

The Auditor-General
Audit Report No.31 2003–04
Business Support Process Audit

**The Senate Order for Departmental
and Agency Contracts
(Financial Year 2002–2003 Compliance)**

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of Australia 2003

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Canberra ACT
26 February 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 (Financial Year 2002–2003 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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Contents

Abbreviations/Glossary	7
Summary	9
Summary	11
Introduction	11
Audit objectives	11
Audit scope and focus	11
Overall conclusion.....	12
Comments from the selected agencies	14
Audit Findings and Conclusions	15
1. Introduction	17
Background	17
Audit requirements	22
Audit scope, focus and criteria.....	24
Audit coverage and methodology	25
Audit findings	26
2. Internet Listings.....	27
Agencies covered by the Senate Order	27
Audit evaluation criteria	28
Assessing compliance with the Senate Order	28
Audit findings	29
3. The Processes Used to Create the Internet List.....	38
Audit evaluation criteria	38
Audit findings	38
4. Confidential Provisions in Contracts	43
Processes agencies use to determine what information in contracts should be protected as confidential.....	43
Audit evaluation criteria	43
Audit findings	44
The use of confidential provisions in contracts.....	48

Appendices.....	59
Appendix 1: Senate Order for Departmental and Agency Contracts (as amended June 2003)	61
Appendix 2: Senate Order for Departmental and Agency Contracts (as amended December 2003)	63
Appendix 3: Number of contracts listed by agencies in accordance with the Senate Order—Financial Year 2002–2003	65
Appendix 4: Agency compliance with the requirements of the Senate Order—Financial Year 2002–2003	70
Appendix 5: Department of Finance and Administration (February 2003)—Criteria for the determination of whether commercial information should be protected as confidential	79
Appendix 6: Comments from the selected agencies	80
 Index	 82
Series Titles	86
Better Practice Guides	89

Abbreviations/Glossary

AIR	Australian Industrial Registry
ATO	Australian Taxation Office
CAC Act	<i>Commonwealth Authorities and Companies Act 1997</i>
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
DCITA	Department of Communications, Information Technology and the Arts
Defence	Department of Defence
DEH	Department of the Environment and Heritage
Federal Court	Federal Court of Australia
Finance	Department of Finance and Administration
Finance criteria for the determination of whether commercial information should be protected as confidential	<ol style="list-style-type: none"> 1. The information to be protected must be identified in specific rather than global terms. 2. The information must have the necessary quality of confidentiality. 3. The disclosure of information would cause detriment to the contractor or other third party. 4. The information was provided under an understanding that it would remain confidential. Refer Appendix 5 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.
Finance letter of 30 June 2003	On 30 June 2003, Finance issued a letter to all FMA Act agencies advising of the June 2003 amendments to the Senate Order and Finance's interpretation of the amendments
FMA Act	<i>Financial Management and Accountability Act 1997</i>
FMIS	Financial Management and Information System
FOI Act	<i>Freedom of Information Act 1982</i>
GaPS	Gazette Publishing System
GITC4	Government Information Technology and Communications version four framework for the building of Information Technology products and services contracts
Necessary qualities of confidentiality	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.
NOIE	National Office for the Information Economy
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 fifth 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, on the Internet, contract details for the Financial Year 2002–2003 reporting period.
2. The audit was conducted in accordance with the Senate Order request for the Auditor-General to undertake twice-yearly examinations of agency contracts listed on the Internet, and to report whether there had been any inappropriate use of confidentiality provisions.

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 more detailed review of the processes used to make 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:
 - Australian Industrial Registry;
 - Australian Taxation Office;
 - Department of Communications, Information Technology and the Arts;
 - Department of the Environment and Heritage;
 - Federal Court of Australia; and
 - National Office for the Information Economy.

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, 78 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 and, as a result, were not required to list details of contracts on the Internet. The majority of lists generally complied with the requirements of the Senate Order, although there was scope for agencies to improve the presentation of the lists and to ensure that all details required of the Senate Order listing had been met.

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. For five agencies, the ANAO concluded that the processes used to compile the Internet listing were generally likely to lead to the lists being complete in terms of the number of contracts listed. The sixth agency's list was unlikely to be complete because procurement policies and procedures, which had been the responsibility of the portfolio department, were transferred to the agency at the time the contract list had to be prepared. As such, at the time of the audit, the agency's processes for complying with the Senate Order requirements were still being developed.

9. Six of the selected agencies had revised, or were in the process of revising, elements of their general contracting practices, policy guidance, tender documentation and contract templates to reflect the changes to government policy. These changes, amongst other things, require both parties to a contract to agree what information, if any, should be protected as confidential prior to the contract being entered into. However, 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.

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 81 FMA Act agencies that could be audited. Details of the other three agencies are provided in Chapter 2 of the report. On 1 July 2003, five new agencies were established so that by the time the audit started in September 2003, there were 86 FMA Act agencies.

10. The ANAO obtained little assurance that, at the contract negotiation stage, agency staff and contractors had discussed the implications of the Commonwealth's accountability environment on the treatment of confidential information. The ANAO found that, in all agencies, the determination of what information should be protected as confidential was made at the time the contract was placed on the Internet listing instead of when the contract was being entered into. As a result, the reasons that a contract was listed as containing confidential information were based on the views of the staff compiling the list and often did not reflect the information that was in the contract.

11. The ANAO reviewed 30 contracts that were listed, or should have been listed, on the Internet as containing confidential provisions to determine whether they had been listed appropriately. As all contracts had been entered into recently, agencies would have had time to put in place changes to contracting policies and procedures to meet the requirements of the new accountability environment. Also, the majority of contracts had been entered into after agencies had been provided with formal guidance on how to enter into appropriate commitments to maintain confidentiality of commercial information in the context of procurement processes.

12. The ANAO considered that only five (17 per cent) of the contracts contained information that was likely to satisfy the criteria for protection as confidential information.

13. In previous audits, the percentage of contracts that the ANAO considered had been appropriately listed ranged from 15 to 38 per cent. In previous audits, the ANAO also recognised that agencies had difficulty in changing procedures to implement the new accountability framework. This was largely because formal Department of Finance and Administration guidance on how to determine the confidentiality of contractors' commercial information had not been available at the time the contracts had been negotiated.

14. However, in this audit, the majority of contracts selected for review had been entered into after the Finance guidance had been issued. As a result, the ANAO considers that a larger percentage of contracts should have been appropriately listed as containing confidential information.

15. The results from this audit highlight the need for all agencies to continually review their policies on the new accountability framework 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 an on-going effective awareness raising regime.

Comments from the selected agencies

16. The comments provided by each of the selected agencies in response to the audit report are shown in Appendix 6.

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 by the tenth day 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 12 months, and which provided for consideration to the value of \$100 000 or more. In addition, the list of contracts was also required to indicate, amongst other things, whether any of the contracts listed contained confidentiality provisions. The *Senate Order for Departmental and Agency Contracts* (the Senate Order) was varied on 27 September 2001 to require additional information to be reported on the Internet listing and in the Ministers' letters.

1.2 The Senate Order was informed by two reports of the Senate Finance and Public Administration References Committee (Senate FPA Committee) tabled in June 2000⁴ and September 2001,⁵ as well as an Australian National Audit Office (ANAO) report on the use of confidentiality provisions in Commonwealth contracts.⁶ The general principle espoused in these reports was that information in government contracts should not be protected as confidential unless there is a good reason to do so. In its report, the ANAO developed criteria to assist agencies in determining whether information in contracts should be treated as confidential. The Senate FPA Committee endorsed the criteria in its final report.

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

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.

⁵ The Senate Finance and Public Administration References Committee, *Commonwealth Contracts: a New Framework for Accountability*, September 2001.

⁶ Australian National Audit Office, Audit Report No.38, 2000–01, *The Use of Confidentiality Provisions in Commonwealth Contracts*, May 2001.

1.4 In August 2001, the Government responded⁷ to the original Senate Order and also endorsed the guidance on confidentiality provided in the ANAO's report on the use of confidentiality provisions in Commonwealth contracts. The Government responded to the amended Senate Order of 27 September 2001 in June 2002. In essence, the Government agreed to comply with the spirit of the Senate Order and advised that information regarding individual contracts would not be provided where disclosure would be contrary to the public interest, legislative requirements and undertakings given. The Government also indicated that agencies' compliance would be progressive as agencies refined arrangements and processes to meet the requirements.

Commonwealth Procurement Guidelines

1.5 On 5 October 2001, the Department of Finance and Administration (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:

- 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.⁸

1.6 The CPGs were reissued in February 2002, with no material changes to these requirements.

1.7 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.⁹

⁷ Department of Finance and Administration, *Murray Motion Key Documents*, August 2001.

⁸ Commonwealth Procurement Guidelines, September 2001, subsection 1.2.

⁹ The GaPS Internet address is <www.contracts.gov.au>.

Senate FPA Committee

1.8 The Senate FPA Committee reported on the first year of operation of the Senate Order in December 2002.¹⁰ The report made a number of recommendations on such issues as the type of Commonwealth organisations to be covered by the Senate Order, the frequency of reporting, and the content and presentation of agencies' Internet listings, as well as a recommendation that the Senate amend its Order of 27 September 2001.

1.9 The Government responded to the Senate FPA Committee report on 19 June 2003 and agreed, or agreed in-principle, with the majority of the recommendations.

1.10 The Government also agreed to comply with the spirit of the latest amendment to the Order. In particular, the Government agreed to comply with the Order on the basis that:

- agencies will use the Department of Prime Minister and Cabinet guidelines on the scope of public interest immunity to determine whether information regarding individual contracts will be provided;
- agencies will not disclose information if disclosure would be contrary to the *Privacy Act 1988*, or to other statutory secrecy provisions, or if the Commonwealth has given an undertaking to another party that the information will not be disclosed; and
- compliance with the Senate Order will be progressive as agencies covered by the *Financial Management and Accountability Act 1997* (FMA Act) refine arrangements and processes to meet the requirements.

1.11 The Senate amended the Order on 18 and 26 June 2003 in response to the recommendations of the Senate FPA Committee report. The amended Order is at Appendix 1.

The Senate Order for Departmental and Agency Contracts—June 2003 amendments

1.12 The amendment of 18 June 2003 required that the commencement date of the contract, the duration of the contract, the relevant reporting period, and twelve-month period relating to the contract listings also be shown.

1.13 The amendment of 26 June 2003 changed the tabling date for Ministers' letters from being based on Parliamentary sitting dates to two calendar months after the last day of both the financial and calendar years.

¹⁰ 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.

Finance letter of 30 June 2003

1.14 On 30 June 2003, Finance issued a letter to all FMA Act agencies advising of the June amendments to the Senate Order and Finance's interpretation of the amendments.

1.15 The letter advised that agencies Internet listings will be required to cover relevant contracts relating to the financial (1 July–30 June) or calendar (1 January–31 December) years, and that Ministers' letters of compliance are to be tabled by no later than two months after the last date of the financial and calendar year, that is, by 31 August and 28 or 29 February.

1.16 The letter also advised of the requirement to list the commencement date of the contract, the duration of the contract, the relevant reporting period covered by the listing and the twelve-month period relating to the contracts. Table 1.1 shows Finance's interpretation of these requirements.

The Senate Order for Departmental and Agency Contracts—December 2003 amendment

1.17 The Order was also amended on 4 December 2003, which affected the frequency of the ANAO audits of compliance with the Order. The amendment requested that the Auditor-General conduct an examination of contracts once a year with a report to be tabled by 30 September each year, as opposed to the examinations being conducted twice a year, which was the situation before the Order was amended. The amended Order is at Appendix 2.

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.
Relevant reporting period	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 this.

Source: Department of Finance and Administration's letter to all FMA Act agencies advising of the June 2003 amendments to the Senate Order and of their interpretation of the amendments. 30 June 2003.

Guidance on confidentiality in contracts

1.18 Finance issued *Guidance on Confidentiality of Contractors' Commercial Information* (Finance Guidance on Confidentiality) in February 2003.¹¹

1.19 The purpose of the Guidance is to assist FMA Act agencies in entering into appropriate commitments to maintain confidentiality of commercial information in the context of procurement processes.

1.20 The Guidance 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;
- 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.

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

Guidance on the listing of contract details on the Internet

1.21 One of the recommendations of the Senate FPA Committee report was that Finance, in conjunction with the ANAO, develop guidelines for the content, presentation and format of contract listings.

1.22 Finance issued *Guidance on the Listing of Contract Details on the Internet* (Finance Guidance on Internet listings) in January 2004¹².

1.23 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.

Audit requirements

Senate Order request

1.24 The Senate Order 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 agreed to the request and tabled audits in February and September 2002, and March and September 2003. This is the fifth such audit in response to the Senate Order request.

Previous audit coverage

1.25 The first and second audits found that all agencies had established Internet listings of their contracts and were generally compliant with the requirements of the Senate Order. In agencies subject to detailed review, the processes used in the compilation of the Internet listings provided the ANAO with reasonable assurance as to the completeness of the lists.

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

¹² Department of Finance and Administration. *Guidance on the Listing of Contract Details on the Internet*. January 2004.

1.27 The third and fourth audits generally found that the processes that agencies had used for establishing contract lists had improved and that agencies had appropriate policy and procedural documentation in place. However, as in previous audits, the ANAO considered many of the contracts had been inappropriately listed on the Internet as containing confidential information even though the contracts examined had been entered into after the agencies had had time to implement the new accountability framework. This was understandable because the *Finance Guidance on Confidentiality* was not published until after the contracts examined in the audit had been entered into.

This report

1.28 This report relates to the fifth audit in response to the Senate Order, namely, the audit of the contract information associated with the tabling of letters by Ministers within two months after the last day of the financial year (31 August 2003)¹³. It includes contracts entered into, or not fully performed, in the 12 months beginning 1 July 2002 and ending 30 June 2003.

Audit Objectives

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

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

¹³ 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 31 August 2003, the ANAO considered agencies compliant for the current reporting period if they had placed a list of contracts on the Internet by 1 September 2003, the first working day after 31 August 2003.

- considered to be confidential, and assess whether the process was likely to be appropriate; and
- (d) a selection of contracts which have been excluded from the Internet listing because the whole contract is considered to be confidential, and assess whether the contract should have been listed.

Audit scope, focus and criteria

Scope

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

1.31 The ANAO's examination of the processes by which agencies determine what information in, or associated with, contracts should be protected as confidential, focussed on the processes being used in the selected agencies now, rather than those used before the agencies were provided with Finance guidance on the new accountability environment.

1.32 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. Only recent contracts were examined because these contracts 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

1.33 The focus of the audit in relation to confidentiality was on commercial information that could reasonably be protected as confidential.¹⁴ However, the ANAO recognises that agencies may have agreed to protect other types of information, for example information with a national security classification and/or personal information, as confidential information.

Audit evaluation criteria

1.34 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

¹⁴ 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 Senate's concern that information was being withheld from the Parliament for reasons of commercial confidentiality.

comply with the relevant legislative requirements, government policies and accepted management principles applicable to each objective.

Audit coverage and methodology

All FMA Act agencies

1.35 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 Financial Year 2002–2003 reporting period are shown at Appendix 3.

1.36 In total, there were 28 238¹⁵ contracts listed on the Internet, of which 4280 (15 per cent) were listed as containing confidential provisions and/or other requirements of confidentiality. As discussed in previous audits, the number of contracts listed as containing confidential provisions and/or other requirements of confidentiality was not complete as the Department of Defence (Defence) had not, as yet, identified all of its contracts with confidential provisions and/or other requirements of confidentiality.

1.37 The ANAO also noted that the Minister for Communications, Information Technology and the Arts advised the Senate that the National Archives of Australia's (NAA) contract list was not up to date in terms of the details of each contract required by the Order to be provided. The advice was that:

- the NAA has a devolved procurement process and does not have sufficient time and resources to investigate the terms of each of the contracts described above; and
- previously the NAA had to make a risk assessment and report “No” on each previous occasion on the assumption that they were unlikely to contain the provisions or requirements of the type referred to in clause 2(c) of the Senate Order.

Where information pertaining to each column of the Senate Order on Departmental and Agency Contracts is not yet available, ‘to be advised’ is inserted.

1.38 NAA has since advised the ANAO that it has made significant improvements to the listing. Information not previously included in the listing has been provided and a number of items on the list have been removed, as they were not within the scope of the requirements of the Senate Order. The NAA also advised that a contracts register is being established

¹⁵ As discussed later, this figure may be not be accurate as the Department of Defence acknowledged that its list is not complete in terms of the number of contracts listed and the details provided.

and tighter contracting procedures are being developed to provide centralised oversight of the devolved procurement process.

Selected agencies

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

- Australian Industrial Registry (AIR);
- Australian Taxation Office (ATO);
- Department of Communications, Information Technology and the Arts (DCITA);
- Department of the Environment and Heritage (DEH);
- Federal Court of Australia (Federal Court); and
- National Office for the Information Economy (NOIE).

Audit methodology

1.40 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.

1.41 The audit was conducted in accordance with ANAO Auditing Standards at an approximate cost of \$195 000. The ANAO engaged a consultant from Courage Partners Pty Ltd to assist with the audit.

Audit findings

1.42 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.

1.43 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 81¹⁶ FMA Act agencies.¹⁷ The five Parliamentary Departments¹⁸, 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,¹⁹ had listed their contracts on the Internet in accordance with 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. In its report on the first year of operation of the Senate Order, the Senate FPA committee requested that the ANAO and Finance discuss ASIO and ASIS compliance with the Senate Order with both bodies.

2.3 During discussions with Finance and the ANAO on options for compliance with the Senate Order, both ASIO and ASIS maintained that details of their contracts should be exempt from Internet listing under the Order for reasons of national security. This position is consistent with the terms of the Government's responses to the Order, which allow for information not to be disclosed if disclosure would be against the public interest or contrary to a statutory secrecy provision.

¹⁶ Five new FMA Act agencies were established outside of the relevant reporting period, that is, on 1 July 2003, and therefore did not enter into any contracts for the current reporting period. However, these agencies will be expected to comply with the Senate Order for future reporting periods. The five new agencies are: Seafarers Safety, Rehabilitation and Compensation Authority (Seacare Authority); Office of the Renewable Energy Regulator; National Blood Authority; Inspector-General of Taxation; and the Aboriginal and Torres Strait Islander Service (ATSIS).

¹⁷ 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_09_07_03.pdf>.

¹⁸ Department of the Senate; Department of the House of Representatives; Department of the Parliamentary Library; Department of the Parliamentary Reporting Staff; and Joint House Department.

¹⁹ Section 49 of the Constitution provides for the independence of each House of the Parliament of the Commonwealth of Australia. In the previous audit, 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 Australian National Audit Office, Audit Report No.5, 2002–03, *The Senate Order for Departmental and Agency Contracts (Autumn 2003)*, September 2003, p.26.

2.4 However, in the interests of accountability, all parties agreed that the best option would be for the ANAO, as part of its next audit of the Order, to examine ASIO and ASIS contracting processes, to confirm their compliance with all relevant legislative and policy requirements. The ANAO recognises that the distribution and publication of any material stemming from this examination will be cognisant of section 37 of the Auditor-General Act 1997, which provides for the results not to be publicly reported if they contain sensitive information.

2.5 Accordingly, there were 78 agencies that were required to, or had agreed to, comply with the Senate Order for the Financial Year 2002–2003 reporting period.

Audit evaluation criteria

2.6 Agencies would be expected to have listed contracts on their websites in accordance with the Senate Order by the due date (31 August 2003)²⁰. 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 letter of 30 June 2003;
- made the list available on the Internet by the due date (31 August 2003)²¹;
- identified the relevant reporting period (Financial Year 2002–2003) and the twelve-month period relating to contracts (1 July 2002 to 30 June 2003); and
- established a clear and readily accessible path to the listing on its home page.

Assessing compliance with the Senate Order

2.7 The ANAO assessed each of the 78 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 (31 August 2003)²², agencies would have had sufficient time to develop policy and practices to allow them to comply fully with the requirements of the Order, as amended in September 2001 and June 2003.

²⁰ See footnote 13.

²¹ *ibid.*

²² *ibid.*

2.8 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 in different stages of achieving compliance with the Order.

Audit findings

Agencies with a contract listing on the Internet

2.9 For the Financial Year 2002–2003 reporting period, all 78 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.

2.10 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.

2.11 Two entities, the Aboriginal and Torres Strait Islander Commission (ATSIC)²³ 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 made a reference on its website to this effect.

²³ 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) was established as the body responsible for the delivery of services to ATSIC and indigenous Australians.

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

2.13 The ANAO's assessment of each of the remaining 72 agencies' compliance with the specific requirements of the Senate Order is detailed at Appendices 3 and 4. 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 3 and 4 also list the other 14 agencies.

Summary of Internet listings

Agency compliance with the Senate Order's requirements

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

- 51²⁴ of the 72 agencies (71 per cent) presented a list of contracts on their website that provided all the contract information required by the Senate Order and the Finance letter of 30 June 2003;
- 67 of the 72 agencies (93 per cent) had placed a list of contracts on the Internet by the due date; and
- 48 of the 72 agencies (66 per cent) provided all the contract information required by the Senate Order and posted the list by the due date.

2.15 The ANAO notes that the number of agencies that were fully compliant with the requirements of the Senate Order is lower than for the Autumn 2003 reporting period, mainly because of the additional reporting requirements of the June 2003 amendments to the Senate Order. The ANAO noted that a number of agencies were either unaware of, or did not fully understand, the new requirements; in particular, a number of agencies did not report the start, and/or end-date, of contracts. Some failed to meet the new listing date.

2.16 The ANAO considers that the recently published Finance *Guidance on Internet listings* should improve the presentation and content of agency Internet listings. The Finance model templates for the presentation of contract lists on the Internet capture all of the requirements of the June 2003 amendments to the Senate Order.

²⁴ The ANAO considered, for the Financial Year 2002–2003 only, 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. The number of compliant agencies reported here reflects this. See also discussion on 'Relevant reporting period and twelve-month period relating to contracts' section in this chapter.

Number of contracts listed as containing confidential provisions

2.17 4280 contracts (15 per cent) were listed on the Internet as containing confidential provisions and/or other requirements of confidentiality²⁵. In the previous reporting period, agencies had listed 20 702 contracts of which 5287 (26 per cent) contained either confidentiality provisions or other requirements of confidentiality.

2.18 The main focus of the audits 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.

2.19 In examining the number of contracts that were only listed as containing confidential provisions, the ANAO found that, in the current period, agencies listed 2776 contracts (10 per cent) on the Internet as containing confidential provisions compared with 3362 (16 per cent) in the previous reporting period. This is a significant reduction and could indicate that the Senate Order and Government policy had helped to reduce the amount of contractual information being protected as confidential. However, the figures are affected by Defence's listing of contracts which neither lists every relevant contract nor shows all contracts that have confidential provisions. The ANAO notes that Defence has complied with this requirement for Defence contracts signed since 1 January 2003 that are listed in the Interim Defence Contracts Register.

2.20 Excluding Defence's contracts from both the current listing and the Autumn 2003 listing, the percentage of contracts reported as containing confidential provisions and/or other requirements of confidentiality has decreased from 30 per cent for the Autumn 2003 reporting period to 20 per cent in the current period. Similarly, the percentage of contracts reported as containing confidential provisions has decreased from 19 per cent²⁶ in the Autumn 2003 reporting period to 13 per cent in the current period. This information is presented in table 2.1.

²⁵ Of these contracts, 2776 contracts were listed as containing confidential provisions and 2146 were listed as containing other requirements of confidentiality. Some contracts were listed as containing both confidential provisions and other requirements of confidentiality.

²⁶ Defence did not report any contracts with confidential provisions for the Autumn 2003 reporting period. However, the ANAO notes that Defence has complied with this requirement for Defence contracts signed since 1 January 2003 that are listed on the Interim Defence Contracts Register.

Table 2.1**Contracts reported as containing confidential provisions**

Previous reporting period (Autumn 2003)		Current reporting period (Financial Year 2002–2003)	
Total contracts	20 702	Total contracts	28 238
Number of contracts listed as containing confidential provisions	3362	Number of contracts listed as containing confidential provisions	2776
Per cent of total contracts listed as containing confidential provisions	16	Per cent of total contracts listed as containing confidential provisions	10
Total contracts (less Defence contracts)	17 665 ²⁷	Total contracts (less Defence contracts)	18 969 ²⁸
Number of contracts listed as containing confidential provisions (less Defence contracts)	3362 ²⁹	Number of contracts listed as containing confidential provisions (less Defence contracts)	2509 ³⁰
Per cent of total contracts listed as containing confidential provisions (less Defence contracts)	19	Per cent of total contracts listed as containing confidential provisions (less Defence contracts)	13

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

2.21 The ANAO considers the reduction in the number of contracts that have been reported as containing confidential provisions has been aided by the availability of the *Finance Guidance on Confidentiality* and by the fact that agencies have had time to progressively meet the requirements of the new accountability environment. The frequent audit surveillance may also have assisted.

²⁷ 20 702 (total contracts (Autumn 2003 listing)) less 3037 (Defence contracts (Autumn 2003 listing)).

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

²⁹ Defence did not report any contracts with confidential provisions for the Autumn 2003 reporting period. However, the ANAO notes that Defence has complied with this requirement for Defence contracts signed since 1 January 2003 that are listed in the Defence Interim Contracts Register.

³⁰ 2776 (total reported confidential provisions) less 267 (Defence contracts reported as containing confidential provisions)

2.22 From the contract reviews conducted in the six agencies, and from some of the contract dates³¹ listed on agency Internet listings, the ANAO noted that there are still a number of other 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 these contracts progressively expire, the number of contracts with confidential provisions and/or other requirements of confidentiality is likely to continue to fall.

Reporting of confidential provisions and other requirements of confidentiality

2.23 The ANAO found it difficult to determine, from some agencies' Internet listings, which contracts contained either confidential provisions, other requirements of confidentiality, or both. The ANAO considered that the reasons provided for confidentiality needed to be more descriptive in order for users of the lists to correctly determine whether the contract contains confidential provisions and/or other requirements of confidentiality. However, the ANAO considers that this will be less of an issue now that Finance has published its *Guidance on Internet listings*.³²

2.24 The Finance *Guidance on Internet listings*³³ 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.

Defence

2.25 As mentioned previously, the Defence contract listing is not complete in either the number of contracts or in identifying those contracts that contain confidential provisions. On 13 August 2003, the Minister for Defence tabled a letter in the Senate advising that a list of contracts had been placed on the Internet, and that:

³¹ 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 are still a number of service orders being raised under head agreements that were executed prior to the implementation of the Senate Order.

³² Department of Finance and Administration. *Guidance on the Listing of Contract Details on the Internet*. January 2004.

³³ Department of Finance and Administration. *Guidance on the Listing of Contract Details on the Internet*. January 2004. Section 7.

As a result of the nature and volume of Defence contracts, and the lack of a centralised contract register for the Department until earlier this year, Defence's efforts to comply with the Senate Order requirements has relied on information captured by the Commonwealth Gazette Publishing System. However, the information contained in the Commonwealth Gazette Publishing System is deficient in the sense that it does not address the requirement to report the use of confidentiality provisions and it does not specify every contract entered into by Defence that is required to be reported by the Senate Order.

In order to overcome these discrepancies, Defence is developing a comprehensive centralised contracts register solution that will enable the Department to more fully comply with the Senate Order. An Interim Defence Contracts Register commenced operation earlier this year. The system captures the required Senate Order information for most Defence contracts valued at \$100 000 and over that were signed since 1 January 2003. The data captured from the system has been included on the Defence Internet site, however, the data is still not fully compliant with the Senate Order requirement in that some categories of contracts are not reported, including disposals, grants and leases. Data that changes as a result of a contract amendment is also not captured by the system. Contracts that are confidential for national security reasons have been intentionally excluded from the Internet list.

The Department is in the process of considering the development of an enhanced system with the primary objective of enabling Defence to more efficiently comply with the Senate Order requirements, particularly as they relate to confidentiality provisions.

Cost of complying with the Senate Order

2.26 Most agencies have used a method based on the time spent and the cost of labour to estimate the cost of complying with the Senate Order. The total of the estimated cost of all agencies complying with the Senate Order as derived from agencies Financial Year 2002–2003 listing was approximately \$846 000, which included Defence costs of \$500 000.

2.27 This figure is higher than the total cost of agency compliance with the Senate Order for the previous reporting period for the Autumn 2003 Parliamentary Sittings (573 000)³⁴, which included Defence reported costs of \$295 000.

³⁴ As reported in Australian National Audit Office Audit Report No.5 2003–2004, op. cit. p.31.

2.28 Defence, for both reporting periods included the costs of establishing an Interim Defence Contracts Register (IDCR).³⁵ Of the other agencies that reported costs of complying with the Order, all had reported only the cost of complying with the Order for the current reporting period. Excluding Defence, the average cost of compliance per agency was approximately \$5 000.

Access to Internet listings

2.29 The ANAO found that most of the 72 agencies had an identifiable path on their website to the contract listing. However, some agencies' contract listings were difficult to locate.

2.30 Of the agencies audited in detail, AIR, DCITA, Federal Court and NOIE had established a readily accessible path to their contract listings on their Internet home page. A site search had to be conducted to locate the ATO and DEH listings.

2.31 Although the way that an agency organises its website is up to the agency to determine, the ANAO considers that an explicit link from the agency's homepage to its list of contracts would assist readers and users to easily locate the agency's contract listing.

Presentation of Internet listings

2.32 This audit, as in previous audits, found there were varying formats used for the presentation of the Internet listing.

2.33 The Finance *Guidance on the listing of contract details on the Internet* 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.

³⁵ Defence included the following explanation for this figure on its website: 'The estimate cost of compliance has been calculated using the actual costs incurred in establishing, maintaining and inputting data into the Interim Defence Contracts Register, and establishment and delivery of training and scoping activities for the development of a more efficient Defence contracts registering system. 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'.

2.34 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 the Listing of Contract Details on the Internet*. January 2004.

2.35 The Finance template for the presentation of contractual information also suggests that agencies include a paragraph above the listing that states the relevant reporting period and the twelve-month reporting period to which the contract list relates³⁶.

2.36 The ANAO considers that the adoption of one of the above two formats by agencies will provide users of the contract lists with a degree of consistency across all FMA agencies. It would also assist contract managers to distinguish between contracts that contained 'confidential provisions' and those with 'other requirements of confidentiality'. If the second option is used, the comments in the reasons column should show why the contract contains confidentiality provisions and/or other requirements of confidentiality.

Relevant reporting period and twelve-month period relating to contracts

2.37 The Finance letter of 30 June 2003 provided an interpretation of the relevant reporting period and the twelve-month period relating to contracts, and suggested that agencies show both periods on their Internet lists.

³⁶ Department of Finance and Administration. *Guidance on the Listing of Contract Details on the Internet*. January 2004. 'Template for Senate Order Internet listing (two 'Reasons for confidentiality' columns)' and 'Template for Senate Order Internet listing (one 'Reasons for confidentiality' column)'.

2.38 The ANAO found that 28 out of 72 agencies (39 per cent) had reported both periods. Seven out of 72 agencies (10 per cent) had reported only the relevant reporting period; and 31 out of 72 agencies (43 per cent) had reported only the twelve-month period. Six out of 72 agencies (eight per cent) did not report the relevant reporting period or the twelve-month period relating to contracts.

2.39 The ANAO noted that a significant number of agencies were not aware of the requirement to report both periods. Once agencies were informed of the requirement, they updated their Internet lists, or indicated that they would do so for the next listing.

2.40 The ANAO also noted that the Finance letter of 30 June 2003 provided guidance on ‘...the manner in which agencies may wish to comply...’ with the June 2003 amendments to the Order. This was interpreted by some agencies as not being mandatory for the Financial Year 2002–2003 listing. As a result, for the Financial Year 2002–2003 listing, the ANAO considered that agencies were compliant if they had indicated (by 31 August 2003)³⁷ either the relevant reporting period *or* the twelve-month period relating to contracts.

2.41 However, for future Internet listings, the ANAO would expect agencies to indicate both the relevant reporting period and the twelve-month period relating to contracts. The model templates for the presentation of contract lists on the Internet within the *Finance Guidance on Internet listings* provide for the specification of both periods.

Conclusion

2.42 The ANAO found that the majority of the 72 agencies covered by the Senate Order had complied with its requirements, although some agencies did not report the start and/or end date of contracts. In addition, some agencies failed to meet the new listing date.

2.43 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.

³⁷ See footnote 13.

3. The Processes Used to Create the Internet List

This chapter is confined to the six agencies selected for detailed review. It relates specifically to 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, by now, 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

Procedures for establishing a Senate Order Internet list

3.2 At the time of the audit, the selected agencies were in various stages of developing formal procedures for the establishment of a Senate Order contract list on the Internet.

3.3 DCITA provided guidance and direction on the requirements of the Senate Order and on the production of a contract list for posting on the Internet in the form of a Minute to all Chief General Managers and/or General Managers. The ANAO considered that, although DCITA's Minute was appropriate, it should be formalised into a procedural document so that staff with procurement responsibility can readily access information on the agency's Senate Order responsibilities. DEH provided procedural guidance on how to compile the Internet list by way of an email to staff.

3.4 At the time of the audit, the other four agencies were considering, or in the process of developing, formal procedures for the establishment of a Senate Internet list. The ANAO considered that the procedures should provide a background to the Senate Order and the Senate Order requirements; and should outline the agency's process for the establishment of a contract list on its website. Further, the procedures should also include reference to the CPGs and Commonwealth Gazettal requirements.

Responsibility

3.5 All of the selected agencies had allocated responsibility for the coordination and preparation of the Internet listing to appropriate personnel. In most cases, the responsible area was a specialist contracts advisory or procurement coordination unit/team.

Recording and reporting of contracts

3.6 The ANAO found that agencies used their Financial Management Information System (FMIS) or contract register, or both, to form the basis of their contract listings or to perform a crosscheck with the contract list as a means of providing some assurance that the list is accurate and complete.

AIR

3.7 The AIR uses a contracts register as the basis for compiling the Senate Order contract list. Contracts identified on the register for Senate Order listing are compared with the previous Senate Order list to identify and remove from the list contracts that have expired. The final list is also crosschecked with entries on the general ledger in the FMIS to ensure that all contracts have been captured and accurately recorded. Contracts with confidential provisions and/or other requirements of confidentiality are identified at the time of listing.

ATO

3.8 The ATO also uses a contract register as the basis for compiling the Senate Order contract list. The contract list is crosschecked against the FMIS at Senate Order reporting time, for accuracy and completeness. At the time of the audit, the central procurement unit identified contracts with confidential provisions and/or other requirements of confidentiality at the time of listing the contracts on the Internet. However, the ATO advised that, in accordance with the requirements of the new accountability environment, it now identifies contracts with confidential provisions as part of the contract negotiation process.

DCITA

3.9 DCITA uses its FMIS as the basis for compiling the Senate Order contract list. A report is printed from the FMIS of all purchase orders raised and grant payments for the required reporting period. The line areas check the list for accuracy and completeness in relation to the contracts raised and managed by them. The line areas identify contracts with confidential provisions and/or other requirements of confidentiality at the time of listing.

DEH

3.10 DEH uses its FMIS as the basis for compiling the Senate Order contract list. An FMIS report of all purchases, grants and funding agreements is sent to the Heads of the Division Service Units (DSUs). The DSUs check the accuracy of the FMIS report for the contracts entered into by their unit, and enter the required Senate Order information for their contracts into a reporting template. The DSUs determine, at the time of listing, whether the contract contains confidential provisions and/or other requirements of confidentiality. The completed templates are collated and a reasonableness check is performed by staff responsible for coordinating the preparation of the list prior to its posting on the Internet.

Federal Court

3.11 The Federal Court uses a contract register as the basis for compiling a Senate Order contract list. Staff with procurement responsibility are required to check the list for accuracy and completeness in relation to the contracts raised and managed by them. The Contracts Manager identifies contracts with confidential provisions and/or other requirements of confidentiality at the time of listing.

NOIE

3.12 NOIE uses its FMIS as the basis for compiling the Senate Order contract list. Contracts identified for listing on the Internet are 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. The updated list is forwarded to the line areas for them to check that it accurately reflects their contracts. The line areas identify contracts, at the time of listing, as containing confidential provisions and/or other requirements of confidentiality. These contracts, where possible, are checked by the Procurement Unit to provide assurance that the contracts have been correctly identified as containing confidential provisions and/or other requirements of confidentiality.

3.13 NOIE acknowledged that its list was not likely to be complete as it had taken over responsibility for procurement, including the requirements of the Senate Order, on 1 July 2003. As a result there were still some transitional arrangements being developed. NOIE advised in January 2004 that a completed list has been placed on the Internet.

Processes for identifying contracts with confidential provisions

General

3.14 As mentioned in Audit Report No.32,³⁸ 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.

3.15 For the contracts entered into under the new accountability environment, the process of ensuring that contracts containing confidential provisions were listed correctly on the Internet should have become 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.

3.16 The ANAO considers the identification of contracts with confidential provisions at the time of listing to be appropriate for those contracts entered into before the introduction of the requirements of the new accountability environment. However, it is not appropriate under the new environment, which requires a negotiated approach for the identification of confidential information to be undertaken before the contract is signed, for confidential information to be identified at the time of listing.

3.17 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, where both the contractor and the agency are required to agree what information, if any, in the contract will be kept confidential. Both parties should decide what contractual information, if any, is confidential before the contract is entered into.

3.18 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.

³⁸ Australian National Audit Office, Audit Report No.32, 2002–2003, op. cit p.34.

3.19 Further, the requirement for contract officers to consider 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

3.20 At the time of the audit, 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.

3.21 For the majority of contracts listed as containing confidential provisions, the ANAO found that agencies determined what information in the contract was confidential at the time of listing. In instances where the ANAO found that confidential information had been specified in contracts, it was as a result of the contractor requesting that certain information be protected as confidential, not as an outcome of a discussion between the agency and the contractor.

Conclusion

3.22 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.

3.23 However, the ANAO could not be certain that all contracts listed on the Internet had been appropriately identified as containing confidential provisions and /or other requirements of confidentiality.

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 agencies use to determine what information in contracts should be protected as confidential

4.1 In assessing agency performance against this objective, 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*.

Audit evaluation criteria

4.2 The ANAO expected that agencies would have put in place, or 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 (FOI Act);
 - they are required to indicate if they considered 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 contract award;
- 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 all of the following:

- the Senate Order for Departmental and Agency Contracts;
- the recent *Finance Guidance on confidentiality*; and
- the CPGs.

4.4 During the audit, DCITA and DEH updated their policy documents to reflect these requirements. All other agencies indicated to the ANAO that they would be updating their CEIs or procurement guidance to reflect the requirements of the new accountability environment.

4.5 The selected agencies each had slightly different processes in place to determine which contractual information should be protected as confidential. 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 criteria³⁹ for determining information to be protected as confidential. However, the staff responsible for the day-to-day management of contracts were generally not aware.

Tender and contract documentation

4.6 Although the majority of the selected agencies advised the ANAO that the general approach taken to contractual information was that the information or material is not considered confidential unless there is a good reason to do so, the ANAO found that only the Federal Court had explicitly stated this position within its tender documents.

4.7 At the time of the audit, the ANAO noted that DCITA, NOIE, ATO, DEH and the Federal Court had implemented changes to their tender documentation and contract templates in an attempt to accord with the new accountability environment. However, the ANAO considered that all agencies can 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.

4.8 The AIR advised that it intended to update its current guidance documentation to accord with the requirements of the new accountability environment.

³⁹ 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*.

GITC4 contract templates

4.9 The ANAO noted that DCITA and the Federal Court use the Commonwealth Government Information Technology and Communications version four (GITC4) framework to build Information Technology (IT) products and services contracts. In the recent contracts examined during the audit, the ANAO noted that none had incorporated elements of the new accountability environment. DCITA advised that it considered that the templates could not be amended as they had been developed by Finance.

4.10 Finance advised that the GITC4 template was designed to allow modification and to provide flexibility. As a result, the template allows for the accommodation of changes in policy between GITC template updates and should be modified, as required, to reflect the Finance guidance.

Head Agreements

4.11 The ANAO noted the majority of the selected agencies had listed some contracts that were entered into under head agreements, most of which had been entered into prior to the implementation of the Senate Order. The ANAO also noted that some agencies had listed these contracts as containing confidential provisions either because of a global confidentiality provision in the contract, or because of commercial-in-confidence markings on every page of the contract. Given that the terms for these contracts (contained in the head agreements) were determined prior to the implementation of the Senate Order, the ANAO considers the listing of these contracts to be appropriate.

4.12 Under the new arrangements⁴⁰, head agreements themselves will not require reporting unless \$100 000 or more has been provided to the offerer to leave the offer open for a period of time. Regardless of whether or not the head agreement is itself a contract, individual contracts valued at \$100 000 or more, created under the head agreement should be reported as separate contracts on the Internet listing.

4.13 The ANAO suggests that, where agencies have head agreements that have at least two or more years to run, and where a substantial number or contracts raised under the head agreement of \$100 000 or more are expected to be raised each year, agencies should discuss with the contractor the new accountability environment for contracting. Agencies should amend the confidentiality provisions in head agreements so that they are consistent with the Commonwealth's position that information in contracts is not to be protected as confidential unless there is a good reason to do so.

⁴⁰ Department of Finance and Administration. *Guidance on the Listing of Contract Details on the Internet*. January 2004. 'Head Agreement'.

Staff training and awareness

4.14 An essential element of entering into contracts is that contract managers are fully aware of the new accountability environment and are able to articulate this to potential contractors.

4.15 At the time of the audit, DCITA offered, to all staff, a general legal awareness course on contracting and a contract management course. These courses were not mandatory, but DCITA advised of its intent to make the courses compulsory for all inductees.

4.16 None of the other selected agencies had training programs in place for procurement staff on the new accountability environment for contracting. The ANAO notes that NOIE intends to implement such courses in 2004.

4.17 The ANAO considers that all of the selected agencies would benefit from the implementation of contract training courses, or a review of current course content, to ensure that up-to-date Finance guidance and Senate Order requirements are adequately covered.

Conclusion

4.18 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. Agencies need to review their current guidance for contracting templates so that they reflect the requirements of the CPGs, Finance guidance and the Senate Order.

4.19 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 contracts⁴¹. However, the staff responsible for the day-to-day management of contracts were generally not aware of those criteria.

⁴¹ Department of Finance and Administration. *Guidance on Confidentiality of Contractors' Commercial Information*. February 2003. Section 3.

The use of confidential provisions in contracts

4.20 This section of the Chapter relates to the ANAO's examination, in the six selected agencies, of a number of contracts that were listed, or should have been listed, on the Internet as containing confidential provisions⁴² to assess whether the contracts had been listed appropriately.

4.21 The ANAO mainly examined contracts entered into during the Financial Year 2002–2003 reporting period. This was on the expectation that 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'.⁴³

4.22 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. In the sample of contracts examined, none of the selected agencies had progressed to the point of discussing and agreeing with contractors during the contract negotiation process whether contracts contained confidential information. Agencies had relied on the contract manager's judgement as to what information was confidential.

4.23 The ANAO assessed information in the contracts to determine whether the information should have been protected as confidential. In these cases, the ANAO, while recognising the circumstances in which the contracts were negotiated, assessed whether the information would have been agreed to be confidential if the Finance criteria⁴⁴ for confidentiality had been used by the agency at the time the contract was entered into.

4.24 In making these assessments, 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:

- the principle that contractual information should not be made confidential unless there is a good reason to do so, was not widely applied;

⁴² In instances where agencies did not report any confidential provisions (for example, AIR, Federal Court), or reported a small number (less than 10) of contracts with confidential provisions (NOIE), the ANAO selected contracts listed as containing only 'other requirements of confidentiality' to determine whether they had been listed appropriately.

⁴³ CPGs February 2002, subsection 1.2.

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

- 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.

4.25 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 whether there were any particular circumstances, not obvious from reading the contract, that would make the information confidential.

Audit evaluation criteria

4.26 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*, are described in full in Appendix 5 and are summarised in Table 4.1. All of the criteria must be met in order for the information to be treated as confidential.

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 ⁴⁵
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

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

⁴⁵ 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.

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

4.27 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.

4.28 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.⁴⁶

4.29 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.⁴⁷

Selection of contracts

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

⁴⁶ Department of Finance and Administration. *Guidance on Confidentiality of Contractors' Commercial Information*. February 2003, p.11.

⁴⁷ Department of Finance and Administration. *Guidance on Confidentiality of Contractors' Commercial Information*. February 2003, 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
Australian Industrial Registry	31	0 ⁴⁸	11
Australian Taxation Office	868	121	760
Department of Communications, Information Technology and the Arts	454	34	30
Department of the Environment and Heritage	145	42	145
Federal Court of Australia	36	1 ⁴⁹	17
National Office for the Information Economy	57	2	28
TOTAL	1591	200	991

Source: ANAO analysis of agency Internet listings for Financial Year 2002–2003 reporting period.

4.31 The selected agencies reported a total of 1591 contracts, representing six per cent of the total number of contracts reported by all FMA Act agencies. In addition, five of the selected agencies reported 200 contracts with confidential provisions, or seven per cent of 2776 such contracts listed by all FMA Act agencies (see Appendix 3).

4.32 The ANAO initially selected 54 contracts for review. However, the ANAO found that DEH had included an agreement between two Commonwealth agencies that was not a contract. Finance had advised agencies in August 2001 that agreements between Commonwealth departments and agencies that are all part of the Commonwealth will not be legally enforceable because it is not possible to enter into a legally enforceable agreement between different parts of the same legal entity.⁵⁰ As a result, 53 contracts were reviewed.

⁴⁸ The reason that the ANAO selected the AIR for audit is because, in the previous period, the AIR listed 13 contracts with confidential provisions and no contracts with other requirements of confidentiality while in this period it had not listed any contracts with confidential provisions and but had listed 11 contracts as having other requirements of confidentiality. That is, the AIR had reversed its reporting categories from the previous period.

⁴⁹ This contract represents an agreement between the Commonwealth and Lease Plan, and is managed by Finance on behalf of the Commonwealth. Although this contract was reported as containing confidential provisions, the ANAO excluded it from the detailed review (discussed later in the chapter) as it was entered into during July 2001, less than a month after the implementation of the Senate Order of June 2001.

⁵⁰ Department of Finance and Administration, *Murray Motion Key Documents*, August 2001.

4.33 Although the ANAO's main focus was on contracts that were listed as containing confidential provisions as opposed to other requirements of confidentiality, both types of contracts were reviewed because of the confusion within agencies as to the difference between confidential provisions and other requirements of confidentiality (discussed previously). Of the contracts reviewed, 26 were listed as containing confidential provisions; and 27 were listed as containing only other requirements of confidentiality.

4.34 The ANAO considered that 18 of the 27 contracts listed as containing other requirements of confidentiality were appropriately listed as they contained clauses that impose confidentiality over the outcome or product of the contract, or they contained standard non-disclosure clauses. This is in accordance with the *Finance Guidance on Internet listings*. Of the remaining nine contracts, four were considered likely to have the necessary qualities of confidentiality and could possibly have been listed as containing confidential provisions. Five were considered not to contain confidential provisions, confidential information or other requirements of confidentiality.

4.35 The above 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.

4.36 The remainder of this chapter reports on whether the selected contracts were appropriately listed on the Internet as containing confidential provisions. It also discusses those contracts that were listed as containing other requirements of confidentiality, which the ANAO considered should have been listed as containing confidential provisions. Table 4.3 shows the number of contracts selected for review and the number of such contracts that were listed as containing confidential provisions or should have been listed as containing confidential provisions.

Table 4.3**Number of contracts selected for review—selected agencies**

Agency	Number of contracts selected for review	Number of contracts selected for review that were listed as containing confidential provisions or should have been listed as containing confidential provisions
Australian Industrial Registry	6	2
Australian Taxation Office	8	7
Department of Communications, Information Technology and the Arts	10	9
Department of the Environment and Heritage	17	9
Federal Court of Australia	5	1
National Office for the Information Economy	7	2
TOTAL	53	30

General audit findings

4.37 The ANAO considers that the majority of contracts reviewed had been inappropriately listed as containing confidential provisions because, in the ANAO's view, there was no information in the contract that satisfied the criteria for protection as confidential information.

Audit findings by agency*Summary*

4.38 The overall result of the ANAO's assessment of contracts for each of the selected agencies is summarised in the Table 4.4.

4.39 The table shows that:

- 11 contracts had provisions that identified specific information as confidential. One of the tests in determining whether information should be protected as confidential is that the information must be identified in specific rather than global terms;
- 19 contracts 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; and

- the ANAO considered that one contract had been appropriately listed on the Internet as containing confidential information, and that four contracts listed as containing other requirements of confidentiality should have been listed as containing confidential provisions.

Table 4.4

ANAO assessment of confidential provisions for selected contracts

Agency	Number of contracts reviewed that were listed as containing confidential provisions or should have been listed as contained confidential provisions	Number of contracts which specifically identified information to be protected as confidential	Number of contracts which did not specifically identify information to be protected as confidential	Number of contracts containing confidential provisions considered appropriate by the ANAO
Australian Industrial Registry	2	nil	2	2
Australian Taxation Office	7	1 ⁵¹	6	1
Department of Communications, Information Technology and the Arts	9	5	4	1
Department of the Environment and Heritage	9	2	7	nil
Federal Court	1	1	nil	1
National Office for the Information Economy	2	2	nil	nil
Total	30	11	19	5

Source: ANAO analysis of agency contract information.

4.40 The results of the ANAO assessment of selected agencies' contracts listed as containing confidential provisions are shown in the paragraphs below.

⁵¹ The contract that specifically identified information in the contract to be kept confidential is not the same contract that the ANAO considered to contain confidential information of the necessary quality.

AIR

4.41 Although the AIR did not list any contracts as containing confidential provisions, the ANAO considered that two of the contracts that were listed as containing only other requirements of confidentiality could have been listed as containing confidential provisions. These contracts, in the ANAO's view, contained sufficiently detailed service level information that, if disclosed, could cause harm or detriment to the contractor.

ATO

4.42 Of the seven ATO contracts selected for review, only one specifically identified information within the contract to be protected as confidential. However, the information specified related to fee rates, which, in the ANAO's view, did not have the necessary quality of confidentiality, and the disclosure of such information was not likely to cause harm or detriment to the contractor. The ANAO also reviewed the contract to see whether there was any other information in the contract that could be considered confidential, but could not find any such information.

4.43 The ANAO agreed that one of the contracts was listed appropriately, even though the contract did not specify the information in the contract to be kept confidential. This contract contained detailed service level information (details of services to be delivered, the systems used to deliver the service and price), which, if disclosed, would be likely cause harm or detriment to the contractor.

4.44 The remaining six contracts did not specify what information in the contract was to be protected as confidential, and, in the ANAO's view, did not contain any information that could be considered confidential.

DCITA

4.45 Five of DCITA's nine contracts selected for review specifically identified information in the contract to be protected as confidential. However, in four of the contracts the information specified generally related to the outcome or product of the contract, which, in the ANAO's view, did not have the necessary quality of confidentiality. The ANAO also reviewed the contracts to see whether there was any other information in the contract that could be considered confidential, but could not find any. The ANAO considered the commercial information, in the fifth contract, to be sufficiently detailed that, if disclosed, could cause harm or detriment to the contractor.

4.46 Four other contracts did not specify any information in the contract to be protected as confidential, and did not contain any information that could be considered confidential.

DEH

4.47 All nine of the DEH contracts selected for review were listed as containing confidential provisions. Two contracts specifically identified information within the contract to be protected as confidential. However, in one contract, the information related to the need for specific personnel to agree not to disclose information and, in the other, the information was a non-disclosure clause. In the ANAO's view, neither of the contracts had information with the necessary quality of confidentiality for it to be protected as confidential. The ANAO also reviewed the two contracts to see whether there was any other information in the contract that could be considered confidential and could not find any.

4.48 The remaining seven contracts did not specify any information in the contract to be protected as confidential, and did not contain any information that could be considered confidential.

Federal Court

4.49 Although the five Federal Court contracts selected for review were listed as containing only other requirements of confidentiality, the ANAO considered that one of the contracts should have been listed as containing confidential provisions. This contract, in the ANAO's view, contained sufficiently detailed pricing and service level information that, if disclosed, could cause harm or detriment to the contractor.

NOIE

4.50 Two NOIE contracts were listed as containing confidential provisions. Both contracts specifically identified information in the contract to be protected as confidential. However, the information related to the outcome or product of the contract, which in the ANAO's view did not have the necessary quality of confidentiality. The ANAO also reviewed the contracts to see whether there was any other information in the contract that could be considered confidential, but could not find any.

Conclusion

4.51 In applying the Finance criteria for determining whether information should be protected as confidential information, the ANAO considered that only five of the 30 contracts listed, or which should have been listed, as containing confidential provisions were appropriately listed.

4.52 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. This indicates a continued need, in contract negotiations, for rigorous application of the principle that contractors' information should not be protected unless there is a good reason to do so. 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.

Audit access clauses

4.53 The CPGs emphasise the importance of agencies ensuring that they are able to satisfy all relevant accountability obligations, including ANAO access to records and premises. Specifically, the CPGs state that, as part of their accountability responsibilities, agencies must consider on a case-by-case basis, including a provision in contracts to enable ANAO access to contractors' records and premises to carry out appropriate audits⁵².

4.54 One of the issues looked at in this audit was whether audit access clauses had been written into contracts. While this aspect was not a major focus of the audit and, therefore, was not examined in detail, the ANAO noted that, of the 53 contracts selected for review, 32 contracts had clauses that allow for ANAO access, which is a higher percentage than when the ANAO last examined the same issue in 2000-2001⁵³.

Contracts excluded from listings

4.55 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 included:

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

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

4.57 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 GaPS⁵⁴. Conversely, if the contract is listed on GaPS, it should also be listed on the Internet.

⁵² Commonwealth Procurement Guidelines. February 2002, subsection 1.2.

⁵³ Australian National Audit Office, Audit Report No.38, 2000–2001, p.49.

⁵⁴ 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 2002–2003, *The Senate Order for Departmental and Agency Contracts (Autumn 2003)*, p.55.

4.58 The ANAO looked at all the Ministers' letters and found that the Department of Defence, the Department of Health and Ageing⁵⁵ and the Australian Federal Police⁵⁶ had not listed some contracts on the Internet due to commercial sensitivity and national security reasons.

Defence and AFP

4.59 In the previous audit, the ANAO examined some Defence⁵⁷ and AFP 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 AFP or Defence contracts in this audit.

Health

4.60 The then Minister for Health and Ageing, in her letter to the Senate, indicated that three contracts had been excluded from the Department of Health and Ageing's (Health) Internet list—two for national security reasons and one for commercial sensitivity reasons. The CEO had given approval, in writing, for two of the contracts to be excluded from both GaPS and the Internet.

4.61 The third contract had been listed on GaPS. Health advised that this had been done unintentionally and had taken steps to remove the contract from the GaPS listing.

4.62 The ANAO considered that the reasons for excluding all three contracts from the Internet list were appropriate.

Selected agencies

4.63 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
26 February 2004

PJ Barrett
Auditor-General

⁵⁵ The then Minister for Health and Ageing indicated in the letter to the Senate that three contracts were excluded from the Department of Health and Ageing website 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 The Minister for Defence indicated that contracts that are confidential for security reasons have been intentionally excluded from the Internet list.

Appendices

Appendix 1: Senate Order for Departmental and Agency Contracts (as amended June 2003)

The Senate Order as at June 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, within 6 months after each day mentioned in paragraph (1), a report indicating that the Auditor-General has examined a number of such contracts selected by the Auditor-General, and indicating whether any inappropriate use of such provisions was detected in that examination.
- (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: 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 3: Number of contracts listed by agencies in accordance with the Senate Order—Financial Year 2002–2003

Agency	Total number of contracts	Total number of contracts listed as containing aspects of confidentiality ⁵⁸	Number of contracts listed as containing confidential provisions	Number of contracts listed as containing other requirements of confidentiality
Aboriginal and Torres Strait Islander Commission ⁵⁹	Not applicable	Not applicable	Not applicable	Not applicable
Aboriginal and Torres Strait Islander Service ⁶⁰	Not applicable	Not applicable	Not applicable	Not applicable
Administrative Appeals Tribunal	12	5	1	4
Attorney-General's Department	163	31	10	25
AusAID	966	4	0	4
Australia-Japan Foundation	4	0	0	0
Australian Bureau of Statistics	73	61	47	14
Australian Centre for International Agricultural Research	134	0	0	0
Australian Competition and Consumer Commission	26	3	3	0
Australian Crime Commission	16	8	0	8
Australian Customs Service	261	25	25	0
Australian Electoral Commission	106	14	14	12
Australian Federal Police	77	1	0	1
Australian Greenhouse Office	117	61	0	61
Australian Industrial Registry	31	11	0	11
Australian National Audit Office	75	62	15	61
Australian Office of Financial Management	7	1	1	0
Australian Public Service Commission	19	4	2	4

⁵⁸ Some contracts were listed as containing 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.

⁵⁹ ATSIC had no contracts that fell within the scope of the Senate Order.

⁶⁰ ATSIS 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 ⁵⁸	Number of contracts listed as containing confidential provisions	Number of contracts listed as containing other requirements of confidentiality
Australian Radiation Protection and Nuclear Safety Agency	7	0	0	0
Australian Research Council	587	0	0	0
Australia Secret Intelligence Service ⁶¹	Not applicable	Not applicable	Not applicable	Not applicable
Australian Securities and Investments Commission ⁶²	Not applicable	Not applicable	Not applicable	Not applicable
Australian Security Intelligence Organisation ⁶³	Not applicable	Not applicable	Not applicable	Not applicable
Australian Taxation Office	868	763	121	760
Australian Transaction Reports and Analysis Centre	21	0	0	0
Bureau of Meteorology	52	3	3	2
Centrelink	1036	101	101	0
Classification Board ⁶⁴	Not applicable	Not applicable	Not applicable	Not applicable
Classification Review Board ⁶⁵	Not applicable	Not applicable	Not applicable	Not applicable
Commonwealth Grants Commission	5	3	3	3
Commonwealth Ombudsman Office	14	5	2	1
Commonwealth Superannuation Administration	21	11	4	11
CrimTrac Agency	16	12	0	12
Commonwealth Superannuation Scheme ⁶⁶	Not applicable	Not applicable	Not applicable	Not applicable
Dairy Adjustment Authority	6	6	1	6

⁶¹ ASIS did not list contracts on the Internet because of national security concerns.

⁶² ASIC had no contracts that fell within the scope of the Order.

⁶³ ASIO did not list contracts on the Internet because of national security concerns.

⁶⁴ 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.

⁶⁵ 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.

⁶⁶ The CSS and PSS Board entered into contracts jointly for the Financial Year 2002–2003 reporting period.

Agency	Total number of contracts	Total number of contracts listed as containing aspects of confidentiality ⁵⁸	Number of contracts listed as containing confidential provisions	Number of contracts listed as containing other requirements of confidentiality
Department of Agriculture Fisheries and Forestry	233	79	41	48
Department of Communications, Information Technology and the Arts	454	47	34	30
Department of Defence ⁶⁷	9269	402	267	363
Department of Education Science and Training	849	287	274	22
Department of Employment and Workplace Relations	1253	1127	1091	53
Department of the Environment and Heritage	145	145	42	145
Department of Family and Community Services	2285	6	6	0
Department of Finance and Administration	144	82	80	79
Department of Foreign Affairs and Trade	173	17	17	0
Department of Health and Ageing	5858	1	1	0
Department of the House of Representatives ⁶⁸	Not applicable	Not applicable	Not applicable	Not applicable
Department of Immigration and Multicultural and Indigenous Affairs	439	176	57	119
Department of Industry, Tourism and Resources	334	144	34	120
Department of the Parliamentary Library	3	1	1	0
Department of the Parliamentary Reporting Staff	46	17	14	3
Department of the Prime Minister and Cabinet	40	10	5	5
Department of the Senate	18	0	0	0

⁶⁷ For an explanation of Defence's way of dealing with its contract list, see Chapter Two of this report.

⁶⁸ 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 had chosen to comply with the Order. See Chapter 2 for discussion on the matter.

Agency	Total number of contracts	Total number of contracts listed as containing aspects of confidentiality ⁶⁸	Number of contracts listed as containing confidential provisions	Number of contracts listed as containing other requirements of confidentiality
Department of the Treasury	30	9	9	0
Department of Transport and Regional Services	366	100	96	70
Department of Veterans' Affairs	944	282	282	0
Equal Opportunity for Women in the Workplace Agency	3	2	2	0
Family Court of Australia	90	22	0	22
Federal Court of Australia	36	17	1	17
Federal Magistrates Service	7	4	4	0
Geoscience Australia	39	5	0	5
Human Rights and Equal Opportunity Commission	4	2	2	0
Insolvency and Trustee Service Australia	24	4	0	4
Inspector-General of Taxation ⁶⁹	Not applicable	Not applicable	Not applicable	Not applicable
IP Australia	96	5	5	0
Joint House Department	49	15	15	0
Migration Review Tribunal	4	0	0	0
National Archives of Australia	91	29	29	0
National Blood Authority ⁷⁰	Not applicable	Not applicable	Not applicable	Not applicable
National Capital Authority	38	0	0	0
National Competition Council	2	1	1	0
National Native Title Tribunal	17	3	3	0
National Oceans Office	3	0	0	0
National Office for the Information Economy	57	28	2	28
Office of Film and Literature Classification	1	0	0	0
Office of National Assessments	10	1	1	1
Office of Parliamentary Counsel	4	3	1	3

⁶⁹ The Inspector-General of Taxation agency was established as a FMA Act agency on 1 July 2003.

⁷⁰ The National Blood Authority 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 ⁵⁸	Number of contracts listed as containing confidential provisions	Number of contracts listed as containing other requirements of confidentiality
Office of the Director of Public Prosecutions	33	1	1	1
Office of the Inspector-General of Intelligence and Security ⁷¹	Not applicable	Not applicable	Not applicable	Not applicable
Office of the Official Secretary of the Governor-General	6	5	2	5
Office of the Privacy Commissioner	2	1	1	0
Office of the Renewable Energy Regulator ⁷²	Not applicable	Not applicable	Not applicable	Not applicable
Productivity Commission	6	0	0	0
Professional Services Review Scheme	2	2	2	0
PSS Board ⁷³	6	3	0	3
Refugee Review Tribunal	5	0	0	0
Seafarers Safety, Rehabilitation and Compensation Authority ⁷⁴	Not applicable	Not applicable	Not applicable	Not applicable
Total	28 238	4280	2776	2146

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

⁷¹ The Office of the Inspector-General of Intelligence and Security placed a note on their website stating that they did not have any contracts subject to the Senate Order for the Financial Year 2002–2003 reporting period.

⁷² The Office of the Renewable Energy Regulator was established as an FMA Act agency on 1 July 2003.

⁷³ The CSS and PSS board entered into contracts jointly for the Financial Year 2002–2003 reporting period.

⁷⁴ The Seafarers Safety, Rehabilitation and Compensation Authority was established as an FMA Act agency on 1 July 2003.

Appendix 4: Agency compliance with the requirements of the Senate Order—Financial Year 2002–2003

Agency	Listed by due date (31 August 2003) ⁷⁵	Reported relevant reporting period or 12-month period ⁷⁶	Name	Subject	Start-date	End date	Value	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reason(s)	Cost of compliance	Method of calculating cost of compliance
Aboriginal and Torres Strait Islander Commission ⁷⁷	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 ⁷⁸	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
Administrative Appeals Tribunal	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Attorney-General's Department	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

⁷⁵ 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 31 August 2003, the ANAO considered agencies compliant for the current reporting period of they had placed a list of contracts on the Internet by 1 September, the first working day after 31 August 2003.

⁷⁶ The Finance letter of 30 June 2003 provided an interpretation of the relevant reporting period and the twelve-month period relating to contracts, and suggested that agencies showed both periods on their Internet lists. The Finance *Guidance on the listing of contract details on the Internet* provides model templates for the presentation of contract lists and provides for the inclusion of both the relevant reporting period (Financial Year or Calendar Year) and twelve-month period relating to contracts (1 July to 30 June or 1 January to 31 December). As the Finance guidance was not available to agencies for the current reporting period, and given that the requirements outlined in the Finance letter was interpreted by some agencies as not being mandatory, the ANAO considered agencies to be compliant if they had indicated either the relevant reporting period or the twelve-month period, or both.

⁷⁷ ATSIIC did not have any contracts that fell within the scope of the Senate Order.

⁷⁸ ATSIIS was established as an FMA Act agency on 1 July 2003.

Agency	Listed by due date (31 August 2003) ^{ys}	Reported relevant reporting period or 12-month period ^{re}	Name	Subject	Start-date	End date	Value	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reason(s)	Cost of compliance	Method of calculating cost of compliance
AusAID	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	x	x
Australia-Japan Foundation	✓	x	✓	✓	✓	✓	✓	x	x	x	✓	✓
Australian Bureau of Statistics	x	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian Centre for International Agricultural Research	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian Competition and Consumer Commission	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	x
Australian Crime Commission	✓	x	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian Customs Service	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian Electoral Commission	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian Federal Police	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian Greenhouse Office	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian Industrial Registry	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	x
Australian National Audit Office	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian Office of Financial Management	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

Agency	Listed by due date (31 August 2003) ⁷⁵	Reported relevant reporting period or 12-month period ⁷⁶	Name	Subject	Start-date	End date	Value	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reason(s)	Cost of compliance	Method of calculating cost of compliance
Australian Public Service Commission	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian Radiation Protection and Nuclear Safety Agency	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian Research Council	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australia Secret Intelligence Service ⁷⁹	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 ⁸⁰	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 ⁸¹	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 Taxation Office	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australian Transaction Reports and Analysis Centre	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Bureau of Meteorology	✓	✓	✓	✓	✓	X	✓	✓	✓	✓	✓	✓
Centrelink	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

⁷⁹ ASIS did not list contracts on the Internet because of national security concerns.

⁸⁰ ASIC did not have any contracts that fell within the scope of the Senate Order.

⁸¹ ASIO did not list contracts on the Internet because of national security concerns.

Agency	Listed by due date (31 August 2003) ⁸²	Reported relevant period or 12-month period ⁸³	Name	Subject	Start-date	End date	Value	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reason(s)	Cost of compliance	Method of calculating cost of compliance
Classification Board 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
Classification Review Board ⁸³	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 Office	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Commonwealth Superannuation Administration	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
CrimTrac Agency	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Commonwealth Superannuation Scheme ⁸⁴	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
Dairy Adjustment Authority	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Agriculture Fisheries and Forestry	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

⁸² 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.

⁸³ 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.

⁸⁴ The CSS and PSS board entered into contracts jointly for the Financial Year 2002–2003 reporting period.

Agency	Listed by due date (31 August 2003) ⁸⁵	Reported relevant reporting period or 12-month period ⁸⁶	Name	Subject	Start-date	End date	Value	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reason(s)	Cost of compliance	Method of calculating cost of compliance
Department of Communications, Information Technology and the Arts	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Defence ⁸⁵	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Education Science and Training ⁸⁶	x	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Employment and Workplace Relations	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of the Environment and Heritage	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Family and Community Services	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Finance and Administration	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Foreign Affairs and Trade	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Health and Ageing	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

⁸⁵ For an explanation of Defence's way of dealing with its contract list, see Chapter Two of this report.

⁸⁶ DEST advised that, due to technical difficulties, its list was not published by 1 September 2003. It was, however, available from 2 September 2003. DEST also advised that it has since refined its processes to ensure that it can meet all future deadlines.

Agency	Listed by due date (31 August 2003) ⁷⁵	Reported relevant reporting period or 12-month period ⁷⁶	Name	Subject	Start-date	End date	Value	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reason(s)	Cost of compliance	Method of calculating cost of compliance
Department of Immigration and Multicultural and Indigenous Affairs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Industry, Tourism and Resources	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of the House of Representatives ⁸⁷	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	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of the Parliamentary Reporting Staff	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of the Prime Minister and Cabinet	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of the Senate	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of the Treasury	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Transport and Regional Services	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Department of Veterans' Affairs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Equal Opportunity for Women in the Workplace Agency	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

⁸⁷ See footnote 68.

Agency	Listed by due date (31 August 2003) ⁷⁵	Reported relevant reporting period or 12-month period ⁷⁶	Name	Subject	Start-date	End date	Value	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reason(s)	Cost of compliance	Method of calculating cost of compliance
Family Court of Australia	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Federal Court of Australia	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Federal Magistrates Service	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Geoscience Australia	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Human Rights and Equal Opportunity Commission	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Insolvency and Trustee Service Australia	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Inspector-General of Taxation ⁸⁸	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
IP Australia	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Joint House Department	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Migration Review Tribunal	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
National Archives of Australia	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
National Blood Authority ⁸⁹	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
National Capital Authority	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

⁸⁸ The Inspector-General of Taxation agency was established as a FMA Act agency on 1 July 2003.

⁸⁹ The National Blood Authority was established as an FMA Act agency on 1 July 2003.

Agency	Listed by due date (31 August 2003) ⁷⁵	Reported relevant reporting period or 12-month period ⁷⁶	Name	Subject	Start-date	End date	Value	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reason(s)	Cost of compliance	Method of calculating cost of compliance
National Competition Council	✓	✓	✓	✓	X	X	X	✓	✓	✓	✓	✓
National Native Title Tribunal	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
National Oceans Office	✓	X	✓	✓	X	X	✓	X	X	X	X	X
National Office for the Information Economy	✓	✓	✓	✓	X	X	✓	✓	✓	✓	✓	✓
Office of Film and Literature Classification	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Office of National Assessments	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Office of Parliamentary Counsel	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Office of the Director of Public Prosecutions	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Office of the Inspector-General of Intelligence and Security ⁹⁰	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	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Office of the Privacy Commissioner	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

⁹⁰ The Office of the Inspector-General of Intelligence and Security placed a note on their website stating that they did not have any contracts subject to the Senate Order for the Financial Year 2002–2003 reporting period.

Agency	Listed by due date (31 August 2003) ⁷⁵	Reported relevant reporting period or 12-month period ⁷⁶	Name	Subject	Start-date	End date	Value	Provisions requiring contract provisions to be kept confidential	Other requirements of confidentiality	Reason(s)	Cost of compliance	Method of calculating cost of compliance
Office of the Renewable Energy Regulator ⁹¹	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
Productivity Commission	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Professional Services Review Scheme ⁹²	✓	X	✓	✓	✓	X	X	✓	✓	✓	X	X
Public Sector Superannuation Scheme ⁹³	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Refugee Review Tribunal	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	X
Seafarers Safety, Rehabilitation and Compensation Authority 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

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

⁹¹ The Office of the Renewable Energy Regulator was established as an FMA Act agency on 1 July 2003.

⁹² PSRS advised that its Internet listing has since been updated to meet the Senate Order requirements.

⁹³ The CSS and PSS board entered into contracts jointly for the Financial Year 2002–2003 reporting period.

⁹⁴ The Seafarers Safety, Rehabilitation and Compensation Authority was established as an FMA Act agency on 1 July 2003.

Appendix 5: 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 6: Comments from the selected agencies

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

Australian Industrial Registry (AIR)

4.65 The AIR agrees with the specific findings made by the ANAO in respect of the AIR contract listing and processes in compiling the listing. The AIR will review classification of listing for the 2003 calendar year listing in line with the ANAO's observations and reference to the DoFA guidance. In addition, as indicated in the report the AIR will update its instructions and guidelines in respect of contract management to reflect its obligations to list contracts in accordance with the Senate Order but also the new accountability requirements. The guidelines on contract management will be expanded to include disclosure and the new accountability requirements in the preparing of contract documentation and will be incorporated into relevant contract templates. The guidelines will also include references to the Department of Finance and Administration guidance and to the Commonwealth Procurement Guidelines. Contract managers and other staff involved in contract management within the AIR will be made aware of the revised guidelines and the Commonwealth's requirements and the AIR will investigate appropriate training/information dissemination options.

Australian Taxation Office (ATO)

4.66 The ATO concurs with the ANAO findings and is addressing the issues raised in the report. The format of the list of contracts has been revised in line with the guidance issued by the Department of Finance and Administration. The standard form tender and contract clauses on confidentiality have been reviewed and procurement procedures will be revised to ensure that they cover the Finance guidance. Training has also been provided for procurement staff.

Department of Communications Information Technology and the Arts (DCITA)

4.67 The Department agrees with the findings of the report. The report indicates that there have been difficulties in understanding the distinction between 'confidential provisions' and 'other requirements of confidentiality' for the purposes of the Senate Order. The Department of Finance and Administration's recent *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*, together with our contracts register under development, will assist the Department in future listings.

Department of the Environment and Heritage (DEH)

4.68 The Department of Environment found the audit to be timely and a useful tool to review and amend departmental procedures and policies in relation to the Senate Order.

4.69 The Department has taken steps to improve the accessibility path of our contract lists on the Internet home page. Documentation has been developed and circulated to explain the confidentiality requirements. However further improvements need to be made to the Department's tender documentation and contract templates to reflect the new accountability environment and include provision for Audit access. The Department recognises that training of staff will be crucial for the successful implementation of the Senate Order requirements and Finance guidance.

Federal Court of Australia (Federal Court)

Chapter 3 The processes Used to Create the Internet list (Federal Court para 3.11, Conclusion para 3.22)

4.70 The Federal Court is in the process of reviewing formal guidance to staff on the existing processes described at para 3.11, for Internet listing of contracts.

Chapter 4 Confidential Provisions in Contracts (Federal Court paras 4.6, 4.7 and 4.9, Conclusion 4.17)

4.71 The Federal Court is in the process of reviewing formal guidance to staff on the existing processes described at paras 4.6, 4.7 and 4.9, to fully accord with the tendering and contracting requirements of the new accountability environment as expressed in the CPGs, Finance Guidance and the Senate Order.

National Office for the Information Economy (NOIE)

4.72 The National Office for the Information Economy (NOIE) notes the findings of the audit, and has incorporated these findings into its contract development and management procedures. In particular, arrangements for appropriately identifying confidential provisions and/or other requirements of confidentiality have been incorporated into standard NOIE tender and contract documentation, and these provisions are now determined at the time of contract development.

4.73 NOIE has amended its specific procedures for compiling the Senate Order listing, to ensure full compliance with the Commonwealth Procurement Guidelines and Best Practice Guide, the Senate Order and its requirements, and the Commonwealth Gazette requirements.

Comments provided by agencies not included in detailed review, but mentioned in the report

National Archives of Australia

4.74 The information relating to the National Archives in the proposed report was correct at the time of investigation. Since the time of the investigation we have, however, reviewed our report for the relevant contracts listed for 2002–2003, and you may wish to reflect these changes in the table in Appendix 3 of the proposed report. The revised information is reflected in the following table.

Agency	Total number of contracts	Total number of contracts listed as containing aspects of confidentiality	Total number of contracts listed as containing confidential provisions	Number of contracts listed as containing other requirements of confidentiality
National Archives of Australia	68	19	19	3

4.75 A number of items previously listed as contracts have been removed from the list because they were assessed as not meeting the definition of a contract, did not involve amounts over \$100 000, or did not fall within the reporting period. Some information previously missing from the Archive's listing has also now been updated. The updated list is available on our website at http://www.naa.gov.au/about_us/procurement/contractors.pdf

4.76 I would also like to take this opportunity to advise you that the Archives is examining measures that will enable us to improve our compliance with the Senate Order. In particular, the proposed report notes that the Archives has a devolved procurement process which has in the past made compliance with the Senate Order difficult. The Archives is now establishing a contracts register and associated contracting procedures that will better enable us to provide centralised oversight of the devolved procurement process.

Index

- Aboriginal and Torres Strait Islander Commission
 - (ATSIC), 29, 65, 70
- audit access clauses, 57
- Auditor-General, 1, 3, 4, 11, 20, 22, 28, 57, 58, 62, 64
- Australian Industrial Registry
 - (AIR), 7, 11, 26, 51, 53, 54, 65, 71, 80
- Australian National Audit Office
 - (ANAO), 3, 4, 17, 27, 34, 41, 57, 65, 71
- Australian Secret Intelligence Service
 - (ASIS), 27
- Australian Securities and Investments Commission
 - (ASIC), 29, 66, 72
- Australian Security Intelligence Organisation
 - (ASIO), 27, 66, 72
- Australian Taxation Office
 - (ATO), 7, 11, 26, 51, 53, 54, 66, 72, 80
- Autumn 2003, 27, 30, 31, 32, 34, 57
- CEIs, 44
- Classification Board, 29, 66, 73
- Classification Review Board, 29, 66, 73
- commencement date, 19, 20, 21, 35, 61, 63
- Commonwealth Authorities and*
 - (CAC Act), 7, 29
- Commonwealth Procurement Guidelines
 - (CPGs), 7, 18, 57, 80, 81
- confidential information, 7, 12, 13, 22, 23, 24, 33, 41, 42, 44, 45, 48, 49, 52, 53, 54, 56
- confidential provisions, 5, 7, 13, 23, 25, 26, 31, 32, 33, 36, 38, 39, 40, 41, 42, 43, 46, 48, 50, 51, 52, 53, 54, 55, 56, 65, 80, 81, 82
- confidentiality provisions, 7, 11, 17, 18, 22, 23, 24, 25, 31, 33, 34, 36, 46, 79
- contract listing, 21, 29, 33, 35, 80
- contract register, 34, 39, 40
- crosscheck, 39
- CSS Boards, 29
- Department of Communications, Information Technology and the Arts
 - (DCITA), 2, 7, 11, 26, 51, 53, 54, 67, 74
- Department of Defence
 - (Defence), 7, 25, 58, 67, 74
- Department of Finance and Administration
 - (Finance), 6, 7, 8, 13, 18, 21, 22, 33, 36, 46, 47, 48, 49, 50, 51, 67, 74, 79, 80
- Department of Health and Ageing

(Health), 58, 67, 74

Department of the Environment and Heritage

(DEH), 7, 11, 26, 51, 53, 54, 67, 74, 81

Department of the House of Representatives, 27, 67, 75

end-date, 30, 35

Finance *Guidance*, 7, 8, 21, 22, 23, 30, 32, 33, 35, 37, 44, 45, 49, 50, 52, 70, 81

Finance *Guidance on Internet listings*, 30, 37

Financial Management and Accountability Act 1997

FMA Act, 8, 11, 17, 19, 62, 64

Financial Management and Information System

FMIS, 8

Gazette Publishing System

(GaPS), 8, 18, 34

GITC4, 8, 46

government, 12, 17, 25

Guidance on Confidentiality, 7, 21, 43, 47, 48, 49, 50

head agreements, 33, 46

intellectual property, 50, 79

Interim Defence Contracts Register

(IDCR), 31, 34, 35

internal costing, 50

Internet, 5, 8, 11, 12, 13, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48, 51, 52, 54, 57, 58, 61, 63, 66, 69, 70, 72, 78, 79, 80, 81

Internet listings, 8, 11, 19, 20, 22, 23, 24, 26, 30, 33, 35, 37, 42, 51, 52, 58, 69, 78

Ministers, 17, 19, 20, 23, 27, 58, 67

National Archives of Australia

(NAA), 25, 68, 76, 82

National Office for the Information Economy

(NOIE), 8, 11, 26, 51, 53, 54, 68, 77, 81

Office of Film and Literature Classification, 29, 66, 68, 73, 77

Office of the Inspector-General of Intelligence and Security, 30, 69, 77

other requirements of confidentiality, 25, 31, 33, 36, 38, 39, 40, 42, 48, 50, 51, 52, 54, 55, 56, 61, 63, 65, 80, 81, 82

Parliamentary Departments, 27, 67

policy, 12, 14, 22, 23, 28, 31, 44, 46, 47

pricing structures, 50

procedures, 12, 13, 26, 38, 39, 48, 80, 81, 82

procurement, 12, 13, 21, 25, 26, 38, 39, 40, 42, 44, 47, 80, 82

profit margin, 50

proprietary information, 50

PSS Board, 66, 69

- relevant reporting period, 19, 20, 27, 28, 30, 35, 36, 37, 61, 63, 70
- Senate Finance and Public Administration References Committee, 8, 17, 19
- Senate FPA Committee, 8, 12, 17, 19, 22, 43
- Senate Order, 1, 3, 5, 6, 8, 11, 12, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 44, 46, 47, 48, 51, 57, 61, 63, 65, 67, 69, 70, 72, 77, 78, 80, 81, 82
- template
 - templates, 36, 40, 46
- tender, 12, 18, 41, 43, 45, 47, 79, 80, 81
- trade secrets, 50
- Training, 67, 74, 80
- twelve-month period relating to the contract listings, 19, 35, 61, 63
- website, 12, 27, 29, 30, 35, 38, 39, 58, 69, 77, 82

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