



The ADB Public Communications Policy Working Paper Missing an Opportunity to Take the Lead

**Comments by the Global Transparency Initiative on the
Working Paper of the Asian Development Bank Public Communications Policy**

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Background

The Public Communications Policy (PCP) of the Asian Development Bank (PCP) establishes the substantive and procedural rules governing access by the public to information held by the ADB. The current policy, adopted in 2005, mandates that it be comprehensively reviewed after a period of time not to exceed 5 years from its effective date.

Pursuant to this requirement, the ADB began its review of the PCP in mid-February 2010. In addition to its internal consultation, the ADB also at that time gave external stakeholders a two-month window to provide comments on the existing PCP. In June 2010, the ADB released its first consultation draft of the new policy, which was the subject of a number of country-level consultations from June to August 2010.

On 26 November 2010, the ADB released publicly the second consultation draft, providing a one-month period for public comment. Sometime in January 2011, it circulated to its Board of Directors the PCP Working Paper (W-Paper). The W-Paper represents what may be regarded as the pre-final draft of the revised PCP. This was considered by the Board in its meeting on 16 February 2011, with the Board comments and views serving as input for the preparation of the final draft PCP (called the R-Paper). The R-Paper is targeted for final approval by the Board in September 2011.

The Global Transparency Initiative (GTI), a network of civil society organizations promoting openness in international financial institutions (IFIs), engaged proactively in the review process, thereby exercising our right to information and to participate. In line with the GTI's mandate, its objective was to advocate for improvements to the PCP so as to render the ADB more transparent. GTI submitted detailed comments on the existing PCP during the first comment period, provided speaking notes on the first consultation draft, participated in a number of the country consultations, and again submitted detailed comments on the second consultation draft. The GTI comments have been based on substantive analysis of the PCP and its subsequent draft revisions, informed by national and international norms and best practices on the right to information, as well as by feedback from affected communities through consultations led by the NGO Forum on the ADB.

We note that, overall, a number of major improvements over the existing 2005 PCP have been introduced in the latest draft, namely the W-Paper. No doubt the active engagement by stakeholders and interested groups such as GTI and the NGO Forum on the ADB has contributed significantly to these positive outcomes. At the same time, we believe more needs to be done to bring the policy into line with best practices, and this paper highlights our key remaining concerns.

We also draw attention in this paper to an unfortunate development in the consultation process recently.

Improvements in the W-Paper

The W-Paper reflects a number of major improvements that bring the PCP closer to international standards regarding the right to information system, among other things as set out in the GTI's [*Transparency Charter for International Financial Institutions: Claiming our Right to Know*](#).

For the first time, the W-Paper expressly recognizes that access to information held by ADB is a right. From language in the 2005 PCP which talks of the ADB providing “support” for access, par. 5 of the W-Paper states unequivocally that it “recognizes the right of people to seek and receive information about ADB operations.” This is a major shift, underscoring the ADB's acceptance that providing information to the public is not just a matter of good policy and practice; it is an obligation which arises from a fundamental human right.

The W-Paper also removed confusing, if not conflicting, provisions on the presumption of disclosure and what documents are “publicly available”. Under the 2005 PCP, “publicly available” was misleadingly defined as being available on ADB's website, thereby being limited to information subject to proactive disclosure. In that policy, requests for information are referred to as “exception-based requests for information”, contradicting the presumption of disclosure. These confusing provisions have been corrected.

The W-Paper has also improved the provisions on access by affected people in terms of language and commitment, although the ADB can still do more in this area, as discussed below.

Finally, the W-Paper mandates the setting-up of an Independent Appeals Panel (IAP). This is a major improvement from the 2005 PCP, which only provides for an internal appeals mechanism - the Public Disclosure Advisory Committee (PDAC). PDAC is composed of the Managing Director General (serving as chair), the Principal Director of OER, the Secretary, and the General Counsel. It reports directly to the President of the Bank. The PDAC is thus not an independent body.

The W-Paper provides for a two-stage appeals process, with PDAC providing for the first stage, and the IAP providing for the second stage of appeals. The IAC will be made up of three outside experts on access to information matters.

Remaining Substantive Weaknesses

Even as we acknowledge the major improvements, we highlight three key concerns regarding areas where the W-Paper fails to conform to international standards.

First, the W-Paper does rather little to address the serious problems with the regime of exceptions under the 2005 PCP. It still allows for a third party veto on disclosure, and includes a number of category-based (instead of harm-based) exceptions.

Various third parties are granted a veto, including co-financiers (par. 67), borrowers with respect to draft legal amendments and amendments thereto (par. 70), and clients through contractual confidentiality or non-disclosure agreements (par. 99(v)). Category-based exceptions, on the other hand, are found in footnote 17 (legal agreements for non-sovereign projects and commercial cofinancing), par. 99(i) (internal documents, memoranda, and other similar communications), and par. 99(xii) (certain types of audit reports).

Third-party veto and category-based exceptions fail to conform to a rights-based approach to access to information, that is, one that upholds a presumption in favor of disclosure, subject only to a narrow set of harm-based exceptions.

Second, the W-Paper introduces a new provision (par. 103) granting the Board and the President the prerogative to restrict access to information not otherwise covered by any exception. This new provision seriously undermines the integrity of the W-Paper.

Giving the President and the Board this power to override the policy at their discretion is directly contrary to the spirit of recognizing a people's right to information. It is also unnecessary given that the regime of exceptions is already quite broad enough to protect all legitimate confidentiality interests. This is also reflected in the fact that national right to information laws do not provide for such override powers.

It is difficult to avoid the conclusion that this power was included so as to allow the Bank to put requests for information beyond the oversight powers of the IAP. It is significant that the W-Paper does not give the IAP jurisdiction over these decisions of the Board and the President to restrict access (see footnote 39).

Third, despite the improvement in the substance and language of the provisions on access by affected people, the W-Paper only partially addresses the 2005 PCP's lack of commitment to ensure effective access on the part of affected people.

The W-Paper still passes much of the responsibility for disclosing information to the borrowing government or private sector sponsors. This has the effect of significantly limiting the ADB's responsibility for access by affected people, so that it ranks far below the Bank's deep level of involvement in project conceptualization, approval and implementation.

This could have been corrected by simply committing to the joint development (with governments and private sector clients) of project or program communications strategies, instead of merely making a commitment to assist clients develop these strategies.

Review Process Takes a Bad Turn

Throughout the review process, up until the commenting period for the second consultation draft, we have consistently acknowledged the ADB's efforts to actively engage interested groups and individuals in the review process. Unfortunately, this engagement was seriously undermined when the ADB refused to make the W-Paper publicly available at the same time it was sent to the Board of Directors, and instead releasing only after Board consideration. This transformed the review into a closed process, at a most crucial juncture.

There was a compelling public interest in the disclosure of the W-Paper at the same time it was circulated to the Board. For groups such as GTI and NGO Forum on the ADB, which have engaged substantively in all previous stages of the consultation process, the stage of Board review was critical as this was where the Board would make the determination of what will be the final contents of the revised PCP. It was, in practical terms, the interested groups' only opportunity to advocate for changes before the Board.

Although we could, and did, approach members of the Board with our comments, the release of the W-Paper would have informed us how in fact management had responded to our earlier comments, and afforded us a last clear chance to articulate and push for further key reforms before the Board. The clarity of our points would have been considerably enhanced by being able to point to the precise provisions and language of the W-Paper.

Ironically, the W-Paper itself acknowledges the anomaly of withholding access to drafts presented to the Board during the decision-making process. In its discussion of its proposed enhancement to the 2005 policy in this area, it states:

However, after these consultations, stakeholders are excluded from access to the drafts presented to the Board during the decision-making process. The final decision document is posted on the ADB's website only after it has been considered by the Board. To emphasize the importance of stakeholder participation in the preparation of these policies and strategies, the revised policy provides for posting on the ADB website of policy and strategy papers which have undergone a public consultation process at the same time that these papers are circulated to the Board for consideration.

Furthermore, such withholding would not be possible under the W-Paper rules, so that the Bank effectively flouted its own commitments.

The reason given for this was that disclosure would have pre-empted the Board's ability to make its own decisions. We roundly reject this convenient excuse. The fact that the new policy itself takes a different approach surely suffices to reject this claim. In any case, it is clear that the Board would have the power to decide whatever it wanted, even though external stakeholders might have advocated for a different position.

Conclusion

In our previous submissions, we called on the ADB to rise to the challenge of taking further measures to improve its draft Policy in both substance and practice. We argued that this was not the time to equivocate or hold back, but the time to embrace transparency and a recognition of the right to information fully, sending a strong signal to all that the ADB takes its declarations on transparency and accountability in earnest.

Recognition of the right to information is on an upward trend in all sectors of public life, whether nationally, sub-nationally or internationally. In July 2010, the World Bank adopted a substantially more robust openness policy, and this has earned it significant kudos. The ADB now has a chance to jump ahead of the World Bank, as it did in 2005 when it adopted the current PCP.

Addressing the issues we raise above would place the ADB at the forefront of IFIs in terms of adhering to the international standards regarding the right to information.

Has the ADB missed this opportunity?

We do not think so. The R-Paper has not yet been finalized. The Board and management can still reconsider and respond positively to our remaining concerns. If they do, the ADB will show leadership and vision, thereby distinguishing it among IFIs in this area.