

# GLOBAL INTEGRITY SUMMIT

Australia 2014

**OUTCOME PAPERS**

Transparency and  
Confidentiality



*Towards an Integrity 20*

[www.integrity20.org](http://www.integrity20.org)

# TRANSPARENCY & CONFIDENTIALITY

Integrity involves the use of entrusted power for publicly justified and, generally, officially endorsed purposes/ends. It involves institutions reflecting on their purpose, living up to that purpose, and demonstrating through transparency and accountability measures that they are doing so.

Government agencies, corporations, media, non-government organisations (NGOs) and individuals want to keep secrets, and find out each other's secrets (which is made easier with the internet and hacking). Transparency is essential to enable external scrutiny of and participation in decision making, priority setting, and information and asset management in institutions. As secrecy poses a greater threat to organisational integrity, more disclosure and transparency are also needed to fight corruption, deal with base erosion and profit shifting (BEPS), and disclose commitments in PPP contracts. But there are some good reasons for keeping secrets – including sovereign negotiations, legal advice and genuine confidentiality and privacy issues including to safeguard the effectiveness of audit and law enforcement techniques and activity; protection of trade secrets and intellectual property; and to avoid the premature release of draft proposals. So too, duties of transparency can carry real compliance costs in time, organization and money. Even so, public interest immunity, security and commercial-in-confidence are overused excuses for keeping from citizens the information that governments collect on their behalf and at their expense – and privacy rights can be used as fig-leaves to cover up wrongdoing. But secrecy is justified in some circumstances. The core task is to determine where the dividing line is and how that line can be enforced.

## TRANSPARENCY AND CONFIDENTIALITY IN DIFFERENT SETTINGS

### Transparency and Governmental integrity

Almost all governments claim to serve the interests of those they govern (and even those who claim legitimacy on theocratic or ideological grounds, will make this claim). Those claims form the basis of the justification of not only their claim to govern but of government themselves. Such power can be abused for personal/party-political ends (corruption). It can also be used ineffectively in maladministration, incompetence or ideological foolishness leading to costly mistakes. Transparency involves knowing how that power is used, those who had input into the decision, the ostensible reasons for it, and those who benefited from it. This knowledge does not prevent the abuse and misuse of power but can allow those to whom the power holders are accountable (from ombudsmen and courts to electorates) to act.

But there can be reasons for keeping state information confidential – negotiations, free and frank advice (whether from lawyers or civil servants), confidential information about citizens and certain information about the private lives of officials that they are entitled to keep to themselves.

### Transparency and Corporate Integrity

Adam Smith warned against joint stock companies but within a century British and other parliaments were making incorporation with limited liability very easy. This was not done on the basis that it was good for the shareholders but that corporations could pool capital and expertise to the benefit of the community through growth and increases in the standard of living. We continue to entrust most economic activity to corporations on this basis. It is the basis of the 'license to operate'. Such a concentration of people, power and resources in large corporations creates the risk that it will be abused – through the abuse of asymmetric knowledge, unequal bargaining power, collusion etc. Consumers and regulators have a strong interest in knowing what is done and the reasons for it. Taxation authorities will want to know details of the accounts, balance sheets, cash flows and financial transfers. Shareholders will want to know how their money is being spent and all who are considering buying or selling stock should have access to the same information. This therefore raises two different aspects of transparency: transparency through public access and disclosure; and transparency through access by regulators to corporate records (which won't necessarily result in public access and knowledge).

On the other hand, corporations will claim that some information is intellectual property (IP) or that the release of some information (for example, costs or marketing strategies) may give other companies a competitive advantage.

## **Transparency and Finance**

Traditionally, banks saw confidentiality as a core duty to their clients – and in some banking systems it has been a watchword. How much a person owned was seen as a matter of privacy. Such information could be used by thieves, blackmailers and competitors. However, knowledge of that by regulators and, sometimes, the general public may be relevant for a number of reasons including identifying potential conflicts of interest, unearthing unexplained wealth of officials and employees, tracing the proceeds of corruption, identifying taxation liabilities and avoidance attempts. There is also a need to know collective information to understand the strength of financial institutions and systemic risks – including those generated from the proliferation of new financial instruments.

## **Transparency and Tax**

Taxation authorities have the duty to collect tax from those who are legally liable to pay it. Taxpayers like to retain some privacy vis-à-vis the general public but it is harder to justify privacy as a reason for withholding information against the Revenue – though the burden of information collection must be relevant in an efficient system.

## **Transparency and Infrastructure**

Given the scale of many infrastructure processes, there are dangers of corruption and waste so that there is a strong interest in open and transparent tendering processes and information about the winning tenders – as well as knowledge of negotiations and any conflict of interests of officials involved. Traditionally, contracts for PPPs have been treated as commercial-in-confidence, a practice that is widely questioned. Indeed, some new initiatives taken up governments now make contracts public as a matter of course. Under its Infrastructure Agenda, the G20 could consider such important advances in integrity, such as the Construction Sector Transparency (CoST) Initiative.

## **Transparency and International Governance**

The case for transparency in national and sub-national governments is generally conceded – with a number of claimed exceptions (e.g. security and cabinet in confidence) that are open to debate. But what of international institutions? There are concerns over secrecy in trade negotiations – and in particular selective secrecy, with drafts shown to only some interested parties. Those parties which have access to drafts can put their views to their governments and have an opportunity to influence the text to their benefit – and to the potential benefit of the government if it is their policy to support a particular industry (which is more common in practice than some theorists would prefer to admit).

# **SECURING TRANSPARENCY**

## **Whistle-blowers/‘internal witnesses’**

When wrong doing is planned in secret, it is the insiders who have the greatest knowledge. Accordingly, whistle-blowers have been critical in exposing scandals in all the above areas – though whistle-blowers in one area may be treated very differently from those in other areas (for example, those revelations about surveillance and Swiss bank accounts). Whistle-blower protection is necessary – though primary reliance should be placed on opportunities to query official action through mandated and protected channels outside of the chain of command. In a perfect system, there would be no need for whistle-blowers. As no system is perfect, there will always be a need for whistle-blowers and means for their protection. This must start with their having access to confidential legal and other advice as to how they may proceed. It must include legislated protection across government and corporate environments – bearing in mind whistle-blowers defending human rights often possess additional international legal entitlements. Finally, it needs to include well-resourced institutions capable of thoroughly investigating whistleblower allegations.

## **Freedom of Information**

Freedom of Information (FOI) legislation has allowed citizens to seek documents and to appeal some or all refusals to grant access to an independent body. It should be noted that FOI legislation generally applies only to public access to government records. Should the FOI model be extended in two other ways – to government contractors (and PPPs); and corporations as to at least some of their records? More recently the debate has moved to a ‘Right to Know’ (RTK).

## **A matter of property**

This point is usually made that information acquired by government is a national resource to be used for public purposes. However a strong property argument can be added to the public interest and rights argument:

1. Information produced by the government for the purposes of making and recording decisions is the property of the people.
2. A good argument is needed to deny access by the people to their property.
3. Some arguments are framed in terms that appear to meet FOI exceptions, but do not stand up to independent scrutiny (necessitating such independent scrutiny).
4. Some good arguments have been made but it is important that they are applicable to the situation.
5. There are some very bad arguments for withholding information to prevent public discovery – that a minister or senior public servant was wrong, foolish, or unethical. Other bad arguments include: that disclosure would lead to confusion or misunderstanding; disclosure would cause captious or ill-founded criticism (or embarrassment); and that the communications passed between senior officials remain a secret. The worst case of all is where information is withheld because it would prove that a Minister misled parliament or electorate (deliberately or otherwise) and failed to correct a statement.
6. To use a power to withhold information for that purpose seems to be a very clear abuse of power for personal or party political ends and to fall within Transparency International's definition of corruption. Whether or not it is formally included within anti-corruption legislation, our procedures should ensure that information will not be withheld on that basis. The decision should be void on the basis that it was made for an improper purpose or an irrelevant consideration. Ministers in any doubt should seek advice from the Integrity Commissioner or the Information Commissioner and the Information Commissioner should always have the right to release such information.

(Note that, while protecting an official from evidence of their false statements or misdeeds is not a justification for withholding information, there might be some cases where there remain other genuine public interest considerations against disclosure which might still trump reasons for disclosure. If so, procedures should be in place to ensure independent determination that this case has been made and full sanctions for false statements.)

## **Automatic posting**

This suggests a move towards a system of publishing as a rule and withholding as an exception (the reverse of the traditional FOI approach). With the recognition that government information is a valuable resource and that technology now makes it easier to make information accessible, the focus has shifted to 'proactive disclosure', public release and open data. On this footing, any decision to withhold information should be based on public interest considerations. Equally, media institutions need to engage judiciously with the wealth of information they acquire from public institutions pursuing transparency management policies. While vigilance and awareness-raising are key roles held by the media, overly sensationalist reporting can work to punish transparent institutions.

## **Duty to create a record – diary, someone taking notes, recording**

FOI, RTK and property rights' approaches deal with documents that are created. In good governance practice, documents are generated in considering and making decisions. But in poor decision making the documentary record may be weak. And where power is abused, the gaps in the documentary record are deliberate (especially in a post FOI world). Modern administrative law requires the giving of reasons – though a post facto rationalisation may get the decision maker off the hook from responsibility. Registers of interests for public officials are now generally required (to avoid conflicts of interest) as are registers of political donors. There is an increasing practice of keeping and releasing appointment diaries. The publication of budget information also occurs, in accordance with the framework established by the International Budget Partnership (and Open Budget Survey).

Should we require the keeping of diaries of whom decision makers see and ensure that, if they see someone with an interest in the decision, that notes are taken by a civil servant (a practice followed by some Federal ministers in recent years)? Should all discussions between decision-makers and those with an interest in the decision be recorded and made available to police or ICAC in any future corruption investigation? This is not because we expect that such discussions will be corrupt – but there is a risk and if recorded the risk will not be realized. An analogy could be drawn to police interviews where there is no presumption that police will beat confessions out of interviewees but if they are recorded they will not act in this manner.

## **Counteracting the bias to non-disclosure**

While privacy, confidentiality and secrecy do warrant protection, too often the balance between exposure and concealment skews towards silence. Laws for wrongful disclosure abound and those who would be embarrassed by the disclosure may be very grateful. However, it is rare for there to be any negative consequences and virtually never any sanctions for to disclose. This bias could be addressed by emphasizing the ultimate ownership of the information and related arguments (1-6 above), a system wide emphasis on transparency, ethical advice and training as well as effective means for appeal. However, it is important to consider the possible criminality of withholding information about waste and wrongdoing. In some cases, withholding information could make the official an accessory after the fact or even part of a conspiracy to pervert the course of justice. As indicated above, withholding information because it would embarrass or expose an official can be appropriately characterized as corruption. The more we ensure that there is a duty to disclose, the need for whistleblowers to act (whether through internal channels when they are effective and external challenge when they are not) is reduced.

## **Transparency is part of the solution, not the whole solution**

A lack of transparency makes corruption, BEPS, overpriced infrastructure and financial malpractice easier. Increased transparency makes it more difficult. But it will not, by itself, solve these problems. It can contribute to the solution, especially if linked to effective accountability mechanisms within the various arms of government, corporations and professions watched over by an independent professional media and civil society organisations.

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