

# Transparency in public-private partnerships – the Berlin experience

**Alexander Dix**

Berlin Commissioner for Data Protection  
and Freedom of Information

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# Outline

- Two types of transparency
- Privatization of Berlin water utilities:  
effects of secrecy
- 2010 Amendments to the Berlin FOIA
- 2011 The successful referendum
- Key messages

# FOI Laws in Germany

- 1st FOI Act 1998 in the State of Brandenburg
- By now 10 states (out of 16) and the Federal Republic have FOI Acts, 2 more states are likely to adopt such laws soon
- The German Information Commissioners meet twice a year

# Two types of transparency

- Passive transparency  
FOI model („pull information“) in Germany  
and elsewhere
- Active transparency  
Duty to publish („push information“)  
In Germany only related to metadata  
(filing schemes, internal regulations etc.)  
Exception: The City State of Bremen  
provides for a public register of  
Government documents

# Privatization of public utilities – the Berlin water case (1)

- Berlin Water Services were partly privatised (49 %) shortly before FOIA was adopted in 1999
- Private investors obtained guarantees for certain profits from the deal – and confidentiality was written into the contract
- Privatization was controversial in itself from the start
- Confidentiality was challenged by an MP in court

# Privatization of public utilities – the Berlin water case (2)

- In addition a grass roots movement „Berlin Water Roundtable“ was formed
- Citizens wanted to know why water prices were rising and what were the details of the public-private partnership
- Government refused to publish the agreement with private investors until 2010 without their consent

# The successful attack on secrecy (1)

- In 2010 the Berlin Water Roundtable initiated a referendum in order to have the agreement published
- Arguably the Berlin FOIA of 1999 would have allowed for individual access for anyone
- In order to thwart the referendum the Government with the support of one opposition party amended the FOIA in 2010

# The successful attack on secrecy (2)

- The Berlin FOIA has been more progressive (FOI-friendly) than other German FOIAs from the start
- In particular it allows for the disclosure of certain personal data
- But it contained restrictive provisions for trade secrets (with public interest clause)



# The successful attack on secrecy (3)

The FOIA Amendments of 2010 provide for a duty to disclose on request and even publish contracts with private investors regarding

- water supply and sewage
- waste disposal
- public transport
- power supply
- hospitals or
- processing of data related to government activity

# The successful attack on secrecy (4)

- Furthermore the FOIA Amendments restrict the trade and business secrets contained in these contracts on public utilities
- Only those trade secrets the disclosure of which would cause major economic losses to the private investor are protected unless there is a predominant public interest in disclosure

# Retroactive transparency

- With regard to contracts which were concluded before the FOIA came into force (which applied to the water privatization) a duty to renegotiate the contract was introduced
- In case no agreement was reached within 6 months the contract was to be published in any case if there was an overriding public interest

# Finally transparency (?)

- When it became clear that the Berlin Water Roundtable would be entitled to hold a referendum the Government suddenly managed to convince the investors to agree to publication (before the 6 months elapsed)
- All parts of the privatization agreement (according to the Government) were put online late in 2010

# Citizens want even more

- In February 2011 the Berlin Water Roundtable obtained a majority in the referendum for greater transparency
- All contracts on the privatization of the Berlin Water Utilities have to be published instantaneously (i.a. on the website of the Berlin Commissioner for Freedom of Information)
- Contracts which were concluded (even in the past) without taking FOIA into account are invalid
- Experts have to investigate whether all contracts have been published
- The first successful referendum in Berlin („people’s legislation“) concerned freedom of information

## Key messages

- Secrecy generates mistrust
- It is possible to gather popular support for more transparency at least in such vital areas as public utilities
- Hopefully the Berlin FOIA Amendments 2010 become a model for legislation in other German States and on the Federal level (maybe elsewhere ?)

# Links

- The Berlin FOI Act as amended 2010 and
- The Act for the Full Disclosure of Secret Contracts for the Partial Privatization of the Berlin Water Utilities (as adopted by Referendum 2011):

<http://www.datenschutz-berlin.de/content/informationsfreiheit/berlin>

look for „Engl. Fassung“