



## FOI and Contracting for State Government

The *Freedom of Information Act 1991* (FOI Act) requires agencies to provide greater access to contracts entered into by the Crown or an agency under FOI.

An agency includes all State Government Agencies, Local Government Authorities (ie Councils) and Universities.

### **Business Affairs Exemption and Contracts**

The *Business Affairs* exemption in clause 7 of Schedule 1 to the FOI Act does not apply to contracts entered into after 1 January 2005. That is, agencies are not able to claim a contract document exempt under FOI and, therefore, not provide access to it, merely because it is a contract containing business affairs.

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

### **Confidential Information and Contracts**

The *Confidential Information* exemption in clause 13 of Schedule 1 can not be claimed in relation to a contract *unless* the contract contains a confidentiality clause that has been approved by the responsible Minister (or his or her delegate) *before* the contract is executed. Confidential information may not necessarily be protected from disclosure under FOI if these approvals are sought after the contract has been entered into.

Approval of a confidentiality clause only needs to be sought where the contract is imposing an obligation of confidence on the government party. If the contract imposes confidential obligations on non-government parties to the contract, such as a private consultant, contractor or supplier, the inclusion of that particular confidentiality clause does not require approval.

### **Contracts that are affected**

The approval of confidentiality clauses in contracts only affect contract documents entered into after 1 January 2005. Contract documents include all types of contracts agencies enter into, including agreements and employment contracts.

Legal advice should be sought in regard to exercising an extension to a contract. In some cases, particularly where the terms of the contract are renegotiated, the contract may be considered a new contract and approvals may need to be sought for any confidentiality clauses.

## **When to use a Confidentiality Clause in a Contract**

During the preparation and negotiation of contracts every effort must be made to avoid incurring an obligation of confidentiality on the part of the government party. Justification for a confidentiality clause should result from the negotiation process and not be an automatic inclusion in standard contracts.

Including a confidentiality clause in a contract should be used only as a last resort. This is because the Objects of the FOI Act place agencies under an obligation to be as open and accountable as possible. Any standard contracts developed by agencies should not include a clause that imposes an obligation of confidentiality on an agency.

## **Delegation of the Power to Approve Confidentiality Clauses**

The FOI Act permits the Minister to delegate the power to approve confidentiality clauses to a specified person or the holder of a specified office. The delegation must be in writing and may be subject to conditions, or restrictions, as the Minister sees fit. The power to approve confidentiality clauses cannot be sub-delegated.

Delegations should be reviewed regularly and particularly following any administrative change to ensure the specified person or holder of a specified office is still the appropriate person to approve confidentiality clauses in contracts.

## **Premier and Cabinet Circular 27 and Contract Disclosure**

The State Government's Contract Disclosure Policy, issued as Premier and Cabinet Circular No 27 - Disclosure of Government Contracts (PC027), is not to be confused with confidentiality clauses under the FOI Act. PC027 relates to the public disclosure of contracts on the Government's Tenders & Contracts website. PC027 provides Chief Executives of State Government agencies the power to exempt parts of a contract from public disclosure on the Tenders and Contracts website. This will not affect an agency's obligation to disclose a contract where an exemption cannot be claimed under FOI.

The definition of an '*eligible contract*' in PC027 should not be confused with the meaning of a 'contract' as it appears in the FOI Act. The word 'contract' is not specifically defined in the FOI Act and should, therefore, be given its general legal meaning.

## **Reporting Requirements**

Clause 13(6) of Schedule 1 to the FOI Act requires agencies to report a contract that is to include a confidentiality clause to the Minister responsible for administering the FOI Act as soon as practicable after it is approved. The term '*as soon as practicable*' means as soon as practicable after the contract has been executed (ie signed by both parties).

The number of contracts containing confidentiality clauses is also to be reported in the FOI Annual Report.

To enable agencies to meet these reporting requirements, data relating to contracts will be derived from the Freedom of Information Management System (FOIMS) by State

Records and provided to the Minister. This means all agencies must ensure their data entered on FOIMS is up to date at all times.

For more information about the reporting requirements of agencies under the FOI Act, please see the FOI Information Sheet entitled *Reporting Requirements Under FOI*.