

The Auditor-General
Audit Report No.8 2002-03
Business Support Process Audit

**The Senate Order for
Department and Agency Contracts
(September 2002)**

Australian National Audit Office

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of Australia 2002

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Canberra ACT
18 September 2002

Dear Mr President
Dear Mr Speaker

The Australian National Audit Office has undertaken a business support process audit across agencies in accordance with the authority contained in the *Auditor-General Act 1997*. I present this report of this audit, and the accompanying brochure, to the Parliament. The report is titled *The Senate Order for Department and Agency Contracts (September 2002)*.

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

AEC	Australian Electoral Commission
AGS	Australian Government Solicitor
ANAO	Australian National Audit Office
ASIO	Australian Security Intelligence Organisation
ASIS	Australian Secret Intelligence Service
Audit Report No.33	<i>Senate Order of 20 June 2001 (February 2002) (ANAO Audit Report No.33, 2001–02)</i>
Audit Report No.38	<i>Use of Confidentiality Provisions in Commonwealth Contracts (ANAO Audit Report No.38, 2000–01)</i>
CEIs	Chief Executive’s Instructions
CEOs	Chief Executive Officers
CPGs	Commonwealth Procurement Guidelines
Defence	Department of Defence
DEST	Department of Education, Science and Training
DVA	Department of Veterans’ Affairs
FCA	Family Court of Australia
Finance	Department of Finance and Administration
FMA Act	<i>Financial Management and Accountability Act 1997</i>
FMIS	Financial Management Information System
FOI Act	<i>Freedom of Information Act 1982</i>
FPA Committee	Senate Finance and Public Administration References Committee
GaPS	Gazette Publishing System
JCPAA	Joint Committee of Public Accounts and Audit
RFT	Request for Tender

Summary and Recommendations

Summary

Background

1. In June 2000, the Senate Finance and Public Administration References (FPA) Committee tabled an interim report of its inquiry into the mechanism for providing accountability to the Senate in relation to government contracts in response to a draft Senate Motion that sought to provide greater transparency of government contracts.
2. In its report, the FPA Committee considered that the level of information to the Parliament and the public about government contracting had not kept pace with the increased rate of contracting out, particularly in the outsourcing of many functions previously performed by government agencies. The Committee also considered that the general principle, sometimes called the reverse onus principle, was that information in contracts should not be made confidential unless there is good reason to do so. The report also commented that, if government sought to keep information confidential, then government must establish that it is in the public interest for the information not to be disclosed.
3. In May 2001, the ANAO tabled Audit Report No.38, 2000–01, *Use of Confidentiality Provisions in Commonwealth Contracts* (Audit Report No.38). This audit, initiated as a result of the FPA Committee inquiry, developed, among other things: criteria to assist agencies in determining whether contract provisions or contract material should be classified as confidential; and a framework for dealing with issues of confidentiality in contracts and disclosure of confidential information to parliamentary committees. The report's recommendations were generally accepted by those agencies that were included in the audit.

The Senate Order and the FPA Committee's final report

4. On 20 June 2001, the Senate made an Order¹ that required Ministers to table letters of advice that all agencies,² which they administered, had placed on the Internet, lists of contracts of \$100 000 or more by the tenth day of the Spring and Autumn³ sittings of Parliament. The list was to include all contracts that had not been fully performed and any other contracts entered into during the previous 12 months, and to indicate, amongst other things, whether the contracts contained any confidentiality provisions.

¹ The Order was amended in September 2001 and renamed the Senate Order for Department and Agency Contracts.

² Agencies within the meaning of the *Financial Management and Accountability Act 1997* (FMA Act).

³ In the case of Autumn 2002 Sittings this was 21 March 2002.

5. In late August 2001, the Government agreed that agencies would comply with the spirit of the Senate Order. The Government advised that information regarding individual contracts would not be provided where disclosure would be contrary to the public interest, legislative requirements or undertakings given. Further, it indicated that agencies' compliance with the Order would be progressive as agencies refined arrangements and processes to meet the requirements.

6. On 26 September 2001, the FPA Committee tabled its final report on its inquiry, *Commonwealth Contracts: a New Framework for Accountability*. The report incorporated a draft amendment to the Order, which was agreed to by the Senate on the following day, and endorsed the application, and immediate use, of the ANAO-developed criteria for assessing confidentiality provisions, in advance of a contract being entered into by Commonwealth agencies.

Commonwealth Procurement Guidelines

7. On 3 October 2001, the Government released the updated *Commonwealth Procurement Guidelines* (CPGs), which, in addition to confirming the requirement to comply with the spirit of the Senate Order, stipulated that agencies should:

- include provisions in tender documentation and contracts that alert prospective providers to the public accountability requirements of the Commonwealth, including disclosure to Parliament and its Committees; and
- consider, on a case-by-case basis, what might be commercial-in-confidence when designing any contract.⁴

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

Government response to the Senate Order, as amended, and the FPA Committee report

9. The Government responded to the Senate Order, as amended, and the FPA Committee report on 5 June 2002. In summary, the response:

- indicated that the Government would comply with the spirit of the amended Order on the same terms as the original Order;
- noted that the classification of commercial-in-confidence material can change over time and that agencies may need to periodically reassess their classification of contractual material; and

⁴ *Commonwealth Procurement Guidelines*, September 2001, subsection 1.2.

- reaffirmed that the February 2002 version of the CPGs required agencies to include provisions in tender documentation and contracts that alert prospective providers to the public accountability requirements of the Commonwealth, including disclosure to Parliament and its Committees.

Requirement for audit

Senate Order request

10. The Senate Order requested the Auditor-General to undertake twice-yearly examinations of agency contracts required to be listed on the Internet and report whether there had been any inappropriate use of confidentiality provisions (paragraph 3 of both the original and amended Order). The Auditor-General agreed to the request, which requires each audit report to be completed within six months of the date set for Ministers to table their letters of advice.

First audit

11. The first audit report, in relation to contract information to be listed on the Internet by the tenth day of the Spring 2001 parliamentary sitting, was titled *Senate Order of 20 June 2001 (February 2002)* and tabled on 25 February 2002.⁵

12. The key findings from the audit of selected agencies were that:

- the processes used to compile the Internet listing of contracts provided a reasonable level of assurance that the listings were complete;
- the processes for determining whether information in a contract was confidential, were considered appropriate; and
- 40 of the 64 contracts examined contained confidentiality provisions that were considered inappropriate when assessed against the Senate-endorsed criteria for determining confidentiality in contracts.

This report

13. This report relates to the second audit under the Senate Order, namely, the audit of the contract information associated with the tabling of letters by Ministers by the tenth day of the Autumn 2002 sitting (21 March 2002). The audit was based on similar objectives to those of the first audit.

⁵ *Senate Order of 20 June 2001 (February 2002)*, Audit Report No.33, 2001–02.

Audit objectives

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

15. In developing the audit objectives, the ANAO had regard to both the original and the amended Order as the Department of Finance and Administration (Finance) had advised agencies that, as the Government had not responded to the amended Senate Order, they ‘...should continue to comply with the terms of the original Order in line with the Government’s response of 27 August 2001’.

Audit scope and focus

Scope

16. The audit involved a desktop review of all FMA Act agencies to enable a report on the information that had been provided on the Internet. In addition, the ANAO selected six agencies for a more detailed review of the processes for making the Internet listings and the policies and practices for determining confidentiality provisions in contracts.

Focus

17. The focus of the audit in relation to confidentiality was on commercial-in-confidence information.⁶ The ANAO recognised, however, that agencies may have reported confidentiality for other reasons, for example, information protected with a national security classification, or personal information.

Overall conclusion

18. The ANAO concluded that most agencies⁷ covered by the Senate Order had reported their contracts of \$100 000 or more on the Internet and complied with most of the requirements of the original Order in accordance with the Government’s policy of progressively complying with requirements of the original Order. Nevertheless, some agencies, particularly the larger ones, faced some difficulties in complying with some of the requirements, such as listing of contracts that contain confidentiality provisions. The ANAO also concluded, in

⁶ The actual wording of the Senate Order does not specifically refer to commercial-in-confidence. However, the commercial-in-confidence classification of contracts was the basis for the original Senate Motion and the holding of the FPA Committee’s inquiry.

⁷ The only exceptions were those claiming exemption and those with no relevant contracts to report. See further Chapter 2, paragraphs 2.2, 2.3 and 2.11.

relation to the six agencies reviewed in detail, that the Internet listings were generally complete in terms of the total number of contracts listed and accurate in terms of content.

19. Most of the six agencies were in the process of updating their policies and procedures to reflect the requirements of the new accountability framework. The ANAO concluded that most policies reflected the guidance in the CPGs that agencies should alert contractors to the accountability requirements of the Commonwealth, including disclosure to Parliament and its committees, and that they should consider, on a case-by-case basis, what might be commercial-in-confidence when designing any contract.

20. Further, the ANAO considered that only nine of 56 contracts entered into by the six agencies reviewed were appropriately classified as confidential if criteria endorsed by the FPA Committee were retrospectively applied to these contracts. The high proportion of contracts classified inappropriately was not unexpected, given that the majority of contracts were entered into by agencies before they had started to make the changes necessary to put into place the new accountability framework and without guidance to determine if information in a contract should be protected as confidential. In most cases, agencies agreed with the ANAO's assessment.

Key findings

Internet listings

21. The ANAO found that most FMA Act agencies had generally complied with the requirements of the original Senate Order or the Order as amended. In addition, a high proportion of agencies had placed their lists on the Internet either by, or shortly after, the due date.

22. Furthermore, 26 per cent of agencies had already complied fully with the additional requirements of the amended Order. A number of other agencies indicated that they had been ready to comply with the Order, as amended, but were waiting until the Government had responded to the Order before varying the information provided in their listing. As a result, most agencies were well placed to meet the additional requirements for the Spring 2002 Internet listing.

23. The processes followed by the six agencies subject to detailed audit, provided a reasonable level of confidence that the Internet listings were likely to be complete or nearly complete. In general, agencies with electronic contract registers were better placed to provide complete information relatively efficiently.

24. The ANAO considers that there is scope for improvement in the processes for ensuring completeness of the contract numbers and the accuracy of the

information relating to the contracts containing confidential information. In particular, guidance provided by agencies for officers to determine confidentiality provisions and the reasons for confidentiality should be more comprehensive to enable greater consistency in agency assessments. In this regard, Finance is developing guidance, which it expects to issue to all agencies in late 2002.

Use of confidentiality provisions

25. Most of the six agencies had either made, or were in the process of making, changes to their contract policy and procedure documents as a result of the new CPGs and the FPA Committee report. Furthermore, most agencies had taken steps to ensure that contractors were aware of the accountability requirements of the Commonwealth through their RFTs and contracts. There was, however, a requirement for some agencies to advise prospective contractors of the need to identify what information, if any, they required to be protected as confidential and that the claims would be considered by the agency before the contract was signed.

26. In applying the criteria developed for determining whether information should be classified as confidential, the ANAO considered that only nine of the 56 contracts examined were appropriately classified as confidential.

27. The ANAO considered that none of the other 47 contracts contained confidential information, and that, therefore, they had been inappropriately classified. As indicated earlier, this high proportion of contracts classified inappropriately was not unexpected, given the circumstances applying at the time the contracts were entered into.

Recommendations

The recommendations are based on the findings from the review of the six selected agencies but should have relevance to all FMA Act agencies, and have been framed accordingly.

**Recommendation
No. 1
Para 2.42**

To assist with the compilation of the Internet listing, the ANAO recommends that all FMA agencies, as appropriate:

- give priority consideration to establishing contract registers where the number of contracts makes it a practicable solution; and
- implement quality assurance processes, as necessary, to ensure the completeness and accuracy of the contract information listed on the Internet.

**Recommendation
No. 2
Para 3.24**

The ANAO recommends that all FMA agencies, as appropriate:

- review the standard forms of request for tender and contract to ensure contractors are made fully aware of the Commonwealth's governance and accountability requirements;
- implement procedures which require a case-by-case consideration of requests for information in, or associated with, contracts to be treated as confidential;
- provide guidance and training for procurement officers to assist them determine the appropriateness of claims of confidentiality made by potential contractors; and
- establish a training and staff awareness program covering the new governance and accountability framework for contracting for all relevant staff.

Agencies' responses

All of the agencies subject to audit agreed, or agreed in principle, with the recommendations. Specific comments from agencies are provided in the paragraphs following the recommendations in Chapters 2 and 3 of the report.

Audit Findings and Conclusions

1. Introduction

Background

1.1 In June 2000, the Senate Finance and Public Administration References (FPA) Committee tabled an interim report of its inquiry into the mechanism for providing accountability to the Senate in relation to government contracts in response to a draft Senate Motion that sought to provide greater transparency of government contracts.

1.2 In its report, the Committee considered that the level of information to the Parliament and the public about government contracting had not kept pace with the increased rate of contracting out, particularly in the outsourcing of many functions previously performed by government agencies. The Committee also considered that the general principle, sometimes called the reverse onus principle, was that information in contracts should not be made confidential unless there is good reason to do so. The report also commented that, if government sought to keep information confidential, then government must establish that it is in the public interest for the information not to be disclosed.

1.3 In November 2000, the Joint Committee of Public Accounts and Audit (JCPAA) tabled Report No.379, *Contract Management in the Australian Public Service*. The key objective of this inquiry was to analyse a range of examples and develop better practice approaches to contract management across Commonwealth agencies.

1.4 The ANAO tabled Audit Report No.38, 2000–01, *Use of Confidentiality Provisions in Commonwealth Contracts* (Audit Report No.38) in May 2001. This audit, initiated as a result of the FPA Committee inquiry, developed, among other things: criteria to assist agencies in determining whether contract provisions or contract material should be classified as confidential; and a framework for dealing with issues of confidentiality in contracts and disclosure of confidential information to parliamentary committees. The report's recommendations were generally accepted by those agencies that were included in the audit.

The Senate Order and the FPA Committee's final report

1.5 On 20 June 2001, the Senate made an Order that required Ministers to table letters of advice that all agencies,⁸ which they administered, had placed on the Internet, lists of contracts of \$100 000 or more by the tenth day of the Spring and Autumn⁹ sittings of Parliament. The list was to include all contracts that

⁸ Agencies within the meaning of the *Financial Management and Accountability Act 1997* (FMA Act).

⁹ In the case of Autumn 2002 Sittings, this was 21 March 2002.

had not been fully performed and any other contracts entered into during the previous 12 months, and to indicate, amongst other things, whether the contracts contained any confidentiality provisions. The Order was to take effect from 1 July 2001. As a result, the initial 12-month period was taken to be 1 July 2000 to 30 June 2001. A copy of the Order is at Appendix 1.

1.6 In late August 2001, the Government agreed that agencies would comply with the spirit of the Senate Order. The Government advised that information regarding individual contracts would not be provided where disclosure would be contrary to the public interest, legislative requirements or undertakings given. Further, it indicated that agencies' compliance with the Order would be progressive as agencies refined arrangements and processes to meet the requirements. A copy of the Government's response is at Appendix 2.

1.7 On 26 September 2001, the FPA Committee tabled its final report on its inquiry, *Commonwealth Contracts: a New Framework for Accountability*. The report incorporated a draft amendment to the Order, which was agreed to by the Senate on the following day, and endorsed the application, and immediate use, of the ANAO-developed criteria for assessing confidentiality provisions, in advance of signing a contract.

1.8 The main elements of the amendment to the Order related to the reporting of additional information on the Internet listings and in the Ministers' letters. In addition, the 'previous 12 months' was defined as 'the period of 12 months ending on the day before the first day of sitting of the Autumn or Spring sittings, as the case may be.' This definition is dependent on the variable dates from sitting to sitting, rather than fixed dates in the calendar, such as 1 July and 31 December.

1.9 The Order, as amended, became known as the *Order of the Senate for Department and Agency Contracts*. A copy of the amended Order is at Appendix 3.

1.10 The Department of Finance and Administration (Finance), as the department responsible for procurement policy, advised agencies on 18 October 2001 (and again on 15 February 2002) to continue to comply with the original Order, until the Government had responded to the amended Order. The advice also recommended that, as a contingency, agencies prepare for the additional requirements of the amended Order.

Commonwealth Procurement Guidelines

1.11 On 3 October 2001, the Government released the updated *Commonwealth Procurement Guidelines* (CPGs), which, in addition to confirming the requirement to comply with the spirit of the Senate Order, stipulated that agencies should:

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

1.12 The CPGs also contain a longstanding requirement for agencies to report all procurement contracts with a value of \$2000 or more in the Gazette Publishing System (GaPS) within six weeks of entering into agreements. GaPS is an electronic service that is available on the Internet.¹¹

1.13 The CPGs were reissued in February 2002, with no material changes to the requirements.

Government response to the JCPAA report on contract management

1.14 On 22 April 2002, the Government responded to the JCPAA report on contract management with some observations relevant to this audit.

1.15 In responding to Recommendation 2—that Chief Executive Officers (CEOs) should, whenever claiming commercial-in-confidence, issue a certificate stating which parts of a contract, and why these parts, are to be withheld—the Government considered that there were already sufficient accountability requirements in place through the CPGs, which include the Senate Order requirements. In addition, the Government stated that ‘Any decision to withhold information on commercial-in-confidence grounds needs to be fully substantiated, fundamentally stating the reasons why such information should not be disclosed’. The Government indicated that it would be ‘...issuing further guidance material that will better clarify how agencies should assess contracts to determine what should be classified as commercial-in-confidence to further enhance the existing robust accountability framework.’ Finance is developing this guidance and expects to issue it to all agencies in late 2002.

1.16 Recommendation 3 of the report stated that ‘All agencies must establish and maintain an effective contract register’. The Government agreed in principle with this recommendation.

1.17 In relation to both recommendations, the Government made particular reference to the CPG requirement that CEOs are responsible for ensuring

¹⁰ *Commonwealth Procurement Guidelines*, September 2001, subsection 1.2.

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

adequate systems for recording decisions, and reasons for making them, are maintained and that 'The responsibility for determining how to manage contracts within an agency properly belongs to the Chief Executive'.

Government response to the Senate Order, as amended, and the FPA Committee report

1.18 The Government responded to the Senate Order, as amended, and the FPA Committee report on 5 June 2002. In summary, the response:

- indicated that the Government would comply with the spirit of the amended Order on the same terms as the original Order;
- noted that the classification of commercial-in-confidence material can change over time and that agencies may need to periodically reassess their classification of contractual material; and
- reaffirmed that the February 2002 version of the CPGs required agencies to include provisions in tender documentation and contracts that alert prospective providers to the public accountability requirements of the Commonwealth, including disclosure to Parliament and its Committees.

1.19 A copy of the Government response in relation to the Senate Order, as amended, is at Appendix4 .

Requirement for audit

Senate Order request

1.20 The Senate Order requested the Auditor-General to undertake twice-yearly examinations of agency contracts required to be listed on the Internet and report whether there had been any inappropriate use of confidentiality provisions (paragraph 3 of both the original and amended Order). The Auditor-General agreed to the request, which requires each audit report to be completed within six months of the date set for Ministers to table their letters of advice.

1.21 The Senate Order, as amended, extended the request to examine contracts that had not been included on the Internet listings and to indicate whether the contracts should have been listed (paragraph 3A refers).

First audit

1.22 The first audit report, in relation to contract information to be listed on the Internet by the tenth day of the Spring 2001 parliamentary sittings, was titled *Senate Order of 20 June 2001 (February 2002)* and tabled on 25 February 2002.¹²

1.23 The audit included a review of all agencies' Internet websites and of the processes used by six agencies¹³ in compiling their Internet listings and in negotiating confidentiality provisions in contracts. The audit also examined 64 contracts deemed to be confidential by the selected agencies to assess whether the use of the confidentiality provisions was appropriate.

1.24 The key findings from the audit of the selected agencies were that:

- the processes used to compile the Internet listing of contracts provided a reasonable level of assurance that the listings were complete;
- the processes for determining whether information in a contract was confidential, were considered appropriate; and
- the use of confidentiality provisions in all 64 contracts examined was not unexpected given that, during the period the contracts were entered into, it was not general practice for agencies to discuss with suppliers those aspects of the contract that might be regarded as confidential. However, in applying the criteria developed for determining whether information should be classified as confidential, the ANAO considered that 40 contracts had confidentiality provisions that were inappropriate.

This report

1.25 This report relates to the second audit under the Senate Order, namely, the audit of the contract information associated with the tabling of letters by Ministers by the tenth day of the Autumn 2002 sitting (21 March 2002). The audit was based on similar objectives to those of the first audit.

Audit objectives

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

¹² op. cit., Audit Report No.33, 2001–02.

¹³ Australian Bureau of Statistics; Department of Agriculture, Fisheries and Forestry; Department of Immigration and Multicultural and Indigenous Affairs; Department of Industry, Tourism and Resources; Department of the Prime Minister and Cabinet; and the Joint House Department.

Objective 1—Internet listings

1.27 The first audit objective was to:

- (a) conduct a desktop review of all FMA Act agencies' Internet sites and determine whether a list of contracts had been placed on the Internet site and whether it was consistent with the requirements of the Senate Order; and
- (b) in selected agencies, examine the processes by which agencies' Internet listings were made, and assess whether the process was likely to lead to a listing that was complete in terms of number of contracts and the details provided.

Objective 2—Confidentiality provisions in contracts

1.28 The second audit objective was to examine in selected agencies:

- (a) the processes by which agencies determined what information in, or associated with, contracts should be protected as confidential or which contracts were considered to be confidential, and assess whether the process was likely to be appropriate;
- (b) a selection of contracts listed as containing confidentiality provisions and indicate whether there was any inappropriate use of such provisions; and
- (c) a selection of contracts which had been excluded from the Internet listing and assess whether the contract should have been listed.

1.29 In developing the audit objectives, the ANAO had regard to both the original and the amended Order as Finance had advised agencies in February 2002 that, as the Government had not responded to the amended Senate Order, they '...should continue to comply with the terms of the original Order in line with the Government's response of 27 August 2001'.

1.30 In addition, the ANAO recognised that agency Chief Executive Officers (CEOs) are responsible and accountable for agency administration under the FMA Act and the *Public Service Act 1999*, including for goods and services provided under outsourced arrangements. CEOs are therefore accountable for their agency's approach to contract management, including for determining, on a case-by-case basis, whether information in a contract should be protected as confidential.

Audit scope, focus and criteria

Scope

1.31 The audit involved a desktop review of all FMA Act agencies (objective 1a) to enable a report on what information had been provided on the Internet. In addition, the ANAO selected six agencies for a more detailed review of the processes used to make the Internet listings (Objective 1b) and of the use of confidentiality provisions in contracts (Objective 2).

1.32 Objective 2a, the examination of processes by which agencies determine what information in, or associated with, contracts should be protected as confidential, focused on the processes being used by the selected agencies now rather than those used in the past. In making an assessment of whether there was any inappropriate use of confidentiality provisions (Objective 2b), the ANAO examined a selection of contracts listed on the Internet as containing confidentiality provisions. Where possible, contracts entered into after 1 July 2001 were selected, as it was unlikely that agencies would have implemented revised contracting practices in order to enhance accountability and transparency before that date.

1.33 In relation to Objective 2c, each of the audited agencies advised the ANAO that none of its contracts had been excluded from being listed on the Internet.

Focus

1.34 The focus of the audit in relation to confidentiality was on commercial-in-confidence information.¹⁴ The ANAO recognised, however, that agencies may have reported confidentiality for other reasons, for example, information protected with a national security classification, or personal information.

Audit evaluation criteria

1.35 Audit evaluation criteria were developed for each of the audit sub-objectives. In summary, the criteria represent the management environment and internal controls that an agency would be expected to have in place to comply with the relevant legislative requirements, government policies and accepted management principles applicable to each objective.

¹⁴ The actual wording of the Senate Order does not specifically refer to commercial-in-confidence. However, the commercial-in-confidence classification of contracts was the basis for the original Senate Motion and the holding of the FPA Committee's inquiry.

Audit coverage and methodology

All FMA Act agencies

1.36 The number of contracts and number of contracts with confidentiality provisions for each of the FMA Act agencies that had listed contracts on the Internet for Autumn 2002 are shown at Appendix 5.

1.37 In total, there were 15 895 contracts on the Internet websites, including 4123 listed as containing confidentiality provisions. The number of contracts listed with confidentiality provisions is not complete, as some agencies have not yet identified which contracts contain confidentiality provisions.

Selected agencies

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

- Australian Electoral Commission (AEC);
- Centrelink;
- Department of Education, Science and Training (DEST);
- Department of Finance and Administration (Finance);
- Department of Veterans' Affairs (DVA); and
- Family Court of Australia (FCA).

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

Table 1.1

Number of contracts listed on the Internet—selected agencies

Agency	Number of contracts	Number of contracts listed as containing confidentiality provisions
Australian Electoral Commission	126	114
Centrelink	904	499
Department of Education, Science and Training	842	365
Department of Finance and Administration	287	278
Department of Veterans' Affairs	795	584
Family Court of Australia	78	26
Total	3032	1866

Source: ANAO analysis as at time of ANAO review of agency Internet listings for Autumn 2002 sittings.

1.40 The selected agencies reported a total of 3032 contracts, representing 19 per cent of the total number of contracts reported by all FMA Act agencies. In addition, the six agencies reported 1866 contracts with confidentiality provisions, or 45 per cent of the total number of such contracts listed by all agencies.¹⁵

Methodology

1.41 The audit involved:

- the accessing of all FMA Act agencies' Internet sites and the downloading of relevant information from the contract listings;
- the conduct of interviews and examination of files and records relating to the contract listings and the selected contracts at each of the selected agencies;
- consultation with legal advisers prior to determining an opinion on whether the contracts selected for examination were appropriately listed as containing confidentiality provisions; and
- discussions with the Procurement Branch in Finance and the FPA Committee Secretariat.

1.42 The six agencies were selected based on the total number of contracts and the proportion of contracts listed as containing confidentiality provisions, while maintaining a range in the size of agencies. The ANAO examined a total of 56 contracts across the six agencies.

1.43 The audit was conducted in accordance with ANAO Auditing Standards at an approximate cost of \$250 000.

Audit findings

1.44 Chapter 2 (Internet Listings) outlines the findings for the first audit objective, while Chapter 3 (Confidentiality Provisions in Contracts) outlines the findings for the second audit objective. The report includes two recommendations for consideration by all FMA Act agencies.

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

¹⁵ Note this percentage is higher than expected, as at the time of audit, some agencies were still working towards progressively meeting the requirements of the Senate Order, and did not classify any contracts as containing confidentiality provisions. See further at paragraph 1.37 and Chapter 2.

2. Internet Listings

This chapter reports on the Senate Order requirement for agencies to list contracts on the Internet.

Agencies' compliance with the requirements of the Senate Order

2.1 This section of the Chapter is concerned with all agencies covered by the Senate Order. It relates specifically to the audit's sub-objective 1a.

Agencies covered by the Order

2.2 During the reporting period, there were 75 FMA Act agencies.¹⁶ The five parliamentary departments,¹⁷ although agencies under the FMA Act, are not Departments of State administered by Ministers and, as a result, are not included in the Order. However, all the parliamentary departments, except the Department of the House of Representatives,¹⁸ chose to comply with the Order.

2.3 The Australian Security Intelligence Organisation (ASIO) and the Australian Secret Intelligence Service (ASIS) did not list contracts on the Internet because of national security concerns.¹⁹

2.4 Accordingly, there were 68 agencies that were required to comply with the Order for the Autumn 2002 reporting period.

¹⁶ FMA agencies were identified by reference to the Department of Finance and Administration website at <www.finance.gov.au/finframework/fma_agencies.html> on 11 February 2002.

¹⁷ Department of the Senate; Department of the House of Representatives; Department of the Parliamentary Library; Department of the Parliamentary Reporting Staff; and Joint House Department.

¹⁸ The Department of the House of Representatives advised that 'as a matter of principle this Department does not acknowledge nor comply with Senate Orders unless the House of Representatives has passed a similar order.'

¹⁹ ASIO advised that it would continue to consider contracts on a case-by-case basis and that, where national security concerns were not present, contracts would be listed in accordance with the Senate Order. ASIS advised that the Director-General had deemed that the disclosure of any contract details would constitute a type of communication that would be in breach of section 39 of the *Intelligence Services Act 2001*.

The requirements

Senate Order (20 June 2001)

2.5 Under paragraph (2) of the Senate Order of 20 June 2001, the list of contracts was to indicate:

- (a) each contract entered into by the agency which has not been fully performed or which has been entered into during the previous 12 months, and which provides for a consideration to the value of \$100 000 or more;
- (b) the contractor and the subject matter of each such contract;
- (c) whether each such contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether any provisions of the contract are regarded by the parties as confidential, and a statement of the reasons for confidentiality; and
- (d) an estimate of the cost of complying with this order.

Senate Order (as amended on 27 September 2001)

2.6 Under paragraph (2) of the Senate Order of 27 September 2001, the requirements of sub-paragraphs (b) and (d) were added to by including:

- the amount of consideration (sub-paragraph (b)); and
- a statement of the method used to make the estimate (of the cost of complying) (sub-paragraph (d)).

2.7 In addition, the wording of sub-paragraph (2)(c) was revised, whereby the words ‘whether any provisions of the contract are regarded by the parties as confidential’ were replaced by ‘whether there are any other requirements of confidentiality’.

2.8 In response to requests from agencies on the scope of the term ‘other requirements of confidentiality’, Finance advised all agencies that it covered ‘...attempts to keep confidential the provisions of the contract; and confidentiality clauses of a general nature’. Confidentiality clauses of a general nature exist in most Commonwealth contracts. In the ANAO’s view, they are designed to protect confidential information that may be obtained or generated in carrying out the contract, as well as protecting information in the contract which may be confidential but which has not been specifically identified.

Audit evaluation criteria

2.9 Agencies would be expected to have listed contracts on their websites in accordance with paragraph (2) of the Senate Order by the due date (21 March 2002).²⁰ In addition to the specific requirements of the Order, each agency would be expected to have:

- identified the relevant reporting period (Autumn 2002) and the period in which the contracts were entered into;²¹ and
- established a clear and readily accessible path to the listing on its home page.

Assessing compliance with the Order

2.10 The ANAO assessed the performance of each of the 68 agencies that were required to comply with the Senate Order against the requirements of the Order. In conducting the assessment, the ANAO recognised that it would be likely that agencies would be in different stages of achieving compliance with the Order because:

- Finance had instructed agencies to comply with the original Senate Order until the Government had responded to the amended Order. As a result, it would not be unreasonable to expect most agencies to have complied with the requirements of the original Order and some agencies to have partly, or fully, complied with the amended Order; and
- The Government, in response to the original Order, indicated that compliance would be progressive as agencies ‘...refine arrangements and processes to meet the requirements (of the Order)’. This was restated in the Government’s response to the amended Order.

Audit findings

Agencies with a contract listing on the Internet

2.11 Sixty-five of the 68 agencies had placed a listing of contracts on their websites for the Autumn 2002 reporting period. Two of the other agencies, namely, the Classification Board and the Classification Review Board, are administered by the Office of Film and Literature Classification and do not enter into contracts in their own right. The third, the Office of the Inspector-General

²⁰ The due date for the listings to be on the Internet was taken to be the tenth day of the Autumn 2002 Sittings, which was 21 March 2002. This day is outlined in paragraph (1) of the Senate Order.

²¹ The period of 12 months as described in sub-paragraph (2)(a) of the Order was generally taken to be 1 January—31 December 2001 for the Autumn 2002 listing, but was specified as being 12 February 2001—11 February 2002 in the Senate Order, as amended.

of Intelligence and Security advised that it did not have any contracts of \$100 000 or more, and, therefore, was not required to place a list on the Internet.

2.12 ANAO assessment of each of the 65 agencies against the specific requirements of either the original or amended Senate Order is detailed at Appendix 6. The ANAO confirmed with each agency that the ANAO's assessment of each listing was correct.

Summary of Internet listings

2.13 In summary, in relation to complying with the requirements of the Order, the ANAO found, on the basis of its desk-top review, that:

- 48 agencies (74 per cent) compiled the listing in accordance with the Order at 20 June 2001 and 17 agencies (26 per cent) compiled the listing in accordance with the Order at 27 September 2001. This is consistent with the ANAO's expectation that the majority would comply with the original Order;
- 22 of the 48 agencies (46 per cent), that had compiled the listing in accordance with the Order at 20 June 2001, met the requirements including the due date;
- nine of the 17 agencies (53 per cent), that had compiled the listing in accordance with the Order at 27 September 2001, met the requirements including the due date; and
- 41 of the agencies had listed by the due date of 21 March 2002 with another 18 within two weeks and another three within two to four weeks, representing a total of 62 (90 per cent) within four weeks of the due date.

2.14 Some agencies advised that they had been ready to comply with the Order, as amended, but decided to wait until the Government had responded to the Order before they did so.

2.15 The Department of Defence and the Department of Health and Ageing had not yet identified which contracts contained confidentiality provisions. Specific comments from these two agencies are shown below:

Department of Defence

2.16 For the previous reporting period, the Minister for Defence had advised the President of the Senate that compliance with the Order had been impracticable in the timeframe available, and accordingly, the Spring 2001 listing by the Department of Defence (Defence) was for all contracts entered into over the last five years.²² In addition, at that time, Defence advised the ANAO that it

²² op. cit., Audit Report No.33, 2001–02, paragraph 2.5, p. 30.

was working towards being able to capture the data to meet the various requirements.²³

2.17 In responding to the request to confirm that the ANAO's interpretation of the Autumn 2002 Internet listing was correct, Defence, advised that, while the number of contracts listed on the website for the period was 3697, the website also included an additional 13 046 contracts from the previous five years. Further, Defence advised that, due to the operation of the its financial management system, 'contracts' in this context, referred to purchase orders notified in the Purchasing and Disposals Gazette, and that, accordingly, in some circumstances, the number of gazetted purchase orders may exceed the number of contracts.

2.18 Defence also advised that:

It has actively pursued measures over the past 12 months to progressively comply with the Order, including:

- **The development of revised guidance for the identification and management of commercial-in-confidence information.** The latest version of the Defence Procurement Policy Manual (DPPM), released in April 2002, provides guidance on the identification, classification and treatment of commercial-in-confidence information, as well as advice on the disclosure of commercial-in-confidence information to Parliament and its committees. The guidance requires Defence and the contractor to identify and agree commercial-in-confidence information within each contract at the effective date.
- **The establishment of a Contracts Register.** Defence is in the process of establishing a Contracts Register database to capture more accurate and comprehensive contract information. It is expected that the Contracts Register will, for future contracts valued at over \$100 000, identify contracts that contain commercial-in-confidence information and provide a statement of reasons. It is anticipated that this database will be in place by March 2003.

Given the scope of the task for Defence, an agency that enters into approximately 5000 purchase orders annually valued at or over \$100000, the above activities represent a considerable resource commitment by Defence.

Department of Health and Ageing

2.19 At the time of the previous audit, the Department of Health and Ageing advised that it was still developing its listing of contracts and anticipated having

²³ *ibid*, paragraph 2.6, p. 30.

a complete listing in line with the requirements of the Senate Order in the near future.²⁴

2.20 In July 2002, the Department of Health and Ageing indicated that the development of the department's website was ongoing and that it would be updated for the Spring 2002 reporting period. The update will include '...the values of contracts; specific references to any confidential contracts and related statement(s) of reasons; and details of the cost, and method of calculating the cost, of compliance with the Senate Order'.

Progress since the previous reporting period

2.21 All agencies required to comply with the Order had listed their contracts on the Internet within eight weeks of the due tabling date, which was an improvement over the Spring 2001 reporting period when six agencies had not listed by the time the audit report was prepared.

Presentation

2.22 The ANAO also found that many agencies did not have a readily identifiable path on their website to the contract listing (see Appendix 7 for the website addresses for all FMA agencies' contract listings). In addition, many agencies had not clearly identified the reporting period covered, namely, Autumn 2002 nor the 12 month period relating to the contracts. As a consequence, readers may have difficulties finding the contract listing and/or ascertaining whether the listing is current.

Conclusion

2.23 The ANAO found that most FMA agencies had generally complied with the requirements of the original Senate Order or the Order as amended. In addition, a high proportion of agencies had placed their lists on the Internet either by, or shortly after, the due date.

2.24 Furthermore, 26 per cent of agencies had already complied fully with the additional requirements of the amended Order. A number of other agencies indicated that they had been ready to comply with the Order, as amended, but were waiting until the Government had responded to the Order before varying the information provided in their listing. As a result, most agencies were well placed to meet the additional requirements for the Spring 2002 Internet listing.

2.25 The ANAO also considers that there is scope for many agencies to improve the presentation and readability of their Internet listings.

²⁴ *ibid*, paragraph 2.7, p. 30.

The processes used to create the Internet list

2.26 This section of the Chapter is confined to the six agencies selected for detailed review. It relates specifically to audit sub-objective 1b, that is, the processes used by the agencies to create the Internet listing of contracts.

Audit evaluation criteria

2.27 Agencies would be expected to have:

- adopted/developed policy and procedures for recording contracts;
- allocated responsibility for recording/listing contracts on the agency's website;
- implemented a system (for example, a contracts register) for the recording and reporting of the relevant information of all contracts (website and GaPS²⁵);
- developed appropriate controls for identifying those contracts with confidentiality provisions and the reasons for confidentiality (including discussing with suppliers as necessary); and
- implemented procedures for reconciling the listing with independent records and checking of the information listed, and updating the agency's website (timeliness, accuracy, completeness).

Audit findings

Policy and procedures

2.28 In view of the short timeframe since the Internet listing had become a requirement, most agencies had not yet revised relevant policies and CEIs relating to procurement and contracts to reflect the Senate Order requirements. However, one agency (Finance) had done so. All six agencies had implemented various arrangements and procedures for the required information to be recorded and reported. The AEC had drafted a revised CEI while the other four agencies intended to amend policy documents in the near future.

Responsibility

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

²⁵ Agencies are required to report all procurement contracts of \$2000 or more on GaPS within six weeks of entering into an agreement.

unit. At DEST it was the Business Assurance Section, which included procurement policy and advising, and in the case of Finance, it was the Financial and E-solutions Group which was responsible.

2.30 All the agencies operated in devolved environments where contracts were arranged and managed by responsible business units, including state offices in five of the agencies. However, at the FCA, central office staff were the only staff that could authorise contracts with a value of \$100 000 or more. As a consequence, the devolved environment in which FCA operates did not impact on the preparation of its listing.

Preparation of the listing

2.31 Centrelink, DEST, DVA and FCA maintained contract registers, which were used as the basis for compiling the listing of contracts required by sub-paragraph 2(a) of the Order. FCA used the register and its financial management information system (FMIS), while the other agencies confirmed details with contract managers and updated the listing with amendments and additions, as necessary. DVA advised that it had enhanced its contract register to record whether a contract contains confidential information and the reasons why the information is considered confidential.

2.32 Finance developed a listing from gazettal data and its FMIS and then distributed it to business groups for confirmation/amendment. The AEC sent out its Spring 2001 listing to operational areas for updating. The AEC advised that it had implemented a contract register from mid 2002.

2.33 Even though the ANAO has been critical of the reliability of GaPS data previously (see Audit Report No.38),²⁶ and the definition of a contract for the purposes of GaPS²⁷ differs from that provided to agencies for purposes of complying with the Senate Order²⁸, it considered that as a general principle, agencies could have used data in GaPS as a way of checking that the relevant procurement contracts were on the Internet. The ANAO found that most agencies had not reconciled their draft Internet listings with GaPS.

2.34 The ANAO analysis of GaPS data revealed that DEST had listed all relevant contracts, whereas both AEC and FCA had not listed a small number of contracts. A complete analysis was not possible for the other three agencies because there was a lack of commonality between the data.

²⁶ op. cit., paragraphs 6.16 to 6.21, pp. 76,77.

²⁷ The CPGs require the reporting of procurement activity covered by agency agreements, Commonwealth contracts and standing offers with an estimated liability of \$2000 or more.

²⁸ The Senate Order applies to procurement contracts and any other agreements that are contracts. See later paragraph 2.50.

2.35 In general, however, even though there were some minor errors identified in the Internet listings, the ANAO considered that the processes adopted by agencies meant that the number of contracts listed on the Internet was likely to be complete or nearly complete.

2.36 The ANAO considered that the Internet listings were best prepared where contract registers and appropriate quality assurance processes were used. The ANAO noted that the establishment and the maintenance of contract registers had been recommended by the JCPAA in its report on contract management.²⁹ The Government, in agreeing in principle with the recommendation, indicated amongst other things that it ‘...is the responsibility of individual agencies to implement procedures for the management of their contracts that best suit their individual and special needs’.³⁰ In the ANAO’s view, consistent with the above, priority should be given by all agencies to establishing contract registers where the number of contracts makes that a practicable response.

Identification of confidentiality provisions

2.37 The identification of confidentiality provisions in contracts and the reasons for confidentiality proved to be a relatively difficult task for all agencies except FCA. In agencies other than FCA, individual contract managers had to make decisions quickly and, in most cases, with limited guidance and independently of each other. In FCA’s case, the contracts unit made the assessments centrally.

2.38 Two agencies (AEC and Finance) consulted the contractors to determine what contractual information the contractors considered to be confidential. In Finance’s case, it wrote to contractors detailing the requirements of the Senate Order and identifying the information, which in the department’s opinion, warranted protection. Contractors were asked to concur with the department’s assessment or advise of any areas of disagreement. Finance adopted this approach because it assumed that most contractors would respond that the entire contract was considered confidential.

2.39 Centrelink, DEST and DVA did not consider it appropriate to consult with contractors because of the large numbers of contracts involved. FCA had no need to do so because of the nature of its contracts.

Conclusion

2.40 The ANAO concluded that the processes followed by the six agencies, provided a reasonable level of confidence that the Internet listings were likely

²⁹ JCPAA Report No 379, Contract Management in the Australian Public Service, p. 43.

³⁰ Senate Hansard, 14 May 2002, pp. 1370,1371.

to be complete or nearly complete. In general, agencies with electronic contract registers were better placed to provide complete information relatively efficiently.

2.41 The ANAO considers that there is scope for improvement in the processes for ensuring completeness of the contract numbers and the accuracy of the information relating to the contracts containing confidential information. In particular, the guidance provided by agencies for officers to determine confidentiality provisions and the reasons for confidentiality should be more comprehensive to enable more consistency in agency assessments.

Recommendation No.1

2.42 To assist with the compilation of the Internet listing, the ANAO *recommends* that all FMA agencies, as appropriate:

- give priority consideration to establishing contract registers where the number of contracts makes it a practicable solution; and
- implement quality assurance processes, as necessary, to ensure the completeness and accuracy of the contract information listed on the Internet.

Agencies' responses

2.43 All six agencies agreed, or agreed in principle, with this recommendation.

2.44 Specific comments were as follows:

- AEC advised that both aspects of the recommendation were being implemented;
- DEST advised that it was compliant with both parts of the recommendation;
- Finance advised that it was proceeding with enhancements to its contracts register; and
- DVA advised that its contract register was continually being developed to improve the department's capability to respond to a range of internal and external reporting requirements.

2.45 Finance, in its role as the department responsible for procurement policy, advised that:

This recommendation is consistent with Commonwealth Procurement Policy. Finance notes that responsibility for determining how to manage contracts within an agency properly belongs to the Chief Executive of that agency, with individual agencies responsible for implementing procedures for the management of their contracts that best suit their individual and special needs.

Other issues arising from the review of Internet listings

2.46 This section of the Chapter relates to some other issues that arose from the review of all Internet sites and of the processes used by the six agencies. These issues can be divided into two main categories:

- interpretation of the requirements and terms of the Senate Order; and
- presentation and disclosure issues.

Interpretation of the requirements and terms

2.47 The ANAO observed that agencies in general had difficulty interpreting certain requirements and terms of the Senate Order. The main issues were:

The reporting period

2.48 To date, most agencies have listed contracts entered into or not fully performed in the financial year for the Spring sittings and in the calendar year for the Autumn sittings. The amended Order has defined the 12-month reporting period as ending the day before the first Parliamentary sitting day for Autumn and Spring respectively. This results in variable reporting dates, for example, 12 February 2001 to 11 February 2002 for the Autumn 2002 period and 19 August 2001 to 18 August 2002 for the Spring 2002 period. In addition, some agencies expressed their concerns to Finance about the timeframe available between the end of the reporting period and tabling of letters of compliance.

2.49 Finance indicated to all agencies that the Minister for Finance and Administration had written to the Chair of the FPA Committee requesting that consideration be given to amending the Order's reporting period to align with calendar year and financial year. The ANAO considers that this would assist all agencies to comply with the Order more efficiently.

Definition of a contract

2.50 The Senate Order does not define what is meant by a contract. Finance consulted with the Australian Government Solicitor (AGS) and advised that agencies should be aware that a contract is based on the legal status of the arrangement rather than the name given to the arrangement, and that if agencies were unsure of the status of the arrangement they should seek their own legal advice. AGS provided examples of arrangements that were likely to be contracts for the purposes of the Senate Order, for example, lease arrangements, certain funding agreements and certain employment contracts (which were not Certified Agreements or Australian Workplace Agreements). The AGS also provided

examples of arrangements that were unlikely to be contracts for the purpose of the Senate Order—these included agreements between two FMA Act agencies, and employment contracts governed by a Certified Agreement.

2.51 The Minister for Finance and Administration subsequently wrote to the FPA Committee suggesting that the Order should only relate to procurement contracts as, by having to list all contracts—

...agencies are likely to need to maintain two systems because GaPS only reports procurement contracts. Limiting the coverage of the Senate Order to include only procurement related contracts will assist the Government with the cost and complexity of compliance.

2.52 This is a matter yet to be resolved between the Government and the FPA Committee.

Presentation and disclosure issues

2.53 The ANAO considers that there are several avenues for improving the presentation and disclosure of the Internet listings to provide some administrative efficiency to agency reporting requirements. These could include ensuring that:

- there is a standard format of listing contracts; and
- the list of contracts includes the date that the contract was entered into and is likely to be complete.

2.54 In addition, Finance advised that it was currently considering proposed amendments to GaPS that would enable the GaPS system to capture Senate Order information in respect of procurement contracts.

3. Confidentiality Provisions in Contracts

This chapter reports on the new accountability framework relating to the use of confidentiality provisions in contracts. It is confined to the six agencies selected for detailed review.

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

3.1 This section of the Chapter relates specifically to sub-objective 2a.

3.2 In assessing the processes agencies used to determine what information in, or associated with, contracts should be protected as confidential, the ANAO used, as the basis for analysis, the contracting accountability framework articulated in the CPGs and the FPA Committee in its final report. The ANAO's view of the process for dealing with confidentiality of information in contracts is shown diagrammatically at Appendix 8.

Audit evaluation criteria

3.3 The ANAO expected that, by the time that the audit commenced in early April 2002, agencies would have had put in place, or would be in the process of putting in place, a contracting framework that:

- ensured that potential contractors understood:
 - that the expected approach in the Commonwealth is for contractual information not to be protected as confidential unless there is a good reason to do so;
 - the accountability requirements applying when contracting with the Commonwealth, including possible disclosure to parliamentary committees, and the requirements of the Freedom of Information (FOI) Act; and
 - that contractual information may be required to be disclosed by law even though the information is considered to be confidential by the contractor;
- required potential contractors to indicate if any information in the tender or the contract was considered to be confidential;
- provided agency officers with criteria to assist them assess, on a case-by-case basis, normally in conjunction with the contractor, the merits

or otherwise of the contractor's claim that information in the contract is confidential and should be protected as such;

- ensured that information agreed as being confidential is identified as such in the contract; and
- established staff training and awareness activities of the Commonwealth's contracting environment for relevant staff.

3.4 As the FPA Committee's final report and the revised CPGs were not released until late 2001, the ANAO acknowledges that there was a limited timeframe for agencies to implement the new framework prior to the commencement of the audit.

Audit findings

Policy and guidance

3.5 Only one of the audited agencies (Finance) had amended its formal procurement policies to incorporate the new accountability framework. At the time of the audit three other agencies had made, or were in the process of making, some changes to tender and contracting documentation and associated practices. One of these agencies, Centrelink, had implemented new practices in October/November 2001. Of the other two, the AEC was developing its policies and the FCA was planning to issue new policies and practices in the near future. The two remaining agencies, DEST and DVA, advised that they too, would be revising their policies in line with the new accountability framework.

3.6 Centrelink was the only agency to have issued any detailed guidance on how to determine what information in a contract was likely to be confidential. Centrelink had participated with a group of other agencies in obtaining guidance on confidentiality matters from the AGS. Centrelink used this and other guidance to develop its own criteria for determining what information in, or associated with, a contract is likely to be confidential.

3.7 Most of the other agencies had issued guidance for determining which existing contracts should be listed on the Internet as containing confidentiality provisions. However, the ANAO considers that the guidance needed to be further developed and provided to procurement and contracting officers to enable them to assess what information in, or associated with, a contract is confidential, as part of the contract negotiation process. As stated earlier, Finance is developing guidance for issue to all agencies.

3.8 DVA advised that, until the department has reviewed its tendering and contracting policy and procedures, '...staff have been given better guidance for

responding to the Senate Order for the Spring 2002 sitting and asked to review the assessment of confidentiality within contracts within the parameters set out in the criteria prepared by ANAO’.

Tender documents

3.9 The ANAO considered that Centrelink’s standard Request for Tender (RFT) provided the most comprehensive advice for prospective tenderers, among the tender documents of the six agencies examined. The RFT covered:

- the governance and accountability framework in which Centrelink operates;
- the requirement for the tenderer to specifically identify all contract provisions or contract material which it considers to be confidential;
- the process by which Centrelink will consider the claims of confidentiality;
- the need for any confidentiality considerations to be agreed before a contract is entered into;
- Centrelink’s reporting and disclosure requirements, including to Parliament; and
- the existence of secrecy provisions in Commonwealth legislation requiring the protection of certain information.

3.10 The RFT used by one of the Business Groups in Finance and the RFTs for the other agencies allowed for prospective contractors to identify information that they consider to be confidential. However, the RFTs did not cover the processes by which the agencies would consider the prospective contractor’s claim for confidentiality. In DEST’s case, the tenderers are required to identify information that they consider confidential, and are advised that ‘...DEST will give effect to the Tenderer’s stated wishes in so far as its obligations under the law permit...’. DVA advised that it was reviewing the existing words in standard tender and contract documents to ensure that tenderers and contractors were explicitly made aware of the Commonwealth’s governance and accountability requirements.

3.11 The ANAO considers that tenderers need to be made aware of the process by which an agency will consider the claims of confidentiality and, in particular, the process used to assess whether a potential contractor’s claim for confidentiality is sound. Agencies need to consider on a case-by-case basis any claims of confidentiality, by the potential contractor, prior to a contract being entered into. Ultimately, the agency must be able to justify its agreeing to the inclusion of confidentiality provisions. An example RFT clause, outlining the advice that the ANAO considers appropriate to provide prospective contractors, is shown below.

Specifying confidential information in tenders—example RFT clause

The Commonwealth operates on the principle that information in a contract should not be protected as confidential unless there is good reason to do so.

Accordingly, Tenderers are asked to identify in Schedule X any information that they consider should be protected as confidential information. Tenderers must provide reasons why this information should be protected.

If the Tenderer fails to provide a response in Schedule X, the agency will consider that the Tenderer has no information that should be protected as confidential.

If the agency and a Tenderer enter into contract negotiations, the agency and the Tenderer must reach agreement on what information will be protected as confidential information under the contract. Changes and additions to information referred to in the Contract as confidential information may be made by agreement in writing between the agency and the contractor from time to time.

Source: Based on Centrelink's RFT

Standard forms of contract

3.12 Five agencies had at least one standard form of contract, including short and long forms for consultancy, IT and general services, and in some cases funding agreements. Generally, the forms at each agency provided for disclosure to Parliament, similar to the RFTs.

3.13 Finance did not have a standard form contract but provided general advice on the elements that need to be considered for each contract through a user guide for standard contract services. In addition, Finance advised that contract staff are expected to use the department's legal panel to assist with determining what information in a contract is confidential.

3.14 The Centrelink and AEC forms of contract, and Finance's procedures provide for confidential information to be defined by way of a contract schedule.

3.15 None of the other three agencies had standard form contract clauses that indicated that confidential information would be specified as such in the contract or listed in a contract schedule. An example contract clause specifying confidential information is shown below.

Specifying confidential information in contracts—example contract clause

The Commonwealth agency will keep confidential the provisions of this agreement (if any) described in Schedule XX of the contract, except:

- in cases where employees, legal advisers, auditors and sub-contractors require the information for the purposes of this agreement;
- as required by law;
- in connection with legal proceedings relating to this agreement; or
- in response to a request from a House of the Commonwealth Parliament or a Commonwealth Parliamentary committee.

Other than the provisions referred to in the clause above, the terms of this agreement are not confidential to the Contractor/Consultant.

Source: Derived from selected agencies' contracts

3.16 All six agencies' contracts generally included clauses, which, in the main, were aimed at protecting Commonwealth information obtained by the contractor during the performance of the contract. An example of such a clause is shown below:

Confidential Information means all information relating to the business, technology, financial or other affairs of the agency which:

- is by its nature confidential;
- is designated by the agency as confidential; or
- the Consultant knows, or ought to know, is confidential.

3.17 In some cases, where the information was not specifically identified in the contract as being confidential, similar clauses were relied upon to protect the contractor's information. In any event, in the absence of such clauses, the law of confidentiality protects information that is by its nature confidential or where both parties know, or ought to know, that the information is confidential.

Staff awareness

3.18 Centrelink, AEC and Finance have issued various policy documents to staff to assist them with the new contracting accountability framework.

3.19 At the time of the audit, the AEC was planning to conduct a national in-house contract training program, designed to address the requirements of the most recent CPGs. The program will consist of two courses—practices before contract signing, and contract management.

3.20 DVA advised that it had three main avenues for staff training and awareness: a two day training course, a nationally distributed newsletter, and

an annual contract summit, attended by representatives from National and State offices. Issues covered by the Senate Order have already been introduced in the training course and the newsletter, and would be covered in the contract summit to be held in September 2002.

3.21 The ANAO considers that, in conjunction with the development of guidance on the use of confidentiality and revision of the RFT and standard contract documents, all agencies should implement regular training and/or awareness programs for relevant procurement and contracting staff, as appropriate.

Conclusion

3.22 The ANAO concluded that most agencies had either made, or were in the process of making, changes to their contract policy and procedure documents as a result of the new CPGs and the FPA Committee report.

3.23 The ANAO also concluded that most agencies had taken steps to ensure that contractors were aware of the accountability requirements of the Commonwealth through their RFTs and contracts. There was, however, a requirement for some agencies to advise prospective contractors of the need to identify what information, if any, they required to be protected as confidential and that the claims would be considered by the agency before the contract was signed.

Recommendation No.2

3.24 The ANAO *recommends* that all FMA agencies, as appropriate:

- review the standard forms of request for tender and contract to ensure contractors are made fully aware of the Commonwealth's governance and accountability requirements;
- implement procedures which require a case-by-case consideration of requests for information in, or associated with, contracts to be treated as confidential;
- provide guidance and training for procurement officers to assist them determine the appropriateness of claims of confidentiality made by potential contractors; and
- establish a training and staff awareness program covering the new governance and accountability framework for contracting for all relevant staff.

Implementing the recommendation

3.25 In relation to the third dot point of the recommendation, the ANAO considers that agencies should use the criteria contained in Audit Report No.38, and subsequently endorsed by the Senate FPA Committee, or legal advice that is consistent with that criteria, until Finance issues guidance to assist agencies in determining claims of commercial confidentiality.

Agencies' responses

3.26 All agencies agreed, or agreed in principle, with the recommendation. Specific comments from agencies are shown below.

Finance policy response

3.27 Finance, in its role as the department responsible for procurement policy, advised that:

Standard forms of RFT and contract

This recommendation is consistent with the Commonwealth Procurement Guidelines which detail that 'Agencies should include provisions in tender documentation and contracts that alert prospective providers to the public accountability requirements of the Commonwealth, including disclosure to Parliament and its Committees'.

Finance also notes in circumstances where agencies do not use agency-wide standard documentation it is important to ensure a process exists whereby contractors are made aware of Commonwealth's governance and accountability requirements. Finance has introduced such a process.

Case-by-case consideration of requests to treat information as confidential

This recommendation is consistent with the Commonwealth Procurement Guidelines which detail that 'Agencies should consider, on a case-by-case basis, what might be commercial-in-confidence when designing any contract'.

Guidance for determining confidentiality

Finance is currently developing Whole-of-Government guidance to assist agencies in determining claims of commercial confidentiality (as acknowledged in the Report).

Training and staff awareness program

This recommendation is consistent with Commonwealth Procurement Policy. However, Finance notes that responsibility for determining how to manage contracts within an agency properly belongs to the Chief Executive of that agency, with individual agencies responsible for implementing procedures for the management of their contracts that best suit their individual and special needs.

3.28 In addition, Finance advised that its comments in relation to other aspects of the recommendation provide examples of the actions taken by Finance to ensure compliance with the Senate Order.

DEST response

3.29 DEST advised that it would adopt, as an interim measure, the recommendations on commercial-in-confidence claims. However, DEST would ‘...also continue to assess on a case-by-case basis confidentiality claims for other than commercial-in-confidence grounds’. Further, as noted earlier, DEST would ‘...re-examine its approach to commercial-in-confidence issues after Finance issues its guidelines for determining claims of commercial confidentiality’.

The use of confidentiality provisions in contracts

3.30 This section of the Chapter relates to the ANAO’s examination of a selection of contracts listed as confidential on the Internet to assess whether the contracts had been listed appropriately (sub-objective 2b).

3.31 In making assessments against this objective, the ANAO recognised that decisions in relation to contracts entered into before 1 July 2001, or before agencies put into place revised procedures for determining what information in contracts should be protected as confidential, would generally have been negotiated in circumstances where:

- the principle that information in, or associated with, contracts should not be made confidential, so far as possible, was not widely applied;
- decisions about the confidentiality of a contract, or some of its provisions, would have been made without the benefit of general guidance on how to determine whether information in contracts should be protected as confidential; and
- the parties may have assumed that the information was given and received in confidence.

3.32 In its examination, the ANAO also recognised that most of the contracts were negotiated at a time when it was not uncommon for agencies to treat commercial information as confidential. Audit Report No.38 noted that confidentiality of information in a contract is influenced not only by the nature of the information that is being provided but also the circumstances in which it is provided. The audit report states:

...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.³¹

³¹ ANAO Audit Report No.38 2000–2001, p. 57.

3.33 Although the use of provisions to protect the confidentiality of information was not unexpected given the circumstances described above, the ANAO considered that, in responding to the request in the Senate Order, it also would be appropriate for contracts to be assessed as if they had been negotiated in the environment envisaged by the FPA Committee in its final report. In this environment, the onus is on the supplier to make a case for information to be protected as being confidential. The aim was to provide Parliament and individual agencies with an assessment of whether there was any commercial information in the contracts that would have reasonably been considered confidential if agencies had used the Senate-endorsed criteria at the time that the contracts were signed.

3.34 The ANAO acknowledges that, in making its judgement on whether a contract has been appropriately classified, it did so by examining the information in the contract and did not discuss with the supplier whether there were any particular circumstances that would make the information confidential over and above, for example, the price elements of the contract, which represented the most common reason for classifying contracts as confidential.

Audit evaluation criteria

3.35 The ANAO assessed each of the contracts selected for examination against the criteria for determining whether information in contracts could properly be protected as confidential, as outlined in the FPA Committee's final report and Audit Report No.38. The criteria includes two main elements, which are detailed below:

- **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’³² 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.

Examples of what would, or would not be considered confidential

3.36 Audit Report No.38, tabled in 2000–2001, provided examples of information in contracts that would generally not be considered to be confidential.³³ These included performance and financial guarantees, rebate, liquidated damages and service credit clauses and the price of an individual item, or groups of items of goods and services.

3.37 Audit Report No.38 also provided examples of the types of information that may be considered confidential. These included trade secrets, a contractor’s internal costing information or information about its profit margins, and pricing structures (where this information would reveal whether a contractor was making a profit or a loss on the supply on a particular good or service).³⁴

3.38 Audit Report No.33, tabled in 2001–2002, provided additional examples of the circumstances where the price in a contract could be considered to be confidential.³⁵

³² 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 (Audit Report No.38, p. 56).

³³ op. cit., paragraphs 5.12 to 5.15, pp. 64, 65.

³⁴ ibid, paragraph 5.16, p. 65.

³⁵ op. cit., paragraphs 2.35 to 2.42, pp. 39,40.

Selection of contracts

3.39 The ANAO selected contracts from those listed on the six audited agencies' websites as containing confidentiality provisions or any other requirements of confidentiality.³⁶

3.40 Where possible, the ANAO obtained a listing of contracts by the date of the contract, in order to select, to the extent practicable, from those contracts that had been entered into since 1 July 2001. The purpose of this was to examine contracts that may have been entered into under the new accountability framework. However, as noted earlier, Centrelink was the only audited agency to implement new practices prior to 1 January 2002. As a result, most of the contracts examined were negotiated under previous arrangements when it was not uncommon for agencies to treat commercial information as confidential.

3.41 The ANAO examined 56 contracts, which were listed as confidential for various reasons. Approximately 70 per cent related to price. This percentage was consistent with the findings of Audit Report No.33 and, at this stage of the transition to a new approach for dealing with the issue of confidentiality in contracts, was not unexpected.

Summary of audit findings

3.42 Nine of the contracts were considered to satisfy criteria for containing information that was confidential.

Specific identification of information

3.43 Two contracts had provisions identifying specific information in the contract as confidential. These contracts contained detailed commercial information, which the ANAO considered had the qualities of confidentiality.

3.44 No contracts had global provisions making the entire contract confidential. One contract used a commercial-in-confidence marking as the means of protecting the entire contract. The use of the confidentiality provisions in this contract was considered inappropriate because the information to be protected should be expressed in specific rather than in global terms.

Qualities of confidentiality

3.45 In the ANAO's view, seven contracts without provisions protecting specific information as confidential, contained information that had the necessary qualities of confidentiality. Four contracts contained commercial information

³⁶ The ANAO did not examine contracts that were listed as not having confidential provisions to assess whether they had information that could have been considered as confidential.

relating to price and three contracts contained detailed information on how services were to be provided.

3.46 As discussed earlier, the ANAO had indicated, in its previous audit reports, that the price of an individual item, or groups of items, of goods and services would generally not be considered confidential. On the other hand, information on pricing structures (where this information, which may include costs, would reveal whether a supplier was making a profit or loss on supply of a particular good or service) may be protected as confidential.

3.47 The ANAO considered that pricing information in four contracts was confidential because:

- the price was detailed enough to allow competitors to determine the cost structures and profit margins of the supplier; and/or
- the daily or hourly rates of the subcontractor shown in the contract were of commercial value to the supplier, which may cause detriment to the supplier should they be disclosed. Companies that use subcontractors may not, as a matter of course, reveal to their subcontractor the difference between what is being paid to them and what the company received. Where this occurs in a field where the supply of a particular or specialised skill set is limited, the information could have commercial value to the supplier because disclosure of this information to subcontractors may cause detriment to the supplier's business.

3.48 In general, the pricing information in the other contracts included prices for services and items but rarely included the costs to the contractors of providing the service or item. It would therefore be unlikely to reveal the profit (or loss) margins for the contractor and would not have provided sufficient information for a competitor to ascertain the profit position or viability of the business. In these cases, the ANAO considered it unlikely that the commercial information would have the necessary quality of confidentiality, to warrant being protected as confidential.

3.49 Daily and hourly rates for contract personnel contained in contracts were commonly regarded by the parties as confidential. The ANAO found that, generally, the rates did not reveal the cost structures of the suppliers and, as such, the commercial information was unlikely to require protection as confidential.

3.50 In addition to the contracts that had price as a consideration, there were three contracts that contained information on how the services were to be delivered. The ANAO considered that these contracts were appropriately classified as confidential because they contained proprietary information about how the services were to be delivered which was known only to the contractor, which, if disclosed, could disadvantage the contractor's competitive position.

Audit findings by agency

Summary table

3.51 In coming to a conclusion on the appropriateness³⁷ of the use of confidentiality provisions in contracts by the six agencies audited, the ANAO assessed whether any information in the contracts considered to be confidential would have been assessed as such, if the Senate-endorsed criteria had been used at the time the contract was negotiated.

Table 3.1

ANAO assessment of appropriateness of confidentiality claims for selected contracts

Agency	Would the information in contracts considered by agencies to be confidential have been assessed as such if the Senate-endorsed criteria had been used at the time that the contract was negotiated?		Comments
	Yes	No	
AEC	0	9	
Centrelink	1	8	Centrelink advised that three contracts were inadvertently listed on the Internet as they contained no confidential information.
DEST	2	7	
DVA	1	8	
FCA	1	5	Five contracts were listed on the Internet as confidential without a statement of reason. The FCA advised that the contracts did not contain any confidential information but had been listed because they contained general clauses that protected confidential information that may be obtained while the contract was being performed.
Finance	4	10	
Total	9	47	

Source: ANAO analysis

³⁷ Also, where the confidentiality of information in contracts is considered confidential, agencies should as a matter of course include a provision which provides an exception with respect to disclosure to a parliamentary committee if only on a confidential basis.

3.52 The results of the ANAO assessments for each of the selected agencies are summarised at Table 3.1 and detailed in the paragraphs below. In addition, agencies' comments are shown, where provided.

AEC

3.53 The nine AEC contracts were listed on the Internet as confidential for the following major reasons: pricing, intellectual property and financial information. As agreement was reached in consultation with the contractors at the time the contracts were listed on the Internet, the ANAO accepts that the parties agreed that some aspects of the contracts were confidential and consequently there was an obligation of confidence on both parties. On this basis, the contracts were listed appropriately on the Internet.

3.54 However, when the information in each contract was assessed using the Senate-endorsed criteria for the necessary qualities of confidentiality, the ANAO considered it unlikely that any information in the contracts would be classified as being confidential.

Centrelink

3.55 Of Centrelink's nine contracts listed on the Internet as containing confidentiality provisions, four were negotiated under Centrelink's revised practices whereby issues of confidentiality are considered on a case-by-case basis before the contract is signed. The ANAO considered that one of these contracts, contained information (identified as confidential in a separate schedule) on the methodology of the services to be provided, which, if disclosed, could cause detriment to the contractor. This contract was assessed as being appropriately classified.

3.56 In relation to the other three contracts negotiated since Centrelink changed its practices, there was no schedule in the contract that indicated that any information was confidential. Centrelink advised that the contracts did not contain any confidential information and that the contracts had been inadvertently listed on the Internet as containing confidential information. Centrelink also advised that this was a result of its transition, during the Internet reporting period, from the old contracting arrangements, where a high proportion of contracts were considered commercial-in-confidence, to the new contracting arrangements. The ANAO agreed that the contracts did not contain any confidential information and that they should not have been listed as such on the Internet. Centrelink subsequently advised that action had been taken to revise the Internet listing in relation to these contracts.

3.57 The five contracts entered into under previous arrangements were listed on the Internet as being ‘labelled commercial-in-confidence’ even though only one had such a marking on the contract. Although Centrelink did not contact the suppliers to ascertain if there was any confidential information in these contracts, the ANAO accepts that the contractors may have considered that the information was confidential, and that there may have been an obligation on Centrelink to protect the information as confidential. As a result, the contracts are likely to have been listed on the Internet appropriately. However, when the information in each contract was assessed using the Senate-endorsed criteria for the necessary qualities of confidentiality, the ANAO considered it unlikely that any information in these five contracts would be classified as being confidential.

DEST

3.58 DEST listed its contracts on the Internet as confidential for a number of reasons but none of the contracts listed as confidential on the Internet contained confidentiality provisions relating to information in the contract. Furthermore, there were no markings on the contracts indicating that any of the information was confidential.

3.59 The ANAO considered that two of the nine contracts listed as confidential on the Internet contained information that met the confidentiality criteria. One contained detailed pricing information from which it might be possible to estimate profit margins, while the other contained the contractor’s methodologies of delivering the services under the contract. Consequently, the ANAO considers that the contracts contained confidential information and were listed appropriately on the Internet.

3.60 Of the other seven contracts, four were listed as being confidential because ‘revealing unit price would adversely affect the Vendor’s business and the Commonwealth’s ability to obtain best value from the market place’, two because of ‘commercial information about pricing structures’ and one because of a general clause that prevented the disclosure of information gained during the performance of the contract. The ANAO recognises that, at the time the contracts were negotiated, the contractor may have considered that the information in the contract was confidential, even though it may not have been explicitly stated, and, consequently, there may be an obligation of confidence on both parties. As a result, each of the contracts is likely to have been appropriately classified as confidential. However, when the information in each contract was assessed using the Senate-endorsed criteria for the necessary qualities of confidentiality, the ANAO considered it unlikely that any information in the contracts would be classified as being confidential because the pricing information was insufficiently

detailed to be of value to competitors. In addition, protection of information obtained during the performance of the contract is not a reason to make information in a contract confidential.

Finance

3.61 All Finance's contracts examined by the ANAO had been entered into before the Finance policy changes to the contracting environment had had a chance to take effect.

3.62 As the classification of information in contracts was done in consultation with contractors, the ANAO accepts that the parties agreed that some aspects of the contracts were confidential and, consequently, there was an obligation of confidence on both parties. As a result, all the contracts are likely to have been appropriately classified as confidential and listed as such on the Internet.

3.63 In assessing the information in the contracts, using the Senate-endorsed criteria for the necessary qualities of confidentiality, the ANAO considered that it was likely that information in four contracts would satisfy the criteria and ten would not. The ANAO considered that the four contracts were appropriately classified as confidential on the basis of pricing, intellectual property and the manner in which the contract was to be undertaken (three cases) and for the protection of market competitiveness, information and privacy (one case). One of the contracts had a specific schedule identified as commercial-in-confidence.

3.64 Of the remaining ten contracts which the ANAO considered were not appropriately classified as confidential when the Senate-endorsed criteria were applied:

- five were listed as being confidential for reasons of pricing, the manner in which the project is to be undertaken and/or intellectual property. The ANAO considered that the information in these contracts on pricing and/or how the services would be performed was not sufficiently detailed to be of value to a competitor, or information that would infringe intellectual property rights, and therefore was not appropriately confidential;
- two were listed as confidential because the commercial information was of value to the business or its competitors. The ANAO considered that the pricing information, if disclosed to the competitors, would not cause detriment to the contractor's business, and as a result, was not confidential;
- two were listed as confidential because Finance wished to protect the information gained during the performance of the contract but, in the ANAO's view, there was no information in the contract that was considered to be confidential; and

- one was listed as confidential for a combination of the above reasons. The ANAO considered that there was no information in the contract that could be considered as confidential.

Finance's response

3.65 Finance agreed that two of the contracts reviewed were incorrectly classified as confidential. For the remainder, Finance reinforced the ANAO's comments that the contracts had been entered into before the Finance policy changes to the contracting environment had taken effect. At the time that the contracts were negotiated, Finance considered that the information contained in the contracts was confidential. Since these contracts were negotiated, Finance has implemented a number of actions to raise awareness of the requirements of the Senate Order.

3.66 Finance advised that, for future contracts, it would use and communicate to all relevant personnel the Whole-of-Government guidance being developed by its Procurement Branch.

DVA

3.67 Although DVA had not contacted contractors to determine if information in the contracts was confidential, the ANAO accepts that the contractor may have considered that information in the contracts was confidential without it having been explicitly stated in the contract. Given these circumstances, the contracts may have been appropriately classified, and listed on the Internet, as containing confidential information.

3.68 In assessing whether information in the contracts was confidential against the Senate-endorsed criteria, the ANAO considered that one contract was confidential because it contained pricing information, which was likely to be sufficiently detailed to allow competitors to reliably estimate the profit margins and associated cost structures of the supplier.

3.69 The other eight contracts were listed as confidential for reasons of 'commercial information' or 'pricing data commercially sensitive'. The ANAO considered that none of these contracts contained confidential information, which either satisfied the necessary qualities of confidentiality or would cause detriment to the contractor if the information was disclosed to a competitor. In other words, the information in the contracts was neither a trade secret nor proprietary information, nor did it reveal pricing structures (where the information would reveal whether the contractor was making a profit or loss), any information about the contractor's internal costing information, or intellectual property matters.

DVA's response

3.70 DVA did not agree with all of the ANAO assessments. DVA advised of the following examples where it might need to accept claims of confidentiality in relation to price where services are for the benefit of veterans, and which, if disclosed, could disadvantage the supplier's business:

- sole supplier, for example, taxi services in a country town; and
- higher discounts offered than offered to the rest of the community.

3.71 DVA also advised that by disclosing unit price in relation to contracts, there is the potential to place the department in a disadvantageous position in future contract negotiations. This claim is supported by the submission made by DVA to the ANAO in relation to Audit Report No.38. In its submission DVA stated:

...it is understandable that a preferred contractor may seek some confidentiality over competitive elements of its services or pricing. It also flows that denying some confidentiality may result in increased prices/costs. This may be for various reasons. One may be to compensate the contractor's possible loss of its competitive edge. Another reason is that a contractor may not wish for a discounted rate to become public knowledge because some of its other customers may themselves seek that discounted rate.

3.72 During the current audit DVA also expressed concerns about the treatment of confidentiality within its contracts and the potential to impact on its ability to secure the best contracting outcome for the Commonwealth.

(DVA) would argue that there are instances where contract information should be considered confidential even though that information falls within the ANAO's generally accepted criteria. Primarily we would take this view in circumstances where the Commonwealth may wish to keep information confidential to protect its interests. For example, negotiation of hospital services across Australia is conducted on a State-by-State basis. Any release of information such as individual pricing schedules could significantly impair DVA's ability to maintain competitive bidding, potentially resulting in increased costs across the provision of the service.

3.73 In DVA's view, it is critical that any criterion by which agencies are expected to make assessments of confidentiality and sensitivity of contract details is flexible enough to allow for assessment on a case-by case-basis and takes into account the diverse nature of the business in which the Commonwealth is purchasing. Further, any criterion should take into consideration the fact that requests for confidentiality may be at the request of the Commonwealth or contractors.

ANAO comment

3.74 The ANAO acknowledges that there may be individual circumstances in which DVA may have to agree to protect information such as discounts, for example, where the market is very limited, but it was not apparent from the review of the contracts in question that these circumstances apply to override the generally accepted criteria referred to earlier.

3.75 When a contract is signed, the information in question becomes jointly owned by the contractor and the Commonwealth. This means that interests of both parties need to be considered. Because courts take the view that government information should generally be disclosed,³⁸ the information should normally not be protected as confidential unless its disclosure would not be in the public interest, for example, for national security reasons or where the ordinary business of government would be prejudiced. Consequently, in the absence of any concerns about disclosure by the other party, the onus is on DVA to justify that protecting the pricing schedules as confidential information is in the public interest, for example, because disclosure of the information would prejudice the ordinary business of government.

3.76 The ANAO considers that, in general, a contracting regime in which information is transparent is not likely to affect adversely the Commonwealth's ability to obtain suitable tenders. Transparency of information should lead to increased competition and better value for money for the Commonwealth in the longer term, as it allows other providers to search out opportunities for new business.

FCA

3.77 Five of the six contracts were listed as being confidential on the Internet but no statement of reason was provided. The FCA advised the ANAO that the contracts did not contain any confidential information but had been listed on the Internet because they contained general disclosure clauses designed to protect Commonwealth information obtained during the performance of the contract. The ANAO agreed that in assessing the information against the Senate-endorsed criteria, there was no information in the contract that could be considered as confidential.

3.78 The sixth contract was listed as confidential as it contained detailed information on the security services to be delivered. The ANAO considered this

³⁸ The Senate FPA Committee in its report *Commonwealth Contracts: A New Framework for Accountability* considered that the Senate Order placed the onus on those who wish to keep the information confidential to argue that confidentiality is warranted. This (reverse onus) principle, central to open and accountable government, is applicable to all government information. *Commonwealth Contracts: A New Framework for Accountability*, op. cit., paragraphs 2.5 to 2.11, pp. 4,5.

contract to be appropriately classified as it satisfied the necessary qualities of confidentiality.

FCA's response

3.79 The FCA advised that it had reviewed the current confidentiality definitions provided by the ANAO and Finance, and that all subsequent listings would be consistent with the requirements of the amended Order.

Conclusion

3.80 In applying the criteria developed for determining whether information should be classified as confidential, the ANAO considered that only nine of the 56 contracts examined were appropriately classified as confidential. Only two of the contracts contained provisions that specified confidential information in the contract. The ANAO considered that these provisions were appropriate as the specified information met the qualities of confidentiality. In the ANAO's view, a further seven contracts contained information that met the qualities of confidentiality.

3.81 The ANAO considered that none of the other 47 contracts contained confidential information, and that therefore, they had been inappropriately classified. This high proportion of contracts classified inappropriately was not unexpected, given that the majority of contracts were entered into by agencies before they had started to make the changes necessary to put in place the new accountability framework, and without guidance to determine if information in a contract should be protected as confidential.

Freedom of Information Act 1982

3.82 An issue of how information in contracts, which both parties have agreed is not confidential, is likely to be treated in response to a FOI request was raised by some agencies. Legal advice provided to the ANAO by the AGS was that:

Where the parties to a contract have agreed between themselves that none of their business or commercial information contained in the contract is confidential, in the normal course of events, a Commonwealth agency subject to the FOI Act could probably rely upon that agreement and disclose that information when sought. However, the agency cannot rely upon that agreement where the contract contains business or commercial information about a third party who is not a party to the contract. Where a third party is a separate legal entity from any of the parties to the contract, in the absence of express consent from the third party similar to that entered into by the contracted parties, it will be necessary to consider

whether its business or commercial information is such as to require exemption under the FOI Act exemptions relating to such information, for example section 43 (business affairs).

3.83 The AGS also suggested that:

...in addition to the identification of confidential information, at the time the contract is entered into the parties should also identify commercially sensitive information of any third parties, which will not be signatories to the contract. Where no information has been so identified or the parties have agreed none of the information falls into this category, the information would not be exempt under either section 43 or 45 of the FOI Act. In the latter case, it would be necessary to obtain a third party's written acknowledgement that its business or commercial information is neither confidential nor commercially sensitive.

Canberra ACT
18 September 2002



P. J. Barrett
Auditor-General

Appendices

Appendix 1

Senate Order of 20 June 2001³⁹

- (1) There be laid on the table, by each minister in the Senate, in respect of each agency administered by that minister, or by a minister in the House of Representatives represented by that minister, by not later than the tenth day of the spring and autumn sittings, a letter of advice that a list of contracts in accordance with paragraph (2) has been placed on the Internet, with access to the list through the department's or agency's home page.
- (2) The list of contracts referred to in paragraph (1) indicate:
 - (a) each contract entered into by the agency which has not been fully performed or which has been entered into during the previous 12 months, and which provides for a consideration to the value of \$100 000 or more;
 - (b) the contractor and the subject matter of each such contract;
 - (c) whether each such contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether any provisions of the contract are regarded by the parties as confidential, and a statement of the reasons for confidentiality; and
 - (d) an estimate of the cost of complying with this order.
- (3) In respect of contracts identified as containing provisions of the kind referred to in paragraph (2)(c), the Auditor-General be requested to provide to the Senate, within 6 months after each day mentioned in paragraph (1), a report indicating that the Auditor-General has examined a number of such contracts selected by the Auditor-General, and indicating whether any inappropriate use of such provisions was detected in that examination.
- (4) The Finance and Public Administration References Committee consider and report on the first year of operation of this order.
- (5) This order has effect on and after 1 July 2001.
- (6) In this order:

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

³⁹ The Order was amended in September 2001 and renamed *The Senate Order for Department and Agency Contracts* (see Appendix 3).

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

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

Appendix 2

Senate Order of 20 June 2001⁴⁰—Government Response (27 August 2001)

On 27 August 2001, the Government responded to the amended Order as follows:

On 20 June 2001, the Senate made an order requiring Ministers to table, twice yearly, a letter of advice stating that all FMA agencies for which they have responsibility place on the Internet a list of contracts of \$100 000 or more which had not been fully performed or which had been entered into in the previous 12 months. The list is to indicate:

- the contractor details and the subject matter of each contract;
- whether the contract includes confidentiality provisions; and
- the reasons for confidentiality.

Finally an estimate of the cost of complying with the order is to be provided. The Government has been advised by the Australian Government Solicitor that the order is probably beyond the Senate's power because it requires information to be provided to the public and not the Senate or a Senate Committee. However, as the Government is committed to transparency of Commonwealth contracts, it will, in principle, comply with the spirit of the order on the basis that:

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

These terms take account of advice to Government that it is likely that the *Parliamentary Privileges Act 1987* would not provide absolute privilege in

⁴⁰ The Order was amended in September 2001 and renamed *The Senate Order for Department and Agency Contracts*.

respect of the publication of information on the Internet and the legal implications of complying with the order. The Government notes that the Auditor-General has agreed to evaluate a sample of the contracts listed for the appropriate use of confidentiality provisions in line with the request in the Senate order. The Australian National Audit Office has advised that it will commence the first of the audits in late August 2001, with a report to be tabled in Parliament in February 2002.

Appendix 3

Senate Order for Department and Agency Contracts (27 September 2001)

On 27 September 2001, the Senate amended its Order of 20 June 2001 as follows:

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

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

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

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

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

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

Appendix 4

Senate Order for Department and Agency Contracts (27 September 2001)—Government Response (5 June 2002)

On 5 June 2002, the Government responded to the amended Order as follows:

On Thursday, 27 September 2001 Senator George Campbell moved, and the Senate passed, a motion that the Senate order on departmental and agency contracts be amended in line with this recommendation.

The Government will comply with the spirit of the amended order on the same terms as the original order.

The terms stipulated in the response to the original order were that:

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

The amended Senate order clarifies that agencies' lists of contracts are to cover the period of 12 months ending on the day before the first day of sitting of the autumn or spring sittings (as the case may be).

As ministers are required, under the Senate order, to table letters of advice in the Senate by not later than the tenth day of the relevant sittings, this clarification means that there is a relatively small 'window' for agencies to bring their lists up to date, brief their ministers on the lists, including sensitivities, and for ministers to table their letters of advice.

The Government notes that it will be challenging for agencies, particularly those with large numbers of contracts to be listed, to complete their preparations in sufficient time to enable the tabling deadline to be met.

As material assessed as Commercial in Confidence (CIC) can change over time, agencies may need to periodically reassess their classification of contractual material.

The Government notes that the Auditor-General is examining a selection of the contracts listed on the Internet to assess whether there was any inappropriate use of confidentiality provisions, as requested in the Senate order.

Appendix 5

Autumn 2002 Agency Contract Listing

Agency ⁴¹	Number of contracts	Number of contracts with confidentiality provisions
Administrative Appeals Tribunal	13	4
Attorney-General's Department	161	42
AusAID	816	0
Australia-Japan Foundation	6	0
Australian Bureau of Statistics	79	62
Australian Centre for International Agricultural Research	183	0
Australian Competition and Consumer Commission	17	3
Australian Customs Service	127	71
Australian Electoral Commission	126	114
Australian Federal Police	64	36
Australian Greenhouse Office	115	110
Australian Industrial Registry	22	7
Australian National Audit Office	74	50
Australian Office of Financial Management	5	0
Australian Public Service Commission ⁴²	11	1
Australian Radiation Protection and Nuclear Safety Agency	5	1
Australian Research Council	3	0
Australian Taxation Office	646	514
Australian Transaction Reports and Analysis Centre	32	0
Centrelink	904	499
Commonwealth Grants Commission	7	5
Commonwealth Superannuation Administration (ComSuper)	18	15
Dairy Adjustment Authority	6	0
Dept. of Agriculture, Fisheries and Forestry	268	151
Dept. of Communications, Information Technology and the Arts	519	103
Dept. of Defence	3697	0
Dept. of Education, Science and Training	842	365
Dept. of Employment and Workplace Relations	588	588
Dept. of Family and Community Services	150	13
Dept. of Finance and Administration	287	278
Dept. of Foreign Affairs and Trade	123	14
Dept. of Health and Ageing	3480	0
Dept. of Immigration and Multicultural and Indigenous Affairs	490	156
Dept. of Industry, Tourism and Resources	223	7
Dept. of the Environment and Heritage	42	42
Dept. of the Parliamentary Library	5	2

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⁴¹ Includes Parliamentary Departments that have listed contracts on the Internet.

⁴² Formerly the Public Sector and Merit Protection Commission.

Agency ⁴¹	Number of contracts	Number of contracts with confidentiality provisions
Dept. of the Parliamentary Reporting Staff	33	14
Dept. of the Prime Minister and Cabinet	47	34
Dept. of the Senate	6	5
Dept. of the Treasury	26	5
Dept. of Transport and Regional Service	311	82
Dept. of Veterans' Affairs	795	584
Equal Opportunity for Women in the Workplace Agency	2	2
Family Court of Australia	78	26
Federal Court of Australia	14	9
Federal Magistrates Service	1	1
Geoscience Australia	48	13
Human Rights and Equal Opportunity Commission	5	5
Insolvency and Trustee Service Australia	22	6
IP Australia	105	5
Joint House Department ⁴³	40	18
Migration Review Tribunal	4	0
National Archives of Australia	20	0
National Capital Authority	43	25
National Competition Council	2	2
National Crime Authority	10	2
National Native Title Tribunal	18	4
National Oceans Office	6	0
National Office of the Information Economy	30	5
Office of Film and Literature Classification	2	0
Office of National Assessments	7	6
Office of Parliamentary Counsel	3	0
Office of the Commonwealth Ombudsman	13	3
Office of the Director of Public Prosecutions	27	2
Office of the Federal Privacy Commissioner	3	2
Office of the Official Secretary of the Governor-General	5	4
Productivity Commission	5	0
Professional Services Review	2	2
Refugee Review Tribunal	8	4
TOTAL	15 895	4123

⁴³ Figures represent Spring 2002 listing.

Appendix 6 Agencies with a Contract Listing on the Internet—Autumn 2002

Agency	Senate Order of 20 June 2001 requirements						Agencies that have listed additional information consistent with the Senate Order as amended	
	Name of contractor	Subject matter of contract	Whether contracts contained confidentiality provisions ⁴⁴	Statement of reasons for the confidentiality	Estimated cost of compliance with the order	Amount of consideration of contract	Method of calculating cost of compliance	
Administrative Appeals Tribunal	✓	✓	✓	✓	✓	✓	✓	
Attorney-General's Department	✓	✓	✓	✓	✓	✓	✓	
AusAID	✓	✓	✓	NA	✓	✓		
Australia-Japan Foundation	✓	✓	✓	NA	✓	✓	✓	
Australian Bureau of Statistics	✓	✓	✓	✓	✓			
Australian Centre for International Agricultural Research	✓	✓	✓	NA	✓		✓	
Australian Competition and Consumer Commission	✓	✓	✓	✓	✗	✓		
Australian Customs Service	✓	✓	✓	✓	✓			
Australian Electoral Commission	✓	✓	✓	✓	✓			
Australian Federal Police	✓	✓	✓	✓	✓			
Australian Greenhouse Office	✓	✓	✓	✓	✓			
Australian Industrial Registry	✓	✓	✓	✓	✓			
Australian National Audit Office	✓	✓	✓	✓	✓	✓	✓	
Australian Office of Financial Management	✓	✓	✓	NA	✓	✓	✓	

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⁴⁴ 'Contracts contained confidentiality provisions' includes contracts where: the contract contained provisions requiring the parties to maintain confidentiality of any of its provisions (Senate Order of 20 June 2001 and as amended on 27 September 2001); any contract provisions were regarded by the parties as confidential (Senate Order of 20 June 2001); and there were any other requirements of confidentiality in the contract (Senate Order as amended on 27 September 2001).

Agency	Senate Order of 20 June 2001 requirements						Agencies that have listed additional information consistent with the Senate Order as amended	
	Name of contractor	Subject matter of contract	Whether contracts contained confidentiality provisions ⁴⁴	Statement of reasons for the confidentiality	Estimated cost of compliance with the order	Amount of consideration of contract	Method of calculating cost of compliance	
Australian Public Service Commission	✓	✓	✓	✓	✓			
Australian Radiation Protection and Nuclear Safety Agency	✓	✓	✓	✓	✓			
Australian Research Council	✓	✓	✓	NA	✓			
Australian Taxation Office	✓	✓	✓	✓	✓			
Australian Transaction Reports and Analysis Centre (AUSTRAC)	✓	✓	✓	NA	✓			
Centrelink	✓	✓	✓	✓	✓	✓	✓	
Commonwealth Grants Commission	✓	✓	✓	✓	✓			
Commonwealth Superannuation Administration (ComSuper)	✓	✓	✓	✓	✓			
Dairy Adjustment Authority	✓	✓	✓	NA	✓			
Department of Agriculture, Fisheries and Forestry	✓	✓	✓	✓	✓			
Department of Communications, Information Technology and the Arts	✓	✓	✓	✓	✓	✓	✓	
Department of Defence	✓	✓	✓	NA	✓	✓	✓	
Department of Education, Science and Training	✓	✓	✓	✓	✓	✓	✓	
Department of Employment and Workplace Relations	✓	✓	✓	✓	✓			
Department of Family and Community Services	✓	✓	✓	✓	✓	✓	✓	
Department of Finance and Administration	✓	✓	✓	✓	✓			
Department of Foreign Affairs and Trade	✓	✓	✓	✓	✓	✓	✓	
Department of Health and Ageing	✓	✓	✓	✓	✓	✓	✓	
Department of Immigration and Multicultural and Indigenous Affairs	✓	✓	✓	NA	✓	✓	✓	
	✓	✓	✓	✓	✓			

Department of Industry, Tourism and Resources	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of the Environment and Heritage	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of the Prime Minister and Cabinet	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of the Treasury	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Transport and Regional Services	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Veterans' Affairs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Equal Opportunity for Women in the Workplace Agency	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Family Court of Australia	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Federal Court of Australia	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Federal Magistrates Service	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Geoscience Australia	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Human Rights and Equal Opportunity Commission	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Insolvency and Trustee Service Australia	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
IP Australia	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Migration Review Tribunal	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
National Archives of Australia	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
National Capital Authority	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
National Competition Council	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
National Crime Authority	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
National Native Title Tribunal	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
National Oceans Office	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
National Office of the Information Economy	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Office of Film and Literature Classification	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Office of National Assessments	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Office of Parliamentary Counsel	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Office of the Commonwealth Ombudsman	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Office of the Director of Public Prosecutions	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Office of the Federal Privacy Commissioner	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

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Agency	Senate Order of 20 June 2001 requirements						Agencies that have listed additional information consistent with the Senate Order as amended	
	Name of contractor	Subject matter of contract	Whether contracts contained confidentiality provisions ⁴⁴	Statement of reasons for the confidentiality	Estimated cost of compliance with the order	Amount of consideration of contract	Method of calculating cost of compliance	
Office of the Official Secretary of the Governor-General	✓	✓	✓	✓	✓		✓	
Productivity Commission	✓	✓	✓	NA	✓			
Professional Services Review	✓	✓	✓	✓	✓			
Refugee Review Tribunal	✓	✓	✓	✓	✓			

Source: ANAO analysis of agency Internet listings

Notes—

Bold typeface indicates agencies selected for detailed audit.

✓ indicates that details were included on the agency Internet listing.

✗ indicates that details were not included on the agency Internet listing.

NA indicates that a statement of reasons was not applicable as no contracts were identified as containing confidentiality provisions.

Appendix 7

Internet Addresses for Agencies' Internet Listings—Autumn 2002

The ANAO has confirmed the Internet addresses with agencies. If an agency's contract listing is not displayed at the address shown below, access to the listing should be made via the agency's Internet home page.

Agency ⁴⁵	Website Details/Path
Administrative Appeals Tribunal	www.aat.gov.au/contracts.htm
Attorney-General's Department	www.ag.gov.au/contracts/23april2002/april02.doc
AusAID	www.usaid.gov.au/publications/pdf/business/senardercalender.pdf
Australia-Japan Foundation	www.aifaustralia.or.jp/english/corporate
Australian Bureau of Statistics	www.abs.gov.au
Australian Centre for International Agricultural Research	www.aciar.gov.au/news/Senate_report_on_contractors.doc
Australian Competition and Consumer Commission	www.accc.gov.au/fs-resources.htm
Australian Customs Service	www.customs.gov.au/ctc/interhome
Australian Electoral Commission	www.aec.gov.au/about/contracts.htm
Australian Federal Police	www.afp.gov.au/page.asp?ref=/GovCorporate/InformationAccess/listContracts.xml
Australian Greenhouse Office	www.greenhouse.gov.au/ago/contracts.html
Australian Industrial Registry	www.airc.gov.au/corporate_services/senate_order_contracts_0102.htm
Australian National Audit Office	www.anao.gov.au
Australian Office of Financial Management	www.aofm.gov.au/compliance/senate.htm
Australian Public Service Commission ⁴⁶	www.apsc.gov.au/about/contractlisting02autumn.htm
Australian Radiation Protection and Nuclear Safety Agency	www.arpsa.gov.au/sen_ord.htm
Australian Research Council	www.arc.gov.au/contracts/default.htm
Australian Taxation Office	www.ato.gov.au/content/businesses/downloads/senate.rtf

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⁴⁵ Includes Parliamentary Departments that have listed contracts on the Internet.

⁴⁶ The Public Sector and Merit Protection Commission changed its name to the Australian Public Service Commission on 26 June 2002.

Agency ⁴⁵	Website Details/Path
Australian Transaction Reports and Analysis Centre (AUSTRAC)	www.austrac.gov.au/contracts/index.htm
Centrelink	www.centrelink.gov.au/internet/internet.nsf/filestores/contracts
Classification Board	www.oflc.gov.au/Pages/Contract.html
Classification Review Board	www.oflc.gov.au/Pages/Contract.html
Commonwealth Grants Commission	www.cgc.gov.au
Commonwealth Superannuation Administration (ComSuper)	www.comsuper.gov.au/pages/contract_list2.htm
Dairy Adjustment Authority	www.daa.gov.au/downloads/senate-order.doc
Department of Agriculture, Fisheries and Forestry	www.affa.gov.au/content/about_affa/contracts.cfm
Department of Communications, Information Technology and the Arts	www.dcita.gov.au/nsapi-text?Mlval=dca_dispdoc&ID=6171
Department of Defence	www.defence.gov.au/dmo/id/cic_contracts/cic_contracts.cfm
Department of Education, Science and Training	www.dest.gov.au/agency_contracts/Senate_order.htm
Department of Employment and Workplace Relations	www.dewr.gov.au/publications/contractlist/default.asp
Department of Family and Community Services	www.facs.gov.au/internet/facsinternet.nsf/aboutfacs/contract_listing.htm
Department of Finance and Administration	www.finance.gov.au/publications/senate_order_on_government_age.html
Department of Foreign Affairs and Trade	www.dfat.gov.au/dept/contracts/index.html
Department of Health and Ageing	www.health.gov.au/contracts
Department of Immigration and Multicultural and Indigenous Affairs	www.immi.gov.au/department/murray/index.html
Department of Industry, Tourism and Resources	www.industry.gov.au
Department of the Environment and Heritage	www.ea.gov.au/about/contracts/index.html
Department of the Parliamentary Library	www.aph.gov.au/library/about/contractsdpl.htm
Department of the Parliamentary Reporting Staff	www.aph.gov.au/dprs/July-Dec%202001.pdf
Department of the Prime Minister and Cabinet	www.dpmmc.gov.au/docs/DisplayContents1.cfm?&ID=129
Department of the Senate	www.aph.gov.au/Senate/dept/index.htm
Department of the Treasury	www.treasury.gov.au
Department of Transport and Regional Services	www.dot9rs.gov.au/agency%5Fcontracts.htm
Department of Veterans' Affairs	www.dva.gov.au/media/aboutus/senate_motion_489.xls
Equal Opportunity for Women in the Workplace Agency	www.eowa.gov.au/Resource_Centre/EOWA_Publications/Murray_Motion_Report.asp
Family Court of Australia	www.familycourt.gov.au/court/html/contracts.html

Agency ⁴⁵	Website Details/Path
Federal Court of Australia	www.fedcourt.gov.au/about/aboutct/aboutct_contracts.html
Federal Magistrates Service	www.fms.gov.au/html/contracts.html
Geoscience Australia	www.ga.gov.au/about/corporate/GA2001_contracts.jsp
Human Rights and Equal Opportunity Commission	www.hreoc.gov.au/about_the_commission/compliance/index.html
Insolvency and Trustee Service Australia	www.itsa.gov.au/aghome/commaff/itsa/senate_contract.html
IP Australia	www.ipaustralia.gov.au/about/A_contracts.htm
Joint House Department	www.aph.gov.au/jhd/about/Contracts.pdf
Migration Review Tribunal	www.mrt.gov.au/MRT%20Contractors%20Report2.pdf
National Archives of Australia	www.naa.gov.au/about_us/senateorder.html
National Capital Authority	www.nationalcapital.gov.au/contract/contracts.html
National Competition Council	www.ncc.gov.au/nationalarticlezone.asp?articlezoneID=152
National Crime Authority	www.nca.gov.au/html/corpserv.htm
National Native Title Tribunal	www.nntt.gov.au/nntt/publictn.nsf.area/homepage?OpenDocument#corp
National Oceans Office	www.oceans.gov.au/contractual.jsp
National Office of the Information Economy	www.noie.gov.au/about/Murray_motion_return.pdf
Office of Film and Literature Classification	www.oflc.gov.au/Pages/Contract.html
Office of National Assessments	www.ona.gov.au/contracts.htm
Office of Parliamentary Counsel	www.opc.gov.au/about/docs/Agency_contracts.doc
Office of the Commonwealth Ombudsman	www.comb.gov.au/publications_information/other_information/contracts.html
Office of the Director of Public Prosecutions	www.cdpp.gov.au/cdpp/senate/senatecontractlist.html
Office of the Federal Privacy Commissioner	www.privacy.gov.au/publications/sogc01.doc
Office of the Inspector-General of Intelligence and Security ⁴⁷	www.igis.gov.au/fs_statements.html
Office of the Official Secretary of the Governor-General	www.gg.gov.au/html/agency_contracts.html
Productivity Commission	www.pc.gov.au/commission/contracts.html
Professional Services Review	www.psr.gov.au/psr%20final/contracts%20-%20professional%20services%20review.htm
Refugee Review Tribunal	www.rrt.gov.au/RRT%20Contractors%20Report2.pdf

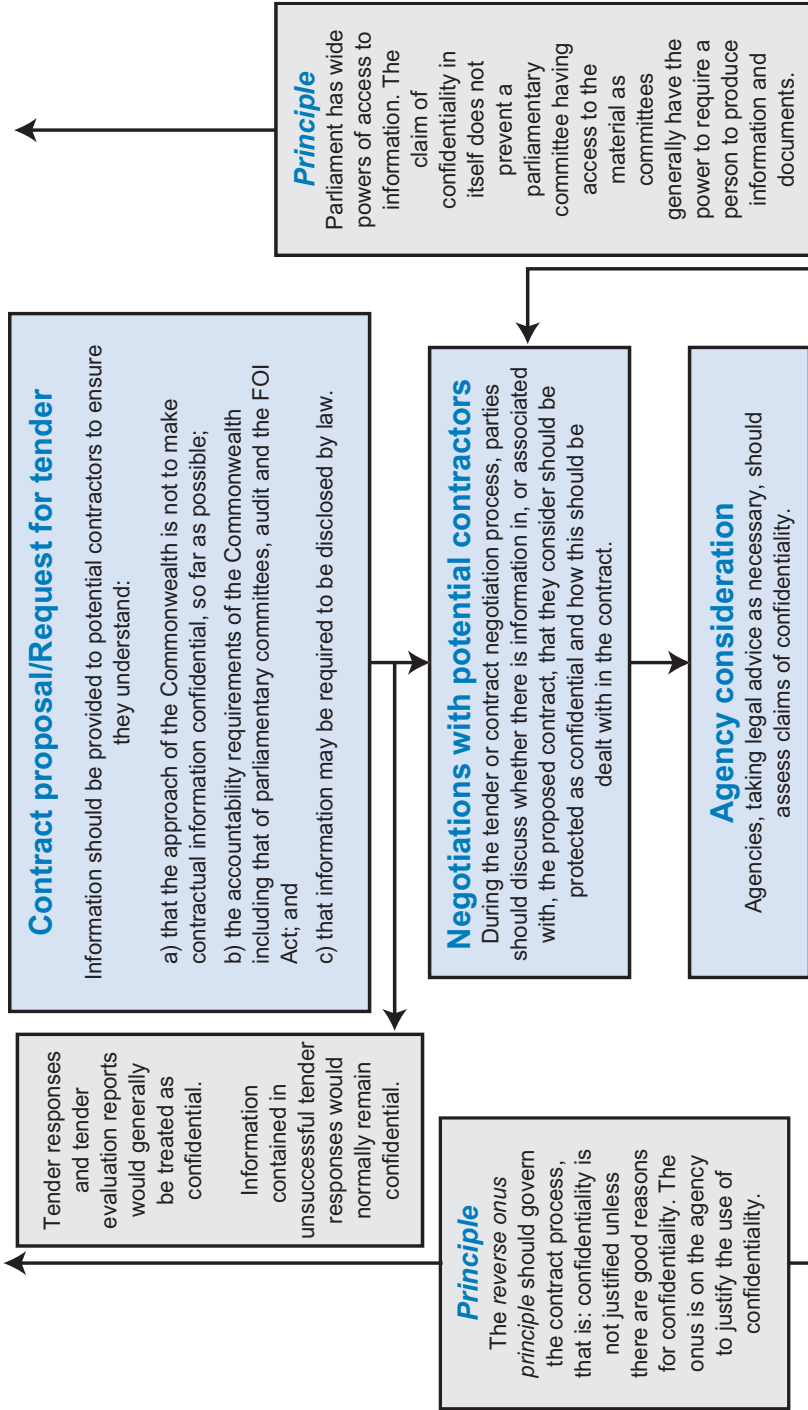
⁴⁷ The Office of the Inspector-General of Intelligence and Security did not have any contracts of \$100 000 or more for the Spring 2001 and Autumn 2002 listings.

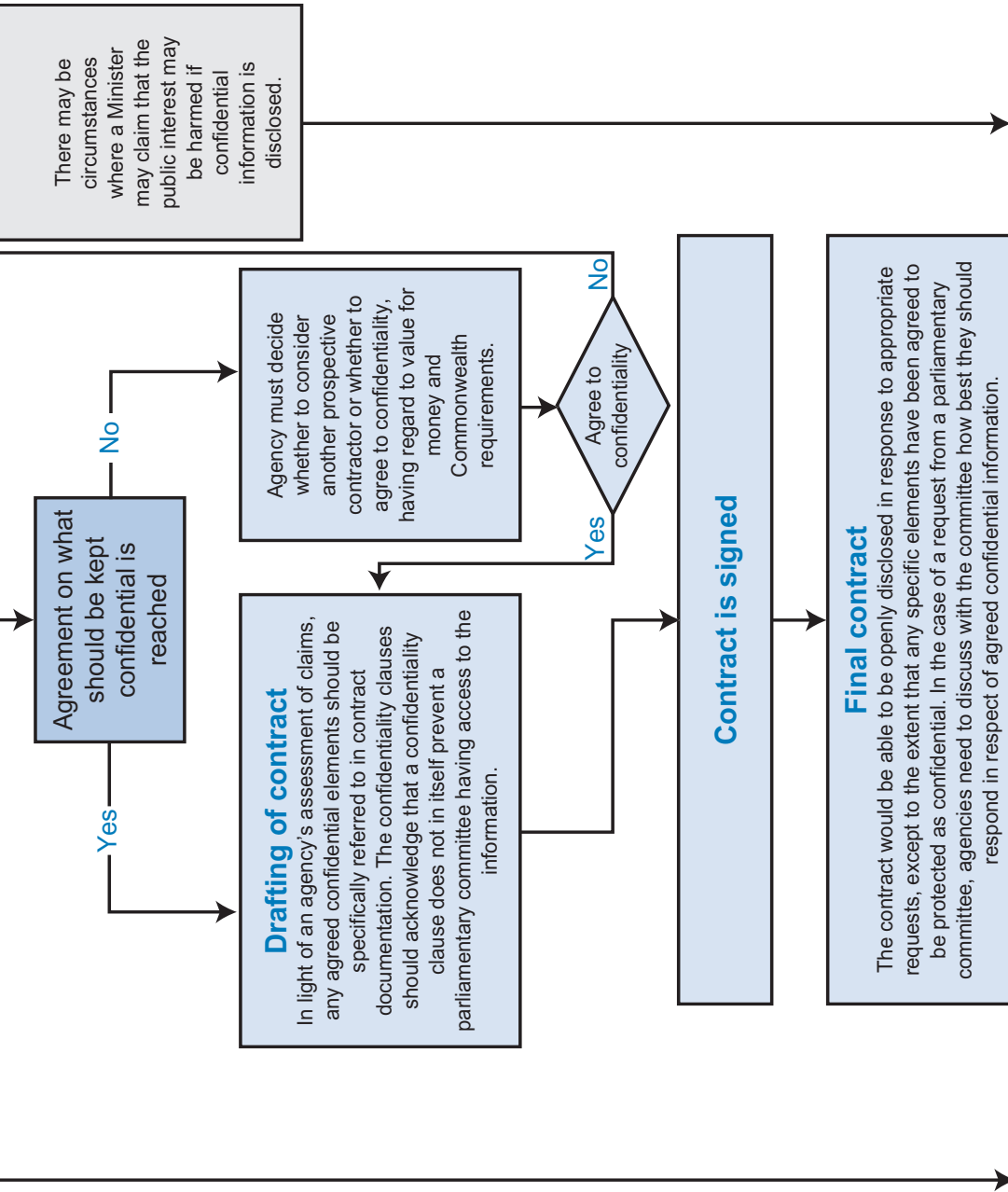
Appendix 8

Process Chart on Dealing with Confidential Information in Contracts

Source: Developed by the ANAO.

NB: DOES NOT DEAL WITH GENERIC CONFIDENTIALITY AND PRIVACY CLAUSES





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