

The Auditor-General
Audit Report No.10 2004–05
Business Support Process Audit

**The Senate Order for
Departmental and Agency Contracts
(Calendar Year 2003 Compliance)**

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of Australia 2004

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Canberra ACT
17 September 2004

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*. Pursuant to Senate Standing Order 166 relating to the presentation of documents when the Senate is not sitting, I present the report of this audit and the accompanying brochure. The report is titled *The Senate Order for Departmental Agency Contracts (Calendar Year 2003 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



P. J. Barrett
Auditor-General

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

AUDITING FOR AUSTRALIA

The Auditor-General is head of the Australian National Audit Office. The ANAO assists the Auditor-General to carry out his duties under the *Auditor-General Act 1997* to undertake performance audits and financial statement audits of Commonwealth public sector bodies and to provide independent reports and advice for the Parliament, the Government and the community. The aim is to improve Commonwealth public sector administration and accountability.

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Abbreviations/Glossary

APS Commission	Australian Public Service Commission
ASIO	Australian Security Intelligence Organisation
ASIS	Australian Secret Intelligence Service
ATSIS	Aboriginal and Torres Strait Islander Service
CAC Act	<i>Commonwealth Authorities and Companies Act 1997</i>
CEIs	Chief Executive's Instructions
ComSuper	Commonwealth Superannuation Administration
confidential information	Information that is subject to an obligation of confidence – either under the contract or under general law principles
confidential/confidentiality provisions	The clauses of a contract that operate to create the contractual confidentiality obligations on the parties to the contract in respect of information that is specified in the contract (for example, in a schedule). For the purposes of the audit, the terms 'confidential provisions' and 'confidentiality provisions' are synonymous.
contractual information	Information in, or relating to, the contract
CPGs	Commonwealth Procurement Guidelines
CrimTrac	CrimTrac Agency
Defence	Department of Defence
Finance	Department of Finance and Administration
Finance criteria for the determination of whether commercial information should be protected as confidential	<ul style="list-style-type: none"> • the information to be protected must be identified in specific rather than global terms; • the information must have the necessary quality of confidentiality; • the disclosure of information would cause detriment to the contractor or other third party; and • the information was provided under an understanding that it would remain confidential. Refer Appendix 4 for more details.

Finance Guidance on Confidentiality	Department of Finance and Administration. <i>Guidance on Confidentiality of Contractors' Commercial Information</i> , February 2003.
Finance Guidance on Internet listings	Department of Finance and Administration. <i>Guidance on the Listing of Contract Details on the Internet</i> , January 2004.
FMA Act	<i>Financial Management and Accountability Act 1997</i>
FMIS	Financial Management Information System
FOI Act	<i>Freedom of Information Act 1982</i>
GaPS	Gazette Publishing System
Head Agreement	This term normally refers to an arrangement whereby an agency enters into a standing offer for the supply of goods or services. It could also refer to where a 'central' agency enters into an agreement with a supplier to facilitate a whole-of-government procurement arrangement.
MOU	Memorandum of Understanding
NAA	National Archives of Australia
Necessary qualities of confidentiality	Useful tests to ascertain whether particular information has the necessary qualities of confidentiality are whether the information is both 'sufficiently secret' and 'significant': secret in the sense that the information is generally not known, and significant in the sense that the owner of the information would be likely to suffer some detriment if the information were made public.
Senate FPA Committee	Senate Finance and Public Administration References Committee
Senate Order/Order	The Senate Order for Departmental and Agency Contracts

Summary

Summary

Introduction

1. This report relates to the sixth audit of *Financial Management and Accountability Act 1997* (FMA Act) agencies' compliance with the *Senate Order for Departmental and Agency Contracts* (the Senate Order), to list contract details for the 2003 Calendar Year reporting period on the Internet.
2. The audit was conducted in accordance with the Senate Order request for the Auditor-General to undertake an annual examination of agency contracts listed on the Internet, and to report whether there had been any inappropriate use of confidentiality provisions. Previous audits were conducted on a twice-yearly basis, as required by the Senate Order request at that time.

Audit objectives

3. The objectives of the audit 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

4. 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 detailed review of the processes used to compile the Internet listings and of the use of confidentiality provisions in contracts.

Selected agencies

5. The six agencies selected for detailed review in this audit were the:
 - Aboriginal and Torres Strait Islander Service;
 - Australian Public Service Commission;
 - Commonwealth Ombudsman;
 - Commonwealth Superannuation Administration;
 - CrimTrac Agency; and
 - National Archives of Australia.

Focus

6. The focus of the audit in relation to confidentiality was on the commercial information that could be protected as confidential information.¹ The ANAO recognised, however, that agencies might have reported the need for confidentiality for other reasons; for example, because it was information with a national security classification and/or personal information.

Overall conclusion

7. The ANAO found that, by the time the audit was completed, 83 FMA Act agencies² had either placed a list of contracts on their websites, or did not have any contracts that fell within the scope of the Senate Order. As a result, they were not required to list details of contracts on the Internet. The majority of lists generally complied with the requirements of the Senate Order. However, there was scope for agencies to improve the presentation of the lists so that they met the requirements of the Order and were in accordance with guidance provided by the Department of Finance and Administration.

8. In relation to the six agencies subject to detailed audit, all had placed a list of contracts on their website by the due date. The ANAO concluded that the processes used to compile the Internet listing, in most agencies, provided a reasonable level of confidence that the number of contracts reported on the Internet was likely to be correct. However, the ANAO found that, in two agencies, the internal controls needed to be improved for the agencies to be assured that the correct number of contracts was listed on the Internet. In addition, the ANAO could not be certain that all contracts listed had been appropriately identified as containing confidential provisions. This was because the identification of such provisions was done at the time of preparing the Internet list rather than at the contract negotiation stage. All agencies advised that they would be implementing the appropriate controls in the near future.

9. At the time of audit, none of the selected agencies had implemented changes to their policy and guidance documentation to reflect the new accountability environment for contracting. This new accountability environment, amongst other things, requires both parties to a contract to agree

¹ 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 Senate FPA Committee's inquiry was the Senate's concern that information was being withheld from the Parliament for reasons of commercial confidentiality.

² During the Senate Order reporting period, there were 86 FMA agencies identified by reference to the FMA Act list provided on the Finance website. There were 83 FMA Act agencies that were required to, or had agreed to, comply with the Senate Order for the 2003 Calendar Year reporting period. Details of the other three agencies are provided in Chapter 2 of the report.

what information, if any, should be protected as confidential prior to the contract being entered into. However, by the time the audit concluded, all the selected agencies had revised, or were in the process of revising, relevant elements of their general contracting practices, policy guidance, tender documentation and contract templates. As identified in previous ANAO audits of the Senate Order, the understanding of how to implement these changes was not uniform across, or within, agencies.

10. The ANAO reviewed 26 contracts that were listed on the Internet as containing confidential provisions to determine whether they had been listed appropriately.

11. The ANAO considered that eleven of the 26 contracts (42 per cent) listed as containing confidential provisions were likely to satisfy the criteria for protection as confidential information. This is an improvement on the results from the previous audits where the percentage of contracts that the ANAO considered had been appropriately listed as containing confidential provisions ranged from 15 to 38 per cent. The other 15 contracts were inappropriately listed because there was no information in the contract that satisfied the criteria for protection as confidential information.

12. The results of this audit highlight the requirement for agencies to continually review their policies on the new accountability environment so that they accord with the Government policy of the time. In addition, agencies should make sure that the policies are known, and acted upon, at all levels within the agency. This reinforces the need for on-going awareness raising action, including the implementation of formal staff training.

13. The ANAO examined a selection of contracts excluded from the Internet listing, and concluded that the contracts had been excluded appropriately for reasons of national security and commercial sensitivity.

Comments from the audited agencies

14. The comments provided by each of the selected agencies in response to the audit report are shown in Appendix 5.

Audit Findings and Conclusions

1. Introduction

Background

1.1 On 20 June 2001, the Senate made an Order that required Ministers to table letters advising that each of the agencies,³ which they administer, had placed a list of contracts on the Internet at the start of the Spring and Autumn sittings of Parliament. The list of contracts was to include all contracts entered into by the agency which had not been fully performed, or which had been entered into during the previous twelve months, and which provided for consideration to the value of \$100 000 or more. In addition, the list of contracts was required to indicate, amongst other things, whether any of the contracts listed contained confidentiality provisions. The Auditor-General was requested to examine a number of contracts listed as containing confidential provisions and indicate whether there was any inappropriate use of such provisions.

1.2 The Senate varied the *Senate Order for Departmental and Agency Contracts* (the Senate Order) in September 2001, and again in June and December 2003. The amendments were relatively minor, mainly focussing on additional information that had to be reported on the Internet listing. The current Order is at Appendix 1.

1.3 The original Senate Order and subsequent amendments were informed by three reports of the Senate Finance and Public Administration References Committee (Senate FPA Committee)⁴ as well as by a number of Australian National Audit Office (ANAO) reports. The general principle espoused in these reports was that, in the public interest, information in government contracts should not be protected as confidential unless there is a good reason to do so.

1.4 The ANAO, in its initial report⁵ tabled in May 2001, developed criteria to assist agencies in determining whether information in contracts should be treated as confidential. 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

³ Agency means an agency within the meaning of the *Financial Management and Accountability Act 1997*.

⁴ The Senate Finance and Public Administration References Committee, *Interim report on the inquiry into the mechanism for providing accountability to the Senate in relation to government contracts*, June 2000; The Senate Finance and Public Administration References Committee, *Commonwealth Contracts: a New Framework for Accountability*, September 2001; and the Senate Finance and Public Administration References Committee, *Report on the first year of operation of the Senate order for the production of lists of departmental and agency contracts*, 12 December 2002.

⁵ Australian National Audit Office, Audit Report No.38, 2000–01, *The Use of Confidentiality Provisions in Commonwealth Contracts*, May 2001.

committees. The Senate FPA Committee endorsed the criteria and framework in its September 2001 report.

Government responses

1.5 In August 2001, the Government responded⁶ positively to the original Senate Order, and also endorsed the guidance on confidentiality of contractual information provided in the ANAO's report on the use of confidentiality provisions in Commonwealth contracts. The Government also responded positively to the amended Senate Order of 27 September 2001 in June 2002.

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

1.7 The Government responded to the Senate FPA Committee report on the first year of the Order's operation on 19 June 2003 and agreed, or agreed in-principle, with the majority of the recommendations.

Senate FPA Committee review of second year of operation of the Senate Order

1.8 The Senate FPA Committee commenced a review of the second year of operation of the Senate Order in March 2004. The report on the review had not been tabled at the date of preparation of this audit report.

Guidance provided by the Department of Finance and Administration

1.9 The Department of Finance and Administration (Finance) has provided a number of guidance documents on the interpretation of the Senate Order and the application of the new accountability framework. The major documents are described below.

Commonwealth Procurement Guidelines

1.10 On 5 October 2001, Finance released 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:

⁶ Department of Finance and Administration, *Murray Motion Key Documents*, August 2001.

- 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.⁷

1.11 The CPGs were reissued in February 2002 and again in July 2004, with no material changes to the above requirements. The latest version makes reference to two guidance documents, which directly relate to the Senate Order and the framework for dealing with the issue of confidentiality in contracts. These two documents, *Guidance on Confidentiality of Contractors' Commercial Information* (Finance *Guidance on Confidentiality*)⁸ and the *Guidance on Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)* (Finance *Guidance on Internet Listings*)⁹ are described briefly below.

1.12 The CPGs also contain a longstanding requirement for agencies to report all agency agreements, Commonwealth contracts, and standing offers with an estimated liability of \$2000 or more in the Gazette Publishing System (GaPS) within six weeks of entering into the agreements. GaPS is an electronic service that is available on the Internet.¹⁰ The current Finance *Guidance on Reporting Procurement in the Gazette Publishing System*¹¹, provides the capacity for an agency to align the requirements of the Senate Order with its GaPS reporting requirements. The Finance *Guidance* notes that agencies should recognise such reporting would be additional to, and would not replace, the current separate reporting requirements for the Senate Order.

Guidance on confidentiality in contracts

1.13 Finance *Guidance on Confidentiality*, which was issued in February 2003, provides agencies with:

- criteria based on legal principle to assist them in deciding if it is appropriate to agree to treat specific commercial information as confidential;

⁷ Commonwealth Procurement Guidelines, September 2001, subsection 1.2.

⁸ Department of Finance and Administration, *Guidance on Confidentiality of Contractors' Commercial Information*, February 2003.

⁹ Department of Finance and Administration. *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*, January 2004.

¹⁰ The GaPS Internet address is <www.contracts.gov.au>.

¹¹ Refer to <http://www.finance.gov.au/ctc/Reporting_Procurement_in_GAPS_16_04_04.rtf>.

- 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.

Guidance on the listing of contract details on the Internet

1.14 In response to a recommendation in the Senate FPA Committee report on the first year of operation of the Senate Order, Finance issued the *Finance Guidance on Internet listings* in January 2004. The guidance covers such issues as:

- the format and content of the Internet listing;
- what are considered contracts for the purpose of the policy; and
- the identification and treatment of confidential contract information.

1.15 In particular, the Finance Guidance provided an interpretation of some of the Senate Order's listing requirements—see Table 1.1 below.

Table 1.1

Finance interpretation of new listing requirements

New listing requirement	Interpretation
Contract commencement date	In most instances contracts will identify the commencement date, where commencement is not specified, agencies should list the date the contract was signed.
Duration of the contract	To facilitate an understanding of the duration of the contract, agencies should report the identified or anticipated end date of the contract. If the end date is not set out in the contract itself, the end date will be the date whereby the latter of the following two events occurs—final payment to the supplier; or provision of the final goods and/or services under the contract.
Relevant reporting period¹²	Agencies should clearly identify the calendar or financial year to which the list relates. For instance, a listing that related to the period from 1 January 2004–31 December 2004 would be referred to as the '2004 Calendar Year listing', whilst a listing that relates to the period from 1 July 2004–30 June 2005 would be referred to as the '2004–2005 Financial Year listing'.
Twelve-month period relating to the contracts	The list should indicate the twelve-month period relating to the contract listing. For instance, a listing that relates to the period from 1 January 2003–31 December 2003 should state 'Senate Order on departmental and agency contracts listing relating to the period 1 January 2003–31 December 2003'.

Source: Department of Finance and Administration Guidance on the Listing of contract details on the Internet (meeting the Senate Order on Departmental and Agency Contracts) January 2004.

¹² Despite this interpretation being provided by Finance, not all agencies were clear on the difference between the relevant reporting period and the twelve-month period relating to the contracts. As a result, a number of agencies listed one or the other. This issue is discussed later in the report.

Audit requirements

Senate Order request for audit of agency compliance with the Senate Order

1.16 The initial Senate Order had requested the Auditor-General to undertake twice-yearly examinations of agency contracts required to be listed on the Internet, and report whether there had been any inappropriate use of confidentiality provisions and whether contracts not included in agency lists should have been listed. The Auditor-General tabled reports on the twice-yearly audits in February and September 2002, March and September 2003, and February 2004.

1.17 On 4 December 2003, the Order was amended to request the Auditor-General to provide a report to the Senate annually (not later than 30 September each year), rather than twice yearly. The Auditor-General agreed to this request on 22 December 2003.

This audit report

1.18 This is the first audit since the amended Order of December 2003, and is the sixth such audit in response to the Senate Order request. It covers the agency list of contracts entered into, or not fully performed, in the 12 months from 1 January 2003 to 31 December 2003.¹³ The Senate Order required the list to be placed on the Internet within two months after the last day of the 2003 calendar year (29 February 2004).¹⁴

Audit objectives

1.19 The audit objectives were as follows:

1. Conduct a desktop review of all FMA Act agencies' Internet sites and determine whether a list of contracts had been placed on the Internet site and whether the list was consistent with the requirements of the *Senate Order for Departmental and Agency Contracts*.

¹³ When the Senate Order refers to contracts entered into in the previous 12 months it 'means the period of 12 months ending on either 30 June or 31 December in any year, as the case may be'.

¹⁴ Although the Finance Letter of 30 June 2003 interprets '2 calendar months after the last day of the Financial Year' (paragraph (1) of the June 2003 amendment to the Senate Order) as being 29 February 2004, the ANAO considered agencies as being compliant for the current reporting period if they had placed a list of contracts on the Internet by 1 March 2004. This was because 29 February 2004 was a Sunday.

2. Examine in selected agencies:
 - (a) a selection of contracts listed as containing confidentiality provisions and indicate whether there was any inappropriate use of such provisions;
 - (b) the process by which the 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 process by which each agency 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 had been excluded from the Internet listing because the contracts were considered to be confidential, and assess whether the contracts should have been listed.

Audit scope, focus and criteria

Scope

1.20 The ANAO undertook a desktop review of all FMA Act agencies so as to report on agencies' compliance with the contract listing requirements of the Order. In addition, the ANAO selected six agencies for more detailed review of the processes used to compile the Internet listings and the use of confidentiality provisions in contracts.

1.21 The ANAO examined a selection of contracts in the selected agencies to assess whether there was any inappropriate use of confidentiality provisions in the contracts. Where possible, the ANAO examined more recently negotiated contracts, because they were likely to have been entered into after agencies had had sufficient time to introduce revised contracting practices to accord with the new accountability environment.

Focus

1.22 The focus of the audit, in relation to confidentiality of information, was on commercial information that could reasonably be protected as confidential.¹⁵ However, the ANAO recognised that agencies may have agreed to protect

¹⁵ 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 Senate FPA References Committee's inquiry was the Senate's concern that information was being withheld from the Parliament for reasons of commercial confidentiality.

other types of information, for example information with a national security classification, and/or personal information, as confidential information.

Audit evaluation criteria

1.23 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.

Audit coverage and methodology

All FMA Act agencies

1.24 The number of contracts and the number of contracts with confidentiality provisions and/or other requirements of confidentiality for each of the FMA Act agencies that had listed contracts on the Internet for the 2003 Calendar Year reporting period are shown at Appendix 2.

1.25 In total, there were 25 568¹⁶ contracts listed on the Internet, of which 4789 (19 per cent) were listed as containing confidential provisions and/or other requirements of confidentiality.

Selected agencies

1.26 The six agencies selected for detailed review (selected agencies) in this audit were the:

- Aboriginal and Torres Strait Islander Service (ATSIS);
- Australian Public Service Commission (APS Commission);
- Commonwealth Ombudsman;
- Commonwealth Superannuation Administration (ComSuper);
- CrimTrac Agency (CrimTrac); and
- National Archives of Australia (NAA).

¹⁶ As discussed later, this figure may not be accurate as the Department of Defence acknowledged that its list is not complete in terms of the number of contracts and the details provided.

Audit methodology

1.27 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 confidential provisions.

1.28 The audit was conducted in accordance with ANAO Auditing Standards at an approximate cost of \$255 000. The ANAO engaged a consultant from Courage Partners Pty Ltd to assist with the audit.

Audit coverage of agency compliance with the Senate Order

1.29 All the six audits of compliance with the Senate Order have generally followed the same methodology. That is, the audit included a desktop review of all agency Internet listings of contracts, and a more detailed examination in six agencies of the processes for compiling the Internet listings and for dealing with the confidentiality of contractual information.

1.30 In total, the ANAO has examined 36 agencies' contracting processes in detail, and reviewed 226 contracts listed as containing confidential provisions to establish whether the contracts were appropriately listed.

1.31 The audits have covered the agencies both with the majority of contracts and the majority of contracts listed as containing confidential provisions. Using the February 2004 Internet contract listing as a basis for analysis, the 36 agencies audited accounted for approximately 94 per cent of all contracts entered into by agencies and 97 per cent of all contracts listed as containing confidential provisions.

1.32 The proportion of contracts the ANAO considered to be appropriately listed as containing confidential provisions ranged from 15 to 42 per cent (refer to Table 1.2).

Table 1.2**Summary of past and current ANAO audit results**

Senate Order Audit Report (Tabling month)	Reviewed contracts considered appropriately listed as containing confidential provisions	Percentage considered appropriately listed
February 2002 (Report No.33)	24 of 64 contracts	38
September 2002 (Report No.8)	9 of 56 contracts	16
March 2003 (Report No.32)	5 of 33 contracts	15
September 2003 (Report No.5)	6 of 20 contracts	30
February 2004 (Report No.31)	5 of 30 contracts	17
September 2004 (Report No.10)	11 of 26 contracts	42
Summary	60 of 229 contracts	26

Source: ANAO analysis of past Senate Order audit reports.

Audit findings

1.33 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 Confidential Provisions in Contracts, respectively) outline the findings for the second audit objective.

1.34 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 requirements for agencies to list contracts on the Internet. It relates specifically to audit objective one, which is an assessment as to whether all agencies covered by the Senate Order had placed a list of contracts on the Internet consistent with the requirements of the Senate Order.

Agencies covered by the Senate Order

2.1 During the reporting period, there were 86¹⁷ FMA Act agencies.¹⁸ The five Parliamentary Departments,¹⁹ 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 previously, all the Parliamentary Departments, except the Department of the House of Representatives,²⁰ had listed their contracts on the Internet so as to comply with the spirit of the Senate Order.

2.2 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. However, as part of this audit, the ANAO examined elements of ASIO and ASIS contracting processes to confirm their compliance with relevant legislative and policy requirements²¹. The audit findings are discussed at the end of this chapter.

¹⁷ The Department of Parliamentary Services (DPS) was formed outside the relevant reporting period, that is, on 1 February 2004, and is not included as one of the 86 agencies. DPS comprises three former Departments: Department of the Parliamentary Reporting Staff; Department of the Parliamentary Library; and the Joint House Department. The ANAO has included the three former Departments in the analysis of Internet listings as the Departments were in existence during the reporting period (2003 Calendar Year).

¹⁸ FMA Act agencies were identified by reference to the FMA Act list on the Finance website: <http://www.finance.gov.au/finframework/docs/FMA_Agencies_List_21_04_04.pdf>.

¹⁹ 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.

²⁰ Section 49 of the Constitution provides for the independence of each House of the Parliament of the Commonwealth of Australia. In previous audits, the Clerk of the House of Representatives advised the ANAO that the Department of the House of Representatives cannot comply with the Senate Order unless directed to do so by the House of Representatives. See ANAO Audit Reports No.32, 2002–03, *The Senate Order for Departmental and Agency Contracts (Spring 2002 Compliance)*, March 2003, p. 26, and No.31, 2003–04, *The Senate Order for Departmental and Agency Contracts (Financial Year 2002–2003 Compliance)*, February 2004, p. 27.

²¹ The audit of ASIO and ASIS contracting processes was foreshadowed in the ANAO's previous audit of the Senate Order. See Australian National Audit Office, Audit Report No.31 2003–04, *The Senate Order for Departmental and Agency Contracts (Financial Year 2002–2003 Compliance)* February 2004, p. 27–28.

2.3 Accordingly, 83 agencies²² were required to, or had agreed to, comply with the Senate Order for the 2003 Calendar Year reporting period.

Audit evaluation criteria

2.4 Agencies would be expected to have listed contracts on their websites in accordance with the Senate Order by the due date (29 February 2004).²³

2.5 In addition to the specific requirements of the Order, each agency would be expected to have:

- listed all the details as required by the Order and in accordance with the *Finance Guidance on Internet Listings*;
- made the list available on the Internet by the due date (1 March 2004);
- identified the relevant reporting period (2003 Calendar Year) and the twelve-month period relating to contracts (1 January 2003 to 31 December 2003); and
- established a clear and readily accessible path to the listing on its home page.

Assessing compliance with the Senate Order

2.6 The ANAO assessed each of the 83 agencies' compliance with the Senate Order. In conducting the assessment, the ANAO expected that, by the time that agencies had to list their contracts on the Internet (29 February 2004), agencies would have had sufficient time to develop appropriate policy and practices to allow them to comply fully with the requirements of the Order, as amended in September 2001 and June 2003.

2.7 However, the ANAO also recognised that, as the Government's responses to the Senate Order indicated that agency compliance would be progressive, agencies could be at different stages of achieving compliance with the Order.

²² The three agencies not included in the 86 were the Department of the House of Representatives, ASIO and ASIS.

²³ Although the *Finance Guidance on the Listing of Contract Details on the Internet* interprets '2 calendar months after the last day of the Calendar Year' (paragraph (1) of the December 2003 amendment to the Senate Order) as being 29 February 2004, the ANAO considered agencies compliant for the current reporting period if they had placed a list of contracts on the Internet by 1 March 2004, the first working day after 29 February 2004.

Audit findings

Agencies with a contract listing on the Internet

2.8 For the 2003 Calendar Year reporting period, all 83 agencies had:

- placed a list of contracts on their websites; or
- placed a note on their website advising that they did not enter into or hold contracts to the value of \$100 000 or more; or
- advised the ANAO that they did not enter into, or hold, contracts to the value of \$100 000 or more.

2.9 Some agencies presented their contracts in one listing as follows:

- the Classification Board and the Classification Review Board are administered by the Office of Film and Literature Classification, and have no statutory power to enter into contracts in their own right; and
- as a result of shared administrative arrangements, the PSS and CSS Boards have reported their contract details together.

2.10 Two entities, the Aboriginal and Torres Strait Islander Commission (ATSIC)²⁴ and the Australian Securities and Investments Commission (ASIC), although established under the *Commonwealth Authorities and Companies (CAC) Act 1997*, are prescribed as FMA Act agencies that handle money other than public money. The ANAO was advised that:

- ATSIC is an FMA Act agency only in relation to the management of two Special Accounts—the Aboriginal and Torres Strait Islander Land Fund Account (Land Fund) and the Aboriginals Benefit Account (ABA). ATSIC further advised that it has executed contracts in relation to those contracts under the provisions of the CAC Act. As a result, ATSIC had not listed any contracts on the Internet; and
- ASIC expenditure relating to contracts to which ASIC is a party has been made from appropriation under the CAC Act, so that no contracts fall within the scope of the Senate Order. ASIC included a reference on its website to this effect.

²⁴ From 1 July 2003, the functions of ATSIC were separated, with ATSIC retaining responsibility for what was previously its elected arm, and a new organisation, Aboriginal and Torres Strait Islander Services (ATSIS) being established as the body responsible for the delivery of services to ATSIC and indigenous Australians. However, the Prime Minister announced on 15 April 2004 that the Government's intention was to abolish both ATSIC and ATSIS and transfer responsibility for ATSIC and ATSIS programmes and functions to mainstream agencies.

2.11 The Office of the Inspector-General of Intelligence and Security and the Seafarers Safety, Rehabilitation and Compensation Authority advised that they did not have any contracts of \$100 000 or more. Both agencies had placed a note to this effect on their websites.

2.12 The ANAO's assessment of each of the remaining 76 agencies²⁵ compliance with the specific requirements of the Senate Order is detailed at Appendices 2 and 3. Agencies confirmed that the ANAO's assessment of each listing was correct. For the purposes of providing a complete list of FMA Act agencies in the report, Appendices 2 and 3 list all 86 agencies.

Summary of Internet listings

Agency compliance with the Senate Order's requirements

2.13 Agency compliance with the requirements of the Senate Order, as identified through the ANAO's desktop review of agencies' Internet listings of contracts, can be summarised as follows:

- 66²⁶ of the 76 agencies (87 per cent) presented a list of contracts on their website that provided all the contract information required by the Senate Order;
- 67 of the 76 agencies (88 per cent) had placed a list of contracts on the Internet by the due date; and
- 60 of the 76 agencies (79 per cent) provided all the contract information required by the Senate Order and posted the list by the due date.

2.14 Table 2.1 shows a comparison between the summarised results for the current reporting period (2003 Calendar Year) and the previous reporting period (Financial Year 2002–2003).

²⁵ Eighty-three agencies less seven agencies comprising Classification Board and Classification Review Board (2), PSS and CSS combined (1), ATSIC (1) and ASIC (1), Office of the Inspector-General (1), Seafarers Safety, Rehabilitation and Compensation Authority (1).

²⁶ For the 2003 Calendar Year reporting period, the ANAO considered agencies to be compliant if the relevant reporting period, or the twelve-month period relating to contracts, or both periods, were identified on the Internet lists.

Table 2.1**Compliance results—current period compared with previous period**

	Current reporting period (Calendar Year 2003)		Previous reporting period (Financial Year 2002–2003)	
	No.*	%	No.**	%
Agencies that provided all the contract information required by the Senate Order and posted the list by the due date	60	79	48	66
Agencies that presented a list of contracts on their website that provided all the contract information required by the Senate Order.	66 [#]	87	51	71
Agencies that placed a list of contracts on the Internet by the due date	67	88	67	93

* 76 agencies were assessed against compliance with the Senate Order for the 2003 Calendar Year.

** 72 agencies were assessed against compliance with the Senate Order for the 2002–2003 Financial Year.

[#] As for the Financial Year 2002–2003, the ANAO also considered agencies to be compliant for the 2003 Calendar Year reporting period, if the relevant reporting period *or* the twelve-month period relating to contracts, were identified on the Internet lists.

Source: ANAO analysis of FMA Act agencies' Internet lists.

2.15 Table 2.1 shows that the percentage of agencies (79 per cent) that were fully compliant with both the listing requirements of the Senate Order and had posted the list on the Internet by the due date was higher than that for the Financial Year 2002–2003 reporting period (66 per cent). However, the agencies that had placed a list of contracts on the Internet by the due date decreased from 93 per cent to 88 per cent between the two reporting periods.

2.16 The ANAO considers the increase in the percentage of agencies that were fully compliant with the requirements of the Senate Order can be attributed to the guidance provided by Finance on how to interpret the requirements of the Order. As well, agencies have had sufficient time to progressively meet the requirements of the new accountability environment.

2.17 The ANAO found that a number of agencies were still either unaware of, or did not fully understand, the requirement to identify the relevant reporting period *and* the 12 month period relating to the contract listings. Accordingly, these agencies did not report both periods, and were technically not compliant with the requirements of the Senate Order. However, for the purposes of the audit, the ANAO accepted that agencies were compliant with the requirements of the Order, where the relevant reporting period *or* the

twelve-month period relating to contracts, were identified on the Internet lists. This is because the ANAO considered that both requirements essentially provided the same information.

2.18 In addition, a small number of agencies did not include an estimate of the cost of complying with the Senate Order; and/or a statement of the method used to make the estimate.

2.19 Nine agencies rectified errors and/or omissions made on their Internet listings after being informed by the ANAO (refer to Appendix 3 for details). The remaining agencies that had errors in, and/or omissions from, their Internet listings advised the ANAO that they would ensure the Internet listing satisfies all the requirements of the Senate Order for the next reporting period.

Number of contracts listed as containing confidential provisions

2.20 4789 contracts (19 per cent) were listed on the Internet as containing confidential provisions and/or other requirements of confidentiality.²⁷ In the previous reporting period, agencies had listed 4280 contracts (15 per cent) as containing either confidentiality provisions or other requirements of confidentiality.

2.21 The main focus of all the audits to date has been on those contracts that contain provisions that protect contractual information as confidential, as opposed to contracts that contain other requirements of confidentiality. This is because, for the purposes of the Order, the other requirements of confidentiality clauses are often used to address the need for contractors to keep information, which may be obtained in carrying out the contract, confidential. These types of non-disclosure clauses are common in most contracts.

2.22 In examining the number of contracts that were only listed as containing confidential provisions, the ANAO found that, in the current period, agencies listed 3052 contracts (12 per cent) on the Internet as containing confidential provisions compared with 2776 (10 per cent) in the previous reporting period. This represents an increase of approximately 10 per cent from the previous reporting period. However, as shown in the following paragraphs, the figures are affected by a change in the reporting process used to prepare Department of Defence's (Defence) current listing of contracts, compared to the process it used for preparing the listing for the previous reporting period.

²⁷ Of these contracts, 3052 contracts were listed as containing confidential provisions and 2419 were listed as containing other requirements of confidentiality. Some contracts were listed as containing both confidential provisions and other requirements of confidentiality.

Defence

2.23 The number of Defence contracts listed on the Internet decreased by approximately 51 per cent from the number in the previous reporting period. On 18 February 2004, the Minister for Defence tabled a letter in the Senate advising that a list of contracts had been placed on the Internet, and that:

Defence has placed significant resources and effort into progressive compliance with the Order, including release of an Interim Defence Contracts Register (IDCR) in March 2003 and the scoping of a permanent contracts register solution. The IDCR records information that identifies the contract, its purpose, dollar value and start and end dates. In addition, it records whether the contract contains any confidentiality provisions and, where appropriate, the justification for them. Compliance using the IDCR approach will be prospective, rather than retrospective, so contracts entered into by Defence prior to 1 January 2003 will continue to be listed from Commonwealth Gazette Publishing System data without confidentiality information.

The Defence website has been updated to include all contracts valued at \$100,000 or above entered into by Defence during the 2003 calendar year, and which have been included on the IDCR. In addition to the 5000 contracts entered on the IDCR, the website lists approximately 25,000 contracts entered into by Defence from 1 July 1996 until 30 June 2003. Contracts that are confidential for national security reasons have been intentionally excluded from the Internet list.

Defence is in the process of considering options that will enable the department to more efficiently comply with the Senate Order requirements, particularly as they relate to confidentiality provisions.

2.24 During the audit, Defence advised that:

...the number of Defence contracts included in the 2003 Calendar Year Senate Order was sourced solely from the IDCR for the first time. In the previous Senate Order (listing for the 2003 Financial Year), Defence's contract numbers were sourced from both the IDCR and the Gazette Publishing System (GaPS). This change in reporting process has resulted in a decrease of the number of contracts listed on the website from 9269 to 4581. This is due in part to the variation of Defence contracting activity over the two reporting periods, and the IDCR capturing data that is specific to the Senate Order requirements, whereas the previous GaPS lists included details of procurement Purchase Orders of which there may be multiple for individual contracts.

2.25 Excluding Defence's contracts from both the current listing and the Financial Year 2002–2003 listing, the percentage of contracts reported as containing confidential provisions has decreased from 13 per cent in the previous reporting period to 12 per cent in the current period. This information is presented in Table 2.2.

Table 2.2**Contracts reported as containing confidential provisions**

	Current reporting period (Calendar Year 2003)	Previous reporting period (Financial Year 2002–2003)
Total contracts	25 568	28 238
Number of contracts listed as containing confidential provisions	3052	2776
Per cent of total contracts listed as containing confidential provisions	12	10
Total contracts (less Defence contracts)	20 987*	18 969**
Number of contracts listed as containing confidential provisions (less Defence contracts)	2576#	2509##
Per cent of total contracts listed as containing confidential provisions (less Defence contracts)	12	13

* 25 568 (total contracts) less 4581 (Defence contracts).

** 28 238 (total contracts) less 9269 (Defence contracts).

3052 (total reported as containing confidential provisions) less 476 (Defence contracts reported as containing confidential provisions).

2776 (total reported as containing confidential provisions) less 267 (Defence contracts reported as containing confidential provisions).

Source: ANAO analysis of FMA Act agencies' Internet lists.

2.26 The ANAO considers the reduction in the percentage of contracts that have been reported as containing confidential provisions continues to be aided by the availability of the *Finance Guidance on Confidentiality* and *Finance Guidance on Internet Listings*, and by the fact that agencies have had time to progressively meet the requirements of the new accountability environment.

2.27 From the contract reviews conducted in the six agencies, and from some of the contract dates²⁸ listed on agency Internet listings, the ANAO noted that there were still a number of contracts that were 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. The ANAO considers that, as

²⁸ The ANAO notes that the contract start dates listed on agency Internet listings are not always indicative of the date that the terms of the contract were agreed. That is, there were still a number of service orders being raised under head agreements that were executed prior to the implementation of the Senate Order.

these contracts progressively expire, the number of contracts with confidential provisions is likely to continue to fall.

Reporting of confidential provisions and other requirements of confidentiality

2.28 The ANAO found that some agencies had not distinguished between contracts requiring the parties to maintain confidentiality of any of its provisions and contracts containing other requirements of confidentiality, as required by paragraph (2c) of the Senate Order and by Finance in its *Guidance on Internet Listings*.²⁹

2.29 The Finance Guidance interprets confidential provisions as those that make specific information contained in the contract confidential, and other requirements of confidentiality as those that protect confidential information of the parties that may be obtained or generated in carrying out the contract (but cannot be specifically identified when the contract is entered into). Other requirements are generally in the form of standard confidentiality provisions of a general nature.

2.30 In the listings where the distinction between confidentiality provisions and other requirements of confidentiality was not made, the ANAO judgement on whether the contract contained confidential provisions or other requirements of confidentiality was generally based on the reason provided on the Internet listing. The ANAO subsequently confirmed this with the agency.

Cost of complying with the Senate Order

2.31 For this, and the previous audits, most agencies that had reported costs of complying with the Order, had used a method based on the time spent and the cost of labour to estimate the cost. In addition, most had reported the cost of complying with the Order for the current reporting period. However, Defence's costs for both reporting periods were cumulative costs, which included the costs of establishing an IDCR³⁰, data verification and the development and delivery of commercial-in-confidence training for Contracting and System Project Office staff.

²⁹ Finance *Guidance on Internet Listings*, pps. 40–41.

³⁰ Defence included the following explanation for this figure on its website: 'The estimated cost of compliance has been calculated using the actual costs incurred in establishing, maintaining and inputting data into the Interim Defence Contracts Register. This includes work such as IDCR data verification carried out, and scoping activities for the development of a permanent Defence contracts registering solution. An estimate of labour hours expended by Australian Public Service staff, based on rates provided by the Defence Chief Finance Officer, also have been taken into account.'

2.32 The total of the estimated cost of all agencies complying with the Senate Order, as derived from agencies 2003 Calendar Year listing, was approximately \$1 475 502, which included Defence costs of \$1 150 000. This figure was higher than the total cost of agency compliance with the Senate Order for the previous reporting period for the Financial Year 2003 (846 000)³¹, which included Defence reported costs of \$500 000.

2.33 Excluding Defence costs, the average cost of compliance per agency was approximately \$4500, a figure similar to that of the previous period.

Access to Internet listings

2.34 The ANAO found that all of the 76 agencies had an identifiable path on their website to the contract listing. This was an improvement on the previous Senate Order audit findings.³² Most agencies had also included an explicit link from their homepage to the list of contracts to provide easy access for readers and users, as discussed in *The Senate Order for Departmental and Agency Contracts (Financial Year 2002 – 2003 Compliance)*.³³

Presentation of Internet listings

2.35 The Finance *Guidance on Internet Listings*³⁴ suggests two ways in which agencies may present contractual information. The options incorporate the requirements of the Senate Order, as amended in June 2003. They now include the commencement date of the contract, the end-date of the contract, the relevant reporting period and the twelve-month period relating to the contract listings.

³¹ Australian National Audit Office, Audit Report No.31, 2003–04, *The Senate Order for Departmental and Agency Contracts (Financial Year 2002–2003 Compliance)*, February 2004, p. 34.

³² *ibid.*, p. 35.

³³ *ibid.*

³⁴ *op.cit.*, *Senate Guidance on Internet Listings*, Section 11, pps. 40–41.

2.36 The two options for the presentation of contractual information are presented below.

Option one: (*two reason(s) columns*)

Contractor	Subject Matter	Amount of Consideration	Start Date	Anticipated End Date	Provisions Requiring Confidentiality Y/N	Reason(s)	Other Requirements of Confidentiality Y/N	Reason(s)
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Option two: (*one reason(s) column*)

Contractor	Subject Matter	Amount of Consideration	Start Date	Anticipated End Date	Provisions Requiring Confidentiality Y/N	Other Requirements of Confidentiality Y/N	Reason(s)
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Source: Department of Finance and Administration. *Guidance on Internet Listings*. January 2004.

2.37 The audit found that, although there were varying formats used for the presentation of the Internet listing, most agencies (67 per cent) had adopted the second option for presentation of the Internet listing provided in the Finance *Guidance on Internet Listings*.

Relevant reporting period and twelve-month period relating to contracts

2.38 The Finance *Guidance on Internet Listings* provided an interpretation of the relevant reporting period and the twelve-month period relating to contracts, and suggests that agencies show both periods on their Internet lists.

2.39 The ANAO found that 58 out of 76 agencies (76 per cent) had reported both periods. Three out of 76 agencies (four per cent) had reported only the relevant reporting period; and 11 out of 76 agencies (15 per cent) had reported only the twelve-month period.

2.40 As discussed earlier, the agencies that did not report both periods were technically not compliant with the requirements of the Senate Order. However, ANAO considered agencies to be compliant with the requirements of the Senate Order for the 2003 Calendar Year reporting period, if the relevant reporting period *or* the twelve-month period relating to contracts were identified on the Internet lists as both requirements essentially reveal the same information.

2.41 Four out of 76 agencies (five per cent) did not report the relevant reporting period or the twelve-month period relating to contracts and, therefore, were not compliant with the Order's requirements.

Other issues noted during the audit

2.42 The ANAO noted the following other issues during the audit:

- Some agencies were still listing Memoranda of Understanding (MOU) with Commonwealth agencies or a body that is part of the Commonwealth of Australia but is not a separate legal entity, in their Senate Order listing. These are not considered contracts for the purposes of the Senate Order listing.³⁵
- Agencies that use an overarching statement explaining that most contracts have a standard confidentiality clause should leave the column for other requirements of confidentiality blank unless there is some specific other requirement of confidentiality not covered by the overarching statement. This is explained more fully in the section on 'Presentation of confidentiality-related information on the Internet listing'³⁶ in the *Finance Guidance on Internet listings*.
- Some agencies listed fully performed contracts, where the contract anticipated end date was listed as being before 31 December 2003 and the start date was prior to 1 January 2003. These contracts should not have been listed in the 2003 Calendar Year reporting period as only new contracts entered into during the reporting period, or existing contracts that have not been fully performed by the end of the reporting period, should be listed.

Conclusion

2.43 The ANAO found that the majority of the 76 agencies covered by the Senate Order had complied with its requirements, although some agencies did not include an estimate of the cost of complying with the Senate Order, and/or a statement of the method used to make the estimate. In addition, nine agencies (12 per cent) failed to meet the listing date.

2.44 There is scope for many agencies to improve the presentation of their Internet listings. The *Finance Guidance on Internet Listings* should assist agencies improve the presentation of Internet listings and provide a level of consistency across all agencies covered by the Senate Order.

³⁵ *Finance Guidance on Internet Listings*, p. 23.

³⁶ *ibid.*, p. 30.

ASIO and ASIS

Background

2.45 The previous ANAO audit reports on agencies' compliance with the requirements of the Senate Order reported that ASIO and ASIS did not list details of contracts on the Internet for reasons of national security³⁷.

2.46 The Senate FPA Committee, in its report on the first year of operation of the Senate Order, recommended that the ANAO and Finance discuss ASIO and ASIS compliance with the Senate Order with both bodies³⁸. During these discussions, both ASIO and ASIS maintained that details of their contracts should be exempt from Internet listing for security reasons. However, all parties agreed that the ANAO, as part of this audit, would '...examine ASIO and ASIS contracting processes to confirm their compliance with all relevant legislative and policy requirements'³⁹.

Audit evaluation criteria

2.47 The ANAO expected that ASIO and ASIS would have:

- an up-to-date set of Chief Executive Instructions (CEIs) with instructions on spending public money and procurement;
- procedures for the identification and recording of contracts;
- tender and contract templates, which had been updated to in accordance with Finance guidance; and
- an up-to-date formal instrument of financial delegations,

Up-to-date Instructions

ASIO

2.48 ASIO did not have a set of formal CEIs, but had a Procedures Manual, which provided direction and guidance on procurement issues. However, the Manual was dated September 1995. As a result, the guidance in place at the time of the audit did not reflect the new accountability environment, nor did it incorporate the latest Finance guidance on procurement. The ANAO found

³⁷ For example, see Australian National Audit Office, Audit Report No.8 2002–03, *The Senate Order for Department and Agency Contracts (September 2002)*, para 2.3.

³⁸ Senate Finance and Public Administration References Committee, *Departmental and agency contracts—Report on the first year of operation of the Senate order for the production of lists of departmental and agency contracts*, December 2002, para 3.64.

³⁹ Australian National Audit Office, Audit Report No.31 2003–2004, *The Senate Order for Departmental and Agency Contracts (Financial Year 2002–2003 Compliance)*, paras 2.2–2.4.

that ASIO had started a project to develop its CEIs and update its procurement guidance documentation.

ASIS

2.49 ASIS's Director-General's Instructions (DGIs), which were issued in December 1997, provide guidance and direction on procurement and spending public money. In February 2004, minor updates were made to the DGIs to incorporate details of a new contract register and the use of a contract details form.

Procedures for recording contractual information

ASIO

2.50 At the time of the audit, ASIO did not have a formal register for contracts. A 'Deed Register' existed, but the information recorded on the register was limited to supplier details and the cost of the contract. ASIO advised that it recognised the weaknesses in its current register and planned to enhance it to provide more detail, including the requirements of the Senate Order.

2.51 ASIO advised that the Director-General had deemed all of ASIO's contracts to be confidential for national security reasons. However, there was no formal document, signed by the Director-General, that stated this. During the audit, ASIO advised that the Director-General had issued a formal document directing that the Organisation's contract details not be listed on GaPS and on the Internet, with appropriate reasons.

ASIS

2.52 ASIS had recently developed a contracts register and procedures to assist in the identification and recording of contracts. The ANAO noted that the register records whether a contract contains a range of special clauses, including confidentiality clauses. To improve its administration of contracts, ASIS plans to implement procedures to improve the recording of contracts including holding copies of all contracts centrally, in the Finance section.

2.53 ASIS advised that the Director-General had made a determination indicating that disclosure of contract details would constitute a breach of Section 39 of the *Intelligence Services Act 2001*⁴⁰. As a result of the determination, ASIS had not developed a formal process for identifying confidential information in contracts. The ANAO found, however, that there was no formal document that supported the Director-General's determination.

⁴⁰ This section prohibits the communication of any information or matter in connection with ASIS's function or its performance except in limited circumstances.

2.54 The Director-General advised that ASIS is aware that a formal document is required, and that this will be addressed in the planned review of the Director-General's Instructions. This review has commenced and is expected to be completed by the end of the calendar year.

Tender and contract templates

ASIO

2.55 The ANAO found that ASIO was reviewing its tender and contract templates to ensure that they complied with the range of guidance material produced by Finance and the ANAO.

2.56 The ANAO considered that ASIO's revised tender templates should include the Finance model clauses for tender documentation⁴¹. The ANAO also considered that ASIO should clearly state in the tender document that, although its contracts are exempted from being publicly listed, ASIO still adheres to the policy and procedural requirements for Commonwealth contracting (for example, the CPGs and the Senate Order principles).

ASIS

2.57 ASIS had recently developed a standard short-form contract. ASIS did not have a standard longer form contract and, if required, used the template developed by the Department of Foreign Affairs and Trade (DFAT). ASIS advised that DFAT was currently updating its short and long form contracts, and that ASIS would be likely to adopt these contract templates, subject to any necessary adjustments to account for security issues.

Financial delegations

ASIO

2.58 ASIO had current delegations documentation. Although there was no specific delegation for the authorisation of spending proposals, there was a delegation for the signing and issue of purchase orders. At the time of the audit, ASIO was in the process of updating its delegations documentation.

2.59 ASIO advised that its delegation schedules were available to all staff on the intranet. ASIO further advised that delegates are briefed on their delegations on appointment. New or revised delegations are made available to staff via email and on the intranet.

⁴¹ Department of Finance and Administration. *Guidance on Confidentiality of Contractors' Commercial Information*. February 2003, section 7.2.

ASIS

2.60 ASIS advised that its authorisations and delegations schedule was revised and re-released to staff in February 2004, and further updated in May 2004 to reflect a redistribution of responsibilities between a number of Senior Executive Service (SES) positions.

2.61 The ANAO observed a high level of awareness of the role and importance of financial delegations amongst the staff in the ASIS's finance section. Signatures on relevant source documentation were subject to various checks to confirm the correct application of delegation authorities. Any concerns about the inappropriate exercise of a delegation generally resulted in the source documents being returned to, or discussed with, the originating area.

3. The Processes Used to Create the Internet List

The discussion in this chapter is confined to the six agencies selected for detailed review. It relates specifically to Objective 2b, that is, an assessment of the processes used by the agencies to create the listing of contracts, to determine whether the process was likely to lead to the list of contracts being complete (in terms of numbers and details provided).

Audit evaluation criteria

3.1 The ANAO expected that agencies would have:

- adopted/developed appropriate 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; and
- developed processes to identify those contracts with confidential provisions and other requirements of confidentiality, and the reasons for the confidentiality.

Audit findings

Policy and procedures for establishing a Senate Order Internet list

3.2 Only Crimtrac had made specific reference to the requirements of the Senate Order in its Chief Executive Instructions (CEIs). The majority of the other agencies⁴² advised the ANAO that they were either currently updating, or would be updating, their CEIs in the near future to reflect the specific requirements of the Senate Order Internet listing.

3.3 All agencies referred to general purchasing and procurement requirements and contracting procedures in their CEIs, and, in most cases, made a direct reference to the CPGs.

3.4 All agencies had developed general procurement procedures but none had developed formal procedures for the establishment of a Senate Order contract list on the Internet. The ANAO considered that agencies could

⁴² The Government's intention was to abolish AT SIS although the new arrangements were not likely to come into effect until 1 July 2004. The responsibility for AT SIS programmes and functions will be transferred to mainstream agencies.

improve procedural guidance by including a reference to the Senate Order requirements, and outlining the process for the establishment of a contract list on the agency's website.

3.5 Further, the procedures should also include reference to the Finance *Guidance on Confidentiality* and *Guidance on Internet Listings*, and the reconciliation processes required to confirm that the Internet list is complete and accurate.

Responsibility

3.6 All of the selected agencies had allocated responsibility for the coordination and preparation of the Internet listing to appropriate personnel. In all cases, the responsible area was a specialist contracts advisory or procurement coordination unit/team. However ATSiS, the APS Commission, the Commonwealth Ombudsman and NAA devolved some aspects of responsibility over contracting and procurement to individual groups or sections.

3.7 However, in all agencies, the final responsibility to ensure the list was complete and correctly listed on the Internet, was centralised.

Training

3.8 The ANAO noted that for the majority of agencies, staff were not formally trained in the requirements of the Senate Order. However, all agencies provided limited on-the-job training. The ANAO considers that the relevant procurement/contracting staff would benefit from formal training on the requirements of the Senate Order and the framework for dealing with the confidentiality of contractual information.

Recording and listing of contracts on the Internet

3.9 In previous audits, the ANAO examined the agencies' processes to develop the Internet list to form a view on whether the list was likely to include all relevant contracts. In this audit, the ANAO compared the Internet list with the agency's contract register, the GaPS database and the agency Financial Management Information System (FMIS), to confirm that all relevant contracts were listed.

3.10 The ANAO found that agencies used their FMIS or contract register, or both, to form the basis of their contract listings or to perform a cross-check with the contract list, as a means of providing some assurance that the list was accurate and complete.

3.11 The processes used by agencies to develop the current contract list, and the results of the ANAO's review of the completeness of the contracts listed on the Internet, are described below.

ATSIS

3.12 ATSIS compared contracts listed on the contracts register with the previous Senate Order list to identify and remove from the list contracts that have expired.

3.13 Group managers confirmed that the list was complete prior to the list being published on the Internet. The final list was also cross-checked with entries on the general ledger in the FMIS to ensure that all contracts had been captured and accurately recorded.

3.14 The list was presented in a format that adheres to the model format in the *Finance Guidance on Internet Listings*.

APS Commission

3.15 The APS Commission cross-checked the contract list with the FMIS, but did not carry out a specific reconciliation between the GaPS report and the Internet list. The ANAO completed a reconciliation of contracts over \$100 000 listed on GaPS and payments made in the FMIS for the period, with the Senate Order Internet list for the 2003 Calendar Year, and found that the Internet list contained all relevant contracts.

3.16 The APS Commission advised the ANAO that a reconciliation between GaPS, the FMIS and the Senate Order listing would be undertaken before finalising future Internet listings.

3.17 The list was presented in a format that adheres to the model format in the *Finance Guidance on Internet Listings*.

Commonwealth Ombudsman

3.18 The Commonwealth Ombudsman maintained a contract register in its central office, and used it as the basis for compiling the Senate Order contract list. As responsibility for letting and managing contracts was devolved to the individual State offices, the central office sent an email (with the attached contracts register) to Regional Directors for them to confirm the listing details and make any necessary amendments.

3.19 The Commonwealth Ombudsman advised that it reconciled the FMIS details with the Internet List prior to publication of the list. The ANAO also reconciled the payments made in the FMIS, for contracts over \$100 000, for the period with the Senate Order Internet list, and found one discrepancy. The Commonwealth Ombudsman has since amended the list.

3.20 The list was presented in a format that adheres to the model format in the *Finance Guidance on Internet Listings*.

ComSuper

3.21 ComSuper used its contracts register as the basis for compiling the Senate Order contract list. Line managers were sent a copy of the current listing from the contracts register so that any amendments could be made, if necessary, to ensure the list was complete and accurate.

3.22 The ANAO reviewed the GaPS listing for contracts over \$100 000 and noted that two vendors were not included in the Senate Order listing. The ANAO also reviewed the FMIS payments with the Senate Order list and noted one purchase order for a contract over \$100 000 was recorded in the FMIS, but was not listed on either GaPS or the Internet. ComSuper advised that it did not routinely compare the contract list with the FMIS or the GaPS listing, but would do so for future Senate Order Internet listings.

3.23 The list was presented in a format that adheres to the model format in the *Finance Guidance on Internet Listings*.

CrimTrac

3.24 CrimTrac used a contract register as the basis for compiling a Senate Order contract list. Contracts identified on the contracts register were compared with the previous Senate Order list to identify and remove from the list contracts that have expired. Staff with procurement responsibility checked the list for accuracy and completeness in relation to the contracts raised and managed by them. At Senate Order reporting time, staff cross-checked the Senate Order list against the FMIS, for accuracy and completeness.

3.25 The ANAO compared the Internet list with the FMIS and found it to be accurate and complete. The ANAO also compared the list with GaPS and found one contract over \$100 000 that was not listed on the Internet list. This contract was let prior to the development of the current contracts register that has the provision to reconcile contracts against the GaPS. The ANAO notes that this contract has since been added to the agency Internet listing. CrimTrac advised that a reconciliation between GaPS records and the Senate Order Internet listing would be conducted for future listings.

3.26 The Internet list was presented in a format that adheres to the model format in the *Finance Guidance on Internet Listings*.

NAA

3.27 The NAA used a contracts register, which registers contracts over \$100 000, as the basis for compiling the Senate Order contract list. The NAA advised that contracts identified for listing on the Internet were compared with the previous Senate Order listing to identify and remove contracts that have

expired, and to add any new contracts that were entered into during the reporting period. However, the ANAO identified 25 contracts on the Internet list that were fully performed as at 31 December 2003 and should have been removed from the listing.

3.28 The NAA reconciled the FMIS details with the Internet list prior to posting of the list, but there was no reconciliation between the GaPS listing and the contracts register, prior to posting. The ANAO checked the Internet list against the FMIS and GaPS records, and identified several vendors listed that were not published on the Internet list.

3.29 The NAA advised that for future listings, the agency would complete a thorough reconciliation of the FMIS, GaPS records, the contracts register and the Senate Order listing.

3.30 The list was presented in a format that adheres to the model format in the *Finance Guidance on Internet Listings*.

Processes for identifying contracts with confidential provisions

General

3.31 As highlighted in previous audit reports, the identification of contract provisions requiring contractual information to be kept confidential was a difficult process for contracts that were entered into prior to the introduction of the new accountability environment.

3.32 For the contracts entered into under the new accountability environment, the process of ensuring that contracts containing confidential provisions are listed correctly on the Internet should be simpler. If there is any confidential information in the contract, it should have been agreed to by the parties to the contract at the time that the contract was entered into, and be identified specifically in the contract. As a result, the staff members responsible for coordinating and compiling the Internet list should be able to compile the list from the information identified in the specific provisions of the contract, without having to determine themselves whether any information in the contract should be protected as confidential.

3.33 The ANAO considers that agencies should communicate to potential contractors the Commonwealth requirements for the proper use of confidential provisions during the tender and contract negotiation process. This should assist both parties in deciding what contractual information, if any, is confidential before the contract is entered into.

3.34 The contract should specifically identify any confidential information, and the contract manager should use this information to identify those contracts to be listed on the Internet as containing confidential information. The principle applies to all contracts, not just to those of \$100 000 or more.

However, only those of \$100 000 or more are required to be listed on the Internet.

3.35 Further, consideration of whether a contract contains confidential provisions, and/or other requirements of confidentiality during the contract negotiation process, will ensure that appropriate commitments to maintain confidentiality are entered into from the beginning of the procurement process.

Selected agencies

3.36 At the time of the audit, the reviewed agencies were generally not in the practice of discussing with potential contractors whether certain information in the contract should be protected as confidential prior to entering into contracts. All the agencies reviewed did, however, acknowledge that they would endeavour to abide by the requirements of the *Finance Guidance on Confidentiality* and the *Guidance on Internet Listings*, for future listings.

3.37 For the majority of contracts listed as containing confidential provisions, the ANAO found that all agencies, except APS Commission and Comsuper, determined what information, if any, in the contract was confidential at the time of listing.

3.38 All APS Commission contracts over \$100 000 that contained confidential provisions had been entered into by other agencies on behalf of the Commission. However, the procedures for contracts that the APS Commission enters into by itself provide for contract managers to apply, at the time that the contracts are being negotiated, the Finance tests to determine whether information should be protected as confidential.

3.39 The procedure in Comsuper, which started after February 2003, was to determine whether contracts contain confidential provisions and/or other requirements of confidentiality at the time the contract was negotiated. For earlier contracts, the determination of whether contracts contain confidential provisions and/or other requirements of confidentiality tended to be made at the time of the listing.

3.40 NAA, Crimtrac and the Commonwealth Ombudsman advised that, in future, the process for identifying confidential information in contracts would take place at the contract negotiation stage.

Conclusion

3.41 The ANAO concluded that the processes used by most selected agencies provided a reasonable level of confidence that the number of contracts reported on the Internet listings was likely to be complete. However, agencies should, in future, reconcile their FMIS and GaPS records with those of their contracts registers prior to the completion of their Senate Order Internet

listings, to provide greater assurance that the Internet list is complete in terms of numbers and details provided.

3.42 However, the ANAO could not be certain that all contracts listed on the Internet had been appropriately identified as containing confidentiality provisions, because the identification of the provisions had not been done at the contract negotiation stage.

4. Confidential Provisions in Contracts

This chapter reports on the new accountability environment relating to the use of confidential provisions in contracts. It is confined to the six agencies selected for detailed review. It relates specifically to Objective 2a, that is, an assessment of whether a selection of contracts listed on the Internet as confidential had been listed appropriately.

Processes used to determine confidential information

4.1 In assessing whether agencies had appropriately listed contracts as confidential on the Internet, the ANAO used, as the basis for analysis, the contracting governance and accountability environment articulated in the CPGs, the Senate FPA Committee in its final report and Finance guidance, which included the *Guidance on Confidentiality* and the *Guidance on Internet Listings*.

Audit evaluation criteria

4.2 The ANAO expected that agencies would have in place, a contracting framework that:

- ensured that potential contractors understood at the time of tendering, or if no tender process is undertaken, at the beginning of negotiations, that:
 - the Commonwealth's position is that contractual information is not to be protected as confidential unless there is a good reason for confidentiality;
 - contractual information may be required to be disclosed by law even though the contractor and the Commonwealth have agreed that the information is confidential;
 - accountability requirements of the Commonwealth should be met, including disclosure to Parliament and its committees and the requirements of the *Freedom of Information Act 1982* (FOI Act);
 - they are required to indicate if they consider any information in the tender or the contract to be confidential, and provide the supporting reasons; and
 - the Commonwealth will treat as confidential any information provided by tenderers/prospective suppliers prior to the award of a contract and, in respect of unsuccessful tenderers, after the contract is awarded;

- provided agency officers with confidentiality criteria (based on, or consistent with, *Finance Guidance on Confidentiality*) 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 confidential and should be protected;
- ensured that information agreed by the agency to be protected as confidential information is identified as such in the contract; and
- established appropriate staff training on, and activities to raise awareness of, the Commonwealth's new accountability environment for relevant staff.

Audit findings

Guidance for agency staff

4.3 All of the selected agencies had CEIs or some other form of formal guidance or instruction available on procurement. However, none of these agencies had included in their documentation references to the new accountability environment or to the following:

- the Senate Order for Departmental and Agency Contracts; and
- the *Finance Guidance on Confidentiality* and/or *Guidance on Internet Listings*.

4.4 During the audit, the NAA updated its policy documents to reflect the requirements of the new accountability environment, and all other agencies indicated that they would revise procurement guidance in the near future to reflect these requirements.

4.5 As in previous audits, the ANAO found that, in the majority of the selected agencies, the officers responsible for the preparation or coordination of the Internet listing were aware of the criteria⁴³ for determining information to be protected as confidential. However, the staff responsible for the day-to-day management of contracts were generally not aware, or had limited understanding, of these requirements.

Tender and contract documentation

4.6 The majority of the selected agencies advised the ANAO that the general approach taken to contractual information was that the information or

⁴³ The ANAO assessed each of the contracts selected for examination against the criteria for determining whether information in contracts could properly be protected as confidential, as outlined in the Senate FPA References Committee's final report, and the *Finance Guidance on Confidentiality*.

material is not considered confidential unless there is a good reason to do so. However, the ANAO found that ATSiS, APS Commission, ComSuper and the NAA had explicitly stated this position within their tender documents. The Commonwealth Ombudsman and CrimTrac advised that they would implement changes to their tender documentation and contract templates in an attempt to accord with the new accountability environment.

4.7 The ANAO considered that all agencies could improve their tender documentation and contract templates by including some, or all, of the following key elements:

- a statement outlining the various Commonwealth accountability requirements;
- a consistent definition of confidential information across all templates;
- a provision for the inclusion of specific reasons justifying why a tenderer may wish to protect certain information in the contract if it is awarded;
- a section that outlines the obligations of confidentiality after the contract has been awarded;
- a more detailed outline, within the general non-disclosure clauses, of the exceptions to confidentiality obligations for Commonwealth contracts; and
- adoption of the Finance model clauses for tender and contract documentation.

Staff training and awareness

4.8 The new accountability environment requires contract managers to be able to articulate the requirements to potential contractors and to negotiate with the contractor the issue of the confidentiality of contractual information. This requires not only good policies and procedures but also a training regime that provides contract managers with the appropriate skills.

4.9 At the time of the audit, none of the selected agencies had formal training programs in place for procurement staff on the new accountability environment for contracting. However, all the agencies indicated that they would consider introducing formal training on the Senate Order requirements and the new accountability environment, in the near future.

4.10 The ANAO considers that all FMA agencies would benefit from the implementation of contract training courses, or a review of current course content, to provide procurement staff with Finance guidance and to ensure that Senate Order requirements are adequately covered.

Finance Forum

4.11 Finance recently conducted a forum for FMA agency procurement staff to discuss the Finance *Guidance on Confidentiality* and the *Guidance on Internet Listings*. One issue raised was that, in many cases, the Finance Guidance does not get passed down, in a timely manner, to the procurement staff, so that they can update the agency's policies and procedures.

4.12 At the forum, Finance undertook to:

- consider, in future, sending copies of the guidance directly to the purchasing and procurement staff; and
- contact the APS Commission to see if future 'contract and procurement training' courses could incorporate the latest Finance *Guidance on Internet Listings* and the Senate Order requirements.

4.13 In addition, Finance advised that it was broadening the range of contacts in agencies, which will help the guidance to be more widely distributed. Guidance will also continue to be directly distributed to Chief Executives, Chief Finance Officers and members of the Procurement Discussion Forum.

4.14 The incorporation of policy guidance in APS Commission courses has been discussed with the APS Commission, with the result that mechanisms have now been agreed for ensuring that developments in procurement policy are reflected in APS Commission training materials.

4.15 An additional outcome of the forum was for agencies to consider the use of a checklist for each contract to ensure that all four tests⁴⁴ provided in the Finance *Guidance on Confidentiality* are considered during discussions with contractors on whether information in the contract is to be protected as confidential.

Conclusion

4.16 The ANAO concluded that, at the time of the audit, none of the selected agencies had implemented changes to their policy and guidance documentation, tender documents and contract templates, that fully accorded with the requirements of the new accountability environment. Consequently, agencies needed to review their current guidance for contracting templates so that the guidance reflects the requirements of the CPGs, Finance guidance and the Senate Order.

⁴⁴ Department of Finance and Administration, *Guidance on Confidentiality of Contractors' Commercial Information*, February 2003. Section 3, 'The Tests'.

4.17 The ANAO concluded that the selected agencies had slightly different processes in place for determining what information in the contract should be protected as confidential. In the majority of the selected agencies, the officers responsible for the preparation and coordination of the Internet listing were aware of the Finance criteria for determining confidentiality in contracts.⁴⁵ However, as has been found in previous audits, the staff responsible for the day-to-day management of contracts were generally not aware of those criteria.

The use of confidential provisions in contracts

4.18 This section of the Chapter relates to the ANAO's examination, in the six selected agencies, of a number of contracts that were listed on the Internet as containing confidential provisions to assess whether the contracts had been listed appropriately.

4.19 The ANAO's main objective was to examine contracts entered into during the 2003 Calendar Year reporting period. This was on the expectation that, by the beginning of 2003, agencies would have had in place, or would be in the process of putting in place, contracting arrangements to reflect the new accountability environment. This environment includes an expectation that agencies 'consider on a case-by-case basis, what might be commercial-in-confidence when designing any contract'.⁴⁶ However, as the type of agencies selected for this audit tended to be smaller in size, having fewer contracts than those in the previous audits, this was not always possible. To compensate, some older contracts were also selected.

4.20 As with the previous Senate Order audits, the audit findings were influenced by the progress individual agencies had made in adopting the new accountability framework for dealing with the confidentiality of information in contracts. In the sample of contracts examined, only the APS Commission and ComSuper (to a limited extent) had progressed to the point of discussing and agreeing with contractors during the contract negotiation process, whether contracts contained confidential information. The other agencies had generally relied on the contract manager's judgement as to what information was confidential, and this was mostly done at the time of listing rather than at the time the contracts were negotiated.

4.21 The ANAO recognised that decisions on 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:

⁴⁵ Refer to Section 3 for more detail.

⁴⁶ CPGs, February 2002, subsection 1.2.

- 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.

4.22 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 Finance criteria⁴⁷ for confidentiality had been used by the agency at the time the contract was entered into.

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

Audit evaluation criteria

4.24 The ANAO assessed each of the contracts selected for examination against the criteria for determining whether information in contracts could properly be protected as confidential. The criteria for evaluation, as presented in the *Finance Guidance on Confidentiality* and also in the *Finance Guidance on Internet Listings*⁴⁸ are described in full in Appendix 4 and are summarised in Table 4.1.

⁴⁷ Department of Finance and Administration. *Guidance on Confidentiality of Contractors' Commercial Information*, February 2003, op.cit., Section 3.

⁴⁸ Department of Finance and Administration. *Guidance on the Listing of Contract Details on the Internet*. January 2004, op.cit., Section 7.

Table 4.1**Department of Finance and Administration confidentiality criteria**

Confidentiality Criteria	
Criterion 1	The information to be protected must be identified in specific rather than global terms
Criterion 2	The information must have the necessary quality of confidentiality*
Criterion 3	The disclosure of information would cause detriment to the contractor or other third party
Criterion 4	The information was provided under an understanding that it would remain confidential

* Useful tests to ascertain whether particular information has this quality are whether the information is both 'sufficiently secret' and 'significant': secret in the sense that the information is generally not known, and significant in the sense that the owner of the information would be likely to suffer some detriment if the information were made public.

Source: Department of Finance and Administration. *Guidance on Confidentiality of Contractors' Commercial Information*. February 2003. Section 3, 'The Tests'.

4.25 All the criteria must be met for the information to be treated as confidential. However, the ANAO, in this and previous audits, accepted that the information was appropriately listed as confidential information if criteria two and three were met. This was because agencies were generally adapting to the new accountability environment at the time of the audit and may not have discussed what contractual information, if any, should be protected as confidential information. As a consequence, it is also unlikely that the contract would specifically identify what information is to be protected as confidential information.

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

4.26 The Finance *Guidance on Confidentiality* provides examples of commercial information in a contract that may be considered confidential and examples of information that would not generally be considered to be confidential.

4.27 This Guidance suggests that the types of commercial information that may be legitimately protected by a confidentiality clause are:

- trade secrets;
- proprietary information, for example, information about how a particular technical or business solution is to be provided;
- contractor's internal costing information or information about its profit margin;

- pricing structures (where this information would reveal whether a contractor was making a profit or loss on the supply of a particular good or service); and
- intellectual property matters where these relate to a contractor's competitive position.⁴⁹

4.28 The types of commercial information that would not generally be considered to be legitimately confidential are:

- performance and financial guarantees;
- indemnities;
- the price of an individual item or group of items of goods or services;
- rebate, liquidated damages and service credit clauses;
- performance measures that are to apply to the contract;
- clauses that describe how intellectual property rights are to be dealt with; and
- payment arrangements.⁵⁰

Selection of contracts

4.29 Table 4.2 shows the total number of contracts, the total number of contracts listed as containing confidential provisions and other requirements of confidentiality, for each of the selected agencies.

⁴⁹ Department of Finance and Administration. *Guidance on Confidentiality of Contractors' Commercial Information*. February 2003. p. 11.

⁵⁰ *ibid.*, p. 12.

Table 4.2**Number of contracts listed on the Internet—selected agencies**

Agency	Number of contracts	Number of contracts listed as containing confidential provisions	Number of contracts listed as containing other requirements of confidentiality
Aboriginal and Torres Strait Islander Service (ATSIS)	1094	11	3
Australian Public Service Commission (APS Commission)	21	2	4
Commonwealth Ombudsman	15	4	5
Commonwealth Superannuation Administration (ComSuper)	22	4	1
CrimTrac	10	5	0
National Archives of Australia (NAA)	80	19	3
TOTAL	1242	45	16

Source: ANAO analysis of agency Internet listings for 2003 Calendar Year reporting period.

4.30 The selected agencies reported a total of 1242 contracts, representing five per cent of the total number of contracts reported by all FMA Act agencies. In addition, the agencies listed 45 contracts as containing confidential provisions, or 1.5 per cent of 3052 such contracts listed by all FMA Act agencies (see Appendix 2).

4.31 The ANAO focussed on contracts that were listed by the selected agencies as containing confidential provisions, rather than those listed as containing other requirements of confidentiality. As discussed earlier, the *Finance Guidance on Confidentiality* interprets confidential provisions as those that make specific information contained in the contract confidential, and other requirements of confidentiality as those that protect confidential information of the parties that may be obtained or generated in carrying out the contract (but cannot be specifically identified when the contract is entered into). Other requirements of confidentiality are often in the form of standard confidentiality clauses of a general nature; as a result these clauses are unlikely to indicate there is any contractual information that should be protected as confidential information.

4.32 The assessment of the appropriateness of the reporting of contracts listed as containing other requirements of confidentiality was provided to individual agencies during the audit as part of the management reporting process, and is not discussed further in this report.

4.33 Although the ANAO focussed on contracts listed as containing confidential provisions, the ANAO selected three contracts (two for APS Commission and one for the Commonwealth Ombudsman) that were only listed as containing other requirements of confidentiality. The ANAO selected these contracts because the reasons provided by the agency indicated the contract might contain confidential information. On the face of it, therefore, it appeared that the contract would have been more appropriately listed as containing confidential provisions. For the purposes of the audit, these three contracts were assessed with the 23 listed as containing confidential provisions.

4.34 Table 4.3 provides a summary by agency of the 26 contracts reviewed by the ANAO and the number of contracts that the ANAO considered appropriately listed as containing confidential provisions.

Table 4.3

ANAO assessment of confidential provisions for selected agency contracts

Agency	Number of contracts selected for review*	Number of contracts that specifically identified confidential provisions in the contract**	Number of reviewed contracts containing confidential provisions or confidential information considered appropriate by the ANAO***
ATSIS	5	0	0
APS Commission	3	1	3
Commonwealth Ombudsman	4	0	2
ComSuper	4	2	3
CrimTrac	3	1	1
NAA	7	1	2
Total	26	5	11

* The number of contracts reviewed included 23 listed as containing confidential provisions and 3 listed only as containing other requirements of confidentiality. (Refer to paragraph 4.31 for more detailed explanation).

** This column shows the numbers of contracts that had the confidential information specifically identified in the contract. One of the criteria for determining whether information should be protected as confidential is that the information must be in specific rather than global terms.

*** This is the overall ANAO assessment of whether the contracts were appropriately listed as containing confidential confidential, based on reviewing confidential information specifically identified in the contract and other confidential information contained in the contract.

Source: ANAO analysis of agency contract information.

General audit findings

Summary

4.35 Table 4.3 shows the following:

- The ANAO considers that 11 of the 26 contracts reviewed (42 per cent) were appropriately listed as containing confidential provisions. The other 15 contracts were considered to be inappropriately listed because, in the ANAO's view, there was no information in the contract that satisfied the criteria for protection as confidential information.
- Only five of the 26 contracts (19 percent) had provisions that identified specific information as confidential. One of the tests for determining whether information should be protected as confidential is that the information must be identified in specific rather than global terms. This is an important criterion because it is likely to demonstrate that agency staff have discussed, and agreed, with the contractor what contractual information is required to be protected as confidential information.
- Twenty-one of the 26 contracts (81 per cent) did not have provisions that specifically identified what information in the contract was considered to be confidential information. In these cases the ANAO had to examine the contract, being guided by any reason shown on the Internet listing, to ascertain what information in the contract may have been confidential.

4.36 The results of the ANAO assessment of the 26 contracts, by each agency, are listed below.

Audit findings by agency

ATSIS

4.37 Four of the five contracts selected for review had been entered into prior to the introduction of the new accountability environment and the issuance of the *Finance Guidance on Confidentiality*. All four contracts were listed as containing confidential provisions. The ANAO considers that if the current *Finance Guidance on Confidentiality* had been available at the time the contracts were negotiated, all four contracts should not have been listed as containing confidential provisions. In the ANAO's view, there was no specific information that had the necessary quality of confidentiality, which if disclosed, may cause detriment to the contractor or a third party.

4.38 The other contract was entered into after the new accountability environment was introduced. This contract should not have been listed as containing confidential provisions, as there was no specific information in the contract that had the necessary qualities of confidentiality.

4.39 In summary, the ANAO considers that none of the reviewed ATSI contracts should have been listed as containing confidential provisions.

APS Commission

4.40 The ANAO selected three contracts for review. Two of these contracts were entered into prior to the initial Senate Order of 20 June 2001, while the other contract was entered into prior to the *Finance Guidance on Confidentiality* being issued. Two of the contracts, including the one entered into after the initial Senate Order, indicated that there were no confidential provisions in the contracts and both were listed as containing other requirements of confidentiality. These contracts were selected for review as the reasons provided on the listing indicated that the contract might contain confidential information.

4.41 The ANAO concluded that one of these contracts had specific confidential provisions identified and that the other contract contained information, which, if disclosed, would be likely to cause commercial detriment to the contractor. The ANAO, therefore, considered that both contracts should have been listed as containing confidential provisions.

4.42 The other contract selected for review was considered to be correctly listed as containing confidential provisions, even though the contract did not specifically identify what information needed to be protected as confidential information. In the ANAO's view, the pricing formulae provided in the contract could reveal commercially sensitive information to competitors, which may result in detriment to the contractor.

4.43 In summary, the ANAO considered that all three of the reviewed APS Commission contracts should have been listed as containing confidential provisions.

Commonwealth Ombudsman

4.44 Three of the four contracts selected for review were listed as containing confidential provisions and were entered into prior to the original Senate Order of 20 June 2001. None of the contracts specifically identified confidential information.

4.45 The ANAO examined the contracts to see whether there was any other information in the contract that could be considered confidential. One contract did contain commercially sensitive information, in that it disclosed certain business methods, costing information and performance information that, if

revealed, could cause detriment to the contractor. The other two contracts did not contain information of a commercially sensitive nature. As a result, the ANAO considered that only one of the three contracts listed as containing confidential provisions, was correctly listed.

4.46 The fourth contract was listed as only containing other requirements of confidentiality. It was selected for review because the reason provided on the listing indicated that the contract might contain confidential information. The ANAO considered that the service delivery methodology of the contractor provided in the contract should be protected as confidential information, because its disclosure may cause harm or detriment to the contractor. As a result, the ANAO considered that this contract should have been listed as containing confidential provisions.

4.47 In summary, the ANAO considered that two of the reviewed Commonwealth Ombudsman contracts should have been listed as containing confidential provisions.

ComSuper

4.48 All four ComSuper contracts selected for review were listed as containing confidential provisions. Two contracts specifically identified confidential information. In both cases, the ANAO considered that disclosure of this commercially sensitive information would be likely to cause detriment to the contractor.

4.49 The third contract, while not specifically identifying confidential information, contained commercially sensitive information with the necessary quality of confidentiality. The ANAO considered that, if this information was disclosed, it would be likely to cause detriment to the contractor.

4.50 The fourth contract did not contain specifically identified confidential information, nor did it contain any information that had the necessary quality of confidentiality. As such, the ANAO considered that this contract should not have been shown as containing confidential provisions.

4.51 In summary, the ANAO considered that three of the reviewed ComSuper contracts should have been listed as containing confidential provisions.

CrimTrac

4.52 The ANAO originally selected five contracts for review. However, the ANAO found that two of these ‘contracts’ were, in fact, Memoranda of Understanding with other Commonwealth agencies and, as a result, were not required to be listed.⁵¹

4.53 The ANAO examined the other three contracts, which were all listed as containing confidential provisions. Only one of the contracts, which was a recent one, specifically identified information in the contract to be protected as confidential. However, although the information may have been considered to be confidential at the time of negotiation by the parties to the contract, the ANAO did not consider it had the necessary qualities of confidentiality and, if disclosed, would be unlikely to cause detriment to the contractor or a third party.

4.54 One of the other two contracts did not contain any confidential information that needed protection and should not have been listed as containing confidential provisions. The other contract, although not identifying specific confidential information, contained information about security matters that required protection. The ANAO considered that this contract was appropriately listed as containing confidential provisions.

4.55 In summary, the ANAO considered that only one reviewed CrimTrac contract should have been listed as containing confidential provisions.

NAA

4.56 All seven contracts reviewed were listed by the agency as containing confidential provisions. Only one of the contracts specifically identified information in the contract to be protected as confidential. This contract was considered to have met all four Finance criteria and was appropriately listed as containing confidential provisions.

4.57 The ANAO considered that one other contract, which did not identify specific information as confidential, contained certain commercially sensitive information requiring protection, the disclosure of which, may cause detriment to the contractor. This contract was considered to be appropriately listed as containing confidential provisions.

4.58 The other five contracts were considered to be inappropriately listed as containing confidential provisions, because there was no information in the contract that had the necessary quality of confidentiality, which if disclosed, would be likely to cause detriment to the contractor or other third party.

⁵¹ Department of Finance and Administration. *Guidance on the listing of Contract Details on the Internet* January 2004, op.cit., p. 23.

4.59 In summary, the ANAO considered that only two reviewed NAA contracts should have been listed as containing confidential provisions.

Conclusion

4.60 In applying the Finance criteria for determining whether information should be protected as confidential information, the ANAO considered that 11 of the 26 contracts listed as containing confidential provisions, were appropriately listed.

4.61 A number of contracts had been listed as containing confidential provisions even though, in the ANAO's view, there was no confidential information in the contract. Although the percentage of contracts appropriately listed is higher in this audit than in the previous five, the result continues to highlight the need, in contract negotiations, for rigorous application of the principle that, in order to provide transparency in Government contracting, contractors' information should not be protected unless there is a good reason to do so.

4.62 The contractor must put a case to the agency for protecting information as confidential based on sound reasons, and the agency must be able to justify the use of a confidentiality clause. The fact that contractors wish to protect confidential information as confidential is not, by itself, a sufficient reason for it to be protected. The same rigour must be applied in relation to contractual information that agencies wish to protect as confidential.

Contracts excluded from listings

4.63 One element of the Senate Order requires that the Minister's letter of advice indicate the extent of, and reasons for, non-compliance with the Senate Order. Examples of non-compliance may include:

- the list not being up-to-date;
- not all relevant agencies being included; and
- contracts all of which are confidential not being included.

4.64 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.⁵²

⁵² Senate Order for Departmental and Agency Contracts (as amended December 2003), paragraph 3(6).

4.65 As a general principle, the ANAO expected that the only contracts not listed on the Internet because the whole contract was considered confidential, would be those contracts over \$100 000 that were exempt from being published on GaPS⁵³. Conversely, if the contract is listed on GaPS, it should also be listed on the Internet.

4.66 The ANAO examined all the Ministers' letters and found that the Department of Defence⁵⁴, the Department of Health and Ageing portfolio⁵⁵ and the Australian Federal Police (AFP)⁵⁶ had not listed some contracts on the Internet due to commercial sensitivity and national security reasons.

Defence and AFP

4.67 In a previous audit,⁵⁷ the ANAO examined some Defence and AFP⁵⁸ contracts that had been excluded from the Internet lists, and considered it appropriate that the contracts had not been listed. The ANAO did not examine any Defence contracts in this audit.

4.68 For this audit, the ANAO examined one new AFP contract excluded from the Internet listing, and considered that it was appropriate that this contract not be listed due to reasons of national security.

Health and Aging Portfolio

4.69 As three of the Department of Health and Ageing portfolio contracts had been reviewed in the last Senate Order audit (two for national security reasons and one for commercial sensitivity reasons), the ANAO considered it unnecessary to review these three contracts again. The ANAO had previously concluded that the reasons for excluding the contracts from the Internet list were appropriate.

⁵³ The Gazettal Reporting Requirements Handbook states that where the Chief Executive of an agency decides that details of a contract or standing offer are exempt matters under the FOI Act, he or she may then direct in writing that the details are not to be notified in GaPS. For further discussion on the matter, see ANAO Audit Report No.5 2002–03, *The Senate Order for Departmental and Agency Contracts (Autumn 2003)*, p. 55.

⁵⁴ The Minister indicated in his letter to the Senate that 'contracts that are confidential for national security reasons have been intentionally excluded from the Internet list'.

⁵⁵ The Minister for Health and Ageing indicated in the letter to the Senate that four contracts were excluded from the Health and Ageing portfolio's listing due to commercial sensitivity and national security reasons.

⁵⁶ The Attorney-General indicated in his letter to the Senate that a small number of AFP contracts which fall within the scope of public interest immunity have not been listed primarily for security reasons.

⁵⁷ Australian National Audit Office, Audit Report No.5 (2003–04) *Senate Order for Departmental and Agency Contracts (Autumn 2003)*.

⁵⁸ The Minister for Defence indicated in the letter to the Senate that 'Contracts that are confidential for national security reasons have been intentionally excluded from the Internet list'.

4.70 The ANAO reviewed the fourth contract and considered that it appropriate that this contract had not been listed on the Internet due to commercial sensitivity reasons.

Selected agencies

4.71 None of the Ministers for the agencies audited in detail, had advised in their letters to the Senate that contracts had been excluded from agency Internet listings. The ANAO confirmed with the selected agencies that none of the contracts had been intentionally excluded from the list.

Canberra ACT
17 September 2004



P. J. Barrett
Auditor-General

Appendices

Appendix 1: Senate Order (December 2003)

Senate Order for Departmental and Agency Contracts (as amended December 2003)

The Senate Order as at December 2003 is shown below:

- (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 2 calendar months after the last day of the financial and calendar year, 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, the commencement date of the contract, the duration of the contract, the relevant reporting period and the twelve-month period relating to the contract listings;
 - (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.
- (3) 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; and
 - (c) contracts all of which are confidential are not included.
- (4) Where no contracts have been entered into by a department or agency, the letter under paragraph (1) is to advise accordingly.

- (5) 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, by not later than 30 September each year 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.
- (6) 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.
- (7) The Finance and Public Administration References Committee consider and report on the first and second years of operation of this order.
- (8) This order has effect on and after 1 July 2001.
- (9) In this order:

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

“previous 12 months” means the period of 12 months ending on **either 31 December or 30 June in any year**, as the case may be.

Appendix 2: Numbers of contracts by agency

Number of contracts listed by agencies in accordance with the Senate Order—2003 Calendar Year

Agency	Total number of contracts	Total number of contracts listed as containing aspects of confidentiality ⁵⁹	Number of contracts listed as containing confidentiality provisions	Number of contracts listed as containing other requirements of confidentiality
Aboriginal and Torres Strait Islander Commission ⁶⁰	Not applicable	Not applicable	Not applicable	Not applicable
Aboriginal and Torres Strait Islander Service ⁶¹	1094	12	11	3
Administrative Appeals Tribunal	15	6	1	5
Attorney-General's Department	165	33	16	24
AusAid	1055	3	3	0
Australia-Japan Foundation	4	0	0	0
Australian Bureau of Statistics	78	62	62	0
Australian Centre for International Agricultural Research	144	0	0	0
Australian Competition and Consumer Commission	32	2	0	2
Australian Crime Commission	19	9	0	9
Australian Customs Service	280	30	29	4
Australian Electoral Commission	144	28	28	0
Australian Federal Police	116	1	1	0
Australian Greenhouse Office	112	56	0	56
Australian Industrial Registry	34	15	4	13
Australian National Audit Office	50	39	9	39

⁵⁹ Some contracts were listed as containing both confidential provisions and other requirements of confidentiality—the total number of contracts claimed as containing aspects of confidentiality is not a total of the other columns.

⁶⁰ ATSIC had no contracts that fell within the scope of the Senate Order.

⁶¹ ATSIIS was established as an FMA Act agency on 1 July 2003.

Agency	Total number of contracts	Total number of contracts listed as containing aspects of confidentiality ⁵⁹	Number of contracts listed as containing confidentiality provisions	Number of contracts listed as containing other requirements of confidentiality
Australian Office of Financial Management	7	1	1	1
Australian Public Service Commission	21	4	2	4
Australian Radiation Protection and Nuclear Safety Agency	10	0	0	0
Australian Research Council	519	0	0	0
Australian Secret Intelligence Service ⁶²	Not applicable	Not applicable	Not applicable	Not applicable
Australian Securities and Investments Commission ⁶³	Not applicable	Not applicable	Not applicable	Not applicable
Australian Security Intelligence Organisation ⁶⁴	Not applicable	Not applicable	Not applicable	Not applicable
Australian Taxation Office	689	574	108	536
Australian Transaction Reports and Analysis Centre	24	2	2	0
Bureau of Meteorology	61	3	2	2
Centrelink	1013	368	89	283
Classification Board ⁶⁵	Not applicable	Not applicable	Not applicable	Not applicable
Classification Review Board ⁶⁶	Not applicable	Not applicable	Not applicable	Not applicable
Commonwealth Grants Commission	5	3	3	3
Commonwealth Ombudsman	15	6	4	5
Commonwealth Superannuation Administration	22	4	4	1

⁶² ASIS did not list contracts on the Internet because of national security concerns.

⁶³ ASIC had no contracts that fell within the scope of the Senate Order.

⁶⁴ ASIO did not list contracts on the Internet because of national security concerns.

⁶⁵ The Classification Board is administered by the Office of Film and Literature Classification, and has no statutory power to enter into contracts in its own right.

⁶⁶ The Classification Review Board is administered by the Office of Film and Literature Classification, and has no statutory power to enter into contracts in its own right.

Agency	Total number of contracts	Total number of contracts listed as containing aspects of confidentiality ⁵⁹	Number of contracts listed as containing confidentiality provisions	Number of contracts listed as containing other requirements of confidentiality
CrimTrac Agency	10	5	5	0
CSS Board ⁶⁷	9	5	0	5
Dairy Adjustment Authority	3	3	0	3
Department of Agriculture, Fisheries and Forestry	281	153	108	52
Department of Communications, Information Technology and the Arts	330	192	10	192
Department of Defence	4581	725	476	625
Department of Education, Science and Training	1043	354	271	89
Department of Employment and Workplace Relations	1343	1067	1066	4
Department of Family and Community Services ⁶⁸	2197	6	6	0
Department of Finance and Administration	167	104	101	62
Department of Foreign Affairs and Trade	165	19	19	17
Department of Health and Ageing	6255	1	1	0
Department of Immigration and Multicultural and Indigenous Affairs	550	167	38	129
Department of Industry, Tourism and Resources	367	136	24	120
Department of the Environment and Heritage ⁶⁹	279	108	106	2
Department of the House of Representatives ⁷⁰	Not applicable	Not applicable	Not applicable	Not applicable

⁶⁷ The CSS and PSS Boards entered into contracts jointly for the 2003 Calendar Year reporting period.

⁶⁸ Includes contract details relating to the Child Support Agency and Social Security Appeals Tribunal. These details are shown separately on the Department's website.

⁶⁹ Includes contract details relating to the Australian Antarctic Division. These details are shown separately on the Department's website.

Agency	Total number of contracts	Total number of contracts listed as containing aspects of confidentiality ⁵⁹	Number of contracts listed as containing confidentiality provisions	Number of contracts listed as containing other requirements of confidentiality
Department of the Parliamentary Library ⁷¹	4	1	1	0
Department of the Parliamentary Reporting Staff ⁷⁰	59	18	18	0
Department of the Prime Minister and Cabinet	40	22	18	4
Department of the Senate	21	0	0	0
Department of the Treasury	17	4	0	4
Department of Transport and Regional Services	571	86	85	68
Department of Veterans' Affairs	903	246	246	0
Equal Opportunity for Women in the Workplace Agency	2	2	2	2
Family Court of Australia	82	15	15	1
Federal Court of Australia	37	18	2	18
Federal Magistrates Service	8	4	1	4
Geoscience Australia	28	5	5	0
Human Rights and Equal Opportunity Commission	6	3	3	0
Insolvency and Trustee Service Australia	31	5	0	5
Inspector-General of Taxation ⁷²	1	0	0	0
IP Australia	108	4	4	4
Joint House Department ⁷⁰	37	9	9	0

⁷⁰ The five Parliamentary Departments are not Departments of State administered by Ministers and, as a result, are not required to comply with the Senate Order. However, all except the Department of the House of Representatives has chosen to comply with the Order.

⁷¹ The Department of the Parliamentary Reporting Staff, Department of the Parliamentary Library and the Joint House Department were amalgamated into a new Department of Parliamentary Services (DPS) on 1 February 2004. The DPS is not included in this report, as it did not exist during the 2003 Calendar Year reporting period.

⁷² The Inspector-General of Taxation agency was established as a FMA Act agency on 1 July 2003.

Agency	Total number of contracts	Total number of contracts listed as containing aspects of confidentiality ⁵⁹	Number of contracts listed as containing confidentiality provisions	Number of contracts listed as containing other requirements of confidentiality
Migration Review Tribunal	5	0	0	0
National Archives of Australia	80	19	19	3
National Blood Authority ⁷³	9	2	2	2
National Capital Authority	38	0	0	0
National Competition Council	2	0	0	0
National Native Title Tribunal	16	4	4	0
National Oceans Office	8	0	0	0
National Office for the Information Economy ⁷⁴	62	0	0	0
Office of Film and Literature Classification ⁷⁵	1	0	0	0
Office of National Assessments	10	1	1	1
Office of Parliamentary Counsel	4	3	1	3
Office of the Director of Public Prosecutions	43	2	2	2
Office of the Inspector-General of Intelligence and Security ⁷⁶	Not applicable	Not applicable	Not applicable	Not applicable
Office of the Official Secretary of the Governor-General	8	7	1	7
Office of the Privacy Commissioner	3	2	2	2
Office of the Renewable Energy Regulator ⁷⁷	1	1	1	1
Productivity Commission	5	0	0	0

⁷³ The National Blood Authority was established as an FMA Act agency on 1 July 2003.

⁷⁴ The National Office for the Information Economy's name was changed to the Australian Government Information Management Office (AGIMO) on 8 April 2004.

⁷⁵ The Office of Film and Literature Classification enters into contracts on behalf of the Classification Board and the Classification Review Board.

⁷⁶ The Office of the Inspector-General of Intelligence and Security placed a note on its website stating that it did not have any contracts subject to the Senate Order.

⁷⁷ The Office of the Renewable Energy Regulator was established as an FMA Act agency on 1 July 2003.

Agency	Total number of contracts	Total number of contracts listed as containing aspects of confidentiality ⁵⁹	Number of contracts listed as containing confidentiality provisions	Number of contracts listed as containing other requirements of confidentiality
Professional Services Review Scheme	4	0	0	0
PSS Board ⁷⁸	Not applicable	Not applicable	Not applicable	Not applicable
Refugee Review Tribunal	6	0	0	0
Seafarers Safety, Rehabilitation and Compensation Authority ⁷⁹	Not applicable	Not applicable	Not applicable	Not applicable
Total	25 568	4789	3052	2419

Source: ANAO analysis of FMA Act agencies' Internet listings.

⁷⁸ The CSS and PSS Boards entered into contracts jointly for the 2003 Calendar Year reporting period.

⁷⁹ The Seafarers Safety, Rehabilitation and Compensation Authority was established as an FMA agency on 1 July 2003. The Authority placed a note on its website confirming that it did not have any contracts of \$100 000 or more for the 2003 Calendar year.

Appendix 3: Agency compliance with Senate Order

Agency compliance with the requirements of the Senate Order—2003 Calendar Year

Agency	Listed by due date (29 February 2004) ⁸⁰	Relevant reporting period or twelve-month period ⁸¹	Name	Subject	Value	Start date	End date	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reason(s) for confidentiality	Cost of Compliance	Method of calculating cost of compliance
Aboriginal and Torres Strait Islander Commission ⁸²	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
Aboriginal and Torres Strait Islander Service ⁸³	x	✓	✓	✓	✓	✓	✓	✓	✓	✓	x	✓

⁸⁰ Although the Finance Letter of 30 June 2003 interprets '2 calendar months after the last day of the Financial Year' (paragraph (1) of the June 2003 amendment to the Senate Order) as being 29 February 2004, the ANAO considered agencies compliant for the current reporting period if they had placed a list of contracts on the Internet by 1 March 2004. This was because 29 February 2004 was a Sunday.

⁸¹ The ANAO considered agencies to be compliant with the requirements of the Senate Order for the 2003 Calendar Year reporting period, if the relevant reporting period or the twelve-month period relating to contracts, or both periods were identified on the Internet lists, as both requirements essentially reveal the same information.

⁸² ATSIC had no contracts that fell within the scope of the Senate Order.

⁸³ ATSIS was established as an FMA Act agency on 1 July 2003. ATSIS placed its contract listing on the Internet on 2 March 2004.

Agency	Listed by due date (29 February 2004) ⁸⁰	Relevant reporting period or twelve-month period ⁸¹	Name	Subject	Value	Start date	End date	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reason(s) for confidentiality	Cost of Compliance		Method of calculating cost of compliance
Administrative Appeals Tribunal	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Attorney-General's Department	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
AusAid	✓	✓	✓	✓	✓	✓	✓	✓	✓ ⁸⁴	✓	✓	✓	✓
Australia-Japan Foundation ⁸⁵	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian Bureau of Statistics	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

⁸⁴ The AusAid Internet listing only listed one column titled 'Whether contract contains provisions requiring the parties to maintain confidentiality of any of its provisions' rather than the two columns suggested in the Finance *Guidance on Internet listings* (the requirement to have two columns distinguishing between the two types of confidentiality is discussed in Chapter Two of the report). The ANAO confirmed that the column was for contracts requiring contract provisions to be kept confidential, and AusAid advised that it had no contracts that contained other requirements of confidentiality.

⁸⁵ The ANAO noted that the Australia-Japan Foundation Internet listing did not include the relevant reporting period or the 12 month reporting period. These details have since been included in its Internet listing. The Foundation did not include columns for provisions requiring contract provisions to be kept confidential and other requirements of confidentiality. However, the note on the front of the listing indicated that none of the listed contracts contained aspects of confidentiality.

Agency	Listed by due date (29 February 2004) ⁸⁶	Relevant reporting period or twelve-month period ⁸¹	Name	Subject	Value	Start date	End date	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reason(s) for confidentiality	Cost of Compliance		Method of calculating cost of compliance
Australian Centre for International Agricultural Research	✓	✓	✓	✓	✓	✓	✓	✓ ⁸⁶	✓ ⁸⁵	✓	✓	✓	✓
Australian Competition and Consumer Commission	x ⁸⁷	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian Crime Commission	✓	✓	✓	✓	✓	✓	✓	✓ ⁸⁸	✓	✓	✓	✓	✓

⁸⁶ The Australian Centre for International Agricultural Research did not include columns for provisions requiring contract provisions to be kept confidential and other requirements of confidentiality. However, the note on the front of the listing indicated that none of the listed contracts contained aspects of confidentiality.

⁸⁷ The Australian Competition and Consumer Commission placed its contract listing on the Internet on 2 March 2004.

⁸⁸ The Australian Crime Commission (ACC) Internet listing only listed one column titled 'Confidentiality required' rather than the two columns suggested in the Finance *Guidance on Internet listings* (the requirement to have two columns distinguishing between the two types of confidentiality is discussed in Chapter Two of the report). The ANAO confirmed that the column was for contracts containing other requirements of confidentiality, and the ACC advised that it had no contracts that contained provisions requiring contract provisions to be kept confidential.

Agency	Listed by due date (29 February 2004) ⁸⁰	Relevant reporting period or twelve-month period ⁸¹	Name	Subject	Value	Start date	End date	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reason(s) for confidentiality	Cost of Compliance	Method of calculating cost of compliance
Australian Customs Service	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian Electoral Commission ⁸⁹	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian Federal Police	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian Greenhouse Office	✓	✓ ⁹⁰	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

⁸⁹ The ANAO noted that although the covering note to the Internet listing refers to the correct reporting period, the Australian Electoral Commission contract listing had the incorrect reporting period. This has since been corrected.

⁹⁰ The ANAO noted that the Australian Greenhouse Office covering note to the contract listing incorrectly identified the reporting period as 1 July 2002 to 30 June 2003 instead of 1 January 2003 to 31 December 2003.

Agency	Listed by due date (29 February 2004) ⁹⁰	Relevant reporting period or twelve-month period ⁹¹	Name	Subject	Value	Start date	End date	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reason(s) for confidentiality	Cost of Compliance		Method of calculating cost of compliance
Australian Industrial Registry	x ⁹¹	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian National Audit Office	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian Office of Financial Management	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian Public Service Commission	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian Radiation Protection and Nuclear Safety Agency	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

⁹¹ The Australian Industrial Registry placed its contract listing on the Internet on 2 March 2004.

Agency	Listed by due date (29 February 2004) ⁹⁰	Relevant reporting period or twelve-month period ⁸¹	Name	Subject	Value	Start date	End date	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reason(s) for confidentiality	Cost of Compliance	Method of calculating cost of compliance
Australian Research Council	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗ ⁹²
Australian Secret Intelligence Service ⁹³	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
Australian Securities and Investments Commission ⁹⁴	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
Australian Security Intelligence Organisation ⁹⁵	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable

⁹² The ANAO noted that the Australian Research Council did not include the method of calculating the cost of compliance in its Internet listing. This has since been included in its Internet listing.

⁹³ ASIS did not list contracts on the internet because of national security concerns.

⁹⁴ ASIC had no contracts that fell within the scope of the Senate Order.

⁹⁵ ASIO did not list contracts on the internet because of national security concerns.

Agency	Listed by due date (29 February 2004) ⁹⁰	Relevant reporting period or twelve-month period ⁸¹	Name	Subject	Value	Start date	End date	Provisions requiring contract provisions to be kept confidential	Reason(s) for confidentiality		Cost of Compliance	Method of calculating cost of compliance
									Other requirements of confidentiality			
Australian Taxation Office	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian Transaction Reports and Analysis Centre	✓	✓	✓	✓	✓	✓	✓	✓	✓ ⁹⁶	✓	✓	✓
Bureau of Meteorology	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Centrelink	✗ ⁹⁷	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Classification Board ⁹⁸	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable

⁹⁶ The Australian Transaction Reports and Analysis Centre (AUSTRAC) Internet listing only listed one column titled 'Confidentiality provision' rather than the two columns suggested in the Finance *Guidance on Internet listings* (the requirement to have two columns distinguishing between the two types of confidentiality is discussed in Chapter Two of the report). The ANAO confirmed that the column was for contracts requiring contract provisions to be kept confidential, and AUSTRAC advised that it had no contracts that contained other requirements of confidentiality.

⁹⁷ Centrelink placed its contract listing on the Internet on 4 March 2004.

⁹⁸ The Classification Board is administered by the Office of Film and Literature Classification, and has no statutory power to enter into contracts in its own right.

Agency	Listed by due date (29 February 2004) ⁹⁰	Relevant reporting period or twelve-month period ⁹¹	Name	Subject	Value	Start date	End date	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reason(s) for confidentiality	Cost of Compliance	Method of calculating cost of compliance
												Not applicable
Classification Review Board ⁹⁹	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
Commonwealth Grants Commission	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Commonwealth Ombudsman	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Commonwealth Superannuation Administration	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
CSS Board ¹⁰⁰	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
CrimTrac Agency	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Dairy Adjustment Authority	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

⁹⁹ The Classification Review Board is administered by the Office of Film and Literature Classification, and has no statutory power to enter into contracts in its own right.

¹⁰⁰ The CSS and PSS Boards entered into contracts jointly for the 2003 Calendar Year reporting period.

Agency	Listed by due date (29 February 2004) ⁸⁰	Relevant reporting period or twelve-month period ⁸¹	Name	Subject	Value	Start date	End date	Provisions requiring contract provisions to be kept confidential	Reason(s) for confidentiality		Cost of Compliance	Method of calculating cost of compliance
									Other requirements of confidentiality			
Department of Agriculture, Fisheries and Forestry	✓	✓ ¹⁰¹	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Communications, Information Technology and the Arts	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Defence	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Education, Science and Training	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Employment and Workplace Relations	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

¹⁰¹ The ANAO noted that the Internet site incorrectly identified the reporting period as 1 January 2002 to 31 December 2003 instead of 1 January 2003 to 31 December 2003. This has since been corrected.

Agency	Listed by due date (29 February 2004) ⁸⁰	Relevant reporting period or twelve-month period ⁸¹	Name	Subject	Value	Start date	End date	Provisions requiring contract provisions to be kept confidential	Reason(s) for confidentiality		Cost of Compliance	Method of calculating cost of compliance
									Other requirements of confidentiality			
Department of Family and Community Services ¹⁰²	✓	✓	✓	✓	✓	✓	✓	✓	✓ ¹⁰³	✓	✓	✓
Department of Finance and Administration	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Foreign Affairs and Trade	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Health and Ageing	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Immigration and Multicultural and Indigenous Affairs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

¹⁰² Includes contract details relating to the Child Support Agency and Social Security Appeals Tribunal. These details are shown separately on the Department's website.

¹⁰³ The Department of Family and Community Services (the Department) Internet listing only listed one column titled 'Confidential provisions' rather than the two columns suggested in the Finance *Guidance on Internet listings* (the requirement to have two columns distinguishing between the two types of confidentiality is discussed in Chapter Two of the report). The ANAO confirmed that the column was for contracts requiring contract provisions to be kept confidential, and the Department advised that it had no contracts that contained other requirements of confidentiality.

Agency	Listed by due date (29 February 2004) ⁸⁰	Relevant reporting period or twelve-month period ⁸¹	Name	Subject	Value	Start date	End date	Provisions requiring contract provisions to be kept confidential	Reason(s) for confidentiality		Cost of Compliance	Method of calculating cost of compliance
									Other requirements of confidentiality			
Department of Industry, Tourism and Resources	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of the Environment and Heritage ¹⁰⁴	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of the House of Representatives ¹⁰⁵	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
Department of the Parliamentary Library ¹⁰⁶	✓	✓ ¹⁰⁷	✓	✓	✓	✓	✓	✓	✓ ¹⁰⁸	✓	✓	✓

¹⁰⁴ Includes contract details relating to the Australian Antarctic Division. These details are shown separately on the Department's website.

¹⁰⁵ The five Parliamentary Departments are not Departments of State administered by Ministers and, as a result, are not required to comply with the Senate Order. However, all except the Department of the House of Representatives has chosen to comply with the Order.

¹⁰⁶ The Department of the Parliamentary Reporting Staff, Department of the Parliamentary Library and the Joint House Department were amalgamated into a new Department of Parliamentary Services (DPS) on 1 February 2004. The DPS is not included in this report, as it did not exist during the 2003 Calendar Year reporting period.

¹⁰⁷ The ANAO noted that the Department of Parliamentary Library contract listing incorrectly identified the twelve-month period relating to the contract listing as 30/6/03 to 31/12/03 instead of 1/1/03 to 31/12/03.

Agency	Listed by due date (29 February 2004) ⁸⁰	Relevant reporting period or twelve-month period ⁸¹	Name	Subject	Value	Start date	End date	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reason(s) for confidentiality	Cost of Compliance	Method of calculating cost of compliance
Department of the Parliamentary Reporting Staff ¹⁰⁵	✓	✓	✓	✓	✓	✓	✓	✓	✓ ¹⁰⁹	✓	✓	✓
Department of the Prime Minister and Cabinet	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of the Senate	✗ ¹¹⁰	✓	✓	✓	✓	✓	✓	✓	✓ ¹¹¹	✓	✗	✗

¹⁰⁸

The Department of the Parliamentary Library (the Department) Internet listing only listed one column titled 'Confidentiality Provisions' rather than the two columns suggested in the Finance *Guidance on Internet listings* (the requirement to have two columns distinguishing between the two types of confidentiality is discussed in Chapter Two of the report). The ANAO confirmed that the column was for contracts requiring contract provisions to be kept confidential, and the Department advised that it had no contracts that contained other requirements of confidentiality.

¹⁰⁹

The Department of the Parliamentary Reporting Staff (the Department) Internet listing only listed one column titled 'Confidentiality Provisions' rather than the two columns suggested in the Finance *Guidance on Internet listings* (the requirement to have two columns distinguishing between the two types of confidentiality is discussed in Chapter Two of the report). The ANAO confirmed that the column was for contracts requiring contract provisions to be kept confidential, and the Department advised that it had no contracts that contained other requirements of confidentiality.

¹¹⁰

The Department of the Senate placed its contract listing on the Internet on 8 March 2004.

¹¹¹

The Department of the Senate Internet listing only listed one column titled 'Confidentiality Provisions' rather than the two columns suggested in the Finance *Guidance on Internet listings* (the requirement to have two columns distinguishing between the two types of confidentiality is discussed in Chapter Two of the report). The ANAO confirmed that the column was for contracts requiring contract provisions to be kept confidential, and the Department of the Senate advised that it had no contracts that contained provisions requiring contract provisions to be kept confidential or other requirements of confidentiality.

Agency	Listed by due date (29 February 2004) ⁸⁰	Relevant reporting period or twelve- month period ⁸¹	Name	Subject	Value	Start date	End date	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reason(s) for confidentiality	Cost of Compliance	Method of calculating cost of compliance
Department of the Treasury	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Transport and Regional Services	✗ ¹¹²	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Veterans' Affairs	✓	✓	✓	✓	✓	✓	✓	✓	✓ ¹¹³	✓	✓	✓
Equal Opportunity for Women in the Workplace Agency	✓	✓ ¹¹⁴	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗
Family Court of Australia	✓	✓ ¹¹⁵	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

¹¹² The Department of Transport and Regional Services placed its contract listing on the Internet on 19 April 2004.

¹¹³ The Department of Veterans' Affairs (the Department) Internet listing only listed one column titled 'Confidential' rather than the two columns suggested in the Finance *Guidance on Internet listings* (the requirement to have two columns distinguishing between the two types of confidentiality is discussed in Chapter Two of the report). The ANAO confirmed that the column was for contracts requiring contract provisions to be kept confidential, and the Department advised that it had no contracts that contained other requirements of confidentiality.

¹¹⁴ Although the contract listing has the correct reporting period, the covering note to the list had the incorrect reporting period.

¹¹⁵ The ANAO noted that the Family Court contract listing incorrectly identified the reporting period as 2003–2004 Calendar Year instead of 2003 Calendar Year. The Family Court has since updated its contract listing to include the correct reporting period.

Agency	Listed by due date (29 February 2004) ⁸⁰	Relevant reporting period or twelve-month period ⁸¹	Name	Subject	Value	Start date	End date	Provisions requiring contract provisions to be kept confidential	Reason(s) for confidentiality		Cost of Compliance	Method of calculating cost of compliance
									Other requirements of confidentiality			
Federal Court of Australia	✗ ¹¹⁶	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Federal Magistrates Service	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Geoscience Australia	✓	✓	✓	✓	✓	✓	✓	✓	✓ ¹¹⁷	✓	✗	✗
Human Rights and Equal Opportunity Commission	✓	✗ ¹¹⁸	✓	✓	✓	✓	✓	✓	✓ ¹¹⁹	✓	✓	✓

¹¹⁶ The Federal Court of Australia placed its contract listing on the Internet on 16 March 2004.

¹¹⁷ The Geoscience Australia (GA) Internet listing only listed one column titled 'Confidentiality' rather than the two columns suggested in the Finance *Guidance on Internet listings* (the requirement to have two columns distinguishing between the two types of confidentiality is discussed in Chapter Two of the report). The ANAO confirmed that the column was for contracts requiring contract provisions to be kept confidential, and GA advised that it had no contracts that contained other requirements of confidentiality.

¹¹⁸ The Human Rights and Equal Opportunity Commission (HREOC) did not include the relevant reporting period or 12 month reporting period in its Internet listing. The HREOC has since included these details in its Internet listing.

Agency	Listed by due date (29 February 2004) ⁸⁰	Relevant reporting period or twelve-month period ⁸¹	Name	Subject	Value	Start date	End date	Provisions requiring contract provisions to be kept confidential	Reason(s) for confidentiality		Cost of Compliance	Method of calculating cost of compliance
									Other requirements of confidentiality			
Insolvency and Trustee Service Australia	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Inspector-General of Taxation ¹²⁰	✗ ¹²¹	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✗
IP Australia	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Joint House Department ¹⁰⁵	✓	✓	✓	✓	✓	✓	✓	✓	✓ ¹²²	✓	✓	✓

¹¹⁹

The Human Rights and Equal Opportunity Commission (HREOC) Internet listing only listed one column titled 'Contract provisions requiring confidentiality' rather than the two columns suggested in the Finance *Guidance on Internet listings* (the requirement to have two columns distinguishing between the two types of confidentiality is discussed in Chapter Two of the report). The ANAO confirmed that the column was for contracts requiring contract provisions to be kept confidential, and the HREOC advised that it had no contracts that contained other requirements of confidentiality.

¹²⁰

The Inspector-General of Taxation (IGT) was established as an FMA Act agency on 1 July 2003. The IGT did not include the cost of compliance and the method of calculating the cost of compliance in its Internet listing. The IGT has since included these details in its Internet listing.

¹²¹

The IGT placed its contract listing on the Internet on 9 March 2004.

¹²²

The Joint House Department (the Department) Internet listing only listed one column titled 'Confidentiality Provisions' rather than the two columns suggested in the Finance *Guidance on Internet listings* (the requirement to have two columns distinguishing between the two types of confidentiality is discussed in Chapter Two of the report). The ANAO confirmed that the column was for contracts requiring contract provisions to be kept confidential, and the Department advised that it had no contracts that contained other requirements of confidentiality.

Agency	Listed by due date (29 February 2004) ⁸⁰	Relevant reporting period or twelve-month period ⁸¹	Name	Subject	Value	Start date	End date	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reason(s) for confidentiality	Cost of Compliance	Method of calculating cost of compliance
Migration Review Tribunal	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
National Archives of Australia	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
National Blood Authority ¹²³	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
National Capital Authority	✓	✗ ¹²⁴	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
National Competition Council	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

¹²³ The National Blood Authority was established as an FMA Act agency on 1 July 2003.

¹²⁴ The National Capital Authority did not include the relevant reporting period or 12 month reporting period in its Internet listing. The Authority has since included these details in its Internet listing.

Agency	Listed by due date (29 February 2004) ⁸⁰	Relevant reporting period or twelve-month period ⁸¹	Name	Subject	Value	Start date	End date	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality		Reason(s) for confidentiality	Cost of Compliance	Method of calculating cost of compliance
National Native Title Tribunal	✓	✓	✓	✓	✓	✓	✓	✓	✓ ¹²⁵		✓	✓	✓
National Oceans Office	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓
National Office for the Information Economy ¹²⁶	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓
Office of Film and Literature Classification	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓

¹²⁵ The National Native Title Tribunal (NNTT) Internet listing only listed one column titled 'Confidential' rather than the two columns suggested in the Finance *Guidance on Internet listings* (the requirement to have two columns distinguishing between the two types of confidentiality is discussed in Chapter Two of the report). The ANAO confirmed that the column was for contracts requiring contract provisions to be kept confidential, and the NNTT advised that it had no contracts that contained other requirements of confidentiality.

¹²⁶ The National Office for the Information Economy's name was changed to the Australian Government Information Management Office (AGIMO) on 8 April 2004.

Agency	Listed by due date (29 February 2004) ⁸⁰	Relevant reporting period or twelve-month period ⁸¹	Name	Subject	Value	Start date	End date	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reason(s) for confidentiality		Cost of Compliance		Method of calculating cost of compliance
Office of National Assessments	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Office of Parliamentary Counsel	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Office of the Director of Public Prosecutions	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Office of the Inspector-General of Intelligence and Security ¹²⁷	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
Office of the Official Secretary of the Governor-General	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

¹²⁷ The Office of the Inspector-General of Intelligence and Security placed a note on its website stating that it did not have any contracts subject to the Senate Order.

Agency	Listed by due date (29 February 2004) ⁸⁰	Relevant reporting period or twelve-month period ⁸¹	Name	Subject	Value	Start date	End date	Provisions requiring contract provisions to be kept confidential	Reason(s) for confidentiality		Cost of Compliance	Method of calculating cost of compliance
									Other requirements of confidentiality			
Office of the Privacy Commissioner	✓	✓	✓	✓	✓	✓	✓	✓	✓ ¹²⁸	✓	✓	✓
Office of the Renewable Energy Regulator ¹²⁹	✗ ¹³⁰	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Productivity Commission	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Professional Services Review Scheme ¹³¹	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗

¹²⁸ The Office of the Privacy Commissioner (OPC) Internet listing only listed one column titled 'Contract provisions requiring confidentiality' rather than the two columns suggested in the Finance *Guidance on Internet listings* (the requirement to have two columns distinguishing between the two types of confidentiality is discussed in Chapter Two of the report). The ANAO confirmed that the column was for contracts requiring contract provisions to be kept confidential and contracts that contained other requirements of confidentiality.

¹²⁹ The ANAO noted that the Office of the Renewable Energy Regulator (ORER) contract listing incorrectly identified the twelve-month period relating to the contract listing as 1/7/03 to 30/6/04 instead of 1/7/03 to 31/12/03 (the ORER became an FMA Act agency on 1 July 2003).

¹³⁰ The ORER placed its contract listing on the Internet on 20 March 2004.

¹³¹ The Professional Services Review Scheme (PSRS) did not include the relevant reporting period, the 12 month reporting period or the method of calculating the cost of compliance on its Internet listing. The PSRS has since included these details in its Internet listing.

Agency	Listed by due date (29 February 2004) ⁸⁰	Relevant reporting period or twelve-month period ⁸¹	Name	Subject	Value	Start date	End date	Provisions requiring contract provisions to be kept confidential	Reason(s) for confidentiality		Cost of Compliance	Method of calculating cost of compliance
									Other requirements of confidentiality			
PSS Board ¹³²	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
Refugee Review Tribunal	✓	✓	✓	✓	✓	✓	✓	✓	Not applicable	✓	✓	✓
Seafarers Safety, Rehabilitation and Compensation Authority ¹³³	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable

Source: ANAO Analysis of FMA Act agencies' Internet listings.

¹³²

The CSS and PSS Boards entered into contracts jointly for the 2003 Calendar Year reporting period.

¹³³

The Seafarers Safety, Rehabilitation and Compensation Authority was established as an FMA agency on 1 July 2003. The Authority placed a note on its website confirming that it did not have any contracts of \$100 000 or more for the 2003 Calendar year.

Appendix 4: Confidentiality criteria

Department of Finance and Administration (February 2003) Criteria for the determination of whether commercial information should be protected as confidential

Criterion 1:

That the information to be protected must be identified in specific rather than global terms

Commonwealth officials are required to identify and consider what specific information, if any, is legitimately protected from disclosure. A request for inclusion of a clause in a contract that states that all information is confidential does not pass this test. Individual items of information, for example pricing or intellectual property, must be separately considered.

Criterion 2:

That the information must have the necessary quality of confidentiality

The specific information must in fact be commercially 'sensitive', that is, it must not already be in the public domain (such as price lists available on the Internet) and its continuing non-disclosure must provide an ongoing commercial benefit to the 'owner' of the information. Parties requesting that the confidentiality of such information be maintained would need to show that there was an objective basis for their request, and not that they simply wished to protect the information.

Criterion 3:

That disclosure would cause detriment to the contractor or other third party

The information must be such that the disclosure of which would cause harm to the 'owner' of the information, also needs to be established on an objective basis. For example, disclosure of Internet price lists could not harm the owner, but disclosure of pricing information that reveals the contractor's margins may have this effect. The party seeking to maintain confidentiality would normally need to identify some real risk of commercial damage to its interests flowing from the disclosure.

Criterion 4:

That the information was provided under an understanding that it would remain confidential

That the information was provided on an understanding that it remains confidential requires consideration of the circumstances in which the information was provided and a determination of whether there was a mutual express or implied understanding that confidentiality is to be maintained. The circumstances include such matters as tendering documentation and contract negotiations. For example, a tender condition and draft contract which included specific confidentiality provisions would support an assertion of such an understanding with respect to the information specified.

Appendix 5: Agencies' responses to the audit report

Selected agencies

The comments provided by each of the selected agencies in response to the audit are shown below.

Aboriginal and Torres Strait Islander Service

ATSIS agrees with the general findings of the report and confirms that the report accurately reflects the audit findings and conclusions. The following is ATSIS' response to the report:

Para 3.2

ATSIS agrees that there isn't any specific reference made to the requirements of the Senate Order in its Chief Executive Instructions (CEIs). On 1 July 2004 ATSIS programmes and functions were transferred to mainstream agencies and the Agency has only a small amount of staff performing certain residual functions, therefore there will be negligible amount of ATSIS' contracts in the future. Furthermore it is the Government's intention to abolish ATSIS thus it would not be advantageous in updating the CEIs at this late stage.

Para 4.37 & Appendix 2 – Numbers of contracts by agency

The confidentiality provisions contained in the contracts examined were originally contracts for the Aboriginal and Torres Strait Islander Commission (ATSIC) that were assigned or novated on the 1 July 2003 to ATSIS. Confidentiality provisions were rarely used in ATSIS' contracts however these clauses have now been added to all contracts.

Any major contracts were cleared by the Australian Government Solicitor's Office (the AGS) and adhered to the Commonwealth Procurement Guidelines. Other contracts of a minor nature, whilst not cleared by the AGS, were based on template proforma contracts that had been previously prepared by the AGS.

Appendix 3 – Agency compliance with Senate Order

ATSIS agrees that it was late in placing the contract listing on the Internet for the current reporting period and will ensure that it complies in the next reporting period.

ATSIS also agrees that it omitted the Agency's cost of compliance with the Senate Order and will make sure to have this added in the next reporting period.

Australian Public Service Commission

The APS Commission found the audit a timely review mechanism from which improvements to existing practices and procedures could be identified. The APS Commission accepts all recommendations in the management report and will commence their implementation as soon as practical.

Commonwealth Superannuation Administration

ComSuper agrees with the specific findings made by the ANAO relating to ComSuper's contract listing. ComSuper has since taken steps to better document procedures, including in relation to reconciliation of information, in compilation of the listing. Recently revised Chief Executive Instructions (CEIs) contain added information relating to the recording and reporting of contracts and the centralisation of responsibility for maintenance of a Contract Register.

The CEIs and ComSuper's internal contracting guidelines now also specifically refer to the need to evaluate confidentiality requirements at the time of contract negotiation. The Contracts Register is also being expanded to include lower value contracts. Contract templates have been amended where necessary to ensure the use of confidentiality clauses are consistent with the new accountability requirements set out in the relevant Finance Guidelines.

National Archives of Australia

The Acting Director-General advised:

I note that comments previously provided to the Australian National Audit Office (ANAO) by the Archives have been incorporated into the proposed report, and that the report takes into account the content of discussions between the Archives and the ANAO. The Archives has begun to improve internal procedures for preparing the list of contracts to be placed on the Internet to ensure the list is complete and correct.

Commonwealth Ombudsman

The Deputy Commonwealth Ombudsman advised:

We have no additional comments to make noting that the draft report incorporates our earlier views. I do emphasise however that since the audit, all tender documentation and contract templates are now in accordance with the new accountability environment statement.

CrimTrac Agency

Since the completion of the audit, the CrimTrac Agency has implemented the recommendations that were contained in the management report that specifically targeted issues relevant to the Agency. These included:

- the development of procedural guidance for the establishment of a contract list on the Internet detailing CrimTrac's responsibilities in relation to the Senate Order;
- checking the accuracy of the classification of contracts, and the accuracy of the reasons given for listing any contract as having either contract provisions or the requirements of confidentiality for the next listing; and
- the alignment of the Agency's RFT and contract templates with the Finance *Guidance on Confidentiality* released in February 2003.

The audit was beneficial in that it provided the Agency with some assurance that the existing process was appropriate and likely to lead to a compliant listing, and more importantly, highlighting areas where improvements could be made to strengthen the process.

Australian Security Intelligence Organisation

The Director-General of Security advised:

ASIO notes the comments and agrees with the recommendations of the audit included in this report to Parliament. Implementation of the ANAO recommendations is being given priority.

Australian Secret Intelligence Service

The Director-General advised that ASIS:

...accepts ANAO's findings and looks forward to further enhancing its processes and systems in line with the Office's recommendations.

Other agencies

Other agency responses to the audit report were included in the text of the report.

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