



A FRAMEWORK FOR DISCLOSURE IN PUBLIC- PRIVATE PARTNERSHIPS

TECHNICAL GUIDANCE FOR SYSTEMATIC, PROACTIVE PRE- & POST-PROCUREMENT
DISCLOSURE OF INFORMATION IN PUBLIC-PRIVATE PARTNERSHIP PROGRAMS

Table of Contents

EXECUTIVE SUMMARY.....	1
PART I.....	9
1. Background & Approach.....	9
2. Drivers of Disclosure	15
3. Challenges and Benefits.....	17
4. Users & Uses of Disclosed Information.....	20
PART II.....	23
5. Designing a PPP Disclosure Framework	23
6. Legislation and Policy.....	27
7. Pre-Procurement Disclosure.....	31
8. Post-Procurement Disclosure.....	37
9. Standard Clauses.....	44
10. Templates.....	46
11. Redactions.....	54
PART III.....	59
12. PPP Disclosure Checklist/ Diagnostic for Countries.....	59
13. References & Resources.....	66

Acknowledgements

This Framework has been prepared for the World Bank Group by Shyamala Shukla, Senior Consultant, World Bank Group Public-Private Partnerships and Team Lead for the Project, with technical inputs from Nagaraju Duthaluri, Lead Procurement Specialist, Public Integrity and Openness, and Salih Kemal Kalyoncu, Senior Procurement Specialist, from the Governance Global Practice. Petter Mathews and Christiaan Poortman from the Construction Sector Transparency Initiative (COST) provided valuable inputs. Research on country policy and practice has been undertaken by the World Bank Group Public-Private Partnerships and by Cambridge Economic Policy Associates. The Framework was reviewed by Isabel Chatterton, Manager, Advisory Services in Public-Private Partnerships, IFC; Richard Cabello, Manager, Advisory Services in Public-Private Partnerships, IFC; Javier Calvo, Principal Investment Officer, Advisory Services in Public-Private Partnerships, IFC; Patricia O. Sulser, Chief Counsel, Legal Department, IFC; Marcela Rozo, Senior Operations Officer, GGP; Gustavo Ezequiel Miranda, Operations Officer, GGP; Daniel Alberto Benitez, Lead Economist and PPP Lead, Transport Global Practice (GTIDR); Julian Mark Jackson, Principal Counsel, Legal Department, IFC; Syed Akhtar Mahmood, Lead Investment Policy Officer, Trade and Competitiveness Global Practice (GTCDR); Mark Moseley, Lead Lawyer, World Bank Group Public-Private Partnerships; Aijaz Ahmad, Senior PPP Specialist, World Bank Group Public-Private Partnerships; and Jeff Delmon, Senior Private Sector Development Specialist, World Bank Group Public-Private Partnerships. Laurence Carter, Senior Director, World Bank Group Public-Private Partnerships; Anita George, Senior Director, Energy Global Practice; Pierre Guislain, Senior Director, Transport Global Practice; Jose Luis Irigoyen, Director, Transport Global Practice; Robert Hunja, Director, Governance Global Practice; Francois Bergere, Program Manager, Public-Private Infrastructure Advisory Facility (PPIAF); Olivier Fremond, Adviser, World Bank Group Public-Private Partnerships; and Clive Harris, Manager World Bank Group Public-Private Partnerships; provided valuable guidance. The team would like to thank Sandra Gain for editing the document.

This is a joint product of the World Bank Group Public-Private Partnerships, GGP, COST and PPIAF. Funding for this product has been provided by the World Bank Group Public-Private Partnerships and by PPIAF.

Acronyms and Abbreviations

ANI	Agencia Nacional de Infraestructura
BBL	brown bag lunch
B.C.	British Columbia
BOT	Build-operate-transfer
BT	budget transparency
COST	Construction Sector Transparency Initiative
CSO	civil society organization
FCCL	fiscal commitments and contingent liabilities
FI	financial institution
FOI	freedom of information
FOIPPA	Freedom of Information and Protection of Privacy Act
GGP	Governance Global Practice
GIPA	Government Information (Public Access) Act 2009
GoK	Government of Karnataka
GP	Global Practice
HM	Her Majesty's
ICRC	Infrastructure Concession Regulatory Commission
IPR	intellectual property rights
IRR	internal rate of return
KPI	key performance indicators
KTPP	Karnataka Transparency in Public Procurement Act 1999
MoRD	Ministry of Rural Development, Government of India
MRG	minimum revenue guarantee
NDA	nondisclosure agreement
NHAI	National Highway Authority of India
OC	open contracting
OGP	open government partnership
PF2	Private Finance 2
PFI	private finance initiative
PFM	public financial management
PIR	post-implementation review
PPIAF	Public-Private Infrastructure Advisory Facility
PPP	public-private partnerships
PPPU	Public-Private Partnerships Unit
RFP	request for proposal
RFQ	request for qualification
RTI	right to information
SECOP	Sistema Electronico de Contratacion Publica
SPV	special purpose vehicle
UN	United Nations
WBG	World Bank Group

EXECUTIVE SUMMARY

Objective

The World Bank Group recommends a systematic structure for proactively disclosing information through this Framework for Disclosure in Public-Private Partnership Projects. The Framework is embedded in the findings of a global review of public-private partnership (PPP) disclosure frameworks and practices in transacted PPP contracts in identified jurisdictions.

There is a dearth of literature and guidance on policy and practice in PPP disclosure and a wide gap in the understanding of the mechanics of disclosure by practitioners within governments and the private sector. The Framework seeks to fill this gap, along with its companion volumes on Jurisdictional Studies and Good Practice Cases. Apart from its potential usefulness to practitioners in the public and private sectors, the Framework is also intended for World Bank Group and other multilateral development bank operational teams in PPP related projects that would have a tremendous opportunity not only to educate stakeholders on the technicalities associated with disclosure, but also to take on an advocacy role to promote better disclosure practices. With this broader approach in mind, professionals in the above categories from different social and infrastructure sectors have been consulted widely during the preparation of the Framework as well as the two companion volumes.

Linking Framework Design with Key Drivers

The Framework has been designed based on the key drivers of disclosure, major factors influencing the drivers, the challenges and benefits associated with disclosure and the uses and various categories of users of information once it is disclosed. Linked directly to these aspects is the issue of customizing disclosure based on the PPP contract clauses and risk-sharing mechanisms within contracts.

It is important to look at the drivers of disclosure in PPP and the specific factors influencing these to maximize the value derived from disclosure and to ensure that disclosure policy and practice are aligned with the objectives. The World Bank Group's consultations with stakeholders suggest that there are multiple but interconnected key drivers, such as mobilizing private capital for investment in infrastructure, increasing public confidence in PPP projects, achieving better value for money, and reducing the risk of corruption. Key issues underlying these are the extent of alignment of private investments with public interest, standards in the delivery of services, predictability around pipelines, a level playing field for bidders, and objective criteria for evaluating bids, among others. These specific factors, to a large extent, have informed the elements that have been recommended for disclosure under this Framework.

More direct and urgent factors inducing government to disclose more appear to be the wider government policy on transparency and whether there is supportive legislation. An inference that can be drawn from the jurisdictional studies is that good practice may be associated with the existence of legislation supporting disclosure, identified as freedom of information (FOI) legislation or other supporting legislation, such as PPP, public financial management, sector-specific legislation, and/or budget transparency related legislation. Where legislation is in place, especially overarching FOI legislation that includes clauses mandating some form of proactive disclosure, more information seems to be available in the public domain. To an extent, the period of time over which PPP projects and programs have been undertaken also impacts disclosure. However, another related association that we may infer is that practice relating to PPP disclosure may have developed more rapidly in emerging countries perhaps because there is more of an imperative and pressure to create new infrastructure.

Levels of Disclosure

While creating a more generic framework design linked to the drivers of disclosure and the factors underlying these drivers, it may not be practical to assume that jurisdictions at various levels of disclosure can easily achieve the recommended level of disclosure. There could be several supply-side hurdles to the recommended level of disclosure. In addition, disclosure in PPP, similar to other aspects of PPP, is the responsibility of the public and private sectors. Although FOI Acts usually place the responsibility of disclosing information on the public sector, in the case of PPP projects, the public sector on its own cannot provide all the required information and has to be aided and assisted by the private sector. Clauses on how information will be collected and disclosed need to be included in contracts. In addition, in some situations, it might be essential to enhance the capacity of the public and private sectors for them to understand the importance and mechanics of disclosure, and to enable them to work together to disclose and disseminate information effectively.

Although standard clauses and methodologies to handle information suggested in the Framework will be useful, these may not fully take care of capacity issues. Given these limitations, the Framework, while recommending a single template for disclosure meant for countries with sufficient capacity, also underscores the importance of countries assessing their capacity and opting for a lower level of disclosure as required. Two additional relatively basic levels of disclosure have been included in the Framework, which suggest the use of the same template but with selective filling in of sections.

Role of Strategic Communication

Disclosure of information appears to be influenced by a host of challenges and benefits. Key challenges facing disclosure appear to be the reluctance of public bodies to share information in the absence of a clear mandate, a dearth of practical internal guidance, nonavailability or inaccuracy of data, time and costs of disclosure, and lack of oversight mechanisms. Sometimes even disclosed information becomes inaccessible, especially where it consists in placing complex, difficult to comprehend, full contract documents in the public domain. A disconnect between the objectives of disclosure and the policies used is also a fundamental challenge. Not surprisingly, challenges such as increased litigation and consequent delays during or after procurement may also arise for governments that disclose, feeding back into the general reluctance to share information.

Disclosure has longer-term and distinct benefits, such as greater accountability in expenditure, higher level of confidence in the fairness of the process, better quality of bids, and the potential for the formulation of improved policies and practice relating to PPP in the long run. Therefore, it is essential that challenges are overcome by building the right frameworks for disclosure as well as by framing the discussion around disclosure through strategic communication with stakeholders.

Since the Framework recommends disclosure beginning with the entry of a project into the approved preliminary pipeline, it is important that strategic communication around projects and programs is formulated at an early stage. This essentially means making disclosure not a one-way process but a two-way, interactive process to ensure that the feedback loops are completed and the disclosed information is understood, absorbed, and used optimally by all stakeholders. Strategic communication also entails placing the project in the right context, benchmarking it in terms of tariffs (and costs) and services using available regional, national, and local benchmarks of existing projects, and also discussing the pros and cons of different alternatives for providing service, highlighting the relative advantages of the selected alternative. It is also important to frame the discussion around other key issues, such as competition and confidentiality, which may be of concern to the private sector.

Recommended Disclosure

The recommended design is hierarchical and includes a logical framework that moves from a high-level mandate to disclose toward the basic elements that need to be disclosed. Table ES.1 provides a snapshot of the recommended features of the Framework. The Framework emphasizes that although these features make up a desired and easy-to-implement design, not all of the features may be needed in all jurisdictions. For example, legislation with proactive disclosure elements is not always required, especially where transparency is already embedded in the governance framework. The United Kingdom is probably one of the few jurisdictions that has all these features in its disclosure framework for PPP, including a comprehensive chapter on information and disclosure in the standard PPP clauses.

Before designing a framework, it is also recommended that countries first conduct a rapid assessment of the status of PPP disclosure using the PPP Disclosure Diagnostic provided as part of the recommended Framework. The PPP Disclosure Diagnostic provides guidance for assessing the status of each of the following areas in the jurisdiction under consideration:

- Overview of the general transparency environment
- History and outlook for PPP disclosure
- Political environment for disclosure
- Legal and policy framework
- Process and institutions
- Guidance on confidential information.

TABLE ES.1: SNAPSHOT OF RECOMMENDED DISCLOSURE

LEGISLATIVE OR POLICY MANDATE	<ul style="list-style-type: none"> • Provide general coverage of contracts entered into by any public authority, including ongoing performance information • Enable public entities to place information in the public domain voluntarily • Include broad areas of redactions relevant for PPP (commercially sensitive information, trade secrets, strategic and public interest related confidential information, etc.)
DETAILED GUIDANCE	<ul style="list-style-type: none"> • Explain the applicability of legislation to contracts and project information

TABLE ES.1: SNAPSHOT OF RECOMMENDED DISCLOSURE

	<ul style="list-style-type: none"> • Specify elements of pre- and post-contract disclosure • Specify timelines • Provide details of confidentiality provisions to the extent possible • Discuss any validation requirements • Provide a template for disclosure
PRE-PROCUREMENT DISCLOSURE	<ul style="list-style-type: none"> • <i>Pre-tender</i>: approved pipeline of projects with brief description of project, services, estimated cost, likely sources of revenue, and tentative procurement dates • <i>Tender</i>: expression of interest, request for qualification, request for proposal (including evaluation criteria and preferred bidder negotiation criteria), draft contract, and detailed project report • <i>Evaluations</i>: names of bidders, names of shortlisted bidders at request for qualification, name of preferred proponent, minutes of bidders' meetings, all communications with bidders during procurement, and modifications to documents • <i>Reports</i>: any oversight reports if available, and value for money (or other methodology for PPP mode evaluation) reports for disclosure following financial close
POST-PROCUREMENT DISCLOSURE	<ul style="list-style-type: none"> • <i>Basic project information</i>: high-level information • <i>Risk</i>: material risks, allocation, mitigation, actual risk events, and cost • <i>Reasons for choice of PPP</i>: qualitative and quantitative analysis • <i>Financial information</i>: financing structure, estimates, and actual revenues (limited by contract type), and forecast and actual equity return (limited by structure and contract type) • <i>Government support</i>: guarantees, grants, land, rights, payments for service, and others • <i>Tariffs</i>: tariff methodology and review and regulation • <i>Performance</i>: actual performance against targets, actual penalties against contract provisions, independent engineer or auditor report, and user feedback and surveys

TABLE ES.1: SNAPSHOT OF RECOMMENDED DISCLOSURE

	<ul style="list-style-type: none"> • <i>Contract termination</i>: termination provisions and handover provisions • <i>Renegotiations or changes</i>: details of changes, impact of change on cost, fiscal commitments and contingent liabilities, risk allocation, tariff or payment, and services or levels of service
CONFIDENTIAL INFORMATION	<ul style="list-style-type: none"> • <i>Areas or elements that could be considered confidential</i> (subject to overarching law and project-specific circumstances): where the competitiveness of the private provider may be jeopardized, such as the base case financial model, debt structure and pricing methodology, and components • <i>Specification of the implications of the audit mandate</i>: underscoring the extent of disclosure to audit, and that audit reports along with confidential information will be disclosed • <i>Specification of time period</i>: time period during which information will remain confidential
STANDARD CONTRACT PROVISIONS	<ul style="list-style-type: none"> • <i>Maintenance and provision of information</i>: list of reports, documents, and other information the private provider should maintain and submit to authority; website and displays at site; timelines for submission and disclosure; and penalties for non-submission • <i>Presumption of full disclosure</i>: everything except confidential information • <i>Confidentiality</i>: language on what constitutes confidentiality, illustrative list of elements, format for listing confidential clauses, and clause for disclosure in public interest
PLATFORM	<ul style="list-style-type: none"> • <i>A single platform is recommended</i>; where not possible, cross links would be desired
TIMELINES	<ul style="list-style-type: none"> • <i>Basic project information</i> can be disclosed pre-procurement as it becomes available • <i>Pre-procurement information</i>: according to the milestones in the process; evaluation and meeting minutes preferably within two to three business days • <i>Renegotiations</i>: preferably within 45-60 days of execution of renegotiated contract

TABLE ES.1: SNAPSHOT OF RECOMMENDED DISCLOSURE

	<ul style="list-style-type: none"> • <i>Performance information</i>: preferably within 15-30 days of receipt of information by authorities • <i>All other information</i>: preferably within 45-60 days of signing the contract
TEMPLATE	<ul style="list-style-type: none"> • <i>Structure</i>: a 10-section simple template including pre- and post-procurement disclosure elements is recommended • <i>Selective completion of template</i>: recommended based on three levels of disclosure: for countries with low capacity, moderate capacity, and mature or substantial PPP programs and capacity

Next Steps

The Framework is recommended for use by jurisdictions with existing or potential PPP programs with suitable customization based on maturity of program, current status of disclosure, types of contract structures and payment mechanisms used, and availability of public sector capacity. There is substantial interest in countries at this point in time and at an appropriate stage in the development and dissemination of this Framework, there is scope for practical applications. There is also scope for use of the Framework, specifically the Disclosure Diagnostic proposed within the Framework, in conjunction with wider open contracting and general transparency related tools, such as the World Bank Group's Scoping Assessment Tool for Procurement Systems. For future related work, there is scope for extending the Open Contracting Data Standard¹ to PPP using the recommendations of this Framework.

The Framework will remain a work in progress and will be refined based on stakeholder feedback, implementation experience, as well as any significant changes in PPP structures and processes.

¹ http://ocds.open-contracting.org/standard/r/1__0__0/en/standard/intro/.

PART I

1. Background & Approach

Background

In January 2013, the World Bank Group (WBG) published a Report entitled Disclosure of Project and Contract Information in Public-Private Partnerships,² which consisted of an examination of disclosure frameworks, including applicable legislation, government policies, rules, regulations and guidelines, as well as actual practice in transacted contracts, in eleven selected jurisdictions.³ The scope of the study was limited to reactive⁴ and proactive⁵ post-procurement disclosure.⁶ Several interviews and global consultations were held with practitioners and policy makers from governments and stakeholders from the private sector in a range of countries, including the selected jurisdictions. Further, technical

² The 2013 Report can be found at the following link:
<http://wbi.worldbank.org/wbi/Data/wbi/wbicms/files/drupal-acquia/wbi/Disclosure%20of%20Project%20PPP.pdf>.

³ The eleven selected jurisdictions are as follows: New South Wales and Victoria in Australia; Bahia, Brazil, and Minas Gerais in Brazil; British Columbia in Canada; Chile; India; Peru; South Africa; and the United Kingdom.

⁴ Disclosure in response to a request for information, usually under a Freedom of Information or Right to Information Act, is termed as reactive disclosure. It is sometimes also called responsive disclosure, which is considered more positive as opposed to the inherent negativity in the term “reactive.”

⁵ Proactive disclosure includes all information that is disclosed by governments either voluntarily or under a mandate provided by legislation or policy.

⁶ Post-procurement disclosure pertains to all disclosure in the period immediately after the signing of the agreement and continues up to completion of contract term, including any post-contract term activities mentioned in the contract such as handover of assets, etc. Pre-procurement disclosure pertains to disclosure prior to signing of the contract and includes all stages of the project from project concept to the completion of bid and negotiations (that is, just prior to signing of the contract).

guidance was provided to individual countries and ministries (on demand)⁷ to improve the transparency of public-private partnership (PPP) programs and projects in parallel.

The WBG PPP Group further developed the results from the 2013 report through a fresh review of policy and practice in PPP disclosure in 2014. This review included pre- and post-procurement information disclosure. That is, the review was wider in scope, so as to include all the phases of a PPP from development to the completion of contract term, but limited to proactive disclosure only to sharpen the focus to this specific area on the spectrum of disclosure. Cambridge Economic Policy Associates was retained to work on the initial research and case studies. Thirteen jurisdictions⁸ in various regions were included in the study. Figures 1 and 2 present a summary of these various initiatives.

FIGURE 1: SNAPSHOT OF WBG PPP GROUP WORK IN PPP DISCLOSURE

	Scope	Methodology	Outcomes/ Findings
Post-Procurement Disclosure Review	<ul style="list-style-type: none"> 11 jurisdictions Reactive and pro-active disclosure policy and practice 	<ul style="list-style-type: none"> Country selection to ensure regional coverage Desk research: policy, contracts Interviews with policy makers, civil society 	<ul style="list-style-type: none"> High reactive disclosure Low proactive disclosure except in Latin American jurisdictions Minimal performance disclosure
Technical Guidance to Countries	<ul style="list-style-type: none"> Technical assistance to ICRC Nigeria - 2012 Technical assistance to MoRD India - 2012 Discussions ongoing with Honduras -2014-15 	<ul style="list-style-type: none"> Study of existing and related legislations Study of contracts Assistance in drafting Participation in consultations 	<ul style="list-style-type: none"> Guidelines approved by ICRC Board Contracts disclosed by MoRD India, guidance approved by Minister but not fully implemented
Dissemination activities	<ul style="list-style-type: none"> BBL - 2012 Webinar - June 2014 3-Webinar series - 2015 Consultation/BBL - 2015 Guidance on PPP Disclosure/ G20 -2015 	<ul style="list-style-type: none"> External and internal audiences included Best practices in specific countries discussed Policy makers encouraged to participate 	<ul style="list-style-type: none"> Awareness of WBG's work among policy makers Awareness of desirability of disclosure among policy makers
Pre and Post-Procurement Disclosure Review	<ul style="list-style-type: none"> 13 jurisdictions Proactive disclosure Identification of good practice cases 	<ul style="list-style-type: none"> Country selection to ensure regional coverage Desk research: policy, contracts Interviews with policy makers, civil society 	<ul style="list-style-type: none"> FOI Acts key to disclosure approach FOI coverage of PPP interpreted variously Rapid learning curve in emerging PPP markets

⁷ So far, such technical guidance has been provided to the Infrastructure Concession Regulatory Commission in Nigeria and the Ministry of Rural Development in India.

⁸ The 13 jurisdictions are New South Wales and Victoria in Australia, Minas Gerais in Brazil, British Columbia in Canada, Chile, Colombia, Honduras, the central government and the state of Karnataka in India, Kenya, the Philippines, South Africa, and the United Kingdom.

FIGURE 2: REGIONAL COVERAGE OF THE 2014 JURISDICTIONAL STUDY OF PPP DISCLOSURE



Approach

The immediate objective of this Framework is to provide a systematic structure for disclosing information for policy makers interested in developing a policy for PPP disclosure in their countries. There is a dearth of literature on policy and practice in PPP disclosure, which this Framework, together with the companion jurisdictional and case study volumes,⁹ seeks to address.

Although the primary target audience is policy makers, the Framework has been designed more broadly to address other stakeholders as well. This Framework can be used by legislators, regulators, PPP practitioners and specialists in the public and private sectors, researchers, civil society organizations, and the general public, who can contribute to improved transparency through playing their respective roles, whether as information creators, disseminators, or users. The Framework is also expected to be useful to teams within the WBG and other multilateral development banks, providing technical guidance on PPP in client countries to include and integrate disclosure into PPP programs and

⁹ The PPP Group has also prepared the following: *Disclosure in Public-Private Partnerships: Jurisdictional Studies* and *Disclosure in Public-Private Partnerships: Good Practice Cases*, which can be useful supplements to the *Framework*.

projects. With this broader approach in mind, professionals in the above categories and also other interested persons from different social and infrastructure sectors have been consulted widely during the preparation of the Framework.

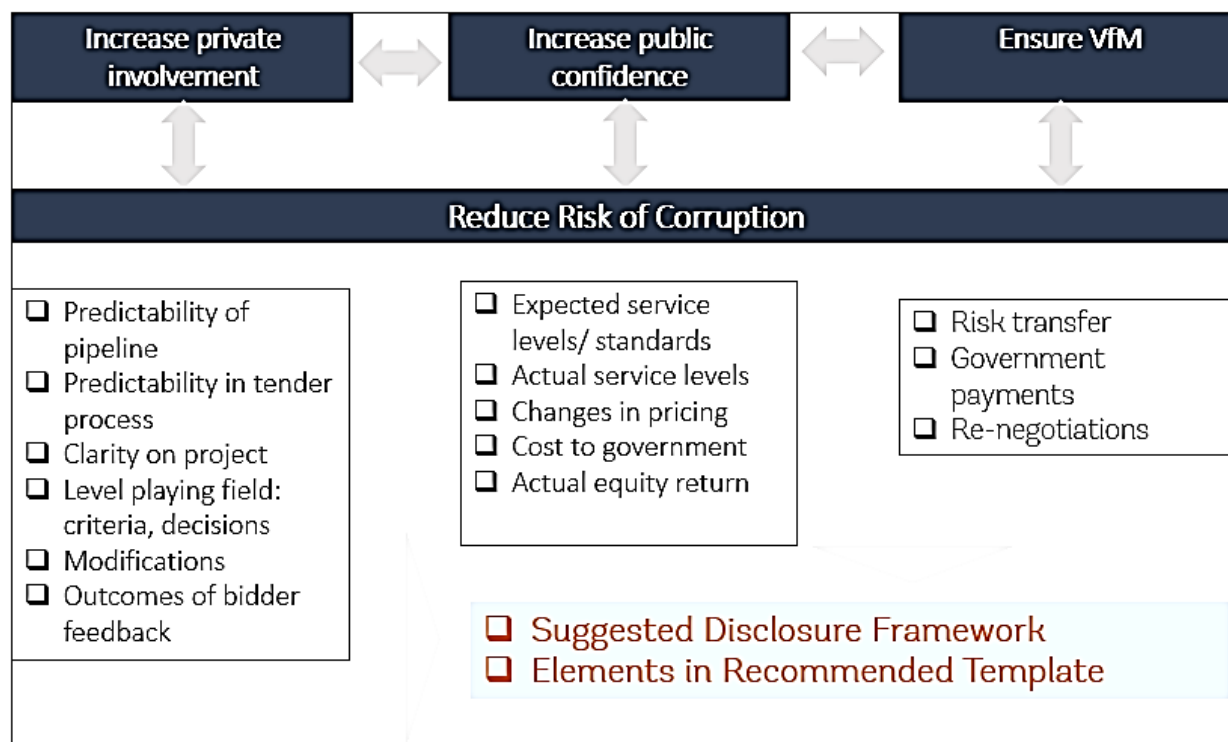
The larger objective of the Framework is to help foster more transparent, efficient, effective, and accountable governance of PPP programs and projects in client countries. This is particularly relevant for jurisdictions that have not fully formalized or implemented their approach and policy relating to disclosure in PPP. The idea is to help clients think through relevant issues to disclose not necessarily more information, but more relevant and useful information, and adopt frameworks that will help in institutionalizing disclosure.

The recommendations in the Framework, including the elements suggested for proactive disclosure, are linked to policy objectives that appear to drive disclosure (figure 3) in a range of jurisdictions. These objectives are treated in greater detail in section 2. The Framework design in section 5 attempts to connect the objectives to policies and the various challenges and benefits discussed in section 3. Further, the users of information and how they use disclosed information have also been key considerations in designing the framework (section 4). In addition, the nature of contractual obligations between the parties has been considered while suggesting the elements to be disclosed in sections 7, 8, and 10. For example, proactive disclosure of information, such as that related to revenue or equity returns, is suggested where there are clear links to revenue-sharing clauses in contracts and to government's own exposure in the context of the risk allocation decisions inherent within the contract.

A recommended template and brief guidance on the use of the template for countries with varying levels of capacity are included as part of the Framework.

The Framework also looks at several related issues, such as supportive legislation, confidential information, and transparency in unsolicited projects.

FIGURE 3: ALIGNING THE FRAMEWORK WITH OBJECTIVES AND DRIVERS OF DISCLOSURE



The rest of **Part I** of the Framework is based on consultations with stakeholders closely involved with PPPs and disclosure issues in countries, and essentially summarizes the findings of these consultations. It also acts as a preamble to Part II, which contains the recommendations. The rest of Part I is structured as follows:

- Section 2 briefly outlines the objectives and drivers of PPP disclosure.
- Section 3 examines the challenges and benefits associated with disclosure.
- Section 4 looks at the users of information and the various ways in which each set of users uses the disclosed information. This section sets the context for connecting the disclosure framework with user needs.

Part II forms the core of the Framework and consists of seven sections. Most of the sections are designed to look briefly at international practice, followed by recommendations for disclosure with a brief rationale. The companion volumes on jurisdictional studies and good practice cases (referred to in footnote 9) deal with country practices in detail, look at actual disclosure in selected projects, and examine specific types of disclosure. These are suggested as additional reading for policy makers or practitioners

looking to gain a greater understanding of international practice or specific types of disclosure. The sections in Part II are:

- Section 5 focuses on the key elements in designing a disclosure framework.
- Section 6 looks at a desirable legislative, policy, and institutional framework.
- Section 7 focuses on the key elements in pre-procurement disclosure and includes a brief subsection on disclosure in unsolicited projects.
- Section 8 focuses on the key elements in post-procurement disclosure, including ongoing performance disclosure.
- Section 9 examines the use of standard clauses.
- Section 10 looks at the use of templates. It also builds a comprehensive template for disclosure of pre- and post-procurement information.
- Section 11 examines the concept of confidential information and redactions.

Part III of the Framework contains additional material and resources to help practitioners, and is structured as follows:

- Section 12 is a Checklist/Diagnostic that can be used to review the status of disclosure in PPP in a country. It is in the nature of a rapid country PPP disclosure diagnostic to identify gaps with the objective of developing a strategy and a useful framework for institutionalizing disclosure.
- Section 13 contains useful references and resources, with links to websites, where available, to supplement the guidance and information provided in the Framework.

2. Drivers of Disclosure

PPP disclosure in the jurisdictions studied appears to be influenced by multiple drivers, such as reducing the risk of corruption, mobilizing private capital for investment in infrastructure, increasing public confidence and awareness, and achieving value for money through PPP transactions (see figure 4). For example, in South Africa, the rationale behind the policy objective of transparency in procurement processes as set forth in the Constitution is the public's right to be informed that public money is being spent accountably. As the beneficiary of the service that is being procured, the public also has the right to be informed that the products that are being procured through PPP demonstrate value for money. Many of these objectives and drivers inducing governments to disclose exhibit interconnectedness.

Other specific factors can be identified under the four broad drivers of disclosure. For example, important factors contributing to an increase in public confidence are (a) aligning private investments with public interest and (b) improving the delivery of public services. Similarly, factors contributing to improved private investment mobilization include (a) the predictability of the PPP pipeline, (b) a level playing field for all bidders, and (c) objective criteria for evaluating bids, among others. These specific factors contributing to the key drivers of disclosure and, to a large extent, determine the elements that should be recommended for disclosure.

In addition to these drivers, which appear to induce governments to disclose more, key direct factors underlying and supporting better disclosure practices in jurisdictions appear to be the wider government policy on transparency and whether these policies are, in turn, supported by legislation.

FIGURE 4: FACTORS DRIVING PPP DISCLOSURE



Although it is difficult to pinpoint any one of these as the key driver, since the approach to disclosure varies across jurisdictions, it appears more conclusive that good practice may be associated with the existence of legislation supporting disclosure. Frequently this legislation supporting disclosure is identified as freedom of information (FOI) legislation or other supporting legislation, such as PPP, public financial management (PFM), sector-specific legislation, and/or budget transparency related legislation. Legislation other than FOI or PPP legislation frequently covers limited areas of disclosure. In addition to non-PPP disclosures, legislation may also cover some aspect of PPP, for example, PFM Acts may mandate the disclosure of all fiscal commitments and contingent liabilities of the government, including those arising from PPP projects. Budget transparency legislation mandates disclosing the budgeted amounts for different projects and programs, including the budget for PPP related payments.

Where legislation is in place, especially overarching FOI legislation that includes clauses mandating some form of proactive disclosure, more information seems to be available in the public domain. FOI Acts are being increasingly interpreted as covering PPPs in addition to mandating proactive disclosure. And in most of the jurisdictions studied, FOI Acts appear to be powerful instruments inducing better proactive PPP disclosure. The majority (seven) of the jurisdictions reviewed by the World Bank have provisions mandating proactive disclosure (see table 1). Where FOI legislation does not exist or does not include proactive disclosure requirements, there is less disclosure or relatively non-uniform disclosure practices. This is the case in India, where the FOI Act recommends but does not mandate proactive disclosure; Kenya, which is yet to have an FOI Act in place; the Philippines; and, perhaps to a lesser extent, South Africa.

However, it is important to emphasize that although the existence of FOI Acts appears to be associated with greater levels of disclosure in PPP, several countries (including some not included in the study) that do not have FOI Acts can still technically mandate disclosure of information through PPP legislative and policy frameworks, specific PPP disclosure frameworks, PFM, sector-specific legislation, or individual contracts. However, it logically follows that the coverage especially in the latter case (individual contracts) could be narrower and non-uniform, and institutionalization may perhaps be more difficult to achieve relative to a scenario where FOI or some other legislative mandate exists.

To an extent, the period of time during which PPP projects and programs have been undertaken also impacts disclosure. But it cannot be said that the maturity of disclosure practices is determined fully by the maturity of the PPP program. Disclosure practice appears to have developed over time in jurisdictions like British Columbia, New South Wales, and Victoria, which have been undertaking PPP projects over a long period of time and also have more mature PPP disclosure regimes. Other jurisdictions, like Colombia, India, and Peru, with relatively recent programs, appear to have progressed much more rapidly up the learning curve, achieving a good level of disclosure in a short space of time. Countries in Latin America appear to be disclosing more information in PPP overall compared with countries elsewhere, whether developing or developed. For instance, in

Colombia, practices in the pre-procurement phase have reached a reasonable level of maturity and this is true of most countries with substantial PPP programs in Latin America.

One association that we may infer is that practice relating to PPP disclosure may have developed more rapidly in emerging countries, perhaps because there is more of an imperative and pressure to create new infrastructure. This observation links back to the objectives of increasing private sector involvement, increasing public confidence, and ensuring value for money, all of which in turn are variously linked with the larger objective of reducing the risk of corruption.

TABLE 1: FOI ACTS IN THE JURISDICTIONS STUDIED

COUNTRY	FOI LAW	PROACTIVE
BRITISH COLUMBIA	Freedom of Information and Protection of Privacy Act	No
CHILE	2008 Access to Public Information Law	Yes
COLOMBIA	Law of Proactive Disclosure 2013	Yes
HONDURAS	2006 Transparency Law	Yes
INDIA & KARNATAKA	Right to Information Act 2005	Yes/no
KENYA	Freedom of Information Bill 2012, currently going through parliament	Not yet known
MINAS GERAIS	Transparency Law, 2011	Yes
NEW SOUTH WALES	Government Information (Public Access) Act, 2009	Yes
PHILIPPINES	Freedom of Information Bill, currently going through Congress	Not yet known
SOUTH AFRICA	Promotion of Access to Information Act, Act 2 of 2000	No
UNITED KINGDOM	Freedom of Information Act 2000	Yes
VICTORIA	Freedom of Information Act 1982	Yes

3. Challenges and Benefits

Disclosure of information appears to be influenced by many challenges and benefits. Many of the challenges can be overcome through a sound and well-thought-out framework. In later sections of the Framework, especially the sections assessing the elements required for a useful disclosure policy, we refer back to some of the challenges and benefits discussed in this section. Some of the major challenges in information disclosure highlighted by PPP practitioners are summed up in the following discussion.

- A key challenge facing disclosure in some jurisdictions appears to be the reluctance of public bodies to share information in the absence of a clear mandate or framework for proactive disclosure as well as the lack of clarity on disclosure specific to PPP. There are many layers of legislation and policy in some of the jurisdictions studied, which

leads to lack of clarity and difficulties in compliance and monitoring. There is also the feeling among government officials that their decisions as well as “advisory” may be exposed to public scrutiny, which appears to induce officials to disclose less rather than more where there is a lack of a clear mandate.

- An additional challenge relates to the retroactive applicability of FOI Acts on projects implemented prior to the legislation. Although the Act would apply in theory, the feasibility of implementing this retroactive effect on documents in practice is questionable, especially where the contracts might have some confidentiality clauses binding both parties. For example, this was an issue when the government decided to disclose contracts in Victoria; the government had to negotiate with the private party in many cases to enable disclosure. The Infrastructure Concession Regulatory Commission in Nigeria, while processing its PPP Disclosure Guidelines, carried out extensive discussions with concessionaires in the port sector to gauge the level of readiness among private investors to accept the government’s decision to disclose. The United Kingdom took a decision in 2010 to disclose contracts signed after January 2011; the policy was not applied to prior projects.
- The main challenge to information disclosure in those jurisdictions where there is a legislative requirement to disclose proactively appears to be the lack of practical internal guidance and processes. For example, Kenyan PPP unit officials indicated that if guidelines were made available, with templates and a dedicated space on the Public-Private Partnerships Unit website, it would be easier to comply with the disclosure provisions under the PPP Act and the related provisions of the PFM Act, such as the requirement to disclose contingent liabilities. The WBG is now providing technical support to the Government of Kenya for disclosure of fiscal commitments and contingent liabilities. An associated issue in disclosure could be uncertainty and/or ambiguity within government agencies about their respective disclosure responsibilities, particularly at the post-procurement stage.
- The availability and accuracy of government data on PPP is a critical issue in disclosure. In the post-procurement phase, it has been observed that project information is often not readily available in practice.
- Another key challenge appears to be the time and cost involved in establishing disclosure practices. Submission of information in line with requirements imposes costs to the public and private parties. Private parties are the repositories of all information during the long operational period of the project and need to make this available for any ongoing operating performance disclosure. For the public sector, in turn, there may be a lack of dedicated staff or budgets to manage information disclosure requirements.
- There seems to be less information disclosure at the post-procurement stage. There is a lack of performance/monitoring reports, which is not unexpected, as sometimes reports are not available within the recommended time and the government cannot make the information available unless it has been able to obtain the information from

the special purpose vehicle (SPV). Further, the policy framework for post-procurement disclosure is less strong and in many cases does not exist.

- Although there might be clarity on what should be disclosed and when, there is no provision for any oversight mechanism in many jurisdictions. This lack makes it difficult to understand the level of compliance. Research on a sample of five projects in each jurisdiction studied showed several instances of inconsistencies in compliance. In general, there is a lack of pressure on private entities to disclose specific performance information, or to set up websites for their projects to keep the general public informed of the developments taking place with the project.
- Disclosed information is often inaccessible in reality. Governments often disclose long contract documents in pdf format with no search features available. In addition, for consumers and members of the general public, the contract documents become inaccessible because of their technical complexity. Few program and project databases are comprehensive and all in one place, consisting of all the project documents, including feasibility reports, concession agreements, and the status of various clearances and land acquisitions.
- A critical issue being discussed in governments with more mature PPP markets and better disclosure policies is what is perceived to be the disconnect between the objectives of disclosure and the policies used. Public accountability and transparency are the main aims of PPP disclosure. However, it is felt in some jurisdictions, like New South Wales, that contract summaries are often very long and key pieces of information, such as financial information, are not included, making these long summaries tedious to read but still leaving the reader ill-informed about the project.
- Apart from challenges impeding better or more disclosure, disclosure itself can have some unexpected or undesirable ramifications. Greater disclosure requirements provide unsuccessful bidders with greater access to effected contracts, leading to increased risk of such bidders bringing claims against the government. Practitioners in Pakistan have provided feedback regarding the challenges of disclosing full PPP contracts, as this might lead to litigation from unsuccessful bidders. Disclosure of draft tender documents with an invitation to the general public to comment in Colombia led to some 1,500+ comments that the government undertook to respond to individually, leading to substantial delays in the project.
- However, it is essential that these challenges are overcome with the right frameworks and policies, given the longer-term and distinct benefits to disclosure that have been pointed out by practitioners, in many cases with anecdotal evidence to substantiate their views. Some of these benefits are summarized as follows:
- Disclosure keeps the public sector accountable for expenditure via PPPs. For example, reactive information disclosure in relation to the Fort St. John Hospital project in

British Columbia allowed analysts to put pressure on the government to achieve value for money from public expenditure.¹⁰

- Information disclosure creates a high level of confidence in the fairness of the PPP procurement process. This confidence reduces uncertainty from a bidder's perspective (for example, potential concerns that a proponent has already effectively been selected and that the procurement process is simply a tick-box exercise). Greater confidence in the process reduces barriers to entry, encourages new potential bidders, and incentivizes more competitive tendering. More competitive tendering is likely to cut economic rents to efficient levels, and therefore offer better value for money for taxpayers.
- In some jurisdictions, such as India as well as the United Kingdom, information disclosure has led to a reformulation of government practices with regard to PPPs. Earlier it was more common for the government to sign memorandums of understanding with individual firms. Since the beginning of a systematic PPP program with the establishment of the Public-Private Partnerships Appraisal Committee and standard contract documentation in the mid-2000s, India engages only in competitive bidding for the allocation of PPP projects at the level of the national government. At the provincial or state level, a few states that have PPP legislation or policies follow mostly competitive bidding. Where unsolicited bids are used, there is a relatively transparent framework for these. In jurisdictions such as the United Kingdom, the publication of audit reports led to widespread public criticism and pressure to disclose information on PPP more systematically, as well as to make major changes in policies. Private Finance 2 (PF2) has several very progressive disclosure clauses as well as new requirements for government equity contribution in PPPs.
- Disclosed information forms an important input into the procurement process in PPPs. There are several benefits to disclosure. In particular, in addition to the project-specific request for qualification (RFQ) and request for proposal (RFP) documents, disclosure of independent reports and public sector commitments at the pre-procurement stage are important inputs for bidders in evaluating the project and putting together a feasible proposal guided by a more reliable assessment of the project's feasibility.

4. Users & Uses of Disclosed Information

There does not appear to be any substantial analysis of users and uses of information in the jurisdictions studied. Such analysis is not straightforward, as it is difficult to identify the uses and users of disclosed PPP information, given that the information is publically available and so can be accessed by any person or organization. However, from

¹⁰ <http://www.policynote.ca/how-the-rules-got-fiddled-to-make-sure-a-public-private-partnership-got-pushed-through/>.

consultations, it can be inferred that there are several key groups of users. In addition, we have some inferences, some of which are obvious, about the use of the disclosed information by each category. Although disclosure of information in itself is useful, it is found to be of greater value where projects and authorities try to engage stakeholders in a dialogue. One issue of importance in this context is how governments frame the discussion around the disclosed information. Many of the pitfalls or unintended consequences of disclosure, which are discussed briefly in section 3, can be avoided or minimized through a good communication strategy that is implemented skillfully by governments. Framing of the context around the disclosed information through a good communication strategy can also educate the users of disclosed information and ensure the fullest and best use of the information:

- Private companies, including bidders. Bidders constitute a major group among the users of disclosed information. This is not surprising, as the information, pre- and post-procurement, is likely to be useful for bidders. For example, the website traffic of Partnerships BC, in British Columbia, tends to increase significantly when there are specific procurement milestones, such as publication of the RFPs, largely because of interest from potential bidders. In addition, parties interested in developing unsolicited proposals tend to follow up on the soundness of the process and criteria, and also try to gain a better idea of the projects already underway and potential projects likely to fit within the government's development plan.

Apart from bidders, private companies in general like to use value-for-money reports for feedback on the public sector comparator as well as risk allocation issues. Private companies are also able to gain a greater understanding of why the winning bidder was chosen and accordingly formulate their own proposals in other bids. Industry is keen to understand the progress of potential projects coming to market, and during the competitive process when extended approval processes can impact directly the private sector's costs of bidding.¹¹ Feedback of this nature from the private sector in the United Kingdom led to the establishment of the project tracker.

- Trade media. Trade media are important users of PPP information documents (more specifically in terms of releasing links to this information to interested parties), and therefore may also be significant contributors to the spikes in website traffic at certain times, for example when expressions of interest, RFQs, and RFPs are released or news about project closings is reported. Significantly, some of these journals come out with regular quarterly and annual reports on project transactions by milestone as well as the total value and number of closed projects by sector, country, and region. Examples of these publications include Infrastructure Journal, InfraNews, Infrastructure Investor, etc.
- Mainstream media. The mainstream media includes general news journalists who look at aspects of the projects related to service quality, social issues, fiscal issues, private

¹¹ HM Treasury, A new approach to public private partnerships, December 2012.

investment, financial issues, land, environment, and resettlement, including the procurement process.

- Members of the public. The general inference is that a few individuals may be interested in PPP contracts and data, most likely (local) government representatives and representatives of civil society organizations that are interested in PPP, or more frequently a specific infrastructure service (including resident welfare associations, especially in the water and power sectors, some of which appear regularly before independent infrastructure regulators).
- Users of services. Service users are understood to be included among the category “general public;” however, users of services are more focused users of project information as it affects them directly. Users are interested in the standards of service as well as actual performance.
- Government departments. When a PPP is commissioned, other government departments, especially those that exercise oversight, such as the Ministry of Finance, also rely on the information disclosed for their own reporting and monitoring purposes. The disclosed information also helps in keeping a better handle on public spending and developing better policy. Government officials working on new but similar projects at the provincial and local levels depend on information and documents disclosed by national PPP units or by other contracting authorities while developing and procuring their own PPP projects.
- Investors. These stakeholders use the information to assess the viability of projects and recommend or make decisions on investments.
- Practitioners and advisors. Practitioners and advisors in the PPP sector consult the disclosed contracts when they work on new projects that have similarities. This practice seems to have assisted in standardizing contracts and, in particular, risk allocation.
- Researchers. Researchers frequently access PPP information, contracts, and performance reports. For example, in 2010 the Conference Board of Canada published a report entitled “Dispelling the Myths: A Pan-Canadian Assessment of Public-Private Partnerships for Infrastructure Investments,” which used the “Value for Money Assessment” documents to assess the efficiency of PPP procurement.^{12,13} Similarly, there is an Australian study that compares PPP projects with traditionally procured infrastructure on several parameters.

¹² Conference Board of Canada report:

http://www.fengatecapital.com/DispellingTheMythsRpt_WEB1.pdf.

¹³ The value-for-money assessment, a document that is often disclosed at the *post-procurement stage*, involves a detailed comparison of the total costs of the PPP and conventional procurement options on an ex ante basis.

PART II

5. Designing a PPP Disclosure Framework

The PPP disclosure framework needs to be designed based on the objectives and drivers of disclosure, its challenges and benefits, and specifically the users and uses of the disclosed information, the type of government support, and consequently government fiscal risk and exposure, linking all of these together in a continuum. We have seen some of these aspects in more detail in the preceding sections. A framework for proactive PPP disclosure is similar to any general proactive disclosure policy in terms of the broad elements, that is, what should be disclosed, when, and in what form; what should not be disclosed; and the responsibilities for disclosure. However, the special circumstances and sensitivities associated with PPP projects, such as the long contract period, complex structure, provision of “public” services by the private party, performance/output-based payment mechanisms, and the multiplicity of stakeholders and their sensitivities, among others, require a PPP disclosure policy to go beyond a general disclosure policy in the level of detail.

The framework should preferably provide a legislative or policy mandate for proactive disclosure, such as through FOI, PPP, PFM, budget transparency or other legislation and, in addition, provide sufficient guidance to officials. The framework should link the disclosed elements with key drivers of disclosure and the anecdotal evidence related to the current and potential use of information. The framework would also vary based on what is already there. For example, if there is applicable legislation that does not mandate proactive disclosure or if there is no applicable legislation, such mandate can be supported through policy and guidelines. Another point to remember is that the higher is the mandate and the more detailed, that is, if there are provisions for proactive disclosure as well as coverage of PPP within the FOI or PPP legislation itself, there is likely to be a better environment for disclosure and more information is likely to be disclosed.

A full suite of instruments could enable sound disclosure and induce better disclosure practices. These instruments include legislation mandating contract or PPP disclosure,

preferably with requirements for proactive disclosure, such as FOI, PPP, PFM, and/or BT legislation with more detailed specific guidance, guidance on confidential information, provision of standard contract clauses, and templates for disclosing information (figure 5).

To build the details of the framework, it is important to understand certain key areas and issues closely associated with disclosure that could be preexisting or need to be newly established or incorporated (table 2). Although all these elements are extremely important, we focus our attention in this Framework on the elements that deserve more focused and substantive attention from the point of view of PPP. We also focus on where the treatment needs to be different for PPP relative to the treatment of general information disclosure, namely policy (including process and institutional issues), templates, and confidentiality.

In the reviews by the World Bank, supply-side technology and resource issues have inevitably been pointed out by policy makers in almost all jurisdictions, whether developed or developing, and whether with mature or less developed PPP markets. The policy makers find that supply-side issues are a key impediment to timely and high-quality disclosure, but do not form a substantive part of the framework given its scope, which is limited to the substance of disclosure. The overall importance of supply-side resource and technology issues in information disclosure in general and in all areas, including PPP, cannot be denied.

An important aspect in designing a disclosure framework is that of systems for collection and aggregation of information. To the extent possible, reports should be machine read or provided as inputs into a shared information system and able to be turned into structured data that can be selectively converted into open data as required. The International Infrastructure Support System of the Sustainable Infrastructure Foundation is developing a project preparation and collaboration platform that can potentially share aggregated and non-aggregated project data with stakeholders. However, the extent of disclosure as well as the decision to disclose will be fully based on the user country's inclination to disclose. As envisaged now, the platform is limited to the project preparation stage, and will not cover the procurement or operational stages for the purposes of information collection and dissemination, while the design suggested by this disclosure framework is wider and much more comprehensive.

In addition, systems need to be built into the design of the disclosure framework that will enable continuous publishing of procurement as well as performance information and data as and when key changes happen. Linking and cross-referencing with other existing similar information sets or databases could be useful.

FIGURE 5: ELEMENTS OF A PPP DISCLOSURE FRAMEWORK

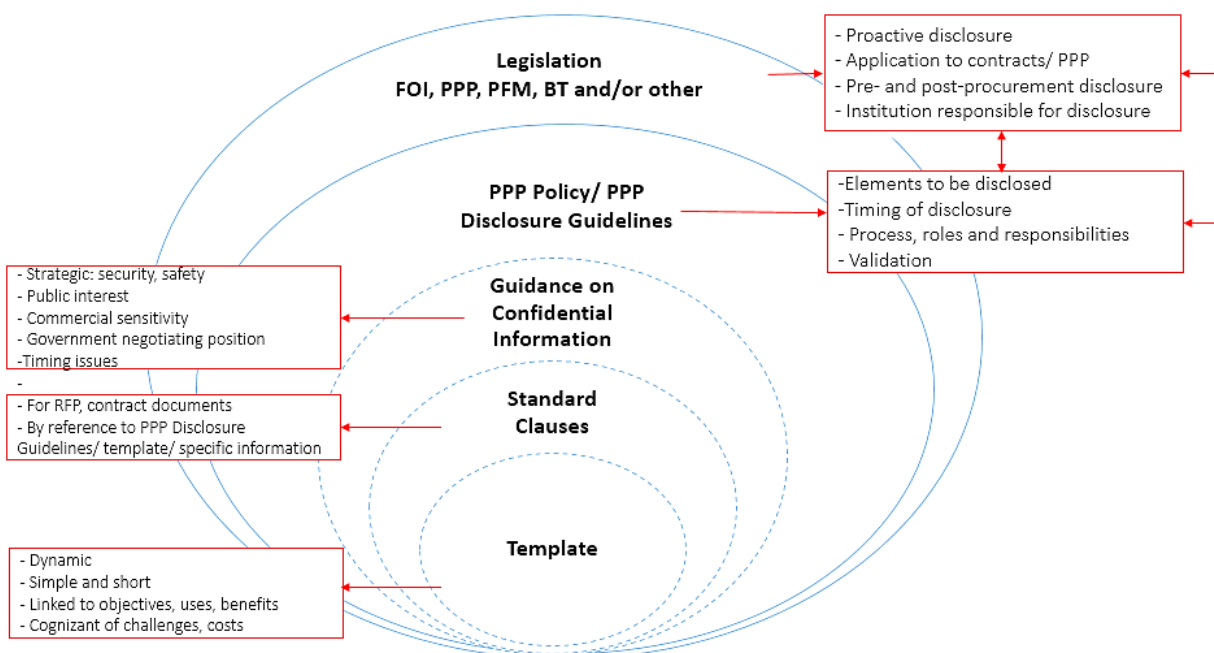


TABLE 2: KEY ISSUES IN CONTRACT INFORMATION DISCLOSURE IN PPP PROJECTS

ELEMENT	DESCRIPTION	KEY ISSUES
LEGISLATION AND POLICY	Laws, regulations and policy, national and subnational	<ul style="list-style-type: none"> • Proactive disclosure • Coverage of disclosure relating to PPP • Definition of confidential information • Timelines for disclosure • Retroactive application
GUIDANCE	The structure and processes within government that support the implementation of legislative provisions/ policy by providing greater clarity on lower level routine associated issues	<ul style="list-style-type: none"> • Elements to be disclosed and when • Roles and responsibilities • Thresholds for failure • Monitoring mechanisms • Consequences of failure • Validation of information: internal, external • Checklists of actions

TABLE 2: KEY ISSUES IN CONTRACT INFORMATION DISCLOSURE IN PPP PROJECTS

ELEMENT	DESCRIPTION	KEY ISSUES
CONFIDENTIALITY	<p>Information that should ideally not be disclosed:</p> <ul style="list-style-type: none"> • Commercially sensitive information • Information that might hurt the negotiating position of the government 	<ul style="list-style-type: none"> • Legislative or policy mandate providing protection • Interpretations of law or policy • Guidance to identify confidential information • Standard provisions to assist officials • Timeframes associated with confidentiality
TEMPLATES	<p>Template/s that can help officials in preparing information for proactive disclosure; templates affect the way information is presented and the efficiency with which it can be prepared for disclosure, and also makes it more accessible</p>	<ul style="list-style-type: none"> • Coverage of key pieces of pre- and post-procurement information • Dynamism: coverage of ongoing financial and performance disclosure and other moving information • Flexibility to cater to different kinds of PPPs/ sectors • Instructions to fill template
TECHNOLOGY	<p>Technical systems associated with the platform for disclosing information; PPP contract information is large in size and needs to be maintained over long periods, archived regularly, and may require relatively more robust systems</p>	<ul style="list-style-type: none"> • Single or disaggregated data platforms • Easy upload and download • Tolerance of high levels of traffic • Security systems to ensure restricted access to data handlers and managers • Effective and regular archiving
RESOURCES	<p>Resources in terms of skill and budget for providing support services, including site maintenance and updating</p>	<ul style="list-style-type: none"> • Skilled personnel for extracting information, uploading, and updating • Budget available for the technology: one-time capital for initial design/systems and recurring budget for maintaining and updating platform and information

6. Legislation and Policy

More information is likely to be disclosed proactively where clear mandates supported by legislation are provided through the FOI Act alone or by PPP and/or PFM Acts and/ or specific guidance. In developing a framework for PPP disclosure in countries, it is important to consider what such legislation, policy, or guidance should incorporate. Legislation, policy, and guidance read together should provide as much clarity as possible on what is to be disclosed when, by whom, and how. There will always be gaps in specific cases as and when new types of problems of interpretation arise, especially with respect to confidential information, but broader issues can be taken care of through sound and practical legislation and guidance. We have seen in an earlier section that some FOI Acts provide for proactive disclosure of information. Most FOI Acts are now also understood to cover PPPs in some way. Many countries also have PPP (or PFM or BT) legislation, policy, or standard operating procedures, some of which have relevant transparency elements (table 3).

TABLE 3: PPP LEGISLATION AND TRANSPARENCY ELEMENTS

COUNTRY	MAIN PPP LEGISLATION OR POLICY	TRANSPARENCY ELEMENTS
BRITISH COLUMBIA	Procurement Related Disclosure for Public Private Partnerships, 2004, 2012 update	Guidance on proactive disclosure
CHILE	Ley de Concesiones de Obras Publicas, 1991, 2010 update	Information disclosure post contract
COLOMBIA	Law 1508 of 2012	No specific transparency requirements
HONDURAS	PPP Promotion Law 2010	Project information is confidential until contract execution with exceptions
INDIA	Draft PPP Policy 2012	Publication requirements
KARNATAKA	Infrastructure Policy for the state of Karnataka, 2007, draft update 2013	Recommends use of model documents, web procurement, etc.
KENYA	PPP Act 2013	Disclosure of information on projects
MINAS GERAIS	PPP Law 2003	No specific elements
NEW SOUTH WALES	New South Wales Public Private Partnerships Guidelines 2006, update 2012	Chapter on disclosure, summaries, and PIR
PHILIPPINES	Build-operate-transfer Law Implementing Rules (RA 7718), 1994, update 2012	Publication requirements for agencies
SOUTH AFRICA	The Public Finance Management Act, 1999	Approaches for improved public financial management
UNITED KINGDOM	Private Finance Initiative Standardisation of PFI Contracts 1999, update 2012	Standard text on disclosure and transparency requirements for contracts
VICTORIA	Partnerships Victoria Requirements 2009, 2013 update	Commitment to transparency and disclosure of processes and outcomes

Detailed guidance underlying general FOI legislation works fairly well, as in the cases of Victoria, New South Wales, the United Kingdom, and British Columbia (see table 4 for an example of elements recommended for disclosure in the British Columbia guidance). These jurisdictions operate within a general and specific mandate provided by the FOI Act and provide detailed guidance on elements to be disclosed. There is no specific PPP legislation in these countries. Thus, specific PPP legislation or even disclosure provisions in any existing PPP legislation may not be necessary where the FOI Act is strong. However, where FOI Acts do not provide for proactive disclosure or do not cover or do not clearly cover PPPs or contracts, or where there is the absence of a general overall environment for disclosure, specific enabling provisions in PPP legislation would clearly be helpful or may be considered a prerequisite to detailed guidance.

TABLE 4: BRITISH COLUMBIA: RECOMMENDED DISCLOSURE

ELEMENT	DISCLOSURE GUIDANCE
REQUEST FOR QUALIFICATIONS DOCUMENT (RFQ)	Recommended; a project website or through a link to the B.C. Bid website. In addition, addenda to RFQ available to proponents registering through the B.C. Bid process.
NAME AND NUMBER OF PARTIES WHO RESPOND TO THE RFQ	Disclosure of number recommended, disclosure of names not advised (ability to attract qualified respondents may be affected)
NAME AND NUMBER OF PARTIES SHORT-LISTED AT RFQ STAGE	Recommended
RFP	Recommended
DRAFT PROJECT AGREEMENT	Not recommended (basis for commercial negotiations and subject to change) Disclosure of preferred proponent recommended when evaluation is advanced

TABLE 5: UNITED KINGDOM: KEY PIECES OF MANDATED DISCLOSURE

- Infrastructure and construction pipeline information
- Accessible information on current PFI and future PF2 projects
- Full contract disclosure (except exempt information)
- Full project and financial information where government has equity
- Actual and forecast equity return information
- Business case approval tracker

Legislation should ideally attempt to include two key requirements in particular: (a) proactive disclosure and (b) specific coverage by direct mention of PPP preferably, or contracts and contract information, and performance and procurement information as part of the definition of information. The degree of detail to be included in the legislation would depend on the preferences of countries. For example, the New South Wales legislation includes a detailed list of elements to be disclosed, the Victoria FOI legislation does too,

although in less detail, whereas most other countries' FOI Acts do not go beyond the mention of contracts and/or government capital or other investments.

Specific advantages of more detailed coverage are that there is a strong mandate for disclosure, there is better clarity on what to disclose, and it becomes inevitable that public bodies disclose. However, there is the question of evolution. For example, in the United Kingdom, there has been a lot of evolution in disclosure in PPP after the FOI Act by interpretation and through intense audit scrutiny and public pressure. The FOI Act itself does not go into too many details of what is covered; the Act leaves the details to be developed through interpretation and government guidance, such as the 2010 policy on disclosure and the more recent PF2, which has strong disclosure requirements (table 5).

Some practical recommendations on what could be covered by legislation are provided in table 6.

TABLE 6: SUGGESTED CONTRACT AND PPP-SPECIFIC CONTENT IN LEGISLATION

CONTENT	DESCRIPTION
GENERAL COVERAGE OF ALL CONTRACTS	Specific information to be covered under disclosure is mentioned within the definition of information or in a separate clause. Contracts entered into by any public authority could be included; a separate, short section dealing with contracts could be useful but not essential.
PROACTIVE DISCLOSURE	Provide for proactive disclosure of contracts with a broad listing of elements to be disclosed, but the latter is not essential and can be a part of guidance.
REDACTIONS	Broad areas of redactions relevant in the context of PPP contracts, such as commercially sensitive information and trade secrets would need to be mentioned as well as strategic/public interest related confidential information.

The level of detail in specific PPP disclosure guidance would depend to an extent on the detail included in the legislation. The policy and guidance would need to fill in gaps in practices and procedures for disclosure of information, including a list of the elements to be disclosed, in the specific context of PPP projects and contracts (table 7).

TABLE 7: SUGGESTED SPECIFIC CONTENT IN DETAILED PPP DISCLOSURE GUIDANCE

CONTENT	DESCRIPTION
LEGISLATIVE MANDATE	A clear interpretation of the application of the legislation to PPP contracts and project information.
ELEMENTS TO BE DISCLOSED PROACTIVELY	Specifics of both pre- and post-contract disclosure, preferably an exhaustive list of items to be disclosed. (See sections 7 and 8.)
PLACE OF DISCLOSURE	Disclosure could be on a common platform or on other individual ministry or agency platforms. This must be specified for pre- and post-procurement disclosure separately, as this may differ based on institutional roles and responsibilities for procurement and for contract management. However, a single platform is recommended for ease of access.
TIMELINES	Specifics of timelines for each of the elements to be proactively disclosed. For example, if contract documents are being disclosed, the timeframe would need to be from the date of the agreement or from the date of financial close. For project performance information, the requirement could be quarterly updating or half-yearly updating. For value for money, the timeframe could be from the date of finalization of the bid. Similarly, timelines should be disclosed for disclosure of minutes of bid meetings, evaluation meetings, names of shortlisted bidders, and so on.
TREATMENT OF COMMERCIAL-IN-CONFIDENCE AND OTHER CONFIDENTIALITY PROVISIONS	Guidance to officials on what constitutes confidentiality. The guidance needs to go beyond stating the headline issues, which are already a part of related legislation. Guidance should discuss each element of the contract that might be part of commercial-in-confidence. There could be detailed discussion of elements that usually constitute commercial-in-confidence, such as methodology and elements of pricing; base case financial model, including details of the costs of financing through debt and equity; other unit costs, profits, elements, and composition of the payments made to the provider, etc. Guidance on when to begin detailed negotiations on confidentiality elements should definitely be included. See section 11 on redactions for more discussion and a snapshot of practices in selected countries.
VALIDATION PRIOR TO DISCLOSURE	The procedure for authentication, whether external or internal to the department, the official/officials responsible for checking and signing off on the information to be disclosed, and the timeframe for the purpose. An important element would be whether to apply external validation to data at all, whether to apply it before disclosure, or whether a provision for random audit after information has been disclosed would suffice. There could be high costs to validation, especially external validation, in terms of time and money.
TEMPLATE	A format for information disclosure that can be filled in by the contracting agency or other institution responsible for disclosure will help in more uniform information disclosure, and could also be utilized for data aggregation by sector, risk profile, value, type, etc. See section 10 for a suggested template.

7. Pre-Procurement Disclosure

There are three distinct phases in the procurement process relating to PPP: pre-tender, tender, and evaluation stages have been built into the suggested disclosure for the pre-procurement phase. The concerns relating to disclosure and the focus tend to be slightly different in each of these phases. For example, the audience for the pre-tender phase is wider than that for the tender and evaluation phases. The rationale for publication of information also tends to be slightly different, as discussed in box 1. The main elements of the pre-procurement phase relate to publishing the project pipeline, establishing the suitability of a project for implementation through feasibility tests, establishing its suitability as a PPP through a value-for-money methodology or other suitable methodologies,¹⁴ carrying out the RFQ and RFP, and evaluating the proposals.

Although every jurisdiction discloses information during the procurement process, the level of disclosure varies. The highest level of disclosure is with regard to the publication of tender documents, while fewer jurisdictions publish information on pipelines or feasibility reports or tender evaluation reports (table 8). British Columbia provides specific guidance on the elements to be disclosed along with the timing of disclosure. Reports of the fairness advisor are disclosed in addition to the tender documents excluding the draft contract. The draft contract is not published, because it is believed that it may harm negotiating positions in future projects. This reasoning is not clear, however, because final contract documents are available in the public domain.

TABLE 8: PRE-PROCUREMENT DISCLOSURE REQUIREMENTS IN PPP PROJECTS ACROSS COUNTRIES

JURISDICTION	PROCUREMENT	TENDER DOCUMENTS	BID EVALUATION
BRITISH COLUMBIA	Major capital project plan made public by responsible minister	RFQ and RFP	Successful bidders named at RFQ stage, preferred proponent named; project value-for-money report disclosed at financial close
CHILE	No requirements	Calls for tender	No requirements
COLOMBIA	Published on SECOP	Published on SECOP	Published on SECOP
HONDURAS	No requirements	Calls for tenders published	No requirements
INDIA	No requirements	RFQ, RFP, detailed project report disclosed	Some states disclose list of bidders; decisions

¹⁴ The methodologies used for processing projects and pipelines may differ from country to country.

JURISDICTION	PROCUREMENT	TENDER DOCUMENTS	BID EVALUATION
KARNATAKA	No requirements	Notices inviting tender published	No requirements
KENYA	National priority list of all PPP projects published	Publication of RFQ, project benefits	No requirements
MINAS GERAIS	Public consultation process prior to public bidding	Information on ongoing tender processes	No requirements
NEW SOUTH WALES	Published by procuring agency, available on e-Tendering website, potential PPP projects also available on Infrastructure Australia website	Published by procuring agency, available on e-Tendering website	Summaries of public interest evaluations publicly disclosed
PHILIPPINES	List of priority projects published by agencies and local government units at least every six months, available in national newspapers and PPP center website	Published weekly for three weeks in local and national newspapers	No requirements
SOUTH AFRICA	No requirements	RFQ published in Government Gazette, on institution's website, through press releases	No requirements
UNITED KINGDOM	Published by procuring agency on contract finder website as "tentative" notice	Published by procuring agency on Contract Finder as "tender" notice	Published by procuring agency on Contract Finder as "award" notice
VICTORIA	Procuring agency to publish on Tenders Victoria website; potential PPP projects also available on Infrastructure Australia website	Published by procuring agency on Victorian Government Tenders Website; RFP only disclosed to short-listed bidders	No requirements, but considered on a case by case basis

The approach to pre-procurement disclosure should be guided by some of the following: private investors' concerns about the predictability of the pipeline and the process of procurement, including a level playing field and transparent decision making; the public's right to know the government's plans for infrastructure investments; the likely fiscal impact of projects; likely changes in service and tariff levels; whether a competitive process has been applied to ensure the best price; and whether the project provides better value for money than other available procurement methods. Disclosure could provide advantages for the government, such as deriving better value for money by reducing private parties' bidding costs (which in turn is linked to the predictability of the process consequently leading to a faster process with fewer hitches as well as ease of preparation of bids). This advantage appears to be a strong objective for disclosure as well as use of standard contract

clauses in jurisdictions like Victoria and the United Kingdom. (See box 1 for suggested elements in pre-procurement disclosure.)

Unsolicited or privately initiated projects present special transparency challenges. Box 2 suggests some disclosure provisions for these projects in two situations. Box 3 provides a brief overview of disclosure of information in unsolicited projects in Colombia.

Pre-procurement disclosure should be on the public procurement portal (at the federal and subnational or provisional levels), dedicated PPP website, and ministry website.

BOX 1: SUGGESTED ELEMENTS IN PRE-PROCUREMENT DISCLOSURE

	DISCLOSED ELEMENTS	RATIONALE FOR DISCLOSURE
PRE-TENDER	Approved pipeline of projects with brief description of project, services, estimated cost, likely sources of revenue, and tentative procurement dates	Provides greater predictability to the private sector, has the potential to enhance competition by preparing the market in advance; provides an opportunity to all stakeholders to express initial concerns
TENDER DOCUMENTS	Expressions of interest, RFQ, RFP (including evaluation criteria, preferred bidder negotiation criteria), draft contract, detailed project report	Informs the market on project and contract details creating potential for better quality bids; enhances the confidence of stakeholders that the bid process and evaluation will be characterized by fairness and objectivity
EVALUATIONS	Names of bidders, names of shortlisted bidders at RFQ, name of preferred proponent, minutes of bidders' meetings, all communications with bidders during procurement, modifications to documents	Provides evidence of a fair evaluation process and fair and open communication with all bidders
REPORTS	Any oversight reports if available, value-for-money (or other methodology for PPP mode evaluation) reports for disclosure following financial close, such as pre-procurement phase element disclosed post-contract signing	Confirms a fair bid process; provides confidence to the public about the appropriate choice of modality and well-considered use of public money; provides information on risk transfer

BOX 2: SUGGESTED ELEMENTS IN DISCLOSURE FOR UNSOLICITED PROJECTS

Based on the process followed in the country, there could be broadly two types of processes for unsolicited projects: one, a process where the project enters the general competitive tender process, normally subsequent to the feasibility study and acceptance of the project proposal by the government; or two, there could be a process whereby the project is not subject to competition at any point of time and is negotiated separately between the government and the project proponent.

In general, logically, the level of information disclosure for unsolicited projects should be as high as or higher than that for projects initiated by the government. With unsolicited projects, there is limited competition and a higher probability of error in the government's judgment about the soundness of the project. In this context, there is a lack of comparable projects, as well as greater probability for misconceptions among the public and other stakeholders.

Table B2.1 suggests elements of disclosure for unsolicited projects for these two broad scenarios. Although disclosure in unsolicited projects can be further elaborated for each type of process followed, a detailed treatment of this is probably most appropriately situated within work related to procurement processes for unsolicited projects.

ELEMENTS SUGGESTED FOR DISCLOSURE	RATIONALE FOR DISCLOSURE
UNSOLICITED PROJECTS SUBJECT TO COMPETITION	
<i>On receipt of unsolicited project.</i> Basic information including sector, services to be provided, proposed location, estimated capital cost, name of the proponent.	Creates the potential to reduce public suspicion surrounding unsolicited projects; demonstrates that public interest has been tested; reduces the likelihood of a bad project being accepted by government; provides certainty on the process to the proponent and other potential bidders.
<i>Following government's decision to accept.</i> Project feasibility report, evaluation process followed, and factors considered, especially the public interest test, further procurement and bidding process details, special conditions and advantages, if any, provided to the proponent.	
<i>During the bid process.</i> The same elements as suggested for projects initiated by government.	
UNSOLICITED PROJECTS NOT SUBJECT TO COMPETITION	
<i>On receipt of unsolicited project.</i> Basic information, including sector, services to be provided, proposed location, estimated capital cost, name of the proponent.	Creates the potential to reduce public suspicion surrounding unsolicited projects; demonstrates that public interest has been considered; reduces the likelihood of a bad project being accepted by government; provides certainty on the project to the proponent.
<i>Following government's decision to accept.</i> Project feasibility report, evaluation process followed, and factors considered, especially the public interest test, details of the negotiation process proposed to be followed.	
<i>Prior to contract execution.</i> Basic information including sector, services to be provided, proposed location, estimated capital cost, draft contract documents, details of any kind of government support proposed (including any payment commitments, guarantee provisions, etc. by government); any revenues to be earned by government and the basis and evaluation process followed for these; if user charges are to be paid, the tariff methodology including process for reviews and revisions.	

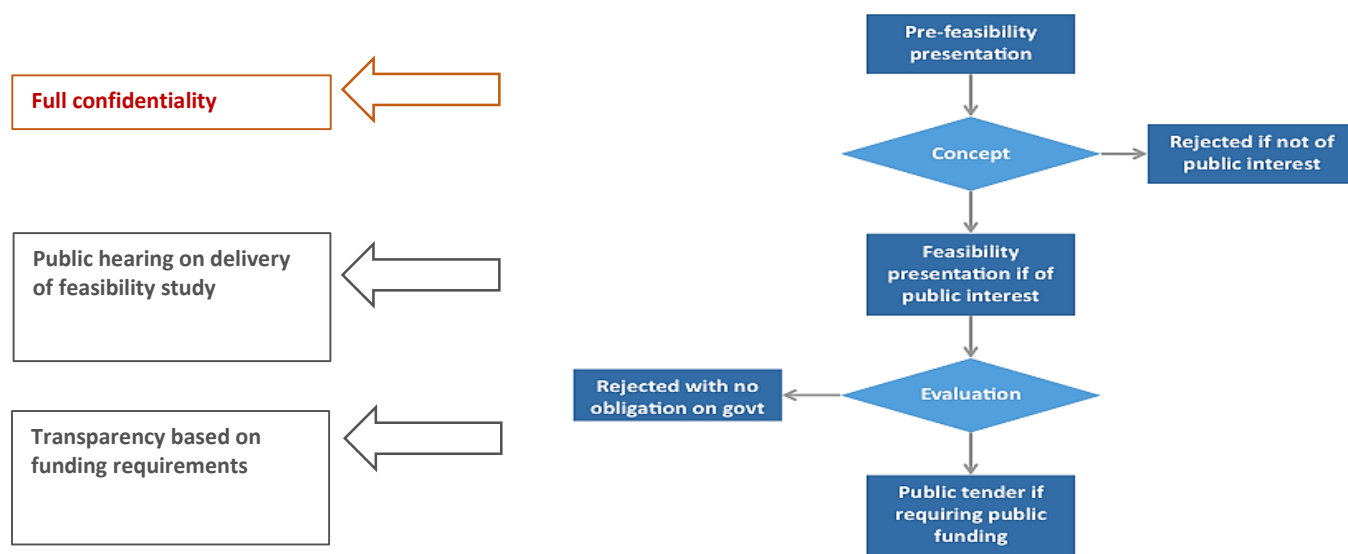
BOX 3: DISCLOSURE OF INFORMATION IN UNSOLICITED PROJECTS IN COLOMBIA

Unsolicited projects can lead to innovation and can be especially useful in countries where the government has low levels of capacity. However, unsolicited proposals are brought forward confidentially, so the level of pre-procurement information proactively placed in the public domain is usually more limited than might be the case in a competitive procurement process. Unsolicited projects can also carry a high risk of corruption and poor value for money.

Colombian Law 1508 of 2012 allows unsolicited projects. Private investors submit these projects to the public authorities in strict confidence. Colombia's strong PPP institutions have created a process that seeks to overcome such risks through appropriate information disclosure.

The preparation process proceeds with a two-staged test shown diagrammatically below. Within the process, there is a requirement for a public hearing for those proposals that progress into the formal feasibility study stage (figure B3.1). This is specifically for the benefit of third parties and has to be undertaken within one month of the feasibility studies being delivered.

FIGURE B3.1: UNSOLICITED PROJECT PROCESS DIAGRAM



Following the public hearing, projects are submitted to open tendering if public funding is required, that is, the standard procurement process is followed via a public tender, which requires the publication of the same data as would be the case for a public procurement (table B3.1). Where projects are fully private sector funded, they proceed under an

abbreviated procurement process, but this still takes place via the Sistema Electronico de Contratacion Publica (SECOPI) and therefore relevant information to facilitate other bidders' participation is placed in the public domain.

A recent National Planning Department publication in Colombia also provides a summary of the status of unsolicited projects and examples of the projects that are currently being pursued.

TABLE B3.1: SUMMARY OF UNSOLICITED PROJECTS IN COLOMBIA

	Rejected Settlement of Terms	Notice of Invitation	Feasibility	Study Feasibility	Rejected Feasibility	Pre-feasibility	Study Pre-feasibility	Rejected Pre-feasibility	Total
Roads	1			17	1		56	29	104
Urban Transport				6	3	2	13	1	25
Public Parking							15	1	16
Urban renewal							11	1	12
Traffic control				2	1		7		10
Street lights				1	1		6	1	9
Solid waste		1					8		9
Train and Subway				2			3	4	9
Healed				1			6		7
Airports			1				5		6
Water and Sanitation							5	1	6
Public Buildings				2			3		5
Commercial							3	2	5
Urban Logistics				1			3	1	5
Public Parks							4		4
Public services							3	1	4
Sporting facilities				1			2		3
Airport Logistics							2		2
Prisons							1		1
Dam construction							1		1
Education							1		1
Port logistics							1		1
Urban								1	1
Television							1		1
Housing							1		1
Document Management							1		1
Cultural centers				1					1
Information systems							1		1
TOTAL	1	1	1	34	6	2	163	43	251

Private sector companies are also publishing information about their involvement in unsolicited projects. For example, the following details of unsolicited projects were available in recent analyst reports for Construcciones El Condoer (The Condor Group):

1. Highway 1 Vial of the Plains. Approved by the Agencia Nacional de Infraestructural (ANI) in its feasibility stage, which means it has been submitted to the Ministry of Finance for approval. It hopes to get the approval of the National Planning Unit and the Ministry. It has a total investment of COL\$1.3 billion (approximately US\$640,000), including construction of 42 kilometers of dual carriageway, 71 kilometers of roads, bridges, and 5 kilometers of maintenance of 264km of roads totaling 354km.
2. Bolivar Antioquia Connection Vial. Just started the feasibility stage and involves works in Antioquia and Bolivar, and has a capex investment of about COL\$900,000 million (US\$455 million).

3. Connection Vial Cesar-Guajira. In the structuring and feasibility stage and review of project completed by the ANI. The initial project was presented to the construction sector, mayoral, and gubernatorial associations. Capex about COL\$311,600 million (US\$154 million).
 - a. <https://colaboracion.dnp.gov.co/CDT/Desarrollo%20Territorial/Oficial%20Ingles%20-%2004.08.2014.pdf>.
 - b. <http://investigaciones.bancolombia.com/InvEconomicas/sid/31096/2014070207382515.pdf>

8. Post-Procurement Disclosure

The approach to disclosure of post-procurement information globally is less consistent than disclosure at the pre-procurement phase. Often proactive publication is limited to the name, value, and minor description of the project by law, as in Kenya and the Philippines. In other cases, contract summaries, value-for-money, and other associated reports are required to be disclosed, as in British Columbia, New South Wales, and Victoria at the point of contract signing or financial close. In Chile, Colombia, Minas Gerais, and the United Kingdom, there are ongoing requirements to publish information on the progress of the project, including financial information in some cases (boxes 4 and 5), as in the United Kingdom under PF2.¹⁵ All the studied jurisdictions require announcement of contract award, such as an announcement in the local press, development of contract summaries, or the publication of contracts, redacted for confidential information. The different approaches are summarized in figure 6.

¹⁵ PF2 is a new approach to PPPs in the United Kingdom that emerged from the private finance initiative (PFI) scheme. This was developed in 2012 and aims to overcome some of the perceived shortcomings of PFI, including its approach to information disclosure.

FIGURE 6: RANGE OF POST-PROCUREMENT DISCLOSURE PRACTICES IN STUDIED JURISDICTIONS



A problem with post-procurement disclosure pointed out by practitioners is the timely collection of information for dissemination. In the United Kingdom, the incorporation of provision of information into the required services with penalties for failure under the new PF2 contract is a significant step forward, but it is too early to see the impact yet. Colombia places the onus for publication on the contractor, which must develop a public website with project details and information on progress.

Disclosure in projects that do not use standard contracts is another area of concern. Governments may find it easier to disclose where standard contracts are used, such as in India and the United Kingdom. Governments may feel less comfortable where bespoke contracts are used for each new project with a substantially distinct set of risk allocation, payment, and/or tariff mechanisms. The sensitivities surrounding cost and service as well as who takes the risk for uncertain events could become quite sensitive and contentious, especially where these give the impression of the lack of a level playing field for investors in different projects.

Our recommendations do not suggest a lower level of disclosure for such projects. The rationale is that disclosure is equally if not more important in projects where standard contracts are not used, as the lack of transparency in the absence of public disclosure in these cases has the potential to become even higher. Governments need to be open and transparent about the reasons supporting the use of specific or different risk allocation parameters, payment mechanisms, fiscal commitments, contingent liabilities, and other key issues.

A sound post-procurement disclosure policy must preferably include publication of two types of information, that is, information about the contract at closure and following that ongoing performance information through expiry or termination of the contract. This information would include the following: brief project information at contract award,

contract summaries and full contracts at financial close, independent engineer and auditor reports during contract operation, and performance and financial information through the expiry of the contract term. It is also important that governments try to develop databases of aggregated project data over time.

In each of these distinct phases, that is, contract award, financial close, and operational phase, the elements to be disclosed must be chosen with care to include data that are close to the ultimate objectives of disclosure. These objectives are to increase the confidence of the public about service, price, and ongoing achievement of value for money. In addition to the project and contract information at the commercial and financial close, ongoing information should be provided to consumers on service and price. The information should include service levels provided compared with agreed levels;¹⁶ penalties for nonperformance, with descriptions of instances or types of nonperformance; tariff variations, preferably with a graph that shows all variations of tariffs over time (along with consumer price index increases and an explanation of methodology); financial performance of the project, such as revenues (including sharing if any provided for) and equity returns; government payments either committed or contingent; and ongoing achievement of value for money, etc. For full contracts, the presumption should be of full disclosure except for specifically exempt information.

It is also important to disclose specific modifications to contract clauses and/or schedules, etc., in the event of renegotiations. These disclosures should highlight any changes in risk allocation, cost, tariff, and government total exposure as a result of the renegotiations.

Post-procurement disclosure should be on the public procurement portal (at the federal and subnational or provincial levels) and be accessible from any dedicated PPP website, the ministry or contracting authority website, and the project website.

Table 9 sums up the key suggested elements for ongoing post-procurement disclosure.

¹⁶ This information can have two sources: one, from reports of an independent engineer, validated/cross-checked by the contracting authority; and two, such data can be generated from the users of services through user-feedback mechanisms embedded in project monitoring systems.

TABLE 9: ONGOING POST-PROCUREMENT DISCLOSURE

Service & Price	Financial Performance	Government Exposure
<ul style="list-style-type: none"> • Service levels agreed • Service levels achieved • Non-performance instances • Penalties provided and imposed • Tariff methodology • Tariff levels and variations 	<ul style="list-style-type: none"> • Forecast revenues • Actuals and shared revenues • Equity IRR and actuals 	<ul style="list-style-type: none"> • Key Risks • Actual risk events • Estimated government payments – commitments and contingent • Actual government payments – commitments and contingent

Table 10 provides the range of elements that form the core of post-procurement disclosure by public authorities along with the rationale for such disclosure.

TABLE 10: ELEMENTS OF POST-PROCUREMENT DISCLOSURE

ELEMENT	DESCRIPTION	RATIONALE FOR DISCLOSURE
Basic project information	High-level information	
Risk	Material risks, allocation, mitigation, actual risk events, and cost	Risk allocation is an important determinant of cost to government and to the paying public/user. Inadequate or excessive transfer of risk is undesirable. Disclosure will provide evidence of proper or improper risk allocation and its effect on costs.
Reasons for choice of PPP	Qualitative and quantitative analysis, including value-for-money analysis, where available	Choice of methodology affects the costs to the public and it is important to assure them that the PPP mode selected is the best possible in terms of cost, given equal standards of service in all modes tested.
Financial information	Financing structure, shares, voting, etc.; estimates and actual revenues earned (in cases where there is a minimum revenue guarantee by government, or substantial support provided by government or there is provision for payment of revenue share by the SPV to the government); forecast and actual equity return (in cases where government has an equity stake or substantial government support has been provided to the SPV either as direct payments or as guarantees)	Provides evidence that government support is justified and required at the level and for the period for which it is being paid. Infrastructure PPP projects are often back-ended in terms of revenues, and especially in greenfield projects initial revenue projections can be inaccurate and often characterized by a high level of uncertainty. It is important to demonstrate to stakeholders the continued relevance of payments between the parties to the contract. Where government has equity stake in a project, it is important to provide information on the financial health of the project, including the returns.
Government support	Guarantees, grants, land rights, payments for service, other	Government support creates commitments and liabilities for government and impacts government budgets. Disclosure will demonstrate the level of such liabilities.
Tariffs	Tariff methodology and review/regulation	Explains to users why they are paying what they are paying.
Major contracts concluded as part of execution of a PPP project	Contract description, method of tendering, value, and contractor/supplier name and address	Demonstrates whether services agreed to and at the level agreed to are being provided.
Performance	Actual performance against targets, actual penalties against contract provisions, independent engineer or auditor performance monitoring report, user feedback or surveys, if any	
Contract termination	Termination provisions, handover provisions	Provides assurance to the public that government has provided for asset quality at termination as well as continuity in provision of service.
Renegotiations, changes	Details of changes with dates, specifying any impact of the change on cost, fiscal commitments or contingent liabilities, risk allocation, tariff, or payment	Has the potential to prevent unsound decisions based on vested interests of the SPV, government, or any other specific stakeholder.

BOX 4: ONGOING PERFORMANCE INFORMATION DISCLOSURE IN THE UNITED KINGDOM

The M25, completed in 1986, forms a 125-mile orbital route some 20 miles from the center of London. In 2009, the Highways Agency signed a 30-year private finance contract with Connect Plus to widen two sections of the M25, refurbish the Hatfield Tunnel, and operate and maintain the M25. The contract has a present value cost of £3.4 billion.

The project was controversial, with the National Audit Office concluding in 2011 that it offered poor value for money. However, the project is an example of good practice for ongoing performance information disclosure.

The Connect First special purpose vehicle publishes an annual performance report. This provides information on the progress through the year, any main events, as well as key performance indicators. These indicators cover: (i) construction milestones, repairs, and renewals, (ii) response times, (iii) repair times, (iv) management of defects, (v) Environmental Amenity Index, and (vi) safety issues.

The following is an illustrative extract from the report:

MEASURE	TARGET %	YR 1	YR 2	YR 3	YR 4
Reactive callouts achieved within 20 minutes (peak periods)	96	71	87	94	96.3
Reactive callouts achieved within 40 minutes (off-peak periods)	96	89	99	100	100
	MINS	1	2	3	4
Average response time (peak periods)	15	17	9	6.5	6.3
Average response time	30	32	10	10	10
	%	1	2	3	4
Repairs required within 28 days repaired on time	96	47	93	96	96
Temporary repairs made in 24 hours	100	19.4	99.5	100	99.9
INDICATORS		YR 1	YR 2	YR 3	
Environmental Amenity Index (%)		90	90	83	

<http://www.connectplum25.co.uk/pdfs/Annual%20Performance%20Report%202013%2012Jun13.pdf>

BOX 5: DISCLOSURE OF FISCAL AND FINANCIAL INFORMATION IN PUBLIC-PRIVATE PARTNERSHIPS IN CHILE

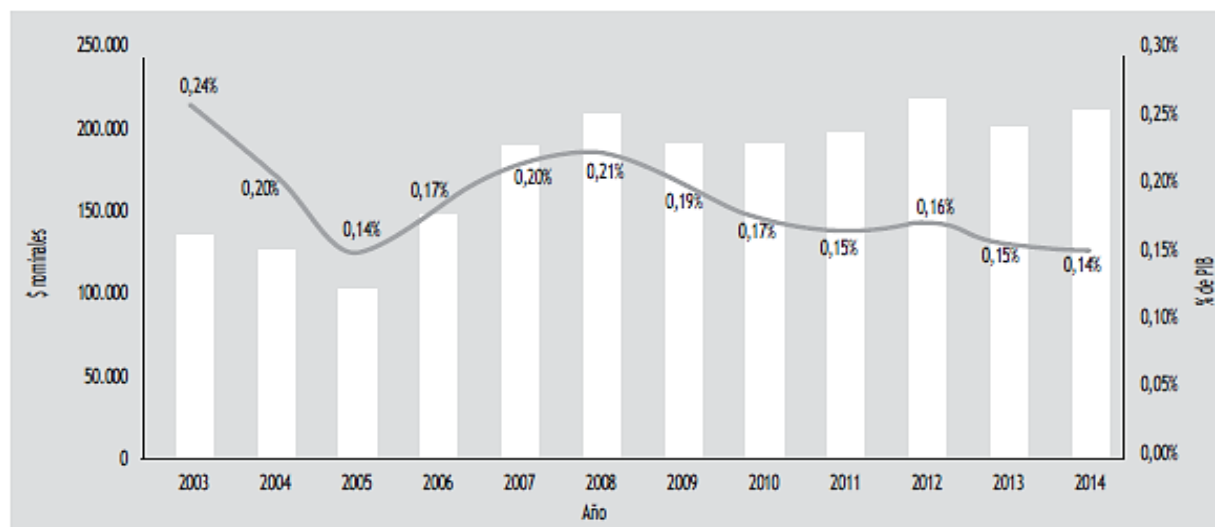
Chile publishes a clear report on fiscal commitments and contingent liabilities arising from active public-private partnership (PPP) projects. This is a regular report that also shows the trends in the movement of contingent liabilities with time, including the annual stock and proportion of liabilities added. Some illustrative reports can be accessed at the following links.

- Contingent liabilities from PPP:
<http://www.dipres.gob.cl/594/w3-propertyvalue-16136.html>
- Fiscal commitments:
<http://www.dipres.gob.cl/594/w3-propertyvalue-15889.html>.

A few example figures are illustrated in figure B5.1 and table B5.1. Not all countries involved in PPP assess, measure, or manage contingent liabilities to the extent that Chile does, however, and therefore may not be in a position to disclose information in a similar manner.

FIGURE B5.1: CHILE: DISCLOSURE OF INFORMATION ON CONTINGENT LIABILITIES

Evolution of the Estimated Net Contingent Liabilities of the Concession System associated to Minimum Guaranteed Income (IMG)



Fuente: Dirección de Presupuestos

Millions of pesos and as % of the GDP of each year

SUMMARY OF CONTINGENT LIABILITIES OF THE TREASURY – REPORTED
(% of GDP estimated for 2014)

Contingent liability	Annual flow (%)	Stock (%)	Observations
Concession system Minimum Income Guarantee	0.01	0.14	Estimate
State guarantee for Debt of Public Enterprises	0.00	1.02	Maximum exposure
Credit guarantee for Tertiary Education	0.01	0.95	Maximum exposure
State deposit guarantee	0.00	1.31	Estimate
Concession system controversies	0.00	0.11	Maximum exposure
Claims against the Treasury	0.01	0.52	Estimate
Coverage fund for corfo risk	--	--	Analysis
Small business guarantee fund	--	--	Analysis
TOTAL	0.03	4.04	

Source: Dipres.

In addition, in Chile, financial information for all PPP special purpose vehicles is published at the following link:

<http://www.svs.cl/institucional/mercados/entidad.php?mercado=O&rut=99573420&grupo=&tipoentidad=RGEIN&row=AABbBQABwAAAA5LAAc&vig=VI&control=svs&pestanias=3>.

All information on concessions, including financial information, is also available at: www.concesiones.cl.

9. Standard Clauses

Standard clauses on disclosure provide specific language that can be included in the contracts by public authorities. These clauses can also guide government negotiating teams while they are negotiating provisions related to the responsibility of private providers to provide information to the public authority, the rights and responsibilities of the public authority to disclose such information fully or partly, any direct disclosure requirements for the SPV, and commercial-in-confidence and other confidentiality provisions in specific project contracts. Inclusion of clear disclosure provisions in the standard contract is also a good way to disseminate and educate investors and potential bidders about the government's approach to information disclosure in PPP contracts. Table 11 summarizes the standard clauses from the jurisdictions studied. Table 12 sets out some suggested inclusions in standard clauses based on good practice.

TABLE 11: SUMMARY OF STANDARD DISCLOSURE CLAUSES IN THE STUDIED JURISDICTIONS

United Kingdom	<p>The new PF2 Standard Contract sets out a full chapter on transparency and information (Chapter 31). This includes required and recommended drafting on confidentiality and freedom of information. Within the required drafting, contractors must</p> <ul style="list-style-type: none"> • Provide a contract summary within 20 days of the signature of the contract • Provide access to all requested project data • Provide quarterly summaries of the information provided by the senior lenders • Provide the authority and HM Treasury a calculation of the equity internal rate of return and other financial information bi-annually. <p>Most significantly, the chapter also sets out that the provision of information is part of the service required and imposes consequences for failure to comply.</p>
Colombia	<p>ANI provides a template contract for its fourth-generation road sector PPPs. This requires contractors to establish a website that provides, among other information, the following details of the project to the public:</p> <ul style="list-style-type: none"> • Objectives, mission, and vision • Physical project scope • Ownership structure of the SPV, changes of control, rights and voting procedures, and composition of the governing bodies • Information about potential conflicts of interest. <p>There must also be public disclosure on the Internet portal of financial information reported to the authorities or to the public and issued a maximum of two months after being approved by the board.</p>
British Columbia	<p>The standard drafting developed by Partnerships BC informs the contractor that following financial close, the authority expects to publicly disclose:</p> <ul style="list-style-type: none"> • The Fairness Advisor's report • A project report • Final project agreement, excluding those portions that may be redacted pursuant to the application of FOIPPA.
New South Wales	<p>Clause 35 of <i>Volume 7: Commercial Principles for Economic Infrastructure</i> of the <i>National PPP Guidelines</i> provides that the government will be entitled to publish the project agreement and other project contracts, but disclosure by the private party is generally prohibited without prior consent of government.</p>
Victoria	<p>Alongside the <i>Commercial Principles</i> noted under New South Wales, <i>Partnerships Victoria: Updated Standard Commercial Principles</i> (2008) require contracts to include a clause providing that the government will be entitled to disclose (on the Internet or otherwise):</p> <ul style="list-style-type: none"> • The terms and conditions of the project agreement and any associated transaction document • Documents or information arising from or connected to the agreement or transaction documents (including the performance of those agreements).
India and Karnataka	<p>Paragraph 40.1 of the model concession agreement for NHAI projects Rs.100 Crores and above sets out that:</p> <ul style="list-style-type: none"> • The concessionaire shall make available for inspection by members of the public copies of this concession agreement, the operation and maintenance contract, the tolling contract, and the state support agreement at the concessionaire's site office during the agreement. • The concessionaire shall also prominently display at the toll plazas public notices about the availability of the public documents for inspection (http://www.nhai.org/concessionagreement.htm).

TABLE 12: WHAT SHOULD THE STANDARD CONTRACT PROVISIONS ON INFORMATION DISCLOSURE CONTAIN?

ELEMENT	DESCRIPTION
Maintenance and provision of information	<p>List of various reports, documents, project summary and other information such as equity ownership*, changes, and other financial information that the private provider would need to maintain and submit to the authority:</p> <ul style="list-style-type: none"> • Maintenance of website or displays at site by SPV. • Timelines for submission and disclosure on website. • Penalties for non-submission.
Disclosure	Presumption of full disclosure except commercial-in-confidence and other exempt information
Confidentiality	<ul style="list-style-type: none"> • Language on what constitutes confidentiality. • Elements of the contract likely to be considered confidential • Format for listing specific confidential clauses.
Disclosure in public interest	Language providing for disclosure of commercially sensitive or confidential information in case of public interest requirement (if provided by law)

a. There could be nondisclosure agreements (NDA) already in existence, which may affect retroactive disclosure related to this. However, the nature of operation of the NDAs that are signed should be carefully studied to align them with disclosure requirements.

10. Templates

One way to disclose is to place information in raw form in the public domain. A relevant example in this context would be placing full contract documents along with schedules and side deeds in the public domain. A more user-friendly alternative is to extract useful and relevant information from the contract documents and place it in a specified format in the public domain, such as a contract or project summary, or in an easy-to-comprehend database. The advantage of the latter is that lengthy documents need not be perused by members of the public to find specific project or contract information (see tips for user-friendliness in table 13).

There are several examples of the use of standard templates (table 14). However, all of these are for post-procurement disclosure subsequent to contract signing or financial closure and are for one-time summaries, which are not dynamic and do not provide for ongoing information disclosure. (The case of Chile is an exception.) To the extent possible, a template for PPP disclosure should have dynamic features, with links, and should include key elements of pre- and post-procurement disclosure (see table 15 for a sample template¹⁷).

¹⁷ This template is for illustrative purposes and would need to be customized based on the key features present in PPP contracts in a specific country.

The timing of disclosure is important. Preferably, all information in the template (except Part I: Basic project information, Part II: Procurement information, Part IX: Information on renegotiations, and Part X: Ongoing performance information) will be disclosed after commercial close within 45-60 days of signing the contract.

Part I: Basic project information can be disclosed pre-procurement as it becomes available.

Part II: Procurement information is recommended for disclosure according to the milestones in the procurement process. Evaluation and meeting minutes should be uploaded within two to three business days.

Part IX: Renegotiations should preferably be uploaded within 45-60 days of execution of renegotiated contracts.

Part X: Can be uploaded within 15-30 days of receipt of the information by the authorities.

Although these timelines would broadly suit most jurisdictions, some element of customizing based on process, feasibility, and capacity issues may be required. For fragile or post-conflict countries or other countries with rudimentary capacity in managing information and timely disclosure, it is suggested that only the basic elements in the template should be used. In addition, initially only the key documents and reports may be disclosed fully. That is, those documents may be uploaded in their original form, with confidential information redacted until such time as the capacity for more structured disclosure becomes available.

The process of approval within the government usually requires the preparation of detailed summary documents for the approving committee and senior management. The same can be used for populating the template and will not entail too much extra effort or capacity. Another way is to use the private entity to create all the post-procurement disclosures. In a manner similar to the prescription under PF2, the contract can prescribe this as a service to be provided by the private entity with penalties for nonperformance. However, pre-procurement information disclosures would need to be prepared by the public authority. Some of the information can also be prepared by the transaction advisors and consultants working on specific projects, until such time as the government itself can prepare the reports.

TABLE 13: TIPS FOR USER-FRIENDLINESS IN PPP DISCLOSURE

- Publish all the required information on the public procurement portal, and in addition on the PPP, ministry, and SPV websites.
- Categorize the project pipeline by phase: concept, feasibility, procurement, and operation.

- Construct landing page with basic project information, videos, news clips, and links to SPV website, if any.
- Provide web-based project or contract summary in template (see table 16) with links to individual sections.
- Provide links to ongoing performance and financial reports from the web-based summary as well as from the landing page.
- Provide links to procurement and contract documents from the web-based project or contract summary as well as directly from the landing page:
- Documents categorized as “contract” and “procurement”
- Under procurement, include categories by phase
- Under contract documents, separate amending documents (which may have come at a later phase).
- Provide links to or information on where users can submit feedback and complaints (state location, virtual or other), along with the procedure for submissions.

TABLE 14: EXAMPLES OF USE OF STANDARD TEMPLATES FOR DISCLOSURE

United Kingdom	“Publication of New Central Government Contracts” includes several checklists and helpful information, including a checklist for steps to follow for publication of contracts from contract development to contract execution. This takes into account transparency clauses in the contract, any required redactions and their accuracy, and the requirements for publishing the contract*.
New South Wales	Chapter 5 of the New South Wales PPP Guidelines (2012) provides detailed guidance as to what the contract summary must contain, including that it must distinguish between (i) non-contractual background information; and (ii) contractual information. A Government Contract Disclosure guidance form, including standard templates, is available from www.procurepoint.nsw.gov.au .
Victoria	Annexure 8 of the Partnerships Victoria guidelines provides a project summary template, recommending that summaries should: <ul style="list-style-type: none"> • Be of up to 20 pages • Provide an explanation of the key principles of the Partnerships Victoria Policy, including a disclaimer that the information in the project summary should not be relied on as a complete description and is not intended to be a substitute for the contract • Provide information on project outcomes, tender process, value for money, public interest considerations, and contract milestones • Include key commercial features.
Chile	The Transparency Council publishes several templates for public bodies to use when proactively publishing information, including one template for subscribed contracts. The template for subscribed contracts requires information on the object of the contract, links to the terms of reference, and the assessment process minutes among other criteria.

* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61200/guidance-publication-of-new-central-government-contracts.pdf.

Capacity issues might limit the format, type, and amount of information that can be put out by the responsible public authority. While this document makes some practical suggestions for overcoming any potential capacity constraints, it is likely that some countries might still not be able to disclose at the level shown in the template in table 15.

Therefore, a graded level of disclosure is suggested, with two intermediate levels prior to graduating to the full template recommended in table 15.

For countries with low capacity. It is suggested that fragile countries and countries with low capacity and resources should fill in the template partially, as follows: Part I or Basic Project Information, Part II or Procurement Information along with disclosure of the RFQ and RFP documents; and Part VI or Government Support. Another option is to disclose the full PPP contract with its schedules in the public domain. Sections III-V and VII- X need not be filled in. The rationale is that these countries lack the staff skills and resources required to extract information from complex contracts and place it in the template, as this work demands a fairly high level of understanding of projects and contracts. In addition, contract management practices may be rudimentary and it may not be possible to put up ongoing performance information in a timely manner. Procurement information is routinely disclosed in all projects by governments as mandated by procurement legislation and, therefore, has been included as part of these recommendations. Disclosing full contract documents would mean a fairly high level of disclosure without a high level of skills. However, care must be taken to ensure that the confidential clauses or schedules of contracts are redacted before disclosure.

For countries with intermediate or moderate capacity. It is recommended that in addition to filling in Parts I, II, and VI, and disclosing full contracts with redaction of confidential information as in the case of countries with low capacity, moderate capacity countries should also attempt to fill in Parts VII and X. That is, the countries should provide information on tariffs, service, and fulfillment of the key performance indicator targets. This would ensure that the public gets headline information on the basic characteristics of the project, the level of taxpayer money going into the project, why the public is expected to pay the stated level of tariff, and the services they would expect to receive against their payments.

TABLE 15: SUGGESTED TEMPLATE FOR PROACTIVE DISCLOSURE OF PROJECTS

BASIC PROJECT INFORMATION

- Project name, location, sector
- Sponsoring agency/department
- Project value
- Project need: benefits provided, economic and social (including specific information on the public interest aspect)^b
- Technical description of the physical infrastructure
- High-level description of the services
- Estimated demand to be served annually
- Project additionality

BASIC PROJECT INFORMATION

- Reason for selection of PPP mode and type in brief
- Brief description of the other modes analyzed and reasons for rejecting these
- Dates of various approvals

CONTRACT MILESTONES (ESTIMATED AND ACTUAL)

- Date of commercial close
- Date of financial close
- Date of commencement of construction or development
- Date of completion of construction or development
- Date of commissioning
- Date of contract expiry

LINKS TO ALL CONTRACT DOCUMENTS

PARTIES TO THE CONTRACT WITH CONTACT DETAILS

- Public authority: name of authority, name of representative, address, telephone, fax, e-mail
 - Private party: name of company or consortium, name of representative, address, telephone, fax, e-mail
 - Financiers: name of Lead FI, other FIs, name of representative of lead FI, address, telephone, fax, e-mail
-

PROCUREMENT INFORMATION

Dates and summary details, links to all procurement documents, final feasibility study, including land acquisition, social, environmental, and rehabilitation related information, reports of independent procurement auditors (if any):

- RFQ
 - Pre-qualification or short list
 - RFP
 - Evaluation criteria: brief description with weightage
 - Brief information on constitution of the evaluation committees
 - Negotiation parameters: brief description of the parameters for negotiation with preferred proponent
 - Minutes of pre-bid meetings
 - Selection of preferred bidder
-

RISK

Listing of risks with information on who bears the risk. The following table can be used. This is not an exhaustive listing. Countries, sectors, and individual projects may use different categorizations. Several risks can be further broken down into components or listed together. If within a large category of risk subcategories are allocated to different parties, it makes sense to show the subcategories clearly:

	DESCRIPTION	ALLOCATION	MITIGATION
Pre-construction risk: all risks up to financial close			
Construction/completion			
Cost risk: capital, operating			
Refinancing risk			
Risk related to change in law, taxes, scope, technical standards, regulatory framework			
Exchange rate risk			
Operating risk			
Commercial risk, market risk, demand risk			
Performance risk			
Financial risk			
Force majeure risk			

EVALUATION OF PPP OPTION: VALUE FOR MONEY OR OTHER APPROACH USED^e

- Link to evaluation report (value for money or other)
 - State the rationale for doing the project as a PPP, including any qualitative or quantitative value-for-money or other analysis that might have been used. If nonfinancial benefits have been quantified or considered, these could be stated.
 - The discount rates used should be specified in the disclosure along with the risk premium used, if any, and an explanation for the rate of risk premium used, referring to guidance, if any, available in this regard or describing project-specific circumstances that justify the risk premium rate used.
-

FINANCIAL INFORMATION^f

- Equity-debt ratio
 - Share capital:
 - Shareholders with proportion held and voting rights
 - Certain contracts provide for caps on equity transfer in different stages of the contract, especially during the construction stage and for a few years thereafter. Give details of any such provisions.
 - Commercial lenders, institutional investors, bilateral or multilateral lenders, public issue of bonds, supplier credit, other
 - Categorize senior debt, mezzanine debt, other
 - Amount and tenor of each, fixed or floating rate
 - Security and step in arrangements
 - Forecast IRR
-

GOVERNMENT SUPPORT

Guarantees	<ul style="list-style-type: none">• Detail the type and exact details of the guarantees provided—both explicit and contingent guarantees—such as minimum revenue guarantee, exchange rate guarantee, debt repayment guarantee, and other guarantees.• Provide links to fiscal commitments and contingent liabilities disclosure reports, if any.
Grants	<ul style="list-style-type: none">• Subsidy as a proportion of project value• Capital subsidies paid during construction with periodicity or milestones• Operating subsidies and their periodicity or milestones
Service payments	<ul style="list-style-type: none">• These are payments made by the public authority or purchaser to the private provider for infrastructure services (applicable in PFI type projects)• Total payments and periodicity• Methodology for calculating payments• Indexation used
Land leases, asset transfers	<ul style="list-style-type: none">• Land transferred on lease or other basis by government: give details of property numbers with the quantum of land transferred, zoning information, conditions of transfer• Equipment transfers: details of equipment with conditions of transfer• Human resources/personnel transfers: details and conditions of transfer

- | | |
|---------------|--------------------------------------------------------------------------------------------------------------------------|
| Other support | <ul style="list-style-type: none"> • Non-complete clauses • Provision for revenue shortfall loan |
|---------------|--------------------------------------------------------------------------------------------------------------------------|

- | | |
|-----------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Revenue-share, if any | <ul style="list-style-type: none"> • Revenue share on base case • Revenue share on upside • Links to graphs: annual concessionaire payments to government |
|-----------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

TARIFFS^h

Tariffs and pricing	<p>This information will be required only where the infrastructure is financed partly or fully through the levy of user charges</p> <p>Methodology for tariff setting/pricing</p> <p>Scope for reviews of tariff, pricing, regulatory mechanisms</p> <p><i>Links to graphs: tariff increases over time, consumer price index movement</i></p>
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CONTRACT TERMINATION

Events of default and termination payments	<p>Describe key events of default under two major categories: concessionaire's events of default, and public authority's events of default. State the termination payments against each, stating clearly the methodology used for total payments. The following format may be used:</p>
--------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

PARTY	EVENTS OF DEFAULT	BRIEF DESCRIPTION OF EVENT OF DEFAULT	TERMINATION PAYMENTS
Concessionaire	1. 2. n.		
Authority	1. 2. n.		

Handover	<p>State details of hand over of assets back to state, condition of assets, and any other conditions relating to hand over. Include details of provisions for continuity of service.</p>
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RENEGOTIATIONS

State variations to contract, if any, after signing of the original contract detailing each change against original provisions. State in addition the details of renegotiations and circumstances leading to renegotiations. State specifically any change due to the renegotiated clauses in the following: roles and responsibilities relating to the project, risk allocation, fiscal exposure, that is, any change in fiscal commitments and contingent liabilities with a rationale for agreeing to the change. Use the following formats:

Nature of Variation

Rationale for variation

Change in roles and responsibilities of the parties due to the variation, if any

Change in original risk allocation due to the variation, if any

Change in original fiscal commitments or contingent liabilities of government due to the variation, if any

Change in capital or operational costs due to the variation, if any

Change in tariffs or service levels due to the variation, if any

Date of variation

PERFORMANCE INFORMATION

Annual demand levels State the actual annual measured levels of demand or stated levels of demand in the provider's report or contract manager's report. Use the following format.

	Year 1	Year 2	Year 3	Year n
Annual demand				

Annual revenues *Recommended only where revenue share clauses or other related clauses such as MRGs are present in the contract*

State the actual annual total revenues reported in the financial statements and reports using the following format. If different categories of revenues need to be reported, create more rows in the table. Provide links to audited financial statements of the provider company.

	Year 1	Year 2	Year 3	Year n
Annual total revenues				

Actual IRR Recommended only where there is government equity investment or other form of government support that is substantial.

Performance State actual year-wise performance here against each of 10-12 identified key performance indicators:

KEY PERFORMANCE INDICATORS	Year 1		Year n	
	Target	Achievement	Target	Achievement

Performance failures State instances of performance failure during the year and the penalty or abatement. Use the format given below to provide information on the provisions of the contract as well as the actual penalties imposed:

Year	
Category of failure	
Nr. of events	
Penalty or abatement provided in contract	
Penalty or abatement imposed	
Penalty paid or abatement effected: Yes/No	

Performance assessments Provide links to audit reports, independent performance assessments of the independent engineer and any other performance reports available for the project.

- This can be disclosed at the pre-procurement stage with the exception of information on the parties to the contract, which will be disclosed once it becomes available, that is, at the end of the procurement process.

- b. It is recommended in the PPP process to carry out a preliminary examination of the social and environmental aspects of the project and identify and disclose potential deal-breakers or challenges as early as possible.
- c. This information can be disclosed in the public domain during the procurement stage. Disclosure in the public domain can be simultaneous with the availability of the documents to prospective bidders.
- d. Information on risk is best disclosed immediately following the execution of the contract.
- e. The rationale for doing PPP can be disclosed at the pre-procurement stage. However, a detailed value-for-money report, if any, should preferably be disclosed following contract execution given that actual bid comparison is available following assessment of bidders and final negotiations with the selected bidder. In addition, where a public sector comparator is created, public entities might have sensitivities in disclosing the public sector comparator in advance, as it might have the potential to affect their negotiating position adversely.
- f. Key pieces of this information become available at financial close and should, therefore, be disclosed only after.
- g. Information on government support should be made available at the time such support is approved for the project. In many cases, decisions on this count are taken prior to bidding; in others, the decision is taken at the end of the bidding process and the quantum and type of support is known only then. Such information is best made available immediately following firm government decision on this.
- h. Where there is a standard way of setting tariffs for specific sectors either by the government directly or by an independent regulator, it is expected that these methodologies have undergone consultations and been placed in the public domain. However, for each project it helps to disclose as part of the procurement documents and as part of the post-procurement template information to be disclosed upon commercial close, the methodology used, and any modifications applied to the particular project. Similarly, disclosure of target levels at commercial close can be done as part of Part VII or as part of the ongoing performance information disclosure during the operational stage. However, it is more intuitive to disclose key performance indicator targets at commercial close as well as along with the ongoing performance information disclosure at a later stage.

11. Redactions

Not all information, either pre- or post-procurement, can be disclosed, given commercial sensitivities as well as public interest related limitations. Most FOI laws make an allowance for specific categories of confidential information. In a majority of the 13 jurisdictions studied, confidentiality requirements for PPP projects follow wider FOI legislation. Figure 7 provides a summary of the restrictions placed on disclosure across the jurisdictions studied.

Although the provisions in most FOI Acts are similar, how issues of confidentiality are interpreted and treated varies substantially across jurisdictions. For example, Victoria and New South Wales provide good examples of mature and well considered disclosure policies; however, despite there being a presumption of complete disclosure and only limited redactions in Victoria, in some of the contract documents examined, key pieces of financial information, including the base case financial model, pricing structure, unit payment details, details of dollar abatements for failure to perform, and loan prices, are among the withheld information.

FIGURE 7: CONFIDENTIALITY PROVISIONS ACROSS JURISDICTIONS

Freedom of Information (FOI) confidentiality definitions—disclosure is restricted if:

UK	It constitutes a trade secret or could prejudice commercial interests (FOI Act 2000 part II, clause 43)
Colombia	It includes financial information that could detrimentally impact competitiveness and Trade secrets/IPR (Law of Proactive Disclosure 2013)
British Columbia	The information is of potential harm to a third party or public body (FOIPPA 1996, clause 21)
New South Wales	It includes the commercial-in-confidence provisions (GIPA, 2009, Section 32)
Victoria	Information was provided in confidence or is commercial (Part IV of the FOI Act, 1982)
Minas Gerais	It could jeopardize the state or population (Transparency Law 2011, Article 8)
Chile	It would affect the performance of the public body or national interest/security (Access to Public Information Law, Article 7)
India/Karnataka	It includes commercial in-confidence, trade secrets or intellectual property (RTI Act, 2005, Section 8).
South Africa	It belongs to a third party (Promotion of Access to Information Act, 2000, clause 36)
Honduras	It belongs to a third party (Transparency Law, 20006, Article 16)

Other confidentiality requirements:

South Africa	Financial information in the bid is kept confidential to ensure the bidding process is competitive. After financial close, the transaction adviser must produce a “close out” report for the confidential and complete records of the institution (PPP Manual, Module 5)
Honduras	Everything except the call for tender is deemed confidential until the PPP contract subscription
Karnataka	Under the KTCP Act, the Government has the power to obtain any information required by them from an Authority relating to procurement
Philippines	Confidentiality restrictions refer to unsolicited bids. Under the proposed changes to the BOT Law, proprietary information within contracts would be kept confidential, but only for a limited period.
Kenya	Negotiation with bidders are confidential.

Provisions on confidentiality in PPPs in detailed guidance and standard provisions should aim toward (a) ensuring that only limited information is redacted and (b) enabling officials to identify confidential information and suitably prepare information for public disclosure. Table 16 provides suggestions for provisions on confidential information in legislation, guidance, and standard clauses.

TABLE 16: SUGGESTED PROVISIONS ON CONFIDENTIAL INFORMATION

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

WHERE	WHAT
	<p>The standard provisions should, however, allow space for specific confidential aspects of each project and provide a format in which the commercially sensitive contract clauses will be listed in schedules with the details of specific information for redaction along with reasons for considering the information as commercially sensitive and the time for which the information is to be considered as confidential.</p>

PART III

12. PPP Disclosure Checklist/ Diagnostic for Countries

Objective

The objective of the PPP Disclosure Checklist/Diagnostic is to help PPP policy makers and practitioners assess the status of PPP disclosure in the jurisdiction and to identify customized PPP disclosure solutions to enable better disclosure. The Diagnostic can also be used by World Bank teams.

What the Checklist/Diagnostic Provides

The Disclosure Checklist/Diagnostic provides guidance (figure 8) to assess the status of each of the following areas in the jurisdiction under consideration:

- Preliminary overview of the general transparency environment
- History and outlook for PPP disclosure
- Political environment for disclosure
- Legal and policy framework
- Process and institutions
- Guidance on confidential information.

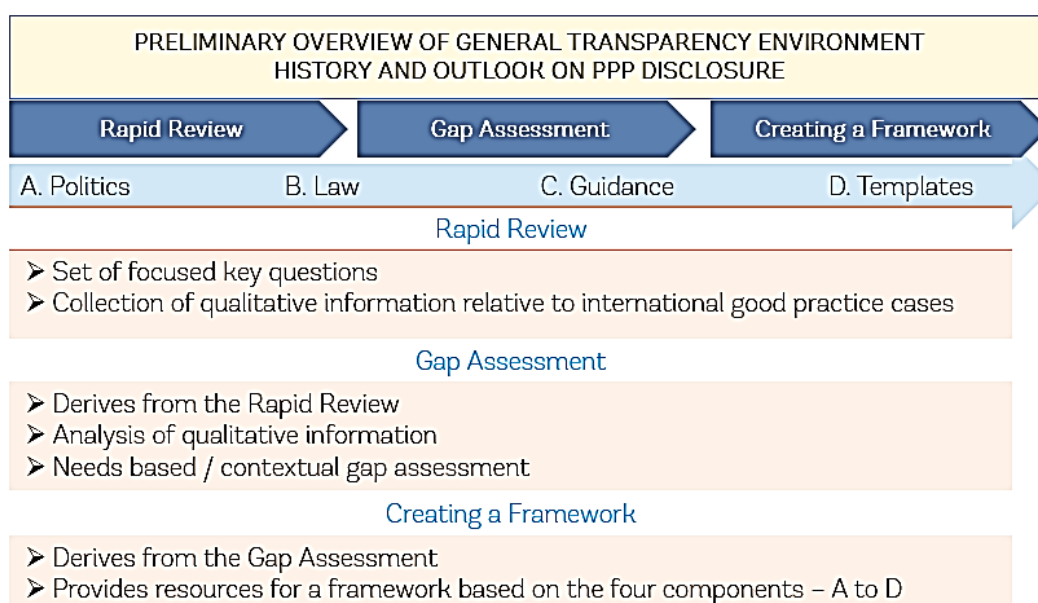
Under each of the areas identified, the Disclosure Checklist/Diagnostic provides the key questions policy makers and practitioners should ask, analysis and techniques for assessing gaps, resources for learning more, and tools for establishing a customized PPP disclosure framework for the jurisdiction. Box 6 suggests some key pointers for using the Diagnostic and table 17 is the detailed Diagnostic. The Diagnostic can be further developed as an Excel-based tool or used as a table template by the users.

Questions in the Diagnostic can be broken down further into components where there are categories for which it is difficult to answer yes/no.

Key Stakeholder Consultations

To assess the disclosure framework and practice through the use of the Diagnostic, the following stakeholders would need to be consulted: information commissioners and others responsible for implementing the FOI Acts (where such Acts exist), the PPPU, the treasury, contracting authorities, financiers, investors, and all categories of information users.

FIGURE 8: PPP DISCLOSURE CHECKLIST/DIAGNOSTIC DESIGN



BOX 6: POINTERS FOR USING THE PPP DISCLOSURE DIAGNOSTIC

INITIAL PRELIMINARY OVERVIEW

A quick survey with a few quick notes based on publications, databases, information disclosed, and earlier recorded reports. The preliminary overview will focus on disclosure in general as well as PPP disclosure in particular.

RAPID REVIEW

Each question will be answered as Y/N

In addition to Y or N, the user will also make short notes giving reasons for the Y or N, plus any relevant information and remarks that could help in gap analysis or strategizing. For example, there could be some questions for which the answer could be partly Y or a nuanced Y or N.

GAP ANALYSIS

Ideally, gap analysis will be done once the rapid review of all components is completed, or

alternatively, an iterative process will be followed for gap analysis where any relevant information in rapid review of other components will be used to modify the previously done gap analysis

What is a gap? This can only be answered relative to a practical need or alternately, a widely accepted good practice, so references and resources provided with this tool may need to be used at this stage.

CREATING THE PPP DISCLOSURE FRAMEWORK

This will ideally be done after the rapid review and gap analysis of all components is completed or alternately there could be several iterations.

Heavy use of references and resources or deployment of an expert in accountability and transparency along with a PPP expert is recommended.

TABLE 17: PPP DISCLOSURE DIAGNOSTIC

PRELIMINARY ANALYSIS

General transparency and openness environment

FOI or Transparency Acts?
 Robust government information portals?
 Procurement systems reputed to be transparent and open?
 The overall openness of decision-making: for example, the quality of public-private dialogue (overall, not necessarily PPP-specific); tradition of consultation on draft laws and regulations
 Information-sharing practices (with public): for example, tradition of sharing information on enacted laws, regulations, policies (is there an e-portal, for example, on the stock of laws and regulations)
 Information sharing within government:
 Degree of accountability to nongovernmental stakeholders: for example, existence of business-to-government or citizen-to-government feedback loops on the quality of service (including regulatory) delivery
 Degree of accountability within government: for example, monitoring mechanisms with associated system of rewards/penalties
 Degree of rent seeking in the government:
 Mechanisms for capacity building and training in the government
 Overall general perceptions on the functioning of legal and institutional frameworks

PPP disclosure at first sight.....

PPPs in the country?
 Sector focus? Numbers? Size? Types?
 Status – development, commercial, financial close, construction, operational?
 Information available on websites on projects and programs?
 Pre- and post-procurement information available? What elements are disclosed?
 Frameworks – PPP Acts, policies on disclosure?
 Media reports, feedback from public on transparency, corruption, governance of PPP
 Key lessons?
 Key government and private counterparts to connect to?

And the prognosis.....

Recent court cases on PPP transparency
 Potential or existing stakeholder/ civil society organization movements
 Published outlooks on PPP transparency

This consists of a preliminary look at the broad landscape of general (that is, not necessarily PPP) governance and transparency issues followed by a preliminary look at disclosure frameworks specific to PPP projects. This will be based on high-level, desktop research, government FOI and PPP websites if any, transparency indices, etc., from Transparency International, COST, related UN work, news media reports, open government partnership, and open contracting work of the Governance GP of the World Bank, other easily available WBG or external publications. See Rule of Law Index,^a Corruption Perceptions Index,^b Index of Economic Freedom^c to get a sense of how legal, regulatory, and institutional frameworks in the country are perceived and rated.

If it is a WBG team using the Diagnostic, it should begin to connect with related government counterparts, such as the PPP Unit, National Treasury, Debt Management Office, contracting authorities, information officers and commissioners (officials responsible for the implementation of the FOI Acts).

If it is government itself that is using the Diagnostic, it will require coordination across ministries.

The output could be a two to three page report.

DETAILED DIAGNOSTIC

COMPONENT	RAPID REVIEW	Y/N	GAP ASSESSMENT	CREATING A FRAMEWORK FOR DISCLOSURE
POLITICAL ECONOMY	<ul style="list-style-type: none"> • Clear support from the highest levels of government (national and subnational) to disclosure in general • Agreement on PPP disclosure among internal stakeholders (ministries, agencies, subnational governments) • Sufficient agreement on the need to disclose and pressure to disclose among important external stakeholders (political parties, unions, private sector, users, media, political commentators, think tanks, civil society organizations, and any other) 	Y/N Y/N Y/N	<p>To be filled by the assessing or country team, but an illustration below:</p> <p>If there is no support to the program from the highest levels of government, or there is no or little internal support the ownership gap is wide.</p> <p>If there is internal support but no external pressure or discussion, the gap is medium or moderate.</p> <p>If there is internal support and external pressure, but there is no approved plan for implementation, the ownership gap is small.</p> <p>Private sector support, especially among concessionaires, is important.</p>	<p>To be filled by the assessing or country team, but an illustration below:</p> <p>Where ownership is low, the emphasis will be on dialogue, discussion, and dissemination of international practice.</p> <p>A moderate or small gap indicates the need for a more systematic approach to PPP disclosure with an ongoing parallel discussion on best practices.</p>
LAW	<p>Are there laws, policies and procedures in place that include the following:</p> <ul style="list-style-type: none"> • Proactive disclosure by governments or agencies • Coverage of proactive disclosure relating to contracts or PPP • High level definition of confidential information, protection to sensitive contract information • Timelines for disclosure • Are there any significant legislative or policy impediments or constraints to PPP disclosure? 	Y/N Y/N Y/N Y/N Y/N	<p>Here it is important to begin with the FOI Act, go down to the PPP Act, PFM Act, and Procurement Act, if any, and look at the disclosure provisions in all of these.</p> <p>Where there is no FOI Act or no proactive disclosure provision in the FOI or the PPP, PFM, Procurement Acts and no coverage of contracts or PPP in the FOI Act, the gap is wide.</p> <p>Where there is coverage of contracts or PPP in FOI but no proactive disclosure provision in either the FOI, PPP, or the PFM Acts, the gap is moderately wide.</p> <p>Where there is coverage of contracts or PPP as well as proactive disclosure, but no timeline or definition of confidential information, the gap is small.</p> <p>Where all four features are present in legislation, there is no gap.</p>	<p>To be filled by the assessing or country team, but an illustration below:</p> <p>Where the gap is high and the concept of proactive disclosure is weak, or there is no FOI at all, it might make sense to build a general culture of disclosure through larger open governance work initially before focusing on PPP. The Governance GP of the World Bank is well equipped to lead this work.</p> <p>Where the gap is either moderate or small, there is a need for a strategy that looks at simultaneous work on open governance as well as sharing of international practices in PPP disclosure to build a demand for more openness in the jurisdiction.</p>

DETAILED DIAGNOSTIC

COMPONENT	RAPID REVIEW	Y/N	GAP ASSESSMENT	CREATING A FRAMEWORK FOR DISCLOSURE
GUIDANCE	<ul style="list-style-type: none"> Clearly established roles and responsibilities on PPP disclosure Processes and actions clearly established in guidance or internal orders Timelines for disclosure clearly established Clear guidance available for officials on the identification and treatment of confidential information, including the timeframe associated with confidentiality, factors to be considered as a test of commercial sensitivity or public interest There are penalties associated with failure to disclose Mechanisms that monitor implementation of disclosure policies, internal and external Processes for checking the accuracy of information and validation, internal and external 	Y/N Y/N Y/N Y/N Y/N Y/N Y/N	<p>Where there is no guidance, the gap is wide.</p> <p>Where there is a guidance, which is missing a majority of the elements stated, especially those on confidentiality, roles and responsibilities, and timelines, then the gap is moderate.</p> <p>Where there is a guidance that has most of the key elements, but might be missing either processes of validation or there are technology issues or monitoring mechanisms, the gap could be between moderate and small. As in all other cases of gap analysis, here too it is a subjective exercise.</p> <p>Where there is a guidance that has all or most elements, there is no gap.</p>	<p>Normally the work on the guidance is less difficult if there is a higher level of enabling clauses for disclosure as part of the legislation.</p> <p>The Framework for PPP Disclosure has an example template and some recommended inclusions to assist in developing the guidance.</p>
TEMPLATE & STANDARD CONTRACT PROVISIONS	<ul style="list-style-type: none"> Comprehensive and clear template for disclosure that covers key pieces of pre- and post-procurement information, including financial and performance information The template is flexible enough to cater to different kinds of PPPs and to PPPs in different sectors The template is dynamic, that is, suited to ongoing financial and performance disclosure Instructions for filling the template included as required There are standard contract provisions that provide the following: <ul style="list-style-type: none"> Specific language for confidential information Specify the period for which the information will be confidential Provide format for listing of specific confidentiality clauses of each contract State clearly the information that the private provider is expected to maintain along with timelines for submission Specify the audit mandate with the extent of disclosure to audit 	Y/N Y/N Y/N Y/N Y/N Y/N Y/N Y/N	<p>If there are no templates or standard clause, the gap in this area is high.</p> <p>If one of these is there but the other is not there, the gap is moderate.</p> <p>If one or both of these are there but inadequate, the gap will still be moderate or small based on the importance of the missing elements.</p> <p>If these exist and are comprehensive and inclusive of all relevant points, there is no gap.</p>	<p>The Framework for PPP Disclosure has an example template and some recommended inclusions to assist in developing the template.</p>

DETAILED DIAGNOSTIC

COMPONENT	RAPID REVIEW	Y/N	GAP ASSESSMENT	CREATING A FRAMEWORK FOR DISCLOSURE
RESOURCES	<ul style="list-style-type: none">Budget is availableSkilled, trained labor is availableTechnology and web platform/s compatible with easy upload and download of informationSecurity systems to prevent data and information tampering	Y/N Y/N Y/N Y/N	If there is an adequate platform for disclosure and no budgetary provisions for hiring extra personnel for the specific work of disclosure, the gap may be moderate or small.	The bank team or client country will have to strategize and understand the magnitude of the resources needed for the purpose given the nature of the framework of disclosure and the associated costs.

a. http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf.

b. <http://www.transparency.org/research/cpi/overview>.

c. <http://www.heritage.org/index/ranking>.

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Useful websites

- <http://transparency.number10.gov.uk/transparency/contract-finder/search>
- <http://www.contracts.vic.gov.au>
- <http://colombiacompra.gov.co/es/secop>
- <http://einstitute.worldbank.org/ei/webinar/themes/transparency-and-accountability-in-public-private-partnerships>

The World Bank Group provides assistance to governments in developing countries to improve access to infrastructure and basic services through public-private partnerships (PPP). When designed well and implemented in a balanced regulatory environment, PPPs can bring greater efficiency and sustainability to the provision of such public services as water, sanitation, energy, transport, telecommunications, health care and education.

The World Bank Group's unique value proposition rests with its capacity to provide support along the entire PPP cycle —upstream policy and regulatory guidance, transaction structuring advice, as well as financing and guarantees to facilitate implementation.



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