

**NEW ZEALAND
INFRASTRUCTURE
COMMISSION**

T E W A I H A N G A

Information Sharing Protocol

October 2019

1 About this protocol

1.1 The Infrastructure Transactions Unit

On 20 February 2019, the Government announced that it would be establishing the New Zealand Infrastructure Commission – Te Waihanga. The Commission will help improve how New Zealand coordinates and plans its infrastructure, makes the most of the infrastructure it already has, and ensures that investment in infrastructure delivers what New Zealand needs.

The Infrastructure Transactions Unit (ITU) was initially established within the New Zealand Treasury in advance of the Commission to provide support to agencies and local authorities in planning and delivering major infrastructure projects with a total cost of ownership exceeding \$50 million. It now forms part of the New Zealand Infrastructure Commission – Te Waihanga.

The ITU's primary role is to support agencies and local authorities to procure and deliver major infrastructure projects; supplementing rather than replacing existing capability.

Another key function is to prepare research and best practice guidance on major infrastructure procurement and delivery, to provide guidance on specific issues, beyond the more general procurement guidance already available from other agencies.

The overarching purpose for the ITU publishing this guidance and its project support is the same: to lift the performance of New Zealand's public and private sectors in procuring and delivering major infrastructure projects.

1.2 Purpose

To perform the above functions, Procuring Entities will be required to share certain information with the ITU, for instance about planned, active or past procurements. In doing so, the ITU recognises that a Procuring Entity may be required to protect Confidential Information, including where it has received such information from third parties (e.g. from potential suppliers during market engagement or a procurement process). The purpose of this ITU Information Sharing Protocol (the Protocol) is to provide guidance on how the ITU and Procuring Entities will manage any information sharing to ensure that probity and confidentiality requirements are met.

This Protocol applies to the ITU in the performance of its above functions but does not apply to the wider strategy and planning function of the New Zealand Infrastructure Commission, Te Waihanga (within which the ITU will be located when the Commission is established later in 2019).

This Protocol constitutes "relevant published ITU guidance" for the purposes of Rule 64(1) (b) of the Government Procurement Rules, 4th edition (Procurement Rules).

2 Sharing of information with the ITU

This section outlines the types of information the ITU is likely to be privy to in its role working with Procuring Entities, and how information shared with the ITU will be handled.

To assist Procuring Entities with high-value infrastructure projects, the ITU will need to receive information from Procuring Entities at various stages throughout a procurement life-cycle. Such information may relate to:

- the business case for new infrastructure investment;
- market dynamics and relevant suppliers;
- procurement plans, associated issues and risks;
- budget and funding considerations in progressing a procurement;
- risk allocation in key contracts;
- assurance of risk management and delivery in the course of a procurement;
- financial models;
- executed project agreements; and/or
- project performance and cost out-turn information.

Given the competitive market context for infrastructure procurement and the Crown's interest in protecting its own commercial position, it is to be expected that a Procuring Entity may need to share Confidential Information with the ITU for the ITU to fully discharge its functions and provide the requisite support to the Procuring Entity. The ITU may also need to collect historical information that retains elements of Confidential Information to continue to enhance the quality of its advice and published

guidance over time. The following key parameters will apply to the ITU's internal handling of any such information that it receives from a Procuring Entity:

- Internal security measures (such as secure storage and electronic information barriers) will be implemented and followed by ITU staff to keep Confidential Information secure.
- Where the ITU is dealing with Confidential Information, the sharing of such information within the ITU will be limited to staff who need to know that information to perform their role.
- The ITU will have a designated point of contact for communications with a Procuring Entity involving Confidential Information, who will oversee the distribution of information within the ITU.

As a central repository for infrastructure transaction knowledge and best practice, it will at times be appropriate for the ITU to share information across central and local government agencies, enabling the transfer of lessons learned between Procuring Entities and projects, and better enabling coordination across sectors. If the ITU sees value in sharing Confidential Information about a Procuring Entity's infrastructure procurement with other agencies, it will first inform and seek the relevant Procuring Entity's views, indicating the type of information it wishes to share and providing assurance about what measures will be taken to maintain confidentiality where required.

3 Tendering of advice to Ministers

The following section will outline how the ITU will handle information relating to advice to Ministers, including the sorts of information that may be included and how the information will be handled to protect confidentiality.

The ITU has a duty to provide independent advice to its Ministers in the performance of its functions. This advice may address matters such as:

- the assessment of high-value infrastructure projects in terms of how or whether such projects achieve economic, environmental, social, cultural and security objectives;
- the prioritisation of high value infrastructure projects;
- appropriate delivery mechanisms for infrastructure projects, the management of relevant risks and providing assurance regarding delivery; and
- matters arising out of the ITU's participation in aspects of procurement processes, including in any relevant project governance and working groups.

The ITU needs to have sufficient information about New Zealand's infrastructure projects to provide accurate, comprehensive and balanced advice to its Ministers. To do this, the ITU's advice may need to draw on its analysis of relevant information that has been provided by Procuring Entities about planned or active procurements. It is not generally expected that underlying Confidential Information would need to be shared with Ministers.

The ITU acknowledges that Procuring Entities may owe certain confidentiality obligations to third parties, subject to conventional exceptions such as under the Official Information Act 1982 (OIA). For instance, in respect of procurements, agencies will likely be required to protect suppliers' Confidential Information in accordance with Rule 4 of the Procurement Rules. As recognised by the Procurement Rules, there is an exception where the disclosure is required by law, convention or Parliamentary or Cabinet Office practice, or where it is a limited disclosure notified in a Notice of Procurement.

While it is not generally expected that advice tendered to Ministers would include underlying third party Confidential Information, the ITU needs to manage for the possibility of situations arising where such information may need to be shared with Ministers for the ITU to provide full and accurate advice. If such a situation arises, the ITU will first inform and discuss with the relevant Procuring Entity the nature of the Confidential Information that is proposed to be shared, so that the Procuring Entity has an opportunity to advise its responsible Minister and the ITU can ensure that any confidentiality obligations are properly identified and complied with.

4 Point of contact for the infrastructure market

This section will consider how ITU will handle sensitive information in its role as a point of contact for the infrastructure market, and also includes provision for OIA requests.

The ITU acts as a first point of contact for the market in relation to upcoming infrastructure investment and delivery opportunities. The ITU also coordinates and publishes pipeline information. In providing information to the market, the following protocols will apply to prevent the disclosure of Confidential Information:

- Infrastructure pipeline information that is published to the market will be sourced from publicly available information or the ITU will otherwise seek confirmation from the relevant Procuring Entity that the proposed pipeline information is appropriate for release.
- Internal guidance will be implemented for ITU staff outlining the types of early-stage and general information that are approved for publication to the market.
- The ITU will ensure it has designated and suitably qualified points of contact who are responsible for communicating information to the market and answering queries to ensure that there is consistency of information being provided. Such ITU staff will also ensure that market participants are not receiving information that might give them an unfair advantage over other participants in the market.
- Confidential Information not intended for release, that the ITU may receive from third parties it engages with, will be handled in accordance with detailed security protocols to ensure that such information is not inadvertently released to the market.
- The ITU will keep a record of its market engagement and document the general nature of its interactions with market participants.

The ITU is subject to the OIA. Where the ITU receives a request for information under the OIA, such a request will be responded to in accordance with the ITU's obligations under that Act. If the ITU receives an information request that another agency has an interest in or that relates to a third party's potentially Confidential Information, the ITU will use its reasonable endeavours to consult with that agency or third party prior to responding to the request. If the ITU receives a request for information that is not held by the ITU but that the ITU believes is either held by or more closely connected with the functions of another agency, the ITU will transfer that request to the other agency in accordance with the OIA.

5 Facilitating the implementation of this Protocol

This final section includes some practical information about the implementation of the this Protocol, scope for supplementary protocol, and definitions.

5.1 Implementation of the protocol

To achieve the objectives of this Protocol, it is expected that where a Procuring Entity is releasing a Notice of Procurement or entering into a confidentiality undertaking (or similar) in respect of an ITU supported procurement, the Procuring Entity will include an exception in the relevant documentation that is sufficient to enable Confidential Information to be shared with ITU staff and (only to the extent necessary) by the ITU with the ITU's responsible Ministers. The sharing of such information would in any event occur only in accordance with this Protocol.

5.2 Supplementary protocol

It is acknowledged that there may in some instances be particular interests or sensitivities to manage in an ITU supported procurement, in terms of protecting Confidential Information. In such cases and according to the particular context, the ITU and the Procuring Entity may agree to establish a supplementary protocol that sits alongside this Protocol to provide further particularity about how the sharing of information with or by the ITU will be managed in the context of the procurement in question.

5.3 Definitions

In this Protocol, unless the context otherwise requires:

- **Confidential Information** includes information that:
 - is by its nature confidential;
 - is identified by a Procuring Entity as 'confidential', 'commercially sensitive', 'sensitive', 'in confidence', 'top secret', 'secret', 'classified' and/or 'restricted';
 - is provided by a Procuring Entity or a third party in confidence; and/or
 - the ITU knows, or ought to know, is confidential,
 - but excludes information that is in the public domain through no fault of either the ITU or a Procuring Entity.
- **Procuring Entity** means all public sector agencies and local authorities considering the procurement of infrastructure with a total cost of ownership of more than \$50 million.