

The Auditor-General
Audit Report No.32 2002-03
Business Support Process Audit

**The Senate Order for
Departmental and Agency Contracts
(Spring 2002 Compliance)**

Australian National Audit Office

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of Australia 2003

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Canberra ACT
5 March 2003

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 Departmental and Agency Contracts (Spring 2002 Compliance)*.

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

Yours sincerely

A handwritten signature in black ink, appearing to read 'Oliver Winder', is positioned below the text 'Yours sincerely'.

Oliver Winder
Acting Auditor-General

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

AUDITING FOR AUSTRALIA

The Auditor-General is head of the Australian National Audit Office. 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/Glossary

AGS	Australian Government Solicitor
AGD	Attorney-General's Department
AusAID	Australian Agency for International Development
Audit Report No.38	<i>Use of Confidentiality Provisions in Commonwealth Contracts</i> (ANAO Audit Report No.38, 2000–01)
Audit Report No.33	<i>Senate Order of 20 June 2001 (February 2002)</i> (ANAO Audit Report No.33, 2001–02)
Audit Report No.8	<i>The Senate Order for Department and Agency Contracts (September 2002)</i> (ANAO Audit Report No.8, 2002–03)
CEIs	Chief Executive's Instructions
confidential information	[inherently confidential] information that is subject to an obligation of confidence—either under the contract or in equity. Inherently confidential information is information that is: <ul style="list-style-type: none">• not in the public domain; and• significant information.
confidential provisions	Provisions of a contract that themselves are confidential information
confidentiality criteria	The criteria described in paragraph 4.32, all of which must be complied with before information can be regarded, legally, as confidential information.
confidentiality provisions	The clauses of a contract that operate to create the contractual confidentiality obligations on the parties to the contract in respect of 'inherently confidential' information that is specified in the contract (for example, in a schedule).
contractual information	Information in, or relating to, the contract.
CPGs	Commonwealth Procurement Guidelines
Customs	Australian Customs Service
DFAT	Department of Foreign Affairs and Trade
DOTARS	Department of Transport and Regional Services
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
Health	Department of Health and Ageing
inherently confidential	see confidential information
JCPAA	Joint Committee of Public Accounts and Audit
RFT	Request for Tender
Third Party Information	Information supplied to government by third parties about their private, personal, or business affairs.

Summary

Summary

Background

1. On 20 June 2001, the Senate made an Order that required Ministers to table letters of advice that all agencies,¹ which they administered, had placed on the Internet by the tenth day of the Spring and Autumn sittings of Parliament, lists of contracts which provides for consideration to the value of \$100 000 or more. 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. The Senate Order was varied by the Senate on 27 September 2001 to require additional information to be reported on the Internet listing and in the Ministers' letters, and is known as the *Order of the Senate for Departmental and Agency Contracts*.²
2. The Senate Order was informed by two reports of the Senate Finance and Public Administration References (FPA) Committee tabled in June 2000³ and September 2001,⁴ as well as an Australian National Audit Office (ANAO) report on the use of confidentiality provisions in Commonwealth contracts.⁵ The general principle (the reverse onus principle) espoused in these reports was that information in government contracts should not be protected as confidential unless there is a good reason to do so. In its report, the ANAO developed criteria to assist agencies in determining whether information in contracts should be treated as confidential. The FPA Committee endorsed the criteria in its final report.
3. The ANAO report also provided guidance on a possible new accountability framework for dealing with the issue of confidentiality in contracts and disclosure of contractual information to parliamentary committees.
4. The Government responded to the original Senate Order in August 2001 and the amended Senate Order in June 2002. In essence, the Government agreed to comply with the spirit of the Senate Order and advised that information regarding individual contracts would not be provided where disclosure would

¹ Agency means an agency within the meaning of the *Financial Management and Accountability Act 1997* (FMA Act).

² The *Order of the Senate for Departmental and Agency Contracts* has been reproduced at Appendix 1.

³ Interim Report by the Senate FPA Committee.

⁴ *Commonwealth Contracts: a New Framework for Accountability*, by the Senate FPA Committee, September 2001.

⁵ *The Use of Confidentiality Provisions in Commonwealth Contracts* (ANAO Audit Report No. 38, 2000–01).

be contrary to the public interest, legislative requirements and undertakings given. The government also indicated that agencies' compliance would be progressive as agencies refined arrangements and processes to meet the requirements.

5. The Senate FPA Committee tabled a report on the first year of the operation of the Senate Order in December 2002, which included a recommendation that the Senate Order passed by Senate on 27 September 2001 be amended. The Senate has not yet responded to the recommendation.

Requirement for the audit

Senate Order request

6. The Senate Order requested the Auditor-General to undertake twice-yearly examinations of agency contracts to be listed on the Internet and report, within six months of the date set for Ministers to table their letters of advice, whether there had been any inappropriate use of confidentiality provisions. The Auditor-General agreed to the request.

7. Audits in response to the Senate Order request were previously tabled in the Parliament in February and September 2002, relating to the Spring 2001 and Autumn 2002 listings respectively.

This report

8. This report relates to the third audit in response to the Senate Order and covers contract information associated with the tabling of letters by Ministers by the tenth day of the Spring 2002 Parliamentary sittings (17 September 2002), covering the reporting period 19 August 2001 to 18 August 2002.

Audit objectives

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

Audit scope and focus

Scope

10. The audit involved a desktop review of all FMA Act agencies to enable the ANAO to report on the information provided on the Internet. In addition,

the ANAO selected six agencies for more detailed review of the processes used to make the Internet listings and of the use of the confidentiality provisions in contracts.

Focus

11. The focus of the audit in relation to confidentiality was on the commercial information that was, or should be, protected as confidential information.⁶ The ANAO recognised, however, that agencies may have reported confidentiality for other reasons, for example because it was, information with a national security classification, or personal information.

Overall conclusion

12. The ANAO concluded that most agencies covered by the Senate Order had reported their contracts of \$100 000 and over on the Internet and complied with the listing requirements of the Senate Order. The majority of agencies had posted their contract lists on the Internet by the due date, and all agencies had posted contract lists by the end of the Spring 2002 sitting period. These findings indicate increased agency compliance with the listing requirements of the Senate Order.

13. In the six agencies subject to detailed audit review, the ANAO concluded that the processes used to compile the Internet listing were likely to lead to the lists being complete in relation to the number of contracts. However, there is a need for agencies to introduce or strengthen the quality assurance processes so that the confidentiality claims for contracts on the Internet reflect the existence of confidential contractual information.

14. All six agencies audited had reviewed their contracting policies and processes to ensure that the issue of confidential information in contracts is appropriately addressed at the time contracts are negotiated. In some agencies, however, it was not apparent that all operational areas fully understood the changes that had been made to contracting policy and processes.

15. All 33 contracts reviewed during the audit had been entered into after the Senate Order had been amended and when agencies had started to put in place changes to contracting policies and procedures to meet the requirements of the new accountability framework. The ANAO considered that only five of these contracts had been appropriately listed on the Internet as containing confidential provisions.

⁶ The actual wording of the Senate Order does not specifically refer to commercial information. However, the basis for the original Senate Motion and the holding of the FPA Committee's inquiry was Senate's concern that information was being withheld from the Parliament for reasons of commercial confidentiality.

16. In relation to the other 28 contracts, the primary reasons for the ANAO considering that the claims of confidentiality relating to contractual information were not appropriate were because the information claimed to be confidential was not specified, or where it was specified, it did not satisfy the established criteria to make it confidential.

17. Although agencies had put in place the required policies and procedures to meet the new accountability framework, the understanding of how to implement the policies was not uniform across, or within, agencies. This suggests the need for much better communication of agency contracting requirements to program administrators and contract managers. This is particularly relevant to agencies operating in an environment where contract management is devolved to operational areas, as was the case in all six agencies audited.

18. The proportion of claims of confidentiality that the ANAO considered to be inappropriate was similar to that in the previous audit. In the previous audit, the ANAO considered that the high proportion of inappropriate claims was not unexpected because the contracts examined had been entered into before the agencies involved had started to make the changes required for the new accountability framework.

Key Findings

Internet listings

19. The ANAO found that FMA agencies had largely complied with the listing requirements of the Senate Order. In addition, a high proportion of agencies had placed their lists on the Internet either by, or shortly after, the due date. The ANAO considers that there is scope for many agencies to improve the presentation and readability of their Internet listings.

The processes used to create the Internet list

20. The ANAO concluded that the processes used by the six agencies provided a reasonable level of confidence that the Internet listings were likely to be complete in relation to the numbers of contracts reported. In general, those agencies with electronic contract registers were better placed to provide complete information relatively efficiently.

21. Those agencies that did not have clear internal policies and procedures for establishing the list of contracts on the Internet and determining what contractual information, if any, should reasonably be protected as confidential, had difficulty in ensuring that contracts were appropriately listed on the Internet as containing confidential information. This is particularly true for the older contracts where confidential information has not been specifically identified in the contract.

22. All agencies, including those that had appropriate policies and procedures for establishing the Internet lists, should implement quality assurance processes, as necessary, to ensure the completeness and accuracy of the contract details on the Internet.

Confidential provisions in contracts

23. Agencies' tender and contract documentation is consistent with the new framework for the treatment of confidential contractual information. Agencies have made progress in developing and promulgating guidance to assist staff in assessing what information, if any, in a contract might be protected as confidential.

24. Agencies should make a sustained effort, through regular training and awareness activities, to develop their staff's understanding of the new accountability framework and how to assess the need for any contractual information to be agreed as confidential information before a contract is signed.

25. In applying the Senate endorsed criteria for determining whether information should be agreed as confidential information, the ANAO considered that only five of the 33 contracts examined were appropriately identified by agencies as containing confidential information.

26. Two agencies advised the Senate that they had excluded some contracts from the Internet listing for privacy reasons because the contracts had been entered into in the name of individuals. This type of exclusion should not be necessary in the future when agencies make individuals aware of the Commonwealth's Senate Order obligations to report contract details on the Internet.

Issues not covered in the two previous audits of the Senate Order

27. During the audit, three issues emerged which had not been apparent during the two previous audits:

- detriment to the confider;
- privacy; and
- confidentiality and disclosure

These issues are discussed in detail in Chapter 4 of the report.

Audit Findings and Conclusions

1. Introduction

Background

1.1 On 20 June 2001, the Senate made an Order that required Ministers to table letters of advice that all agencies,⁷ which they administered, had placed on the Internet by the tenth day of the Spring and Autumn sittings of Parliament, lists of contracts which provide for consideration to the value of \$100 000 or more. 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. The Senate Order was varied by the Senate on 27 September 2001 to require additional information to be reported on the Internet listing and in the Ministers' letters, and is known as the *Order of the Senate for Departmental and Agency Contracts*.⁸

1.2 The Senate Order was informed by two reports of the Senate Finance and Public Administration References (FPA) Committee tabled in June 2000⁹ and September 2001,¹⁰ as well as an Australian National Audit Office (ANAO) report on the use of confidentiality provisions in Commonwealth contracts.¹¹ The general principle (the reverse onus principle) espoused in these reports was that information in government contracts should not be protected as confidential unless there is a good reason to do so. In its report, the ANAO developed criteria to assist agencies in determining whether information in contracts should be treated as confidential. The FPA Committee endorsed the criteria in its final report.

1.3 The ANAO report also provided guidance on a possible new framework for dealing with the issue of confidentiality in contracts and disclosure of contractual information to parliamentary committees.

1.4 The Government responded to the original Senate Order in August 2001 and the amended Senate Order in June 2002. In essence, the Government agreed to comply with the spirit of the Senate Order and advised that information regarding individual contracts would not be provided where disclosure would

⁷ Agency means an agency within the meaning of the *Financial Management and Accountability Act 1997* (FMA Act).

⁸ *The Order of the Senate for Departmental and Agency Contracts* has been reproduced at Appendix 1.

⁹ Interim Report by the Senate FPA Committee.

¹⁰ *Commonwealth Contracts: a New Framework for Accountability*, by the Senate FPA Committee, September 2001.

¹¹ *The Use of Confidentiality Provisions in Commonwealth Contracts* (ANAO Audit Report No. 38, 2000–01).

be contrary to the public interest, legislative requirements and undertakings given. The government also indicated that agencies' compliance would be progressive as agencies refined arrangements and processes to meet the requirements.

1.5 The Senate FPA Committee tabled a report on the first year of the operation of the Senate Order in December 2002. The report is discussed briefly at paragraph 1.14.

Commonwealth Procurement Guidelines

1.6 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.¹²

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

1.8 The CPGs also contain a longstanding requirement for agencies to report all agency agreements, procurement contracts and standing orders 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.¹³

Guidance on confidentiality in contracts

1.9 The Department of Finance and Administration issued guidance on the confidentiality of contractors' commercial information in February 2003.¹⁴

1.10 The purpose of this guidance is to assist agencies to ensure that they enter into appropriate commitments to maintain confidentiality of commercial information in the context of procurement processes.¹⁵

¹² *Commonwealth Procurement Guidelines*, September 2001, subsection 1.2.

¹³ The GaPS Internet address is <www.contracts.gov.au>.

¹⁴ Confidentiality of Contractors' Commercial Information <www.finance.gov.au/crc/confidentiality_of_contractors.html>

¹⁵ The ANAO notes that this guidance is limited to identification of commercial information that could reasonably be protected as confidential and does not address broader types of information that might be confidential.

1.11 The guidance provides agencies with:

- criteria based on legal principle to assist them to decide if it is appropriate to agree to treat specific commercial information as confidential;
- an approach for agencies to use to resolve with tenderers/contractors whether commercial information will be treated as confidential; and
- advice on the use of appropriate contractual terms for confidentiality purposes.

1.12 The initial criteria for agencies to apply in deciding whether information should be kept confidential were based on those contained in Audit Report No. 38.

FPA Committee Report

1.13 The FPA Committee's *Report on the first year of operation of the Senate order for the production of lists of departmental and agency contracts* was tabled in the Parliament on 12 December 2002. The report made a number of recommendations concerning such issues as the type of Commonwealth organisations to be covered by the Senate Order, the frequency of reporting and the content and presentation of agencies' Internet listings, as well as a recommendation that the Senate amend its Order of 27 September 2001. The recommendations still have to be responded to by the Senate and the Government.

Requirement for audit

Senate Order request

1.14 The Senate Order requested the Auditor-General to undertake twice-yearly examinations of agency contracts to be listed on the Internet and report, within six months of the date set for Ministers to table their letters of advice, whether there had been any inappropriate use of confidentiality provisions. The Auditor-General agreed to the request.

First and second audits

1.15 The first and second audits found that all agencies had established Internet listings of their contracts and were generally compliant with the requirements of the Senate Order. In agencies subject to detailed review, the processes used in the compilation of the Internet listings provided the ANAO with reasonable assurance as to the completeness of the lists. Also, the processes for determining the confidentiality of information in a contract were considered appropriate.

Nevertheless, the ANAO noted that agencies had difficulty identifying what information should be protected as confidential information, with many instances where information was inappropriately identified as confidential information. The ANAO concluded, however, that this was not unexpected as the contracts assessed were entered into by agencies prior to the implementation of the new accountability framework and without guidance to determine whether information in a contract should be protected as confidential information.

This report

1.16 This report relates to the third audit in response to the Senate order, namely, the audit of the contract information associated with the tabling of letters by Ministers by the tenth day of the Spring 2002 Parliamentary sittings (17 September 2002), covering the period 19 August 2001 to 18 August 2002.

Audit objectives

1.17 The audit objectives were to assess agency performance in relation to compiling the Internet listings required by the Senate Order and the appropriateness of the use of confidentiality provisions in Commonwealth contracts. The objectives were as follows:

1. Conduct a desktop review of all FMA Act agencies' Internet sites and determine whether a list of contracts has been placed on the Internet site and whether it was consistent with the requirements of the *Order of the Senate for Departmental and Agency Contracts*.
2. Examine in selected agencies:
 - (a) a selection of contracts listed as confidential and indicate whether there is any inappropriate use of such provisions;
 - (b) the processes by which agencies Internet listing was made, and assess whether the process was likely to lead to the list of contracts placed on the Internet being complete;
 - (c) the processes by which agencies determined which contracts placed on the Internet contained confidential provisions or were considered to be confidential, and assess whether the process was likely to be appropriate; and
 - (d) a selection of contracts which have been excluded from the Internet listing and assess whether the contract should have been listed.

Audit scope, focus and criteria

Scope

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

1.19 The examination of processes by which agencies determine what information in, or associated with, contracts should be protected as confidential, focussed on the processes being used in the selected agencies now, rather than those used in the past.

1.20 In making an assessment as to whether there was any inappropriate use of confidentiality provisions, the ANAO examined a selection of contracts listed on the Internet as containing confidentiality provisions. Where possible, contracts entered into after 12 February 2002 were selected as it was likely that, by then, agencies would have commenced the process of implementing revised contracting practices in order to enhance transparency and associated accountability.

Focus

1.21 The focus of the audit in relation to confidentiality was on commercial information that could reasonably be protected as confidential.¹⁶ The ANAO recognised, however, that agencies might have agreed to protect as confidential information other types of information, for example, with a national security classification, or personal information.

Audit evaluation criteria

1.22 Audit evaluation criteria were developed for each of the audit 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.

¹⁶ The actual wording of the Senate Order does not specifically refer to commercial information. However, the basis for the original Senate Motion and the holding of the FPA Committee's inquiry was Senate's concern that information was being withheld from the Parliament for reasons of commercial confidentiality.

Audit coverage and methodology

All FMA Act agencies

1.23 The number of contracts and the number of contracts with confidentiality provisions for each of the FMA Act agencies that had listed contracts on the Internet for Spring 2002 are shown at Appendix 2.

1.24 In total there were 20 097 contracts on the Internet websites, of which 4855 (24 per cent) were listed as containing confidential provisions and/or other requirements of confidentiality.

Selected agencies

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

- Attorney-General's Department (AGD);
- Australian Agency for International Development (AusAID);
- Australian Customs Service (Customs);
- Department of Foreign Affairs and Trade (DFAT);
- Department of Health and Ageing (Health); and
- Department of Transport and Regional Services (DOTARS).

1.26 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
Attorney-General's Department	176	46
Australian Agency for International Development	1020	0
Australian Customs Service	120	61
Department of Foreign Affairs and Trade	185	18
Department of Health and Ageing	4885	241
Department of Transport and Regional Services	583	161
Total	6969	527

Source: ANAO analysis of Internet listings for Spring 2002 Parliamentary sitting.

1.27 The selected agencies reported a total of 6969 contracts, representing 34.7 per cent of the total number of contracts reported by all FMA Act agencies. In addition, five of the six agencies reported 527 contracts with confidentiality provisions, or 10.9 per cent of the total number of such contracts listed by all agencies.

1.28 The sixth agency, AusAID, did not list any contracts as containing provisions requiring confidentiality of the terms of the contract, as its policy is that no information in a contract will be considered as confidential.

The methodology

1.29 The audit methodology involved:

- accessing all FMA Act agencies' Internet sites and downloading relevant information from the contract listings;
- conducting interviews, and examining files and records relating to the contract listings and the selected contracts at each of the selected agencies; and
- consulting with legal advisers prior to forming an opinion on whether the contracts selected for examination were appropriately listed as containing confidentiality provisions.

1.30 The audit was conducted in accordance with ANAO Auditing Standards at an approximate cost of \$210 000. The ANAO engaged a consultant from Courage Partners Pty Ltd to assist with the audit.

Audit findings

1.31 Chapter 2 (Internet Listings) outlines the findings for the first audit objective, while Chapters 3 and 4 (The Processes Used to Create the Internet Listing and Confidentiality Provisions in Contracts, respectively) outline the findings for the second audit objective.

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

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 Objective One.

Agencies covered by the Senate Order

2.2 During the reporting period, there were 79 FMA Act agencies.¹⁷ The five parliamentary departments,¹⁸ although classified as agencies under the FMA Act, are not Departments of State administered by Ministers and, as a result, are not included in the Senate Order. However, as occurred in the previous audits, all the parliamentary departments, except the Department of the House of Representatives, chose to comply with the Senate Order.

2.3 The Clerk of the House advised the ANAO of the position of the Department of the House of Representatives in relation to the Senate Order:

Section 49 of the Constitution provides for the independence of each House of the Parliament of the Commonwealth of Australia. That section of the Constitution links the powers of the Houses to the powers of the United Kingdom House of Commons as at 1901, in relation to which the acknowledged commentary on constitutional power, Hatsell says:

The leading principle, which appears to pervade all the proceedings between the two Houses of Parliament, is, that there shall subsist a perfect equality with respect to each other: and that they shall be, in every respect, totally independent of each other.

It is therefore clear that the resolution of the Senate cannot bind the House of Representatives or the Department that serves it. The Senate has no legal right to require a response for the House, and properly advised would never seek to achieve one. I believe it would be acting without due respect to the privileges of the House of Representatives and acting without legal justification if I responded to an order of this kind unless directed to do so by the House.

¹⁷ FMA agencies were identified by reference to the *Financial Management and Accountability Regulations 1997*, 12 September 2002.

¹⁸ 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.

The Clerk of the House also raised for consideration whether the inclusion of a return to a Senate Order of any material relating to the House not authorised by it might be considered an infringement of the privileges of the House.

2.4 As in previous audits, 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.

2.5 Accordingly, there were 76 agencies that were required to, or had agreed to, comply with the Senate Order for the Spring 2002 reporting period.

Audit evaluation criteria

2.6 Agencies would be expected to have listed contracts on their websites in accordance with the Senate Order by the due date (17 September 2002).¹⁹ In addition to the specific requirements of the Senate Order, each agency would be expected to have:

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

Assessing compliance with the Senate Order

2.7 The ANAO assessed each of the 76 agencies' compliance with the Senate Order. In conducting the assessment, the ANAO expected that agencies would have had sufficient time since the passing of the original and amended Senate Orders to adopt practices that would ensure they could comply fully with the requirements of the Senate Order. However, the ANAO also recognised that the Government's responses to the Senate Order indicated that agency compliance would be progressive. Therefore, it was likely that agencies would be in different stages of achieving compliance with the Senate Order.

Audit findings

Agencies with a contract listing on the Internet

2.8 All 76 agencies had placed a listing of contracts on their websites for the Spring 2002 reporting period by the time the audit was completed. Some agency listings were integrated with their portfolio department, or with other aligned bodies, as follows:

¹⁹ The due date for the listings to be on the Internet was taken to be the tenth day of the Spring 2002 Sittings, which was 17 September 2002. (Paragraph (1) of the Senate Order).

- The Australian Antarctic Division's contract details are included in the Department of Environment and Heritage list.
- The Child Support Agency Australia and the Social Security Appeals Tribunal are included in the Department of Family and Community Services list.
- 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.
- As a result of shared administrative arrangements, the PSS and CSS Boards have reported their contract details together.

2.9 The Office of the Inspector-General of Intelligence and Security advised that it did not have any contracts of \$100 000 or more and has placed a note to this effect on its website.

2.10 The ANAO's assessment of each of the 76 agencies compliance with the specific requirements of the Senate Order is detailed at Appendix 3.²⁰ Agencies confirmed that the ANAO's assessment of each listing was correct.

Summary of Internet listings

Agency compliance with the Senate Order's requirements

2.11 In summary, agency compliance with the requirements of the Senate Order, as identified through the ANAOs desk top review of agencies Internet listing is as follows:

- 53 of the 76 agencies (70 per cent) fully complied with the requirements of the Senate Order by the due date, and
- seven of the 76 agencies (9 per cent) complied in part with the requirements of the Senate Order by the due date.

Number of contracts listed

2.12 As mentioned earlier, 24 per cent or 4855 contracts were listed as containing confidential provision and/or other requirements of confidentiality.²¹ In the previous reporting period, agencies had listed 15 895 contracts of which 4123 (26 per cent) contained either confidential provisions or other requirements of confidentiality.

²⁰ The ANAO assessment was provided to each agency to confirm the assessment was accurate.

²¹ Of these contracts, 2594 contracts were listed as containing confidential provisions and 2749 were listed as containing other requirements of confidentiality. Some contracts were listed as containing both confidential provisions and other requirements of confidentiality.

2.13 However, as in previous audits, the ANAO was unable to draw any conclusions from these figures on the impact of the Senate Order on reducing the number of contracts containing confidential provisions. This is because compliance with Senate Order is being undertaken progressively and a large number of contracts had been entered into before the Senate Order came into effect. As a result, such contracts would have been identified as containing confidential information without consideration as to whether the information was truly confidential.

2.14 Again, as in previous audits, the Department of Defence (Defence) had not yet posted a complete list of contracts or identified which contracts on the Internet list contained confidential provisions or other requirements of confidentiality. Specific comments from Defence are shown below.

Department of Defence

2.15 Defence has advised that:

- the results depicted on the department's Internet listing reflect all contracts and purchase orders notified in the Commonwealth Purchasing and Disposals Gazette for the period concerned;
- there may be instances where several purchase orders have been raised against the one contract;
- it has undertaken a number of initiatives to address compliance issues with respect to the Senate Order;
- it has developed guidance for the identification and management of commercial-in-confidence information, revised its contract clauses and has progressed work on establishing a contracts register database to capture more accurate and comprehensive information; and
- the contracts register interim implementation is expected to occur in March 2003 and this reporting, once operational, will be prospective.

Cost of complying with the Senate Order

2.16 Most agencies have used a method based on the time spent and the cost of labour to estimate the cost of complying with the Senate Order. The estimated total cost of all agencies complying with the Senate Order was approximately \$375 000 for the Spring 2002 listing.

Confidential provisions in contracts and other requirements of confidentiality

2.17 One of the amendments to the original Senate Order related to agencies' identification of both contract provisions requiring parties to maintain

confidentiality of contract provisions and other requirements of confidentiality. Paragraph 2 (c) of the original Order was changed from:

whether each such contract contains provisions requiring 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

to:

whether each such contract contains provisions requiring 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 confidentiality.

in the amended Order.

2.18 This change raised the question of what was meant by other requirements of confidentiality. Finance advice to agencies was that amendments to paragraph 2(c) of the Senate Order were directed at clarifying its scope to cover:

- attempts to keep confidential the provisions of the contract; and
- confidentiality clauses of a general nature.

2.19 The ANAO considers that these clauses of a general nature are likely to include commonly used clauses to impose obligations of confidentiality in respect of information not necessarily contained in the text of the contract itself, such as trade secrets, or other information that may be obtained or generated in carrying out the contract. Health advised that it has interpreted—‘other requirements of confidentiality’ to mean where there are any requirements of confidentiality, outside the contract, which require *the contract* to be kept confidential, in line with the department’s understanding of the original intent of the Senate Order.

2.20 Agencies have dealt with this change to the Senate Order in one of three ways, for example by:

- identifying, in one column, those contracts with confidential provisions and other requirements of confidentiality. The reasons for confidentiality are provided only for those contracts with confidential provisions;
- identifying, in one column, those contracts with confidential provisions and other requirements of confidentiality. The reasons for confidentiality are provided for those contracts with confidential provisions and for those contracts with other requirements of confidentiality; or
- identifying those contracts with confidential provisions in one column and those with other requirements of confidentiality in another. Some agencies provided reasons against both columns while others provided reasons only for those contracts that contained confidential provisions.

2.21 The ANAO considers that the method of the presentation of the Internet listing, which provides for both contracts with ‘confidential provisions and contracts with ‘other requirements of confidentiality’ to be identified separately, allows for a clear distinction between the two requirements of the Senate Order. The ANAO also considers that it would be good practice for agencies to make a clear statement on their Internet listings as to how they have interpreted the term ‘other requirements of confidentiality’

Presentation

2.22 The ANAO found that most agencies had a readily identifiable path on their website to the contract listing (see Appendix 4 for the website addresses for all FMA agencies’ contract listings). There were also varying formats to the Internet listing; in particular the distinction between contracts that contained ‘confidential provisions’ and those with ‘other requirements of confidentiality’, was dealt with in different ways.

2.23 Of the six agencies reviewed in detail, the ANAO considers that the AGD listing of contracts is the clearest and most complete response to the requirements of the Senate Order. The approach taken by AGD to the presentation of the listing is clear and helpful for the reader, and provides a good model for other agencies to follow.²²

Figure 2.1

Example of Agency Listing

Contractor	Subject	Consideration (\$)	Provisions Requiring Confidentiality (Y/N)	Reason(s)	Other Requirements of Confidentiality (Y/N)	Reason(s)
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Source: AGD Home Page.

Conclusion

2.24 The ANAO found that FMA agencies had largely complied with the listing requirements of the Senate Order. In addition, a higher proportion of agencies had placed their lists on the Internet either by, or shortly after, the due date than in the previous audits. The ANAO considers that there is scope for many agencies to improve the presentation of their Internet listings.

²² The ANAO notes the FPA Committee in its report on the first year of the operation of the Senate Order has recommended that the Senate Order be amended to include additional information, and that the ANAO, in consultation with Finance, develops guidelines for the presentation of agencies listings. This recommendation is yet to be responded to by the Senate and the Government.

3. The Processes Used to Create the Internet List

This chapter is confined to the six agencies selected for detailed review. It relates specifically to the processes used by the agencies to create the Internet listing of contracts.

Audit evaluation criteria

3.1 The ANAO expected that, by now, agencies would have:

- adopted/developed appropriate policy and procedures for recording contracts;
- allocated responsibility for recording/listing contracts on the agency's website;
- implemented a system for the recording and reporting of the relevant information of all contracts;
- developed appropriate controls for identifying those contracts with confidentiality provisions and the reasons for confidentiality; and
- implemented procedures for reconciling the listing with independent records and checking of the information listed, and updating the agency's website.

Audit findings

Policy and Procedures

3.2 The six agencies had developed appropriate policies and procedures for the required contractual information to be recorded and reported on the Internet. In all six agencies, the requirements of the Senate Order are detailed in the Chief Executive Instructions (CEIs) or the CEIs make suitable reference to the CPGs. As stated in Chapter One, the CPGs highlight the need for agencies to comply with the requirements of the Senate Order.

Recording and listing of contracts

3.3 All six agencies audited operated in devolved environments where contracts were arranged and managed by responsible operational areas. In all but one agency, this responsibility includes maintaining contract databases. In Customs, the contracts database is centrally managed and maintained.

3.4 In all agencies, specialist contracts advisory or procurement co-ordination units were responsible for the coordination and posting of the list of contracts on the Internet.

3.5 AusAID has a central contracts database, which it uses to compile its Internet listing of contracts. All areas of AusAID are responsible for placing contracts on the contracts database.

3.6 Customs has a central contract database on which the Accredited Purchasing Unit (APU) places contracts based on information provided by operational areas. The database is used to generate the information required for both the gazettal of contracts and the Internet listing. In addition, copies of contracts valued at over \$100 000 are provided to the APU.

3.7 AGD and DFAT have a central database but rely on the operational areas to compile Internet listings.

3.8 Health and DOTARS have several databases in the operational areas. Both rely on the operational areas to compile the Internet listing. Health is in the process of developing a central contracts database that will simplify the recording of contracts and the compilation of the Senate Order listing. DOTARS is developing a central grants database and enhancing the functionality of its finance system to capture information relating to contracts.

3.9 Each agency had a different approach to satisfy itself that the listing was complete, as follows:

- AusAID's FMIS does not allow payments to contractors to be made unless there is a contract registered in the contracts database. This arrangement acts as a control on the completeness of the contracts listing.
- The APU in Customs uses the contracts database to generate an initial list of contracts for the Internet listing, and then seeks operational area confirmation that the list is complete in terms numbers of contracts and the details provided. As well, the fact that the APU holds copies of all contracts valued at over \$100 000 means that checks on the numbers of contracts to be listed can be made relatively easily.
- In DFAT, the Internet listing is checked by the Financial Management Section of the Financial Management Branch against the contracts database and the FMIS.
- In AGD, the Financial Policy and Contracts Section of the Financial Management Branch checks the Internet listing against the FMIS and a monthly list of consultancies, contracts and grants that is provided to the Secretary and the Attorney-General; the central contract register is updated on the basis of these checks.

- In Health, the appropriate First Assistant Secretaries are asked to sign-off on the accuracy and completeness of the advice given by their operational areas to the co-ordinating contracts unit.
- In DOTARS, the Contracts Advisory Unit does a reasonableness test on the listing. Any contracts on the list that do not seem to be consistent with the department's approach are checked against the contract details held by the Contracts Advisory Unit.

Processes for identifying contracts with confidential provisions

3.10 The identification of contract provisions requiring contractual information to be kept confidential is a difficult process in relation to contracts that were entered into prior to the introduction of the new accountability framework. For these contracts, which are still the majority of those listed on the Internet, agency staff need to review the content of each contract, in conjunction with the contractor if possible, to determine the information that should be protected as confidential. For the contracts entered into under the new accountability framework, this process is simplified by the fact that any confidential contractual information will be agreed by both parties to the contract and be specifically identified in the contract.

3.11 In most of the agencies audited, the review of the older contracts was undertaken in operational areas by staff that had an understanding of the sensitivities relating to individual contracts. The guidance available to staff generally related to the requirements of the Senate Order rather than how to make an assessment of confidentiality of contract provisions. For the most part, contractors were not consulted.

3.12 AGD and DFAT undertook some checks of the accuracy of the information provided by operational areas prior to the listing being posted. AusAID undertook a review of the information in its draft listing to ensure that the list was complete. However, because its standard approach is that contracts will not contain any information to be protected as confidential, AusAID did not undertake a check of contract documentation.

3.13 The three remaining agencies relied on the data provided by operational areas. However, they did not have formal processes in place to check whether the contracts contained confidential information.

Conclusion

3.14 The ANAO concluded that the processes used by the six agencies provided a reasonable level of confidence that the Internet listings were likely to be complete in relation to the numbers of contracts reported. In general, those

agencies with electronic contract registers were better placed to provide complete information relatively efficiently.

3.15 Those agencies that did not have clear internal policies and procedures for establishing the list of contracts on the Internet and determining what contractual information, if any, should reasonably be protected as confidential, had difficulty in ensuring that contracts were appropriately listed on the Internet as containing confidential information. This is particularly true for the older contracts where confidential information has not been specifically identified in the contract.

3.16 All agencies, including those that had appropriate policies and procedures for establishing the Internet lists, should implement quality assurance processes, as necessary, to ensure the completeness and accuracy of the contract details on the Internet.

4. Confidential Provisions in Contracts

This chapter reports on the new accountability framework relating to the use of confidential 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

4.1 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 basis of the ANAO's analysis is detailed in the evaluation criteria below.

Audit evaluation criteria

4.2 The ANAO expected that, by the time the audit commenced in mid September, agencies would have 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 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 contractor and the Commonwealth have agreed that the information is confidential;
- required potential contractors to indicate if they considered any information in the tender or the contract to be confidential;
- provided agency officers with confidentiality 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 particular contractual

information is inherently confidential and should be protected as confidential information;

- ensured that information agreed by the agency to be protected as confidential information is identified as such in the contract; and
- established staff training and awareness activities of the Commonwealth's new accountability framework for relevant staff.

Audit findings

Policy and guidance for agency staff

4.3 Four agencies (AGD, AusAID, Customs and Health) had completed the amendment of their formal procurement policies and contract documentation (RFT and standard form contracts) to incorporate the new accountability framework. The other two agencies (DFAT and DOTARS) completed appropriate amendments during the audit.

4.4 The ANAO considers that, while Customs had made appropriate changes to its CEIs and contract documentation, further refinement is required to ensure the documentation reflects the amendments to the Senate Order and clearly outlines the new accountability framework.

4.5 AGD was the only agency to have issued any detailed guidance to staff on how to determine what information, if any, was likely to require protection as confidential information. AusAID, because of its approach that no contractual information is confidential, had no need to provide guidance on how to determine whether information was confidential.

4.6 DOTARS had provided a briefing note in August 2002 to those staff responsible for compiling the listing on how to determine what information in a contract should be regarded as confidential. In addition, the briefing note advised that it was highly unlikely that entire contracts could reasonably be regarded as confidential. The ANAO considers that this advice, which was provided to Business Managers to assist them in developing the list of contracts for the Internet, should also have been made available to procurement staff at the time that they were negotiating contracts.

4.7 Other agencies had directed their staff to the ANAO Report No.38, as a source of information on how to determine what contract information should be classified as confidential.

Tender documentation

4.8 Four agencies had amended tender documentation to advise prospective tenderers about the new accountability framework. AusAID had no need to amend its documentation because it has been working for some years in a framework that does not make any contractual information confidential.

4.9 Health has standard contract clauses included in its RFT informing tenderers that the Commonwealth gives no undertaking to treat contractors' information as confidential. However, the RFT provides an opportunity for prospective contractors to specify if they do not agree with the standard form contract, including the clause in which the Commonwealth gives no undertaking to treat contractors' information as confidential. The ANAO considers that this approach is consistent with the new accountability framework, provided that, in practice, contractors are fully aware of the implications of this clause.

4.10 All the other agencies have included material in their revised RFT documentation which makes tenderers aware of the Commonwealth's position that:

- contractual information will not be protected as confidential information unless there is a good reason to do so; and
- tenderers must indicate what, information if any, they wish to protect as confidential information and that contract negotiations will include discussion of what might be protected as confidential information.

4.11 The ANAO considers that agencies' RFTs outline the new accountability framework in which Commonwealth agencies now operate, and the associated reporting and disclosure requirements. Finance guidance includes model clauses for tender documentation, these clauses have been reproduced at Appendix 5.

4.12 AGD, DFAT and Health had developed guidance for staff on the use of the RFT. Both AGD and DFAT included information about how to assess whether contractual information might be protected as confidential information under the contract.

4.13 As discussed earlier, DOTARS provided advice to staff to support the development of the Internet listing, which would be useful in the consideration of what information might be protected as being confidential. DOTARS has the additional process that all contracts over \$50 000 must be cleared through the legal branch, giving further opportunity for consideration to be given to what information should be identified as being confidential.

4.14 Customs is in the process of redeveloping guidance to staff on identifying information that might reasonably be protected as being confidential.

Standard form contract

4.15 All agencies, except AusAID, had revised their standard form contracts to provide for any information the parties agreed in the negotiation process was to be protected as confidential information to be specified in a schedule to the contract. As already indicated, AusAID had no need to modify their standard form contract because it already has the practice of not making any contractual information confidential.

4.16 Health works on the presumption that contractors' contractual information is not confidential. The rationale for the position is that the department is accountable for procurement decisions and that those decisions should be available for scrutiny by Government. The expectation is that potential contractors will seek to renegotiate the relevant contract clause where they consider some of their information is confidential. Where a potential contractor seeks to protect information as confidential, departmental officers are encouraged to seek specialist advice on what may constitute confidential information and how to provide for this in the contract. The decision to accept the claim of confidentiality, or otherwise, is based on an assessment as to whether the information which the contractor is seeking to protect, meets confidentiality criteria.

4.17 Several agencies had developed guidance for staff on the use of their respective standard form contracts, particularly where the templates could be altered according to the circumstances to apply in a particular contract. In AusAID, staff can select from a suite of contracts according to the value of the contract, but within each, the conditions are standard with only the schedules being altered to insert the particulars of the contractor and task. DOTARS is working towards development of a similar suite of contracts where provisions cannot be altered.

4.18 By the time this report is tabled, most agencies will have completed their revision of guidance to assist staff in the use of RFT and contract documentation, and in assessing what contractual information, if any, should be protected as confidential information.

Staff Awareness

4.19 AusAID and DFAT have incorporated information about the new environment for dealing with sensitive information into their contract management training.

4.20 AGD has advised that although it has not identified the development of specific training that addresses confidentiality of contractual information, the Financial Policy and Contracts Section provides advice on an ad hoc basis in response to staff inquiries.

4.21 Because DOTARS has been progressively introducing its revised documentation to contract managers, it has not run any systematic training for staff about the new accountability framework or on how to handle sensitive contractual information in contracts. However, the department advised that it ‘...intends to run awareness training for its higher-level officers to aid in the correct identification of commercially sensitive information.’

4.22 Customs provides a procurement awareness course to staff; this course identifies the requirement for agencies to comply with the Senate order, but does not specifically address how to decide whether to protect specific information as confidential information.

4.23 In Health, contract management training courses do not provide details on how to decide whether to protect specific information as confidential information. Operational areas are advised to seek advice and drafting assistance from the Legal Services Branch where appropriate. The department indicated that it will revise these courses to address the reporting requirements of the Senate Order and the identification of confidential information.

4.24 The ANAO found, for the most part, that although central units responsible for contracting policy and guidance have amended and promulgated documentation to reflect the new accountability framework, not all operational areas had a sound and informed understanding of the changed environment and how to decide whether to protect specific information as confidential information. This is evidenced by the ANAO’s review of the Internet listings and assessment of the appropriateness of the confidentiality claims for selected contracts, which indicated that there were a number of contracts that were inappropriately described as confidential. The findings are discussed in detail later in this Chapter.

4.25 The ANAO notes that it may take some time and several iterations of training and awareness sessions for a widespread understanding of the treatment of confidentiality in contracts to be developed and applied by procurement staff within large agencies in which responsibility for procurement is devolved.

Conclusion

4.26 Agencies’ tender and contract documentation is consistent with the new framework for the treatment of confidential contractual information. Agencies have made progress in developing and promulgating guidance to assist staff in assessing what information, if any, in a contract might be protected as confidential.

4.27 Agencies should make a sustained effort, through regular training and awareness activities, to develop their staff’s understanding of the new accountability framework and how to assess the need for any contractual information to be agreed as confidential information before a contract is signed.

The use of confidential provisions in contracts

4.28 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.

4.29 The ANAO focussed its examination of contracts on those that commenced in 2002, with the expectation that agencies would have put in place, or would be in the process of putting in place, contracting arrangements to reflect the new accountability framework. This framework includes an expectation that agencies 'consider on a case-by-case basis, what might be commercial-in-confidence when designing any contract'.²³

4.30 However, in making assessments about whether contracts contained appropriate confidential provisions, the ANAO recognised that decisions in relation to contracts entered into before agencies put into place revised procedures for determining what contractual information should be protected as confidential, would generally have been negotiated in circumstances where:

- the principle that contractual information should not be made confidential unless there is a good reason to do so, was not widely applied;
- decisions about the confidentiality of contractual information, would have been made without the benefit of general guidance on how to determine whether the information should be protected as confidential information; and
- the parties may have assumed that the information was given and received in confidence, in which case an equitable obligation of confidence may have arisen.

4.31 In addition, the ANAO acknowledges that, in making its judgement on whether information has been appropriately identified as confidential information provisions, it did so by examining the information in the contract. The ANAO did not discuss with the supplier whether there were any particular circumstances, not obvious from reading the contract, that would make the information confidential.

²³ *Commonwealth Procurement Guidelines*, September 2001, subsection 1.2.

Audit evaluation criteria

4.32 The ANAO assessed each of the contracts selected for examination against the criteria for determining whether contractual information could properly be protected as confidential, as outlined in the FPA Committee's final report and Audit Report No.38. These criteria 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.
- **Information has the necessary quality of confidentiality**
 - A confidentiality claim should not be made or accepted in relation to innocuous material or information or something that is trivial.
 - The information should usually 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 value to the confider (for example, trade secrets), and it is likely that detriment will be caused to the 'confider'²⁴ should it be disclosed.
 - At the time when confidentiality is claimed, the information must be known only by a limited number of parties. It must not be in the public domain (for example, details may already appear in the client charter, published business plan or annual report). Confidentiality may be appropriate for a limited period only. 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.

²⁴ 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). The ANAO has received recent legal advice that detriment can only be truly identified after a breach of confidence. This issue is discussed in the following paragraphs.

- **Given and received in confidence**
 - The circumstances in which the information is provided and accepted must clearly show that it was given by the confider (contractor) and accepted by the confidee (agency) on the basis that it is to be kept confidential.²⁵ This is a critical element, the absence of which will prevent confidentiality being asserted to protect information from disclosure.

4.33 Since Audit Report No.38 was tabled in May 2001, the ANAO has received additional legal advice that detriment to the contractor is not a criterion, in its own right, to determine whether information should be protected as confidential information. Detriment is only relevant, if at all, when a *breach* of an actual obligation of confidence has occurred or is likely to occur after the contract is entered into (see page 56 of Audit Report No.38). It is not required to *create* an obligation of confidence in relation to particular information at the time a contract is entered into. As the criteria in Audit Report No.38 are specifically targeted at the situation where the parties are considering *creating* obligations of confidence in respect of particular information, potential detriment needs to be dealt with in this context.

4.34 While the concept of potential detriment may not be a required element in deciding whether to protect information as confidential information before the confidence is breached, the ANAO considers that, for the purposes of the new accountability framework, the concept of potential detriment is important. It allows agencies to discuss with contractors, at the time the contract is being negotiated which information might be protected, and the length of time it should be protected, in a way that enables the likely impact of the disclosure to be considered. Accordingly, the ANAO considers that the issue of potential detriment to the provider of the information should be addressed when discussing claims of confidentiality.

²⁵ In a small number of cases, the Commonwealth will be entering contracts where it has commercial interests that it wishes to protect. Such circumstances could include trade secrets flowing from research and development conducted by a government agency. In cases where the Commonwealth has a commercial interest, it may wish to ensure that certain contractual information is protected as confidential. The criteria detailed in paragraph 4.32 could be applied equally in cases where the Commonwealth has a particular commercial interest, as well in as those situations where a contractor has such an interest.

Examples of what would, or would not, be considered confidential

4.35 Audit Report No.38, tabled in May 2001, provided examples of information in contracts that would generally not be considered to be confidential.²⁶ 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.

4.36 Audit Report No.38 also provided examples of the types of information that may be considered confidential including 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).²⁷

4.37 Audit Report No.33, tabled in February 2002, provided additional examples of the circumstances where the price in a contract could be considered to be confidential. Relevant extracts from both Audit Report No.38 and Audit Report No.33 are at Appendix 6.

Selection of contracts

4.38 The number of contracts listed by the agencies audited as containing confidential provisions was shown in Table 1.1.

4.39 The ANAO selected 51 contracts from those listed as containing 'confidential provisions' or any 'other requirements of confidentiality' on five of the six audited agencies' websites.²⁸ As these contracts had not been listed previously on the Internet, the ANAO expected that most of them would have been entered into after 12 February 2002 and negotiated in the new contracting environment. However, on examining the contracts, the ANAO found that 18 had been entered into prior to 12 February 2002 and, as a result, focussed its review on the 33 remaining contracts.

4.40 As occurred in the previous two audits, the audit findings were influenced by the progress individual agencies had made in adopting the new accountability framework. Where agencies had progressed to the point of discussing and agreeing with contractors whether contracts contained confidential information, the ANAO was able to assess whether the specific provision (for example, by way of specific schedule) detailing the information as confidential information was appropriate.

²⁶ *op. cit.*, Audit Report No.38, paragraphs 5.12 to 5.15, pp. 64, 65.

²⁷ *ibid.*, paragraph 5.16, p. 65.

²⁸ The ANAO did not examine contracts of these five agencies that were listed as not having confidential provisions to assess whether they had information that could have been considered as confidential.

4.41 On the other hand, where agencies had not discussed contractual confidentiality issues with contractors and had relied on the contract managers' judgements as what information was inherently confidential, the ANAO assessed the information in the contract to determine whether the information was in fact confidential. In these cases, the ANAO, while recognising the circumstances in which the contracts were negotiated, assessed whether the information would have been agreed to be confidential if the Senate endorsed confidentiality criteria had been used by the agency at the time the contract was entered into.

4.42 The ANAO also examined 20 contracts from the sixth agency, AusAID, to determine whether its contract listing, which indicated that none of the contracts contained confidential information or other requirements of confidentiality, was correct. As discussed later in this Chapter, the ANAO considered that all the AusAID contracts reviewed were appropriately listed on the Internet.

General audit findings

4.43 The ANAO considered that five of the 33 contracts reviewed contained confidential information. The major reasons that the ANAO considered the other 28 contracts were not appropriately identified as containing confidential provisions on the Internet listing were because claims generally did not meet the confidentiality criteria, for example because they related to non-specific information.

4.44 The major findings were similar to those in the previous two audits. In particular, the ANAO found that pricing was still a major issue. As previously indicated, the ANAO considers that, as general principle, price payable under a contract should not be protected as confidential because it does not meet the confidentiality criteria detailed earlier. The ANAO's position in relation to price has been restated in Appendix 6.

4.45 The question whether discounts should be treated as confidential pricing information was raised during the audit. The ANAO considers that decisions about whether or not discounts are confidential information are difficult. As the draft Finance *'Guidance on Confidentiality of Contractors' Commercial Information'* points out, discounts may or may not be confidential, depending on the circumstances of the particular case. The Finance guidance advises that prospective contractors may seek to protect the confidentiality of the discount information in instances where the prospective contractors' *'...financial interests would be prejudiced if its other customers were to know of, and seek, similar levels of discount as those available to the Commonwealth...'*

4.46 If the information in contracts about discounts is significant to the contractor, it could satisfy the criteria of being inherently confidential information. However, the information is only more significant than a non-

discounted price (which is generally not considered to be confidential) if the price can be identified as a discount price, which is not available to other customers. As with price, the discounted price or the percentage of the discount only reveals a margin if it refers specifically to a definite benchmark of actual cost. Such information, if contained in the contract, may have commercial sensitivity with possible detriment to the contractor if disclosed because other contractors or the contractor's other customers would know the discount agreed, and, therefore, the information may potentially warrant protection.

4.47 In addition, a number of contracts still had global provisions that made the entire contract confidential. They therefore did not meet the criterion that confidential information should be specifically identified.

Privacy

4.48 During the audit, the ANAO identified a number of contracts that had been excluded from agencies' Internet listing because the contracts had been entered into in the name of individuals. Agencies claimed that to include this information on their Internet listings may breach the *Privacy Act 1988* (Privacy Act). The detail of these exclusions is covered later in this Chapter.

4.49 The Privacy Act makes provision for the privacy of personal information collected, held, used and disclosed by Commonwealth agencies and certain private sector organisations. The core of the legislation is a set of Information Privacy Principles (IPPs) applying to Commonwealth agencies. An individual can be an organisation for the purposes of the Privacy Act. A business not otherwise subject to the Privacy Act, will need to comply with the IPPs if it is a contracted service provider to a Commonwealth agency.

4.50 The legislation applies only to personal information—which is defined in the Privacy Act in essence as:

any information or an opinion about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion.

It is a very wide definition and would include commercial information about a individual.

4.51 There are some exceptions to the obligations specified in the IPPs, the most relevant for this audit being personal information contained in a generally available publication. Such information is not a record subject to the Privacy Act and would include information published in the Commonwealth Purchasing and Disposals Gazette, and the Australian Securities and Investment Commission's publicly available databases. Information uplifted from a generally available publication and included in another record of an agency or organisation is subject to the Privacy Act.

4.52 IPP 11 deals with disclosure of personal information. That principle prohibits disclosure without consent of the individual concerned except in specified situations. These exceptions include, but are not limited to where:

- the individual is otherwise reasonably likely to be aware or have been made aware that that kind of disclosure is commonly made, or
- where the disclosure is required or authorised by law.

4.53 The ANAO considers that the best way to ensure that an individual is indeed aware of the ways in which contractual information is routinely disclosed by the agency is by including a notice of possible disclosures in the request for tenders or expressions of interest (or other such documentation) so that the individual provides the information to the agency in the knowledge of such possible disclosure.

Confidentiality and disclosure

4.54 During the audit, it became apparent that some agencies considered that, while contractual information may not be considered confidential because it can be disclosed to Parliament, it could be considered confidential because it should not be disclosed to the public. The ANAO considers that, at the time of contract negotiation, the fact that information may at some time in the future be disclosed to Parliament is not relevant to the decision as to whether to make certain information confidential. The relevant issue is whether, according to the confidentiality criteria, the information is actually confidential information.

4.55 Even if information is confidential, it may be disclosed by an agency where the law authorises, or requires, the information to be disclosed, for example, in response to the following:

- a demand from Parliament or a Parliamentary Committee so empowered to demand disclosure to the Parliament or Committee;
- a subpoena of a court or summons from a tribunal empowered to issue summonses to obtain evidence;
- a demand issued under specific legislation (e.g. the *Social Security Act* or the *Income Tax Assessment Act*);
- a request under the *Freedom of Information Act 1982*;
- an obligation under the *Privacy Act 1988*;
- an application under the *Archives Act 1983*; and/or
- discovery processes during litigation.

4.56 In relation to other requests for access to contractual information that is not confidential information, the *Freedom of Information Act 1982* will generally be the basis for agencies' decisions on whether to disclose the information. As discussed in Audit Report No.8:

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).²⁹

4.57 It is essential that contractors and the agency have a shared view of the implications of agreeing that contractual information is not to be protected as confidential information, particularly about the impact that such an agreement may have on requests for information.

Audit findings by agency

Summary

4.58 In coming to a conclusion on the appropriateness³⁰ of the use of confidentiality provisions in contracts by the six agencies audited, the ANAO took into account whether the contracts had been entered into in circumstances where the information had been identified and agreed by both parties to the contract as being confidential or whether the circumstances were such that the contract was listed as containing confidential information without such agreement being reached. In the latter case, the ANAO determined whether any contractual information, which was listed as confidential, would have been assessed as such, if the Senate-endorsed confidentiality criteria had been used at the time the contract was negotiated.

²⁹ op.cit Audit Report No. 8, p. 61.

³⁰ Also, where the confidentiality of information in contracts is considered confidential, agencies should, of course, include a provision which provides an exception with respect to disclosure to a parliamentary committee if only on a confidential basis.

4.59 The results of the ANAO assessments for each of the selected agencies are summarised at tables 4.2 and 4.3, depending on whether the contract:

- had provisions that identified information as confidential; or
- did not have provisions that specifically identified confidential contractual information. In these cases, the ANAO had to examine the information in the contract to ascertain whether the contract was appropriately listed on the Internet as containing confidential information.

Table 4.2

ANAO assessment of confidentiality claims for selected contracts—contract provisions

Agency	Number of contracts in the sample listed as confidential	Number of contracts which specifically identified information to be protected as confidential	Number of specific confidentiality provisions considered appropriate by the ANAO
AGD	8	2	1
AusAID ¹			
Customs	5	1	0
DFAT	6	6	1
DOTARS	6	0	
Health	8	0	
Total	33	9	2
¹ As discussed earlier, AusAIDs approach is not to classify any contractual information as confidential.			

Source: ANAO analysis

4.60 As illustrated by the table above, less than a third of the contracts reviewed contained provisions specifically identifying information as confidential. Of these nine contracts, the ANAO considered that only two were appropriately listed as containing confidential information.

4.61 The remaining 24 contracts reviewed did not contain provisions that specified what information was confidential. In these cases, the ANAO looked at the reasons on the Internet listings as to why the contract was listed as containing confidential provisions, and made an assessment of the inherent confidentiality of the information in the contracts (see Table 4.3). As with the assessment in the previous table, the ANAO used the criteria outlined earlier in this Chapter as the basis of its assessment.

Table 4.3

ANAO assessment of appropriateness of claims of confidentiality in contracts that have not specifically identified confidential information

Agency	The number of contracts listed as confidential which are not supported by specific provisions in the contract	Number of contracts where confidentiality claims were considered appropriate
AGD	6	1
AusAID		
Customs	4	0
DFAT	0	
DOTARS	6	1
Health	8	1
Total	24	3
¹ As discussed earlier, AusAIDs approach is not to classify any contractual information as confidential.		

Source: ANAO Analysis

4.62 As shown in Table 4.3, only three of the contracts reviewed were considered by the ANAO to have been appropriately listed on the Internet as containing confidential provisions.

4.63 The results of the ANAO assessment for each of the six agencies are shown in the paragraphs below. In addition, agencies' comments are shown where provided.

AGD

4.64 The department's Internet listing showed contracts with confidential provisions separately from those with other requirements of confidentiality. The ANAO found that some of the contracts were listed as having confidential provisions, when they should have been listed as containing 'other requirements of confidentiality'.

4.65 In relation to contracts listed as having confidential provisions, the ANAO agreed two instances where the information was appropriately identified as being confidential. The first related to a hardware upgrade on an information system carrying national security information, which was identified as confidential in the contract, and the other related to a contract that contained pricing information that was so detailed that the margin and cost structure of the provider could be identified. This information was not specified as being confidential in the contract.

4.66 The ANAO did not agree with the department's position in relation to two contracts that pricing details in the contract should be protected as confidential information. Further, the ANAO identified instances in two other contracts where the claims of confidentiality made on the Internet listing related to issues that were outside the contract.

4.67 The remaining two contracts contained other requirements of confidentiality, and had been incorrectly listed on the Internet as containing confidential provisions.

4.68 Further, AGD excluded eight contracts from its Internet listing for privacy reasons (discussed in more detail at paragraphs 4.88-4.90). During the course of the audit, the department reviewed two of the excluded contracts and agreed that exclusion for privacy reasons was not appropriate. It has undertaken to include such contracts on future contract lists.

4.69 The department has advised it will continue to seek to protect daily and hourly rates relating to legal counsel, but will provide total contract values on the Internet listing. Although as stated previously, information on daily or hourly rates does not generally satisfy the confidentiality criteria, the ANAO is aware that the Attorney-General advised Ministers in November 2000 that daily and hourly rates of legal counsel engaged by the Commonwealth should not be disclosed without prior consultation with the Attorney-General.

AusAID

4.70 The ANAO found that the information in a sample of contracts reviewed was consistent with the AusAID policy of not regarding any provisions of any contracts as confidential information. The ANAO concluded that all contracts were appropriately listed as not containing confidential information.

4.71 Most of the contracts contained information of the kind that other agencies included in this audit, and earlier audits, had agreed to protect as confidential information, and that the ANAO has found to be inappropriately protected, for example:

- fees and daily rates for specific consultants;
- detailed prices lists of goods and services;
- specified personnel to undertake the work;
- payment schedules including milestone payments with detailed charts of activities and work to be completed for payments to be made against those milestones;
- formulae for adjustment of fees after two years;
- management fees expressed as a percentage over price of supply of goods and services; and
- detailed budgets for projects.

4.72 AusAID advised that contractors have not made any requests to keep any information of the types detailed above, or any other aspects of their contracts with the agency, confidential.

Customs

4.73 Of the five contracts reviewed, only one was in the revised standard contract format. Of the other four contracts, one was a sales contract provided by the supplier; another was a proposal from the supplier with no contract or letter of acceptance of the proposal; and the remaining two were old forms of contract, which do not provide for the identification of confidential information in the contract. This suggests that the existence of the revised standard form contract is not well known and/or has not translated into procurement practice in the operational areas.

4.74 In considering whether claims of confidentiality were appropriate the ANAO notes:

- only the one contract based on the revised standard form contract contains a provision that allows for the identification of information in the contract as confidential information. This contract, however, is inappropriately listed on the Internet as containing confidential provisions because the relevant schedule to the contract does not identify any provisions as confidential; and
- the other four contracts did not contain any provisions specifying the information to be protected as confidential. The ANAO, in assessing whether the information in the contract was confidential, considered the claims of confidentiality made on the Internet listing were inappropriate in all but one contract. This contract contained information relating to an unsuccessful subcontracting option which, if disclosed, could cause detriment to the subcontractor. The other three contracts did not contain any information that could be considered inherently confidential.

DFAT

4.75 DFAT had examined provisions that required the parties to identify in a schedule of the contract the information that they had agreed to protect as confidential in all six contracts.

4.76 Pricing information was considered to be confidential in all six contracts. In the ANAO's view, there was insufficient information provided in the contract to reveal the cost structures, profitability or profit margins of the contractor. As a result, the necessary quality of confidentiality, in the ANAO's view, was probably not established.

4.77 Discount information was protected as confidential at the request of the contractors in three contracts. The ANAO considers that the information, if disclosed, would not provide competitors with any further or more significant information than they would already have from competing in the same market, bidding for the same tenders and using the already gazetted price information on the successful bids for tenders. The ANAO notes that the discount was shown only as a price and not a discount. As presented, the information did not reveal the cost structures, profitability or profit margins of the contractor. As a result, in the ANAO's view, the necessary criteria of confidentiality were probably not established.

4.78 Intellectual Property was identified as confidential information in two contracts. The ANAO considered that one contract was appropriately listed on the Internet listing as containing confidential information. However, the other contract, which contained a clause assigning the Intellectual Property rights did not contain any confidential information.

4.79 DFAT advised it is the department's view that, at the time these contracts were negotiated, the use of confidentiality clauses was appropriate, and the department will reassess its use of such clauses in all future contracts.

DOTARS

4.80 The main issues arising from the review of the six contracts that DOTARS listed on the Internet as having confidential provisions, are summarised below:

- One of the contracts did not contain specific confidential provisions, but did contain information that might reasonably have been protected as confidential information.
- One contract was listed as containing other requirements of confidentiality although the reason stated for listing the contract was that the contract contained sensitive pricing information. The ANAO considers that the claim was inappropriate as the pricing details in the contract were not sufficiently detailed to meet the necessary qualities of confidentiality, that is the information is probably not inherently confidential.
- Four of the six contracts were for grants to companies. In each of these cases, the application for grant was attached to the contract. In no case did the application include any information that showed the detailed business strategy or plan, or any financial information about the company, which revealed its viability, or any detail of its business operation that would not already be known in the marketplace by competitors.³¹ The

³¹ One of the contracts reviewed was listed as confidential to protect the business plan the contractor was obliged to provide under the terms of the contract. The plan had not been provided to the agency at the time of the audit. While the ANAO acknowledges that elements of business plans may be inherently confidential information, this assessment can only be made once the business plan has been received.

ANAO acknowledges that some grant applications, not included in this sample, may contain more detailed financial information of a kind that could meet the test for inherently confidential information. The department advised that it is examining the grants application form so that those parts of the application which are necessary to the contract (the description of the activity to be funded) can be separated from the application material which might contain commercially sensitive information that is not necessary to include in the contract.

Health

4.81 While Health advised that, for the purpose of the Senate Order listing of contracts, it focused on whether any obligation of confidence existed in relation to the contract itself, this was not reflected in the sample of contracts reviewed by the ANAO. In these contracts the ANAO found that the claims that contracts contained confidential information on the department's Internet listing did not reflect the content of contractual agreements.

4.82 None of the eight contracts reviewed included clauses that specifically identified confidential information. As a result, the ANAO had to use the reasons provided in the Internet listing to identify what information the department considered to be confidential and whether the classification was appropriate. The ANAO considered that one contract had been appropriately classified.

4.83 The ANAO notes that many of the reasons for claiming confidentiality in the other seven contracts related to price, intellectual property and the commercial information of the contractor. These claims were not specifically identified in the contract document nor supported by the detail in the contracts themselves. The ANAO considers that the department needs to provide clarification to staff of the purpose of the listing and clear guidance that the content of the listing should be consistent with the agreed contract provisions. The department provided further guidance to staff to support the formulation of the next list of contracts (Autumn 2003). Further, the department advised the ANAO that it will append commentary to the future contract lists to outline the purpose of the list and explain that public access to departmental information is governed by established processes relating to the operation of the FOI Act.

Contracts excluded from the listing

4.84 The Senate Order requested that the Auditor-General indicate that he has examined a number of selected contracts that have not been included in the Internet list, and to indicate whether the contracts should have been listed.

4.85 All but two of the audited agencies advised the ANAO that none of their contracts had been excluded from the Internet list. Customs and AGD had excluded some contracts from the listing and had provided information to this effect in the Minister's letter tabled in the Senate. Comments on these contracts are provided below.

Customs

4.86 The Minister's letter, tabled in the Senate on 11 November 2002, advised that eight contracts with individuals were not listed because disclosure was considered to be contrary to the provisions of the Privacy Act. The decision to exclude these contracts was taken without formal legal advice to support the appropriateness of the decisions.

4.87 The ANAO's understanding of the IPPs embodied in the Privacy Act is that, if contracts had been entered into through an RFT process, which clearly sets out the reporting requirements of the Commonwealth in such a way that the contractor would know that certain contract details will be reported in a number of ways, it is reasonable to assume that the contractor, including an individual, has been notified that certain contract information will be disclosed. Customs' current RFTs inform potential contractors of the reporting requirements of contracts, so that such exclusions from the Internet listing should not be necessary in the future.

AGD

4.88 Nine contracts with individuals were not listed because disclosure was considered to be contrary to the provisions of the Privacy Act and one contract had been excluded because of security implications.

4.89 The ANAO reviewed a number of these excluded contracts, which related to the operation of Royal Commissions. The ANAO's legal advice is that if contracts had been entered into through an RFT process, the reporting requirements of the Commonwealth should have been detailed in such a way that the contractor would know that certain contract details, which would include information about individuals, would be listed on the Internet.

4.90 The ANAO considers that, for those contracts that are entered into outside the RFT process, contractors, particularly individuals, should be specifically informed of the reporting requirements within the Commonwealth prior to any agreement being entered into.

Conclusion

4.91 In applying the Senate endorsed criteria for determining whether information should be agreed as confidential information, the ANAO considered that only five of the 33 contracts examined were appropriately identified by agencies as containing confidential information.

4.92 Two agencies advised the Senate that they had excluded some contracts from the Internet listing for privacy reasons because the contracts had been entered into in the name of the individuals. This type of exclusion should not be necessary in the future if agencies make individuals aware of the Commonwealth's Senate Order obligations to report contract details on the Internet.

Canberra ACT
5 March 2003



Oliver Winder
Acting Auditor-General

Appendices

Appendix 1

Senate Order for Department and Agency Contracts

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 2

Number of contracts listed by agencies in accordance with the Senate Order—Spring

Agency	Total number of Contracts	Total confidential provisions	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality
Administrative Appeals Tribunal	12	4	4	0
Attorney-General's Department	176	46	37	15
AusAID	1020	0	0	0
Australia-Japan Foundation	5	0	0	0
Australian Bureau of Statistics	52	40	28	40
Australian Centre for International Agricultural Research	169	0	0	0
Australian Competition and Consumer Commission	26	3	0	3
Australian Customs Service	120	61	0	61
Australian Electoral Commission	122	6	6	6
Australian Federal Police	111	17	17	0
Australian Greenhouse Office	83	83	83	29
Australian Industrial Registry	27	10	10	0
Australian National Audit Office	50	26	26	22
Australian Office of Financial Management	7	1	1	1
Australian Public Service Commission	17	3	2	3
Australian Radiation Protection and Nuclear Safety Agency	6	1	0	1
Australian Research Council	4	0	0	0
Australian Taxation Office	622	537	44	537
Australian Transaction Reports and Analysis Centre (AUSTRAC)	15	0	0	0
Bureau of Meteorology	113	0	0	0
CentreLink	1097	587	85	502
Classification Board ³²	0	0	0	0
Classification Review Board ³³	0	0	0	0
Commonwealth Grants Commission	5	3	3	3
Commonwealth Superannuation Administration (ComSuper)	22	16	6	16
Commonwealth Superannuation Scheme (CSS) Board ³⁴	5	4	0	0
CrimTrac	15	11	0	11
Dairy Adjustment Authority	5	0	0	0
Department of Agriculture Fisheries and Forestry	315	167	26	147

³² The Classification Board is administered by the Office of Film and Literature Classification and does not enter into contracts in its own right.

³³ The Classification Review Board is administered by the Office of Film and Literature Classification and does not enter into contracts in its own right.

³⁴ This includes contracts for both Commonwealth Superannuation Scheme and Public Sector Superannuation Scheme.

Agency	Total number of Contracts	Total confidential provisions	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality
Department of Communications Information Technology and the Arts	523	46	44	2
Department of Defence	3346	Not reported	Not reported	Not reported
Department of Education Science and Training	938	345	299	52
Department of Employment and Workplace Relations	1136	1009	1009	0
Department of Family and Community Services ³⁵	1392	377	35	374
Department of Finance and Administration	269	65	61	64
Department of Foreign Affairs and Trade	185	18	18	0
Department of Health and Ageing	4885	241	204	204
Department of Immigration and Multicultural and Indigenous Affairs	712	154	42	112
Department of Industry Tourism and Resources	238	129	8	121
Department of the Environment and Heritage ³⁶	229	194	1	194
Department of the Parliamentary Library	3	1	1	0
Department of the Parliamentary Reporting Staff	49	20	1	19
Department of the Prime Minister and Cabinet	64	37	4	33
Department of the Senate	6	1	0	1
Department of the Treasury	23	5	0	5
Department of Transport and Regional Services	583	161	134	84
Department of Veterans' Affairs	699	267	267	0
Equal Opportunity for Women in the Workplace Agency	1	1	0	1
Family Court of Australia	76	26	26	1
Federal Court of Australia	20	13	0	13
Federal Magistrate Services	5	5	1	4
Geoscience Australia	28	17	17	0
Human Rights and Equal Opportunity Commission	4	4	1	3
Insolvency and Trustee Service Australia	25	5	0	5
IP Australia	151	6	0	6
Joint House Department	40	18	3	17
Migration Review Tribunal	4	0	0	0
National Archives of Australia	55	0	0	0
National Capital Authority	25	12	12	0
National Competition Council	1	1	1	0
National Crime Authority ³⁷	13	4	0	4
National Native Title Tribunal	17	4	3	1
National Oceans Office	4	0	0	0
National Office of the Information Economy	44	11	11	0
Office of Film and Literature Classification	2	0	0	0
Office of National Assessments	12	12	3	12
Office of Parliamentary Counsel	3	2	1	2
Office of the Commonwealth Ombudsman	15	5	2	4
Office of the Director of Public Prosecutions	29	2	2	0
Office of the Federal Privacy Commissioner	2	1	1	0

³⁵ Includes contract details relating to the Child Support Agency and the Social Security Appeals Tribunal.

³⁶ Includes contract details relating to the Australian Antarctic Division.

³⁷ On 1 January 2003 the National Crime Authority became the Australian Crime Commission.

Agency	Total number of Contracts	Total confidential provisions	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality
Office of the Inspector-General of Intelligence and Security	0	0	0	0
Office of the Official Secretary of the Governor-General	6	5	2	5
Productivity Commission	5	0	0	0
Professional Services Review	2	2	2	2
Public Sector Superannuation Scheme (PSS) Board ³⁸	-	-	-	-
Refugee Review Tribunal	7	3	0	3
Total	20 0097	4855	2594	2749

³⁸ Details included under Commonwealth Superannuation Board.

Appendix 3

Agency compliance with the requirements of the Senate Order—Spring 2002 (as at 17 February 2003)

Agency	Date compliance advice tabled in the Senate	Supplier Name	Subject Matter	Contract Value	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reasons	Cost of compliance	Method of calculating cost of compliance
Administrative Appeals Tribunal	11/11/2002	✓	✓	✓	✓	N/A	✓	✓	✓
Attorney-General's Department	11/11/2002	✓	✓	✓	✓	✓	✓	✓	✓
AusAID	16/09/2002	✓	✓	✓	N/A	N/A	N/A	✓	✓
Australia-Japan Foundation	16/09/2002	✓	✓	✓	N/A	N/A	N/A	✓	✓
Australian Bureau of Statistics		✓	✓	✓	✓	✓	✓	✓	✓
Australian Centre for International Agricultural Research	16/09/2002	✓	✓	✓	N/A	N/A	N/A	✓	✓
Australian Competition and Consumer Commission		✓	✓	✓	N/A	✓	✓	✓	✓
Australian Customs Service	11/11/2002	✓	✓	✓	✓	✓	✓	✓	✓
Australian Electoral Commission	18/09/2002	✓	✓	✓	✓	✓	✓	✓	✓
Australian Federal Police	11/11/2002	✓	✓	✓	✓	N/A	✓	✓	✓
Australian Greenhouse Office	18/09/2002	✓	✓	✓	✓	✓	✓	✓	✓
Australian Industrial Registry		✓	✓	✓	✓	N/A	✓	✓	✓
Australian National Audit Office	18/09/2002	✓	✓	✓	✓	✓	✓	✓	✓
Australian Office of Financial Management		✓	✓	✓	✓	✓	✓	✓	✓
Australian Public Service Commission	18/09/2002	✓	✓	✓	✓	✓	✓	✓	✓
Australian Radiation Protection and Nuclear Safety Agency	16/09/2002	✓	✓	✓	N/A	✓	✓	✓	✓
Australian Research Council	18/09/2002	✓	✓	✓	N/A	N/A	N/A	✓	✓
Australian Taxation Office		✓	✓	✓	✓	✓	✓	✓	✓

Agency	Date compliance advice tabled in the Senate	Supplier Name	Subject Matter	Contract Value	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reasons	Cost of compliance	Method of calculating cost of compliance
Australian Transaction Reports and Analysis Centre (AUSTRAC)	11/11/2002	✓	✓	✓	N/A	N/A	N/A	✓	✓
Bureau of Meteorology	18/09/2002	✓	✓	✓	N/A	N/A	N/A	✗	✗
CentreLink	19/09/2002	✓	✓	✓	✓	✓	✓	✓	✓
Classification Board ³⁹	11/11/2002	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Classification Review Board ⁴⁰	11/11/2002	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Commonwealth Grants Commission	18/09/2002	✓	✓	✓	✓	✓	✓	✓	✓
Commonwealth Superannuation Administration (ComSuper)	18/09/2002	✓	✓	✓	✓	✓	✓	✓	✓
Commonwealth Superannuation Scheme (CSS) Board	18/02/2003	✓	✓	✓	✓	✓	✓	✓	✓
CrimTrac	11/11/2002	✓	✓	✓	N/A	✓	✓	✓	✓
Dairy Adjustment Authority	24/09/2002	✓	✓	✓	N/A	N/A	N/A	✓	✓
Department of Agriculture Fisheries and Forestry	24/09/2002	✓	✓	✓	✓	✓	✓	✓	✓
Department of Communications Information Technology and the Arts	16/10/2002	✓	✓	✓	✓	✓	✓	✓	✓
Department of Defence	16/09/2002	✓	✓	✓	✗	✗	✗	✓	✗
Department of Education Science and Training	18/09/2002	✓	✓	✓	✓	✓	✓	✓	✓
Department of Employment and Workplace Relations	15/10/2002	✓	✓	✓	✓	N/A	✓	✓	✓
Department of Family and Community Services ⁴¹	19/09/2002	✓	✓	✓	✓	✓	✓	✓	✓
Department of Finance and Administration	18/09/2002	✓	✓	✓	✓	✓	✓	✓	✓
Department of Foreign Affairs and Trade	16/09/2002	✓	✓	✓	✓	✗	✓	✓	✓

³⁹ The Classification Board is administered by the Office of Film and Literature Classification and does not enter into contracts in its own right.

⁴⁰ The Classification Review Board is administered by the Office of Film and Literature Classification and does not enter into contracts in its own right.

⁴¹ Includes contract details relating to the Child Support Agency and the Social Security Appeals Tribunal.

Agency	Date compliance advice tabled in the Senate	Supplier Name	Subject Matter	Contract Value	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reasons	Cost of compliance	Method of calculating cost of compliance
Department of Health and Ageing	16/09/2002	✓	✓	✓	✓	✓	✓	✓	✓
Department of Immigration and Multicultural and Indigenous Affairs	15/10/2002	✓	✓	✓	✓	✓	✓	✓	✓
Department of Industry Tourism and Resources	15/10/2002	✓	✓	✓	✓	✓	✓	✓	✓
Department of the Environment and Heritage ⁴²	18/09/2002	✓	✓	✓	✓	✓	✓	✓	✓
Department of the Parliamentary Library	N/A	✓	✓	✓	✓	N/A	✓	✓	✓
Department of the Parliamentary Reporting Staff	N/A	✓	✓	✓	✓	✓	✓	✓	✓
Department of the Prime Minister and Cabinet	18/09/2002	✓	✓	✓	✓	✓	✓	✓	✓
Department of the Senate	N/A	✓	✓	✓	✓	✓	✓	✓	✓
Department of the Treasury		✓	✓	✓	N/A	✓	✓	✓	✓
Department of Transport and Regional Services	11/11/2002	✓	✓	✓	✓	✓	✓	✓	✓
Department of Veterans' Affairs	19/09/2002	✓	✓	✓	✓	N/A	✓	✓	✓
Equal Opportunity for Women in the Workplace Agency		✓	✓	✓	N/A	✓	✓	✓	✓
Family Court of Australia	15/10/2002	✓	✓	✓	✓	✓	✓	✓	✓
Federal Court of Australia	11/11/2002	✓	✓	✓	✓	✓	✓	✓	✓
Federal Court of Australia	11/11/2002	✓	✓	✓	N/A	✓	✓	✓	✓
Federal Magistrate Services	11/11/2002	✓	✓	✓	✓	✓	✓	✓	✓
Geoscience Australia	16/09/2002	✓	✓	✓	✓	N/A	✓	✓	✓
Human Rights and Equal Opportunity Commission	11/11/2002	✓	✓	✓	✓	✓	✓	✓	✓
Insolvency and Trustee Service Australia	11/11/2002	✓	✓	✓	N/A	✓	✓	✓	✓
IP Australia	16/09/2002	✓	✓	✓	✓	✓	✓	✓	✓
Joint House Department	N/A	✓	✓	✓	✓	✓	✓	✓	✓
Migration Review Tribunal	15/10/2002	✓	✓	✓	N/A	N/A	N/A	✓	✓
National Archives of Australia	16/10/2002	✓	✓	✓	N/A	N/A	N/A	✓	✓
National Capital Authority	11/11/2002	✓	✓	✓	✓	N/A	✓	✓	✓
National Competition Council		✓	✓	✓	✓	N/A	✓	✓	✓

⁴² Includes contract details relating to the Australian Antarctic Division.

Agency	Date compliance advice tabled in the Senate	Supplier Name	Subject Matter	Contract Value	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reasons	Cost of compliance	Method of calculating cost of compliance
National Crime Authority ⁴³	11/11/2002	✓	✓	✓	N/A	✓	✓	✓	✓
National Native Title Tribunal	11/11/2002	✓	✓	✓	✓	✓	✓	✓	X
National Oceans Office	18/09/2002	✓	✓	✓	N/A	N/A	N/A	✓	✓
National Office of the Information Economy	18/09/2002	✓	✓	✓	✓	N/A	X	✓	✓
Office of Film and Literature Classification	11/11/2002	✓	✓	✓	N/A	N/A	N/A	✓	✓
Office of National Assessments	18/09/2002	✓	✓	✓	✓	✓	✓	✓	✓
Office of Parliamentary Counsel	11/11/2002	✓	✓	✓	✓	✓	✓	✓	✓
Office of the Commonwealth Ombudsman	18/09/2002	✓	✓	✓	✓	✓	✓	✓	✓
Office of the Director of Public Prosecutions	11/11/2002	✓	✓	✓	✓	N/A	✓	✓	✓
Office of the Federal Privacy Commissioner	11/11/2002	✓	✓	✓	✓	N/A	✓	✓	✓
Office of the Inspector-General of Intelligence and Security	18/09/2002	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Office of the Official Secretary of the Governor-General	18/09/2002	✓	✓	✓	✓	✓	✓	✓	✓
Productivity Commission		✓	✓	✓	N/A	N/A	N/A	✓	✓
Professional Services Review	16/09/2002	✓	✓	X	✓	✓	✓	✓	✓
Public Sector Superannuation Scheme (PSS) Board	18/02/2003	✓	✓	✓	✓	✓	✓	✓	✓
Refugee Review Tribunal	15/10/2002	✓	✓	✓	N/A	✓	✓	✓	✓

⁴³ On 1 January 2003 the National Crime Authority became the Australian Crime Commission.

Appendix 4

Website address for agencies Internet listing of contracts—Spring 2002

Department/Agency	Web Address
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/senorderlis.pdf
Australia-Japan Foundation	www.ajf.australia.or.jp/english/corporate.htm
Australian Bureau of Statistics	www.abs.gov.au/websitedbs/D3310114.NSF/4a256353001af3ed4b2562bb00121564/86158083b1e61cc5ca256ac5007eac24!OpenDocument
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/site/index.cfm?nav_id=670&area_id=5
Australian Electoral Commission	www.aec.gov.au/_content/what/publications/public_policy/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/registry/contracts/contracts.html
Australian National Audit Office	www.anao.gov.au/WebSite.nsf/ViewCat?ReadForm&View=InfoDocs&Cat=Contracts&Start=1&Count=10
Australian Office of Financial Management	www.aofm.gov.au/compliance/senate.htm
Australian Public Service Commission	www.apsc.gov.au/about/contractlisting02spring.htm
Australian Radiation Protection and Nuclear Safety Agency	www.arpansa.gov.au/sen_ord.htm
Australian Research Council	www.arc.gov.au/contracts/default.htm
Australian Taxation Office	www.ato.gov.au/content.asp?doc=/content/Businesses/14409.htm
Australian Transaction Reports and Analysis Centre (AUSTRAC)	www.austrac.gov.au/contracts/index.htm
Bureau of Meteorology	www.bom.gov.au/bep/j43589list.shtml
CentreLink	www.centrelink.gov.au/internet/internet.nsf/ea3b9a1335df87bcca2569890008040e/7c6e90a4451f8517ca256c31001c00d5!OpenDocument&Highlight=2,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_list3.htm
Commonwealth Superannuation Scheme (CSS) Board	www.css.gov.au/css/corporate/contracts.htm
CrimTrac	www.crimtrac.gov.au/SenateContractOrder.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/Article/0,,0_1-2_1-4_111484,00.html
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/Agency	Web Address
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.htm
Department of Industry Tourism and Resources	www.industry.gov.au/content/controlfiles/display_details.cfm?objectid=06EDC39D-AAC6-4864-929A4B1009C8600E
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/contractsdp1.htm
Department of the Parliamentary Reporting Staff	www.aph.gov.au/dprs/whatsnew.htm
Department of the Prime Minister and Cabinet	www.dpmc.gov.au/docs/DisplayContents1.cfm?&ID=129
Department of the Senate	www.aph.gov.au/Senate/dept/contracts.pdf
Department of the Treasury	www.treasury.gov.au/contentitem.asp?pagelid=030&ContentID=396
Department of Transport and Regional Services	www.dotars.gov.au/dept/contracts.htm
Department of Veterans' Affairs	www.dva.gov.au/media/aboutus/contracts/index.htm
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
Federal Court of Australia	www.fedcourt.gov.au/aboutct/aboutct_contracts.html
Federal Magistrate Services	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.html
Migration Review Tribunal	www.mrt.gov.au/contractors.html
National Archives of Australia	www.naa.gov.au/about_us/senate_order.html
National Capital Authority	www.nationalcapital.gov.au/contract/index.htm
National Competition Council	www.ncc.gov.au/articleZone.asp?articleZoneID=152
National Crime Authority ⁴⁴	www.nca.gov.au/html/corpserv.htm
National Native Title Tribunal	www.nntt.gov.au/about/Contracts2002_a.html
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/documents.htm
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	www.igis.gov.au/fs_statements.html

⁴⁴ On 1 January 3 the National Crime Authority became the Australian Crime Commission.

Department/Agency	Web Address
Office of the Official Secretary of the Governor-General	www.gg.gov.au/html/agency_contracts.htm l
Productivity Commission	www.pc.gov.au/commission/contracts.html
Professional Services Review	www.psr.gov.au/psr%20final/Contracts%20-%20professional%20services%20review.htm
Public Sector Superannuation Scheme (PSS) Board	www.pss.gov.au/pss/corporate/contracts.html
Refugee Review Tribunal	www.rrt.gov.au/RRT%20Contractors%20Report2.pdf

Appendix 5

Model clauses for tender documentation¹

These clauses have been taken from the *Guidance on Confidentiality of Contractors' Commercial Information – February 2003*, issued by the Department of Finance and Administration.

General statement on front of tender documents

The Commonwealth is subject to a number of specific requirements, which support internal and external scrutiny of its tendering and contracting processes. These include:

- (a) the requirement to publish details of agency agreements, Commonwealth contracts and standing offers with an estimated liability of \$2,000 or more in the Purchasing and Disposals Gazette; and
- (b) the requirement to report a list of contracts valued at \$100,000 or more and identify confidentiality requirements in accordance with the Senate Order on Department and Agency Contracts.

Tenderers should also note that the Parliament and its committees have the power to require the disclosure of Commonwealth contracts and contract information to enable them to carry out their functions.

The Commonwealth will treat as confidential any information provided by tenderers/prospective suppliers prior to the award of a contract. Once a contract has been awarded, the Commonwealth will not keep such information confidential if it was provided by the successful tenderer/supplier unless:

- (a) the supplier requests that specific information should be kept confidential;
- (b) the specific information is by its nature confidential; and
- (c) the Commonwealth agrees to that request.

In considering a request for confidentiality, the Commonwealth will consider whether disclosure would cause detriment to the contractor or other third party and the circumstances under which the information was disclosed. The Commonwealth will also consider whether confidentiality is supported by the underpinning principles of Commonwealth procurement such as Value for Money, Accountability and Transparency.

¹ The ANAO considers that agencies should seek their own legal advice to ensure that any amendment they make to contract and RFT documentation is appropriate for their individual circumstances.

The Commonwealth cannot provide an absolute guarantee of confidentiality because certain confidential information may be required to be disclosed by law or to the Parliament or the Auditor-General.

Model clause for tender documents

1 Confidentiality

1.1 The Commonwealth undertakes to keep confidential any Confidential Information provided to the Commonwealth by tenderers prior to the award of contract and, in respect of unsuccessful tenderers, after contract award.

1.2 The obligation of confidentiality in clause 1.1 does not apply if the Confidential Information:

- (a) is disclosed by the Commonwealth to its Advisers or employees solely in order to consider the tender responses;
- (b) is disclosed by the Commonwealth to the responsible Minister;
- (c) is disclosed by the Commonwealth, in response to a request by a House or a Committee of the Parliament of the Commonwealth of Australia;
- (d) is authorised or required by law to be disclosed; or
- (e) is in the public domain otherwise than due to a breach of clause 1.1.

1.3 The Commonwealth will agree to keep confidential any specific information provided under, or in connection with, the Contract where it is appropriate to do so having regard to the matters covered by the Commonwealth's Guidance on Confidentiality of Contractors' Commercial Information.

1.4 To enable the Commonwealth to consider whether it agrees to keep specific information confidential, tenderers must include in their tender any request that information is to be treated as confidential following the award of a contract to it, specifying the information and giving reasons why it is necessary to keep the information confidential.

1.5 The Commonwealth will consider any request made under clause 1.4 and will inform the tenderer whether or not the Commonwealth, in its sole discretion, agrees to the request and the terms under which it agrees.

1.6 The terms of any agreement will form part of the Contract to be awarded at the completion of the tender process.

Appendix 6

Prices in Contracts

Extract from Report No.38 (Appendix 5)

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

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

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

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

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

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

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

Extract from Report No.33 (Paragraphs 2.40 and 2.41)

In making the assessment of whether the pricing methodology was sufficiently detailed to disclose profitability, or profit margins, and thus might be protected as confidential, the ANAO considered whether the methodology disclosed all, or most, of the following information:

- unit price of items supplied, source and cost of supply, and likely volume;
- unit prices combined with details of how the good or service is likely to be produced or delivered;
- discounts combined with volume and source of supply/cost of delivery factors; and
- performance indicators linked to bonus payments where contractor's distribution of these payments to staff or sub-contractors, may indicate profit margins.

The ANAO identified the following examples of information relevant to the assessment of pricing methodology, which illustrated the presence of multiple elements of pricing structure, and thus provided sufficient information to warrant the methodology being regarded as confidential (see paragraph 2.36) in the contracts reviewed:

- Prices for standard lines, known in the relevant industry, combined with the source of supply for those items, and the discount applying to those items from that source. Competitors may know the approximate costs to the contractor of such goods and thus would be able to estimate, with reasonable accuracy, the profit margin being made by the contractor on those goods. In this context, sources of supply and volume of items likely to be supplied might also be information that, together with standard lines pricing, could be of commercial value to the business and therefore could cause detriment to the supplier if disclosed.
- A panel of preferred suppliers for a particular type of service (for example, project management) established by one agency with a head agreement to cover the bulk of the terms of the contract. For specific projects, each panel member prepared a detailed and specific offer. The offers contained

details of materials to be used with volume and source of supply, subcontractors and their rates, and the expected number of days required to deliver the specified service. The information contained in each of these offers is sufficiently detailed to be of commercial value to the other contractors who are, by virtue of the panel arrangement, operating in and competing for, identical business.

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Department of Finance and Administration

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