

Inter-American Development Bank: Note on the Revised Proposal for the Access to Information Policy

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The Inter-American Development Bank (IDB) has been engaged in a process to revise its current Access to Information Policy (current Policy), which was adopted in 2010.¹ In 2022, the IDB presented a proposed new Access to Information policy for public consultation. In January 2024, the IDB launched an additional round of public consultations on a Revised Version of the Proposal for the Inter-American Development Bank New Access to Information Policy (Revised Proposal).

The Centre for Law and Democracy submitted comments on the 2022 proposal in its Analysis of the Proposal for the New Access to Information Policy, published in December 2022.² This Note³ updates that earlier Analysis and should be read in conjunction with it. It comments primarily on the changes in the Revised Version as compared to the earlier draft. It is, like the earlier Analysis, based on international standards on the human right to access information held by public authorities, whether they operate at the national or international levels, or the right to information (RTI).

In general, the Revised Proposal represents a notable and needed improvement over the current Policy and we encourage the IDB to retain these improvements in the final, adopted version. The Revised Proposal also includes some improvements from the 2022 draft, reflecting comments made during consultations, particularly in relation to the procedure for making requests for information. That being said, some of the most substantial issues that we

¹ Available at: <https://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35167427>.

² The Analysis is available at: <https://www.law-democracy.org/live/wp-content/uploads/2022/12/IDB-Analysis.Dec22.FINAL.pdf>.

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identified with the 2022 draft remain in the Revised Proposal, particularly in the area of exceptions and proactive disclosure.

Objective and Principles of the Policy

Some positive new language has been incorporated into Sections 1 and 2 of the Revised Proposal on, respectively, the objective and principles. New language in Section 1.1: Objective explicitly refers to aligning with international better practice, including a new footnote which indicates that the IDB will coordinate with access to information agencies and data protection offices in member countries to support the design and implementation of national laws related to this objective. There are also some small changes to the Principles set out in Section 2, including stronger language committing the IDB to provide maximum access to information and a more explicit reference to the right to appeal decisions to deny access.

These changes are all welcome. However, it would be preferable if the reference to international better practice recognised that the right to information is protected as an international human right.⁴ It is important to signal that providing access to information is not merely a better practice but represents respecting a fundamental human right.

We also note that the recommendation in our earlier Analysis to include references to the wider benefits of the right to information in these sections is not reflected in the Revised Proposal.

Requesting Procedures

Making and Processing Requests

Section 7 of the Revised Proposal contains several small wording changes which substantially improve the procedures for making and processing requests, although some issues still remain.

Compared to the 2022 draft, which was silent on the question of fees, Section 7.1(b) positively clarifies that no fees shall be imposed for “submitting and processing” requests. It also indicates that “service fees”, or “costos de reproducción” (costs of reproduction) in the Spanish version, may be imposed, in accordance with the Implementation Guidelines which are to be adopted by the Access to Information Committee following consultation with the Board of Executive Directors. Section 11.1 indicates that the Implementation Guidelines will

⁴ There is a reference to this in Paragraph VI of the Background for the New Proposed Access to Information Policy.

provide rules governing the “response and reproducing costs” for information requests (“respuesta y costos de reproducción” in Spanish).

These changes are welcome but some language tweaks are needed. First, the relevant English text in Section 7.1(b) needs to be better aligned with the Spanish, as reproduction costs is much more precise than “service costs”. Then, the language in Section 11.1 is unclear. CLD’s 2022 Analysis recommended that any fees should be limited to the cost of reproducing and sending the information. Perhaps “response and reproducing costs” is meant to mirror this recommendation, but the term “response” would encompass wider costs related to processing a request. We recommend cutting or revising this word, in both English and Spanish, so as to align the language in Section 11.1 with that of the revised English Section 7.1(b).

Some other small adjustments to Section 7.1(b), such as the removal of language implying that only information which is not available on the website can be requested, also reflect recommendations made by CLD and are likely to improve and clarify the requesting process.

In another revision, Section 7.1(c) now specifies that the IDB will keep requester identity confidential when requested “and without the need to provide a reason”. This clarification is welcome but, as noted in the original Analysis, it would be even better to allow for anonymous requests to be made.

We also note that a number of the recommendations from our earlier Analysis have not been reflected in the Revised Proposal, including to move Section 7.1(f) to Section 4, on Exceptions and to clarify its language, and to expand the provision on assistance to cover all requesters.

Timelines

The Revised Proposal also has better provisions regarding the timelines for responding to requests. New language in Section 7.1(e)(2) specifies that responses should be provided “as soon as possible” and within 30 calendar days, while Section 8.2 indicates the same time limit for decisions on appeals by both the Access to Information Committee and the External Review Panel. Such language signals that the IDB should not wait until the last possible moment to respond to requests, but rather as soon as possible but at the latest within the stated deadline, and is a better practice for improving timeliness in responding to information requests.

Similarly, Section 7.1(e) also clarifies that any extensions may not exceed the original time frame for responding to a request. This change is extremely important to prevent “denial by delay” situations and improve overall timeliness of the system, as noted in CLD’s earlier Analysis.

At the same time, some of the recommendations from our earlier Analysis have not been reflected in the Revised Proposal. We noted that a standard 30 days for responding to ordinary requests is too long, given the historical performance of the IDB (with a reported average response time for non-historical requests in 2021 of 4 days for standard requests and 22 days for complex requests).⁵ We also noted that it is not reasonable to apply the historical time limit of 45 days for responding to requests for information that pre-dates the new policy, given that the 30-day limit has been applied since the current 2010 Policy came into force (i.e. this would unnecessarily extend the time limit for providing information that is currently provided in 30 days).

Exceptions

Exceptions

The Revised Proposal's regime of exceptions is largely the same as in the 2022 draft. However, changes have been made to the exceptions related to privacy, legal and investigative matters, and information provided in confidence. The last of these is relatively minor: it now explicitly mentions "clients and third parties" but these would presumably have been covered as third parties anyway. The other two changes are more substantial.

The privacy exception has been revised significantly. Instead of protecting all "[i]nformation that, if disclosed, would affect the privacy of individuals, including personal information and communications" it now covers "Personal Data that, if disclosed, could cause a direct harm to an individual, which does not result from a legitimate disclosure". On the positive side, this incorporates a stronger harm test ("direct harm" as compared to "affect the privacy"). However, the design of both the 2022 draft and the Revised Proposal essentially rely on weak harm language in the primary exceptions in Section 4.1 but a strong harm test in Section 4.2 which we assume overcomes the weak primary language. As such, the stronger harm test may not be very important.

Of concern, however, is the fact that while the 2022 draft required the impact to be on the privacy of an individual, the Revised Proposal would cover any direct harm, of whatever nature. This problem is somewhat mitigated by the fact that the scope of this exception in the Revised Proposal is limited to personal data. However, this term is defined broadly in clause 11 of the definitions part of the Revised Proposal.⁶ However personal data extends significantly beyond the scope of privacy and, although there is significant overlap between

⁵ IDB, 2021 Report on Implementation of the Access to Information Policy, p. 15, <https://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=EZSHARE-1494108453-501>.

⁶ This definition is identical to the definition of the same term in the IDB's Personal Data Protection Policy, at Section II(8). Available at: <https://www.iadb.org/en/home/privacy-notice#:~:text=We%20may%20share%20the%20personal,specific%20services%20for%20the%20IDB.>

the two notions, they essentially serve to protect against different types of harms. For example, even if an employee of the IDB's name and position are already publicly known, that information is still personal data. As such, a request for information about such an employee that revealed corruption or misconduct could be refused under the redrafted exception, on the basis that it would directly harm that person, such as by harming their reputation or exposing them to accountability or liability for their misconduct, even though it would not harm that person's privacy.

There is, however, new language excluding information which results from a "legitimate disclosure", which the footnote to this exception indicates is a disclosure which is in accordance with the IDB Group's Personal Data Protection Policy. The idea may thus be to align the two policies. However, better practice for access to information remains to tether this exception to the idea of privacy as opposed to the wider notion of personal data.

Changes to the "legal, disciplinary or investigative matters" exception also have mixed impacts. On the one hand, it now merely refers to information that could create a "risk of legal dispute" whereas previously it referred to an "undue risk". This change is disappointing, potentially enabling remote or theoretical risks to be relied upon as grounds for refusing to disclose information.

More positively, this exception now refers to specific investigatory and complaints processes under its institutional integrity, sanctions and ethics systems, instead of referencing investigations generally. However, the exception now covers all information related to these processes, instead of clarifying that the information must somehow harm those investigations. It is not clear whether the harm test in the first sentence of section 4.1(f) also applies to the second sentence but, if not, these revisions indicate that such information could be kept confidential. The harm test in Section 4.2 should still apply, but the exception itself should refer to a concrete harm and should not be worded so as to imply that entire categories of information are excluded. At the same time, our previous comments on this exception still apply (i.e. have not been addressed).

One of the recommendations from our earlier analysis which is not reflected in the Revised Proposal relates to the idea that the primary exceptions should be more aligned with the language of the Section 4.2 harm test. In particular, they should avoid using neutral terms like "could affect" and instead consistently refer to some sort harm ("could harm", "could compromise" and so on).

Harm Test and Overrides

The Revised Proposal does not materially alter the approach in the 2022 draft to the harm test (Sections 4.2 and 4.3) and positive override (Section 5). As noted in CLD's earlier Analysis, while the proposed approach is a substantial improvement over the current Policy, there are outstanding issues. One is limits on the use of the positive override, for example to a

discretionary and exceptional rule, as opposed to a regular and mandatory one. Another is that the override is to be applied only by the Access to Information Committee (or the Board of Governors or Board of Executive Directors, for their information) and only applies to information which “has not been provided under an express restriction of disclosure”. A further issue is that both the harm test and the public interest override refer generally to a “benefit” as triggering this, rather than the public interest in disclosing the information.

Another core concern is the relationship between the balancing between harm and benefits which is found in both the positive override in Section 5 and the harm test in Section 4.2. While Section 5.1 of the Revised Proposal now helpfully indicates that the positive override will be applied “in accordance with the criteria set” in Section 4.2, this does not resolve the confusion as to how and when this balancing exercise will be applied in practice. Specifically, the Section 4.2 harm test is to be applied routinely and at the first instance but the Section 5.1 override can only be applied by the Access to Information Committee. As noted in CLD’s original analysis, the proper approach is to apply the harm test and the public interest override in an assessment made at the first instance. The harm test suggests that this is how it will be done but the positive override section suggests otherwise, thereby creating inconsistencies in the Revised Proposal which will potentially lead to confusion later on.

Another issue is that it is not clear how claims to apply the positive override will come before the Access to Information Committee. This could of course arise on appeal, with the applicant presenting arguments to this effect at that time. It would, however, be preferable to set out a procedure whereby first instance decision-makers can obtain a quick decision on this from the Committee when they believe the conditions for applying the positive override are engaged.

Positively, the Revised Proposal reflects a stronger commitment to ensuring that the harm test is applied transparently. Section 4.3 says that Implementation Guidelines will determine a mechanism for ensuring the outcome of the harm test is “registered and disclosed”, while Section 4.2 indicates that the harm test will be “registered and communicated” according to Section 4.3. Given the difference in this wording, it is not entirely clear if this means communicated to the requester, disclosed publicly, for example via a public database, or both. The first is particularly important and established international standards call for requesters to be notified about the reasons for any refusal to disclose information. But the second would reflect better practice and could position the IDB as a leader among international financial institutions in this area.

We would also like to raise a point here which was not reflected in our earlier Analysis even though it is dealt with in the same way in the 2022 draft and the Revised Proposal. This is rules on classification and declassification in Sections 6.1 and 6.3. As a first point, the policy should make it very clear that while classification can be useful, it should not, of itself, serve as a ground for refusing to disclose information. Instead, the harm test should be applied at

the time of any request to determine whether the disclosure of the information at that time would cause harm.

Second, it could be useful to concretise the declassification schedule, for example by providing that certain types of information will at least presumptively automatically be declassified after say five or ten years. This could apply, for example, to deliberative information, certain investigative information and certain information relating to the Board of Governors and Board of Executive Directors.

Third Party Information

In our earlier Analysis, we expressed concern that third parties have an effective veto over decisions to disclose, as well as the lack of clear procedures for consulting with third parties. These issues have not been resolved.

One wording change in the Revised Proposal slightly addresses the first issue. Section 3.2(a), which specifies that the opinions of borrowers and clients will be taken into account when deciding on disclosure, now specifies that this will be taken into account for purposes of applying the exceptions in Section 4. This suggests that the opinions of third parties will be considered when applying the harm test but will not themselves constitute a conclusive decision on this. This change is therefore welcome.

However, it does not ultimately resolve the fairly clear language on this issue found in the exception in Section 4.1(c) Information Provided in Confidence. This still lacks a harm test (and indeed any reference to a protected interest), thus making it unclear whether and if so how the harm test would be applied to this exception. Instead, it states fairly clearly that once its conditions are met, the information will simply not be disclosed, with those conditions effectively giving third parties a veto over the release of information. Better practice here, as reflected in the large majority of the 140 national access to information laws, is to limit this exception to cases where, on an objective test, disclosure of the information would be likely to harm the legitimate commercial interests of the third party who provided it.

Appeals and Governance

The Revised Proposal is largely the same as the 2022 draft in relation to governance (Section 9) and the appeals process (Section 8). One change is that Section 9.4 now includes language about the selection of External Review Panel members, noting that the selection will be carried out by a “competitive and transparent process” and specifying that members should be selected pursuant to traits such as expertise, independence and professional background in access to information and transparency. Such requirements reflect international standards and are a positive addition.

The fundamental structure of the appeals process has not changed from the earlier draft. As noted in the discussion of request procedures above, an improvement is the introduction of limits to extensions of the timelines for appeals. Otherwise, issues identified in CLD's earlier analysis remain. More detail about the appeals process, specifically as to written decisions with reasons, would be useful. It is also important to extend the right of appeal to cover all relevant breaches of the policy and not just refusals to disclose information.

Proactive Disclosure

As highlighted in CLD's earlier Analysis, the 2022 draft made stronger commitments in principle to proactive disclosure but did not establish a clear framework for implementing those commitments. The Revised Proposal makes some improvements but still fails to establish clear rules for proactive disclosure. Instead, the IDB appears to have made the decision to address proactive disclosure primarily through the Implementation Guidelines. Section 11.1 of the Revised Proposal has new language indicating that the Implementation Guidelines will establish rules for routinely disclosed documents, in addition to those in the Annex.

Although this change at least offers an option for spelling out the rules on proactive disclosure, it would be better to have a stronger framework for proactive disclosure in the policy itself. This could include, for example, minimum proactive disclosure responsibilities, timeframes for such disclosure, the manner of making such disclosures particularly in circumstances where impacted persons and communities may face barriers to accessing information online, and a monitoring system for ensuring compliance with proactive disclosure obligations. Although it would be appropriate for some of these details to be found in Implementation Guidelines, more of this substance should be contained directly in the policy.

One positive change in the Revised Proposal is that it expands the list of documents in Annex I and clarifies that they should be routinely disclosed. The Annex is now titled "Illustrative List of Routinely Disclosed Information" while Section 11.1 indicates that the Implementation Guidelines will address routinely disclosed information "in addition to" what is listed in the Annex. These changes make it reasonably clear that the information listed in the Annex is meant as a minimum baseline for proactive disclosure, although this is never stated explicitly.

The Annex has been amended to include a list of "operational information", beyond the environmental and social information listed in the 2022 draft. This expansion was needed and creates a stronger minimum baseline for what information should be proactively disclosed. However, some of the language in the chapeau to this sub-list is unfortunate. For example, it states that this information will be disclosed on the IDB's website "when

applicable” rather than in addition to possible other means of disclosure, which creates confusion over the precise nature of these disclosure commitments.⁷

Recommendations

- CLD reiterates the recommendations contained in its earlier Analysis to the extent that they are not reflected in the Revised Proposal, particularly those related to the regime of exceptions.
- The new language in the sections on objectives and principles should reference the right to information as part of international human rights law and set out the wider benefits of this right.
- The policy should make further improvements to the rules on processing request by:
 - Amending the language in Section 7.1(b) to refer to reproduction costs instead of “service fees”, removing the reference to response costs in Section 11.1 or changing it to the costs of sending information, and harmonising the two sections.
 - Eliminating the prohibition on anonymous requests.
 - Incorporating earlier recommendations on moving Section 7.1(f) to Section 4, on Exceptions, and clarifying its language, as well as expanding the provision on assistance to cover all requesters.
- Consideration should be given to reducing the timelines for responding to requests to 20 or even 15 days and historical information should, at most, apply only to information held by the Bank prior to the coming into force of the 2010 Policy.
- In terms of the exceptions in the Revised Proposal, the IDB should:
 - Clarify that the “privacy of individuals” exception applies only when disclosure would harm the individual’s privacy, rather than any kind of harm.
 - Restore the reference to “undue risk” in the legal and disciplinary matters exception and, while retaining the more explicit reference to specific IDB processes, reintroduce a reference to harm to those procedures.
 - Incorporate proper references to some notion of harm into all of the primary exceptions.
 - Ensure that both the harm test and the positive override can be applied by the decision-maker at the first instance or, at a minimum, provide for a procedure whereby first-instance decision makers can quickly obtain approval for the positive override.
 - Improve the standards for applying the positive override, as outlined above.
 - Clarify the way in which information about how the harm test has been applied will be disclosed.
 - Clarify that the system of classification does not avoid the application of the harm test at the time a request for information is received and consider setting up a more structured and routine system for declassification of certain categories of information after set periods of time, such as five or ten years (sunset clauses).

⁷ Both the 2022 draft and the Revised Proposal indicate that the environmental and social information listed in the annex will also be disclosed “when applicable”, although the website is not mentioned.

- Revise the exception for information provided in confidence so that it is no longer a third-party veto and instead applies only when, on an objective standard, disclosure is likely to harm the legitimate commercial interests of third parties.
- More detail should be added to the policy regarding appeals – for example requiring them to be in writing with reasons – and the grounds for lodging an appeal should be extended to any relevant breach of the policy.
- The decision to leave additional rules regarding proactive disclosure to the Implementation Guidelines should be reconsidered in favour of providing more detailed guidance on minimum obligations, timelines, means of disclosure and monitoring in this area in the primary policy.