Comments on the Draft

Open Government Partnership

Information Disclosure Policy

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Introduction

These Comments contain an analysis by the Centre for Law and Democracy (CLD) and Access Info Europe (AIE) on the draft Open Government Partnership (OGP) Information Disclosure Policy (draft Policy). The draft Policy was prepared by the OGP and circulated on 25 October 2011 for a one-month comment period.

The Open Government Partnership describes itself as "a multilateral initiative that aims to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance." In that sense it is an intergovernmental initiative and hence much of the information it holds comes from public bodies.

In addition, the OGP is a multi-stakeholder collaboration, overseen by a Steering Committee of government and civil society representatives. It will receive information from independent experts, from civil society organisations and possible from members of the public. These individuals and organisations understand the role of the OGP in promoting the highest levels of transparency and will be aware when they submit information that it will also be treated in this fashion.

It is therefore appropriate that the OGP, consistent with its mission to promote open government, adopts an access to information policy which is in line with the highest standards for recognition of this fundamental right.

These Comments aim to help the OGP prepare a policy which conforms to the very openness standards that it is advocating for government. They highlight shortcomings in the draft Policy and provide recommendations for reform, as relevant.

The draft Policy has a number of strengths. In particular, it makes a relatively strong commitment to the proactive disclosure of information, along with a commitment to go beyond disclosure and to consult on draft policies. At the same time, we have a number of concerns with the draft Policy. A key concern is the lack of detail in the policy, which has the result of leaving important matters to the discretion of the OGP. Thus, the rules regarding the processing of requests and appeals, as well for applying exceptions, are particularly brief. Some more specific concerns are the failure of the policy to recognise the fundamental human right to information, the significantly overbroad and discretionary regime of exceptions, and the failure of the draft Policy to put in place a system of protections and sanctions.

These Comments are based on international standards regarding the right to information, as reflected in the *RTI Rating*, prepared by CLD and Access Info Europe.[1] They also reflect better legislative practice in democracies around the world.[2]

1. Right of Access and Scope

The Draft Policy states, in Section I on proactive disclosure, that it operates on a presumption of openness. This is useful, but should be moved to the introductory comments, so that it is clear that it applies to the whole policy, and not just the provisions on proactive disclosure.

The policy should go further and recognise the human right to access information held by public authorities. This should be done given the OGP's hybrid nature as a quasi-public body and also to be true to the OGP mission of promoting the highest standards of open government. The recognition of the right of access to information by the UN Human Rights Committee, the Inter-American Court of Human Rights, the European Court of Human Rights, the African Commission on Human and Peoples' Rights and numerous constitutions around the world should be incorporated directly into the heart of the OGP Disclosure Policy.

In line with the above, the OGP should consider changing the name of its policy. In international circles, the term "disclosure policy" is often associated with the international financial institutions (IFIs) and dates back to the time when information was only made available proactively. Many IFIs have now moved forward and added requesting systems to their policies, but have retained the old names for the sake of continuity. The OGP has no such historical legacy and is a different type of initiative. It should therefore start out with a name which fully reflects a rights-based approach, for example, by naming its policy the OGP Right of Access to Information Policy.

In addition to a clear statement in favour of the presumption of openness, the policy should include interpretive provisions which make it clear that cases of doubt will be resolved in favour of the disclosure of information.

We assume from the language of the draft Policy that it applies to everyone (i.e. that everyone, including legal entities, may make requests), but this should be specified.

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[1] This document, published in September 2010, reflects a comprehensive analysis of international standards adopted both by global human rights mechanisms, such as the UN Human Rights Committee and Special Rapporteur on Freedom of Opinion and Expression, and by regional courts and other mechanisms in Europe, Africa and Latin America. It is available at: http://www.law-democracy.org/wp-content/uploads/2010/09/Indicators.final_.pdf.

[2] See, for example, Toby Mendel, *Freedom of Information: A Comparative Legal Survey, 2nd Edition* (2008, Paris, UNESCO), available in English and several other languages at: http://portal.unesco.org/ci/en/ev.php-URL_ID=26159&URL_DO=DO_TOPIC&URL_SECTION=201.html.

It would also be useful to specify that the policy applies to all information held by the OGP. Under Exceptions to Full Disclosure, the draft Policy states that OGP may refuse any request that requires it to "create, develop, or collate information or data that it does not currently collect". It is not quite clear what this means. It is reasonable to limit the scope of the policy to information that OGP does hold. But OGP should make a commitment under the policy to collate information from records that it does hold, at least unless this would seriously undermine the ability of the organisation to carry out its core work.

Recommendations:

- The commitment to a presumption of openness should be moved to the introductory part of the policy, to make it clear that it applies to the whole policy.
- The policy should recognise the fundamental human right to access information held by public bodies and state that it aims to give effect to that right.
- The title of the policy should be amended to reflect its rights based approach and the fact that it is not just about proactive disclosure.
- The policy should include interpretive provisions which call for it to be interpreted so as to give best effect to the right of access.
- The policy should make it explicit that everyone, including legal entities, may make requests, and that it covers all information held by OGP, regardless of the form in which it is held.
- The term "collate" should be removed from the exception regarding the creation of information, and the policy should commit OGP to make all reasonable efforts to collate information from records that it holds.

2. Requesting Procedures

The draft Policy is quite sparse in relation to the procedures for making requests. It states, rather bizarrely, that requests will be "handled by staff rather than automation"; it is unclear how proper application of the policy could possibly be achieved with an automated system. Requests may be submitted to the "receiving individual", to the OBP Support Unit Director or to the Steering Committee Co-Chairs "as appropriate". As far as substance goes, requests should describe information sufficiently clearly so that staff "can reasonably locate information without undue burden".

These rules appear to be well intentioned but they signally fail to meet minimum better practice standards including by failing to incorporate some core mechanisms of an access to information framework. There is some value in not making a policy of this sort excessively detailed, but the draft Policy goes to the other extreme, with such brevity as

to leave the matter of processing of requests almost entirely at the discretion of staff and Steering Committee Co-Chairs.

We recommend that this part of the policy be completely reworked. It should make it clear that it is free to file requests and that requesters need only describe the information sought reasonably clearly and provide a return address for delivery of the information (which may be an email address).

The reference to locating information "without undue burden" should be removed. If OGP keeps its information in good order, it should not be a problem to retrieve it, as long as it is clearly described.

Requesters should be permitted to submit requests via the normal channels which include through the online form but also by email, post, and fax. We also recommend that the reference to the appropriate addressee for requests be removed. Instead, OGP should establish a mailing address, fax line and dedicated email address for receipt of requests, which a dedicated member of staff (see below) would then route internally to the appropriate person.

OGP should commit to providing reasonable assistance to requesters as necessary, for example where they are unable to describe the information sought with sufficient precision or where they need help making a request due to disability, illiteracy or for any other reason. This can be expected to impose very little burden on OGP, and in any case it would be subject to a reasonableness constraint.

The policy should set out a basic framework for the processing of requests. Requesters should be provided with a receipt (ideally with a unique reference number) upon lodging a request and requests should be responded to as soon as possible and in any case within a clear timeframe, say of a maximum of ten working days.

A clear framework should also apply for how information is provided to the requester. Requesters should be able to select from among a list of options for receipt of the information (for example, an electronic copy or a true physical copy). Fees should be able to be imposed only for information which is provided in physical form (i.e. electronic delivery will always be free of charge), and then at reasonable rates. Given the international nature of the initiative, and the challenges requesters in at least some countries will face in making payments, we recommend that the policy be 'generous' in this area, for example by providing for the first 100 pages to be free and then limited costs for larger requests, along with a sensible waiver policy to address payment problems.

We believe that all of these rules could be set out in a few paragraphs, as they essentially have above, and that this would provide a far more clear and robust framework for the processing of requests.

Recommendation:

- The rules for processing of requests should be substantially improved, in particular so as to make it clear that:
  - It is free to file requests; only a reasonable description of the information sought along with an address for delivery need be provided.
  - Dedicated addresses for delivery of requests (online form, email, fax and postal mail) will be provided.
  - Reasonable assistance will be provided to requesters.
  - Receipts will be provided for requests immediately and responses will be provided as soon as possible and in any case within ten working days.
  - Requests have a right to stipulate how they would like to receive information; electronic delivery of information will be free of charge and limited costs for physical reproduction and posting of information should be established.

3. Duty to Publish

Section I of the draft Policy elaborates on the OGP's commitment to publish information proactively. This is a welcome part of the draft Policy and it is also welcome that in Section II there is a commitment to post the answers to any requests on the website along with a log of requests and responses. We note that a well developed proactive disclosure policy can reduce the number of requests that have to be processed.

The first paragraph of the proactive disclosure section seems to introduce a tension between the "presumption of openness in all of its activities" and making "available on-line a substantial amount of information". The word "substantial" qualifies the extent of the proactive disclosure without being specific. It is recommended that there be a commitment to make available proactively in significant detail and in original form an extensive set of information held by the initiative.

The OGP has the opportunity here to do something cutting edge: it is a small operation which is being established with transparency in mind. It is working with and has the support of some leading information technology companies and civil society actors working in the transparency and accountability field. It should be possible to design disclosure into its work by placing open data principles at the core of the OGP's information management systems. This would not only serve the OGP's own transparency goals but could act as a model for participating countries.

Instead of doing this, the draft Policy limits itself to a traditional bureaucratic concept of the publication of information in the form of specific documents which are enumerated as

a list in the policy. The list comprises: financial data (including donors, annual budget and expenditure); governance information (including agendas, participants and minutes of meetings, and approved policies and documents); information on the implementation of the OGP initiative (including letters of intent and reports from governments and independent experts); and operational activity (the names and titles of key staff, information on vendors).

It is not clear whether the list of classes of information contained in the draft Policy was drawn up after a review of all the information held – or likely to be held – by the OGP. If not, the drafters should go back and design the main categories of information subject to proactive disclosure in an organic fashion based on the specific informational structure of the OGP.

As with the rest of the draft Policy, the section on proactive publication suffers from excessive brevity and a failure to elaborate on details. The lack of descriptions accompanying each class of information make it hard to judge what exactly will be published under headings such as "donors", "amounts", or "timeframe". Will it be all the data on the donors including funding proposals? Will the amounts (of money it is presumed) be published in sufficient detail that it is possible to track expenditure in real time? What exactly is to be published under "timeframe"? All this should be clarified with detailed explanations as to what falls into each class of information.[3] In other words, in the redrafted policy more rigour is needed to avoid future misunderstandings.

We note that the above will facilitate both the implementation and the possibility of evaluating implementation of the disclosure policy. For example, the pledge to publish "Steering Committee meeting and OGP Event minutes/summaries" does not make clear under what circumstances summaries only are acceptable. This effectively leaves this key issue up to the discretion of the OGP, and makes it hard to assess whether or not the policy has been adhered to if, eventually, only summaries rather than the detailed minutes are published.

Similarly, the commitment to transparency regarding "vendors and costs for OGP projects" needs to include precise details of the public procurement information that will be made public. This should include a commitment to transparency of the entire public procurement cycle from advance planning of tenders through to contracting (with copies of contracts being published) through to reports and evaluations. Given the small scale on which OGP operates, this should be relatively easy to achieve and could provide a positive model for participating States.

Not currently included in the proactive disclosure policy is the list of all information held by the OGP. We recommend publication of such a list in Section 7 of this comment, as it

[3] A review of international standards in this area can be found in the World Bank Paper *Proactive Transparency – the Future of the Right to Information?* by Helen Darbishire, available here: http://siteresources.worldbank.org/WBI/Resources/213798-1259011531325/6598384-1268250334206/Darbishire_Proactive_Transparency.pdf

is an essential tool for permitting requesters to file requests; this should be incorporated into the proactive disclosure section of the policy.

The draft Policy also fails to provide any detail on how the information to be made public will be published. There is a commitment to publish the information online, and this makes sense given the international nature of the project, but consideration should also be given to making at least some of the information available in hard copy, particularly for dissemination to stakeholders in the OGP participating States which do not have high levels of Internet penetration.

Using multiple channels for disseminating the information is particularly important when it comes to information such as the country reports and evaluations and civil society responses, which should be distributed at the national level in ways that ensure they reach interested parties. This is something which could be worked out with participating States but should be included as a feature of the OGP's own disclosure policy.

When it comes to online publication, the Policy should require publication of information in formats which make it reusable and meet current Open Data definitions.[4] These include that the information should be published in formats which are machine-readable and open source (or, at a minimum, open specification). Hence, documents should not be published only as PDFs but also in other formats such as Word and Open Office (this was not the case with this draft Policy, which was published only as a PDF file). All data should be made available in easily usable formats such as CSV or XLS (spreadsheet formats).

In order to publish information in machine-readable formats, OGP should require participating States and other actors to submit documents in appropriate formats. Exceptions to this should be carefully reviewed by the OGP and restricted to exceptional cases.

All original information generated by the OGP itself should be published either free of any intellectual property licence or under a Creative Commons 3.0 Unported Licence or similar licence which permits users to make full use of the information with the only requirement being attribution of the source. This would be consistent with the current website policy on Terms of Use (available at: http://www.opengovpartnership.org/terms-use).[5]

[4] See the Open Definition at http://opendefinition.org/okd/.

[5] It is also recommended that there be a review of these Terms of Use to ensure that they are consistent with the draft Policy. The current phrasing, which includes that the OGP "*reserves its exclusive right in its sole discretion to alter, limit or discontinue the Site or any Materials in any respect. The Open Government Partnership shall have no obligation to take the needs of any User into consideration in connection therewith*" and that it "*reserves the right to deny in its sole discretion any user access to this Site or any portion thereof without notice*" are not fully consistent with the enduring commitment to providing information to the public which comes with an initiative such as the OGP, nor is the right to deny any user access to the site without reason in line with the draft Disclosure Policy.

The draft Policy's proactive section also fails to establish timeframes for publication. It is recommended that these be included in the policy for each class of information. For example, reports submitted to the OGP process should be uploaded immediately upon receipt, and minutes of meetings should be prepared and uploaded within, for example, five working days of the meeting. The policy should aim for the highest standards on publication of spending data, which should be updated frequently, in close to real time.

Recommendations:

- The policy should make a clear commitment to maximal levels of proactive disclosure. This should be achieved, among other things, by designing disclosure into all of OGP's information management systems from the outset, making possible real time publication of documents and raw data.
- The categories of information subject to proactive disclosure should be revisited to ensure that they are designed organically to reflect all of the types of information held by OGP.
- Significantly more detail should be added under each category so that it is clear both internally and externally what exactly the publication commitments are. Timelines for publication should be added as part of this process.
- The policy should include a commitment to publish a list of all documents and datasets held.
- The policy should commit to disseminating at least some information in hard copy and via alternate channels to the Internet, including in countries with low Internet penetration. This obligation could be shared with participating States but the OGP should retain responsibility for ensuring that it happens.
- The policy should require online publication of information in reusable, open specification formats including open document and open spreadsheet formats. Member States should be required to submit information in these formats.
- All original information generated by the OGP should be published under a licence which only requires source attribution such as a Creative Commons 3.0 Unported Licence.
- The website terms and use should be revised to bring them into line with the policy.

4. Exceptions and Refusals

This part of the draft Policy is in our view the most problematical. The draft Policy lists four exceptions as follows:

i. Information received with an explicit expectation of confidentiality.

ii. Information which, if disclosed, would harm the safety, security or privacy of an individual.
iii. Information which, if disclosed, would, "in OGP's view", "demonstrably inhibit candid policy dialogue with governments, donors, communities or partners".
iv. "Internal pre-decisional policy documents that are not available for public consultation", provided that these will be available after three years.

Where a request is refused, OGP will provide a "reasonable and timely justification" for this. Furthermore, OGP reserves the right to reject "spurious or unreasonable requests, including blanket requests".

In our view, only one of these exceptions, the second one, is appropriately worded. The first one essentially grants a veto over disclosure to the provider of information, regardless of any objective rationale for this or of the presence of absence of any risk of harm. National right to information laws do not allow this, and where international financial institutions have included rules along these lines in their policies, they have been harshly criticised for it.[6] At a minimum, this exception should be limited to information the disclosure of which could be expected to cause serious harm to a legitimate interest of the information provider.

Due consideration here should be given to the nature of the OGP initiative, which is all about fostering transparency. Those who provide information to OGP should do so understanding that the organisation operates under a strong presumption of openness and that it will refuse access to information only in very limited and clearly justifiable circumstances. To permit stakeholders to veto transparency is to reverse this understanding; those who are not ready to act in a transparent fashion should consider whether they are ready to be part of the OGP.

The third exception, for reasons which remain unclear, introduces a subjective element – "in OGP's view" – which would give OGP wide discretion to refuse information. In a sense, this condition can be read into all of the exceptions, because it is OGP that will decide on the applicability of exceptions, so the matter is always based on its view. But it sends a very wrong signal to include this in the formal test, and it also limits proper oversight (see below). In particular, it restricts any reviewer to assessing whether OGP had reasonable grounds for its decision, instead of deciding whether or not the decision was correct.

The fourth exception is far too broad. Its scope lacks definition (what is an "internal pre-decisional policy document"?) and is potentially very broad. Instead of relying on vague terms which could easily be abused, the policy should set out clear and justifiable interests to be protected, such as the free and frank flow of ideas within an organisation (just as exception 3 protects this between an organisation and its external partners). It

[6] See the website of the Global Transparency Initiative at: http://www.ifitransparency.org/.

should then link these exceptions to a requirement of harm, which is currently absent from this exception.

Furthermore, the fourth exception contains internal contradictions. It is somewhat circular, inasmuch as it relies on the notion of not being "available for public consultation" to restrict exactly such availability. More seriously, it includes two time references which can only be expected to clash, namely "pre-decisional" and "after three years". The only way to resolve this conflict would be if the three-year rules came into play only if a document remained pre-decisional even after this period, which hardly seems to make sense.

At the same time, the draft Policy also seems to have overlooked certain exceptions which it might need to apply. Thus, at present, the policy would not protect legally privileged information or information the disclosure of which might harm the commercial interests of others.

The draft Policy's power to reject "spurious or unreasonable requests, including blanket requests" is also not justifiable. Some national laws do allow for the rejection of vexatious or repetitive requests, but the terms 'spurious' and especially 'unreasonable' are broader than this.

The rejection of blanket requests runs counter to the very nature of the OGP initiative. It is entirely possible that a "blanket" request might be made for the same data from each of the countries which are participating in the initiative, and there is nothing inherently problematic or wrong about such a request. Blanket requests should, as appropriate, be dealt with under the regime for processing requests, which requires the information to be described sufficiently clearly to allow it to be identified, and for assistance to be provided where this is not the case, rather than through a power to reject the request wholesale.

In line with international standards and better international practice, the policy should incorporate a **public interest override**, so that information will still be released where the benefits of disclosure outweigh the harm to the protected interests.

Consideration should be given to the idea of expanding on what is presumably the real purpose of the three-year reference in the fourth exception, namely to limit the overall duration of exceptions. It would be appropriate to apply some sort of overall time limit to all of the exceptions except the second one.

Consideration should be given to making it clear in the policy that, where only part of a record is covered by an exception, the rest of the record will be disclosed (severability). In apply this rule, access should be granted to all information except that which is clearly covered by an exception. For example, a report provided by a confidential source could still be released, with only the information which might reveal the identity of that source blacked out.

The requirement to provide "reasonable and timely justification" for the rejection of a request is useful. However, timeliness should, as noted above, be addressed through the rules on processing of requests. It would be useful to replace the term 'reasonable' with a requirement to give clear reasons for any refusal, including the specific grounds in the policy upon which the refusal is based. Finally, requesters should be notified of their right to appeal against any refusal.

Recommendations:

- The substance of the exceptions should be completely revised so that they are all harm-based and protect interests which are recognised as legitimate under international law, as outlined above.
- Consideration should be given to expanding the regime of exceptions to protect key interests such as legal privilege and commercial information.
- The ability to reject "spurious or unreasonable requests, including blanket requests" should be replaced with a more limited power to reject vexatious requests.
- All of the exceptions should identify legitimate protected interests and allow for non-disclosure only where this would cause harm to that interest (the harm test).
- The policy should incorporate a public interest override.
- Consideration should be given to providing for an overall time limit for the first and third exceptions (in addition to the fourth).
- A severability clause should be added to the regime of exceptions thereby guaranteeing partial access in cases where documents hold some exempt information.
- The requirement to provide "reasonable and timely justification" should be replaced with a proper regime for processing requests (see above) along with a specific requirement to give both grounds and reasons for any refusal of a request, along with information about requesters' right to appeal against such refusals.

5. Appeals

The draft Policy provides that when the OBP Support Unit or Co-Chairs refuse a request for information, the requester may appeal to the full Steering Committee. This is a form of internal appeal. The grounds for this type of appeal are very limited, as it is engaged only when a request has been refused. Breach of other aspects of the policy, including the procedural rules that we recommend be added, are not included, and nor are failures to respect the policy's proactive disclosure commitments.

A second problem with this internal appeal is that the draft Policy fails to establish any procedures for the processing of appeals. It is not necessary to include a lot of detail here but at least some minimum framework of rules – for example, as to the timelines for processing appeals and matters such as the rights of the complainant to be heard – should be provided for.

We also recommend that the OGP put in place a second, external appeal, to be heard by a group of respected external experts. Individuals could be appointed by the Steering Committee for a fixed period of time, but the body called 'together' (virtually) only as necessary, when an appeal is presented. This would presumably be relatively rarely, thereby ensuring that the cost and effort of this would not be onerous.

Recommendations:

- The grounds for an appeal should be any failure to respect the commitments set out in the policy, including those relating to proactive disclosure.
- At least a basic framework of rules for appeals should be established in the policy.
- The policy should also provide for a second, external level of appeal.

6. Sanctions and Protections

Most national right to information laws provide for sanctions for officials who wilfully obstruct access to information. This is probably not realistic in the context of the OGP, but it would be useful for the policy to commit the organisation to incorporating performance in applying the policy into its staff appraisal systems, and to indicate that serious breaches of the policy will be treated as disciplinary matters.

Better practice also calls for protection for officials who, in good faith, release information in response to a request, even if it is ultimately decided that they should not have done so. The same is true for individuals who release information on wrongdoing (whistleblowers).

Recommendations:

- Performance in applying the information disclosure policy should be incorporated into OGP's performance appraisal systems, while serious failures to apply the policy should treated as disciplinary matters.
- The policy should provide for protection against employment related sanctions for employees who disclose information in good faith either pursuant to the policy or with a view to exposing wrongdoing.

7. Promotional Measures

As a small organisation, it is not necessary for OGP to put in place the full range of promotional measures that might be required for larger official bodies. We believe, however, that it would be useful to put in place at least three measures. First, OGP should identify a dedicated staff member with responsibility for receiving and processing requests for information, and for making sure that all of the proactive publication commitments in the policy are met and that the information is kept up-to-date. This will facilitate requests and also help ensure that implementation of the policy is not relegated to the back burner.

Second, OGP should make available on its website a full list of the more important record and all types of records that it holds. This will facilitate the making of requests for information, and help requesters to present more targeted requests, ultimately potentially saving OGP time and effort.

Third, the policy should require the OGP to publish an annual report on implementation of the policy. This should, among other things, outline the efforts OGP has made in the areas of proactive disclosure and responding to requests (including statistical information about requests, such as how many have been lodged, how they have been responded to and so on), as well as a description of any challenges.

Recommendations:

- OGP should identify a dedicated member of staff with responsibility for ensuring proper implementation of the policy.
- OGP should publish on its website a full list of the more important records and types of records it holds.
- OGP should publish an annual report on implementation of the policy which includes data on the processing of requests and information made available proactively.