

# Confidentiality and disclosure of government contracts

**Report 8: 2017–18**



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## Reference to comments

In accordance with section 64 of the *Auditor-General Act 2009*, we provided a copy of this report to the departments of Housing and Public Works; Premier and Cabinet; Natural Resources, Mines and Energy; Environment and Science; and State Development, Manufacturing, Infrastructure and Planning. In reaching our audit conclusions, we have considered their views and represented them to the extent we deemed relevant and warranted when preparing this report.

We received responses from the departments of Housing and Public Works; Premier and Cabinet; Natural Resources, Mines and Energy; Environment and Science; and State Development, Manufacturing, Infrastructure and Planning. The responses are in Appendix A.

## Report cost

This audit report cost \$285 000 to produce.



Your ref:  
Our ref: 2017-9158P



20 February 2018

The Honourable C Pitt MP  
Speaker of the Legislative Assembly  
Parliament House  
BRISBANE QLD 4000

Dear Mr Speaker

**Report to Parliament**

This report is prepared under Part 3 Division 3 of the *Auditor-General Act 2009*, and is titled *Confidentiality and disclosure of government contracts* (Report 8: 2017–18).

In accordance with s.67 of the Act, would you please arrange for the report to be tabled in the Legislative Assembly.

Yours sincerely

Brendan Worrall  
Auditor-General

# Contents

**Audit objective and scope ..... 2**

**Summary ..... 3**

    Audit conclusions ..... 4

    Summary of audit findings ..... 5

**Recommendations..... 8**

**Contact the Queensland Audit Office ..... 51**

## KEY FACTS



Queensland Government estimates its annual spend on essential goods and services as over \$14 billion\*



Government policy of open and transparent information



All reportable contracts valued at \$10 000 and over are to be disclosed\*\*



Over 56 000 contracts disclosed on Open Data alone as at September 2017\*\*\*



Multiple reviews and inquiries into integrity, accountability and transparency of government

Source:

\*Queensland Government Procurement Strategy 2017

\*\*Queensland Procurement Policy 2017

\*\*\*Queensland Government data—Queensland Government contracts directory—awarded contracts

## Audit objective and scope

In this audit, we examined the use of confidentiality provisions in Queensland Government contracts. We also assessed whether selected departments met contract disclosure requirements. The audit included the:

- adequacy of current guidance available to aid staff in these activities
- impact of these activities on accountability and transparency.

The audit scope included five departments:

- Department of the Premier and Cabinet
- Department of Housing and Public Works
- Department of Environment and Science
- Department of Natural Resources, Mines and Energy
- Department of State Development, Manufacturing, Infrastructure and Planning.

## Summary

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The Queensland Government has adopted a model of openness through the routine release of information to the public. The government aims to make information available to the public as a matter of course, unless there are compelling reasons for keeping it confidential.

The primary objective of the *Right to Information Act 2009* is to:

... give a right of access to information in the government's control unless, on balance, it is contrary to the public interest to give that access.

In keeping with the policy of open information and the *Right to Information Act 2009*, parliament and members of the public should have access to government contract information unless there is a sound reason not to. This includes government contracts for the procurement of goods and services. The public has a right to know how much public money government is spending, on what, and with which vendors.

### Confidentiality provisions

While confidentiality provisions are required for government to protect sensitive information for itself and its stakeholders, inappropriate use can reduce transparency and public trust in government.

Contracts can include one or both types of confidentiality provisions—general and specific. General provisions set out a general understanding between the parties on how they will deal with information when performing the contract. Most government contracts contain standard general confidentiality provisions which do not preclude agencies from publicly reporting the required contract information.

Specific confidentiality provisions make specific information contained in a contract, or information obtained or generated in carrying out the contract, confidential. This doesn't usually prevent agencies from disclosing the required contract details. In these cases, the agency must specifically identify the information considered confidential and record the reason for non-disclosure of this specific information.

The Office of the Chief Advisor—Procurement, within the Department of Housing and Public Works, produced the *Procurement Guidelines—Contract Disclosure*. These guidelines reinforce the model of an open and transparent government by stating:

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

### Disclosure requirements

The *Queensland Procurement Policy 2017* requires agencies to publish basic details for awarded contracts valued at \$10 000 and over, and additional contract details for awarded contracts valued at \$10 million and over. The *Procurement Guidelines—Contract Disclosure* requires affected agencies to disclose certain types of contracts publicly. Affected agencies include departments, large statutory bodies and special purpose vehicles.



The *Procurement Guidelines—Contract Disclosure* require agencies to report awarded contracts valued at \$10 000 or more in the QTenders system. However, some agencies also currently report awarded contracts or transactional reporting of invoices and purchase orders of value \$10 000 or more in the Queensland Contracts Directory. Agencies (through the Office of the Chief Advisor—Procurement) also report some contract information on Queensland Open Data. Figure A shows the three contract disclosure systems that are available to agencies, including the source of the data, and who administers the system.

**Figure A**  
**Contract disclosure systems available to agencies**

Contract disclosure system	Source of data	Type of data disclosed	System administrator
QTenders	<ul style="list-style-type: none"> <li>Contract award through QTenders</li> <li>Manual input by agencies</li> </ul>	Full contract details	Department of Housing and Public Works' Office of the Chief Advisor—Procurement
Queensland Contracts Directory	<ul style="list-style-type: none"> <li>Insights Data Warehouse</li> <li>Manual input by agencies</li> </ul>	Transactional data Full contract details	Department of Housing and Public Works' Office of the Chief Advisor—Procurement
Queensland Open Data	<ul style="list-style-type: none"> <li>Queensland Contracts Directory</li> </ul>	Transactional data Full contract details	Queensland Government Chief Information Office

Source: Queensland Audit Office.

To assess the confidentiality and disclosure of government contracts, we examined the adequacy of current systems and guidance available to all affected agencies. We then examined a sample of contracts for five departments.

## Audit conclusions

We set out to assess the extent and appropriateness of the use of confidentiality provisions in Queensland Government contracts. However, we were unable to do this because the five audited departments' contract registers lacked sufficient information.

While most Queensland Government contracts contain general confidentiality provisions, we identified only a few examples of contracts containing specific confidentiality provisions at the five departments we audited. This was because the departments did not record whether contracts used specific provisions. And for those we did identify, the departments did not document the reasons for including them—meaning there is a lack of evidence that staff have conducted an assessment to justify the need. We also found that none of the five departments had a complete record of all their contracts. The departments' deficiencies in contract record keeping means that no one can determine the extent of the use of confidentiality provisions in Queensland Government contracts.

In terms of disclosing awarded contracts, the Queensland Government clearly communicates its commitment to being open and transparent in its policies and principles. The Office of the Chief Advisor—Procurement's guidance clearly sets out the requirements for what agencies should disclose regarding reportable contracts. But their process is less clear for where and how these disclosures should occur. This leads to confusion among agencies on how to discharge their responsibilities. As a result, a number of the departments we examined are falling short in disclosing awarded contracts in accordance with the Queensland Government's reporting requirements.

Of the 90 contracts we examined, they:

- appropriately disclosed only 25 per cent
- did not disclose 21 per cent at all
- partially disclosed the remaining 54 per cent.

This is mainly due to incomplete records, multiple systems and, in some cases, a lack of awareness or misinterpretation of disclosure requirements. This, and a lack of data validation, has led to both duplicate and missing disclosures, resulting in unreliable publicly reported data.

This is exacerbated by confusion in the disclosure guidelines about how and where agencies must disclose contract information. Also, the departments' ambiguous processes and systems are not fully effective, and prevent them from fully meeting disclosure requirements. They are not delivering on the government's commitment to be open and transparent about awarded contracts.

## Summary of audit findings

### Using confidentiality provisions in contracts

Contracts can include general and specific confidentiality provisions. Figure B explains what these two types of provisions cover and what agencies must report or record if they use them.

**Figure B**  
Types of confidentiality provisions

Type of provisions	Explanation	Reporting and recording requirements
General confidentiality provisions	<ul style="list-style-type: none"> <li>▪ restate legislative obligations for confidentiality (such as under the <i>Information Privacy Act 2009</i> or a secrecy provision); or</li> <li>▪ set out a general understanding between the parties in relation to how they will deal with information when performing the contract</li> </ul>	<ul style="list-style-type: none"> <li>▪ do not prevent agencies publicly reporting required contract information</li> <li>▪ agencies do not need to record use of general provisions</li> </ul>
Specific confidentiality provisions	<p>protect the confidentiality of:</p> <ul style="list-style-type: none"> <li>▪ all or part of the contract itself—such provisions would only be necessary where the contract needs to specify the information that the entity has determined is confidential; or</li> <li>▪ information obtained or generated in performing the contract</li> </ul>	<p>agencies must:</p> <ul style="list-style-type: none"> <li>▪ specifically identify and document the information considered confidential</li> <li>▪ record the reason for non-disclosure of this specific information</li> </ul>

Source: Queensland Audit Office.

Queensland Government agencies use general confidentiality provisions as a standard in most contracts. These provisions appropriately cover how the related parties will keep information confidential. Their use does not preclude agencies from publicly reporting the required contract information. The *Right to Information Act 2009* states that agencies must provide access to a document unless it contains exempt information or its disclosure would, on balance, be contrary to public interest.



Specific provisions are specifically tailored for an individual contract. Examples of specific confidentiality provisions include:

- supplier's confidential intellectual property during the performance of the contract
- supplier access to sensitive security information to perform the requirements of the contract
- new confidential intellectual property created during the contract
- confidential report dealing with sensitive public interest issues.

Such clauses can be used to protect commercial information that an agency has determined is confidential or to protect government material. If agencies include specific confidentiality provisions in a contract, they must identify what information is confidential and justify their reasons why. Most of the departments we audited do not have a complete record of all their contracts. None of the departments record whether contracts have specific confidentiality provisions in them, and the justification for their use. We were therefore unable to readily identify contracts that included specific confidentiality provisions and confirm that the departments had appropriately documented the reasons for their decisions.

None of the departments we examined demonstrated that they had identified and mitigated the risk of the disclosure of confidential information. They did not set clear expectations within their contract management plans of how to effectively manage the risk that departments may breach confidentiality. We previously addressed this deficiency with a recommendation in *Report to Parliament 10: 2013–14—Contract management: renewal and transition*.

Poor record keeping prevents anyone from determining the extent of the use of confidentiality provisions in government contracts. Departments need to improve their contract registers and management systems for this to happen.

There is a lack of guidance on the appropriate use of both general and specific confidentiality provisions in contracts. This may lead agencies to incorrectly classify what specific information is confidential or to make the wrong decisions about when to appropriately use confidentiality provisions.

The Office of the Chief Advisor—Procurement, responsible for whole-of-government guidance supporting the *Queensland Procurement Policy*, does not provide specific guidance for the use of confidentiality provisions in contracts. This is different from other jurisdictions like the Australian Government, which provides useful criteria and examples to its agencies. None of the departments we examined had specific training or guidance materials available to all affected staff on how to use confidentiality provisions in contracts. However, we found the departments appropriately relied on legal advice for guidance, particularly for high risk contracts.

## Disclosing contract information

The departments we examined had fully disclosed only a quarter of the 90 contracts in our selection (these were disclosed on QTenders). They had not disclosed around 21 per cent of contracts at all; nor had they documented the reasons for non-disclosure.

Departments had partially disclosed more than half of the contracts on one or more of the three available systems, but they did not meet full disclosure requirements. They either missed basic details, or reported only transactional value instead of the full contract value.

As a result, the Queensland Government does not have a complete record of awarded contracts. In some cases, departments are misinterpreting how confidentiality provisions prevent disclosure. Mostly though, we found partial or non-disclosure was more due to incomplete contract records, multiple contract systems and, in some cases, a lack of awareness of disclosure requirements.

Departments do not record enough information about the partial or non-disclosure of reportable contracts, which is a disclosure requirement. We found that departments whom operate a decentralised procurement structure were more prone to not disclose contracts, due to a lack of oversight.

Agencies are using different systems to report contract information. While the *Procurement Guidelines—Contract Disclosure* states agencies should use QTenders for reporting, the Office of the Chief Advisor—Procurement allows for transactional reporting in the Queensland Contracts Directory. Agencies use transactional data to meet disclosure requirements because they do not have a complete record of all their contracts. Agencies (through the Department of Housing and Public Works) also report some contract information on Queensland Open Data. This contributes to the lack of a complete record of all awarded contracts above the \$10 000 nominated threshold.

## Recommendations

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### Department of Housing and Public Works

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We recommend that the Department of Housing and Public Works' Office of the Chief Advisor—Procurement:

1. improves guidance and training available to agencies on the use of confidentiality provisions and disclosure of contracts

The enhancements should include guidance on:

- the appropriate use and recording of confidentiality provisions (Chapter 2)
- when partial or non-disclosure of reportable contracts is appropriate. (Chapter 3)

### Whole-of-government

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We recommend that the Department of Housing and Public Works in consultation with the Department of the Premier and Cabinet, and other relevant departments:

2. determine the most appropriate place and process to disclose reportable contracts to achieve the desired outcome of providing a complete and accurate public record of awarded contracts

The enhancements should include:

- reporting all *Procurement Guidelines—Contract Disclosure* minimum reporting requirements (Chapter 3)
- the ability for agencies to record when and why they have used specific confidentiality provisions. (Chapter 3)

### All agencies

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We recommend that all agencies:

3. meet all mandatory requirements set out in *Procurement Guidelines—Contract Disclosure*

This includes ensuring that:

- agency procurement policies and procedures include these requirements for contract disclosure (Chapter 3)
- disclosure requirements are communicated to and enacted by officers undertaking procurement activities (Chapter 3)

4. improve their contract registers or contract management systems to ensure a complete record of all awarded contracts

The enhancements should include:

- consolidating all contracts in one record, or where a decentralised model is elected, maintaining this information in a consistent format so that it can be consolidated (Chapter 3)
- documenting whether a contract has specific confidentiality provisions and the reasons for their use (Chapter 2)
- documenting reasons for non-disclosure of contracts. (Chapter 2)

# Auditor-General reports to parliament

## Reports tabled in 2017–18

Number	Title	Date tabled in Legislative Assembly
1.	Follow-up of Report 15: 2013–14 Environmental regulation of the resources and waste industries	September 2017
2.	Managing the mental health of Queensland Police employees	October 2017
3.	Rail and ports: 2016–17 results of financial audits	December 2017
4.	Integrated transport planning	December 2017
5.	Water: 2016–17 results of financial audits	December 2017
6.	Fraud risk management	February 2018
7.	Health: 2016–17 results of financial audits	February 2018
8.	Confidentiality and disclosure of government contracts	February 2018

## Contact the Queensland Audit Office

