



Comments on the Draft Policy on Public Information of the Asian Infrastructure Investment Bank

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Executive Summary

The Asian Infrastructure Investment Bank (AIIB) signalled its commitment to the principle of transparency when it adopted its Public Information Interim Policy (Interim Policy) just one month after it started operations in 2016. The Interim Policy recognised that it was not a final document, calling for a “comprehensive Policy” to be adopted “in the future” and for its implementation to be reviewed annually.

In January 2018, the AIIB released a Draft Policy on Public Information (draft Policy). We commend the incorporation of several civil society recommendations in the draft Policy, including a principles-based approach, an express intent “to generate maximum disclosure and achieve a culture of operational transparency at the Bank”, an emphasis on accountability to stakeholders, and an override of exceptions to disclosure. Several of the exceptions to disclosure have also been modified to reflect a harm-based approach.

The draft Policy is, however, far from “comprehensive.” It lacks sufficient detail to serve as a predictable, effective mechanism to promote transparency and access to information at the Bank. The purpose of a policy is to commit the Bank to taking specific action and adhering to clear rules. Vague, flexible provisions – and statements of principles without clear commitments to action – fundamentally undermine the objectives of a policy.

Key areas for improvement include setting an unambiguous objective of maximising disclosure and expanding the scope so that this Policy harmonises the standards for openness across all of AIIB’s operations. Provisions on proactive disclosure should include a clear list of the documents that AIIB will disclose, along with timeframes for such disclosure both prior to “functional events” (such as Board approval of a project) and after those events. The rules on procedures for making requests need to be significantly revised so as to provide a clear framework for this. The system of appeals also needs significant further development, including by incorporating an independent appeals mechanism. The most significant need for reform is in terms of the regime of exceptions, which determines the line between what information is public and what is not. Many of the exceptions in the draft Policy are unduly broad and in some cases they grant the Bank excessive discretion to refuse to disclose information, such as where this might place an administrative burden on the Bank or constitute an “interference” in the political affairs of a member country. Such provisions are not consistent with a commitment to maximum disclosure of information.

These Comments represent the contribution of the Centre for Law and Democracy (CLD) and the Bank Information Center (BIC) to the AIIB’s February/March 2018 public consultation on the Draft Policy on Public Information. They are based on international standards and better comparative practice on the right of the public to access information held by public bodies, with a particular focus on the access to information policies of other international financial institutions. CLD and BIC are ready to continue to work with the AIIB to improve its information disclosure policy and to help it implement that policy in an efficient and fair manner.

Introduction

The Asian Infrastructure Investment Bank (AIIB or Bank) formally came into existence on 25 December 2015. Already by January 2016 it had adopted a Public Information Interim Policy (Interim Policy),¹ signalling the importance that the AIIB attaches to this particular issue. The adoption of an information policy is consistent with Article 34(4) of the AIIB's Articles of Agreement, which states, in part: "The Bank shall establish a policy on the disclosure of information in order to promote transparency in its operations."²

The Interim Policy calls for a "comprehensive Policy on Public Information" to be adopted in the future, "in light of the Bank's early experience".³ In June 2017, the Board Committee on Policy and Strategy "approved the commencement of a review of the PIIP and the objective of the Board of Directors adopting a new policy in the near future".⁴ In January 2018, the AIIB published a draft Policy on Public Information (draft Policy or draft PPI)⁵ and an accompanying background paper,⁶ and commenced a public consultation process.⁷

The draft Policy has a number of strengths. It is, as it claims to be, based on a presumption in favour of disclosure, which can generally only be overridden based on the regime of exceptions set out in the policy. It envisages the proactive disclosure of a range of information, supplemented by reactive disclosure, in response to requests, of other information not falling within the scope of the regime of exceptions.

At the same time, the draft Policy suffers from a number of weaknesses. Although it creates a presumption in favour of disclosure and a regime of exceptions, it also reserves to itself the discretion not to disclose other information, through the negative public interest override. The system for proactive disclosure lacks any specific list of documents to be disclosed, or timeframes for disclosure. The wording of many exceptions is overly broad and in some cases even unclear. The draft Policy almost entirely omits to mention the procedures for making and processing requests, and the rules regarding appeals from refusals to disclose are signally unclear.

The AIIB has presented itself as a 'lean' international financial institution (IFI) that seeks to limit the bureaucracy and paperwork that it suggests characterise other IFIs, and to operate in an efficient manner with limited human resource costs. However, this cannot relieve AIIB of its obligation to respect the right of the public to access information held by public bodies or the

¹ Available at: <https://www.aiib.org/en/policies-strategies/operational-policies/public-information.html>.

² Available at: https://www.aiib.org/en/about-aiib/basic-documents/_download/articles-of-agreement/basic_document_english-bank_articles_of_agreement.pdf.

³ Note 1 at paragraph 2.

⁴ Background Paper on the Public Information Interim Policy Review, 22 January 2018, paragraph 4. Available at: https://www.aiib.org/en/policies-strategies/operational-policies/public-consultation/.content/_download/background_paper_on_PPI.pdf.

⁵ Available at: https://www.aiib.org/en/policies-strategies/operational-policies/public-consultation/.content/_download/draft_policy_on_public_information.pdf.

⁶ Note 4.

⁷ See: <https://www.aiib.org/en/policies-strategies/operational-policies/public-consultation/index.html>.

right to information (RTI), which has been recognised internationally as a fundamental human right.

These Comments are intended as a contribution to the AIIB's February/March 2018 public consultation on the draft Policy. They are based on international standards in this area and better comparative practice, with a particular focus on the access to information policies of other IFIs. In order to respect minimum standards on RTI, there is a need to revise the draft Policy in a number of areas. There is also a need to conduct a public consultation on critical details that are currently left out of the draft Policy and are instead planned be included in an implementing directive.⁸

These Comments analyse and provide recommendations grouped according to the following headings in the draft Policy: 1. General Comments; 2. Introduction to the Policy; 3. Scope; 4. Key Concepts, Overarching Intentions and Governing Principles; 5. Requirement to Disclose Information Proactively; 6. Requirement to Disclose Information Upon Request; 7. Requests for Information Disclosure; 8. Exceptions to Disclosure Requirements and Override of Disclosure Requirements and Exceptions to Disclosure Requirements; and 9. Reporting Requirements, Implementation, and Other Issues.

1. General Comments

The Background Paper to the draft Policy notes that steps have been taken to reduce qualifiers such as “where feasible” as a result of the introduction of a presumption in favour of disclosure into the draft Policy.⁹ While this is a positive step, the draft Policy continues to employ vague language throughout the document. Clarity and precision are necessary for a core policy document, particularly one that implements the AIIB's commitment to transparency and is required by AIIB's Articles of Agreement. More generally, while we support the idea of a principles based policy, this in no way means that it is appropriate for the policy to include vague language or language which grants undue discretion to Bank staff in terms of interpreting what is meant.

Without clear and precise language, the public may not fully understand the policy and the meaning of its provisions. Vague language also grants excessive discretion to Bank staff in their application of the policy and creates a risk that the important commitments made in the Policy will not be adhered to in practice. This is a problem throughout the draft Policy, as noted in the comments that follow.

Recommendation:

- The draft Policy should be carefully reviewed and edited to remove unduly broad, vague or unclear language so that the resulting version is clear and precise as to its import.

⁸ Note 4 at paragraph 3.

⁹ The Background Paper states: “This adoption of a presumption in favor of disclosure results in the absence of qualifiers in the draft PPI (such as “whenever possible” and “where feasible”), which is in line with the requests of a number of stakeholders.” Note 4 at paragraph 10.

2. Introduction to the Policy

We welcome AIIB's commitment to disclose "information held by the Bank."¹⁰ This represents an important first step in aligning the draft Policy with international best practice. Paragraph 1.4 indicates that the draft Policy is a "major policy" of the Bank, which is also positive.

Paragraph 1.1 states that the draft Policy "makes provision for required public disclosure of information". We assume that "required" in this context means "the mandatory" but it could also be read as meaning that it "makes provision for the public disclosure of information where this is required", which would be a very restrictive meaning. It is very important that policies be drafted very clearly to avoid subsequent restrictive interpretations of vague language.

Recommendation:

- Paragraph 1.1 should be edited to make it clear that the Policy seeks to create binding rules governing the disclosure of information, rather than that it is limited to information which is required to be disclosed.

3. Scope

Paragraph 2.1 of the draft Policy defines the scope of information it covers as follows: "*information* shall mean all readable and communicable information physically and electronically held by the Bank, irrespective of its form, format or derivation". This is clearly intended to cover a wide range of information and in many respects it does. But it would exclude, for example, audio or video files that could not be read, inasmuch as it refers to "readable *and* communicable". Perhaps the simplest option would be to replace the italicised "and" in the previous quote with "or otherwise". Another approach would be to focus on the idea that information is any material that is capable of communicating meaning. The same applies to the use of the conjunction 'and' between "physically" and "electronically", which should be replaced by "and/or".

Paragraph 2.1.1 states that the Policy "is without prejudice to specific information disclosure requirements adopted by the Board of Directors in other policies." In our view, this provision should be revised in light of the "overarching intention" of the policy to "generate maximum disclosure" of information. The Policy should state clearly that in case of a conflict between it and any other Bank policy, its provisions shall prevail, in line with the policies of the European Investment Bank (EIB)¹¹ and the Asian Development Bank (ADB).¹² Moreover, the Policy should state explicitly that it serves to institutionalise the presumption in favour of disclosure

¹⁰ Paragraph 1.1.

¹¹ The EIB Transparency Policy, 2015, paragraph 1.3. Available at: <http://www.eib.org/infocentre/publications/all/eib-group-transparency-policy.htm>.

¹² Public Communications Policy 2011: Disclosure and Exchange of Information, paragraph 34. Available at: <https://www.adb.org/sites/default/files/institutional-document/32904/files/pcp-2011.pdf>.

across all of the Bank work, including the disclosure of information about the environmental and social impacts of projects, the Compliance, Effectiveness, and Integrity Unit, and the Project-Affected People's Mechanism.

Paragraph 2.2 of the draft Policy indicates that it does not require the Bank to “create information in a new form or format”, which is problematic. There are two aspects to this. The first refers to the core idea of creating a new format. In some cases, refusing to do this might be reasonable, for example where the Bank is asked to create a transcript from a video that it holds. However, in many cases, the Bank can provide information in a different format through a simple electronic conversion. For example, the Bank may hold data in specialised statistical software, such as IBM SPSS Statistics, which many AIIB stakeholders may not have access to. Converting the data from SPSS to Excel or even .pdf essentially takes place at the click of a button, and would represent no administrative burden to AIIB, while offering a great benefit to requesters who do not have access to the original software.

The second aspect refers to the idea that information may be spread among different primary records (documents, electronic files). For example, a request for the amount spent by the Bank on office costs in 2016 and 2017 might require the extraction of that information from the 2016 and 2017 budgets, a task that would represent a very minor burden on AIIB staff. Moreover, while in that particular case simply providing the requester with the two budgets might suffice, there will be other cases where providing the master file would actually take more time, for example where a file contained sensitive information that needed to be redacted prior to disclosure.

The Policy should find an appropriate balance between serving the needs of requesters and not committing the Bank to undertake unduly onerous tasks. This can be achieved by introducing language into paragraph 2.1 indicating that the Bank will compile information or provide it in the format preferred by the requester unless that would impose an undue burden on it.

Recommendations:

- The definition of “information” in paragraph 2.1 should be clarified. A simple option would be “*information* shall mean all recorded material held by the Bank that communicates meaning, irrespective of its form, format or derivation”.
- Paragraph 2.1.1 should make it clear that the PPI serves to institutionalise the presumption in favour of disclosure across all of the Bank's operations and, to that end, it should state clearly that, in case of a conflict between the PPI and other policies, the provisions of the PPI shall prevail.
- Instead of providing that the Bank does not have to “create information in a new form or format”, paragraph 2.2 should indicate that the Bank will compile information and/or provide it in the format preferred by the requester unless that would impose an undue burden on it.

4. Key Concepts, Overarching Intentions and Governing Principles

The draft Policy includes three sets of what might be described as ‘core values provisions’, namely “Key Concepts”, in section 3, “Overarching Intentions”, in section 4, and “Governing Principles”, in section 5. This is confusing inasmuch as the specific statements in these paragraphs address overlapping issues in different ways and it is not clear how they relate to each other or whether there is any hierarchy among these provisions and, if so, what.¹³ Clarification is needed on the relationship between these three sections.

A number of provisions in the draft Policy refer to its underlying basis, namely to guarantee openness. Thus, paragraph 4.1 recognises the importance of transparency to accountability, while paragraphs 3.1.1 and 4.2 indicate that the policy is “principles-based” and that it is intended “to generate maximum disclosure and achieve a culture of operational transparency at the Bank.” These are both positive statements.

At the same time, the core meaning of maximum disclosure – namely to disclose information unless there is an overriding need for secrecy – is never set out properly. Instead, Principle 1, at paragraph 5.1.1, states that the Bank shall disclose information unless the information “falls within an exception”, which is not so much a principle as an operating rule. And even this is apparently not accurate, because paragraphs 3.1.4 and 10 provide for disclosure to be overridden even in the absence of an exception justifying this.

Furthermore, a principles-based policy should include a list of documents that will be proactively disclosed. Paragraph 3.1.2 states: “This Policy recognizes functional events as the basis for the required proactive public disclosure of information.” As discussed under heading 5 below, we believe that a far more specific framework for the proactive disclosure of information is needed. The policy should also recognise the particular importance of the Bank being accountable to project-affected people, a key set of stakeholders.

Principle 4 (paragraph 5.1.4) indicates that, in implementing the policy, the Bank will have “due regard to the operational efficiency, administrative capacity and financial resources of the Bank”. This is extremely problematical, largely because its meaning is unclear and it therefore grants the Bank broad discretion to interpret it as it might wish. In our experience with other IFIs, it is unlikely that the costs of implementation of the policy would ever become overwhelming or severely hamper “operational efficiency.” We are concerned that the principle of “due regard” could indicate that the Bank intends to reserve for itself the right to refuse to implement the Policy, for example by refusing to respond to a request for information whenever it deems this to be “burdensome.” No analogous principle is found in the information policies of other leading IFIs.

It is also problematical that Principle 4 appears to contradict directly Principle 1, which says that the only reason for the Bank to refuse to disclose information is the regime of exceptions. This is exacerbated by paragraph 5.1, which states that the four principles “shall jointly govern the Bank’s disclosure of information to the public within the exercise of this Policy.” This “joint governance” approach creates a lack of clarity about what constitutes the dominant objective or core value of the Policy.

¹³ For example, paragraph 3.1.3 refers to exceptions, paragraph 4.2 refers to the idea of maximum disclosure, and this idea is essentially repeated in paragraph 5.1.1, containing Principle 1.

The purpose of adopting policies is to commit the Bank to doing certain things and behaving in certain ways. Vague, flexible provisions like Principle 4, especially when put in the principles section of a policy, fundamentally undermine this underlying purpose of adopting a policy because they have the effect of granting back to the Bank the discretion to apply or not to apply the rest of the provisions of the policy.

Ultimately, Principle 4 is unnecessary. If the Bank has a concern about the impact of very large requests, then it could adopt an operative provision which was specifically tailored to this concern. It could also, if it felt that was needed (although there is no evidence to support this), adopt a provision on vexatious requests, which are found in some national laws (but again not in the information policies of other leading IFIs).

We note three key gaps in the core values sections of the draft Policy: first, a lack of reference to the values that underpin exceptions to disclosure; second, the failure to recognise that the right to access information as a human right; and, third, the absence of any principle on processing of requests.

Assuming the Governing Principles set out in section 5 are supposed to provide the core framework of overriding principles for the policy, it is a matter of concern that there is no reference in this section to the values underlying exceptions. Principle 1 does refer to exceptions, but only as setting the boundaries for maximum disclosure. The only other reference to the idea of exceptions among the core values provisions is in paragraph 3.1.3, which notes that the policy recognises “multiple legitimate interests that shall be afforded protection”. The draft Policy does not mention the importance of clear exceptions based on a risk of harm or indicate that exceptions only apply in light of an overriding need for secrecy. In contrast, the principles section the World Bank’s policy refers to “a clear list of exceptions”, while the paragraph that sets out the exceptions refers to the idea of causing harm to a legitimate interest.¹⁴

Second, the draft Policy does not recognise that the right to access information held by public authorities such as the AIIB is a human right. This has been widely recognised globally and the information policies of both the ADB and the EIB include statements about the right to information as part of their guiding frameworks.¹⁵ The draft Policy also fails to refer to the importance of giving effect to this right, or to its benefits, apart from as a means of enhancing accountability (paragraph 4.1). The right creates many other benefits and it is important for these to be recognised and referred to in the policy.

Third, while the Governing Principles recognise the duty of the Bank in the area of proactive disclosure (Principle 2 in paragraph 5.1.2), there is no analogous principle recognising the duty of the Bank to process requests for information. Instead, Principle 3 (paragraph 5.1.3) only

¹⁴ Bank Policy: Access to Information, 2015, Paragraph III(A)(1) and Paragraph III(B)(2). Available at: <https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=3693>.

¹⁵ The ADB Policy states in paragraph 17: “Freedom of information is recognized as a fundamental human right as set forth in the Covenant on Civil and Political Rights.” Further, paragraph 30 states: “ADB recognizes the right of people to seek, receive, and impart information and ideas about ADB-assisted activities.” Note 12. The EIB Policy, for example states, at paragraph 3.5, that its policy is “consistent with the legal obligations of the EIB in respect of the principle of openness and the right of public access to documents.” Note 11.

commits the Bank to treating requests equally and in a non-discriminatory manner which, while positive, would technically be met if the Bank ignored, equally, all requests.

Recommendations:

- The three sets of ‘core values provisions’, in sections 3, 4 and 5, should either be integrated into one set of principles or the way that the different statements interact (for example as to any hierarchy) should be made clear. At a minimum, the values expressed in these sections should be rendered fully consistent and compatible.
- The meaning of the term “maximum disclosure” should be defined in the policy and the core values should incorporate the idea that there will be a specific minimum list of documents that are subject to proactive disclosure.
- The policy should recognise the particular importance of the Bank being accountable to project-affected people.
- Principle 4 in the current draft Policy should be removed and replaced with a principle which recognises exceptions and defines the underlying basis for them in a clear and limited manner.
- Should this be deemed necessary, an operative provision could be introduced into the body of the Policy, in the part dealing with the processing of requests, which allowed the Bank to refuse to process requests which were so onerous that they undermined its ability to operate effectively and/or which were vexatious.
- The policy should recognise the human rights status of the right to information.
- The core values should also recognise the commitment of the Bank to process requests for information.

5. Requirement to Disclose Information Proactively

Paragraph 6.1 sets out the Bank’s commitment to disclose information proactively “within three event categories that are based upon the functioning of the Bank”, namely financial, institutional and operational. According to the Background Paper, “all information in these three categories will be bound by events and processes to determine when they will be disclosed, as is the current practice at AIIB.”¹⁶

Disclosure of information in each of the three “event categories” occurs only after “approval or adoption” by the Board of Directors, Board of Governors or President (paragraphs 6.1.1, 6.1.2 and 6.1.3). This is an extremely limited commitment to proactive disclosure of documents and, in our view, a more precise approach is needed. The policies of the African Development Bank (AfDB),¹⁷ ADB,¹⁸ Inter-American Development Bank (IDB)¹⁹ and World Bank²⁰ all require the

¹⁶ Note 4, paragraph 13.

¹⁷ Bank Group Policy on Disclosure and Access to Information, 2012, paragraph 4.10.1. Available at: http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/Bank_Group_Policy_on_Disclosure_and_Access_to_Information.pdf.

¹⁸ Note 12 at paragraph 93.

¹⁹ Access to Information Policy Implementation Guidelines, 2011, paragraph 5.1. Available at:

disclosure of certain documents which have been circulated to the Board for information, and the AfDB,²¹ ADB²² and World Bank²³ also routinely disclose specific types of documents circulated to the Board for consideration or approval. The draft Policy also fails to provide for the release of operational documents that do not require approval by the President or the Board, such as draft environmental and social impact assessments and monitoring reports on individual projects.

The draft Policy does not set out any timeframes for disclosure of documents. In our experience, event-based disclosure and disclosure based on specific timeframes are both complementary and essential to prevent gaps in the disclosure of information. Timeframes should be set to ensure that documents are disclosed within an appropriate period of time after a functional event or process has occurred (for example within five working days of a document's production, of the management review committee's approval of a project concept note, or of the receipt of a draft ESIA or implementation report from a client). Clear timeframes would address some of the remaining gaps in disclosure of information that continue to occur under the Interim Policy, particularly a failure to disclose information about project implementation.

In addition, timeframes should be set to ensure that documents are disclosed within a specific period of time prior to functional events, such as Board approval of a project or a Board meeting. For Category A projects (public sector, private sector, and financial intermediaries and their Category A sub-projects), the Policy should require disclosure of Project Summary Information (PSI) documents 120 days prior to Board approval.²⁴ The Policy should stipulate that PSIs will be disclosed at least 60 days prior to Board approval for public sector projects²⁵ and 30 days prior to Board approval for private sector projects.²⁶ In addition, the Policy should provide specific timeframes for disclosure of environmental and social information.²⁷ In particular, for Category A projects, the Policy should require disclosure of environmental and social impact assessments at least 120 days prior to Board approval.²⁸

Paragraph 6.2 states that “Annex A to this Policy sets out examples of information, correspondent to these functional event categories.” While Annex A illustrates the documents

<http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=37532979>.

²⁰ Note 14 at paragraph III.B.4.d.

²¹ Note 17 at Appendix 1.

²² Note 12 at paragraph 93.

²³ Note 14 at paragraph B.III.B.4.b-d.

²⁴ This is consistent with ADB's policy, which represents best practice in this regard. ADB Operational Procedures: Public Communications at paragraph 11. IFC's policy also contains specific time-bound requirements for Category A projects that require a longer period of disclosure of summary information prior to Board approval. IFC Access to Information Policy at paragraph 34.

²⁵ This is consistent with EBRD's policy, which represents best practice in this regard. Note 32 at paragraph 3.1.5.

²⁶ ADB, EBRD, and IFC all adhere to this requirement. ADB Operational Procedures: Public Communications at paragraph 11. Note 32 at paragraph 3.1.5. IFC Access to Information Policy at paragraph 34. EIB also requires time-bound disclosure of summary information. Note 11 at 46.

²⁷ The AIIB's ESF commitments to disclosure are limited to disclosure of specific forms of environmental and social information either “prior to, or as early as possible during the Bank's appraisal of the Project,” or “in a timely manner.” ESF, paragraph 58.

²⁸ This is consistent with ADB's policy, which represents best practice in this regard. ADB Operational Procedures: Public Communications at paragraph 18. AfDB and EBRD require a minimum of 120 days for public sector projects, and 60 days for private sector projects. Note 32. at paragraph 3.4.1. AfDB Safeguards at page 28. IFC also requires 60 days for its projects. IFC Access to Information Policy at paragraph 34.

that could be disclosed under the draft Policy’s commitment to proactive disclosure, it is not clear to us whether or not it is binding as part of the Policy. We strongly recommend that the Policy incorporate, as an operative element, a list of documents to be proactively disclosed. This list would provide much-needed clarity on the AIIB’s interpretation of its commitments to proactive disclosure. This would include clarity regarding documents that are particularly important to external stakeholders, and thereby strengthen relationships between those stakeholders and the Bank.

Annex A states that certain forms of environmental and social information will be disclosed “in accordance with the Environmental and Social Framework.” We note that the AIIB’s Environmental and Social Framework (ESF) includes a general, and extremely limited, set of commitments.²⁹ The draft Policy should serve to maximise disclosure by expanding the disclosure of environmental and social documents and including documents such as stakeholder engagement plans and environmental and social information for financial intermediary sub-projects.

Recommendations:

- The definition of each “event category” should be expanded to include additional events and processes, including the submission of a document to the Board (for information or approval), internal decisions made by AIIB staff with respect to a project, and project-related documents and other information the Bank receives from clients.
- Specific timeframes should be established for “event-based” disclosures. Documents should also be disclosed within a specific period of time prior to certain functional events, such as disclosure of draft environmental and social impact assessments 120 days prior to Board approval of a project. Documents should also be disclosed within an appropriate period of time after a functional event or process has occurred (for example within five working days).
- A list of documents to be proactively disclosed should be included as an operative element of the Policy.
- The Policy should expand the existing commitments to disclosure of environmental and social documents to include documents such as stakeholder engagement plans and environmental and social information for financial intermediary sub-projects.

6. Requirement to Disclose Information Upon Request

²⁹ The ESF stipulates that the Bank posts the following Client-produced documentation on projects: draft environmental and social assessment reports, ESMPs, ESMPFs, resettlement plans, RPFs, Indigenous Peoples plans and IPPFs, or “other approved forms of documentation, as well as final or updated versions of these documents; ESMPs, resettlement plans, Indigenous Peoples plans and monitoring reports required to be prepared by Clients during Project implementation under ESMPFs, RPFs, IPPFs, or other approved forms of documentation; any updated information, along with information on any material changes in the Project. The ESF also stipulates that the Bank will post “its reviews of the use of country and corporate systems.”

The draft Policy is relatively sparse in terms of rules regarding the processing of requests. Paragraph 7.1 commits the Bank to disclosing information in response to a request, in line with the policy, and paragraph 7.2 provides that where disclosure is inconsistent with the policy, the requester shall be provided with a “written explanation to that effect”. Paragraph 7.3 then provides that the timetable for dealing with requests for information shall be determined by the President.

Paragraph 7.2 is useful, but should include more detail on what the written notice will contain. Better practice (ADB,³⁰ AfDB,³¹ European Bank for Reconstruction and Development (EBRD),³² EIB³³ and IDB³⁴) is to indicate that, in cases of refusal, the requester should be provided with reasons and notice of their right to lodge an appeal against the refusal. ADB³⁵ demonstrates even better practice by indicating to the requester the particular rule in the policy that justifies the refusal.

Paragraph 7.3 is not in line with better practice. Time limits should be set out directly in the policy. A commitment to a presumptive maximum processing time for requests would ensure stability for external stakeholders, prompt processing of requests and greater transparency in the way the policy is applied. Thus, the policies of ADB,³⁶ AfDB,³⁷ EBRD,³⁸ EIB³⁹ and World Bank⁴⁰ all establish clear time limits, of twenty working days or less, as presumptive maximum processing times for requests, while IDB has established a presumptive timeframe of thirty days for responding to requests.⁴¹ These are analogous to the time limits at the national level, with almost every national law including a specific limit. It is common practice to allow for these limits to be extended in particularly complex cases (for example where retrieval of the information requires searching through a large number of records or where extensive consultation with other parties is required),⁴² but better practice (EBRD,⁴³ EIB⁴⁴) is to establish

³⁰ Note 12 at paragraph 134.

³¹ Note 17 at paragraph 3.1.2

³² EBRD, Public Information Policy, 2014, paragraph 2(vi). Available at: <http://www.ebrd.com/what-we-do/strategies-and-policies/public-information-policy.html>.

³³ Note 12 at paragraph 5.25.

³⁴ Access to Information Policy, 2010, Paragraph 8.7. Available at: <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35167427>.

³⁵ Paragraph 134 of the policy provides: “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 the refusal. In case ADB denies requested information, it shall inform the requester of the right to appeal in accordance with paragraphs 136–141 of the policy.” Paragraph 74 also states: “In its response, the department concerned or the InfoUnit, as the case may be, will either provide the requested information or the reasons why the request has been denied, indicating the particular provision(s) in the policy that justifies the refusal, and, as applicable, the harm that could be caused by disclosing the information.” Note 12.

³⁶ Paragraph 134 of the ADB policy. Note 12.

³⁷ Paragraph 4.4.1 of the AfDB policy. Note 17.

³⁸ Paragraph 2(vi) of the Annex to the EBRD policy. Note 32.

³⁹ Note 11 at paragraph 5.22.

⁴⁰ The World Bank, *Bank Directive/Procedure: Access to Information* (1 July 2015). Available at: <http://pubdocs.worldbank.org/pubdocs/publicdoc/2015/7/173131435852879745/AI-Directive-Procedure.pdf>.

⁴¹ Note 34 at para 8.4.

⁴² Paragraph 74 of the ADB policy, Note 12, provides: This period may be extended in the case of a request for historical information, if the information requested is difficult to retrieve.” Paragraph 4.4.1 of the AfDB policy provides: “However, more time may be needed in some special circumstances and in cases of complex requests, or requests requiring review by or consultations with internal Bank Group departments, units, stakeholders, the

an overall time limit, for example of another twenty working days, for such extensions. Better practice (EBRD,⁴⁵ EIB⁴⁶) is also to require the Bank to notify the requester if additional time is needed, with such notice indicating the new time limit and the reasons for it. Finally, better practice (ADB,⁴⁷ EIB⁴⁸) is to include a commitment to process requests as soon as possible, rather than simply within the maximum time limit. In many cases, requests can be processed within days, and there is no need to wait until the end of the time limit to answer such requests.

Beyond the brief rules in section 7, the draft Policy omits to mention almost any details about how requests are to be submitted and processed. It says nothing even about how to lodge a request, including with whom they should be lodged, what addresses to use, what means of communication may be used or whether the Bank will provide assistance to requesters where this is needed. In contrast, ADB,⁴⁹ AfDB,⁵⁰ EBRD⁵¹ and IDB⁵² provide email addresses, online forms, fax numbers and mailing addresses for submitting information requests. EIB provides an email address and also states that requests can be submitted to any EIB address.⁵³ Better practice is to limit the required content of a request to a description of the information sought and an address for delivery of that information, with the Bank making a commitment not to ask requesters for the reasons for their requests or even to identify themselves personally.⁵⁴ The acceptance of anonymous requests is particularly important in light of the closing space for civil society throughout Asia. The Bank also should commit to receiving requests in languages other than English, given that many people living in the region of operations of the Bank do not speak English. ADB,⁵⁵ AfDB,⁵⁶ EBRD⁵⁷ and EIB⁵⁸ all accept requests in languages other than English.

Information Disclosure Committee, or the Board. Note 17.

⁴³ Paragraph 2(vi) of the Annex to the EBRD policy, Note 32, provides: “The Bank will normally respond within 20 working days after receiving the request or clarification or, if a timely explanation for a further delay is provided (within 10 working days following receipt), no later than 40 working days.”

⁴⁴ Paragraph 5.23 of the policy states: “In exceptional cases, for example in the event of an application relating to a very long document or when the information is not readily available and complex to collate, the time-limit may be extended and the correspondent shall be informed accordingly no later than 15 working days following receipt.” Note 11.

⁴⁵ Paragraph 2(vi) of Annex to the policy states: “The Bank will normally respond within 20 working days after receiving the request or clarification or, if a timely explanation for a further delay is provided (within 10 working days following receipt), no later than 40 working days.” Note 32.

⁴⁶ Paragraph 5.23 of the policy states: “In exceptional cases, for example in the event of an application relating to a very long document or when the information is not readily available and complex to collate, the time-limit may be extended and the correspondent shall be informed accordingly no later than 15 working days following receipt.” Note 11.

⁴⁷ Note 12 at paragraph 134.

⁴⁸ Note 11 at paragraph 5.22

⁴⁹ Paragraph 131 of the ADB policy. Note 12.

⁵⁰ Paragraph III.3.1 of the AfDB policy. Note 17.

⁵¹ Paragraph 2(i) of the Annex to the EBRD policy. Note 32.

⁵² Paragraph 8.2 of the IDB policy. Note 34.

⁵³ Paragraph 5.16 of the EIB policy, Note 11. See also paragraph 2(i) of the Annex to the EBRD policy, Note 32.

⁵⁴ For example, paragraph 4.4.2 of the AfDB policy states: “Bank Group staff shall not inquire into the identity or intent of a person requesting access to a Bank Group document, unless such an inquiry is necessary to allow the Bank Group to judge whether there is any obstacle as per the list of exceptions to release of the document.” Note 17.

⁵⁵ Note 12 at paragraph 135.

⁵⁶ Note 31 at paragraph 3.1.

⁵⁷ Note 32 at paragraph 2(iii) of the Annex to the policy.

⁵⁸ Note 11 at paragraph 5.27.

Like the ADB and EBRD,⁵⁹ the Bank should make a commitment to receive requests in the national languages of requesters living in Asian countries.

The AIIB should also commit to providing reasonable assistance to requesters who need such assistance for whatever reason, for example because they are having difficulty describing the information they are seeking sufficiently clearly, or they face challenges producing a request in written form, including because of a disability. The portal for submitting requests should also be compatible with screen readers.

In terms of responding to requests, the Bank should commit to providing requesters with a receipt acknowledging their requests within a set time limit, say of five working days, as is the case with AfDB,⁶⁰ ADB⁶¹ and World Bank,⁶² as well as the EBRD's general practice.⁶³ This provides evidence that the request was made and also provides a yardstick against which time limits can be measured. Information should be provided in any language in which it is available (i.e. so that the AIIB would not be required to engage in translation to answer a request). However, the Bank should go further and make a commitment to translate some key documents into other languages, given the Bank's recognition, in paragraph 4.1 of the draft Policy, of its accountability to its stakeholders. As noted above, information should normally be provided in the form preferred by the requester (such as a physical or electronic copy), where such a preference has been expressed, unless this would harm the record containing the information or would place an undue burden on the Bank, as is the practice at EBRD⁶⁴ and EIB.⁶⁵ The policy should also indicate that it is free for requesters to make requests and at least a certain amount of information, say 20-50 pages, should also be provided for free. While the possibility of levying a charge for larger requests could be envisaged, such a charge should be limited to the reasonable (i.e. competitive) costs of photocopying and sending information, as is the case with the EIB.⁶⁶ Even in this case, fee waivers should be available in cases of need, as at the World Bank.⁶⁷

There might be some debate as to what part of the above needs to go in the Policy as opposed to rules adopted by the President or other forms of binding rules. We are aware, for example, that at least some of the issues mentioned above are currently found in the Public Information Requests Processing Directive.⁶⁸ However, better practice, as reflected clearly in the examples provided above, is to incorporate the types of rules that do not need to be changed frequently directly into the policy. This establishes them on a fixed basis, and provides more stability and transparency in the rules for the key issue of making requests. There is no reason not to do this (i.e. not to put these rules in the main policy).

⁵⁹ See, respectively, notes 55 and 57.

⁶⁰ Note 31 at paragraph 4.4.1.

⁶¹ Note 12 at paragraph 134.

⁶² See paragraph III.C.1 of the World Bank Information Procedure, note 40.

⁶³ Note 32 at paragraph 2(iv) of the Annex to the policy.

⁶⁴ Paragraph 2(ii) of the Annex to the policy states: "Mode of Communication: Responses will be transmitted in the same mode as the request unless the requester stipulates a different form of communication." Note 32.

⁶⁵ Paragraph 5.26 of the EIB policy provides: "Information shall be supplied in an existing version and format, or, if feasible, in a format according to the specific needs of the requester." Note 11.

⁶⁶ Paragraph 5.28 of the EIB policy provides: Only the costs of producing and sending copies may be charged to the applicant. The charge shall not exceed the real costs of producing and sending the copies. Note 11.

⁶⁷ Note 40 at paragraph III.C.4

⁶⁸ Available at: https://www.aiib.org/en/policies-strategies/_download/public-information/public-information.pdf.

Recommendations:

- The policy should detail what the notice upon refusal of a request will contain, which should include the provision in the policy relied upon to refuse disclosure as well as the right of the requester to lodge an appeal against this decision.
- The policy should set out the timetable for responding to requests rather than leaving this up to the President to decide (and, potentially, to change from time to time). This should require requests to be responded to as soon as possible, provide for a maximum presumptive time limit for responding to requests and then provide for an extended time period for more complicated requests.
- The policy should include a proper regime of rules regarding the lodging and processing of requests, as detailed above.

7. Requests for Information Disclosure

Section 8 introduces a significant degree of confusion about how the system for appeals under the Policy will work. Paragraph 8.1 provides that the President, in consultation with the Board, shall appoint a Chief Information Disclosure Officer to “receive requests for information that the Bank has allegedly not disclosed in accordance with this Policy”. Paragraph 20 of the Background Paper clarifies that the purpose of this is to “ensure requesters have a chance to appeal if they believe the policy has been violated”.⁶⁹ However, this language is inherently confusing inasmuch as it refers to the idea that the Chief Information Disclosure Officer will receive “requests” and this term is also included in the title for section 8. It would be preferable to make it quite clear directly in the policy that this section, and the role of this Officer, is to address appeals.

Paragraph 8.2 provides that the Chief Information Disclosure Officer shall recommend disclosure to the President, within the “timetable determined by the President”, where the requester “demonstrates” one of two conditions: that the Bank did not act in accordance with the policy or that the policy should be overridden on the basis of a “legitimate interest that is otherwise not appropriately protected under this Policy”. As discussed below, it is problematical that appeals would be decided by the President, a single, and very senior, person at the Bank.

It is also unclear what the second condition in paragraph 8.2 refers to. The language seems to suggest that it has something to do with the public interest overrides provided for in paragraphs 10.2.1 and 10.2.2 (referred to there as “legitimate interests”, the same term as is used in paragraph 8.2.ii). However, according to section 10, those are to be determined by the Board of Directors, while paragraph 8.4 explicitly prohibits the Chief Information Disclosure Officer from making recommendations which disregard the Board of Directors overrides. This needs to be clarified.

⁶⁹ Note 4.

Paragraph 8.3 provides that the Chief Information Disclosure Officer may make such recommendations regarding “the disclosure of information as may be considered necessary” to the President, and that such recommendations and the decision of the President shall themselves be made public. While the commitment to make these recommendations and decisions public is welcome, the true import of this provision is unclear. Is it an authorisation to act outside of the parameters of the policy, where this is “necessary” (whatever that might mean)? If so, is this intended to cover both positive and negative decisions on disclosure? If so, it is extremely problematic since it provides for non-disclosure not only pursuant to a negative override but also whenever the President deems this to be “necessary”. If not, what does it mean? Instead of making appeals contingent upon “necessity”, the policy should require the Chief Information Disclosure Officer to recommend revising the original decision whenever, in his or her opinion, its provisions have not been respected.

In addition to these problems, the system of appeals in section 8 is very limited compared to the appeals systems in place at other IFIs. The policy should set out clearly the grounds upon which an appeal can be based. Better practice (EIB,⁷⁰ ADB⁷¹) is to provide for an appeal whenever a requester believes that his or her request has not been dealt with in accordance with any of the rules set out in the policy regarding the processing of requests, and not only when a request has been denied.

Section 8 also creates an inappropriate burden of proof. Paragraph 8.2 places the burden on the requester to show that either the Bank has not followed the policy or that the policy should be overridden. This is unrealistic given that the requester has not been able to review the substance of the information. As such, it is possible neither for the requester to assess whether the information is exempt nor to conduct a public interest balancing to decide whether it should, nonetheless, be released. All that should be required is for the requester to raise a reasonable argument in an appeal, which should then be examined fully by the body considering the appeal.

This is supported by the language in other IFI policies. At the ADB, a requester is only required to present a “reasonable argument” that the policy has been violated.⁷² At the AfDB, the requester is only required to show a “legitimate concern” by making “a case that the policy has been violated”.⁷³ According to the rules for submitting appeals in the IDB policy, all that is required is a “statement explaining the requester’s basis for submitting the request for review”.⁷⁴

Better practice is also to set out at least a basic procedural framework for the processing of appeals. Paragraph 8.2 provides for the timetable to be determined by the President, but the time limits for processing appeals should be set out directly in the policy or at least another binding instrument (ADB,⁷⁵ AfDB,⁷⁶ EBRD⁷⁷). The appellate body should also be under an obligation to

⁷⁰ Paragraph 6.2 of the policy provides: “Any natural or legal person affected, or feeling affected, by a decision and/or action of the EIB, which includes failure to deliver according to its Transparency Policy, may lodge a complaint with the EIB’s Secretary General.” Note 11.

⁷¹ Paragraph 9.1 of the policy provides: “The IAP will consider appeals alleging that ADB violated the policy by restricting access to information that it would normally disclose under the policy.” Note 12.

⁷² Note 12 at paragraph 137.

⁷³ Note 31 at paragraph 4.5.1 and accompanying footnote.

⁷⁴ Access to Information Policy Implementation Guidelines, note 19, paragraph 6.3.

⁷⁵ Paragraphs 138-139 of the policy provide: “The PDAC shall notify the requester of ADB’s decision in writing,

provide reasons for its decisions to the requester (ADB⁷⁸, EBRD⁷⁹). The draft policy requires the Bank to disclose only “recommendations” from the Chief Information Disclosure Officer to the President, and “the resulting final determination on disclosure”.⁸⁰ This is quite different from a proper notice requirement vis-à-vis the requester.

More generally, other IFIs have moved forward in important ways in this area in recent years. ADB,⁸¹ AfDB,⁸² IDB⁸³ and World Bank⁸⁴ have all established two-tier systems of appeals, first to a more senior internal panel and then to an independent external body, so as to ensure that requesters can obtain an objective and impartial review of their complaints. Thus, the World Bank has the Access to Information Committee, an internal body that advises management on access to information issues, and the Access to Information Appeals Board, an external body comprised of independent experts.⁸⁵ In contrast, under section 8 the AIIB simply has the Chief Information Disclosure Officer making a recommendation to the President. The multi-person internal bodies in place at other IFIs offer a more robust appeals system even at the internal level. And then these other IFIs also provide for an independent level of appeal. Although these systems and, in particular, the external appeals mechanisms, have not been used extensively at

giving the reasons, as soon as a decision has been made and, in any event, no later than 20 working days after receiving the appeal, unless the Board has made a decision under paragraph 99. In such case, the requester shall be notified upon the Board’s decision. 139. If the PDAC upholds the initial decision to deny a request for information, the requester may file an appeal to the IAP. ... The IAP will be required to consider all appeals no later than 45 calendar days after receiving the appeal.” Note 12.

⁷⁶ Paragraph 4.5.5 of the policy provides: “The decision on appeals will be provided within 40 working days of receiving an appeal unless delays and pertaining reasons are communicated in writing to the requester before the expiry of the 40 day period.” Note 31.

⁷⁷ Paragraph 3(v) of the Annex to the policy provides: “The Secretary General will notify the appellant in writing of his or her decision on the appeal, giving the reasons, no later than 20 working days after receiving the appeal or clarification.” Note 32.

⁷⁸ Paragraph 141 of the policy provides: “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. If ADB or the IAP upholds the prior decision to deny access to the information requested, ADB shall notify the requester of the decision and specify the reasons. If ADB or the IAP reverses the prior decision to deny access, ADB shall notify the requester of the decision and provide the requested information.” Note 12.

⁷⁹ Paragraph 3(v) of the Annex to the policy provides: “The Secretary General will notify the appellant in writing of his or her decision on the appeal, giving the reasons, no later than 20 working days after receiving the appeal or clarification.” Note 32.

⁸⁰ Paragraph 8.3

⁸¹ ADB has an internal public disclosure advisory committee and independent appeals panel. Paragraph 128 of the policy provides: “The IAP will comprise three external experts on access to information matters. The IAP members will be engaged to work on an intermittent basis and only when called upon to consider an appeal of a decision made by the PDAC.” Note 12.

⁸² AfDB has an internal Information Disclosure Committee (which represents management) and an Appeals Panel “comprise[d] of three Members, with at least two being external from the Bank. Members of the Appeals Panel will be appointed by the President of the Bank Group, in consultation with the Board.” Note 17.

⁸³ Paragraph 9.1 of the policy provides: “This policy creates a two-stage review mechanism for requesters who are denied access to information in the form of a) an interdepartmental Access to Information Committee and b) in the event that the interdepartmental Committee were to deny the request, a three-member external panel.” Note 34.

⁸⁴ The World Bank has the Access to Information Committee, an internal body which advises management on access to information issues, and the Access to Information Appeals Board, an external body comprised of independent experts.

⁸⁵ See paragraph III.B.8.b of the policy, note 14.

most other IFIs, they are still crucially important inasmuch as they signal to internal decision makers that if they do not interpret the policy in a reasonable manner, the matter may well go to an external decision maker. This tends to ensure that internal decision-makers exercise their discretion in a reasonable way in the first place. It may be noted that the costs of these systems are in reasonably direct proportion to the extent to which they are used, since these appellate bodies are only constituted when an appeal is received.

Recommendations:

- Section 8 should be completely rewritten so that its meaning is clear. Paragraphs 8.2.ii and 8.3 should, in particular, be revised and the latter should not establish additional grounds to refuse requests.
- The policy should set out in clear and precise terms the right of requesters to appeal on the basis that any provision of the policy was not followed in the processing of their requests.
- In an appeal, the requester should only be required to present a reasonable claim that the policy was not followed in any material aspect, including as to the application of the public interest (“legitimate interest”) override. It should then fall to the body considering the appeal to assess the merits of that claim fully.
- The policy should also provide for at least a basic framework of rules governing the processing of appeals, including timeframes, procedural due process guarantees and notice requirements.
- Consideration should be given to putting in place a senior panel, involving more people than just the Chief Information Disclosure Officer and the President, to consider appeals on an internal basis.
- Consideration should also be given to providing for an appeal to an independent external body.

8. Exceptions to Disclosure Requirements and Overrides

The regime of exceptions is a crucial part of any policy that seeks to give effect to the right to information, since it represents the dividing line between openness and secrecy. On the one hand, it is essential that the exceptions provide adequate protection to all legitimately confidential interests. On the other hand, an overbroad regime of exceptions will undermine the whole thrust of the policy, since it will create undue secrecy.

This part of the Comments is divided into two sections. The first addresses general or structural issues with the exceptions in the draft Policy and the second focuses on individual or specific exceptions. The regime of exceptions in the draft Policy is found mainly in sections 9 and 10, although it is also referenced in paragraphs 3.1.3, 3.1.4, 8.4 and, indirectly, 11.

Structural Considerations

Accepted international standards on transparency dictate that information should always be disclosed unless all of the following three conditions are met:

1. The information falls within the scope of a clearly described list of interests – such as privacy and national security – the protection of which is deemed worthy of overriding openness.
2. Disclosure of the information would pose a clear risk of harm to one or more of the relevant interests.
3. The harm posed by disclosure is greater than the overall public interest in the disclosure of the information.

These three conditions are considered in turn below.

1. The information falls within the scope of a clearly described list of interests – such as privacy and national security – the protection of which is deemed worthy of overriding openness.

International standards recognise a number of interests that may legitimately be protected through exceptions to the right to information. The interests which may be protected are described in Indicator 29 of the RTI Rating⁸⁶ as: “national security; international relations; public health and safety; the prevention, investigation and prosecution of legal wrongs; privacy; legitimate commercial and other economic interests; management of the economy; fair administration of justice and legal advice privilege; conservation of the environment; and legitimate policy making and other operations of public authorities”.⁸⁷

This is an area where, overall, the draft Policy is much improved over the Interim Policy, at least as regards the general descriptions of the exceptions (i.e. the italicised portion of each exception paragraph) and the general principle on exceptions, in paragraph 3.1.3, which refers to “legitimate interests that shall be afforded protection”.

However, the detailed descriptions of many of the exceptions continue to use on vague and unclear language, which allows for subjective interpretation. In addition, two of the exceptions do not refer to one of the legitimate interests noted above. The first is Exception 4, in paragraph

⁸⁶ The RTI Rating is the leading global methodology for assessing the strength of right to information laws. It is frequently relied upon by a range of development actors, including the World Bank and UNESCO, to assess RTI laws.

⁸⁷ The full list of RTI Rating Indicators is available at: <http://www.rti-rating.org/wp-content/uploads/Indicators.pdf>. As a comparison, the EIB’s list of categories of exceptions is one of the tightest, protecting: international relations; financial, monetary or economic policy of the EU, its institutions and bodies or a Member State; the environment; commercial interests of a natural or legal person; the Bank’s decision-making process; intellectual property; court proceedings and legal advice; and the purpose of inspections, investigations and audits. The ADB recognises the following categories: Deliberative and Decision-Making Process; Information Provided in Confidence; Personal Information; Financial Information; Security and Safety; Legal or Investigative Matters; Internal Audit Reports; and Trust Fund Audit Reports. The AfDB recognises the following: Deliberative Information and Incomplete Reports; Communications involving the Bank Group’s President, Executive Directors and the Governors; Legal, disciplinary or investigative matters; Information provided in confidence by member countries, private-sector entities or third parties; Administrative information; Financial information; Safety and security; and Personal information. The IDB: Personal information; Legal, disciplinary or investigative matters; Communications involving Executive Directors; Safety and security; Information provided in confidence; Intellectual property; Business/financial information; Corporate administrative information; Deliberative information; Certain financial information; Country-specific information; and Information relating to non-sovereign guaranteed operations.

9.1.4, which protects the “General Powers and Sound Banking Principles of the Bank”. This is not an internationally recognised interest, and its description is also unclear. While it is legitimate to protect the ability of countries to manage their economies and legitimate economic interests, the language goes beyond that. The second is Exception 5, in paragraph 9.1.5, which protects the “International Character of the Bank”. This, again, is not an internationally recognised interest unlike, for example, international relations. Each of these is elaborated upon in more detail in the section on the specific exceptions.

2. Disclosure of the information would pose a clear risk of harm to one or more of the relevant interests.

In this area the draft Policy is again much tighter than the Interim Policy, with most of the exceptions including clear harm-based language such as “jeopardize”, “prejudice” or “undermine”. However, some of the language in Exception 3, in paragraph 9.1.3, refers to unclear forms of harm. This includes a reference to the “misuse” of its resources and facilities, and to being “contrary to” its purpose and functions.

3. The harm posed by disclosure is greater than the overall public interest in the disclosure of the information.

Unlike the Interim Policy, the draft Policy includes a developed set of rules on overriding both disclosure requirements and exceptions in the public interest or, in the language of the policy, “legitimate interests” (often referred to as the public interest override). It shares this approach with the disclosure policies of the ADB,⁸⁸ EIB,⁸⁹ IDB,⁹⁰ World Bank⁹¹ and EBRD,⁹² which all allow for the exceptions to be overridden where this is in the public interest. Numerous national

⁸⁸ According to paragraph 3.2 of the policy, the ADB reserves the right to override the policy exceptions if it determines that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. Note 12.

⁸⁹ Paragraph 5.7 of the policy states: “The exceptions under 5.5 and 5.6 shall apply unless there is an overriding public interest in disclosure. As regards the first, second and fourth bullet points of Article 5.5 with the exception of investigations, an overriding public interest in disclosure shall be deemed to exist where the information/document requested relates to emissions into the environment.” And paragraph 5.8 states: “The grounds for refusal, in particular as regards access to environmental information/documents should be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment.” Note 11.

⁹⁰ Paragraph 8.1 of the policy states: “As described in Principle 2, the Bank may decide to provide access to certain specified types of information normally subject to one of the policy’s exceptions, in extraordinary circumstances, -if it determines that the benefit to be derived from doing so would outweigh the potential harm that application of the policy might otherwise entail, and so long as the Bank is not legally or otherwise obligated to non disclosure and has not been provided information with the understanding that it will not be disclosed.” Note 34.

⁹¹ Paragraph III.B.8(b)(i). Note 14.

⁹² Paragraph E.3 of the policy states: “In exceptional circumstances, the Bank reserves the right to disclose confidential information protected by the confidentiality criteria set out above which it would ordinarily not release to third parties. The Bank may exercise this right if, in connection with a project in which the Bank has invested, the Bank’s management determines that the disclosure of certain confidential information would be likely to avert imminent and serious harm to public health or safety, and/or imminent and significant adverse impacts on the environment. Any such disclosure by the Bank would be on the most restricted basis necessary to achieve the purpose of the disclosure, such as notice to the appropriate regulatory authorities.” Note 32.

right to information laws go further and make it mandatory to disclose information where this is in the overall public interest.

The first reference to this is in paragraph 3.1.4, which stipulates that the policy recognises both positive and negative overrides (i.e. overrides both mandating and denying disclosure), in “limited circumstances” and based on “the balancing of competing legitimate interests”. Paragraph 10.1 then claims that the provisions on disclosure represent “an inherent balancing of legitimate interests”. This is not actually correct. In a large majority of cases, disclosure of information does not pose a risk of harm to any legitimate interest and so no balancing is required. The approach taken in virtually all national access to information laws is to create a presumption of openness, which may be defeated when disclosure would pose a risk of harm to a protected interest. It is only at that point that a public interest balancing is engaged, i.e. when the presumption in favour of disclosure has been reversed in favour of secrecy. The balancing at that point, depending on its outcome, will either leave in place the reversal in favour of secrecy (no disclosure) or trump it (disclosure). There is simply no need to have a reverse or negative override if the policy has already protected all legitimate interests against harm. Reflecting this, almost no national laws provide for a negative override.

The positive and negative overrides are found, respective, in paragraphs 10.2.1 and 10.2.2. The former applies whenever “a legitimate interest served by disclosure outweighs the harm arising from the disclosure of such information”. As such, it is in line with the theory of a public interest override set out above.

The negative override applies whenever “the harm arising from the disclosure of such information outweighs the legitimate interest served by disclosure”. The problem with this approach is that it fails to take into account the human rights status of access to information. As a human right, it is not appropriate to allow it to be overridden in the face of just any harm. Instead, a carefully defined regime of exceptions, which sets out the specific interests the protection of which might override the right, should be established (as, indeed, is done in section 9 of the draft Policy). The right should only be subject to being overridden when a defined legitimate interest is at risk, rather than a generic notion of harm.

There are also procedural problems with the way the overrides work. There is a difference here between the positive and negative overrides. As noted, we do not believe there is any need for a negative override. However, if it is retained, then procedural barriers to its use are at least some form of protection against its abuse. However, procedural barriers undermine the appropriate application of a positive override. In relation to such an override, first, according to paragraph 10.3, it is the President who invokes the procedure, whereas it should be applied, as relevant, at the point the initial request is being considered or at least whenever the requester asks for this to be done. In other words, there is no need for this issue only to be considered at the appeal level. Second, the override is to be decided by the Board of Directors. Given the extremely high-powered nature of this decision-making approach, it is to be assumed that the President would engage it only very sparingly. In contrast, the positive override is applied at a much lower level in other IFI policies while, at the national level, it is normally applied at the initial decision-making level (and thereafter at each level of appeal).

There are a number of other general or systemic problems with the regime of exceptions in the Interim Policy, as follows:

- *Severability*: The draft Policy fails to provide for the redaction of sensitive information from a document and the disclosure of the rest of the document where this is feasible. This is a key means of promoting maximum disclosure, which is a stated goal of the draft Policy (see paragraph 4.2). Such provisions are found in the information policies of other IFIs.⁹³
- *Declassification*: Better practice among IFIs, including the AfDB,⁹⁴ EIB,⁹⁵ IDB,⁹⁶ ADB⁹⁷ and World Bank, is to put in place overall time limits on secrecy or historical disclosure provisions, in recognition of the fact that the sensitivity of almost all types of information declines over time. Thus, the World Bank policy provides for declassification after five, ten or twenty years of much of the information covered by the regime of exceptions.⁹⁸ The draft Policy fails to establish such a regime. We note that the Background Paper recognises that this is something that the AIIB will need to address over time and suggests that it will be incorporated into future versions of the policy.⁹⁹

Recommendations:

- The references to “misuse” and being “contrary to” should be removed from

⁹³ See, for example, paragraph 95 of the ADB Policy, which states: “If a document (or part of it) subject to posting on the ADB website is not posted because the information contained in the document falls under an exception, ADB shall make reference to the document or the information removed therefrom, unless citing the document or the removed information would itself violate an exception. If part of the information contained in a document to be provided upon request falls under an exception, such information shall be removed from the document and the requester shall be informed of the reason of such removal. Note 12.

⁹⁴ Paragraphs 4.8.1 and 4.8.2 of the policy state: “In recognition of the fact that the sensitivity of information under the list of exceptions may change over time, Management of the Bank Group will also adopt a system for declassification to make most information that was once classified as Restricted available at a later date. Under the declassification system, Restricted information may be made public after 5 years, 10 years, 20 years or more depending on its sensitivity and harmful effect. Information subject to declassification will be defined in the Information Disclosure Handbook. Some Restricted information will not be declassified.” Note 31.

⁹⁵ Paragraph 5.14 of the policy states: “The exceptions will only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. After 30 years, a document becomes subject to review for public archiving. In the case of documents covered by the exceptions relating to the protection of personal data or commercial interests of a natural or legal person including intellectual property, the exceptions may, if necessary, continue to apply after this period. In general, information shall only be held by the Bank until the end of the retention requirements has been reached.” Note 11.

⁹⁶ Paragraphs 7.1 and 7.2 of the policy state: “The Bank recognizes that the classification of information as non-public under the exceptions listed in Section 4 of this policy may change over time, thus the implementation of this policy will also include a system for declassification to be developed by Management and disclosed prior to the policy’s effective date. The classification level assigned to information/documents will determine the schedule for disclosure, including the declassification of records under a three-tier timeline after five, ten or 20 years. Information classified under the strictest confidentiality standard of the classification system will not be disclosed even after 20 years.” Note 34.

⁹⁷ Paragraph 98 of the policy provides for historical disclosure after 20 years. Note 12.

⁹⁸ Note 14 at paragraph III.B.6.b.

⁹⁹ Note 4, paragraph 21.

Exception 3 and replaced with proper harm-based language.

- The claim, in paragraph 10.1, that disclosure of information represents an “inherent balancing of legitimate interests” should be removed, as it is simply not accurate.
- The policy should not provide for a negative override (i.e. an override of a disclosure requirement).
- The positive override should be applied at all stages of decision-making relating to requests, and not simply by the Board and at the behest of the President.
- The Policy should adopt a clear provision on severability, to provide for the redaction of sensitive information from a document and the disclosure of the rest of the document where this is feasible.

Specific Exceptions

Below, we analyse the different exceptions individually to identify areas for improvement to align them with international standards and better practice among IFIs. As a general comment we note that, all too often, the exceptions employ very vague and flexible language, and sometimes even language which has no clear meaning, with the result that, overall, the regime of exceptions grants far too much discretion to AIIB staff. We recommend a complete review of the specific language used, with a view to coming up with a clear and precise regime of exceptions.

Exception 1: Protecting the Privacy and Integrity of the Individual.

All access to information policies and laws include an exception to protect individual privacy and, to that extent, this exception is aligned with better practice. Exception 1 goes on, however, to protect not only the safety and security of individuals, which is again legitimate, but also their “physical or mental well-being”. This is unnecessary, as demonstrated by the fact that it goes beyond the scope of the exceptions found in other IFI policies. Furthermore, it could be abused. For example, if information about a project’s environmental and social performance showed that an employee was incompetent at his or her job, disclosure of that information might be deemed to affect his or her mental well-being.

Exception 2: Protecting the Commercial and Financial Autonomy of the Individual and Legal Entities

It is appropriate to protect the legitimate commercial interests of both the Bank and third parties. However, the draft Policy goes beyond this to protect a very peculiar concept, the “financial autonomy” of an individual, the Bank or any other legal entity. This is not a notion that is protected by other IFI policies or by national laws, and its meaning is unclear. The draft Policy goes on to protect the “financial worth” or “assets” of individuals, the Bank and corporate entities. These are again notions that other IFIs have not deemed necessary to protect, at least insofar as they extend beyond legitimate commercial interests.

Exception 3: Protecting the Functional Integrity of the Bank

There is a core set of interests here – such as the free and frank exchange of advice within the Bank or its ability to develop and apply policies effectively – that need to be protected, in particular against premature disclosure of information. However, this exception is phrased in

extremely broad, vague and even unclear terms. It starts out by limiting disclosure where this would “misuse its resources and facilities, or would be contrary to the purpose and functions of the Bank”. These are vague notions which are not protected by the information policies of other IFIs, and which do not appear to be closely related to the sorts of legitimate interests otherwise protected by regimes of exceptions. The protection against misuse of its resources seems to grant the Bank broad discretionary power to refuse to disclose information where this might place some administrative burden on it, which is not consistent with a commitment to maximum disclosure of information. It is not clear how the release of information held by the Bank could be contrary to its “purpose and functions”, and this language again appears to grant undue discretion to the Bank.

The exception then goes on to protect “the administrative, deliberative or decision-making discretion of the Bank”. There is a core of deliberative and decision-making processes that need to be protected, but it seems very odd indeed to describe these by reference to the Bank’s “discretion”. It would make more sense, and be much clearer, simply to protect the interests noted above. The reference to administrative discretion is particularly undefined and could be deemed to cover almost any administrative procedure being overseen by the Bank. The list of specific interests that follows this unclear reference – namely “information that is legally privileged, or would jeopardize an inspection, investigation, or audit involving the Bank” or result in the Bank not respecting national laws – is much more precise and clear.

Exception 4: Protecting the General Powers and Sound Banking Principles of the Bank

The first part of this exception – protecting the Bank’s “credit worthiness or access to capital markets at prices the Bank deems reasonable” – is uncontroversial. However, the exception goes on to protect “the effective use of its powers in accordance with Article 16 of the Articles of Agreement” and “the principles of sound banking in accordance with Article 9 of the Articles of Agreement”. For its part, Article 16 sets out a wide range of general powers of the Bank, such as raising funds, buying and selling securities and so on. The whole idea of a regime of exceptions is to protect those limited and defined interests that may be at risk from the disclosure of information. It is appropriate to protect the Bank’s legitimate commercial operations, as Exception 2 does, and it would also be legitimate to protect general economic management tools (against harm). But protecting the full gamut of powers of the Bank goes significantly beyond this and could easily be abused.

Article 9 of the Articles of Agreement refers in a very general way to “the principles of sound banking”, and this is again referred to in Article 13(1) of the Agreement, but this notion is nowhere defined in the Agreement. It thus represents an undefined concept, which it is inappropriate to rely upon as the basis for an exception. Further, other IFIs do not find it necessary to include these sorts of undefined and potentially very broad interests in their regimes of exceptions. It might seem legitimate to rely on language used in other Bank documents when phrasing exceptions but in fact this language is used in those other documents for completely different purposes and transcribing them into the access to information policy does not represent a good fit.

Exception 5: Protecting the International Character of the Bank

As noted above, the title of this exception fails to refer to a defined interest that might be harmed by the disclosure of information. Article 31 of the Articles of Agreement goes under the title “The International Character of the Bank,” but includes references that have nothing to do with the disclosure of information, such as a prohibition on the Bank accepting funds that might prejudice its functions and the need for staff to be loyal to the Bank. Once again, by relying on language in the Articles of Agreement, the draft Policy ends up with an exception that fails to focus on specific sorts of interests that need protection against a risk of harm posed by the disclosure of information. As such, it is open to being interpreted and applied in an overly broad and/or discretionary manner.

The second part of this exception protects against interference “in the political affairs of any of the Members of the Bank”. This reference, which also comes from Article 31 of the Agreement, again appears to represent a poor fit within a regime of exceptions in an information disclosure policy. It is recognised that public authorities like the AIIB have a legitimate interest in maintaining good relations with States and other intergovernmental organisations (IGOs), and that disclosure may be refused where the release of the information would cause harm to those relationships. But this is a very different concept from interfering in the political affairs of a country. It is unclear how the disclosure of information could interfere in the political affairs of a country, and other information disclosure policies and laws do not include an exception along these lines. In any case, whenever the disclosure of information might pose a risk of such interference, that information would be covered by language protecting against harm to relations with other States.

Recommendations:

- The language used in the regime of exceptions in section 9 of the draft Policy should be carefully reviewed and edited so that it is clear and precise.
- The reference to “physical or mental well-being” in Exception 1 should be removed.
- The references to “financial autonomy”, “financial worth” and “assets” in Exception 2 should be removed and the exception should instead protect the legitimate commercial interests of different parties.
- Exception 3 should be completely revised so that it focuses exclusively on interests that need protection against the disclosure of information. The references to “misuse its resources and facilities, or would be contrary to the purpose and functions of the Bank” and to “the administrative, deliberative or decision-making discretion of the Bank” should be removed. These sections should be replaced with harm-based language and references to ideas like preserving the free and frank exchange of advice within the Bank and the protection of the policy process against premature disclosure of information.
- Exception 4 should not rely on language taken from the Articles of Agreement, where the language is used for entirely different purposes than to underpin an exception to the right to access information. Instead, Exception 4 should focus on the ability of the Bank to collaborate with States on economic management tools and the commercial interests of the Bank.

- Exception 5 should again avoid relying on language from the Articles of Agreement as the basis for an exception, including the “international character of the Bank” and the need to avoid interfering in the political affairs of Members. Instead, it should focus on protecting its good relations with other States and IGOs.

9. Reporting Requirements, Implementation, and Other Issues

Paragraph 12(1) of the draft Policy provides for the presentation, by the President to the Board, of an annual report on implementation of the Policy. This is positive, but it would be useful to include more specifics on the contents of the report, which should, among other things, include general recommendations for improvement of the system. EBRD¹⁰⁰ and EIB¹⁰¹ specify that annual reviews of policy implementation will include the number of requests received, the Bank’s response to those requests, the number of appeals, the outcomes of appeals and compliance with the timeframes specified in the policies. ADB also commits to disclose a list of requests and the Bank’s response to those requests, as well as a list of all appeals received and the outcomes of those appeals,¹⁰² while the World Bank includes this information in practice in its annual report.¹⁰³

The policy also should commit to making the report public. The ADB,¹⁰⁴ EBRD¹⁰⁵ and EIB¹⁰⁶ all commit to disclose annual reports on implementation of their respective access to information

¹⁰⁰ Paragraph 4 of the Annex to the policy states: “In the annual Public Information Policy: Report on the Implementation, which is posted on the EBRD website, the Bank will endeavour to report on its handling of requests and will provide a record of responses. The reports would typically cover the correspondence received by the Bank via the information request on-line form or forwarded to the Civil Society Engagement Unit for the coordination of responses, and such matters as: the number of requests made, granted in full or part, or refused; compliance with response timeframes; the number of appeals against refusal of requests and the outcome of those appeals; other facts which indicate efforts made to abide by the spirit and intentions of the PIP.” Note 32.

¹⁰¹ Paragraph 9.4 of the policy states: “The Bank shall publish annually a report for the preceding year on the implementation of this Policy, including e.g. the number of information requests handled, the number of cases in which the Bank refused to grant access to information, the reasons for such refusal, the type and number of appeals filed with different appeal mechanisms, the adherence to the deadlines specified for responding to information requests and for publishing project related information on the website.” Note 11.

¹⁰² Paragraphs 134 and 141 of the ADB policy state: “ADB shall post on its website the list of requests reviewed, and the corresponding decisions, i.e., fulfilled or denied, with the reason for the latter. ... ADB shall post on its website a list of all appeals received, the nature of each appeal, and the decision taken in each case.” Note 12.

¹⁰³ See the 2015 annual report, *The World Bank Annual Report and Five Year Retrospective: Moving Forward on Transparency and Accountability*, pp. 11-14, 31-33. Available at: <http://documents.worldbank.org/curated/en/836081467999089075/pdf/105102-AR-PUBLIC-Access-to-Information-FY-2015-Annual-Report-and-Five-Year-Retrospective.pdf>.

¹⁰⁴ Paragraph 142 of the ADB policy states: “ADB will monitor the implementation of the policy and evaluate its impact. ADB will post on its website an annual report showing the monitoring results.” Appendix 4 describes the results framework for the policy. Note 12.

¹⁰⁵ Paragraph F.4 of the policy states: “The Secretary General will report to the Board on implementation of the Policy on an annual (calendar year) basis and the Report will be publicly released and posted on the Bank’s website.” Note 32.

¹⁰⁶ Paragraph 9.4 of the policy states: “The Bank shall publish annually a report for the preceding year on the implementation of this Policy.” Note 11.

policies. As a matter of practice, the World Bank also discloses its annual report on the implementation of its access to information policy.¹⁰⁷

Paragraph 12(2) provides for the report, on a triennial basis, to evaluate the policy and to recommend such review of the policy “as may be considered necessary”. It is not entirely clear from this language that there will be a regular review of the policy (for example if the President did not deem that to be necessary) that includes public consultations. In contrast, the AfDB,¹⁰⁸ ADB,¹⁰⁹ EBRD¹¹⁰ and EIB¹¹¹ specify timeframes for regular, comprehensive reviews of their access to information policies. ADB,¹¹² EBRD¹¹³ and EIB¹¹⁴ also commit to conducting public consultations as part of the formal review process.

Paragraph 13.1, on Implementation, states: “[T]he President shall ensure the observance of this Policy through issuing a Directive”. We recommend that the Board ensure that a public consultation on the contents of the directive, ideally at the same time as consultations are held on a second draft of the Policy.

Paragraph 13.1 also states that the President “shall assign and resource such Bank Personnel as he considers necessary for the effective and efficient implementation of this Policy.” Better practice is to also provide for sanctions, for example in the form of disciplinary measures, for staff who wilfully obstruct implementation of the policy. While it is to be hoped that the imposition of such sanctions would be rare, this language would send a clear signal to staff that management takes the right to information seriously. Staff also should be protected against any retaliatory or disciplinary measures for disclosing information, in good faith, pursuant to the policy.

Recommendations:

¹⁰⁷ See the 2015 annual report, *The World Bank Annual Report and Five Year Retrospective: Moving Forward on Transparency and Accountability*, note 103.

¹⁰⁸ Paragraph 3.5.3 of the policy states: “Three years following the coming into effect of this Policy, Management will carry out a review on its implementation.” Note 31.

¹⁰⁹ Paragraph 144 of the policy states: “ADB shall conduct a comprehensive review after a period of time, not to exceed 5 years from the effective date of the policy. The review will engage interested individuals and organizations.” Note 12.

¹¹⁰ Paragraph F.5 of the policy states: “The Policy will be subject to review in parallel with the Environmental and Social Policy on a five year cycle, with a public consultation process.” Note 32.

¹¹¹ Paragraph 9.3 of the policy states: “Formal reviews, including public consultations, are envisaged to take place every 5 years, or can otherwise be initiated in case of changes to the EU’s policy and legislative framework on transparency and disclosure of information, changes to policies and procedures within the EIB that require an alignment of this Policy, and any other changes the EIB judges necessary and appropriate.” Note 11.

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- The policy should set out the main types of information that are to be included in the annual report on implementation of the Policy, and require the report to be made public.
- Paragraph 12.2 should be revised to make it clear that, on a triennial basis, there will be a review of the policy and that the review will involve public consultations.
- The Board should ensure a public consultation on the contents of the directive which, in practice, should take place at the same time as the consultation on the second draft of the Policy.
- The policy should provide for sanctions, potentially in the form of disciplinary measures, for staff who wilfully obstruct implementation and for protection for staff who apply the policy in good faith.

Conclusion

The AIIB signalled a strong commitment to the idea of openness when it adopted the Interim Policy as part of the early policy framework for its operations. It recognised from the outset that the Interim Policy was limited in terms of detail, and more oriented towards general principles, and called for a “comprehensive Policy” to be adopted “in the future”.

The draft Policy that was released in January 2018 is a good start but it is far from “comprehensive”. While it contains several important improvements, it lacks sufficient detail to serve as a predicable, effective mechanism to promote transparency and access to information at the Bank. The purpose of Bank policies is to commit the Bank to taking specific action and adhering to specific rules. Vague, flexible provisions – and references to principles without clear commitments to action – fundamentally undermine the underlying purpose of adopting a policy, and effectively grant Bank staff the discretion to apply or not to apply the provisions of the Policy, even though it has formally been adopted by the Board.

The Centre for Law and Democracy and Bank Information Center call on the AIIB to substantially revise the draft Policy to bring it more into line with international standards in this area as well as better practice, including by among other IFIs. We remain ready to work with the AIIB to continue to improve its information disclosure policy, as well as to help implement the policy in an efficient and fair manner.

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