# **‘Knowledge is the mother of wisdom and virtue’**

*For infrastructure policy and projects ‘confidentiality’ should reflect system-of-government principles.*

*Should commercial confidentiality be limited to communications within an Executive Government such as between Ministers and their Departments? Should arrangements and communications between a Government and other parties be visible to Parliamentarians and the public?*

## **A point**

Previous articles demonstrated and decried the lack of proper public information about infrastructure. The issue taken relates to democratic accountability.

Delayed yet pervasive long-term consequences of infrastructure alter basic conditions of life. Projects and policies change people’s access to opportunity depending on where they reside. Not always for the better; it is possible for projects to reduce access to opportunity.

The public’s ability to exact accountability – at elections – is compromised unless these consequences are known e.g. prior to projects starting.

Government refusal to disclose consequences is tantamount to an attempt to divorce power of the state from its responsibility. This is incompatible with our system of government.

The situation is exacerbated if a Government determines what is made public. This enables it to mislead the public without fear of correction.

## **Confidentiality**

Often a Government will argue it withholds information due to ‘commercial confidentiality’.

Typically, this is based on claims:

* financial interests of individuals who deal with it might suffer; and/or
* financial costs of transactions or projects might increase.

While some hold these make commercial confidentiality a public interest exception to disclosure principles, neither claim is valid.

The former - relating to voluntary transactions - is circular. Private financial interests are equally protected if there is nothing to disclose - by not doing a deal with the Government.

The latter, increased financial government costs - even if empirically demonstrable, which it is not - suffers two flaws.

First, costs are borne first by Parliament and ultimately by the public rather than the Government. Government power over money comes from Parliament via the Consolidated Fund (income) or Appropriations (spending).

Second, government – unlike business – does not have a profit maximisation purpose or motive. ‘Normal’ business rules should not and do not apply to the exercise of state power.

There is suspicion ‘commercial confidentiality’ protects incumbent political interests by denying opportunities to question policies. Such protection is profoundly anti-democratic.

## **For discussion**

Does commercial confidentiality ignore tensions between the Executive and Parliament?

For the Commonwealth, it has been suggested determination of confidentiality by Senate Committees, using public interest classes, is a way to resolve the tension. I doubt it.

Commercial confidentiality has been extended beyond any credible basis in NSW.

Any legitimate basis for claims of confidentiality must conform to Australian systems of government where:

* the Executive Government is separate from Legislature and Judiciary;
* the Executive answers to the Legislature Parliament;
* Parliament answers to the electorate.

The mandate of the Executive derives from Parliament. The Government, in most respects, acts as exclusive agent for Parliament. The primary exceptions, where Executive is a ‘principal’ rather than ‘agent’, arise from implied powers. Most such exceptions relate to preservation of rule of law.

The Executive can enter contracts. Its powers to do so are probably more limited in the Commonwealth than in States.

Consideration of a general question - what information can an agent withhold from its principal? – leads to considering commercial confidentiality in two classes:

1. consequences of Executive decisions;
2. reasons for those decisions being made.

### Consequences of decisions

Parliament will be unable to hold Government to account unless its members know the content and consequences of Government decisions that affect other parties.

Commercial confidentiality of the content of arrangements between the Government and other parties undermines the primacy of Parliament and the people. Put another way: it can never be in the public interest to hide from the public what their representatives have commercially obligated them to do.

Hence information about (1), the content and effects of policies and projects, should be available to all members of Parliament.

### Reasons for decisions

Class (2), the question of reasons for decisions, is more intricate.

Can it be resolved by an implication of separation of powers; that organs of the state are separate? Such separation allows differentiation of reasoning:

1. within the Executive. This arises from implied powers and are part of the Executive as a body rather than ‘agent’ of Parliament; from
2. advised to the Executive, from sources external to the Government. This involves the Executive acting as agent of Parliament.

If the former is not a matter for Parliament, the latter arguably is.

If so, there are implications for information generated by or for the public service as part of the Executive, for example:

* public service advice to Ministers can be withheld from Parliament, but advice to the public service cannot;
* there is no commercial in confidence basis for withholding from Parliament advice given to Ministers from outside the public service such as from contractors, consultants or statutory authorities.

The claim of commercial confidentiality regarding advice/reasons for decision making:

* may be irrelevant for internal advice, type (a), since there is a general confidentiality;
* might only be claimable by Parliament, if at all, for external advice, type (b).

Is it possible for Parliament to provide blanket commercial in confidence exemptions in advance of Parliamentarians viewing the information for which the claim is to be made? To do so seems an abdication rather than delegation of power.

## **Final word**

The heading of this article is from the Jubilee Room of the New South Wales Parliament.

The Premier of that State recently committed to increasing’ transparency’ of the personal circumstances of Ministers and members of Parliament.

The issue of Government infrastructure commercial confidentiality is more important than adding further layers of oversight re politician’s peccadilloes.

Surely Parliamentarians and Governments wish to increase the wisdom and virtue of the public? If so, they should advance legislation and practices to more accurately reflect principles – rather than ‘compromises’ - and which provide the public with greater confidence in the operation of their democracy.

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