Towards a Presumption of Openness
AfDB: A Long Way to Go

Comments by the Global Transparency Initiative on the Draft Policy on Disclosure and Access to Information of the African Development Bank

9 August 2011

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Executive Summary

The African Development Bank (AfDB) is currently reviewing its 2005 access to information policy. A new draft policy document, the *African Development Bank Group Policy on Disclosure and Access to Information*, was posted on the Bank's website in June 2001. As part of a wider process of consultation, the Bank has invited interested stakeholders to make comments on this draft Policy.

These Comments are the Global Transparency Initiative's (GTI) submission on the draft Policy. The GTI very much welcomes this undertaking by the Bank to review its information disclosure policy, and the opportunity to bring the policy more into line with both the principles set out in the GTI's *Transparency Charter for International Financial Institutions: Claiming our Right to Know* and the increasingly strong transparency practices of a growing number of other multilateral development banks. We welcome, in particular, the commitment by the Bank to move to a proper presumption of disclosure, whereby all of the information it holds would be subject to disclosure, unless it falls within the scope of the regime of exceptions defined by the policy. We also welcome the proposal to establish both internal and external appeals mechanisms to review refusals to provide access.

At the same time, the draft Policy presented by the Bank fails in important ways to conform to the standards set out in the Charter. The GTI's key comments and recommendations, organised according to the nine principles set out in the GTI Charter, are highlighted below and elaborated upon in greater detail in the body of the Comments.

Principle 1: The Right of Access

One of the most important developments in the new draft Policy is that moves to a true presumption of disclosure, something the GTI has long been calling for and which we very much welcome. At the same time, we believe the policy should go even further and recognise the human right to access information.

Principle 2: Automatic Disclosure

It is a grave shortcoming to conclude, as the draft Policy does, that moving to a true presumption of disclosure means that there should be no commitment to the proactive disclosure of information. Proactive disclosure is extremely important to ensure that key documents are available in a timely manner and without individuals having to go through the process of making requests for them. We therefore call on the Bank to reverse this approach and to make an extensive commitment to disclose key documents on a proactive basis.

Principle 3: Access to Decision-Making

The draft Policy makes only a very general and rudimentary commitment to the disclosure of information to facilitate access to decision-making. We recommend that this part of the policy be substantially enhanced to include commitments to provide access to draft documents regarding key decision-making processes, including Board meetings, in a timely

fashion and in a manner that ensures that those most affected by the decisions can effectively access relevant information.

Principle 4: The Right to Request Information
The draft Policy fails to establish rules regarding the procedures for making, processing and responding to requests. This is a significant gap in the policy which should be addressed.

Principle 5: Limited Exceptions
The regime of exceptions is the real Achilles Heel of the draft Policy. Although the draft Policy claims to establish a presumption in favour of disclosure and to be in line with the exceptions in the World Bank's 2010 policy, in fact many exceptions are far too broad and most are not harm-tested. The relationship between the exceptions in the policy and the process of classification of documents is not clear, and emails may be taken outside of the scope of the policy depending on how they are filed within the Bank's information management systems. Provision for a public interest override is weak, while the override can also be used to withhold information, contrary to international standards. We recommend a comprehensive review of the regime of exceptions to bring it into line with the standards set out in the Charter, and better practice by other IFIs, as well as in national right to information laws.

Principle 6: Appeals
We very much welcome the proposal to establish a two-tier system of internal and external appeals. However, these measures are largely undermined by statements limiting the scope of appeals to information which is not classified (whereas many appeals could be expected to specifically be about whether such classification is appropriate). The independence and powers of the external oversight body, the Ad-hoc Appeals Panel, should also be strengthened.

Principle 7: Whistleblower Protection
The draft information policy does not deal with whistleblower protection. We call on the Bank to ensure that its policy in this area is in line with the standards set out in the GTI Charter.

Principle 8: Promotion of Freedom of Information
The draft Policy includes a number of welcome promotional measures, including annual reporting on implementation efforts and measures to strengthen the information technology system. We call on the Bank to go further and commit to key measures such as undertaking public awareness-raising, putting in place central tracking systems for requests, integrating positive implementation efforts into the Bank's central incentive and appraisal systems, and providing training for staff on implementing the new policy.

Principle 9: Regular Review
We welcome the Bank's commitment to review the policy after three years and call on it to undertake wide-ranging consultations with interested stakeholders at that time.

I. Introduction

The African Development Bank (AfDB) is currently reviewing its access to information policy, the *African Development Bank Group Policy on Disclosure of Information*, adopted in October 2005. A new draft *African Development Bank Group Policy on Disclosure and Access to Information* (draft Policy) was posted on the Bank's website in June 2001. As part of a wider process of consultation, the Bank has invited interested stakeholders to make comments on this draft Policy. This document is the Global Transparency Initiative's (GTI) submission on the draft Policy.

The GTI very much welcomes this undertaking. Since 2005, other international financial institutions (IFIs) – notably the World Bank, Asian Development Bank and Inter-American Development Bank – have introduced very significant changes to their access to information policies, resulting in more principled and extensive disclosure of information to the public. It is now time for the African Development Bank to bring itself into line with, or even exceed, the level of openness at these other development banks.

The right to access information held by public bodies, including inter-governmental organisations like the AfDB, is a fundamental human right. At its heart is a presumption that all information held by public bodies should be accessible, subject only to a narrow regime of exceptions. Access should be ensured through both the proactive disclosure of information and the putting in place of procedures to make requests for information. Any refusal to disclose information should be subject to appeal before an independent oversight body. These are the key features of a right to information system found in the GTI's *Transparency Charter for International Financial Institutions: Claiming our Right to Know* (the Charter). These features are given concrete form in the GTI policy document, the *Model World Bank Policy on Disclosure of Information* (the Model Policy).[1]

These Comments assess the new draft Policy against the principles set out in the Charter and Model Policy.[2] Assessed against these documents, the Bank's policy proposals represent a significant advance over the 2005 policy. In particular, we welcome the commitment by the Bank to move, for the first time, to a proper presumption of disclosure, whereby all of the information it holds would be subject to disclosure, unless it falls within the scope of the regime of exceptions defined by the policy. We also welcome the proposal to establish both internal and external appeals mechanisms to review refusals to provide access.

At the same time, we note that the draft Policy fails in important ways to conform to the principles set out in the Charter. Some of the more significant areas for further reform include the complete removal of the positive list of documents scheduled for automatic or proactive disclosure, the very weak commitment to disclose information to facilitate participation in decision-making, the complete absence of rules regarding the processing of requests, the vastly overbroad, and often vague and hence flexible, regime of exceptions,

[1] This was developed in 2009 in the context of the review of the World Bank's information disclosure policy.
[2] All references are to the draft Revised Disclosure Policy dated May 2011, posted on the AfDB's website on 9 June 2011.

the lack of strong guarantees regarding the independence and powers of the external oversight body, and the absence of some key promotional measures. These and other issues are discussed in more detail below.

II. Analysis in Light of GTI Charter Principles

Principle 1: The Right of Access

> *The right to access information is a fundamental human right which applies to, among other things, information held by international financial institutions, regardless of who produced the document and whether the information relates to a public or private actor.*

The draft Policy is to be commended inasmuch as it recognises a true presumption of disclosure, an important development over the existing policy (see para. 1.1.6 and sections 3.1 and 3.2). It also contains some useful statements setting out reasons why openness is important (sections 1.1 and 1.2, for example). At the same time, we believe that these statements of purpose could be strengthened. It would be useful, for example, for them to refer to the idea of increasing participation in the work of the Bank, to be even clearer about the important role openness can play in helping to hold the Bank to account for its activities, and to state directly that openness can help reduce the risk of wrongdoing.

We also note that this overarching presumption of disclosure is undermined by the inclusion of a principle on safeguarding the deliberative process (para. 3.2.6) among the principles which underpin the policy. It is not clear to the GTI why what is treated in other policies and national laws as simply another exception has been elevated in the draft Policy to the level of an independent principle. This emphasis appears to reflect a strong preoccupation with the notion that the deliberative process somehow warrants special protection.

The GTI considers the near absolute protection for the deliberative process in the draft Policy to be entirely inappropriate and to pose a very serious risk to the achievement of the policy's stated goals. This concern is borne out by the proposed exceptions, which are vastly overbroad in relation to deliberative documents (see below, under Exceptions).

The Charter, in line with international developments, calls for the information disclosure policies of international financial institutions (IFIs) to recognise that access to the information they hold is a fundamental human right. We understand that this is a strong statement to include in a policy, and note that the World Bank failed to do this in its new policy, adopted in December 2009. However, the Asian Development Bank is proposing to include such a statement in its revised policy (due to be finalised in September 2011), demonstrating that this is a realistic approach.

It is extremely important for the policy to define clearly the information which it covers. The GTI's Model Policy, for example, defines information as information which is recorded

in any form, and makes it clear that the policy applies to all information "which is drawn up, received, held by or accessible to the Bank, regardless of who produced it" (paragraph 1(b)). The Charter also calls on IFIs to make sure that their information policies cover relevant information held by third parties. Paragraph 3 of the Model Policy gives effect to this, stating:

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

In stark contrast to these standards, the draft Policy simply fails to define the information which it covers.

Recommendations:

- The list of reasons given as to why transparency is important in should be widened.
- Safeguarding the deliberative process should not be elevated to a "Guiding Principle" in the policy and para. 3.2.6 should be removed.
- The policy should recognise that access to the information it holds is a fundamental human right.
- The policy should define the information which it covers, which should include all information "drawn up, received, held by or accessible to the Bank, regardless of who produced it". The Bank should also make a commitment to ensure that it either holds or can access information relevant to its operations which was created by a third party, subject only to reasonable operational constraints.

Principle 2: Automatic Disclosure

> *International financial institutions should automatically disclose and broadly disseminate, for free, a wide range of information about their structures, finances, policies and procedures, decision-making processes, and country and project work.*

The draft Policy does not include any specific list of documents that are scheduled for automatic or proactive disclosure. Instead, para. 1.1.8 states that the new Policy will include "a strengthened presumption of disclosure, eliminating the positive list and emphasizing a limited negative list".

The GTI believes that this represents a degree of confusion about the role of the presumption of disclosure and the negative list. If put into practice in its present form, this would significantly undermine openness. It would also represent a marked departure from the practice of other IFIs which have moved to a presumption of disclosure limited only by

a negative list, all of which have nevertheless retained the positive list of information that will be proactively disclosed. The same is true of all better practice national laws, which provide for a clear presumption of openness and also positive lists of information scheduled for proactive disclosure. Finally, international standards are very clear in this area, calling for both a presumption of disclosure, a clear and narrow negative list and a positive list of information subject to proactive disclosure.

Better practice information disclosure policies and laws envisage two main modalities for promoting access to information. The first, and in some respects central one, is through requests, whereby anyone may request and receive information. The presumption of disclosure applies primarily to this form of access, which applies to all of the information held by public authorities. The second modality for disclosing information, which is a very important supplement to request-driven access, is through the proactive disclosure of information, even in the absence of a request. This ensures that everyone can readily access key information about or relating to the work of the concerned public entity, without the delays associated with a request-driven process. For the vast majority of people, who will never make a request for information, the second form of access is in practice the most important one.

We recognise certain elements in the draft Policy which relate to the idea of proactive disclosure. For example, it states:

> The Bank Group has made progress in making information public particularly through the creation and development of the website and opening of the Field Offices. The Bank's website continues to experience increased traffic and is stimulating greater awareness and demand for Bank products. (para. 2.1.5)

The Bank also is candid about the difficulties it has faced in disseminating information:

> However, adoption of previous policies was not accompanied by a commensurate level of both human and financial resources for effective implementation. As a result, the Bank Group has not been at par with other development finance institutions in terms of the scope and depth of the information made available. The Bank Group has yet to further tap into the full benefits of disclosing information through the website and Field Offices. Therefore, knowledge about the Bank Group's development role on the continent has been limited by a gap in information. (para. 2.1.5)

The draft Policy also refers to the 2009 Communications Strategy (para. 2.1.7). That Strategy states, among other things, that "fostering a culture of more open communication is a priority objective" (para. 4.2.2) and speaks of moving to "a more systematic approach to building communication into project development and implementation" (para. 4.3.4). For its part, the draft Policy does refer to the need to "ensure more outreach to the countries" (para. 3.2.2 under the guiding principle of Enhanced Access).

However, these statements are not a substitute for addressing the issue of proactive disclosure systematically in the policy, as is the case with all other IFI information disclosure policies, including those that have been revised recently. The policy should

explicitly commit to proactive disclosure and indicate clearly and specifically what information the Bank will publish. This should include additional documents scheduled for release under the new policy over and above what is currently being published pursuant to the existing policy. Paragraph 5 of the Model Policy provides a list of the types of documents that should be subject to proactive disclosure.

Moreover, the policy should go beyond simply listing the documents which are scheduled for proactive disclosure and address how they are going to be disseminated. This should, for example, include a commitment to increase collaboration with stakeholders to improve local outreach and providing information in diverse forms and channels. The draft Policy does refer to the need to "explore various communication approaches and channels to effectively disseminate information" (para. 4.1.2), but this is extremely general in nature.

The Model Policy addresses these and related issues as follows:

> *Form of Dissemination*
>
> 13. The Bank utilizes a wide range of dissemination mechanisms to disclose information to the public in an accessible form, including in gender and culturally sensitive forms. All automatically disclosed information is disseminated, at a minimum, through the Bank's website. Information relevant to local or affected communities is made available in a form and manner which they can access in practice. Information provided via the Bank's website is available in different formats, including in a text only format, to accommodate varying qualities of Internet access, and in a format that does not require particular proprietary software to access.

Recommendations:

- The proposal to drop the positive list from the new policy should be abandoned and, instead, the new policy should provide a comprehensive list of documents that are subject to automatic or proactive disclosure. This list should represent an increased commitment to proactive disclosure over the previous policy.
- The policy should establish a minimum platform of measures that will be taken with respect to proactive disclosure of information, specifically detailing the forms and mechanisms that will be used to disseminate this information.

Principle 3: Access to Decision-Making

> *International financial institutions should disseminate information which facilitates informed participation in decision-making in a timely fashion, including draft documents, and in a manner that ensures that those affected and interested stakeholders can effectively access and understand it; they should also establish a presumption of public access to key meetings.*

The level of transparency which is essential to building and maintaining public dialogue and increasing public awareness about the Bank's development role and mission requires more than just making information available. The policy should establish a robust

framework for stakeholder participation in decision-making about Bank-financed operations, as well as the operations of the Bank. This requires stakeholder access to certain types of information, such as policies and development strategies, while they are still in draft form and subject to revision. If stakeholders are only presented with fixed decisions and final outcomes, meaningful engagement is not possible.

There are a number of key aspects to this area of policy commitment. It should include a commitment to engage in consultation around a number of key documents. These are outlined in paragraph 8 of the Model Policy as follows:

> *Access to decision-making*
>
> 8. At a minimum, a standard notice and public comment period is provided for the following decision-making processes:
>
> a. Organizational procedures, rules and directives.
> b. Institutional policies and strategies.
> c. Country strategies.
> d. Lending, grant, credit and guarantee operations.
> e. Institutional and project-level evaluations and audits.

The policy should detail the types of documents that will be made available to facilitate participation in decision-making, along with the timelines for this (see paragraphs 8 and 9 of the Model Policy). As noted above, a commitment should be made to ensure that information is disseminated to those affected the decision-making processes noted above in a manner that ensures that they can effectively access it and use it at a meaningful stage of the decision-making process. This may require information to be disseminated in physical form to local communities (for example via notice boards) and/or for technical documents to be 'translated' into commonly understood terms. It will also be important to put in place a clear translation framework that ensures that key documents are available in languages that are understood by local populations (see paragraph 18 of the Model Policy).

In this area, as with proactive disclosure, the draft Policy is largely silent. To the extent that it does appear to address the issue, it provides for significantly overbroad powers to keep deliberative information secret (see, for example, paras. 3.3A and 3.3B). The draft Policy does, however, make some sort of commitment to the simultaneous disclosure of certain documents, as follows:

> *4.9 Simultaneous Disclosure*
>
> 4.9.1 Simultaneous disclosure of information to the Public shall apply to the following:
>
> (i) Documents classified as "Public" under the Bank Group's documents management system and provided by Management to the Board of Directors for information would be simultaneously disclosed to the Public at the time of their distribution to the Board of Directors.
>
> (ii) Operational Policies and Sector Strategies provided to any committee of the Board of Directors would be simultaneously disclosed to the Public if some earlier version of the document had been previously considered by the Board of Directors.
>
> (iii) Country and Regional Strategy Papers and Loan Proposals for sovereign-guaranteed operations, would be disclosed simultaneously with their distribution to the Board of Directors, subject to the non-objection of the country/s concerned.

This is welcome but clearly falls far short of the commitments that are outlined in the Model Policy, of that are found in better practice IFI information disclosure policies.

Standard relating to access to decision-making also provide for access to meetings where decisions are made. As a public body, the Bank should provide public access to meetings of the directors. Allowing observers to attend the meetings of executive bodies is an increasingly established practice. Although the World Bank does not provide access to meetings of the Board of Executive Directors, observers may now attend a number of executive body meetings, including of the Bank's Clean Technology Fund, Strategic Climate Fund, Forest Investment Program, Forest Carbon Partnership Facility and Pilot Program on Climate Resilience. It has also been longstanding practice at the Global Environment Facility. Many UN bodies provide public access to decision-making bodies. And the US Federal Reserve has taken steps to allow the public to access its meetings. At a minimum, the Bank's Board should launch a pilot programme of conducting select meetings in public and test the effects open meetings have on candour and the quality of the deliberations. This should include posting notice of the meetings, and agendas, in advance.

Furthermore, documents containing information about what happens at meetings – such as summaries, minutes and transcripts of the discussions – should be disseminated as soon as possible after they are prepared. Unfortunately, the draft Policy essentially throws a complete veil of secrecy over all of these documents (see para. 3.3B(vi)).

Recommendations:

- The policy should provide access to draft information at key milestones to promote stakeholder engagement/participation and ownership.
- The policy should include a standard notice and comment period for key Bank decision-making processes, in order to provide a more consistent and predictable framework for stakeholder access and participation.
- The information noted above should be disseminated to those affected by decisions in a manner in which they can access it in practice; this may require alternative methods of disseminating the information, as well as a commitment to ensure that key documents are available in translated form.
- Board transcripts and Executive Director statements should be released as soon as the deliberations to which they relate have been concluded.
- The policy should establish a pilot programme of conducting a select number of Board meetings in public to test the effects of greater openness.

Principle 4: The Right to Request Information

> *Everyone has the right to request and to receive information from international financial institutions, subject only to a limited regime of exceptions, and the procedures for processing such requests should be simple, quick and free or low-cost.*

A key aspect of moving to a true presumption in favour of disclosure is the need to set out clear rules for making, processing and responding to requests for information. The draft Policy essentially fails to do this, providing instead that an Implementation Plan will be developed later on (para. 3.5.1). The main responsibility for this is given to the Secretary General's office (para. 4.2.2).

The GTI believes that the main policy should provide substantially more detail on the processing of requests for information, consistent with the practice at other IFIs. It is a clear principle of international law that excessive discretion should not be allocated to officials in matters regarding respect for fundamental rights.[3] Failing this, at a minimum the Bank should commit to holding a second round of consultations on the implementation phase.

The key issues which need to be addressed regarding the making, processing and responding to requests include the following:

Making Requests:
The policy should state clearly that requests may be made in different forms, including in writing or orally, electronically, or by hand, regular mail or fax, and that only minimal information needs to be provided in a request (i.e. a description of the information and an address for receipt of it). Requests should also be able to be made at different locations, ideally anywhere the Bank has a physical presence, as well as through a central email address. It should also be possible to make requests in different languages, including any official language of a member country. The policy should also make it clear, although this is to be assumed, that requesters do not have to provide reasons for their requests. However, providing such reasons may help the Bank determine whether or not the public interest override might apply, and the option of providing reasons for this purpose should be communicated to requesters.

Assistance:
The draft Policy is silent as to any commitment by the Bank to provide assistance to requesters. The provision of such assistance can be essential for requesters who are not familiar with making requests for information or with how the Bank operates. It can also save the Bank time and effort since working with requesters to focus their requests on the information they really want can significantly streamline the requesting process.

Timelines:
The policy should set out clear timeframes within which requests must be processed. The GTI Charter calls for a commitment to respond to requests as soon as possible, making it clear that fifteen working days is a maximum.

Notice:

[3] See, for example, Concluding Observations of the UN Human Rights Committee on Kyrgyzstan's Initial Report, 24 July 2000, CCPR/CO/69/KGZ, para. 21.

The policy should require notice to be provided to requesters whose requests have been refused. Such notice should indicate the exact provision of the policy which has been relied upon to refuse access, a reasoned explanation of the application of that provision to the facts of the particular request, and information about the right of the requester to lodge an internal and then external appeal.

Form of Access:
The policy should make it clear that requesters have the right to specify the manner in which they would like to access information, for example by inspection, photocopy, electronic copy or transcript, and to access the information in this form unless there are overriding reasons for refusing this. Form of access should also extend to the language in which the information is provided, as long as the Bank has the information in that language.

Fees:
The policy should include clear rules on charging of fees for access (at the moment, it simply gives the authority to the Information Disclosure Committee to set fees; see para. 4.3.3). We recommend, for example, that no fees be charged for processing or collating information, that the first 100 pages of photocopying be provided for free, that maximum photocopy rates be set centrally, and that requests which are in the public interest be provided free of charge. These rates should be posted on the Bank's website and should be displayed, along with other information about making requests for information, at all Bank offices where requests are received or processed.

Unreasonable Requests:
Para. 4.3.4 of the draft Policy gives the Information Disclosure Committee extremely broad powers to reject "unreasonable, multiple, blanket" requests. These are very vague terms which could be abused to refuse 'difficult' requests. We believe that this power should be restricted to 'vexatious' requests, which would cover only requests that were made in bad faith. The same paragraph provides that the Bank does not have to develop or compile information or data that does not already exist. This is legitimate but it should be made clear that this does not relieve the Bank of the obligation to process data where this can be done through automated means (for example using a computer programme).

Recommendations:

- The policy should include a clear framework for the making, processing and responding to requests, in line with the above. At a minimum, the Bank should make a commitment to develop clear rules regarding the processing of requests, and to hold public consultations before finalising these rules.

Principle 5: Limited Exceptions

The regime of exceptions should be based on the principle that access to information may be refused only where the international financial institution can demonstrate (i) that disclosure would cause serious harm to one of a set of clearly and narrowly defined,

and broadly accepted, interests, which are specifically listed; and (ii) that the harm to this interest outweighs the public interest in disclosure.

It is a guiding principle of the draft Policy that the goal is "maximum disclosure" (3.2.1) and that the list of exceptions will be "limited" (3.2.3). Significantly, the draft Policy claims that the list of exceptions is "aligned with that of the World Bank". Unfortunately, in practice the draft Policy contains a list of seven exceptions that can only be described as vastly overbroad, in many cases using vague and flexible terms. While they follow in very broad terms the exceptions in the World Bank policy, in their detail they are significantly broader. We note that in any case, GTI has been critical of some of the exceptions in the World Bank policy, which are themselves unduly broad.[4]

It is well established under international law that exceptions to the right to information must be harm-based. This implies that information may be withheld only where it is established that disclosure of the information would pose a clear risk of harm to a protected interest. A particular problem with the exceptions in the draft Policy is that they fail to respect this standard.

Para. 3.4.1 of the draft Policy does refer in a very general way to the need for harm to be established before access to information will be refused:

> The Bank Group will refrain from disclosing information only when it determines that doing so would result in significant material, financial, or reputational harm to the Bank Group, Bank Management, or Bank Staff; and would compromise the interest(s) protected by the exceptions in this Policy or the Bank Group's ability to achieve its development mandate.

This is helpful as an interpretive guide but it fails to meet the standard that exceptions must be harm-tested. To be properly harm-tested, each exception must refer to the specific harm against which it seeks to protect.

What follows is a detailed examination of each exception and some related elements of the proposed Policy.

Deliberative information and incomplete reports (para. 3.3A):

The five specifics cited in this section span virtually all of the information held by the Bank and none refer to any possible harm. Indeed, despite its preoccupation with the deliberative process exception, the draft Policy fails to identify any proper harm in that context, referring only to vague and general notions such as the need to protect 'confidentiality' during the deliberative process (para. 3.2.6 establishing protection of the deliberative process as a principle).

[4] See Comments on Toward Greater Transparency Through Access to Information: The World Bank's Disclosure Policy: Revised Draft (October 16, 2009). Available at: http://www.ifitransparency.org/uploads/7f12423bd48c10f788a1abf37ccfae2b/GTI_comments_WBdisclosure_Nov09.final.pdf.

The task of defining harm in this context has been addressed successfully in many right to information laws. It is only by drilling down to specific underlying interests, such as the free and frank provision of advice or the success of a policy (which we understand to be a reference to its successful implementation), that those which might be harmed by disclosure can sensibly be identified. It is these interests, rather than the vastly wider notion of the deliberative process, that the policy should protect.

Looked at from another perspective, the disclosure of a large majority of the information that would be covered by the deliberative process exception as defined in the draft Policy would not lead to any harm whatsoever. This is clear from practice at the national level – where most of this information is routinely disclosed in many countries – as well as the practice at some other IFIs.

A comparison between the standards in the draft Policy and those of national right to information laws is instructive. In a few countries – such as India and Jamaica – the right to information law does not include a deliberative exception. This has been a matter of some debate in India, where it is seen by some as undermining the ability of the government to function effectively. A survey of some other countries clearly establishes that their internal deliberations exceptions are far narrower than the one proposed by the Bank. Some examples are as follows:

<u>Azerbaijan</u>

- information the disclosure of which may impede the formulation of policy, until a decision has been made
- information the disclosure of which may undermine testing or a financial audit, until these processes have been completed
- information the disclosure of which may undermine the free and frank exchange of ideas within a public body (Article 35, Law on Right to Obtain Information, 2005)

<u>Japan</u>

- internal government deliberations or consultations the disclosure of which would risk unjustly harming the frank exchange of views or the neutrality of decision-making, unnecessarily risk causing confusion, or risk causing unfair advantage or disadvantage to anyone (Article 5, Law Concerning Access to Information Held by Administrative Organs, 1999)

<u>Mexico</u>

- opinions, recommendations or points of view provided by officials as part of a deliberative process prior to the adoption of a final decision (Article 14, Federal Transparency and Access to Public Government Information Law, 2002)

<u>Peru</u>

- information that contains advice, recommendations or opinions as part of the deliberative process; this exception is 'terminated' once the decision is made, but only

if the public body makes reference to the advice, recommendation or opinion (Article 17, Law of Transparency and Access to Public Information, 2002)

South Africa

- an opinion, advice, recommendation, or account of a consultation or discussion for the purpose of assisting to formulate a policy
- information the disclosure of which could reasonably be expected to frustrate the deliberative process by inhibiting the candid exchange of views and opinions within government, or the success of a policy by premature disclosure (Section 44, Promotion of Access to Information Act, 2000)

Thailand

- internal opinions or advice, but not background technical or factual reports upon which they are based (Section 15, Official Information Act, 1997)

Uganda

- information containing advice or recommendations, or an account of a consultation or discussion
- information the disclosure of which could reasonably be expected to frustrate the deliberative process by inhibiting the communication of an opinion, report or recommendation, or the conduct of a consultation or discussion (Section 33, Access to Information Act, 2005)

United Kingdom

- information relating to the formulation of government policy or ministerial communications, but not to statistical information once the policy has been adopted
- information the disclosure of which would, or would be likely, to prejudice the free and frank provision of advice (Sections 35 and 36, Freedom of Information Act, 2000)

United States

- inter-agency memoranda which would not be available to parties in litigation (Subsection (b), Freedom of Information Act, 1966)

It is immediately clear that all of these examples are far narrower than the deliberative process exception in the draft Policy inasmuch as all are at least limited to opinions, advice or recommendations relating to the formulation of policy. Some – such as Thailand and the United Kingdom – in direct contrast to the draft Policy, specifically exclude background material. Several – including Azerbaijan, Japan, South Africa and Uganda – incorporate harm requirements linked to narrow interests such as the free and frank provision of advice, testing or audit procedures, or the success of a policy.

The Model Policy includes an exception to protect internal information as follows:

Policy formulation and investigations

42. The Bank may refuse to disclose information where to do so would, or would be likely to:

a. Seriously frustrate the success of a policy, by premature disclosure of that policy.
b. Significantly undermine the deliberative process within the Bank by inhibiting the free and frank provision of advice or exchange of views.
c. Significantly undermine the effectiveness of a testing or auditing procedure used by the Bank.
d. Cause serious prejudice to an ongoing investigation by the Bank.

43. The constraints set out in paragraph 42 do not apply to facts, analyses of facts, technical data or statistical information. The constraints set out in paragraph 42(a) and (b) do not apply once the policy has been adopted.

At a minimum, the policy should restrict the scope of paras. 3.3A(i)-(iii) to opinions, advice or recommendations relating to the formulation of policy, and should exclude background studies and statistical information.

Communications involving the Bank Group's President and Executive Directors (para. 3.3B)

These exceptions are, once again, unacceptably broad. They cover all communications emanating from the Bank Group's President and individual Executive Directors officers, as well as all Board records relating to deliberative processes. The draft Policy does allow the various parties involved to authorise the disclosure of these documents. This is useful, since otherwise it would not even have been possible to release the draft Policy to which these comments relate. But it is the opposite of a presumption of disclosure; it is simply a discretion to disclose.

The principles and standards outlined above apply in the same way to the documents described in paragraph 3.3B of the draft Policy. They should be subject to disclosure unless their release would harm a specific protected interest, such as the free and frank exchange of ideas or the success of a policy through premature disclosure. There should also, in accordance with Principle 3 of the Charter, be provision for broad access to both meetings of the Board and documents relating thereto.

Legal, disciplinary or investigatory matters (para. 3.3C)

The attorney-client exception included in category (i) of this paragraph goes far beyond what is covered by attorney-client privilege since many communications with the General Counsel fall outside of the ambit of this privilege. Category (iv) says that the Bank "will not release information" regarding investigations by the Independent Review Mechanism. It would be preferable to state that the policy does not apply to this information.

Information provided in confidence by member countries, private sector entities or third parties (para. 3.3D)

The draft Policy largely regards information provided by countries and other third parties as originator-owned and grants them a veto over release of that information. Furthermore, it appears that this veto is permanent and absolute since there is no provision for these documents to become eligible for routine declassification.

It is appropriate to protect the legitimate interests of third parties, as well as good relations with them, but this does not require granting them a veto over the release of information. This approach does not conform to the draft Policy's commitment to harm-tested exceptions. It is not the approach taken in national right to information laws, which instead define precise interests to be protected, such as trade secrets, commercial advantage and good relations with other States, and then subject these to a harm test. To ensure proper protection of these interests, the policy should grant third parties the right to make representations as to why information they have provided falls within the scope of an exception before it is disclosed. But it should not grant them a veto over release.

The GTI Model Policy protects these interests through two exceptions:

> *Confidential third party information*
>
> 38. The Bank may refuse to disclose information provided in confidence by a third party where:
>
> a. To disclose the information would, or would be likely to, cause serious prejudice to the trade, industrial, commercial or financial interests of a party other than the requester.
>
> b. To disclose the information would, or would be likely to, prejudice the future supply of similar information from a similar source, and the Bank has a significant and legitimate interest in the continued supply of such information.
>
> 39. The constraint set out in paragraph 38 does not apply where notice has been provided to the third party under paragraph 45 of an intention to disclose the information and that third party has not objected to its disclosure.

> *Information provided by other States*
>
> 44. The Bank may refuse to disclose information provided to it in confidence by a State or another international organisation, where to communicate it would, or would be likely to, seriously prejudice relations with that State or other international organisation, on an objective standard, or endanger the future flow of information from that State or other international organisation. This constraint does not apply where notice has been provided under paragraph 45 of an intention to disclose the information and the State or other international organisation has not objected to its disclosure. It also does not apply where the information in question would be subject to disclosure under a national access to information law.

Internal administrative information (para. 3.3E) and Financial information (para. 3.3F)

The draft Policy includes strong exceptions in favour of information relating to corporate administrative matters, such as corporate expenses, procurement and so on, as well as an exception in favour of certain information about the Bank's financial activities. Once again, the approach focuses on excluding certain categories of information from disclosure, rather than protecting legitimate interests from harm.

The Model Policy includes the following exception to protect the Bank's financial interests:

> *Commercial interests of the Bank*
>
> 41. The Bank may refuse to disclose information where to do so would, or would be likely to, cause serious prejudice to the legitimate commercial or financial interests of the Bank.

In some cases, the restrictions are clearly overly broad. It is reasonable for stakeholders to expect the Bank to disclose information concerning its expenses and its assumptions of risk. Examples could include the Bank's expenditures on salaries and perquisites, advertising and marketing, or the contractual commitments and identity of its service providers for insurance, travel, catering and entertainment, as well as on its choice of property, including purchase or rental contracts for office premises, other accommodations or storage.

Safety and Security (para. 3.3G)

This exception, which aims to protect the security and safety of Bank staff, is one of the few that is clearly harm-tested. GTI believes that this exception is legitimate.

Personal information (para. 3.3H)

This exception does not include a harm test; this could be achieved by stating that the exception applies only to the unreasonable disclosure of personal information. Furthermore, in many respects this exception is too broad. Thus, Bank personnel policies, including the processes for staff appointments, should be public information. The exception for the investigation of staff misconduct is unacceptably wide as it excludes disclosure of the findings and sanctions.

Bank Group's Prerogative to Disclose or Withhold Information (3.4)

Para. 3.2.3 of the draft Policy establishes, as a guiding principle for the policy, that the Bank "will refrain from disclosing information when it determines that the potential harm of doing so outweighs the benefit of disclosure." Unfortunately, the idea that the Bank should disclose information where the benefits of this outweigh the harm is not given equivalent priority in the draft Policy.

Pursuant to para. 3.4.1, the Bank reserves the right to disclose information on the list of exceptions earlier than otherwise required. This right will be exercised by the Information Disclosure Committee. The procedure for this is set out in para. 3.4.2 for various types of information, so that Board approval is required for Board documents, third party consent for third party information, and the approval of the Information Disclosure Committee for other documents.

The GTI welcomes the idea of a public interest override along these lines. However, we note that this override is unduly limited in a number of ways. First, it appears to be discretionary, since it is expressed as a right vesting in the Bank, rather than as an obligation. Under better practice national right to information laws, the override is applied automatically, and not at the discretion of officials. Second, third party information is effectively not covered by the override, since it is always legitimate to disclose this information with the consent of the third party. Third, it is unclear what standard will be used to decide whether or not information will be disclosed. In most other IFI policies and

national right to information laws, the standard is whether the larger public interest is served by disclosure, or by secrecy.

A good example of a national public interest override is found in section 8(2) of the Indian Right to Information Law, 2005:

> Notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

Pursuant to para. 3.4.3 of the draft Policy, the Bank also reserves the right not to disclose information which it would normally disclose. This would apply in "exceptional circumstances", but otherwise no indication is given of what standard might be applied.

We note that national right to information laws do not include a power to override the disclosure of otherwise non-exempt information and that this is highly problematical, given the clear opportunity for abuse. Furthermore, it runs counter to the idea that access to information is a fundamental human right, which cannot be overridden for mere reasons of convenience. All of the legitimate reasons to refuse to disclose information should be described as specific exceptions to the right of access.

Classification and Declassification of Records (paras. 4.6 and 4.7)

Pursuant to para. 4.6.1 of the draft Policy, each document will, as appropriate, be classified and the classification will indicate when the document can "eventually be disclosed". This information will, pursuant to para. 4.7.2, be made available after 5, 10 or 20 years, although some information may never be released. These systems will be further developed in the Information Disclosure Handbook, which will also provide "a list of the documents falling under each level of classification" (para. 4.7.3).

Other than these framework provisions, little guidance is given on how the classification system would work in practice. In any case, we note that this is not the appropriate way to decide on whether or not, or when, information should be made public. Rather, the test should be whether or not as a matter of fact, and as assessed at the time of a request, the information does or does not fall within the scope of the regime of exceptions. It is also a problem that original classification is normally done by the originator of a document, who may possibly have an undue inclination towards protecting information. Furthermore, it is not possible to determine with any accuracy in advance whether it will take 5, 10 or 20 years for the sensitivity of a document to decline. As a result, the initial classification designation should not be construed as meaningful in the handling of requests.

Pursuant to para. 4.6.2, information received by the Bank will be classified based on the originator's classification system. This simply perpetrates the originator veto approach which, as we note above, is highly problematical. Furthermore, it would presumably be difficult, if not impossible, to integrate the many varied classification systems used by third parties into the main classification system used by the Bank (i.e. this is not practical).

Electronic Mail (4.8)

Pursuant to para. 4.8, the draft Policy establishes a separate system for the treatment of emails. Paras. 4.8.1(i) and (ii) simply indicate that emails will be treated in accordance with their classification status (i.e. either as public or restricted). This appears to be identical to the treatment of other information. More significant is para. 4.8.1(iii), which states: "Access will not be provided to e-mails that are not filed in the Bank Group's documents management system". This would effectively allow Bank employees to evade the disclosure policy by filing emails outside of the main Bank information management systems.

Omission

The draft Policy does not clarify that where only part of a document is covered by an exception, the rest of the document will be provided to requesters (severability).

Recommendations:

- The regime of exceptions should be substantially revised so that all exceptions are subject to a specific harm test and are otherwise drafted clearly and narrowly so as to conform to the stated presumption of disclosure in the policy.
- Specifically, the following changes should be made:
    - Specific protected interests, rather than categories of documents, should be listed for deliberative and communications documents. Only opinions and advice should be covered by this exception, and background and statistical documents should specifically be excluded from its ambit(paras. 3.3A and B).
    - The attorney-client exception should be limited to information covered by actual attorney-client privilege (para. 3.3C).
    - The policy should state that it does not apply to information about investigations by the IRM, rather than stating that the Bank will not release such information (para. 3.3C).
    - Instead of recognising a broad originator veto, the policy should list the specific legitimate interests of third parties (such as commercial advantage) and only permit information to be withheld when disclosure would pose a risk of harm to those interests (para. 3.3.D).
    - The broad exceptions in favour of internal administrative information and financial information should be replaced with an exception in favour of the legitimate commercial or financial interests of the Bank (paras. 3.3E and F).
    - The exception in favour of personal information should incorporate a harm test (para. 3.3H).
- The public interest override should be made mandatory and should apply whenever the overall public interest is served by disclosure (i.e. whenever the benefits of disclosure outweigh the harm that disclosure would cause to the protected interest). There should be no prerogative to refuse to disclose information that does not fall within the scope of the regime of exceptions on public interest grounds (para. 3.4).

- It should be made clear that the system of classification does not impact on whether or not information will be released in response to a request. Instead, the test should be whether or not the information falls within the scope of the regime of exceptions, as determined at the time of the request (paras. 4.6 and 4.7).
- Officials should not be able to take emails outside of the scope of the policy simply by failing to register them in the Bank's management system. Instead, as with all information, the test for disclosure should be the regime of exceptions (para. 4.8).
- The policy should provide for the partial release of documents where only part of the information they contain falls within the scope of the regime of exceptions (severability).

Principle 6: Appeals

> *Anyone who believes that an international financial institution has failed to respect its access to information policy, including through a refusal to provide information in response to a request, has the right to have the matter reviewed by an independent and authoritative body.*

Para. 4.4 of the draft Policy establishes a two-stage system of appeals for a "failure or denial to provide information eligible for disclosure". A first level of appeal is to the Information Disclosure Committee. Importantly, the draft Policy provides for a second level of appeal to an Ad-hoc Appeals Panel. According to the draft Policy: "The Ad-hoc Appeals Panel will operate independently from the Information Disclosure Committee and will report directly to the President of the Bank Group."

The GTI very much welcomes the establishment of this appeals process and, in particular, the Ad-hoc Appeals Panel reporting to the President. However, there are a number of serious shortcomings built into the draft Policy. Probably the most important is that para. 4.4.1 states:

> "Restricted" documents specified in section 3.3 above ("List of Exceptions") as not eligible for disclosure will not be subject to the appeals procedure.

It is not clear what this means but the primary purpose of filing an appeal is precisely to challenge claims by Bank officials that information does fall within the scope of the regime of exceptions. To posit this as a prior condition for exercising the right of appeal would, therefore, appear to deprive it of much of its relevance. Furthermore, the right to appeal should not be limited only to failures to provide information but should also extend to issues such as breach of the timelines for responding to requests, charging too much for the provision of information and failing to provide information in the form requested.

Another serious concern is that, unlike in the case of the World Bank, the Ad-hoc Appeals Panel is not described as a body which is independent from the Bank and its management (it is just independent from the Information Disclosure Committee). This problem is compounded by the vague description of who will sit on the Appeals Panel, which could

consist entirely of Bank staff, "as appropriate" (footnote 9). Again, this may be contrasted with the World Bank policy, which identifies three person profiles, all of whom are independent of the Bank (see footnote 40 of that policy). Furthermore, the title of the Panel, which includes the term 'ad-hoc', seems to suggest that different panels might be constituted for different appeals. This would seriously undermine the integrity of the Panel, as well as its ability to develop expertise. Instead, it should be made clear that the members of the Panel will be appointed for a fixed period of time, say four or five years, although it might meet on an ad-hoc basis as necessary to process appeals.

The draft Policy also fails to set out any procedures for the processing of appeals by the Ad-hoc Appeals Panel, although some rules are set out for appeals to the Information Disclosure Committee (see para. 4.4.5). The policy should provide for basic procedural rules for processing appeals, and also provide for key powers of the Panel, including that it may access information and conduct investigations, and that it may order the Bank to disclose information or take other measures to redress breaches of the policy.

Recommendations:

- All decisions not to release documents should be appealable, regardless of whether or not a document purports to have been classified in accordance with para. 3.3 of the policy.
- The grounds for appeal, and the associated remedies, should be broadened to include complaints about timeliness, fees and form of access.
- The policy should make it clear that the Ad-hoc Appeals Panel will be independent of the Bank staff and management.
- The members of the Panel should be appointed for a fixed period of time, although actual meetings may be held on an ad-hoc basis.
- The independent appeal body should have the power to conduct investigations and to order the disclosure of information, as well as other measures to ensure compliance with the policy.

Principle 7: Whistleblower Protection

> *Whistleblowers – individuals who in good faith disclose information revealing a concern about wrongdoing, corruption or other malpractices – should expressly be protected from any sanction, reprisal, or professional or personal detriment, as a result of having made that disclosure.*

The draft Policy does not address the issue of whistleblowing.

Recommendation:

- The Bank should make a clear commitment to bring its whistleblower policy into line with the standards set out in the GTI Charter.

Principle 8: Promotion of Freedom of Information

> *International financial institutions should devote adequate resources and energy to ensuring effective implementation of their access to information policies, and to building a culture of openness.*

The draft Policy includes a number of commitments regarding its implementation and promotion, which we welcome. These include annual reporting on implementation efforts (para. 3.5.3), putting in place better document management systems (para. 4.5), a number of proposals for strengthening the information technology system, including to track disclosure obligations (see para. 4.10), the creation of an Information Disclosure Handbook (para. 4.12) and various budgetary commitments (see Annex I).

Other measures might also be considered. A commitment to engage in public education activities to promote awareness about the new policy and its implications, particularly among affected populations, is very important. A central tracking system should be put in place regarding requests, including how many are made, what they relate to and how they are processed. The annual report on implementation efforts should include an overview of information from the tracking system, and it should be published. Sanctions should be put in place for those who wilfully obstruct implementation, while positive efforts to implement the policy should be rewarded through the Bank's central incentive and appraisal systems. Mandatory staff training should also be provided for. The World Bank's approach could provide good guidance on this.

Recommendations:

- A commitment should be made to raise external awareness about the new policy, particularly among project affected communities.
- A central tracking system should be put in place to record the making and processing of requests.
- The annual report on implementation of the policy should involve consultations with civil society groups, provide an overview of requests and responses to them from the tracking system, and should be made public.
- Implementation of the policy should be incorporated into the Bank's corporate management structures, including incentive and appraisal systems. This should also include a regime of sanction for wilful obstruction of the policy.
- Comprehensive training should be provided to staff on implementation of the policy.

Principle 9: Regular Review

> *Access to information policies should be subject to regular review to take into account changes in the nature of information held, and to implement best practice disclosure rules and approaches.*

Pursuant to para. 3.5.3 of the draft Policy, the Bank will review the policy after three years. The GTI welcomes this commitment and calls on the Bank to consult widely with civil society organisations when undertaking this review.

Recommendation:

- The Bank should consult with civil society organisations and other stakeholders when conducting the three-year review.