



Disclosure of Project and Contract Information in Public-Private Partnerships



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List of Acronyms

AAI	Airports Authority of India
ANTAQ	Agência Nacional de Transportes Aquaviários, Brazil
ANTT	Agência Nacional de Transportes Terrestres, Brazil
BC	British Columbia
BSES	Bombay Suburban Electric Supply, India
C&AG	Comptroller and Auditor General
CIC	Chief Information Commissioner
DEFRA	Department of Environment, Food and Rural Affairs, United Kingdom
DERBA	Departamento de Infraestrutura de Transportes da Bahia
DIAL	Delhi International Airport Limited, India
FOI	Freedom of Information
FOIPPA	Freedom of Information and Protection of Privacy Act, British Columbia
GIPA	Government Information Public Access, New South Wales
HMT	Her Majesty's Treasury, United Kingdom
JVC	Joint Venture Company
MCA	Model Concession Agreement
MIAL	Mumbai International Airport Limited, India
MoRD	Ministry of Rural Development, India
NAO	National Audit Office, United Kingdom
NHAI	National Highway Authority of India
NPV	Net Present Value

NSW	New South Wales, Australia
O&M	Operation and Maintenance
OMDA	Operation, Management and Development Agreement
PBC	Partnerships British Columbia
PFI	Private Finance Initiative, United Kingdom
PIO	Public Information Officer
PIR	Post Implementation Review
PPP	Public-Private Partnership
PV	Present Value
PSC	Public Sector Comparator
PURA	Provision of Urban Amenities in Rural Areas
RFP	Request for Proposal
RFEOI	Request for Expressions of Interest
RTI	Right to Information
SHA	Shareholders' Agreement
SPV	Special Purpose Vehicle
UK	United Kingdom
VfM	Value for Money
VGf	Viability Gap Funding
WBI	World Bank Institute

Executive Summary

1. This report presents a review of current practices on the disclosure of information on PPP projects and contracts from 11 jurisdictions at the national and sub-national level representing 8 countries. It is part of a broader program of work being undertaken by the World Bank Institute (WBI) on increasing the transparency of public-private contracting.
2. **The objective of this review** is to present emerging practices on the disclosure of information on PPP projects and contracts and to distill from these suggestions to government agencies on how they can provide more information to their public on their PPP projects. There are no grounds to believe that PPPs require greater transparency than similar projects executed through traditional public procurement. However as with publicly-executed projects PPPs can benefit from greater transparency. In addition PPPs may require considerations and approaches to disclosure not present in publicly-executed projects.
3. **The benefits of disclosure.** There is not yet a body of evidence linking the transparency of information on PPPs to program/project performance, in part because efforts to improve transparency are relatively new. However there are reasons to believe that significant disclosure can help PPP programs achieve better value-for-money. Examples include how revealing information on procurement of PPPs can improve governance, how disclosing information on government contributions to and risk-bearing under PPPs can improve the management of the fiscal costs of PPPs, and how disclosing information on the performance of PPPs provides users of services with an understanding of what levels of service they should be getting. Contract disclosure may well produce more sustainable contracts and benefit the private sector by reduced risks of renegotiation.
4. **The costs of disclosure.** The disclosure of information is not costless and a comprehensive program of disclosure including contracts, related documents and ongoing performance reporting will require significant resources. However scanning and placing online the current version of the contract requires relatively little resources and can be a useful step in itself. Summarizing and publishing information on the ongoing performance of a PPP requires more resources, although arguably much of this effort is an essential part of contract management and should be performed anyway.
5. **Current practices on the disclosure of information.** Some jurisdictions ensure that a substantial amount of information is disclosed proactively. In many others, although information can be accessed via general transparency laws, it is time consuming for both information users and information producers. Latin American countries publish their PPP contracts, the United Kingdom adopted a pro-disclosure policy,

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India has recently published a large number of highways contracts, and Australia and Canada disclose significant information on their contracts and projects. While there are still countries with no proactive disclosure, and countries that significantly redact published contracts, in many jurisdictions contracts are disclosed online with no redactions at all. There is therefore evidence of significant disclosure of information on PPP projects and contracts, as well as a clear trend towards proactive disclosure of information on PPP contracts and projects.

6. **Proactive disclosure.** In nine out of eleven jurisdictions we reviewed, online disclosure of PPP contracts, in a proactive way, is now the norm, while in a tenth one online disclosure is rapidly spreading. In most cases, scanned signed contracts are downloadable.
7. **Full disclosure.** Roughly one half of the jurisdictions practicing online proactive disclosure do not redact PPP contracts. The ones that do redact have now strict rules on redactions, restricting the reasons for redactions and regulating the redaction procedure.
8. **Contract and project summaries.** Some governments have implemented a practice of publishing contract summaries that present in plain language the complex provisions included in their PPP contracts. This practice is not and should not be used as a substitute for contract disclosure, but as a useful complement to contract disclosure. These summaries can also include information on the project rationale and the procurement process.
9. **Actual performance of PPP operators:** Countries with no proactive disclosure of contracts also do not proactively disclose performance.
10. **Table 1 below provides a summary of practices** in the jurisdictions surveyed covering some but not all of the areas on disclosure that we surveyed:
 - Contract Disclosure: the public availability of the actual signed contract and any substantial changes to its prescriptions that may have happened after signing of the contract.
 - Contract Summary: Is there a document presenting the project and the contract in plain language, describing the object and conditions, term, quality and performance requirements and indicators, reward/penalties scheme, and monitoring system?
 - Government Guarantees: Availability of information on guarantees, including in the form of side letters etc.
 - Performance and Audit Reports: Information on disclosure of performance reports by PPP Operators, Contract Managers, Third Party Assessments, as well as audit reports.
11. **Emerging practices in disclosure of information on PPPs.** Based on our review and an assessment of practices some key elements of proactive disclosure should be:
 - The disclosure of the current PPP contract (identifying any changes made since the contract was originally signed) and relevant side agreements including government guarantees, with minimal

redactions which reflect commercially confidential information;

- The disclosure of future stream of payments and government commitments under PPP contracts;
- The publication of a summary which provides in plain language the most important elements of the contract and project and key information on the rationalization of the project, selection as a PPP and procurement;
- information on a regular basis on the performance of the project; and
- A process by which information is authenticated/validated.

12. The remainder of this report is structured as follows:

- Section 1 presents a synthesis of observed practices and then a recommended approach in terms of essential information to be disclosed and the key instruments through which this is done;
- Section 2 presents country case studies in a standardized format reflecting the recommendations in Section 1;
- Annexures 1 and 2 list relevant websites, legislation and policy.

Table 1 - Summary of approaches to PPP contract and project disclosure

	Contract Disclosure	Summary	Guarantees	Performance reports
Australia: New South Wales	proactive disclosure with redactions	detailed summary	statement of actual liabilities, statement of indemnities /guarantees including loans are proactively disclosed	<ul style="list-style-type: none"> • operator reports not proactively disclosed, only reactively • post implementation reviews proactively disclosed • audit reports proactively disclosed
Australia: Victoria	proactive disclosure with redactions	detailed summary	proactively disclosed as part of project summary, but not described in detail	<ul style="list-style-type: none"> • performance reports not proactively disclosed, only reactively • some third-party assessments proactively disclosed • audit reports proactively disclosed
Brazil: Federal	full proactive disclosure is the standard	no summary	all guarantees are stated in disclosed contracts	<ul style="list-style-type: none"> • performance reports not proactively disclosed • audit reports not disclosed
Brazil: Bahia	full proactive disclosure is the standard	no summary	all guarantees are stated in disclosed contracts	<ul style="list-style-type: none"> • performance reports not proactively disclosed • audit reports not disclosed
Brazil: Minas Gerais	full proactive disclosure is the standard	no summary	all guarantees are stated in disclosed contracts	<ul style="list-style-type: none"> • operator reports not disclosed • annual reports disclosed for selected projects; monthly performance proactively disclosed • results from user surveys proactively disclosed • audit reports not disclosed
Canada: British Columbia	proactive disclosure with redactions	brief summary	proactively disclosed	<ul style="list-style-type: none"> • performance reports not proactively disclosed • audit reports proactively disclosed
Chile	full proactive disclosure is the standard	no summary	all guarantees are stated in disclosed contracts	<ul style="list-style-type: none"> • operator reports not disclosed • contract management reports proactively disclosed • audit reports not disclosed

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	Contract Disclosure	Summary	Guarantees	Performance reports
India	proactive disclosure in some sectors	no summary	all guarantees are stated in disclosed contracts	<ul style="list-style-type: none"> • performance reports not proactively disclosed, only reactively • audit reports proactively disclosed
Perú	full proactive disclosure	no summary	all guarantees are stated in disclosed contracts	<ul style="list-style-type: none"> • performance reports for transport projects proactively disclosed • audit reports not disclosed
South Africa	no proactive disclosure, only reactive disclosure	no summary	all guarantees are stated in the contracts, and only reactively disclosed	<ul style="list-style-type: none"> • all reports, third party assessments and user surveys reactively disclosed • a few case studies of healthcare PPPs available online • audit reports reactively disclosed
United Kingdom	for new contracts, proactive disclosure with redactions	no summary	proactive disclosure for new contracts, reactive for old ones	<ul style="list-style-type: none"> • performance reports reactively disclosed; proactive disclosure of performance data for some projects • audit reports proactively disclosed

Section I:

Practices and Recommendations

Review of current country practices

1. This report presents a review of current practices on the disclosure of information on PPP projects and contracts from 11 jurisdictions at the national and sub-national level representing 8 countries. It is part of a broader program of work being undertaken by the World Bank Institute on increasing the transparency of public-private contracting.
2. The objective of this review is to present emerging practices on the disclosure of information on PPP projects and contracts and to distill from these suggestions to government agencies on how they can provide more information to the public on their PPP projects. It has been done both to inform the global dialogue on open contracting as well as to provide ideas to countries that are now looking at how to increase the transparency of their PPP programs. Many countries are trying to implement freedom-of-information legislation and this includes applying it to their PPP programs, a topic we also address here.

Why look at PPPs in particular?

3. We do not believe that PPPs require greater transparency than similar projects executed through traditional public procurement, but do believe that significant disclosure is essential for reaching efficiency, and that PPPs may require considerations not addressed for traditional contracts, because:
 - PPP projects are long-term and the contracts underpinning them can be very complex documents;
 - Experience shows they are subject to frequent renegotiation, therefore key terms in the original contract may well change substantially over the course of the project;
 - They often relate to services of public interest, and there may be substantial fiscal transfers or commitments made as part of the contract; and
 - At least in some countries PPPs are sometimes or even often awarded on a sole-source or unsolicited basis and not subject to competition in award.
4. In jurisdictions where PPP contracts are regulated by sectoral or cross-sectoral regulators, and the regulatory framework is well established, rules require providers to make public certain financial and performance related information as part of the regulatory process. In sectors or countries where

regulation is mostly by contract without a separate regulatory agency there may not be such processes and disclosure of contract information by governments becomes essential.

Possible benefits from increased disclosure on PPPs

5. There is not yet a body of evidence related to the impacts of greater disclosure of information on PPP contracts and projects and their performance and the efficiency of PPP programs, not least in part because this aspect of PPP governance is relatively recent. However there are reasons to believe that significant disclosure can help PPP programs achieve desired value-for-money and better outcomes. Examples include how revealing information on procurement of PPPs can improve governance, how disclosing information on government contributions to and risk-bearing under PPPs can improve the management of the fiscal costs of PPPs, and how disclosing information on the performance of PPPs provides users of services with an understanding of what levels of service they should be getting. Contract disclosure may well produce more sustainable contracts and benefit the private sector by reduced risks of renegotiation.
6. The disclosure of information is not costless although some actions require much less resources than others. Scanning a copy of a contract or a report on project performance and placing these online requires virtually nothing in the way of resources. Summarizing and publishing information may require more effort, but for the information we outline much of this should be done as a matter of course for good contract management and due diligence. Examples include summary information on performance and key information on public sector commitments and guarantees under projects. These represent important elements in contract management and in understanding the fiscal costs of a project, respectively. The information we are proposing be placed in the public domain therefore should already be an active focus of agencies working on PPPs.
7. At the same time it is recognized that the same considerations that apply to disclosure of government contracts in general would apply to PPPs, for example that disclosing commercially confidential information might harm the business interests of a party to the contract and that approaches towards disclosure have to be tailored accordingly.

The geographic scope of the review

8. The purpose of this review is to examine practices on disclosure on contract and project information for PPPs in a set of countries with PPP programs that have substantial deal flow and/or an internationally high profile.
9. The jurisdictions reviewed were selected based on the fulfillment of at least 3 of the following four criteria:

- The jurisdiction has had a substantial deal flow in PPPs during the past two decades or has a substantial pipeline of projects;
 - The jurisdiction has a rapidly developing or fairly mature PPP framework and regulatory mechanisms;
 - The jurisdiction is prominent in the region or globally in the area of PPPs;
 - The jurisdiction has a commitment to disclosure in terms of the existence of a freedom of information legislation.
10. The review covered both practices at the national government level – in the UK, South Africa, Chile, Peru and India – as well as practices at the state government level in Australia (in Victoria and New South Wales) and Brazil (in Minas Gerais and Bahia). The review did not survey practices related to all contracts in countries where there are large numbers of PPPs implemented by different agencies (e.g. United Kingdom), but reviewed a representative sample of contracts.
11. The United Kingdom, Victoria and New South Wales are mature PPP markets with more than two decades of PPP experience. The deal flow in these states is substantial. Chile, Brazil and Peru have been implementing PPPs since the early 1990s. From a regional perspective, Brazil, Chile and Peru are amongst the highest-ranking countries in Latin America in terms of their experience in implementing PPP projects and with generally favorable institutional, legislative, and investment climate for establishing public-private initiatives.¹ Chile and Peru also have a strong commitment to disclosure of contracts. South Africa has a strong PPP framework in place although the deal flow in terms of numbers and value has been relatively modest. British Columbia has a modest deal flow but can be considered fairly mature in terms of a strong PPP framework and some good disclosure practices. India, on the other hand, has both a fairly high level of maturity in terms of a framework for PPPs and a fairly large deal flow in terms of numbers as well as value.

Approach and methodology

12. The review is focused on policies and practices in post-contract disclosure relating to PPPs in selected jurisdictions. We did not examine processes for consultation during the project identification and procurement process. These are clearly important but have typically been the subject of more analysis and debate. However our review did examine the extent to which information on identification and procurement are placed into the public domain post contract award. It also does not cover aspects such as disclosure costs and technology. While the review mentions the institutional context and the responsibilities relating to PPPs in different jurisdictions in brief and also the responsibilities for putting out information in the public domain, it does not dwell on the pros and cons of the administrative set-up, nor does it try to find a cause and effect between these issues and the extent of disclosure in different jurisdictions.

¹ EIU, 2010.

13. The review looked at disclosure in the following areas:

- Contracts and related documents – whether signed and currently applicable contracts including changes and variations are in the public domain, and whether this extends to side letters and other agreements entered into in relation to the project by the government. As part of this the extent of redaction of information was noted. We examined both the release of the actual document as well as whether shorter plain-language summaries were available;
- The rationale for the project and its selection as a PPP, for example value-for-money assessments;
- Government support to projects, including guarantees on traffic, revenue, debt, and other government support such as direct payments or financing; in addition information on the transfer of assets (land or land rights etc), and the assignment of risk under the project, including events of default and termination rights;
- Performance of the project, including disclosing key performance indicators, performance assessments and user surveys, contract management reports and reports presented by the project company, and audit reports, and information on financial penalties or rewards related to performance; and
- The extent to which sensitive information was redacted.

14. The methodology adopted consisted of a review of policy and legislation relating to information disclosure in all the selected jurisdictions,² followed by an examination of actual practice. In addition to the review of legislation and policy, standard contract provisions, actual signed contracts, side-deeds, contract and project summaries, performance audit reports and project databases available for the six jurisdictions were examined. Only a sample of the available contracts has been examined, taking care to cover as many sectors as possible. Project contracts are evolving constantly and what is true of one contract may not always be completely true of all other contracts. For example, certain information regarding redaction practices of governments is mentioned in the report as an illustration on the basis of a detailed examination of specific project contracts and may, therefore, not necessarily apply to all contracts. However, in most jurisdictions there is substantial uniformity in the extent of disclosure and the information in this review can be widely applied within the jurisdiction.

15. While we have thoroughly examined frameworks for reactive disclosure in countries and what is applicable to PPP contracts, we have not conducted an empirical measurement of what is actually disclosed in a sample of cases where such requests for information have been made as this was beyond the scope of review.

16. Finally, while we present legislation, policy and practices in disclosure in the jurisdictions examined, and also present the extent of proactive disclosure, we do not try to find a cause-and-effect relationship and do not try to present an analysis on whether certain frameworks result in more disclosure. This study is a review and merely points to frameworks which may have the potential to work well.

² See Annexure 1 and 2 for a list of the main legislation and policy examined and the websites studied for assessing the extent of disclosure.

Reactive and Proactive Disclosure

17. By *reactive disclosure* we mean, here and throughout the text, disclosure by a government department or other public agency in response to a request by a member of the public for a specific piece of information. Procedures for making requests are outlined in the legislation or rules framed under the legislation. Usually, reactive disclosure is at a cost which may be nominal or substantial. Disclosure requires a specific period of time which may be as much as a month or more in many cases, based on the prescriptions within the Act and Rules.
18. We use the expression *proactive disclosure* and *open access* information interchangeably throughout the text. Posting of information in the public domain by government on its own, without a public request, is proactive disclosure of information. Information posted in this manner would be freely accessible to anyone who is interested. This can be done in various ways such as creating a project database with key pieces of contract information, a library of PPP contracts or contract and project summaries etc and publishing it. Publication can be online or through other means.
19. Mandated proactive disclosure is either incorporated into the country's freedom of information legislation or in its information disclosure or PPP contract disclosure policy, and requires the posting of important project and contract information in the public domain by departments and other public agencies within a given time period after award of contract. It also requires updating for additions, modifications, deletions and variations in the information disclosed from time to time. Non-mandated disclosure is discretionary disclosure of information that departments and agencies are not required to publish but are encouraged to publish or would like to publish. What items could constitute non-mandated proactive disclosure could be based on criteria such as the frequency with which requests have been made for the information by the public under the freedom of information legislation, importance of the information in educating the public about PPP contracts, controversial details of projects that are being discussed in the media such as the basis for analyses of bids and other information such as changes in legislation and policy that need to be communicated to investors.

Legislation and Policy

20. Freedom of Information legislation is the basis for disclosure, especially reactive disclosure in most of the jurisdictions examined. In Australia, the states of New South Wales and Victoria have general freedom of information legislation, as well as detailed provisions that specifically treat contract information disclosure separately, including proactive disclosure of summaries of contracts and full contract documents beyond a specific total project value. British Columbia has a general freedom of information legislation and specific guidelines on proactive disclosure of project and contract information in PPPs. South Africa and India have legislation that provides for disclosure of all information other than exempt information, but legislation does not specifically deal with contract information disclosure and does not attempt to go

into the specificities of what information government should disclose proactively. In South Africa, the PPP Manual performs this function with specific guidance on standard contract provisions to be used to ensure an optimal level of information disclosure. In India, while the Act is quite clear and includes 'contracts' in the definition of information, there is no guidance for officials explaining the provisions in Law and how it should apply to PPP contracts. In the United Kingdom, while the presumption is for disclosure of all information other than exempt information, information commissioners have the option to prepare model publication schemes for public entities for disclosure of information. Under the UK FOI Act, information that a private entity or entity not covered under the Act holds on behalf of the public authority, and which can be accessed by the public authority otherwise, can be disclosed by the authority after obtaining such information from the entity. British Columbia has similar provisions in its Act. Under the new transparency policy in the United Kingdom, all new contracts (redacted for commercially sensitive information) are being placed in the public domain beginning January 2011.

21. From a legislative standpoint, Transparency and Access to Information Laws underpin government practices in Peru and Chile, where public institutions are required to publish official documents on their websites, as well as to respond to requests for information submitted by any citizen within specific timeframes and following established procedural guidelines.³ In Brazil, until recently, there was no overarching legislation that specifically addressed the citizen's right to access information. Instead, transparency practices have been instituted within the framework of more than 100 legal provisions at the state, federal and municipal level, which either grant or restrict access to information from specific public institutions.⁴ Such a disjointed legislative situation has enabled substantial freedom in terms of information disclosure practices at the state and federal level. The scenario is likely to change given the new Law on Access to Information effective 2012. As the new Law comes into force, new procedures and guidelines for public disclosure of information are being established, and public bodies are being instituted to enforce the legislative directives, and oversee their correct implementation across federal, state, and municipal levels.

Disclosure of contracts and related information

22. In 9 of the 11 jurisdictions surveyed, online disclosure of PPP contracts in a proactive way is the norm, while in a 10th jurisdiction this practice is spreading. The tendency is to place signed contracts online in a downloadable format. In some jurisdictions there are redactions (see the next two sections) but in others there are none. In many cases associated schedules and side agreements are also disclosed where the government agency concerned is party to them.
23. Many countries also provide information on the procurement process involved and the rationale for the project and the selection of the PPP modality. On the latter, contract/project summaries in Australia

³ For a detailed review of the Law on Public Disclosure of Information in Chile: www.leydetransparencia.gob.cl/ley-de-transparencia/que-es; and in Peru: www.peru.gob.pe/normas/docs/LEY_27806.pdf

⁴ www.marco.artigo19.org

provide information on the results of the PSC evaluation which is a key decision-making tool in the choice of whether to go with the public or PPP option. These same summaries also provide information on the procurement process.

Guidance and Practice on Redactions

24. Victoria, New South Wales, British Columbia and the United Kingdom have detailed guidance on redactions, while others currently rely on clauses in their access to information legislation. The guidance from the United Kingdom on the tests for determining commercial confidence is exhaustive, however, ultimately in all cases the private provider and the authority need to negotiate on what is to be redacted and what can be disclosed. The actual practice on redactions is not fully consistent across countries and discussions with practitioners indicate it has been evolving over time. In some cases for example total costs and payments are disclosed; unit costs and pricing, and indexation and discount rates are not perhaps because the latter are felt to provide more information on the actual cost structure of the private party than the global information.
25. The practice in the covered Latin American countries is one of full disclosure with no redactions. The original contract, and its variations if existing, is disclosed in full, typically as scanned versions of signed documents.

Disclosure of Financial Information, risk allocation and transfers between the government and the private party

26. Almost all countries disclose useful financial information related to the project company such as the shareholding structure with names of shareholders and equity proportions. In some instances, details of debt financing are also stated as in the case of some project summaries from Victoria, although this is not as common. Victoria and New South Wales provide detailed information on the value for money assessment for the project. There are detailed disclosures relating to the methodology used for the calculation of the PSC and its components: risks other than retained risk, costs including design and construction costs, life-cycle asset replacement costs and maintenance and facilities management costs.
27. Disclosures on payments to private providers vary widely -- India in its OMDA for airport projects discloses the exact quantum of upfront fees as well as proportions of revenue payable as annual fees. Victoria does not disclose the payment amounts and reimbursements made to project companies in a number of older contracts examined, while in the newer contracts the contract summaries disclose total payments. British Columbia has practices similar to Victoria. Total costs and payments are disclosed; unit costs and pricing, and indexation and discount rates are not. The United Kingdom displays in its database the actual and potential unitary payments with dates of payments for each project. The information

relating to disclosure or redactions of financial information is scattered in various sub-sections under each section of this review.

28. Chile, Peru, Brazil, Bahia and Minas Gerais publish basic contractual data, such as user-fees and agreed availability payments from government to private operators, but give less relevance to actual flows of funds.

Information on the Performance of PPP Projects

29. While information on performance is important in all projects, traditionally procured as well as PPPs, the former are outside the scope of this review. We only look at the latter. PPPs are long term contractual relationships based on certain agreed expectations of performance making performance monitoring by the public entity all the more important to ensure that contractual conditions are met.
30. While in some jurisdictions like British Columbia and India, regular updates are available on the construction phase of projects, information on performance in the operational phase against target indicators as agreed in the contract is less easily available. Performance audit reports are available as open access information for all countries other than specific Latin American jurisdictions, but these are one time reports and mostly deal with cross cutting issues across projects and sectors rather than project specific issues, although there are some reports on specific projects. Some public entities such as the NHAI in India place substantial information on programs in their annual reports and a part of their information systems is placed in the public domain, but the information is mostly consolidated information and not suitable for assessing individual project performance. South Africa commissioned case studies of their health sector PPPs which they have made available as open access information. Infrastructure Australia has published case studies on a range of infrastructure projects, including PPPs. Minas Gerais and Chile do publish very relevant information of performance.

Validation of Proactive Disclosures

31. There is less consistency on the aspect of validation of proactive disclosures. In one of the jurisdictions examined, namely New South Wales, we come across a legislatively mandated independent system of certification of information through audit and disclosure to parliament before proactive disclosure to the public. In some countries such as South Africa and India, not enough information comes under the category of proactive disclosure for this to be a matter of concern yet. In others, the system of verification is internal to the department that holds or produces the information.
32. Despite the similarities in the information disclosure regimes in the countries examined, especially in terms of legislation, there is substantial variation in the practice and processes relating to proactive disclosure as well as what is considered confidential.

Suggested approaches for PPP project and contract disclosure

33. The evidence above presented includes several good approaches to the disclosure of contract and project information on public-private partnerships (PPPs). A PPP disclosure policy should ensure that:
- a) the public is fully informed about:
 - the range of services included in the contract and the performance levels agreed upon and the performance levels achieved;
 - important aspects of the procurement process; and
 - the use of government grants, guarantees and other financial support including significant risk-bearing
 - b) whilst still protecting the competitive position of the company delivering services under the PPP.
34. Based on these principles the following should be the key elements of proactive disclosure:
- The disclosure of the current PPP contract (identifying any changes made since the contract was originally signed) and relevant side agreements including government guarantees, with minimal redactions which reflect commercially confidential information;
 - The disclosure of future stream of payments and government commitments under PPP contracts;
 - The publication of a summary which provides in plain language the most important elements of the contract and project and key information on the rationalization of the project, selection as a PPP and procurement;
 - Information on a regular basis on the performance of the project; and
 - A process by which information is authenticated/validated.
35. Table 2 below presents what we regard as good practices in terms of the information to be disclosed concerning PPPs. As can be seen from the country summaries, it is possible to find countries which are already implementing each of these areas, and some countries which are implementing disclosure in most areas.
36. There are some priorities that could be followed in sequencing steps to enhance disclosure. A summary will provide a more accessible source of information for stakeholders and allows for the presentation

Disclosure of Project and Contract Information in Public-Private Partnerships

of summary information on performance. However, it does not substitute per se for placing the current version of the contract in the public domain and the priority would be to place the full contract including associated documents in the public domain. Information on performance should also be a priority so that users and the general public understand how the project is performing relative to expectations.

Table 2-Suggested Approaches to the Disclosure of Information on PPP Projects and Contracts

Documents and reports disclosed	
Contract and associated agreements	Current contract and amendments including annexes and schedules with minimal redactions based on strict definitions of commercial confidentiality and national interest. The current version should include renegotiations and significant adjustments to contract parameters.
Summary of contract and project	Concise and plain language document providing relevant summary information on the project.
Reports on implementation	Performance reports from contract management authority. Audit reports from Supreme Audit Authority.
Information on project including rationale and procurement information	
Project description	Project name, location, sector and department. Project value and technical description of the physical infrastructure the project will provide. High level description of the services to be provided and approximate demand.
Rationale for project and for PPP option	The rationale for the project in terms of the balance of costs and benefits. Reason for selection of PPP mode and for rejection of alternate modes considered.
Description of tender process or other selection process	Dates of milestones during the tender process: RFQ, Pre-qualification, RFP, announcement of short-listed bidders, final announcement of winning bidder. Assessment criteria: Brief description of each assessment criterion and its weight. Bid evaluation reports (minus confidential information contained in them), as well as brief information on the constitution of the technical and financial assessment committees. If award was non-competitive, explain why and present the award process.
Contract milestones	Date of signing of contract; date of financial close; date of commencement of construction/development; date of completion of construction/development; date of commissioning; date of contract expiry. Dates of contract renegotiation and significant adjustment to key contract parameters (e.g. level of government support).
Project structure and parties to the contract	Information on the structure of the project and the main parties, structure of project company, main financiers (shareholders and lenders) and sub-contractors.
Information on project performance	
Expected and actual levels of performance	Key performance indicators (KPIs) here with target performance levels expected against each (and timeline for achievement). Actual performance against these KPIs, main areas of failure in performance and associated penalties/abatements.
Tariffs and pricing	User charges, methodology for tariff setting/pricing, scope for its review.
Information on financial transfers and risk allocation	
Payments between government and private partner	Contractually agreed and actual transfers including capital subsidies, operating subsidies, service payments and transfer or share of project revenues between the government and the concessionaire.
Other asset transfers	Land transferred on lease or other basis by government.

Guarantees and other arrangements that affect financing/costs	Detail the guarantees provided, such as minimum revenue guarantees, exchange rate guarantees, debt repayment guarantees and other guarantees including minimum rate of return guarantees. Non-compete clause. Provision for revenue shortfall loans; arrangements for sharing gains of refinancing between public authority and private provider.
Risk allocation matrix	Listing of risks with information on who bears the risk.
Events of default and termination payments	Describe main events of default (concessionaire's events of default, public authorities' events of default) and the contractual provisions for termination payments.

Redactions – recommended practices

37. As noted earlier, disclosure should be undertaken in a manner that takes into account that releasing certain information can harm the competitive positions of the companies bidding for or participating in PPPs, nor divulge other confidential information. At the same time without essential information on pricing, payments, asset transfers, performance and penalties would not be very useful to stakeholders. It is arguably also important to disclose whether or not the contract grants some form of exclusivity or monopoly on services, including conferring on the private party the first right-of-refusal in developing competing facilities. Therefore if contracts were disclosed without the following information they would be of limited use:
- Overall payments made by the government as well as capital grants and other direct financial support;
 - The main risks being assumed by the government under the project (including revenue or traffic guarantees, termination liabilities);
 - The main performance parameters and penalties associated with these; and
 - Changes to the contract since signing.
38. Table 3 below provides some indications on a framework for redactions with details of what legislation, policy and standard provisions should contain in this regard. We also include a snapshot of practices in redactions, based on an examination of a small sample of contracts. These practices are not consistent across all projects or true of each and every project, but are a general average view. Current practice in writing contracts also introduces elements that might be redacted but should not be in contracts in any case. An example includes contracts that refer to input specifications or technologies. A more efficient approach should rely on the concept that PPP contracts are output-based and should not therefore contain much reference to inputs. Arguably these clauses relating to inputs or technology rarely help the public party to the contract.
39. In order to avoid conflict between transparency rules and fair treatment of private partners, a few clear rules on disclosure and redactions should be included in the law or in procurement document, alerting private partners for items that will be mandatorily disclosed or that will not be redacted.

Table 3 - What could be included in legislation, policy and guidance, and standard provisions for effective and minimum redactions of PPP contracts?

Where	What
Provisions in law	The general classes of confidential information combined with the presumption of full disclosure. Commercial confidence as a category important for PPPs is stated in law as one of the exemptions provided.
Policy and guidance to officials	<p>Guidance should be fairly detailed and in the nature of a step by step module in negotiating and finalizing commercial in confidence in PPP contracts as well as understanding how to identify what would really constitute commercial in confidence in a specific case.</p> <p>It is important to understand that guidance would always leave discretion to the negotiating official as commercial in confidence in different types of contracts and for different types of providers would be different.</p> <p>Guidance should include the following:</p> <ul style="list-style-type: none"> • When do officials start to think of commercial in confidence clauses? • Should the public authority ask for the provider’s opinion on what he considers commercially sensitive information clause by clause or element by element at RFP stage? • When should officials begin to negotiate on confidentiality? • What factors are to be considered as a test of commercial sensitivity? Examples: disclosure negatively affecting revenues or earnings, costs, access to finance, the provider’s ability to compete in the market. • How should officials weigh the impact of disclosing or not disclosing information on public interest? • Once the clauses are identified, what format should officials use for reflecting the agreement in the contract? E.g. a separate schedule listing all the confidential clauses or parts of clauses identifying in detail each element
Standard contract provisions	<p>These should provide specific language for confidential information based on the general exemptions provided in relevant legislation, but pointing to specific elements which in the context of the project would be considered confidential.</p> <p>State clearly the information that the private provider is expected to maintain along with timelines for submission: performance reports quarterly or bi-annual on each of the performance indicators, report on revenues, report on aggregate demand etc.</p> <p>The audit mandate should be clearly specified along with the extent of disclosure to audit which should ideally be the complete information, including information classed as sensitive information. The fact that audit reports along with the sensitive information will be fully in the public domain needs to be underscored in the standard provisions.</p> <p>The likely confidential elements could be areas where the competitiveness of the private provider may be jeopardized due to disclosure such as the base case financial model of the private provider which was the basis of the bid and other financial elements such as the pricing methodology or elements of pricing which might compromise the competitive position of the private provider.</p> <p>The standard provisions should, however, allow space for specific confidential aspects of each project and provide a format in which the commercially sensitive contract clauses will be listed in schedules with the details of specific information for redaction along with reasons for considering the information as commercially sensitive and the time for which the information is to be considered as confidential.</p>

Authentication/Validation processes for proactive disclosures

40. PPP contracts are typically made up of the main project deed with schedules and several side deeds and associated agreements. Preparing a summary or database of information from individual contracts requires extracting information for each project from multiple documents, sometimes running into 20-30 different kinds of documents or more. It is essential to ensure that any PPP contract information put out into the public domain by a department or agency whether in the form of a contract summary or

project summary or a database with several fields of information, or complete contract documents, is a faithful reproduction of the original information and contains information identical to that in the contract in terms of substance and statistics.

41. While there can be administrative mechanisms for careful extraction of contract information with skilled persons performing the work, accuracy can be ensured by having a second level which oversees the primary information prepared.
42. Contract information that is proactively disclosed should ideally be subject to a process of validation or authentication, internally or externally, or both. Internal validation or authentication is a process of checking the reproduced information for accuracy through comparisons with the original within the department or agency which is producing or reproducing the information. In the case of PPP project contract disclosures, it could be the PPP Unit or the line ministry or whichever authority possesses the original contract information or contract documents, performance information and analyses relating to the PPP project contract.
43. External validation or authentication consists of an independent agency external to the department or agency producing or reproducing the information cross-checking the accuracy and signing or approving it. The agency responsible could be the supreme audit authority, or the Ministry of Finance where it is not the authority producing or reproducing the information or any other independent agency. There can also be provision for random or routine audit of compliance with disclosure policies.

Section II: Country Summaries

Australia: New South Wales

Institutional Context

PPPs are procured by different levels of government and different agencies in New South Wales. However, New South Wales is subject to the National PPP policy and guidelines like all other Australian state and territory governments, an exception to this being the local government sector PPPs. The NSW Treasury plays a key role in PPP procurement and policy, including disclosure.

Legislation and Policy

The Government Information (Public Access) Act 2009 (the GIPA Act), establishes the policy and processes on access to contract information. The Act is very clear in terms of the type of information that can be made available with regard to different types of contracts. The Freedom of Information (NSW) Act 1989, the precursor of the GIPA 2009 which was later repealed, was amended in 2006 to require publication of government contracts. Section 15A was inserted with detailed information on the classification of contracts and the information that is to be made available to the public. Section 15A directed the disclosure of government contracts starting 2007. The language in the Government Information (Public Access) Act 2009 is similar to that in the FOI Act 1989, but there is further elaboration on several aspects of the processes and procedures for information disclosure. In addition, the NSW government has detailed information disclosure guidance for PPPs.⁵

Under the Government Information (Public Access) Act 2009 (GIPA 2009), all agencies must make open access information publicly available.⁶ The details of what constitutes open access information are described in the Act. Open access information is available free of charge on an agency's website and in any other way. The agency's register of government contracts⁷ which is the principal way in which agencies put out information on contracts, including PPPs, is open access information⁸ and must be published on the government tenders website or other internet website.⁹

⁵ National PPP Guidelines – NSW *Jurisdictional Requirements*, NSW Treasury, March 2009

⁶ Section 6 of *GIPA 2009*

⁷ Division 5, *Government Contracts with Private Sector, GIPA 2009*

⁸ Part 3, *Open Access Information, Division 1, Preliminary, 18 (e), GIPA 2009*

⁹ Section 35, *GIPA 2009*

PPP Database

NSW does not have a comprehensive database of PPP projects, although a list of PPP projects undertaken in NSW is available at www.wwg.nsw.gov.au. A list of projects in the pipeline is also available. In addition, a database of PPP projects already contracted, projects under procurement, and potential projects that can be procured as PPPs is maintained by Infrastructure Australia.¹⁰ For projects that have been contracted, this Infrastructure Australia database gives the name of the project, the name of the procuring government, the total value of the project, saving on PSC (only for some projects), date of issue of RFEOI, date of issue of RFP, date of contractual close, contract term (only for some projects) and the names of the members of the winning consortium.

Disclosure of Contract Documents and Summarized Versions

There are three classes of contracts that are described in the GIPA – Class 1 contracts with which we are not concerned, Class 2 contracts which include all privately financed contracts which would include all PPPs and Class 3 contracts which are Class 2 contracts over \$5 million in value (Australian dollar).¹¹ Most major PPP projects would be Class 3 contracts due to the large values. For Class 2 contracts, information is made available in substantial detail in the contracts register.¹² The contract document is available on request in the case of Class 2 contracts. For Class 3 contracts, the contract document itself is also included in the contract register in addition to the above information listed for Class 2 contracts.¹³

In addition to publishing contract documents in the contracts register on the basis of the provisions in the GIPA, contract summaries of each PPP project contract are separately prepared under the Working with Government Guidelines and disclosed proactively on the NSW treasury website.

Contract Variations

All variations in contracts are disclosed in the contracts register within 60 days of the variations coming into effect.¹⁴ Also, audited amended contract summaries with contract variations are expected to be disclosed following a procedure similar to that for original contract summaries.

Disclosure of Payments, Land Leases and Guarantees

Australian contracts have fewer guarantees than in other jurisdictions, but where these are provided the

¹⁰ See www.infrastructureaustralia.gov.au/public_private

¹¹ Sections 29, 30, 31, *GIPA 2009*

¹² Sections 29 and 30 of the *GIPA 2009*

¹³ Section 31, *GIPA 2009*

¹⁴ Section 33, *GIPA 2009*

guarantee deed discloses details of the arrangement. Contract summaries too contain broad details of the guarantee arrangement. Contract summaries provide information on the property to be leased or transferred under the contract, but do not go into exact details.

The total payments made are disclosed as part of the contract summary.

Performance Assessments and Reports

In 1991, performance audit was included as part of the functions of the NSW Audit office.¹⁵ Full Audit Reports are published on the NSW Audit website, including the performance audit reports relating to PPPs. While the area of performance audit has not evolved sufficiently, the general inference that can be drawn from looking at the audit reports by the NSW audit office¹⁶ is that the audit is either thematic and across projects or of specific issues in specific projects, including PPP projects. Audit reports are tabled in the Parliament and are fully disclosed to the public as open access information.

On routine performance reports of PPP projects, there is not much material available as open access information that can be easily found. The reports which are prepared by the private provider and delivered to government are not open access information. Government may, however, disclose these reports if requested under the GIPA Act 2009 after considering whether there is a public interest consideration against disclosure of the performance reports.¹⁷ However, there are general studies on performance including one performance benchmarking study that looks at relative time and cost performance for PPP projects and traditionally procured projects using a sample of 25 PPP projects and 42 traditional style projects from different states in Australia including New South Wales.¹⁸ In addition, Post Implementation Review (PIR) is generally undertaken for all PPP projects within 12 months after operations have commenced. The Working With Government Guidelines do not require publishing PIR reports and the reports are not part of the open access information under the GIPA 2009. However, under GIPA 2009, agencies are encouraged to proactively release as much information as possible and PIR reports meet the criteria for proactive release. Historically, NSW Treasury has published PIR reports on its Working With Government website (www.treasury.nsw.gov.au/wwg) to meet community expectations of more open and transparent government.

Redactions

GIPA 2009¹⁹ states that commercial-in-confidence provisions of a contract means any provisions that disclose the contractor's financing arrangements or cost structures or profit margins or full base case financial model or intellectual property in which the contractor has an interest or any matter that would place the contractor at a

15 *Public Finance and Audit Act 1983* as amended in 1991.

16 See www.audit.nsw.gov.au/publications

17 Section 14 (Part 2, Division 2), Table 4, Business interests of agencies and other persons.

18 *National PPP Forum – Benchmarking Study Phase II Report on the Performance of PPP Projects in Australia When Compared with a Representative Sample of Traditionally Procured Infrastructure Projects*, December 17, 2008, University of Melbourne.

19 Schedule 4, Interpretive provisions, *GIPA 2009*

substantial disadvantage in relation to other contractors or potential contractors, whether at present or in the future. The commercial-in-confidence clauses of a contract are not included in the contracts register.²⁰ There are other clauses which may not be included such as matters that could affect public safety and security,²¹ and information for which there is an overriding public interest against disclosure. In case the agency excludes any information, it must include in the contracts register information about the types of provisions that have not been included, reasons for not including these provisions, a statement whether the information will be included in the contracts register at a later date and if so, the likely date of such inclusion.²²

Validation of Proactively Disclosed Information

Among the countries reviewed, NSW alone has a system of external validation²³ of information prior to disclosure. The agency owning the project is required to submit each contract summary to the audit authority within 30 days of signing of the contract. Upon receipt of the contract summary, the audit authority carries out audit and tables the audited contract summary in Parliament within 90 days. After the contract summary has been tabled, it is made available as open access information by publishing on the government tender website or other website meant for this purpose and by also informing the public of such publication through Public Notices. Audit ensures accuracy and authenticity of information. A similar process is followed for validation of modified contract summaries consequent to contract variations.

Table 4 - Disclosure of Information on PPP Projects and Contracts – New South Wales

Documents and reports disclosed	
Contract and associated agreements and approaches to redactions	For all privately financed contracts up to Aus \$ 5 million, contract documents are available only on request. For PPP contracts above 5 million, contract documents are available online with confidential information redacted. ²⁴ Side agreements are disclosed. The list of project documents contained in the summary includes a summary of the purpose of each side deed. Contract variations are published in the register of contracts by way of amendments if they are material variations within 60 days. Redacted elements as observed in examined contracts include unit costs and unit payments for services and indexed and non-indexed element of payments.
Summary of contract and project	For PPP contracts an audited summary is published it has been tabled in Parliament. ²⁵ Changes are made to the contract summary which is published following audit and tabling in Parliament with advertisement of availability of amended summary placed in public notices.
Reports on implementation performance	Reports by PPP operators are not disclosed proactively but can be disclosed under the GIPA. Post Implementation Reviews jointly undertaken by NSW Treasury and the Agency initiating the Project within 12 months after commencement of operations are available online on the NSW Treasury website. All performance audit reports are available online ²⁶ . Not every project has been audited.

20 Section 32 (1) (a), *GIPA 2009*

21 Section 32 (1) (c), *GIPA 2009*

22 Section 32 (2), *GIPA 2009*

23 By external validation, we mean a validation process that is external to the agency sponsoring/ implementing/ owning the project.

24 www.treasury.nsw.gov.au

25 http://www.treasury.nsw.gov.au/__data/assets/pdf_file/0015/22605/NSW_PPP_Guidelines_2012_Final_Version_14_August_2012_dnd.pdf

26 www.audit.nsw.gov.au/Publications/Performance-Audit-Reports

Information on project including rationale and procurement information	
Project description	Information is provided in the Infrastructure Australia database and in the summary.
Rationale for project and its procurement as a PPP	The contract summary provides information on the rationale: this discloses the risk adjusted PSC is disclosed in NPV terms as follows: three cases are given, the best case (95% probability that PSC cost would be higher), PSC most likely case (mean of PSC cost estimates) and PSC worst case (95% probability that PSC cost would be lower than this). The cost of private sector delivery by the selected company is disclosed with savings in each of the three cases. The breakup of the PSC is disclosed – raw capital cost estimate, capital risk adjustment, raw operation cost, operational risk adjustment, competitive neutrality adjustment and net benefit from commercial opportunities. The components of the risk adjustment both capital and operating are stated in great detail. The discount rate and systemic risk premium are stated.
Description of tender process or other selection process	Provided in the contract summary and disclosed in the contract.
Contract milestones	Provided in the contract summary and disclosed in the contract.
Project structure and parties to the contract	Details of the composition of the private sector consortium with the details of the holding structure as well as equity proportions of each are disclosed in the project summary and contract document. Methodology for sharing of refinancing gains is disclosed. Details of consent to sale of equity, refinancing etc. are disclosed as contract variations.
Information on project performance	
Expected and actual levels of performance	Required services, features and standards are disclosed. Minimum maintenance and performance standards are stated. Benchmarking and market testing provisions are disclosed. The procedure for benchmarking is disclosed but the results of these are not disclosed. KPIs are set out in detail. Abatements for failure to perform redacted.
Tariffs and Pricing	Details of user fees are given, indexing or permitted rates of increase are disclosed.
Information on financial transfers and risk allocation	
Payments between government and private partner	The contract summary describes the payments to be made to the private party, periodicity, description of the linkage of performance to payments, adjustments for inflation and wage price movements, volume and usage adjustments. Formula for periodic payments disclosed along with abatements for failure to perform. Actual amounts of fees to be paid are stated. In some updated contract summaries, the actual payments made or received by the authority are stated, efficiency reduction amounts, if any, are stated. Payments to be made by project company to the state, for example for procuring license etc. are disclosed in terms of actual amounts. However, break-up of costs and payments in the contract document are not disclosed. For example, in the new schools 2 projects, the unit costs and services payment per demountable classroom unit is not disclosed; installation cost per unit is not disclosed. The indexable and non-indexable elements of the quarterly service payments, for example, are not disclosed. Details of where inflation adjustment and wage rate adjustment apply are given. Details of revenue share if any are stated. Other elements that constitute the payment are disclosed but the amounts of each are not disclosed.
Other asset transfers	The assets to be transferred by the public sector to the contractor, price to be paid by the public and basis for future changes in price are proactively disclosed. Also the basis on which price is set are disclosed as part of project summary. Exact details of land leases/transfers redacted.
Guarantees and other arrangements that affect financing/costs	Statement of actual liabilities of Crown, statement of indemnities and/or guarantees, and significant guarantees or undertakings between parties including loans entered into or agreed to be entered into are proactively disclosed.
Risk allocation matrix	Details of the risk allocation arrangement against each category of risk under construction and operation are stated in the summary and the contract.
Events of default and termination payments	Details of what constitutes an event of default, procedure to be followed on notice of event of default is disclosed, enumeration of termination rights for either party's default, details of methodology for determining the market value of deed for calculating termination payment are disclosed, including details of step in rights. Details of the components of termination payments for each type of default are also disclosed.

Australia: Victoria

Institutional Context

In Australia, the federal government's presence in PPPs is less significant as the delivery of major infrastructure projects in the health, justice, education, water, transport and other sectors is controlled by states. Victoria is one of the states in the forefront in terms of PPPs in Australia. Government departments and agencies play a direct role in PPP procurement, while Partnerships Victoria which is a part of the Commercial Division in the Department of Treasury and Finance, is directly involved in all the projects in terms of providing advice. The Department of Treasury and Finance provides the Government with economic, financial and resource management policy advice, while its Partnerships Victoria unit develops policy and guidelines on public-private partnership and provides advice to departments and agencies in the procurement and management of PPP projects.

Legislation and Policy

The Victorian Government's policy on disclosure of contract information is guided by the Freedom of Information Act 1982 as amended from time to time, National PPP Guidelines, Volume 6, Jurisdictional Requirements, Partnerships Victoria Requirements, January 2010, Version 2 and the policy statement on Ensuring Openness and Probity in Victorian Government Contracts, October 2000. These documents set the tone for the extent of disclosure of information by the government regarding contracts in general; including PPPs. Based on the requirements of the FOI Act as well as the Policy on disclosure of contracts,²⁷ the Victorian Government Purchasing Board has published the policy on disclosure of contracts larger than \$100,000 in its Procurement Policies Master Manual.²⁸

The idea is to proactively disclose as much information as possible to the public free of cost without the need to use the FOI Act and to categorize any information as confidential only after in-depth deliberation.

²⁷ *Ensuring Openness and Probity in Victorian Government Contracts*, October 2000.

²⁸ *Procurement Policies Master Manual*, available at <http://www.vgpb.vic.gov.au>

Government contracts including PPP contracts were initially not routinely proactively disclosed by the Victorian government. An audit review was undertaken in 2000 in response to criticism regarding the lack of transparency on the part of government. The audit review recommended more openness and transparency and also recommended that contract documents of around 70 major projects signed between 1992 and 1999 be released. Since there were clauses in the contracts which made disclosure difficult, the government negotiated the release of these contracts with the private parties concerned. This was probably a milestone in contract information disclosure for the Victorian government, making it one of the most pro-active states on this issue.

The policy and rules emphasize that at the time of tender, the private party should be made aware of the disclosure requirements.²⁹ These requirements are also set out in the Standard Commercial Principles contained in the National PPP Guidelines (published on the Infrastructure Australia website).

Documents that are not exempt documents under the Freedom of Information Act 1982 or are not already disclosed by the government on its website or in an otherwise accessible manner can be accessed by making an application under the Freedom of Information Act.³⁰

PPP Database

Victoria does not have a downloadable database of PPP projects. The relatively small number of projects (in November 2011 there were 21 Partnerships Victoria projects in existence) and the ready availability of contracts and project summaries can be considered a factor that limits the need for such a database. The reasons for failure to make available a database, cited by knowledgeable persons, is that there is always a shortage of staff as well as budget needed for IT related expenses and hence development of such a database is not yet justified given the small number of projects and the ready availability of information. However, there is a database of PPP projects already contracted, projects under procurement and potential projects that can be procured as PPPs maintained by Infrastructure Australia.³¹ For projects that have been contracted, the IA database gives the name of the project, the name of the procuring government, the total value of the project, saving on PSC (only for some projects), date of issue of RFEOI, date of issue of RFP, date of contractual close, contract term (only for some projects) and the names of the members of the winning consortium.

Disclosure of Contract Documents or Summarized Versions

Once a contract is signed, it must be published on the contracts website of the government (The Central Registry of Contracts) within 3 months of financial close. All contracts above \$10 million must be published.³²

²⁹ Paragraph 2, Standard Tender and Contract Terms on Disclosure, Disclosure of Contracts > \$100,000 Policy, December 2002, Victoria Government Purchasing Board.

³⁰ Section 13, Victorian Freedom of Information Act, 1983

³¹ www.infrastructureaustralia.gov.au/public_private

³² Paragraph 19, Disclosure Policy and Project Summary Requirements, National PPP Guidelines, Volume 6, Jurisdictional Requirements, Partnerships Victoria Requirements. January 2010 (Version 2)

A summary containing headline details of the project is also required to be published within three months of financial close.³³ However, this is different from the additional requirement to complete a more comprehensive project summary that is applied to PPP projects only. While a template is provided³⁴, the Victorian Government acknowledges that this is an evolving exercise.³⁵

In Victoria, there is some amount of inconsistency in the disclosure of associated project agreements, for example, side letters, related agreements with other stakeholders, along with the main contract document as open access information for contracts for the period 1992-99 due to contractual limitations that existed in releasing contracts retrospectively. Since then, the presumption has been towards disclosure of all information other than commercial in confidence and there is consistency in the disclosure of the main contract as well as its schedules and annexures and any other documents under which the government has some payment obligations, including side letters, agreements with other stakeholders etc.

Contract Variations

While there are timelines for disclosure of original contract information, Victoria does not provide timelines for disclosure of contract variations, unlike provisions in New South Wales where contract variations are treated in a manner similar to original contracts in terms of disclosure. There is no current policy that details processes and guidelines for publishing changes to contracts. However as a matter of general practice, significant variations are published along with the original contract.

Payments, Land Leases, Guarantees

Project summaries do not appear to give details of guarantees, exact nature and value of assets transferred and the amount and installments of payments to be made. However, details of when payments commence and the periodicity of payments is disclosed. The project summary is probably sufficiently comprehensive from the point of view of someone not interested in minute contract details. The requirement to disclose the complete contract document compensates somewhat for the lack of comprehensive information in the project summary.

Information on leases, collection of charges, payments, government facilities/ assets made available to the private provider are stated in the project summary; the quantum of payments (in net present cost terms) is set out in the value for money section of the project summary.

33 All project summaries are available at the Partnerships Victoria website: www.partnerships.vic.gov.au/CA25708500035EB6/0/A8FBE27F965DFEE5CA257626001B/COCF?OpenDocument

34 Annexure 8, National PPP Guidelines, Volume 6, Jurisdictional Requirements, *Partnerships Victoria Requirements*, January 2010 (Version 2)

35 "In determining the appropriate content of the project summaries, each *Partnerships Victoria* project has its own specific and unique circumstances to take into account. The content of the summaries will also evolve as new areas of public interest emerge", Paragraph 19, Disclosure Policy and Project Summary Requirements, National PPP Guidelines, Volume 6, Jurisdictional Requirements, *Partnerships Victoria Requirements*. January 2010 (Version 2)

Performance Reports and Assessments

On routine performance reports of PPP projects, there is not much material available that can be easily found other than performance audit reports which are published. There are general studies on performance including one performance benchmarking study that looks at relative time and cost performance for PPP projects and traditionally procured projects using a sample of 25 PPP projects and 42 traditional style projects from different states in Australia including Victoria.³⁶ However, this discloses only consolidated performance relative to public projects using a specific sample across states and, therefore, is not useful in terms of looking at specific projects or levels of performance.

Many of the Victorian PPPs, like the hospital PPPs do not provide services directly to the public as the contractor is in charge of maintenance of building and equipment while clinical services are provided by the public sector operator. So, the information on the private sector operator may typically not be disclosed as it may not be necessary or interesting to the public. Victoria's outsourced public transport franchises which are not PPPs, on the other hand, provide direct services and publish monthly performance reports on specific indicators.

While data on PPPs can be accessed through the FOI Act, this has not been a prominent issue in the discussion on disclosure. Reports presented to government by PPP operators are not routinely disclosed. These are typically detailed periodic reports. Summaries of these reports would be more useful for the public rather than raw reports placed in the public domain. However, these can be accessed under the FOI Act.

Performance audit reports as mentioned above are available at www.audit.vic.gov.au, with links provided also by Partnerships Victoria website, www.partnerships.vic.gov.au, in its section on "Project Information". One recent example of an audit review of prison PPP projects is accessible at www.audit.vic.gov.au/reports_and_publications/latest_reports/2010-11/20101509_prisons.aspx. Internal audit reports are not placed in the public domain as open access information but would be provided on request under the FOI Act.

Redactions

Section 47(1) of the Victorian FOI Act 1982 has among exemptions relevant to PPPs "trade secrets, any other information having a commercial value that would be, or could be reasonably expected to be, destroyed or diminished if the information were disclosed." Victorian policy states that "only trade secrets or genuinely confidential information" will be redacted.

³⁶ National PPP Forum – Benchmarking Study Phase II Report on the Performance of PPP Projects in Australia When Compared with a Representative Sample of Traditionally Procured Infrastructure Projects, December 17, 2008, University of Melbourne.

Validation of Proactively Disclosed Information

The project summary for a PPP project is approved by the Treasurer and the Portfolio Minister concerned before publication.³⁷ This is similar to the system of external validation found in NSW, but the Victorian system involving the line ministry as well as the Ministry of Finance/Treasury brings in an element of external validation.

Table 5 - Disclosure of Information on PPP Projects and Contracts – Victoria

Documents and reports disclosed	
Contract and associated agreements	<p>70 major contracts since 1992 recommended by the report of the Audit Review have been published on the government contracts website³⁸.with limited exceptions³⁹. The Central Register of Contracts gives users access to any new contracts over \$ 10 million in value. For some of the older agreements, side deeds are not disclosed, however for the newer agreements, the side deeds where the public authority/state is a party are disclosed, e.g. independent reviewer agreement, securitization agreement, construction license, maintenance license etc.</p> <p>There is no policy on publishing changes in contracts, but as a matter of general practice, significant variations are published along with the original contract.</p> <p>Victorian policy states that “only trade secrets or genuinely confidential information” will be redacted.</p>
Summary of contract and project	<p>Project summaries approved by Treasurer and responsible Portfolio Minister are published for all projects contracted since 2007. All project summaries are available at the Partnerships Victoria website⁴⁰. Published project summary is updated if there are significant variations.</p>
Reports on implementation performance	<p>Reports by PPP Operators are not disclosed proactively but can be requested under the FOI Act.</p> <p>Reports on individual projects produced by Contract Managers are not disclosed proactively, but can be requested under the FOI Act. Project’s Annual financial payments are available in the Department’s Annual Reports which are published.</p> <p>With respect to third party assessments and user surveys, practice is inconsistent. Typically not required to disclose. Sometimes available online. Otherwise, can be requested under the FOI Act.</p> <p>All performance audit reports are available at www.audit.vic.au/. Internal audit reports are available on request under the FOI Act.</p>
Information on project including rationale and procurement information	
Project description	<p>Information is provided in the Infrastructure Australia database (see above). Also reported in the project summary.</p>
Rationale for project and its procurement as a PPP	<p>The project summary describes the methodology used for calculation of the PSC and its components. The PSC is expressed in PV terms and the capital costs, lifecycle asset replacement costs, transferred risks and competitive neutrality values are shown separately. Quantifiable VfM benefits are shown based on the cost of the winning bid. Other VfM benefits of the selected proposal are detailed where present. Discount rates used for obtaining the net present cost of the winning bid are mentioned along with the date for which the PV applies.</p> <p>Base-case financial model withheld.</p>

37 Paragraph 19, Disclosure Policy and Project Summary Requirements, National PPP Guidelines, Volume 6, Jurisdictional Requirements, *Partnerships Victoria Requirements*, January 2010 (Version 2)

38 www.contracts.vic.gov.au or www.partnerships.vic.gov.au

39 *Victoria Freedom of Information Act*, 1982 provides for withholding commercial in confidence information or other information disclosure of which may be contrary to the interests of the state.

40 <http://www.partnerships.vic.gov.au/CA25708500035EB6/0/A8FBE27F965DFEE5CA257626001BC0CF?OpenDocument>

Description of tender process or other selection process	Project summary provides information on main milestones, selection criteria, winning bidder.
Contract milestones	Information is available in the project summary on main project and contract milestones Revisions to contracts would indicate dates of revision.
Project structure and parties to the contract	Provided in the project summary with information on main parties to the project including government authority. The summary includes the names of all debt and equity investors with their relative contributions. Debt gearing is disclosed. Loan terms are also specified in some cases. Debt Finance deed discloses the details of security over project assets.
Information on project performance	
Expected and actual levels of performance	KPIs, quality failures, other failure events, periodicity of reporting required are disclosed. However thresholds are typically blacked out. Details of dollar abatements for failure to perform not disclosed. Actual performance not proactively disclosed.
Tariffs and Pricing	Toll rates are disclosed with the indexation methodology in road contracts examined, however, in a rail services agreement examined, agreed sector fares have been deleted, reimbursement of fares information is withheld and revenue survey details which form the basis of the fares / reimbursements have been withheld.
Information on financial transfers and risk allocation	
Payments between government and private partner	Details of when payments begin, the periodicity of payments and the relationship to milestones are stated in the project summary as well as the contract document. Details are given of the conditions under which payments may vary and how. E.g. reduction in payments for unavailability, performance breaches etc. For actual service payment components and amounts withheld. Payment amounts and reimbursements made to the project company are withheld, for example in the peninsula link project agreement schedules, all base quarterly service payment components and amounts are blacked out, although the methodology for calculating each component is given. In the payment schedule, all numbers and amounts are deleted, and also the multipliers used in the calculation of payments where these are numbers are blacked out. Project's Annual financial payments are available in the Department's Annual Reports which is published.
Other asset transfers	The project summary gives information about leases, government facilities/assets made available to the private provider. These are also included in the published contract document. Land lease plans with exact details of land withheld.
Guarantees and other arrangements that affect financing/costs	Included in project summary. Details of state's share of future refinancing gains/losses disclosed. Details of sharing of risks of increased interest rates are disclosed along with the circumstances under which state's liquidity support is to be provided. Revenue sharing arrangements also disclosed.
Risk allocation matrix	High level outline of risk allocation is given in the project summary. These are given under the following risk categories which are further sub-divided into individual risks such as site risks, design and construction risks, operating risks, planning risks, change in law/policy/taxes risk, force majeure risk, industrial relations risk, cost risk, time risk, technical obsolescence risk, insurance risk, finance risk, utilities risk, damage to property during project term risk. The categorizations are slightly different based on the type of project and kinds of risks involved. However, details of quantification of each of these risks are not disclosed. Also full text of contract is available with risk allocation clauses. Risk registers are not disclosed as open access information.
Events of default and termination payments	Events of default, the triggers and termination payments are specified in the contract summary. Termination scenarios with details of the method of calculation of termination payments for each scenario are disclosed along with triggers for each. These can also be accessed from published contract document.

Brazil: Government of the Union

As described below, the provisions for PPP contract disclosure differentiate between the so-called “concessions” (PPPs with no payments from government to the private operator) and “PPPs” *sensu stricto* (the ones with payments from government to the private partner).

Institutional Context

Even before the approval of Brazil’s Law on Access to Information, in 2011, the practice regarding PPP projects in Brazil was one of significant openness and disclosure, with full proactive disclosure PPP contracts and their variations, as well as of other relevant project information. This was a consequence of procurement regulations that required full disclosure of Requests for Proposal and other tender documents, combined with the adoption of simplified draft contracts — as in Spain and Peru, PPP contracts are usually the simple bundling of the draft contract (included in the Request for Proposal) and the financial proposal presented by the winner of the tender. Draft contracts and financial proposals are typically disclosed in the websites of the relevant ministries and agencies, along with any contract changes and fee adjustments.

Brazil has a long history of concessions signed by the federal government and the several state governments, as well as large municipalities. At the federal level, responsibility for procurement is decentralized, albeit all “government-pays” PPP projects are subject to scrutiny and supervision by a central PPP Unit at the Ministry of Planning, Budget and Management (*Ministério de Planejamento, Orçamento e Gestão*). Disclosure of contracts and project details is a responsibility of the ministries and agencies that procure and sign PPP contracts. In its website, the PPP Unit lists all projects (signed or in procurement, including state projects). State governments use different approaches to PPP procurement, centralizing PPP procurement or not, disclosing all projects or only some classes of projects).

The federal government is responsible for interstate roads, interstate railroads, airports and seaports, while state and municipal governments are responsible for water distribution, sewage, urban and state roads, health and education. The Ministry of Transport has the largest volume of PPP projects (mainly road and railway concessions) and discloses information through its agencies, namely ANTT (*Agência Nacional de Transportes Terrestres*) for land transport and ANTAQ (*Agência Nacional de Transportes Aquaviários*) for port and fluvial/sea transport.

On the transparency front, the Brazilian government is co-heading, with the US, the Open Government Partnership, and so perceiving itself as an international sponsor of transparency and good-governance, namely in public procurement. Internally, this transparency program translates into legislative and practical initiatives for fostering the transparency agenda, at federal and sub-national levels.

Legislation and Policy

A Right to Information Law was approved in 2011 and became effective in 2012, prescribing proactive disclosure of information on contracts and projects — the law does not mandate full proactive disclosure of contracts, but most ministries, departments and agencies, at all levels of government, are actually disclosing large-value contracts such as PPP contracts.

Being a civil law country with a traditional formal concession law (Lei de Concessões de Serviços Públicos 8987, enacted 1995), Brazilian legislators felt the need to create a specific framework for “government-pays” PPP, so a Private-Public Partnership Law (Law 11079 enacted on 30 December, 2004⁴¹) was approved. Currently, PPP contracts with no payments from government to the private partners are known as “concessions”, while the other are known as “PPP” (despite being themselves formally also concessions: administrative or sponsored concessions, i.e. *concessões administrativas* or *concessões patrocinadas*).

Brazil’s 1988 Constitution (Article 5, paragraph XXXIII) guarantees the right of all citizens to access and obtain information from public bodies, with the exception of information that is deemed confidential, the disclosure of which would constitute a threat to Society and the State.⁴² Notwithstanding this basic responsibility of the State and the Public Administration to inform its citizens, prior to 2012 no framework existed for identifying what documents should be made available to the public and what procedures should be followed in order to provide information both proactively and upon request by the public.

The recent Law on Access to Information (Law 12527 enacted on 18 November, 2011⁴³) establishes that all public institutions, as well as public corporations and entities controlled directly or indirectly by the State, are subject to its directives. Article 5 specifies the obligation of the State to safeguard citizens’ right to access information, guaranteed through objective and efficient procedures implemented in a transparent manner, and using language that is clear and easy to understand. Moreover, directives under Article 8 detail the kind of information that must be proactively disclosed by public entities (through open-access websites), and includes: registers of transfer of financial assets; expenses registers; information pertaining to bidding processes, including signed contracts; and general data for the monitoring of programs, initiatives, projects and public works.⁴⁴ This Law also establishes procedural guidelines with the objective of making information more readily available to the public, as well as creating the mechanisms for public institutions

41 http://www.planalto.gov.br/ccivil_03/_Ato2004-2006/2004/Lei/L11079.htm, or, for an English version, http://www.planejamento.gov.br/hotsites/ppp/conteudo/legislacao/arquivos_down/041230_Lei_11079_eng.pdf

42 http://www.planalto.gov.br/ccivil_03/constituicao/constitui%C3%A7ao.htm

43 http://www.planalto.gov.br/ccivil_03/_Ato2004-2006/2004/Lei/L11079.htm

44 <http://www.senado.gov.br/atividade/materia/getPDF.asp?t=98636&tp=1>

Disclosure of Project and Contract Information in Public-Private Partnerships

to be increasingly responsive to requests for information by the public. A Citizen Information Office (*Serviço de Informações ao Cidadão*) was created in order to mediate between the public and different government entities. Upon request by any citizen, public institutions are responsible for providing immediate access to available information (for more information, see <http://www.acessoainformacao.gov.br>).

For “PPPs” *sensu stricto*, Law 11079 establishes a framework for bidding processes and PPP contracts, including a series of directives to be adhered to, including “transparency in procedures and decisions”. The PPP Unit in the Ministry of Planning, Budget and Management is responsible for the maintenance of a federal PPP website, and ensuring that federal government reports on PPPs, as well as other official documents which fall under the domain of public interest, excluding confidential information, are made available to the public.⁴⁵

All disclosed documents are published in full, with no redactions. Contracts are typically the bundling of the draft contract (previously published during tender phase) and the economic proposal of the award winner (usually one or two pages containing simply the required subsidies or user-fees).

The federal PPP Unit discloses information on all *sensu stricto* “PPP” projects implemented in the country, at the federal as well as the state level, in the form of a table containing basic project characteristics and investment figures. These contain details such as figures on estimated investment, subsidies and user charges, but comprehensive information on state level projects is disclosed only at the state level. Some government agencies (e.g. ANTT, www.antt.gov.br, for road and railway concessions) list their projects in a user-friendly way and then link to extensive information, including the contract and its variations.

Table 6 - Disclosure of Information on PPP Projects and Contracts – Brazil, Government of the Union

Documents and reports disclosed	
Contract and associated agreements	Disclosure of information is a responsibility of the entity that signs the contract on behalf of public authorities — a government department, or a government agency. Proactive disclosure should be delivered through its website. Departments and agencies do proactively disclose information on contracts, typically including the contract and its variations. For instance, regarding port contracts, www.antaq.gov.br lists all projects and links each one to the actual contract (facsimile with letters); ⁴⁶ regarding road and railway concessions, www.antt.gov.br (choose “Infraestrutura”, then “Rodoviário” or “Ferroviário”, then “Concessões”) lists all projects and, for each one, discloses the contract and its variations, plus sub-contracts. Changes to contracts are made available through the agencies or ministries’ websites. Proactive disclosure of contract variations is mandated but there are no timelines for website disclosure; variations are also published in the Official Bulletin in order to be effective. Disclosed contracts are not redacted.
Summary of contract and project	Departments and agencies do proactively disclose information on PPP contracts, typically including description of the project and information on user-fees. For instance, regarding port contracts, www.antaq.gov.br lists all projects and links each one to the actual contract (facsimile with letters); ⁴⁷ regarding road and railway concessions, www.antt.gov.br presents general information, a map, the contract, and annual user-fee tables.

⁴⁵ See: www.planejamento.gov.br/hotsites/ppp/index.htm

⁴⁶ Choose “Portos”, then “TUP Terminais de uso privativo”, then “Contratos de Adesão” or “CA anteriores a 2010”)

⁴⁷ Choose “Portos”, then “TUP Terminais de uso privativo”, then “Contratos de Adesão” or “CA anteriores a 2010”)

Reports on implementation performance	Brazilian PPP contracts include provisions for the production of performance reports (by contract managers or by independent monitors), but the institutional websites do not disclose performance reports. Agencies responsible for sectoral regulation, such as ANTT regarding roads and railways, publish annual reports with some performance data. For example, regarding road and railway concessions, www.antt.gov.br discloses independently audited concessionaire financial reports, and a few performance reports. Audit reports produced by the Federal Court of Auditors (<i>Tribunal de Contas da União – TCU</i>) are also made available to the public through its website.
Information on project including rationale and procurement information	
Project description	Departments and agencies present brief descriptions of their PPP projects. Contract disclosure provides more detailed information.
Rationale for project and its procurement as a PPP	Not provided.
Description of tender process or other selection process	Award is always through competitive tender. Request for proposals and other tender documents are proactively disclosed, including selection criteria. No description of the procurement process is provided.
Contract milestones	Project descriptions include some contract milestone, but not in a standard way.
Project structure and parties to the contract	Disclosed with basic project information.
Information on project performance	
Expected and actual levels of performance	Expected levels disclosed in the contract, actual levels disclosed in performance reports.
Tariffs and Pricing	User fees disclosed by contracting departments and agencies.
Information on financial transfers and risk allocation	
Payments between government and private partner	For <i>stricto sensu</i> PPPs (the ones receiving transfers from government), the database maintained by the federal PPP Unit provides information on the subsidies granted to various projects. However, actual payments and asset transfers are not proactively disclosed.
Other asset transfers	All land allocated to the project is registered as public property, following the usual procedures.
Guarantees and other arrangements that affect financing/costs	All guarantees are disclosed ex-ante at the beginning of the tender: they are part of the draft contract published with the Request for Proposal, ultimately converted into the actual contract. When guarantees are later translated into a formal letter e.g. a letter to the financiers, that letter becomes an appendix to the contract and is published as an integral part of the contract.
Risk allocation matrix	Disclosed in the contract.
Events of default and termination payments	Disclosed in the contract.

Brazil: State Government of Bahia

In the same way as at federal level and other states, Bahia recognizes different procurement and contracting rules for “concessions” and for *stricto sensu* “PPPs”.

Institutional Context

Besides the traditional “concessions”, the State of Bahia initiated in 2004 a *stricto sensu* “PPP” program (*Programa de Parcerias Público-Privadas do Estado da Bahia – PPP Bahia*).⁴⁸ A PPP Unit, reporting to the State Treasury Secretary, coordinates different public entities on “PPP” projects, supports the appraisal of infrastructure projects, and disseminates PPP knowledge.

Legislation and Policy

A series of legislative directives and decrees have contributed to the foundation of the PPP Bahia Program, including its constituent bodies. The most relevant of these is Law 9290 of December 27, 2004, which created the PPP Program of the State of Bahia. Similar to the law that instituted “PPP” at the federal level in Brazil (Law 11079 of 2004); the state legislation aimed at promoting and attracting private investment to projects of public interest. The Decree 12653 of February 28, 2011 regulates the presentation of private PPP proposals addressing government requests (*Procedimento de Manifestação de Interesse - PMI*). Regarding disclosure of information, Article 4 of Law 9290 includes a directive securing “transparency and publicity in procedures and decisions”, while Article 10 specifically states that “tender documentation and PPP contracts will be submitted for public consultation”. Also in accordance to Law 9290, essential and standard contract clauses are identified, including: performance requirements, chronogram of project implementation, project financing, sanctions, event of default and termination rights, and management of contracts, amongst others.

48 http://www.sefaz.ba.gov.br/administracao/ppp/lei_mensagem.htm

Bahia PPP Law mandates that tender documents and contracts (related to *sensu stricto* “PPPs”) are to be disclosed to the public. PPP contracts are typically the bundling of the draft contract (previously published during tender phase, as the Bahia PPP Law mandates) and the economic proposal of the award winner (usually one or two pages containing simply the required subsidies or user-fees); but there are exceptions, for instance the PPP contract for Hospital do Subúrbio, which includes the financial data embedded in the final text of the contract, as disclosed. In all cases, disclosed contracts are supposed to follow literally the draft contracts included in the Request for Proposals and so already in the public domain before contract award.

In its website (www.sefaz.ba.gov.br/administracao/ppp), the PPP Unit maintains a list of all *sensu stricto* “PPPs”, linking to a wide range of contract and project information. The several departments with “concession” contracts provide some information on their projects.

Table 7 - Disclosure of Information on PPP Projects and Contracts –Bahia

Documents and reports disclosed	
Contract and associated agreements	For each “PPP” project, the PPP Unit website discloses proactively the full contract and its variations, as well as all legislation related to it. For “concessions”, the contract is typically not proactively disclosed. For <i>sensu stricto</i> PPP contract, as stipulated in Bahia PPP Law, all contract variations (<i>Termo Aditivo</i>) are disclosed on the PPP Unit website as stated above. For other contracts, the proactive disclosure of contract and its variations is not explicitly mandatory. Disclosed contracts are not redacted.
Summary of contract and project	For each “PPP” project, the PPP Unit website presents (under “detalhe”, i.e. “details”) a short presentation of the contract (including its expected cost for government), and a file with project description. Information on “concessions” is not provided by the PPP Unit, but instead by the several departments responsible for the projects. For instance, the agency in charge of energy, transport and communications, Agerba, provides in its website, www.agerba.ba.gov.br , information on its PPP contracts. Other departments and agencies provide additional bits of information. For example, for the BA-093 Road information disclosure is provided through the institutional websites of State Secretariat for Planning (<i>Secretaria de Planejamento – SEPLAN</i>), the State Secretariat for Infrastructure (<i>Secretaria de Infraestrutura – SEINFRA</i>), the Department of Transport Infrastructure (<i>Departamento de Infraestrutura de Transportes da Bahia – DERBA</i>), and the State Court of Auditors (<i>Tribunal de Contas do Estado</i>).
Reports on implementation performance	Performance reports are produced by independent auditors, but not disclosed. However, some reports are available, for instance a preliminary 2010 audit report on the Fonte Nova Stadium project, prepared by the Secretariat of Work, Labor, Income, and Sports (<i>Secretaria do Trabalho, Emprego, Renda e Esporte – SETRE</i>), is available through the Court of Auditors of the State of Bahia. ⁴⁹ Audit reports are made available through the Court of Auditors of the State of Bahia. For example, the External Audit Report (December 2010) on the bidding process for the BA-093 road is available at http://www.tce.ba.gov.br/files/RELATORIO_1677_2011.pdf . No PPP performance reports are made available proactively.

49 See <http://portal2.tcu.gov.br/portal/pls/portal/docs/2031288.pdf>

Disclosure of Project and Contract Information in Public-Private Partnerships

Information on project including rationale and procurement information	
Project description	For each “PPP” project, the PPP Unit website presents (under “detalhe”, i.e. “details”) a short presentation of the contract (including its expected cost for government), a file with project description, preliminary and feasibility studies on the project, the full contract and its variations, information on the tender, as well as all legislation related to it. Additional information, not project-specific, on guarantees provided by government is disclosed in the same website, in the section on “Garantia Pública”. Information on “concessions” is not provided by the PPP Unit, but instead by the several departments responsible for the projects, and does not always include contract disclosure. For instance, the agency in charge of energy, transport and communications, Agerba, provides in its website, www.agerba.ba.gov.br , information on its PPP contracts: maps, some project milestones, user-fee tables, but does not disclose the contract. Other departments and agencies provide additional bits of information. For example, for the BA-093 Road information disclosure is provided through the institutional websites of State Secretariat for Planning (<i>Secretaria de Planejamento – SEPLAN</i>), the State Secretariat for Infrastructure (<i>Secretaria de Infraestrutura – SEINFRA</i>), the Department of Transport Infrastructure (<i>Departamento de Infraestrutura de Transportes da Bahia – DERBA</i>), and the State Court of Auditors (<i>Tribunal de Contas do Estado</i>).
Rationale for project and its procurement as a PPP	For each “PPP” project, the PPP Unit website presents preliminary and feasibility studies on the project, typically addressing the rationale for the project.
Description of tender process or other selection process	Award is always through competitive tender. Request for proposals and other tender documents are proactively disclosed, including selection criteria. No description of the procurement process is provided.
Contract milestones	Some milestones disclosed in no systematic way in project presentations.
Project structure and parties to the contract	Disclosed in the project summary.
Information on project performance	
Expected and actual levels of performance	Expected levels disclosed in the contract, actual levels disclosed in performance reports.
Tariffs and Pricing	For each “PPP” project, the PPP Unit website presents the expected cost for government; for “concessions”, the responsible departments disclosure user-fee tables, but does not disclose the contract. Other departments and agencies provide additional bits of information.
Information on financial transfers and risk allocation	
Payments between government and private partner	Expected payments disclosed by the PPP Unit for each project. Actual payments not disclosed by the PPP Unit, but available through public budget documents.
Other asset transfers	All land allocated to the project is registered as public property, following the usual procedures.
Guarantees and other arrangements that affect financing/costs	For “PPP” contracts, clauses regulating guarantees are made available as part of contract disclosure. Additional information, not project-specific, on guarantees provided by government is disclosed in the PPP website, in the section on “Garantia Pública”. The legislation on “concessions” does not allow government to provide guarantees related to the contracts.
Risk allocation matrix	Not disclosed.
Events of default and termination payments	No specific information provided, besides contractual provisions (disclosed in the contract documents).

Brazil: State Government of Minas Gerais

In the same way as at federal level and other states, Minas Gerais recognizes different procurement and contracting rules for “concessions” and for *stricto sensu* “PPPs”.

Institutional Context

As the federal government and other states, Minas Gerais recognizes different procurement and contracting rules for “concessions” and for *stricto sensu* “PPPs”. Traditional “concessions” were already common in the state. Being a pioneer in the development and implementation of *stricto sensu* “PPPs” in Brazil, Minas Gerais designed its institutional framework even before the federal government did so for the whole country. Established in 2003, the PPP Unit of the State of Minas Gerais (established under the State Secretariat for the Economic Development of Minas Gerais, or *Secretaria do Estado de Desenvolvimento Econômico de Minas Gerais*, SEDE) is responsible for coordinating and implementing the PPP Policy in the State, particularly in what refers to “PPP” projects. Besides the direct technical support to departments and agencies, the PPP Unit also provides direct support to procuring authorities during one or several phases of the project cycle, depending on the maturity of the procuring organization. The PPP Unit has also established a PPP Expertise Centre (*Centro de Referência de Conhecimento*), exchanging knowledge with similar PPP units at the national and international level, in addition to managing PPP contracts in the State.⁵⁰

Minas Gerais PPP program has served as a model for other states in Brazil interested in implementing PPP projects and disclosing project and contract information. The State of Minas Gerais has been serving as an example on practices related to disclosure of project information, draft and final signed contracts, as well as bidding process documentation and technical background reports.

⁵⁰ <http://www.ppp.mg.gov.br/unidadeppp>

Legislation and Policy

Several laws have influenced the development and implementation of PPP projects, as well as the disclosure of project and contract information, in the State of Minas Gerais. Law 14868 of 2003 created the PPP Program at the State level, including the development of projects in transportation, education, health, sanitation, penitentiary systems, agriculture, and science and technology. Though no overarching framework has been in force to influence and regulate transparency practices, Article 2 of Law 14868 requires “publicity and clarity in adopting procedures and in making decisions”. Furthermore, under Article 12, bidding process documentation and PPP contracts are required to be available for public consultation, without mentioning any specific procedural guidelines for the public disclosure of information. This Law also mandates that any PPP project must be included in a PPP Plan that describes the list of ongoing initiatives. The plan (and therefore the list of projects) has to be approved by a decree of the governor after a period of public consultation. It means that there cannot be any project under preparation that is not publicly known. (art 7, §2)⁵¹

More specific regulation on disclosure of information through institutional websites was passed in a few State resolutions enacted over the past few years. The first, Resolution 72 of 2003, drafted by the State Secretariat for Planning and Management (*Secretaria de Estado de Planejamento e Gestão – SEPLAG*), establishes directives for the structuring, elaboration, maintenance and administration of public information websites. This was followed by Resolutions 40 of 2008, and 51 of 2009, modifying or expanding regulations in the same area. Though not specific to PPPs, these legislative directives do establish some relevant State-level parameters for disclosure of information via institutional websites. According to Resolution 72 of 2003, Article 5, web pages should be “easy to read and present content with clarity, coherence, relevance, timeliness, organization, simplicity, objectivity and truthfulness.”⁵² Article 7 specifies that all information contained in websites of the State’s public entities must be rigorously updated, while Article 9 establishes a communication service, “Talk to Us” (“*Fale Conosco*”), which, somewhat similarly to the Transparency Portals established in Peru and Chile, facilitates the direct access to information held by public institutions. Through this open channel, citizens can request information, and requests must be responded to within 2 working days, either by disclosing information, referring the public to another institutional source, or requesting more days to fulfil the request. All available information on projects is, however, extensively disclosed proactively.

All documents are disclosed in their original form in the public domain and are signed off by the original producer of the document. When information is extracted from the original documents and placed in a separate format, such as in the case of the project factsheet and guarantees or payment reports, the PPP Unit checks each piece of information.

51 The list of initiatives, approved after public consultation, can be found at: [ppp.mg.gov.br → informações institucionais → plano PPP](http://ppp.mg.gov.br/informacoesinstitucionais)

52 SEPLAG, Secretaria de Estado de Planejamento e Gestão, Resolução no. 72/2003, Capítulo I

Table 8 - Disclosure of Information on PPP Projects and Contracts – Minas Gerais

Information on project including rationale and procurement information	
Contract and associated agreements	<p>Under the title “Nossos Projetos”, the PPP Unit website allows for downloading the full version of contract documents.</p> <p>All contract variations are proactively disclosed. (The files for download on the website include changes to the contracts of MG050 and Mineirão, the only “PPP” contracts that have been changed in Minas Gerais so far.) Renegotiation, and its impact on payments and quality of services, is fully disclosed for all projects as soon as the parties come to an agreement.</p> <p>All contract documents are proactively fully disclosed and, in most cases, the original scanned document, with no amendment, is downloadable. There is no specific guidance on redactions. However, having no guidance on redactions may become a problem and the private sector might challenge this in course of time, so, in order to avoid future litigation directed towards the government, the PPP Unit of Minas Gerais is preparing basic regulations which are expected to be ready by November 2012.</p>
Summary of contract and project	<p>Under the title “Nossos Projetos”, the PPP Unit website has a basic database of projects that have achieved financial close, including, for each one, a project factsheet that contains, the following information, in a standardized format:</p> <ul style="list-style-type: none"> Basic information (Informações básicas) Project description (Descrição do projeto) Rules regarding government payments (Pagamento público) Other obligations of the government in the contract (Outras obrigações do poder público) Brief description of performance indicators (Os indicadores para avaliação de desempenho) Estimated figure of the private investment (Valor projetado do investimento privado) Guarantees provided by government in the contract – Value and basic rules (Garantias financeiras do poder público) Other relevant aspects of the project (Outros destaques do projeto)
Reports on implementation performance	<p>The full versions of monthly performance reports are available from January 2011 to the last one. There is also a comparative chart of the evolution of the aggregated performance index.⁵³</p> <p>On the regulatory side, the National Land Transport Agency, ANTT, discloses annual sectoral reports on roads and railways. As of November 2011, reports were available on the institutional website for each year between 2002 and 2010.⁵⁴ Finally, external audit reports, falling under the responsibility of the State Court of Auditors (Tribunal de Contas do Estado), were not found for public access via the institutional website.</p>
Project description	<p>The PPP website presents a project summary, technical background papers and feasibility studies, and a presentation of the project (PowerPoint), disclosing projected costs, basic project characteristics, results from demand studies, detailed information on risk analysis, performance indicators and requirements, guarantees, and requirements for project financing, amongst others.</p> <p>For each project, there are two versions of the project summary/ factsheet: a preliminary version is published during the public consultation phase, along with the bidding documents and the draft of the contract; once the tender process is over and the contract is signed, the old version is updated with details of the winning bid, such as value of the contract and other details.</p>
Rationale for project and its procurement as a PPP	<p>The project summary presents the rationale for the project, not always for PPP procurement.</p> <p>Minas Gerais PPP Law mandates extensive proactive disclosure on preliminary studies regarding “PPP” projects. Considering that broad disclosure, some redactions are needed for the pre-procurement phase and only for that phase: in order to protect the government’s negotiating position and to foster competition among the bidders, some aspects of the business case may not be disclosed such as the pre-approved budget limit and the rate of return considered.</p>
Description of tender process or other selection process	<p>Award is always through competitive tender.</p> <p>Request for proposals and other tender documents are proactively disclosed, including selection criteria.</p> <p>No description of the procurement process is provided.</p>
Contract milestones	<p>The PPP website presents a chronogram of project interventions.</p>
Project structure and parties to the contract	<p>Basic information included in the project factsheet.</p>

53 [ppp.mg.gov.br → nossos projetos → ppp - mg050 → execução do contrato](http://ppp.mg.gov.br/nossos-projetos/ppp-mg050/execucao-do-contrato)

54 For annual reports on roads concessions, see: <http://www.antt.gov.br/relatorios/rodoviario/relatorios.asp>; for annual reports on railways, see: <http://www.antt.gov.br/relatorios/ferroviario/relatoriosFerrovias.asp>

Disclosure of Project and Contract Information in Public-Private Partnerships

Information on project performance	
Expected and actual levels of performance	Expected levels disclosed in the contract, actual levels disclosed in performance reports. In terms of monitoring and evaluation reports, an Independent Auditor (Verificador/Independente) is responsible for evaluating the performance of PPP operators. Disclosure of those reports is not mandatory, but the PPP unit has adopted it as a policy directive for their projects. ⁵⁵ Contracted through an open bidding process, the Independent Auditor follows the execution of projects in order to monitor project performance. These reports are proactively disclosed following the process shown below.
Tariffs and Pricing	The PPP website presents, for each project, the level of unitary payments and user-fees.
Information on financial transfers and risk allocation	
Payments between government and private partner	Information on payments made to the private party is proactively disclosed on the PPP website. The information includes the previous year's direct subsidies, the current year subsidies already paid and to be paid, and the projections of the subsidies/payments for the next 10 years. This information is presented for each contract signed and is updated every two months. ⁵⁶
Other asset transfers	All land allocated to the project is registered as public property, following the usual procedures.
Guarantees and other arrangements that affect financing/costs	Information relating to guarantees is found as part of the proactively disclosed contracts and also as part of the project presentation included in the PPP Unit website. Information on guarantees can also be found at the sector-specific ministerial level. For example, for a transport project, all information on guarantees can be accessed through the institutional website of the State Secretariat for Transport and Public Works (Secretaria de Estado de Transportes e Obras Públicas – SETOP) under “Programas and Government Actions” (“Programas e Ações do Governo”). In some cases, the actual figures for guarantees may not be disclosed as in the case of the PPP project for the Prison Complex ⁵⁷ where only the model guarantee is disclosed. The information on land leases is currently not disclosed.
Risk allocation matrix	The PPP website presents detailed information on ex-ante risk analysis.
Events of default and termination payments	No specific information provided, besides contractual provisions (disclosed in the contract documents).

⁵⁵ Documentation regarding the contract with specific verificadores independentes can also be found on the PPP site.

⁵⁶ It can be found at ppp.mg.gov.br → informações institucionais → gastos com ppp (try reeo for details)

⁵⁷ This is an administrative concession for the construction and management of a prison, has a signed contract dating June of 2009. The public authority is the State Secretariat for Social Protection (Secretaria de Estado de Defesa Social – SEDE), which is also responsible for the supervision, control and monitoring of the project.

Canada: British Columbia

Institutional Context

PPPs in British Columbia are undertaken at federal, provincial/territorial as well as municipal levels. Partnerships British Columbia, a registered company wholly owned by the Province of British Columbia, undertakes the work of developing PPPs in British Columbia. It provides services such as project management advice to government and its agencies with respect to identifying opportunities for maximizing the value of public assets and for developing public — private partnership projects. PBC is involved closely with projects up to financial close following which contract management work is looked after by the sponsoring agency or the agency which owns the project. Disclosure up to financial close is the responsibility of PBC, while the clients themselves are responsible for disclosure post financial close during the operational stages of the project.

Legislation and Policy

The Freedom of Information and Protection of Privacy Act (FOIPPA) 1993⁵⁸ of British Columbia is the overarching legislation that provides for the disclosure of public documents. Partnerships British Columbia which is an incorporated company wholly owned by government is included under the public bodies which come under FOIPPA.⁵⁹ While it does not specifically mention these, contract and project information is disclosed under the Act as it covers all records “in the custody or under the control” of a public body. The records in the possession of contractors are also included under the purview of the Act if they are related to a contract in the custody of the public body, except the contractors’ internal administrative records which are not directly related to the operation of the contract. However, FOIPPA requests cannot be made directly to the contractors similar to the situation in India and the United Kingdom.

The Budget Transparency and Accountability Act, 2000 provides for proactive disclosure of essential information in respect of all projects, regardless of the procurement method.

58 Available at www.leg.bc.ca/procs/procsupp/

59 Schedule 2 of Freedom of Information and Protection of Privacy Act 1993.

In addition, Partnerships British Columbia provides detailed guidance on proactive disclosure for PPP projects.⁶⁰ The guidance recommends setting disclosure guidelines at the beginning of a process as these help to “establish ground rules and provide certainty to prospective private partners”. It prescribes different methods of disclosure based on the stage of the process. It also outlines the specific information to be disclosed at specific milestones associated with the procurement of public private partnership projects.

PPP Database

Partnerships British Columbia does not maintain a database of PPPs. This is not considered useful taking account of the small number of PPP projects.⁶¹ However, as mentioned above, PPPs are undertaken by different levels of government and the Canadian Council for PPPs maintains a database of all PPP projects in Canada.⁶²

Disclosure of Contract Documents or Summarized information

Contract documents, namely the main agreement and the schedules are disclosed proactively by the government after redacting commercially sensitive information.⁶³ The target date for publication is within 60 business days of financial close.

British Columbia also provides information about its PPP projects in other ways. It has a one-page project case study for each project which provides information at different periods of time. When the project is complete, the project overview gives details of the infrastructure provided, the cost, location, population served, services provided, date of start and completion of construction, value of positive economic benefit, short summary of risks transferred, names of public and private sector partners and project objectives. Updates on the progress of projects after financial close are typically managed by the public sector entities managing the project.

In addition, a project report is made available after the signing of the agreement which contains summarized key information about the project, how it will be delivered and the contract terms and conditions, specifically the following: the project benefits, background, objectives and scope of the project, the financing for the project, the amounts provided by the government and the budget heads under which these would be provided, the financing to be brought in by the private partner, the availability payments to be made, how different project delivery options were analyzed, the process of selection of the private provider, the details of the final agreement signed between the authority and the private partner and the methodology for

⁶⁰ Procurement Related Disclosure for Public Private Partnerships, updated January 2010, Partnerships British Columbia.

⁶¹ BC had around 33 PPP projects at the time of writing this review.

⁶² projects.pppcouncil.ca/ccppp/src/public/search-project?pageid=3d067bedfe2f4677470dd6ccf64d05ed

⁶³ Procurement Related Disclosure for Public Private Partnerships, updated January 2010, Partnerships British Columbia.

monitoring of the contract. This is somewhat similar to the project or contract summaries of countries such as NSW and Victoria, but not as detailed.

News releases on the progress of the projects are also provided on the website. In addition, links to the physical progress of the project are provided where the present status of the project can be checked.

Contract Variations

Partnerships BC does not disclose contract variations. Disclosure relating to any change after financial close is not within Partnerships BC's mandate. There is no specific policy for disclosure of variations.

Disclosure of Payments, Land Leases and Guarantees

The Budget Transparency and Accountability Act provides for disclosure to the Legislative Assembly of a statement of current and anticipated costs to a government entity where a commitment of more than \$50 million towards the capital cost of a project has been made or is anticipated. Commitments would include money, land, facilities, rights or other benefits and guarantees.⁶⁴ In case of such commitments, the Act further provides for disclosure of a major capital project plan stating the objectives, costs, benefits and risks within one month after the commitments have been made.⁶⁵

The total payments made by the provincial and federal governments towards the capital costs of the project are stated along with information about the budget head or initiative under which these are made. The total availability payments to be made are also stated in terms of the dollar net present value.

The formulae used for calculating the monthly installments of the availability payments are given, although in the contracts examined, indexation factors have been deleted. Traffic volume payment formulae are given but the passenger vehicle equivalent rates are deleted. Several other rates used for payments are deleted. Multipliers used in several formulae are deleted. Traffic disruption charge rates are not disclosed in the highway or other road agreements examined. The unavailability deduction formulae are given, but the rates applicable are not disclosed. Deduction rates for different kinds of non-conformity are deleted.

All details of permits and licenses in respect of land are given in detail in the schedules and in the drawings attached to the agreement. The boundaries of the sites and the permits and licenses issued are disclosed fully.

Where there are guarantees, this information is disclosed proactively.

⁶⁴ Section 8, Major capital project information to be presented with the estimates, Chapter 23, Budget Transparency and Accountability Act, 2000.

⁶⁵ Section 14, Major capital project plans to be made public at the time of commitment, Chapter 23, Budget Transparency and Accountability Act, 2000.

Performance Reports and Assessments

Regular updates on the progress of construction of projects are found on the project websites maintained by the departments owning the projects. However, less performance information relating to the operational phase can be found from these sources. Reports relating to specific performance of completed projects against target indicators were not found on examination of department and project websites. Reports of contract managers and operators are not disclosed proactively but could be made available on request under the FOI Act.

The audit reports of PPPs are proactively disclosed to the public by the BC Auditor General.⁶⁶ These contain a detailed review of the performance of the PPP and whether the PPP achieved value for money as anticipated. However, audit of every PPP is not done, so the performance audit reports cannot serve as a source for understanding the regular performance of all PPPs.

Redactions⁶⁷

The FOIPPA is the overarching legislation which creates certain exceptions from release of information, i.e. circumstances where information may be withheld. The FOIPPA protects information that may be harmful to the business interests of a third party, which includes, among other things, trade secrets, commercial, technical and financial information supplied by the third party, disclosure of which may harm the competitive or negotiating position of a party or result in undue financial loss or gain to a party.⁶⁸ However, this information does not need to remain confidential and can be disclosed if the third party agrees to its disclosure. There is also a provision for exception where the information may harm the interests, including financial or commercial interests of a public body.⁶⁹ There are provisions for exception for various other categories.

Information that is 50 years old or more is subject to disclosure pursuant to FOIPPA. There are also overriding provisions that (i) the head of a public body can under certain circumstances disclose exempt information after following due process outlined in the Act⁷⁰ and (ii) any information can be disclosed if it is in the public interest.

However, as in the other countries reviewed, there cannot be a uniform prescriptive approach to redactions. Each agreement needs to be looked at in its own terms for sensitivities in a process of consultation with the private party. More importantly, the private party needs to be aware of what specific information will be disclosed and what will be kept confidential before the signing of the agreement.

⁶⁶ Audit reports are disclosed on the website of the BC Auditor-General at www.bcauditor.com

⁶⁷ Wherever this report speaks of specific elements of disclosure or redactions, it is necessary to note that this information is based on a review of legislation, policy, guidelines and, more importantly, specific project contracts. This is true for the document as a whole. In the case of British Columbia, the specific contracts reviewed were for the following projects — the Abbotsford Regional Hospital and Cancer Centre, South Fraser Perimeter Road, the Kicking Horse Canyon, Royal Jubilee Hospital, Gordon and Leslie Diamond Health Care Centre, and Sea-to-Sky Highway Improvement Project. All statements made in the report are, therefore, not true of every project as project contracts vary and evolve with time and based on specific requirements.

⁶⁸ Division 2 --Exceptions, Section 21: Disclosure harmful to business interests of a third party", Freedom of Information and Protection of Privacy Act 1993.

⁶⁹ Section 17, Freedom of Information and Protection of Privacy Act, 1993.

⁷⁰ Section 23, Freedom of Information and Protection of Privacy Act, 1993.

The major area for redactions in British Columbia PPPs from an examination of specific contracts appears to be the base case financial model submitted by the private party. The base case financial model and any revised version of this are confidential information. The financial base case equity and project IRRs are also redacted from the contracts before proactive disclosure.

Other items seen to be commonly redacted are the unit pricing, default interest rate, the indexation factors, the multipliers used in various formulae, the discount rate that has been used, the definitions pertaining to “force majeure” and “eligible force majeure”.⁷¹ In the definition of “variations” the threshold amount of such changes has been deleted from the agreements examined. In some cases, the rates for penalties or other kinds of costs have not been disclosed. In the contracts examined, insurance coverage is not disclosed.

Validation of Proactively Disclosed Information

The Project Report which is proactively disclosed is approved by the Minister of the relevant ministry. It is also reviewed by Partnerships BC but there is no formal sign-off by them. The contract documents are approved by the relevant ministry after the redactions process and before being proactively disclosed.

Table 9 - Disclosure of Information on PPP Projects and Contracts – British Columbia

Documents and reports disclosed	
Contract and associated agreements	Signed Contracts are proactively disclosed to FOI standard on the Partnerships BC website within 60 days of financial close. Some associated agreements such as direct agreements with stakeholders may be disclosed. Schedules are disclosed except where these contain confidential information. Legislation protects information that may be harmful to the business interests of a third party. Redactions from an examination of specific contracts include the base case financial model submitted by the private party including base case equity and project IRRs. Other items seen to be commonly redacted are the unit pricing, default interest rate, the indexation factors, the multipliers used in various formulae, the discount rate that has been used, the definitions pertaining to “force majeure” and “eligible force majeure”. In some cases, the rates for penalties or other kinds of costs have not been disclosed. In the contracts examined, insurance coverage is not disclosed. Disclosure relating to any change after financial close is not within Partnerships BC’s mandate. There is no specific policy for disclosure of variations.
Summary of contract and project	Project Reports and Case Studies containing summary project and contract information are posted on the Partnerships BC website. ⁷²
Reports on implementation performance	This information is developed by the public sector entity owning the project. Several assessments and survey reports are available on departmental websites, but not necessarily performance assessments of PPP projects. ⁷³ Reports by operators were not found on project websites or project owners’ websites. Reports on the progress of project construction are disclosed proactively on the project websites with link provided on the Partnerships BC website. ⁷⁴ PPP audit reports are disclosed on the website of the auditor general. ⁷⁵

71 This information is based on the project contracts reviewed.

72 www.partnershipsbc.ca

73 The website of the Ministry of Transportation and Infrastructure, British Columbia, was examined for reports and other information relating to PPP projects. Some reports are available, such as demand studies etc. pertaining to some of the PPP projects such as the Sea-to-Sky Highway, but these are not available for all projects.

74 An example of a project website examined is that for the Kicking Horse Canyon Project at www.kickinghorsecanyon.ca/khc_updates.htm

75 www.audit.vic.gov.au/

Disclosure of Project and Contract Information in Public-Private Partnerships

Information on project including rationale and procurement information	
Project description	Included in the project reports.
Rationale for project and its procurement as a PPP	VfM analysis is published as part of the project report — it includes multiple criteria analysis for the project, a VfM for the final agreement versus the PSC base-case. This also includes cost, benefits and risks of the project. The methodology used for the VfM analysis is stated in each report, apart from being detailed in a public document available on the Partnerships BC website.
Description of tender process or other selection process	This information is included in the short headline info that is available on the PBC website and also in the project report. In addition, project updates are published that give RFQ issued, closed, shortlist announced, contract award, construction begin and complete date. The report of the Fairness Reviewer is also available for the tender process in cases that were examined.
Contract milestones	Included in project report and contract. Department websites contain information on progress in commissioning of projects.
Project structure and parties to the contract	Included in project report.
Information on project performance	
Expected and actual levels of performance	Proactively disclosed on the Partnerships BC website in the contract document.
Tariffs and Pricing	Proactively disclosed on the Partnerships BC website in the contract document.
Information on financial transfers and risk allocation	
Payments between government and private partner	The amount of funding contribution of government is stated in dollars in the project report, along with the budget/ initiative under which it has been provided.
Other asset transfers	Legislation requires the proactive disclosure of commitments of money, land, facilities, rights or other benefits.
Guarantees and other arrangements that affect financing/costs	British Columbia legislation requires proactive disclosure of guarantees within a month after commitment. These are disclosed proactively on the PBC website as part of the contract document as well within 60 days of financial close.
Risk allocation matrix	The project's risks are made public via the concession agreement for the project which is published and which contains detailed risk allocation provisions over the period of concession. The project report which is also released proactively contains a brief overview of the allocation of key risks.
Events of default and termination payments	Proactively disclosed on the Partnerships BC website in the contract document

Chile

Being a pioneer in PPP innovation, Chile implemented several PPP programs during the past few decades. Projects range from PPPs in roads, railroads, airports, ports, to prisons and hospitals. All PPP projects and contracts follow the same disclosure policy and practice, irrespective of PPP model.

Institutional Context

Chile is a pioneer in implementing PPP modalities for public infrastructure and services. Projects (for roads, airports, hospitals, prisons, and other infrastructure) are originated in several ministries, then scrutinized by the Planning Ministry, and typically procured through open bidding processes by the Concessions Office (*Coordinación de Concesiones de Obras Públicas*), a department of the Ministry of Public Works.⁷⁶

Legislation and Policy

Chile has recently passed Law 20285 on Access to Public Information (*Ley sobre Acceso a la Información Pública*), which came into effect on 2009, regulating issues related to transparency in the Public Administration, the right of all persons to access information from public entities, the procedures to exercise the aforementioned right, and exceptions to the publication of information. To this effect, the Law establishes what information must be made available to the public through institutional websites, defines the procedures necessary in order to obtain additional information, and creates the Transparency Council (*Consejo para la Transparencia*), an autonomous entity responsible for overseeing public organisms' compliance to the legislation.

Chile's specific legislation on transparency poses a distinction between "active" and "passive" transparency, the former referring to the publication of information through institutional websites, and the latter to the right of any individual to request information (a right secured in Article 8 of Chile's Constitution), which public organisms have an obligation to provide with the exception of confidential information as defined under the Law.

⁷⁶ See www.concesiones.cl/acercadelacoordinacion/funcionamientodelsistema/Paginas/MarcoLegal.aspx

Disclosure of Project and Contract Information in Public-Private Partnerships

In 2010, Chile established a new normative framework for PPPs by sanctioning the Law on Concessions of Public Works (*Ley de Concesiones de Obras Públicas*), which modified the original legislation on Concessions dating from 1996 (*Ley de Concesiones, Decreto Ministerio de Obras Públicas no.900*). Title XV, Article 98 of the Law establishes specific norms on users' rights to access information. It specifically states that all relevant documentation, which is pertinent to the implementation of a contract, must be made available to all interested parties, once the official contract has been signed. This includes access to: bidding rules and regulation, pre-project documents, background studies and other technical project documents, as well as side letters, changes to the tariff system, and changes to the contract.⁷⁷

In Chile the information produced by the Government is public and available to anyone (audit reports are an identified exception to this rule), so it is not subject to redactions.

The Concessions Office website includes a list of PPP projects (operational, under construction, in procurement, in preparation, the pipeline of future projects, and even cancelled projects, plus a list of received unsolicited proposals).

Besides contractual information, the government (and particularly the Ministry of Public Works, who procures most PPP projects on behalf of several ministries and then monitors the contracts) proactively discloses online a significant volume of information on project performance.

Table 10 - Disclosure of Information on PPP Projects and Contracts – Chile

Documents and reports disclosed	
Contract and associated agreements	Chile's Concessions Office (www.concesiones.cl) discloses the full contract (i.e. the draft contract included in the Request for Proposal, and the winning bidder's economic proposal). For some concessions there is no disclosed information on investment or government costs, and sometimes even the economic proposal is missing. According to law, amendments to contracts, and legal resolutions on changes to contracts, tariffs and service characteristics (Resolución) are disclosed for all projects, with notice on the Official Bulletin. However, the website does not always present those legal documents. ⁷⁸ Disclosed contracts are not redacted.
Summary of contract and project	Project description typically includes information on the initial value of investment, contract term, and bidding process dates.
Reports on implementation performance	For each project, the Concessions Office discloses the last assessment report for the concession (presenting data on demand/usage, as well as some performance indicators such as accidents and complaints), but only the most recent assessment report.

⁷⁷ MOP, Ley y Reglamento de Concesiones de Obras Públicas, 2010.

⁷⁸ For instance, the June 2012 Concessions Office report on the La Florida airport PPP refers to the term extension by 5 years, according to Decreto Supremo MOP 759/1997, but that Decree is not disclosed in the Concessions website nor the reasons for the extension.

Information on project including rationale and procurement information	
Project description	Chile's Concessions Office (www.concesiones.cl) currently oversees a large portfolio of PPPs. Its website presents each project, disclosing the Request for Proposals, the full contract (i.e. the draft contract included in the Request for Proposal, and the winning bidder's economic proposal), and the last assessment report for the concession (presenting data on demand/usage, as well as some performance indicators such as accidents and complaints). Projects range from PPPs in roads, railroads, airports, ports, to prisons and hospitals. Project description typically includes information on the initial value of investment, contract term, and bidding process dates; but for some concessions there is no disclosed information on investment or government costs, and sometimes even the economic proposal is missing.
Rationale for project and its procurement as a PPP	Not proactively disclosed.
Description of tender process or other selection process	Award is always through competitive tender. Request for proposals and other tender documents are proactively disclosed, including selection criteria. No description of the procurement process is provided.
Contract milestones	A few milestones are included in the project presentation. Monitoring reports present the most relevant project and contract milestones.
Project structure and parties to the contract	Basic information included in project presentation and in monitoring reports.
Information on project performance	
Expected and actual levels of performance	Expected levels disclosed in the contract, actual levels disclosed in the periodic performance reports. Technical monitoring reports (Informe Mensual) are produced monthly by contract managers, on performance assessment, containing information on services, accidents, user feedback, amongst other things, are disclosed regularly for all projects — for each concession, the Concessions Office maintains a link to the most recent monthly report. Financial information is provided periodically by the private operators to Superintendencia de Valores y Seguros at www.svs.cl . Audit reports are considered confidential and are not disclosed.
Tariffs and Pricing	User charges and information on their review and update is included in the performance reports; basic rules for review are provided in the disclosed contracts.
Information on financial transfers and risk allocation	
Payments between government and private partner	Details of asset transfers are disclosed in the fiscal report, Informe de Finanzas Públicas, appended to the annual Budget Law. ⁷⁹
Other asset transfers	Details of asset transfers are disclosed in the fiscal report, Informe de Finanzas Públicas, appended to the annual Budget Law. Land is government property — when acquired, land is registered as government land.
Guarantees and other arrangements that affect financing/costs	Guarantees are also disclosed, with their type and volume computed in the PPP chapter in Informe de Pasivos Contingentes. ⁸⁰ Aside from project documents that are accessible to the public through the Concessions Office, the Ministry of Finance plays an active and important role in the evaluation of projects' potential fiscal impact, publishing information on long-term fiscal commitments resulting from contractual management of public works in public budget documents (Informes de Pasivos Contingentes). Periodic evaluations of contingent liabilities are also made available through the institutional website. ⁸¹
Risk allocation matrix	Not disclosed.
Events of default and termination payments	No specific information provided, besides contractual provisions (disclosed in the contract documents).

79 For information on year 2012, see page 64 of www.dipres.gob.cl/572/propertyvalue-15889.html

80 See www.dipres.gob.cl/572/propertyvalue-16136.html

81 See 2010 Infrascopes Index, EIU, Chile

India

Institutional Context

The institutional structure for PPPs in India requires examination within the context of its federal structure of government.⁸² The Government of India as well as state and local governments undertake PPPs, the former through various line ministries such as the Ministries of Shipping, Road Transport and Highways (including the NHAI⁸³), Civil Aviation (including the AAI⁸⁴), Urban Development, Rural Development (PURA PPPs⁸⁵) etc. All central government PPPs, other than PURA PPPs, above a prescribed value are subject to assessment and approval by the PPPAC⁸⁶ before being procured. The Project Steering and Monitoring Committee (PSMC) and an inter-ministerial Empowered Committee (EC) have been entrusted with the responsibility of assessing and approving proposals for PURA PPPs. State PPPs are approved at the state level. Local PPPs require approval at local, state or central level, depending upon the type and financing structure of the PPPs. When state PPPs require financial assistance for projects, they seek viability gap funding (VGF) for support, in which case the Empowered Committee /Institution⁸⁷ examines such requests. The PPPAC and EC are housed in the Ministry of Finance, Department of Economic Affairs with the PPP Cell acting as secretariat for these institutions.

The Cabinet Committee on Infrastructure (CCoI) makes decisions on major projects and key policy matters pertaining to central government PPPs in infrastructure.

82 This review includes an examination of Government of India project and contract information only. Disclosure of project and contract information by states and local bodies does not form part of this review although some of the legislature/policy alluded to might apply to local bodies also.

83 The National Highway Authority of India develops, maintains and manages national highways in the country. It was established by the NHAI Act 1988 and operationalized in 1995.

84 Airport development projects, both brownfield and greenfield, are undertaken by the Airports Authority of India which is a public sector undertaking constituted under an Act of Parliament. AAI manages 125 airports, which include 11 International Airports, 81 Domestic Airports and 27 Civil Enclaves at Defense airfields. AAI has entered into Joint Ventures at Mumbai, Delhi, Hyderabad, Bangalore and Nagpur Airports.

85 These are PPPs for Provision of Urban Amenities in Rural Areas (PURA) which include a number of activities of infrastructure development and service provision with grant funding from various departments of Government of India, grant funding from state governments concerned and investment by the Concessionaire, combined with economic activities funded solely through private investment. These PPPs are implemented by the MoRD through the Gram Panchayats (rural local bodies at village level) and have a totally different institutional set-up as compared to mainstream infrastructure PPPs in India.

86 The PPPAC is an inter-ministerial committee chaired by the Secretary, Department of Economic Affairs with Secretaries of other key ministries as members.

87 These are part of the institutional structure notified for the approval of VGF for PPP projects.

Legislation and Policy

Currently there is no specific policy on disclosure of contract information on Public-Private Partnerships in India.⁸⁸ The general legislation on disclosure of information, the Right to Information Act, would, therefore, apply. Initially there appeared to be some ambiguity within the government on disclosure of information relating to PPP project contracts on two counts namely whether PPP project SPVs or project companies are subject to the RTI Act and whether PPP project contracts are subject to disclosure at all. The first point of ambiguity arises from the definition of 'public authority' under the Act. The Central Information Commission (CIC), the government authority empowered to act upon complaints relating to the RTI Act, had held in a case relating to Distribution Companies⁸⁹ that such project companies/SPV's fall within the purview of the RTI Act 2005, should provide information to the public under the Act and must appoint PIOs for such purpose.⁹⁰ However, since this and other related cases are sub judice (still under consideration), the lack of clarity on the issue of inclusion of PPP SPVs and joint-ventures (JVC) as 'public authority' under the Act may still continue till the Courts decide this issue.⁹¹

The latter ambiguity arose from the issue of whether PPP contracts in themselves are covered under the definition of 'information' under the Act. However, this issue appears to have been resolved within the government and PPP contracts are now recognized as falling within the purview of information as defined under the Act.⁹² Another related aspect is the extent to which information can be or should be disclosed proactively. The RTI Act encourages public authorities to proactively disclose as much information as possible and thereby reduce public resort to the Act,⁹³ but fails to provide guidance on proactive disclosure of PPPs.⁹⁴

In the Draft National PPP Policy published in 2012,⁹⁵ the government recognizes transparency in Government processes as a top priority for PPPs and the need to be transparent to retain the trust of the stakeholders. The Draft Policy also states that the Government will 'publish separate mandatory disclosures and fair practices which all PPP projects should follow'. The Ministry of Rural Development is considering disclosure of rural PPP contracts under their scheme for Provision of Urban Amenities in Rural Areas (PURA) through disclosure of summarized information and signed contract documents.⁹⁶

88 The exception to this is the Ministry of Rural Development's Draft Guidelines for the Disclosure of Project and Contract Information under PURA. MoRD is developing these based on recommendations of the WBI and expects to notify these very soon. These will be the first such guidelines in India for disclosure of PPPs in any sector.

89 These are private providers of retail electricity and have in many cases government equity thereby coming under the category of Joint Ventures.

90 The Central Information Commission in its decision dated 16.3.2006 held that Distribution Companies, namely BSES Rajdhani Power Limited, BSES Yamuna Power Limited and North Delhi Power Limited fall within the definition of public authority under Section 2(h) of the RTI Act 2005 with certain consequential directions given to the DERC on this issue. The aggrieved companies then filed Writ Petitions No. 6833, 6834 and 3835 of 2006 in the Delhi High Court seeking direction from the High Court to quash the decision of the Central Information Commissioner. The last interim order in this regard available on the Delhi High Court website gives directions to the CIC to reconsider the issue after hearing the petitioners. Other similar writ petitions have been filed, examples being writ petitions no. 542/2007, 543/2007 and 544/2007 in which the High Court vide its order dated 23.01.2007 has stayed the operation of the RTI in respect of distribution companies. It is now almost five years from the date of this order but a search of the Delhi High Court database reveals no final order on the issue yet.

91 It appears from a reading of the definition of "public authority" that a PPP could be covered under the Act as has been held by several State Information Commissioners in India if there is a substantial element of public investment involved.

92 The RTI Act defines "information" to include contracts, reports and data held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force.

93 Clause 4(2), *Right to Information Act, 2005*.

94 Exception to this are MoRD Disclosure Guidelines for PURA PPPs, expected to provide for proactive disclosure.

95 Available at www.pppinindia.com/pdf/draftnationalppppolicy.pdf

96 The information on proposed PURA disclosure is accurate at the time of writing this report. However, as the guidelines are yet to be formally published by Gol, the details of the elements and timelines for disclosure may vary.

PPP Database

The Ministry of Finance has a website dedicated to PPP projects.⁹⁷ This website provides access to a database of state and central PPP projects which contains information on project cost, names of equity holders in the SPV, initial risk allocation between the parties, VGF allocation from various sources, dates of various milestones in the tender process, results of renegotiations, details of financiers and amounts, tariff fixation methodology, regulatory structure etc.⁹⁸ However, the website is not comprehensive as it does not provide data uniformly for all projects. Details of actual grant disbursements, detailed performance indicators and performance against these indicators are also unavailable.

The NHAI website provides access to a database of all its projects, including PPP projects,⁹⁹ which includes a summary of each phase of the National Highway Development Project with information on the number of contracts awarded, length in km, total project cost, awarded cost, number of contracts and length completed. Monthly and cumulative progress reports and year-wise contract completion schedules are also posted. Additionally, Information System Reports beginning April 2010 and ending August 2011 are available. The NHAI website also provides a list of terminated contracts.

Some dated reports available on the AAI website provide information on the cost, status of the project, PPP type and name of the developer with respect to some airport PPP projects.

Disclosure of Contract Documents or Summarized Information

The extent of disclosure of PPP contracts varies among different departments of the Government of India. The AAI has disclosed online certain agreements relating to Delhi and Mumbai airports.¹⁰⁰ The NHAI recently¹⁰¹ published close to 150 highway contracts¹⁰² on its website. Other sectors/ departments have not made project contract documents available proactively. The MoRD is currently preparing to disclose PURA project contracts through a more systematic disclosure policy. Under the new policy, the Concession Agreement and the State Support Agreement will be disclosed within 30 days of financial close on the MoRD website (www.pura.org.in)

97 <http://pppinindia.com>

98 <http://www.pppindiadatabase.com>

99 <http://www.nhai.org/rmenu>

100 Lease Deed between AAI and DIAL, 25th April, 2006; Lease Deed between AAI and MIAL, 26th April 2006; Operation, management and Development Agreement between AAI and DIAL for Delhi Airport, 4th April 2006; Operation, Management and Development Agreement between AAI and MIAL for Mumbai Airport, 4th April 2006; SHAs for Mumbai International Airport Limited, Delhi International Airport Limited are available at the AAI site http://www.aai.aero/righttoinformation/Right_info_Agreement.jsp

101 During the year 2012.

102 <http://www.nhai.org/concessionagreementcj.asp>

Contract Variations

Whilst, changes in scope with new costs are made available for some projects through the PPP database, it does not go into any level of detail. However, variations would be made available like other public documents if requested under the RTI Act. Under the proposed guidelines for the disclosure of PURA PPPs, all approved contract variations agreed to and signed by all concerned parties are to be placed in the public domain within 60 days of such variation. Additionally, approved variations are to be added to the project summaries within 60 days of approval by the Ministry. Variations would include all changes to the Concession Agreement made subsequent to signing of the original agreement.

Disclosure of Payments, Land Leases and Guarantees

Although details of land and asset leases are disclosed in the schedules to the OMDA DIAL and MIAL – i.e. land lease arrangements with airline and other companies that existed at the time of signing the agreement, the exact details of the land or asset leases by the Authority to the JVC have not been disclosed. The DIAL and MIAL OMDAs detail upfront fees, annual and support payments to be made or received by the authority from the JVC.

While grant funding allocations under the VGF scheme of government are disclosed proactively, details of actual grant disbursements are not disclosed.

The MoRD plans to proactively disclose all information on grant payments and land and asset transfers as part of project summaries. The information on land transfers and grant payments is also a part of the Concession Agreement, which will be subject to disclosure for PURA PPPs.

Performance Reports and Assessments

A lesser amount of information on project performance is made available proactively. The proactively disclosed NHAI management information system presents a summary of land acquisition state-wise, but does not provide information on project-wise status of land acquisition. While this system is helpful in getting an overall picture of the status of works, it is difficult to glean information on the status and performance of individual contracts against agreed performance targets.

The Comptroller and Auditor General (C&AG) conducts performance audits of PPPs in India and has disclosed audit reports relating to PPP projects. However, these reports are more in the nature of audit of sectors with PPP as a whole rather than an audit of standalone PPP projects, e.g. a recent report on performance of major ports many of which have privately operated terminals.¹⁰³

¹⁰³ See Report No. 3 of 2009-10 for the period ended March 2009, Performance Audit of Functioning of Major Port Trusts in India - Ministry of Shipping at the following link: saiindia.gov.in/english/home/Our_Products/Audit_Report/Government_Wise/union_audit/recent_reports/union_performance/2009_2010/Civil_%20Performance_Audits/Report_no_3/exe-sum.pdf

The MoRD proposes to disclose monthly/ quarterly reports of PURA projects by the Independent Engineer and validated by the Gram Panchayat (the contract manager); and provide links to PURA audit reports as part of its proposed project summaries. It also proposes to disclose user surveys and third party assessments that may be undertaken as part of the project.

Redactions

The RTI Act contains provisions for withholding certain information – commercial confidence, trade secrets or intellectual property – if disclosure is likely to harm a third party unless larger public interest warrants disclosure.¹⁰⁴ However, there appears to be no specific guidance on redactions of PPP contracts.¹⁰⁵

Validation of Proactively Disclosed Information

Each department is responsible for the accuracy of its proactive disclosures and there appear to be no specified procedures for certifying or validating information or databases. The MoRD proposes to carry out an internal validation process for PURA PPPs wherein all contract documents and proposed project summaries to be proactively disclosed will be examined and approved by the Joint Secretary (JS) and Director/Deputy Secretary (DS) supervising PURA PPPs.

Table 11 - Disclosure of Information on PPP Projects and Contracts – India, Union government level

Documents and reports disclosed	
Contract and associated agreements	<p>All PPP contracts are subject to reactive disclosure under the RTI Act. A set of 150 Highway PPP contracts has been proactively disclosed by NHAI, with no redactions.¹⁰⁶ These contracts are as signed and without any modifications that may have subsequently taken place.</p> <p>The Delhi Airport and Mumbai Airport OMDAs¹⁰⁷ have been proactively disclosed by AAI. Some direct agreements such as state support agreements, SHAs etc. are sometimes disclosed. However, this excludes several other PPP contracts.</p> <p>Contract Variations are not made available proactively, but would be fully disclosed under the RTI Act. In a few cases information relating to changes in scope, including cost is available through the PPP database.</p> <p>Some standard documents are available online such as the MCA for Highways and Ports, but others have to be purchased from the Planning Commission of India.</p> <p>Side agreements are typically not disclosed. For example, in the project agreements for DIAL and MIAL, 9 agreements constitute project agreements — OMDA, State Support Agreement, Shareholders’ Agreement, CNS-ATM Agreement, Airport Operator Agreement, State Government Support Agreement, Lease Deed, Substitution Agreement and Escrow Agreement. Only two of the nine agreements are available on the AAI website. Moreover the OMDA includes only the standard formats for these agreements.</p>

¹⁰⁴ Clause 8(1)(b), *Right to Information Act, 2005*.

¹⁰⁵ MoRD’s proposed guidance on disclosure of PURA PPPs will exempt information which may affect the competitive position of the private party; the financial model submitted by the private party is likely to constitute exempt information – however, parts of the financial information included in the financial model are likely to be disclosed.

¹⁰⁶ www.nhai.org

¹⁰⁷ www.aai.aero/righttoinformation/Right_info_Agreement.jsp

Summary of contract and project	Some information provided in the database (see above) but contract/project summaries not routinely provided.
Reports on implementation performance	Reports other than audit reports are typically not disclosed proactively but made available under the RTI Act. Audit reports of the C&AG are disclosed proactively. However, few audits of PPP projects appear to have been carried out.
Information on project including rationale and procurement information	
Project description	Some information provided in PPP database but not uniformly for all projects.
Rationale for project and its procurement as a PPP	Not disclosed.
Description of tender process or other selection process	Information on dates of RFQ, RFP, numbers of shortlisted bidders. Assessment criterion is stated (most cases it is the lowest grant bid parameter). Bid evaluation report is typically not disclosed
Contract milestones	Disclosed in the contract
Project structure and parties to the contract	Provided in the contracts that are disclosed. Also some information contained in the database (see above).
Information on project performance	
Expected and actual levels of performance	For airport projects, objective service quality requirements are disclosed. Operation and maintenance standards are disclosed. Target rating requirements per quarterly IATA/ACI/AETRA passenger surveys disclosed for airport projects. Performance measures along with the targets and dates disclosed. Details of works and date of commissioning for each project disclosed. Penalties for default on service quality or other performance stated in terms of a specific percentage of revenues. Actual performance for most PPP projects not disclosed.
Tariffs and pricing	Highway toll rates are disclosed – toll policy document is published. The methodology for indexing and review of Airport Charges along with rights of collection is disclosed at http://www.aai.aero/misc/Updated_Airport_Charges_as_on_11_01_2011.pdf . However, the state support agreement which describes the passenger service fees in detail is not available. Typically provided in standard contracts and provided in full in the final contracts that are proactively disclosed.
Information on financial transfers and risk allocation	
Payments between government and private partner	Details of VGF allocations for individual central and state projects are available through the PPP database for some projects and from the NHAI database for NHAI projects, but updated information on actual payments made is not disclosed proactively.
Other asset transfers	Asset/land leases are disclosed in the case of DIAL and MIAL and planned to be disclosed proactively under PURA PPPs. Not typically disclosed proactively in other cases.
Guarantees and other arrangements that affect financing/costs	Provided in standard contracts and typically provided in full in the final contracts that are proactively disclosed.
Risk allocation matrix	Risk allocation between parties is disclosed for some projects in the PPP database and typically provided in full in the contracts that are proactively disclosed. Many central projects follow the standard agreement and the clauses relating to risk allocation are rarely changed. Therefore, the actual signed contract usually has the same risk allocation. Risk registers are not maintained.
Events of default and termination payments	Provided in standard contracts and typically provided in full in the final contracts that are proactively disclosed.

Peru

In Peru, PPP disclosure policies do not discriminate between different PPP models, but practice differs from department to department.

Institutional Context

The Private Investment Promotion Agency (*ProInversión*) is responsible for the procurement of most PPP projects for the national government, having a lesser role in supporting regional projects. Its project portfolio ranges from land transportation, airports and seaports, to energy, telecommunication. The supervision of these projects is handled by sectoral authorities — for instance, for transport infrastructure, service levels and tariff adjustments have been overseen since 1998 by the Supervising Agency for Investment in Public Transport Infrastructure (*Organismo Supervisor de la Inversión en Infraestructura de Transporte de Uso Público, Ositran*), while Superintendency of Sanitation Services (*Superintendencia Nacional de Servicios Sanitarios, SUNASS*) oversees projects in the water and sanitation sector. The procurement and management of PPP-hospital contracts is managed by a health social security entity, EsSalud (www.essalud.gob.pe).

Legislation and Policy

The fundamental right of every citizen to obtain information from public entities in Peru is guaranteed by the Constitution, which states that every person has the right to request information, with no need to express reasons for said request, and to receive information from public institutions within a legal timeframe and subject to necessary costs, with the exception of personal information and information that is prohibited by law for reasons of confidentiality and threat to national security. On the basis of this constitutional right, Law 27806 on Transparency and Access to Public Information (*Ley de Transparencia y Acceso a la Información Pública*), enacted 2002, mandates public entities to disclose information and respond to direct requests from the public. Moreover, a mechanism for transparency has been established (see Annex 6 on “*Principio de Publicidad*”) and *transparency portals* (e.g. www.proinversion.gob.pe/transparencia) were created to facilitate communication between public institutions and citizens. Sharing a standard form, transparency

portals can be accessed on the institutional website of every public entity and serve to disclose internal information of the public organism, and also information regarding investments and projects managed by the institution.

With respect to specific legislation on PPPs in Peru, several laws and decrees regulate private investment in public infrastructure works and public services. The most relevant legislative are Decrees 758 and 059-96-PCM, instituting norms for the promotion of PPPs and regulating them. Though these legislative marks have been in place since the early 1990s, they lack specific directives on disclosure of contracts, including what information must be made available to the public, and how regulatory agencies should establish transparent reporting practices. Law 27332 on regulatory entities also lacks directives on transparency and disclosure of supervisory and monitoring reports to the public. More recently, in 2008, Peru passed Legislative Decree 1012 (the legal framework for PPPs), regulated through Decreto Supremo 146-2008-EF.

Generally abiding by the legal structure instituted through the Law on Transparency and Access to Information of 2002, the Public Administration discloses information pertaining to project development, bidding process, and project implementation and oversight. The procurement agencies (e.g. ProInversión, Essalud) proactively disclose a large volume of information. Specific mechanisms are set in place to request additional information, for example through transparency portals.

With respect to projects for which contracts have been signed and that are currently being implemented, the public can access information through *ProInversión*, under "*ProInversión*" and "*Procesos de promoción a cargo del Estado (concluidos)*". Projects are listed either as public initiatives ("*Procesos por Iniciativa Estatal*") or as private initiatives ("*Procesos por Iniciativas Privadas*"). For transport projects, the regulatory agency, *Ositran* (see www.ositran.gob.pe), also discloses relevant project information. Combined, the public has access to project description, signed contracts, table of user-fees, and related legal documents.

Specific mechanisms are set in place to request additional information, for example through transparency portals.

ProInversión lists its projects, sector by sector, linking to tender and contract information.¹⁰⁸ Essalud lists the PPP projects (called "APP") for healthcare facilities (not listed by ProInversión).¹⁰⁹

¹⁰⁸ See www.proinversion.gob.pe, choose "ProInversión" in the main menu, then "Procesos de promoción a cargo del Estado (Concluidos)".

¹⁰⁹ See www.essalud.gob.pe, under "Transparencia" and then "Proyectos de Infraestructura".

Table 12 - Disclosure of Information on PPP Projects and Contracts – Peru

Documents and reports disclosed	
Contract and associated agreements	For each of its projects, ProlInversión discloses a large volume of information, including the Request for Proposals and other tender documents, and the contract (including preliminary versions) and its annexes. However, the same may not be true of every sector — for instance, PPP contracts for hospitals are not currently disclosed by EsSalud, only information relating to the bidding process and official public announcements can be readily accessed. The transport regulator, Ositran, also publishes PPP contracts and their variations. Comprehensive information on changes to contracts is disclosed by Ositran in their annual evaluation published by sector (airports, roads, railroads and ports) and project. In Peru the information produced by the Government is public and available to anyone (audit reports are an identified exception to this rule), so it is not subject to redactions. There is no specific validation process. Each public entity selects a specific employee in charge of disclosing information.
Summary of contract and project	The procurement agencies (e.g. ProlInversión, Essalud) present a brief description of each PPP project, but no contract summary.
Reports on implementation performance	Performance reports can be publicly accessed through regulatory agencies. For transport projects, annual performance and monitoring reports prepared by the sector regulator are proactively disclosed under Annual Evaluations (Evaluación Anual), which includes quantitative information on investments, detailed changes to contracts, information on user-fees, and performance assessment of the operator. These are published by Ositran by sector (airports, roads, railroads and ports), project, and year under “Evaluacion Anual” and “Evaluacion Economica”. Third party evaluations are carried out in some cases and are published. EsSalud does not publish performance reports for its healthcare PPPs. Audit reports are not disclosed to the public and fall under the norm of confidentiality.
Information on project including rationale and procurement information	
Project description	For each of its projects, ProlInversión discloses a large volume of information, including the Request for Proposals and other tender documents, and the contract (including preliminary versions) and its annexes. However, the same may not be true of every sector — for instance, PPP contracts for hospitals are not currently disclosed by EsSalud, only information relating to the bidding process and official public announcements can be readily accessed. Performance reports can be publicly accessed through regulatory agencies. Specific mechanisms are set in place to request additional information, for example through transparency portals.
Rationale for project and its procurement as a PPP	No information provided.
Description of tender process or other selection process	Request for proposals and other tender documents are proactively disclosed, for ProlInversión projects (the vast majority of Peru’s PPP projects), including selection criteria. No description of the procurement process is provided.
Contract milestones	Some milestones presented in project description.
Project structure and parties to the contract	Included in project description.
Information on project performance	
Expected and actual levels of performance	Expected levels disclosed in the contract, actual levels disclosed in performance reports.
Tariffs and Pricing	Complete information on user-fees in transport PPPs is disclosed by Ositran, for each project and year.
Information on financial transfers and risk allocation	
Payments between government and private partner	For transport projects, information disclosed in performance reports by Ositran.

Other asset transfers	Not proactively disclosed.
Guarantees and other arrangements that affect financing/costs	Proactively disclosed contracts include annexes (Anexos) with detailed information on guarantees.
Risk allocation matrix	Not disclosed.
Events of default and termination payments	No specific information provided, besides contractual provisions (disclosed in the contract documents).

South Africa

Institutional Context

The PPP Unit in South Africa plays a key role in the procurement and management of PPPs in South Africa. The PPP Unit was established in 2000 following the approval of a Strategic Framework for PPPs by Cabinet in 1999 and the notification of Treasury Regulations for PPPs.¹¹⁰ The first PPP projects in South Africa were executed by the South African National Roads Agency between 1997 and 2000.

Legislation and Policy

In South Africa, access to information on PPP contracts is guided by the Constitution,¹¹¹ the Promotion of Access to Information Act 2 of 2000, the Promotion of Administrative Justice Act 3 of 2000, Standardized Public Private Partnership Provisions, and the Public Private Partnership Manual.

Access to information is a right protected under the Constitution in South Africa. The Constitution provides that “everyone has the right to have access to (1) information which the government has and (2) information that someone else has if they need to protect any of their rights”.¹¹² Information that can be accessed is not limited to the information that the government has, but extends to a private body or any other entity if any person needs such information to protect any of their rights.

The *Promotion of Access to Information Act* details the procedures and processes through which the public may access information.¹¹³ The Act requires reactive disclosure of information. In case of refusal of any request for access to information, “adequate reasons” for refusal need to be stated.¹¹⁴ The South African legislation does not expressly provide for provision of information in summarized form instead of raw data as in the case of the legislation in the United Kingdom.

¹¹⁰ Within the framework of the Public Finance Management Act (Act 1 of 1999)

¹¹¹ *Constitution of the Republic of South Africa, Act 108 of 1996*

¹¹² Section 32, Access to Information, Chapter 2, *Constitution of the Republic of South Africa, Act 108 of 1996*

¹¹³ Section 9(a)(i) and (ii), *The Promotion of Access to Information Act 2 of 2000*

¹¹⁴ Section 25(3)(a), *The Promotion of Access to Information Act 2 of 2000*

The PPP Unit's *Standardized Public Private Partnership Provisions* and the *Public Private Partnership Manual*¹¹⁵ support the government's access to information policy and further elaborate on its application to information disclosure in PPP contracts and the treatment of confidential information in relation to PPP contracts. The presumption is in favor of as much reactive disclosure as is possible with very little information withheld as commercially sensitive or sensitive due to public interest reasons.¹¹⁶ The Standardized Provisions also state clearly the obligation on private entities to make information available.¹¹⁷

All pre-qualified bidders need to sign a code of conduct at the time of the bid¹¹⁸ which includes several conditions including the requirement for information disclosure. The requirement states the need "to recognize the public's right to access information in the interests of administrative justice".¹¹⁹

PPP Database

There is no large database on PPP projects with contract information and performance information available freely to the public. The South African government is currently working on preparing a database, but this may or may not be made available in the public domain. A list is available on its website with brief information. However, the PPP website of the National Treasury¹²⁰ maintains a list of closed projects with the following information given for each project: name of project, name of sponsoring government entity, contract type, duration of project, date of financial close, names of contact official and private partners, financing (debt and equity as well as government contribution), names of financiers, transaction advisors, value to government namely NPV of the unitary charge and NPV of benefit to government. The information, however, starts with projects achieving financial close in December 2001. There is no information on projects implemented earlier.

Disclosure of Contract Documents and Summarized Versions

There is full reactive disclosure of actual signed contracts under the Promotion of Access to Information Act 2000 which provides for full disclosure of all documents in the possession of the government, except confidential information relating to trade secrets, proprietary information or other information which cannot be disclosed. Neither contract documents nor other summarized versions are made available by governments proactively in the case of national PPP projects.¹²¹

115 Accessible at www.ppp.gov.za

116 Clause 95.1, *Standardized Public Private Partnership Provisions*

117 Clause 95.2.1, *Standardized Public Private Partnership Provisions*

118 Module 5, "Procurement", *Public Private Partnership Manual*

119 Annexure 2, Code of Conduct, Module 5, Procurement, *Public Private Partnership Manual*

120 www.ppp.gov.za/Documents/Closed%20PPP%20Projects%20as%20at%20December%202011.pdf

121 The distinction between municipal PPPs and national level PPPs may be noted. All municipal PPP contracts are proactively disclosed by mandate. However, in this review of South Africa we do not deal with municipal PPPs.

Contract Variations

Under South African law, material changes to contracts are called “variations” and must be approved by the National Treasury through processes as provided for.¹²² The variations, like all information in possession of government can be accessed by the public by making a request under the Promotion of Access to Information Act.

Disclosure of Payments, Land Leases and Guarantees

While government guarantees — debt guarantees, demand guarantees, revenue guarantees etc. — are not typical of provisions in South African PPP contracts, in instances where these are provided, they are included in the PPP Agreement which is subject to disclosure on request under the Act.

The transfer of assets is disclosed as part of the contract document upon request as such transfers are listed in the schedules to the contract. In water services and toll-road concessions, the contract describes the details of the rights granted to the private party to collect fees. The government’s capital contributions are disclosed. All toll-road subsidies or for that matter all other operating subsidies are disclosed.

Performance Reports and Assessments

The PPP Unit in South Africa has recently started user surveys which are available to the public on request. In addition, the unit has published case studies of healthcare PPPs which are proactively disclosed. Other reports, such as reports presented by the PPP operators to government under the contract clauses are discussed in steering committee meetings along with the reports presented by contract managers and are available to the public on request.

The Auditor-General’s powers of audit extend to PPPs: regularity, performance, as well as forensic audit of PPPs may be conducted. All audit reports of PPPs are placed in the public domain.¹²³ The Constitution,¹²⁴ the Auditor General Act¹²⁵ and the PPP Manual¹²⁶ state that all audit reports must be made public.

122 Treasury Regulation 16.8

123 All audit reports are available at <http://www.agsa.co.za/>

124 Section 188, *Constitution of the Republic of South Africa 1996*

125 Section 3, *Auditor General Act 1995*

126 Module 7, *Auditing PPPs, Public Private Partnership Manual*

Redactions

The Act lists the grounds for refusal of access¹²⁷ to records. Some of these which could be relevant in the context of PPP contracts would be:

- Commercial information of a third party including protection of trade secrets and financial, commercial, scientific or technical information the disclosure of which may affect the commercial or financial interest of the provider;
- Confidential information, the disclosure of which would breach an agreement with a third party;
- Information relating to the economic interests or financial welfare of the Republic;
- Mandatory protection of research information of a third party and protection of research information of a public body;
- Operation of public bodies – a public entity may refuse a request for access to a record containing (i) an opinion, advice, report or recommendation obtained or prepared; or (ii) an account of a consultation, discussion or deliberation that has occurred for the purpose of the formulation of a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law. A record may not be refused insofar as it consists of an account of, or a statement of reasons required to be given in accordance with section 5 of the Promotion of Administrative Justice Act, 2000;
- Manifestly frivolous or vexatious requests or substantial and unreasonable diversion of resources.

Validation of Proactively Disclosed Information

Since hardly any information is disclosed proactively in South Africa, the procedure for validation of information before display has not been a matter of concern so far.

Table 13 - Disclosure of Information on PPP Projects and Contracts – South Africa

Documents and reports disclosed	
Contract and associated agreements	Contracts, and their variations, are subject to reactive disclosure.
Summary of contract and project	No summaries are provided.
Reports on implementation performance	A few case studies of healthcare PPPs have been proactively disclosed. Other reports, such as reports presented by the PPP operators to government, are subject to reactive disclosure. All audit reports must be made public.

¹²⁷ Chapter 4, Grounds for Refusal of Access to Records, *The Promotion of Access to Information Act 2 of 2000*

Disclosure of Project and Contract Information in Public-Private Partnerships

Information on project including rationale and procurement information	
Project description	Basic information proactively disclosed.
Rationale for project and its procurement as a PPP	Reactive disclosure.
Description of tender process or other selection process	Not reported.
Contract milestones	Not reported.
Project structure and parties to the contract	Proactively disclosed in National Treasury website.
Information on project performance	
Expected and actual levels of performance	Expected levels subject to reactive disclosure. Actual levels not reported.
Tariffs and Pricing	Reactively disclosed.
Information on financial transfers and risk allocation	
Payments between government and private partner	Contracted capital contributions and other payments are described in reactively disclosed contracts. Actual disbursements not actively reported.
Other asset transfers	Not proactively reported.
Guarantees and other arrangements that affect financing/costs	Government guarantees are not typical, but when provided should be included in the contracts, which are reactively disclosed.
Risk allocation matrix	Not disclosed.
Events of default and termination payments	Reactively disclosed.

United Kingdom

Institutional Context

The HM Treasury in UK plays a major role vis-à-vis PPP policy. There are other devolved government PPP policy units, support bodies such as 4ps which provide PPP support to local authorities, Infrastructure UK which assists in PPP implementation and department private finance units which also play a major role in the procurement and implementation of PPPs. The supreme audit office, NAO, has a key role in auditing PPPs. Transport, health and education sectors account for a large proportion of PPP projects by value. The procurement and management of PPPs is devolved with different levels of government and different agencies involved directly, for example, a large number of school projects that have been undertaken by local authorities and many hospital projects that have been undertaken by National Health Service trusts. The range of British PPP contracts that may fall under the classification of PPPs encompasses a significant diversity, from the so-called PFI (Private Finance Initiative, the most relevant set of PPP contracts in the country) and PPPs, to franchises and so-called privatized public services (such as prisons).

Legislation and Policy

The British disclosure policy changed significantly during the past few years, from scarce reactive reporting to the public (and even to the Parliament) to a broad proactive disclosure of new contracts (avoiding subtle arguments regarding confidentiality, commercial interests, and the private characteristics of PPP contracts). Currently in the United Kingdom, the public has access to all documents, other than exempt information¹²⁸, held by a public authority, under the provisions of the Freedom of Information Act 2000¹²⁹. The new transparency regime started by the government in 2010¹³⁰ makes the provisions of the FOI Act less important as far as new contracts are concerned, as what can be disclosed under the FOI Act will now be disclosed proactively. However, the FOI Act still retains its importance due to the lack of retrospective

128 Section 43, *Freedom of Information Act 2000*

129 Section 1(1), *Freedom of Information Act 2000*

130 See www.cabinetoffice.gov.uk/content/transparency-overview for details of policy

applicability of the new policy. Old contracts which would include current contracts will be available only under the FOI Act unless departments decide to proactively publish these. We have, therefore, examined the provisions of the FOI Act, the Code of Practice on the discharge of public authorities' functions under Part I of the Freedom of Information Act 2000¹³¹ and the standard provisions before going on to the new transparency guidance issued by the government.

'Public Authority'¹³² is clearly defined in the FOI Act, with the scope for designating additional organizations/bodies as public authority, specifically those entities that exercise "functions of a public nature" or provide "under a contract made with a public authority any service whose provision is a function of that authority."¹³³ PFI contractors are not included within the definition of "public authority" under the FOI Act and have not been designated as public authorities so far. The Government carried out a consultation in 2007 in order to consider the suitability of bringing additional entities under the purview of the FOI Act. The consultation paper discussed the pros and cons of designating various types of entities under the FOI Act.¹³⁴ The Government, however, concluded on the basis of response to the consultation that "no general expansion of FOI in relation to contractors" was necessary at that point of time.¹³⁵

The Code of practice provides guidance to public authorities on provision of information under the FOI Act¹³⁶. Of particular interest to us is the guidance in the code relating to "inclusion in contracts entered into by public authorities of terms relating to the disclosure of information".

The standard provisions enable an authority to access most of the information or even all of the information and documents available with the PPP project/provider – information available with the PFI/PPP contractor but not with the public authority is covered under the FOI Act through the standard provision for making accessible to the public "information that the Contractor is holding on its (the Authority's) behalf and which the Authority does not hold itself".¹³⁷ Specifically listed is information related to revenues, expenditure and financing.

The guidance on the new transparency regime for central government¹³⁸ contracts and local government contracts¹³⁹ details the processes and procedures for placing contract information online along with discussion on exemptions.

A Public Sector Transparency Board has been established in the Cabinet Office to support government's commitments to make data available. For monitoring purposes, departments are required to report publication through the Cabinet Office to the Board around the fifth of every month.

131 Referred to as "the Code" or "the Code of Practice" elsewhere in this section

132 Section 3 (1) , *Freedom of Information act 2000*

133 Section 5 (1) (a), 5 (1) (b) and 5 (2), *Freedom of Information Act 2000*

134 *Freedom of Information Act: Designation of Additional Public Authorities, 25th October, 2007*

135 *Freedom of Information Act 2000: Designation of Additional Public Authorities, Response to Consultation, CP(R) 27/07, 16 July 2009*

136 Secretary of State for Constitutional Affairs' *Code of Practice on the discharge of public authorities' functions under Part I of the Freedom of Information Act 2000, issued under section 45 of the Act, November 2004*, presented to Parliament by the Secretary of State for Constitutional Affairs pursuant to section 45(5) of the Freedom of Information Act 2000

137 Paragraph 26.10, *Standardization of PFI Contracts Version 4, March 2007*

138 *Publication of New Central Government Contracts, Guidance Note, updated September 2011*

139 *Local Transparency - A Practitioners Guide to Publishing New Contracts and Tenders Data, March 2011*

PPP Database

HM Treasury publishes UK PFI data twice a year. This is unaudited information on signed projects and projects which are in procurement. Departmental estimates of the total value of projects in procurement which are expected to reach preferred bidder stage in each of the next two financial years are also published. Information on unitary charges expected to be paid on signed contracts each financial year is updated and published twice yearly.

The following information on signed projects is published — commissioning entity, region, constituency, date of financial close, whether the project is in operation or construction stage, period of contract, balance sheet treatment under different accounting systems, estimated capital value, undiscounted unitary charge payments each year over project cycle, details of the current ownership in the SPV along with names and shares of the equity holders. HMT started tracking changes in PFI equity ownership in 2008 but the information includes only change in ownership and percentage shareholding, but nothing about the transaction itself or the premium earned by the party exiting the SPV or how it might affect the unitary payments committed or already paid by government.

On projects in procurement, brief data relating to commissioning entity, region, date of publication in the Official Journal of the European Union, expected date of preferred bidder, estimated date of financial close, operational period of contract and estimated capital value is given. The data relates to more than twenty departments.

This information is updated twice a year for new, terminated and merged projects or those that can no longer be categorized as PFI, and for existing projects. However, we could not find old archived databases pertaining to each data collection point. As mentioned earlier, beginning January 2011, all new contracts (redacted for confidential information) are made available on a dedicated site.¹⁴⁰

The Scottish government discloses some details of its PFI/PPP projects on its website¹⁴¹ — consolidated information on done deals by sector and by type of project with number of projects and capital value, done deals project wise with sector, status — whether operational, contract term, capital value, consortium name, procuring agency, dates of preferred bidder, financial close, service start, details of senior debt provider, the last being blank in many cases.

Disclosure of Contract Documents or Summarized Versions

All old PPP/PFI contracts can be made available on request under the Act. Information requested under the FOI Act. Information can be provided in the form of a summary rather than in raw form if the applicant

¹⁴⁰ transparency.number10.gov.uk/transparency/contract-finder/search

¹⁴¹ www.scotland.gov.uk/Topics/Government/Finance

so desires.¹⁴² This is important as it ensures that the public is able to get contract information in an easy to understand format.

There is obvious inconsistency in disclosure of contract information by different departments and entities. There have been cases where entire contracts have not been disclosed despite requests under the FOI Act, with Information Commissioners having to direct departments/agencies to disclose information, such as in the case of the Lothian Health Trust which was asked by the Information Commissioner in Scotland to disclose a PFI contract after it had refused to do so on grounds on confidentiality, but had been unable to explain why an entire contract should be considered confidential.

As far as information on old PPP contracts is concerned, Transport for London (TfL) has made available on its website the full documents of the three former PPP contracts, the Tubelines JNP contract, Metronet BCV contract and the Metronet SSL.¹⁴³

All new¹⁴⁴ central government contracts over £10,000¹⁴⁵ are to be published in full, including all performance indicators and penalty measures. Contracts must be published after 20 days from the date of award, leaving out any standstill period.¹⁴⁶ Only limited information is expected to be withheld. Local governments are encouraged to publish contracts over £500. Publication of contracts must include specification, terms and conditions, associated schedules (which may include the winning tenderer's bid), the overall pricing but in some cases not necessarily a breakdown of pricing structures.

According to the new British PPP policy announced end of 2012,¹⁴⁷ the transparency approach requires the private sector to provide equity return information for publication, and the Treasury will publish an annual report detailing project and financial information on all projects where Government holds a public sector equity stake.

Contract Variations

Variations to contracts must be made available under the FOI Act for old contracts. Under the new transparency regime, variations to contracts need to be published only when the variation changes the contract significantly resulting in a new contract.¹⁴⁸ Similarly, renegotiations to contracts resulting in new contracts are required to be published.¹⁴⁹ When contracts are terminated the information is required to be stated along with the reason for termination where possible.¹⁵⁰

¹⁴² Section 11 (1) C, *Freedom of Information Act 2000*

¹⁴³ See www.tfl.gov.uk/tfl/corporate/modesoftransport/tube/pppcontracts/0_0_0_0.asp

¹⁴⁴ Paragraph 2.8 of the guidance on *Publication of New Central Government Contracts* states that the requirement is not retrospective

¹⁴⁵ Paragraph 2.11, *Publication of New Central Government Contracts*, Guidance Note, updated September 2011

¹⁴⁶ Paragraph 8.1, *Publication of New Central Government Contracts*, Guidance Note, updated September 2011

¹⁴⁷ See http://www.hm-treasury.gov.uk/infrastructure_pfireform.htm.

¹⁴⁸ Paragraph 2.12, *Publication of New Central Government Contracts*, Guidance Note, updated September 2011

¹⁴⁹ Paragraph 2.18, *Publication of New Central Government Contracts*, Guidance Note, updated September 2011

¹⁵⁰ Paragraph 2.19, *Publication of New Central Government Contracts*, Guidance Note, updated September 2011

Payments, Leases, Guarantees

Some departments proactively display information on payments, leases and guarantees. Defra lists information on “PFI credits” approved to local authorities in 32 projects with project status and name of contractor. The UK PFI database makes data on unitary payments to providers available in a database updated twice yearly.

Information on leases and guarantees is now being made available as part of the new transparency regime where contracts are being published in full. For the old contracts, they would be available under the FOI Act.

Performance Reports and Assessments

PFI/PPP performance is assessed by the NAO from time to time apart from reports submitted by the PPP operator to the authority. All of the NAO’s publications are on its website¹⁵¹ and these include reports on several PFI projects, individual projects as well as cross cutting PFI issues. NAO reports provide a rich source of information on PPP project performance. Other than NAO reports, we do not typically find detailed performance reports that are proactively disclosed.

The Defra website provides links to summary information on waste disposal authority data, recycling and composting performance and targets, project milestones and annual environmental indicators. The Defra has also published an assessment of 18 of its PFI projects based on deliverability of project, benefits delivered relative to funding and timing of benefit.¹⁵²

Overall, substantial performance data appears to be available in the United Kingdom relative to other countries. However, data available for different projects is not uniform in quality and depth.

Redactions

The FOI Act provides for exemptions from disclosure on 23 grounds, including commercial confidentiality, with two categories of exemptions, absolute exemptions and qualified exemptions.¹⁵³ For qualified exemptions, the public interest test must be applied.¹⁵⁴ There is guidance¹⁵⁵ under the Act on the exemptions under section 43 of the Act. Especially relevant for our purpose is the following:

“A department’s, or other body’s, commercial interests might, for example, be prejudiced where a disclosure would be likely to: damage its business reputation or the confidence that customers, suppliers or investors

¹⁵¹ www.nao.org.uk/publications

¹⁵² *Spending Review 2010 – Changes to Waste PFI Program – Supporting Analysis*, available at archive.defra.gov.uk/environment/waste/localauth/funding/pfi/documents/pfi-supporting-analysis-waste101206.pdf

¹⁵³ Section 2, Freedom of Information Act, 2000

¹⁵⁴ Section 2, Freedom of Information Act, 2000

¹⁵⁵ Freedom of information guidance, exemptions guidance, Section 43 - Commercial interests

may have in it have a detrimental impact on its commercial revenue or threaten its ability to obtain supplies or secure finance weaken its position in a competitive environment by revealing market-sensitive information or information of potential usefulness to its competitors”¹⁵⁶.

The Code discusses the issue of prior consultation with third parties in order to, among other things, categorize information as exempt information or otherwise.¹⁵⁷ The Code also gives detailed guidance on confidentiality obligations¹⁵⁸ vis-a-vis the responsibility to supply information. The guidance makes disclosure or otherwise specific to each contract, with a presumption that most of the information would be disclosed.

The provisions in the FOI Act and the Code are further supported by standard contract provisions on confidentiality and the disclosure of information in PFI/PPP contracts. The standard contract clauses provide some specific language for use in contracts but, “the contract should determine whether information provided by the Authority to the Contractor and vice versa is to be treated as confidential. It should also specify the extent to which details in the contract are confidential”.¹⁵⁹

The standard provisions state that “the only commercially sensitive information may be the financial provisions (e.g. the price and the priced elements of the payment mechanism)¹⁶⁰. It goes on to state that financiers would likely desire to withhold information on, for example, the pricing of the loan. While the FOI does not presume that specific financial information is confidential, standard provisions indicate that pricing will often be commercially sensitive.

The standard provisions, however, recognize the benefits of disclosing contractual terms.¹⁶¹ The provisions note that listing on a stock exchange or a project company financing itself through the issue of bonds would mean disclosure of an immense amount of financial information. The provisions also highlight that confidentiality provisions can be disclosed to audit. Audit is done by the National Audit Office and the Comptroller and Auditor General (C&AG), primarily in carrying out value for money reviews and in examining the economy, efficiency and effectiveness of the project or program under review. Audit can in turn include pricing or any other financial information in its reports which would be placed in the public domain. The standard provisions also specify that the C&AG can examine the contractor’s records.¹⁶²

Under the new transparency regime, redactions of contractual text are permitted in accordance with the exemptions provided under the FOI Act.¹⁶³ Contractors are given the opportunity to identify what they regard as sensitive information.¹⁶⁴

¹⁵⁶ Freedom of information guidance, exemptions guidance, Section 43 - Commercial interests

¹⁵⁷ Paragraph 25, Part IV, Secretary of State for Constitutional Affairs’ *Code of Practice on the discharge of public authorities’ functions under Part I of the Freedom of Information Act 2000*, issued under section 45 of the Act, November 2004, presented to Parliament by the Secretary of State for Constitutional Affairs pursuant to section 45(5) of the Freedom of Information Act 2000

¹⁵⁸ Part V, Secretary of State for Constitutional Affairs’ *Code of Practice on the discharge of public authorities’ functions under Part I of the Freedom of Information Act 2000*, issued under section 45 of the Act, November 2004, presented to Parliament by the Secretary of State for Constitutional Affairs pursuant to section 45(5) of the Freedom of Information Act 2000

¹⁵⁹ Paragraph 26.5, *Standardization of PFI Contracts Version 4, March 2007*

¹⁶⁰ Paragraph 26.8.2, *Standardization of PFI Contracts Version 4, March 2007*

¹⁶¹ Paragraph 26.9.2, *Standardization of PFI Contracts Version 4, March 2007*

¹⁶² Paragraph 26.9.3, *Standardization of PFI Contracts Version 4, March 2007*

¹⁶³ See www.justice.gov.uk/guidance/foi-exemptions-guidance.htm

¹⁶⁴ Section 6, Exemptions and Redactions, *Publication of New Central Government Contracts*, Guidance Note, updated September 2011

Validation of Proactively Disclosed Information

While the guidance on publication of new central government contracts does not cover the issue of validation of proactively disclosed information, similar guidance for local transparency¹⁶⁵ contains step-by-step instructions on processing data for publication. Data is extracted from the contracts register, and matched to the template¹⁶⁶ fields and checked for inaccuracies at this stage followed by redactions, internal review and sign off. There does not, however, seem to be any provision for audit or external review of the data. The validation here is internal to the organization in possession of the data and responsible for publishing the data. The PFI database is also not subject to any independent validation process.

Table 14 - Disclosure of Information on PPP Projects and Contracts – United Kingdom

Documents and reports disclosed	
Contract and associated agreements	Contracts signed since January 2011 are available at transparency.number10.gov.uk/transparency/contract-finder/search , as well as their variations. Old contracts and their variations must be requested under the FOI Act. However, where variations and renegotiations result in new contracts, it is presumed that the new transparency policy will apply. Disclosure is subject to redactions that may be significant for old contracts. Public entities have interpreted commercially sensitive information in various ways leading to different degrees of disclosure or refusal to disclose in specific cases.
Summary of contract and project	No summaries are proactively provided, but may be requested by the public.
Reports on implementation performance	Performance reports by PPP operators, contract managers and third party assessments and user surveys are available upon request under the Act. Performance data of individual PFI/PPP projects are available proactively on some of the department websites, e.g. Defra for waste projects. All audit reports are available online (www.nao.org.uk/Recommendation).
Information on project including rationale and procurement information	
Project description	Not proactively produced.
Rationale for project and its procurement as a PPP	Not proactively disclosed.
Description of tender process or other selection process	Not actively reported.
Contract milestones	Some basic information is proactively disclosed.
Project structure and parties to the contract	Basic information is proactively disclosed.

¹⁶⁵ Section 3-5, *Local Transparency — A Practitioners Guide to Publishing New Contracts and Tenders Data*, March 2011

¹⁶⁶ Appendix A: Contract Register Data Template, *Local Transparency — A Practitioners Guide to Publishing New Contracts and Tenders Data*, March 2011

Disclosure of Project and Contract Information in Public-Private Partnerships

Information on project performance	
Expected and actual levels of performance	A significant volume of data on performance is now being proactively disclosed, but not homogeneously.
Tariffs and Pricing	Proactively disclosed in the contract, for new contracts. Reactively disclosed, for old contracts.
Information on financial transfers and risk allocation	
Payments between government and private partner	Unitary payments under PFI contracts project-wise are disclosed proactively on HM Treasury website. ¹⁶⁷ Other transfer of assets will be published online where these are part of contract for new contracts and must be requested under the FOI Act for old contracts. “PFI credits” approved to local authorities in 32 waste management PFI projects are published on Defra website. ¹⁶⁸
Other asset transfers	No specific disclosure regime.
Guarantees and other arrangements that affect financing/costs	Disclosure as part of the contract document, available online for new contracts starting January 2011 and can be disclosed under the FOI Act for old contracts.
Risk allocation matrix	Not disclosed.
Events of default and termination payments	Proactively disclosed in the contract, for new contracts. Reactively disclosed, for old contracts.

¹⁶⁷ http://www.hm-treasury.gov.uk/ppp_pfi_stats.htm

¹⁶⁸ <http://defra.gov.uk/environment/waste/local-authorities/widp/pfi-projects/>

Annexures

Annexure 1: List of Websites

Australia: New South Wales

- tenders.nsw.gov.au
- www.treasury.nsw.gov.au/www.
- www.oic.nsw.gov.au/oic_agencies.html
- www.nswprocurement.com.au/Tenders/Disclosure-of-Information.aspx
- www.infrastructureaustralia.gov.au/public_private/

Australia: Victoria

- www.tenders.vic.gov.au
- www.vgpb.vic.gov.au.
- www.contracts.vic.gov.au
- www.partnerships.vic.gov.au
- www.vago.vic.gov.au.
- www.audit.vic.gov.au/
- www.infrastructureaustralia.gov.au/public_private/

Brazil

- www.marco.artigo19.org
- www.planejamento.gov.br/hotsites/ppp/conteudo/
- www.planalto.gov.br/ccivil_03/constituicao/constitui%C3%A7ao.htm
- www.senado.gov.br/atividade/materia/getPDF.asp?t=98636&tp=1
- www.ppp.mg.gov.br/unidadeppp
- www.antt.gov.br/relatorios/rodoviario/relatorios.asp
- www.sefaz.ba.gov.br/

Canada: British Columbia

- www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/96165_00
- www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_00023_01
- www.partnershipsbc.ca/files/documents/pbc-disclosure-guidance-19jan10-update_000.pdf
- www.partnershipsbc.ca/files-4/projects.php
- www.partnershipsbc.ca/index.php
- www.bcauditor.com

Chile

- www.leydetransparencia.gob.cl/ley-de-transparencia/que-es
- www.concesiones.cl

India

- <http://www.nhai.org/concessionagreement>
- http://idd.kar.nic.in/docs/MCA_Ports.pdf
- <http://www.nhai.org/procurement>
- http://www.nhai.org/procurement_current.asp
- <http://www.nhai.org/tenderindex2011.htm>
- www.nhai.org/rmenu
- www.tenderwizard/NHAI
- www.rti.india.gov.in/cic_decisions
- delhihighcourt.nic.in/

Peru

- www.peru.gob.pe/normas/docs/LEY_27806.pdf
- www.proinversion.gob.pe/
- www.essalud.gob.pe/
- www.ositran.gob.pe/

South Africa

- www.PPP.gov.za
- www.agsa.co.za/

United Kingdom

- www.hm-treasury.gov.uk
- <http://defra.gov.uk/environment/waste/local-authorities/widp/pfi-projects/>
- http://www.tfl.gov.uk/tfl/corporate/modesoftransport/tube/pppcontracts/0_0_0_0.asp
- <http://www.scotland.gov.uk/Topics/Government/Finance>
- <http://www.cabinetoffice.gov.uk/content/transparency-overview>
- <http://www.communities.gov.uk/corporate/transparencingovernment/contracttenders/>
- <http://www.communities.gov.uk/corporate/transparencingovernment/transparency>
- www.cabinetoffice.gov.uk/resource-library/guidance-transparency
- www.cabinetoffice.gov.uk/sites/default/files/resources/PPN%200711%20Guidance%20on%20Transparency.pdf
- www.businesslink.gov.uk/bdotg/action/layer?topicId=1086319968
- transparency.number10.gov.uk/transparency/contract-finder/search
- financialsanctions.hm-treasury.gov.uk/d/pfi_sopc4markedupch1-10_210307c.pdf
- www.cabinetoffice.gov.uk/sites/default/files/resources/Guidance%20-%20Publication%20of%20new%20central%20government%20contracts_0.pdf
- lgnewcontracts.readandcomment.com/files/2011/04/Local-transparency-a-practitioners-guide-to-publishing-new-contracts-110331.pdf

Annexure 2: List of Legislation and Policy

British Columbia

- Freedom of Information and Protection of Privacy Act 1993
- Budget Transparency and Accountability Act, 2000
- Procurement Related Disclosure for Public Private Partnerships, updated January 2010, Partnerships British Columbia

India

- RTI Act 2005
- Draft National PPP Policy 2011
- Draft PPP Rules 2011
- C&AG (Duties, Powers and Conditions of Service) Act 1971
- PPPs in Infrastructure: Public Auditing Guidelines, Comptroller and Auditor General of India, October 20, 2009

New South Wales

- National PPP Guidelines, Vol 6: Jurisdictional Requirements, New South Wales Requirements, June 2009
- Government Information (Public Access) Act 2009 No. 52
- Working with Government, Guidelines for Privately Financed Projects, December 2006
- Disclosure of Information concerning tenderers and outcome of the tender process: based on Premier's Memorandum, 2007-01

South Africa

- Constitution of the Republic of South Africa No. 108 of 1996
- Promotion of Access to Information Act 2 of 2000

- Promotion of Administrative Justice Act 3 of 2000
- Standardized Public Private Partnership Provisions
- Module 5, Procurement, PPP Manual
- The Auditor General Act, 1995
- Auditing of PPPs, Manual 7

United Kingdom

- Freedom of Information Act 2000
- Secretary of State for Constitutional Affairs' Code of Practice on the discharge of public authorities' functions under Part I of the Freedom of Information Act 2000, Issued under section 45 of the Act, November 2004, Presented to Parliament by the Secretary of State for Constitutional Affairs pursuant to section 45(5) of the Freedom of Information Act 2000
- Chapter 26 of Standardization of PFI Contracts Version 4, March 2007
- Freedom of Information Act 2000: Designation of additional public authorities, Response to Consultation, CP(R) 27/07, 16 July 2009
- 4ps Guidance for Local Authorities, Disclosure of Information and Consultation with Staff and Other Interested Parties, March 2005
- Publication of New Central Government Contracts, Guidance Note, updated September 2011
- Local Transparency - A Practitioners Guide to Publishing New Contracts and Tenders Data, March 2011

Victoria

- Freedom of Information Act, 1982
- Partnerships Victoria Public Disclosure Policy, March 2007
- National PPP Guidelines, Volume 6, Jurisdictional Requirements, Partnerships Victoria Requirements, January 2010, Ver 2
- Statement of Premier Steve Bracks, Ensuring Openness and Probity in Victorian Government Contracts, a Policy Statement, October 2000



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