Fifth Green Climate Fund Board Meeting, October 2013

Note on Interim Information Disclosure Practice

Comments by the Global Transparency Initiative

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Introduction

The Green Climate Fund (GCF or Fund) will hold its fifth Board meeting from 8-10 October 2013 in Paris, France. Decision B.04/10 of the Board, adopted at its June 2013 meeting, called on the Interim Secretariat to prepare a "draft interim information disclosure practice for consideration by the Board". In response, the Secretariat has prepared a draft Interim Information Disclosure Practice (draft Policy), contained in Annex II of Doc. GCF/B.05/16 of 17 September 2013.

Paragraphs 2 and 3 of the draft Policy note that the GCF's "Governing Instrument provides that the Fund will operate in a transparent and accountable manner guided by the principles of efficiency and effectiveness" and claims that the draft Policy fully reflects those principles. Paragraph 4 goes on to stipulate, as a Guiding Principle: "The Fund will apply a presumption in favour of disclosure for all information and documents relating to the Fund and its funded activities." Elsewhere, the Fund has recognised that the key standard for achieving these goals is a policy based on the so-called negative list approach, whereby all documents and information not covered by a list of exceptions (i.e. a negative list) would be disclosed (see, for example, paragraph 1 of the main document).

Unfortunately, the draft Policy takes an almost entirely positive list approach (i.e. providing a list of the documents that the Fund will disclose), and makes relatively little effort to put in place the key elements of a negative list approach. This is foreshadowed in the first paragraph of the draft Policy, which states that it sets out, "the main categories of information that the Fund and its related organs will publicly disclose". It is also reflected in the fact that 26 of the document's 36 operative paragraphs (i.e. not including the Introduction) list types of documents which the GCF will disclose (i.e. a positive list). In contrast, only paragraph 5 addresses the all-important issue of the exceptions (negative list), and only three paragraphs (numbers 35 to 37) address the complex issue of processing requests for information, while one addresses appeals.

Exceptions or the Negative List

Paragraph 5 describes the types of information that the GCF will not disclose, stating generally that these are in line with the "standard practices of most international organizations" and indicating that a comprehensive list will be developed in 2014 as part of the Fund's longer-term information policy. This is reasonable, given that this is simply an interim policy.

More problematical are the specific exceptions that are described in paragraph 5 of the draft Policy, many of which go beyond what is legitimate and/or are not harm tested. These are described and critiqued in detail below, and recommendations are provided to bring the draft Policy more closely into line with international standards and better practice. We note than none of our recommendations on exceptions would render the

policy more complex or detailed, and that is not our aim, taking into account that it is an interim policy document.

Given that this is an interim policy, we are not proposing that the complex matter of exceptions be dealt with in great detail. But we believe that it would be very unfortunate for the draft Policy to establish poor practice principles. Rather, we recommend that complex decisions be left to be decided at a later point, and that the current policy leave these open, allowing for decisions to be made as necessary on a case-by-case basis.

1. *Personal information, including personal communications of Board members, staff and business partners*

It is normal to include an exception in favour of private information, and such exceptions are found in the policies of all international financial institutions (IFIs) and all national laws. The term 'private information' is to be preferred over the term 'personal information' inasmuch as the latter is normally understood to include all information from which an individual may be identified (personally identifying information), much of which has no privacy value.

The specific reference to "personal communications" in the context of this exception is problematical. Many employees use their work emails and mobile phones for private communications, and it is uncontroversial that such communications are private, even when carried via work communications systems. But it is far from clear why, in such a brief statement on the privacy exception, it was felt to be necessary to refer to them explicitly.

It is hard to avoid the impression that what is really meant here is not "personal communications" but *individual communications* relating to Fund business. If so, there is no warrant whatsoever for excluding these from the scope of the policy and these are included in all better practice disclosure documents. It is true that the information policies of many IFIs do include a blanket exception for emails, but this is clearly poor practice and has been strongly criticised by external observers.[1] While the Fund may not wish to come to a comprehensive decision on this sort of issue at this point, neither should it so clearly close the door on better practice.

- Recommendation: This exception should provide for the non-disclosure only of information which would reveal private information about an individual and leave the precise scope of this to be decided for this interim period on a case-by-case basis.

2. *Information relating to safety and security that, if disclosed, would endanger the life, health, or safety of any individual, or the environment*

[1] See, for example, Centre for Law and Democracy, *Openness Policies of the International Financial Institutions: Failing to Make the Grade with Exceptions* (2012). Available at: http://www.law-democracy.org/live/cld-publishes-report-on-problematical-exceptions-to-transparency-at-ifis/.

This is a recognised category of exception, found in both IFI policies and national laws. Furthermore, in line with better practice, this exception is harm-tested (i.e. it is only triggered when disclosure of the information would cause harm).

- Recommendation: This exception should be retained as is.

3. Privileged and investigative information, including legal opinions

The category of legally privileged information is an exception that is found in most IFI policies and national laws. While these exceptions often do not include a specific reference to the notion of harm, this is generally understood as being inherent in the scope of the exception. The way this exception is worded in the draft Policy, however (i.e. privileged information, including legal opinions), seems to suggest that the scope of privileged information might go beyond legal opinions, and include an undefined category of other information.

As stated, this exception would cover all investigative information, a category that could be interpreted quite broadly. It also lacks a harm test. At a minimum, this should be narrowed down to refer only to investigations being undertaken by the Fund, so as to make it clear what is envisaged, and a harm test should be added.

- Recommendations: The first part of this exception should make it clear that it applies only to legally privileged information. The second part of this exception should be limited to investigations being undertaken by the GCF, and to cases where disclosure of the information would be likely to cause harm to that investigation.

4. Third-party information given to the Fund in confidence and accepted as such (see also paragraph 32)

This exception reflects a misunderstanding about the proper relationship between a public body such as the GCF and the third parties with which it interacts. A distinction should be made here between States and other inter-governmental organisations (IGOs), on the one hand, and other third parties with which the GCF does business or carries on other relations, on the other. In the case of the former, it is incumbent on the GCF to show some respect for their desire for confidentiality, while also using its influence to push for greater openness. Thus, many IFIs insist that certain types of documents be open, while also respecting States' desire for confidentiality in other ways. At the same time, there is a tendency among many States to vastly over-classify even entirely non-sensitive information. To get around this, better practice polices and laws refer to the idea of exempting information the disclosure of which would harm relations between the entity and the State which provided the information. This recognises that just because information may bear some sort of classification label does not necessarily mean that disclosing that information would actually be harmful.

In relation to other third parties, while it is important to protect legitimate commercial interests, it is not appropriate to allow the third party to set the conditions for this. Instead, application of the exception should be conditioned on the objective existence of a

risk of harm to a legitimate commercial interest. In this case, the views of the third party as to any risk of harm are relevant, inasmuch as they may help make an objective assessment as to whether the risk does in fact exist, but they should not be determinative. Otherwise, the third party would essentially dictate the terms of openness, regardless of whether any proper interest was at risk.

This is a standard approach in national laws, and it has not caused problems either for public bodies or for the commercial entities with which they do business. Unfortunately, many IFIs have refused to take this common sense approach,[2] perhaps due to their long established practices and relationships, developed before they made a strong commitment to openness. This is a problem that the Fund, as a new entity, is well poised to avoid.

- Recommendations: The policy should distinguish between information provided by States and IGOs, on the one hand, and information provided by other third parties, on the other. In relation to States and IGOs, in addition to the condition that confidentiality is accepted by the Fund, the exception should be made conditional upon a requirement that disclosure of the information would harm relations between the Fund and the State or IGO which provided the information. For other third parties, the Fund should recognise only exceptions based on privacy and an objective test of harm to a legitimate commercial interest.

5. *Deliberative information, including draft documents (work in progress) unless such disclosure is needed to facilitate public consultations*

This exception is again significantly overbroad and would potentially cover an enormous amount of information. There are circumstances where deliberative information needs to be kept confidential, for example where to disclose it would prejudice the free and frank provision of similar advice in future or where premature disclosure of a draft policy would harm the policy development process or the likely success of the policy. These interests, however, need to be harm tested, in line with international standards on exceptions, unlike the blanket exception set out in the draft Policy.

Once again, this is an area where there is a significant difference in the approach taken by many IFIs and in better practice national laws, a problem the GCF should take early steps to avoid.

- Recommendation: The internal or deliberative documents exception should be limited to cases where disclosure of the information would harm a legitimate interest, such as the free and frank provision of advice or the success of a policy.

6. *Financial information that, if disclosed, would prejudice the financial or commercial interests of the Fund and its activities*

[2] See *Openness Policies of the International Financial Institutions: Failing to Make the Grade with Exceptions*, *ibid.*

This exception protects a legitimate interest, namely the financial or commercial interests of the Fund, and it is also harm-tested, in line with international standards in this area.

- Recommendation: This exception should be retained as is.

Processing Requests

Paragraphs 35 to 37 address the issue of processing requests for information and provide for the following limited rules:

- requests may be submitted via the online request form, or by mail or fax (para. 35);
- requests must be submitted in English, but the Fund may also consider requests made in another official language of a developing country (para. 36); and
- responses will provide one of the following: the information; a URL where the information may be found; a legitimate reason as to why the information may not be provided, based on the exceptions (para. 37)

In addition, the draft Policy states that guidelines on processing requests, including time limits, will be developed at a later stage (para. 35).

These rules are generally welcome, but they constitute an unduly rudimentary system for processing requests. It is not clear why the draft Policy opts to delay setting out key rules such as timelines until later, instead of providing at least a framework for processing requests. This is hardly a complex or controversial matter.

In terms of the rules provided, we believe a slightly stronger commitment to receiving requests in languages other than English would be appropriate. In particular, we would welcome language which suggested that the Fund will try to process requests in developing country languages, subject to resource and capacity constraints. Furthermore, better practice is to provide requesters whose requests have been refused not only with the basis for that refusal but also with information about their right to appeal against it.

We also recommend that consideration be given to including at least framework rules in the interim policy on the following request processing issues:

- The issue of how requests will be received, which should ideally be by any officer of the Fund, along with a dedicated central email, fax number and address for receiving requests.
- An indication of what information a request should include (ideally simply an address for providing the information or notice of refusal and an adequate description of the information sought).
- A commitment to provide an acknowledgement of receipt of a request within a set time limit, for example of five working days.
- A commitment to process requests as soon as possible and in any case within set maximum time limits. This may include a standard time limit as well as the

possibility of extending it in appropriate circumstances (i.e. where the request is complex and/or requires consultation with other officers or third parties). It could also include a commitment to try to process certain types of urgent requests – for example where access to the information is needed to prevent human rights abuse or other harm, or to underpin participation – on an expedited basis.

- An indication that requesters may specify a preferred form for accessing the information (such as a physical or electronic copy), along with a commitment to provide the information in that form unless to do so would harm the record containing the information or unduly disrupt the work of the Fund.
- A commitment to provide reasonable assistance to requesters who may be in need of such assistance for whatever reason, including to reduce an oral request to writing.
- A commitment to provide information free of charge in most cases, while reserving the right to charge for larger requests if this should be deemed necessary.

Appeals

We welcome the commitment in paragraph 38 to receive appeals against refusals to provide access and, in particular, for the Executive Director to make "appropriate arrangements for impartial review of the complaint". The idea of impartial review is in line with better practice among IFIs, and external appeal bodies are now in place at several IFIs. We recommend, however, that this commitment be strengthened in two ways. First, requesters should be allowed to lodge appeals complaining that requests have not been dealt with in accordance with the policy, rather than just against refusals to provide information. This might cover, for example, instances where a requester had received no response to their request (which is not technically a denial of the request) or where time limits or fee maximums had been exceeded.

Second, while we understand that the Fund may not wish to set out unduly rigid structures in an interim policy, at the same time we believe that it should stipulate that 'impartial' means involving individuals who are not part of the formal structures of the Fund (i.e. independent or external reviewers). This would make it clear that the Fund is committed to the principle of independent review, which is crucial to the success of any information policy. During an interim period, and taking into account that the volume of appeals at other IFIs are very limited, actual appeal panels could be constituted on an *ad hoc* basis as appeals were received.

Conclusion

We very much welcome the fact that the Fund has moved forward with dispatch to put in place a framework for realising the right to information, including through the proactive disclosure of information as well as the receipt and processing of requests for information. This right has been recognised internationally as a fundamental human right,

and it is encouraging that the Fund is demonstrating an early commitment to respect this right.

At the same time, we believe that the draft Policy suffers from two key structural flaws. First, it proposes an unduly broad regime of exceptions to the right of access. We understand that a fully-fledged regime of exceptions will be developed through consultations as part of the process of developing the longer-term policy, and that is appropriate. At the same time, the draft Policy sets out several proposals for exceptions that fail to respect international standards in this area, as well as better practice. We believe that this is likely to set something of a precedent which may make it more difficult later on to put in place a policy which is more closely aligned with international standards.

Our detailed recommendations regarding exceptions are set out above. The draft Policy should at least conform to basic international standards by making all exceptions harm-tested. Otherwise, where the Fund is genuinely not clear on where it stands on a particular exception, we recommend that instead of opting for an explicitly restrictive approach, the interim policy should employ language which would allow for case-by-case decisions, thereby allowing for the establishment of a practical base of experience which could feed into the development of the longer-term policy.

Second, the draft Policy unduly neglects the issue of how requests should be dealt with. This is both unfortunate and unnecessary, since this is neither a controversial nor a complex issue. We believe that adopting all of our recommendations in this area would add a page or at most one and one-half pages to the length of the policy. Furthermore, this would add considerable clarity to the request process, to the benefit not only of requesters but also those at the Fund tasked with dealing with requests.

Finally, a clear commitment by the Fund, at this early stage, to an independent or external review process would signal that its stated intention to adopt a true presumption of disclosure approach in its information policy is genuine. This would be unlikely to impose much of a practical burden on the Fund, but would go some way to building trust with external stakeholders.

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