



CENTRE FOR LAW  
AND DEMOCRACY

## *Asian Development Bank*

### **Comments on the Draft Consultation Paper on the Public Communications Policy**

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## **Introduction**

The right to access information held by public authorities or the right to information has been recognised internationally as a fundamental human right, including by the Inter-American Court of Human Rights,<sup>1</sup> the European Court of Human Rights<sup>2</sup> and the UN Human Rights Committee.<sup>3</sup> Perhaps the most famous defence of the right was offered by Louis Brandeis, an eminent jurist and U.S. Supreme Court Justice, who noted: “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”<sup>4</sup> In other words, allowing access to information builds public trust, helps to solve social problems and prevents public bodies from being enveloped by a culture of suspicion.

The ADB itself recognised the value of this right in 2005 when its Public Communications Policy recognised, “the right of people to seek, receive, and impart information and ideas about ADB-assisted activities.”<sup>5</sup> That Policy included a commitment to conduct a review on a five yearly basis, which led to a formal revision to the policy in 2011<sup>6</sup> and, in 2016, a Draft Consultation Paper on the Policy (the *Review of the Public Communications Policy of the Asian Development Bank: Disclosure and Exchange of Information* (draft Policy)).<sup>7</sup>

The draft Policy is in some respects aligned with better practice standards and it marks a welcome attempt at simplification. At the same time, it also fails in important ways to move beyond positions already taken in 2011. These Comments focus on the proposals in the new draft Policy, highlighting shortcomings and providing recommendations for improvement. It relies on, among other things, the Global Transparency Initiative’s (GTI) *Transparency Charter for International Financial Institutions: Claiming Our Right to Know* (GTI Charter),<sup>8</sup> the *GTI Model World Bank Policy on Disclosure of Information* (GTI Model Policy),<sup>9</sup> and the

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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.

<sup>4</sup> Louis Brandeis, “What Publicity Can Do”, *Harper’s Weekly*, 20 December 1913. Available at: [www.law.louisville.edu/library/collections/brandeis/node/196](http://www.law.louisville.edu/library/collections/brandeis/node/196).

<sup>5</sup> The Public Communications Policy of the Asian Development Bank: Disclosure and Exchange of Information, March 2005, para. 31.

<sup>6</sup> Public Communications Policy 2011: Disclosure and Exchange of Information, October 2011.

<sup>7</sup> November 2016. Available at: <https://www.adb.org/documents/pcp-review-draft-consultation-paper-staff-instructions>.

<sup>8</sup> September 2006. Available at: <https://www.article19.org/data/files/pdfs/submissions/transparency-charter.pdf>.

<sup>9</sup> May 2009. Available at:

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

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information policies of other international financial institutions (IFIs).

## **1. Guiding Principles**

In contrast to early policies, the new draft Policy focuses exclusively on reactive disclosure or responding to requests. The provisions on proactive disclosure have been moved to the relevant staff instructions,<sup>10</sup> while the provisions on public communications will be included in the ADB's External Relations Approach.<sup>11</sup> These changes substantially simplify and shorten the document.

The draft Policy lists seven key guiding principles, namely Presumption in favor of disclosure, Proactive disclosure, Right to access and impart information and ideas, Country ownership, Limited exceptions and Right to appeal.

The first principle, in paragraph 10 of the draft Policy, creates an overarching presumption in favour of disclosure of all documents in the ADB's possession, "unless they contain information that fall within the exceptions to disclosure specified in the policy." This is a sound underlying principle that aligns with the GTI Charter<sup>12</sup> as well as the policies of other IFIs, including the World Bank, the African Development Bank, the European Investment Bank, and the Inter-American Development Bank.<sup>13</sup>

The second principle, in paragraphs 11 and 12 of the draft Policy, commits the ADB to "proactively share its knowledge and information about its work, and its opinions, with stakeholders and the public" in appropriate time frames in order "to facilitate participation in ADB's decision making". As noted above, the specific provisions on this have been moved to staff instructions, so that although this is presented as a Guiding Principle of the draft Policy, in fact it is not a principle that is actually realised through the Policy.<sup>14</sup>

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<sup>10</sup> Staff Instructions on Routinely Disclosed ADB Documents and Information, November 2016. Available at: <https://www.adb.org/documents/pcp-review-draft-consultation-paper-staff-instructions>.

<sup>11</sup> See draft Policy, note 7, paras. 6 and 7.

<sup>12</sup> Note 8, Principle 1.

<sup>13</sup> See: section III.B, para. 1 of the World Bank's Access to Information Policy, available at: <https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=3693>; para. 3.1.2 of the African Development Bank's (AfDB) Disclosure and Access to Information Policy, available at: [https://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/Bank\\_Group\\_Policy\\_on\\_Disclosure\\_and\\_Access\\_to\\_Information.pdf](https://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/Bank_Group_Policy_on_Disclosure_and_Access_to_Information.pdf); para. 5.1.a. of the European Investment Bank's (EIB) Transparency Policy, available at: <http://www.eib.org/infocentre/publications/all/eib-group-transparency-policy.htm>; and paras. 2.1 and 3.1 of the Inter-American Development Bank's (IDB) Access to Information Policy, available at: <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35167427>.

<sup>14</sup> These Comments are limited to the draft Policy and therefore do not address the question of proactive disclosure of information.

One problem with the substance this principle, furthermore, is that while documents submitted to the Board “for information” are posted online at the same time as they are circulated to the Board, documents submitted to the Board “for consideration” are not disclosed until they are either approved or endorsed by the Board (see paragraph 12). This is far too rigid and fails to conform to better practice in this area. While there may be circumstances when it is appropriate for documents to be withheld from the public until they are approved by the Board, that is certainly not always the case. As an example, there is no reason why the draft Policy, once it is ready to be submitted to the Board for approval, should not also be made publicly available. Furthermore, the draft Policy fails to indicate what happens should no Board approval or endorsement be forthcoming

The third principle, in paragraph 13 of the draft Policy, is titled “Right to Access and Impart Information and Ideas”. This principle recognises the “right of people to seek, receive and impart information and ideas about ADB-assisted activities”. It also commits the ADB to ensuring that information about both “sovereign and non-sovereign projects and programs ... 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 language is similar to some of the phrases in the GTI Model Policy. However, it requires further elaboration to ensure that these commitments are delivered in practice and, as with the second principle, these commitments are not provided for in the draft Policy itself.

The fourth principle, in paragraph 14 of the draft Policy, Country ownership, recognises the importance of country ownership and states that, as a result of this, “before disclosing certain documents, the views of DMCs regarding the contents and timing of their documents’ disclosure shall be considered”. As stated, this principle is unobjectionable. However, as we note below, in fact the views of DMCs about disclosure are more than just considered, they are treated as binding in respect of disclosure of at least certain types of documents.

The fifth principle, in paragraph 15 of the draft Policy, Limited exceptions, combines appropriate statements on exceptions – such as that ADB needs to “protect its own and its clients’ legitimate business interests” – with statements which are completely at odds with international standards – such as that it is common for right to information laws to include exceptions for commercial information obtained in confidence and that the ADB reserves a right not to disclose information it would normally disclose. These problems are borne out in the detail of the draft Policy on exceptions, as analysed below.

The sixth principle, in paragraph 16 of the draft Policy, Right to appeal, is in line with international standards inasmuch as it recognises a two-stage system of appeals, first to an internal body, the Access to Information Committee (AIC), and then to an independent external panel, the Independent Appeals Panel (IAP). Unfortunately, consistently with previous practice (and the practice of other IFIs), the external body has no power to consider appeals on the basis that the public interest favours disclosing the information.

One issue that is not mentioned in the Guiding Principles is the idea that giving full effect to the presumption of disclosure requires giving access to documents created by third parties through ADB-supported projects. The most effective way to achieve this in practice is to add legally binding language to contracts and partnership agreements giving the ADB access to information created pursuant to those contracts. To this end, the Bank should consider adopting a principle similar to the one outlined in the GTI Model Policy that includes a commitment to include language in contracts to ensure that, “subject to reasonable operational constraints, [the IFI] can access the information created or obtained pursuant to those contracts, by the parties to those contracts.”<sup>15</sup> This would ensure that, when a third party creates documents relating to an ADB contract, the public could access these documents via the ADB.

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<sup>15</sup> Note 9, para. 3.

### **Recommendations:**

- Consideration should be given to limiting the scope of the Guiding Principles for this document to benefits that the policy itself provides (and not including statements about benefits that are included in other documents).
- The rule on documents provided for consideration of the Board should be reworded so as to provide more flexibility for earlier disclosure of these documents as appropriate.
- The principle on exceptions should be revised to align with international standards, in particular by removing the ideas that third parties have the right to designate “commercial information” as confidential and that the Bank should have the power to refuse to disclose information by reference to a so-called “public interest”.
- The principle on appeals should also be revised to align with international standards, in particular by giving the external (independent) appeal body the power to consider claims for disclosure of information in the public interest.
- Consideration should be given to including a Guiding Principle to the effect that the ADB will ensure that it, and hence the wider public, has access to documents created by third parties as part of ADB projects.

## **2. Procedural Protections**

### **Making Requests for Information**

The draft Policy provides, in paragraph 23, that requests shall be made in writing and delivered to ADB’s Department of External Relations by email, mail, Internet request form or fax. Requests can also be sent to the resident mission, a representative’s office or the ADB department/office concerned. This is in line with the GTI Model Policy and current industry standards.

Paragraph 29 of the draft Policy provides that requests can be submitted in English or in any of the official or national languages of ADB members. This is a positive provision. However, requests in languages other than English must be addressed to the relevant resident mission. Not all member countries have resident missions and some requesters may not be able to locate this office. It would be preferable if the Department of External Relations would accept requests in all languages and then send them out to the resident mission (if one exists) or another office which has the necessary language capacity. Local language requests should also be accepted at any ADB office within the requester’s home country.

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The policy should make it clear that requesters should never be asked for the reasons for their requests or even to identify themselves personally. Para 4.4.2 of the African Development Bank policy, for example, states: “Bank Group staff shall not inquire into the identity or intent of a person requesting access to a Bank Group document, unless such an inquiry is necessary to allow the Bank Group to judge whether there is any obstacle as per the list of exceptions to release of the document.”<sup>16</sup>

The draft Policy is also silent as to the commitment of the ADB to provide assistance to requesters. In most cases when requesters fail to identify the information they are seeking in sufficient detail, as required by paragraph 23 of the draft Policy, this is because they need help to do that. The Bank should provide reasonable assistance to them in such cases, or where assistance is needed to produce a written request due to illiteracy or disability. Paragraph 28 of the GTI Model Policy provides for all of these forms of assistance to be provided.

### **Responding to Requests**

Pursuant to paragraph 28 of the draft Policy, the ADB must acknowledge receipt of a request within 5 working days (which is in line with paragraph 29 of the GTI Model Policy) and the requester will be notified of the decision as soon as it has been made and no later than within 20 working days after the request has been received. These rules are broadly in line with international standards, although the GTI Model Policy provides for a 15-day response period.

However, paragraph 28 also states that the ADB can extend the 20-day deadline if the request is “complex”. There is no elaboration of what is considered to be “complex”. Paragraph 30 of the GTI Model Policy, in contrast, limits extensions to cases where a request requires “extensive consultation with different Bank officials or third parties, or searching through a large number of records”, and the African Development Bank policy also provides for analogous grounds for extensions.<sup>17</sup>

Even more problematical is the fact that the draft Policy fails to establish any overall time limit on extensions. In contrast, paragraph 30 of the GTI Model Policy limits any extension to an additional ten working days (i.e. up to a total maximum of 25 working days). It is very important that an overall time limit for processing requests be imposed, to avoid unreasonable delays.

Better practice is also to allow requesters to choose their preferred form of access and to commit to provide information in this form unless that would create an undue burden or pose a threat to the preservation of the record. For example,

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<sup>16</sup> Note 13, para. 4.2.2.

<sup>17</sup> Note 13, para. 4.4.1.

paragraph 26 of the GTI Model Policy allows requesters to specify the form in which they wish to receive the information, including inspection of the record, obtaining a physical or electronic copy, or getting a transcript of a sound or visual record.

Instead of providing for this, paragraph 26 of the draft Policy allows the ADB to refuse “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.” It is legitimate to impose some limits on the efforts the ADB must make to “create” information but this provision casts too wide a net and would allow ADB to refuse to generate information even using automated processing capacity that it possesses. A better approach would be to allow ADB to refuse such actions only where they imposed an unreasonable burden on it.

Paragraph 26 also allows the ADB to refuse “unreasonable or unsupported requests [and] blanket requests”. These terms are far too vague and grant ADB officials undue discretion in the handling of requests. A better approach would be to grant the ADB the right to refuse “frivolous” or “vexatious” requests, preferably after defining these terms appropriately narrowly. With respect to “blanket requests”, these should never be refused before assistance has been offered to help requesters narrow the scope of their request.

#### **Recommendations:**

- The policy should be more flexible as regards where requests in languages other than English may be made, in line with the suggestions above.
- The policy should make it clear that requesters should never be asked the reasons for their requests or even to identify themselves personally.
- The ADB should commit to provide reasonable assistance to requesters where they need this to describe the information they are seeking appropriately clearly or to produce a written request.
- Consideration should be given to reducing the initial time limit for responding to requests to 15 working days.
- An overall time limit should be provided for extensions to the initial time limit and clearer grounds for justifying such an extension should be set out in the policy.
- The ADB should commit to providing information in the form preferred by a requester, unless this would create an undue burden for it or pose a risk of harm to the record.
- Paragraph 26 should be revised to provide that the ADB will make reasonable efforts to create information from existing records and to allow it to refuse requests only where they are vexatious or frivolous.

### **3. Exceptions**

According to international standards, three conditions should be met before information may legitimately be withheld from a requester. First, the information should relate to one of a recognised list of public or private interests which may justify such withholding. Second, disclosure of the information should pose a risk of harm to that interest. Third, the harm to the interest should outweigh or be greater than the overall public interest benefits of disclosure. According to the GTI Charter, an IFI should only refuse to grant access to information where it can show: “(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.”<sup>18</sup>

#### *1. Current Information*

Many (most) of the specific exceptions in the draft Policy fail to conform to the first two of these standards by protecting a legitimate interests against a risk of harm. These are discussed one-by-one below.

#### Deliberative and Decision-Making Process

Paragraphs 19(i) and (ii) of the draft Policy are both premised on the idea that disclosure of the information would “compromise the integrity of the deliberative and decision-making process ... by inhibiting the candid exchange of ideas and communications”. There is a slight difference in this key wording, but the essence is the same, with the first paragraph aimed primarily at internal communications and the second at external communications (“between and among ADB and its members and other entities with which ADB cooperates”). This is a legitimate interest and it contains a clear statement of harm.

However, paragraph 19(i) goes on to provide a list of categories of records that are included within this exception, namely, “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.” Theoretically, if these types of records were subjected strictly to the test as set out in the earlier part of this paragraph, it would not be problematical. However, long-standing experience with IFIs shows that these types of lists are treated as stand-alone descriptions of the scope of the exception (i.e. all of the information contained in these categories of records is excluded from disclosure). Such an approach fails to restrict the scope of

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<sup>18</sup> Note 8, Principle 5.

the exception to protecting a legitimate interest against harm.

Paragraph 19(iii) exempts the following: “Proceedings of the Board of Directors, except for verbatim transcripts, minutes of Board meetings, and Chair’s Summaries of certain Board meetings.” No specific interest in need of protection is identified and so it is not possible even to posit a risk of harm. This exception, like all exceptions, should identify the interest(s) to be protected (an example might be the free and frank exchange of advice within Board meetings) and then attach a harm to it.

#### Information Provided in Confidence

Paragraph 19(iv) of the draft Policy represents an unfortunate addition to the list of exceptions found in the 2011 policy, inasmuch as it is a straight-up third party veto, providing: “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.” In other words, whenever any third party says, upon providing it, that information is confidential, that information will be treated as confidential, regardless of its actual content. Furthermore, this would appear to apply broadly to any third party.

The corresponding provision in the 2011 policy was far narrower in scope, providing:

Information provided to ADB in confidence by a member or international organization and that, if disclosed, would or would be likely to materially prejudice ADB’s relations with that party or any other member.<sup>19</sup>

This provision is limited in scope to members or international organisations, and it includes a clear risk of harm (“materially prejudice”) to a legitimate interest (ADB’s relations with those parties).

Paragraph 19(v), which is the same as its 2011 counterpart, starts out with an exemplary statement of an interest and harm, namely information which, “if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position” of the supplying party. However, it then goes on to include “any confidential business information”, defined as any information covered by a confidentiality agreement. This is much narrower than the straight third party veto found at paragraph 19(iv), inasmuch as ADB has to enter into a specific confidentiality agreement for it to be triggered, but it still fails to refer to anything like an interest or harm, as required by international standards.

The GTI Model Policy provides a useful approach for dealing with third party

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<sup>19</sup> Note 6, paragraph 97(iv).

information, through contacting the third party and seeing whether it consents or objects to disclosure of the information.<sup>20</sup> The draft Policy does provide, in paragraph 24, for consultations with third parties, but fails to refer to the idea of seeking their consent for disclosure.

#### Personal Information

This exception, at paragraph 19(vii) of the draft Policy, is unclear as to its scope. It covers “personal information” but then goes on to state “**as** disclosure of such information would or would be likely to compromise the legitimate privacy interests of the person concerned.” [emphasis added] This would seem to cover all personal information and not just information the disclosure of which would pose a threat of harm to a legitimate privacy interest. It may be noted that “personal information” is normally understood as all information from which a person can be identified, which is far broader than the notion of private information. As with the deliberative exception in paragraph 19(i), this exception goes on to stipulate a number of categories of included information, some of which – such as “terms of employment” – include at least some information which is not private.

The GTI Model Policy, in line with better international practice, limits the scope of this exception to the “unreasonable disclosure of personal information about a natural person”, thereby excluding from its scope the disclosure of non-private personal information. It also recognises four exceptions to the privacy exception, namely where consent has been provided, where 20 years have passed since the person has died, where the personal information “relates to the job description, position, or functions of an employee or official of the Bank, or individual working for or with the Bank,” and where notice has been provided that the Bank intends to release the information and the person does not object.<sup>21</sup>

#### Financial Information

For the most part, the exceptions relating to “financial information” in paragraphs 19(viii) and (ix) of the draft Policy are in line with international standards inasmuch as they identify a legitimate interest and then protect it against harm from disclosure. The one weaker element of this exception is the reference to “information to which capital and financial markets may be sensitive”, which seems to allow broad discretion to Bank staff and which fails to conform to the “would or would be likely to prejudice” standard that is found elsewhere in the draft Policy.

#### Security and Safety

This exception, found at paragraph 19(x) of the draft Policy, is in line international standards inasmuch as it applies only where disclosure of the information would pose a risk of harm to “the life, health, safety, or security of any individual, or safety

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<sup>20</sup> Note 9, para. 45.

<sup>21</sup> Note 9, para. 36.

or security of ADB assets or ... the defence or national security of a member.”

#### Legal or Investigative Matters

Like some of the exceptions noted above, this exception, found at paragraph 19(xi) of the draft Policy, contains both legitimate and unjustifiable elements. It legitimately exempts information which is “subject to attorney-client privilege” and information which, if disclosed, “would or would be likely to materially prejudice an investigation or the administration of justice or violate applicable law.” Even this could be improved by inserting a provision that allows for attorney-client privilege to be waived by the party which holds that privilege.

This exception also, however, covers 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”. This is simply too broad in particular inasmuch as it fails to identify an interest and then protect it against harm. It is not appropriate to rely on the “ADB’s rules on such investigations” here because these were not drafted with transparency in mind and do not conform to international standards relating to the disclosure of information.

#### Internal Audit Reports and Trust Fund Audit Reports

The first part of this exception, in paragraph 19(xii)(a) of the draft Policy, like the one in favour of privacy, uses the term “as” (the harm might result), rather than requiring there to be a concrete risk of harm. The second part, in paragraph 19(xii)(b), refers to the idea of disclosure violating “applicable auditing standards.” It is not clear what these might be, but no such exception is found in the vast majority of national right to information laws, suggesting that it is not necessary.

## *2. Other Issues*

Consistently with international standards, paragraph 20 of the draft Policy recognises that information becomes less sensitive as it ages, providing for release of the information upon request after 20 years have passed. This is positive. However, the provision is very limited in scope, covering just three and one-half of the twelve exceptions provided for in paragraph 19. While not all information becomes public over time – for example private information remains private as long as the person is still alive – this is absurdly limited in scope. Better practice in this area is to apply the historical rule to all of the exceptions in favour of public interests, and then to provide for an exceptional procedure to extend confidentiality beyond the time limit where this really is necessary.

Paragraph 21 of the draft Policy provides for a positive public interest override, whereby the ADB may still disclose information covered by an exception if the public interest in this outweighs the harm that may be caused. The Access to

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Information Committee (AIC) recommends disclosure and this is decided by the Board (for Board documents) and the President (for other documents). This is positive but there are three main limitations which fail to respect international standards. First, the decision is discretionary, rather than mandatory, meaning that ADB could refuse to release information even if the overall public interest called for its disclosure. Second, the approval level for this is extremely high, suggesting that it will be applied very sparingly, while many other IFIs allow the equivalent body to the AIC to apply this override, at least for non-Board documents. Third, it does not apply if the “ADB has given an express legal commitment to a party to keep such information confidential and not to disclose such information, unless such a party consents.” The ADB should not enter into legal commitments that do not allow it to disclose information in the public interest, noting that this is a human rights commitment of the ADB. Instead, third parties should be required to do business with the ADB in a way that respects human rights.

Paragraph 22 provides for a negative public interest override whereby information that is not covered by an exception may still be withheld where the harm from disclosure is deemed to outweigh the benefits. This prerogative may only be exercised by the Board, a very high level of decision making, which should limit its use. However, international standards call for the public interest override only to apply in the positive sense of authorising *additional* disclosures in the public interest and this also the situation in national right to information laws, where reverse public interest overrides are virtually unknown. A proper regime of exceptions should protect all legitimate secrecy interests, so that there is no need to provide for a discretionary extension of the regime. Furthermore, a reverse public interest override fails to align with international standards, which hold that restrictions on transparency are legitimate only if drafted narrowly and clearly. Finally, and related to the previous point, affording this sort of discretion to information holders almost inevitably leads to abuse.

### Recommendations:

- The reference to the list of categories of records in paragraph 19(i) should be removed, so that it is only where harm would result that information may be withheld.
- The exception in favour of Board proceedings should be revised by adding a reference to an interest or interests to be protected and a requirement of harm.
- Paragraph 19(iv), providing for a third party veto, should be replaced by an exception protecting against harm to relations with members or intergovernmental organisations, as was the case in the 2011 policy.
- The reference to confidentiality agreements in paragraph 19(v) should be removed.
- The policy should put in place a system to allow for third parties to consent to the disclosure of information provided by them.
- The exception in favour of personal information in paragraph 19(vii) should apply only where disclosure of the information would harm a legitimate privacy interest.
- The part of the exception in favour of financial information in paragraph 19(viii) which applies to “capital and financial markets” should be made subject to a proper harm test (i.e. “would or would be likely to prejudice”).
- The exception for attorney-client privilege should be subject to a waiver by the person holding the privilege.
- The exception covering “information relating to any investigation” in paragraph 19(xi) should be subject to a harm test.
- A clear harm test should be added to the exception in favour of internal audit reports, in paragraph 19(xii)(a).
- The exception in paragraph 19(xii)(b) should be removed.
- The historical disclosure rule in paragraph 20 should apply to all exceptions that protect public interests, but be subject to a special procedure so that it may be overridden in exceptional cases where this is really necessary.
- The positive public interest override in paragraph 21 should be made mandatory, should be applied by the AIC except in the case of Board documents and should apply regardless of any legal undertakings by ADB (i.e. ADB should not legally agree to waive this power).
- The negative public interest override should be removed from the policy.

## 4. Appeals

The draft Policy provides for a two-stage appeals process, in line with international standards. Requesters can lodge an appeal before the Access to Information Committee (AIC) when they believe the ADB has improperly denied their request for information or when they are seeking a public interest override of the policy's exceptions. The only remedy available is to be given access to the information, while the draft Policy sets out various procedural rules for the processing of appeals. If the appeal is based on the public interest override set out in paragraph 21, the AIC will make a recommendation but this must be approved by the Board for Board records or the President for all other records (see paragraphs 32-34 of the draft Policy).

A second appeal lies from a decision of the AIC to the Independent Appeals Panel (IAP), which is comprised of three external access to information experts, but only for improper denials of requests and not for matters relating to the public interest override. Various procedural rules are again provided for, including that the decision of the IAP is final (see paragraphs 35-36 of the draft Policy).

These provisions are largely in line with international standards and the presence of an external appeal mechanism is especially welcome. There are a few ways in which this system could, however, be improved. The first is that the grounds for appeals, which are currently limited to denials of access to information, could be broadened. Even if the only remedy is access to the information, appeals should lie for other breaches of the rules, for example for delays in processing requests, among other things to promote accountability. Furthermore, opening up the grounds for appeals would ensure that no issues would slip through the cracks (such as, for example, cases where wrong information was provided, which are not technically denials of access).

Second, consideration should be given to widening the scope of remedies. For example, where information has not been provided in the form sought by the requester, an appropriate remedy would be to provide it in that form. Other remedies might be possible, such as the provision of compensation, exceptionally, to requesters who were directly harmed by the non-provision of information. This might prevent such requesters from going to the Compliance Review Mechanism, thereby saving the ADB time, effort and embarrassment.

Third, although in the past the IAP has been robustly independent, it might be useful to introduce language to this effect into the policy. The name of the body – the Independent Appeals Panel – obviously suggests independence and there is also a reference to this in the relevant Guiding Principle, in paragraph 16. However, there is no reference to independence in paragraph 35, which is where the functional rules on appointment of the members are set out.

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Finally, ideally, the IAP would have the power to deal with appeals from refusals to apply the positive public interest override (and, if it were retained, against our recommendations, decisions to apply the negative public interest override). At a minimum, however, consideration should be given to granting it the power to make recommendations on this, with final decisions to lie, as they currently do, with the Board and President.

#### Recommendations:

- The grounds for appeals should be broadened to include any failure to apply the policy properly.
- Consideration should be given to broadening the scope of remedies available upon appeal.
- Consideration should be given to including a reference to the idea of independence of the IAP in the operative provisions governing the appointment of its members (i.e. in paragraph 35).
- Consideration should be given to allowing the IAP to consider appeals relating to the public interest override. At a minimum, it should have the power to make recommendations regarding this.

### **5. Sanctions and Protections**

An important accountability tool for ensuring appropriate application of access to information laws and policies is the idea that there should be sanctions for those who wilfully fail to apply or even obstruct the application of the policy. Thus, paragraph 56 of the GTI Model Policy provides for disciplinary sanctions for those who obstruct access. No such system is provided for in the draft Policy.

The GTI Charter also refers to the idea of whistleblower protection.<sup>22</sup> We note that ADB has a separate Whistleblower and Witness Protection Policy, found in Administrative Order 2.10 (2009).<sup>23</sup>

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<sup>22</sup> Note 8, Principle 7.

<sup>23</sup> This is beyond the scope of the draft Policy and therefore outside of the scope of these Comments.

**Recommendation:**

- The policy should provide for disciplinary sanctions for those who wilfully obstruct its implementation.

## **6. Promotion of Freedom of Information**

Principle 8 of the GTI Charter, titled Promotion of Access of Information, states: “International financial institutions should devote adequate resources and energy to ensuring effective implementation of their access to information policies, and to building a culture of openness.” The draft Policy includes some laudable features to promote access to information. It provides for systems for tracking requests (paragraph 28) and appeals (paragraph 40), and also provides for the publication of an annual report on implementation (paragraphs 31 and 42).

The draft Policy also commits to preparing instructions to guide staff in implementation, and awareness-raising materials for borrowers and clients (also to implement the policy) and for other stakeholders (presumably on using the policy) (paragraph 30). It allocates an oversight role to the AIC, although this is very general in nature (paragraph 31).

Paragraph 42 of the draft Policy provides that amendments to the policy “will be made from time to time as needed.” This may be contrasted with the 2011 policy, which provided for a “comprehensive review after a period of time, not to exceed 5 years from the effective date of the policy”.<sup>24</sup> Specifying clear timeframes for regular, comprehensive reviews of access to information policies is reflected in industry standards. Paragraph 3.5.3 of the African Development Bank policy states: “Three years following the coming into effect of this Policy, Management will carry out a review on its implementation.”<sup>25</sup> Paragraph 9.3 of the EIB policy requires formal reviews to “take place every 5 years, or can otherwise be initiated in case of changes to the EU’s policy and legislative framework on transparency and disclosure of information, changes to policies and procedures within the EIB that require an alignment of this Policy, and any other changes the EIB judges necessary and appropriate.”<sup>26</sup>

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<sup>24</sup> Note 6, para. 144.

<sup>25</sup> Note 13, para 3.5.3.

<sup>26</sup> Note 13, para 9.3.

### Recommendations:

- Consideration should be given to elaborating a clearer oversight role for the AIC.
- The policy should include a clear timeframe for a comprehensive review of its provisions.

### Conclusion

The ADB has demonstrated a commitment to the idea of transparency through its policies at least since 2005, when it became the first IFI to start to transition to a true presumption of disclosure. The 2016 Draft Consultation Paper on the Public Communications Policy continues this tradition, building on previous drafts and simplifying them so that they are more accessible to the public. We welcome the fact that the draft Policy recognises a presumption in favour of disclosure and commits to release information both on a proactive basis and in response to requests. At the same time, we are disappointed that the new draft does not introduce many improvements over the 2011 policy or seek to resolve some of the shortcomings in that policy.

By far the most significant need for more bold efforts at reform is in terms of the regime of exceptions, which determines the line between what information is public and what is not. The current regime of exceptions is fundamentally flawed. Several exceptions do not include a harm test while some even fail to identify any protected interest. The positive public interest override is too limited in nature and is not subject to independent oversight, while the negative override seriously undermines the draft Policy's claim to establish a limited regime of exceptions by granting the Board a catchall discretionary exception. Not only does the new draft not narrow the already problematical exceptions in the 2011 policy, it actually broadens them.

There are a number of other ways in which the draft Policy fails to take advantage of this opportunity for reform to address weaknesses in the 2011 policy. To create a true presumption in favour of disclosure, documents created by third parties pursuant to an ADB project should be covered by the policy and accessible to the public. The policy should also include more detailed and clear rules regarding the procedures for making and responding to requests. And a broader and stronger right of appeal would bring the policy more fully into line with international standards in this area.

We hope that the ADB will take on board our recommendations for reform and

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ensure that the next draft of the policy more fully conforms to international standards in this area. Only in this way will ADB be able to claim that remains a leader among IFIs in terms of transparency.