

The Use of Commercial-in-Confidence material and In Camera Evidence in Committees

Report No. 7

Standing Committee on Administration and Procedure

August 2001

Legislative Assembly for the Australian Capital Territory



Resolution of appointment

In 1995, the Legislative Assembly for the Australian Capital Territory (the Assembly') adopted Standing Order 16 which established the Standing Committee on Administration and Procedure ('the Committee'). The members of the Committee for the Fourth Assembly ('the Members') are:

The Speaker (Presiding Member)

Simon Corbell MLA

Harold Hird MLA

Trevor Kaine MLA

Paul Osborne MLA

Kerrie Tucker MLA

Standing Order 16 authorises the Committee to inquire into and report on, among other things, the practices and procedure of the Assembly.

Terms of reference for Inquiry

On 19 November 1998, the Assembly resolved:

'That, noting the two recommendations of the Standing Committee for the Chief Minister's Portfolio Report No. 2 concerning the Draft Principles and Guidelines for the Treatment of Commercial Information held by ACT Government Agencies, the Standing Committee on Administration and Procedure inquire into and report on:

- 1) the procedures to be followed by the Assembly or an Assembly committee, where a committee request for the provision of information is met with a claim of commercial-in-confidence, confidentiality or public interest immunity; and
- 2) the provision of in camera evidence to Assembly committees and the use of that evidence.



Table of contents

RESOLUTION OF APPOINTMENT	3
TERMS OF REFERENCE FOR INQUIRY	3
TABLE OF CONTENTS	4
CHAPTER 1.INTRODUCTION.....	7
BACKGROUND	7
CHAPTER 2. COMMERCIAL-IN-CONFIDENCE.....	9
THE POWER TO CALL FOR THE PRODUCTION OF DOCUMENTS.....	9
PUBLIC DISCLOSURE	10
PUBLIC INTEREST IMMUNITY	11
COMMERCIAL IN CONFIDENCE.....	12
CONCLUSION	18
CHAPTER 3. IN CAMERA EVIDENCE	21
ISSUES.....	22
<i>Guidelines for allowing in camera evidence.....</i>	<i>24</i>
<i>Applications to give in camera evidence.....</i>	<i>25</i>
<i>Criteria for allowing in camera evidence</i>	<i>25</i>
<i>Expectations of confidentiality.....</i>	<i>27</i>
<i>Disclosing in camera evidence.....</i>	<i>29</i>
SANCTIONS FOR IMPROPER DISCLOSURE.	31
SECURITY ISSUES	32
APPENDIX 1	34
GUIDELINES IN RELATION TO CLAIMS OF COMMERCIAL IN CONFIDENCE	34
SPECIFIC IDENTIFICATION OF INFORMATION IN QUESTION	34
INFORMATION HAS THE NECESSARY QUALITY OF CONFIDENTIALITY.....	34
DETRIMENT TO THE ‘CONFIDER’ OF THE INFORMATION	35
<i>Trade secret information.....</i>	<i>35</i>
<i>Information having a commercial value that would be diminished or destroyed if disclosed ...</i>	<i>36</i>
<i>Examples of what would not be considered confidential</i>	<i>36</i>
EXAMPLES OF WHAT WOULD BE CONSIDERED CONFIDENTIAL	37
PRINCIPLES AND GUIDELINES FOR THE TREATMENT OF COMMERCIAL INFORMATION HELD BY ACT GOVERNMENT AGENCIES. CHIEF MINISTER’S DEPARTMENT FEBRUARY 1999	37
OVERVIEW	38
<i>Application.....</i>	<i>38</i>
PUBLIC ACCESS	39
ACCESS BY THE LEGISLATIVE ASSEMBLY AND ITS COMMITTEES.....	39
<i>KEY PRINCIPLES</i>	<i>39</i>
<i>GUIDELINES.....</i>	<i>39</i>
DECISIONS ABOUT CONFIDENTIALITY	41
IS THE INFORMATION “PERSONAL INFORMATION”?	41
HAS THE INFORMATION BEEN INDEPENDENTLY DEVELOPED OR ACQUIRED BY THE TERRITORY	43

SHOULD ANY AGREEMENT TO TREAT INFORMATION AS COMMERCIAL-IN-CONFIDENCE BE LIMITED IN TIME? .	43
<i>Disclosure</i>	43
IS THERE AN OVERRIDING LEGAL OBLIGATION OF CONFIDENTIALITY	44
HAS THE PERSON WHO PROVIDED THE INFORMATION SUBSEQUENTLY AGREED TO ITS RELEASE?	44
<i>PARTIAL DISCLOSURE</i>	44

Summary of recommendations

THE USE OF COMMERCIAL-IN-CONFIDENCE MATERIAL AND IN CAMERA EVIDENCE IN COMMITTEES

Recommendation 1

The Committee recommends that the Assembly adopt the following standing order:

Immediately prior to a witness giving evidence before an Assembly committee, the Presiding member or Acting Presiding member shall inform the witness of their right to apply to be heard *in camera* and the committee by way of a resolution will decide the application on the following criteria:

Recommendation 2

The Committee recommends that the Assembly adopt a standing order articulating the principles and procedures for granting the publication of *in camera* evidence.

That standing order should read:

Evidence given *in camera* shall only be authorised for publication by the Assembly by way of resolution. Where a committee wishes to authorise *in camera* evidence that it has taken, it shall table a report, recommending that the Assembly authorise the publication of that evidence. A majority of members of the relevant committee (in the case of the report) and the Assembly (in the case of a resolution) should be satisfied that there is a real and justifiable need to disclose the *in camera* evidence or that subsequent events have removed the need for confidentiality, or that the evidence given does not warrant the confidential treatment which it was originally thought might be necessary. Every attempt will be made to notify a witness who has given *in camera* evidence as well as any third parties who have been named in that evidence before disclosure takes place.

Recommendation 3

The Committee recommends:

- The establishment of a registrar of *in camera* evidence who would be required to log all *in camera* evidence and store that evidence in a class 'B' safe; and
- That the electronic versions of transcripts of *in camera* evidence be encrypted for storage on Secretariat computers and for transmission in email, CD-ROM and floppy disk.

CHAPTER 1. Introduction

Background

1.1. This report arises out of the Second Report of 1998 from the Standing Committee on the Chief Minister's Portfolio in which it was recommended that the Standing Committee on Administration and Procedure develop an amendment to the Standing Orders to provide that:

- i) where a Minister fails to present a document to a Committee on the grounds of "commercial-in-confidence" the Minister must provide the committee with a justification for the claim; and
- ii) where a committee does not accept a claim the committee must report its reasons for not accepting the claim to the Assembly.

1.2. As a result of this recommendation the Legislative Assembly referred the following matter to the Committee on 19 November 1998:

Inquire into and report on:

- a) the procedures to be followed by the Assembly or an Assembly committee, where a committee request for the provision of information is met with a claim of commercial in confidence, confidentiality or public interest immunity; and
- b) the provision of in camera evidence to Assembly committees and the use of that evidence.

1.3. This report addresses that reference.

1.4. Chapter One looks at the question of the use of claims of commercial confidentiality to restrict the Assembly's access to documents held by government. The powers of legislatures throughout Australia are discussed to establish the extent of the Assembly's powers to insist on the production of documents. The changing nature of government, particularly the increasing use of private sector agencies to provide public services under contract, is examined briefly to establish the importance of the issue and the need for the Assembly to take a strong line on the issue.

1.5. The progress made by the ACT Government in developing principles and guidelines in relation to public accountability and openness is also summarised to illustrate that there is no fundamental disagreement between the legislature and the executive on this issue and to establish a basis for a co-operative approach to it.

1.6. The report then suggests possible standing orders which would impose an obligation on Ministers who make claims of commercial in confidence in

relation to documents being sought by the Assembly or its committees to justify such claims in concise statements to the Assembly or a committee. The proposed standing orders make it clear that the Assembly remains the final arbiter of whether a claim to confidentiality will be accepted.

1.7. Chapter Two of the report examines the role of *in camera* evidence in the proceedings of Assembly committees and what procedures and principles may be applied in: 1) making a decision to take *in camera* evidence; and 2) making a decision to *in camera* evidence.

1.8. Three proposals are forwarded in this regard and they are:

- 1) a procedure for witnesses to make an application to give evidence *in camera*;
- 2) a proposal that only the Assembly may authorise the publication of *in camera* evidence and where a committee wishes to authorise the publication of evidence, it will report to the Assembly with a recommendation to this affect; and
- 3) a protocol on the handling of *in camera* evidence.

Chapter 2. Commercial-in-confidence

The power to call for the production of documents

2.1. The power of legislative bodies to call for the ‘persons, papers and records’ is an essential power for the effective functioning of a legislative chamber in a ‘polity founded on responsible government’ such as the Australian Capital Territory. In *Egan v Willis* Justice Michael Kirby, commenting on the powers of the NSW Legislative Council, stated that:

... such a demand [for the production of documents] is *prima facie* essential to the existence of that body as a legislative chamber.¹

2.2. In the Commonwealth Parliament,

The power to conduct inquiries by compelling the attendance of witnesses, the giving of evidence and the production of documents is conferred by, but also exists independently of, section 49 of the Constitution.²

2.3. In *Egan v Willis* Justice McHugh stated that:

When the nature of parliamentary government under the Westminster system is properly understood, it is apparent that the power [to order the production of documents]... is one that inheres in the very notion of a parliamentary chamber.³

2.4. The Australian Capital Territory (ACT) Legislative Assembly has the power to ‘make laws for the peace, order and good government of the Territory’ and it may declare its own powers with only the limitation that they do not exceed the powers of the Commonwealth House of Representatives.⁴ Thus the ACT Assembly has inherited the powers, privileges and immunities of other “Westminster” parliaments.

2.5. The power to call for evidence is underpinned by the immunity of proceedings in the Assembly from ‘question and impeachment’ in the courts.

¹ *Egan v Willis* (1998) 73 ALJR 75. This case involved a dispute between the NSW Legislative Council and one of its members, a State Government minister, over the power of the Council to demand the production of papers by the Minister and its power to punish him if he failed to produce them. The High Court, on appeal from the Supreme Court of New South Wales upheld the right of the Council on both issues.

² Odger’s Australian Senate Practice, 9th edition, (1999) ed Harry Evans, p. 54.

³ *Egan v Willis* (1998) 73 ALJR 93-94

⁴ *Australian Capital Territory (Self-Government) Act 1988*, section 22 and section 24(2)(a)

In practice this means that members cannot be sued or prosecuted for anything said in a properly constituted meeting of the Assembly or one of its committees. Nor can the contents of documents that have been properly received and published by the Assembly give rise to action in the courts. Taken together these powers and immunities give the Assembly a formidable capacity to scrutinise the executive.

2.6. In exercising their powers legislatures have resisted any limitation being placed on them by outside bodies. While disputes over the request for documents from the executive frequently give rise to conflict and counter-claims of executive privilege or public interest immunity, legislatures have insisted that they remain the sole arbiters of the extent of their powers and immunities. Generally speaking, legislatures will only accept limits on their powers to call for documents that are made by express legislative provision, i.e. made by the legislature itself. Thus the general exemptions in Freedom of Information legislation, for example, may provide guidance in considering claims of public interest immunity but the legislature is not bound by them. The powers of the legislature and its committees to seek access to information are considerably greater than those conferred on individuals by such legislation.

Public disclosure

2.7. The obligations of disclosure on the public sector are not the same as those that apply to the private sector. The Commonwealth Auditor General, in a recent report noted that, in the private sector:

Freedom of contract ... includes the freedom to agree that information, including the contract itself, should be kept confidential. It is therefore a reasonably straightforward matter in any contract to include a confidentiality clause that effectively restricts the disclosure of relevant information in the contract and its terms.⁵

2.8. In the case of contracts between the public and private sectors,

It is the taxpayer who funds government contracts. Decisions on whether matters that involve a government should, or should not, be disclosed involve a consideration of the public interest. ... any party arguing for non-disclosure should be able to substantiate its case for such an approach.⁶

The report commented that ‘government use of contracts to achieve public goals is quite different to [sic] how contracts are used in the private sector’ and identified four key differences:

⁵ Australian National Audit Office, Report No. 38, 2000-01, (Canberra 2001) p 53.

⁶ Ibid., p. 52.

- accountability to the legislature and the people;
- legislative provisions requiring the proper and efficient expenditure of public money;
- general legal presumptions that government should act as a moral exemplar in the market place; and
- public policy constraints on governments' use of contract law.

2.9. The ACT government has acknowledged these imperatives in its *'Principles and Guidelines for the Treatment of Commercial Information Held by ACT Government Agencies'*, (1999):

In handling commercial information, Government agencies must abide by a commitment to as full disclosure as possible; within the framework of existing Freedom of Information law.

... in the absence of some overriding public interest against disclosure, it would generally be expected that the terms or key features of a contract would be open to public scrutiny.

The obligation of the Government to account for its management of the Territory's resources means that in some circumstances commercial information ... must be disclosed.⁷

2.10. The debate over public disclosure is not, it would seem, one of principle but of the appropriate limits of disclosure. Each of the quotations from the ACT Government above contains a qualifier – that disclosure is governed by existing Freedom of Information law; overriding public interest against disclosure or the ill defined 'in some circumstances'.

Public interest immunity

2.11. In resisting the exercise of the legislature's powers to require the production of documents, the executive relies on 'public interest immunity' (also referred to as executive, or crown, privilege). Simply put, it argues that there is a countervailing public interest in denying access to documents or other information that outweighs the legislature's and the public's interest in disclosure. This is commonly asserted and may be accepted with regard to the records of Cabinet discussions and advice tendered by public servants to Ministers, in areas concerning military security and the privacy of diplomatic transmissions where publicity might actually damage the public interest.

⁷ *Principles and Guidelines for the Treatment of Commercial Information Held by ACT Government Agencies*, (1999), p 3.

Immunity is also claimed for personal details, otherwise private to an individual and of no legitimate interest to the public, which are collected by government agencies such as the Australian Taxation Office or the Departments of Health and Social Security.

2.12. Legislatures sometimes accept the claims of the executive to public interest immunity. At the same time they strongly resist any suggestion that such claims are conclusive. Blanket claims to immunity for whole documents or categories of documents are not acceptable and, as mentioned above, the right to decide the merits of such claims remains with the legislature.

2.13. A third area in which privacy is frequently claimed is with regard to the commercial transactions of government, particularly contracts for the acquisition of goods and services. It is with this area of commercial in confidence claims that this report is particularly concerned.

Commercial in confidence

2.14. The claim by executive governments to withhold papers because they contain commercial information that should be kept confidential is not new. However it has become of greater importance in recent years as a result of changes to public administration in Australia. The adoption of the 'purchaser/provider' model for the provision of a range of social, educational and health services to the community and for internal operational functions within government agencies has profoundly altered the nature of the public sector. The adoption of corporate models of management for government agencies in which the agency operates at arms length from government, its senior executives are employed on performance contracts and its operations are governed by targets set out in performance agreements also have the potential to weaken the chain of accountability joining administration, executive government and legislature.

2.15. These developments present new challenges to legislatures wishing to consider proposed legislation thoroughly and attempting to scrutinise government activity carefully. They also afford government greater opportunities to obstruct that scrutiny. If the details of the provision of public services and the expenditure of public money are to be withheld from the legislature because they are now tied up in contracts with the private sector then an essential element of public accountability of government will be significantly eroded.

2.16. In Australia, the Commonwealth, States and Territory governments have all faced challenges to the right of legislatures to receive information, to the powers of Auditors-General to examine public expenditure and to the opportunities provided by administrative appeals tribunals, Ombudsmen, etc to review administrative action.

2.17. In the Australian Capital Territory (ACT) these issues have been brought to the forefront of debate by high profile cases, particularly the demolition of the old Canberra Hospital and the redevelopment and hiring of Bruce Stadium, in which the initial unwillingness of the executive to allow reasonable scrutiny of its actions by the legislature became a major public debate.

2.18. This issue extends beyond purely financial details included in contract arrangements. Ministers, officials and executives of government owned corporations also exercise powers and discharge responsibilities conferred on them by legislation. The Legislative Assembly has a right to scrutinise the exercise of these powers.

2.19. The need for the Assembly to pursue matters relating to the internal workings of agencies and the proper exercise of powers conferred on ministers and executives is clearly illustrated by the findings of the ACT Auditor General with regard to the redevelopment of Bruce Stadium.

In summary, the Territory has a statutory and administrative framework in place to provide for the effective governance and management of major projects. In respect of the redevelopment of Bruce Stadium, however, there were a number of omissions and deviations which resulted in both governance and management arrangements not being adequate.⁸

2.20. The response from the Chief Executive of the Chief Minister's Department acknowledges the substance of the Auditor's criticism:

What is required is effective, regular, structured and documented reporting. The senior executives responsible ... failed to meet that test. This is an error of process which we are seeking to correct ...⁹

2.21. The Commonwealth Auditor-General commented on this general development and commented that:

As part of their overall scrutiny of agency operation, parliamentary committees may seek information concerning contracts to help inform their overall assessment of Government performance. Their ability to have access to such information should not be eroded because certain information in contracts is claimed to be confidential.¹⁰

2.22. This report also noted the general principle set out by the Australasian Council of Auditors-General that:

⁸ ACT Auditor General, *Reports on the Performance Audits of the Redevelopment of Bruce Stadium*, Report 1, *Summary Report*, para 5.15, p. 34.

⁹ Quoted, *ibid*, p.224.

¹⁰ ANAO, Report 38, *op cit.*, p 30.

... where the Parliament has delegated its powers to the Government to enter arrangements with budgetary implications, Parliament must retain the right to scrutinise the arrangements after the event.¹¹

2.23. Claims that documents or other forms of information cannot be disclosed because of commercial confidentiality rest on a number of grounds. It may be argued that the private supplier of goods or services has insisted on confidentiality in its dealings with government and government feels bound to respect that position. More sophisticated claims will assert that:

- ongoing negotiations would be harmed by publication of details of those negotiations;
- the integrity of competitive tendering processes would be damaged;
- government's ability to attract private sector partners will be reduced if public disclosure of details of business relationships is insisted upon;
- the commercial value of intellectual property or 'trade secrets' will be lost; or
- a company's competitive position will be damaged by public disclosure.

2.24. Each of these grounds may be reasonable. However particular claims for the confidentiality of commercial information held by government must be soundly based having regard to the specific circumstances and content of a document or piece of information.

2.25. For example it is generally accepted that confidentiality should apply to contract details, negotiating strategies, costing formulae etc during the actual tendering or negotiating stage of a contract or agreement. Clearly publication of details of a negotiating position or the contents of a tender could damage the position of the parties involved, including the government, and adversely affect the outcome of the process.

2.26. This committee generally supports that view. However, there are circumstances in which the legislature may wish to have access even to this class of information. Where commitments are made during negotiations and are ultimately embodied in contracts that amount to unannounced policy decisions on the part of government then the right to confidentiality in the negotiating process may not be assumed. For example, in the Bruce Stadium Hiring Agreement there is a significant "revenue guarantee" – a public subsidy

¹¹ Quoted, *ibid.*, p30.

– by the Government to the Canberra Raiders football club. There are two aspects of this about which the Assembly may have wished to be informed prior to or during the negotiating phase. The decision of the then government to provide a revenue guarantee from public funds to the Raiders to ensure that they continued to use Bruce Stadium was a policy decision that should properly have been canvassed in public. Secondly, the actual level of subsidy was considerably in excess of the amount, which the relevant Cabinet submission led Ministers to believe would be paid.¹² It is not the committee's intention to reopen these issues which have been covered in great detail by the ACT Auditor General.¹³ However they provide useful examples of circumstances where the Legislative Assembly might have every justification for wanting public disclosure of negotiating strategies and costing formulae.

2.27. In the past such claims have often reflected a desire to avoid scrutiny or embarrassment and have had little to do with genuine public interest. Inquiries by various parliamentary committees and Auditors-General throughout Australia provide numerous examples of confidentiality being claimed for information which is already in the public domain or freely available from other sources; information which is required by law to be made public, for example in compliance with the Corporations law and information which is essentially trivial.

2.28. The disputes over the Bruce Stadium hiring contracts revealed, among other things, how much material whose publication would not harm anybody's interests was covered by confidentiality claims made by the then ACT Government.

2.29. In evidence to a Senate committee the then New South Wales Auditor General made the general point that contract details normally have a limited commercial value.

[The contract] was quite complicated for taxation and other purposes and it had reasonably significant intellectual value attached to it. Nevertheless, the proponents of similar deals say that they have a very short life because, within a very short time, they are seeing other legal firms using identical language in other documents, because the exchange of information is so rapid within a reasonably small commercial world, even for Sydney, that the life of it is a one-project life. You can hold it until the tender is done but, after that, it is gone. It has been used by other people because so many people know and understand the value of the concepts that you have had in

¹² The ACT Auditor General has commented that "The \$1.37m assurance for the Raiders eventually agreed was equivalent to 5.7 times the amounts estimated and proposed in the Cabinet submission." - see paragraph 5.15, page 35, Auditor General's Report 10, *Stadium Hiring Agreements*.

¹³ Auditor General's Report, Reports of the Performance Audit of the Redevelopment of Bruce Stadium, see particularly Report 10, *Stadium Hiring Agreements* (Canberra 2000).

your tender documents. So my conclusions come from actual testimony from the private sector.¹⁴

2.30. The Commonwealth Auditor General's Report, *The Use of Confidentiality Provisions in Commonwealth Contracts*, examined a range of contracts and commented,

The provisions in the contracts examined would suggest that there has not been any detailed consideration of what should properly be classed as confidential ... [and] there was little reference in contract related material to the powers of parliamentary committees to require persons to produce information and documents.¹⁵

2.31. There has been no similar study of ACT Government contracts, however the major inquiry by the ACT Auditor-General into the redevelopment of Bruce Stadium suggest that a culture of responsibility, accountability and public disclosure was not well established in the ACT administration.

2.32. The attempts by the Assembly's Select Committee on Estimates to obtain documents with regard to the move to new office space by the Canberra Tourism and Events Corporation (CTEC) illustrates the lack of thought that has gone into the issue of disclosure. In response to a request from the Committee for relevant documents, made on 8 May 2001, the responsible Minister advised the Committee on 14 May that he would seek legal advice on the release of the documents. On 15 May he wrote to the Committee dismissing their request as "irresponsible to the point of absurdity". On the following day the Committee received a second letter from the Minister (also dated 15 May) advising that "...releasing the documents to committee members no longer poses a commercial in confidence issue".

2.33. It is of interest that, during debate on the Public Access to Government Contracts legislation in the Assembly, an ACT Minister commented that,

... the irony is that the things that public servants seem to think it is so important to keep confidential, apart from privacy issues, seem to cause [Ministers] so little difficulty. It is rarely a minister who says "keep this particular price confidential for a political purpose".¹⁶

2.34. The ACT Government through its *Principles and Guidelines for the Treatment of Commercial Information...* (1999) and *ACT Government Purchasing Policy and Principles Guideline* (1999) has begun to approach the

¹⁴ Mr Tony Harris, Senate Finance and Public Administration References Committee, *Contracting out of government services*, 20 May 1997, Committee Hansard, p378.

¹⁵ Audit Report 38, 2000-01

¹⁶ Australian Capital Territory Legislative Assembly *Debates*, 7 December 2000, p3804.

issue of public accountability in a fairly detailed way. However as the foregoing paragraphs illustrate, the practical application of these principles and guidelines leaves much to be desired.

2.35. The *Guidelines for the Treatment of Commercial Information*, at pages 4 to 8, has established ‘key principles’ and specific criteria with regard to accountability and confidentiality that the Assembly should support, particularly that:

- the Government is obliged to disclose information wherever possible, including information related to its commercial dealings, to the people on whose behalf it is acting; ...
- information obtained through commercial dealings is not automatically commercial in confidence; ... and
- ... classification [as confidential] itself does not justify non-disclosure. Specific grounds or reasons, consistent with these guidelines, are required to justify any decision not to disclose commercial information.¹⁷

2.36. While the document does refer to the role of the Assembly and its committees in passing, explicit reference to the powers of the Assembly and the accountability obligations of the Executive to it should be included in these ‘key principles’.

2.37. The document also sets out a series of ‘tests’ that might be applied in considering claims for confidentiality.

2.38. It is in the interests of both the Assembly and the Government that a culture of openness and accountability is promoted within the ACT Administration. The Assembly should seek to keep the executive up to the standards it formally espouses.

2.39. Private companies doing business with the ACT must also be made familiar with the accountability requirements of the Assembly and other agencies such as the Auditor General and the Ombudsman. Ideally accountability issues should be dealt with throughout the negotiation process not as an afterthought once a contract is signed.

2.40. The *Principles and Guidelines* mentioned above are now used in conjunction with the ACT Government’s *Purchasing Policies and Principles* in making purchasing decisions. Openness has also been fostered by the *Public Access to Government Contracts Act 2000*, which requires the publication of the details of ACT Government contracts worth \$50 000, or more.

¹⁷ *Principles and Guidelines*, op cit, p 4.

2.41. It is to be hoped that as these various measures become familiar to Ministers and officials then areas of dispute between the legislature and the executive will be narrowed down to the genuinely difficult cases. However disputes will still arise. The *Principles and Guidelines* contain a number of qualifications permitting confidentiality and the *Public Access to Government Contracts Act* allows for some details of contracts to be withheld. It also contains a ‘model confidentiality clause’ that leaves considerable scope for keeping parts of contracts out of the public domain.

2.42. The committee believes strongly that the powers of the Legislative Assembly are important and must be asserted. At the same time the obligations imposed on the executive to meet the Assembly’s demands and to foster a culture of openness and accountability must be matched by judicious and responsible use of its powers by the Assembly.

Conclusion

2.43. This committee has been charged with recommending procedures to the Assembly which will assist it in dealing with the refusal by government to provide information to it based on a claim of public interest immunity or commercially confidentiality.

2.44. At the outset the Legislative Assembly must continue to assert unequivocally its powers with regard to the provision of documents relating to the activity of government in response to its requests and the right to publish information in the public interest notwithstanding any claims to confidentiality made by the executive. The legislature has an inherent right to have access to such documents and is the arbiter of executive claims to public interest immunity in relation to its requests. The Assembly is not bound by general legislative exemptions or limitations in acts such as the Freedom of Information Act nor by confidentiality clauses inserted in contracts or by assumptions, based on private sector practice, about the confidentiality of contracts or other commercial agreements.

2.45. The Assembly should also establish that, where claims of immunity or commercial in confidence are made, a reverse onus applies – the person making the claim must justify that claim. Government documents must be assumed to be public unless a convincing case of public interest in their confidentiality can be made. This is in line with Parliamentary practice elsewhere and also in the spirit of the ACT Government principles quoted above.

2.46. The Assembly’s primary objective should be to ensure that claims to confidentiality are not made lightly and, when made, are subject to rigorous scrutiny. The following draft standing order is proposed:

Where the Assembly or one of its committee requests a Minister or a public official to provide a document or documents and that request is

refused on the grounds of public interest immunity/commercial in confidence then the Assembly or the committee shall request from the responsible minister a statement setting out the grounds on which public interest immunity is claimed. The Minister must provide such a statement to the assembly or the committee within the time limit specified in the request.

2.47. Time limits attached to such requests should be reasonable and have regard to the subject of the request and the sittings of the Assembly.

2.48. This statement must refer to specific information or parts of a document and the claim must rest on particular grounds. The grounds for commercial in confidence claims have been widely discussed in the ACT Government documents referred to above; the Commonwealth Auditor-General's Report on this subject and in many other places. In considering a claim the Assembly should test it against these well established, general criteria.¹⁸ However each claim must be decided on its own merits not because its subject falls into some general category of documents or information.

2.49. Where a claim for confidentiality is accepted or the Minister persists in refusing access to information the Assembly or its committees should seek to negotiate access nonetheless. Documents can be received in an edited form, in confidence or evidence can be taken *in camera*. While less desirable than public disclosure such proceedings may provide a way of avoiding an impasse.

2.50. It is important that where there are genuine issues of confidentiality and where committees wish to take *in camera* evidence they must be able to reassure the parties giving evidence that the committee's procedures and practices offer an appropriate degree of security in protecting the information. *In camera* evidence can be made public by a majority vote of a committee or by a vote of the Assembly itself. While it is to be hoped that that power would be exercised judiciously, properly advised, potential witnesses may find it does not offer sufficient security.

2.51. The question of taking evidence in-camera is dealt with in the next section of this report.

2.52. Where no satisfactory compromise between competing claims can be reached the following draft standing order is proposed:

¹⁸ Criteria proposed in these documents are presented in Appendix I. These are provided for the information only. They do not represent a definitive statement of grounds for making or rejecting claims of confidentiality. Nor should they be taken as limiting the Assembly in its deliberations on such questions.

Where the refusal to provide information takes place before a committee and the committee does not accept the Minister's claim of public interest immunity or cannot negotiate access to the documents while preserving their confidentiality the committee shall report the matter to the Assembly on the first sitting day after it so decides.

Consideration of the committee's report will become an order of the day and the committee's presiding member and the relevant Minister shall attend the sitting of the Assembly.

The Minister shall make a statement to the Assembly giving the grounds on which immunity is claimed and any other relevant information which may have accumulated since the initial decision to refuse the committee's request and the Assembly will make a decision with regard to the request.

2.53. If the Assembly finds itself in an unresolvable dispute with a Minister over the presentation of documents various options are available to it. Legislatures have considerable powers to impose penalties on members who fail to comply with their orders including censure and suspension from the Assembly or from a committee. However, in practice such powers are rarely used.

2.54. In addition the assembly has significant 'political' powers with regard to the conduct of business which could be used to apply pressure to a Minister in such circumstances. If a claim of commercial in confidence is rejected by the Assembly and the Minister is unwilling to compromise then the dispute will probably be resolved politically. There may be perfectly legitimate disagreements as to where the balance of public interest lies – for disclosure or confidentiality – or the dispute may be mere expediency on the part either or both sides. In such circumstances it usually comes down to a calculation by each side as to the political costs and benefits of pursuing the matter.

Chapter 3. In camera evidence

3.1. Under Assembly standing order 242, Assembly committees have the power to take evidence from witnesses on a confidential, or *in camera*, basis. Standing orders provide that evidence taken *in camera* (transcripts of those proceedings and documents received *in camera*) will remain confidential to the members of that committee. It is a breach of Assembly standing orders to divulge evidence that has been taken *in camera* unless there has been a resolution of the Assembly or the relevant committee to do so.

3.2. The use of *in camera* evidence raises two important questions for the Assembly: 1) what procedures and principles should be applied to invoke such a procedure when hearing from witnesses; and 2) what procedures and principles should be applied in making a decision to disclose evidence that has been taken *in camera*?

3.3. These issues are briefly explored in this chapter of the report.

3.4. Under current provisions there are no guidelines to assist Members about the most prudent way to proceed when considering an application to take *in camera* evidence or a decision to disclose *in camera* evidence. This section proposes some approaches for the Assembly's consideration including:

- 4) a procedure for witnesses to make an application to give evidence in camera;
- 5) a proposal that only the Assembly may authorise the publication of in camera evidence and where a committee wishes to authorise the publication of evidence, it will report to the Assembly with a recommendation to this affect¹⁹; and
- 6) a protocol on the handling of *in camera* evidence.

3.5. This chapter makes reference to Australian House of Representatives Practice to examine current thinking on the procedural framework for *in camera* evidence. This report also makes reference to a House of Representatives Standing Committee on Procedure report on the disclosure of *in camera* evidence and the 1998 Standing Committee on the Chief Minister's Portfolio report, '*Draft Principles and Guidelines for the Treatment of Commercial Information Held by ACT Government Agencies*'.

¹⁹ Where the relevant committee is no longer in existence (for example a select committee), the Assembly as custodian of committees' documents may authorise the publication of in camera evidence.

Issues

3.6. The 1998 Standing Committee on the Chief Minister's Portfolio report, '*Draft Principles and Guidelines for the Treatment of Commercial Information Held by ACT Government Agencies*' summarises the provisions in the Assembly's relevant standing order covering *in camera* evidence. That committee noted that:

Standing Order 242 provides, inter alia, for a committee to authorise the publication of submissions, exhibits and oral evidence. This standing order also provides that any evidence taken or documents received *in camera* or on a confidential basis by a committee remains strictly confidential unless its publication is authorised by the committee or the Assembly.²⁰

3.7. The 1991 House of Representatives Standing Committee on Procedure report on *in camera* evidence notes that, '*In camera* hearings are usually, but not necessarily, granted following a request from a witness for his or her evidence to be treated as confidential. In other cases, the initiative will come from the committee itself'.²¹ Although not formalised, the process is the same in the Assembly.

3.8. Ensuring that the business of parliament is open and transparent to the public it serves is a key feature of the democratic process. Parliamentary procedure should, where possible, reflect the ascendancy of openness in government, enhancing the capacity for members of the public to be kept informed about the business of their elected representatives concerning matters of public importance. As a general rule, therefore, the proceedings of parliamentary committees, which are merely subsets of the parliament itself, should be in public where possible.

3.9. However, the provision of *in camera* evidence to an Assembly committee precludes public scrutiny and therefore committees must give careful consideration before allowing *in camera* evidence to be taken.

3.10. The provision for allowing *in camera* evidence to be taken by parliamentary committees is predicated on the idea that in investigating particular matters, a committee may wish to hear from a person or persons whose evidence has the capacity to cause some disadvantage or damage to various parties should that evidence be given publicly. Harm could potentially be caused to the witnesses themselves, third parties, or an area of concern that a witness has claimed should be immune from public scrutiny (due to the potential for disadvantage) such as commercial-in-confidence material.

²⁰ Standing Committee on the Chief Minister's Portfolio (1998) '*Report on Draft Principles and Guidelines for the Treatment of Commercial Information Held by ACT Government Agencies*' p 6.

²¹ House of Representatives Standing Committee on Procedure op cit, p 1.

3.11. Evidence taken *in camera* is a double edged sword. Given that evidence taken in camera cannot be disclosed beyond the committee's members, committees are limited in the extent to which they can use it in reporting on a matter. Evidence taken in camera can be alluded to in a committee's report but the identity of a witness must not be divulged either by naming the witness or by outlining so much detail of their evidence that other members of the community could connect the dots and deduce the identity of the witness. The later point is particularly relevant in the ACT which is a relatively small community.

3.12. A committee's decision about whether or not to allow the hearing of evidence *in camera* raises a tension between the public interest in disclosure about important matters of community concern, and the interests of a witness and others who may be harmed or disadvantaged by the giving of that evidence in a public forum. As the House of Representatives Practice points out, 'When a witness makes an application for an *in camera* hearing, the committee decides the issue on the balance of the public interest and any disadvantage the witness, or a third party, may suffer through publication of evidence'.²²

3.13. Confining itself to the issue of taking *in camera* evidence in relation to commercial-in-confidence material, the 1998 report of the Assembly Standing Committee on the Chief Minister's Portfolio makes specific mention of a committee's need to balance its prerogative to scrutinise government versus the potential for damage to private interests should commercially sensitive information be publicly disclosed. It notes that, 'the capacity for committees to take *in camera* evidence means the requirements of government accountability can be balanced against any public interest in confidentiality or any adverse impact of publication of commercial information on private sector business'.²³

3.14. Against this background, a decision as to the appropriateness of taking *in camera* evidence should not be taken lightly by a parliamentary committee. Simply asserting that *in camera* evidence is warranted is not a sound basis on which a committee should grant approval. For example, a shy witness could not make a reasonable claim to be heard *in camera* simply on the basis that they are diffident speakers.

3.15. House of Representatives Practice outlines some of the situations where *in camera* evidence may be warranted. The House of Representatives Practice notes that:

²² Barlin et al op cit, p 672.

²³ ACT Assembly Standing Committee on the Chief Minister's Portfolio op cit, p 9.

Witnesses may request an *in camera* hearing but a committee will agree only for compelling reasons. Evidence which committees would normally take *in camera* and not publish because of possibly adverse affects on a witness includes: evidence which might incriminate the witness, industrial secrets, classified material, medical records and evidence which may bring advantage to witness's prospective adversary in litigation. In the last case the witness could be disadvantaged by having details of a case made known to an adversary or by informing the adversary of the existence of certain evidence beneficial to the witness's case and even how the evidence might be obtained. Other reasons for *in camera* hearings could include evidence likely to involve serious allegations against third parties, a matter which is sub judice... or a matter on which a Minister may otherwise claim public interest immunity....²⁴

3.16. Currently the Assembly has no established procedures delineating how applications by witnesses to give *in camera* evidence will be dealt with. The areas requiring clarification include:

- the procedures and principles that should be followed in considering an application to give evidence *in camera*;
- the procedures that should be in place dealing with applications by witnesses to give *in camera* evidence;
- the information that should be provided to witnesses who have been given approval to give *in camera* evidence;
- the procedures and principles that should be followed in making a decision to authorise the publication of *in camera* evidence;
- the sanctions that might apply to members who breach the standing orders by disclosing evidence given *in camera* without a resolution of the committee or the Assembly; and
- ensuring the security of evidence given *in camera*.

3.17. These issues are discussed below.

Guidelines for allowing in camera evidence

3.18. The Committee has proposed that a formalised process be mandated surrounding applications by witnesses to be heard *in camera*.

²⁴ Barlin et al op cit, p 672.

Applications to give in camera evidence

3.19. Currently an invitation to apply to give *in camera* evidence is not extended, as a matter of course, to all witnesses before they appear at a committee hearing. It is done at the discretion of members of the committee; or sometimes witnesses themselves take the initiative and request to be heard *in camera*.

3.20. Before witnesses appear at a public hearing, an information brochure outlining the provision for *in camera* evidence is sent out to them by the Committee Office. The brochure points out that:

Committees may decide that written or oral evidence is to be treated confidentially. Evidence taken *in camera* at a hearing is available only to the committee and the witness concerned. Such evidence remains confidential unless its publication is authorised by the committee or the Assembly subsequently...²⁵

3.21. However, committees do not, as a matter of course, then remind witnesses about this provision on the day of the hearing. One possible result of this is that a witness who has not read, or has forgotten or failed to understand the information brochure may not be aware of their right to apply to be heard *in camera*.

3.22. For this reason, the Committee sees that Assembly should adopt a standing order requiring the presiding member of a committee to inform all witnesses that they have are able to apply to be heard *in camera* (the witness would be informed about the right to apply to give their evidence *in camera* immediately prior to the giving of that evidence). Under the proposal, the presiding member of a committee would outline the types of situations where *in camera* evidence may be warranted as well as stressing that committees will only grant an application for compelling reasons.

Criteria for allowing in camera evidence

3.23. Once a committee has decided to hear an application for a witness to give their evidence *in camera*, a decision needs to be made as to the merits of the application. As noted above, House of Representatives Practice outlines numerous situations which may warrant the use of *in camera* evidence. The categories mentioned in the House of Representatives Practice include:

- evidence which might incriminate the witness;

²⁵ ACT Legislative Assembly for the ACT, 'Information for Person Making Submissions to, or Appearing as Witnesses Before, Committees of the ACT Legislative Assembly'.

- industrial secrets/commercial-in-confidence material;
- classified material;
- medical records;
- evidence which may bring advantage to witness's prospective adversary in litigation;
- evidence likely to involve serious allegations against third parties;
- matters that are before the court (sub judice)

3.24. There may be cases where even when an application is made to give *in camera* evidence on one of the grounds listed above, a committee may still form the view that the public interest in disclosure is deemed to be paramount and deny the application.

3.25. It is also the case that grounds other than those listed may be used to invoke *in camera* provisions. That is to say that the list in House of Representatives Practice should not be seen as exclusionary or exhaustive.

3.26. During the Fourth Assembly, the Standing Committee on Education, Community Services and Recreation received *in camera* evidence from witnesses in relation to its inquiry into Educational Services for Children with a Disability. That committee agreed to receive the evidence *in camera* after a serious incident took place at a Canberra school. The committee was concerned that individual children would be named and the committee deemed that it was important to protect their identity. In this case the committee viewed the individual interests of the children concerned to be of more importance than the interest in public disclosure of the evidence. It was also the case that witnesses may not have been prepared to give their evidence without an *in camera* hearing and thus that committee would have forgone the opportunity to hear about many of the on-the-ground issues confronting these children.

3.27. Another area of particular importance in considering an application to give evidence *in camera* is whether the evidence to be given *in camera* is directly germane to the issues before the committee.

3.28. It is not appropriate to allow the use of *in camera* evidence where that evidence is not directly relevant to the work of the committee or even where that evidence is only tangentially related. Where a witness has applied to be heard *in camera* and the subject matter of that evidence is not *directly* relevant to the business of the committee's work on a particular inquiry or issue, the application is usually denied.

3.29. An application to provide *in camera* evidence should be able to meet the following criteria:

- 1) that the specific evidence given is *directly* relevant to the committee's investigations;
- 2) that there is the likelihood for the evidence to harm either the witness or a third party.

3.30. After considering the witness's application vis-à-vis the criteria, the committee would then either: 1) accept the application and close the session to the public; or 2) it would deny the application and give the reasons for its decision to the applicant.

3.31. It is also the case that committees must continually monitor the evidence while it is being given to ensure that the above criteria are being met. It is possible that a committee could *prima facie* accept a witness's claim that *in camera* evidence is warranted only to find that in the giving of the evidence it becomes apparent that there is, in fact, no reasonable basis to allow the evidence to proceed *in camera*. In this event, a committee could stop the session to deliberate on whether the evidence should continue in camera and if a decision is made that it should not, the committee would inform the witness that their evidence will be given in public or not at all.

3.32. It must also be noted that in camera evidence should never be used where there is malicious intent on behalf of a witness to reflect negatively on a third party.

Expectations of confidentiality

3.33. *In camera* evidence is not evidence given 'off the record'. Under the current Assembly standing orders, once a committee has determined to take *in camera* evidence from a witness or witnesses, no assurance can be given that the evidence received will remain *in camera*, remain confidential indefinitely.

3.34. Indeed, as it currently stands, a simple majority of the Assembly or the committee²⁶ that received the evidence is all that's required to authorise publication at any time. Given the ease with which publication of *in camera* evidence can occur, it is essential that witnesses proposing to make an application to give their evidence *in camera* are fully informed about the potential for the evidence to become public at some future date. As the House of Representatives Practice notes, 'Witnesses granted permission to give their evidence *in camera* should be warned that it is within the committee's (or the House's) discretion to publish the evidence subsequently, if it thinks fit'. While

²⁶ Below is a discussion as to whether the Committee wishes to consider recommending changes in this regard.

the Committee Office does provide an information brochure to witnesses briefly outlining that *in camera* evidence may be disclosed, there is currently no requirement in the Assembly procedures for the committee itself to inform a witness about the possibility that their evidence may be publicly revealed.

3.35. To address this, the Committee proposes a standing order of the Assembly requiring the presiding member of a committee to inform witnesses that have been approved to give their evidence *in camera* that it is within the power of the Assembly to disclose all or part of the evidence at a later date²⁷.

3.36. A useful form of words can be found in the 1991 House of Representatives Standing Committee on Procedure report on disclosure of *in camera* evidence. That committee recommended that the following resolution be adopted by the House:

A committee may, on its own initiative or at the request of, or on behalf of, a witness or organisation, hear evidence in private session. A witness shall be informed that it is within the power of the committee and the House to disclose all or part of the evidence subsequently. Publication of evidence would be the prerogative of the committee and would only be disclosed if the majority of the committee so decided by resolution.²⁸

3.37. The Committee proposes that a standing order be adopted to address some of the issues raised above.

Recommendation 1

The Committee recommends that the Assembly adopt the following standing order:

Immediately prior to a witness giving evidence before an Assembly committee, the Presiding member or Acting Presiding member shall inform the witness of their right to apply to be heard *in camera* and the committee by way of a resolution will decide the application on the following criteria:

- 1) that the specific evidence given is directly relevant to the committee's investigations; and**
- 2) that there is the likelihood for the evidence to harm either the witness or a third party.**

²⁷ The proposed change is discussed below under 'Disclosure of *in camera* evidence'

²⁸ House of Representatives Standing Committee on Procedure (1991) 'Disclosure of In Camera Evidence', p 6.

Where a committee approves the application, the session shall be closed to the public and the witness shall be informed that it is within the power of the Assembly to authorise the evidence for publication at a later date.

Where an application is denied, the witness shall be given reasons for that decision.

Disclosing in camera evidence

3.38. The Committee also proposes the adoption of procedures setting out what steps need to be taken should *in camera* evidence be authorised for publication. Given that the nature of evidence given *in camera* is potentially injurious, it is of great importance that witnesses are advised with great alacrity should their evidence be authorised for publication. It is also important that third parties who have been named in evidence given *in camera* also be notified promptly. This is particularly important where a third party's reputation may have been adversely reflected upon.

3.39. Of course the decision about whether or not to authorise the publication of *in camera* evidence is a vexed issue. Again, as with a decision to receive evidence *in camera*, there is a tension between the public interest in disclosure and the protection of individuals who may be disadvantaged should their evidence come to light.

3.40. The report of the Standing Committee on the Chief Minister's Portfolio acknowledges that:

The committee considers a protocol [for *in camera* evidence] could derogate from the power of the Assembly and its committees to authorise the publication of evidence as they see fit. It could reasonably be expected that any resolution of a committee, or the Assembly, to authorise publication of *in camera* evidence... would give due consideration to the interests of all persons and parties involved and that the resolution would recognise an overriding public interest in disclosure...²⁹

3.41. The House of Representatives Practice examines some of the areas where a decision to disclose *in camera* evidence may be warranted. The House of Representatives Practice notes that:

For obvious reasons a committee should authorise publication of *in camera* evidence only when there is a real and justifiable need or when subsequent events have removed the need for confidentiality, or when the evidence given does not warrant the confidential treatment which it was originally thought might be necessary. For example, having heard the evidence the committee might form the opinion that the arguments in favour of

²⁹ Standing Committee on the Chief Minister's Portfolio op cit, p 10.

publication in the public interest carry more weight than the grounds for confidentiality claimed, or that a claim that the evidence is sub judice... cannot be sustained. Committees, while not authorising publication of evidence generally, may need to authorise publication of the evidence to a person named in it in order to enable such a person to be aware of statements made and thus enabled to put his or her view to the committee.³⁰

3.42. As noted, currently the disclosure of *in camera* evidence can be achieved by way of resolution of either the committee that received the evidence or the Assembly.

3.43. Current provisions in the standing orders raise one serious logistical difficulty in this regard. Currently it is a breach of the standing orders for members of a committee, secretariat staff or anyone else to disclose *in camera* evidence, including disclosure to other MLAs. A problem could therefore arise should the Assembly be asked by way of a motion to authorise *in camera* evidence for publication as all members of the Assembly would not have access to the evidence to assess the merits of the publication order (except of course for those MLAs who are members of the relevant committee).

3.44. Of course, it is still possible for the committee to authorise the *in camera* evidence but it could well be the case that the view of a committee is not shared by the majority of the Assembly. Under the current provisions it is possible that two lone members (a majority of most standing committees) are able to authorise publication of *in camera* evidence. Given the seriousness of such a decision, it is appropriate to include some checks and balances in the process. There is also a case to restrict the authority of committees to disclose evidence without reference to the Assembly.

3.45. The Committee proposes that the authority to publish *in camera* evidence be located solely in the Assembly (where a committee wishes to authorise publication it would report to the Assembly with a recommendation to this effect). Under this process, the committee would table a brief report to the Assembly outlining the case for the publication of the *in camera* evidence supported by a majority of the committee's members. Any dissent to the recommendation of the committee could be tabled in the normal way. Following this it would be the role of the Assembly to assess the merits of the arguments – either accepting or rejecting the recommendation of the committee.

3.46. Committees drafting reports of this nature would need to ensure that any sensitive information contained in the *in camera* evidence at issue is not disclosed. Reports of this nature would only argue the case for publication on general principles, not specifics.

³⁰ Barlin et al op cit, p 672.

Recommendation 2

The Committee recommends that the Assembly adopt a standing order articulating the principles and procedures for granting the publication of *in camera* evidence.

That standing order should read:

Evidence given *in camera* shall only be authorised for publication by the Assembly by way of resolution.

Where a committee wishes to authorise *in camera* evidence that it has taken, it shall table a report, recommending that the Assembly authorise the publication of that evidence.

A majority of members of the relevant committee (in the case of the report) and the Assembly (in the case of a resolution) should be satisfied that there is a real and justifiable need to disclose the *in camera* evidence or that subsequent events have removed the need for confidentiality, or that the evidence given does not warrant the confidential treatment which it was originally thought might be necessary. Every attempt will be made to notify a witness who has given *in camera* evidence as well as any third parties who have been named in that evidence before disclosure takes place.

3.47. This measure would have the effect of limiting a committee's power to authorise the publication of evidence, not the Assembly's. It would still be the case that the Assembly could authorise the publication of *in camera* evidence without a report of the relevant committee with a recommendation to this effect.

3.48. Where the Assembly wished to authorise the publication of *in camera* evidence in the absence of a report from the relevant committee, the Assembly could resolve to authorise the publication of the material to the Members of the Assembly only. This would allow Members to appraise the material and access whether there is a case for authorising broader publication. This would overcome the logistical difficulty discussed above in paragraph 3.43.

Sanctions for improper disclosure.

3.49. This report has not considered whether specific sanctions should be applied where an MLA has disclosed *in camera* evidence improperly. However, the Assembly currently has a range of sanctions, both political and institutional, at its disposal for members who are in contempt of the Assembly. The

disclosure of *in camera* evidence without approval is a serious contempt and existing sanctions such as suspension of a member would be appropriate where this has been found to occur.

Security issues

3.50. At the present time, the ACT Legislative Assembly Secretariat has no protocols for handling transcripts of evidence taken *in camera* and other documents that have been received *in camera*. There are no security requirements for the storage of *in camera* evidence and no guidelines for the electronic transmission and retention of this evidence.

3.51. This is of great concern to the Committee. Without appropriate protocols in this regard, the integrity of the *in camera* status could be jeopardised.

3.52. The Committee has proposes that the Assembly adopt a clear set of protocols for the storage, handling and transmission of *in camera* evidence to provide an assurance that these confidential materials remain confidential at least until the Assembly resolves otherwise.

Recommendation 3

The Committee recommends:

- **The establishment of a registrar of *in camera* evidence who would be required to log all *in camera* evidence and store that evidence in a class ‘B’ safe; and**
- **That the electronic versions of transcripts of *in camera* evidence be encrypted for storage on Secretariat computers and for transmission in email, CD-ROM and floppy disk.**

Greg Cornwell MLA
Presiding Member

21 August 2001

Appendix 1

Guidelines in relation to claims of commercial in confidence

In the 38th Report for 2000-01, *The Use of Confidentiality Provisions in Commonwealth Contracts* the Commonwealth Auditor General considers possible grounds for claiming, or rejecting claims for, confidentiality in relation to government documents.

The first section considers the general ‘characteristics’ of material that might be subject to claims.

These extracts are taken from chapters 4 and 5 of the Auditor General’s report referred to above.

The ANAO considers that agencies should protect, or agree to protect, as confidential, information that satisfies the following criteria.

Specific identification of information in question

- The information to be protected must be able to be identified in specific rather than global terms.
 - Particular clauses or parts of clauses within a contract, or particular information, may satisfy this requirement, rather than the contract as a whole, or all of the information.
- A confidentiality claim should not be made or accepted in relation to innocuous material.

Information has the necessary quality of confidentiality

- The information in question must not be something that is trivial or within the public domain (for example, details may already appear in the client charter, published business plan or annual report).
- The information must have continuing sensitivity for the entity whose information has been confided. It is not sufficient that the ‘confider’ merely wishes to protect the communication.
- The information must have a commercial value to the business or its competitors (for example, trade secrets), and it is likely that detriment would be caused to the ‘confider’ should it be disclosed.
- At the time when confidentiality is claimed, the information must be known only by a limited number of parties. The nature of some of the items of information may be such that they enter the public domain over time as

circumstances change (for example, where otherwise confidential information has been tendered in court proceedings, or where a contract has been awarded following a tendering process).

Detriment to the 'confider' of the information

- Detriment to a 'confider' resulting from the disclosure of information is generally a necessary element to a court making a finding that disclosure would amount to a breach of confidence.

However, where the information is about spending taxpayers' money and the government seeks to enforce a confidence, the courts have held that detriment must be established by reference to the relevant public interests that would be damaged upon disclosure. Unlike a private party seeking to enforce a confidence against the Commonwealth, the Commonwealth is obliged to act in the broader public interest. Public discussion and criticism of government actions or embarrassment do not amount to sufficient detriment to warrant a confidentiality claim.

Information that has been held by the courts to be confidential

Building on the discussion of criteria, it is necessary to consider the specific categories of information that have been protected by the courts and tribunals as confidential information. These are discussed below.

Trade secret information

- A trade secret has been referred to as a type of information which has about it the necessary quality of secrecy to be the subject of a confidence. Consideration needs to be given to whether the information in question consists of a process or device which has been developed for use by an entity for the purposes of its continuing business operations. A contract, may well refer to such information but the contract itself will rarely reveal such information.
- The legal tests used to determine a trade secret include the following:
 - the extent to which information is of a technical nature (it is more likely to be considered a trade secret if it is so);
 - the extent to which the information is known outside the business of the owner of that information;
 - the extent to which the information is known by persons engaged in the owner's business;

- measures taken by the owner to guard the secrecy of the information;
 - the value of the information to the owner and to his/her competitors;
 - the effort and money spent by the owner in developing the information; and
 - the ease or difficulty with which others might acquire or duplicate the secret.
- Examples of trade secrets that may be contained or referred to in contracts include industrial processes, formulae, product mixes, customer lists, engineering and design drawings and diagrams, and accounting techniques.

Information having a commercial value that would be diminished or destroyed if disclosed

- Identifying information of commercial value requires a consideration of:
 - the value of the information to the entity; and
 - whether that value may be destroyed or diminished through disclosure.
- Information has commercial value to an entity if it is valuable for the purposes of carrying on the commercial activity in which that entity is engaged. It may be valuable because it is important or essential to the profitability or the viability of a continuing business or commercial operation.
- The investment of time and money is not a sufficient indicator (in itself) that information has commercial value ...
- Information which is old or out of date, or is publicly available, may have no remaining commercial value.
- Having commercial value alone is not sufficient to warrant protection. It must be clear that the commercial value of the information will be diminished or destroyed by disclosure...
- Examples of information having a commercial value that may be associated with contracts include production costs, profit margins, pricing structures ... and research and development strategies.

Examples of what would not be considered confidential

5.12 The following types of information in, or in relation to, contracts would generally not be considered confidential:

- performance and financial guarantees;
- indemnities;
- the price of an individual item, or groups of items of goods or services;
- rebate, liquidated damages and service credit clauses;
- performance measures that are to apply to the contract;
- clauses which describe how intellectual property rights are to be dealt with; and
- payment arrangements.

5.15 Though not in the contract itself, the performance of the contractor against the requirements in the contract and agreed assessment criteria, should always be disclosed This after all, is the ultimate test of the efficient use of taxpayers' money.

Examples of what would be considered confidential

5.16 The following types of information may meet the criteria of being protected as confidential information:

- trade secrets ...;
- proprietary information of contractors (this could be information about how a particular technical or business solution is to be provided);
- a contractor's internal costing information or information about its profit margins;
- pricing structures (where this information would reveal whether a contractor was making a profit or loss on the supply of a particular good or service); and
- intellectual property matters where these relate to a contractor's competitive position.

PRINCIPLES AND GUIDELINES FOR THE TREATMENT OF COMMERCIAL INFORMATION HELD BY ACT GOVERNMENT

AGENCIES. CHIEF MINISTER'S DEPARTMENT FEBRUARY 1999

OVERVIEW

This paper outlines **principles and guidelines to give effect to the Government's policy** of transparency and openness in acting on behalf of the people of the ACT. The guidelines are based on existing rights of public access to information held by Government agencies under the *Freedom of Information Act 1989* (the FOI Act).

In handling commercial information, Government agencies must abide by a commitment to as' full disclosure as possible; within the framework of existing Freedom of Information law.

Principles of probity, ethical decision-making and fair dealing must be observed.

The community's right to know how public resources and assets are managed extends to the Territory's commercial dealings with the private sector. Public scrutiny of commercial dealings must be expected as a part of doing business with Government. On the other hand, businesses that enter into commercial arrangements with the Territory also expect that their valuable commercial information provided in confidence will be protected. For example, confidentiality is an essential part of a fair tendering process and is necessary to protect the genuine commercial interests of contractors. However, in the absence of some overriding public interest against disclosure, it would generally be expected that the terms or key features of a contract would be open to public scrutiny.

The obligation of the Government to account for its management of the Territory's resources means that in some circumstances commercial information in the possession of a Government agency must be disclosed. Individuals and businesses have a right to know, in advance of providing information, when this might occur.

The principles and guidelines are designed to assist public employees in identifying the limited circumstances in which information should be considered commercial-in-confidence.

Application

These guidelines apply to commercial information in the possession of all ACT Government agencies. This includes administrative units and statutory authorities and bodies. The guidelines do not apply to Territory Owned Corporations to the extent that access to documents relating to their competitive commercial activities is exempt under the FOI Act.

Public Access

The FOI Act is the appropriate mechanism by which public access to information held by Government agencies is provided. Agencies must make sure that the provisions of the FOI Act are used when considering FOI claims. These Guidelines do not replace that Act.

Access by the Legislative Assembly and its Committees

Requests for information by the Legislative Assembly and its Committees must be dealt with in accordance with the Participation in Parliamentary Inquiries Handbook.

The capacity of Assembly Committees to consider information in-camera means the requirements of government accountability can be balanced against any public interest in confidentiality or any adverse impact of publication of commercial information on private sector businesses.

KEY PRINCIPLES

The following key principles will govern the treatment of commercial information held by government agencies:

- the Government is obliged to disclose information wherever possible, including information relating to its commercial dealings, to the people on whose behalf it is acting;
- private citizens and corporations have a right to expect that confidential information with commercial value will be protected, including from inadvertent, unintended or improper disclosure;
- information obtained through commercial dealings is not automatically commercial-in-confidence;
- confidentiality should be agreed where justified by the nature of the information and consistent with the following guidelines;
- while classifying commercially sensitive information as confidential means it will be accorded appropriate security within an agency, the classification itself does not justify non-disclosure. Specific grounds or reasons, consistent with these guidelines, are required to justify any decision not to disclose commercial information;
- where information falls into exemptions in the *Freedom of Information Act 1989*, or there is a general contractual confidentiality clause, voluntary disclosure by agreement should be considered after consultation with the person or business that provided the information.

GUIDELINES

The principle of open access to information is a fundamental element of accountable government. In general, the Territory will make available

information concerning its commercial dealings. Within the public sector accountability framework, classifying information as commercial-in-confidence to avoid disclosure is not appropriate.

Confidentiality will be afforded to commercial information provided by private citizens or businesses in limited circumstances. This includes where confidentiality is required under a pre-existing legal duty to maintain confidence or by a pre-existing contract.

The obligation of government to account for its actions limits the extent to which the Territory can enter confidentiality agreements. It is important that the Territory's business partners

understand these limits early in any discussions. It should be understood that commercial-in-confidence status would be afforded only in the limited circumstances set out in these guidelines. Discussion of these issues should occur early in any negotiation before potentially confidential information comes into the possession of the Territory.

In any future dealings by or on behalf of the Territory, those dealing with the Territory should be informed in writing that:

- the Territory will act under a policy in favour of making available to the public information surrounding its commercial dealings. This may include making available details of contractual arrangements between the Territory and the private citizen or corporation;
- the Territory may be required to disclose information, either under the FOI Act or by the responsible Minister in the Legislative Assembly;
- confidentiality will be afforded only in accordance with these guidelines. Contracting firms or individuals should clearly identify, in writing, any information they believe is confidential. Agencies, in consultation with the contracting party, must resolve which information will be considered as confidential before the matter proceeds.

Where it is agreed that information is confidential, the party providing the information should be advised in writing that confidentiality may be subject to exceptions where the information:

is required, or authorised, to be disclosed by law; must be disclosed to the Territory's solicitors, auditors, insurers, advisers or Territory Ombudsman; is disclosed by the Auditor-General, in the public interest, in a report to the Legislative Assembly;

- is required to be disclosed by the Legislative Assembly or its Committees; or
- is reasonably necessary for the enforcement of the criminal law or for the protection of the public revenue.

An indicative confidentiality clause, which sets out the extent to which the Territory can agree to confidentiality, is at Attachment B.

Decisions about confidentiality

The Territory should agree to treat information as confidential in limited circumstances and in accordance with the following guidelines.

Where the reason for confidentiality relates to the possibility that disclosure may impact adversely on the business providing the information (for example, where the information is

commercially valuable or disclosure would lead to a financial detriment), the private citizen or corporation should provide the reasons for seeking confidentiality. This permits those acting on behalf of the Territory to consider all relevant issues when assessing whether it is appropriate to agree to confidentiality. It also means any later claim for access to the information can be properly assessed.

The following issues should be considered before agreeing to accept information in confidence, including confidentiality clauses in contracts.

Is the information “Personal information”?

“Personal information” is information or an opinion, whether true or not, about a natural person whose identity is apparent, or can reasonably be ascertained, from the information or opinion. This includes professional resumes and employment histories of specified personnel who may be engaged on a business project or venture with the Territory. It may also include the business or professional affairs of a natural person.

Information should be treated as confidential if its release would result in the unreasonable disclosure of personal-information.

“Personal information” is also subject to the confidentiality and privacy obligations of the Privacy Act 1988.

Does the information concern trade secrets or is it information with a commercial value that could be destroyed or diminished by disclosure?

Information of this kind may, in some circumstances, be treated as commercial-in-confidence. An assertion that trade secrets are involved should be closely examined. The information should be unknown to other persons and of a business, trade or technical nature. Information defined as trade secrets could include secret business, manufacturing or training procedures, specific client lists, pricing data, market projections, internal financial information or proposals and business methodologies having an inventive element not generally available or known in an industry.

Information that is not a trade secret may nonetheless have a commercial value that would be destroyed or diminished if disclosed and which should therefore be protected. Information may be regarded as having a relevant commercial

value if it is important to the profitability or viability of a continuing business activity.

Any confidentiality obligation should be limited to the specific trade secret or commercially valuable aspect of any information. It should not extend to the general commercial or contractual specifics of a commercial arrangement with a private citizen or corporation.

Would disclosure of information concerning the business affairs of a company have an adverse effect upon the company that is unreasonable in the circumstances”

Information about the business affairs of a company (that is, the money-making aspects of its business as opposed to its private or internal affairs) may be considered confidential where

disclosure of the information would disadvantage the contracting firm with its competition in a way that is unreasonable in the circumstances.

This category reflects the issues covered under the FOI Act business affairs exemption. An assessment of reasonableness requires a balancing of the public interest in the disclosure of the information and the private interest in maintaining confidentiality. The potential detriment to the business by release of the information is obviously an important factor. However, this may not be conclusive in the face of an overriding public interest favouring disclosure.

The public interest may be described as something that is of serious concern or benefit to the public rather than of individual interest. The public interest is usually assessed in relation to the circumstances of the particular case and factors such as the importance of public access to government information and scrutiny of government action.

Would an obligation to treat information as commercial-in-confidence inappropriately restrict the Territory in the management or use of Territory assets?

The management or use of Territory assets, and anything impinging on this, should ordinarily be assumed part of the public domain. Information such as that contained in a proposal for the development of Territory assets should not be treated as commercial-in-confidence as this may limit the range of people with whom the Territory may deal or the use the Territory makes of its own property. In such circumstances, confidentiality should not be agreed.

Would disclosure cause significant harm to the Territory, or not generally be in the public interest?

In some circumstances it is appropriate for the Territory to keep information confidential where disclosure would significantly harm the Territory or otherwise not be in the public interest. For example, this would include where disclosure of information is likely to impact adversely on the future bargaining position of the Territory.

A key factor in determining whether disclosure is not in the public interest is the probable effect of release on the interests of the public at large. Personal or institutional detriment is not sufficient.

Is the information public knowledge?

Confidentiality should not be agreed if the information that is claimed to be confidential is already in the public domain.

Has the information come into the possession of the Territory from other sources without restriction in relation to disclosure?

If information is already known and there are no restrictions as to disclosure by the Territory, a claim of commercial-in-confidence should not be supported.

Has the information been independently developed or acquired by the Territory

A claim for confidentiality would not be justified if the Territory has the information from another source.

Should any agreement to treat information as commercial-in-confidence be limited in time? .

In many cases, the commercial value of information *will* exist only for a limited time. In these cases, it is not necessary to maintain confidentiality for any period longer than that required to fairly protect the interests of the party seeking the confidentiality agreement.

For example, once a contract is signed at the completion of a tender process, many issues of confidentiality may no longer exist.

Disclosure

When the question of disclosure is being considered, the following matters should be addressed in addition to the issues outlined above. These matters extend to pre-existing contracts as well as contracts made after these guidelines come into effect. In cases of doubt, agencies should seek legal advice about the status of confidentiality agreements prior to disclosure of information.

Is disclosure compelled under law?'

The Government is subject to certain specific legal requirements compelling disclosure. These requirements may override obligations to treat information as confidential and should be carefully addressed to ensure that the Territory complies with all of its obligations.

Disclosure may be required by:

courts, subject to areas of established privilege;

the Legislative Assembly or its Committees, subject to Ministerial claims of public interest immunity;

claims under the FOI Act, subject to statutory exceptions; and

requests/requirements for information from accountability agencies such as the Ombudsman or Auditor General. The *Public Interest Disclosure Act 1994* also permits disclosure of otherwise confidential information to government agencies on the basis of belief on reasonable grounds of wrongdoing.

Is there an overriding legal obligation of confidentiality

Legal confidentiality and privacy obligations should be identified and strictly observed. For example, there may be a pre-existing legal duty to maintain confidence (eg brought about by an agreement to receive information in confidence), or an obligation of confidentiality imposed by a pre-existing contract.

Has the person who provided the information subsequently agreed to its release?

In all cases where confidentiality may be claimed, the person who provided the information should be asked whether or not he or she agrees to its disclosure. Such an agreement may override a prior obligation of confidence.

Is disclosure of the information reasonably necessary for the protection of the Territory revenue or the administration of justice?

There is a clear public interest in the enforcement of the criminal law and laws which impose pecuniary penalties (such as the *Trade Practices Act 1974*). The Territory's policy is that it should not provide a secrecy shield that may adversely affect the public revenue or enforcement of the criminal law or laws that impose pecuniary penalties.

Partial disclosure

While it is generally expected that the terms of government contracts would be open to public scrutiny, there may be circumstances where disclosure of the full contract is contrary to the public interest. In these circumstances, deletions of sensitive information from a contract or use of a contract summary, as set out below, would permit appropriate scrutiny of contractual arrangements. If a contract summary is used, it should be clearly identified as such.

A contract summary is not an appropriate response to a request for information by the Auditor General. The *Auditor General Act 1996* permits the Auditor-General to balance public interest considerations before publishing information in a report to the Legislative Assembly.

It would be expected that the following information should be included in a contract summary:

- the full identity of the contractor, including details of cross ownership of relevant companies;
- the duration of the contract;
- any transfer of assets under the contract;
- all maintenance provisions in the contract;
- the price payable by the public and the basis for changes in this price;
- renegotiation and renewal rights;
- the results of cost-benefit analysis;
- risk sharing in the developmental and operational stages of the contract;

any penalty clauses;

- significant guarantees or undertakings, including loans, agreed or entered into;
- any other information required by statute to be disclosed to the Australian Securities Commission and any made available to the public; and
- other key elements of the contractual arrangements’.

Consistent with these Guidelines, it would not be necessary to include intellectual property or information about the business affairs of a company where disclosure would impact adversely on the company in a way that is unreasonable in the circumstances.

Consultation

When a request under the FOI Act is received for information that relates to the business, commercial, professional or financial affairs of an individual or business and the agency has a discretion concerning whether the information should be released, it is important to consult with the individual or business that supplied the information.

Businesses should be given a reasonable opportunity to identify information that, in their view, comes within one of the grounds of exemption in the *Freedom of Information Act 1989*. They should be encouraged to provide further information to support that view, although these submissions cannot determine the agency’s decision whether to release the information. This information may, however, be very important in assisting the agency to explain why information cannot be released.

Section 27 of the FOI Act requires, where reasonably practicable, consultation with businesses or individuals about the release of information concerning their

professional or business affairs, or the commercial or financial affairs of an organisation or undertaking.

Review of Decisions

Any decision to release information relating to business affairs in the face of objection by the relevant individual or business is subject to review rights under section 69 of the FOI Act. The individual or business should be promptly informed of the decision and their right to ask the Administrative Appeals Tribunal to independently review the decision before the documents are released.

¹ This is based on a model devised by the Public Accounts Committee of the NSW Legislative Assembly.