



CENTRE FOR LAW
AND DEMOCRACY

IDB Invest

**Analysis of the Draft Access to Information
Policy**

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Introduction¹

This Analysis contains the Centre for Law and Democracy's (CLD's) comments on the draft Access to Information Policy (draft Policy)² prepared by IDB Invest.³ The draft Policy was distributed for comment in April 2018 prior to the current round of public consultations on the draft Policy, which is taking place from 23 May to 23 September 2018.⁴

CLD welcomes the fact that IDB Invest is making an effort to update its 2005 Disclosure of Information Policy and to renew its commitment to respect and promote the right to information (RTI), or the right to access information held by public authorities, recognised globally as a human right. The draft Policy contains a number of important improvements over the 2005 Policy. At the same time, it still fails in important ways to accord with international standards or better international practice in relation to RTI. The most problematical part of the draft Policy is the regime of exceptions, which is far too broad and, at places, discretionary. Furthermore, there are also problems in other areas, including the procedures for making and processing requests for information and the system of appeals where, in particular, more detail would be useful.

CLD prepared this Note on the draft Policy in the hope that it, along with other comments received during the public consultation, will help IDB Invest to strengthen the policy so as to provide a strong basis for public access to the information it holds. The Note contains a number of recommendations for improving the draft Policy. CLD would be happy to provide specific drafting suggestions for how concretely to reflect our recommendations in the actual policy.

1. Right of Access and Scope

Clause 3 of the draft Policy contains a positive general statement about developments regarding the right to information, including that it has been recognised as a fundamental human right, while clause 4 suggests that the principle

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² IDB Invest, draft Access to Information Policy, April 2018. Available in English, French, Portuguese and Spanish at: <https://consultation.idbinvest.org/en/main>.

³ Formerly known as the Inter-American Investment Corporation (IIC).

⁴ The call for comments is available at: <https://consultation.idbinvest.org/en/main>.

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of “maximizing access” governs the policy. These statements are supplemented by clause 10, located in the section on Principles, which states that the policy creates a presumption in favour of access, subject only to the exceptions.

However, these positive statements are undermined by clause 5, which stipulates that the draft Policy does not create any rights, which seems to contradict the recognition of RTI as a human right. Even more problematically, clause 5 limits the scope of the policy to information produced after it comes into effect. This is unnecessary and is not reflected in better practice policies or laws. If IDB Invest feels it needs to protect the expectations of third parties who provided information before the adoption of the new policy, this forward-looking limitation could apply to that information. But there is no need to limit the scope of the policy to information produced by IDB Invest after the policy came into effect.

Clause 8 refers to the ideas of accountability and keeping external stakeholders informed about its work as key drivers for the policy. But it fails to refer to other external benefits of transparency – such as fostering participation and combating corruption – and the draft Policy also fails to incorporate a commitment to interpret the policy in the manner that best gives effect to the benefits listed.

In addition to establishing a presumption in favour of disclosure, clause 10 commits ADB Invest to release as much information as possible proactively. Clause 12, also in the section on Principles, states that IDB Invest will use “all practical means to facilitate access to information ... including through its website”. This focus on proactive disclosure is useful but there is nothing in the Principles that refers to the idea of reactive disclosure or responding to requests, which is a very important gap. It would be preferable if the policy included a commitment in the Principles section to ensuring that the rules governing the submission and processing of requests are as user friendly as possible.

In terms of scope, there does not appear to be any limitation regarding who may make a request for information from IDB Invest. Clause 7 makes it clear that the policy applies to “all information that the IIC produces and receives”, and explicitly states that this includes information relating to “the Office of Evaluation and Oversight (OVE), the Office of Institutional Integrity (OII), the Sanctions Committee, the Independent Consultation and Investigation Mechanism (ICIM), the Office of Ethics (ETH), the Office of the Executive Auditor (AUG), and the Office of the Ombudsperson”. It might be preferable to limit the scope of the policy to information which is held by IDB Invest, whether it produced or received the information (since it may no longer hold information which it once produced or received). The draft Policy also fails to define “information”; a definition could help ensure that everything that communicates meaning is covered, regardless of the format in which it is held (such as documents, emails, videos and so on).

Recommendations:

- Clause 5 should be amended to remove the claim that the policy does not create any rights.
- Clause 5 should also be amended so that the policy covers all information held by IDB Invest, not just information created after it comes into effect. If necessary, an exception could be carved out from this for information provided to IDB Invest by third parties prior to the policy coming into effect.
- The policy should refer to the external benefits of openness, such as fostering participation and combating corruption, and include a commitment to interpret the policy in the manner that best gives effect to those benefits.
- The Principles section of the policy should include an explicit reference to reactive disclosure (in addition to the references to proactive disclosure).
- Consideration should be given to limiting the scope of the policy to information which is held by IDB Invest.
- The policy should define information to include anything that communicates meaning, regardless of its particular form.

2. Requesting Procedures

The draft Policy is relatively brief in terms of its provisions on the making and processing of requests. Clause 69(i) provides that requests can be submitted online or by email, while clause 69 (ii) allows for written requests “if the requester does not have access to the internet”. The latter reference is unnecessary; the policy should set out the ways in which requests may be made and then leave it up to the requester to decide how to make his or her request. Furthermore, the policy should include a dedicated both email and physical address for making requests. Finally, better practice is also to allow for requests to be made in person and ideally even orally (with IDB Invest then reducing them to writing).

According to clause 70, requests may be made in any of the four official languages of IDB Invest, while information will be provided in the language in which it is available. Better practice in this regard is to allow for requests to be made in any official language of a country in which IDB Invest operates. Furthermore, although translation of information can involve considerable costs, better practice is to make at least some commitment to provide for translation in appropriate cases.

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The precise implications of clause 71, under the heading “Responding to Requests”, are not clear. It states that IDB Invest “will assess the possibility of responding to requests for information based on the scope of the requests, the number of requests, and the availability of the information requested”. Above, we suggested that the scope of the policy should be limited to information which is held by IDB Invest, which would vitiate the need for the last reference. Otherwise, this clause appears to grant IDB Invest the discretion to refuse to respond to a request on the basis that its scope is too large or that it has received too many requests. This is simply not reasonable and provisions along these lines are not found in other RTI policies or laws.

Otherwise, clause 71 provides that receipt of requests will be acknowledged, although no time limit is specified for this; the limit should ideally be three or at most five working days. Clause 71 also provides that responses to requests will be provided within 30 calendar days, which may be extended based on the scope or complexity of the request, with the requester being provided with the extended timeframe where “possible”. Better practice is to commit to responding to requests “as soon as possible”, to provide for a shorter initial timeframe for responding, say of ten working or 15 calendar days, and to place overall limits on extensions, say of 30 calendar days.

Clause 72 provides that information will be released via the website, with the requester being sent a link. This seems to imply that this is the only way information will be made available (although clause 75, regarding fees, suggests that copies may also be provided). Not all requesters will have access to the Internet and, in any case, better practice is to allow the requester to stipulate the format in which they wish to receive the information (which may be an electronic or a paper copy, or even an opportunity to inspect documents).

Clause 75 states: “The IIC may charge reasonable fees for the cost of producing and sending copies to requesters which may be regulated in the implementation guidelines.” This implies that it is free to file a request, but it would be preferable to make this explicit in the policy. Better practice is also to provide a base number of pages of photocopies – say 15 or 20 pages – for free, and to provide for fee waivers for impecunious requesters, although the latter might be difficult for an international institution to implement.

A few procedural issues which are currently missing should also be clarified in the policy:

- The policy should indicate what information is required to be provided when making a request, which should be limited to a description of the information sought and a means of (address for) delivery. Under no circumstances should IDB Invest ask for the reasons behind the lodging of a request.

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- IDB Invest should make a commitment to provide assistance to requesters when they need it, for example because they are having problems describing the information clearly or making a written request for information.

Recommendations:

- The reference to not having access to the Internet in clause 69 (ii) should be removed.
- The policy should stipulate both an email and physical address for submitting requests and should also provide for the possibility of making requests in person and orally.
- Consideration should be given to allowing for requests to be made in any official language of a country in which IDB Invest operates, as well as to making a commitment to translate documents in appropriate circumstances.
- The reference to discretionary grounds for IDB Invest to refuse to process a request, in clause 71, should be removed.
- The policy should provide for a time limit of three to five days to acknowledge receipt of a request.
- Consideration should be given to establishing commitments to respond to requests as soon as possible, to reducing the initial presumptive time limit for responding to 15 calendar days and to imposing an absolute time limit, say of an additional 30 calendar days, on time limit extensions.
- The policy should give requesters an opportunity to indicate the format in which they would like to receive the information, along with a commitment to try to provide it in that format.
- The policy should make it clear that it is free to file a request. Consideration should also be given to providing a base number of pages of photocopies – say 15 or 20 pages – for free and to providing for fee waivers for impecunious requesters, perhaps to be applied at the discretion of IDB Invest.
- The policy should indicate clearly what information is required to be provided when making a request, which should not include the reasons for making the request.
- IDB Invest should make a commitment to provide assistance to requesters who need help making their requests.

3. Exceptions

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It is universally recognised that the right to information is not absolute and that the protection of a number of public and private interests may justify the withholding of information. The rules governing this – or the regime of exceptions – are key to the success of any information policy. Clause 11 of the draft Policy sets out a good governing principle for exceptions, as follows:

The exceptions to disclosure contained in this Policy are based on the clear and well-defined possibility that the potential harm to interests, entities, or affected parties arising from disclosure of information would outweigh the benefits.

Furthermore, clause 51, the first in the section on Exceptions, articulates a good test for applying exceptions:

... Based on the premise that the disclosure of information could be more prejudicial than beneficial to such legitimate rights or interests, the IIC does not provide access to the following categories of information:

Despite this, the regime of exceptions set out in the draft Policy is very problematical and will need to be amended substantially in order to conform to international standards. These standards set out three main conditions for exceptions:

1. Exceptions should protect narrowly defined legitimate interests – such as national security or commercial competitiveness – rather than types or classes of information – such as the armed forces or confidential information – or illegitimate interests.
2. Information should be disclosed unless this would pose a risk of harm to one of the legitimate interests which is being protected (the harm test).
3. Even if disclosure poses a risk of harm, the information should still be released where this is in the overall public interest (the public interest override).

For the most part, the specific exceptions, set out in clauses 52-58, refer to legitimate interests. However, in most cases these exceptions both define a (often appropriate, harm tested) principle and then provide for (often excessively broad, non-harm tested) specific examples of the principle. As a result, these exceptions tend to go too far, protecting specific classes of information instead of defining a legitimate interest and then protecting it against harm.

A particular problem with the draft Policy as a whole, unfortunately also found in many other international financial institution's (IFI) information policies, is the vastly overbroad protection of information provided by third parties, which essentially grants them a veto over the release of information they provide to IDB Invest. This is reflected not only in the first substantive exception (in clause 52) but also in several other statements in the draft Policy. Clause 4 already refers to the idea that IDB Invest needs to "preserve the trust of its clients and third parties". Although this is in itself unobjectionable, clause 9 illustrates how IDB Invest

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understands this by stating: “[T]he IIC respects and protects the confidentiality of the information it receives from its clients and third parties”, which essentially means that these parties have a veto over the release of information. This obviously does not conform to the principle set out in clause 11 or the international standards noted above, both of which require harm before information may be refused.

Some of the provisions on the proactive or routine disclosure of information – such as clauses 47 and 50 – refer explicitly to the “consent of the client” as a condition for release of the information.

In terms of requests for information, clause 52 states that it protects the “commercial, proprietary, financial, privileged, intellectual property, or other non-public information about the IIC, its clients, or third parties” because this “would be contrary to the legitimate expectations of such parties”. Strikingly, the same clause claims that this is “consistent with the practice of commercial banks and of most public sector financial institutions with respect to their investments in the private sector”. This is absolutely not the case. At the national level in most countries with RTI laws, at least public sector financial institutions are required to disclose information, including commercial information, unless that would specifically harm the legitimate commercial interests of the third parties who provided the information. This is obviously completely different than not disclosing non-public commercial information about third parties, i.e. information which those third parties have elected to keep confidential, regardless of the real consequences of making it public, as the draft Policy proposes to do. Clause 52 also lists “Board documents relating to specific investments, advisory service projects, and investment facilities” as being exempt, which is not only incredibly unclear (or at least highly discretionary) but also fails to refer to any legitimate interest or to impose any harm test.

Clause 59 also gives countries a veto over the disclosure of country strategies, indicating that they will be disclosed when they are distributed to the Board, “subject to the no objection of the respective country”.

The role of third parties comes up again in clause 74, which calls for the “the procedure described in section d) above to consult with such client or third party” to be followed when a request is received which relates to information provided by a third party. This actually does not make sense at the moment, since the ‘section d)’ referred to covers clauses 71-73, which do not mention third parties. It is legitimate, indeed good practice, to consult with third parties in the context of such requests (i.e. for information provided by them), but this should be done simply to broaden the information which is available to IDB Invest, which should then decide whether to disclose the information based on an objective assessment of whether or not this would harm the legitimate interests of the third party.

Moving beyond third party information, clause 53 protects “Financial Information”, including “financial information that would be detrimental to the financial or commercial interests of the IIC if disclosed, including information that may be sensitive in capital and financial markets or that may affect its competitiveness.” While this is a bit too broad, it at least refers to interests and then protects them against harm, in line with international standards (although later on the same clause defines the harm as “may be sensitive” and “may affect its competitiveness”, which is too low a standard of harm).

However, the main problem with this clause, as with most of the clauses setting out exceptions, is the specific examples set out in the sub-clauses. For clause 53, four sub-clauses, namely (i)-(v) list a number of specific classes of information which are exempt. While many of these are broadly legitimate, not all of them always are mainly because they fail to incorporate a harm test, and it is simply unnecessary to elaborate on the main description of the exception in this class-based manner.

Clause 54 starts out by protecting “the integrity of the decision-making process” and “the free and candid exchange of ideas in the deliberative processes”, which is legitimate, although in one part the harm test, namely “would affect”, is not clear enough. This clause also commits to make public, at the end of a deliberative process, “the final decision, results, and agreements that emerge from these processes”, which is a positive feature. Once again, however, the specific examples provided for in sub-clauses (i)-(viii) do not, for the most part, reflect legitimate interests and are not harm tested. Specific examples of this include “studies, reports, audits, assessments, or analyses prepared to support internal decision-making or the establishment of Management directives and procedures” (sub-clause (v)) and “circulars and technical briefing materials prepared by Management” (sub-clause (vii)).

Clause 55, once again, starts out by defining a legitimate exception – legally privileged information – but then goes on to provide specific examples which go far beyond the proper scope of this notion. The sub-clauses define four different classes of information including, egregiously, “consultations regarding integrity matters, and information regarding integrity due diligence in investments and operations”.

Clause 56 is more profoundly problematical since it does not refer to any legitimate interest or standard of harm, instead simply referring to three types of communications involving Executive Directors. This should be removed and, instead, any sensitive communications of this sort should be covered by the exception on internal deliberations (or perhaps international relations).

Clause 57 is one of the more tightly drafted exceptions, protecting security, but again one of the sub-clauses, namely (iv), goes to far in protecting all “information about logistical and transport arrangements”, rather than just information the disclosure of which would pose a security or safety risk.

Clause 58 protects “personal information”. Better practice is to protect “privacy” rather than personal information. Not all information that qualifies as personal is private, and it is the latter quality that warrants protection from disclosure (clause 58 does also refer to the idea of privacy). As with other exceptions in the draft Policy, the sub-clauses set out class-based exceptions which go beyond the legitimate scope of privacy. While medical information is almost always private, the same is not always true of “personal staff records” and sub-clause (ii) specifically exempts, on a blanket basis, “information relating to staff appointments and selection processes, internal conflict resolution mechanisms, and investigations of allegations of staff misconduct”, which can certainly include non-private information.

Clauses 62 and 63 set out the public interest override for the policy. Unlike the policies of many IFIs, which allow for non-disclosure in the public interest, sometimes referred to as a reverse public interest override, the draft Policy provides for disclosure in the public interest only in a positive sense, which is better practice and in line with the vast majority of national laws in this area.

Despite this, there are problems with the way the public interest override is formulated. It incorporates several restrictive rules or qualifiers, such as being engaged only in “exceptional circumstances”, where disclosure is “likely to avert serious and imminent harm” or “imminent and significant adverse impacts”. International standards require only that the benefits of disclosure outweigh the harm. It applies only where there is a risk of harm to “public health, security” or “the environment”, thereby excluding commonly recognised public interests such as preventing human rights abuse or exposing corruption. Finally, the application of the override is discretionary, as the IIC “reserves the right to” and “may exercise” the override. In contrast, international standards require override provisions to be mandatory so as to ensure that they are applied appropriately rather than merely on a discretionary basis.

Beyond compliance with the three-part test for exceptions under international standards, the regime of exceptions has other problems. One is the use of the term “confidential”, which is not defined, as a basis for non-disclosure of information. Clause 15 provides generally that “confidential information” will be excluded from the list of information which will be proactively (routinely) disclosed. Clauses 22, 47 and 50 then specifically and unnecessarily repeat the idea that information which is confidential shall not be proactively disclosed.

Clause 61 states that “information of a confidential nature contained in joint IIC and IDB documents will be protected”, and that the “criteria for the application of this provision will be developed through implementation guidelines”. While it would be helpful to define confidentiality even in implementation guidelines, something as important as this should feature in the main body of the policy. Clause 64 calls for the classification of information based on its “public” or “confidential” nature”. Clause 73 is perhaps the most problematical one referring to confidentiality, since it appears to create a freestanding general exception, providing that IDB Invest may deny a request when it determines that the information is “confidential”. Clause 65 is more helpful, referring to the idea that information will be considered to be “confidential” based on the policy’s exceptions. The policy should make it clear that whenever it refers to confidentiality, this means confidential based on the regime of exceptions and not some other, potentially broader and more discretionary, notion of confidentiality.

Clause 66, titled ‘Historical Information’, is not actually about the disclosure of historical information but, instead, clarifies the point already set out in clause 5 (as noted above) to the effect that information produced or received by IDB Invest before the entry into force of the policy will be assessed based on the policy that was in effect at the time the information was produced or received. A true historical rule would recognise that the sensitivity of information declines over time and provide for the release of different types of otherwise exempt information after set periods of time, such as five, ten or 20 years.

Recommendations:

- The whole regime of exceptions in the draft Policy should be reviewed and amended, as necessary, to ensure that it protects only legitimate interests and incorporates clear and strong harm tests.
- The policy should protect the legitimate commercial and privacy interests of third parties against harm, but this should be based on an objective assessment of whether disclosure would cause harm, rather than the expectations of third parties, let alone through giving them a veto over the disclosure of information. Based on this, consultations with third parties about the disclosure of information should be aimed at facilitating the objective assessment and not at giving them a veto. Similarly, references to the “consent of the client” in the section on the proactive disclosure of information should be removed.
- The policy should additionally protect IDB Invest’s good international

relations with other States and inter-governmental organisations.

- Consideration should be given to removing all or at least most of the specific examples of exempt information listed in the sub-clauses of clauses 52-58 on the basis that most of them are not harm-tested and many go beyond the scope of legitimate interests recognised under international law or even in the hat of the clause in which they are situated.
- Clause 56 should be removed and the interests addressed there should instead be considered under other exceptions, including the new exception to protect international relations.
- Clause 58 should be amended to refer to “privacy” instead of “personal information”.
- The positive public interest override should be strengthened by removing the qualifications so that it applies whenever the benefits of disclosure outweigh the harm, by recognising a wider range of public interests that may trigger it and by providing for it to apply on a mandatory rather than discretionary basis.
- The policy should make it clear that any reference to the “confidentiality” of information means confidential in the sense of being exempt pursuant to the regime of exceptions in the policy. Classification should, similarly, be based on the same idea.
- Consideration should be given to putting in place a proper regime for the historical disclosure of information that creates a presumption that certain types of information shall be disclosed (i.e. that the exceptions shall no longer apply) after set periods of time (say of five, ten and 20 years).

4. Appeals

Successful RTI systems provide for an independent and effective system of appeals for requesters who feel that their requests have not been dealt with in accordance with the policy or law in question. Ideally, the appeals process before IFIs will be two-tiered, starting with an internal appeal to a more senior person or body and then allowing for an appeal to an independent external body that makes a final and binding decision on the matter.

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Clause 76 of the draft Policy appropriately provides for a two-tier system of appeals, first by a management created body (clause 77) and then by an “external panel independent of Management” (clause 78). Clause 78 states simply that the internal appeal is overseen by “a mechanism established by IIC Management”, without providing any detail as to what the mechanism will look like. It is important that the appeal is handled by a higher authority within the IIC so that it represents a genuine review of the original decision. Ideally, the policy itself would set out at least a framework for the membership of the internal appeal mechanism. As currently drafted, clause 77 states that a requester “may first opt” for an internal appeal, which is not entirely clear as to whether, as we presume, an internal appeal must precede an appeal to the external panel.

Clause 78 makes it clear that the external panel will be independent of management and that its decisions are final but provides no further details. It also fails to set out the powers of the panel during an appeal. Better practice is to make it explicit that the members of the external panel must meet minimum independence and competency requirements.

Several clauses – including clauses 13, 76, 78 and 79 – suggest that the right of appeal only arises where a requester has been denied access to information. Clause 77, on the other hand, uses broader language stating that the appeal will “confirm the correct application of the Policy and its exceptions”. Better practice is to provide for an appeal whenever a requester believes that a request has not been dealt with in accordance with any of the rules in the policy relating to requests.

Clause 79 provides that appeals must be lodged within 30 calendar days, while clause 80 provides for a 30-day limit for decisions by both the internal and external review panels, while also allowing for (unlimited) extensions to this. Given that IDB Invest will already have carefully considered a request at the first level (i.e. at the requesting stage), 30 days is unnecessarily long for processing an internal appeal. On the other hand, 30 days is rather short for an external appeal, which will involve an entirely new consideration of the matter and a number of logistical issues, presumably including bringing together the diverse members of the panel and potentially including translation. On the other hand, some maximum limit should be set for extensions at both levels of appeal.

Ideally, the policy should also make it explicit that both levels of appeal are free for requesters.

Recommendations:

- Consideration should be given to setting out at least a framework for the

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membership of the internal panel in the policy and to clarifying that requesters wishing to appeal must start with an internal appeal.

- Similarly, consideration should be given to setting out a framework of rules on both the appointment and powers of the external panel.
- The policy should make it clear that requesters may lodge an appeal whenever they feel that any of the policy's provisions governing the processing of requests has not been complied with and not just when a request has been denied.
- Consideration should be given to shortening the time limit for processing an internal appeal and to lengthening it for an external appeal, while overall limits on extensions for both types of appeals should be introduced.
- The policy should clarify that it is free to lodge an appeal.

5. Other Issues

Clause 81 of the draft Policy provides that the Finance and Administration Department is responsible for supervising implementation of the policy. That is positive but consideration should be given to creating a small dedicated unit within IDB Invest with a mandate to promote better practice internally with respect to implementation of the policy, to provide or support the provision of training to staff and to raise public awareness about the policy.

Clause 82 notes that the policy will be "subject to revision". Better practice is to indicate a specific timeline – for example of three years or not more than five years – for conducting a review of the policy, to ensure that this does actually take place in a timely manner.

Consideration should also be given to providing for sanctions, for example of a disciplinary nature, for staff who intentionally obstruct implementation of the policy. Unfortunately, this is a not an uncommon problem with these sorts of policies. Furthermore, it would be useful to provide for explicit protection for staff who release information in good faith pursuant to the policy. This helps give them the confidence to release information which may previously have been considered confidential.

Recommendations:

- Consideration should be given to establishing a small, dedicated internal unit within ADB Invest with a mandate to promote better practice

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implementation, to support training for staff and to raise public awareness about the policy.

- A time limit for conducting a review of the policy, say of three or four years, should be added.
- Consideration should be given to providing for sanctions for staff who wilfully obstruct implementation of the policy.
- Consideration should be given to providing protection for staff who release information in good faith pursuant to the policy.