



New South Wales

# Freedom of Information Amendment (Open Government—Disclosure of Contracts) Bill 2005

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

## Overview of Bill

The object of this Bill is to amend the *Freedom of Information Act 1989* (**the FOI Act**) so as:

- (a) to insert into that Act a section that requires details of major contracts entered into between the Government and the private sector to be published on the internet within 90 days after they have been entered into, and
- (b) to define the expression “commercial-in-confidence provisions” for the purposes of the proposed section, and
- (c) to ensure that the published details of any such contract do not have to include the commercial-in-confidence provisions of the contract, and that those provisions are not subject to the public rights of access conferred by Part 3 of that Act.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on the date of assent.

**Clause 3** is a formal provision that gives effect to the amendments to the FOI Act set out in Schedule 1.

## **Schedule 1 Amendments**

### **Details to be published of contracts between the Government and the private sector**

**Schedule 1 [1]** inserts a new section 15A into Part 2 of the FOI Act. The proposed section provides that details of any contract for more than \$150,000 that is entered into between a government agency and a private sector entity (being a contract to undertake a project or to provide goods or services) are to be published on the agency's internet website, and in such other manner as the Minister responsible for the agency may approve. The details are to be published within 90 days after the government agency enters into the contract. The details to be published vary, depending on whether the contract concerned is for less than \$5 million or for more than \$5 million, but in either case exclude commercial-in-confidence provisions (to be defined in the proposed section). The proposed section will not apply to contracts entered into before the commencement of the proposed section.

### **Further protection for “commercial-in-confidence provisions”**

**Schedule 1 [2]** inserts a new paragraph into clause 7 (1) of Schedule 1 to the FOI Act. The effect of the proposed paragraph is that commercial-in-confidence provisions of a government contract (within the meaning of proposed section 15A) will be specifically exempt from the public disclosure provisions of Part 3 of the FOI Act.

**Schedule 1 [3] and [4]** make consequential amendments to clause 7 (1) (b) (i) and (c) (i) of Schedule 1 to the FOI Act.



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New South Wales

# Freedom of Information Amendment (Open Government—Disclosure of Contracts) Bill 2005

No. , 2005

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## A Bill for

An Act to amend the *Freedom of Information Act 1989* so as to require publication of government contracts; and for other purposes.

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<b>The Legislature of New South Wales enacts:</b>	1
<b>1 Name of Act</b>	2
This Act is the <i>Freedom of Information (Open Government— Disclosure of Contracts) Act 2005</i> .	3 4
<b>2 Commencement</b>	5
This Act commences on the date of assent.	6
<b>3 Amendment of Freedom of Information Act 1989 No 5</b>	7
The <i>Freedom of Information Act 1989</i> is amended as set out in Schedule 1.	8 9

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<b>Schedule 1</b>	<b>Amendments</b>	1
	(Section 3)	2
<b>[1] Section 15A</b>		3
	Insert after section 15:	4
<b>15A</b>	<b>Disclosure of government contracts with the private sector</b>	5
(1)	Within 90 days after a government contract is entered into by or on behalf of an agency, a summary of the main details of the contract must be published on the agency’s internet website and in such other manner as the responsible Minister for the agency may approve.	6 7 8 9 10
(2)	Without limiting subsection (1), a summary referred to in that subsection must include the following particulars:	11 12
(a)	in relation to a contract under which the total amount to be paid for the project to be undertaken, or for the goods or services to be provided, exceeds \$150,000 but does not exceed \$5 million:	13 14 15 16
(i)	the name and business address of the contractor, and	17
(ii)	particulars of any cross-ownership between that contractor and any other relevant private sector entities, and	18 19 20
(iii)	the date on which the contract was entered into, and the period within which the contractor’s obligations under the contract are to be fulfilled, and	21 22 23
(iv)	particulars of the project to be undertaken, or the goods or services to be provided, by the contractor, and	24 25 26
(v)	the amount payable to the contractor under the contract, and	27 28
(vi)	any provisions under which the amount payable to the contractor may be varied, and	29 30
(vii)	any provisions with respect to the termination, variation or renegotiation of the contract, and	31 32
(viii)	in the case of a contract arising from a tendering process, the criteria against which the various tenders were assessed,	33 34 35

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Schedule 1 Amendments

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- (b) in relation to a contract under which the total amount to be paid for the project to be undertaken, or for the goods or services to be provided, exceeds \$5 million:
  - (i) the particulars referred to in paragraph (a), and
  - (ii) particulars of future transfers of assets to the State at zero, or nominal, cost to the State, including the value of those assets and the date of their proposed transfer, and
  - (iii) particulars of future transfers of assets to the contractor at zero, or nominal, cost to the contractor, including the value of those assets and the date of their proposed transfer, and
  - (iv) any provisions under which it is agreed that the contractor is to receive payment for providing operational or maintenance services, and
  - (v) the results of any cost-benefit analysis conducted in connection with the matters to which the contract relates, and
  - (vi) particulars of how risk is to be apportioned between the parties, quantified (where practicable) in net present-value terms and specifying the major assumptions involved, and
  - (vii) particulars as to any guarantees or undertakings between the parties, including any guarantees or undertakings with respect to loan agreements entered into or proposed to be entered into, and
  - (viii) particulars of any other key elements of the contract.
- (3) Nothing in this section requires the publication of:
  - (a) the commercial-in-confidence provisions of a government contract, or
  - (b) any other information in relation to a government contract that is of such a nature that its inclusion in a document would cause the document to be an exempt document.
- (4) This section does not apply to or in respect of any government contract that was entered into by or on behalf of an agency before the commencement of this section.
- (5) In this section:
  - agency** includes a statutory State owned corporation (and its subsidiaries) as defined in the *State Owned Corporations Act 1989*.

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<i>commercial-in-confidence provisions</i> , in relation to a government contract, means any provisions of the contract that disclose:	1
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(a) the contractor’s financing arrangements, or	4
(b) the contractor’s cost structure or profit margins, or	5
(c) any intellectual property in which the contractor has an interest, or	6
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(d) any matter whose disclosure would place the contractor at a substantial commercial disadvantage in relation to other contractors or potential contractors, whether at present or in the future.	8
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<i>contractor</i> , in relation to a government contract entered into by an agency, means the person with whom the agency has entered into the contract.	12
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<i>government contract</i> means a contract between an agency and a private sector entity under which the private sector entity agrees:	15
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(a) to undertake a specific project (such as a construction, infrastructure or property development project), or	17
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(b) to provide specific goods or services (such as information technology services),	19
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but does not include a contract under which the total amount to be paid for the project, or for the goods or services, is less than \$150,000.	21
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<i>private sector entity</i> means any person or body (whether incorporated or unincorporated) who or which is not an agency.	24
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<b>[2] Schedule 1 Exempt documents</b>	26
Insert after clause 7 (1) (a):	27
(a1) if it contains matter the disclosure of which would disclose the commercial-in-confidence provisions of a government contract (within the meaning of section 15A), or	28
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<b>[3] Schedule 1, clause 7 (1) (b) (i)</b>	31
Insert “or commercial-in-confidence provisions” after “trade secrets”.	32

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Schedule 1 Amendments

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**[4] Schedule 1, clause 7 (1) (c) (i)**

Insert “, commercial-in-confidence provisions” after “trade secrets”.

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