



Draft Consultation Paper

November 2016

Review of the Public Communications Policy of the Asian Development Bank: Disclosure and Exchange of Information

(To be renamed Access to Information Policy)

This draft is for consultation purposes only and may not reflect the views of ADB's Management or Board of Directors. Comments may be submitted to pcpreview@adb.org by 30 December 2016.

Asian Development Bank

ABBREVIATIONS

ADB	–	Asian Development Bank
CPS	–	country partnership strategy
DMC	–	developing member country
IAP	–	independent appeals panel
PDAC	–	Public Disclosure Advisory Committee

GLOSSARY

affected people	–	people who may be beneficially or adversely affected by a project or program assisted by the Asian Development Bank (ADB)
Board	–	unless specified otherwise, refers to ADB's Board of Directors
borrower	–	when applied to a sovereign project, means a recipient of ADB assistance
client	–	when applied to a nonsovereign project, means the borrower, guarantee beneficiary, fund manager, investee, or similar entity to which ADB lends or guarantees, or in which it invests
nonsovereign project	–	any project financed by a loan, guarantee, equity investment, or other financing arrangement that is (i) not guaranteed by a member state or a government; or (ii) guaranteed by a member state or a government under terms that do not allow ADB, upon default by the guarantor, to accelerate, suspend, or cancel any other loan or guarantee between ADB and the related member state
sovereign project	–	any project financed by a loan, grant, or other financing arrangement that is (i) extended to a member state, or (ii) guaranteed by a member state
upon	–	"upon" approval, circulation, completion, endorsement, discussion, issuance, receipt, or submission, means as soon as is reasonably practical, and no later than 2 weeks (14 calendar days) following the date of approval, circulation, completion, endorsement, discussion, issuance, receipt, or submission



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I. BACKGROUND

1. The review of the Asian Development Bank's (ADB) Public Communications Policy (PCP) is being done in accordance with paragraph 144 of the PCP, which states that a review of the policy should be conducted no later than 5 years from its effective date. ADB's PCP was approved by the Board of Directors on 25 October 2011, and became effective on 2 April 2012.

2. The purpose of the review is to ensure that ADB's disclosure and transparency practices remain relevant, up-to-date, and at par with its comparator organizations. Specifically, it will look at lessons from the last 4 years of policy implementation, changes in ADB business processes, and the evolution of disclosure policies in other multilateral development banks.

3. A PCP review Steering Committee (SC), is tasked to provide overall strategic guidance on the review process supported by a task force to provide technical advice. The review involves external and internal consultations and the establishment of a review website on ADB.org where a consultation draft will be posted for public comments.

4. This first draft consultation paper is organized as follows: Section II provides an introduction, and outlines the proposed changes to the policy. Section III articulates the guiding policy principles and lists the exceptions to disclosure. Section IV discusses the implementation arrangements, and Section V relates to policy effectivity and review.

II. INTRODUCTION

5. ADB recognizes that transparency and accountability are the keys to development effectiveness. ADB is committed to openness and transparency, and recognizes that an essential part of its institutional governance is the recognition of people's right to seek access and to contribute inputs into ADB operations.

6. The proposed policy will constitute a shift from a prescriptive policy that listed which information would be made available, to a more principles-based policy. This means a higher level of transparency and reaffirms the principle of a presumption in favor of disclosure such that any document in ADB's possession will be disclosed unless it falls within a limited set of exceptions.

7. Changes to the proposed policy include the removal of the list of information to be disclosed and removal of the public communications approach; which are more aligned with international best practice in disclosure policies. The list of documents to be disclosed will be included in the relevant staff instructions. The section on public communications will now be subsumed under ADB's External Relations Approach, which calls on ADB, among others, to find new ways to strategically reach out to its multiple stakeholders using various channels and communications tools. To provide more clarity and focus, the policy will be renamed Access to Information Policy.

8. The draft policy detailed below is subject to further revisions based on consultations. If approved by ADB's Board of Directors, the final policy paper will supersede the Public Communications Policy approved in 2011.

III. THE POLICY

A. Guiding Principles

9. The **Access to Information Policy (AIP)** aims to enhance stakeholders' trust in and ability to engage with ADB, thereby increasing the development impact of ADB operations. The policy promotes transparency, accountability, and the ability of stakeholders to participate in the development that affects their lives.

10. **Presumption in favor of disclosure.** The policy is based on the overarching principle of a presumption in favor of disclosure. All documents in ADB's possession may be disclosed unless they contain information that fall within the exceptions to disclosure specified in the policy.

11. **Proactive disclosure.** ADB shall proactively share its knowledge and information about its work, and its opinions, with stakeholders and the public. The ADB website will be the primary vehicle for proactive disclosure. Other means of proactive disclosure of information and documents (e.g., information to support a consultation process) will be used by ADB as well as borrowers and clients, depending on the intended recipient or audience, and the intended purpose for disclosing the information. Proactive disclosure is important to assure stakeholders that essential information about ADB and its operations will be publicly available within appropriate time frames to facilitate participation in ADB's decision making.

12. Unless restricted by other provisions in the policy, documents submitted to the Board for information shall be posted on the ADB website upon circulation to the Board. Board documents submitted to the Board for consideration shall be posted on the ADB website upon approval or endorsement by the Board.

13. **Right to access and impart information and ideas.** ADB recognizes the right of people to seek, receive, impart information and ideas about ADB-assisted activities through equal access to information. ADB shall work closely with the borrower or client to ensure information about sovereign and nonsovereign projects and programs (including environmental and social issues) is made available to affected people, including women, the poor, and other vulnerable groups, within a time frame and in a language and manner that allows them to provide meaningful inputs into project design and implementation. This process will start early in the project preparation phase, allowing their views to be adequately considered in the project design, and continue at each stage of project or program preparation, processing, and implementation. People will have equal access to the information that ADB makes available under the policy.

14. **Country ownership.** ADB recognizes the importance of country ownership of the activities it supports in its developing member countries (DMCs). Thus, before disclosing certain documents, the views of DMCs regarding the contents and timing of their documents' disclosure shall be considered.

15. **Limited exceptions.** Full disclosure is not always possible. For example, ADB needs to explore ideas, share information, hold frank discussions internally and with its members, and consider the special requirements of its nonsovereign operations,¹ protect its staff's right to

¹ A legally binding undertaking not to divulge clients' confidential business information is a standard requirement for private sector financial institutions, as well as for ADB's comparators, to engage in business with clients. The need

privacy and protect its own and its clients' legitimate business interests. Thus, a limited set of exceptions is provided in the policy. However, ADB reserves the right to override the policy exceptions (para. 21) or not to disclose, under exceptional circumstances, information that it would normally disclose (para. 22).

16. **Right to appeal.** The policy recognizes the right of those requesting information to a two-stage appeals process when they believe that ADB has denied their request in violation of its policy. While the first stage of the appeals process is internal, through the Access to Information Committee (AIC), the second stage is through an external panel independent from ADB. An appeal may also be filed with the AIC to override the policy exceptions that restrict access to the requested information, on the basis that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.

B. Exceptions to Disclosure

17. The exceptions to disclosure are set forth in paras.19 and 22. The list of exceptions is based on ADB's determination of the harm that disclosure might cause to specific parties, or of interests that may outweigh the benefit of disclosure.

18. If a document or part of a document subject to posting on the ADB website is not posted because the information contained in the document falls under an exception, ADB shall refer to the document or the information removed² unless citing the document or the removed information would itself violate an exception.

1. Current Information

19. Subject to the provision in para. 21, ADB shall not disclose the following information:

Deliberative and Decision-Making Process

- (i) Internal information that, if disclosed, would or would be likely to compromise the integrity of ADB's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from governors and their alternates, Board members, directors' advisors, members of Management, ADB staff, ADB consultants, and other entities established and/or individuals appointed by ADB.
- (ii) Information exchanged, prepared for, or derived from the deliberative and decision-making process between ADB and its members and other entities with which ADB cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ADB and its members and other entities with which ADB cooperates by inhibiting the candid exchange of ideas and communications, particularly with respect to policy dialogue with DMCs.

for protection of confidential business information is also widely recognized in freedom of information laws, which includes an exception for the release of commercial information obtained in confidence.

² The reference to the removed document or information would be made on the relevant web page, which would still include the title of the removed or redacted document.

- (iii) Proceedings of the Board of Directors,³ except for verbatim transcripts,⁴ minutes of Board meetings,⁵ and Chair's Summaries of certain Board meetings.⁶

Information Provided in Confidence

- (iv) ADB has an obligation to protect information that it receives in confidence. ADB does not provide access to information provided to it by a member country or a third party in confidence except with the express written permission of that third party or country.
- (v) Information (including proprietary information) provided to ADB by a party and that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or another party that was the source of the information, or any confidential business information (information covered by a confidentiality agreement or nondisclosure agreement that ADB has entered with clients and/or other related parties).
- (vi) Information provided to ADB in confidence, alleging fraud, corruption, or other violation of ADB's Anticorruption Policy, or misconduct, except to the extent permitted by and in accordance with ADB staff rules and rules on investigations, as well as the identity of the party making such allegation (whistleblower), unless the whistleblower consents to disclosure of his or her identity.

Personal Information

- (vii) Personal information relating to Board members, director's advisors, members of Management, ADB staff, consultants and contractors, as disclosure of such information would or would be likely to compromise the legitimate privacy interests of the person concerned. This includes terms of employment, performance evaluations, and personal medical information of Board members, director's advisors, members of Management, ADB staff, consultants and contractors, information relating to their appointment and selection processes, personal communications, as well as information relating to proceedings of internal conflict resolution and appeal mechanisms and information related to investigations, except to the extent permitted by the person concerned or staff rules and Board of Directors' rules and regulations.

Financial Information

- (viii) Financial information that, if disclosed, would or would be likely to prejudice the legitimate financial or commercial interests of ADB and its activities, or financial information to which capital and financial markets may be sensitive. This may

³ For the purpose of this policy, proceedings of the Board of Directors refers to proceedings of the Board of Directors and of Board committees, and comprises all statements made or filed during Board meetings or committee meetings and records regarding such meetings, such as verbatim transcripts, minutes of committee meetings, and memoranda or other communications between ADB Management, departments, or the Secretary and the Board, in all formats, including electronic.

⁴ Verbatim transcripts of formal Board meetings may be disclosed upon request and in their entirety 10 years after the date of their creation, provided that the formal Board meetings have been held on or after 2 April 2012 and they do not contain or refer to any information that falls within the policy exceptions.

⁵ Minutes of each regular Board meetings are disclosed after approval of the minutes by the Board but no later than 60 calendar days after the Board meeting. This applies to regular Board meetings held on or after 2 April 2012.

⁶ Applies to chair's summaries of each Board discussion on the country partnership strategy and regional cooperation strategies, and each policy or strategy approved or endorsed by the Board at a formal Board meeting.

include estimates of ADB's future borrowings, financial forecasts, data on individual investment decisions for ADB's treasury operations, credit assessments, analyses of creditworthiness, credit ratings, and risk assessments of its borrowers and other clients.

- (ix) Financial information that, if disclosed, would or would be likely to prejudice the ability of a member to manage its economy.

Security and Safety

- (x) Information that, if disclosed, would or would be likely to endanger the life, health, safety, or security of any individual, or safety or security of ADB assets, or to prejudice the defense or national security of a member.

Legal or Investigative Matters

- (xi) Any information subject to the attorney–client privilege (including communications to or from ADB counsel or its external legal advisors); information relating to any investigation of alleged fraud, corruption, or misconduct, except to the extent permitted by and in accordance with ADB's rules on such investigations; or any information that, if disclosed, would or would be likely to materially prejudice an investigation or the administration of justice or violate applicable law.⁷

Internal Audit Reports and Trust Fund Audit Reports⁸

- (xii) (a) Internal audit reports of ADB's Office of the Auditor General, as such reports may contain sensitive information about internal systems, which could be exploited by third parties to the detriment of ADB;⁹ and (b) certain audit reports of ADB's external auditors on ADB-administered trust funds, where the public disclosure of these reports would violate the applicable auditing standards.¹⁰

2. Historical Information

20. Any information concerning ADB-assisted projects, programs, policies, strategies, and general operations held by ADB for more than 20 years from the date such information was produced by, or provided to ADB, will be considered historical information. Historical information shall be disclosed upon request,¹¹ except for information that falls within the exceptions listed in para. 19 (iii)–(vii), (ix)–(xi), and (xii)(b).

⁷ This may include restrictions imposed by securities and banking laws, and copyright law.

⁸ Audit opinions and audited financial statements disclosed to the public as part of ADB's *Annual Report* are not covered by this exception (para 19 [xii]).

⁹ Highlights of ADB's internal audits and all audit findings rated high and medium risk are shared with the Audit Committee of the Board.

¹⁰ Certain trust fund financial statements are prepared in accordance with donors' accounting requirements (which may be different from the accounting standards generally accepted in the US), and are audited in accordance with auditing standards generally accepted in the US (which are applicable to ADB). Such auditing standards limit disclosure of financial statements prepared in accordance with accounting standards other than those generally accepted in the US and the associated audit opinion to those who have a specified interest in the fund, i.e., contributors and those responsible for managing and/or administering the fund.

¹¹ Proceedings of the Board will be disclosed in accordance with the provisions in para. 19 (iii).

3. Public Interest Override (Positive Override)

21. Notwithstanding the provisions in para. 19 on types of information not to be disclosed, external stakeholders may request ADB to disclose such information in the public interest. The Access to Information Committee (AIC) will consider such requests. ADB may disclose requested information if it determines that the public interest in disclosing the information outweighs the harm that may be caused by disclosure. Any recommendation of the AIC to disclose or deny such information will require the approval of the Board for Board records and the President for other documents. However, the public interest override provision will not apply 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.

4. ADB's Prerogative to Restrict Access (Negative Override)

22. ADB also reserves the right not to disclose, under exceptional circumstances, information that it would normally disclose if it determines that such disclosure would or would be likely to cause harm that outweighs the benefit of disclosure. This prerogative may be exercised only by the Board.

IV. IMPLEMENTATION ARRANGEMENTS

A. Procedures for Accessing Information

1. Requests for Information

23. All requests for information and documents must be made in writing (email, mail, internet request form, or fax). Requests may be directed , by mail to Department of External Relations, Asian Development Bank, 6 ADB Avenue, Mandaluyong City, 1550 Metro Manila, Philippines; by email to disclosure@adb.org; or by fax to +63 2 636 2649. Requests may also be directed to the resident mission, representative office, or ADB department or office concerned. Requests should indicate with reasonable specificity the information that is being sought to enable ADB, within a reasonable period of time, to locate the information.

24. The ADB department or office concerned will determine whether a document contains information that may not be disclosed in accordance with the provisions set out in para. 19. ADB will consult with the borrower, client, or cofinancier, as appropriate. The Information and Disclosure team will provide guidance to ADB staff as necessary. If part of the information contained in a document to be provided upon request falls under an exception, such information shall be removed from the document and the requester shall be informed of the reason of such removal.

25. Historical information is available on request, in accordance with the provisions of para. 20. Requests for historical information must identify the specific information requested; blanket requests for access to historical information will not be accepted.

26. ADB reserves the right to refuse unreasonable or unsupported requests, blanket requests, and any request that would require ADB to create, develop, or collate information or data that does not already exist or is not available in its records management system.

27. ADB shall not be required to comply with, or respond to, repeated or unreasonable requests for information on the same subject from the same person, organization, or group if ADB has provided such information after a previous request or has given reasons why it cannot provide the information.

2. Responding to Requests for Current Information

28. ADB shall acknowledge receipt of a request within 5 working days of receiving the request. ADB shall notify the requester as soon as a decision has been made or no later than 20 working days after receiving the request. For complex requests, ADB may extend the deadline for responding to the request, provided the requester is notified and acknowledges the extension. In its response, ADB shall either provide the requested information or the reasons why the request has been denied, indicating the particular provision(s) in the policy that justifies the refusal. In case ADB denies requested information, it shall inform the requester of the right to appeal in accordance with paras. 32–40 of the policy.¹² ADB shall post on its website the list of requests reviewed, and the corresponding decisions, i.e., fulfilled or denied, with the reason for the latter.

3. Language of Requests

29. Requests may be submitted to ADB in English or in any of the official or national languages of ADB members. Requests for information and documents submitted in languages other than English may be addressed to the relevant resident mission.

B. Staff Instructions and Awareness-Raising Materials

30. The Access to Information Policy staff instructions will set the step-by-step procedures to guide ADB staff in making operational information and documents publicly available. The staff instructions will list all documents and titles that are publicly available through this policy. Separate awareness-raising materials will be developed and updated as needed to guide ADB's borrowers and clients in implementing the policy and to inform other interested stakeholders on the policy provisions. All these materials will be posted on the ADB website and disseminated in-country as appropriate.

C. Access to Information Committee

31. The Access to Information Committee (AIC), formerly called the Public Disclosure Advisory Committee will interpret, monitor, and review the disclosure requirements of the policy. The AIC will be nominated by and report to the President. It will convene as needed to review requests for information that have been denied by other ADB departments or offices. The AIC has the authority to uphold or reverse decisions to deny access to information, except for decisions by the Board to restrict access (para. 22). The AIC will also consider requests for disclosure in the public interest of information covered by a policy exception (para. 21). The AIC will review and endorse the annual report of the AIP assessing the implementation of the policy. The annual report will include a summary of refusals to provide information to the public, and any recommendations for changes to the policy and its related implementation.

¹² This timeline will not apply in cases where ADB uses its prerogative pursuant to para. 22 not to disclose information it would normally disclose. In that case, ADB will submit the matter to the Board for a final decision.

D. Appeals

32. ADB has a two-stage appeals process by which requesters can appeal when they believe that ADB has denied their request for information in violation of the policy. An appeal may also be filed to override the policy exceptions that restrict access to the information requested, on the basis that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. The remedy available to a requester who prevails on appeal is limited to receiving the information requested. The two-stage appeals process is described below.

1. First Stage of Appeals: Access to Information Committee

33. A requester who is denied access to information by ADB may file an appeal with the AIC if the requester can (i) provide a reasonable argument that ADB has violated the policy by restricting access to information requested, or (ii) make a public interest case to override the policy exceptions that restrict access to the information requested.

34. The AIC shall acknowledge receipt of an appeal within 5 working days and will convene as soon as possible to consider the appeal. In reviewing appeals, the AIC will consider the policy exceptions specified in para. 19. If the appeal is based on the public interest override set out in para. 21, the AIC will consider such request but any recommendation to disclose or deny such information will require the approval of the Board, for Board records, and the President, for other documents; and their decisions shall be final. The AIC shall notify the requester of ADB's decision in writing, giving the reasons, as soon as a decision has been made and, in any event, no later than 20 working days after receiving the appeal, unless the Board has decided under para. 22. In such case, the requester shall be notified upon the Board's decision.

2. Second Stage of Appeals: Independent Appeals Panel

35. The Independent Appeals Panel (IAP) will consider appeals alleging that ADB violated the policy by restricting access to information that it would normally disclose under the policy. It will have the authority to uphold or reverse the AIC's decisions to deny access to information. The IAP has no authority to consider appeals on any decision made by ADB under paras. 21 and 22. The IAP comprises three external access to information experts.¹³ The IAP members will be engaged to work on an intermittent basis and only when called upon to consider an appeal of a decision made by the AIC.

36. If the AIC upholds the initial decision to deny a request for information, the requester may file an appeal to the IAP. The IAP will consider appeals alleging that ADB violated the policy by restricting access to information. In reviewing an appeal, the IAP shall consider the appeal, the policy exceptions, and statements, if any, filed by ADB and/or any third party concerned opposing disclosure of the relevant information. The IAP will have the authority to uphold or reverse the relevant decisions of the AIC, and its decisions will be final. The IAP will be required to consider all appeals no later than 45 calendar days after receiving the appeal. The IAP shall not consider appeals against decisions taken by the Board or the President, as the case may be, if the appeal is based on the public interest override set out in para. 21, or appeals against decisions taken by the Board using their prerogative to deny access to information normally disclosed set out in para. 22.

¹³ IAP members will be nominated by the President and approved by the Board.

3. Submission of Appeals and Notification of Decisions

37. All appeals to the AIC must be filed in writing within 90 calendar days after ADB's initial decision to deny access to the requested information. All appeals to the IAP must be submitted in writing within 90 calendar days after the AIC's decision to uphold ADB's initial decision to deny access. Appeals may be submitted: by mail addressed to the AIC or the IAP to Department of External Relations, Asian Development Bank, 6 ADB Avenue, Mandaluyong City, 1550 Metro Manila, Philippines; by email to disclosure@adb.org; or by fax to +63 2 636 2649. Appeals received beyond the 90-day period for filing an appeal shall be deemed out of time and shall not be considered. All appeals should be set out in a brief letter and contain the following:

- (i) a description of the information originally requested, and
- (ii) an explanatory statement that sets out the facts and the grounds that support the requester's claim that ADB violated the policy or that the public interest override (para. 21) applies.

40. Requesters shall be notified if the appeal is dismissed (i) for a failure to file within the required time, (ii) for a failure to provide sufficient information that would reasonably support the appeal, or (iii) because the AIC or the IAP does not have authority to consider the matter being appealed. If ADB or the IAP upholds the prior decision to deny access to the information requested, ADB shall notify the requester of the decision and specify the reasons. If ADB or the IAP reverses the prior decision to deny access, ADB shall notify the requester of the decision and provide the requested information. ADB shall post on its website a list of all appeals received, the nature of each appeal, and the decision taken in each case. The list will be updated upon issuance of a decision.

E. Relation to Other Policies

41. In the event of conflict between any disclosure provision of other Board-approved policies and this AIP, the principles of the AIP shall prevail.

V. POLICY EFFECTIVITY DATE, MONITORING, AND REVIEW

42. The policy shall become effective 6 months after approval by ADB's Board of Directors. ADB will monitor the implementation of the policy and post an annual report on its website. Amendments to the policy will be made from time to time as needed.