



CENTRE FOR LAW
AND DEMOCRACY

OPENNESS POLICIES OF THE INTERNATIONAL FINANCIAL INSTITUTIONS:

Failing to Make the Grade
with Exceptions

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Global
Transparency
Initiative

Openness Policies of the International Financial Institutions: Failing to Make the Grade with Exceptions



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Introduction

The past few decades have seen a rapid expansion in recognition of the right to information (RTI). While only a handful of RTI laws existed in the 1980's, today nearly 80% of the world's population lives in a country that has adopted a legal framework for RTI. Hand in hand with this growth in RTI legislation has been an evolution in how we understand RTI. In particular, RTI has gone from being viewed primarily as a governance reform to being broadly recognised as a fundamental human right. Specifically, RTI is now recognised as being part of the right to free expression, protected under Article 19 of the United Nations *Universal Declaration of Human Rights*,¹ as well as the freedom of expression guarantees found in other international human rights treaties.

Freedom of expression is not an absolute right and this also applies to the right to information. Public bodies are permitted, and indeed in many cases are obliged, to refuse to release certain information whose disclosure would harm legitimate public interests, such as national security or the right to personal privacy. Under international law, there is a three-part test for restrictions on freedom of expression, which are deemed legitimate only where they are i) prescribed by law; ii) for the protection of an interest that is specifically recognised under international law; and iii) necessary to protect that interest.²

In the specific context of the right to information, this has been translated into a similar three-part test, as follows:

- The information must relate to an interest which is clearly defined in law. International law recognises only the following legitimate aims: the rights and reputations of others, national security, public order, and public health and morals.
- Disclosure of the information must threaten to cause substantial harm to the protected interest (harm test).
- The harm to the interest must be greater than the public interest in having the information (public interest override).

Each part of the test is important, and reflects the idea that restrictions on rights bear a heavy burden of justification. It is clear that only restrictions which serve to protect the interests recognised under international law as grounds for restricting freedom of expression may be legitimate. This narrow list ensures that only interests of significant weight may trump the right to information.

The harm test flows directly from the primary requirement of necessity in the general test for restrictions on freedom of expression. If disclosure of the

¹ UN General Assembly Resolution 217A(III), 10 December 1948.

² See, for example, Article 19(3) of the *International Covenant on Civil and Political Rights* (ICCPR), adopted by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976.

information does not pose a risk of harm, it clearly cannot be necessary to withhold the information to protect the interest.

Finally, the idea of weighing the public interest in openness against the potential harm from disclosure also flows from the necessity test. It is widely recognised that this part of the test involves a proportionality element. Thus, the European Court of Human Rights has repeatedly referred to the issue of whether “the inference at issue was ‘proportionate to the legitimate aim pursued’”.³ If the overall public interest is served by disclosure, withholding the information could not be said to be proportionate.

The recognition of RTI as a human right has also been accompanied by the development, through jurisprudence and international standard setting, of established better practices in the implementation of this right.⁴ At the core of this emergent understanding of RTI is the basic idea that the people, from whom all legitimate public institutions ultimately derive their authority, have a right to access any information held by these institutions.

For the most part, this understanding has been applied primarily to national public bodies. However, inter-governmental organisations (IGOs) are created and often funded by States, which are themselves accountable to their people. It is clear that States cannot avoid their human rights obligations simply by creating other institutions to carry out tasks on their behalf. This is as true of international financial institutions (IFIs), which are wholly supported by public monies, as it is of other IGOs.

Civil society has long demanded that IFIs operate in a transparent fashion. In order to encourage greater openness at the IFIs, the Global Transparency Initiative (GTI) was formed. It brings together two key communities of interest – namely those focusing on the IFIs and those focusing on RTI – and focuses on the intersection of their interests, namely openness at the IFIs.⁵ A key GTI document is the *Transparency Charter for International Financial Institutions: Claiming our Right to Know*,⁶ adopted in 2006, which sets out key standards for transparency at the IFIs.

Starting with the World Bank in 1993, most IFIs have adopted disclosure policies in order to provide a framework for the right to information. However, historically these frameworks have fallen far short of international standards in this area. As the GTI Charter states:

³ See *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40.

⁴ See the chapter on International Standards in Mendel, Toby, *Freedom of Information: A Comparative Legal Survey*, 2nd Edition (2008, Paris, UNESCO). Available in various languages at: http://portal.unesco.org/ci/en/ev.php-URL_ID=26159&URL_DO=DO_TOPIC&URL_SECTION=201.html.

⁵ See, for example, www.ifitransparency.org.

⁶ Available at: www.ifitransparency.org/doc/charter_en.pdf.

Despite a stated 'presumption in favour of disclosure' in most of these policies, [the IFIs] in fact operate on precisely the opposite presumption. For the most part, they list which documents will be disclosed and when, and there is a presumption against the disclosure of all the other information they hold. They do not establish a right of access, the lists of documents subject to disclosure is limited, they do not set out clear and narrow grounds for refusing access and they do not provide for independent oversight mechanisms to ensure proper implementation of the policy.⁷

While a lack of proper transparency is always problematic, it is particularly worrisome in institutions that act as conduits for large sums of public money. The GTI has from the outset advocated for a complete overhaul of these problematic 'positive list' access to information policies (i.e. policies which list the documents which will be disclosed and erect a presumption that all other information will be withheld), and called for a rights-based approach in line with the standards set out in the Charter.

Since the GTI first started its advocacy on this issue, there have been some significant improvements in the disclosure policies of many IFIs. Starting with the Asian Development Bank (AsDB), in 2005, these policies have slowly been evolving to more of a true presumption of openness, although progress has been uneven and much remains to be done.

A significant jump forward came with the adoption by the World Bank of its new *World Bank Policy on Access to Information*, in December 2009 (which came into force in July 2010). This policy built on earlier work at the AsDB and established a true presumption of disclosure, along with a set of exceptions to that presumption. Importantly, it also established an independent oversight mechanism to hear appeals from refusals to disclose information.

At the same time, significant problems remain in the IFI information disclosure policies. One of the most problematical areas is in relation to exceptions, which still do not conform to the three-part test outlined above. Indeed, the regimes of exceptions in IFI policies fail to conform to all three branches of the test as many exceptions are not defined clearly, not all exceptions are subject to a harm test, and public interest overrides are either lacking entirely or very weak in nature.

The treatment by IFIs of two exceptions to the right to information – namely protection of the commercial interests of third parties and protection of internal deliberations – has been especially problematic. This report outlines key standards applied to these exceptions at the national level, and then contrasts these with the way these exceptions are currently treated in the various IFI disclosure policies. In this way, the report aims to demonstrate clearly the problematical nature of these IFI exceptions and, in particular, the lack of any justification for them. This, in turn, leads naturally to the conclusion that there is a need for substantive change in the way IFIs approach these exceptions.

⁷ *Transparency Charter for International Financial Institutions: Claiming our Right to Know*, p. 1.

Commercial Interests of Third Parties

Given their role as funding agencies, and their contractual arrangements with many implementing agencies, IFIs handle considerable amounts of commercially sensitive data. The legitimate scope of protection for this information has been clearly defined at the national level. A good expression of this may be found in Article 36 of South Africa's Promotion of Access to Information Act,⁸ which states:

- (1) Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if the record contains—
 - a. trade secrets of a third party;
 - b. financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or
 - c. information supplied in confidence by a third party the disclosure of which could reasonably be expected—
 - i. to put that third party at a disadvantage in contractual or other negotiations; or
 - ii. to prejudice that third party in commercial competition.
- (2) A record may not be refused in terms of subsection (1) insofar as it consists of information—
 - a. already publicly available;
 - b. about a third party who has consented in terms of section 48 or otherwise in writing to its disclosure to the requester concerned; or
 - c. about the results of any product or environmental testing or other investigation supplied by, carried out by or on behalf of a third party and its disclosure would reveal a serious public safety or environmental risk.
- (3) For the purposes of subsection (2)(c), the results of any product or environmental testing or other investigation do not include the results of preliminary testing or other investigation conducted for the purpose of developing methods of testing or other investigation.

This effectively defines three different types of commercially sensitive information:

1. trade secrets;
2. other inherently sensitive information which, if disclosed to others, would harm the commercial interests of a third party; and
3. information supplied in confidence which would undermine the negotiating or competitive power of a third party.

Although this formulation is more comprehensive than most, it is far from unique in its basic structure and standards. Article 15 of Nicaragua's Law of Access to Public Information⁹ presents a more-or-less analogous test:

For the effects of this Law, Reserved Public Information will be considered that

⁸ Act 2 of 2000.

⁹ No. 621 of 2007.

information expressly classified as such through the agreement of the head of each entity, in the application of the following criteria:

...

- c. When the information consists of bank secrets or commercial, industrial, scientific or technical secrets that are property of third parties or of the State, intellectual property or industrial, commercial or reserved information that the Administration received in compliance with a requisite procedure or proceeding, without prejudice for the disclosure of the Registry of Intellectual Property established in the pertaining laws.

The Nicaraguan law stipulates a harm test and public interest override separately, which are applicable to all of the exceptions, including the one quoted above.

Roughly similar definitions of the scope of protected commercial interests of third parties may be found in the RTI laws of many other countries, although the precise wording and structure varies. A representative set of examples includes India,¹⁰ Bulgaria,¹¹ Liberia¹² and the United Kingdom.¹³

The United States generates a substantial amount of jurisprudence in this area. Exemption 4 of the Freedom of Information Act (FOIA) protects “trade secrets and commercial or financial information obtained from a person and [which are] privileged or confidential”.¹⁴

There are two coexisting standards for determining whether information falls into the first branch of this exception, covering trade secrets, which complicates any assessment of its precise scope. In *Ruckelhaus v. Monsanto Co.*,¹⁵ the United States Supreme Court defined a trade secret as “any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an advantage over competitors who do not know it or use it.” This definition comes from the highest judicial authority in the United States, but its applicability as a standard for access requests has been questioned because it did not originate as a FOIA challenge. Although the case was about whether or not the Environmental Protection Agency could publicly disclose information regarding ingredients in the applicant company’s pesticides, it was brought under the Federal Insecticide, Fungicide, and Rodenticide Act.

A competing definition, provided by the District of Columbia Circuit Court in *Public Citizen Health Research Group v. FDA*, has been followed in some United States jurisdictions. This case limits trade secrets to “a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either

¹⁰ The Right to Information Act 2005, No. 22 of 2005, s. 8(1)(d).

¹¹ Access to Public Information Act, SG No. 55/7.07.2000, s. 17.

¹² Freedom of Information Act of 2010, ss. 4.4 and 4.8.

¹³ Freedom of Information Act 2000 c. 36, ss. 43 and 2.

¹⁴ 5 U.S.C. § 552(b)(4) (2000).

¹⁵ 467 U.S. 986 (1984).

innovation or substantial effort.”¹⁶ This case, which involved a request for the results of tests conducted by various manufacturers of intraocular lenses, which were then submitted to the US Food and Drug Administration, was argued under FOIA, and its proponents claim that its narrower definition is more consistent with the legislative intent of that law.

Both the *Public Citizen Health Research Group* definition and the *Ruckelhaus* definition have been adopted in subsequent FOIA cases, meaning that these two standards coexist within United States law. This can be problematic because the *Ruckelhaus* standard, applying to any information that might provide a competitive advantage, is significantly broader than the *Public Citizen Health Research Group* approach, which applies only to information which is directly involved in the production process. The *Public Citizen Health Research Group* definition also requires the information to have been the result of “innovation or substantial effort”, a requirement which is absent from *Ruckelhaus*.

Despite the differences, there is a clear common thread between these two standards, both of which require that the information be commercially valuable, used in one’s business, and maintained in secrecy. Broadly speaking, these three elements roughly correspond to the requirements of international standards in this area.

The second branch of the exception, for privileged or confidential commercial information, is easier to define. Commercial information is confidential, “if disclosure of the information is likely to have either of the following effects: 1) to impair the government’s ability to obtain the necessary information in the future; or 2) to cause substantial harm to the competitive position of the person from whom the information was obtained.”¹⁷ Thus, although on the surface the United States’ exception for third-party commercial interests appears significantly different from those found in Nicaragua or South Africa, subsequent jurisprudence has shaped the exception in a way that is basically consistent with those standards, including by building in a harm test.

As noted above, a harm test or requirement of harm is central to the legitimacy of an exception under international law. Information should not be included under the commercial interests exception merely because it relates to the commercial interests of a third party. Rather, the test is whether the disclosure of that information would harm a legitimate commercial interest.

The Relevance of Providing Information in Confidence

Importantly, courts in the United States have ruled out protection of information simply because it was provided by a third-party in the belief that it would be confidential. In the case of *Comdisco, Inc. v. GSA*, the judge ruled that the submitter’s

¹⁶ 704 F. 2d 1280 (D.C. Cir. 1983), p. 1288.

¹⁷ *National Parks and Conservation Association v. Morton (I)*, 498 F.2d, p. 770 (D.C. Cir. 1974).

subjective belief in the confidentiality of their information might be relevant, but only where they had provided the information voluntarily and where disclosure would hamper the government's ability to collect similar information in the future.¹⁸ In this case, the relevant harm is not to the commercial interests of the third party, but to the ability of the government to collect important information. The South African law defines an explicit exception along these lines, allowing for non-disclosure of information where disclosure "could reasonably be expected to prejudice the future supply of similar information, or information from the same source".¹⁹

In Comdisco, a computer-services company had submitted a proposal for a government contract to the General Services Administration (GSA). After the contract was awarded, the GSA received an access request for the specific pricing breakdown within the proposal. GSA refused to disclose certain aspects of the pricing that reflected Comdisco's risk assessments, into which the company had invested considerable research. To allow competitors to have access to this information for free or nearly free would clearly put Comdisco at a competitive disadvantage, since it had paid for the production of the information.

However, GSA found no harm in disclosing other aspects of the unit pricing. Despite Comdisco's protests that they had expected the entire pricing structure to remain confidential, the GSA opined that the disclosure was "a price of doing business with the Government."²⁰ This is an important point, and one which is very relevant in the context of IFIs. In other words, the subjective perspective of the third party is not determinative, because it should understand the implications of doing business with government (or an IFI).

The court upheld this interpretation, and concluded that, in cases such as this, the financial incentives made it unlikely that disclosure would hinder the government's ability to collect similar information (in the form of bids) in the future. Once again, there is a clear lesson here for IFIs, in terms of their informational 'bargaining power'. Companies provide information in these contexts because of the business advantages of this, and imposing (non-commercially harmful) disclosure requirements will not overcome this.

A similar approach was taken in the United States in *Public Citizen Health Research Group v. FDA*, where the court ultimately ruled that "conclusory and generalized allegations" are not enough to establish harm.²¹

Courts in other countries have also come to the same conclusion. In the case of *E Solicitors on behalf of Company A v. Department of Communication, Energy and*

¹⁸ 864 F. Supp. 510 (E.D. Va. 1994), at V.

¹⁹ S. 37(1)(b)(i).

²⁰ *Ibid.*, at II.

²¹ 704 F.2d 1280 (D.C. Cir. 1983), p. 1291.

Natural Resources, the Irish Information Commission stated: “[T]he essence of the test in Section 27(1) is not the nature of the information but the nature of the harm which might be occasioned by its release”.²²

New Zealand’s Ombudsman has also taken a similar approach:

Simply asserting that the requested information was commercially sensitive is not enough under the [Official Information Act] to establish a good reason for withholding it. Rather, [the third-party commercial interests exception] requires that disclosure would be likely to ‘prejudice or disadvantage commercial activities.’²³

That case revolved around a land trade that the New Zealand Defence Force (NZDF) conducted in order to acquire land for a military training area. The fact that the private owner of the land claimed that the agreement was subject to an understanding of confidentiality was not enough, of itself, to bring it within the scope of the commercial exception. The relevant issue was whether disclosure of the information would harm a commercial interest. The Ombudsman did exempt certain valuations whose disclosure had been objected to by the landowner, since his motivation in trading and holding the land had been the pursuit of profit, which would have been adversely affected by the disclosure.

The Ombudsman also held that NZDF’s actions were not “commercial activities”, which had traditionally been defined as follows: “[The] essence of commercial activity is the buying or selling of property, goods or services for the purposes of profit”. In this case, the aim of the NZDF was to conduct military purposes. Had they been engaging in trade for reasons of profit, the outcome might have been different. In a comment, the Ombudsman did recognise that had the request taken place during the period of negotiations towards the trade, or had it related to some special negotiating approach or other matter the disclosure of which might have been useful in future negotiations, the outcome might also have been different.

The Nature of the Harm Required

In the United Kingdom, the Information Commissioner provided a good analysis of the degree of probability of harm that is necessary to demonstrate that the potential for harm is enough to justify withholding information:

The Commissioner’s interpretation of ‘likely to prejudice’ is that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk.²⁴

²² Case 080183, 10 November 2010. Available at:

<http://www.oic.gov.ie:80/en/DecisionsoftheCommissioner/LongFormDecisions/Name,13137,en.htm>.

²³ Decision of the Ombudsman of New Zealand, Case Notes W47626. 14th Compendium, pp. 159-162, 2007.

²⁴ Reference: FS50073979, 24 July 2006, para. 5.2.2.

This case demonstrates that the bar for demonstrating “real and significant prejudice” is high. The information requested related to the purchase by a private company of a bundle of shares from a public authority. The company that purchased the shares claimed that at the time of the request they were involved in negotiations over their possible purchase by a larger rival, and the valuation of this portion of their assets could be detrimental to the negotiations. The Commission accepted that the negotiations were ongoing and that the valuation could be significant within that process, but nonetheless rejected the claimed commercial interests exception because a number of different considerations “come into play in negotiations involving the sale of shareholdings in private limited companies.” While acknowledging that disclosure of the information could be prejudicial to the company’s ongoing negotiations, they found that this prejudice did not meet the threshold of being real and significant:

The Commissioner accepts that knowledge of the share price paid in a recent transaction involving the same company may be a factor in negotiations but given the multiplicity of factors involved in the negotiation process, the Commissioner is of the view that it is not key.... In addition, the Commissioner is mindful that the valuation of shareholdings depends on a range of factors, referred to in paragraph 5.2.10. The Commissioner is mindful that developments within AP Galgorm or external market forces in the intervening period could have an impact on the company’s worth rendering information as not substantially useful for either the seller of the other company or other potential bidders for that business.²⁵

It is generally recognised that harm coming from “embarrassing” disclosure is not applicable under this heading. This includes information that might upset customers or employees.²⁶ Although this might impact negatively on a company’s business, that is based on the underlying reasons for the embarrassment, not the disclosure of the information *per se*.

As with all exceptions to the right to information, this exception also does not apply if the information is already publicly available elsewhere or where the information has already been shared with the company’s competitors. There clearly cannot be any harm to a legitimate commercial interest simply from further disclosure of already public information.

The commercial exception, again in common with all exceptions, ceases to apply once the risk of material harm has expired. Better practice holds that the commercial sensitivity of information contained in bids or tenders expires once the contract has been concluded. This is partially because the completion of the contract should mean that commercial interests within that transaction have been settled. It also flows partly because of the heightened need for transparency in the context of

²⁵ *Ibid.*, para. 5.2.12.

²⁶ See *Public Citizen Health Research Group v. FDA*, 704 F.2d, p. 1291, footnote 30; *CAN Fin. Corp. v. Donovan*, 830 F.2d, p. 1154; *General Electric Co. v. NRC*, 750 F.2d, p. 1402-3; and *Center to Prevent Handgun Violence v. Dep’t of Treasury*, 981 F. Supp. 20 (D.D.C. 1997).

public tenders, given the potential for corruption or inappropriate considerations being taken into account.

This was highlighted in the Indian case of *State of Jharkhand & Anr. v. Navin Kumar Sinha & Anr.*, which concerned information provided by companies as part of a tendering process for a contract to construct a sewerage and drainage system. The Division Bench of the Jharkhand High Court gave a strong statement regarding their general approach to disclosure of tenders:

Prima facie, we are of the view that once a decision is taken in the matter of grant of tender, there is no justification to keep it secret. People have a right to know the basis on which the decision has been taken. If tenders are invited by the public authority and on the basis of tender documents, the eligibility of a tender or a bidder is decided, then those tender documents cannot be kept secret.²⁷

The presence or absence of other protections, such as through a patent, can be a factor in determining the potential for harm. In other words, where external legal protections exist which already provide sufficient protection to particular information, there is no need to additionally protect it by keeping it confidential.

The demonstration of meaningful competition can be an important ingredient in showing that one's competitive position would be harmed by disclosure. This exception cannot be claimed where a particular body lacks meaningful competition.²⁸ In other words, a company cannot claim that the disclosure of information will harm its competitive position where in fact it lacks any competition.

The sophistication of the marketplace should also be considered, along with the likelihood that competitors will be astute enough to use the information to their commercial advantage. Although a highly competitive market helps make the case for harm, it is not determinative. In a request for information regarding the particulars of budget airline Ryanair's contract with Derry City Council over the use of their local airport, the United Kingdom Information Commissioner heard extensive arguments regarding the cutthroat nature of the low-cost airline market. Nonetheless, the Commissioner ordered the information to be disclosed because they had not been presented with evidence regarding the specific harm that this would be likely to cause.²⁹

Consulting with Third Parties

In protecting third party interests generally, including commercial interests but also privacy, many access regimes provide a consultative procedure to ensure that the parties whose interests may be compromised are given a voice in the process. A

²⁷ AIR 2008 Jhar 19, 2007 (3) JCR 668 Jhr., p. 26.

²⁸ See *Hughes Aircraft Co. v. Schelsinger*, 384 F. Supp. 292, 297 (C.D. Cal. 1974).

²⁹ Reference: FS5 0066753, 21 February 2006.

good example of this is found in Article 29(2) of Ireland's Freedom of Information Act:

(2) Subject to subsection (5), before deciding whether to grant a request to which this section applies, a head shall, not later than 2 weeks after the receipt of the request

...

b. if the request is one to which section 27(3) or 28(5) applies, cause the person to whom the information relates, to be notified, in writing or in such other form as may be determined

i. of the request and that, apart from this section, it falls, in the public interest, to be granted,

ii. that the person may, not later than 3 weeks after the receipt of the notification, make submissions to the head in relation to the request, and

iii. that the head will consider any such submissions before deciding whether to grant or refuse to grant the request.

(3) A person who receives a notification under subsection (2) may, not later than 3 weeks after such receipt, make submissions to the head concerned in relation to the request to which this section applies referred to in the notification and the head

a. shall consider any such submissions so made before deciding whether to grant the request,

b. shall cause the person to be notified in writing or in such other form as may be determined of the decision, and

b. if the decision is to grant the request, shall cause to be included in the notification particulars of the right of review of the decision under section 34, the procedure governing the exercise of that right and the time limit governing such exercise.

(4) Subject to subsection (5), a head shall make a decision whether to grant a request to which this section applies, and shall comply with subsection (3) in relation thereto, not later than 2 weeks after

a. the expiration of the time specified in subsection (3), or

b. the receipt of submissions under that subsection in relation to the request from those concerned, whichever is the earlier, and section 8 (1) shall be construed and shall have effect accordingly.

What is particularly noteworthy here is that although third parties are invited to share their concerns the ultimate decision on whether or not the information should be disclosed remains in the hands of the head of the public authority. In deciding the matter, the public authority is required to assess whether or not the harm envisaged in the law would be likely to be realised and, if so, whether or not disclosure of the information is nevertheless in the overall public interest. India's law contains a similar requirement to consult with third parties, but only gives them ten days to respond.³⁰

The Practice of the IFIs

An examination of IFI disclosure policies reveals serious inconsistencies with the established standards outlined above. For example, the *World Bank's Policy on Access to Information* recognises the following as an exception:

³⁰ The Right to Information Act 2005, No. 22 of 2005, s. 11.

Thus, the Bank does not provide access to information provided to it by a member country or a third party on the understanding of confidentiality, without the express permission of that member country or third party.³¹

This is completely different from the practice described above. It effectively cedes all control over the question of openness of third party information to third parties, as though the Bank were not really a player in the matter. There is no consideration of whether harm is likely to, or even may, result from disclosure of the information. This may be contrasted with the established practice of consulting with third parties to hear their views, but leaving the actual decision to the public body (i.e. the Bank). Furthermore, the public interest override contained in the Policy, already very weak, does not even apply to third party information.

The disclosure policies of other IFIs are similarly problematic when it comes to protecting third parties' commercial interests. The Asian Development Bank's 2005 *Public Communications Policy* does contain a harm-tested exception for third party commercial interests.³² However, this is significantly undermined by the ADB's commitment, as part of the regime of exceptions, not to disclose information "if ADB has given an express legal commitment to a party to keep such information confidential and not to disclose such information, unless such party consents".³³

Third parties also maintain veto power over information disclosure from the Inter-American Development Bank, with a public interest override applying only in "exceptional circumstances."³⁴

It should be noted, however, that not all IFIs fall short in this regard. The European Investment Bank's transparency policy roughly corresponds with international standards:

5.1.1 Presumption of disclosure: All information held by the Bank is subject to disclosure upon request, unless there is a compelling reason for non-disclosure. As the EIB operates as a bank, there are certain constraints on the information it discloses (see "Exceptions" below).

...

5.2.3 Unless there is an overriding public interest, access to information shall also be refused where disclosure would undermine the protection of:

- commercial interests of a natural or legal person;

...

5.2.7 As regards third-party documents, the Bank shall consult with the third party whether the information in the document is confidential, according to this policy, unless it is clear that the document shall or shall not be disclosed.³⁵

³¹ Para. 14.

³² Para. 126(8).

³³ Para. 130.

³⁴ *Access to Information Policy*, April 2010, Principles 2.1.2 and 4.1(e).

³⁵ Available at: <http://www.eib.org/about/publications/eib-transparency-policy.htm>.

Internal Deliberations

Another legitimate exception that is often problematic in its application by IFIs is an exception protecting internal deliberations. This exception recognises the need within public authorities to have a 'space to think' and, in particular, to foster the free and frank provision of ideas as part of decision making processes. However, according to international standards there are important limits to the scope of this exception. Section 36 of the United Kingdom Freedom of Information Act is a good example of how this exception should be framed:

- (1) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—
 - a. would, or would be likely to, prejudice—
 - i. the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - ii. the work of the Executive Committee of the Northern Ireland Assembly, or
 - iii. the work of the executive committee of the National Assembly for Wales,
 - b. would, or would be likely to, inhibit—
 - i. the free and frank provision of advice, or
 - ii. the free and frank exchange of views for the purposes of deliberation, or
 - c. would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.³⁶

The last part of this, namely section 36(1)(c), could be criticised for being unduly open, although it does at least include a harm test.

Another way this exception is structured in section 44 of the South African Promotion of Access to Information Act is also instructive:

- (1) Subject to subsections (3) and (4), the information officer of a public body may refuse a request for access to a record of the body—
 - (a) if the record contains—
 - (i) an opinion, advice, report or recommendation obtained or prepared; or
 - (ii) an account of a consultation, discussion or deliberation that has occurred, including, but not limited to, minutes of a meeting,
for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law; or
 - (b) if—
 - (i) the disclosure of the record could reasonably be expected to frustrate the deliberative process in a public body or between public bodies by inhibiting the candid—
 - (aa) communication of an opinion, advice, report or recommendation; or

³⁶ Freedom of Information Act 2000, c. 36.

- (bb) conduct of a consultation, discussion or deliberation;
or
- (ii) the disclosure of the record could, by premature disclosure of a policy or contemplated policy, reasonably be expected to frustrate the success of that policy.

Here, the first part of the exception, namely section 44(1)(a) is problematical inasmuch as it does not refer to harm, but it otherwise represents a good definition of the interests being protected.

The Decision Making Process

This exception has generally been understood solely as a means to protect the confidence and candour of internal deliberations. It should thus not be surprising that only information whose disclosure would exert a negative impact on such deliberations can legitimately be excluded. As a result, this exception should not apply to statistics or other factual content where candour is not an issue:

Virtually all of the courts... have recognized that it requires different treatment for materials reflecting deliberative or policymaking processes, on the one hand, and purely factual, investigative matters, on the other.³⁷

Mexico's Federal Transparency and Access to Public Government Information Law limits the scope of the exception to "the opinions, recommendations or points of view that are part of a public servant's deliberative process."³⁸

The United States FOIA contains only a vague exception for "interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."³⁹ However, in *National Labor Relations Board v. Sears, Roebuck & Co.* the United States Supreme Court adopted a purposive approach in interpreting this provision. The case arose from a request by a department store chain for information from the National Labor Relations Board about the basis for previous decisions which the Board had adopted in response to complaints of certain unfair labour practices. In responding to the Board's argument that the information was contained in intra-agency memoranda and therefore exempt, the Supreme Court drew a clear line around the scope of this exception based on the purported harm that underlay its inclusion:

Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions. The quality of a particular agency decision will clearly be affected by the communications received by the decision maker on the subject of the decision prior to the time the decision is made. However, it is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached, and therefore equally difficult to see how the quality of the decision will be affected by forced disclosure of such communications, a long as prior communications and the

³⁷ *EPA v. Mink*, 410 U.S. 73 (1973), p. 89. Available at: <http://supreme.justia.com/us/410/73/case.html>.

³⁸ Published 11 June 2002, Revised June 6 2006, Article 14(6).

³⁹ 5 U.S.C. § 552(b)(5) (2000).

ingredients of the decision making process are not disclosed. Accordingly, the lower courts have uniformly drawn a distinction between pre-decisional communications, which are privileged... and communications made after the decision and designed to explain it, which are not.⁴⁰

This establishes the important rule that information may only be withheld prior to a decision being adopted. As the Indian Information Commission pointed out, there is no need to protect the candour of a decision making process if the decision in question has already been finalised:

In terms of Section 8(1)(i), Cabinet decisions, the reasons thereof and the material on which the decisions were taken shall be made public after the decision is taken and the matter is complete except those covered under any of the exemptions in Section 8.⁴¹

Mexico's *Federal Institute for Access to Public Information Guidelines*, an interpretive guide published by the Federal Institute for Access to Information and Data Protection, sets out a clear framework for determining when a decision should be considered to have been finalised, as follows:

For the purposes of Section VI of Article 14 of the Act the final decision shall be deemed to have been taken when the agency or public servants responsible for making the final determination conclusively resolve their deliberative process regardless of whether or not the decision has been executed.

In the cases of deliberative processes whose decisions can be challenged, they are considered to have been adopted definitively after the respective period has elapsed without such a challenge being filed.

The final decision of the deliberative process is also considered to have been taken when the authority responsible for making the decision is of the opinion that the discussion has run its course or for any other reason should be discontinued.

In the event that the request for access is made to an administrative unit other than the one responsible for making the final decision and it is not known if it has been adopted yet, the receiving unit must consult the responsible unit in order to determine whether it is appropriate to grant access.⁴²

One consequence of the limitation of this exception to decision making is that public authorities that seek to apply it are expected to place the material within a specific ongoing decision-making process. This has been found by the courts in the United States in the case of *Senate of the Commonwealth of Puerto Rico v. Department of Justice*.⁴³ This case arose out of the death of two Puerto Rican political activists,

⁴⁰ 421 U.S. 132 (1975), pp. 150-152. Available at: <http://supreme.justia.com/us/421/132/case.html>.

⁴¹ Shri. Arvind Kejriwal sought from the CPIO, Ministry of Commerce & Industry, 132/ICPB/2006-19.10.2006. Similar reasoning can be found in *Federal Open Market Committee v. Merrill*, 443 U.S. 340 (1979), pp. 360-363.

⁴² Published 18 August 2003, p. 29. Available (in Spanish) at: <http://www.salud.gob.mx/unidades/cdi/nom/compi/li180803.html>. Unofficial translation by the authors.

⁴³ 823 F.2d 574, 585 (D.C. Cir. 1987).

allegedly after they had been taken unharmed into police custody. The regional Department of Justice investigated the allegations of murder but declined to bring criminal charges. As a result, the Puerto Rican Senate filed an access request for all of the evidence relating to the investigation, which the Department of Justice refused based on several FOIA exceptions, including internal deliberations. Justice Ruth Bader Ginsburg, on behalf of the District of Columbia Court of Appeals, responded to this aspect of the Department of Justice's claim:

In deciding whether a document should be protected by the privilege we look to whether the document is "predecisional" - whether it was generated before the adoption of an agency policy - and whether the document is "deliberative" - whether it reflects the give-and-take of the consultative process... A document is "predecisional" if it precedes, in temporal sequence, the "decision" to which it relates. Accordingly, to approve exemption of a document as predecisional, a court must be able "to pinpoint an agency decision or policy to which the document contributed."⁴⁴

Ultimately, the Court found that the Department of Justice had provided insufficient evidence to demonstrate an ongoing decision making process to which the information in question related, and remanded the case for reconsideration on that basis. The Court in *Safecard Services, Inc. v. Securities and Exchange Commission* came to an identical conclusion, ruling that the government agency had failed to demonstrate with adequate specificity the decision making process that the requested documents, dealing with an investigation into the appellate companies alleged stock manipulation, were part of.⁴⁵

Similarly, the Irish Information Commissioner requires public authorities claiming the deliberative exception to establish that the information relates to a process of "consideration of various matters with a view to making a decision on a particular matter."⁴⁶

India

The Indian right to information law, generally considered a world leader, does not include any exception for internal deliberations. This issue has become a major battleground, and the Indian Information Commission has since adopted a unique perspective on the issue by considering internal deliberations as a type of fiduciary relationship between the junior officers that issue comments or recommendations and the senior officers who receive this advice and decide on which course of action to pursue:

When the file notings by one officer meant for the next officer with whom he may be in a hierarchical relationship is in the nature of a fiduciary entrustment it should not ordinarily be disclosed and surely not without the concurrence of the officer preparing that note. When read together, Section 11(1) and Section 8(1)(e),

⁴⁴ *Ibid.*, pp. 37-38.

⁴⁵ 926 F.2d 1197, (D.C. Cir. 1991).

⁴⁶ *E Solicitors on behalf of Company A v. Department of Communication, Energy and Natural Resources*, Reference 080183.

unerringly point to a conclusion that notings of a “confidential” file should be disclosed only after giving opportunity to the third party, viz. the officer / officers writing those notes, to be heard.⁴⁷

This last sentence is key, as it denotes a clear limitation to the exception, which grants the junior officer the right to voice opposition to the release of their notes but no veto power to stop disclosure. The process is thus similar to that applied in the context of the third-party commercial interests exception, spelt out above. However, given the fact that the individual impacted is a public servant and the information in question consists of official advice, the balancing in these cases is tilted heavily in favour of disclosure. This approach remains unique to Indian jurisprudence.

Other Issues

The court in *National Labor Relations Board* ruled that the public interest precludes this exception from applying to any “statements of policy and interpretations which have been adopted by the agency” and “instructions to staff that affect a member of the public.”⁴⁸ The basic idea here is that an agency’s working procedural or interpretive principles and guidelines should be transparent. Even if these are used to guide future decision-making, the public has a right to know how government agencies operate internally, among other things in order to plan their interactions with these agencies properly.⁴⁹ In determining whether statements issued to subordinates are a part of the decision making process or are binding policy statements, the proper test is whether the subordinates have discretion not to follow the directives. If no such discretion exists, the statements should be considered binding policy and should not be subject to the internal information exception.⁵⁰

As with other exceptions, the exception for internal documents does not apply where the information is already publicly available or has been previously disclosed. However, this concept applies in a unique way to the internal deliberations exception since it only applies to communications made within or between public agencies. As a result, disclosure of the information to third parties or other non-government agencies generally waives the admissibility of this exception.⁵¹ This makes sense, since once the confidentiality of the decision-making process has already been breached by disclosure to an outside party, it is difficult to argue that further disclosures would negatively impact the deliberative process.

Harm Test and Public Interest Override

The application of the harm test and public interest override are especially important in the context of the internal deliberations exception. This is because of

⁴⁷ CIC/AT/A/2006/00363-3.11.2006.

⁴⁸ *National Labor Relations Board v. Sears, Roebuck & Co.*, pp.153 and 154.

⁴⁹ *Schlefer v. United States*, 702 F.2d 233 (D.C. Cir. 1983). Available at: <http://law.justia.com/cases/federal/appellate-courts/F2/702/233/329404/>.

⁵⁰ *Ibid.*

⁵¹ *Chilivis v. SEC*, 673 F.2d 1205, p. 1212 (11th Cir. 1982).

the natural tendency of public authorities to interpret this exception broadly, and the difficulty of keeping it within appropriately narrow parameters.

Oversight bodies have imposed strict requirements of harm when applying this exception. Ireland's Information Commissioner adopted a purposive approach in considering a request for information regarding the electronic voting system for local elections, including a requirement that institutions or agencies wishing to exempt material under this exception point to a specific harm to the public interest which will accrue through this particular disclosure:

It is not enough for a body merely to assert that the decision making process on a certain matter would be affected detrimentally without clearly setting out how this might transpire. I would expect the public body to be able to elaborate on how, and to what extent, its decision making process might be affected by the release of the information in question.⁵²

A wide range of factors have been taken into account in assessing whether or not to apply the public interest override in the context of this exception. In *Mr XYZ and Dun Laoghaire-Rothdown County*,⁵³ the Irish Information Commissioner took into account different considerations in assessing whether the overall public interest favoured the disclosure of preliminary architectural drawings of park developments. These included the ability of individuals to exercise their rights under the Act to the fullest extent, the public interest in knowing how a public body performs its functions, individuals being able to understand the reasons for courses of action taken by a public body, and holding public authorities accountable for the use of public funds.

An important consideration here is the ability of the public to participate in policy and decision making processes. Clearly, conducting these processes in secret effectively precludes meaningful public participation. It is widely recognised that, in a democracy, the public has a right to engage in key decision and policy making processes. This requires the disclosure of certain pre-decisional documents for purposes of consultation.

Application of this Exception at the IFIs

As the above demonstrates, the exception for internal deliberations should be applied in a narrow and targeted way, and only so far as is necessary to protect the candour necessary for effective decision making. Unfortunately, many IFIs tend to frame this exception far more broadly than international standards mandate.

A good example of this is the World Bank. Although the new policy, which came into effect only in July 2010, represents an important step forward in terms of openness, this has not remotely been the case with the internal deliberations exception. Indeed, this exception, which is not harm-based, is vastly overbroad. It covers a vast

⁵² Mr X and the Dept. of the Environment, Heritage, and Local Government, Reference: 040102.

⁵³ Reference 090106.

swath of information. Specifically, the policy defines a very broad class exception for deliberative information in paragraph 16, which includes the following:

(a) Information (including e-mail, notes, letters, memoranda, draft reports, or other documents) prepared for, or exchanged during the course of, its deliberations with member countries or other entities with which the Bank cooperates.

(b) Information (including e-mail, notes, letters, memoranda, draft reports or other documents) prepared for, or exchanged during the course of, its own internal deliberations

The breadth of this exception is defined in greater detail in both the footnotes and the sub-categories listed under section 16(b). This includes a number of Board documents, including transcripts of meetings and the statements of individual Executive Directors. A good example of this is in relation to Executive Directors in paragraph 16(b)(iv) of the policy, as follows:

Communications and memoranda originating in Executive Directors' offices relating to Board or Board Committee proceedings.

Paragraph 16(c) even includes “[s]tatistics prepared, or analyses carried out, solely to inform the Bank’s internal decision-making processes”.

It is abundantly clear that this extends far beyond the scope of the deliberative exception as applied at the national level. Indeed, it is a class exception, inasmuch as it covers a whole category of information and does not include a harm test. Furthermore, it is not restricted to information relating to a decision-making process, it is not restricted to advice or instances where candour needs to be protected (indeed, even statistical material is excluded, in direct contradiction of the explicit rules in some better practice national laws) and there is no recognition that the making of a decision affects the scope of this exception. In short, it is vastly overbroad.

In theory, a public interest override does apply to this exception. However, this override would be considered only by the internal Disclosure Committee; the external, independent appeals body would not be able to review decisions not to disclose in the public interest.

The European Bank for Reconstruction and Development’s *Public Information Policy*⁵⁴ sets out the following framework:

E. INFORMATION CONSIDERED CONFIDENTIAL

⁵⁴ Approved by the Board on 26/27 July 2011. Available at: <http://www.ebrd.com/pages/about/policies/pip.shtml>.

1. The Bank is committed to openness and transparency as a basic principle of its engagement with public stakeholders. Nevertheless, there are some instances where full disclosure is not possible. Specifically, the Bank will not disclose:

1.1 Documents intended for internal purposes only, or classified under the Bank's internal classification regime as confidential.

1.2 Board documents, unless Board approval for release is given... [including] documents relating to the Bank's own decision making processes (except for agendas and minutes of the Board of Directors' meetings) and related internal documents, memoranda and other communications that are prepared for, exchanged in connection with, or derived from the Bank's deliberative or decision-making processes, including any internal documents, memoranda, or other communications that are issued by or between members of the Bank's Board of Directors, the advisers and staff employed in the offices of the Bank's Board members, members of the Bank's management, its staff, or its consultants, attorneys, or agents.

Despite the EBRD's claimed commitment to "openness and transparency", this exclusion is extremely problematic. Sections 1.1 and 1.2, excluding all Board documents or documents intended for internal purposes, go far beyond what is necessary to protect the policy making process. Indeed, one wonders what the purpose of an access mechanism is if it does not apply to any documents intended for "internal purposes only", since presumably those documents intended for external purposes will have already been released. The overly broad ambit of this exception is further evidenced by the fact that "documents relating to the Bank's own decision making processes", which should describe the entire scope of application of this exception, subject to further limitations based on the need for harm to candour, is listed as simply one class of information in the exception. The blanket exclusion for details of procurement processes is also problematic given the heightened public interest in transparency for such processes, as well as the absence of any justification for this exclusion.

As with the World Bank, the public interest override does little to address this overbreadth. The override is found in paragraph 3 of section E of the policy:

3. In exceptional circumstances, the Bank reserves the right to disclose confidential information protected by the confidentiality criteria set out above which it would ordinarily not release to third parties. The Bank may exercise this right if, in connection with a project in which the Bank has invested, the Bank's management determines that the disclosure of certain confidential information would be likely to avert imminent and serious harm to public health or safety, and/or imminent and significant adverse impacts on the environment. Any such disclosure by the Bank would be on the most restricted basis necessary to achieve the purpose of the disclosure, such as notice to the appropriate regulatory authorities. If the confidential information has been provided by or relates to a Bank client, the Bank would make such disclosure only after informing the client of its concerns and considering the client's plans to address and mitigate the potential harm involved.

4. The foregoing principles apply equally to proposed and existing investments as to projects in which the Bank's investment is to be, or has been, repaid, sold or

otherwise concluded...

In contrast to the overly broad nature of these exceptions, the public interest override is written in strikingly narrow terms, being discretionary and limited to “exceptional circumstances” where the disclosure “would be likely to avert imminent and serious harm to public health or safety, and/or imminent and significant adverse impacts on the environment.” Even in these instances, the policy adds the caveat that these disclosures “would be on the most restricted basis necessary to achieve the purpose of the disclosure.”

Section 4, which explicitly extends these exceptions beyond the conclusion of projects, is also contrary to international standards insofar as it fails to recognise that much deliberative information should become subject to disclosure after decisions are made.

Exclusions of “documents intended for internal purposes” and an overly restrictive approach to bidding and tendering process are also found in the Council of Europe Development Bank’s *Public Information Policy*:

Information considered confidential:

- Documents intended for internal purposes only or documents classified as internal documents by the Bank
- Documents pertaining to the Organs’ decision-making processes, unless Organs approval for release is given
- ...
- Information related to procurement processes, in particular pre-qualification information submitted by prospective bidders, tenders, proposals or price quotations, or records of deliberative processes.⁵⁵

Once again we see blanket protection being afforded to internal documents, whatever this category may be deemed to include.

The lack of a harm test or a limitation for deliberative processes that have run their course is also a problem with the *African Development Bank Group Policy on Disclosure of Information*.⁵⁶ In addition, far from having a public interest override for disclosure, the African Development Bank provides an override for additional classification:

5.8: Records of internal deliberative processes including Board documents and proceedings protected by Rules 11 and 12 of the Rules of Procedure of the Boards of Directors of the Bank and the Fund (the “Board of Directors”), respectively, as well as, communications to and from Executive Directors, their Alternatives, their Advisors as well as the President, except to the extent that the Boards of Directors

⁵⁵ Adopted in May 2008. Available at: http://www.coebank.org/upload/legal/en/Public_information_policy.pdf.

⁵⁶ Adopted in October 2005. Available at: <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/10000004-EN-THE-AFRICAN-DEVELOPMENT-BANK-GROUP-POLICY-ON-DISCLOSURE-OF-INFORMATION.PDF>.

authorize their disclosure, will not be available to the public.

5.9: In addition, public availability of some information may be precluded on an ad hoc basis when, because of its content, wording, or timing, disclosure would be detrimental to the interests of the Bank Group, its partners, a member country, or Bank staff.

It is interesting to note that, in relation to this exception, the European Investment Bank is once again the lone example of a framework which roughly accords to international standards:

5.2.5 Access shall be refused where disclosure would seriously undermine the integrity of the Bank's decision-making process. The Bank may refuse access to documents if the request concerns material in the course of completion or unfinished documents or data or if the request concerns internal communications where such an exemption is provided for in the national laws or customary practice, taking into account the public interest served by disclosure.

Conclusion

It is now widely acknowledged that the IFIs have come a long way in terms of developing their information disclosure policies since these first appeared in the early 1990s. A significant development in several IFIs, which has largely taken place over the last five years, has been the shift from the positive list approach – whereby only information on a positive list was subject to disclosure – to a so-called negative list approach – whereby all information except information on the negative list (or list of exceptions) is subject to disclosure. Despite the somewhat confusing terminology, the negative list approach represents a move to a real presumption of disclosure, thereby bringing the IFI policies more into conformity with international standards in this areas, as well as established practice at the national level.

Despite these positive developments, serious problems still remain in IFI openness policies. The most significant remaining barrier to full implementation of the internationally recognised right to information is the overbroad negative lists, or regimes of exceptions, that are still in place in most IFI policies. Many of these policies are particularly problematical in relation to exceptions protecting two types of interests, namely the commercial interests of third parties and internal deliberations.

The reluctance of IFIs to open up in both areas is somewhat understandable. They believe they need to respect the confidentiality claims of third parties with whom they do business. And they also see a need to protect their internal processes from close public scrutiny. There is a kernel of legitimacy in both claims.

At the same time, extensive practice at the national level – supported by international standards and decisions of courts and other oversight bodies – demonstrates that a balancing of the public interest in openness and these other

interests cannot support the broad exceptions claimed in the IFI policies. Instead, a far more careful calibration of the scope of these exceptions is appropriate.

In both cases, a requirement of harm needs to be imposed. Third parties have a legitimate stake in protecting their commercial interests, and it is this to which the harm test should be attached. As a result, instead of allowing these parties freely to exert claims of confidentiality, the exception should apply only where disclosure of the information would in fact harm their commercial interests. These parties have a right to be consulted, so that decision makers can be sure to take their claims into account, but in the end the test is an objective one.

Longstanding practice at the national level in line with these standards – i.e. of using an objective test of harm to legitimate commercial interests, along with a right to be consulted – puts paid to claims by the IFIs that they need to give third parties an effective veto over the disclosure of information provided by them. In other words, this national experience clearly demonstrates that third parties will continue to engage and do business with the public sector even if the information they provide will be disclosed subject only to narrow protections for commercially sensitive information.

The situation is similar for internal deliberative information. Public bodies do have an interest in preserving the candour of internal deliberations, or the free and frank provision of advice for purposes of decision making. But the exception in favour of such deliberative information should be limited to what is necessary to protect this interest. This means, among other things, that there needs to be a decision making process for which advice is needed, and that it can be shown that disclosure of the information would indeed impact negatively on that decision making process.

Once again, national experience demonstrates that the practice at several IFIs of throwing a cloak of secrecy over all internal information is simply not legitimate. In particular, this experience demonstrates conclusively that limiting the internal deliberative exception in the way described above does not impede the effective operations of public bodies. Indeed, it improves their operations, among other things by making them more accountable.

Experience at the national level also demonstrates the importance of applying a strong public interest override to both of these exceptions. In other words, even where harm to a legitimate interest is likely to result, the information should still be disclosed where this would serve the larger public interest. The limited and public interest overrides that are found in most IFI disclosure policies, which are discretionary and impose unrealistically high standards for application, do not conform to national practice and cannot be justified.

Many IFIs should be commended for the significant advances they have made in recent years in terms of their policy on openness. At the same time, progress remains stunted by excessively broad regimes of exceptions. In other words,

although the IFIs have moved to a negative list, they have not yet managed to trim that list down to an appropriate size. This is particularly true in relation to third party commercial information and internal deliberative information. Experience at the national level clearly demonstrates that while in each case there is a core of information that needs to be kept confidential, it is possible to protect the relevant interests while defining this core of information narrowly, based on the idea of preventing harm and recognising a strong public interest override. The IFIs need to recognise this and narrow the exceptions in their information disclosure policies accordingly.