

# Guideline for determining requests for confidentiality in accordance with the Crown Contracts Confidentiality Policy

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Contact:

Department of Treasury and Finance

Procurement and Property Branch

GPO Box 147

Hobart Tasmania 7001 Australia

Telephone: (03) 6166 4444

Email: [purchasing@treasury.tas.gov.au](mailto:purchasing@treasury.tas.gov.au)

Website: [www.purchasing.tas.gov.au](http://www.purchasing.tas.gov.au)

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## Background

The Government is committed to ensuring that government contracting is conducted in an open and transparent manner and that contracts to which the Crown is a party do not contain confidentiality provisions which might unduly fetter public scrutiny of those contracts.

The Government's policy in relation to confidentiality provides that contracts between the Crown and another party must not contain confidentiality provisions.

From 15 September 2012 a Head of Agency may approve the inclusion of a confidentiality provision in a contract entered into, negotiated or arranged by his or her Agency in circumstances where the disclosure would cause unreasonable detriment to the Crown or another party to the contract and confidentiality, in part or in whole, is in the public interest.

Treasurer's Instruction 1401 provides general instructions on the procedures to be adopted to comply with the policy including the requirements for approval of confidentiality. Treasurer's Instruction 1402 provides additional general instructions in relation to disclosure of contracts and requirements specific to procurement are contained in Instructions [1124](#) and [1229](#).

Further information on the policy is available from the publication, *Crown Contracts Confidentiality Policy*, located on the [Purchasing website](#).

## Process for approving the inclusion of confidentiality provisions in contracts

An application for the inclusion of confidentiality provisions is to be made to the relevant Head of Agency during the contract negotiation stage by the officer responsible for the negotiation of the contract.

Approval for the inclusion of confidentiality provisions can only be given, on a case by case basis, where the relevant Head of Agency determines that the requirements of Instruction [1401](#) have been met.

The Head of Agency, in his or her absolute discretion, may decide that some of the provisions referred to in an application are to be disclosed even if approval is given for other provisions to be kept confidential. The Head of Agency should impose a limit on the period of confidentiality where it is considered practical to do so (ie at a certain point in time in the future the information will be partly released or fully released when the information is no longer sensitive).

The Head of Agency is required to provide his or her determination in writing and the written advice should set out the specific provisions that are to be protected, together with the time limit on the period of confidentiality. Thereafter, the terms of the contract must be drafted to give effect to the decisions of the Head of Agency and Crown Law advice must be obtained in this regard.

Retrospective approval may not be given, except in exceptional circumstances and where advice, in writing, is provided by a Crown Law Officer\* that the relevant confidentiality provisions are in the best interests of the Crown.

If a request for confidentiality is not approved, or if approval is given in terms not acceptable to either party to the contract, that party may either withdraw from the negotiations or waive their confidentiality requirements.

Where approval is given, the agency is responsible for reporting on the contract on its website and in their annual report.

It will be up to an individual agency to determine how it structures its internal processes for making determinations on requests from a contractor for confidentiality in a contract. However, it is recommended that agencies use their Procurement Review Committees or their Audit Committees to assist the Head of Agency in making such determinations.

Note: Information relevant to requests may be disclosed when required by law, for example under the *Right to Information Act 2009*.

## Assessing approvals

As a starting point, the provisions protecting confidentiality of the provisions of the contract must only be approved for inclusion in a contract where:

1. another party to the contract requests confidentiality or a Crown Law Officer\* has certified, in writing, that there are good and sufficient reasons for the Crown to maintain confidentiality; and
2. the provisions of the contract sought to be made confidential are specifically identified; and
3. the disclosure of the provisions of the contract would cause unreasonable detriment to the Crown or another party to the contract; and
4. confidentiality, in part or in whole, is in the public interest.

### ***A request by the other (non-agency) party to a contract or certification from a Crown Law Officer***

The Government's policy position is that government contracting is conducted in an open and transparent manner and that contracts between the Crown and any other party must not contain confidentiality provisions.

As a result, a decision by a Head of Agency to allow the inclusion of confidentiality provisions in a contract must arise as a result of a specific request by the other party to the contract or where a Crown Law Officer has certified, in writing, that there are good and sufficient reasons for the Crown to maintain confidentiality.

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\* Crown Law Officer is defined in the Instruction as being the Solicitor-General, the Assistant Solicitor-General, the Director of Public Prosecutions, any Assistant Director of Public Prosecutions, the Crown Solicitor and the Assistant Crown Solicitor.

## **The nature of the information**

The information must be:

- specifically identified; and
- such that disclosure would cause unreasonable detriment to the Crown or another party to the contract.

Guidance information on the assessment of these requirements is available from the Department of Finance and Deregulation's website at [www.finance.gov.au](http://www.finance.gov.au) at Finance Home » Procurement » Procurement Policy & Guidance » Buying for Government » Contract Issues » Confidentiality through the Procurement Cycle » Practice and at [Finance Home](#) » Procurement » Procurement Policy & Guidance » Buying for Government » Contract Issues » Confidentiality Procurement Cycle » [Tips](#).

## **The “Public Interest” Test**

Once it is determined that the nature of the information is such that it should be considered suitable to be excluded from the application of the Crown Contracts Confidentiality Policy, the next step is to determine whether confidentiality is in the public interest.

In this regard, reference should be made to the public interest tests contained in section 30A of the *Audit Act 2008* and Schedule 1 of the *Right to Information Act 2009*.

For example, it would be in the public interest to allow confidentiality where public disclosure of information could:

- unfairly prejudice the commercial interests of any persons or body; or
- cause damage to the relations between the Government of the State and another Government; or
- divulge information or a matter that was communicated in confidence between the State and the Commonwealth or between the State and another State or a Territory.

Common law precedents relevant to the issue of what constitutes public interest may also be of assistance.

## **Reporting requirements**

### **Website reporting**

The Treasurer's Instruction [1401\(8\)](#) provides that contracts containing confidentiality provisions must be reported by the Agency on their website.

The TI does not mandate the information to be included, however, the following is an example of the type of information recommended to be included on the agency website:

*The Crown Contracts Confidentiality Policy provides that contracts between the Crown and any other party must not contain confidentiality provisions, unless approved by a Head of Agency. Approvals are only provided where the Head of Agency determines that disclosure would cause unreasonable detriment to the Crown or another party to the contract and confidentiality, in part or in whole, is in the public interest.*

*The table below lists contracts that contain confidentiality provisions as a result of an approval by the Head of Agency of the Department of X. All such contracts will also be disclosed in the Department's Annual Report.*

| Parties               | Date of approval | Date confidentiality no longer applies | Contract type | Agency contact details   | Details of whether the contract is published and a link to the contract if published electronically |
|-----------------------|------------------|--|---------------|--|---|
| Crown and XLS Pty Ltd | 12/9/2012        | 12/9/2013                              | Lease         | B Smith, Chief Procurement Officer, 29 Elizabeth Street, Hobart<br><br>6254 7891<br><br>b.smith@deptx.tas.gov.au | Yes<br><br>www.deptx.tas.gov.au/lease2  |

### Annual report

The Treasurer's Instruction [1401\(9\)](#) provides that contracts containing confidentiality provisions must be disclosed in the relevant Agency's Annual Report. The information to be included, for each such contract, is:

- the names of the parties; and
- the date of approval by the Head of Agency of the inclusion of the confidentiality provisions.

The following is an example of the type of information to be included in the Annual Report:

#### **Contracts containing confidentiality provisions as a result of an approval pursuant to the Treasurer's Instruction 1401(4) during 2012–13**

*The Treasurer's Instruction 1401 provides that contracts between the Crown and any other party must not contain confidentiality provisions except where the Head of Agency determines that disclosure would cause unreasonable detriment to the Crown or another party to the contract and confidentiality is in the public interest.*

| Parties               | Date of approval of confidentiality |
|-----------------------|-------------------------------------|
| Crown and XLS Pty Ltd | 12/9/2012                           |

### Other reporting or disclosure requirements

For other reporting and disclosure requirements relating to contracts please refer to Treasurer's Instructions 1110, 1111, 1212, 1213, 1402 located on the [Treasury website](#) and the *Crown Contracts Confidentiality Policy* located on the [Purchasing website](#).

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