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AND DEMOCRACY

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Analysis of the Proposal for the New Access to Information Policy

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Introduction¹

The Inter-American Development Bank (IDB) adopted its current Access to Information Policy (the Policy) in 2010.² Along with the Implementation Guidelines,³ the Policy provides the guiding framework for public access to information held by the IDB.

Since the IDB adopted its Policy, several other international financial institutions have adopted or revised their own policies, and the Policy is now out of date with better practice. Furthermore, access to information policies of international institutions generally lag significantly behind international standards for access to information, including in comparison to strong national right to information laws,⁴ again suggesting the need for a review. As such, we strongly support the process to revise the Policy.

Accordingly, the IDB's current ongoing process to revise the Policy is a very welcome development and provides an opportunity to strengthen substantially transparency at the IDB. This Analysis considers the 2022 Proposal for the New Access to Information Policy circulated for public consultation (the Proposal).⁵ It evaluates the Proposal against international standards for access to information and makes recommendations for further improvement based on that.

Overall, the Proposal would substantially strengthen access to information at the IDB. A number of changes appear to be informed directly by international better practice and the Proposal would remove some of the most problematic aspects of the current Policy. We thus welcome the main thrust of the Proposal. However, in some areas additional changes are warranted. This Analysis highlights the strengths of the proposed changes while also setting out specific recommendations for further improvement.

1. Principles and Scope of the Policy

Access to information policies should contain clear principles which reflect a commitment to the right to information, the importance of transparency and the benefits of openness, for

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² Available at: <https://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35167427>.

³ Available at: <https://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=37532979>.

⁴ CLD's RTI Rating, available at rti-rating.org, contains a comprehensive assessment of national right to information laws.

⁵ Available at: <https://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=EZSHARE-908968382-303>.

example in combatting corruption. Such principles can inform interpretation of the Policy and can send a message regarding its importance to Bank staff.

The Proposal revises the “principles” section (section 2), consolidating the language as compared to the current Policy. In general, this change creates a clear statement of principles and eliminates potentially harmful caveats that are better included in a precise articulation of exceptions. However, for the third principle, “explanation of decisions and right to review”, the language has perhaps been cut too much, leaving only a passing reference to the right to review in the heading.

While we appreciate the more concise revised section, the Policy could be improved by adding references to the overall benefits of access to information as well as the status of access to information as a human right. A benefits section can provide guidance to decision makers applying, for example, exceptions and the public interest override. Highlighting the role of access to information in combatting corruption and ensuring open debate about the activities of the IDB, for example, could provide important context. Similarly, referencing the human rights status of the right to information underscores that it is not merely a voluntary commitment of the IDB but a response to a more fundamental obligation. Such commitments are best placed in the “principles” section although potentially they could also be incorporated in the “objective” section.

Access to information policies should be broad in scope in terms of coverage of information and the bodies which make up the IDB.

The new Proposal states that it will apply to “all information in the Bank’s possession”. In comparison, the current policy only covers information *produced* by the IDB, only extending to information *possessed* by the IDB where such information is specifically referenced in the Policy.⁶ The new language is accordingly much stronger, making it clear that all information in the IDB’s possession falls under the scope of the policy. However, we recommend that the Proposal should also include language clarifying that “information” includes information held in any format. This makes clear that the full range of electronic, physical, audio-visual and other records can be accessed via the Policy.

Recommendations

- Overall, the changes to section 2 are positive, but should avoid trimming language on the importance of the right to review and should add additional language on the benefits of access to information and access to information as a human right.

⁶ Para. 1.2 of the Policy, as supplemented by the definition of information in the Implementation Guidelines at p. ii.

- The proposal to broaden the scope of the Policy to cover all information in the IDB's possession should be adopted.
- The Policy should specify that it applies to all information regardless of the format in which it is held.

2. Requesting Procedures

Clear rules on how to make and process requests ensure that making a request is accessible, including for requesters from diverse backgrounds and varying familiarity with the IDB. The Proposal provides substantially more detail on the requesting procedure than the Policy, including in the important area of timelines for responding to requests. These changes are welcome but additional adjustments to the Proposal could strengthen them further.

2.1. Making and Processing Requests

The current Policy does not provide any details on the procedure for making requests. Such details are instead found in the Implementation Guidelines.⁷ Better practice is to establish a basic framework of procedural rules in the policy itself, so as to ensure that the process is easy and accessible and to avoid “denial by procedure” scenarios where ambiguity in the process enables a culture of secrecy.

Accordingly, the new “Information Request Mechanism” section (section 7) in the Proposal is very welcome. It includes some highly positive provisions, such as an opportunity to submit requests in a wide variety of formats including at the various IDB offices (which presumably includes country offices), language on facilitating access for persons with disabilities and a specification that requesters need not give a reason for their requests. All of these features represent better practices.

At the same time, the following additional improvements would strengthen the new “Information Request Mechanism” section:

- Proposed section 7.1(c) states that anonymous requests will not be considered. Such a requirement is unnecessary and will potentially deter requests, particularly if the request relates to a highly sensitive matter.
- The Policy provides no guidance on fees or costs for accessing information. It should specify that there is no fee to make a request and then limit costs for providing information to the actual costs of reproducing and sending the information. This aligns with international better practice. Even if the IDB is not currently in the habit of imposing fees or excessive costs, encoding this in the policy is important.

⁷ Starting at para. 8.2.

- Proposed section 7.1(f) indicates that in responding to requests which may involve exemptions information the harm test shall be applied “as well as the procedure established in the Implementation Guidelines”. This language risks creating confusion. The intent of this provision is likely to ensure that those responsible for reviewing requests apply the harm test, a positive feature that should be retained. However, it does not fit here but in the parts of the policy dealing with exceptions. In addition, referring to Implementation Guidelines procedures in the same sentence risks implying that the Guidelines could alter the applicability of the harm test. We recommend removing this language.
- The proposed language on assisting persons with disabilities in filing requests (section 7.1(b)(3)) is welcome but a broader commitment to assist requesters would be better. For example, the Escazú Agreement calls for language on assisting persons or groups in vulnerable situations, including indigenous peoples and ethnic groups, in preparing requests.⁸ The IDB could also consider adding language to the policy to strengthen the ability of project impacted communities to file requests.
- The Proposal should make a commitment to provide assistance to requesters, or at least to seek clarification from them, in case of overbroad or unclear requests. In the absence of such language, the default approach to these requests may simply be to reject the request, which could disproportionately impact less educated requesters or those who are less familiar with the IDB.⁹

Some other changes are less important but could improve clarity and strengthen implementation of the Policy. For example, including the precise URL for the online form directly in the policy could be counter-productive, for example if it becomes outdated should the IDB restructure its website. The wording in proposed section 7.1(b)(2) could be clearer. Making a request “online” at the IDB’s offices does not make sense but perhaps means via email to individual offices such as country offices.

We also suggest removing the stipulation that only “information not available on the IDB’s institutional website” can be requested. Requesters should be encouraged to check the IDB’s website but a failure to find information on that website should not exclude them from making a request. In such cases, the IDB should direct the requester to the appropriate webpage. While seemingly a minor distinction, in practice our experience indicates that these kinds of additional grounds for denying a request may be applied too broadly. This change is particularly important for equity reasons, as persons without Internet access or with poor

⁸ Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, adopted 4 March 2018, in force 22 April 2021, Article 5(4).

⁹ Currently, para. 8.3 of the Implementation Guidelines state that the IDB reserves the right to refuse “unreasonable or unsupported requests” including multiple requests, blanket requests or requests that would require collation of data not already available in the IDB’s system. In our view, this is not proper even under the current Policy, because it effectively expands the grounds for refusing a request and is insufficiently precise. A better approach for dealing with unclear or ambiguous requests is reflected in our proposal here.

Internet access (such as those who only access the Internet through mobile data plans) may not be able to search easily for information on the IDB's website.

2.2. Timelines

Positively, the Proposal lists deadlines for acknowledging receipt of requests and responding to requests in the Policy itself, instead of leaving this to the Implementation Guidelines, which is the current approach. However, improvements could be made on the length of the deadlines. 30 calendar days is on the longer side. CLD's RTI Rating, which ranks country RTI laws, considers best practice here to be 15 days or less. Given that the IDB has been operating under a 30-day deadline for some time, it should consider reducing this deadline. For example, the IDB's reported average response time for non-historical requests in 2021 was 4 days for standard requests and 22 days for complex requests,¹⁰ suggesting the IDB has the capacity to handle a shorter timeline. A 15-day timeline, for example, would be feasible for most requests, with extensions used for more complex requests.

There are two problems with the special time limit for historical requests. First, this is defined far too broadly to cover all information which dates from before the adoption of the new policy. This is not appropriate. Historical information should be defined as information which is beyond a certain age (say 15 or 20 years) or at least as information which dates from before the adoption of the current Policy in 2010. Given that the current Implementation Guidelines already specify these 30 and 45 day deadlines, there is certainly no need to "reset the clock".

Second, 45 calendar days is an overly long deadline. While in 2021, the average historical request reportedly took 91 days,¹¹ this may be so high due to difficulties in consulting non-electronic records due to the COVID-19 pandemic. Regardless, 45 days is much longer than international better practice. We suggest a 30-day deadline, with the option of an extension.

Better practice is to require requests to be answered "as soon as possible", which is not mentioned in the Proposal. This makes it clear to IDB staff that they should not delay until the deadline to respond to a request.

Another issue is the lack of any limit on how long extensions may be. Clear limits on extensions are imperative to avoiding "denial by delay" scenarios. In Canada, for example, while extensions are supposed to be limited to certain circumstances and must be for a "reasonable period of time", extensions are very widely abused because of the lack of a fixed limit on extensions. There should be a maximum time limit for extensions; for example, a cap of 30 calendar days for extensions and perhaps a bit longer for historical requests. Notice of

¹⁰ IDB, 2021 Report on Implementation of the Access to Information Policy, p. 15, <https://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=EZSHARE-1494108453-501>.

¹¹ *Ibid.*

an extension should be provided before the end of the original timeline and should be required to include a rationale for the extension, requirements which are not mentioned in the Proposal.

Recommendations

- The new section 7 provides crucial guidance on the procedure for making requests and should be adopted. However:
 - The prohibition on anonymous requests in proposed section 7.1 should be removed.
 - A provision should be added which states that filing a request is free and that any costs for providing information will not exceed the cost of reproducing and sending that information.
 - Proposed section 7.1(f) should be moved, to the extent necessary, to the part of the policy dealing with exceptions and the reference to the Implementation Guidelines in this context should be removed.
 - Broader obligations to assist requesters should be added, including for persons with disabilities and where requests are unclear or ambiguous.
 - The stipulation in proposed section 7.1(b) that only information which is not available on the IDB's website can be requested should be removed.
- The new timelines in section 7 are welcome. However:
 - The IDB should consider reducing the timelines for both standard and historical requests.
 - Historical requests should at least be limited to those relating to information which is older than the current Policy.
 - The policy should require requests to be answered "as soon as possible".
 - The Proposal should be amended to impose an overall time limit on extensions, and to require notice of an extension to be provided before the expiry of the original time limit and to include reasons for the extension.

3. Exceptions

Clear and well-articulated exceptions are crucial to ensuring that only information the disclosure of which would pose a real risk to a legitimate interest is kept secret. Exceptions should then be applied in accordance with a “harm test” and “public interest override” as explained below. This section discusses the regime of exceptions in the Proposal, including its harm test and public interest override. It then examines how the Proposal would handle third-party information, an issue that can undermine even a strong regime of exceptions.

3.1. Exceptions



The Proposal restructures the exceptions to disclosure, establishing six exceptions rather than the current ten. Overall, the revisions to the exceptions are a very welcome development, cutting some problematic language and clarifying ambiguities. They also indicate a shift towards a regime of exceptions based on concrete protected interests rather than categorical exclusions of certain types of information. Some additional changes could further advance this shift, however.

We support the removal of the four exceptions omitted in the proposed Policy for the following reasons:

- *Communications involving Executive Directors*: A blanket exclusion for communications involving Executive Directors is not appropriate. Other exceptions for privacy and for deliberative information are sufficient to protect the need for confidentiality of Bank employees and a space for debate and internal discussion. Exceptions should also not specially privilege the communications of higher-level staff; if anything, those whose decisions are especially impactful should be subject to greater public scrutiny.
- *Corporate administrative information*: This exception covers information related to the IDB's own corporate expenses, real estate or procurement processes. Transparency around the IDB's own expenditures and real estate is important. Where disclosure could pose a legal or financial risk to the IDB, other exceptions would apply. Although the World Bank has this exception in their policy, other international financial institutes do not, demonstrating that it is not necessary.¹²
- *Country specific information*: This exception is far too broad, referring not to an interest to be protected but, instead, a category of information. It effectively gives countries a veto over disclosure and duplicates concerns addressed by the exception for information provided in confidence, discussed below. Notably, the policies of other major international financial institutions do not include such an exception.
- *Information related to non-sovereign guaranteed operations*: As with the country specific information exception, this exception is not present in the policies of other major development banks. It is also problematically deferential to third parties. Operations involving non-sovereign borrowers should be subject to transparency requirements and any confidentiality concerns related to sensitive financial or other interests should be addressed by other exceptions, alongside a proper procedure for consulting with third parties.

In addition to the above exceptions, the Proposal eliminates Annex 1, which contains a list of specific information that will not be disclosed. We also commend this change. By listing specific documents in Annex 1, the Policy effectively excludes the application of the harm

¹² See Asian Development Bank, Access to Information Policy, 2018, section III(B), <https://www.adb.org/sites/default/files/institutional-document/450636/access-information-policy.pdf>; and EIB Group, Transparency Policy 2021, sections 5.3-5.15, https://www.eib.org/attachments/strategies/eib_group_transparency_policy_2021_en.pdf.

test and public interest override to them, which should always apply. Furthermore, as previously noted, Annex 1 does not reflect a proper approach to exceptions, focusing on certain types of documents rather than on the potential harms caused to protected interests if information is released.

The Proposal also revises the remaining exceptions. We briefly offer some comments and recommendations on the revisions, as well as the scope of the exceptions in the current Proposal. A consistent problem is creating exceptions for information the disclosure of which would “affect” the protected interest. A less neutral word which indicates harm (such as “compromise”, “damage” or “harm”) should be the default. Although there is a separate section dealing with the harm test, the addition of harm-based language here will help clarify that it applies.

We offer the following thoughts on the specific exceptions in the Proposal:

- *Personal information and communications*: The new language is more precise, protecting information which affects the privacy of individuals instead of a more general reference to protecting the confidentiality of personal information. This is a positive change, as it focuses the exception on a key protected interest, namely privacy. The footnotes also reference the IDB’s Personal Data Privacy Policy, more precisely articulating the interaction between the two policies.
 - As a drafting recommendation, it should be clear that the reference to “including personal information and communications...” refers to kinds of information which may raise privacy interests rather than a new exception. In other words, the information should still harm the privacy of individuals for this exception to apply. For example, the English wording could read: “Information, such as personal information and communications of Bank staff and any other individual, shall be protected if its disclosure would compromise the privacy of individuals”.
 - The reference to “affect” privacy should be replaced by a harm-based term.
- *Safety and security*: This exception now references the safety or security of any individual, and not just IDB staff and contractors. This change is positive as it could provide protection for people such as those who were impacted by development projects and who engage with the IDB, such as those participating in stakeholder consultations.
- *Information provided in confidence*: The proposed changes to this exception are overall positive, limiting the scope of the exception to information which was not created by the IDB, which was not made public by the supplier, and which the third party supplier has identified as confidential. However, this exception does not refer to an interest that needs protection but, instead, a category of information. As such, it is not clear how the harm test stipulated in section 4.2 could be applied here. This exception should instead focus on information which could cause harm to specific legitimate



interests of third parties, such as commercial or financial interests, rather than on the fact that it was provided in confidence. For example, the new policy of the European Investment Bank exempts information the disclosure of which would undermine the protection of commercial interests, listing as an example information covered by a confidentiality agreement or in relation to which a third party has a legitimate expectation of non-disclosure.¹³

- This exception should also be accompanied by a clear procedure for consulting with third parties, an issue which is discussed further below.
- Language should be added here which clarifies this information should be disclosed if the third party consents to its disclosure.
- *Deliberative information*: The Proposal adds important clarifying language to the exception, so that instead of covering all internal deliberations, it only covers information the disclosure of which would affect the integrity of the decision-making process. The new language also specifies that the final decisions and outcomes of deliberative processes will be made public when the deliberative process has been concluded. Such clarifications are positive.
 - However, “affect” should again be replaced by a harm-based term.
- *Financial information*: The Proposal also strengthens the wording of this exception. It eliminates the problematic reference to information to which financial markets “may be sensitive” in the current Policy.
 - Here again “affect” should be replaced with a non-neutral word such as “harm”.
- *Legal, disciplinary or investigative matters*: The Proposal reworks the current exception, which contains a general exclusion for information which is subject to legal advice, attorney-client privilege or matters which are in legal dispute or under negotiation. The new language creates an exception if the disclosure will *affect* attorney-client relations or matters in legal dispute or negotiation. Generally, this is an improvement although, again, “affect” should be replaced with a harm-based term. However, we believe it is still too broadly worded, as follows:
 - We recommend against replacing “attorney-client privilege” with “attorney-client relations”. “Relations” is too broad; read expansively, it could encompass a large amount of internal communications involving Bank counsel, for example. We suggest replacing “affect attorney-client relations” with “violate attorney-client privilege” or some similar formulation.
 - On the other hand, a consistent problem in the access to information context is when governments or institutions abuse exceptions protecting attorney-client privilege, for example by including a lawyer on correspondence to engage this exception. Attorney-client privilege should be understood in a strict sense. For this reason, we support the Proposal’s elimination of the exception for “legal

¹³ EIB Group Transparency Policy, note 12, para. 5.5.

advice” which, like “attorney-client relations”, could be interpreted too broadly. It may also be worthwhile to provide more precise guidance on the interpretation of attorney-client privilege in the Policy, for example by noting that it should be interpreted in a strict sense and should not apply to policy advice given by lawyers which does not relate to a specific legal process.

- The IDB may wish to consider the language in the European Investment Bank’s new policy, which does not explicitly reference attorney-client privilege and instead applies where disclosure would undermine the protection of “court proceedings and legal advice”.¹⁴ The former has the advantage of avoiding an unduly broad definition of the scope of attorney-client privilege. However, the reference to “legal advice” is problematical although it is at least accompanied by a harm test.

3.2. Harm Test and Overrides

International standards on the right to information call for exceptions to be applied in accordance with a “harm test” and a “public interest override.” This means:

- Information should only be withheld when its disclosure poses a specific risk of harm to an interest protected by an exception.
- Any public interest benefits of disclosure should be identified and, where these override the harm, the information should be released (the so-called “public interest override”).

A positive feature of the Proposal is that it would bring the IDB’s approach on these issues more closely into line with international standards. Under the current Policy, there is no general harm test which applies to each disclosure decision. Instead, the Policy treats many exceptions, along with the documents in Annex I, as a situation where a risk of harm is automatically presumed to exist. While the Policy creates a positive override, it is limited to a few exceptions. Even more problematically, the Policy establishes a negative override, allowing the Access to Information Committee to refuse to disclose information which would normally be available. Such a “negative override” is not consistent with access to information standards and creates an unacceptably sweeping avenue for maintaining secrecy.

The new Proposal makes substantial progress towards correcting these problems. It inserts a new “harm test” at section 4.2 so that, when applying an exception, the IDB will consider whether there is a substantial and identifiable harm, a strong standard. Section 4.2 then requires an evaluation of whether the identified harm outweighs the benefit of disclosure and whether keeping the information secret is the most suitable way to prevent the identified harm. Furthermore, the Proposal eliminates the negative override. It also cleans up some

¹⁴ EIB Group Transparency Policy, note 12, para. 5.6.

problematic language in the positive override and expands its scope to all exceptions. These changes are all very welcome.

However, some further improvements should be considered. The positive override still does not constitute a proper public interest override. Instead, it merely refers to “benefits” which outweigh the potential harm. Left undefined, “benefits” could be read to refer to benefits to the IDB, for example, instead of the public interest. Information disclosing evidence of mismanagement or corruption may be of very high public interest but its disclosure could be seen as not benefiting the IDB, because it could harm the IDB’s reputation or operations. Without a clear reference to public interest considerations, the positive override may not serve its proper function, which is to ensure the disclosure of information of overriding public interest.

Second, the Proposal creates some confusion regarding the public interest override by including it both in the second part of the harm test in section 4.2(b), which the IDB is supposed to apply routinely when responding to information requests, and then again in section 5.1. The section 4.2(b) rule is substantially better than the one in section 5.1, inasmuch as it applies at the stage of the original decision on disclosing information and mandates disclosure whenever the harm does not outweigh the benefits of disclosure. However, this double-barrelled approach is confusing.

Third, the section 5.1 override is applied only by the Access to Information Committee (or the Board of Executive Directors in some cases). It is not clear how this could work in practice. Presumably some procedure for referring cases which appeared to raise important public interest benefits to the Committee would need to be put in place, which is at best an awkward way of dealing with this. Better practice, as reflected in the vast majority of national right to information laws, is for the public interest override to be applied at the time of the initial decision on the applicability of the exceptions, by the original decision-maker who makes that decision (usually an information officer). We strongly recommend that this approach be incorporated into the IDB policy. If there are concerns that the public interest override will be applied too liberally by the original decision maker, not a concern that finds support in the extensive practice on this at the national level, a special procedure could be put in place to refer borderline decisions on this to the Committee.

Fourth, the positive override should be amended to avoid treating it as such an exceptional and limited measure. While the Proposal provides that the positive override applies on an “exceptional” basis, instead of an “extraordinary” basis as in the current Policy, this is still unduly restrictive. Instead, the override should apply whenever the public interest benefits of disclosing information outweigh the harms. In addition, the Proposal indicates that the IDB “may” apply the override; instead, it should apply mandatorily whenever the public interest benefits outweigh the harm.



Fifth, section 5.1 establishes that the positive override will not apply when information has been provided “under an express restriction of disclosure”. This should be removed. The public interest override should very specifically override expressions of confidentiality by third parties, just as it overrides harms to other interests, including privacy, for example. If removing this provision is not deemed to be possible, we recommend that it be narrowed to apply only when an express confidentiality agreement regarding the information exists.

3.3. Third Party Information

Where third parties can effectively veto the disclosure of information, this essentially acts as an exception to which neither the harm test nor public interest override apply. While third parties may have legitimate confidentiality or other interests that justify non-disclosure, they should not be able unilaterally to prevent disclosure. Unfortunately, the current Policy is both overly deferential to third party preferences for non-disclosure of information and fails to establish clear procedures for consulting with third parties.

The Proposal appears to recognise this problem. It introduces a new distinction, in section 3.2, between “proprietary country or client information”, meaning information generated by borrowers and clients of the IDB and provided as part as part of preparations for investment projects, and information produced by the IDB which a member country believes should be protected. For the first category of proprietary information, the opinion of borrowers and clients will be “taken into account” when making decisions related to disclosure. For the second category, member countries can provide written notice to the IDB giving reasons for non-disclosure, and the harm test “will be observed”.

While section 3.2 is a step in the right direction, much greater clarity is needed on how the concerns of third parties will be used and particularly around whether third party preferences against disclosure will be determinative. Section 3.2(a) indicates that the views of third parties will be “taken into account”; it should be clarified that this means what it appears to say and that their views will not be treated as determinative or as a veto and that the normal standards for withholding information, namely the presence of a risk of harm to a protected interest which is not outweighed by the public interest in disclosure, will be applied. Concern on this front is significantly exacerbated by the exception in section 4.1(c), which does effectively allow third parties to veto the disclosure of information simply by identifying it as confidential (which we recommended above should be removed).

The policy should also establish clear procedures for consulting with third parties about information disclosure. Creating a clear procedure will allow third parties to consent to disclosure where they are not concerned about this, thereby facilitating appropriate openness, and will ensure consistency in obtaining the views of third parties regarding disclosure. Such a procedure could be incorporated into the procedure outlined in the section



7 “information request mechanism” and should include clear timelines for such consultations.

Recommendations

- The proposed removal of four exceptions and the current Annex 1 should be adopted. The changes to the remaining exceptions are also largely positive, but references to disclosures which would “affect” an interest should be replaced with a harm-based term. In addition:
 - The proposed exception for information provided in confidence should be re-written to focus on information the disclosure of which would harm third party commercial (or potentially other) interests.
 - The IDB should retain the reference to attorney-client privilege instead of replacing it with attorney-client relations, and should consider further revising this exception to clarify its scope.
 - The other more minor language tweaks mentioned above should be considered.
- The proposed harm test, elimination of the negative override and elimination of certain restrictions on the positive override are all highly positive changes and should be adopted. However, we also recommend:
 - The positive override should be converted into a true public interest override.
 - The positive override should be applied when making initial decisions about disclosure instead of only by the Access to Information Committee and it should be mandatory rather than discretionary and exceptional so that it applies whenever the public interest in disclosure outweighs the harm.
 - The exclusion of the public interest override for information provided under an express restriction of disclosure should be removed.
- The Proposal's approach to third party information or information impacting the interests of third parties should be revisited as follows:
 - It should be made quite clear that the approach in section 3.2(a), whereby input from third parties is taken into account, does not avoid the application of the normal standards for exceptions, namely the harm test and public interest override (i.e. third parties should not have a veto over disclosure).
 - Clear procedures should be established for consulting with third parties.

4. Appeals and Governance

Creating the appropriate institutional structure to support implementation of an access to information policy is crucial. This includes an appropriate system of appeals. The current Policy establishes an interdepartmental Access to Information Committee, effectively an internal appeal within the IDB, and an external appeal to an independent External Panel.

Such an approach aligns with better practice but the precise governance structure for access to information is poorly defined in the current Policy. The Proposal takes important steps to address this.

4.1. Governance

The Proposal includes a new “Governance” section (section 9) which, overall, creates a much stronger institutional grounding for the Policy. Notably, it would enshrine the Access to Information Office as a central technical unit responsible for coordinating implementation of the Policy. Offices or central units of this nature have been crucial for insuring implementation of access to information laws or policies in other contexts.

The proposed Governance section also provides greater details on the structure of the Access to Information Committee and the External Review Panel. Positively, the Access to Information Committee now has an expanded mandate, with powers to oversee general application of the Policy and interpret the Policy.

Section 9 also provides greater guidance on the structure of the External Review Panel, which is only briefly mentioned in the current Policy. For example, the Policy now clearly articulates that the Panel will be “independent of Management”. Appointment procedures and tenure details currently contained in the Implementation Guidelines are also now incorporated into the Policy itself, which is better practice for protecting the independence of an external body. These procedures could be further strengthened by providing protection against arbitrary removal of panel members, since currently it is ambiguous whether the IDB can remove a panel member before the end of the three-year term.

4.2. The Appeals Process

The current Policy does not include details about the procedures for appeals. The Proposal somewhat addresses this gap, providing a 30-day timeline for the decisions of the Access to Information Committee and External Review Panel, and requiring written notice in case of extension. This is an important and welcome addition. However, we recommend that limits be established for extensions to the 30-day timeline, just as for responding to requests. Some additional details would also be valuable. For example, the Policy should clearly state that the decision should be in writing and accompanied by reasons, as well as (in the case of the Access to Information Committee) instructions on how to appeal to the External Review Panel.

The power to appeal to the Committee is limited to cases where requests have been denied; we recommend that this be expanded to cover all claimed breaches of the Policy relating to requests. This would enable requesters to challenge other implementation problems, such as



a failure to disclose within the required timeline. The same should apply to appeals to the Panel, which should be available for all claimed breaches of the Policy relating to requests.

Unfortunately, the Proposal retains the ban on the Panel reviewing decisions of the Access to Information Committee regarding the use of the positive override. As previously noted, a proper public interest override should be integrated into the decision-making process at all stages and this should also apply to appeals. This is, however, essentially dependent on making the other changes to the positive override discussed above, especially converting it from an exceptional discretionary process to a mandatory one. In the alternative, if the IDB still does not want to grant the External Panel full powers to review decisions relating to the positive override, it could empower the Panel to make recommendations in this area, subject to a final decision of the Board of Executive Directors.

Recommendations

- The new Governance section is a positive addition. The IDB should also consider adding protections for Panel members against arbitrary or retaliatory removal before the end of their term.
- Timelines for the appeals process, along the lines of those in the Proposal, should be adopted, along with overall time limits for extensions to those time limits. Requiring appeals decisions to be in writing and accompanied by reasons should be considered.
- Requesters should have a right to lodge appeals about any violation of the Policy relating to requests, not just denials, before both the Access to Information Committee and the External Review Panel.
- The Panel should have the ability to review decisions not to apply the positive override. In the alternative, the Panel should be able to make recommendations in this area, subject to a final decision by the Board of Executive Directors.

5. Proactive Disclosure

The current Policy only addresses proactive disclosure in a limited manner, via a simultaneous disclosure requirement for certain Board documents when they are disclosed to the Board of Executive Directors. While the Implementation Guidelines take note of routinely disclosed documents and contain a sample non-exhaustive list of such documents, overall no proper proactive disclosure policy framework currently exists.

The new Proposal contains stronger commitments in principle to proactive disclosure. The “principles” section now explicitly commits to maximising proactive disclosure, while the explanatory background to the new Proposal also notes the importance of proactive disclosure. Section 6.2 of the Proposal also attempts to streamline the simultaneous disclosure



requirement, which currently includes some clunky and ambiguous language, and positively adds a specific reference to routine disclosure.

Unfortunately, however, the Proposal fails to establish an adequate proactive disclosure framework and may even weaken the current simultaneous disclosure requirements. Section 6.2 of the Proposal simply states that within the information classified as public, the IDB will disclose “certain information” via simultaneous disclosure when it is distributed to the Board of Executive Directors. This is very ambiguous as to its scope although a footnote provides a list of examples. The current Policy is also ambiguous, with a heading that refers to “simultaneous disclosure of certain Board documents”. Within this heading, however, it states that information sent by Management to the Board of Executive Directors and classified as “Public” *will* be simultaneously disclosed, subject to some more detailed guidance on specific types of documents. If anything, the new language seems to soften this requirement.

The intent of section 6.2 of the Proposal is likely to streamline the language around simultaneous disclosure, a needed reform which if done correctly could expand the scope of proactive disclosure. Unfortunately, however, the current language is too ambiguous to ensure rigorous proactive disclosure. Instead, the Proposal should clarify the simultaneous disclosure procedure, for example by creating a clear default presumption of simultaneous disclosure for documents classified as public when they are shared with the Board of Executive Directors.

Similarly, instead of merely referencing routine disclosure, the policy should make specific commitments in this area. One option is to include a partial, non-exhaustive list of documents, similar to the one currently contained in the Implementation Guidelines, in the text of the Policy itself or in an annex. Another option is to provide a list of categories of information that should be released. The policy could use both of these approaches, with a list of documents subject to routine disclosure alongside with a non-exhaustive list of categories of information to be disclosed. The policy should also establish timelines for routine disclosure, such as “as soon as possible but no later than five working days” after the document is finalised or otherwise approved for public distribution.

Finally, the IDB should consider incorporating proactive disclosure into its references to information on environmental and social impacts and risks, information in relevant local languages, information on development results and information on procurement in section 3.1. Potentially, the interaction of proactive disclosure requirements with other policies such as the Environmental and Social Policy Framework could be handled in the Implementation Guidelines, but these all relate to kinds of information where transparency is especially important and affirming routine disclosure of such documents in the Policy itself could be useful. For example, while Annex 1 refers to disclosure of certain environmental and social information, it fails to specify clearly that such information will be proactively disclosed.



Recommendations

- While retaining a more streamlined approach to simultaneous disclosure, section 6.2 should be reviewed and amended to establish a stronger framework for proactive disclosure, including to:
 - Create a default presumption of simultaneous disclosure of documents classified as public when they are shared with the Board of Executive Directors.
 - Provide for specific routine disclosure requirements, including timelines (“as soon as possible” and within a set period) and guidance on routine disclosure, preferably through a list of specific documents to be disclosed and/or a non-exhaustive list of description of categories of information to be disclosed.
- Consider clarifying the interaction of proactive disclosure requirements with the information and policies mentioned in section 3.1.

