Corporations: Transparency and Confidentiality

Paper for the International Conference
“Establishing a dialogue on Fuel and Energy Sector Transparency Initiative”
26-27 September 2011, Bishkek, Kyrgyzstan

by
Gary Pienaar, Institute for Democracy in Africa (South Africa)
and Bharath Jairaj, World Resources Institute, USA

Transparency is important in several areas of extractive industries and energy governance. When a government is a party to an agreement, contract transparency is critical to promote ongoing state accountability to citizens and to ensure that the terms of the contract enhance rather than jeopardize public welfare. When the subject matter of such contracts are natural resources or other common resources of the public, the arguments for the public to be able to access the terms and scope of such contracts are stronger. Contract terms are often kept confidential to protect trade secrets and privileged commercial information, and these are often necessary and required. Yet there are many reasons to disclose contract terms and related details to the public. Greater transparency in such contracts is needed to protect public interest, basic human rights, and enable the meaningful public participation required for strong democratic institutions and good governance.

Government contracts and confidentiality

The notion of confidentiality and secrecy might appear misplaced in an age when the internet has become the primary platform for the accelerated flow of information among people, and as more and more information becomes available, often free of cost, via the internet. Nonetheless, information is a contested policy area – whether we are speaking of security, public order, intellectual property or individual privacy.

One such contested space is the debate between transparency and confidentiality of government contracts in the energy sector. Simply put, contract transparency is not standard practice. In a recent publication that distills the arguments for and against contract transparency, the authors found that the primary arguments in favor of secrecy of contracts have their origins in commercial practice, where parties to contracts routinely negotiate and arrive at contracts behind closed doors. The terms of disclosure, if any, are set out within the terms of such contracts.

There are a variety of arguments advanced in support of such secrecy, and include:
• The need to protect commercially sensitive information;
• A fear of having to match concessionary deals, or competing in a ‘race to the bottom’; and

A desire to avoid alienating constituents, and exposing incompetence or corruption.\textsuperscript{2}

The most reasonable arguments for secrecy emphasize the need for protection of information to ensure commercial competitiveness. Thus, private corporations commonly argue that contracts regulating investment in energy or extractive industries deal with highly sensitive commercial issues, including expensive technology development and patents, delivery schedules, as well as pricing. Disclosing these details, it is argued, risks jeopardizing companies’ competitive advantage, which justifies protecting the confidentiality of negotiations, of key project information and sometimes even of the existence of the contract itself. Investors may be concerned that disclosure of such sensitive information may give competitors an undue commercial advantage, which would in turn stifle the innovation fundamental to the benefits of efficient competition.

Equally, host governments resist exposure to being pressured to replicate less attractive deals, concerned that future investors could invoke favorable treatment granted in earlier contracts in order to extract better terms than the government may be prepared to offer in the present instance, thereby entrenching the lowest common denominator.\textsuperscript{3} The same may be true sometimes for private corporations: they do not want to be seen to be settling for less than a competitor might accept, as this may prompt difficult, if not always well-informed, questions from shareholders.

In a particular negotiation, government officials may sometimes feel obliged to agree to terms less favorable than they may have preferred, especially if the government is in desperate need for additional revenues to fund an urgent program. Government may fear that the company will withdraw from negotiations, and that an important investment opportunity may be entirely lost, or that the government may be obliged to accede to even less attractive terms with a rival company that has a less responsible track record. Both governments and companies may fear that subsequent disclosure of a concluded agreement will lead to second-guessing and pressure from dissatisfied constituents, particularly on governments, to renegotiate in pursuit of a better deal.

In addition, effective government for the general public good is not always perceived or experienced in the same way by all stakeholders, members of the public and voters. Most often, government involves difficult choices between alternative courses of action and sensitive compromises. Persuading voters that the best decisions are being taken in everyone’s best interests is a challenging exercise at the best of times. In new democracies, where expectations of a better life are especially heightened, governments are confronted with a particularly weighty responsibility.

Moreover, government officials and representatives, like each of us, prefer not to be seen to be making careless errors of judgment, or that we may appear less savvy than experienced corporate lawyers. Less acceptably, some public officials argue in favor of secrecy so that their incompetence or outright corruption is hidden from public scrutiny.

\textsuperscript{2} Ibid.
\textsuperscript{3} Ibid.
Is confidentiality of government contracts reasonable?

This paper and others on the relationship between natural resource investment contracts and sustainable development conclude that the arguments for confidentiality of government contracts do not stand up to closer scrutiny.

Even the strongest of these arguments do not justify current levels of secrecy. In fact, conclude the authors, many may not have direct relevance to contract disclosure: some commercially sensitive information does not warrant protection—since much of it is already subject to disclosure under other laws, including laws for publicly listed corporations—and little of it is actually disclosed in the contracts themselves.

While governments may find it politically embarrassing and damaging to disclose a ‘bad deal’, it does not appear to be harmful to either companies or host countries in the long term. The Enron / Dabhol case in India in 1992 is a good example of this. The Enron contract had everything wrong about it; a rushed and incomplete contract-making process, absence of competitive bidding, lack of transparency and the appearance of corruption. The multibillion dollar contract was negotiated exclusively between the state government of Maharashtra and Enron and signed within three days; and was treated as “highly confidential.”

Unsurprisingly, the government of India and other agencies subsequently found several irregularities in the largely one-sided (in favor of Enron) contract. Learning from this experience, the government of India introduced several key reform measures in the next few years; introducing elements of competition and transparency in decision making in the sector. A new Electricity Act was enacted to replace the earlier laws, and it introduced open and competitive bidding process, independent regulators and provided space for public participation. Thus, the review of a “bad contract” had positive effects on the sector and the country as a whole.

Rosenblum and Maples also note that resisting disclosure may actually exacerbate controversy, and that the costs of confidentiality can be high, and include masking corruption, incompetence, and inappropriate trade-offs and compromises that undermine the public interest – all of which were true in the Enron case. It follows from the above that state and private actors who continue

---

4 Many of the arguments and principles are equally applicable to infrastructure investment contracts, including in the energy sector.
5 Cotula, Lorenzo, “Investment Contracts and Sustainable Development: How to Make Contracts for Fairer and More Sustainable Natural Resource Investments” International Institute for Environment and Development (UK), 2010, and Rosenblum & Maples op cit. This part of the paper relies extensively on these studies.
6 Under company law in several countries, even corporations that are not listed on the securities exchange may be regarded as public and are required to disclose certain essential financial and ownership information – See (South Africa) Companies Act, 2008, Indian Companies Act, 1956.
8 Ibid.
9 Supra n.1
to insist on interpretations that allow the clauses to prevent disclosure may be doing so either because they are misinformed or are motivated by with *mala fide* (bad faith).

From a governance perspective, the argument for transparency is stronger.

“Even as they conduct business, governments have duties, obligations and interests that go well beyond pure profit maximization. As such, the same secrecy afforded to contracting parties in commercial law is out of place in such contracts. Governments must be held accountable for all contracts they enter, be they for the provision of roads or the purchase of goods. And when the contracts concern non-renewable resources, the need for scrutiny is even more pressing.”\(^{10}\)

This argument is strengthened by the international jurisprudence on the right to information, which increasingly supports the disclosure of agreements, as well as domestic freedom of information laws in countries across the world, whose starting presumption is that state-held information should be public.

**Why transparency of government contracts matters**

Contract transparency is important in several areas of minerals extractive and energy industry governance. When a government is a party to an agreement, transparency is critical to promote ongoing state accountability to citizens and to ensure that the terms of the contract enhance rather than diminish public welfare. While contract terms are often kept confidential, ostensibly to protect trade secrets and privileged commercial information, there are many reasons to disclose contract terms to the public. Greater transparency in state-investor contracts is needed to protect public health and safety, human rights, and enable the meaningful public participation required for strong democratic institutions and good governance.

International financial institutions such as the World Bank, the IMF and the IFC are beginning to encourage greater transparency through their disclosure and access to information policies, and Performance Standards.\(^{11}\) The strongest proponent is the IMF, which has endorsed contract transparency as key to the good governance of extractives.\(^{12}\) Similarly, governments in several countries require oil, gas or mining contracts to be voted on publicly by the parliament, while other countries without such parliamentary requirements—including East Timor, Peru and Ecuador—have nonetheless made contracts publicly available in one or more of their extractive sectors. A few countries explicitly support contract transparency as a fundamental principle in

\(^{10}\) Ibid. at pg 11ff.

\(^{11}\) See World Bank Policy on Access to Information, 1 July 2010 – Introductory paragraphs read with especially s. 6; and the International Finance Corporation’s Access to Information Policy, 1 January 2012 – Introductory paragraphs read with s.10, s. 11(a) and s.12. Both emphasise the benefits of transparency, establish a presumption of disclosure with exceptions based on a harm test, and a public interest override. See also “The World Bank’s New Access to Information Policy: A Conceptual Leap Within Limits”, Bank Information Centre and Global Transparency Initiative (GTI) Info Brief, March 2010.

managing their extractive sector; examples include Liberia, in its EITI bill, and Ghana, in its rapidly developing oil sector.

Some of the recurrent arguments for contract transparency include:

a) **Transparency is essential for the responsible management of natural resources, and of the potential for growth and economic development that those resources can bring**

Governments, citizens, and investors all have much to gain from contract transparency. Governments will be able to negotiate better contracts if they have access to contracts other than their own, access that industry already enjoys. Coordination among government agencies in enforcing and managing the contracts will be facilitated. Citizens’ suspicions of hidden injustices will decrease, creating better relationships with communities and a more stable contract that is less likely to be subject to calls for renegotiation. Compensation or other remedial action will more easily be seen to be reasonable, fair and appropriate in the circumstances.

b) **Citizens have a right to know how their government is managing or disposing of their resources.**

In most countries, sub-surface resources such as minerals, oil, coal and gas are the property of the nation, not the individual property owner of the surface rights. The same is often true of other natural resources, such as water, forests and land. Greater transparency is a democratic public good in itself, as well as being instrumental in securing socially equitable, and economically and environmentally sustainable development. International human rights law accepts that citizens have a right to know how their government is managing the natural resources it owns on behalf of the nation. Access to information and public participation in decision-making are among key pillars in the concept of sustainable development recognized in Principle 10 of the 1992 Rio Declaration on Environment and Development and in Article 1 ‘Objective’ of the Aarhus Convention.

---

13 See, for example U.N. General Assembly Resolution 1803 (XVII) of 14 December 1962, “Permanent Sovereignty over Natural Resources.” Available at: [http://www2.ohchr.org/english/law/resources.htm](http://www2.ohchr.org/english/law/resources.htm)


15 Principle 10 provides that:

‘Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.’
c) It is *contrary to the rule of law* for these contracts to be kept secret

Many energy and extractive sector contracts signed with host governments are incorrectly viewed as mere commercial transactions. Rather, their long-term nature often gives them a treaty-like character, as they are also mechanisms for realization of public policy: they define the terms and conditions of significant investments that affect the livelihoods and environments of large numbers of people over lengthy periods of time.\(^{17}\)

Contracts are essentially the law of a public resource project,\(^{18}\) and a basic tenet of the rule of law is that laws should be publicly available. Many energy and extractive projects are so significant in size and scope that they ‘directly affect the lives, livelihoods and living conditions of … large [sections of the] population for decades. The contracts governing these projects may constitute the most significant rules affecting the surrounding populations’. Because they ‘modify existing laws, freeze the application of those laws, or elaborate on outdated or incomplete laws’, in effect, these contracts create their own law. Democratic accountability therefore makes it essential to disclose their contents.

d) Without transparency, stakeholders’ fears flourish, and mistrust and conflict are aggravated

Transparency may increase pressure for more evenly balanced contracts because the parties may be more easily held accountable for the deals they sign. Civil society organizations’ reports on the Baku-Tbli-Ceyhan (BTC) and Chad-Cameroon pipeline contracts, the Mittal Steel contract in Liberia, and other projects in Liberia and the Democratic Republic of Congo, highlighted several problems associated with contracts concluded without transparency during protracted war and lengthy, uneasy transitions to relative stability. Because of these and many other negative experiences, failure to disclose, or to provide a plausible explanation for non-disclosure, may be perceived as designed to hide ‘inconvenient truths’.

e) Contract transparency can help governments secure a better deal for their country’s resources, provide an incentive for governments and companies to make more sustainable deals, and deter corruption

The extractive and energy sectors in many countries are ‘imperfect markets’ where governments are often at a disadvantage when negotiating with large transnational corporations. Information asymmetry can lead to sub-optimal deals, even if a government is trying in good faith to negotiate


\(^{17}\) This is especially true of build-and-operate (-and transfer - BOT) energy infrastructure contracts.

\(^{18}\) Rosenblum & Maples at pg 16
in the interest of its citizens. Contract transparency is an important measure for creating a level playing field between companies and governments. However, governments may not behave in their citizens’ best interests, not necessarily for dishonest reasons, but simply because when citizens have less information about government policy and actions, governments’ incentive to respond to the citizens’ interests and priorities is weakened. Public disclosure of contracts incentivizes governments to be responsive to as many constituencies as possible. While posing its own difficulties, it is likely to result in more sustainable contracts with reduced pressure for renegotiation.

Moreover, demands for the simplistic extension or repetition of treatment granted to earlier investment projects may be countered on the basis of different economic situations (for example, more favorable treatment granted to earlier projects may be justified on the basis of the need to promote investment in a marginal project) and of the changing negotiating power of all the parties (for example, if the host government has acquired greater experience, expertise and capacity to manage the sector on the back of earlier investments).

Lack of transparency and public scrutiny in contract negotiation and management often allows special interests to outweigh the public interest, while creating fertile soil for corruption. By contrast, systematic publication of contracts will deter special provisions in contracts that are the result of corruption. This safeguard is enhanced by the adoption of model contracts with fewer variables. In these circumstances, material changes may provide an easily-detectable signal of special favors.

f) Contract transparency is likely to enhance effective, coordinated and coherent government management of resources

Conflict over natural resource and energy issues may extend to departments or agencies within government and the state, such as legislatures or revenue collection agencies, which are bypassed when natural resource contracts are treated as the exclusive preserve of one department. Transparency is calculated to enhance coordination within government and enable its various branches and agencies to fulfill their respective legislative, oversight and regulatory obligations to ensure accountability to the public interest.

Balancing confidentiality and transparency in government contracts

If one accepts that government contracts should be transparent, does this imply a requirement of total transparency? Should governments and corporations be permitted some degree of confidentiality?

As previously mentioned most investment contracts are negotiated confidentially. Even the very existence of the negotiation process may not be publicly known.\(^{19}\) In some instances, a separate confidentiality agreement may be signed at the early stages of the negotiation or of a public procurement process. Such a confidentiality agreement aims to protect the confidentiality of any

\(^{19}\) Cotula at pg 86
technical, financial or other commercially valuable information exchanged during these processes, which becomes especially relevant if the bid is unsuccessful or if subsequent negotiations break down. For example, in negotiations for a joint venture (not infrequent in large energy or extractive industry projects, or infrastructure projects), a confidentiality agreement may require the parties not to disclose or use information other than in connection with the joint venture. Should the negotiations fail, both parties would have to return or destroy information, and keep details of the negotiation confidential.\textsuperscript{20}

There may well be good reasons to keep parts of the negotiation confidential. Putting aside the investor’s concern about commercially valuable information, confidentiality may also better enable the parties to make reciprocal concessions without undue repercussions, thus making it easier to reach a mutually acceptable compromise.

By contrast, in view of the important public interests at stake, it is submitted that it is essential to establish effective mechanisms to ensure transparency in several key aspects of the contractual relationship. It has been argued that governments ‘genuinely pursuing the public interest’ have ‘little to fear from greater transparency and civil society should feel confident’ in pushing for greater scrutiny.\textsuperscript{21} What are the practical dimensions and implications of this distinction? And what are some of the key moments at which transparency might be most appropriate? What are parameters of transparency and confidentiality: where does one draw the line between these two competing imperatives; or can they be complementary?

It is generally accepted that, just as freedom of information laws recognize certain exceptions in order to protect national security and public order, and individuals have a right to expect legal protection of their right to privacy, it is acceptable for companies, including state-owned companies that compete with private companies in the market, to expect some safeguards. The nature and extent of those safeguards is the question. They should not be excessively broad: as we have seen, blanket safeguards for ‘commercially sensitive information’ (as determined by the company) are unnecessary in many instances, and deliver an inappropriate distribution of risk in imperfect markets and in transactions that have considerations that transcend the simply commercial. Confronted by these complex realities, limits on freedoms and protection of rights both have their place.

It is therefore necessary to seek a more appropriate balance between protecting certain admittedly genuine concerns about commercial confidentiality, on the one hand, and enabling maximum transparency and public scrutiny, on the other. This approach accepts that the existence of commercially sensitive or valuable information is the start of the enquiry, rather than an end to it. Importantly, it also posits that transparency can serve to protect legitimate commercial interests. Thus, by enhancing transparency and public participation in the decision-making process, and by placing appropriate limits on the scope of confidentiality, commitment to these principles can


\textsuperscript{21} Cotula at p86.
contribute to greater stability of the investment environment, and effectively reducing the likelihood of subsequent agitation to renegotiate the agreement itself.

First, blanket confidentiality and confidentiality provisions cannot remain. These provisions are often drafted in rather broad terms to include the contract itself, negotiations or action taken under it, any related documentation (e.g. reports, data, studies and other materials) and important project information. Such contracts usually restrict the ability of the parties to disclose this information, unless both parties mutually agree to it. In some cases, confidentiality clauses feature some narrowly defined exceptions, concerning for instance disclosure required by stock exchange regulations, negotiation of financing arrangements, international arbitrations, etc.

Confidentiality clauses that are too restrictive undermine the ability of the public to scrutinize the project and of people adversely affected by the project to claim their rights.

**Transparency should be the Rule:** We believe that in government contracts, transparency should be the rule, not the exception. An excellent example of this is available in Denmark’s approach to hydrocarbon exploration. Section 22(3) of Denmark’s Model License for Exploration & Production of Hydrocarbons (2005) states:

"[Information can be disclosed if] no legitimate interest of the Licensee requires the information to be kept confidential; essential public interests outweigh Licensee’s interest in maintaining confidentiality; information of a general nature is furnished in connection with issuance of public statements […]".  

(Emphasis added)

In other words, as in the new World Bank and IFC access to information policies, an explicit recognition that the public interest should outweigh the company’s private interests, while also providing a narrow exception for specific confidentiality requirements. The onus shifts to the parties to prove on a case-by-case basis that a particular piece of information falls within that exception, preferably based on the proven likelihood of substantial harm should confidentiality not prevail – a ‘harm test’. Similarly, clauses prohibiting the disclosure of confidential information without the consent of both parties can be qualified or limited by language requiring that such consent cannot be unreasonably withheld or delayed. Further, protection of confidential information can also be subject to exceptions concerning disclosure required by law (including not only stock exchange regulations, as is frequently done, but also freedom of information legislation), or for the purpose of protecting health, safety and the environment, particularly in emergency situations. As they are a public policy tool, it is good practice for the contract itself not to be confidential; if specific aspects of the contract constitute genuinely confidential information, they may be redacted before publication. Finally, for proprietary information in contracts, for instance involving technology transfer, more stringent clauses may be included. In

---


23 Ss. 46 and 70 of PAIA contain mandatory overrides in the public interest in these situations, applicable to the public and private sector, respectively.
all the above cases, the clauses should also clarify that if the public interest outweighs commercial considerations, information should be made public.

In addition to shifting the onus, and approach, there are additional policy measures that could be introduced to ensure greater transparency in contracts and we explain those using the example of South Africa. For instance, even while government contracts may be labeled “confidential”, some important aspects of the planning, procurement, contracting and licensing processes may be public – for instance, where a standard power purchase agreement (PPA) is disclosed, or a draft is published for public comment; where developments of relatively large scale must undergo a public and participatory environmental impact assessment process, where a public tendering process is used, or where the licensing process allows for a degree of public participation, albeit possibly after a PPA has been concluded. All of these windows of opportunity for transparency exist in South Africa.

Public debate on strategic policy choices is an additional avenue for balancing public interest and confidentiality. Even before any public procurement process or negotiation of individual contracts starts, there can be a lively public debate on the development of policy orientations, laws and model contracts. These documents represent strategic policy decisions (for instance, about whether and how efforts should be made to attract foreign investment in particular sectors) and provide the framework for the subsequent negotiations of individual contracts. ‘For this debate to be meaningful, it must take place even before engaging in any individual contract negotiations.’

Similarly, public input into contract negotiations can be an additional policy measures that could balance confidentiality needs. The host government may also seek input from the public during the overall process leading up to the conclusion of individual contracts, particularly in the early stages of contracting, for example, public tendering, evaluation or award process.

---

24 Eskom, the electricity utility has over the years published various versions of a standard PPA, and the National Energy Regulator has published one applicable to the procurement of renewable energy produced by independent powers producers, but no public input has been invited.

25 Government has in recent years diluted the rigour of the EIA process, supposedly because it was slowing down development.

26 Section 217 of the Constitution, 1996, and the Public Finance Management Act, 1999, require that public procurement must utilise a system that is ‘fair, equitable, transparent, competitive and cost-effective’. While details of internal checks and balances prescribed by National Treasury are not proactively disclosed, many aspects will be disclosed in response to a request in terms of the Promotion of Access to Information Act, 2000.

27 The National Energy Regulator of SA, NERSA) is required by law to hold public hearings in a licence application by a successful tenderer, but very little of the supporting information must be disclosed. Thus, members of the public are not permitted to see any details of the voluminous documentation an applicant is required to file.

28 Cotula illustrates his point by referring to ‘the recent and growing trend towards large-scale land acquisitions in Africa – including for instance a 450,000-hectare biofuel project in Madagascar. In countries that are major recipients of land-based investments, the acquisition of land on such a large scale will have significant and lasting repercussions for local livelihoods, national food security and the nature of agricultural development.

29 In South Africa, a process akin to this type of strategic national conversation is being undertaken by the National Planning Commission, much as the Codesa constitutional negotiations shaped the current national Constitution.
Disclosure of the main features of the project is essential to enable informed and meaningful public participation.

**Parliamentary approval of contracts** is another additional ‘balancing’ measure: requiring major investment projects to seek parliamentary approval can provide an enhanced dimension of public scrutiny, as well as safeguarding investors from the pressures of subsequent renegotiation of the contract. Parliamentary approval is already a legal requirement for natural resource contracts in some jurisdictions, such as Azerbaijan, Egypt, Georgia, Ghana, Kyrgyzstan, Liberia, Sierra Leone and Yemen.\(^{30}\) Significantly, note Rosenblum and Maples, ‘parliamentary ratification of contracts is yet another example of the regularity with which contracts come into the public domain with no discernable harm to the country or company’.\(^{31}\)

Similarly, legislative oversight can equally be used as an opportunity for public inputs and pressure in particular instances. However, this is conditional on the existence of particular mechanisms and resources in order to enable well-informed and genuine scrutiny. Parliamentarians need adequate time and information, as well as technical assistance from experts in the field, before use of parliamentary processes such as public hearings to invite views on proposed contracts. Of course, for parliamentary scrutiny to be robust, parliamentarians should be able to propose and adopt amendments to the contract, rather than making an all or nothing decision to accept or reject it.

**Mandatory social and environmental impact assessments** may also enable the public scrutiny of investment projects, if not of the contracts themselves. EIAs or ESIAs may be components of national law, as in South Africa or India, or requirements of policies of the international financial institutions and multilateral banks.

**Procedural rights** provide an additional opportunity to ensure greater public scrutiny not only of contract negotiation but also of contract management or implementation. They are legal entitlements that enable the public to have a say in government decisions, and ensure access to information, public participation in decision-making, and the ability to seek judicial review of adverse decisions. Procedural rights may be established by international law – for instance, under the 1998 Aarhus Convention, which specifically deals with environmental information (see Box 1).

---

\(^{30}\) Rosenblum and Maples at p. 48, and Cotula at p. 87
\(^{31}\) Rosenblum and Maples at p. 48
In South Africa, the Constitution provides the basis for such procedural rights in section 33: ‘Just administrative action

1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
3. National legislation must be enacted to give effect to these rights, and must
   a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
   b. impose a duty on the state to give effect to the rights in subsections (1) and (2); and
   c. promote an efficient administration.’

This fundamental right is elaborated in the Promotion of Administrative Justice Act, 2000 (PAJA)\textsuperscript{32} and, in the environmental context, by the National Environment Management Act, 1998 (NEMA).\textsuperscript{33}

Finally, most freedom of information laws exclude the private sector from their jurisdictional purview, and apply only to information and records held by the state, subject to exemptions. A main reason for the exclusion is that the laws have evolved in the conventional human rights framework, which has long imposed obligations for human rights on the state only. A departure from this convention is now taking place with sharing of human rights responsibilities with the private sector as well. In this scenario, exclusion of the private sector from the laws has deleterious effects on transparency and integrity in public policy as well as on capability of the citizens to exercise their human rights. Because the private sector is now performing many public

\textsuperscript{32} \url{http://www.info.gov.za/view/DownloadFileAction?id=68196}
\textsuperscript{33} \url{http://www.info.gov.za/view/DownloadFileAction?id=70641}
functions that were conventionally performed by the state, substantial amounts of information held by the former would now be placed outside of the scope of the legal regime for access to information. Therefore, extension of the regime to the private sector has become vital for advancement of the human rights agenda.  

Looking specifically at Africa, the South African and Kenyan Constitutions, which guarantee a constitutional right of access to information from private bodies, represents an unprecedented opportunity to extend accountability and transparency to the private sector.  

**Conclusion**

In conclusion, we reiterate two central arguments of this paper. The first, that secrecy is bad for government contracts for a range of reasons discussed in the paper; and second, that this does not mean that all contract information must necessarily be disclosed, but that the scope for confidentiality must be narrow and limited to a case-by-case determination where the onus is on the parties to show why confidentiality outweighs the public interest in that case.

Making transparency of government contracts the norm, and confidentiality the exception, is a necessary first step to better public benefits. Denmark’s model law on hydrocarbon development and exploration provides us a real-life example of this approach. However, alongside this shifting of onus, there could be several additional policy measures – that seek to enhance transparency, and through it, increase public scrutiny and participation in government decisions. These are not presented as “either/or” options, but as “and” options – i.e., that all these policy measures and mechanisms can work simultaneously and jointly, to enhance governance of the sector.

---