



Securing the People's Right to Information ADB Must Do More

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

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I. Introduction

The Asian Development Bank (ADB) began the review of its *Public Communications Policy: Disclosure and Exchange of Information* (PCP) in mid-February 2010. The Global Transparency Initiative (GTI) welcomed the review, and submitted its comments on 15 April 2010 in the document *Securing the People's Right to Information: Will the ADB Rise to the Challenge?: Comments by the Global Transparency Initiative on the Public Communications Policy of the Asian Development Bank*¹, alongside a joint submission with the NGO Forum on the ADB titled *Bold Measures Towards a Responsive PCP: Joint Recommendations on the ADB Public Communications Policy*.

The analyses in the first submission by GTI, as well as in this submission, are guided by the following:

- The principles of the GTI Transparency Charter for International Financial Institutions.
- The GTI policy document, the [Model World Bank Policy on Disclosure of Information](#) (the Model Policy).
- Better openness practices by other IFIs, including the new [Disclosure Policy](#) adopted by the World Bank on 10 December 2009.
- Relevant best practices in national right to information legislation.
- Consultations with various non-government organisations working on the ADB as well as communities affected by ADB funded projects and their support groups, including:
 - An international workshop on the PCP jointly organised by the GTI, the NGO Forum on the ADB, and the Freedom from Debt Coalition in Manila on 11-12 February 2009; and
 - Consultation meetings organised by the NGO Forum on the ADB, with participation from the GTI, with select affected communities and their support groups from Indonesia (held in Yogyakarta, Indonesia on 22-23 January 2010), the Mekong region (held in Siem Reap, Cambodia on 19-21 February 2010) and South Asia (held in Dhulikhel, Nepal on 26-28 February 2010), along with comments solicited from groups from Central Asia.

After the first comment period, the ADB released in early June 2010 the first consultation draft of the new policy. In the document *Securing the People's Right to Information: Will the ADB Rise to the Challenge?: Speaking Notes by the Global Transparency Initiative on the June 2010 Consultation Draft of the Public Communications Policy of the Asian Development Bank*², the GTI expressed surprise that the ADB's Consultation Draft contained almost no new measures to enhance openness, and asked that the ADB take the

¹ Available at: http://www.law-democracy.org/wp-content/uploads/2010/07/ADB-Submission.GTI_Apr10.pdf.

² Available at: http://www.law-democracy.org/wp-content/uploads/2010/07/ADB-Submission.GTI_Jun101.pdf.

review process seriously and act in good faith. We were assured, however, that the comments will be taken into close consideration in light of the country consultations that were still to take place. In all, the ADB conducted 20 country consultations in 12 different countries between June and August.

We note that the country consultations, as reported in the consultation summaries, consistently confirmed the key concerns that we raised in our first submission, particularly regarding the exceptions, the appeals mechanism, and access to information by people and communities directly affected by ADB projects and programs.

On 26 November 2010, the ADB published the Second Consultation Draft of the PCP Review 2010 (draft Policy), with a one-month period being provided for comments. It is this second draft Policy which is the subject of this submission.

II. Positive Changes in the Second Draft

The right to access information held by public bodies, including inter-governmental organisations like the ADB, is a fundamental human right. An authoritative statement of the key features of a right to information system are found in the GTI's [*Transparency Charter for International Financial Institutions: Claiming our Right to Know*](#) (the Charter), which was adopted after a very extensive process of consultation and review.

At the heart of the right to information is a presumption that all information held by public bodies should be accessible, subject only to a narrowly-drawn regime of exceptions. Access should be ensured through both the proactive disclosure of information and the putting in place of procedures to make requests for information. Any refusal to provide information should be subject to appeal before an independent oversight body.

Assessed against the Charter and our first submission, we acknowledge a number of positive changes introduced in the draft Policy.

For the first time, it expressly recognises a right to access information about “ABD-assisted activities” (par. 36). It removes previous ambiguity in the presumption in favour of a right of access to all documents by removing the misleading references to “publicly available” documents in the 2005 PCP. It commits to the proactive disclosure of more information than had hitherto been the case (pars. 66-131). And, in an important improvement over the 2005 PCP, it not only retains an internal appeals mechanism, but also introduces an Independent Appeals Panel (pars. 157-8 and 166-171).

Still, there are issues that we have identified in our first submission, mostly confirmed in country consultations, that the draft Policy either fails to address, or addresses inadequately. We discuss these in the succeeding sections, with an appeal to ADB for more decisive response. We also comment on provisions than we believe could be further improved.

III. The Regime of Exceptions

The right to information as guaranteed under international law creates a presumption in favour of the disclosure of all information held by public bodies. However, international law recognises that in limited circumstances disclosure may pose a threat of harm to certain public or private interests which would justify the withholding of information. It is thus appropriate for a disclosure policy to set out a carefully drawn and narrow regime of exceptions which provides for a proper balance between openness and competing interests.

International law establishes clear guidelines for any system of exceptions to the right of access. Disclosure of information is required unless three cumulative conditions are met:

- disclosure would cause harm;
- the harm is to a legitimate private or public interest listed in the law or policy; and
- the harm outweighs the benefits that would result from disclosure of the information.

This harm-based approach is followed in most exceptions in national right to information laws and is also reflected in Principle 5 of the Charter, as follows:

Principle 5: Limited Exceptions

The regime of exceptions should be based on the principle that access to information may be refused only where the international financial institution can demonstrate (i) that disclosure would cause serious harm to one of a set of clearly and narrowly defined, and broadly accepted, interests, which are specifically listed; and (ii) that the harm to this interest outweighs the public interest in disclosure.

The draft Policy states that it “is based on a presumption in favor of disclosure” which shall apply to all documents “unless they contain information that fall within the exceptions of the Policy” (par. 35). The regime of exceptions is set out in paragraphs 132-139, although some other parts of the draft Policy are also relevant. Paragraph 42 provides that in the event of a conflict between the disclosure provisions of the Policy and any other policy, the disclosure Policy shall prevail. One of the implications of this is that the exceptions in the Policy are the only grounds upon which disclosure of a document may be refused, which is welcome.

Paragraph 132 provides that if information is removed from a document because it falls within the scope of an exception, ADB will make reference to that, presumably by notifying the requester. This statement would make more sense as part of paragraph 133, which provides for the disclosure of part of a document where only part of it is exempt.

The same paragraph also provides that if a document is not posted on the website as required, ADB shall make reference to that document. The meaning of this is not clear, but it might refer to cases where a document is not posted because of the exceptions. It is

hard to see how an entire document from among those listed for proactive disclosure could be exempt. Regardless, the meaning of this should be clarified and it should also be made clear exactly how reference is intended to be made to the removal of information or non-posting of a document.

The main exceptions are set out in paragraph 135. These are very similar to the exceptions set out in the current 2005 Policy, and so the comments on exceptions in our earlier submission on that Policy of 15 April 2010, *Securing the People's Right to Information: Will the ADB Rise to the Challenge?: Comments by the Global Transparency Initiative on the Public Communications Policy of the Asian Development Bank*, remain pertinent, except as outlined here.

The introductory sentence of paragraph 135 states that in deciding what information should not be disclosed, the ADB weighs the benefits of disclosure against the harm that it may cause. The corresponding sentence in the 2005 PCP simply states that information covered by the exceptions will not be released. While no doubt well-intentioned, the new formulation is problematic because it introduces confusion about the harm and public interest parts of the assessment of exceptions. This should take part in two phases: first officials should consider whether disclosure would harm one of the protected interests and, if so, a further assessment should take place as to whether release of the information is nevertheless warranted in the overall public interest.

For the most part, the exceptions in the draft Policy protect legitimate interests, although in some cases the interests are cast too broadly. Most of the exceptions also incorporate a harm test, but three exempt whole categories of documents or information (category-based exceptions), namely proceedings of the Board of Directors (par. 135.3), personal information (par. 135.6) and audit reports (par. 135.11). This is contrary to the international standards outlined above, because such category-based exceptions are over inclusive, leading to documents being withheld even where there is no genuine risk of harm.

There are two types of specific exceptions in the draft Policy which are particularly problematical, namely those protecting the deliberative and decision-making process, and those protecting information provided in confidence.

Deliberative and Decision-Making Process Exception

The exceptions in paragraphs 135.1 and 135.2, which are substantially identical to their counterparts in the 2005 Policy, purport to protect the integrity of the deliberative and decision-making process. The harm identified is, in both cases, compromising the “integrity of the deliberative and decision-making process” by “inhibiting the candid exchange of ideas and communications”. The first exception applies to deliberative and decision-making processes internal to ADB, and the second to deliberations involving ADB members and external entities. Neither paragraph 135.1 nor 135.2 are subject to

historical protection (i.e. these interests are only protected in relation to documents that are less than twenty years old).

Safeguarding deliberative space for those charged with developing public policy, and in particular the free and frank exchange of ideas, is widely recognised as a legitimate interest and an exception along these lines is found in most national right to information laws. At the same time, this exception must be clearly circumscribed if it is not to be abused so as to exclude the public from participation in decision-making.

Paragraphs 135.1 and 135.2 represent better practice than the analogous provisions in the new World Bank Disclosure Policy inasmuch as they explicitly incorporate a harm test. In contrast, the World Bank policy elevates the deliberative process to the status of a principle and does not include a harm test.³

At the same time, there are two concerns with these provisions. First, they do not appear to protect a sufficiently broad set of legitimate internal policy processes, such as the effectiveness of a policy or investigations (although the PCP does protect the administration of justice, which might cover this). Based on country experiences, the key problem with having an internal exception which is formally too limited is that in practice the institutional response is to interpret it unduly broadly. Bureaucracies are normally very adept at protecting information they believe should be confidential. Trying to impose unduly limited exceptions is likely to backfire as officials attempt to redress this through unduly expansive interpretation. As a result, it is better to protect all legitimate interests.

Paragraph 42 of the Model Policy provides a list of appropriate internal interests which should be protected:

Policy formulation and investigations

42. The Bank may refuse to disclose information where to do so would, or would be likely to:
- a. Seriously frustrate the success of a policy, by premature disclosure of that policy.
 - b. Significantly undermine the deliberative process within the Bank by inhibiting the free and frank provision of advice or exchange of views.
 - c. Significantly undermine the effectiveness of a testing or auditing procedure used by the Bank.
 - d. Cause serious prejudice to an ongoing investigation by the Bank.

Second, paragraph 135.1 explicitly lists “internal documents, memoranda, and other similar communications” as examples of the types of information that fall within its scope. This is unfortunate as many Bank staff are likely to interpret this as meaning that all of these types of documents should be kept confidential. Evidence (sample denials based on this exception) shows that this is in fact the case, leading to the unfortunate consequence that many ADB documents not identified for voluntary disclosure are withheld as falling under this exception.

³ See paragraphs 7 and 17(i) of the World Bank Policy.

For those interested in participating in decision-making, it is particularly important to have access to the background facts upon which officials are basis their decisions, such as studies, statistics and factual findings. Paragraphs 135.1 and 135.2 could be improved by explicitly excluding background studies, factual findings and statistical information from the scope of the exception.

Pursuant to paragraph 135.3, the “proceedings of the Board of Directors” are confidential. There are some exceptions to this exception. A rolling schedule of items for Board consideration for the forthcoming three weeks is disclosed, along with the minutes of Board meetings, upon approval (par. 122). A positive development over the 2005 PCP is the commitment to provide verbatim transcripts of formal Board meetings, but only ten years after they were created (par. 121). Furthermore, chair’s summaries of certain Board discussions – namely on the Country Partnership Strategy and Regional Cooperation Strategy (par. 70), and on operational policies and strategies (par. 74) – shall be made available upon their final circulation to the Board.

The GTI considers that Board meetings should be open and that members of the public should be allowed to observe them. To facilitate this, notice of meetings, indicating the time, place and topics to be discussed, should be provided in advance. Meetings may be closed to protect legitimate interests but any decision to close a meeting should itself be taken in public and reasons for closure should be provided. Summaries, minutes and transcripts of Board meetings should be made available as soon as possible after the meeting, and not ten years later, although legitimately confidential information may be redacted.

To the extent that openness, either of the meeting itself or in relation to transcripts, would inhibit the free and frank discussion of a particularly sensitive matter at a Board meeting, closure could be asserted under the exceptions in paragraphs 135.1 and 135.2, discussed above. There is no need for further protection for Board confidentiality.

Third-party Information

Third parties which provide information to the ADB do so on the understanding that the information is subject to the ADB’s openness policy and that, as a result, it may be made public, absent a risk of harm to a protected interest. Historically, the disclosure policies of many IFIs effectively established an “originator veto”, which gave parties supplying information the power to veto its disclosure. Such rules are not found in national right to information laws and practice at the national level clearly demonstrates that such vetoes are inappropriate and unnecessary to protect legitimate commercial interests.

A positive feature of the draft Policy is that it seems on its face to reject the “originator veto”. For example, information obtained from member countries or international organisations is subject to disclosure even if provided in confidence; withholding it requires a showing that disclosure would “materially prejudice ADB’s relations with that

party or another member country” (par. 135.4). Furthermore, information provided by a third party is protected if disclosure of that information would “materially prejudice the commercial or financial interests, and/or competitive position of such party” (par. 135.5). These provisions reflect a reasonable harm-based approach.

However, they are substantially undermined by other provisions. As far as commercially sensitive information goes, paragraph 135.5 goes on to protect not only the commercial interests of the party that provided the information, but also “other parties concerned”, whatever ‘concerned’ may mean in this context. This provision was not found in the 2005 Policy and is not found in most national right to information laws. It is one thing to protect information provided by a business, on the basis that it is sensitive, and quite another to protect information that was not provided by that business. The latter is far more open and does not engage the issues of relationship and trust that are raised by the former.

Far more serious yet, is the latter part of paragraph 135.5, which protects not only harm-based commercial information, but “any confidential business information”, defined as information covered by a confidentiality or nondisclosure agreement entered into by ADB. This is supported by paragraph 138, which provides that ADB will not disclose any information if it “has given an express legal commitment to any party to keep such information in question confidential”, unless that party consents to the disclosure. It would appear that this provision is not subject to the public interest override, which only applies to paragraphs 135 and 136.

The commercial information exception would continue, under the draft Policy, to apply to historical information older than 20 years, whereas under the 2005 PCP, only the exception to protect good relations persists beyond 20 years.

Also relevant here is paragraph 34, which states that the views and interests of developing member countries (DMCs) shall be respected when the Policy is implemented. It would seem that this would inform the interpretation and application of paragraph 135.4. Paragraph 40 states that “nonpublic business information” belonging either to itself or its clients will not be disclosed. This is a vague and unfortunate statement, which might be used to further extend the already extremely broad commercial exception in paragraphs 135.5 and 138.

Provisions allowing for a third party veto are also found elsewhere. Under paragraph 105, a bilateral or multilateral co-financier is given the right to object to the disclosure of legal or financial agreements in official co-financing transactions. Worst still is footnote 19, which forecloses outright the public availability of private sector legal agreements entered into by ADB. In contrast, under paragraph 108 public sector loan agreements are publicly available after confidential information (i.e. information falling under the exceptions) has been removed.

Together, these provisions create unduly broad protection for information provided by third-parties, which applies not only to genuinely commercially sensitive information but

to any information whose confidentiality the ADB is prepared to warrant. They therefore vest substantial discretionary power in the ADB effectively to set the Policy aside through agreement. These provisions seriously undermine the presumption of disclosure.

It may be noted that in some respects, the draft Policy represents an improvement over the existing PCP inasmuch as the category-based exceptions in favour of all confidential business information and procurement processes, widely defined, have been removed. However, the exceptions described above presumably cover most if not all of this information anyway.

The draft Policy includes a limited third party consultation provision, in paragraph 162, which allows the ADB to “consult with the borrower, client, or co-financier, as appropriate”. This is rather limited in scope but, more importantly, vests discretion in ADB staff to decide whether or not consultation is ‘appropriate’. Instead, the ADB should be required to consult whenever there is a well-founded reason to assume that an exception applies to information obtained from a third party which is the subject of an access request. In such cases, the third party should be given an opportunity to make representations as to why it believes the information should be withheld, or to consent to its disclosure. The third party’s objection should not be treated as a veto, but as a factor to be taken into account when assessing whether or not an exception actually applies.

The Model Policy provides the following third party notice clause:

Third party notice

45. Where a request for information relates to information provided to the Bank in confidence by a third party, the Bank 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. Where a third party objects to the disclosure of the information, the Bank will take this into account, among other things, when deciding whether or not to disclose the information.

Other Exceptions

Paragraph 135.6 exempts a range of employment-related files on ADB management, staff and consultants from disclosure, such as terms of employment, performance evaluations and medical information. While much of this information is legitimately confidential, using a category-based exception is an unfortunate way of protecting it. This provision should be replaced with a harm-based exception based on the interest to be protected, in this case the legitimate privacy interests of ADB management, staff and consultants. This would ensure that the sensitivity of a file is assessed based on its substance rather than its title. The Model Policy, for example, refers to the “unreasonable disclosure of personal information about a natural person” (paragraph 36).

Paragraph 135.11 provides blanket protection to audit reports, both internal and external. While audit processes may legitimately be kept confidential, it is normal practice for

public bodies to disclose annual audit reports. In any case, the legitimate aim, presumably something along the lines of the protection of ADB's ability to manage its resources, should be substituted for the category-based exception, and a harm test should be added. This exception, insofar as it covers external audit reports, continues to apply after 20 years to historical documents, still as a category-based exception, which is particularly problematical, since it may be assumed that the disclosure of audit reports from 20 years ago would rarely harm the ADB.

Category-based exceptions in the 2005 PCP in favour of various types of financial information have been replaced in the draft Policy by a harm-based exception (par. 135.7). This is an improvement. However, the list of specific types of information from the 2005 document – such as estimates of future borrowings, financial forecasts, credit ratings, and so on – have been kept as possible examples of the information that may be covered by the new exception. As with the list of specific types of documents in paragraph 135.1, there is a risk that this list may be understood by staff as placing these types of documents off-limits.

Notice for Denial of Access

Paragraph 164 requires the ADB to provide reasons when a request for information is denied, indicating the particular provision in the Policy upon which it has relied to justify the refusal (the same rule was previously found in paragraph 157 of the PCP). In practice, we have observed cases where a denial of access to information by the ADB is accompanied by just a simple reference to the claimed exception under the PCP. This does not satisfy the requirement to provide reasons for the application of an exception. Exceptions represent a derogation from the substantive human right to information. As a result, the ADB, when denying a request for information, has the burden of showing that the information requested falls within the scope of one or more exceptions. This burden is not discharged by a bare reference to an exception. At a minimum, the denial should state clearly the legitimate aim or interest sought to be protected, and the facts and circumstances that demonstrate the substantial harm to, or the frustration of, the legitimate aim or interest that will result from the disclosure of the information.

Public Interest Override

International law requires requests for information to be granted if the public interest in disclosure, on balance, outweighs the harm that would be caused to the protected private or public interest. This flows directly from the concept of proportionality, which applies to any restrictions on rights (i.e. restrictions need to be proportionate and where the harm to the right exceeds the benefit to other interests, this standard is not met). This implies that any regime of exceptions to a disclosure policy should be subject to a 'public interest override'.

The draft Policy only provides for a limited public interest override, in paragraph 137. Application of the override is discretionary rather than obligatory, as it provides that the

“ADB *may* disclose” information pursuant to it [emphasis added]. Furthermore, any such decision must be expressly approved by the Public Disclosure Advisory Committee (PDAC, see below), which represents a significant barrier to the application of this rule in practice. The discretionary nature of this rule suggests, peculiarly, that the ADB reserves the right to act against the overriding public interest. The public interest override should be mandatory and should apply whenever there is an overriding public interest in disclosure. The Model Policy includes the following public interest override:

Public interest override

46. Notwithstanding any provision in this Section of the Policy, the Bank does not refuse to disclose information unless the harm to the interest protected by that provision outweighs the overall public interest in disclosure.

Far more serious, however, is paragraph 139, which allows the ADB to refuse to disclose information even if it is not covered by an exception, where it assesses the risk of harm from disclosure to outweigh the benefits. The Board exercises this prerogative with respect to Board documents, and the President exercises it, “following a rigorous consultation process within ADB” for other information. Unlike other decisions to refuse to disclose information, withholding of information under paragraph 139 is not subject to appeal (see below).

This reverse public interest rule, which was not found in the 2005 PCP, is extremely problematical, as, in effect, it gives the ADB the power to extend the exceptions beyond what is provided for in the policy. Such rules are more-or-less unknown in national right to information laws, where it is accepted that the exceptions should offer a complete set of grounds for refusing to disclose information.

Historical Information

We welcome the fact that the PCP establishes a presumption that historical information will be released 20 years after its issuance. Paragraph 136 sets out a series of seven exceptions which continue to apply after 20 years, from among the 11 exceptions found in paragraph 135, which apply to contemporary information. Our concerns with these exceptions, noted above, apply with even greater force when they are applied to historical documents.

Furthermore, it is not clear why at least some of the interests listed in paragraph 135 would need to be protected for 20 years. This applies, for example, to the deliberative process exceptions and to the proceedings of the Board of Directors. These documents would lose their sensitivity within five or at most ten years, making a shorter declassification window more appropriate. We welcome the commitment to release verbatim records of Board documents after ten years, and would recommend a similar period, or even a shorter period, for most other internal documents as well.

Recommendations:

- The policy should make it clear when the commitment to reference information or documents that have not been made public arises and how such references will be provided.
- The introductory sentence in paragraph 135, the main exceptions provision, should simply state that information falling within the scope of its provisions will not be made available (perhaps adding that this is subject to the public interest override).
- The list of interests protected under the deliberative process exceptions found in paragraphs 135.1 and 135.2 should be expanded so as to protect not only the free and frank provision of advice but also the success of policies, testing and audit procedures, as well as ongoing investigations.
- The reference to “internal documents, memoranda, and other similar communications” should be removed from paragraph 135.1.
- The deliberative process exceptions under paragraphs 135.1 and 135.2 should expressly exclude background information such as facts, analysis of facts and technical data.
- The Board of Directors should not receive special protection over and above that accorded generally to other ADB-held information. The protection to Board of Directors proceedings under paragraph 135.3 should be removed. Instead, Board meetings should be open to the public and transcripts of these meetings should be made available on a proactive basis.
- Protection for commercially sensitive business information should be limited in scope to those who provided the information in the first place.
- The ADB should not be allowed to extend the harm-based exceptions in favour of commercially sensitive information by entering into confidentiality agreements, and paragraph 138, protecting legal agreements on confidentiality, and the part of paragraph 40 protecting “nonpublic business information” should be removed.
- The provisions in paragraph 105 giving a bilateral or multilateral co-financier the right to object to the disclosure of legal or financial agreements in official co-financing transactions, as well as footnote 19, giving blanket exception to commercial co-financing agreements, should be removed.
- The policy should require the ADB to consult with third parties who are affected by an access request relating to information they provided to the ADB whenever there is a well-founded reason to assume that an exception applies.
- The exception in favour of privacy, in paragraph 135.6, should be transformed into a harm-based exception (for example, preventing the unreasonable disclosure of private information).
- The exceptions in paragraph 135.11, in favour of (internal and external) audit reports should be removed or at least conditioned by reference to the idea of harm to a legitimate interest.
- The ADB should commit to providing proper reasons for the non-disclosure of information, by expressly requiring that the notice of denial should state clearly

the legitimate aim or interest sought to be protected, and the facts and circumstances that demonstrate the substantial harm to the legitimate aim or interest that will result from the disclosure of the information.

- The provision for public interest override in paragraph 137 should be revised to make it mandatory.
- The reverse public interest override in paragraph 139 should be removed.
- The historical protection for certain types of information under paragraph 136 – such as Board information and internal information – should be shortened to five or at most ten years.

IV. The System of Oversight

A key oversight function in the draft Policy is the establishment of the Public Disclosure Advisory Committee (PDAC), with a mandate to “interpret, monitor, and review the disclosure requirements of the Policy”. The Committee is comprised of the Managing Director General (the chair), the Principal Director of the Department of External Relations (DER, the secretary) and the General Counsel, and reports directly to the President (par. 157).

Any requester who believes that his or her request for information has unreasonably been denied, or that the public interest was not applied appropriately in his or her case, may, within 60 days, submit a complaint to PDAC. This procedure does not apply to decisions by the Board not to disclose information, or to decisions by the President to withhold information on public interest grounds. PDAC will acknowledge receipt of such a complaint within five days and come to a decision as soon as possible and in any event within 30 calendar days. In coming to a decision, PDAC shall take into account both the exceptions and the public interest in disclosure, and it shall provide reasons for its decision (pars. 167-168 and 170).

A very important and positive development in the draft Policy is the creation of an Independent Appeals Panel (IAP), composed of three independent experts nominated by the President (the policy suggests that these be a representative of a DMC, an expert on the right to information who is independent of government, and an expert on access to commercial information). Where PDAC upholds the initial decision to refuse to disclose information, the requester may lodge an appeal with IAP, again within 60 days. This procedure is limited to appealing against decisions by PDAC not to disclose and so, like PDAC appeals, does not cover decisions by the Board or President not to disclose information. IAP is also precluded from considering claims that the public interest public interest override should be applied to overcome the exceptions. The IAP is tasked with making its best effort to consider all appeals within a reasonable period of time (par. 169 and footnote 33).

Pursuant to paragraph 176, the disclosure requirements of the PCP are also subject to review in line with the policy on accountability, namely the *Review of the Inspection Function: Establishment of a New ADB Accountability Mechanism*,⁴ adopted 29 May 2003. This means that anyone who has been harmed by the non-application of the Policy may petition the Compliance Review Panel for redress.

At the time it was established, PDAC was an important innovation and it still represents a useful internal level of appeal from refusals to disclose information, which should help ensure consistency in the application of the policy, as well as an opportunity for the ADB to address refusals internally. One concern about appeals to PDAC is that they are limited in two ways. First, as noted, they do not cover decisions by the Board or President not to

⁴ Available at:
http://www.adb.org/Documents/Policies/ADB_Accountability_Mechanism/default.asp?p=policies.

disclose. This is perhaps understandable given that this group cannot override the Board or President. Second, they apply only to refusals to disclose documents, not other failures to apply the policy (for example by breaching the timelines).

The latter point relates, perhaps, to the scope of remedies, which is similarly narrow, allowing only for the information to be provided to the requester (par. 166). It may be appropriate to limit the remedies available to the requester to obtaining the information but we believe that the policy should outline other possible responses by PDAC, such as taking appropriate measures to ensure that timelines are respected. The scope of appeals could then be widened correspondingly as well.

Another shortcoming with the PDAC appeal, which also applies to the IAP appeal, is that there is a fixed 60-day time limit for lodging appeals (par. 170). While this is appropriate as a general time limit, it would be preferable to incorporate some flexibility by allowing PDAC and IAP to waive this limit in appropriate cases. Furthermore, the draft Policy also allows appeals to be rejected where they fail to provide sufficient information to support the appeal. Again, this is not inappropriate, but it is important to avoid a situation where appeals are too easily rejected or too great a burden is placed on the requester. To this end, the rules should make three things clear. First, it should be clear that the burden of proof is on ADB to justify any refusal to provide information. Second, it should be clear that all a requester needs to do is raise a possible question about the release of the information for the appeal to be considered. Third, where an appeal fails to meet this standard, the requester should be given an opportunity to revise the appeal and resubmit it.

It is unfortunate that appeals to IAP are not allowed for situations where either the Board or President has refused to disclose information, or against refusals by PDAC to disclose information in the public interest. We understand that it might be sensitive for IAP, which reports to the President, to order the President to disclose information and a body reporting to the President cannot make orders directed at the Board. However, it is possible that an imaginative solution might be found, such as allowing IAP to make recommendations or observations in such cases. Similarly, we believe that it would be appropriate for IAP to make recommendations regarding public interest disclosures.

The right to appeal to the Compliance Review Panel is useful, although it is limited in scope to those who have suffered harm from the non-application of a policy and the procedure for accountability reviews is normally very cumbersome and time-consuming.

Recommendations:

- The scope of the right to appeal should be extended to all instances where the ADB has failed to respect the disclosure provisions of the policy and PDAC should be able to take action to resolve such problems over and beyond simply ordering the disclosure of the relevant information.

- PDAC and IAP should be able to waive the 60-day deadline for filing appeals in appropriate cases.
- The policy should make it clear that the onus of justifying refusals to disclose information rests with the ADB. Requesters should only be required to raise a possible question about release of information for appeals to be accepted and, where initial applications fail to do this, requesters should be given a chance to revise their appeals.
- Consideration should be given to allowing the IAP to consider appeals against refusals by the Board or President to disclose information, or against the non-disclosure of information in the public interest, perhaps through making recommendations or observations on these cases.

V. Access by Affected People

Despite positive references to access to information by affected people in the 2005 PCP, our consultations with affected communities and their support groups presented a picture of consistent failure to respect PCP commitments to affected people in practice. We heard and verified numerous accounts of the following access to information problems relating to ADB assisted projects:

- Ineffective public/community notice of projects under preparation.
- Limited, incomplete information, if at all available at the local level.
- Lack of timeliness of information.
- Lack of comprehensibility of available information.
- Unresponsiveness of concerned people at the local project level, whether from ADB or from the government or private sponsor.
- The primary means of public access to information, which is the ADB website, is not available to most members of the community.

These observations have been echoed at the ADB's own country consultations.

One underlying reason we identified for this situation is the ADBs lack of institutional commitment to providing information to affected people. Instead, the ADB passes much of the responsibility for disclosing information to the borrowing government or private sector sponsors. Where the ADB does take responsibility for making project documents publicly available, the general rule is that public availability means availability on its website, which facility is unfortunately inaccessible to poor communities.

To address the problem, we called on the ADB to revise paragraph 74 to make clear a direct obligation on the part of the ADB to provide information to communities affected by projects to which it provides assistance. We also called for the strengthening of Paragraph 75 to make the joint development of communication plans for ADB assisted projects and programmes mandatory, and not merely discretionary as provided in the 2005 PCP.

We acknowledge the improvements introduced in paragraphs 82 and 83 of the draft Policy that respond to the issues we raised. But the ADB can show greater commitment and can address the imbalance of the past by further improving Paragraph 83 to make more definite the requirement of a communications strategy, and by amending Paragraph 159 to correct its negation of joint responsibility for project information.

Recommendations

- Paragraph 83 should be further strengthened as follows:

“83. To support the requirements in paragraph 82, ADB will **assist develop jointly with** DMC governments and private sector clients ~~to develop~~ 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.”

- The first sentence of Paragraph 159 should be deleted to correct ADB’s negation of its responsibility for project information, and the paragraph further strengthened as follows:

“159. ~~For ADB projects, much of the responsibility for disclosing information will rest with the borrower/client.~~ The borrower/client will work with staff from operational departments to provide focal points in project areas to **provide information to** and dialogue with 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.”

VI. Other Comments

Pursuant to paragraph 62 of the draft Policy (see also paragraph 35), the scope of the policy is limited to documents the ADB “produces or requires to be produced”. This is a very significant limitation and potentially rules out a wide range of information which the ADB holds, but which it has not itself produced or required to be produced. Better practice is to cover all information held by or accessible to the institution. The GTI Model Policy goes even further:

Information held by third parties

3. To give full effect to the presumption of disclosure, the Bank includes, from the date of adoption of this Policy, clauses in the contracts it concludes to ensure that, subject only to reasonable operational constraints, it can access the information created or obtained pursuant to those contracts, by the parties to those contracts. This includes access to key documents held by borrowing governments or direct service providers created or obtained pursuant to a contract with the Bank.

The draft Policy again commits to its review within five years (par. 175). This is welcome but, at the same time, five years is a very long time in a field where developments are taking place all the time, including in the form of reviews by other IFIs, as well as in terms of changing attitudes and values about information. We recommend that the new policy commit to a full review within a shorter period of time, for example within three years.

In general, the procedural rules in the draft Policy are consistent with the standards in the GTI Charter. However, a commitment to assist requesters who are having difficulty formulating their requests, for whatever reasons, would be a useful addition. Furthermore, requesters should be given an opportunity to specify their preferred manner of accessing the information (such as electronically, in paper copy, through inspection *in situ*, and so on), and such preferences should be respected unless this would be unduly disruptive or costly.

Recommendations

- Paragraphs 62 and 35 should be revised to expand the coverage of information to include not just documents the ADB produces or requires to be produced, but all documents held by or accessible to it.
- Consideration should be given to including a new provision so that the ADB commits to ensuring that it has access to information held by bodies which operate under a contract with the ADB.
- The new policy should commit to a full review within three years instead of five years.
- Consideration should be given to adding provisions making a commitment to assist requesters who need such assistance and to providing access to information

in the form preferred by the requester.

Conclusion

The ADB is a very powerful institution. All of its operations, from policy reform to development finance, are public sector in nature. These operations, directly or indirectly, for better or worse, affect the lives of millions of men and women not only in Asia but throughout the world.

Because of this, the ADB itself, in its draft Policy, acknowledges the moral argument for transparency and public accountability. Paragraph 3 of the draft Policy states in part that “the ADB must demonstrate openness and accountability”. In the absence of any international body with compulsory jurisdiction over the ADB, and in the face of broad ADB immunities at the country level, internal policies such as the disclosure policy constitute the main mechanisms to secure transparency and accountability. This is why this review of the existing PCP, as well as its outcome, is so very important.

We note the extensive process of consultation which the ADB is undertaking as part of its review of the current PCP, adopted in 2005. This is appropriate given the significant importance of this policy and its impact on external stakeholders. We also note some important advances in the draft Policy as compared to the existing 2005 Policy, most particularly the establishment of an Independent Appeals Panel.

At the same time, we believe that more could be done to bring the policy into line with international standards and better comparative practices, as outlined in this Submission. By circulating a second draft Policy for consultation, we sincerely hope that the ADB is open to making further improvements in the draft, before it is put to the Board for approval. It is in this spirit that the GTI is providing this submission on the second draft Policy.

We call on the ADB to rise to the challenge of taking further measures to improve the draft Policy in both substance and practice. This is not the time to equivocate or hold back; it must embrace transparency and its recognition of the right to information to its full extent, thereby sending a strong signal to all that it takes its declarations on transparency and accountability in earnest.