# ACHIEVING TRANSPARENCY WITH BLURRED GOVERNMENT BOUNDARIES

***Sven Bluemmel****

All Australian jurisdictions have legislation that aims to strengthen democracy by ensuring that public sector information is broadly available, subject only to a limited number of exemptions. Increasingly, the private and not-for-profit sectors are used to provide services and infrastructure that were traditionally provided by the public sector. This is done through a variety of mechanisms, including various types of public-private partnership as well as through other contracts for services.

In this paper, I examine the impact of these changing boundaries on existing measures to achieve accountability and transparency in the delivery of public services and infrastructure. While I focus predominantly on the legislative landscape in Western Australia, many of the issues are equally applicable elsewhere.

## The changing face of public service delivery

In October 2009, the final report of the Economic Audit Committee to the Western Australian Treasurer (the EAC Report) articulated the following vision:

> The public sector will increasingly act as a facilitator of services, rather than a direct provider, with all areas of service delivery opened to competition. Citizens in need of services will exercise control over the range of services they access and the means by which they are delivered.[1]

This statement clearly envisages a continuation of a long term trend, in Western Australia and elsewhere, to move away from the rigid, traditional model of public services being solely delivered by public servants. Western Australia, in particular, has for some years been at the forefront of working with the not-for-profit sector in providing services to people with disability. This service delivery model was a significant factor in the State being the last jurisdiction to sign up to the National Disability Insurance Scheme.[2]

Another example of this trend is the provision of public patient health services. The major tertiary hospitals in Western Australia currently operate a traditional public sector model. However, some health campuses providing public patient services are operated by non-government entities, including the Peel Health Campus and the Joondalup Health Campus. In both cases, the State government has contracted with private sector providers to deliver health services to public patients, alongside the delivery of other health services to private patients, in return for payment from the State. In another model, the flagship Fiona Stanley Hospital will be operated as a public hospital, but will have most non-clinical services outsourced to the private sector.[3]

In addition, a private company operates two correctional facilities in Western Australia, the Acacia Prison and the Wandoo Reintegration Facility.[4] These are managed under a contract between the State and the private operator Serco.

---

* *Sven Bluemmel is Western Australian Information Commissioner.* *This paper was presented at the AIAL 2014 National Administrative Law Conference, Perth WA, 25 July 2014.*

There are many more examples of the increasing use of the non-government sector to deliver public services. These are generally driven by the laudable goals of making the delivery of public services more efficient and flexible. However, this changing face of public sector delivery means that the boundary between the public sector and other sectors is not as clear as it once was. It also means that a person who is receiving a publicly funded service may not be aware that the service is being provided by a private or not-for-profit organisation.

I do not propose to argue for or against the merits of these developments in this paper. I do, however, seek to highlight the ramifications for achieving transparency and accountability. The EAC Report envisages that '…a commitment to performance monitoring and evaluation will ensure transparency and accountability, facilitating ongoing learning and improvement.'[5] However, this appears largely directed at ensuring that allocation and funding decisions are subject to disclosure and analysis, rather than seeking to make private and not-for-profit service providers subject to the same levels of transparency as the public sector bodies that previously delivered the service. One of the general principles underlying freedom of information legislation is that any person has a right to access whatever government information they wish, for whatever reason they choose, subject only to legislative exemptions. The citizen is no longer reliant on obtaining only such information as government considers important or convenient enough to disclose. While the performance monitoring and evaluation envisaged by the EAC Report is essential to ensuring public value, it falls short of achieving the goals of the *Freedom of Information Act 1992* (WA) (the *FOI Act)*.

**How are current Freedom of Information laws coping with the changes?**

The *FOI Act* creates a right of access to documents of any State and local government agency, other than an exempt agency, subject only to a limited number of exemptions. The *FOI Act* defines an 'agency' as being a Minister or a public body or office.[6] The term 'public body or office' is defined in clause 1 of the Glossary as:

(a) a department of the Public Service;
(b) an organisation specified in column 2 of Schedule 2 to the *Public Sector Management Act 1994*;
(c) the Police Force of Western Australia;
(d) a local government or a regional local government;
(e) a body or office that is established for a public purpose under a written law;
(f) a body or office that is established by the Governor or a Minister;
(g) a body or office that is declared by the regulations to be a public body or office; or
(h) a contractor or subcontractor as defined in the *Court Security and Custodial Services Act 1999* or the *Prisons Act 1981*.

For agencies other than Ministers, a reference to a 'document of an agency' includes a reference to a document in the possession or under the control of the agency, including a document which the agency is entitled to access.[7]

***Defining the private operator as an agency***

One mechanism currently used in the *FOI Act* to ensure transparency in the delivery of services is to define a particular class of service provider as a government agency pursuant to paragraph (h) of the definition of 'public body or office' referred to above. This brings the

provider into all aspects of the FOI regime, including receiving and dealing with access applications, reporting annual statistics and proactively publishing certain information about the provider's functions and services.

In many ways, this is the most comprehensive way of ensuring that public services provided by a private sector provider are subject to transparency and scrutiny. Because it is so comprehensive, this mechanism needs to be used with care to ensure that service providers made subject to the *FOI Act* are identified with precision, and that there is no unintended overreach into unrelated areas of the service provider's business. In the case of private providers of custodial facilities, this is made easier by the fact that those services are provided pursuant to specific legislation. However, this is not always the case.

A further drawback of this approach is that because it relies on legislative change, it is slow and cumbersome. It requires significant effort and oversight to ensure that new or changing models of service delivery are identified, and that the *FOI Act* is amended accordingly. This may not always be compatible with the ideal of flexible, responsive and innovative service delivery which underpins the blurring of government boundaries in the first place, as identified in the EAC Report.

***Relying on an agency's entitlements to access documents***

Even where a service provider is not deemed to be an agency under the *FOI Act*, a document held by that provider will still be considered to be a document of an agency, and be potentially accessible under the Act, where a government agency is entitled to access that document. Whether an agency is entitled to access a particular document held by a contractor depends on the circumstances of the relationship and the nature of the particular document. Nothing in the *FOI Act* requires agencies to include document access rights in contracts.

An agency's coercive statutory power to compel the production of documents for certain administrative or regulatory purposes is generally not sufficient to make such documents potentially accessible under the *FOI Act*. In *Re Miller and Racing and Wagering Western Australia* [2012] WAICmr 19, I found that documents in the possession of Perth Racing, formerly the Western Australian Turf Club, were not documents in the possession or control of Racing and Wagering Western Australia, the latter being an agency as defined in the *FOI Act*.[8] While the *Racing and Wagering Western Australia Act 2003* gives Racing and Wagering Western Australia the power to direct a racing club to produce documents relating to the affairs of the club, I did not accept that it was the legislature's intention that an agency should have to take some additional, formal step of exercising that power to take possession of documents in order to respond to an access application under the *FOI Act*. Accordingly, the coercive legislative power was not sufficient to bring the documents 'under the control' of the agency for the purposes of the *FOI Act*.

***Express contractual obligations of transparency***

Another approach currently in use, which aims to achieve a level of transparency in the provision of public services by the private sector, is to place contractual obligations on the service provider to make certain documents available directly, without an applicant having to apply to the agency.

As noted above, there are several public health facilities operated by private providers in Western Australia. One of these is the Peel Health Campus (PHC). Until recently, PHC was operated by Health Solutions (WA) Pty Ltd, pursuant to an agreement with the Minister for Health. That agreement included a requirement that PHC have a policy permitting access by public patients to their personal information.

Aspects of this arrangement were tested in *Re Pisano and Health Solutions (WA) Pty Ltd trading as Peel Health Campus* [2012] WAICmr 24 *(Pisano)*. That case confirmed that PHC was not an agency for the purposes of the *FOI Act*. The case also highlighted that relying on contractual provisions results in privately operated public medical facilities being subject to a weaker level of transparency than medical facilities operated directly by the State in at least three ways. First, public patients treated at such facilities do not have a legally enforceable right under the *FOI Act* to access their medical records but are reliant on the operator honouring its obligations under the agreement. Secondly, any decisions on access to information made by private operators cannot be tested on external review by me. Finally, the relevant agreement only provided for public patients to access their own medical records. No such limit applies to medical facilities operated directly by the State.

***Absence of express contractual obligations of transparency***

The limitations identified above in relation to the provision of public patient services by private sector health providers also apply in the provision of general services by the private sector. While this occurs in many different areas, two examples should serve to illustrate some of the key issues.

The first example is where government agencies utilise the services of external consultants to investigate workplace conflicts or misconduct. These processes typically involve the consultant interviewing affected staff and witnesses, analysing relevant instruments such as legislation, codes of conduct and the like; and producing a report to the agency. Usually, the consultant also provides the agency with copies of supporting documentation, such as records of interviews. There is little doubt that those copied documents are documents of an agency and thus potentially accessible under the *FOI Act*, even if a consultant were to claim copyright over some or all of those documents. However, the consultant may claim that the report is exempt under the *FOI Act* because its disclosure would reveal the consultant's business processes in a way that would harm his or her commercial affairs. While such claims are often unsuccessful when tested on external review, they may be upheld by an agency in its initial decision. At the very least, they are likely to delay disclosure of documents to an applicant. In any event, they represent an obstacle which would not exist if the investigation had been carried out directly by the agency. There is also the possibility that a consultant may give interviewees an unrealistic expectation of confidentiality, particularly if they are not familiar with the *FOI Act*.

A related scenario occurs where an agency engages a contractor to undertake a process of research and investigation which is intended to inform a public policy or project. Again, a contractor may claim that the resultant report is exempt from disclosure because it contains the consultant's commercial or business information. A consultant who is not as familiar with legislative transparency mechanisms as an experienced public servant may also be more likely to create unrealistic expectations of confidentiality while gathering information from contributors or members of the public.

**Evaluating possible approaches to the issue**

The developments identified above have the potential to erode transparency. For the purposes of this paper, I take it that an erosion in transparency in this context is undesirable and should either be avoided or expressly and transparently acknowledged.

While any legislative response is ultimately a matter for Parliament, I will now pose some questions that need to be answered, and some principles that should be considered in evaluating any proposed response.

The first question is whether society should accept any overall decrease in transparency in the delivery of what have traditionally been considered public services. It may be argued that improvements in efficiency justify the cost of some decrease in transparency. Perhaps unsurprisingly, I would take a lot of convincing before I accepted such an argument. Making processes subject to greater transparency may well cause some administrative or political inconvenience. However, it is a mistake to equate the absence of any inconvenience with proof that processes are working more efficiently. In my experience, greater transparency has the potential to improve efficiency and effectiveness by subjecting processes to criticism and scrutiny. The short term inconvenience suffered is likely to be a small price to pay.

A related question is whether it is acceptable to have different levels of transparency in individual cases depending on whether the service is provided by a public or a private provider. To illustrate, is it acceptable for a medium security prisoner in a privately operated prison to have weaker rights to access information about their treatment in custody than a medium security prisoner in a publicly operated prison? Similarly, is it acceptable for a patient in a privately operated public health facility (such as Peel Health Campus) to have weaker document access rights than a patient in a publicly operated public health facility? I would expect that most people would consider such differential outcomes to be arbitrary and unacceptable.

By virtue of the definition of 'contractor' in the *FOI Act*, a private operator of a Western Australian prison is subject to the same legal obligations under that Act as the Department of Corrective Services, which operates all other prisons. In a legal sense at least, there is no loss of transparency. However, as identified in *Pisano*, the situation in respect of privately operated public patient facilities is less satisfactory.

Another consideration in evaluating potential approaches is the extent to which those approaches rely on an individual decision maker in an outsourcing process turning his or her mind to the issue of transparency. As noted above, the *FOI Act* currently provides that any private provider that provides services under custodial services legislation is deemed to be an agency for the purposes of the Act. This mechanism is broad and automatic. It does not rely on the need for transparency to be identified and established each time a new outsourcing arrangement is contemplated. On the other hand, relying on a specific contractual obligation in an effort to ensure an acceptable level of transparency requires the issue to be identified at an early stage in planning and negotiations. This can easily be overlooked, particularly when the agency is under pressure to deliver a high profile project.

Most Australian Auditors-General have so-called 'follow the dollar' powers enshrined in enabling legislation which allow them to audit the spending of public resources even when this is done by non-government entities. While there may be different considerations in the audit context to the freedom of information context, that model and its implementation may nevertheless offer some relevant lessons to the issue of ensuring transparency in the face of the changing public service delivery landscape.

**Conclusion**

There is no doubt that the way in which public services are delivered will continue to change. The private and not-for-profit sectors will continue to play a bigger role and the boundaries will continue to blur. These developments have already demonstrated the potential to improve quality and efficiency. Achieving such benefits is not incompatible with maintaining high levels of transparency. However, current mechanisms such as those in the *FOI Act* will need to be critically examined to determine whether they are able to provide the level of transparency and accountability which the public rightly demands.

**Endnotes**

1 WA Government 'Putting the Public First - Partnering with the Community and Business to Deliver Outcomes' Final Report 2009 page (i), accessed by the author on 23 July 2014 at the following address: http://www.dpc.wa.gov.au/Publications/EconomicAuditReport/Documents/eac_final_report.pdf.
2 http://www.abc.net.au/news/2014-03-31/western-australia-signs-up-to-the-ndis-trials/5356978.
3 http://www.abc.net.au/news/2012-08-28/unions-oppose-hospital-workers-privatisation-plans/4228670.
4 http://www.correctiveservices.wa.gov.au/prisons/prison-locations/default.aspx.
5 Above, n 1.
6 *Freedom of Information Act 1992* (WA) Glossary, clause 1.
7 Ibid clause 4.
8 See also *Re Ninan and Department of Commerce* [2013] WAICmr 31.