



# **Securing the People's Right to Information Will the ADB Rise to the Challenge?**

**Proposed Amendments by the Global Transparency Initiative to  
the Second Consultation Draft of the Public Communications  
Policy of the Asian Development Bank (26 November 2010)**

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## Introduction

This document provides concrete suggested amendments to the Second Consultation Draft of the Public Communications Policy of the Asian Development Bank (26 November 2010). The amendments are designed to bring the draft PCP into line with international standards and better comparative practice by other international financial institutions (IFIs). They are based on the Global Transparency Initiative's (GTI) Comments on the Second Consultation Draft of the PCP, submitted to the ADB on 26 December 2010 (available at: <http://www.law-democracy.org/wp-content/uploads/2010/07/Submission.10.12.26.final.pdf>).

This document only duplicates those paragraphs of the Second Consultation Draft of the PCP to which amendments are being proposed. The amendments are presented as track changes to the original draft. Furthermore, the paragraphs are in the order in which they appear in the draft PCP, rather than according to the types of changes they recommend (for example to the regime of exceptions). A better understanding of this document can be achieved when it is read in conjunction with the GTI's Comments of 26 December 2010.

## Specific Proposed Amendments

35. **Presumption of disclosure.** The Policy is based on a presumption in favor of disclosure. All documents that ADB produces, requires to be produced, holds or has a right to access may therefore be disclosed unless they contain information that falls within the exceptions of the Policy.

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35A. ADB shall, from the effective date of this Policy, include clauses in the contracts it concludes that, subject only to reasonable operational constraints, it can access the information created or obtained pursuant to those contracts by parties thereto. This includes access to key documents held by borrowing governments or direct service providers created or obtained pursuant to a contract with the Bank.

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40. **Limited exceptions.** Full disclosure is not always possible. For example, ADB needs to explore ideas, share information, hold frank discussions internally and with its members, and consider the special requirements of its private sector operations. ADB shall safeguard the privacy of its staff and protect commercially sensitive information of itself or its clients. However, exceptions are limited. ADB shall disclose all information that it produces or requires to be produced unless such information falls within the exceptions of the Policy. ADB reserves the right to override the Policy's exceptions if it determines that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.

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Deleted: ADB also reserves the right not to disclose, under exceptional circumstances, information that it would normally disclose if it determines that such disclosure would or would be likely to cause harm that outweighs the benefit of disclosure.

62. The Policy establishes the disclosure requirements for documents that ADB

produces, requires to be produced, holds or has a right to access. It does not set forth the requirements for producing such documentation. References to other ADB policies are made throughout the Policy. Any reference to another ADB policy includes that policy as amended by ADB from time to time. Any policy or strategy developed or revised by ADB after the Policy's effective date shall clearly articulate the disclosure requirements for documents and other information required to be produced under that policy or strategy. Such disclosure requirements shall be consistent with the general principles set out in the Policy.

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83. To support the requirements in paragraph 82, ADB will develop jointly with DMC governments and private sector clients a project or program communications strategy, which will be an integral part of consultation and participation by affected people and other interested stakeholders. Such a strategy would help borrowers/clients to involve affected people in the design and implementation of ADB-assisted activities, and increase involvement of grassroots and civil society organizations in the development process by detailing how to engage in dialogue with affected people and broaden public access to information. This will be done by indicating in various documents, such as the project or program communications strategy, consultation and participation plan or the project administration manual, (i) types of information to be disclosed, (ii) mechanisms for public notice, including language and timing, and (iii) responsibility for implementing and monitoring of information disclosure and dissemination.

105. ADB shall post on its website a summary of projects requiring cofinancing. Information on official cofinancing of projects, if any, such as major terms and conditions, shall be available in respective TA reports or RRP's that ADB posts on its website. ADB shall make cofinancing agreements for such official cofinancing, including project-specific cofinancing agreements, framework agreements, and trust fund agreements between ADB and any bilateral or multilateral cofinancier, available upon request.

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#### 4. Exceptions to Presumed Disclosure

132. Paragraphs 135, 136, 138 and 139 set forth the exceptions to ADB's presumption in favor of disclosure of information.

133. If only part of a requested document is subject to nondisclosure pursuant to the list of exceptions, any information in the document which is not subject to nondisclosure shall, to the extent that it may reasonably be severed from the rest of the information, be communicated to the requester. In this case, ADB shall make reference to the removed information, unless this would itself violate an exception.

Deleted: If information is removed from a document because the information falls under an exception, or if a document cited in the Policy is not posted on the ADB website as required, ADB shall make reference to the removed information and/or the document, unless citing the removed information or document would itself violate an exception.

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

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**a. Current Information**

135. ADB shall not disclose the following information:

**Deleted:** In deciding what information should not be disclosed, ADB will weigh the benefits of disclosure against the harm that disclosure might cause to specific parties or interests. In this regard,

**Deliberative and Decision Making Process**

1. Internal information that, if disclosed, would, or would be likely to compromise the integrity of ADB's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, the success of a policy, through premature disclosure of that policy, or the integrity of testing or audit procedures,

**Deleted:** , including internal documents, memoranda, and other similar communications to or from Governors and their Alternates, Executive Directors and their Alternates, Director's Advisors, members of Management, ADB staff, and ADB consultants

2. Information exchanged, prepared for, or derived from the deliberative and decision making process between ADB and its members and other entities with which ADB cooperates that, if disclosed, would, or would be likely to compromise the integrity of the deliberative and decision-making process between and among ADB and its members and other entities with which ADB cooperates by inhibiting the candid exchange of ideas and communications, particularly with respect to policy dialogue with DMCs.

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3. Proceedings of the Board of Directors,<sup>2</sup> with the exception of Board meeting minutes and verbatim transcripts of formal Board meetings as referred to in paragraphs 121 and 122, and chair's summaries of certain Board meetings as referred to in paragraphs 70 and 74. ¶

3. Paragraphs 135.1 and 135.2 do not apply to background facts, analyses of facts, technical data or statistical information.

**Information Provided in Confidence**

4. Information provided to ADB in confidence from a member country or international organization, that if disclosed, would, or would be likely to materially prejudice ADB's relations with that party or another member country.

**Deleted:** or other parties concerned, or any confidential business information (information covered by a confidentiality agreement or nondisclosure agreement that ADB has entered into with clients or other related parties)

5. Information (including proprietary information) provided to ADB by a party which, if disclosed, would, or would be likely to materially prejudice the commercial or financial interests, and/or competitive position of such party.

**Deleted:** Individual records, including terms of employment, performance evaluations, and personal medical information of Executive Directors, their Alternates, and Director's Advisors, members of Management, and ADB staff and consultants, information relating to staff appointment and selection processes, personal communications, as well as information relating to proceedings of internal conflict resolution and appeal mechanisms and information related to investigations, except to the extent permitted by the staff concerned or staff rules and Board of Directors rules and regulations.

5A. Information covered by a confidentiality agreement or nondisclosure agreement that was entered into prior to the effective date of this Policy.<sup>3</sup>

**Personal Information**

6. Information the disclosure of which would constitute an unreasonable invasion of the privacy of an identifiable individual.

**Financial Information**

7. Financial Information that, if disclosed, would, or would be likely to prejudice capital and financial markets or the legitimate financial or commercial interests of the Bank and its activities. This may include estimates of ADB's future borrowings, financial forecasts,

**Deleted:** , or financial information to which capital and financial markets may be sensitive

<sup>3</sup> ADB will no longer enter into confidentiality agreements that go beyond the scope of the exceptions in this Policy.

data on individual investment decisions for ADB's treasury operations, credit assessments, analysis of creditworthiness, credit ratings and risk assessments of its borrowers and other clients.

8. Financial information that, if disclosed, would, or would be likely to prejudice the ability of a member government to manage its economy.

### Security and Safety

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

### Legal or Investigative Matters

10. Any information subject to the attorney-client privilege (including communications provided and/or received by ADB counsel or its external legal advisors) or any information that, if disclosed, would or would be likely to materially prejudice an investigation or the administration of justice or violate applicable law.<sup>4</sup>

#### b. Historical Information

136. ADB shall consider as historical any information held by ADB for more than 20 years from the date such information was produced by, or provided to, ADB. Historical information shall be disclosed upon request, except for information that falls within the exceptions listed in paragraphs 135.4, 135.5, [136.5A](#), 135.6, 135.8, 135.9 and 135.10.

[136A. The information listed in paragraphs 135.1 and 135.2 shall be disclosed upon request after five years.](#)

#### c. Public Interest Override

137. ADB shall disclose information listed in paragraphs 135 and 136 if ADB determines that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.<sup>5</sup>

138. However, notwithstanding paragraph 137, ADB shall not disclose information listed in paragraphs 135 and 136 if ADB has given an express legal commitment to a party to keep such information confidential and not to disclose such information, unless such party consents.

#### d. Third Party Consultations

[139. Where a request for information relates to information provided to ADB in confidence by a third party, ADB will give written notice to that third party of the request and will give the third party eight days within which to object to disclosure of the information and to provide reasons as to why the information should not be disclosed.](#)

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Audit Reports ¶**

11. (i) Internal audit reports of ADB's Office of the Auditor General, and (ii) audit reports of ADB's external auditors on ADB-administered trust funds and grants, except for audit opinions and audited financial statements disclosed to the public as part of ADB's Annual Report. ¶

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**Deleted:** Any decision to disclose information in such case would require the express authorization of the Public Disclosure Advisory Committee (PDAC).

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d. ADB's Prerogative to Restrict Access ¶**

139. ADB also reserves the right not to disclose, under exceptional circumstances, information that it would normally disclose if it determines that such disclosure would or would be likely to cause harm that outweighs the benefit of disclosure. This prerogative may be exercised only by (i) the Board, with respect to Board records; and (ii) the President, with respect to other information, following a rigorous consultation process within ADB. ¶

<sup>4</sup> This may include restrictions imposed by securities and banking laws and copyright law.

<sup>5</sup> For example, if a request for information reveals a serious public safety or environmental risk.

Where a third party objects to the disclosure of the information, ADB will take this into account, among other things, when deciding whether or not to disclose the information.

157. The PDAC shall interpret, monitor, and review the disclosure requirements of the Policy. The PDAC will be composed of the Managing Director General (serving as chair), the Principal Director of DER, the Secretary, and the General Counsel, and will report directly to the President. It will convene as needed to review complaints that requests for information have not been dealt with by other ADB departments or offices in accordance with the provisions of the Policy. It has the authority to uphold or reverse prior decisions to deny access, and to identify the necessary remedies for other breaches of the Policy. Secretariat support to the PDAC will be provided by the InfoUnit. The PDAC will review and endorse the annual report on the Public Communications Policy by assessing the implementation of the disclosure elements of the Policy. The annual report will include a summary of refusals to provide information to the public, as well as any recommendations for changes to the Policy and its related *Operations Manual* sections, or the organizational structure supporting ADB's public disclosure of information.

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158. The Independent Appeals Panel (IAP) will consider appeals alleging that ADB violated the Policy by restricting access to information that it would normally disclose under the Policy. It has the authority to uphold or reverse PDAC's decisions to deny access. Secretariat support to the IAP will be provided by the Office of the Secretary.

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159. The borrower/client will work with staff from operational departments to provide focal points in project areas to dialogue with, and provide information to, affected people about the project (paragraph 82). Project focal points may use the ADB website to access project and country- related information and to disclose such information to interested parties, using locally and culturally appropriate delivery mechanisms.

**Deleted:** For ADB projects, much of the responsibility for disclosing information will rest with the borrower/client.

161A. ADB shall provide all reasonable assistance to requesters in making requests, for example to help them record in written form an oral request, to ensure that a request describes the information sought in sufficient detail, or to process a request in a language other than an official language.

161B. Requesters may specify the form in which they would like to access the information they seek (for example by inspecting it, by receiving an electronic copy or by receiving a physical copy) and ADB shall provide access in that form unless to do so would unreasonably interfere with the work of ADB, be detrimental to the preservation of the record containing the information or breach a copyright not held by ADB.

164. ADB shall acknowledge receipt of a request within 5 working days. ADB shall notify the requester as soon as a decision has been made, and, in any event, no later than 30 calendar days after receiving the request. In its response, ADB shall either provide the requested information or the reasons why the request has been denied, indicating the particular provision(s) in the Policy that justifies such refusal, along with the specific reasons why the information is covered by that exception. In case ADB denies requested information, it shall inform the requester of their right to appeal in accordance with

paragraphs 166–171 of the Policy. ADB shall post on its website the list of requests reviewed, and the corresponding decisions and reasons.

166. It is proposed that ADB adopt a two-stage appeals process by which requesters can appeal when they believe that (i) ADB has [failed to process a request in accordance with the Policy](#) or (ii) ADB may override the Policy's exceptions that restrict access to the information requested because the public interest in disclosing the information outweigh the harm that may be caused by such disclosure. The remedy available to a requester who prevails on appeal is limited to receiving the information requested. The two-stage appeals process shall be established as follows:

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167. A requester who [believes his or her request for information has not been dealt with by ADB in accordance with the policy](#) may file an appeal to the PDAC if the requester is able to (i) establish a *prima facie* case that ADB has violated the Policy; or (ii) make a public interest case to override the Policy's exceptions that restrict access to the information requested.

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168. The PDAC shall acknowledge receipt of an appeal within 5 working days. It will convene as soon as possible to consider the appeal. In reviewing appeals, the PDAC will consider the Policy's exceptions as well as whether the public interest in disclosure of the requested information outweighs the harm that may be caused by such disclosure. [In an appeal, the onus shall be on ADB to justify the non-disclosure of information by reference to the exceptions.](#) The PDAC shall notify the requester of its decision in writing, giving its reasons, as soon as a decision has been made and, in any event, no later than 30 calendar days after receiving the appeal.

Deleted: Decisions of the PDAC on public interest cases will be final and not eligible for the second stage of appeals.

169. If the PDAC upholds the initial decision to deny access, the requester may file an appeal to the IAP that would comprise three outside experts on access to information matters.<sup>6</sup> The IAP will consider appeals alleging that ADB violated the Policy by restricting access to information. In reviewing appeals, the IAP will consider the Policy's exceptions. [It will have the authority to uphold or reverse the relevant decisions of the PDAC, and its decisions in such instances will be final.](#) The IAP will make its best effort to consider all appeals that are received within a reasonable time period.

Deleted: The IAP will not consider requests to override the Policy's exceptions.

170. All appeals to the PDAC (first stage of appeal) or the IAP (second stage of appeal) must be submitted in writing within 60 calendar days of the decision(s) to deny access. Appeals must be submitted by mail addressed to the PDAC or the IAP through the InfoUnit at Asian Development Bank, 6 ADB Avenue, Mandaluyong City, 1550 Metro Manila, Philippines, by e-mail to [disclosure@adb.org](mailto:disclosure@adb.org), or by fax to +63 2 636 2649. Appeals received beyond the 60-day period for filing an appeal shall be deemed out of time and shall not be considered, [provided that the PDAC and IAP, respectively, may waive this deadline in appropriate cases.](#) All appeals should be set out in a brief letter and contain the following:

- (i) a description of the information originally requested; and

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<sup>6</sup> IAP members will be nominated by the President of ADB and endorsed by its Board. It is suggested that the three members of the IAP could respectively be (i) a representative of a DMC with adequate experience in freedom of information matters; (ii) an expert on access to information, independent of the government; and (iii) an expert on access to information in a commercial setting.



(ii) an explanatory statement that sets out the fact and the grounds which support the requester's claim that ADB violated the Policy by improperly interpreting or inappropriately restricting access to the information requested.

171. Requesters shall be notified if the appeal is dismissed (i) for a failure to file within the required time; (ii) for a failure to provide sufficient information that would reasonably support the appeal; or (iii) because the PDAC or the IAP does not have authority to consider the matter being appealed. To meet the requirements of (ii) above, all a requester needs to do is to raise a doubt as to whether or not the Policy might have been properly applied. Before rejecting a request under (ii), the PDAC or IAP shall provide the requester with an opportunity to clarify the appeal. If the PDAC or the IAP upholds the prior decisions to deny access to the information requested, the notice shall specify the reasons. If the PDAC or the IAP reverses the decision to deny access, the requester shall be notified of the decision and of the process for making the information available to the requester. ADB shall post on its website a list of all appeals received, the nature of each appeal, and the decision taken in each case. The lists will be updated upon issuance of a decision by the PDAC and the IAP, respectively.

### **Alternative Proposal**

We understand that there may be some resistance to removing paragraph 139, allowing the Board and/or President to render information confidential even where it does not fall within the scope of the exceptions set out in the Policy. We remain firmly against the inclusion of this paragraph. However, in case it is retained, we would like to propose the following provision to allow the IAP to at least make comments on the application of this type of override as an alternative to our main proposal reflected in the amendments above:

171A. Where the information sought has been rendered confidential through the application of ADB's prerogative to restrict access, pursuant to paragraph 139 of the Policy, the IAP may entertain direct appeals from such decisions. In such cases, the IAP may provide comments and make recommendations as to the appropriate outcome, but it does not have the authority to make decisions on the case. Where the IAP recommends that the information be made available, the Board or President, as applicable, shall reconsider their decision to exercise their prerogative in favour of confidentiality.

175. ADB shall conduct a comprehensive review after a period of time, not to exceed 3 years from the effective date of the Policy. The review will actively engage interested individuals and organizations.

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