

FOI and Contracting for Local Government and Universities

The *Freedom of Information Act 1991* (FOI Act) requires agencies to provide greater access to contracts entered into by an agency. An agency includes State Government agencies, Local Government Authorities (ie Councils) and Universities.

Business Affairs Exemption and Contracts

The Business Affairs exemption in clause 7 of Schedule 1 to the FOI Act does not apply to contracts. That is, agencies are not able to claim a contract document exempt and, therefore, not consider it for release, merely because it is a contract containing business affairs.

Since clause 7 does not apply to contracts entered into after 1 January 2005, there is no obligation on agencies to consult third parties under section 27 of the FOI Act before providing access to the contract. However, the obligation to consult third parties under the other consultation sections, ie sections 25, 26 or 28 still applies, where relevant.

Confidential Information and Contracts

The Confidential Information exemption in clause 13 of Schedule 1 can not be claimed in relation to a contract unless the contract contains a confidentiality clause that was approved before the contract was executed. That is, confidential information may not be protected from disclosure under FOI if these approvals are sought after the contract has been entered into.

The approval to include a confidentiality clause in a contract must be sought from the agency. In the case of Local Government, the Elected Members of a Council could be the body appointed by the Council as responsible for approving confidentiality clauses. For Universities, it could be the Vice Chancellor. Individual agencies must decide who is the appropriate person or office to be appointed to approve confidentiality clauses. This process should be formalised and recorded in writing.

It should be noted that approval of confidentiality clauses only needs to be sought where the contract is imposing an obligation of confidence on the government party. If the contract imposes confidential obligations on other parties to the contract such as a consultant, contractor or supplier, the inclusion of a confidentiality clause does not require approval.

During the preparation and negotiation of contracts every effort must be made to avoid incurring an obligation of confidentiality on the part of Local Government or the University. Seeking approval to include confidentiality clauses in contracts should be used only as a last resort.

Delegation of the Power to Approve Confidentiality Clauses

Local Government and Universities may delegate the authority to approve confidentiality clauses in contracts. For example, where the Elected Members of a Council are appointed as the appropriate body to give approvals, they may delegate this authority to the Chief Executive Officer of the Council, or other officers within the Council. The same applies to Universities.

If delegation to approve confidentiality clauses does occur, it is important that the delegation process be documented appropriately.

Contract Disclosure

Agencies should to make contract documents available outside the FOI process, where appropriate. This will help reduce the impact on agency resources required to process and manage FOI and it will help make agencies more open and accountable.

Reporting Requirements

Clause 13(6) of Schedule 1 to the FOI Act requires agencies to report a contract that includes a confidentiality clause to the Minister responsible for administering the FOI 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 reported in the FOI Annual Report. To enable agencies to meet these reporting requirements, data relating to contracts will be derived 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 the FOI Information Sheet entitled *Reporting Requirements Under FOI*.

Need further assistance?

Contact

Tel (+61 8) 8204 8786

Email staterrecords@sa.gov.au

Web www.archives.sa.gov.au

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