



Note on the UNEP Access-to-Information Policy (Revised 2015)

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This Note contains the Centre for Law and Democracy's (CLD's) comments on Draft (ver.2) of the UNEP Access-to-Information Policy (Revised 2015), 12 November 2015 (draft Policy). The draft Policy was prepared by the United Nations Environment Programme (UNEP) and was distributed for comment in November 2015 prior to an informal dialogue on the draft Policy to be held on 25 November 2015.¹ These Comments should be read along with CLD's letter of 26 June 2014 to Achim Steiner, Executive Director, United Nations Environment Programme, on UNEP's Access-to-Information Policy issued on 6 June 2014, which was only intended to have a duration of one year.²

CLD welcomes the fact that UNEP has indeed limited the duration of the June 2014 Access-to-Information Policy to one year and that it is undertaking consultations on its new draft Policy. We also welcome the fact that the new draft Policy contains important improvements over the June 2014 Policy. At the same time, there remain significant areas where the draft Policy fails to accord with international standards or better international practice in relation to the right to information (RTI), which is now recognised globally as a human right.

Statement of Right and Scope

¹ The call for comments, along with the draft Policy, is available at:
<http://www.unep.org/environmentalgovernance/UNEPsWork/AccessstoInformationPolicy/Revised2015/tabid/1060867/Default.aspx>.

² Available at: <http://www.law-democracy.org/live/unep-practice-what-you-preach/>.

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Paragraph 2 of the draft Policy contains a strong positive statement to the effect that the Policy is “guided by openness” and that information “is available to the public, in the absence of a compelling reason for confidentiality”. However, the draft Policy fails to refer to the wider benefits of openness – including to support participation in the activities of UNEP and to foster better governance at UNEP – or to require the Policy to be interpreted in the manner which best gives effect to those benefits.

The draft Policy is also unclear as to its scope. The Introduction includes a detailed definition of “environmental information”, while paragraph 2 of the draft Policy states that openness will apply to any information “concerning the work of UNEP in accordance with its mandate ... in particular environmental information generated and maintained through programmes of UNEP”. This is unnecessarily complex and confusing, and could provide scope for limited interpretation of the Policy, for example by limiting it to environmental information. Better practice is simply to apply policies of this sort to all information held by UNEP, albeit subject to the regime of exceptions.

Recommendations:

- The Policy should refer to the external benefits of openness, including to support participation and to foster better governance at UNEP, and should require its provisions to be interpreted in the manner which best gives effect to those benefits.
- The Policy should apply to all information held by UNEP, regardless of the nature of that information or whether or not it is deemed to relate to the formal mandate of UNEP.

Request Procedures

The main provisions on how requests may be lodged and how they will be processed are set out in paragraphs 6-8 of the draft Policy. Paragraph 6 provides that requests must be sent to the Access-to-Information Desk in Nairobi, for which a physical address, telephone number and email address are provided. At a very minimum, a fax number for receiving requests should be provided. It would be preferable, however, for UNEP to make provision for requests to be received either in person or by mail at its regional offices in other countries, which would be easier and cheaper for some people.

Paragraph 8 provides that “requests should be handled promptly”, that an acknowledgement of a request will be sent within five calendar days and that “UNEP will endeavour to handle all requests within thirty (30) calendar days after the acknowledgment of receipt is sent”. It would be clearer for the policy to provide that requests will be responded to as soon as possible, with the time frames being provided as maximum limits for responding. Furthermore, the overall limit should not be linked to the

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acknowledgement of receipt both so as to keep the limit to 30 calendar days (as opposed to 5 + 30 days) and to avoid the risk that the overall limit might be extended where an acknowledgement was not provided in time or at all.

The draft Policy fails UNEP to commit to provide assistance to requesters who need it either to describe the information sought sufficiently clearly or for any other reason. The draft Policy also fails to commit to providing information in the format stipulated by requesters in their requests, whenever possible.

Recommendations:

- A fax number for lodging requests should be provided and it should be possible to lodge requests in person or via mail at UNEP's offices in different countries.
- UNEP should make a formal commitment in the Policy to respond to requests as soon as possible and in any case within a overall time limit of 30 calendar days, regardless of whether and when an acknowledgement of receipt is provided.
- UNEP should make a formal commitment in the Policy to provide assistance to requesters who need it and to provide access to information in the format stipulated by requesters whenever possible.

Exceptions

The regime of exceptions in the draft Policy is one of its weaker points. The main exceptions are found in paragraph 5. Paragraph 5(a) establishes an extraordinarily broad third party veto, whereby documents received from or even sent to third parties “under an expectation of confidentiality” will not be disclosed (see also paragraph 22, which requires written consent from third parties before information received from them in confidence may be disclosed). This effectively grants third parties a veto since no conditions whatsoever are imposed on what information they may declare to be confidential. It also goes beyond even the very broad third party exceptions found in some disclosure policies of other inter-governmental organisations, such as the World Bank, inasmuch as it also covers information sent to third parties in confidence, again without any conditions. International standards in this area suggest that information should be considered confidential only where disclosure would, on an objective standard, harm a legitimate third party interest, such as privacy or commercial advantage (both already covered by other exceptions).

Paragraph 5(c) appears to be directed primarily at security, a legitimate interest which may require some degree of confidentiality, but it also includes much wider language, protecting the “proper conduct of any operation or activity of the United Nations”. This is extremely broad in nature, potentially covering anything done by the United Nations, and fails to conform to international standards which require exceptions to identify a specific

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interest in need of protection. Adding the word ‘security’ before ‘operation’ would largely remedy this problem.

Paragraph 5(d) is also problematical inasmuch as it covers all information “related to internal investigations”, whether or not the disclosure of the information would pose a risk of harm to those investigations. The addition of a harm test here would largely remedy this problem.

Paragraph 5(g) is essentially a catchall, additional exception, which covers:

Other kinds of information, which because of their content or the circumstances of their creation or communication must be deemed confidential.

It is obvious from its very language that this exception could be abused to claim secrecy in respect of practically any information held by UNEP. There are virtually no conditions on its application, other than the requirement that secrecy flow from the content or circumstances of the information. Such catchall exceptions are wide open to abuse and are not found in the policies of other inter-governmental organisations, let alone better practice national right to information laws.

Paragraph 9 also allows UNEP to refuse a request deemed to be “an excessive demand” on its resources. Once again, this is extremely discretionary in nature and would allow UNEP to refuse any larger request which it did not wish to process for whatever reason. Better practice in this area is to place more objective conditions on such exceptions – such as only allowing UNEP to refuse to process ‘manifestly unreasonable’ or ‘vexatious’ requests – or allowing UNEP to charge for its time once a request goes beyond a certain minimum amount of processing time.

Paragraph 22 provides for a form of public interest override whereby the Executive Director may, in “extraordinary circumstances”, disclose information where “the overall benefits of such disclosure outweigh the potential harm to the interests protected by the exceptions” or refuse to disclose information where “such disclosure is likely to cause harm that outweighs the benefits of disclosure”. It would appear, from the location of this provision in the draft Policy as well as the wording of both it and provisions relating to appeals, that consideration of the public interest test is to lie outside of the mandate of the oversight body, the Access-to-Information Panel. The test is also entirely discretionary in nature. Finally, unlike better practice, the override works both ways, i.e. to mandate both the disclosure and the withholding of information. The latter is unnecessary inasmuch as the exceptions already protect all legitimate secrecy interests. On the other hand, disclosure in the public interest is founded on the idea that this is a human right and that exceptions, which go against the default presumption of disclosure, cannot apply where the overall public interest is served by disclosure.

The draft Policy also lacks a severability clause, whereby if only part of a document is confidential, that part will be removed or redacted and the rest of the document will be

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disclosed. Finally, there is no provision on notice in case a request is refused, which would commit UNEP to indicate the exact provision in the policy which is being relied on to refuse the request, along with information about how to appeal against the refusal.

Recommendations:

- Paragraph 5(a) should be removed from the policy, given that all third party interests are already protected by other exceptions.
- Paragraph (c) should be limited in scope to information the disclosure of which would harm security.
- Paragraph 5(d) should incorporate a harm test inasmuch as it relates to internal investigations.
- Paragraph 5(g) should be removed from the policy.
- Paragraph 9 should be revised so as to be limited in nature to procedural means (such as charging for larger requests) or to incorporate more stringent, objective language relating to its application.
- The public interest override in paragraph 22 should be subject to appeal before the Access-to-Information Panel, should be mandatory in nature and should only operate so as to mandate disclosure (and not secrecy) where this is in the overall public interest.
- The policy should include rules on severability and notice in cases where requests are refused.

Appeals

A requester may, pursuant to paragraph 10, appeal to the Access-to-Information Panel, but only where a request has been denied (and not, for example, in relation to excessive fees or delays). Furthermore, it is clear that the Panel's role is simply to provide advice and that an actual decision on an appeal lies with the Executive Director (see paragraphs 10 and 16). Better practice, even in the case of an inter-governmental organisation, is to provide that the decisions of the external panel are final (see, for example, the rules relating to the Inter-American Development Bank's External Review Panel). At a minimum, the decisions of the oversight body should be made independently, even if the Executive Director has the power to refuse to implement them, rather than the body merely serving in an advisory role to the Executive Director.

The members of the Panel are appointed by the Executive Director and consist of two UNEP staff members and one external representative. The UNEP, in line with better practice among other inter-governmental organisations, should opt for a more independent Panel, for example with a majority of external members, especially given the merely recommendatory nature of their review of refusals to disclose information. Experience around the world has amply demonstrated that internal members do not

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provide a fresh, independent review of decisions to refuse to disclose information, among other things because they are too close to the original decision-makers. At the very minimum, the external review should provide an opportunity for a real review of the original decision, followed by an obligation (formal or moral) on the UNEP to justify any refusal to follow that decision.

Recommendations:

- The grounds for an appeal should include any failure to apply the policy properly in relation to a request.
- The role of the Access-to-Information Panel should be to provide an independent decision on the request. Ideally, its decisions should be final but, if they are not, UNEP should at least be required to explain why it is not following their decision, if that is the case.
- The Panel should include a majority of external members, who will be in a better position to provide a fresh, independent review of the original decision.