

Use and disclosure of confidentiality provisions in government contracts

Queensland Government Procurement



Use and disclosure of confidentiality provisions in government contracts.

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Purpose

This purpose of the Use and disclosure of confidentiality provisions in government contracts guide is designed to help government buyers understand and implement confidentiality requirements into their procurement and contracting practices. This guide should be read in conjunction with the *Queensland Procurement Strategy 2023 – Jobs, Economy, Legacy, Confidence* (QPS), the *Queensland Procurement Policy 2023* (QPP) and your agency's policies, procedures, and guides for procurement.

Introduction

The Queensland Government is committed to observing high standards of integrity, probity and accountability commensurate with the objective, value and risk of the procurement.

Maintaining confidentiality of competitive commercial information should always be balanced with ensuring the public's right to access government held information.

Embedding integrity, probity and accountability in our activities and processes and behaving ethically are key principles of the *Queensland Procurement Policy 2023* (QPP). The Queensland Government displays this culture by:

- being fair and impartial
- delivering timely outcomes using public resources
- ensuring that decisions we make are transparent and defensible, and
- meeting expected standards of probity and accountability.

What is confidential information?

In government procurement, a request for confidentiality is made when information given by the supplier to a government agency is done so in circumstances where both parties understand the information is to be kept confidential.

There are generally two types of confidentiality provisions in contracts:

- **General confidentiality provisions** - these are found in standard contractual conditions (such as the Queensland Government's conditions for general goods and services conditions and general contract conditions under Queensland Information Technology Contracting framework QITC). These provisions set out a general understanding between the agency and supplier on how to deal with information under a contract.
- **Specific confidentiality provisions** - these are specific requests from a supplier to keep certain information confidential. Specific confidentiality provisions are captured in a bespoke confidentiality agreement drafted by legal services.

Confidentiality provisions in government contracts

This guide sets out the requirements for using specific confidentiality provisions.

The existing confidentiality provisions contained in standard government contract condition templates are, for the purpose of this guide, referred to as general confidentiality provisions.

General confidentiality provisions

General confidentiality provisions are the provisions provided in the general contract conditions. These provisions provide a general understanding of how the parties will manage information relating to the contract and disclosure of information. This ensures information is not disclosed except to appropriate departmental officers and supplier personnel on a need-to-know basis for the purpose of performing the contract.

General confidentiality provisions **do not keep government agencies from publishing** information about the contract as part of the government's contract disclosure requirement (refer to the QPP clause 31).

If a procurement officer identifies that the general confidentiality provisions are insufficient, a specific bespoke confidentiality agreement should be used.

Specific confidentiality provisions

A specific confidentiality provision relates to information that a supplier has explicitly requested to be kept confidential. The request will be considered on a case-by-case basis and should be based on the outcome of the Confidentiality Test (refer later in the guide for more information). The information can be existing at the establishment of the contract, or it can be information generated in the performance of the contract. It is the responsibility of the supplier to request that the specific information be kept confidential. Specific confidentiality agreements must be drafted by legal services as a bespoke confidentiality agreement.

The details in the bespoke confidentiality agreement **will generally not be published** as part of contract disclosure under the QPP. It is not a guarantee of absolute confidentiality. Under the *Right to Information Act 2009* (RTI Act), the agency may be obliged to disclose information or documents in its possession.

Confidentiality agreements should only be entered into when the request to keep information confidential is clearly understood and agreed between the parties. Simply being provided a document marked 'confidential' is not a sufficient reason for a bespoke confidentiality agreement to be put in place.

Confidentiality provisions should not be used as a matter of course and should only be included where there is strong justification for confidentiality.

Legislated confidentiality requirements

Legislation in force governs how certain types of information should be dealt with and is to be kept confidential by default.

Information of this legislative nature does **not** need a bespoke confidentiality agreement.

An example of this is the *Information Privacy Act 2009* (IP Act) which applies to the Queensland public sector. The IP Act contains privacy principles which set out how agencies handle personal information. Personal information in this instance means any information about an identifiable person (e.g., name, address, phone number, email address, age, or gender). If a contract contains personal information, the agency must have appropriate procedures in place to ensure the information is kept secure from unauthorised access, use, modification, disclosure, or other misuse.

In some cases, there may also be specific legislation administered by or applicable to an agency that confers additional privacy and confidentiality obligations. In these cases, procurement officers should seek legal advice to ensure adherence to these obligations. For example, officers within Queensland Health must follow additional guidelines to protect people's health and medical details.

Other areas relevant to confidentiality

Right to Information Act 2009

Under the RTI Act, all public sector information is open to the public as a starting point. Information can only be withheld by government agencies if there is a good reason not to disclose it. Schedule 3¹ of the RTI Act contains a list of information that is considered exempt/confidential information and would therefore be contrary to the public interest to release. These decisions are made within the RTI unit by delegated officers.

Confidentiality deeds

The Queensland Government has published category specific 'Confidentiality, Privacy and Conflict of Interest Deeds'.² These deeds are usually used when approved parties or supplier personnel are required to be involved in delivering parts of the contract. It is not necessary for the supplier to sign the Confidentiality, Privacy and Conflict of Interest Deed as they are bound to comply with the confidentiality obligations in the general contract provisions.

Identifying specific confidential information

The reason for specific confidentiality requests from suppliers vary greatly. For example, suppliers may request to keep information confidential because they do not want to risk losing their competitive advantage. Common requests for confidentiality relate to:

- **Trade secrets** – examples include a formula, technical design and commercial production method.
- **Price** – examples include internal costing information or information about profit margins and pricing structure, individual prices, rebates and guarantees.

Requests for confidentiality must be precise and specific

The request to keep information confidential needs to be precise and highly specific. If it is too broad it may be meaningless. The information should not be generally known to the public or ordinarily be available to competitors. For example, if a supplier asks to keep business related information confidential, this must be precisely identified and needs to clearly demonstrate that the supplier would be disadvantaged by the disclosure of such information.

The procurement officer will need to consider the confidentiality request and balance that with public interest factors favoring disclosure and non-disclosure to determine whether it is contrary to the public interest to release the information.

Information in tender documents is unlikely to be considered confidential if it:

- contains little sensitive detail or is generic in nature
- is common knowledge in the industry
- is common knowledge or already in the public domain (e.g. information in the press or on a supplier's website, that is common knowledge in the industry or is generic in nature).

¹ Available online via the Queensland Legislation website: www.legislation.qld.gov.au/view/html/inforce/current/act-2009-013.

² Available online via <https://www.forgov.qld.gov.au/finance-and-procurement/procurement/procurement-resources/templates-including-terms-and-conditions>

Maggbury Pty. Ltd. v. Hafele Australia Pty. Ltd.

In the case of Maggbury Pty. Ltd. v. Hafele Australia Pty. Ltd.³, the parties had entered into an agreement containing a request for confidentiality around the product and design of goods created by Maggbury and marketed by Hafele.

In the agreement Hafele had agreed to keep all information provided by Maggbury in relation to the product confidential. When negotiations failed, Maggbury accused Hafele of violating the confidentiality agreement. The Court held that the confidentiality provisions were so broad that the restriction in the agreement was unreasonable.

A potential claim for specific confidentiality by a supplier during the tendering process should not be inconsistent with the agency's requirement and objective of the procurement. An example of this would be if an agency releases a tender for audit services. The purpose of the procurement is to conduct an audit of the agency's compliance to accounting practices. The audit outcome will be published on the agency's website in line with the government's approach to be more transparent. The successful auditor has requested that the audit itself be confidential. This request should be denied by the agency due to the inconsistency with the requirements of the procurement.

In cases like this, agencies should clearly outline the objectives of the procurement upfront and make it clear that the outcome will be accessible on a public facing repository.

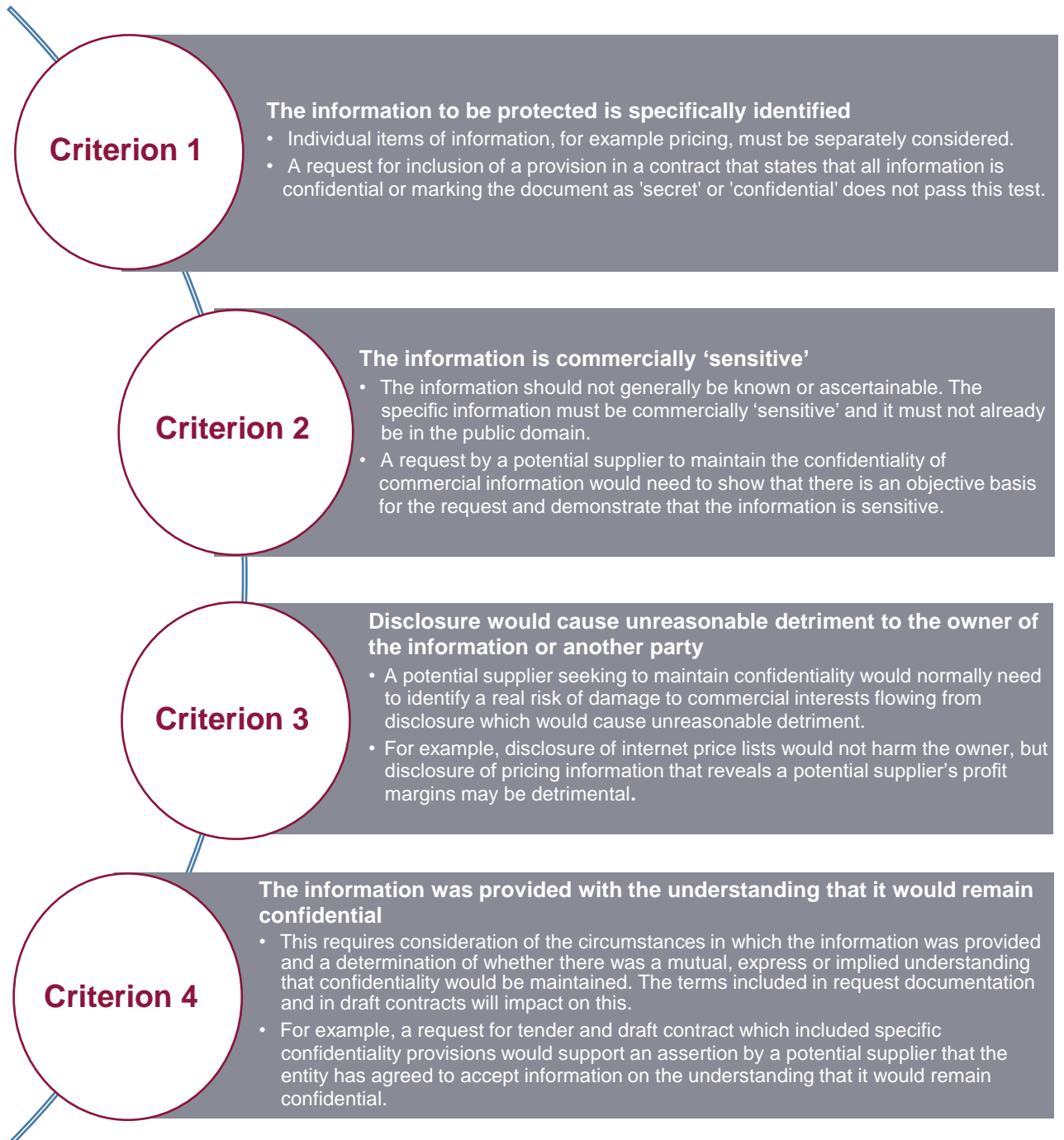
Long term implications and suitability of confidentiality in contracts

Agencies also need to assess the long-term implications and suitability of agreeing to keep specific information confidential. For example, the procurement officer must determine whether the contract information will need to be provided to any third-party providers during the term of the contract. If the nature of the contract is such as there will a requirement for frequent third-party input and advice, a specific confidentiality deed might not be the most suitable way of managing confidential information.

³ Further information on Maggbury Pty. Ltd. v. Hafele Australia Pty. Ltd. is available online at: www.austlii.edu.au/au/journals/DeakinLawRw/2005/31.html.

Confidentiality Test

To assist procurement officers in determining if the requested information can and should be confidential, a Confidentiality Test can be applied. Procurement officers must keep appropriate documentation supporting their assessment and outcome. All four criteria must be met for the supplier's information to be considered confidential.⁴



⁴ Source: Adapted from 'Confidentiality throughout the procurement cycle'. Department of Finance, Australian Government. Available online at <https://www.finance.gov.au/government/procurement/buying-australian-government/confidentiality-throughout-procurement-cycle>.

Planning and managing confidential information

Planning

During the planning stage, the procurement officer should plan for how to deal with potential confidential information. The procurement officer should plan for how to deal with the information for the procurement lifecycle (i.e. before the tender is released, during the tender process, the contract negotiation/drafting stage and the contract management stage).

Procurement officers should try to manage the extent to which potential suppliers are required to submit commercially sensitive information in their submissions. When preparing the tender and a draft contract, include additional information (where appropriate) on the procedure for protecting confidential information, or information about how the agency will deal with requests to keep certain information confidential.

Clearly outline the procedure for how suppliers can request a confidentiality assessment. The potential request for a confidentiality assessment should always be taken into consideration when planning the procurement as some more complex requests can take a long time to draft and negotiate.

Tendering and contracting

The request for a specific confidentiality assessment can arise at any time during the tendering period through to the contract negotiation stage.

Confidentiality during the tender and evaluation stage

During the tender and evaluation stage, information such as tender submissions, meeting notes and records of the evaluation must be treated as confidential information. Unauthorised release of material generated during the tender and evaluation stage could potentially impact the outcome of the project and raise issues with probity and accountability. To reinforce the importance of treating information as confidential, the evaluation panel and any potential advisors must sign a confidentiality undertaking with clear guidance on how information should be treated.

If a procurement officer receives a request for a specific confidentiality assessment during the tendering and contracting stage, the following steps are required to properly assess the request:

1. The supplier submits a written request for a specific confidentiality provision. The specific information should be clearly identified in the tender/contract documentation. It is important that the supplier shows proof of ownership of the information which they seek to keep confidential.
2. The procurement officer should review the documentation and provide the supplier with an indicative timeframe for when the assessment will be ready.
3. The procurement officer reviews the request and undertakes the Confidentiality Test. The Confidentiality Test results in a pass or fail.
4. The procurement officer drafts a summary of the Confidentiality Test results and obtains appropriate sign off by a procurement delegate.
5. The supplier receives written correspondence regarding the result of their confidentiality request.
6. The approved confidentiality provision is captured in an agency's contract management system/register (refer to 'Keeping a central record of confidentiality provisions' for further information).

Failure to meet the Confidentiality Test

Where a request for specific confidentiality has failed to meet the Confidentiality Test requirements, the agency should provide the supplier with information about the reason for not approving the request. If the supplier is unsatisfied with the result, legal advice should be sought on the matter.

Case study: Total price

In contract negotiations, a potential supplier of human resource services asks an agency to maintain the total price of a proposed contract as confidential on the basis that release of the information would enable its competitors to estimate future bids by the organisation. In the Conditions of Offer, the agency indicated that the Queensland Government is required to report the contract price as part of QPP requirements for contract disclosure.

Analysis of the request indicates that the claim does not meet the test for confidentiality:

1. Criterion One – Met

The information identified as confidential is specific, being the total price of the contract.

2. Criterion Two – Not met

The total price does not have the quality of confidentiality after a contract is signed. Despite the potential supplier's claim, the information is not commercially sensitive in a contract because it does not provide sufficient detail to enable competitors in the market to determine the potential supplier's cost structures and profit margins.

3. Criterion Three – Not met

Disclosure of the total price would not damage the supplier's commercial interests given the issues raised in the previous point. In relation to the potential supplier's claims, future bids by the organisation would need to address the statement of requirements, which may involve the provision of different services, service levels, and possibly, use of different service delivery methods. Accordingly, disclosure of the total price in this case is unlikely to provide sufficient information for the potential supplier's competitors to determine the likely price of future bids by the supplier.

4. Criterion Four – Not met

An understanding of confidentiality does not exist between the agency and potential service supplier at this point.

Result: Based on this analysis, it would not be appropriate for an entity to agree to a request to maintain confidentiality as not all the criteria have been met.⁵

⁵ Source: Adapted from 'Confidentiality throughout the procurement cycle'. Department of Finance, Australian Government. Available online at: <https://www.finance.gov.au/government/procurement/buying-australian-government/confidentiality-throughout-procurement-cycle#tips>.

Putting in place a bespoke confidentiality agreement

Once the Confidentiality Test has been applied and evaluated, the procurement officer must arrange for the confidential information to be drafted and included in a bespoke confidentiality agreement. Simply relying on the general confidentiality provision in the contract conditions is not sufficient. Procurement officers must seek legal advice on drafting a bespoke confidentiality agreement to ensure that all legal and accountability obligations are captured.

Managing the contract

Confidential information can only be confidential if it is kept secure. It is the responsibility of the agency to have policies and procedures in place to keep confidential information securely stored and that any risk of unauthorised disclosure is appropriately mitigated. This includes physically protecting the information from being accessed by unauthorised personnel. Agencies should establish procedures for recording confidential information such as creating a register where the confidential information is documented.

Contract management plans should also deal with how confidentiality will be managed. At a minimum, this should include:

- a summary of the confidential information and where in the contract the confidential information is referred to
- the timeframe for confidentiality clause(s) – are they for the term of the contract or does it become obsolete after a certain contract period (confidentiality should only be maintained for the period the information is deemed confidential)
- current state of the confidential information – is it existing or will it be generated during the term of the contract
- risk assessment and mitigation strategies to avoid unauthorised disclosure.

Ultimately senior management is accountable for the storage of confidential information held by government agencies and must ensure that this information is used on a need to know basis.

Improper use of confidentiality

Under current legislation, improper use of confidential information by procurement officers or other government officers can be a criminal offence.

Improperly accessing and/or disclosing such information can⁶:

- damage the reputation of the organisation or individuals
- provide unfair advantages (for example, commercial) to the recipients of the information
- adversely affect projects, activities and the public interest
- increase the likelihood of corruption (petty misuse is likely to lead to more systemic and serious abuse over time).

Contract disclosure

Just because a contract contains confidential information, it does not mean that a contract cannot be disclosed. For example; if a bespoke confidentiality agreement has been created to protect the suppliers proposed unit cost, it does not prevent the agency from disclosing the total estimated value of the contract.

⁶ 'Confidential information: unauthorised access, disclosure and the risks of corruption in the Queensland public sector'. Crime and Corruption Commission Queensland. Available online at: <http://www.ccc.qld.gov.au/corruption-prevention/confidential-information/confidential-information>.

Keeping a central record of confidentiality provisions

Each agency should ensure that it has a register in place to capture contracts that contain specific confidentiality provisions. Ideally this should form part of the agency's contract management system/register. Having this enables the agency to quickly see which of its contracts have bespoke confidentiality agreements in place and helps them to ensure that confidential information is not accidentally disclosed.

Agencies should also be aware that the 'Procurement guidelines: Contract disclosure' require the publishing of whether a specific confidentiality clause has been used as part of undertaking contract disclosure.

For physical records of confidential procurement information, procurement officers should refer to the Queensland Government information security classification framework (QGISCF) which sets the minimum requirements for information security classification. According to the QGISCF, the most appropriate classification of confidential procurement information is Commercial-In-Confidence⁷.

Ensuring proper records are kept

Like all procurement activities, any decisions related to the use of confidentiality provisions must be documented. In particular, the reason(s) for the use of any specific confidentiality provisions needs to be documented.

Release of information under a confidentiality provision

The type of information it would be reasonable to disclose, such as total value of the contract, will depend on the nature of each contract and the confidentiality issue involved. There are two circumstances under which information subject to a confidentiality provision may be released:

- firstly, at a point in time where the information subject to the provision is no longer considered commercially sensitive, for example, after commercial negotiations and contracting are complete
- secondly, where disclosure is necessary to meet transparency and accountability requirements including disclosure as part of an entity's annual financial statements.

Checklist

Requirements	Yes / No
Has the supplier specifically asked for information to be kept confidential?	
Does the request pass the Confidentiality Test?	
Has a bespoke confidentiality agreement been developed by legal services?	
Has a contract file been created?	
Has the confidential information in the file been expressly marked confidential?	
Has the confidentiality provision been captured in reporting?	

⁷ 'Information security classification framework, Queensland Government Chief Information Office (QGISCF)'. Available online at: www.qgcio.qld.gov.au/documents/information-security-classification-framework-qgisf.