



Documents held by government contractors: Agency obligations under the *Freedom of Information Act 1982*

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The *Freedom of Information Amendment (Reform) Act 2010*, passed in May 2010, introduced a range of important reforms to freedom of information laws. A new provision that commences on 1 November 2010 requires agencies to take contractual measures to ensure that they receive documents held by certain contractors or subcontractors if a person requests access to documents under the *Freedom of Information Act 1982* (the FOI Act). This document explains the new requirement and provides a model clause for agencies to use.

The new requirement

Section 6C of the FOI Act requires an agency which is subject to the Act to take contractual measures to ensure that the agency receives a document from a 'contracted service provider' if:

- the agency receives an FOI request for access to the document
- the document relates to the performance of a 'Commonwealth contract' (but not the entry into the contract) and
- the document is created by, or is in the possession of, the contracted service provider or subcontractor.

Contracted service provider

A 'contracted service provider' is an entity that is or was a party to a Commonwealth contract and responsible for providing services under that contract (s 4(1)). The contracted service provider will need to ensure that any subcontracts it enters allow it to meet its obligations under the Commonwealth contract to provide documents.

Performance of a 'Commonwealth contract'

A 'Commonwealth contract' is a contract which has all of the following elements:

- (a) the Commonwealth or an agency is, or was, a party to the contract
- (b) under the contract, services are, or were, to be provided:
 - (i) by another party
 - (ii) for or on behalf of an agency, and
 - (iii) to a person who is not the Commonwealth or an agency (that is, to the public)



(c) the services are in connection with the performance of an agency's functions, or the exercise of an agency's powers (s 4(1)).

The documents that are covered by the requirement relate to the performance of the Commonwealth contract and not the entry into the contract. This means that documents relating to the negotiations before the contract was made are not included.

Contract for services

The requirement does not apply to contracts for the procurement of services for the agency's use, such as information technology services or cleaning services provided to the agency. Rather, the requirement is concerned with contracting out arrangements involving the provision of services to the public on behalf of the agency.

The obligation applies to provision of services, not to goods or to arrangements for the provision of financial assistance in the nature of grants.

Documents 'created by or in the possession of'

The obligation extends to documents created by or in the possession of the contractor or sub-contractor. This ensures that relevant documents that the contractor may have passed to another party, such as a subcontractor, are still within the scope of the request.

When an agency should seek documents from a contractor

The contractor's obligation to give a document to an agency is triggered by an FOI request to the agency. It is a matter for the agency to determine whether the scope of the FOI request requires the agency to ask the contractor to provide documents. The contractor would be expected to liaise with any subcontractor as appropriate.

When the obligation commences

The new requirement applies to contracts entered into on or after 1 November 2010. It does not apply to contracts entered into before this time, even if the services under the contract do not commence until after 1 November 2010.

Where the contracted service provider delays or does not respond to the agency's request

The time an agency has to make a decision on an FOI access request is not automatically extended if the agency needs to obtain documents from a contractor. An agency may, however, seek the FOI applicant's agreement to extend the time for making its decision for up to 30 days (s 15AA). Alternatively, including where the FOI applicant does not agree to an extension, the agency may



apply to the Information Commissioner for an extension if the access request is voluminous or complex (s 15AB).

The Information Commissioner may provide an extension of 30 days or such other period the Information Commissioner considers appropriate.

An agency can refuse an access request where it has not received a document from a contractor pursuant to the contractual requirement and the agency has taken all reasonable steps to receive the document (s 24A(2)).

Giving access to documents received from a contractor

The agency is not obliged to give the FOI applicant access to any documents that the contractor gives the agency. The documents are to be treated in the same way as documents that the agency holds: if it is appropriate, an agency may refuse access on the basis that an exemption applies under the FOI Act.

If the contract does not comply with section 6C

If an agency has not included in a contract a provision that complies with section 6C, the agency may seek the contractor's cooperation in providing the relevant documents. The agency should also consider whether there are other provisions in the contract which give the agency other rights of access to documents.

If the agency has not complied with section 6C by including an appropriate clause in a contract made after 1 November 2010, a complaint may be made to the Information Commissioner. The Information Commissioner can investigate complaints about an agency's action in performing its functions or exercising its powers under the FOI Act, and has a range of powers to gather information for this purpose (Part VIIB). These powers include the power to enter premises, including the premises occupied by a contracted service provider and used predominantly for the purposes of a Commonwealth contract (s 77). The Information Commissioner may also require any person to produce information and documents (s 79), make recommendations to an agency (s 86) and report to the minister if an agency does not take appropriate action (s 89A).

Background to section 6C

The new requirement implements a recommendation of the *Open Government* report, the 1995 report by the Australian Law Reform Commission and Administrative Review Council on the review of the FOI Act. The review included an examination of the public's right of access to information where agencies contracted with private sector bodies for services both to the government and to the public on behalf of the government.



The report concluded that no additional measure was needed to extend the right of access to documents held by a private contractor that provided services to the government. The agency should hold the information it needs to be satisfied that the contract was being properly discharged. Any such information in the agency's possession would be subject to the FOI Act.

The report recommended, however, that access to information should be improved where private sector bodies are contracted to provide services to the community on behalf of the government. The report concluded that contracting out of this kind posed 'a potential threat to the government accountability and openness provided by the FOI Act'.¹ If an arrangement is underpinned by contract, an agency 'should ensure that suitable arrangements are made for the provision of public information access rights'.²

Section 6C makes those arrangements by a contractual obligation. There has been a precedent for some time for using contractual arrangements to bind private contractors in the *Privacy Act 1988* (s 95B). That provision essentially requires Commonwealth contractors to comply with the Information Privacy Principles.

Model clause

The following model clause is provided to assist Australian Government agencies to meet their obligations under s 6C and to promote a consistent approach across government. The clause has been prepared having regard to standard Australian government contract templates, and its terms reflect the requirements of s 6C. Agencies may draft their own provisions to take account of particular situations.

X. Access to documents

- X.1 In this clause, 'document' and 'Commonwealth contract' have the same meaning as in the *Freedom of Information Act 1982* (Cth).
- X.2 The Contractor acknowledges that this contract is a Commonwealth contract.
- X.3 Where the Agency has received a request for access to a document created by, or in the possession of, the Contractor or any subcontractor that relates to the performance of this contract (and not to the entry into the contract), the Agency may at any time by written notice require the Contractor to provide the document to the Agency and the Contractor must, at no additional cost to the Agency, promptly comply with the notice.
- X.4 The Contractor must include in any subcontract relating to the performance of this contract provisions that will enable the Contractor to comply with its obligations under this clause X.

¹ Australian Law Reform Commission and Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982*, ALRC Report 77 (1995) [15.12].

² *Ibid*, Recommendation 99.



Notes on the model clause

The model clause is expressed as an obligation on the contractor to provide a document to the agency promptly upon the agency's request, following receipt of an access request under the FOI Act. It is for the agency to determine in each case whether to request documents from the contractor in order to meet the FOI request.

The agency may require the provision of documents by written notice at any time after an FOI access request has been received.

A contractor who engages any sub-contractor to assist in performance of the contract must include provisions to allow the contractor to meet its obligations to the agency.

The contractor bears the cost of complying with the obligation to produce the documents. If the contractor does not comply with the contractual obligation, it would be open to the agency to take the action it considers appropriate for breach of the contract, depending on how seriously it regards the non-compliance.

The contractor's obligation to comply with an agency notice is not limited to a contract under which services are still being provided. When settling the terms of a contract, an agency should consider what obligations are placed on contractors to retain records for audit or other purposes. Procurement guidance in the *Standard Contract Clauses to Provide ANAO Access to Contractors' Information*³ includes a model clause for audit and access. That clause requires a contractor to retain, and require its subcontractors to retain, all relevant books and records for seven years after the end of the contract.

The information provided in this fact sheet is of a general nature. It is not a substitute for legal advice.

For further information

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³ Available at www.finance.gov.au/publications/anao-access-to-contractor-information/index.html.