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It is routine for construction contractors to tender for and then contract with government for the provision of public infrastructure. For construction contractors, public infrastructure tenders and contracts carry a potential risk in that commercially sensitive information then provided to the government may be amenable to public disclosure, under the freedom of information legislation operating in all Australian jurisdictions. Among other things, this article evaluates whether this perceived risk of public disclosure of commercially sensitive information is realistic, before going on to analyse and set out steps that construction contractors might take to manage this risk, so trade secrets and other valuable commercial information does not make their way into the public domain. .... 507

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# Managing the Risk of Government Tender Disclosure under Freedom of Information Legislation

Duncan Anderson\*

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*It is routine for construction contractors to tender for and then contract with government for the provision of public infrastructure. For construction contractors, public infrastructure tenders and contracts carry a potential risk in that commercially sensitive information then provided to the government may be amenable to public disclosure, under the freedom of information legislation operating in all Australian jurisdictions. Among other things, this article evaluates whether this perceived risk of public disclosure of commercially sensitive information is realistic, before going on to analyse and set out steps that construction contractors might take to manage this risk, so trade secrets and other valuable commercial information does not make their way into the public domain.*

## I. INTRODUCTION

In modern times, Australian governments and local authorities no longer maintain their own public works departments, as once was the case. Instead of maintaining fleets of construction equipment and extensive workforces at great taxpayer expense, Australian governments and local authorities nowadays look to the private sector to construct and maintain public infrastructure. It is commonplace for these to request tenders from, and then contract with, construction contractors in the private sector.

For construction contractors, government contracting has the potential to give rise to legal risks that would not eventuate from private sector contracting. One such legal risk associated with government contracting concerns the extent to which commercially-valuable information provided to government during the infrastructure tendering process may be publicly disclosed.

Government information is able to be disclosed to the public by way of freedom of information legislation, to which the Commonwealth and state and territory governments have been subject for many years. This freedom of information legislation is comprised in a series of Australian enactments collectively referred to in this article as “FOI legislation”.<sup>1</sup>

The purpose of the FOI legislation is meritorious, in that it is to “promote and enhance the processes of democracy and representative government by increasing access to information held by the government”.<sup>2</sup>

In a decision that concerned the confidentiality of information provided to the Commonwealth Civil Aviation Authority by a tenderer for a procurement contract, the Federal Court said:

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<sup>1</sup> The freedom of information legislation is comprised in the following Australian enactments; *Freedom of Information Act 1982* (Cth); *Freedom of Information Act 2016* (ACT); *Freedom of Information Act 1991* (SA); *Freedom of Information Act 1982* (Vic); *Freedom of Information Act 1992* (WA); *Government Information (Public Access) Act 2009* (NSW); *Information Act 2002* (NT); *Right to Information Act 2009* (Qld); *Right to Information Act 2009* (Tas).

<sup>2</sup> Abigail Rath, “Freedom of Information and Open Government” (Parliament of New South Wales, Background Paper No 3, 2000 September 2000) Executive Summary <<https://www.parliament.nsw.gov.au/researchpapers/Pages/freedom-of-information-and-open-government.aspx>>.

Parties who contract with government agencies must, in matters of confidentiality, be taken to have done so subject to such lawful rights of access to information in the agency's hands as our laws and system of government confer on others.<sup>3</sup>

Accordingly, there is no obvious reason as to why commercially-valuable information provided by construction contractors to government during the infrastructure tendering process would not be subject to public disclosure under FOI legislation, in the same way as other information held by government.

There is the potential for construction contractors' trade secrets and other sensitive commercial information to be disclosed to the public by way of FOI legislation. Members of the public able to gain access to contractor information in this way may include a construction contractor's industry competitors.

With these considerations in mind and looking at things from the point of view of a private sector construction contractor, the objectives of this article are to:

- (1) Set out and analyse the scope of government's public disclosure obligations under the FOI legislation;
- (2) Evaluate whether the risk of FOI disclosure of commercially-valuable information provided to government during the infrastructure tendering process is real and substantial;
- (3) Identify any safeguards in the FOI legislation that may serve to prevent public disclosure of commercially-valuable information provided to government during the infrastructure tendering process;
- (4) Analyse the effectiveness of any such safeguards; and
- (5) Provide an analysis as to steps that construction contractors can take, so as to reduce the risk of FOI disclosure of commercially-valuable information provided to government during the infrastructure tendering process.

Part II of this article analyses the scope of government's public disclosure obligations under the FOI legislation and addresses whether in light of this, the risk of FOI disclosure of information provided to government during infrastructure tendering is real and substantial.

Upon a conclusion that the risk of such FOI disclosure is indeed real and substantial, Part III of this article provides an analysis as to potential safeguards to disclosure in the FOI legislation and Part IV goes on to evaluate how effective these potential safeguards may be, to prevent public availability of contractor information provided to government during infrastructure tendering.

Following directly on from this evaluation, Part V of this article offers a series of conclusions as to how private sector construction contractors may reduce the risk of commercially-valuable information provided to government during infrastructure tendering from being disclosed to the public, under the FOI legislation.

## II. THE SCOPE OF GOVERNMENT DISCLOSURE OBLIGATIONS UNDER THE FOI LEGISLATION

The FOI legislation sets out a process whereby members of the public may obtain access to information held by government.

A member of the public first applies to the relevant government agency or local council for access to information he or she wants to see. The government agency or local council then makes a principled decision on the bases of the relevant FOI legislation as whether to grant or refuse access.

If access is refused, the member of the public can apply to the relevant Commonwealth, State, or Territory Information Commissioner or Ombudsman for a review. Any party that remains aggrieved upon such a review may then appeal to an external State or Territory tribunal.

On considering the FOI legislation it may be observed that:

- (1) The FOI legislation requires that government information be disclosed to the public, unless the information to which access is sought is exempted from disclosure by the legislation itself;<sup>4</sup>

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<sup>3</sup> *Hughes Aircraft Systems International v Airservices Australia (No 3)* (1997) 76 FCR 151, 246.

<sup>4</sup> *Freedom of Information Act 1982* (Cth) s 11A; *Freedom of Information Act 2016* (ACT) ss 6, 16 and Schs 1 and 2; *Freedom of Information Act 1991* (SA) ss 3, 12, 20; *Freedom of Information Act 1982* (Vic) s 3; *Freedom of Information Act 1992* (WA) ss 10,

- (2) The FOI legislation defines government information to which the public is to have access in very broad terms:<sup>5</sup>
- (3) The FOI legislation provides the public with a legally enforceable right to access to government information.<sup>6</sup>

These and other features of the FOI legislation serve to create a statutory presumption in favour of public disclosure of a very wide range of information in government's possession. On the face of things, the presumption of disclosure applies to information provided by construction contractors to government during the infrastructure tendering process. Accordingly, the potential exists for such information to be disclosed to the public under the FOI legislation.

It is important to consider whether the risk of public disclosure of commercially-valuable information provided to government during infrastructure tendering is real and substantial. If the risk of such disclosure is more apparent than real, then further analysis would largely be theoretical and potentially of little practical value.

Two examples of requests for access to government information under FOI legislation coming before State information commissioners and administrative tribunals are instructive, in this regard.

In *Adani Mining Pty Ltd v Office of the Information Commissioner (Adani)*,<sup>7</sup> the appellant had controversially commenced development of a large coalmine, west of Townsville and Rockhampton in Central Queensland.

The appellant wanted to build an airport close by the mine and undertook discussions with the Townsville City Council and Rockhampton Regional Council, concerning financial assistance towards construction and operation of the airport.

In October 2017, the parties signed a "term sheet" that recorded the main terms on which they were prepared to contract, pending a formal written agreement.

The Australian Broadcasting Corporation requested access to the "term sheet" under the *Right to Information Act 2009* (Qld) but the Townsville City Council decided this was exempt from disclosure under that legislation.

The ABC appealed to the Queensland Information Commissioner who held it entitled to access the "term sheet". The appellant then appealed to the Queensland Civil and Administrative Tribunal (QCAT) to prevent public disclosure of the term sheet.

The appellant failed to persuade QCAT that the term sheet was necessarily exempt from disclosure under the Queensland FOI legislation and the Deputy President referred this aspect back to the Information Commissioner, for further consideration.<sup>8</sup>

In *Speno Rail Maintenance Australia Pty Ltd v Western Australian Government Railways Commission (Speno Rail)*,<sup>9</sup> Speno Rail Maintenance Australia Pty Ltd (Speno Rail) and Rail Technology International

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23; *Government Information (Public Access) Act 2009* (NSW) ss 5,12,14; *Information Act 2002* (NT) s 3(2); *Right to Information Act 2009* (Qld) ss 3, 44, 47, 48; *Right to Information Act 2009* (Tas) s 7.

<sup>5</sup> *Freedom of Information Act 1982* (Cth) s 4 definition of "document of an agency"; *Freedom of Information Act 2016* (ACT) s 14 definition of "government information"; *Freedom of Information Act 1991* (SA) s 4 definition of "document"; *Freedom of Information Act 1992* (WA) s 9 and Glossary definition of "document"; *Freedom of Information Act 1982* (Vic) s 5 definitions of "document" and "document of an agency" etc; *Government Information (Public Access) Act 2009* (NSW) s 4 definition of "government information"; *Information Act 2002* (NT) s 4 definition of "government information"; *Right to Information Act 2009* (Qld) ss 12, 13; *Right to Information Act 2009* (Tas) s 5 definition of "information".

<sup>6</sup> *Freedom of Information Act 1982* (Cth) s 11; *Freedom of Information Act 2016* (ACT) s 7; *Freedom of Information Act 1991* (SA) s 12; *Freedom of Information Act 1982* (Vic) s 13; *Freedom of Information Act 1992* (WA) s 10; *Government Information (Public Access) Act 2009* (NSW) s 9; *Information Act 2002* (NT) s 15; *Right to Information Act 2009* (Qld) s 23; *Right to Information Act 2009* (Tas) s 7.

<sup>7</sup> *Adani Mining Pty Ltd v Office of the Information Commissioner* [2020] QCATA 52.

<sup>8</sup> *Adani Mining Pty Ltd v Office of the Information Commissioner* [2020] QCATA 52, [46]. There is no record of the Queensland Information Commissioner having reconsidered the ABC's request for access to the term sheet on the Austlii website.

<sup>9</sup> *Speno Rail Maintenance Australia Pty Ltd and Western Australian Government Railways Commission* [1997] WAICmr 29.

Pty Ltd (Rail Technology) had submitted tenders to the Railways Commission for provision of ultrasonic testing of rail.

Although Speno Rail's tender was successful, it applied to the Railways Commission under the *Freedom of Information Act 1992* (WA) for access to the tender that had been submitted by Rail Technology.

The Railways Commission refused access and Speno Rail lodged a complaint with the Information Commissioner for a review; Rail Technology objected to its tender being disclosed and was joined as a third party.

Through the conciliation process, Speno Rail agreed to pare down its access request to a small number of documents in Rail Technology's tender, referring to Speno Rail itself. In his decision, the Western Australia Information Commissioner required that Railways Commission give Speno Rail access to these documents, even though Rail Technology had copyright over these.

Following on from the analysis earlier in this article as to the scope of government disclosure obligations under the FOI legislation, it is submitted that the examples of the ABC's request for access to the commercially sensitive term sheet in *Adani* and Speno Rail's request for access to a competitor's tender in *Speno Rail* serve to show that the risk of FOI disclosure of commercially-valuable information provided to government during infrastructure tendering is real and substantial.

Members of the public (including industry competitors) can and do look to the FOI legislation to gain access to such information and it is desirable for private sector construction contractors to look to ways in which such disclosure may be prevented.

### **III. SAFEGUARDS IN THE FOI LEGISLATION TO PREVENT PUBLIC DISCLOSURE OF COMMERCIALY-VALUABLE INFORMATION PROVIDED TO GOVERNMENT DURING INFRASTRUCTURE TENDERING**

As discussed in Part II of this article, the FOI legislation operates on the basis that members of the public must be allowed access to government information, unless the information to which access is sought is exempted from disclosure through the application of the legislation itself.

From the perspective of private sector construction contractors wanting to guard against public disclosure of information provided to government during infrastructure tendering, it is to be noted that six out of the nine enactments comprising the FOI legislation allow for exemptions to public disclosure, in circumstances where this would amount to an unlawful breach of confidence.

In theory, a construction contractor may reduce the risk of FOI disclosure of information provided to government during infrastructure tendering, by looking to have these unlawful breach of confidence exemptions apply.

The six enactments referred to above are the *Freedom of Information Act 1982* (Cth), the *Right to Information Act 2009* (Qld), the *Freedom of Information Act 1991* (SA), the *Freedom of Information Act 1992* (WA), the *Government Information (Public Access) Act 2009* (NSW) and the *Information Act 2002* (NT).

Of these six enactments, the *Freedom of Information Act 1982* (Cth), *Right to Information Act 2009* (Qld), *Freedom of Information Act 1991* (SA) and the *Freedom of Information Act 1992* (WA) all contain provisions whereby any prospective FOI disclosure of government information that is in breach of an obligation of confidence is exempt from disclosure, as a matter of course.<sup>10</sup> A prospective disclosure of government information need only amount to a breach of an obligation of confidence owed by government to the information provider, for the exemptions to apply.

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<sup>10</sup> *Freedom of Information Act 1982* (Cth) s 45 and the Table to s 31A; *Freedom of Information Act 1991* (SA) s 39(12) and cl 13(1)(a) to Sch 1; *Freedom of Information Act 1992* (WA) ss 10, 23 and cl 8(1) to Sch 1 and *Right to Information Act 2009* (Qld) s 48 and cl 8(1) to Sch 3. For examples of decisions that confirm the effect of this legislation is to exempt prospective disclosure of government information in breach of an obligation of confidence from FOI disclosure as a matter of course, see *Adani Mining Pty Ltd v Office of the Information Commissioner* [2020] QCATA 52, [6], *Park v Moreton Bay Regional Council* [2020] QICmr 39, [11] and *Apache Northwest Pty Ltd v Department of Mines and Petroleum (No 2)* [2011] WASC 283, [22], [23] (Edelman J).

The *Government Information (Public Access) Act 2009* (NSW) and *Information Act 2002* (NT) also contain provisions whereby government information may be exempted from disclosure, if this would trigger a breach of an obligation of confidence. However, under both enactments, such information is not exempt unless it can also be shown that disclosure will not be in the public interest.<sup>11</sup>

This article focuses on the provisions of the *Freedom of Information Act 1982* (Cth), *Right to Information Act 2009* (Qld), *Freedom of Information Act 1991* (SA) and the *Freedom of Information Act 1992* (WA), whereby any prospective FOI disclosure of government information in breach of an obligation of confidence is automatically exempted from disclosure. Each of these provisions is in similar terms to the exemption in cl 8(1) to Sch 3 to the *Right to Information Act 2009* (Qld):

Information is exempt information if its disclosure would found an action for breach of confidence.

Throughout the remainder of this article, these provisions are collectively referred to as “unlawful breach of confidence exemptions to FOI disclosure”, with the inquiry generally being whether private sector construction contractors are able to take advantage of the provisions, so as to reduce the risk of FOI disclosure of commercially-valuable information provided to government during the infrastructure tendering process.

#### **IV. HOW EFFECTIVE ARE THE UNLAWFUL BREACH OF CONFIDENCE EXEMPTIONS TO FOI DISCLOSURE TO PREVENT PUBLIC DISCLOSURE OF INFORMATION PROVIDED TO GOVERNMENT DURING THE INFRASTRUCTURE TENDERING PROCESS?**

To assess the effectiveness of the unlawful breach of confidence exemptions to FOI disclosure, it is first necessary to consider how State and Commonwealth information commissioners, administrative tribunals and Courts have interpreted these.

In this regard, the initial step is to identify the legal causes of action to which the unlawful breach of confidence exemptions to FOI disclosure apply. In a decision as to proper construction of the predecessor to cl 8(1) to Sch 3 of the *Right to Information Act 2009* (Qld), the Queensland Information Commissioner said in *B v Brisbane North Regional Health Authority (B and BNRHA)*:

However, on the basis of the material set out above, I consider that the better view is that the words “found an action for breach of confidence” in s.46(1)(a) of the Queensland FOI Act should be taken to refer to a legal action brought in respect of an alleged obligation of confidence in which reliance is placed on one or more of the following causes of action:

- (a) a cause of action for breach of a contractual obligation of confidence;
- (b) a cause of action for breach of an equitable duty of confidence;
- (c) a cause of action for breach of a fiduciary... duty of confidence and fidelity.<sup>12</sup>

The Information Commissioner then said:

Furthermore, I consider the terms of s. 46(1)(a) require the test of exemption to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, possessed of appropriate standing to bring a suit to enforce an obligation of confidence said to be owed to that plaintiff, in respect of information in the possession or control of the agency or Minister faced with an application for access... to the information in issue.<sup>13</sup>

It follows from these extracts that the unlawful the breach of confidence exemptions to FOI disclosure may assist a construction contractor to prevent FOI disclosure of information provided to government during infrastructure tendering, where a prospective FOI disclosure would provide the contractor with

<sup>11</sup> *Government Information (Public Access) Act 2009* (NSW) s 14 and para 1(g) of the Table to that section; *Information Act 2002* (NT) ss 50, 55.

<sup>12</sup> *B v Brisbane North Regional Health Authority* [1994] QICmr 1, [43]. See also *Ramsay Health Care Ltd v Information Commissioner* [2019] QCATA 66, [60] (President Daubney J) confirming an action for breach of confidence extends to both equitable and contractual obligations of confidence.

<sup>13</sup> *B v Brisbane North Regional Health Authority* [1994] QICmr 1, [44]; *Palmer v Townsville City Council* [2019] QICmr 43, [43].

either an action for breach of a contractual obligation of confidence or an action for breach of an equitable duty of confidence, against government.

The effectiveness of the exemptions can only be gauged by identifying the various elements of both causes of action and then analysing how these elements may apply, with respect to contractor information provided to government during infrastructure tendering.

The first section of Part IV of this article identifies elements of a breach of a contractual obligation of confidence for the purposes of the unlawful breach of confidence exemptions and considers how these may apply, with respect to information provided to government during infrastructure tendering.

Contractual protection from FOI disclosure is likely to be the simplest means of protection from a construction contractor's point of view. However, contractors often undertake infrastructure tendering under strict time constraints and it is not always realistic to conclude a formal confidentiality agreement with government, prior to tender submission.

The second section of Part IV of this article accordingly goes on to consider and analyse elements of a breach of an equitable duty of confidence, upon which a contractor might ultimately need to rely.

The third cause of action referred to in *B and BNRHA* is discounted from further consideration, as government is unlikely to owe fiduciary duties to infrastructure contractors.

## **A. Cause of Action for Breach of a Contractual Obligation of Confidence**

The elements of a cause of action for breach of a contractual obligation of confidence will depend upon on whether a contractual term as to confidence is either express or implied.

### **1. Express Contractual Terms as to Confidence**

In its recent decision in *Crown Resorts Ltd v Zantran Pty Ltd*, the majority of the Full Federal Court said:

It can be accepted that where there is an express term in a contract as to confidentiality it will be enforced by a court of equity subject to equitable defences, including any discretionary considerations, unclean hands and subject to identified public policy that makes void or unenforceable a contract or a contractual provision as to confidence.<sup>14</sup>

In the Queensland term-sheet access case of *Adani*, the Deputy President of QCAT summarised the Full Federal Court's statement regarding enforcement of an express contractual term as to confidentiality as follows:

In effect, where there is a contractual obligation of confidence, it will be enforced in equity so long as the necessary discretionary consideration is present that damages will not be an adequate remedy (which will ordinarily be the case), unless some recognised defence on equitable grounds arises.<sup>15</sup>

The Deputy President was here referring to the Court's equitable jurisdiction to grant injunctive relief, so as to prevent a prospective breach of contract. The Deputy President signalled an injunction is the primary remedy on breach of a contractual obligation of confidence, as the usual contractual remedy of compensatory damages will not normally be adequate to protect the interests of the information provider.

Further on in *Adani*, the Deputy President referred to the position subsisting under the Queensland FOI legislation, whereby defences to an action for breach of confidence are discounted from an assessment whether an unlawful breach of confidence exemption to FOI disclosure may apply.<sup>16</sup> Consequently, a construction contractor need only establish a breach of a subsisting contractual obligation of confidence, so as to take advantage of the unlawful breach of confidence exemptions to FOI disclosure and prevent FOI disclosure of information provided during the infrastructure tendering process.

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<sup>14</sup> *Crown Resorts Ltd v Zantran Pty Ltd* [2020] FCAFA 1, [34] (Allsop P with whom White J agreed).

<sup>15</sup> *Adani Mining Pty Ltd v Office of the Information Commissioner* [2020] QCATA 52, [16].

<sup>16</sup> *Adani Mining Pty Ltd v Office of the Information Commissioner* [2020] QCATA 52, [39]. Defences are also irrelevant with respect to the unlawful breach of confidence exemption to FOI disclosure in the *Freedom of Information Act 1982* (Cth); *Lobo v Department of Immigration and Citizenship* (2011) 56 AAR 1, [407]; [2011] AATA 705.

In contrast to the position with respect to an action for breach of an equitable obligation of confidence, the Deputy President also found there was no “public interest exception” to a breach of a contractual obligation of confidence, in the context of the unlawful breach of confidence exemptions to FOI disclosure. The Deputy President based this finding on the following reasons:

- (1) By the terms of the Queensland FOI legislation, the Queensland Parliament had deemed public disclosure of government information in breach of an obligation of confidence to be against the public interest and it was not for the judiciary to gainsay it;<sup>17</sup>
- (2) There was high judicial authority against a “public interest exception” with respect to a contractual obligation of confidence owed by government to third party.<sup>18</sup>

Despite the Deputy President having found no “public interest exception” exists with respect to a breach of a contractual obligation of confidence, it is apparent there are sound counterarguments in favour of such an exception.

In his summary concerning enforcement of an express contractual term as to confidentiality set out above, the Deputy President made only passing reference to the judicial discretion to grant injunctive relief for this purpose. The only aspect of the discretion mentioned by the Deputy President was that damages should not be an adequate remedy.

In contrast, Australian courts traditionally look to apply the “good working rule” set out by the English Court of Appeal in *Shelfer v City of London Electric Lighting Company (Shelfer)*, in exercising their discretion to grant injunctive relief to restrain an unlawful act.<sup>19</sup> The substance of the “good working rule” is that a Court may award damages in lieu of injunctive relief where the following apply:

- (1) injury to the plaintiff’s legal rights is small;
- (2) that injury is capable of being estimated in money;
- (3) that injury is one which can be adequately compensated by a small money payment; and
- (4) the case is one in which it would be oppressive to the defendant to grant an injunction.

Over the years, Courts came to “slavishly” follow the “good working rule” in *Shelfer*, so that injunctions to restrain wrongful acts became the norm, in circumstances where awards of compensatory damages may have sufficed.<sup>20</sup>

Recently in *Coventry v Lawrence*,<sup>21</sup> the United Kingdom Supreme Court eschewed this approach and emphasised the Court’s discretion to grant injunctive relief was unfettered:

Where does that leave A L Smith LJ’s four tests? While the application of any such series of tests cannot be mechanical, I would adopt a modified version of the view expressed by Romer LJ in *Fishenden* 153 LT 128, 141. First, the application of the four tests must not be such as “to be a fetter on the exercise of the court’s discretion”.<sup>22</sup>

Relevantly, the Supreme Court further held that a Court might legitimately take account of the “public interest” in exercising its unfettered discretion to grant injunctive relief.<sup>23</sup> Similarly, in the recent High Court decision of *Smethurst v Commissioner of Police*, Edelman J said:

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<sup>17</sup> *Adani Mining Pty Ltd v Office of the Information Commissioner* [2020] QCATA 52, [34].

<sup>18</sup> *Adani Mining Pty Ltd v Office of the Information Commissioner* [2020] QCATA 52, [37]; *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, 456.

<sup>19</sup> *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, 322–323 (AL Smith LJ) (*Shelfer*). For examples of Australian decisions considering the “good working rule” in *Shelfer* see *Break Fast Investments v PCH Melbourne* (2007) 20 VR 311, [36], [49]; [2007] VSCA 311 and *Coles Group Property Developments Ltd v Stankovic* [2016] NSWSC 852, [170].

<sup>20</sup> See *Coventry v Lawrence* [2014] UKSC 13, [161] (Lord Sumption) “In my view, the decision in *Shelfer* is out of date, and it is unfortunate that it has been followed so recently and so slavishly” and [171] (Lord Mance) “I entirely agree with Lord Sumption (at para 161) that the decision in *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 is out of date and that it is unfortunate that it has been followed so recently and so slavishly”.

<sup>21</sup> *Coventry v Lawrence* [2014] UKSC 13.

<sup>22</sup> *Coventry v Lawrence* [2014] UKSC 13, [123] and see also [120], [154], [162], [170], [239].

<sup>23</sup> *Coventry v Lawrence* [2014] UKSC 13, [124], [157], [161].

A common instance where an injunction is refused due to considerations of general principle beyond the justice between the parties is where the injunction would interfere with the rights of third parties. *Another is where it would interfere with a clear and compelling interest of the general public.*<sup>24</sup>

Accordingly, there is authority in support of the Court's discretion to grant injunctive relief being completely unfettered, with Courts being able to take account of the "public interest" when deciding whether to grant an injunction, to restrain an unlawful act.

Despite that, it is submitted the Deputy President was correct to find there was no "public interest exception" to the breach of a contractual obligation of confidence, in the context of an unlawful breach of confidence exemption to FOI disclosure. Under the Queensland FOI legislation, the Queensland parliament has deemed public disclosure of government information in breach of an obligation of confidence to be against the public interest and outside the legislation's ambit. That being the case, the Information Commissioner and QCAT were prevented for entertaining considerations as to the "public interest".

Based on the Deputy President's analysis in *Adani*, it is submitted the elements of a breach of contractual obligation of confidence for the purposes of the unlawful breach of confidence exemptions to FOI disclosure comprise the following:

- (1) A written contract between the information provider and the information recipient;
- (2) A clause in the written contract obliging the information recipient to keep information received from the information provider confidential;
- (3) Provision of information by the information provider to the recipient under the confidentiality clause;
- (4) A threatened breach of the confidentiality clause through disclosure by the recipient.

In the context of information provided in an infrastructure tender, the first and second elements effectively require that there be a written contract as to confidentiality between the tendering entity and the government agency requesting the tender. Compliance with these elements should not be taken lightly, as a document comprising a simple promise to keep information confidential unsupported by consideration will not amount to an express contractual obligation of confidence and will not support an unlawful breach of confidence exemption to FOI disclosure.<sup>25</sup>

As to the third element, the tendering entity must provide the requesting government agency with information to which the confidentiality clause in the written contract applies, in order for a cause of action to arise on the prospective disclosure of that information and the relevant unlawful breach of confidence exemption to FOI disclosure to apply. The challenge for a tendering contractor is to ensure it enters a binding contract with the relevant government agency, containing a confidentiality clause broad enough in its terms to include all matters between them.

While a government request for tender may include a written assurance as to confidentiality, it does not necessarily follow that a separate, process contract including that assurance as a term will be concluded, on submission of the contractor's tender.<sup>26</sup> A formal written contract is required, so as to ensure information confidentiality.

As the QCAT Deputy President alluded to in *Adani*, a potential solution is for the tendering contractor to enter a prior contract with the government agency to keep all matters between them confidential.<sup>27</sup>

## **2. Implied Contractual Terms as to Confidence**

Recent authority suggests there is little, if any, distinction between the task of ascertaining existence of a duty of confidence based on an implied contractual term and the task of ascertaining existence of a corresponding equitable duty of confidence.<sup>28</sup>

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<sup>24</sup> *Smethurst v Commissioner of Police (Cth)* (2020) 94 ALJR 502, [274] (Edelman J); [2020] HCA 14 (emphasis added).

<sup>25</sup> See, eg, *Palmer v Townsville City Council* [2019] QICmr 43, [50].

<sup>26</sup> *IPEX ITG Pty Ltd (in liq) v Victoria* [2010] VSC 480, [43].

<sup>27</sup> *Adani Mining Pty Ltd v Office of the Information Commissioner* [2020] QCATA 52, [24].

<sup>28</sup> *Mastec Australia Pty Ltd v Trident Plastics (SA) Pty Ltd (No 2)* [2017] FCA 1581, [143].

The elements as to breach of an equitable duty of confidence in the context of the unlawful breach of confidence exemptions to FOI disclosure are considered in the second section of Part IV to this article.

## **B. Cause of Action for Breach of an Equitable Duty of Confidence**

From a construction contractor's point of view, a written confidentiality contract with government presents as the simplest and most convenient way of reducing the risk of tender information becoming subject to FOI disclosure.

However, contractors often undertake infrastructure tendering under strict time constraints and it is not always realistic to conclude a formal confidentiality agreement with government prior to tender submission. Without a written confidentiality agreement, a contractor may find it needs to rely on a breach of the equitable duty of confidence, in order to take advantage of the unlawful breach of confidence exemptions to FOI disclosure.

It is therefore necessary to identify the elements of a breach of the equitable duty of confidentiality and consider how these may apply with respect to contractor information provided to government, during infrastructure tendering.

In *Corrs Pavey Whiting & Byrne v Collector of Customs (Corrs Pavey)*,<sup>29</sup> the solicitors for the Australian patent holder of a pharmaceutical drug made a request to the Collector of Customs under the Commonwealth FOI legislation, for access to information showing whether a competitor may have imported the drug in breach of the patent.

The Full Federal Court considered whether the requested information was exempt from disclosure, on the basis this would amount to a breach of an equitable duty of confidence. In his dissenting judgment, Gummow J set out four elements needing to be established to make out this cause of action:

The plaintiff (i) must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question; and must be able to show that (ii) the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge); (iii) the information was received by the defendant in such circumstances as to import an obligation of confidence; and (iv) there is actual or threatened misuse of the information.<sup>30</sup>

This formulation for a case in equity to protect alleged confidential information has been adopted by the Full Federal Court in *Optus Networks Pty Ltd v Telstra Corp Ltd (Optus Networks)*<sup>31</sup> and more recently applied by the President of the QCAT in *Ramsay Health Care Ltd v Information Commissioner (Ramsay Health Care)*.<sup>32</sup> While *Optus Networks* was not an FOI case, the application of the unlawful breach of confidence exemption to disclosure in cl 8(1) to Sch 3 of the *Right to Information Act 2009* (Qld) was directly at issue in *Ramsay Health Care*.

Before going on to evaluate the four elements comprising a breach of the equitable duty of confidence identified in *Corrs Pavey*, it may be noted this cause of action has previously been considered to include a fifth element. This was for the breach of confidence to inflict, or be likely to inflict, "detriment".

In *B and BNRHA*, the Queensland Information Commissioner considered that comments previously made in *Corrs Pavey*, together with comments by the Federal Court in *Smith Kleine & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health (Smith Kleine)*<sup>33</sup> and by the High Court in *Commonwealth of Australia v John Fairfax & Sons Ltd (John Fairfax)*,<sup>34</sup> had supported the view that an original confider of information had to establish detriment in order to invoke the exemption from disclosure in the predecessor to cl 8(1) to Sch 3 of the *Right to Information Act 2009* (Qld).

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<sup>29</sup> *Corrs Pavey Whiting & Byrne v Collector of Customs* (1987) 14 FCR 434.

<sup>30</sup> *Corrs Pavey Whiting & Byrne v Collector of Customs* (1987) 14 FCR 434, 443.

<sup>31</sup> *Optus Networks Pty Ltd v Telstra Corp Ltd* (2010) 265 ALR 281, [39]; [2010] FCAFC 21.

<sup>32</sup> *Ramsay Health Care Ltd v Information Commissioner* [2019] QCATA 66, [94].

<sup>33</sup> *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1990) 22 FCR 73, 112 (Gummow J).

<sup>34</sup> *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39.

After that, Queensland Information Commissioners regularly invoked this fifth element as to “confider detriment” in their decisions.<sup>35</sup> Advent of this fifth element may have heightened the risk of FOI disclosure of commercially-valuable information provided to government during infrastructure tendering, by increasing the burden on any contractor, seeking to have an unlawful breach of confidence exemption to FOI disclosure to apply.

The High Court’s decision in *John Fairfax* had concerned an injunction application by the Commonwealth government, rather than by a third party providing information to government. Many subsequent decisions doubted the existence of a requirement to show detriment,<sup>36</sup> which can only to have been consistent with the philosophy underpinning the equitable jurisdiction to protect confidential information set out by Gummow J in *Smith Kline*:

The basis of the equitable jurisdiction to protect obligations of confidence lies,...., in an obligation of conscience arising from the circumstances in or through which the information, the subject of the obligation, was communicated or obtained: ... The plaintiff comes to equity to vindicate his right to observance of the obligation, not necessarily to recover loss or to restrain infliction of apprehended loss.<sup>37</sup>

It was not until the President of the QCAT gave his decision in *Ramsay Health Care* that the erroneous fifth element as to “confider detriment” was removed from the list of elements to establish a breach of an equitable duty of confidence, before the Information Commissioner.<sup>38</sup>

The unsatisfactory position as to the legally erroneous fifth element of “confider detriment” illustrates additional legal risks for those seeking to take advantage of exemptions to public disclosure in the FOI legislation.

On considering a number of decisions of the Queensland Information Commissioner as well as the QCAT decisions in *Adani* and *Ramsay Health Care*, it is observed that Information Commissioners are well capable of making mistakes in applying the unlawful breach of confidence exemptions to FOI disclosure.

In addition, the presumption or bias towards public disclosure of government information contained in the FOI legislation tends to permeate the analysis and decision-making by the Information Commissioner. The tenor of the decisions is for the Commissioner to hold in favour of information disclosure, rather than for an exemption from disclosure to apply.

Those seeking to take advantage of the exemptions to disclosure in the FOI legislation therefore face a discernible litigation risk.

Returning to the four elements of a breach of the equitable duty of confidence, the first element requires “a plaintiff to identify with specificity, and not merely in global terms that which is said to be the information in question”.

It is submitted this first element is uncontroversial and may readily be made out in the context of a contractor’s formal tender to government during the infrastructure tendering process. The element does not figure prominently in decisions by State and Territory Information Commissioners and tribunals, in which the unlawful breach of confidence exemptions to FOI disclosure have been considered.

The second element as to breach of the equitable duty of confidence requires information to have “the necessary quality of confidentiality (and is not, for example, common or public knowledge)”.

It is submitted that the distinction between contractor information satisfying this requirement and contractor information which does not lies in the extent to which the information provided to government is commercially innovative or sensitive on the one hand, and the extent to which that information is commonly known, on the other.

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<sup>35</sup> *Ramsay Health Care Ltd v Information Commissioner* [2019] QCATA 66, [91].

<sup>36</sup> *Ammon v Consolidated Minerals Ltd (No 3)* [2007] WASC 232, [310].

<sup>37</sup> *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1990) 22 FCR 73, 112.

<sup>38</sup> *Ramsay Health Care Ltd v Information Commissioner* [2019] QCATA 66, [95], *Department of Energy and Public Works and Queensland Health; Cairns Regional Council (Third Party)* [2021] QICmr 15, [29].

A building design and specification incorporating an innovation directly attributable to the skill of the information provider would likely carry a quality of confidentiality, while a largely conventional building design and specification would not.<sup>39</sup> In any event, the inquiry as to the second element is one of fact for determination on a case by case basis.

The third element as to a breach of equitable duty of confidence requires information to have been received by the defendant “in such circumstances as to import an obligation of confidence”.

In the context of contractor information provided to government during the process of tendering for an infrastructure project, two decisions are instructive as to circumstances in which a government obligation of confidence will be imported.

*Dockpride Pty Ltd v Subiaco Redevelopment Authority (Dockpride)*,<sup>40</sup> a judgment of Le Miere J in the Supreme Court of Western Australia, concerned a request by the defendant first for expressions of interest, and then for tenders, to purchase and develop part of 80 hectares of dormant land in Perth.

An entity associated with the plaintiff called Westpoint submitted an expression of interest to the defendant. Westpoint then received a letter from the defendant’s agent enclosing the tender documents and stating inter alia:

It is important to note that the selection process will be subject to a probity audit by an independent auditor selected from one of Perth’s major accounting firms.<sup>41</sup>

The plaintiff’s tender was shortlisted with one other tender by Blackburne. The defendant accepted Blackburne’s tender, despite this not having complied with a number of aspects of the formal design guidelines, set out in the defendant’s initial information package.

The plaintiff sued the defendant, claiming damages for breach of a tender process contract that had included a term obliging the defendant to conduct the tender process fairly and according to defined criteria.

Together with the letter above, Le Miere J of Western Australia, made reference in its judgment to a process the defendant had adopted in dealing with the tenderers.

Part of that process had included a meeting between representatives of the defendant and Westpoint “to receive feedback on Westpoint’s expression of interest submission and to understand the tender decision-making and selection process”.<sup>42</sup> The Court accepted that at this meeting, a representative of the defendant had said words to the effect that:

[T]he answer to any generic question relevant to all tenderers would be provided as advice to all tenderers whereas unique questions specific to an individual proposal would be answered only to the proponent.<sup>43</sup>

The Court further accepted that at the same meeting, the defendant’s representative had gone on to repeat the statement in the agent’s letter advising “a probity auditor would be appointed to ensure the equity and transparency of the selection process”.<sup>44</sup>

The Court concluded the defendant’s process in dealing with the tenderers had effectively given rise to an equitable duty of confidentiality and said:

During the tendering process a duty of confidentiality may arise to protect information provided by either party. This duty exists whenever information is provided in circumstances where it is obvious that it is being provided in confidence. This may arise by implication.<sup>45</sup>

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<sup>39</sup> See, eg, *Wagdy Hanna and Associates Pty Ltd v National Library of Australia* (2012) 7 ACTLR 70, [214]; [2012] ACTSC 126, where the Court doubted the confidentiality of information in the plaintiff’s tender concerning (1) stockpickers of the same brand as all shortlisted tenderers and (2) shelving that was readily available on the market.

<sup>40</sup> *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211.

<sup>41</sup> *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211, [34].

<sup>42</sup> *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211, [62].

<sup>43</sup> *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211, [243].

<sup>44</sup> *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211, [243].

<sup>45</sup> *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211, [244].

It follows that where a principal conducts itself in such a way so as to give rise to a duty of confidentiality by implication during a tendering process, the third element as to a breach of the equitable duty of confidence may be satisfied with respect to contractor information then provided.

As with the second element of the cause of action, the question whether a principal's duty of confidentiality may arise by implication is one of fact for assessment on a case by case basis. However, a principal's duty as to confidentiality is more likely to arise by implication, if it adopts a formal and prescriptive tendering process including for example representations to the tenderers as to the probity and transparency of the selection process.

In *Wagdy Hanna and Associates Pty Ltd v National Library of Australia (Wagdy Hanna)*,<sup>46</sup> Refshauge ACJ in the Supreme Court of the Australian Capital Territory considered a claim arising from tenders for construction of a storage facility at the National Library of Australia in Canberra.

In 1996, the defendant invited tenders for construction of an additional repository to store materials held by it. The plaintiff submitted a tender, as did a company called Decoin Engineering Pty Ltd (Decoin). Decoin's tender was successful and it constructed a repository, which the plaintiff considered incorporated a number of design features in its own proposal. The plaintiff believed the defendant had disclosed these features to Decoin, before deciding to accept Decoin's tender.

The plaintiff sued the defendant, claiming damages primarily based on the defendant having breached a contractual obligation of confidence, but also on the basis it had breached an equitable duty of confidence.

On finding the defendant did not disclose the plaintiff's design to Decoin, the Court went on to consider *inter alia* whether the defendant had breached an equitable duty of confidence to the plaintiff.<sup>47</sup> In so doing, the Court set out an extract as to the law of confidentiality in tender documents appearing in N Seddon's 2009 text *Government Contracts* part of which read:

During the tendering process a duty of confidentiality may arise to protect information provided by either party. This duty exists whenever information, such as trade secrets or sensitive government or commercial information, as provided in circumstances where it is obvious that it is being provided in confidence. *This may arise expressly* or by implication. . . . The existence of a duty of confidentiality may indirectly control one practice sometimes resorted to in negotiated tenders by the body seeking tenders, namely, disclosing to one tenderer an innovative feature of another tenderer's bid. So long as the innovative feature was *in the form of information provided in confidence*, the disclosure would be in breach of confidence.<sup>48</sup>

The extract from *Government Contracts* identifies two additional circumstances to that in *Dockpride*, in which contractor information provided to government during a tendering process will import an obligation of confidence by the government recipient.

The first of these is where government *expressly* states the tendering process will be confidential and the second is where contractor information is in the form of information provided in confidence; the Court in *Wagdy Hanna* provided an illustration of this second category, when it indicated a duty of confidentiality would be imported into the tendering process by a "statement by the tenderer marking his or her tender as confidential".<sup>49</sup>

Putting aside the circumstances in which an infrastructure tendering process may give rise to a government obligation of confidence, equity has previously recognised that the public interest in obtaining access to government information is one of the factors to be considered, in deciding whether government information should be the subject of an obligation of confidence.<sup>50</sup>

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<sup>46</sup> *Wagdy Hanna and Associates Pty Ltd v National Library of Australia* (2012) 7 ACTLR 70; [2012] ACTSC 126.

<sup>47</sup> *Wagdy Hanna and Associates Pty Ltd v National Library of Australia* (2012) 7 ACTLR 70, [210]–[215]; [2012] ACTSC 126.

<sup>48</sup> *Wagdy Hanna and Associates Pty Ltd v National Library of Australia* (2012) 7 ACTLR 70, [212]; [2012] ACTSC 126 (emphasis added); the full extract of N Seddon's 2009 text *Government Contracts* as to the law of confidentiality in the tender documents set out by the ACT Supreme Court closely mirrors the content of the full extract from the Supreme Court of Western Australian's decision in *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211, part of which is reproduced on page 23 of this article.

<sup>49</sup> *Wagdy Hanna and Associates Pty Ltd v National Library of Australia* (2012) 7 ACTLR 70, [213]; [2012] ACTSC 126.

<sup>50</sup> *Ramsay Health Care Ltd v Information Commissioner* [2019] QCATA 66, [82] (*Ramsay Health Care*); consideration of public interest as a factor in deciding whether government information should be subject to an obligation of confidence has been

However, the High Court has not articulated the circumstances where a “public interest exception” may apply to relieve government of an obligation of confidence and the scope of any “public interest exception” remains unclear.<sup>51</sup>

In addition, some but not all of the FOI legislation contains blanket exemptions to public disclosure of information that is subject to a government obligation as to confidence.<sup>52</sup> It is opined that Courts may act contrary to these blanket exemptions, if they were to allow public disclosure of otherwise confidential government information, based on their own judgment as to the public interest in preference to that of Parliament as expressed in the FOI legislation itself.

It is therefore submitted that any “public interest exception” existing as part of the third element of a breach of an equitable duty of confidence is unlikely to impact upon the application of the unlawful breach of confidence exemptions to FOI disclosure.

The fourth element as to a breach of equitable duty of confidence requires that there be an actual or threatened misuse of the information concerned.

In *B and BNRHA*, the Queensland Information Commissioner confirmed the inquiry as to this element concerned whether “disclosure would involve a misuse of the confidential information, (i.e. a use which is not permitted having regard to the scope of the obligation of confidence)”.<sup>53</sup>

As to the scope of an obligation of confidence, the majority of the Full Federal Court said in *Joint Coal Board v Cameron*:

The question is essentially one of fact. Whether, and if so, to what extent, the information in question was provided under an express or implied pledge of confidentiality, and if so, *the scope and extent of that confidentiality, will depend upon an analysis of all the relevant circumstances.*<sup>54</sup>

On one view, these statements of principle may be viewed as requiring Information Commissioners and administrative tribunals to make a value judgment, as to the scope of a government’s obligation as to confidence arising on provision of contractor information when tendering for an infrastructure project.

The advent of the necessity for a value judgment by a decision-maker would tend to increase uncertainty around application of the unlawful breach of confidence exemptions to FOI disclosure and increase the risk to contractors of such disclosure.

However, it is not always appropriate to view the elements of a cumulative legal test as requiring entirely separate and distinct enquiries. Regarding application of the fourth element of a breach of the equitable duty of confidence generally, it is submitted the scope of any government obligation of confidence will be informed at least in part by the outcome of the inquiry as to the third element as circumstances importing an obligation of confidence. If a contractor provides an innovative building design to government as part of an infrastructure tender, it should look to ensure the scope of any government obligation of confidence is in the widest possible terms, by marking the tender documents “confidential”.

That aside, equity provides guidance as to the scope of an obligation as to confidence concerning information provided during infrastructure tendering; where confidential information is conveyed, equity will intervene to restrain further use or disclosure, for a purpose other than that for which it was given in the first place.<sup>55</sup>

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categorised as part of the third element as to whether information was received in such circumstances as to import an obligation of confidence; *Ramsay Health Care*, [71].

<sup>51</sup> *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10, 31 (Mason CJ); *Ramsay Health Care Ltd v Information Commissioner* [2019] QCATA 66, [83].

<sup>52</sup> *Freedom of Information Act 1982* (Cth); *Freedom of Information Act 1991* (SA); *Freedom of Information Act 1992* (WA); *Right to Information Act 2009* (Qld).

<sup>53</sup> *B v Brisbane North Regional Health Authority* [1994] QICmr 1, [103].

<sup>54</sup> *Joint Coal Board v Cameron* (1989) 24 FCR 204; 19 ALD 329, 339 (emphasis added). The Full Federal Court considered the application of the unlawful breach of confidence exemption to FOI disclosure in *Freedom of Information Act 1982* (Cth) s 45 as this provision then stood.

<sup>55</sup> *Mastec Australia Pty Ltd v Trident Plastics (SA) Pty Ltd (No 2)* [2017] FCA 1581, [185].

## V. CONCLUSION

The FOI legislation in Australia provides members of the public with a legally enforceable right of access to a very wide range of information in government's possession. The legislation requires this be disclosed to the public, unless information to which access is sought is exempt from disclosure under the legislation itself.

In tendering for government infrastructure projects, private sector construction contractors may provide commercially-valuable and commercially sensitive information directly to government agencies that are subject to the FOI legislation.

Members of the public (including industry competitors) can and do make use of the FOI legislation to gain access to construction contractor information provided to government agencies, in and around the infrastructure tendering process. Accordingly, there is a risk to construction contractors that commercially-valuable and commercially sensitive information provided during infrastructure tendering will be disclosed to the public, through the freedom of information process.

To manage and mitigate this risk, construction contractors can look to bring their infrastructure tendering information within certain unlawful breach of confidence exemptions to FOI disclosure, in the FOI legislation. The unlawful breach of confidence exemptions appear in some, but not all, of the FOI legislation; their effect is to prevent prospective disclosure of government information, where this would have government in breach a legal duty of confidence owed to the original information provider.

For the unlawful breach of confidence exemptions to apply with respect to a construction contractor, government must first owe the contractor either a contractual obligation of confidence or an equitable duty of confidence, with respect to the contractor's tender information.

As to a contractual obligation of confidence, the analysis in the first section to Part IV of this article indicates there are significant advantages to a construction contractor in having a written confidentiality agreement with a government agency requesting tenders, rather relying on any equitable duty of confidence on that agency's part.

As with contracts generally, a contractual obligation of confidence stands to provide a contractor with a comparatively high degree of control and certainty, in being able to manage FOI disclosure risk. A contractor is able to take the initiative by preparing its own confidentiality agreement, for consideration by the government agency seeking tenders.

A contractor is more likely to be successful in invoking one of the unlawful breach of confidence exemptions to FOI disclosure, by relying upon a contractual obligation of confidence in preference to a corresponding equitable obligation. There is measurably less litigation risk associated with an Information Commissioner or administrative tribunal interpreting and applying a straightforward confidentiality clause, than in applying the complex elements of a breach of an equitable duty of confidence.

However, there are several aspects around contractual obligations of confidence, about which contractors ought to be mindful.

First, a confidentiality contract with a government agency requesting tenders should be in the form of a deed to avoid issues as to adequate consideration.

Second, the scope of a confidentiality clause should be in the widest possible terms, to reduce the possibility of that the clause does not apply with respect to any of the tender information ultimately provided to government.

Contractors should also be aware they cannot rely on an express assurance as to confidentiality by a government agency in its request for tender documents, as the basis for a contractual obligation of confidence, arising upon submission of tender documents. While there are other means by which a binding agreement as to confidentiality may be concluded, the simplest and most effective FOI risk management tool available to a contractor is a broadly-drafted deed of confidentiality, concluded with the relevant government agency.

While a broadly-drafted confidentiality deed may be the best means by which contractors can reduce FOI disclosure risk, contractors are often required to prepare and submit infrastructure tenders under strict time constraints and it is not always realistic for them to conclude a formal confidentiality agreement, prior to tender submission.

A contractor may find that it has to look to breach of an equitable duty of confidence by government, in order to take advantage of the unlawful breach of confidence exemptions to FOI disclosure and prevent public access to information it has provided, during infrastructure tendering.

It is apparent from the analysis in the second section to Part IV of this article that application of the four elements of a cause of action for breach of an equitable duty of confidence is a significantly more complex exercise, than that associated with breach of a contractual obligation of confidence.

Assessment of each of the elements of a breach of an equitable duty of confidence is largely undertaken on a case by case basis, with there being significant risks around the quality of evidence and its presentation and assessments made as to the merits, by Information Commissioners in particular.

These considerations suggest that an equitable duty of confidence will be of little use as tool to manage the risk of FOI disclosure, in the context of an infrastructure tendering process.

However, contractors involved in government contracting should not discount an equitable duty of confidence on the part of government as a legitimate means of managing FOI disclosure risk.

The analysis in the second section to Part IV of this article indicates the first and fourth elements of a breach of equitable duty of confidence may readily be made out, by a contractor involved in government contracting. While satisfaction of the second and third elements may be largely down to the actions of the government agency requesting tenders, contractors are able to enhance their prospects in this regard, by emphasising with government that their dealings in tendering for an infrastructure project are confidential and by clearly marking tender documentation to that effect.

Whatever their approach to managing FOI disclosure risk, private sector construction contractors should seek to be proactive from the outset of the tendering process, as inaction is unlikely in their best interests.