



FOI and Contracting for State Government

The 2004 amendments to the *Freedom of Information Act 1991* (FOI Act) that came into effect on 1 January 2005 had a significant impact on contract documents. There is now greater access to contracts entered into by the Crown or an agency under FOI.

An agency includes all State Government Agencies, Local Government Authorities (ie Councils) and Universities.

The following topics are discussed in this information sheet:

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Business Affairs Exemption and Contracts

The *Business Affairs* exemption in clause 7 of the FOI Act was amended so that it no longer applies to contracts. That is, agencies are not able to claim a contract document exempt under FOI, and therefore not accessible, merely because it is a contract.

Confidential Information and Contracts

The *Confidential Information* exemption in clause 13 of the FOI Act can not be claimed in relation to a contract unless the contract contains a confidentiality clause that has been approved by the Responsible Minister (or his or her delegate) before the contract is executed.

It is important that confidentiality clauses are approved before the contract is executed. Confidential information may not be protected from disclosure under FOI if these approvals are sought after the contract has been entered into.

Approval of confidentiality clauses need be sought only where the contract is imposing an obligation of confidence on the government party. If the contract imposes confidential obligations on other non-government parties to the contract such as a private consultant, contractor or supplier, the FOI Act does not require approval of a confidentiality clause.

Contracts that are affected

The FOI amendments only affect actual contract documents entered into after 1 January 2005. Actual contract documents include all types of contracts Government enters into, including agreements and employment contracts.

Contracts entered into before 1 January 2005 and pre-contractual documents, or documents generated in the course of the administration of the contract, will not be affected.

Legal advice should be sought in regard to exercising an extension to a contract. In some cases, particularly where the terms of the contract are renegotiated, the contract may be considered a new contract and may require approvals to be sought for confidentiality clauses from the Responsible Minister or his or her delegate.

When to use a Confidentiality Clause in a Contract

During the preparation and negotiation of contracts every effort must be made to avoid incurring an obligation of confidentiality on the part of Government. Justification for a confidentiality clause should result from the negotiation process and not be an automatic inclusion in standard contracts.

Seeking approval of confidentiality clauses in contracts should be used only as a last resort. This is because the Government is under an obligation to be as open and accountable as possible (section 3 of the FOI Act). Standard Term contracts should not include any clauses that impose an obligation of confidentiality on the Government or the Agency.

The Crown Solicitors Office has issued a Legal Bulletin (Bulletin No 33 and an addendum to the Bulletin, Legal Bulletin 33a) on the 2004 amendments to the FOI Act. This Bulletin includes specific advice for State Government agencies in regard to contract documents. The Bulletin also includes standard clauses that should be used in Government contract documents where confidentiality clauses will be included.

Delegation of the Power to Approve Confidentiality Clauses

The FOI Act permits the Minister to delegate the power to approve confidentiality clauses to a specified person or the holder of a specified office. The delegation must be in writing and may be subject to conditions, or restrictions, as the Minister sees fit. The power to approve confidentiality clauses cannot be sub-delegated.

To whom the Minister delegates this power and the process and conditions by which delegation occurs is for each Minister and agency to determine. However, it may be prudent to review delegations on an annual basis or following any administrative change to ensure the specified person or holder of a specified office is still the appropriate body to be approving confidentiality clauses in contracts.

Premier and Cabinet Circular 27 and Contract Disclosure

The State Government's Contract Disclosure Policy, issued as Premier and Cabinet Circular No 27 'Disclosure of Government Contracts' (PC027), is not to be confused with confidentiality clauses under the FOI Act. This circular relates to the public disclosure of contracts on the Government's Tenders & Contracts website. PC027 provides Chief Executives of State Government agencies the power to exempt parts of a contract from public disclosure on the Government's Tenders and Contracts website. This will not affect an agency's obligation to disclose a contract where an exemption cannot be claimed under FOI.

Where possible, agencies should aim to be proactive and make contract documents available outside the FOI process. This will reduce the impact on an agency's resources for managing FOI and it will help make Government more open, accountable and consistent with the objects of the FOI Act.

Furthermore, the definition of an 'eligible contract' in PC027 should not be used as a definition for 'contract' as it appears in the FOI Act. The word 'contract' is not specifically defined in the FOI Act and should therefore be given its general legal meaning.

Reporting Requirements

Under clause 13(6) of Schedule 1 of the FOI Act, agencies must report a contract that is to include a confidentiality clause to the Minister responsible for administering the Act as soon as practicable after it is approved. The term 'as soon as practicable' means as soon as practicable after the contract has been executed (ie signed by both parties).

The number of contracts containing confidentiality clauses is also to be reported in the FOI Annual Report.

To enable Agencies to meet these reporting requirements, data relating to contracts will be derived monthly and annually from the Freedom of Information Management System (FOIMS) by State Records and provided to the Minister. This means all agencies must ensure their data entered on FOIMS is up to date at all times.

For more information about the reporting requirements of agencies under the FOI Act, please see FOI Information Sheet entitled *Reporting Requirements Under FOI*.