

# FREEDOM OF INFORMATION ACT 1991 (SA)

## Protecting confidential information in contracts

*Briefing note issued by Office of the General Counsel*

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The [Freedom of Information Act 1991](#) (FOI Act) is intended to promote transparency and accountability in the decision-making of governments and publicly-funded bodies, such as universities, and to facilitate more effective participation by members of the public in processes involved in the making and administration of laws and policies and the decisions which impact them. The FOI Act provides each member of the public with a legally enforceable right to be given access to documents that are subject to the Act and held by agencies, such as the University. This means the University must give access to a document where requested, unless it is an [exempt document](#) as that term is defined in the FOI Act.

The University is regularly engaged in highly sensitive commercial negotiations with its key stakeholders and key partners. Sometimes the University and/or another party may exchange confidential information in relation to partnerships, proposals, projects or arrangements. Related documents may attract elements of confidentiality. This briefing note is intended to assist University personnel to ensure confidential information is recognised and managed in the time and manner that accords with laws and recognises the University's interests.

### Protecting confidential contracts

Merely including a confidentiality clause in a contract does not necessarily exempt the contract from disclosure under a FOI request.

For a contract (or parts of it) to be protected from disclosure, it needs to meet the requirements of the FOI Act and the University's [Freedom of Information Policy](#). The contract must:

- Contain matter that is genuinely confidential; and
- Contain a confidentiality clause which has been approved by the Vice-Chancellor and President (or nominee, that is, the Chief Operating Officer or General Counsel – the approver - ) **prior** to the contract being signed.

**The approver needs to be satisfied that the contract contains matter that is of sufficient sensitivity, and that its disclosure would ,on balance, not be in the public interest.**

To apply for a contract, or parts of it, to be protected from disclosure under the FOI Act, you will need to have carefully considered and express your reasons. This means being clear about:

- Which information you believe should be kept confidential; for example, business plans, financial information, designs, formulas, business methods, a specific schedule or annexure, the entire contract, or any information exchanged between parties that is not in the public domain.
- Reasons why you believe it is justifiable to keep the information secret from disclosure under FOI. Consider what makes the information particularly sensitive, and how disclosure of the identified information may:
  - adversely impact the University or a third party,
  - prejudice future supply of information to the University, or
  - impact the future ability of the University to enter into or negotiate similar contracts.

The contract itself should include the three following features:

1. A clear **definition** of the “Confidential Information” – which can be specific, (e.g. business plans, financial information, designs, formulas, business methods) or more general (e.g. any information exchanged between the parties in relation to this project that is not in the public domain);

2. A **confidentiality clause** prohibiting the unauthorised use or disclosure to third parties of the Confidential Information, for example:

*“For the purposes of the Freedom of Information Act 1991 (SA) (“the FOI Act”) and more particularly clause 13 of Schedule 1 of the FOI Act, [either-the entirety of this Agreement is confidential – OR – clauses X and Y are confidential – OR – Schedule 1 is confidential]. For the avoidance of doubt, if the University receives a request for the disclosure of information under the FOI Act, the [Counterparty] requires the University to claim an exemption from disclosure of this Agreement as well as any Confidential Information disclosed under this Agreement, and the University agrees to notify [Counterparty] of any such request in writing.”*

and preferably;

3. An **Exemption Notice** in the header of the relevant contract to alert readers to the approved confidentiality exemption, for example:

#### Freedom of Information Act 1991 (SA) Exemption Notice

**For the purposes of the Freedom of Information Act 1991 (SA) this document contains Confidential Information the unauthorised disclosure of which would, under the terms of this Agreement, constitute a breach of the contract or found an action for breach of confidence. This Agreement contains a confidentiality clause which has been approved by the University of Adelaide under section 13(2) of Schedule 1 of the Freedom of Information Act 1991 (SA).**

### Process for obtaining approval

Please use the **Confidentiality Clause Approval Form** at the end of this Briefing Note to seek approval of a FOI confidentiality clause in a contract. Steps for obtaining approval are shown below:



The University is required under the FOI Act to report to the Attorney-General on all contracts containing an approved confidentiality clause, as well as other FOI statistical data. This process ensures the University complies with those requirements.

### Resources

- [University Freedom of Information website](#)
- [University Freedom of Information Policy](#)
- [Freedom of Information Act 1991 \(SA\)](#)
- [Contracts and Agreements Policy](#)
- [Contract Management Handbook](#)
- [University Records Policy](#)

### Contacts

For assistance with seeking FOI exemptions or drafting confidentiality clauses, contact:

Jackie Morris  
Accredited FOI Officer  
Legal and Risk Branch  
Division of University Operations  
Tel: +61 8 8313 5804  
Email: [foi@adelaide.edu.au](mailto:foi@adelaide.edu.au)

## FREEDOM OF INFORMATION ACT 1991 (SA) Confidentiality Clause Approval Form

*This form should be used to seek approval of a confidentiality clause in a contract pursuant to Paragraph 13(2)(b)(iii) of Schedule 1 of the Freedom of Information Act 1991 (SA). The inclusion of the confidentiality clause must be approved prior to execution of the contract.*

Once completed, please forward this form and a copy of the relevant contract to [foi@adelaide.edu.au](mailto:foi@adelaide.edu.au).

Contact details of person completing this form		
Name		
Position		
School / Branch / Unit		
Contact Details	Email	
	Phone	
Date form completed		
Contract details		
Description of the Contract		
Name(s) of other parties		
Information to be kept confidential (specify specific information or entire contract)		
Explanation of reason some or all of the contract should be kept confidential from disclosure under FOI		
Text of proposed confidentiality clause		
HPE Content Manager File Reference		

Approved by a duly authorised delegate of the Vice-Chancellor

\_\_\_\_\_  
Chief Operating Officer/  
General Counsel  
(Delete as applicable)

\_\_\_\_\_  
Date

*To be completed by Accredited FOI Officer*

Approval No. \_\_\_\_\_ of \_\_\_\_\_ (Year)

Fully executed copy provided to FOI Officer  Date received: \_\_\_\_\_ LD: \_\_\_\_\_