

# Observations on the European Bank for Reconstruction and Development's Draft Access to Information Policy and Directive

May 2024



Centre for Law and Democracy  
info@law-democracy.org  
+1 902 431-3686  
www.law-democracy.org

These Observations<sup>1</sup> were prepared in response to the European Bank for Reconstruction and Development's (EBRD's or Bank's) public consultation on its 2024 draft Access to Information Policy (draft Policy) and draft Directive on Access to Information (draft Directive),<sup>2</sup> which, when finalised, will replace the current Policy (and Directive), which dates from 2019.<sup>3</sup>

Overall, the new draft Policy introduces some significant improvements, particularly in terms of tightening the language around exceptions and abolishing the negative public interest override, something the Centre for Law and Democracy (CLD) has often called for in the context of international financial institutions (IFIs). At the same time, there remain serious problems with the regime of exceptions, including a lack of clarity around the standards actually being proposed, as well as a number of other areas where tweaks and greater clarity are needed.

Thus, while the draft Policy is a step in the right direction, additional reforms are needed to bring the Policy more fully into line with international standards. These Observations make

---

<sup>1</sup> This work is licensed under the Creative Commons Attribution-Non Commercial-ShareAlike 3.0 Unported Licence. You are free to copy, distribute and display this work and to make derivative works, provided you give credit to Centre for Law and Democracy, do not use this work for commercial purposes and distribute any works derived from this publication under a licence identical to this one. To view a copy of this licence, visit: <http://creativecommons.org/licenses/by-nc-sa/3.0/>.

<sup>2</sup> Information about the consultation process, as well as the new proposed (draft) documents is available at <https://ebrd.com/esp-aip-overview.html>.

<sup>3</sup> The current Policy and Directive are available at <https://www.ebrd.com/what-we-do/strategies-and-policies/access-to-information-policy.html>.

recommendations accordingly, focusing on Principles and Scope, Procedures for Requests, The Regime of Exceptions, Appeals, and Other Issues.

## Principles and Scope

Section I of the draft Policy sets out a number of positive “purposes” of the Policy, referring to ideas such as accountability, improving dialogue with affected stakeholders, fostering good governance, supporting an economically and environmentally sustainable transition, promoting awareness of the Bank’s operations and improving the public’s ability to participate in Bank consultations. It also recognises the right to access information, including as an enabling right for other human rights. This is supported by the principle of Transparency in Section III.1.1, which sets out the principle of maximum disclosure, and the principle of Accountability, in Section III.1.3, which reiterates many of the wider purposes found in Section I. This is all very positive although it would be preferable if the policy also included a requirement to interpret its provisions so as best to give effect to those wider purposes and principles. Otherwise, the relevance of referring to them in the policy is not very clear.

In terms of the scope of the draft Policy, we assume that anyone may make a request for information, although this is not stated explicitly (instead, Section III.5.1 simply refers to “all requests for information” without indicating who may make such a request). We also assume that the draft Policy is intended to apply to all parts of the Bank’s operations although, again, this is not actually stated.

In terms of the scope of the draft Policy in terms of information, Section III.1.1, setting out the general principle of Transparency, refers to “information relating to the Bank’s Operations and Activities” (while these terms are defined in Section II). For its part, Section III.5.1, referring to requests for information, does not additionally define the scope of information covered, so that the scope set out in the principle of Transparency would appear to be the defining concept here. An “operation” of the Bank is defined as “any equity, loan, guarantee or borrowing transaction of the EBRD in accordance with the Agreement Establishing the EBRD”. The latter qualification raises questions as to whether, should the Bank provide a loan or guarantee that was not in accordance with the Agreement, information relating to this activity would be excluded from the scope of the policy. For its part, an “activity” of the Bank is defined as “technical assistance, advisory services, policy dialogue and cooperation, financed and/or implemented by the EBRD, or governance, administration and decision-

making processes of the EBRD ". This appears to be relatively broad but it might still exclude certain types of activity undertaken by the Bank.

A much preferable approach here would be to allow requests for any information which is held by or is accessible as a matter of law to the Bank. In such cases, we may assume that the information relates to the Bank's operations, understood broadly, and, as such, should be covered by the policy. This is the approach taken in better practice national access to information laws. It is simple, easy to apply (since neither Bank officials nor information applicants need to assess factors such as whether the information relates to certain kinds of services or operations of the Bank) and appropriate, as demonstrated by the experience of countries which rely on a similar definition.

## Procedures for Requests

The main provision in the draft Policy on procedures for responding to requests is Section III.5.1, as supported by Section IV.2 of the draft Directive. These rules have a number of positive features, such as the facility to submit requests in any official language of an ERBD recipient country, the ability to submit requests in various ways and the fact that the provision of information shall not incur any fees, which we will not elaborate on here, since our focus is on recommendations to improve the draft Policy and Directive.

Section III.5.1.ii of the draft Policy, along with Section IV.2.2.ii of the draft Directive, require requests to be "as clear and precise as possible" and then provide that if a request is insufficiently clear, the Bank may ask the requester to clarify. This is not inappropriate although it would be preferable simply to require requests to be sufficiently clear to enable the Bank to locate the information requested (which is a lower standard than "as clear and precise as possible"). Also, when asking for clarification, the Bank should also offer assistance to the requester since, oftentimes, requesters face challenges in clarifying their requests which simple advice from inside the Bank can resolve.

Section III.5.1.iii of the draft Policy indicates that the Bank is not required to "create or develop information or data that does not already exist or is not available in the Bank's record keeping systems" to respond to a request. This is again not inappropriate. However, it would be useful to clarify in the policy that this does not apply to situations where the Bank can, using automated tools, extract, using a reasonable amount of effort, the sought-after information from information or data it holds.

Section III.5.1.iv of the draft Policy provides for responses either to provide the information or to deny the request. But Section III.2.6 envisages a third type of response, namely a deferral, and this should also be reflected in Section III.5.1.iv. The same provision provides that, in case of refusal, the notice shall set out the reasons for this. This is helpful but such a notice should also include information about the right of the requester to appeal against the refusal (see also Section III.2.2.iii of the draft Directive).

Section III.2.2.i of the draft Directive provides for acknowledgement of requests, which is positive. It also provides for these “generally” to be provided within five working days, but in any case within ten working days. Many national access to information laws provide for five working days for acknowledgements and it is not clear why an additional five working days might be needed for something as simple as this.

Section III.2.2.iii of the draft Directive provides for responses to requests to be provided within 20 working days, which may be extended, with notice being provided within 10 working days, for another 20 working days. Consideration should be given to requiring requests to be responded to as soon as possible and also to reducing the initial (presumptive) period for responding to requests to 10 working days, in line with best practice at the national level. In addition, while it is sometimes appropriate to extend the initial period, conditions for this should be incorporated into the policy, such as that the request requires a search through a large number of records or consultation with third parties.

Section III.1.6 of the draft Policy, setting out the Principle of Accessibility, indicates that the Bank will “use its best effort to disclose information in a form and manner that is accessible and user friendly”. This is positive although it is not entirely clear that it applies to disclosures of both a proactive and reactive nature (i.e. responding to requests), especially since the second paragraph of that provision focuses only on proactive disclosure. In addition, better practice is to go beyond a general commitment in this area and instead to require the Bank to provide information in the format stipulated by the requester, subject to this not being unduly onerous for the Bank or harmful to the record.

Section III.5.1 of the draft Policy states that, in “case of a denial, the reasons for the decision shall be given”. This is positive. However, it would be useful to additionally specify that this applies to denials in whole or in part, and that where information is redacted the reasons for each separate redaction should be provided.

## The Regime of Exceptions

While our concerns with other parts of the draft Policy and Directive are mostly fairly minor in nature, we have more profound concerns with the regime of exceptions. Despite exemplary statements about the standards for exceptions in Section III.1.2 of the draft Policy, containing the principle of Limited Exceptions to Disclosure, and in the chapeau to Section III.2 of the draft Policy, prefacing the main section on exceptions, the substance of the actual provisions on exceptions does not align with those standards. Indeed, despite the principled commitment to “clear and well-defined exceptions” based on harm and a public interest override, in many cases exceptions are not well defined and cover whole categories of information, thereby avoiding any assessment of harm, while in some cases they even grant a veto over disclosure to different parties, which again is not a harm-based approach.

Decisions about exceptions should, instead, be based on an individual assessment of each request. Under international standards, the proper analytical framework for applying an exception to disclosure is as follows:

- Determining that the information falls within the scope of a legitimate protected interest that is specified in the regime of exceptions.
- Determining that disclosure of the information would pose a real risk of harm to the identified interest (the “harm test”).
- Determining that any public interests that would be fostered by disclosing the information are overridden by the harm that this causes (the “public interest override”).

Section III.1.2 and the chapeau to Section III.2 of the draft Policy both articulate clearly the harm test and public interest override. For example, Section III.1.2 indicates that exceptions will only be applied where “there is a reasonably foreseeable harm from disclosure that would outweigh the benefits” and a similar statement is found in the chapeau to Section III.2. However, the latter states that the exceptions are “based on” that idea rather than that the exceptions apply only to the extent that those standards are observed, and the last sentence in that provision refers to “categories of information” which are not disclosed, rather than types of interests which apply only subject to the standards set out in the chapeau. We assume that the specific language in the provisions on exceptions underneath that chapeau prevails and, indeed, we deem that to be the only logical way to interpret the draft Policy. In addition to the language of the chapeau of Section III.2, there are a few additional reasons for this conclusion, including that many of the specific exceptions refer to categories of information and not interests, such that it is not actually possible to apply a harm test to them, that other exceptions do not include any harm test, that some effectively extend a veto to various parties

to prevent disclosure of information (which is entirely incompatible with the notion of a harm test), and that even where exceptions do incorporate a harm test, these vary considerably in terms of their nature and strength.

As part of our analysis of the purpose of the positive language in Section III.1.2 and the chapeau to Section III.2 of the draft Policy, we also note that the language of the specific provision on the public interest override in Section III.3 is utterly inconsistent with that language (see below for our detailed analysis of this). Once again, we assume that the former is the operative provision, given that it focuses explicitly and exclusively on the public interest override. As such, we have to conclude that the positive language in Section III.1.2 and the chapeau to Section III.2 of the draft Policy is merely window dressing and that it does not actually apply in an operative manner to the exceptions.

This would not matter if each specific exception (and the public interest override provision) set out appropriate standards for the non-disclosure of information. This is, however, far from the case. We have the following concerns with the specific provisions on exceptions:

- The chapeau to Section III.2.1 reiterates an appropriate harm test for the type of interests it covers (i.e. deliberative information). However, the last sentence here, which introduces the specific elaboration of this exception, states that this “includes”, suggesting that what follows should be treated as specific elaborations of examples of this type of exception. The nature of those specific exceptions is incompatible with the introductory statement of harm, with some referring to categories of information rather than interests and others allocating a veto to various parties.
- Section III.2.1.i refers to various types of information “intended for internal deliberations” or for “audit matters”. These are categories of information and not interests which might be protected. As such, the harm test cannot sensibly be applied to them. The same criticism applies to Section III.2.1.v (referring to virtually all types of internal communications).
- Section III.2.1.ii refers very broadly to Board of Directors documents, with the exception of agendas, minutes and documents “expressly approved for disclosure by the Board of Directors”. This is the very opposite of a presumption of disclosure and is, instead, a presumption of non-disclosure (which only the Board of Directors can override). And, once again, it does not refer to any interest which might be protected against harm.
- Section III.2.1.iii refers very broadly to Board of Governors documents, with the exception of agendas, summary records of proceedings of meetings and Governors

statements and resolutions. This is, once again, the very opposite of a presumption of disclosure which also fails to refer to any interest which might be protected against harm.

- Section III.2.1.iv refers to two broad categories of information. The first – “information in connection with deliberation, advice and decision-making between the EBRD, EBRD members and/or donors or other parties the EBRD co-operates with” – is another category of information rather than an interest. The second – “any other information which, if disclosed, in the Bank’s view would seriously undermine policy engagement and dialogue with a member country” – does refer to a harm, which is positive. It is unclear, however, why this is qualified by the idea that the harm needs to be assessed “in the Bank’s view” rather than as an objectively existing harm (which of course procedurally would first stand to be assessed by Bank staff).
- Section III.2.2.i refers to a very broad range of financial information. Instead of establishing a harm-based exception, this provision even goes beyond a broad veto in favour of any “entity or entities concerned”, and requires their positive permission to disclose. This does not even require the information to have been provided by those entities. Although the footer to Section III.2.2 does require the information to be “in relation to, from, or on behalf of” a number of categories of entities, this broad formulation hardly limits the scope of this extremely broad exception.
- Section III.2.2.ii, in contrast to Section III.2.2.i, is at least limited to information which was not created by the Bank, but again extends a veto over disclosure to the party having provided the information. This applies where the originator has either identified the information as confidential or “legitimately requested” that it not be disclosed. While some form of harm might be read into the notion of a legitimate request for confidentiality, this does not apply to cases where the originator has identified the information as confidential.
- Section III.2.2.iii refers to financial information relating to procurement processes and, as such, once again refers to a category of information rather than an interest which needs to be protected against harm.
- Section III.2.3.i appears to be aimed at legally privileged information but it goes very far beyond the proper scope of this notion to cover any correspondence with legal advisors (noting that, unlike regular clients, the Bank may engage in correspondence with its legal advisors about any issue at all, including policy issues which have nothing to do with legal privilege), as well as any other form of “professional secrecy”, something which is not covered by national access to information laws. This is at least

qualified by a general harm test referring to prejudice to an investigation or legal proceeding, or "undue risk" in litigation or arbitration.

- Section III.2.3.ii refers to information relating to investigations of misconduct or violations of EBRD policies, or to integrity-related matters. Once again, this is a category of information rather than an interest which needs protection against harm. It could be transformed into such an exception by limiting it to information the disclosure of which would harm the processes it refers to.
- Section III.2.3.iii refers to two types of information, first any information "relating to" the Whistleblowing Policy and second any information which would compromise the identity of a whistleblower. The first is a category of information (not legitimate) while the second is an interest to be protected (legitimate).
- Section III.2.3.iv refers to a vast array of "legal documentation" such as contracts or even negotiations. We note that the latter cannot properly be referred to as "legal documentation". In any case, this is a broad category of information rather than an interest to be protected against harm. Furthermore, many public entities have adopted an almost entirely opposite practice of proactively disclosing all contracts over a certain size (where necessary with appropriate redactions to protect legitimately sensitive information).
- Section III.2.4 covers personal information and is largely in line with international standards. However, the second sentence of this provision, which provides a partial list of types of included private information, is simply not necessary. First, not all of the items on this list would, if disclosed, breach the "legitimate privacy interests of the person concerned", as required by the first sentence. Second, there are many other types of private information and providing just a partial list may be confusing.
- Section III.2.5.i refers, among other things, to information the disclosure of which "could ... prove a threat to the national security of a member country". This is too low of a harm standard, especially taking into account the fact that exceptions in favour of national security are very frequently abused. Instead, the standard should be "would or would be likely", as is used in Section III.2.4 in favour of private information.
- The first part of Section III.2.5.iii refers to information the disclosure of which "might compromise" the security of any individual or put the safety and security of Bank assets "at risk". This is generally appropriate but these harm standards are too low and, instead, the standard of "would or would be likely" should be used. The second part, referring to information relating to transportation, does not incorporate a harm test or even refer to an interest (rather it refers to a category of information).



Section III.2.6 allows senior Bank staff, where they determine that protection for a legitimate interest may be achieved by deferring release of the information, to defer the release of the information until such time as the risk has passed. This is not inappropriate. However, this should be supplemented by a general provision to the effect that all exceptions apply only to the extent that the harm they envisage is present at the time a request is made. The policy should also incorporate presumptive historical limits on the non-disclosure of at least certain categories of information, namely those protecting interests of the EBRD (as opposed to of third parties). Such historical sunset clauses are now found in the information disclosure policies of an increasing number of IFIs.

Section III.3 sets out the public interest override. Very positively, the negative override, which provided for the Bank to deny disclosure on general public interest grounds, has been removed from the draft Policy. Such negative overrides are not found in national access to information laws, are being progressively removed from IFI policies and are simply not necessary, given that the regime of exceptions already protects all legitimate secrecy interests.

In terms of the positive override, Section III.3 now states that, in "exceptional circumstances, the Bank reserves the right to disclose information that it would ordinarily not release". The grounds for this are where the disclosure "would be likely to avert imminent and serious harm to public health, safety or security, and/or imminent and significant adverse impacts on the environment".

While this is generally positive, it may also be noted that it falls very far short of the much broader statements of the positive override found in Section III.1.2 (the principle on exceptions) and the chapeau to Section III.2 of the draft Policy, which state that information will only be withheld where the harm from disclosure outweighs the benefits. These statements do not limit the override to "exceptional circumstances" or to only an attenuated list of very significant possible benefits (all focused on avoiding serious harms).

Better practice in terms of the public interest override is for it to apply whenever the benefits from disclosure, understood broadly (and not limited to avoiding very serious harms), outweigh (and not only exceptionally) the harm to the protected interest. Furthermore, better practice is for the override to apply in a mandatory rather than discretionary manner (i.e. for it not to be cast as a right for the Bank to apply when it wishes).

Section IV.2.2.iv of the draft Directive provides that where information is provided to a requester, it shall normally only be given to that party but that if the Bank determines that there is "a broader public interest" in the information, it shall also disclose that information

via its website. This is positive. However, consideration should be given to broadening this to include any case where others may have an interest in accessing the information.

## Appeals

The draft Policy provides for appeals to be lodged with the Information Appeals Panel, comprising the "the Secretary General, the General Counsel and another member of the Bank's Executive Committee designated by the President" (Section III.5.2.i). This represents a form of internal appeal.

A first issue here is that it is not entirely clear what the basis for such an appeal may be. Section III.1.5 of the draft Policy, setting out the principle of Good Governance, refers to appeals where the Bank decides not to disclose information (and this is repeated in Section III.5.2.ii of the draft Policy and Section IV.2 of the draft Directive). However, Section III.5.2.ii of the draft Policy appears to set out a wider basis for appeals, namely whenever a request has "not been satisfied" and the requester "believes that this has been contrary to this Policy and/or the Directive". Even this formulation is not very clear since it is not clear what is meant by a request not having been satisfied and this may apply only where the request has been refused. Better practice is to allow for an appeal whenever a requester believes that his or her request has not been processed in line with the rules. This may involve a denial, in whole or in part, of the substance of the request but it might also involve other forms of breach, such as a failure to provide an acknowledgement of the request or excessive charges. It may be noted that Section III.5.3.i, relating to appeals to the Independent Project Accountability Mechanism (IPAM), sets out a slightly wider basis for appeals to that mechanism, namely whenever "the Bank has failed to disclose Project specific information in accordance with this Policy".

The latter type of appeal applies only when a person or organisation believes "they are affected, or likely to be affected, by a Project". It is to be expected that this would cover only a very small proportion of all requests for information. Other requesters do not have access to any independent level of appeal. This may be contrasted sharply with many other international financial institutions, which have established external panels or boards consisting of outside experts to hear second instance appeals, such as the Inter-American Development Bank's ATI External Panel, the World Bank's ATI Appeals Board and the International Financial Corporation's Access to Information Appeals Panel. The Bank should do the same.

## Other Issues

Although the EBRD does have a Whistleblowing Policy, adopted in 2021, the draft Policy fails to provide protection to officials who release information in good faith pursuant to the policy. This is important to give officials the confidence to disclose information without fearing that they may be punished for making an honest (good faith) mistake.

Various provisions in the draft Policy refer to a commitment by the Bank to raise awareness about the policy and to engage with stakeholders in relationship to it, including Section III.1.3. This is positive and is important to ensure that the policy is actually used in practice by different stakeholders.

Section III.6 of the draft Policy provides for the Secretary General of the Bank to monitor and report on its implementation, while Section VII provides that the Secretary General is “accountable” for the policy and that the Director, Stakeholder Relations, is “responsible” for it. Section VIII goes on to require the Secretary General to report annually to the Board of Directors on implementation of the policy, including prospective changes to the directive, with the report being disclosed via the website following the discussion about it at the Board of Directors. Pursuant to Section IX of the draft Directive, the report shall include information about the handling of requests. These are all positive requirements.

## Recommendations

- Consideration should be given to adding an interpretive clause to the policy which requires it and the directive to be interpreted in the manner which best gives effect to its wider purposes and principles.
- Consideration should also be given to clarifying that everyone may make a request for information and that the policy applies to all parts of the Bank's operations.
- Instead of using a complicated and qualified definition of information, the policy should simply enable requests to be made for any information which is held by or is accessible as a matter of law to the Bank.
- Section III.5.1.ii of the draft Policy should be amended to require requests to identify the information sought sufficiently clearly to enable Bank staff to locate it and the policy should also include a commitment, when a request is insufficiently clear, to offer assistance to the requester to clarify the request.

- Section III.5.1.iii of the draft Policy should be supplemented by a statement making it clear that this does not cover situations where the Bank can, without undue effort and via automated means, generate information which is responsive to a request from the information and data which it holds.
- Section III.5.1.iv of the draft Policy should be expanded to cover not only denials and the provision of information but also deferrals, and information about how to appeal against a denial should also be included in the denial notices.
- Acknowledgement of requests, as provided for in Section III.2.2.i of the draft Directive, should simply be done within five working days, and the possibility of extending this to ten working days should be removed.
- Requests should be required to be responded to as soon as possible and consideration should be given to reducing the initial time limit for responding to 10 working days from 20. Conditions for extending that time limit – such as that the request requires a search through a large number of records or consultation with third parties – should be added to the policy.
- The policy should incorporate a commitment to respond to requests in the format preferred by the requester, subject to this not being unduly onerous for the Bank or harmful to the record.
- The policy should make it clear that notice in case of partial denials should include the reasons for each redaction or separate denial.
- The whole regime of exceptions in the draft Policy should be fundamentally reworked, including in the following ways:
  - The exemplary standards for the harm test and public interest override contained in Section III.1.2 and the chapeau to Section III.2 of the draft Policy should be applied in practice to all exceptions. One way to do that would be to make it clear that all of the exceptions in Section III.2 applied only subject to the standards set out in the chapeau to that section.
  - The specific exceptions should be revised, as highlighted above, so that they are clear and narrow, and only refer to legitimate interests which need protection against harm and not categories of information (or interests which are not recognised as being legitimate under international law).
  - No third party should have a veto over the release of information. Instead, the policy should protect legitimate third-party interests, as well as the interest of the Bank in maintaining good relations with other States and inter-governmental organisations, and protect those interests against harm.

- A different approach to Board of Directors and Board of Governors information should be adopted which again involves the identification of interests and then protecting those interests against harm. Should this be deemed to be necessary, those boards could apply the test themselves.
- All exceptions should apply only to the extent that the harm they envisage is present at the time of the request. In addition, consideration should be given to adding in historical time limits or sunset clauses for exceptions protecting the interests of the Bank.
- Instead of being cast as an exceptional, limited and discretionary matter, the public interest override should reflect the standards set out in Section III.1.2 and the chapeau to Section III.2 of the draft Policy, i.e. it should be mandatory and apply whenever the public interest in accessing the information, understood broadly, is greater than the risk of harm from disclosing it.
- Consideration should be given to amending Section IV.2.2.iv of the draft Directive so that information which has been disclosed pursuant to a request will also be disclosed via the website whenever it is likely that others may have an interest in accessing that information.
- It should be clear that appeals to the Information Appeals Panel may be lodged whenever a requester believes that his or her request has not been dealt with in accordance with the rules for processing requests in the policy.
- Instead of only providing for appeals to an independent body – namely the Independent Project Accountability Mechanism – where someone is affected by a project, the Bank should establish a dedicated independent oversight panel for information appeals which may be used by anyone who is not satisfied with a decision by the Information Appeals Panel.
- The policy should provide protection to officials who release information pursuant to its provisions in good faith.