

The Principles on Commercial Transparency in Public Contracts

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The Principles on Commercial Transparency in Public Contracts

The Working Group on Commercial Transparency in Public Contracts

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Foreword

Every year, governments worldwide sign contracts worth trillions of dollars. They buy textbooks and fighter planes, hire consultants, commission firms to run railways and build bridges, take out loans and give guarantees, grant mining concessions, and issue licenses to use the public airwaves. Each time, legal documents specify who will pay how much to whom for what. These contracts commit taxpayer resources and national wealth, often for many years. They help determine the quality of vital government services as well as the financing that governments will have in the future. Citizens should know what is in those contracts—not least, to be able to hold governments to account. But they can only do so if the contracts are published.

Open contracting is centered on the idea that government contracts should be proactively published in a form that makes the information in those contracts easily available to firms and citizens. Open contracting regimes have been launched by governments worldwide, including in Ukraine, the UK, Mexico City, Nepal, and Nigeria. Such regimes have proven to be a powerful tool to improve procurement outcomes and expose poor contracting practices. Experience to date suggests that contract publication can be straightforward and inexpensive, posing little bureaucratic burden.

But there are cases in which full publication of all the information in government contracts can be against the public interest. This includes instances where full publication would reveal personal information or harm national security or result in the release of information that is commercially valuable—designs, processes, and financial information that help companies compete profitably. If revealing commercially sensitive information would deter firms from bidding or offering innovative approaches to delivering goods and services, it can be in the public interest to keep the information confidential. If, however, sharing it

attracts additional bidders and makes markets more open and transparent, this is in the public interest.

Commercial sensitivity is frequently used as a reason for denying or only partially responding to freedom-of-information requests for contracts or redacting material from contracts that are published. However, there is little guidance and very mixed practice regarding when it is in the public interest to publish or to redact information that is potentially commercially valuable but does not constitute a trade secret.

The Center for Global Development Commercial Transparency in Public Contracts Working Group was convened last year to help fill that gap. The organization brought together individual experts with experience in business, government agencies, and civil society to try to build consensus around a set of principles regarding when contract information might justifiably be redacted on the grounds of commercial confidentiality and how the redaction process should work. A draft set of the principles was shared with stakeholder groups in October last year before a final round of revisions in December. This report presents the 10 Principles developed by the Working Group.

I see agreeing the Principles as a first step. I hope that governments, firms, and civil society groups will come forward to support and endorse the Principles under the umbrella of the open contracting movement, and that governments will use them to inform rules and processes for contract publication and redaction.

These Principles build on a key concept: information should be kept confidential on the grounds of commercial sensitivity only when it is in the public interest to do so. I hope you find them useful.

Caroline Anstey, Chair
CGD Working Group on Commercial
Transparency in Public Contracts

Summary of the Principles

Transparency by design: *Transparency should be the norm for all government contracts, particularly regarding information on what is being exchanged and for what price. Contracting systems should be designed to support proactive publication of contracts as open data.*

1. Public contracting should be designed for transparency and efficiency.
2. Full contract publication should be the norm.
3. Information needed to judge value for money should be disclosed.

Exceptions in the public interest: *Redactions on the basis of commercial sensitivity should only be justified where the public interest in withholding information is greater than the public interest in having that information published. The assessment should take into account both any commercial harm to the contractor and the broader benefits of transparency to markets and public trust.*

Where exceptions to publication are considered:

4. Information should only be redacted for reasons of commercial sensitivity when the public interest in withholding information is greater than the public interest in disclosure.
5. The public interest test should take into account the wider economic benefits of the sharing of commercial information, as well as the case for accountability and the public's right to know.
6. All redactions should be clearly marked with the reason for redaction.

A clear and robust process: *Governments should issue detailed guidance on commercial sensitivity principles and exemptions, put in place systems to support publication, ensure that redaction is time-limited, and use other oversight mechanisms to compensate for information withheld from publication.*

7. Governments should issue clear guidance to public entities, agencies, and firms on contract publication and when information may be exempted from publication for commercial sensitivity reasons.
8. Where redaction is potentially allowed, there should be a clear process for determining what is redacted, why, for how long, and with what appeals process.
9. There should be a system for ensuring that contracts and contract information are in fact disclosed in practice.
10. Where exemption to disclosure of information is granted for commercial sensitivity reasons, this should be grounds for increased scrutiny through other oversight mechanisms.

The full principles are on pages 12–15 of this report.

Section 1.

Background and Concepts

The Case for Commercial Transparency in Public Contracting

Governments around the world engage with commercial partners in relationships to buy, sell, lease, and contract. The effectiveness of these processes is critical for the delivery of public services and management of public resources. With government procurement worth around US\$10 trillion each year, and natural resource rents worth US\$5 trillion, the stakes are high. There is a strong case for governments to publish critical documents in the life cycle of public contracting, including the contracts themselves. Such “open contracting” can improve decision making within the government, level the playing field for contracting firms, increase trust and competition, reduce prices, and ultimately improve the value for money of outcomes.¹

While the contract itself is only one document in the cycle of contracting, it holds critical details about the terms of the deal: what goods, services, or assets were bought or sold and for what price, and who the contractor is.

Having the details of contracts in the public domain can improve competitive tendering by attracting bidders and demonstrating that the outcome is fair. This is critical for achieving value for money. In the EU, single-bidder contracts are on average 7 percent more expensive than contracts with multiple bidders.²

1. Kenny, Charles, with Jonathan Carver. 2012. *Publish What You Buy: The Case for Routine Publication of Government Contracts*. CGD Policy Paper 011. Washington, DC: Center for Global Development. https://www.cgdev.org/sites/default/files/1426431_file_Kenny_Publish_What_You_Buy_FINAL_0.pdf. Karanicolas, Michael. 2018. *The Costs of Secrecy: Economic Arguments for Transparency in Public Procurement*. Washington, DC: Open Government Partnership.

2. Bauhr, Monika, Agnes Czibik, Mihaly Fazekas, and Jenny de Fine Licht. 2017. *Lights on the Shadows of Public Procurement: Transparency in Government Contracting as an Antidote to Corruption?* DIGIWHIST project. Kecskemét, Hungary: AKKI. <http://digiwhist.eu/wp-content/uploads/2017/09/D3.2-Light-on-the-Shadows-of-Public-Procurement.pdf>.

Across a large pool of European countries in 2015, around 40 percent of all high-value procurement tenders attracted only one or two bids, and only 3 percent of all winning companies had their offices outside the procuring country.³ Evidence from Slovakia suggests that procurement transparency reforms that included contract publication were associated with an increase in competition on the average government tender, from 2.3 bids in 2009 to 3.6 bids in 2013.

Contract publication also allows legislators and the public to scrutinize the terms of public contracts and monitor their subsequent performance, enhancing accountability and reducing the opportunity for malfeasance to be hidden. This is critical because corruption in public contracting is a major means for illicit enrichment, state capture, and the undermining of public institutions. Fifty-seven percent of foreign bribery cases prosecuted under the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention involved bribes to obtain public contracts. Practices range from rigging the tendering process through noncompetitive contracts awarded directly to favored firms, to awarding contracts to the lowest-cost bidder but then allowing costs to multiply during implementation. There is also the different problem of collusion – where cartels of bidders secretly agree to carve up the market and fix prices. Even in the absence of corruption or collusion, lack of knowledge or lack of incentive can result in “passive waste” through purchasing that is more expensive or of a lower quality than could otherwise be achieved.

3. Cingolani, Luciana, and Mihaly Fazekas. 2017. *Administrative Capacities That Matter: Organisational Drivers of Public Procurement Competitiveness in 32 European Countries*. DIGIWHIST project. Berlin: Hertie School of Governance. http://digiwhist.eu/wp-content/uploads/2017/12/D3.5-Admin-capacities-procurement-Cingolani-Fazekas_revised.pdf.

Governments are increasingly moving to publish the text of all or some public contracts, and it is an idea that has gathered wide support (including from the World Bank; governments such as those of Colombia, France, Mexico, UK, Ukraine, and Nigeria; and a wide range of civil society organizations, collaborating in the Open Contracting Partnership).

These Principles are intended to support action and engagement toward improving commercial transparency in public contracts among policymakers and information regulators, public agencies, international organizations, firms, and information users.

What Do We Mean by “Public Contract”?

A contract is a promise or set of promises that are legally enforceable and, if violated, allow the injured party access to legal remedies. “Public contracts” refer to contracts in which at least one party is a government, public agency, or state-owned enterprise. Freedom of information (FOI) laws often include a definition or list of relevant public agencies in a jurisdiction. These typically include central, local, and municipal government departments; police and armed forces; publicly funded schools, universities, hospitals, and museums; and publicly owned utilities and transport agencies.

International intergovernmental organizations such as UN agencies and the World Bank are not covered by national FOI laws but should also arguably provide access to information along similar lines.⁴ In practice, some international organizations have policies and processes for enabling access to information, and others have yet to develop them.

Contracts themselves include licenses, concessions, permits, grants, loan agreements, or any other documents

exchanging public goods, assets, or resources. In the extractives sectors, for example, they may be called mineral development agreements, exploration and exploitation agreements, or investment agreements. They include all annexes, schedules, and documents attached to or referenced as part of the legally enforceable contract, as well as any amendments made after the initial contract is signed.

The Principles concern the publication of any and all of these types of contracts, once signed.

Frameworks for Publication

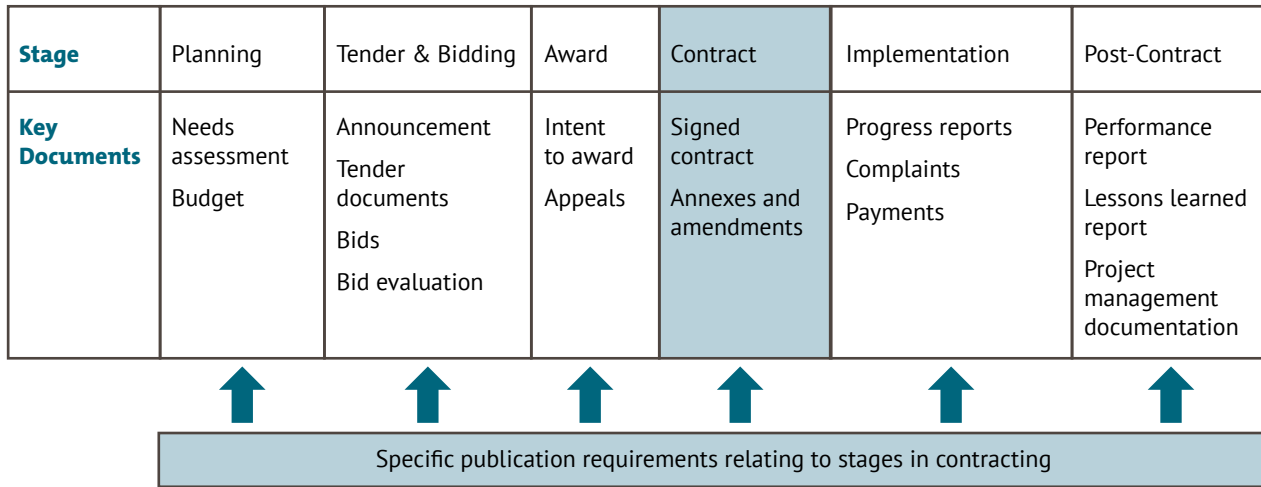
Whether contracts are published and whether specific pieces of information are redacted depends on the applicable policy and legal frameworks and how they interact (Figure 1). These can be at both the national and local level and can also reflect the processes and cultures of the agencies themselves. Relevant legal frameworks include FOI laws, laws concerning trade secrets, and public procurement laws and policies, as well as access to information and open-contracting policies of international organizations.

FOI laws and policies set general rules, including for exemptions. Procurement laws and policies are more targeted, setting proactive policies regarding when contracts or other pieces of information will be published. For example, Ukraine’s public procurement system is based on the principle of absolute transparency: “Everyone sees everything.” All information related to public procurement must be open and freely accessible online, available in an open data format.

The Principles have been developed to provide general guidance, both in cases where contract transparency is governed by general FOI laws and in cases where it is covered by specific transparency requirements.

4. Global Transparency Initiative. 2007. *Transparency Charter for International Financial Institutions: Claiming Our Right to Know*. Cape Town, South Africa: Global Transparency Initiative. http://www.ifitransparency.org/doc/charter_en.pdf.

Figure 1. General framework: access to information



Exemptions from Publication

Both general FOI laws and specific contract publication schemes allow for information to be exempted from publication, often based on the same criteria. For example, in Slovakia publication of most public contracts is mandatory, but items can be redacted based on exemption principles established by the earlier FOI law.⁵ Typical grounds for exemption to access to information, set out in law, include the following:

- **National security:** Information related to intelligence services or information whose disclosure would prejudice national security. This could include, for example, specifications relating to weapons design or covert activities
- **National interest:** Information whose disclosure would prejudice international relations or the economic interests of the state or the financial interests of any administration
- **Integrity of the justice system:** Information related to criminal investigations or proceedings;

information whose disclosure would be likely to prejudice law enforcement; or information held by virtue of being part of court proceedings, inquiry, or arbitration

- **Effectiveness of public institutions:** Information whose disclosure would be likely to prejudice the exercise of the public audit function or the conduct of public affairs (such as free and frank provision of advice)
- **Personal privacy:** Information whose disclosure would be likely to endanger the physical or mental health or safety of any individual, or personal data that is covered by data protection principles, such as contact details, ages, and employment histories
- **Legal confidentiality:** Information held under legal professional privilege, information prohibited from disclosure by other laws, or information whose disclosure is punishable as a contempt of court

5. National Council of the Slovak Republic. 2000, as amended 2006. Freedom of Information Act. http://www.legislationline.org/download/action/download/id/4255/file/Freedom_of_Info_act_2000_am2006_en.pdf.

- **Commercial confidentiality:** Information provided by a third party in confidence, information whose disclosure would be likely to prejudice the commercial interests of any person (including the public authority holding it), or information that constitutes a trade secret or is commercially sensitive

In relation to public contracts, the exemptions that are most relevant are those related to **personal privacy**, **national security**, **information obtained in confidence**, and **commercial sensitivity**. In general, where a contract is between a public agency and an individual (such as a routine employment contract), there can be a broad case for exemption of any financial and personal details. Where individual staff members or contractors are named in contracts between entities, the names can be redacted. Contracts involving defense spending often include some information that cannot be revealed because of national security concerns; this does not mean the whole contract necessarily should be withheld.

The Principles do not cover the situations of personal privacy or national security, although they recognize that these can be legitimate reasons for exempting information from publication.

Commercial Confidentiality, Sensitivity, and Trade Secrets

Information that is commercially sensitive is often described as being covered by “commercially confidentiality.” However, confidentiality is a broader concept than commercial sensitivity (Figure 2). Confidentiality is usually defined in law in terms of information that is nontrivial, not already in the public domain, and imparted by another person or entity under conditions of confidentiality. This definition can cover a wide range of information submitted during contract

bidding and negotiation. In general, however, the final contract is not considered information “obtained from another person” since it is mutually agreed. In the simplest cases, where requests for tenders specify how goods and services are to be delivered, contracts frequently contain little more than this (already public) information and the delivery price.

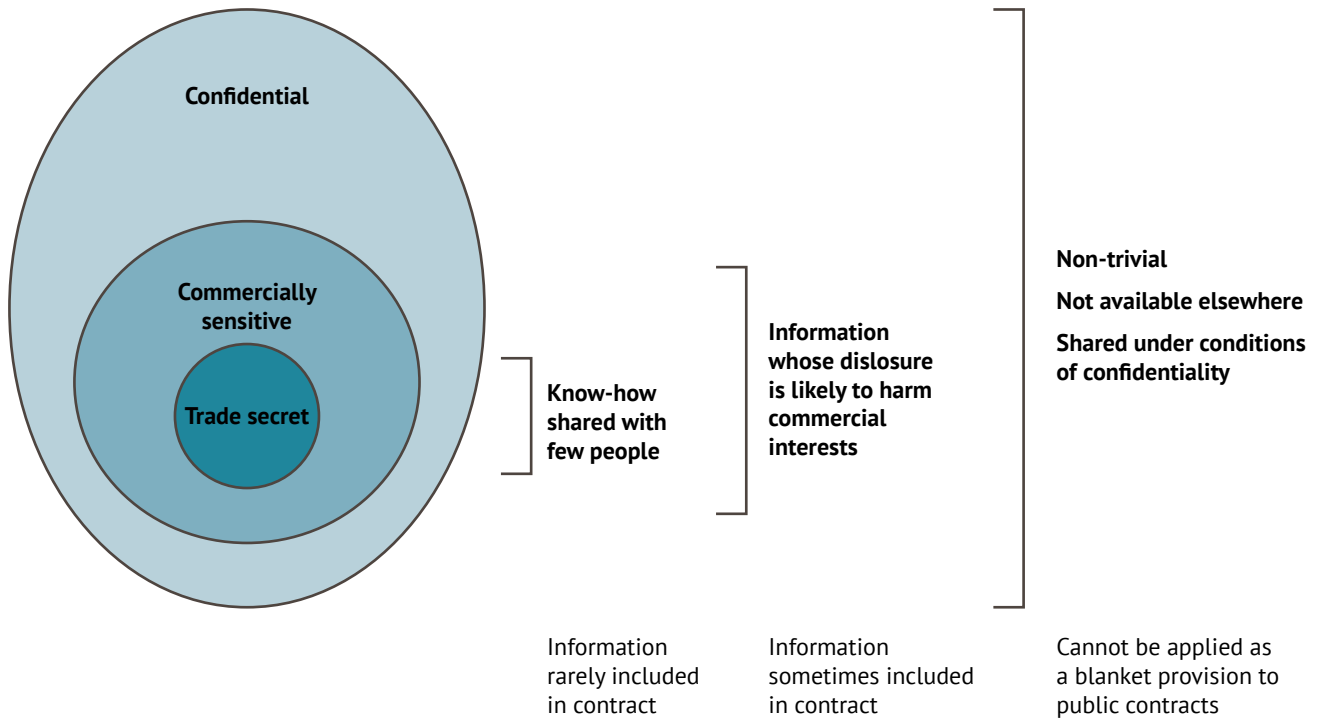
However, more complex contracts may contain technical information that was given to a public agency by the other party and that is commercially sensitive.

Commercial sensitivity is more narrowly defined in FOI law. It concerns information whose disclosure would be likely to harm the commercial interests of any person or entity, including the contractor, sub-contractors or suppliers, or the public agency itself. The types of information most often included in this category include information on line-item pricing, profit margins, and input costs. Some countries allow an absolute exemption on publishing commercially sensitive information, whereas others apply a further public interest test to determine whether this information should be published or withheld (Table 1).

Trade secrets is a narrower concept than commercial sensitivity. It is a concept that relates to commercial espionage and the misappropriation of valuable commercial know-how and is often defined in law outside of FOI regulations. It encompasses information that is known by only a limited number of people in the business and kept well-guarded, such as proprietary manufacturing and industrial processes and recipes, sales methods, distribution methods, consumer profiles, advertising strategies, and lists of suppliers or clients. It is rare that the content of trade secrets is included in detail in a contract, since the document is likely to be used by a wide range of personnel in the process of delivering, monitoring, and accounting for the project.

There is often a stronger exemption for trade secrets than for matters of commercial sensitivity in FOI law. For example, the Danish Access to Public Administrative Documents Act states that there is no right of access

Figure 2. Confidential, commercially sensitive, or trade secret?



to information on technical devices or processes or on business or operating procedures, and where information disclosure may harm public or private commercial interests the right of access “may be limited to the extent necessary.”

While in general the commercial sensitivity exemptions in most countries’ FOI laws have similar wording, the extent to which information is routinely published or redacted depends in large part on how these exemptions are implemented and interpreted. The potential to use exemptions can be overridden by prior agreement. For example, South Africa’s Promotion of Access to Information Act states that information can be released if the individual is informed, before providing it, that the information belongs to a class of information that will or might be made available to the public. In the UK, transparency clauses are included in model contracts, and procuring organizations are advised to explain transparency requirements to potential suppliers early, setting out clearly

in tender documentation the types of information to be disclosed and discussing categories of information that might be exempted.⁶ In Georgia, bidders using the electronic procurement system are told in advance that all information will be disclosed, unless Georgian legislation provides a case for nondisclosure.

In general, the overall contracts should not be considered as covered by broad confidentiality provisions as they are the product of mutual agreement rather than information supplied by another party. Specific information within the contract may be eligible for withholding from publication on the basis of commercial sensitivity. Trade secrets are rarely included in contracts.

6. Crown Commercial Service. 2017. *The Transparency of Suppliers and Government to the Public*. London: Crown Commercial Service. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/592358/TransparencyPrinciplesFebruary2017.pdf.

Table 1. Freedom of information (FOI) exemptions related to commercial information

Country or Organization	Exemptions Granted
Colombia	Includes financial information that could detrimentally impact competitiveness and trade secrets/intellectual property rights. (Law of Proactive Disclosure, 2013)
Denmark	Includes information on technical devices or processes or on business or operating procedures and policies or the like, to the extent that it is of significant financial importance to the person or enterprise concerned that the request be refused. (Act 572, Section 12) If necessary to protect considerations for protecting public financial interests, including interests relating to public commercial activities, or protecting private and public interests where the special nature of the matter means that secrecy is required. (Section 13)
Germany	In the case of information obtained or transferred in confidence, where the third party's interest in confidential treatment still applies at the time of the application for access to the information and where such access compromises the protection of intellectual property. Access to business or trade secrets may only be granted subject to the data subject's consent.
Honduras	If information belongs to a third party. (Transparency Law, 2006, Article 16)
India/Karnataka	If information includes commercial in-confidence information, trade secrets, or intellectual property. (Right to Information Act, 2005, Section 8)
Nigeria	Includes trade secrets and commercial or financial information obtained from a person or business that are proprietary or privileged, the disclosure of which would, or would be likely to, prejudice the commercial interests of any person, including the trade secrets, commercially sensitive intellectual property rights, or know-how of a third party. (Freedom of Information Act, 2011, Section 15)
South Africa	Includes: (1) trade secrets of a third party; (2) financial, commercial, scientific, or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or (3) information supplied in confidence by a third party, the disclosure of which could reasonably be expected (a) to put that third party at a disadvantage in contractual or other negotiations or (b) to prejudice that third party in commercial competition. (Promotion of Access to Information Act, 2000, Clause 36)
UK	(1) If it constitutes a trade secret. (2) If its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). (Freedom of Information Act, 2000, Part II, Clause 43, Section 32)
US	Trade secrets and commercial or financial information obtained from a person are privileged or confidential. This has been interpreted by courts as meaning that information in a commercial or financial matter is "confidential" for the purposes of the exemption if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. ^a (US Freedom of Information Act, Section 552(b)(4))
UNDP	UNDP does not provide access to financial, commercial, scientific or technical information that may, in UNDP's sole opinion or as a result of a confidentiality restriction, if disclosed: (1) Cause harm to UNDP or a third party's commercial and financial interests; (2) Put a third party at a disadvantage in contractual or other negotiations; (3) Prejudice a third party in commercial competition
The World Bank	Information provided by member countries or third parties in confidence. The bank has an obligation to protect information that it receives in confidence, without unless it receives the express permission of that member country or third party to disclose the information. When a member country or a third party provides financial, business, proprietary, or other non-public information to the bank with the understanding that it will not be disclosed, the bank treats the information accordingly.

a. National Parks and Conservation Association v. C B Morton. 1974. 498 F. 2d 765. <https://openjurist.org/498/f2d/765/national-parks-and-conservation-association-v-c-b-morton>.

Table 2. Public interest arguments made for and against publication of contract information

Against Publication	For Publication
<ul style="list-style-type: none"> • May discourage companies from bidding • May lead to clustering of bids • Undermines incentives for innovation and research toward public goals, due to loss of costly information for contractors 	<ul style="list-style-type: none"> • Enables accountability and scrutiny of public agency • Promotes public understanding and safeguards democratic processes • Attracts new bidders through transparency • Leads to greater competition in future bids • Leads to successful approaches being replicated across agencies

The Public Interest

In some countries, information can only be redacted on the basis of commercial sensitivity if it passes a “public interest test.” The UK, Australia, Canada, India, Ireland, and New Zealand all include an explicit public interest test in their FOI laws. The test considers whether there is a stronger public interest in maintaining the confidentiality of a particular piece of commercially sensitive information or in disclosing it (Table 2). In the UK, the Information Commissioner’s Office states that while FOI exemptions on commercial confidentiality grounds should be followed, “the presumption in favour of disclosure should apply to the vast majority of commercial information about government contracts, with commercial confidentiality being the exception rather than the rule.”⁷

FOI laws and guidance may also set out the kinds of factors that must *not* be taken into account. For example, the Australian FOI law states that embarrassment to or a loss of confidence in the government, misunderstanding, confusion, or unnecessary debate are not reasons for nondisclosure.⁸

It is important to note that the public interest test does not weigh up the *private harm* from disclosure against

the public interest in disclosure; rather, it weighs up the public interest on both sides. It does take into account that private harm can cause public harm, such as by making companies unwilling to bid or to invest in innovative solutions. There can also be need for temporary redaction or withholding of contracts when the timing of the information release would affect ongoing bidding for closely linked contracts.

Sometimes there are provisions for exceptional cases even if there is no routine public interest test. For example, the United Nations Development Programme (UNDP) policy says it can “decide not to disclose or delay dissemination of information that would normally be accessible if it determines that the harm that might occur by doing so will outweigh the benefits of access” and conversely may “make available to the public information ordinarily excluded from disclosure when it determines that the benefit would outweigh the potential harm, except where UNDP is legally obligated to confidentiality.”

Some countries do not apply an explicit public interest test but state that exemptions must be “justified and proportionate.” This is a weaker form than the public interest test, since it weighs up private harm versus public interest.

Applying the public interest test case by case to particular pieces of information is the most flexible way to apply the test, but this can be slow and costly, introducing uncertainty for all parties. This process may not

7. UK Information Commissioner’s Office. 2017. *Commercial Interests (Section 43). Freedom of Information Act guidance*. Wilmslow, UK: Information Commissioner’s Office. <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>.

8. Office of the Australian Information Commissioner. 2010. “FOI Fact Sheet 8: Freedom of Information – Exemptions.” <https://www.oaic.gov.au/freedom-of-information/foi-resources/foi-fact-sheets/foi-fact-sheet-8-exemptions>.

be necessary for many contracts, since (unlike other items covered by FOI laws) contract terms are frequently shared within industries, among joint venture partners. Rather than relying on case-by-case general determination, it may be established that full contracts or particular classes of information should be disclosed, with this disclosure included as an up-front requirement for bidders in model contracts and tender information.

In countries where there has been widespread corruption in public contracts, the priority of building trust and integrity in the public contracting system and the low levels of trust and capacity in institutions can make this approach attractive. In these situations, the balance of economic costs and benefits from disclosure is also likely to be pushed further toward the positive, since the value of confidentiality to potential suppliers is only as strong as the confidence that they have in the organizations involved.

This approach is particularly well established in the extractive sectors, where the ownership of natural resources by citizens, the irreversible sale of non-renewable public goods, the often-significant revenue-generation potential, the associated corruption risks, and the information asymmetries between government and companies mean that full disclosure is likely to be in the public interest.⁹

The Working Group recommends: Redactions on the basis of commercial sensitivity should be justified only where the public interest in withholding information is greater than the public interest in having that information published. The assessment should take into account both any commercial harms to the contractor and the broader benefits of transparency to markets and public trust.

9. Munilla, Isabel, and Kathleen Brophy. 2018. *Contract Disclosure Survey 2018: A Review of the Contract Disclosure Policies of 40 Oil, Gas and Mining Companies*. Oxford, UK: Oxfam. <https://www.oxfam.org/en/research/contract-disclosure-survey-2018>.

This does not rule out the use of general policies for full disclosure in particular sectors, countries, or types of transactions. The application of exceptions to publication can depend on factors including contract types and levels of trust in public institutions (where there is less trust in institutions, the case for full publication is stronger).

Value for Money

The key objective of public contracting is achieving value for money. This is not only about price but about the optimum combination of whole-life costs and quality. Information that allows the contract's value for money to be judged is particularly socially valuable, as it allows competitors to judge whether they could provide the same or better service at a more competitive price in similar tenders in the future. The same information also enables legislators and citizens to scrutinize the contract's value for money and to assess its delivery over time.

This poses a dilemma for the application of the public interest test, since the pieces of information which are most valuable in terms of the public economic interest in disclosure will also be the ones involving the greatest potential harm to private commercial interests.

In long-term, complex contracting relationships, as in a public-private partnership or a mining agreement, these pricing arrangements can be very detailed. For example, where there is an element of risk sharing between the public agency and the private contractor, the agreements can include details of financial modeling, subcontractor and input pricing, guarantees, and financial arrangements. These elements are particularly sensitive, and the private contractor may argue that the details of the pricing and risk-sharing strategy are part of its commercial know-how and should not be made public.

Where the public interest test is applied on a case-by-case basis, it should be robustly applied to both sides of the economic case for disclosure; the contractor suffers harm because of new bidders and enhanced competition, but the public agency (and the public more broadly) benefits.

“Bright line” transparency requirements can also be aligned to the public interest principle in determining what classes of information should generally be released or may generally be redacted, such as information concerning technology/inventions, intellectual property, or trade secrets. In Ukraine, Article 27 of the 2015 Public Procurement Law states that price, other evaluation criteria, technical conditions, technical specifications, and documents confirming compliance with the qualification criteria should not remain confidential. However, in Nigeria, the World Bank has recommended that rules on commercial confidentiality for public-private partnerships exempt pricing methodology, bid evaluations, financial models, bills of quantity, and internal rates of return.¹⁰ In setting such bright lines, governments and international organizations should consider the public interest in disclosure.

A key way to reconcile private partners’ legitimate interest in not disclosing valuable know-how and financial details with the need for transparency is to avoid including this information in contracts by specifying the contracts in terms of output or outcomes. This leaves suppliers free to deliver goods and services in the most cost-effective and innovative way without detailing technology specifications in the public domain.

It is also important to note that not all elements of value for money may be captured in the contract itself. For example, information concerning the effectiveness of a particular drug, the expertise and experience of the company delivering a service, the technical merit of the bid, or aesthetic and functional characteristics of the proposal.

10. World Bank. 2017. *Improving Transparency and Accountability in Public-Private Partnerships*. Disclosure Diagnostic Report: Nigeria. Washington, DC: World Bank.

The Working Group recommends: Where information needed to judge value for money is in the contract, it should be disclosed. If information needed to judge the value for money of the contract over its lifetime is requested for redaction, it should pass the public interest test. Proactive disclosure policies and procurement information frameworks may mandate publication of specific value-for-money information such as price, evaluation criteria, technical conditions, technical specifications, performance obligations, and documents confirming compliance with the qualification criteria.

Putting the Principles into Practice

Different countries have different laws and systems for regulating access to information. Some countries and intergovernmental organizations do not have access-to-information laws or policies at all. In some countries the question of what is legitimate to redact is overseen by an information regulator who also publishes guidance, while in others disagreements about what should be disclosed go directly to court and guidance can only be gleaned from case law. The Principles have been developed to be applied in all of these different situations.

Practical options for action include the following:

1. Developing and/or reforming access-to-information laws to limit exemptions and include a public interest test
2. Championing a culture and policies in favor of disclosure among firms and public agencies
3. Strengthening statutory guidance on applying the public interest test in relation to commercial sensitivity
4. Establishing requirements for full contract publication in procurement policy or in key sectors

5. Setting “bright line” rules about types of information that should or should not be withheld when publishing contracts
6. Writing transparency requirements into tender conditions and model contracts

7. Training and raising awareness of the limits on commercial sensitivity exemptions and the public interest in disclosure

The Principles provide a common ground for governments, firms, and civil society to use to inform specific actions and reforms to rules and processes for contract publication and redaction.

Section 2.

The Principles on Commercial Transparency in Public Contracts

These Principles on commercial transparency in public contracts have been developed by a working group of professionals from the public and private sectors, as well as information users from civil society. They are a guide to the development and implementation of policy on commercial transparency in all kinds of government contracts, including procurement, sales, concessions, leases, insurance, loans, and grants.

Preamble

There is a public interest in tender, bidding, and contracting processes being open, transparent, and clear when government entities and public bodies enter into deals and agreements with external partners to buy, sell, or manage assets, goods, or services. This increases trust, competition, value for money, and quality in government services, with benefits to government, the private sector, and citizens alike.

The Principles below concern one aspect of the contracting process: the publication of the contract itself, once signed. They seek to address the question of whether and what information can be exempted from publication for reasons of commercial sensitivity.

Contract documents set out the legally binding terms agreed to between a public agency and a partner (the contractor). Enabling access to the full text of these documents, including all annexes and amendments, is important for building trust, supporting competition, and allowing people to monitor the performance of government contracts and assess the value for money delivered over the contracts' lifetime. While freedom of information (FOI) laws can be used in many

jurisdictions to request access to information held by public bodies, there is a strong case for proactive and routine publication of the full text of public contracts, for both clarity and efficiency.

Specific pieces of information included in a contract should only be withheld where it is in the public interest to do so. Public-interest reasons for withholding information also include **if the information would harm national security or reveal personal information, but these reasons are not covered by the Principles below**. In addition, it can sometimes be in the public interest for information to be withheld for reasons of commercial sensitivity, but lack of clear rules, guidance, and processes for determining what information should be withheld leads to confusion, uncertainty, and, on occasion, overly broad use of this exemption.

Because these Principles are broad in their coverage, they allow both for publication regimes where individual pieces of information may be considered for redaction, and for those where there is a clear up-front policy of full text publication without exemptions, applied across a jurisdiction, sector, or area of contracting. What they do not envisage is blanket use of commercial confidentiality as a means to hold back information without regard to the public interest.

These Principles are aimed at creating a level playing field for transparency in public contracting. In practice, different countries and sectors will move toward transparency at different speeds. The more universally the Principles are applied, the larger the gains.

The 10 Principles cover **transparency by design**, **exceptions in the public interest**, and the need for a **clear and robust process**:

- I. *Transparency by design***: Transparency should be the norm for all government contracts, particularly regarding information on what is being exchanged and for what price. Contracting systems should be designed to support proactive publication of contracts as open data.
- II. *Exceptions in the public interest***: Redactions on the basis of commercial sensitivity should only be justified where the public interest in withholding information is greater than the public interest in having that information published. The assessment should take into account both any commercial harms to the contractor and the broader benefits of transparency to markets and public trust.
- III. *A clear and robust process***: Governments should issue detailed guidance on commercial sensitivity principles and exemptions, put in place systems to support publication, ensure that redaction is time-limited, and use other oversight mechanisms to compensate for information withheld from publication.

Transparency by design

- 1. *Public contracting should be designed for transparency and efficiency***. The design of procurement and other contracting systems and model contracts should aim to reduce the need for redaction and uncertainty about publication. Bidders should be aware of transparency requirements from the outset of a bidding process.
- 2. *Full contract publication should be the norm***. Governments should undertake full, proactive contract publication. Information should only be redacted on the grounds of commercial sensitivity where a clear case has been made that it is *in the public interest* to redact more than the public

interest to publish information. Ideally, contract information should be published in an open data, machine-readable format with a clear data schema to facilitate sharing and use.

- 3. *Information needed to judge value for money should be disclosed***. The fundamental aim of transparency is to ensure that government resources are well used. This requires that citizens and competing firms be able to access information on what has been bought, sold, leased, or otherwise exchanged, and at what price. Procurement policies may mandate publication of information on price, evaluation criteria, technical conditions, technical specifications, performance obligations, and documents confirming compliance with the qualification criteria. If information needed to judge the contract's lifetime value for money is requested for redaction, the request should only be granted if the redaction passes the public interest test.

Exceptions in the public interest

The application of exceptions to publication can depend on factors including contract types and levels of trust in public institutions (where there is less trust in institutions, the case for full publication is stronger). For example, in the extractive sectors, the ownership of natural resources by citizens, the irreversible sale of nonrenewable public goods, the often significant revenue-generation potential, the associated corruption risks, and the information asymmetries between government and companies in the sector combined suggest that a general policy of full disclosure is likely to be in the public interest.

Where exceptions to publication are considered:

- 4. *Information should only be redacted for reasons of commercial sensitivity when the public interest in withholding information is greater than the public interest in disclosure***. The potential for harm to the contractor and to the public interest that may result from disclosure of commercially

sensitive information should be weighed against the public interest in disclosure. A public interest test should robustly weigh these two cases and explain the decision made. The burden of proof of harm to the public interest from publication should be on those seeking to withhold information from the public.

5. ***The public interest test should take into account the wider economic benefits of the sharing of commercial information, as well as the case for accountability and the public's right to know.*** There is a public benefit in increasing competition in bidding rounds for future public contracts. Exemption to disclosure on the basis of the public interest test requires demonstrating (a) that significant potential financial harm to the contractor or the public agency is likely; (b) that the harm to the contractor or the public agency will harm the public interest; (c) that it is reasonable to believe that this harm could be avoided through the redaction of contract text (including that it is unlikely this information could be accessed through other channels); and (d) that this negative impact clearly outweighs the benefits of access to the information for the government, market, and citizens through enhanced competition, market information, and scrutiny.
6. ***All redactions should be clearly marked with the reason for redaction.*** Where the reason given for redaction is commercial sensitivity, a link to the public interest justification should be provided. Redactions should include an indication of how long the information will be withheld for and what appeals process is available. Agencies designing information systems or data standards for contracting and contract publication should include redactions and related information within the data system and metadata (so that cases of redacted information can easily be searched, patterns of redaction monitored, and redactions automatically flagged where the exemption to publication has expired).

A clear and robust process

7. ***Governments should issue clear guidance to public entities, agencies, and firms on contract publication and when information may be exempted from publication for commercial sensitivity reasons.*** This can include model contracts which specify publication, guidelines specifying classes of information that will never be allowed to be exempt from disclosure in signed contracts and/or inclusive lists of possible information types that may be considered for redaction. Guidelines from information regulators on the public interest case for redaction should be principles-based rather than mechanical and exhaustive.
8. ***Where redaction is potentially allowed, there should be a clear process for determining what is redacted, why, for how long, and with what appeals process.*** For example, a good practice process could begin with the party that claims potential direct financial harm delineating the information they are seeking to redact at the time of bid submission or as soon as practicable thereafter before the contract is signed (this party is usually the contractor but could be the public agency). The party alleging harm provides an argument as to why it thinks the redaction meets the public interest test. If the contractor is making the request, the public agency in the first instance applies the public interest test. If it is the public agency seeking redaction, a separate government body (potentially the FOI authority) acts as arbiter of the legitimacy of that claim. The request for redaction and the granting of the exemption to publication includes a time limit on how long the exemption from publication will be granted. This time frame could be until the end of the contract or for some specified period afterward. Members of the public should also be able to appeal redactions if they believe that the public interest test has not been satisfied.

9. *There should be a system for ensuring that contracts and contract information are in fact disclosed in practice.* Publication might be required for contracts to be legally valid (and thus enforceable), e-procurement systems might automatically publish contracts or deny payment if contracts are not available, or procurement committees might be instructed to deny final approval until publication. Dispute and complaint mechanisms on contract awards are other important safeguards.

10. *Where exemption to disclosure of information is granted for commercial sensitivity reasons, this should be grounds for increased scrutiny through other oversight mechanisms.* In cases in which the public's ability to assess value for money is limited by redaction, there is an enhanced role for oversight mechanisms (such as a supreme auditing institution or ombudsman, or additional judicial or legislative oversight) that can access the redacted information while ensuring its ongoing confidentiality.

Section 3.

Working Group Biographies

CHAIR: Caroline Anstey, Senior Adviser, Inter-American Development Bank

Caroline Anstey is a senior adviser at the Inter-American Development Bank. She was previously chief operating officer at the Open Society Foundations, group managing director at UBS AG, and managing director at the World Bank. During a 19-year career at the World Bank Group she also worked as World Bank chief of staff, vice president of external affairs, country director for the Caribbean Region, and head of media and chief spokesperson. She was previously an award-winning program editor and senior producer at the BBC. Prior to joining the BBC, she worked in the British House of Commons as political assistant to the Rt. Hon. James Callaghan MP. Caroline has served on the boards of the UBS Optimus Foundation and Swiss Sustainable Finance, and on a number of international advisory bodies. For five years, she served as a sherpa for the heads of government meetings of the G7 and G20.

Luke Balleny, Manager, International Council on Mining and Minerals (ICMM)

Luke Balleny joined ICMM in 2014 as a senior program officer. He is responsible for ICMM's governance and transparency work, including the organization's relationship with the Extractive Industries Transparency Initiative. In addition, he is deeply involved in ICMM projects related to enhancing mining's economic contribution to local communities and engaging investors. Prior to joining ICMM, Luke worked as a journalist at the Thomson Reuters Foundation, the charitable arm of Thomson Reuters, where he wrote about global corruption, governance, transparency, and accountability issues. Earlier in his career, he worked in the Thomson Reuters Global Business Compliance group, where, among other responsibilities, he managed the day-to-day running of the company's internal anti-bribery and corruption program.

Owen Barder, Vice President and Senior Fellow, Center for Global Development

Owen Barder is director of CGD Europe. He is also a visiting professor in practice at the London School of Economics and a specialist adviser to the UK House of Commons International Development Committee. Owen was a British civil servant from 1988 to 2010, during which time he worked at No. 10 Downing Street as private secretary (economic affairs) to the prime minister; in the UK Treasury, including as private secretary to the chancellor of the exchequer; and in the Department for International Development, where he was variously director of international finance and global development effectiveness, director of communications and information, and head of the Africa Policy and Economics Department. As a young Treasury economist, he set up the first UK government website, to put details of the 1994 budget online.

Lesley Coldham, Group Manager, Government, Public Affairs and Policy, Tullow Oil PLC

Lesley Coldham spent 15 years with diamond mining company De Beers where, working in a variety of corporate affairs, government, and industry liaison roles, she gained a strong understanding of the challenges associated with natural resource extraction, revenue management, and governance in emerging economies. She joined Africa-focused Tullow Oil in 2010 to develop the company's approach to stakeholder engagement and policy management. She was instrumental in developing Tullow's industry-leading approach to transparency of payments and contract transparency, and today she continues to drive the company's development of and engagement around key areas of sustainability policy.

Gavin Hayman, Director, Open Government Partnership

Gavin Hayman leads the Open Contracting Partnership, a multisector alliance to foster collaboration, innovation, and collective action that is challenging vested interests and working to change the global norm in public contracting from closed to open. Previously, Gavin was executive director and director of campaigns at Global Witness, where he oversaw groundbreaking and award-winning investigative, campaigning, and advocacy work uncovering secret deals, corruption, and conflict around the world. He helped create the international Publish What You Pay campaign and helped negotiate the intergovernmental Extractive Industries Transparency Initiative that brings together oil and mining companies, home and host governments, and civil society to improve disclosure and oversight of more than US\$1 trillion of oil and mining money. He is an expert on illicit financial flows and helped lead global efforts to end the abuse of anonymous shell companies for money laundering and financial crime, including working with the British government's recent presidency of the G8 and the Open Government Partnership.

Jáchym Hercher, Policy Officer, European Commission

Jáchym Hercher works at the European Commission on public procurement policy, mainly in the area of procurement data and data analytics. Currently, he is leading the eForms project, the European Union's update of the data standard used for publishing information about public procurement. He also contributes to various other procurement data standardization initiatives, such as the Open Contracting Data Standard. Previously, he worked in the Czech civil service on the development of quantitative indicators to measure the impact of the European Social Fund.

Nick Hirons, Senior Vice President, Global Ethics and Compliance, GlaxoSmithKline (GSK)

Nick Hirons was appointed senior vice president for global ethics and compliance at GSK in 2014, and he is responsible for compliance, risk management, corporate security, and investigations. He is a member of the corporate executive team. Prior to this, he was head of audit and assurance. Nick initially joined the company in 1994 as an international auditor in the UK. From 1997 to 2013, he was based in the United States; he then moved to China to establish a new governance model for GSK's China business.

Robin Hodess, Director, Governance and Transparency, The B Team

Robin Hodess became director of governance and transparency at The B Team in April 2018, leading the initiative on open contracting and anti-corruption more broadly. Previously she was director for advocacy, policy, and research at Transparency International, where she developed work on corporate transparency and financial integrity. Prior to joining Transparency International, Robin ran a program on economic globalization for the Carnegie Council on Ethics and International Affairs. She has taught courses on media and politics at the European School of Management and Technology, Free University of Berlin, and the University of Leipzig, as well as serving as assistant director for international security programs at the Center for War, Peace, and the News Media at New York University. Since September 2016, Robin has been a civil society member of the Open Government Partnership Steering Committee.

Sally Hughes, Chief Executive Officer, International Association for Contract and Commercial Management (IACCM)

Sally Hughes leads IACCM, the leading global association for commercial and contract management professionals. The association's membership is drawn from many industries and is made up of contract and commercial managers, negotiators, attorneys, and supply chain professionals. Sally is an experienced and accomplished commercial and contracts management professional, having held senior commercial positions at a variety of corporate and multinational organizations. After earning an honors degree in law, Sally spent her time in-house in the corporate sector, where she worked globally in the telecom and IT industries before establishing her own legal and commercial consultancy in 2007.

Gyude Moore, Visiting Fellow, Center for Global Development

Gyude Moore served as Liberia's minister of public works and country lead on construction and maintenance infrastructure from December 2014 to January 2018. Prior to taking on that role, he served as deputy chief of staff to President Ellen Johnson-Sirleaf and head of the President's Delivery Unit (PDU). As head of the PDU, Moore led a team that monitored progress on the delivery of Liberia's Public Sector Investment Program. PDU monitored and drove delivery, on behalf of the president, of more than US\$1 billion in road, power, and port infrastructure investments as Liberia attempted to rebuild after the civil war. As one of the president's most trusted advisers, Gyude also played a crucial role in supporting President Sirleaf as Liberia shaped its post-Ebola outlook. At CGD his work is focused on governance, examining the infrastructure sector in particular. He also concentrates on channels for attracting private finance into African infrastructure. Moore serves on the board of advisers of the Master of Science in Foreign Service program at Georgetown University.

Richard Morgan, Head of Government Relations, Anglo American

Richard Morgan is an international government relations adviser for Anglo American, one of the world's largest mining companies, headquartered in the UK and listed on the London and Johannesburg stock exchanges. He began his career at the British Embassy in Tokyo as a Commercial officer (1986–1990). Later he held a position on the communications/media team at the Foreign and Commonwealth Office in London (1990–1995), followed by working as first secretary at the British High Commission in South Africa (1995–2000) and in the Middle East and North Africa Department. He was head of public diplomacy at the Foreign and Commonwealth Office (2008–2010). Richard also worked as director of communications and public affairs for Africa, the Middle East, and Turkey for Unilever (2005–2008).

Eliza Niewiadomska, Senior Counsel, Public Procurement, European Bank for Reconstruction and Development

Eliza Niewiadomska is a counsel in charge of the public procurement sector at the Legal Transition Programme of the EBRD in London. She is a senior legal expert who has gained more than 12 years of professional experience in legal advice and procurement management at key positions in government in Poland. She has hands-on experience in carrying out legislative reform related to harmonization with the EU *acquis* and practical knowledge of public procurement from different perspectives: engaging in the legislative process, creating an institutional framework, conducting procurements, and bidding for public contracts. Eliza has more than 6 years of managerial experience as a general counsel for public- and private-sector entities and a director of procurement and infrastructure projects in the utilities sector in Poland. She was in charge of legal teams at the Public Procurement Office of Poland and ComputerLand SA, a leading information and communications technology company in Poland. Prior to joining the EBRD, she worked for PGE Polska Grupa Energetyczna SA in Warsaw and was responsible for developing new procurement policies and integrating and modernizing the organization's procurement processes.

Dennis Santiago, Procurement Advisor, Philippines

Dennis Santiago is a procurement advisor with government agencies, development partners, and multi-lateral development banks performing procurement advisory, review, monitoring, evaluation, and capacity development. He was the executive director of the Government Procurement Policy Board–Technical Support Office (GPPB-TSO) in the Philippines (2011–2018), where he worked with the operational units to establish standardized procurement policies and procedures; modernization of the eProcurement System; a system for monitoring and evaluation; and a procurement professionalization program. In various capacities, he attended local and international conferences and fora involving government contracting and acquisition. He was board secretary to the GPPB; Philippine representative to the Open Contracting Partnership Steering Committee; lead negotiator on government procurement in bilateral and multilateral trade negotiations; and program director for government affairs with Procurement Watch, Inc., an NGO. He teaches at the Faculty of Arts and Letters (Law), University of Santo Tomas, Philippines; the Asian Institute of Management (Program and Project Development and Management); and the Development Academy of the Philippines (Public Management Development Program).

Gabriel Sipos, Executive Director, Transparency International Slovakia

Gabriel Sipos has led Transparency International Slovakia since 2009, helping to introduce radical transparency reforms in Slovakia not adopted elsewhere in the world, such as mandatory online publication of government contracts as well as publicly accessible judicial contracts and judge performance data. With its public campaigns and rankings, Transparency International Slovakia helped substantially increase transparency for Slovak state-owned companies and municipalities. Gabriel has served on the boards of journalism prize competitions in Slovakia and the Czech Republic and in recent years has been among the five most-cited experts on government affairs in Slovakia.

Oleksii Sobolev, Director, ProZorro.Sale

Oleksii Sobolev is director of ProZorro.Sale, a system initiated by Ukraine's Ministry of Economic Development and Trade, Transparency International, the Deposit Guarantee Fund, the National Bank of Ukraine, and several Ukrainian electronic platforms. ProZorro.Sale's goal is to provide transparent, fast, and effective sales of state and communal property, as well as to fight against corruption by providing equal access to data, enhancing public control, and increasing the number of potential buyers. It currently facilitates asset sales of failed banks and the privatization and lease of public assets. Previously Oleksii was a portfolio manager at Dragon Asset Management and before that an auditor at EY Ukraine. After the 2014 "Revolution of Dignity" in Ukraine he decided to help the country and joined the team of Andriy Pyvovarsky, former Minister of infrastructure, as an adviser to the minister leading projects in state-owned enterprise reform and open data, and was actively engaged in creating a Ukrainian chapter of an international Construction Sector Transparency Initiative (CoST Ukraine). He is a Chartered Financial Analyst and president of the CFA Society Ukraine.

PROJECT TEAM

Maya Forstater, Visiting Fellow, Center for Global Development

Maya Forstater is a visiting fellow at the Center for Global Development and a researcher and adviser on business and sustainable development. Her work focuses on the intersection of public policy, business strategy, and sustainability, including questions regarding tax and development, financing for low-carbon investment, and multisector partnerships and standard setting. From 2014 to 2016 she was a senior researcher for the United Nations Environment Programme's Inquiry into the Design of a Sustainable Financial System. She has also worked with the Transparency and Accountability Initiative (for the Open Government Partnership), the South African Renewables Initiative, the Global Green Growth Initiative, AccountAbility, and the World Business Council for Sustainable Development.

Charles Kenny, Senior Fellow, Director of Technology and Development, Center for Global Development

Charles Kenny's work focuses on gender and development, the role of technology in development, governance and anticorruption, and the post-2015 development agenda. He is the author of the book *Getting Better: Why Global Development Is Succeeding, and How We Can Improve the World Even More* and *The Upside of Down: Why the Rise of the Rest Is Great for the West*. Charles was previously at the World Bank, where his assignments included working with the vice president for the Middle East and North Africa Region, coordinating work on governance and anticorruption in infrastructure and natural resources, and managing a number of investment and technical assistance projects covering telecommunications and the Internet.

Section 4.

Further Reading

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