit competitors.*[22]

Protective Security Manual 2000

2.11 The *Protective Security Manual* (PSM), which has Government endorsement, is the principal means for disseminating Commonwealth protective security policy and best practice guidelines for all Commonwealth agencies. The PSM provides general guidance and broad advice on protective security matters. The PSM defines a security classification system which has been devised primarily to ensure that official information held by, or shared between, Commonwealth agencies receives adequate protection based on the degree of harm that could be caused to the Commonwealth in the event of unauthorised disclosure of the information.[23] When a security classification has been applied to official information, the minimum standards for the protection of the information detailed in the PSM must be applied.

2.12 The PSM provides guidance on how to identify non-national security information[24] that requires increased protection. Most often this will be information about government or agency business, law enforcement operations, personal information and commercial interests.

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21 As will be seen in Chapter 5, the ANAO view is that prices of goods and services should generally not be considered to be confidential.

22 Draft CPGs July 2000, page 6.

23 *Protective Security Manual* – Part A Chapter 4 Framework: page A15.

24 Non-national security information is defined as any official resource (including equipment) that requires increased protection and does not meet the definition of national security information. National security information is any official resource that records information about, or is associated with, Australia's security, defence, international relations or national interest.

In relation to commercial interests, this is information which, if compromised, could affect the competitive process and provide the opportunity for unfair advantage. There is no guidance within the PSM that would assist agencies in determining what specific types of information would fall within the commercial interests category.

2.13 The PSM also provides guidance on how to assign protective markings to non-national security information. The commercial-in-confidence marking is used when the compromise of the information could cause limited damage to the Commonwealth, the Government, commercial entities or members of the public. The protective marking commercial-in-confidence should be applied to information if unauthorised disclosure of the information could:

- disadvantage the government in commercial or policy negotiations with others; and
- cause financial loss or loss of earning potential to, or facilitate improper gain or advantage for, individuals or private entities.

2.14 The PSM details agencies responsibilities for ensuring the security of Commonwealth material. For example:

- when outsourcing, or contracting out a function, agencies remain responsible for the efficient and secure performance of that function;
- agencies must ensure that contracted service providers are fully aware of the agency's security policy and guidelines;
- agencies must be able to carry out an examination of the contractor's security procedures when undertaking its regular audit or review of the contractor's methods and procedures; and
- access must be permitted for a security risk review to evaluate the contractor's security procedures.[25]

2.15 The PSM also requires that appropriate security procedures, based on the nature of the function and the classification of the information, need to be negotiated with the contractor and settled before finalising the contract.

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[25] *Commonwealth Protective Security Manual 2000*, Attorney-General's Department, October 2000.

Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters—November 1989

2.16 Although not designed as a reference for staff involved in procurement activity, the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters—November 1989*, provide some guidance in relation to the disclosure of information to parliamentary committees. The Guidelines state that:

> *…the public and parliamentary advocacy and defence of government policies and administration has traditionally been, and should remain the preserve of ministers, not officials. The duty of the public servant is to assist ministers to fulfil their accountability obligations by providing full and accurate information to the Parliament about the factual and technical background to policies and their administration.*[26]

2.17 The Guidelines also discuss the general principles of conduct during hearings which include that :

> *…there be the freest possible flow of information between the public service, the Parliament and the public…officials should be open with committees and if unable or unwilling to answer questions or provide information should say so, and give reasons.*[27]

2.18 The Guidelines acknowledge that the freedom of information legislation establishes the minimum standards of disclosure of documents held by the Commonwealth. *'Any material that would not be exempt under this legislation should be produced or given, on request, to a parliamentary committee'*.[28] Moreover, the Guidelines also state that *'…it may be in the public interest to provide to the committee a document or information for which an exemption would normally be claimed under the Act'*.[29]

2.19 The Guidelines provide that there may be instances where it may not be possible to provide committees with all the information that they seek. These circumstances are limited to: matters of policy; public interest immunity; and confidential material where in camera evidence is desirable.[30]

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26 *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*—November 1989: para 1.1.

27 ibid, para 2.19.

28 ibid, para 2.20.

29 ibid, para 2.20.

30 Senate legislative committees when sitting as estimate committees are required to take evidence in public, that is, they cannot hold in camera hearings.

2.20 The Guidelines point out that public interest immunity claims may only be made by ministers. The Guidelines provide details in relation to the types of information that may be classified confidential, but do not provide guidance on how to classify material.

2.21 The ANAO notes that the Department of Prime Minister and Cabinet is currently reviewing the Guidelines. Although not finalised at the time of the audit, the draft Guidelines provide a specific reference to commercial information:

> *There is no general basis to refuse disclosure of commercial information to the Parliament even if it has been marked 'commercial-in-confidence'. The appropriate balance between the interests of accountability and appropriate protection of commercial interests should be assessed in each case.*
>
> *As a general guide, it would be inappropriate to disclose information which would disadvantage a contractor and advantage their competitors in future tender processes.*[31]

2.22 The draft Guidelines also provide examples of the types of information that would normally be disclosed and types of information that it would be inappropriate to disclose. For example, the draft Guidelines suggest that it would be inappropriate to disclose information such as commercial strategies or intellectual property which could disadvantage a contractor and advantage competitors in future tender processes. The draft Guidelines suggest that a description of the total amounts payable under a contract and the actual performance of a contractor would normally be disclosed.

Agency guidance

Chief Executive's Instructions

2.23 Chief Executive Officers are accountable to their Ministers for their agency's procurement activities and are authorised to issue Chief Executive's Instructions (CEIs) that may include directions to officers involved in the procurement of goods and services.

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[31] Now entitled *Guidelines for Officials on Responding to Requests for Information from the Parliament and Members of Parliament* (draft as at 30 March 2001), paras 6.11 and 6.12.

2.24 Each of the nine agencies in the audit sample had developed processes and procedures for contracting activity. A review of these processes and procedures revealed that five of the nine agencies did not cover the issue of classification or treatment of confidential information. One agency requires all officers to treat as confidential all information disclosed by organisations relating to suppliers' normal business affairs as well as to the commercial aspects of suppliers' offers to the Commonwealth including prices, discounts, cost breakdowns and profit. This guidance indicated that failure to fulfil this requirement might give rise to an unfair advantage to another organisation. Another agency provided for contracts to contain clauses that protect the confidentiality of material deemed to be confidential, and that the contract should identify all material that is not confidential.

Training

2.25 Two of the nine agencies in the sample required contracting staff to meet specified formal training requirements. In addition, a further two agencies had prepared training modules for their staff specific to contracting activity. The remaining agencies relied on broader training available to public service officers involved in contracting activity.

2.26 The audit reviewed the specific training material developed by agencies and a number of generic contract training courses that are readily available to the public sector. The audit was unable to identify any instances where the issue of classification or treatment of confidential information was addressed.

2.27 Agencies commented that the lack of specific Government wide guidance on the issue of how they should identify and treat confidential information made it difficult for them to develop agency specific guidance on the matter. Agencies indicated that they would reflect any Government wide guidance that might be developed in their internal documentation.

Conclusion

2.28 The current *Commonwealth Procurement Guidelines* do not provide guidance on how to determine whether information in, or in relation to, a contract is confidential, either from the Commonwealth's or the contractor's point of view. Nor do they provide guidance on the rights of access by the Parliament or the public, and how this is to be dealt with in contracts. However, the Department of Finance and Administration's Competitive Tendering and Contracting website contains some limited guidance on what information could be considered as confidential from a contractor's perspective and suggests that information identified as confidential by the provider is not usually publicly released.

2.29 Draft revisions to the *Commonwealth Procurement Guidelines* being developed at the time of the audit, indicate that confidentiality of information should be considered on a case-by-case basis when developing a contract, and provide some examples of categories of information that could be construed as confidential.

2.30 Guidance developed by individual agencies on how to determine whether information in, or in relation to, a contract is confidential is limited, and does not highlight the need for agencies and contractors to determine, during the contract development stage, what information in, or in relation to, a contract is confidential.

2.31 While not addressing the classification of information at the time of contract development, the *Protective Security Manual* and the current version of the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters—November 1989* do address the issues of protection and disclosure of information respectively. Further, the *Protective Security Manual* requires that appropriate security procedures, based on the nature of the function and the classification of information, need to be negotiated with the contractor and settled before finalising the contract.

3. Current Agency Practice Regarding the Use of Confidentiality and Related Contractual Provisions

This chapter outlines how agencies have addressed the issue of the inclusion of confidentiality provisions in contracts to date, the use of indemnity clauses and ANAO access clauses. It refers to the views of selected contractors on the use of confidentiality provisions.

General approach taken to contract formulation

3.1 There are a variety of approaches amongst agencies for dealing with contracting matters. Of the nine agencies reviewed:

- all but one have a central group that is responsible for providing advice and assistance in relation to contract development;
- all but one have standard contracts or templates that are used as a basis for developing contracts:
  - in agencies that have major acquisition functions, there are a number of standard contracts for specific purposes;
  - nearly all agencies have standard contracts for the purposes of consultancy contracts; and
- all agencies obtain legal advice to assist them in more complex contractual situations, such as the development of contracts for major outsourcing arrangements:
  - this advice may be from in-house legal advisers, the Australian Government Solicitor or any of the private legal firms that agencies engage to provide advice.

Use of confidentiality clauses in contracts

3.2 The approach taken to using confidentiality clauses in particular contracts tends to flow primarily from the standard approach these agencies have adopted. There were five principal categories of contractual arrangements examined as part of the audit:

- standard contracts used by agencies to purchase goods or consultancy services;
- contracts established under the Government Information Technology and Communications contracting framework version 3 (GITC3);

- outsourcing contracts of various types;
- construction or building contracts; and
- purchase orders.

3.3 Across the first three categories of contracts, the ANAO found that a variety of approaches to addressing the confidentiality of information had developed over time. In addition, the ANAO found that the question of what information in, or in relation to, a contract would be considered to be confidential for commercial reasons was generally not addressed in any specific manner in the development of the contract. There was very little in the contracts themselves to indicate, with any clarity, what information would be considered confidential. The result of this is that after the contract was put in place, responses to queries about what should be deemed confidential were not consistent. Some responses indicated that the whole contract was confidential; some indicated that financial information in the contract was confidential; and some indicated that intellectual property provisions in the contract were confidential.

3.4 In a number of the agencies there was uncertainty as to the contract information that could be provided to Parliament. It was evident that often little discussion took place in the development of the contract on what information should be treated as confidential. The ANAO noted that, in some cases, the views of agencies on what was confidential appeared to draw heavily on the approach taken by contractors and not on an explicit set of criteria. Without clear criteria being available on what should be treated as confidential, such an approach is not altogether unexpected.

3.5 Even where there were some quite comprehensive confidentiality provisions in certain contracts it was not always clear what information associated with the contract was confidential. The ANAO observed that in one instance, despite the presence of a clause that allowed for the disclosure of confidential information to meet *'Parliamentary reporting and accountability obligations*,' the agency still sought legal advice on the circumstances under which it could provide information to parliamentary committees. This uncertainty suggests that there is a need to explicitly decide, during contract formulation, what information in a contract should be confidential. In addition, where it is considered in either, or both parties' interests that some degree of confidentiality of information is appropriate, agencies should seek to include a provision in the contract for such information to be disclosed to the parliamentary committees, if only on a confidential basis.[32]

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[32] It is noted that Senate legislative committees when sitting as estimate committees are required to take evidence in public, that is, they cannot hold in camera hearings.

3.6 In the case of construction contracts and purchase orders, there were no confidentiality provisions in any of the documentation that the ANAO examined. In all of the construction contracts, there were intermediate, specialist firms that let the tenders and drew up the contract. The form of contract that was used in these cases was the Standards Association Australia standard contract for construction purposes.

Forms of confidentiality clauses used in contracts

3.7 The principal form that confidentiality provisions take in the case of consultancy contracts is a requirement for the consultant not to disclose any confidential information, Commonwealth material or contract material. In many cases this requirement goes hand in hand with a provision that enables the Commonwealth to obtain written undertakings from individual consultant staff that they will not disclose confidential information. In some cases there is a specific provision that the consultant is not to make any public comment regarding the consultancy. These contracts do not include an explicit requirement on the Commonwealth not to disclose matters.

3.8 The principal provision that is often used in the group of contracts for the acquisition of information technology and communications goods or services,[33] referred to above, is:

> *Neither the Contractor nor the Contract Authority will, without the written approval of the other (which will not be withheld unreasonably), make public or disclose the information of the other which is confidential. Confidential information includes information marked as confidential, and information which by its nature is confidential, is known to be confidential or which the party ought to have known was confidential.*

3.9 This type of contract provision puts a clear responsibility on both the contractor and the Commonwealth to keep information confidential. However, the definition of what is confidential information, as used in this clause, provides little indication of what should be classed as being genuinely confidential. These contracts generally do not refer to the power of a parliamentary committee to order the production of information and documents.

3.10 A third major category of contracts is those for the outsourcing of government functions. In the agencies examined, these contracts included fairly comprehensive provisions relating to confidentiality that required both parties not to disclose confidential information.

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[33] These types of contracts refer to general procurement and do not cover agency outsourcing activity.

3.11 The contracts requiring both parties to keep information confidential were generally contracts of higher value and greater complexity.

3.12 In the 63 contracts examined:

- 48 per cent required the contractor to keep information confidential;
- 41 per cent required both parties to keep information confidential; and
- 11 per cent had no confidentiality provisions.

Reference to parliamentary interests

3.13 In a number of the more major contracts, there were provisions for the agency to disclose information for parliamentary purposes.

3.14 Some agencies had adopted the practice of including a provision in certain contracts along the lines that '*The Consultant agrees to provide all reasonable assistance…*' including for '*…any inquiry conducted by Parliament or any parliamentary committee*'. The ANAO considers that this is a very useful way of drawing to the attention of a private sector contractor that information (including confidential information) in contracts may be required to be disclosed to external bodies such as parliamentary committees. Including clear statements that allow for the agencies to provide information to parliamentary committees when required, would be a positive response to concerns expressed by parliamentary committees. In addition, agencies should outline the power of a parliamentary committee to require a person to produce information and documents.

Contractors' interests in confidentiality clauses

3.15 In discussions with selected contractors (or their representatives) that had major contracts with the Commonwealth, there was often a strong view that clauses relating to the confidentiality of information were important. There was also a general view that proprietary information in contracts should not be disclosed, nor should certain pricing information. In these instances, the contracting agency often held similar views.

3.16 One organisation, that has major outsourcing contracts with the Commonwealth, indicated that it would welcome improvements being made to how agencies approached the issue of confidential information in contracts. It considered that improvements in how this issue was approached could provide greater public confidence in outsourcing as a way of delivering services.

3.17 In the case of smaller contracts, the requirement for confidentiality is generally only placed on the contractor, not the agency; this requirement appears to have been accepted by contractors for a long time as a standard part of doing business with government. Contractors' staff are often required to sign personal undertakings of what they are to protect, and recognise the legislative sanctions that could be imposed if disclosure were to occur.

3.18 While contractors consider that confidentiality of information in contracts is important, many also accepted Parliament's need to have access to certain information related to their contracts. Some contractors, however, appeared not to accept Parliament's interest as readily. The ANAO considers that, by dealing more explicitly with the issue of confidentiality in the development of the contract, and explaining Commonwealth expectations in tender documentation, this would help overcome the divergence in understanding that appears to occur on some occasions. In addition, improved guidance would strengthen the position of agencies in influencing how confidentiality issues are dealt with and generally raise awareness among agencies.

ANAO access clauses

3.19 Given the interest of parliamentary committees and the Auditor-General in the use of ANAO access clauses, the ANAO included an examination of the use of these clauses as part of its overall examination of contracts.

3.20 The Auditor-General has written to agencies twice since 1997 promoting the inclusion of clauses in contracts that would allow for ANAO access to contractor's records, information and assets which are directly related to contract performance, and to contractors' premises when required. This requirement for provision of access to contractors' premises would be over and above the legislated power in the *Auditor-General Act 1997* whereby the Auditor-General has a broad power to require relevant persons to produce documents. The intention is for the ANAO's access powers to be generally equivalent to that which would reasonably be specified by the contracting agency in order to fulfil its own performance management and administration responsibilities.

3.21 In respect of access to premises, the issue of legislative access to premises of contractors has been the subject of considerable debate including consideration by the Joint Committee of Public Accounts and Audit (JCPAA). The JCPAA has twice recommended that the *Auditor-General Act 1997* be amended or provision made in the Finance Minister's Orders to enable the Auditor-General to access the premises

of a contractor for the purpose of inspecting and copying documentation and records directly related to a Commonwealth contract and to inspect any Commonwealth assets held on the premises of a contractor, where such access is, in the opinion of the Auditor-General, required to assist in the performance of an Auditor-General function.[34]

3.22 The Government, in response to recommendations contained in the JCPAA's Report 368 indicated that it did not favour mandating the Auditor-General's access to premises through legislation or other means. The Government did, however, indicate that it supports Commonwealth bodies including appropriate clauses in contracts as the best and most cost-effective mechanism to facilitate access by the ANAO to a contractor's premises in appropriate circumstances.

3.23 Some agencies proposed that, while they did not have a specific clause providing ANAO access, they would facilitate ANAO access through their agency's own access provisions. The ANAO welcomes such cooperation. However, it is desirable for the ANAO to have direct access and not be reliant on an agency's concurrence for access to be achieved.

3.24 While this aspect was not a major focus of the audit, the ANAO noted that, in the contracts examined, where provision was made for agency access to contractors' premises, ANAO access provisions were included in less than 40 per cent of cases.

Indemnity clauses

3.25 The Senate Finance and Public Administration References Committee has expressed an interest in the use of indemnity clauses in contracts by agencies.[35]

3.26 In discussions with agency staff, there was a very strong caution expressed about the inclusion of indemnities by the Commonwealth as part of a contract.

3.27 Of the contracts selected for examination in this audit, the majority did not include an indemnity by the Commonwealth. The examples of a Commonwealth indemnity observed during the audit related to GITC3 contracts, whose standard terms include a Commonwealth indemnity.

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34 JCPAA Report 368, Review of Audit Report No.34, *New Submarine Project Department of Defence*, 1997–98 and JCPAA Report 379, *Contract Management in the Australian Public Service.*, October 2000.

35 The ANAO addressed the subject of indemnities in Audit Report.47 1998–99, *Management of Commonwealth Guarantees, Indemnities and Letters of Comfort.*

3.28 In most contracts, there was a fairly broad indemnity provided by the contractor to the Commonwealth. In the case of some of the more major contracts, there were limits included in the contract on the contractor's liability.

3.29 The Commonwealth carries some obvious responsibility in those circumstances where it is supplying product that is to be used by the contractor.

3.30 The ANAO found no evidence to suggest that agencies were using confidentiality provisions in contracts to hide disclosure of indemnities or guarantees provided by the Commonwealth.

3.31 Information regarding the Commonwealth's indemnities and guarantees is included in the Commonwealth's Financial Statements.[36] Indemnities and guarantees provided by the Commonwealth are reported as both quantifiable and non-quantifiable contingent losses. The Commonwealth's quantifiable contingent losses related to indemnities and guarantees as at 30 June 2000 was $2.131 billion.

Dispute resolution clauses

3.32 The Senate Finance and Public Administration References Committee expressed an interest in the use of confidentiality dispute resolution clauses in contracts by agencies.

3.33 None of the contracts selected for examination in this audit contained specific reference to dispute resolution in relation to confidentiality. However, the majority of the contracts reviewed during the audit included a provision for general dispute resolution. These clauses generally provided for the appointment of an arbitrator or mediator in the event that parties could not reach a resolution between themselves.

Conclusion

3.34 There is uncertainty among agencies over what information should properly be classified as confidential, and what should not. The question of what information in, or in relation to, a contract would be considered confidential was generally not addressed in any specific manner in the development of the contract.

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[36] *Consolidated Financial Statements for the Year Ended 30 June 2000*, pages 36–41.

3.35 The provisions in the contracts examined would suggest that there had not been any detailed consideration of what should properly be classed as confidential. Contractors expressed the view that certain elements of their contracts should be confidential, but many of them also accepted Parliament's need to have access to contractual information.

3.36 There was generally little reference in contract related material to the powers of parliamentary committees to require persons to produce information and documents. Including clear statements in contracts that allow for agencies to disclose information to parliamentary committees, when required, would be a positive response to concerns expressed by parliamentary committees.

4. The Legal Framework and Guidelines Related to Confidential Information

This chapter outlines how public sector contracting arrangements differ from those only involving private sector parties. It also sets out what guidance can be discerned from existing legislation, and court and tribunal judgments. The chapter sets out a basis for how confidential[37] *issues should be dealt with in contracts, and how these issues relate to existing legal provisions. This chapter draws heavily on advice provided by the Australian Government Solicitor and Dr Nick Seddon.*[38]

Differences between public and private sector arrangements regarding contracting

4.1 A clear distinction exists between contracts involving two private sector parties, and those involving both private and public sector parties. In the latter case it is the taxpayer who funds government contracts. Decisions on whether matters that involve a government should, or should not, be disclosed involve a consideration of the public interest. Given our system of parliamentary accountability, any party arguing for non-disclosure should be able to substantiate its case for such an approach.

4.2 The issue of the use of confidentiality provisions in government contracts has not been confined to the Commonwealth. For example, the Victorian Government commissioned an independent Audit Review of Government Contracts in 2000. The review examined disclosure of contracts by the State Government, and made the following comments on the private sector's use of contracts:

> *In the private sector, when an entity decides to enter into and perform a contract, there is very little that the law or any other institution has to say about the probity of the behaviour of the parties to that relationship. Freedom of contract generally means freedom to exploit, behave harshly or otherwise to engage in practices that may offend moral scruples.*[39]

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37 In this report the term confidential refers to commercial-in-confidence, one of a number of categories of IN-CONFIDENCE information provided for in the *Protective Security Manual* (for example, staff-in-confidence; security-in-confidence etc).

38 Dr Nick Seddon, formerly of the Law Program, Research School of Social Science, Australian National University.

39 Victorian Audit Review of Government Contracts, May 2000, Chapter 3.

4.3 Freedom of contract also includes the freedom to agree that information, including the contract itself, should be kept confidential. It is therefore a reasonably straightforward matter in any contract to include a confidentiality clause that effectively restricts the disclosure of relevant information in the contract and its terms. In the private sector, it is common to include such clauses. The issue is whether this practice is appropriate in government contracts where there are different accountability obligations.

4.4 As explained in the Victorian Review, government use of contracts to achieve public goals is quite different to how contracts are used in the private sector. In the Commonwealth's case this same point is relevant. In the Commonwealth:

- the Government is accountable to Parliament and the people, and this applies to its contracting activities just as it does to all of its other activities;
- the FMA Act imposes standards and procedures in relation to the activities of government agencies that are designed to ensure that public money is spent properly and efficiently:
  - section 44 requires Chief Executives of agencies to use Commonwealth resources in an efficient, effective and ethical manner;
- judicial pronouncements have made it clear that the government must act as a 'moral exemplar' in the market place.[40] This standard of conduct can translate into substantive rules that bind governments, such as terms implied in a contract, a requirement of openness and a requirement to adhere strictly to the rules of a tender process; and
- the government may choose to be constrained in bringing the full force of law to bear against a non-performing contractor because this could destroy the contractor's business, or else it could be very disruptive to the government's programs.

4.5 Because of the public accountability imperatives outlined above, there is a compelling case for the public sector to define the standards expected to be applied to contracting activities, having regard to the relationship between the Executive Government and Parliament. In particular, the resort to confidentiality clauses is inappropriate unless there is genuinely sensitive information to be protected. Government operations bring a range of additional issues that need to be considered, as well as a recognition that government agencies are sometimes not

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40 *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1 at 41 (Finn J).

free to act in the same manner as private sector parties might. While clauses in contracts examined as part of the audit included provisions to keep contracts, or parts thereof, confidential, the terms and conditions of a government contract rarely contain information that needs to be protected, such as a trade secret. Clear criteria are required to guide agencies in the exercise of their responsibilities to ensure appropriate levels of transparency and accountability in respect of contracts that agencies enter into. Such criteria can also inform those wishing to do business with the Commonwealth of the conditions which apply.

4.6 Separately from a consideration of confidential information discussed below, it will also be necessary, in relation to the particular information being considered, to assess whether:

- the information is protected under some specific legislative provision or for some other specific reason; or
- the information should be protected because the public interest would not be served if the information were disclosed.

Confidentiality issues in contracts

4.7 It is important that agencies consider the issue of what information should be kept confidential before they agree:

- to accept information on the basis that it is to be kept confidential;
- to insert a clause into a contract which obliges the parties to keep this information confidential; or
- to take any other measures which result in the information inadvertently being regarded as confidential.

4.8 It has been the case, in the past, that much information has been treated as confidential information simply because it related to, or was contained in, a contract. This tendency has led to the use of confidentiality clauses to protect the terms of the entire contract and all related information. When this happens, the ability to scrutinise and assess government programs and accountability for the use of taxpayers' money can be significantly impaired.

4.9 The reason for making the distinction between the private and government use of confidentiality measures is that courts and tribunals take the view that, unless there are specific requirements (legislative or otherwise) which dictate that information should not be disclosed, information held by the government should as far as possible be publicly available.

4.10 In a small number of cases, the Commonwealth will be entering contracts where it has commercial interests that it wishes to protect. Such circumstances could include trade secrets flowing from research and development conducted by a government agency. In cases where the Commonwealth has a commercial interest, it may wish to ensure that certain information or contract provisions are confidential. The criteria developed below could be applied equally in cases where the Commonwealth has a particular commercial interest, as well as in those situations where an outside contractor has such an interest.

4.11 Criteria that agencies can use to make an assessment about whether to protect information as confidential information are set out in the following section. These criteria have in large measure been derived from a consideration of the exempt categories of documents described in section 43 of the FOI Act, that is, documents relating to business affairs. Decisions under section 45 of the FOI Act, that is documents containing material obtained in confidence, have also been considered, but these decisions generally focus on the situation where it is claimed that certain information has been provided in circumstances giving rise to *'…an obligation of confidence.'*[41]

4.12 There is, however, a difficulty arising from using the FOI Act as a guide. The Act exempts documents relating to business affairs or that are provided in confidence but does not specify precisely what information properly falls into these categories. It is therefore necessary to go back to the initial process of categorisation of information to ensure that only information that is genuinely sensitive is protected. The reverse onus principle should apply—so that the starting point should be disclosure unless there is good reason for confidentiality.

Criteria for decisions

4.13 In the absence of any comprehensive material to assist agencies in determining whether contractual provisions should be treated as confidential, the ANAO has developed some criteria to assist in such decisions. These criteria are designed to assist agencies to make a decision on the inherent quality of the information before the information is accepted or handed over—rather than focusing on the circumstances surrounding the provision of the information.

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41 Coco v A.N. Clark (Engineers) Ltd (1969) RPC 41, page 47.

4.14 The ANAO considers that agencies should protect, or agree to protect, as confidential, information that satisfies the following criteria.

Specific identification of information in question

- The information to be protected must be able to be identified in specific rather than global terms.
  - Particular clauses or parts of clauses within a contract, or particular information, may satisfy this requirement, rather than the contract as a whole, or all of the information.
- A confidentiality claim should not be made or accepted in relation to innocuous material.

Information has the necessary quality of confidentiality

- The information in question must not be something that is trivial or within the public domain (for example, details may already appear in the client charter, published business plan or annual report).
- The information must have continuing sensitivity for the entity whose information has been confided. It is not sufficient that the 'confider' merely wishes to protect the communication.
- The information must have a commercial value to the business or its competitors (for example, trade secrets), and it is likely that detriment will be caused to the 'confider' should it be disclosed.
- At the time when confidentiality is claimed, the information must be known only by a limited number of parties. The nature of some of the items of information may be such that they enter the public domain over time as circumstances change (for example, where otherwise confidential information has been tendered in court proceedings, or where a contract has been awarded following a tendering process). Much commercial information has quite a short sensitivity period, say two or three months, but some can remain sensitive for many years.

Detriment to the 'confider' of the information

- Detriment to a 'confider' resulting from the disclosure of information is generally a necessary element to a court making a finding that disclosure would amount to a breach of confidence.
  - However, where the information is about spending taxpayers' money and the government seeks to enforce a confidence, the courts have held that detriment must be established by reference to the relevant public interests that would be damaged upon disclosure. Unlike a private party seeking to enforce a confidence against the

Commonwealth, the Commonwealth is obliged to act in the broader public interest. Public discussion and criticism of government actions or embarrassment do not amount to sufficient detriment to warrant a confidentiality claim.

– Commonly, the terms and conditions of a government contract are jointly developed as part of the contracting process. As already noted, as a matter of the ordinary law of contract, it is open to the parties to agree that certain information should be kept confidential. But, this confidentiality option is often not appropriate in the public arena. It is therefore essential for agencies to consider very carefully the particular terms and conditions of a proposed contract. To illustrate, should the specific amounts that are paid to an IT contractor for individual services be confidential? Disclosing what is paid to the contractor does not, for example, reveal the contractor's cost-structure (which may well be the subject of legitimate protection). The contractor may be making a good profit on that item of service or may be carrying a loss and making profits on other items. The amount paid to the contractor does not reveal this information.

Circumstances in which information is provided

- The information above has been provided to assist with the making of an assessment about the nature of the information that is being provided or accepted.
- The circumstances in which the information is provided or accepted are also important. If the information is provided or accepted where it is clear that the provider's position is that the information should not be disclosed, this is an important factor to consider when making an assessment about whether to classify the information as confidential. However, it is not the only one as all of the relevant criteria, including this one if it exists, need to be satisfied before the information should be classified as confidential.

Information that has been held by the courts to be confidential

4.15 Building on the discussion of criteria, it is necessary to consider the specific categories of information that have been protected by the courts and tribunals as confidential information. These are discussed below.

Trade secret information

- A trade secret has been referred to as a type of information which has about it the necessary quality of secrecy to be the subject of a confidence. Consideration needs to be given to whether the information in question consists of a process or device which has been developed for use by an entity for the purposes of its continuing business operations. A contract may well refer to such information but the contract itself will rarely reveal such information.
- The legal tests used to determine a trade secret include the following:
  - the extent to which information is of a technical nature (it is more likely to be considered a trade secret if it is so);
  - the extent to which the information is known outside the business of the owner of that information;
  - the extent to which the information is known by persons engaged in the owner's business;
  - measures taken by the owner to guard the secrecy of the information;
  - the value of the information to the owner and to his/her competitors;
  - the effort and money spent by the owner in developing the information; and
  - the ease or difficulty with which others might acquire or duplicate the secret.
- Examples of trade secrets that may be contained or referred to in contracts include industrial processes, formulae, product mixes, customer lists, engineering and design drawings and diagrams, and accounting techniques.

Information having a commercial value that would be diminished or destroyed if disclosed

- Identifying information of commercial value requires a consideration of:
  - the value of the information to the entity; and
  - whether that value may be destroyed or diminished through disclosure.
- Information has commercial value to an entity if it is valuable for the purposes of carrying on the commercial activity in which that entity is engaged. It may be valuable because it is important or essential to the profitability or the viability of a continuing business or commercial

operation. Information also has commercial value to an entity if a genuine, arms-length buyer would be prepared to pay to obtain that information.

- The investment of time and money is not a sufficient indicator (in itself) that information has commercial value. Information can be costly to produce without necessarily being worth anything to an entity's competitor.
- Information which is old or out of date, or is publicly available, may have no remaining commercial value.
- Having commercial value alone is not sufficient to warrant protection. It must be clear that the commercial value of the information will be diminished or destroyed by disclosure, before an agency agrees to protect it.
- Examples of information having a commercial value that may be associated with contracts include production costs, profit margins, pricing structures (where the information would reveal whether a contractor was making a profit or loss on the supply of a particular good or service) and research and development strategies.

Other information that may warrant protection

- Information concerning the business, commercial or financial affairs of a person or the business, commercial or financial affairs of an entity will be protected by the courts if disclosure would have an unreasonably adverse effect on the business or person.
  - Business, commercial or financial affairs information concerns money-making affairs. An entity's business affairs relates to the profitability and viability of its business operations. Examples of such information that may be contained in contracts include profit margins and cost-structures. Consideration needs to be given as to whether disclosure of the information would cause significant harm to the entity's competitive position.
  - Unreasonably adverse effect requires a consideration of all the circumstances and of the public interest. There will be occasions when notwithstanding an adverse effect on the business, the disclosure of the information will not be unreasonable. Examples include where disclosure would reveal unlawful activities, where there have been cogent allegations of wrongdoing or where the subject matter is of serious concern to the public.

Conclusion

4.16 Guidance on how to deal with confidential information in, or in relation to, contracts should be consistent with the broad principles in legislation, as well as with what courts and tribunals have held to be confidential information and what this implies for access by various parties. Desirably, this would be reflected in, or referenced by, the guidance that is available to agencies responsible for developing contracts with private sector firms. This guidance could be applied equally in cases where the Commonwealth has a particular commercial interest it wishes to protect. Overall, the reverse onus principle should apply, that is, that disclosure is the expected approach unless there is good reason for confidentiality.

4.17 The ANAO notes that the terms of a government contract will rarely contain information of the type held by the courts to be confidential.

5. Suggested Approach to the Implementation of Guidelines Related to Confidential Information

In response to interest expressed by agencies, this chapter provides some practical guidance on what contractual matters, if any, should be agreed to be confidential. It goes on to propose a strategy to improve the guidance available to agencies and sets out a better practice approach to responding to requests from parliamentary committees.

Executive Government and parliamentary committees

5.1 As noted previously, ministers are accountable to the Parliament for the exercise of ministerial authority, while public servants are accountable to ministers for the exercise of delegated authority.[42] The guidelines in this report are designed to assist in the normal exchanges that occur between the Executive Government and parliamentary committees and provide a framework in which agencies can address confidentiality matters related to contracts and parliamentary committees can have greater confidence in how such matters are treated.

5.2 Irrespective of the guidance outlined in this report, a parliamentary committee or the Government can argue that a particular piece of information should be disclosed or protected, for whatever reasons they consider appropriate. The practical effect to date has been that any such conflicts have been resolved in the political arena rather than the courts.

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42 MAB–MIAC *Accountability in the Commonwealth Public Sector*, June 1993, page 4.

The approach to disclosure

5.3 Based on an analysis of the case law, it is unlikely that the entire contents of a contract would be confidential information. In the ANAO's view, the criteria described in Chapter 4, should be used to determine whether a case can be made for particular contractual information to be treated as confidential. All potential or actual contractors to the Commonwealth should be advised clearly and conspicuously of the accountability requirements in the Commonwealth (for example, parliamentary committees), of audit requirements, of the existence of the FOI Act and that the information may be required to be disclosed by law, for example under court subpoena, parliamentary order or as part of discovery during legal proceedings.

5.4 As discussed in Chapter 1, Parliament has wide powers of access to information. The claim of confidentiality in itself does not prevent a parliamentary committee having access to the material as committees generally have the power to require a person to produce information and documents, and the mere fact that particular information is confidential, does not, by itself, provide grounds for resisting disclosure on the basis of public interest immunity.

5.5 Any request for information under the FOI Act must be considered in accordance with the provisions of that legislation. Provisions that apply to individual agencies, such as the International Traffic in Arms Regulations for Defence, should be included in the contract guidance material of those agencies.

5.6 Agencies' attention is also drawn to new sections 95B and 95C of the *Privacy Act 1988* which were inserted by the *Privacy Amendment (Private Sector) Act 2000* and will come into effect on 21 December 2001. Section 95B requires agencies to consider their own obligations under the Act when entering into Commonwealth contracts and obliges them to take contractual measures to ensure that a contracted service provider does not do an act, or engage in a practice, that would breach an Information Privacy Principle if done by the agency. The obligation on the agency extends to ensuring that such an act or practice is not authorised by a subcontract.

5.7 To ensure that individuals can find out about the content of privacy clauses agreed between agencies and organisations and included in Commonwealth contracts, section 95C enables a person to ask a party to the contract for information about any provisions of the contract that are inconsistent with an approved privacy code binding the party or the

National Privacy Principles. The party requested must inform the person in writing of any such provisions. This ensures that parties to a Commonwealth contract cannot claim that provisions are confidential in respect of privacy standards in Commonwealth contracts, thereby preserving accountability and openness in respect of these standards.

Tender information

5.8 Information that is provided to potential contractors as part of the request for tender (or proposal) package should make clear that the approach being taken is to promote disclosure of contractual information to the maximum extent. In addition, potential contractors should be advised of the access rights of the public, Parliament, the courts and external review agencies, such as the Auditor-General and Ombudsman, to information in contracts. During the tender or contract negotiation process, parties should be asked to identify what information, if any, that is to be included in the contract which they consider should be protected as confidential information, and why.

5.9 Information provided to agencies in a tender (or proposal) would normally be kept confidential as it may contain, for example, the organisation's strategy to win the competitive tendering process. Disclosing such information, that is not part of a successful bid, may also reduce the government's ability to attract bids from tenderers in the future. Where information provided in the tender documentation is to be included in a contract, it will be necessary to consider what information, if any, should remain confidential based on the approach set out above.

5.10 The ANAO notes that tender evaluation reports may contain some information from tenders that is considered to be confidential. It could be argued that disclosure of some parts of evaluation reports, where the merit of one tenderer against another is assessed, would not be in the public interest.[43] Disclosure of such information may be considered by tenderers to be an unreasonable cost of doing business with government. The ANAO observes that evaluation reports would generally be treated as confidential as they are part of the deliberative processes of government.

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[43] Para 2.32 (d) of the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters—November 1989*, would appear to provide scope for such an argument to be made in the context of a claim for public interest immunity; such claims can only be made by Ministers.

5.11 The integrity of the tender assessment process is reliant on the tender assessment processes put in place by an agency. Unsuccessful tenderers themselves are able to test the validity of the assessment process in the courts, if they consider that there has been a breach of procedural fairness.

Examples of what would not be considered confidential

5.12 The following types of information in, or in relation to, contracts would generally not be considered to be confidential:

- performance and financial guarantees;
- indemnities;
- the price of an individual item, or groups of items of goods or services;[44]
- rebate, liquidated damages and service credit clauses;
- performance measures that are to apply to the contract;
- clauses which describe how intellectual property rights are to be dealt with; and
- payment arrangements.

5.13 In relation to the third dot point above, three of the nine agencies that were involved in the audit indicated that information about the price of individual, or groups of, items of goods or services may be considered confidential as:

- disclosure of such information may adversely affect the Commonwealth's ability to attract and benefit from quality tenderers; and
- such information may often be of commercial value to other providers and possibly detrimental to the service provider.

5.14 The ANAO considers that an analysis of the criteria on whether material should be treated as confidential does not support an argument that pricing information in Commonwealth contracts should, as a general rule, be kept confidential. Disclosing the price in a contract does not reveal, for example, the contractor's cost-structure or whether the

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[44] Looking at examples in daily life is a good way to consider this category. For example, if you go to a car repairer you are able to obtain details of what you are to pay for labour and parts and the quantities of each. In addition, at the dentist you obtain a bill for each individual treatment that you receive, even though you pay the total amount. This level of detail can also be found out by getting a quote to provide the service. This information does not indicate what the cost of a service is, or whether a profit or loss is being made on the provision of the service.

contractor will make a profit or loss on the item. Nevertheless, where the price in a contract may reveal, for example, information that is commercially sensitive to the contractor, such as how the services are to be delivered, then the information may be considered to be confidential. An agency would be accountable for such a decision. A more detailed discussion of the issue is included at Appendix 5.

5.15 Though not in the contract itself, the performance of the contractor, against the requirements of the contract and agreed assessment criteria, should always be disclosed and the contractor should be made aware of these requirements. This, after all, is the ultimate test of the efficient use of taxpayers' money. This issue is discussed in more detail later in the chapter.

Examples of what would be considered confidential

5.16 The following types of information may meet the criteria of being protected as confidential information:[45]

- trade secrets (as explained in some detail earlier);
- proprietary information of contractors (this could be information about how a particular technical or business solution is to be provided);
- a contractor's internal costing information or information about its profit margins;
- pricing structures (where this information would reveal whether a contractor was making a profit or loss on the supply of a particular good or service); and
- intellectual property matters where these relate to a contractor's competitive position.

Changing the approach to the use of confidentiality provisions

Previous requests for information

5.17 As part of the audit, the ANAO examined certain instances where parliamentary committees had sought information, particularly relating to contracts, and information was not provided on grounds of commercial confidentiality. The ANAO assessed the responses made in terms of the criteria proposed in this report. Details related to the cases examined are at Appendix 6.

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[45] The legal basis of these particular types of information is outlined in Chapter 4.

5.18 The results of the analysis suggest that application of the criteria set out in this report, together with a suggested approach that encourages dialogue with committees to assess how the request for information can best be met, is likely to have led to different decisions being made by agencies as to whether the information should have, reasonably, been treated as confidential. In turn, it is likely that committees would have been provided with the information they sought or other information, which in large measure, would have met their needs. This assessment by the ANAO on the confidentiality of certain information does not take into account the power of a parliamentary committee to require a person to produce information as set out previously in the section on the powers of parliamentary committees in Chapter 1. This reinforces the need for clear guidance to be available to agencies on how to address this issue, and for them to apply it in a considered and responsible manner.

Effecting change

5.19 To give effect to a change in the approach to be taken by agencies, there are a number of matters that require consideration.

5.20 As stated earlier, the principal guidance material related to contracting that has been set down by the Executive Government is in the *Commonwealth Procurement Guidelines* (CPGs). There is no specific reference to commercial-in-confidence considerations in the existing CPGs. However, a draft version of a new set of Guidelines states:

> *Agencies should consider, on a case-by-case basis, what might be commercial-in-confidence when designing any contract. Typically, things that may be commercial-in-confidence may include a company's cost or prices,*[46] *intellectual property, or information that could benefit competitors.*

5.21 The ANAO considers that the wording in the CPGs should be amended to provide high level advice on the public accountability responsibilities of parties when contracting with the Commonwealth. The existing guidance in the draft CPGs could be replaced by words along the lines of those set out in the first part of Recommendation No.1.

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[46] As mentioned earlier and discussed more fully in Appendix 5, the ANAO's view is that prices of goods and services are generally not considered to be confidential.

5.22 Additional guidance to that available in a document such as the CPGs would be beneficial to assist agencies to make informed decisions on what information should be considered confidential in particular cases. The ANAO considers that this detailed guidance, based on Chapters 4 and 5 of this report, should be included in a related toolkit, or better practice documentation, which would be readily accessible by agencies and tenderers.

5.23 Given the devolved nature of government procurement, the ANAO proposes that agencies themselves should consider how this approach should best be reflected in agency guidance, standard contracts and requests for tender. Depending on the type of government wide guidance available, agencies should consider the extent to which the approach outlined in this report is reflected in Chief Executive's Instructions and related guidance.

Recommendation No.1

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.

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*.

Agency Responses:

All but two agencies agreed with the recommendation.

The Department of Finance and Administration agreed with the first part of the recommendation but disagreed with the second part as '*…the Minister for Finance and Administration has responsibility for the CPGs and must approve any changes*'.

ANAO comment: While recognising that the Minister for Finance and Administration has responsibility for the CPGs, the ANAO seeks the support of the Department for the appropriate amendments to the CPGs to be made.

The Department of Agriculture, Fisheries and Forestry—Australia agreed with qualification and noted that:

> *High level advice on the use of confidentiality clauses in contracts should be included in the Commonwealth Procurement Guidelines*

(CPGs). However, confidential terms, conditions and information within specific contracts should be identified on a case by case basis. This is particularly in relation to prices of individual or groups of items for goods or services as this information may often be of commercial value to other providers and possibly detrimental to the service provider.

ANAO comment: The issue as to whether prices of individual or groups of items for goods and services should be confidential is addressed in Appendix 5.

Comments made by other agencies in relation to the recommendation are shown below:

The Department of Defence supports:

…an approach that provides tenderers with an insight into Defence's responsibilities to Parliament and its committees. However, the exact nature of the provisions to be inserted into the tendering documentation needs to be clearly articulated. Defence suggests that the provisions should be clear as to the meaning of a sound basis for their confidentiality.

Centrelink suggested that:

- All Requests for Offer documents should contain provisions which alert prospective suppliers to identify which elements of their bids they regard as commercial-in-confidence;

- …criteria against which agencies will consider confidentiality claims by suppliers should be published to suppliers;

- The guidelines will best suit users' needs if they are able to assist procurement and contracting staff to consider claims by suppliers to confidentiality on a case by case basis. Without that type of guidance, it is Centrelink's concern that determining the status of suppliers' claims to confidentiality will be a lengthy and involved process with potential for inconsistent outcomes;

- The guidelines should also address situations where the supplier will not negotiate on claims of confidentiality during the tender evaluation phase… and the …proposed new CPGs in their current form do not appear to adequately address this issue;

- The new CPGs should be developed in conjunction with agencies and the Attorney-General's Department as the matter has significant implications for staff undertaking procurement activities in Centrelink; and

> -…[they] would be pleased to act as a 'pilot' for testing of the new provisions.

The Australian Taxation Office is '*…happy to provide input into the development of agency guidance on the use of confidentiality provisions in Commonwealth contracts*'.

The Department of Communications, Information Technology and the Arts agreed that:

> *...it would be useful for the Department of Finance and Administration to develop guidance on the handling of confidential information for inclusion in the Commonwealth Procurement Guidelines. Pending finalisation of the [audit] report and amendment to the Commonwealth Procurement Guidelines, this Department has amended the Conditions of Offer for Tenders to ensure that tenderers are aware of the need to bring to the Department's attention any material that they consider to be confidential. In addition, the Department proposes to amend its Procedures for Contracting for Consultancy Services to provide more guidance for program areas on handling confidential information.*

5.25 The ANAO considers it important that relevant parliamentary committees be consulted on any updated material to be issued to agencies on the use of confidential provisions in contracts, given their particular interest in the matter.

5.26 Once revised arrangements on the use of confidential issues in contracting have been put into operation, the ANAO would propose to schedule an audit to determine how well agencies were meeting the requirements set down in the CPGs and related guidance.

5.27 In discussions, agencies raised the issue that, in some limited circumstances, an agency may wish to claim, for purposes unrelated to the commercial interests of contractors, that a particular clause should not be disclosed. This could arise because of a particular clause which provided a concession to one contractor that should not be made known generally, as other contractors would be likely to seek the same concession. Generally speaking, this would be difficult to justify.

5.28 As noted earlier, in the case of a request from a parliamentary committee, there is some limited scope to make a claim of public interest immunity.[47] Guidance on such a claim is included in the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters—November 1989*. The Guidelines point out that such claims can only be made by ministers.

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47 Additional discussion of relevant matters is at paras 1.30 to 1.35 of Chapter 1.

Better practice approach to responding to parliamentary committee requests

5.29 Notwithstanding that an undertaking to keep information in, or in relation to, a contract confidential is not a sufficient basis to refuse to provide the material to Parliament or to a parliamentary committee, cooperative arrangements to satisfy requests for the disclosure of information should be considered.

5.30 Better practice suggests that, where a parliamentary committee seeks information about a contract, the agency should, in the first instance, provide all the information that it reasonably can. To the extent that there are confidential elements in which the committee has an interest, the agency would need to explain the reasons that the information is considered to be confidential. If appropriate, it may seek to discuss the issue privately with the committee to determine whether the committee's need for particular information can be met in some other way. Throughout discussions, the relevant Minister should be kept fully informed as appropriate.

5.31 If the agency cannot readily provide the information to the parliamentary committee, it should consider approaching the contracting party to seek its agreement to the relevant provisions in the contract being provided to the committee. In some cases, the passage of time may mean that the contractor does not consider that it would be particularly disadvantaged in disclosing the clause, or may be willing for the committee to have access to the information on the basis of some form of agreement, such as a hearing in camera. It is noted that Senate legislation committees, sitting in estimates, are unable to receive material in camera.[48]

5.32 Many agencies have existing contracts that contain unnecessarily restrictive confidentiality provisions. If a parliamentary committee seeks information in, or in relation to, such a contract, it is suggested that an agency, in consultation with the contractor, apply the criteria developed in Chapter 4 as a basis for considering what information could be supplied in response to a formal request by such a committee.

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[48] If they consider it warranted, Senate legislative committees may reconvene in another format.

Performance information relating to contracts

5.33 There would appear to be one major, yet fairly routine, occurrence that arises with parliamentary committees having ready access to contracts. This relates to the provisions in the contract or schedules that set down the performance measures that are to be used as part of the contract management process. In the ANAO's opinion, these measures should not be confidential given the long held interest of the Parliament in performance measurement and management.

5.34 Although agencies are required to report to Parliament against outputs and outcomes, on occasions Parliament may seek some knowledge as to how individual contractors are performing against the performance measures set down in the contract.

5.35 In contract management arrangements there will be an ongoing process of obtaining information related to the performance of the contractor, discussing with the contractor whether the achievements are appropriate and receiving information on measures to improve performance where necessary. The ANAO considers that, while a parliamentary committee is unlikely to be interested in this level of exchange between agencies and contractors, summary information related to contractual performance measures may be requested. This material would usually be able to be derived from reporting information that the agency would have available for management purposes. The ANAO does not consider that providing such information, even if at times uncomfortable for a contractor, would generally meet the test of being classed as confidential or an unreasonable disclosure of its commercial position.

Recommendation No.2

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.

Agency Responses:

The Australian Taxation Office; the Department of Employment, Workplace Relations and Small Business; the Department of Finance and Administration agreed with this recommendation without comment.

The Department of Health and Aged Care agreed with the recommendation and indicated that:

> *It would be useful for agencies to be given clear criteria of what committees are likely to want examined more closely. For example,*

the type of data to be reported, for what sort of contract period and/or the dollar threshold. This would then indicate the minimum requirements for systems that should be implemented for best management of contracts.

The Department of Defence agreed with the recommendation and suggested that its:

> *…existing contractual provisions are sufficient to provide Defence and the Parliament with appropriate performance information. For example, Defence's contracting template for strategic acquisitions, SMART 2000, requires contractors to provide a comprehensive range of reports, including a Contract Master Schedule, a Contract Work Breakdown structure, and a monthly Cost Performance Report. In addition, Defence generally has an on-site resident project team and regular project meetings to monitor the contract.*

The Department of Family and Community Services agreed in principle and noted that:

> *…consequential data collection and reporting requirements go well beyond the capacity of FaCS' existing capability in this area. A suitable time frame may be required to enable supporting management systems to be developed and implemented to provide this level of information.*

The Department of Communications, Information Technology and the Arts agreed in principle and indicated that:

> *…although, comparatively few contracts in the Department require the inclusion of performance measures, …guidance [is to] be developed for program areas on seeking or developing summarised performance information and the disclosure of such information to the Parliament.*

Centrelink agreed with qualification and noted that:

> *Many Commonwealth contracts contain 'performance' measures for contractors to be measured against. Basic information would be available during the course of normal contract management processes in many instances. However, in certain complex or strategic type contracts, the level of performance information may not be capable of being easily and accurately ascertained, particularly in the short term. In respect of some contracts, performance may be measured in terms of long term strategic outcomes, such as outsourcing arrangements. It should be acknowledged that in some circumstances, the extent of summarised information may be difficult to obtain or provide immediately on request.*

The Department of Agriculture, Fisheries and Forestry—Australia agreed with qualification and noted that:

> *…for major contracts with performance measures, agencies should be able to provide summarised performance information on progress. However, depending on the commercial sensitivity of the performance indicator it may be appropriate to provide this information on a confidential basis. Procurement officers should ensure that tender documentation includes advice to that effect.*

Conclusion

5.37 The ANAO considers that agencies should explicitly consider the criteria outlined in Chapter 4 to determine which information in, or in relation to, a contract, if any, should be classified as confidential in the development of a contract. Agencies' approach should also provide for contractors to indicate what information they consider should be classified as confidential.

5.38 To give effect to this changed approach in considering confidential information in contracts, the ANAO considers that agencies should include provisions in tender documentation that alert prospective tenderers or contractors to the public accountability responsibilities of agencies.

5.39 The ANAO also considers there would be considerable benefit in high level advice on the public accountability responsibilities of parties when contracting with the Commonwealth being provided in the *Commonwealth Procurement Guidelines*, with detailed guidance being included in a related toolkit, or other better practice documentation, which is readily accessible by agencies and contractors. It is also proposed that, in the preparation of such guidance material, relevant parliamentary committees be consulted.

5.40 Bearing in mind that it is open to parliamentary committees to pursue the provision of any contractual information, the ANAO proposes that agencies should work cooperatively with both contractors and with parliamentary committees to ensure that contractual information is provided to the maximum extent possible, and that the needs of all parties are appropriately recognised. This would instil greater trust and confidence in the process and a more general sharing of culture and values in public contracting.

6. Reporting

This chapter examines the current reporting practices of agencies in relation to contracts through the Gazette Publishing System and annual reports.

Introduction

6.1 There are two primary reporting mechanisms used by agencies, governed by the FMA Act, in relation to their contracting activity—the Commonwealth Purchasing and Disposals Gazette and annual reports.

Gazettal of Government contracts

Background

6.2 Current Government policy, articulated in the CPGs, requires that agencies publish all open business opportunities, and report all contracts and standing offers with a value of $2000 or more in the Commonwealth Purchasing and Disposals Gazette. This policy aims to ensure that public procurement is, to the maximum extent, open and transparent, and that agencies are accountable for their purchasing decisions.[49]

6.3 Through the Gazette Publishing System (GaPS) agencies are required to report: agency agreements; Commonwealth contracts; arrangements such as standing offers to supply goods and services; period contracts; service contracts; and maintenance agreements. Information must be gazetted within six weeks of the arrangements being entered into. Details of information which agencies are required to gazette can be found in Appendix 7.

6.4 GaPS is a database onto which agencies upload contract data as required by CPGs. The database can be accessed by the public through the Internet[50] and contains search functions in relation to the date the contract was signed, the date of gazettal, contract value, name of supplier and name of agency that entered into the contract.

6.5 The gazettal process is prescribed in the *Mandatory Reporting Requirements Handbook* issued by the then Office for Government Online, now the National Office for the Information Economy.

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49 Request for Tender for Gazette Site – Office for Government Online.

50 The Internet address is www.contracts.gov.au.

Purpose of gazettal

6.6 Compliance in any reporting regime is best achieved when it is clearly understood who uses the information and for what purpose.

6.7 The ANAO was not able to identify any guidance documentation that provides a clear statement of the purpose or intended application of the data collated through the gazettal process. The general principles of accountability contained in the CPGs state that:

> *Accountability involves ensuring individuals and organisations are answerable for their plans, actions and outcomes. Openness and transparency in administration, by external scrutiny through public reporting, is an essential element of accountability.*[51]

This statement does not provide the context for, nor does it specify the requirements for gazettal. It is not clear to agencies what they should be reporting and how the information will be used.

6.8 The current GaPS reporting framework does not readily reflect the reporting implications of more recent changes in the way that agencies deliver their outcomes. Although the *Mandatory Reporting Requirements Handbook* prescribes the process of gazettal and related requirements, there is no detailed advice on how agencies should deal with items other than traditional standing offers, Commonwealth contracts and agency agreements. For example, there is no formal guidance on how arrangements such as panel, cluster and multi-year arrangements should be gazetted.

6.9 The purpose of a panel arrangement is to pre-qualify providers of specific services to enable agencies to engage expertise efficiently and effectively as the need arises. Agencies are often unable to estimate the value of work that may be undertaken by individual members of the panel or indeed the panel in its entirety. The treatment of this common type of arrangement is not addressed in any of the guidance documentation available to agencies.

6.10 Cluster arrangements occur when a number of agencies group together and enter into a single contract with a provider of goods or services. Although cluster arrangements are more readily defined in relation to value, the question is more one of how the gazettal should occur. Full gazettal by individual members of the cluster fails to illustrate the true nature of the arrangement and apportionment between cluster members would under-estimate the magnitude of the complete arrangement. This general issue has been subject to stakeholder criticism in the past.

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[51] CPGs Part 4 – Accountability and Reporting.

6.11 Further, the gazettal of multi-year arrangements is an issue. The practice tends to be for agencies to gazette the entire contract during the financial year which the contract is finalised, regardless of duration. If the gazettal process is to provide any type of profile of Commonwealth contracting activity, there is a need for the multi-year arrangements to be recognised.

6.12 Because there is a variety of contractual models that agencies utilise to deliver their outcomes, guidance on gazettal arrangements should address how reporting should occur in these different circumstances.

6.13 In addition, the types of funding arrangements used by agencies are evolving and agencies use a variety of terms to define the arrangements they have entered into, including:

- grants;
- funding agreements;
- funding contracts;
- funding deeds;
- contracts; and
- agreements.

6.14 The ANAO found that it was not clear to agencies which arrangements were required to be gazetted. In some agencies, it is recognised practice not to gazette arrangements that involve the agency engaging third parties to provide services to the public while in another agency substantially similar arrangements are gazetted.

6.15 The ANAO considers that clarification as to the purpose of gazettal and what should be gazetted would support improved consistency in reporting by agencies.

Data accuracy

6.16 The ANAO found that the accuracy of the GaPS database is compromised by:

- duplication of entries;
- the gazettal of payments against previously gazetted contracts;
- lack of internal controls in agencies, including ineffective or non-existent contract registers to ensure that the gazettal processes capture all the necessary transactions;
- gazettal of items which agencies are expressly advised not to gazette;
- inadequate description of the goods or services being procured;

- different gazettal practices in agencies (this is linked to definitional issues discussed elsewhere and changes to the way in which the government does business);
- the failure to report contract variations;
- failure to gazette within the required six week gazettal period; and
- the failure of some smaller agencies to gazette at all.

6.17 In addition, the ANAO was unable to make an assessment on the completeness of the information provided in GaPS.

6.18 As a result of the above, GaPS, in its current state, cannot always be relied upon to provide comprehensive and accurate information on agency contracting activities.

6.19 Until recently, data entry into the gazette was largely a manual process for all agencies. Some agencies still manage the gazettal function manually because there are relatively few transactions. The effectiveness of this process is dependent on appropriate internal controls for data capture and data quality.

6.20 With the introduction of new financial management information systems it has become possible for many agencies to automate the gazettal process. In one particular system, which is used in many agencies, the entry of a transaction into the system automatically activates a gazettal screen that must be completed before the entry can be finalised if the transaction value is greater than $2000. This type of automated approach ensures data capture, but not data quality.

6.21 Efficient internal control mechanisms remain necessary to ensure data quality when using automated approaches. Agencies that engaged in a systematic data checking and clarification process prior to uploading the data into GaPS appear to be providing data which contains fewer instances of gazettal of excluded items, duplicate entries, and entries which are payments against previously gazetted contracts. The data uploaded by agencies that do not have in place clear quality control processes contain a greater amount of data that should not be gazetted, or has previously been gazetted. This data contaminates the entire database, significantly reducing its usefulness.

Prescribed agencies

6.22 In relation to the agencies that were not readily identified as complying with the gazettal requirements, the ANAO noted that 16 of 52 prescribed agencies identified in the FMARs did not report separately in GaPS.

6.23 As prescribed agencies are required to meet the reporting requirements specified in the CPGs, the ANAO sought clarification of the gazettal process used by these agencies during the 1999–2000 financial year. Seven agencies gazetted their contracts through the appropriate portfolio department; eight agencies did not gazette their contracts and therefore did not meet their reporting requirements;[52] and one agency had a specific exemption under the FMARs.

The existing GaPS reporting threshold

6.24 The appropriateness of the $2000 threshold for gazettal of contracts and standing offers was also considered during the audit. From the information available it appears that the $2000 threshold was established in 1989 when major changes were made to purchasing provisions in the Finance Regulations. In today's terms, that value would be just over $8000.[53]

Table 6.1
Stratification of GaPS Database 1999–2000

Value Greater than or Equal to ($)	*Total Number of Contracts*	*Per cent of database*	*Number of Contracts per Value Level*
>1 000 000	901	0.7	901
500 000	1 741	1.4	840
250 000	3 242	2.5	1 501
100 000	7 680	5.6	4 438
50 000	13 982	10.8	6 302
25 000	23 757	18.4	9 775
10 000	47 654	37.0	23 897
8 000	55 757	43.2	8 103
2 000	128 958	100.0	73 201

Source: ANAO analysis of GaPS Database 1999–2000 financial year

6.25 Table 6.1 stratifies the data contained in the GaPS database for the 1999–2000 financial year and, despite the underlying weaknesses in the data identified earlier in this chapter, is illustrative of the likely impact on the number of transactions to be reported.

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[52] Each of these agencies have indicated that they have put in place processes to ensure that they meet their contract reporting requirements for the 2000–2001 financial year.

[53] $8036.67 – compounding $2000 annually over the period 1989 to 2000 using the weighted average Consumer Price Index of eight capital cities – (ABS All Groups Index Numbers).

6.26 A movement in the threshold would greatly affect the number of transactions which agencies are required to gazette but not significantly reduce the level of contract expenditure reported. For example, by increasing the threshold from $2000 to $8000 would reduce the number of contracts on the data base by approximately 60 per cent but would still result in 97 per cent of total expenditure being reported.[54] A reduction in the number of contracts to be reported on would enable agencies to put in place cost-effective quality assurance mechanisms. This should have a significant impact on the quality of the data provided and enhance the usefulness of the database.

6.27 Even in today's largely automated environment, lifting the threshold to $8000 would still impose an administrative load on agencies. Generally, consideration of reporting mechanisms has set higher minimum reporting values, for example:

- the motion put before the Senate last year that sought to have agencies post an indexed list of contracts on their websites indicating which contracts had confidentiality provisions and the reasons for the confidentiality provisions, set the threshold at $10 000. This was later revised to $100 000;
- the thresholds for reporting consultancy contracts and competitive tendering and contracting contracts in agency annual reports are $10 000 and $100 000 respectively;
- under new legislation in the ACT, the reporting threshold is $50 000; and
- the reporting threshold under the proposed legislation in Victoria is likely to be $100 000.

Review of the reporting process

6.28 The need to review the appropriateness of the gazettal reporting threshold and the amount and type of contractual information available through the gazette was raised in discussions during the audit.

6.29 The Department of Finance and Administration commenced a review of the mandatory reporting requirements of the gazettal process during the course of the audit, and advised that the review will consider the views of external stakeholders once initial research tasks have been completed.

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[54] Based on 1999–2000 financial year data contained in GaPS and information provided by the National Office for the Information Economy.

6.30 The ANAO considers that stakeholders identified for this purpose should include Ministers, industry, agencies and, importantly, parliamentary committees given their particular interests. Part of the consideration could also include the views expressed in the Senate Motion 489 that parliamentarians be informed of those contracts that contain confidentiality provisions, and in JCPAA Report 379 where one recommendation was that Chief Executive Officers should '*whenever claiming commercial-in-confidence, issue a certificate stating which parts of a contract* [are confidential] *and why these parts are to be withheld'*. In addition, changing technology allows new options to be considered by policy makers on what information can cost-effectively be placed in the public domain. For example, as was shown earlier, the Victorian Government is likely to require the full text of contracts over $10 million to be placed on the Internet.

6.31 The current review being conducted by the Department of Finance and Administration might consider that additional data fields have the potential to improve the usefulness of the contract information collated through the gazettal process; this could include:

- expected completion date;
- actual completion date;
- performance information;
- an edit log to track contract variations; and
- contract status.

6.32 Changes to gazettal requirements will impose costs on agencies which would need to be weighed against the benefits of improved gazettal arrangements. The ANAO considers that the most cost-effective manner in which to implement such changes would be to provide agencies with a reasonable lead time to allow the changes to be effected as part of a financial management information system upgrade.

Recommendation No.3

6.33 The ANAO recommends that, in its current review of the mandatory reporting requirements for the gazettal of contracts, the Department of Finance and Administration includes the following:

- clarification of stakeholders' information needs;
- clarification of the scope of information that should be collected in relation to individual contracts;
- consideration of the appropriate data presentation, including differentiating the categories of information to be published; and

- the appropriate threshold for reporting.

The outcome of the review should be the promulgation of clear guidance on gazettal requirements in relation to procurement.

Agency Responses:

All agencies, except the Department of Finance and Administration, agreed with this recommendation.

The Department of Finance and Administration disagreed with the recommendation. The department considered it:

> *…unnecessary because the Department of Finance and Administration has already commenced a comprehensive review of mandatory reporting requirements that addresses these matters.*

ANAO comment: The ANAO has recognised in the report that the Department of Finance and Administration has commenced a review of mandatory reporting requirements as part of a wider review of Commonwealth procurement. The ANAO welcomes the review but, as it is in its early stages and the terms of reference have still to be developed, considers that the recommendation remains relevant. As can be seen by the responses below, the recommendation is supported by agencies that have expressed that they would like the review to consider particular additional issues, and be able to provide input to, or be consulted on, the review.

Comments made by individual agencies in relation to this recommendation are shown below:

The Department of Defence:

> *…agrees that there have been difficulties in the past associated with the data reported in the Gazette which have been impediments to the usefulness of the information. However, any changes to the gazette reporting system must consider the cost implications for agencies, including costs associated with upgrading financial management information systems.*

The Department of Defence also commented that:

> *…if the recommendation was accepted, it has the potential to generate substantial additional work especially if past contract performance reporting is contemplated, particularly the actual completion date. The actual completion date itself is a complex subject for larger defence projects and does not lend itself to simplified reporting mechanisms.*

Centrelink indicated strong support for:

> *…a review of this kind which should be conducted in close consideration of agencies' Financial Management Information Systems, and the impending e-procurement environment. The legislative requirement for gazettal should be capable of being fully complied with by agencies and ideally achieved through the maximum use of automation. A broad statement of purpose in respect of the gazettal process would be of great benefit, for example the relationship between notification of expenditure of an administrative nature as opposed to notification of contracts arranged. (The latter implying a contract resulting from a procurement process involving a public tender or a competitive quotation).*

The Australian Taxation Office is:

> *...happy to provide input into the review of mandatory reporting requirements for the gazettal of contracts and suggested that …limiting gazettal to publicly tendered contracts over $100 000 would assist with the utility of reporting.*

The Department of Health and Aged Care indicates that:

> *It would be useful if the proposed review explored and articulated more clearly the objective of gazetting. Currently the primary objective is to advise the marketplace of which companies are getting work and what type of goods and services are being purchased by the Commonwealth. If we wish to change this objective in order to provide for closer scrutiny of a wide range of expenditure by the Commonwealth, then this needs to be clearly articulated before decisions are made about what data is to be reported.*

The Department of Communications, Information Technology and the Arts:

> *…suggests that any such review should also examine whether gazettal of contracts should continue, given that contracts are now reported in detail on agencies' websites and in annual reports.*

The Department of Agriculture, Fisheries and Forestry—Australia suggested that:

> *…any review of the mandatory reporting requirements should also include consultation with agencies.*

Exemption from the gazettal process

6.34 The CPGs provide for an exemption from gazettal if the Chief Executive of an agency decides that details of a contract or standing offer are exempt matters in accordance with the FOI Act.[55] He or she may then direct in writing that the details are not to be notified in the Commonwealth Purchasing and Disposals Gazette.

6.35 As part of its inquiry into Contract Management in the Australian Public Service, the JCPAA wrote to 17 agencies and asked them to identify any contracts which the Chief Executive Officer had deemed to be exempt from gazettal. Of the 17 agencies concerned, only two identified any contracts which the relevant Chief Executive Officer had deemed exempt for gazettal.

6.36 The ANAO notes that the contract information disclosed through the gazettal process is not information that would be exempt under the provisions of the FOI Act. Therefore, for a contract to be given exemption from gazettal, it must be for reasons such as national security, or where publication of the contract details may lead to potential harm to the contractor, the Commonwealth or other governments.

Requirements for annual reports

6.37 Each year the Department of the Prime Minister and Cabinet issues a document entitled *Requirements for Annual Reports*. The JCPAA approves this document in accordance with subsection 63(2) and 70(2) of the *Public Service Act 1999*. The requirements apply to annual reports for departments of state and executive agencies. As a matter of policy, the requirements specified in the document also apply to prescribed agencies under section 5 of the FMA Act.

6.38 The annual report must include a summary statement detailing the number of consultancy services' contracts[56] over $10 000 let during the year and the total expenditure on consultancy services during the year. Further, more detailed information on consultancy services is also required, either as an appendix to the report, or on request, or through the Internet.

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55 In accordance with the FOI Act exempt matter means matter the inclusion of which in a document causes the document to be a document which is exempt from disclosure.

56 The *Requirements for Annual Reports* defines '*Consultancy services as the application of expert professional skills to investigate or diagnose a defined issue or problem, carry out defined research, reviews or evaluations or provide independent advice, information or creative solutions to assist the agency in management decision making.*'

6.39 Where applicable, the annual report must also include a summary statement in relation to the competitive tendering and contracting[57] undertaken during the year. The *Requirements for Annual Reports* suggest that the statement refer to the total value and period of each contract let in excess of $100 000, the nature of the activity, and the outcome of competitive tendering and contracting, including any net savings.

6.40 From an examination of the published annual reports of the sample agencies for 1999–2000, the ANAO noted that the requirements for agencies to report their activities in relation to consultancy services and competitive tendering and contracting were being met. Validation of source material held by agencies to determine the accuracy or completeness of the information was not conducted.

6.41 The ANAO considers that a review of why it is necessary to have different reporting requirements with different thresholds—one for all contracts (which includes consultancy services, and competitive tendering and contracting) in GaPS and one for contracts specifically relating to consultancy services, and competitive tendering and contracting activity in annual reports—is warranted.

Conclusion

6.42 Although many agencies may be diligent in their approach to the gazettal process, there are significant discrepancies in GaPS data, partly as a result of differing gazettal practices among agencies. Consequently, GaPS, in its current state, cannot always be relied upon to provide comprehensive and accurate information on agency contracting activities.

6.43 In addition, the low threshold for reporting means that there is a large number of small to medium transactions on the database. Not only does that make the information difficult for the public to access, but it also imposes a significant administrative burden on agencies in relation to inputting the data and ensuring data quality. Raising the threshold would ensure a focus on the more significant contractual arrangements in the Commonwealth.

6.44 In recent years, the way in which agencies meet their outcomes has changed considerably and the reporting framework does not readily reflect this change in practice, as has been observed in the Parliament.

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[57] The *Requirements for Annual Reports* defines competitive tendering and contracting as '*the process of contracting out the delivery of government activities previously performed by a Commonwealth agency to another organisation.*'

The ANAO found that, partly as a result of a lack of clear guidance, agencies were not fully aware as to what types of contractual arrangements have to be gazetted and for what reason.

6.45 Clarification is required as to exactly what should be reported through the gazettal process and appropriate definitions are needed to support improved consistency in reporting by agencies. In addition, consideration should be given to the costs and benefits of changes proposed to the gazettal of, or the introduction of any other disclosure method for, Commonwealth contractual information.

Canberra ACT
24 May 2001

P.J.Barrett
Auditor-General

Appendices

Appendix 1

Senate Motion 489

General business notice of Motion 489 reads:

(1) There be laid on the table, by each minister in the Senate, in respect of each department or agency administered by that minister, or by a minister in the House of Representatives represented by that minister, by not later than the tenth day of the spring and autumn sittings, a letter of advice that an indexed 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 indexed list of contracts referred to in paragraph (1) indicate:

(a) each contract entered into by the department or 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 $10 000 or more;

(b) the contractor and the matters covered by each such contract; and

(c) whether each such contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether any provisions of the contract are regarded by a party as confidential, and a statement of the reasons for confidentiality.

(3) In respect of each contract identified as containing provisions of the kind referred to in paragraph (2)(c), there be laid on the table by the Auditor-General, within six months after the relevant letter of advice is tabled, a report indicating whether, in the opinion of the Auditor-General, the claim of confidentiality in respect of that contract is appropriate.

(4) In this order:

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

'indexed' means indexed alphabetically for subject matter of contract and contractor; and

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

Revised Motion 489

Motion 489 was subsequently amended to increase the reporting limit to $100 000 and paragraph (3) was revised to state:

> In respect of contracts identified as containing provisions of the kind referred to in paragraph (2)(c), there be laid on the table by the Auditor-General, within six months after each day mentioned in paragraph (1), a report indicating that the Auditor-General has examined a number of such contracts selected by the Auditor-General, and indicating whether any inappropriate use of such provisions was detected in that examination.

Appendix 2

Senate Finance and Public Administration References Committee—Inquiry into the Mechanism for Providing Accountability to the Senate in Relation to Government Contracts

In its report on the *Inquiry into the Mechanism for Providing Accountability to the Senate in Relation to Government Contracts*, the Senate Finance and Public Administration References Committee requested that the Auditor-General take into consideration the following matters in the course of his audit of the use of confidential contract provisions, and report on them to the extent that he can do so:

- the extent and type of confidentiality provisions entered into (in contracts);
- whether those confidentiality provisions were entered into at the request of the agency or contractor;
- the extent to which indemnities are being offered or risk transferred to the Commonwealth in secret provisions and the potential financial exposure of the Commonwealth as a result;
- the extent of the use of clauses requiring an agency to consult with the contractor before disclosing contract provisions;
- whether any contract provisions had been inappropriately claimed to be confidential, as ascertained through FOI or parliamentary requests, and if so, on what grounds;
- whether the Chief Executive has issued directions that the details of any contract not be notified in the Gazette, on the grounds that its details are exempt matters under the FOI Act;
- whether any contracts which should have been notified in the Gazette were not so notified;
- examples of appropriate confidentiality claims;
- details of training supplied to officers negotiating contracts; and
- confidentiality dispute resolution.

The Committee also asked that the Auditor-General report on any difficulties encountered in the audit.

Appendix 3

Previous Commonwealth Consideration of the Issue

Administrative Review Council

1. The Administrative Review Council's 1998 report, *Contracting Out of Government Services* addressed a variety of issues in relation to government contracting activity and how to ensure efficient and effective outcomes while maintaining accountability and transparency.

2. While the report noted that the public interest in maintaining government accountability through information access needs to be balanced against the interests of contractors, the Council considered as a general principle that rights of access to information relating to government services should not be lost or diminished because of the contracting out process.

3. The report expressed the concern that agencies may too readily agree to treat contractors' documents as confidential, and that these agreements have the potential to affect not only the operation of the *Freedom of Information Act 1982*, but also may influence the release of information to parliamentary committees and more generally the public in annual reports and other public reports. The Council's view was that it would be desirable for government agencies to adopt a uniform approach to the circumstances in which they will agree to treat information as confidential. The Council recommended that guidelines should be developed and tabled in Parliament by the Attorney-General setting out the circumstances in which Commonwealth agencies will treat information provided by contractors as confidential.

Joint Committee of Public Accounts and Audit

4. The Joint Committee of Public Accounts and Audit in its Report 379 *Contract Management in the Australian Public Service* considered the issue of commercial-in-confidence in relation to Commonwealth contracting activity. The main concern raised was the perception that *'..accountability and parliamentary scrutiny are being eroded through the application of commercial-in-confidence to all or parts of government contracts'*.[58] Evidence provided to the Committee supported its belief that there were instances where agencies were inappropriately claiming information relating to contracting activity as being commercial-in-confidence. One

[58] Report 379, para 2.44.

of the recommendations in the report was that that agency Chief Executive Officers '…*should, whenever claiming commercial-in-confidence, issue a certificate stating which parts of a contract* [are confidential] *and why these parts are to be withheld'.*

Senate Finance and Public Administration References Committee

5. In its inquiry into the *Mechanism for Providing Accountability to the Senate in Relation to Government Contracts*, the Senate Finance and Public Administration References Committee, noted that as far back as the 1970s, estimates committees lamented their inability to receive information in camera; their main concern is related to information which was deemed to be commercially confidential. The Committee identified a general level of concern in relation to the disclosure of the information relating to government contracting activity and that there was a genuine need to clarify both reporting expectations and requirements. The Committee supported the Auditor-General's view that the question of whether commercial-in-confidence information should be disclosed to Parliament or through public reporting mechanisms should be premised on the general principle that information should be made public unless there is a good reason for it not to be. In other words, there should be a reversal of the onus of proof, which would require the party arguing for non-disclosure to substantiate that disclosure would be harmful to its commercial interests or the public interest.

Australasian Council of Auditors-General

6. In addition to Commonwealth consideration of the issue, the Australasian Council of Auditors-General, in its *Statement of Principles—Commercial Confidentiality and the Public Interest*, made the following point:

> *The accountability requirements of the public sector cannot be equated to those in the private sector.*
>
> *There is a requirement in the public sector that the Government demonstrate that its use of public resources has been effective, economical, efficient and that it complies with all law and meets community standards of probity and propriety.*[59]

7. The Council also suggested that the four basic elements of good governance are accountability, participation, predictability and transparency.

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[59] Australasian Council of Auditors-General, *Statement of Principles, Commercial Confidentiality and the Public Interest—Information Required for Public Interest and Accountability Reasons*, June 2000.

Appendix 4

Alternative Approaches to Dealing with Commercial Confidentiality in Government Contracts

Introduction

1. The purpose of this appendix is to summarise the approaches taken by the governments of Victoria, Australian Capital Territory (ACT) and the United States of America (USA) in dealing with the classification and disclosure of confidential contractual information.

Victoria

2. In early 2000, the Victorian Government set up an independent audit review of Government contracts[60] entered into during the previous administration.

3. After the Audit Review's report was considered by the Government, the Premier made a statement in October 2000 that the Victorian Government was

> *…committed to maximum disclosure of all contracts entered into by Departments* and was . . . *clear that contractual confidentiality should not inhibit the Auditor-General, the Ombudsman and parliamentary committees from exercising their investigative powers.*[61]

4. The major elements of the policy are[62]:

- The burden of proof in favour of contract disclosure will be shifted, reducing to a minimum the information that is withheld from the public. The requirement to disclose major contracts will be entrenched in legislation as a statutory obligation on Government agencies. Limited exceptions to this general policy will be permitted if there is a compelling reason. In assessing whether such a compelling reason exists, the Government will be guided by the criteria established by Parliament in the *Freedom of Information Act 1982*. Only trade secrets

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60 *Audit review of Government contracts. Contracting, privatisation, probity and disclosure in Victoria 1992–99*, State Government of Victoria May 2000. There were two terms of reference which are relevant to this audit. (1) To provide recommendations on probity and disclosure during tendering processes, the announcement of the award of contracts and during the contract administration period. (2) The possible release of relevant details of specific major contracts, having regard to the State's legal liabilities and without infringing a reasonable interpretation of 'commercial-in-confidence'.

61 *Ensuring Openness and Probity in Victorian Government Contracts—A Policy Statement*, 11 October 2000, paras 18 and 30.

62 A summary of the major elements of the Policy Statement.

or genuinely confidential business information will be withheld from voluntary disclosure, along with material which if disclosed would seriously harm the public interest. Even where a measure of confidentiality is allowed, the Government will look to ensure that it is time-limited.

- Government contracts will be made available in a database readily accessible via the Internet, containing headline details of all Departmental contracts worth more than $100 000. Government contracts over $10 million in value will be published in full on the Internet. Where a clause has been deleted from a published contract, a note will be included explaining the scope of the excision and the grounds on which it has been made. Paper copies of these contracts will be made available for sale for a reasonable price by the Department concerned and may be viewed in person free of charge.
- The Government will be open with the private firms with which it does business. In future, agencies will make clear to firms before they enter into contracts with the Victorian Government the strict limitations on contractual confidentiality which will apply. They will point out that the Government cannot override the Freedom of Information Act, the powers of Parliament, the Ombudsman or the Auditor-General. The Government will have a strong presumption in favour of full contractual disclosure, but it will also be fair-minded in applying FOI principles to ensure that genuinely confidential business information is protected. These principles will be spelled out to private firms at the start of each major tendering process.

5. The detail of how the policy is to be implemented is still being considered. It is likely that potential Government contractors will be advised at the tender stage that the information in the contract will be disclosed, and, as part of the conditions of tendering, the Tenderer will have to agree to accept that the Department will publish (on the Internet or otherwise): the name of the successful or recommended tenderer(s); the value of the successful tender(s); the Contractor's name; and the provisions of the Contract generally. As part of the tender process, the tenderer is asked to identify information in the tender that should be categorised as a trade secret or as information that if disclosed would unreasonably disadvantage the tenderer's business. Guidelines on the sort of information that can be withheld are provided as part of the tender process.

6. Embedded in the standard contracts will be the same disclosure provisions as in the tender documents.

7. By May 2001, 205 current contracts entered into since 1999 were listed on the Internet.

Australian Capital Territory

Principles and Guidelines

8. In February 1999, the Chief Minister's Department in the ACT issued *Principles and Guidelines for the Treatment of Commercial Information Held by ACT Government Agencies.*

9. The Principles were based on the presumption that public scrutiny of commercial dealings must be expected as part of doing business with Government, and that businesses that enter into commercial arrangements with the Territory also expect that their commercial information provided in confidence will be protected. Individuals and businesses have the right to know, in advance of providing information, when disclosure might occur.

10. The other key principles were:

- information obtained through commercial dealings is not automatically commercial-in-confidence;
- while classifying commercially sensitive information as confidential means it will be accorded appropriate security within an agency, the classification does not justify its non-disclosure; and
- where information falls into exemptions in the ACT *Freedom of Information Act 1989*, or there is a general contractual confidentiality clause, voluntary disclosure by agreement should be considered after consultation with the person or business that provided the information.

11. An important part of the concept was that the Government should agree to treat information as confidential in limited circumstances and that the organisations or individuals seeking confidentiality of information should provide reasons at the time the contract is negotiated. This would allow government officials to consider the claims before agreeing to confidentiality, and later claims for access to the information can be properly assessed.

12. Confidentiality should be agreed where justified by the nature of the information and consistent with the following guidelines (summarised here but explained in more detail in the Principles document):

- Is the information personal information?
- Does the information concern trade secrets or is it information with a commercial value that could be destroyed or diminished by disclosure?
- Would disclosure of information concerning the business affairs of a company have an adverse effect upon the company that is unreasonable in the circumstances?
- Would an obligation to treat information as commercial-in-confidence

inappropriately restrict the Territory in the management or use of Territory assets?

- Would disclosure cause significant harm to the Territory, or not generally be in the public interest?
- Is the information public knowledge?
- Has the information come into the possession of the Territory from other sources without restriction in relation to disclosure?
- Has the information been independently developed or acquired by the Territory?
- Should any agreement to treat information as commercial-in-confidence be limited in time?

13. The ACT included statements of this policy in tender documents, contracting manuals, training material and a leaflet that was distributed to prospective contractors. In addition, government solicitors working with contracts were made aware of the policy and the necessity for it to be considered in the development of government contracts.

Legislation

14. Three private members bills were introduced in to the Legislative Assembly in 2000 as part of an ongoing debate within the Assembly that information in government contracts was being withheld incorrectly from public scrutiny for commercial-in-confidence reasons.

15. Legislation was enacted on 21 December 2000 in the form of the *Public Access to Government Contracts Act 2000*, which provided for government agencies to prepare a public text of a government contract within 21 days of making the contract where the contract is not a contract of employment, or has a consideration of less than $50 000 or is a contract for the settlement of liability to an individual. The public text is to include all the text of the contract that is not confidential and paper copies are to be available for purchase and electronic copies are to be available without charge.

16. The Act provides for an agency agreeing to make information in a contract confidential only if it satisfied that it is required by, or gives effect to, an obligation of confidentiality that arises from another source, or the release of the information would result in:

- the unreasonable disclosure of personal information; or
- the disclosure of a trade secret; or
- the unreasonable disclosure of information with commercial value; or
- the unreasonable disclosure of information about the business affairs of a person.

17. The Act also prevents an agency agreeing to make information confidential if it:

- would inappropriately restrict a government agency in the management or use of Territory assets; or
- it would not be in the public interest to do so; or
- the information is already public knowledge; or
- the information has been obtained by the government agency from another source; or
- the agreement would require the confidentiality to apply for longer than is necessary to protect the interest concerned.

18. Under the provisions of the Act, the Auditor-General is to maintain a register of contracts containing confidentiality clauses and provide the appropriate Legislative Assembly committee a list of contracts inserted in the register at the end of each six month period. Government agencies are to provide the Auditor-General with a copy of any contract containing confidentiality clauses within 14 days of the contract being made.

United States of America

19. In the USA the fundamental principle is that

> *…an informed citizenry is essential to the democratic process and that the more the American people know about their government the better they will be governed. Openness in government is essential to accountability and the (Freedom of Information) Act has become an integral part of that process.*[63]

20. Under the terms of the Freedom of Information Act (the FOIA), every record possessed by a government agency must be made available to the public in one form or another, unless it is specifically exempted from disclosure or specifically excluded from the Act's coverage in the first place. There are nine exemptions, which provide the only bases for nondisclosure, and generally they are discretionary, not mandatory.

21. Exemption 4, the exemption relevant to this audit, protects trade secrets and commercial or financial information obtained from a person that is privileged or confidential, and is designed to afford protection to

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[63] From *Freedom of Information Guide* May 2000 Introduction, page 1 (the quote is from a text of a speech made by President Clinton on 4 October 1993).

those individuals or organisations that are required to furnish commercial or financial information to the government by safeguarding them from the competitive disadvantages of disclosure.

22. The Freedom of Information Guide (the Guide) provides a detailed description of the exemptions provided under the Act

23. The Guide discusses the various legal cases that have led to the present position on the two categories of information—a trade secret and information that is commercial or financial—that are exempt from disclosure under Exemption 4. For example, most agencies are prohibited by law from disclosing contract proposals—which would contain proposed price information—if those proposals have not become incorporated into an ensuing government contract. This provides statutory protection for the prices proposed by unsuccessful tenderers because that information is not incorporated into the resulting government contract.

24. Because the onus is on the contractor to show why information in a contract should be exempt from disclosure, agencies provide contractors with guidance on how to determine what should be released and examples of what could qualify as exempt information are often provided.

25. A 1994 briefing paper, written by a US Department of Defense lawyer, illustrates the disclosure environment in which contractors work. The briefing paper includes advice on the protection of proprietary information for those who are providing or intending to provide goods and services to the Government. Some of the advice is for the contractor:

- to remember to mark any proprietary information submitted to the Government consistently and use standard terminology such as commercial or financial information the release of which would cause substantial competitive harm to the tenderer;
- to have a FOIA trained employee or attorney to respond promptly to advice that the Government is considering releasing information under the terms of the FOIA and be ready to state precisely how the contractor's competitive interests would be harmed by the release of proprietary information; and
- in response to advice that the Government is considering releasing information under the terms of the FOIA, to provide the Government the 'ammunition' it will need to protect the contractor's proprietary information, including making suggestions to enable the Government to release all reasonable segregable portions of the information.

26. While individual Members of Congress possess the same rights of access as those guaranteed to any person under the relevant section of the FOIA, Congress as a body (or through its committees and subcommittees) cannot be denied access to information on the grounds of FOIA exemptions. In addition, the investigative arm of the Congress, the US General Accounting Office (GAO), has broad statutory and contractual authority to review records of agencies and contractors. The GAO routinely exercises the authority in performing both financial audits and program evaluations.

Appendix 5

Prices in Contracts

1. In Chapter 5 (paragraph 5.13) it was noted that three of the nine agencies had indicated that information about the price of individual items or groups of items of goods or services may be considered confidential for the following reasons:

- While recognising that information such as unit prices in Commonwealth contracts may properly be disclosed to Parliament, disclosure to the public in general may adversely affect agencies' ability to attract and benefit from quality tenderers. Some such information may disclose not only prices but also the manner of the delivery of the services and the background pricing methodology, and could potentially lead to price and bid convergence, lessening the benefit to the Commonwealth.
- Information on the prices of individual, or groups of items, of goods and services may often be of commercial value to other providers and possibly detrimental to the service provider.

2. The ANAO considers that an analysis of the criteria on whether material should be treated as confidential does not support an argument that pricing information in Commonwealth contracts should, as a general rule, be kept confidential.

3. Disclosing what is paid, or has been agreed to be paid, to a contractor does not necessarily reveal the contractor's cost-structure. The contractor may be making a profit or may be carrying a loss, but the amount paid, or agreed to be paid, to the contractor should not reveal this information.

4. Both parties to the contract may wish to keep unit price information confidential but that, by itself, in the Commonwealth environment, is not sufficient justification for confidentiality. Nevertheless, where the price in a contract may reveal, for example, information that is commercially sensitive to the contractor, such as how the services are to be delivered, then the information may be considered to be confidential.

5. The ANAO considers that a contracting regime in which it is known that such information will be made public should not adversely affect the Commonwealth's ability to obtain suitable tenders. Having publicly available information related to the unit prices in contracts that have been awarded should lead to increased competition and better value for money for the Commonwealth in the longer term. Such information allows low cost providers, or potential providers, to search out opportunities for new business.

6. As discussed at paragraph 5.32 of the report, the ANAO recognises that agencies may have existing contracts in which they have agreed with the contracting party that the price per service or per product is confidential. In these circumstances, the ANAO acknowledges that there is a case for discussing any request for pricing information with the contractor prior to information being provided to a parliamentary committee.

Appendix 6

Case Studies on Requests for Information by Parliamentary Committees

The following case studies are based on actual questions and answers at parliamentary committees. The studies are designed to illustrate that had the guidelines proposed in this audit report been available at the time the questions were asked, the responses provided to the parliamentary committees may have been different. The assessments are made with the benefit of hindsight and in the knowledge that, at the time the questions were asked, there was no detailed guidelines available to assist agencies to assess whether information in contracts is confidential.

Case Study 1

In response to a question on notice, the parliamentary committee was advised that the contents of the contract cannot be divulged because of the commercial nature of its contents.

Assessment against criteria: The information to be protected must be able to be identified in specific rather than global terms. Except for elements in the contract which meet the criteria described in this report, information in the contract should have been disclosed to the committee.

Case Study 2

In response to questioning at a committee hearing, a department undertook to seek advice from another agency on the sale price of a property in a contract. Subsequently, the department informed the committee that the other agency had indicated that it considered the information to be commercial-in-confidence and the information was not disclosed to the committee.

Assessment against criteria: The information relating to the sale price of a property can be obtained by a member of the public by reference to specific government records (for example, titles office). Accordingly, the material concerned should not be treated as confidential, as it is publicly available and can be obtained by other means. In any case, the sale price of a property is unlikely to have any of the qualities that make it commercial-in-confidence information.

Case Study 3

In response to a question on the value of a contract, the parliamentary committee was advised that the information is commercial-in-confidence.

Assessment against criteria: Although the information was specific, it does not satisfy the other criteria for non-disclosure. As a general rule neither contract values nor the total price of a good or service should be considered commercial-in-confidence in the Commonwealth Government environment.

continued next page

Case Study 4

A parliamentary committee was informed that although the Agreement is considered to be commercial-in-confidence, with the concurrence of each contractor, it could be viewed by committee members on the understanding that the document is commercially sensitive and should not be divulged to a third party.

Assessment against criteria:

- The information to be protected must be able to be identified in specific rather than global terms, so parts of the Agreement that were not considered confidential could have been disclosed.
- The approach taken to consult with the other party is considered to be appropriate. Seeking to allow committee members access to the information without divulging to other parties is an approach that is open to agencies when dealing with the issue of disclosure of confidential information.

Case Study 5

In response to a question on notice on whether a report from a consultant was available, the parliamentary committee was informed that the report contained analysis that is commercially sensitive to the organisation and its partners.

Assessment against criteria:

- The information to be protected must be able to be identified in specific rather than global terms, and to claim that the whole report could not be released was not reasonable.
- The agency should have identified the specific information and whether it was of a technical nature (trade secret), or its value could have been diminished if it had been released. The committee should be advised why the agency is seeking to withhold the information and alternatives for disclosure should be discussed.

Source: ANAO application of proposed guidelines based on analysis of Hansard

Appendix 7

Extract from Commonwealth Procurement Circular CPC 98/3—Changes to Commonwealth Procurement Framework

Details to be notified as part of the 'Gazettal' process include:

- ministerial portfolio, department or agency, division or group, branch or office and postcode of branch or office;
- description of the goods or services sufficient to identify the nature and quantity of the procurement;
- department or agency reference;
- for contracts, the purchase order number, total estimated liability (Australian currency) and date;
- for standing offers or similar arrangements, the total estimated value (Australian currency) and period of the offer;
- where applicable, the identifying period contract number or the relevant standing offer used to acquire the supplies;
- for each supplier, its name, postal address, postcode, State, country and its Australian Business Number (ABN)[64];
- name and telephone number of the contact officer for enquires about the notification; and
- the Australian and New Zealand Standard Commodity Classification (ANZSCC) for the goods or services procured.[65]

Agencies should not report the following details in the *Gazette*:

- transfer of funds to other agencies, divisions within an agency or trust funds within an agency which are not in return for goods and services;
- grants to outside bodies or state governments;
- proceeds from sales or disposals of assets;
- tax payments, for example, fringe benefits tax;

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64 Commonwealth Procurement Circular CPC 00/3 implemented the requirement that the Australian Business Number be the new supplier identifier for gazettal purposes, prior to the release of this circular agencies were required to gazette suppliers Data Universal Numbering System (DUNS TM).

65 Changes to the Commonwealth Procurement Framework—Commonwealth Procurement Circular CPC 98/3.

- salaries to Commonwealth public servants;
- payments of travelling allowances or other allowances to public servants;
- petty cash reimbursements for officers who have paid for supplies from their own funds;
- payment of monthly or other accounts payable under an existing, previously gazetted contract;
- refunds to customers for a prior payment made for a product or service; and
- supplies procured and used overseas.[66]

66 ibid.

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