



Victorian Government
Solicitor's Office

Freedom of Information— Government contracts with the private sector

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Strategic advice
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Confidentiality in government contracts

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What is 'Confidential information'

- 'Confidential information'
 - Facts or knowledge not in the public domain
- Regarded as a category of intellectual property
 - But there is no property in information per se
- How is 'confidential information' protected at law?
 - equitable doctrine of confidence
 - contract

I will run through some confidentiality basics and give an overview of the way in which 'confidentiality' is typically approached in government procurement processes and commercial contracts entered into by government.

All standard definitions of 'intellectual property' include 'confidential information' but it is trite law that there is in fact no 'property' in information per se, confidential or otherwise. Of course, some types of 'information' may qualify for protection under one of the intellectual property regimes which do confer rights of a proprietary nature. For example, an 'invention' may be protected by a patent if it meets the stringent requirements for patentability under the Patents Act. A particular form in which information is expressed may be protected by copyright. So may an original compilation of data (even though the data itself does not qualify for protection), if skill and labour has been expended on producing the compilation.

If information does not qualify for protection under one of the statutory IP regimes, but has a value, commercial or otherwise, to the person who possesses it, what legal protection is available to prevent unauthorised use or disclosure of that information?

For the answer we need to look in two different areas of the law: equity and contract. The equitable doctrine of confidence originated from the decision of the English High Court of Chancery in the case of *Prince Albert v Strange* in 1849. That case involved an application by Queen Victoria's husband, Prince Albert, to prevent the defendant from listing and describing in a catalogue some private etchings made by the royal couple, including, among other things, portraits of their children and their favourite dogs. It was apparent that the impressions had been obtained by the defendant through surreptitious means of one kind or another.

The court held that Prince Albert was entitled to an injunction to prevent the inclusion of a description of the etchings. As to the legal basis for granting a remedy, the Lord Chancellor had the judicial equivalent a three way bet, stating that the plaintiff was entitled to an injunction for 'breach of trust, confidence or contract'.



Doctrine of confidence

- Information with the necessary quality of confidence
- Communicated in circumstances importing an obligation of confidence
- Unauthorised use of the information to the detriment of the confider

Prince Albert v Strange was the first of a long line of cases from which the modern doctrine of confidence emerged. According to the doctrine, the law will grant a remedy if a plaintiff can show that information 'with the necessary quality of confidence' has been communicated or imparted in circumstances importing an obligation of confidence and that an unauthorised use has been made of the information to the detriment of the party communicating it.

What is information with the necessary quality of confidence about it? In essence, any facts or knowledge not in the public domain may have the necessary quality of confidence. Information is considered to have entered the public domain if it is well-known to that section of the public which has an interest in knowing it. The kinds of information which the courts have protected include trade secrets and other information of commercial value, information of artistic value, information relating to state security and private facts.

The second element will be satisfied if the communication of the information was expressly made in confidence, or was communicated in the context of a relationship of trust and confidence, for example, information communicated by an employer to an employee in the course of employment. It will also be satisfied if a reasonable person would have implied from the circumstances of the communication that it was made in confidence.



Contractual obligations of confidence

- Obligations to keep certain information confidential may be included in a contract
- The obligations may be on only one party or on both parties

As the Lord Chancellor recognised in *Prince Albert v Strange*, confidentiality obligations may also be based in contract.



Why use contract?

- Certainty as to what information is protected (because 'confidential information' is defined in the contract)
- Not necessary to establish the existence of the obligation
- Contractual remedies available
- Defendant cannot rely on 'equitable' defences

Note that the definition of confidential information in a commercial contract is likely to cover information of all kinds and in all forms, but to carve out information which is or subsequently enters the public domain other than as a result of a breach of the agreement, which the other party can demonstrate was in its possession prior to the date of the agreement; which the was independently developed by the other party or which was lawfully obtained by the other party from a third person entitled to disclose the information. These carve outs reflect the law's position that there is no property in information per se.

The usual position in a commercial contract between two private entities is that the contract itself and all information connected with the contract or disclosed under it is confidential.



Confidentiality in government contracting

- Growth of outsourcing by government led to increasing reliance on “commercial in confidence” as a ground for shielding information from scrutiny
- Concerns about erosion of transparency and accountability
- Rethink

The increase in the outsourcing of government functions at Commonwealth and state levels in the 1990s led to a degree of alarm about the use of ‘commercial in confidence’ to withhold information about government contracting activities from the public, the parliament and the auditor-general. Concerns were expressed the increasing use of the cloak of confidentiality was inimical to the principle of open, transparent and accountable government.

In the wake of a number of reports on the issue prompted by this concern, (including the March 2000 report of the Victorian Public Accounts and Estimates Committee entitled *Commercial in Confidence Material and the Public Interest*, and the report of the Australian National Audit Office entitled *The Use of Confidentiality Provisions in Commonwealth Contracts*) policies and processes were introduced at Commonwealth level and in a number of states to promote greater transparency in connection with government contracts. In Victoria, the Contracts Publishing System was established to implement the Bracks government policy entitled *Ensuring Openness and Probity in Victorian Government Contracting*. The policy requires the publication of headline details of contracts with a value of more than \$100,000 and full publication of contracts with a value of more than \$10 million. Material will be redacted from the published version of a contract only if, in the State’s view, it falls within one of the exemptions in the FOI Act. The exemptions most likely to apply are the business information exemptions which are the subject of Jo’s presentation.

A common theme in the reports is that the default position in private sector contracting – blanket confidentiality – is not appropriate when government is a party to a commercial contract. Rather, the default position should be disclosure of information unless there is a compelling reason for it to be kept confidential.



What information is legitimately confidential?

- Specific
- Continuing commercial sensitivity
- Commercial value
- Likely detriment from disclosure

In determining what confidentiality obligations a government party should accept, it is necessary to consider whether the information for which protection is sought is legitimately confidential, ie would the other party suffer material disadvantage if the information were disclosed?



What information is legitimately confidential?

- Trade secrets
- Other commercially valuable information/business, commercial or financial affairs information
 - Production costs, profit margins, pricing structures, R&D strategies

A 'trade secret' may be defined as information consisting of a process or device which has been developed for use by an entity for the purposes of its continuing business operations. It is often information of a technical nature. Examples of 'trade secrets' include: manufacturing processes, recipes, engineering and technical designs, product specifications, business and marketing strategies. Colonel Sanders' 11 secret herbs and spices is a famous example of a 'trade secret'. The original handwritten recipe is now kept in Louisville in a custom-built, digital safe housed in a vault reinforced with two feet of concrete in the ceiling, walls and floor and under 24-hour video and motion-detection surveillance!



Confidentiality provisions in conditions of tender and contracts

- Be careful to ensure that government party does not agree to confidentiality obligations which conflict with
 - Statutory disclosure obligations, eg FOI
 - Obligation to provide information to Auditor-General
 - The requirement to publish details of the contract in accordance with the Contracts Publishing System
 - The ability of public servants to brief departmental Secretaries and Ministers

In view of the various accountability mechanisms to which government is subject, a government party should **not** agree to unqualified contractual obligations of confidence. The template 'conditions of tender' available on the Victorian Government Purchasing Board (VGPB) website contain provisions which state the key principles of the Openness Policy, and inform tenderers that 'any non-disclosure of contract provisions must be justified by applying the principles for exemption under the provisions of the FOI Act.' The template agreements available on the VGPB website contain clauses by which the contractor expressly consents to the disclosure of information by government to meet statutory obligations, the provision of information to the Auditor General and to the publication of details of the contract in accordance with the Contracts Publishing System.



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Section 34 and business information

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Overview

- Section 34(1)(b) – undertakings
- Section 34(4)(a)(ii) – agencies
- Consultation and reverse FOI
- Reform of business exemption in other jurisdictions
- FOI in Victoria



Decisions concerning the disclosure of commercially sensitive material produced by government agencies require the balancing of two competing sets of public interests. These are the public interest in ensuring Victorian government agencies are able to operate as effectively as possible, and the public interest in ensuring political and financial accountability.

- 'Public Accounts and Estimates Committee Thirty-Fifth Report to Parliament Inquiry into Commercial in Confidence Material and the Public Interest' (March 2000)



Section 34(1)(b) - undertakings

A document will fall within this exemption if:

- the information was **acquired** by an agency or a Minister from a **business, commercial or financial undertaking**;
- the information relates to **matters of a business, commercial or financial nature**; and
- disclosing the information would be **likely to expose the undertaking unreasonably to disadvantage**.



What is business information?

- A document containing information of a business, commercial or financial nature (broad)
- Not enough to contain merely business information
- Key issue: whether disclosure is likely to expose undertaking or agency *unreasonably* to disadvantage



Section 34(2) - disadvantage

- Is information is generally available to competitors of undertaking?
- Would information be exempt matter if it were generated by an agency or a Minister?
- Can information can be disclosed without causing substantial harm to competitive position of undertaking?
- Any public interest or other relevant considerations?



Documents falling within s 34(1)(b)

- Contracts re staging of Commonwealth Games
- Methodology used by an auditing firm
- Unsuccessful tenderer's application
- Sponsorships offered
- Confidentiality clauses v FOI
- Impact of timing of request and stage of a business transaction



Documents not falling within s 34(1)(b)

- Advertising contract including dollar amounts and details of the services to be provided and for how much
- Part of a company's tender proposal including costing of advertising campaign strategy
- Wording in a partially released operation plan describing 'control techniques' in the culling of bats
- Medical and investigation reports in relation to an workplace injury investigation/claim



Section 34(3) – consultation

- You must consult with an undertaking if a request relates to business information supplied by the undertaking
- Consultation must take place *before* making a determination
- Ascertain views of undertaking re disclosure
- Evidence and objective assessment required



Section 34(3) – reverse FOI rights

- Section 34(3)(b): agency must notify undertaking of its decision *before* releasing documents
- Must notify undertaking of its right to seek review at VCAT pursuant to s 50(2)(e) subject to seeking internal review under s 51
- Note s 50(4) public interest override power of VCAT



Section 34(4)(a)(ii)

A document will fall within this exemption if:

- in the case of an agency **engaged in trade or commerce**
- the information relates to **matters of a business, commercial or financial nature**; and
- disclosing the information would be **likely to expose the agency unreasonably to disadvantage**



Section 34(4)(a)(ii)

- **'engaged in trade or commerce'**: interpreted broadly
- **'likely to expose the agency unreasonably to disadvantage'**: critical to claiming exemption



Documents falling within s 34(4)(a)(ii)

- Contracts re staging of Commonwealth Games
- Sponsorships offered by agency
- Database extract containing names of government assistance
- Financial models concerning freeway project
- Parts of business plans for Grand Prix
- Parts of reports prepared to attract investors for proposed ski fields project



Documents not falling within s 34(4)

- University council minutes
- A medical report and investigator's report in relation to an workplace injury investigation/claim
- Terms of concluded advertising contract (cf tender documents)



Reform of business exemption

- Commonwealth, NSW and QLD reviews
- Overhaul of FOI legislation in NSW and QLD
- Proactive disclosure encouraged
- Presumption documents will be released
- Removal of business information exemption
- Introduction of public interest test
- Does Victorian FOI legislation need to be reformed?



'Take home' points (1)

- Objective: facilitate and promote release of information
- Not all documents containing business information will fall within s 34
- Need to look at likely disadvantage
- Consultation with undertaking
- If an undertaking does not object to release – document more than likely should be released



'Take home' points (2)

- Public interest considerations – do these outweigh any sensitivity associated with the document?
- A decision to deny access must be based on evidence of disadvantage
- Evidence must be objectively assessed
- Timing of request
- Notification of reverse FOI rights