

Commercial arrangements for local government *

The *Government Information (Public Access) Act 2009* is set to commence in early 2010. The Act includes provisions that give members of the public greater access to information concerning contracts between private sector and government agencies.

Access to information from private sector contractors

Section 121 of the *GIPA Act* applies where an agency (including a local council) enters into a contract with a private sector body ("the contractor") under which the contractor agrees to provide services to the public on behalf of the agency. The contract between the agency and the contractor must include a term that enables the agency to have an immediate right of access to information:

- relating directly to the performance of services by the contractor
- collected by the contractor from members of the public to whom it provides, or offers to provide, the services, and
- received by the contractor from the agency to enable the contractor to provide the services.

It is council's responsibility to ensure that the contract allows for this.

Section 121 does not require a contractor to provide access to information that:

- would reveal the contractor's financing arrangements, financial modelling, cost structure or profit margins
- the contractor is prohibited from disclosing under any Australian law, or
- could place the contractor at a substantial commercial disadvantage in present or future dealings with the agency.

What contracts are affected?

Not all contracts entered into by local councils will be affected by the disclosure provisions in the *GIPA Act*.

Only contracts with private sector bodies entered into after the *GIPA Act* commences, where the private sector body provides a service to the public on behalf of the agency, will be required to contain information access clauses.

This would include, for example, contracts with a waste management company to provide services on a council's behalf. If in doubt as to whether a particular contract is affected, it is best to err on the side of caution and include a clause giving a right to immediate access to the specific information listed in section 121.

Relationship to other obligations under the *GIPA Act*

Information obtained by local councils about private sector contractors forms part of the "government information" that councils hold. This means it could be the subject of an access application under the *GIPA Act*.

If an access application is made relating to a private sector entity, that entity may have a right to be consulted under section 54 of the *GIPA Act* before the council decides to release the information. If the private sector contractor objects to information being disclosed, council must take that objection into account in determining if there is an overriding public interest against disclosure.

What assistance is available?

The Office of the Information Commissioner (OIC) has provided more advice on this issue, including template contractual terms that councils may choose to insert into their private sector contracts.

One clause sets out the obligations of private sector contractors to provide immediate access to information, and the consequences of breaching these obligations. The other clause sets out the rights of private sector contractors to be consulted following an access application.

These templates are available on the OIC website at www.oic.nsw.gov.au.

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The government contracts register

The *GIPA Act* also requires agencies (including local councils) to record and publish certain information about some contracts with private sector bodies.

Part 3, Division 5 of the *GIPA Act* states that information about contracts worth more than \$150,000 between agencies and private sector bodies must be recorded in a register of government contracts.

That register must be published on council's website, and made public in any other way that the council decides to make its open access information available (for open access information publication requirements, see section 6 of the *GIPA Act* and the separate knowledge update *How does the GIPA Act affect local government?*)

Contracts that must be included in the government contracts register are those:

- between an agency and a private sector contractor
- signed after the commencement of the *GIPA Act*
- for a value of \$150,000 or more, and
- involve
 - the contractor undertaking a specific project such as construction, infrastructure or property development,
 - the contractor agreeing to provide specific goods or services,
 - the transfer or lease of real property.

Employment contracts do not need to be included in the register.

Different classes of contracts

The Act provides for three different classes of contracts, each with different information requirements.

Class 1 contracts are those which have, or are likely to have, a value of \$150,000. Council must enter the following information about Class 1 contracts in the government contracts register within 60 days of the contract becoming effective:

- the name and address of the private sector contractor

- details of any related company that may be involved in carrying out the contractual obligations
- the date the contract became effective and its duration
- the particulars of the project or goods or services to be provided under the contract
- the estimated amount payable to the contractor and any allowable variations to that amount
- any renegotiation provisions
- the method of tendering and criteria for assessment, if appropriate
- any provisions for payment to the contractor for operational or maintenance services.

Class 2 contracts are class 1 contracts where:

- there has not been a public tender process and the terms and conditions of the contract have been negotiated directly with the contractor, or
- the contract was the subject of a tender (whether public or not) but the terms and conditions have been substantially negotiated with the contractor, or
- the obligations of one or more parties to maintain or operate infrastructure or assets could continue for 10 years or more, and the contract involves a privately financed project (as defined by Treasury) or the exchange of significant assets.

In addition to the requirements for class 1 contracts, class 2 contracts require the following information to be entered in the register:

- particulars of any future transfer of significant assets to and from the council
- the results of any cost-benefit analysis
- particulars of how risk will be apportioned, if relevant
- particulars of any significant guarantees or undertakings between the parties, and
- any other key elements of the contract (see section 30).

If a class 2 contract has a value, or likely value of more than \$5 million, it becomes a **class 3 contract**. Councils must publish a copy of a class 3 contract on the government contracts register.

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What information is protected?

Councils do not have to publish in the register of government contracts, the following confidential information:

- the commercial-in-confidence provisions of a contract
- details of any unsuccessful tender
- any matter that could reasonably be expected to affect public safety or security, or
- any information where there is an overriding public interest against disclosure.

Commercial-in-confidence provisions of a contract refer to information which:

- would reveal the contractor's financing arrangements, financial modelling, cost structure or profit margins,
- could place the contractor at a substantial commercial disadvantage in present or future dealings with the agency, or
- would disclose any intellectual property in which the contractor has an interest.

How long must the information be included in the register?

Section 34 of the *GIPA Act* requires information, including a copy of a contract, to be included in the government contracts register for either 30 days, or until the obligations under the contract have been satisfied, whichever is the longer period.

Further information

- Go to www.oic.nsw.gov.au
- Email oiceinfo@oic.nsw.gov.au
- Mail GPO Box 7011, Sydney NSW 2001
- Call **1800 194 210** between 9am to 5pm, Monday to Friday (excluding public holidays).

If you have a hearing or speech impairment, you can call us through the National Relay Service (NRS) on **133 677** or if you want to talk to us with the assistance of an interpreter, you can call us through the Translating and Interpreting Service (TIS) on **131 450**. NRS and TIS are free services.

* PLEASE NOTE:

The new Right to Information system has not yet commenced. If you are seeking access to government information now, before the Government Information (Public Access) Act 2009 (GIPA Act) commences, please contact the agency holding the information, or visit the Freedom of Information website at www.dpc.nsw.gov.au/about_us/freedom_of_information or contact the Premier's Department FOI Hotline on 02 9228 4441.