



fact sheet

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Confidentiality considerations for tenders, funding programs and other government initiatives

Identifying and protecting confidential information is an important consideration in many tenders, funding programs and other government initiatives.

This fact sheet:

- provides a summary overview of the obligations on government employees to protect both government and third-party confidential information
- outlines some of the issues for experts and advisers employed under contract and external members of committees and advisory groups
- provides some tips for managing confidential information.

Common law

Agency information

In determining whether information of a Commonwealth agency is confidential, a number of legislative instruments and common law principles are relevant. At common law:

- For 'government information', the High Court has held that in certain situations 'the Government must prove that the public interest demands non-disclosure' for it to be held to be confidential. This contrasts with private persons' confidential information, for which the common law affords greater protection.
- 'Government proprietary information', which is government information about 'non-governmental' operations, receives a similar amount of protection as private information.

Third party information

When determining if the information of other parties is confidential, it is important to consider these points:

- Information may be protected as confidential through contract. It may be an express term or it may be implied into the contract through the circumstances.
- Contracts may arise without a written contract, such as through an oral agreement or from the circumstances. For example, courts have found that 'pre-tender' contracts may arise between the party that puts out a 'request for tender' and the tenderers.²
- Aside from these contractual obligations, where one party (the confider) communicates to another (the recipient) private or secret matters on the express or implied understanding that the communication is for a confidential purpose, these communications are treated as confidential.³

¹ *Esso Australia Resources Ltd v Plowman* (1995) 69 ALJR 404, 413.

² *Wagna Hanna and Associates Pty Ltd v National Library of Australia* [2012] ACTSC 126 (3 August 2012).

³ See for example *Corrs Pavey Whiting and Byrne v Collector of Customs, Victoria* (1987) 14 FCR 434, especially the judgment of Gummow J; *Campbell v Illawarra Golf Club Pty Ltd (in liq)* [2012] NSWSC 1252.

Legislation and policies

Commonwealth entities

In addition to obligations that might arise through contract or equitable obligations, there is a duty on public sector employees to protect the Commonwealth entity's – and, in certain cases, a third party's – confidential information. This duty is established and enforced through a number of laws and policies which will vary depending on the agency and the circumstances. These include:

- the Public Service Regulations, which provide that Australian Public Service (APS) employees must not disclose information obtained or generated 'in connection' with their work that may harm the government, was communicated in confidence within the government or was received by the government from someone outside the government (reg 2.1)
- s 28 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) provides that a person who obtains information because they are an official of a Commonwealth entity must not improperly use the information to gain or seek to gain a benefit or an advantage for themselves or someone else or to cause or seek to cause detriment to the Commonwealth entity or someone else
- s 70 of the *Crimes Act 1914*, which provides that a Commonwealth officer who breaches a duty of confidentiality may be guilty of an offence punishable by up to 2 years imprisonment
- s 79 of the *Crimes Act 1914*, which deals with official secrets
- s 142.2 of the *Criminal Code Act 1995*, which deals with offences relating to 'abuse of public office' and prohibits a public official from using any information they have obtained as a public official to dishonestly obtain a benefit for themselves or for another person. Section 91 of the Code creates an offence for the non-authorized disclosure of information concerning the defence or security of the Commonwealth.
- paras 7.20–7.24 of the Commonwealth Procurement Rules (CPRs), which require agencies to take appropriate steps to protect the Commonwealth's confidential information and make provision for submissions to be treated as confidential before and after the award of a contract.⁴ However, once the contract has been awarded, the terms of the contract are not confidential unless the agency has identified specific information in the contract to be kept confidential in accordance with the guidance on *Confidentiality throughout the procurement cycle* at www.finance.gov.au/procurement
- paras 5.3 and 5.6 of the Commonwealth Grants Rules and Guidelines (CGRGs), which require that Commonwealth entities must publish on their websites information on individual grants, unless it is determined that public reporting is contrary to the *Privacy Act 1988*, other statutory requirements or the specific terms of a funding agreement.⁵
 - Paragraph 5.5 of the CGRGs which require officials of a Commonwealth entity to identify whether a grant agreement contains confidentiality provisions.
- the Commonwealth's Protective Security Policy Framework, which requires agencies to ensure that government employees, contractors and temporary staff who require ongoing access to Australian Government information and resources are eligible to have access; have had their identity established; are suitable to have access; and are willing to comply with the Commonwealth's policies, standards, protocols and guidelines that safeguard the agency's resources
- other legislation that also needs to be considered, in certain contexts, to decide whether information can be disclosed. Examples include the *Freedom of Information Act 1982*, which provides statutory support for making government information publicly available; the *Privacy Act 1988*, which provides for the protection of 'personal information' gathered by the government; the

4 Once a contract has been awarded, the terms of the contract, including parts of the contract drawn from the submission, are not confidential unless the agency has determined and identified in the resultant contract that specific information is to be kept confidential in accordance with the guidance on *Confidentiality throughout the procurement cycle* at www.finance.gov.au/procurement.

5 In these circumstances, an agency must publish as much information as legally possible; document the reasons for not reporting fully; and take all reasonable steps to ensure that future grant agreements contain provisions that do not prevent the disclosure of the information.

Income Tax Assessment Act 1936, which contains secrecy provisions about using and disclosing taxpayer information; the *Social Security Act 1991*; the *Defence Act 1903*; the *National Health Act 1953* and the *Archives Act 1983*.

Other parties with access to information

People who are not officers or employees of an agency may also have obligations to protect confidential information – for example, advisers or experts employed by an agency and members of committees and advisory groups involved in the initiative. Obligations of confidentiality for these people may stem from:

- any contracts that they have with the agency, which are likely to require them to maintain and protect certain information as confidential and to comply with the protective security policy framework where applicable
- an equitable duty of confidence to the agency which is owed in circumstances where the agency provides private or secret information to them, on the express or implied understanding that the communication is for a restricted purpose
- Commonwealth legislation. Many of the laws mentioned above apply directly or are applied by contract to third parties. For example, in s 70 of the *Crimes Act 1914*, a ‘Commonwealth officer’ includes a person who performs services for or on behalf of the Commonwealth, a Territory or a public authority under the Commonwealth. Both the Privacy Act and the FOI Act require certain contracts to include specific obligations on contractors.

Tips for managing confidentiality

- Ensure confidential information is identified:
 - Check the confidentiality status of agency information.
 - Be aware of claims of confidentiality by third parties over the information received from them. Consider carefully whether any actual or implied confidentiality obligation might exist and how this will affect what can be done with the information.
- Consider how confidential information will be managed for the particular initiative:
 - Consider whether confidentiality considerations for the initiative require specific protocols for managing information.
 - Consider whether there should be contractual obligations of confidentiality (at both a corporate and a personal level) imposed upon external parties who are involved in the initiative.
 - Ensure that contracts for services require compliance with applicable Commonwealth policy or legislation such as the *Privacy Act 1988* and that request documentation includes any necessary information about proposed use of information.
 - Ensure compliance with legislation and policies such as the CPRs or CGGs where they apply to the initiative.
- Ensure all of those exposed to confidential information in the initiative are aware of their obligations and the specific arrangements for managing confidential information for the initiative.
- Where information is sought from third parties (for example, in response to a tender or as a result of a submission in response to a government initiative), consider how the information will be used and to whom it will need to be disclosed when drafting the request documentation.
- External parties should be mindful of their contractual obligations and the Commonwealth legislation that may apply when working on public sector initiatives.

More information

If you require further information or advice on confidentiality, and what AGS can do to help, please contact:

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