



**CENTRE FOR LAW  
AND DEMOCRACY**

**Submission on the Transparency Policy of  
the International Monetary Fund**

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## ***Introduction***

The right to information (RTI) has gained broad recognition as a human right in recent years, one which gives everyone a right to access information held by public bodies. It is entrenched within international human rights guarantees of freedom of expression, as recognised in decisions of the Inter-American Court of Human Rights<sup>1</sup> and the European Court of Human Rights,<sup>2</sup> as well as the UN Human Rights Committee's 2011 General Comment on Article 19 of the International Covenant on Civil and Political Rights (ICCPR).<sup>3</sup>

The Global Transparency Initiative (GTI)<sup>4</sup> is a global network of organisations which promote RTI within international financial institutions (IFIs), to which the Centre for Law and Democracy belongs. The GTI has long held that IFIs are bound by international guarantees of the right to information, a standard that was clearly articulated in the core GTI document, the *Transparency Charter for International Financial Institutions: Claiming our Right to Know* (the GTI Charter), adopted in 2006, which sets out key standards for transparency at the IFIs.<sup>5</sup>

The recognition of RTI as a human right has been accompanied by the development, through jurisprudence and international standard setting, of established better practices for the implementation of this right. At the core of RTI is the basic idea that the people, from whom public bodies ultimately derive their (legitimate) authority, have a right to access information held or created by these bodies. RTI also delivers many functional benefits, including because greater transparency serves to promote more responsible stewardship of public resources and discourages frivolous spending and corruption.

Most IFIs have recognised the imperatives of openness, including in relation to their own activities, and have adopted disclosure policies in order to provide a policy framework for this. The early policies were essentially positive disclosure lists, or commitments to disclose various documents on a proactive basis. These policies were in stark contrast to national RTI laws which, in addition to providing for proactive disclosure, establish a strong presumption of openness, put in place clear procedures for making and responding to requests for information, contain developed lists of exceptions and establish administrative complaints systems.

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<sup>1</sup> *Claude Reyes and Others v. Chile*, 19 September 2006, Series C, No. 151.

<sup>2</sup> *Társaság A Szabadságjogokért v. Hungary*, 14 April 2009, Application no. 37374/05.

<sup>3</sup> General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para. 18. Article 19 is the one in the ICCPR which guarantees freedom of expression.

<sup>4</sup> See: <http://www.ifitransparency.org/>.

<sup>5</sup> Available in several languages at: <http://www.ifitransparency.org/activities.shtml?x=44474>.

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Over the last ten years, many IFIs – including the World Bank, the Asian Development Bank and the Inter-American Development Bank – have transformed their disclosure policies so that have come to resemble national RTI laws more closely. In the case of the IMF, however, the latest Transparency Policy, adopted in 2009,<sup>6</sup> remains stuck in the position of being a positive disclosure list. The main challenge for the IMF in the current review is, therefore, to bring its policy more closely into line with standards on RTI, and the practice of the more progressive IFIs in the area of openness, by transforming it from a disclosure list into a policy giving effect to a true presumption of disclosure.

This Submission, prepared in response to the Consultation on the 2013 Review of the IMF's Transparency Policy,<sup>7</sup> outlines the major areas where the IMF Transparency Policy is deficient and provides substantive recommendations for improvement based on international standards. In addition to the GTI Charter, this Submission relies on the 2009 *Model World Bank Policy on Disclosure of Information*, adopted by the GTI in the context of a review by the World Bank of its disclosure policy, but which contains standards that are relevant for all IFIs.<sup>8</sup> Together, these two documents provide a clear set of standards for implementing the right to information at IFIs.

This Submission was prepared by the Centre for Law and Democracy, an international human rights organization based in Canada which provides expert legal services on foundational rights for democracy, including freedom of expression, access to information, the right to participate and freedom of assembly and association.

### ***Moving to a True Presumption of Disclosure***

The focus of the current IMF Transparency Policy is entirely on the proactive or automatic disclosure of information. As such, and as noted above, it fails to establish a proper system of openness which, in addition to the proactive disclosure of information, also involves a system for responding to requests for information. In this regard, it has failed to make the transition that has been made by other IFIs in their information disclosure policies.

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<sup>6</sup> Available at: <http://www.imf.org/external/np/pp/eng/2009/102809.pdf>. The policy came into force in March 2010.

<sup>7</sup> See <http://www.imf.org/external/np/exr/consult/2013/transpol/index.htm> for more information about this.

<sup>8</sup> Available at:

[http://www.ifitransparency.org/uploads/7f12423bd48c10f788a1abf37ccfae2b/GTI\\_WB\\_Model\\_Policy\\_final.pdf](http://www.ifitransparency.org/uploads/7f12423bd48c10f788a1abf37ccfae2b/GTI_WB_Model_Policy_final.pdf).

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According to the GTI Charter:

Everyone has the right to request and to receive information from international financial institutions, subject only to a limited regime of exceptions, and the procedures for processing such requests should be simple, quick and free or low-cost.

The fact that the IMF's Transparency Policy patently fails to live up to this standard means that it has to be considered one of the worst IFI policies in this area.

The IMF has embraced what might be termed a mini-request driven system through the adoption of its Transparency Policy - Archives Policy, in a parallel decision to the adoption of the main Transparency Policy. Pursuant to this Policy, a few categories of documents become available to the public after three or five years, but the majority are only released after twenty years.<sup>9</sup> Even after that point, there remain exceptions for attorney-client privilege, confidential documentary materials provided by external parties, personnel files, and documents and proceedings of the IMF Grievance Committee. Beyond these listed exceptions, the Managing Director and the Executive Board have the power to classify documents indefinitely. There are no listed mechanisms for appealing against these classifications, or any limits on what can be permanently classified.

To achieve the transition to an approach based on a presumption of disclosure, the the Policy needs to incorporate the following additional elements:

*Presumption of Openness*

The policy should include a statement establishing a true presumption of openness. The statement quoted above from the GTI policy is a good example of this. Another good example is from the Asian Development Bank's (ADB) Public Communications Policy 2011: Disclosure and Exchange of Information, paragraph 29 of which states:

The policy is based on a presumption in favor of disclosure. Therefore, all documents that ADB produces or requires to be produced may be disclosed unless they contain information that falls within the exceptions of the policy specified in paras. 97 and 101.

*Procedures*

The policy should include a clear set of procedures governing the making of and responding to requests. This should include such items as a dedicated email and physical address to which requests may be sent, clear timelines for responding to requests, and a commitment to provide assistance to help requesters. As an example of this, clear procedures are provided for in paragraphs 24-27 of the World Bank's 2010 Policy on Access to Information. Paragraph 24 starts by stating: "Information that is disclosable under this policy and is not on the Bank's external website is available on request (subject to paragraph 26)."

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<sup>9</sup> See: [http://www.imf.org/external/pubs/ft/sd/index.asp?decision=14498-\(09/126\)](http://www.imf.org/external/pubs/ft/sd/index.asp?decision=14498-(09/126)).

### *Exceptions*

The policy should include a narrow set of exceptions which is designed around the idea that access to information may only be refused where disclosure of the information would cause harm to a legitimate interest (harm-based exceptions), rather than containing a list of types of information that shall be kept secret. Indeed, is a cardinal openness principle that access to information should only be refused where disclosure of the information would lead to a demonstrable and specific harm. As Principle 5 of the GTI Charter states:

The regime of exceptions should be based on the principle that access to information may be refused only where the international financial institution can demonstrate (i) that disclosure would cause serious harm to one of a set of clearly and narrowly defined, and broadly accepted, interests, which are specifically listed; and (ii) that the harm to this interest outweighs the public interest in disclosure.

The list of legitimate interests recognised under international law is limited to the following: national security; international relations; public health and safety; the prevention, investigation and prosecution of legal wrongs; privacy; legitimate commercial and other economic interests; management of the economy; fair administration of justice and legal advice privilege; conservation of the environment; and legitimate policy making and other operations of public authorities. The exceptions found in para. 97 of the ADB's Public Communications Policy 2011 largely conform to these standards inasmuch as they are largely harm-based and limited to the items listed above.

Even where a legitimate interest is engaged, information should still be released unless the harm outweighs the public interest in disclosure. An example of a well-crafted public interest override can be found in para. 26 of the 2007 Public Disclosure Policy of the European Investment Bank, which provides that access to information will be refused where disclosure would undermine various interests, unless "there is an overriding public interest". A more discretionary approach is taken by the World Bank, which reserves the right to disclose information covered by the regime of exceptions, "if the Bank determines that the overall benefits of such disclosure outweigh the potential harm to the interest(s) protected by the exception(s)." (para. 18 of the Policy).

### *Right of Appeal*

The policy should also establish a right to appeal against refusals to provide information and other claimed breaches of the policy to an independent complaints body. In its 2010 Policy on Access to Information, the World Bank created both an internal Access to Information Committee (see para. 37) and an independent information Appeal's Panel (see para. 38). Similar independent bodies have been

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established at both the Asian Development Bank and the Inter-American Development Bank.

### Recommendation:

- The whole approach of the Transparency Policy should be substantially enhanced by establishing a true presumption of openness along with a comprehensive system to give effect to it, involving the elements outlined above.

### ***Automatic Disclosure***

The IMF's Transparency Policy is essentially structured around automatic disclosure. There are 24 enumerated categories of documents which are supposed to be published promptly on a rolling basis. According to the IMF's *Key Trends in Implementation of the Fund's Transparency Policy for 2012*,<sup>10</sup> lag times in publication vary considerably depending on the country. Some documents are published less than a week after being considered, while for others, publication is delayed for nearly a year. This discrepancy is indicative of an initial problem with the Transparency Policy, which is that it does not provide specific timeframes for when documents should be published.

A more serious problem is that, for 20 of the 24 categories of documents listed, publication is contingent on the consent of the affected member State. According to Section 2(a) of the Transparency Policy, consent is "voluntary but presumed" and members are "encouraged" to consent. There is, however, no requirement for member States to ground their objection in a legitimate concern or any mechanism for appealing against a member's objection.

Giving members a blanket veto over the disclosure of documents that relate to their dealings with the IMF directly breaches the fundamental principle on which the right to information is founded, as well as the broader principles of openness which the IMF's Transparency Policy is meant to reflect. It is a cardinal openness principle that access to information should only be refused where disclosure of the information would lead to a demonstrable and specific harm.<sup>11</sup> Giving members a veto also runs against the values set out in the Preamble to the Transparency Policy, which begins by stating: "[T]he Fund will strive to disclose documents and

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<sup>10</sup> Available at: <http://www.imf.org/external/np/pp/eng/2012/071612.pdf>.

<sup>11</sup> See, for example, Principle 5 of the GTI Charter.

information on a timely basis unless strong and specific reasons argue against such disclosure.”

The disclosure rates noted in *Key Trends in Implementation of the Fund's Transparency Policy* provide a good indication of why it is problematic to leave decisions about disclosure up to the discretion of member States. There is a notable trend in the list of countries that did not publish any of their specified documents in 2011 – namely Antigua and Barbuda, Brazil, Brunei Darussalam, Djibouti, Dominican Republic, Equatorial Guinea, Ethiopia, Libya, Myanmar, Oman, Sri Lanka, Turkmenistan and Vietnam – which includes some of the world's worst human rights offenders and, with a few exceptions, countries that are generally hostile towards democracy and transparency.

Instead of accommodating the wishes of member States, the IMF should require any State which wishes to object to the disclosure of a document to show cause grounded in a demonstrable harm to a legitimate exception.

Sections 2(c), 3(a) and 3(b) state that members who receive certain types of assistance from the IMF are expected or required to consent to the disclosure of documents related to that assistance. While this is helpful, it only applies to certain specific categories of information and to certain States. For other categories of information, the bar for disclosure is set higher, for example in Section 2(d), which requires explicit consent.

#### **Recommendations:**

- The Transparency Policy should include clear timeframes for the publication of documents.
- Member States should not have a veto over the disclosure of information otherwise subject to automatic publication. Instead, any State wishing to keep all or part of any document secret should be required to demonstrate that disclosure would harm a legitimate interest.

### **Conclusion**

In 2008, the GTI issued a briefing on the major problems with the IMF's Transparency Policy.<sup>12</sup> The briefing was prepared as a submission for the IMF's last

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<sup>12</sup> Available at:

[http://www.ifitransparency.org/uploads/7f12423bd48c10f788a1abf37ccfae2b/IMF\\_Transparency\\_Policy\\_Briefing\\_Final.pdf](http://www.ifitransparency.org/uploads/7f12423bd48c10f788a1abf37ccfae2b/IMF_Transparency_Policy_Briefing_Final.pdf).

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major information disclosure policy review. It urged the IMF to use the review as an opportunity to substantially improve its Policy, noting:

The transparency policy of the IMF contains no recognition of the right of access to information, a basic requirement for effective and accountable governance of an institution. Additionally it is limited in coverage and badly integrated with the archives policy. The IMF has no clear rules or decision-making system around documents classified as confidential and strictly confidential. Though more than half of IMF executive directors have freedom of information legislation in place in their home countries, they have not moved to put such standards in place at the Fund.

The briefing further pointed out that the IMF failed to meet five of the nine principles of the GTI Charter, and only partially met the other four. Five years later, and despite a major overhaul of the automatic disclosure provisions of the policy at the end of 2009, all of these deficiencies remain.

It is worth noting that the fundamental deficiencies noted in both this Submission and the GTI's 2008 policy briefing stand in stark contrast to the positive and optimistic language of the IMF's own factsheet on transparency:

Transparency in economic policy and access to reliable data on economic and financial developments is critical for sound decision-making and for the smooth functioning of an economy. The IMF has policies in place to ensure that meaningful and timely information—both about its own role in the global economy and the economies of its member countries—is provided in real time to its global audiences...

Greater openness and clarity by the IMF about its own policies and the advice it provides to its member countries contributes to a better understanding of the IMF's own role and operations, and makes it easier to hold the Fund accountable for its policy advice.<sup>13</sup>

In other words, although the IMF recognises the importance of transparency to engagement, accountability and effective governance, it has not taken the necessary steps to ensure that its Transparency Policy will give practical effect to these openness benefits. The Policy signally fails to conform to international standards which are accepted not only by openness advocates but also by national governments and an increasingly significant number of IFIs.

At the very minimum, the IMF should incorporate a proper system for request-based access to information into its Policy, based on a presumption of disclosure. This should be accompanied by a requirement that refusals be harm-based and subject to an independent appeals process. In terms of its rules on automatic disclosure, the IMF should not allow countries to veto the release of information, but should require this to be tested against the same harm-based exceptions that apply to request-based access.

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<sup>13</sup> Available at: <http://www.imf.org/external/np/exr/facts/trans.htm>.



Absent a strong commitment along these lines, the IMF is set to languish far behind other IFIs in terms of transparency policy. As such, it would be failing to give effect to a fundamental human right. Furthermore, and given the increasingly important role played by the IMF in world affairs, it would go against the very values which the IMF has itself proclaimed are served by transparency.