

ATO Procurement Guideline

2004/01

Identifying Information to Protect as Confidential Information

Issue

To properly identify ATO, Contractor and jointly-owned information (eg the contract) that legally needs to be protected as confidential information, and comply with accountability policy requirements to report confidentiality provisions in contracts (\$100,000 or greater) in accordance with the Senate Order on departmental and agency contracts.

Guideline

Procurement officers who receive commercially sensitive information from tenderers and contractors need to determine what needs to be protected as confidential information. While the Commonwealth Procurement Guidelines (CPGs) require that tenderers' submissions must be treated as in confidence, any request by a tenderer for their submitted information to be treated confidentially in a **contract** should be considered on a case-by-case basis. Commitments to maintain confidentiality of such information in a contract should be agreed to only when these requests are appropriate.

Before it is possible to make a decision on whether certain information needs to be protected as confidential information, it is first necessary to identify who owns the information: the Contractor; the ATO; or both entities¹.

The criteria for determining what is confidential for the three categories of information are at [Attachment A](#).

Tenderers should be asked to notify details of any information they regard as confidential together with reasons, based on legal principles, justifying why the information should be kept confidential. During negotiations, procurement officers need to apply appropriate legal principles to determine when they should protect information as confidential information. This will ensure among other things, that appropriate information is provided to Parliamentary Committees, but will also ensure that senior ATO officers appearing before Parliamentary Committees are confident that ATO personnel have properly identified information that needs to be protected as confidential information and can provide a legally sound basis to justify this position.

A worksheet to assist procurement officers with identifying jointly-owned confidential information is at [Attachment B](#).

Suitable contractual provisions should then be negotiated to require the specific information to be kept confidential and provide for relevant exceptions, in line with

¹ For the purpose of this Guideline:

- **Contractor Information** is information supplied to the ATO by the Contractor about their private, personal or business affairs; and
- **Government Information** is information about government which has been generated by government

the Commonwealth's disclosure obligations. Standard contracts clauses have been included in the standard contract templates for this purpose. Where possible, details of the confidential information should be listed in a schedule to the contract, although an alternative definition of Confidential Information is available which provides added flexibility as it does not require the ATO to list all its confidential information in the schedule.

Background

The CPGs requires agencies to consider and properly identify, on a case by case basis, what might be classified commercial-in-confidence when designing any contract.

In order to give transparency to this policy, the Government has indicated that agencies are to list on the Internet contracts of \$100,000 or more, including whether they contain confidentiality clauses. The information to be included, the timeframes for reporting, and the terms of compliance are set out in Finance's *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*.

Corporate Procurement updates the list and maintains separate procedures on the process for maintaining and updating the list.

Related Reading

- AGS Legal Briefing on 'Identifying and Protecting Confidential Information' (included in Workshop Materials)
- Department of Finance and Administration Best Practice Policy Guidance on 'Confidentiality of Contractors' Commercial Information'
- ANAO audit report on 'The Use of Confidentiality Provisions in Commonwealth Contracts'.
- Commonwealth Procurement Guidelines (January 2005)

Issue Date and Authority

Mel Box,
Assistant Commissioner,
Corporate Procurement
05 April 2004
(Updated 15 December 2004)

Attachment A**Criteria for Determining Confidentiality*****Contractor Information***

Contractor Information should only be protected as confidential information if **all** of the following criteria (**Contractor Information confidentiality Criteria**) are met:

- a. is **specific information**: information must be distinguishable from the full range of information that is available, and be able to be identified with specificity and not in global terms (eg specific clauses, not whole contract; a particular trade secret, not all the information about the confidant's business);
- b. is **'inherently confidential' or 'secret' information**, ie the Contractor Information is:²
 - i. **sufficiently secret** - information must not be in the public domain or be known only to a limited number of parties; but the information does not have to be absolutely inaccessible before it can be characterised as secret information; publication in one place may not destroy confidentiality generally; and
 - ii. **significant** - the preservation of the secrecy of the information must be of substantial concern or interest to the confider; information must not be 'trivial' or 'innocuous' in nature. Confider needs to show more than simply that it wishes to protect information. (eg trade secrets, some intellectual property, pricing data, charge-out rates, information about customer requirements and personal information). If the Contractor insists that he/she will suffer detriment if the information is not protected, this may be an indicator of the significance of the information, and should be given serious consideration by Procurement officers;
- c. **has been communicated by the confider in confidence to the recipient**: the term 'communicated' is to be understood widely to include all situations in which a recipient is given access to the information with the knowledge and consent of confider and includes direct communication, or exposure of the recipient to the information eg in contract negotiations. Generally, if both parties understood that information has been provided in confidence, this will be sufficient. It is relevant that confider provided an express warning against disclosure; AND
- d. **has been received by the recipient in circumstances that imposed an obligation on the recipient to respect the confidentiality of the information**: the circumstances surrounding the receipt of the information to the recipient are relevant. Circumstances can be such as to demonstrate that the recipient either knew, or ought to have known, that information was being disclosed in confidence and/or for a limited purpose. The issue is to be judged according to understanding of the parties *at the time* the information is received by the recipient.

In some circumstances there may exist 'public interest' grounds for the courts denying protection for Contractor Information as confidential information – even if the recipient has agreed to protect the information as confidential information. Examples

² includes some business or commercial information, personal information, government information, artistic or literary secrets.

include information which reveals a breach of national security, information which reveals breaches of the law (eg of legislation, fraud), information about a danger to the public (eg health risks). Procurement officers should therefore be very cautious about agreeing to protect Contractor Information as confidential information if the information is of this kind. The disclosure of this information must be in the ‘public interest’, not merely *of interest* to the public.

Government Information

The courts treat Government Information differently to Contractor Information. The courts take the view that Government Information is held by Government *on behalf of* the public, and that in a democratic society, this information should generally be disclosed to the public so that the public is able to discuss, review, and if appropriate, criticise Government actions. Government Information should be protected as confidential information if it is specific information and the release of the information is likely to injure the ‘public interest’

The courts are not very specific about what ‘injury to the public interest’ means - though they have indicated that ‘where national security relations with foreign countries, or the ordinary business of government will be prejudiced’ the information should not be disclosed. An example of information that may prejudice the ordinary business of government may be an especially unfavourable contract provision (eg limitation on liability). The mere possibility of embarrassing public discussion would not however be regarded by a court as prejudicing the ordinary business of government.

If an ATO officer takes the view that the relevant Government Information should not be disclosed for public interest reasons (ie should be protected as confidential information), he/she should require the potential recipient to agree to protect the information as Confidential Information *before, or at the time*, it is communicated to the recipient.

Information Jointly Owned by Contractor/Agency (Balancing of Interests)

When a private sector entity decides to deal with a government agency, it needs to understand that a government agency operates in a legal and administrative environment that requires the agency to be fully accountable to its Minister, and ultimately to the Government, to the Parliament and to the public. This requires the agency to provide information, for example, to Senate Estimates Committees about their activities, including the expenditure of public moneys. This is the primary factor that should influence discussions between an agency and a Contractor on confidentiality issues about jointly owned information (eg provisions in the contract), and therefore a balancing of the interests of the parties is required to reach an appropriate outcome. But agencies should give due weight to the concerns of the Contractor about possible detriment it may suffer if certain information is not protected, and in relation to the Contractor’s *own* information (eg trade secrets), it is **the Contractor Information Confidentiality Criteria** (see above) that must be applied, *not* the tests applying to Government Information.

Attachment B**WORKSHEET**

INFORMATION OWNED JOINTLY BY CONTRACTOR AND GOVERNMENT		
	CONTRACTOR INFORMATION ISSUES	
NO.	CONFIDENTIALITY CRITERIA	COMMENTS
a	Specific Information?	
b	Information has the necessary quality of confidence ³ :	
i	Sufficiently Secret?	
ii	Significant?	
c	Communicated by the confider to the recipient in confidence	
d	Received by the recipient in circumstances which imposed an obligation on the recipient to respect the confidentiality of the information	
e	Any 'public interest' reason for refusing to protect as Confidential Information	
	GOVERNMENT INFORMATION ISSUES	
NO.	TESTS	
a	Specific Information?	
b	Will disclose of information injure the public interest	
c	Agency considerations	
	BALANCING OF INTERESTS	
	Accountability issues Public's right to know Contractor's concerns	

³ or to put it another way is 'inherently confidential information'