

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
ATTORNEY-GENERAL'S PORTFOLIO

Question No. 90

Senator Murray asked the following question at the hearing on 31 October 2005:

ANAO audits for the last three years have revealed a consistently low level of compliance across most agencies with DOFA confidentiality criteria (February 2003) for determining whether commercial information should be protected as confidential. The ANAO's latest report on the Order (No.11 2005-2006, September 2005) states that departments and agencies need to give higher priority with this important requirement of the Senate Order.

- a) What specific measures have been or will be taken to address this problem, give it higher priority and raise compliance levels?
- b) What guidance and training are provided to staff about the confidentiality criteria and the four tests employed to determine whether information should be protected?
- c) What internal auditing or checking is performed to test compliance in this area? If none is performed, why not and is the agency considering the adoption of internal controls and checks?

The answer to the honourable senator's question is as follows:

Attorney-General's Department

- a) The Department makes ongoing efforts to comply with the confidentiality criteria by maintaining appropriate guidance materials for use during the procurement process and by providing guidance during the data gathering phase to develop internet listings. For instance, data coordination requests to senior managers highlight recent audit findings and recommendations, as well as ministerial views that more caution needs to be taken in complying with the Senate Order. A quality assurance process, in preparing the listing, is also in place.
- b) Appropriate procedures and guidance is provided to officers at the time the contract list is prepared. In addition, the Department's standard contract templates (as a component of tender documentation) include guidance on the four tests. A training program on confidentiality provisions is planned for staff within the Department, which will include the need to fully document the reasons for the confidentiality of clauses.
- c) The Department currently has two phases to internal checking by the central procurement advisers. Firstly, data is checked against the Financial Management Information System and other internal contract lists to ensure full capture, or reasons for non-listing. Secondly, clarification is required from Divisions where confidentiality claims are made that may appear incongruous.

More detailed quality assurance reviews of procurement processes and documentation is planned for early and mid 2006. Included in these reviews will be considering the appropriate identification of confidential information and listing on the internet.

Administrative Appeals Tribunal (AAT)

- a) The Tribunal uses a standard contract that requires contractors to specifically identify confidentiality requirements and supply reasons for the confidentiality.
- b) As a small agency only a limited number of managers are involved in procurement and they are aware of the requirements.
- c) It is part of the internal audit plan.

Australian Crime Commission (ACC)

- a) The ACC restricts publication or limits specific details of contracts and procurement only on the basis of sensitivity and the potential to compromise operations.
- b) ACC staff use templates which include appropriate confidentiality clauses.
- c) ACC internal audits cover compliance with the Order.

Australian Customs Service (ACS)

a) Customs has made the Department of Finance and Administration's Financial Management Guidance No. 8 *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts* January 2004 and Financial Management Guidance No. 3 *Guidance on Confidentiality of Contractor's Commercial Information* February 2003 available to all Customs staff on its internal intranet. The confidentiality criteria of the Senate Order is checked in all contracts by staff involved in the procurement and contract negotiation stages. Customs attempts to negotiate any claims to confidentiality out of contracts before signature.

Customs has outlined the confidentiality requirements in its Chief Executive Instructions and regularly provides training and awareness sessions to staff. Customs proposes to continue these initiatives.

b) The confidentiality criteria and the four tests employed to determine whether information should be protected is provided to staff through the provision of the Department of Finance and Administration's Financial Management Guidance No. 8 *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts* January 2004 and Financial Management Guidance No. 3 *Guidance on Confidentiality of Contractor's Commercial Information* February 2003 to all staff through the internal intranet. The confidentiality criteria and four tests are also covered in staff training and awareness sessions.

c) The National Procurement and Contracting Section within Commercial Services Group compiles the Senate Order report as required. In compiling the report the area compares a central Contracts Register, entries on the Gazettal Publishing System (GaPS) and financial data from the financial management information system. The final list is then checked against the Department of Finance and Administration guidance on confidentiality.

Customs internal audit program provides regular audits on Customs procurement operations including the requirements of the Senate Order report. The most recent audit was conducted in September 2005.

Australian Federal Police (AFP)

a) The AFP had nil contracts (for the last reporting period) which contain provisions requiring the parties to maintain confidentiality of any of its provisions.

The AFP has a number of measures in place to ensure compliance with the Senate Order, particularly, the requirement for business areas to consult with National Procurement and Contracts, and AFP Legal on all procurement processes valued above \$80,000.

b) The AFP's tender documents, including the draft contract, and the AFP's Contract Registration Form provide guidance on the Senate Order. This guidance will be enhanced further when the AFP develops its comprehensive procurement and contract management training program in early to mid 2006.

c) All contracts are vetted by Legal prior to their execution to ensure compliance with the Senate Order.

Australian Security Intelligence Organisation (ASIO)

ASIO provides guidance to staff on the Chief Executive's Instructions and compliance with the Commonwealth Procurement Guidelines which cover the requirements of the Senate Order.

a) In 2005, ASIO staff attended contracts training offered by the Australian Public Service Commission. The APSC training covers the requirements of the Senate Order. ASIO also provides in-house awareness sessions on its procurement reporting obligations conducted by the agency contracts adviser.

b) ASIO's Chief Executive's Instructions were updated in 2005 to reflect the revised Commonwealth Procurement Guidelines that took effect from 1 January 2005. The Instructions refer to the Department of Finance publications, Financial Management Guidance No.3: Guidance on Confidentiality of Contractors' Commercial Information (February 2003) and Financial Management Guidance No. 8: Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency contracts) (January 2004).

c) ASIO is developing a procurement unit to support the role of the agency contracts adviser. This unit will be responsible for awareness raising, compliance monitoring and meeting the Organisation's reporting requirements in this area.

Australian Transaction Reports and Analysis Centre (AUSTRAC)

a) The Agency will be conducting a review of its template contracts to ensure compliance with DoFA confidentiality criteria. Request for tender documentation will also be reviewed to ensure they contain satisfactory information and instructions relating to confidentiality of information in contracts.

b) Staff are provided with Senate Order specific procurement guidance material developed by the Department of Finance and Administration (DoFA) which covers the confidentiality of contractors' commercial information.

c) AUSTRAC incorporates competitive tendering and contracting practices (including compliance with the Commonwealth Procurement Guidelines) into its audit program.

CrimTrac

a) CrimTrac was part of the ANAO 2003 report on the Order. Since this Audit, CrimTrac has reviewed its procedures to ensure compliance with the confidentiality criteria. In CrimTrac's most recent Senate Contract List only one contract was listed with confidentiality provisions. This contract had already been considered appropriate to list this way by the ANAO.

Additionally, CrimTrac intends to run a procurement and contract training seminar early 2006 to ensure compliance in relation to all aspects of contracting.

b) Trained Strategic Support and Communications staff provide guidance to agency staff who are involved in contract preparation. CrimTrac's Senate Contract List is prepared according to a procedure which has been examined and supported by the ANAO. All contracts made with CrimTrac must be checked and registered by the Strategic Support and Communications section of the agency which is also responsible for preparing the Senate Contract List. This ensures consistency throughout the agency.

c) The Senate Contract List is checked by a number of staff in the Strategic Support and Communications team and also against the Financial Management Information System and our internal contract register.

Commonwealth Director of Public Prosecutions (CDPP)

a) The Department of Finance and Administration's confidentiality criteria are applied as part of the tender process.

b) i) Copies of the Commonwealth Procurement Guidelines and other procurement guidance material issued by Department of Finance and Administration, including FMG3, "Guidelines on Confidentiality of Contractors' Commercial Information" and FMG 8, "Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)" are available on our intranet site for all staff to refer to.

ii) A member of staff is presently completing training in Certificate IV Government (Procurement and Contracting) and is available to provide advice.

c) Compliance is reviewed by a senior staff member.

Family Court of Australia

a) At this time the Family Court of Australia (the Court) has not adopted any additional measures given current compliance with the requirement – all contracts over \$100,000 have been reported/published.

b) Internal procedures and tender documentation state the reporting requirements and provide reference to the guidance available through DoFA. Staff providing support to procurement and contracting activities are made familiar with the reporting evaluation criteria and additional information available for guidance, such as the Finance 'Guidance on Confidentiality'.

c) All procurement processes valued at \$80,000 or more are procedurally required to be actioned through and/or reported to the Court's Contracts and Property section. Reporting through the sections database/register is cross referenced with the Court's financial data to ensure all contracts

over \$100,000 are reported. There is a contracts and procurement compliance audit planned during the second half of 2005/06. This audit will be conducted by internal audit.

Family Law Council

The Family Law Council does not separately contract or purchase services. It is an advisory body that operates within the Department.

Office of Parliamentary Counsel (OPC)

a) The Office of Parliamentary Counsel (OPC) is a small agency with only a very small number of contracts which are negotiated by members of the Senior Management Team.

Internal procurement guidelines/procedures refer to the Commonwealth Procurement Guidelines. The Senior Management Team are aware of the need to comply with DoFA confidentiality criteria for determining whether commercial information should be protected as confidential.

b) No additional guidance or training and awareness sessions are provided to OPC staff. Guidance provided in ANAO and DoFA publications is adequate.

c) OPC had an internal audit on contracts in 2004.

Office of the Privacy Commissioner

a) The Office operates under the current *Commonwealth Procurement Guidelines and Policy Framework*.

As allowed under the Policy Framework, the processes and guidelines internally developed by the Office reflect the limited size and scope of the procurement activities within the organisation. Under a corporate support agreement, HREOC undertakes procurement activities on behalf of the OPC. OPC policies and practices mirror the reporting provisions set down in the procurement guidelines. In particular the Office intranet contains a specific link in its Procurement Guideline area to the *Confidentiality of Contractors* guideline. The Office will seek advice from HREOC on whether the existing arrangements are adequate in the light of the recent ANAO report.

b) The Office does not provide any specific training or awareness sessions for staff concerning the relevant confidentiality clauses. This training has not been provided because procurement exercises giving rise to requests for confidentiality clauses are unusual events. The Office has not sought to develop in-house expertise in this area because procurement involving contracts is coordinated centrally on the Office's behalf by HREOC. Under the service agreement HREOC carries out procurement activities on behalf of the Office and advises the Office on requirements for compliance with the procurement guidelines and reporting requirements including those arising under the Senate Order.

c) As required under the *FMA Act (1997)*, the Office has established an audit committee and internal audit function to assist management in monitoring compliance in reporting requirements, amongst other matters. As part of this process the audit committee regularly reviews the organisations compliance risks to ensure that the control environment is sufficient to address the assessed risks. Internal audit recently reviewed the purchasing activity performed by HREOC on behalf of the OPC and did not identify any compliance concerns associated with the Senate Order reporting requirements.