

Article 19 Comments Regarding African Development Bank Disclosure Policy Review

OCTOBER 2003

African Development Bank
Angle des trois rues: Avenue du Ghana,
Rue Pierre de Coubertin, Rue Hedi Nourra
B.P. 323
1002 Tunis Belvedere
Tunisia

Dear President Kabbaj,

Re: Review of the African Development Bank Group's Policy on Disclosure of Information

ARTICLE 19, Global Campaign for Free Expression, welcomes the African Development Bank's (ADB) decision to review its Policy on Disclosure of Information (Disclosure Policy) and its commitment to encouraging public debate through improved transparency. Nonetheless, we are concerned that the proposed amendments fail to put in place a progressive access to information regime necessary to ensure the full exercise of the public's right to know in accordance with international standards. We very much hope that changes will be introduced as a result of this review which will rectify these problems.

In this letter, we address a number of specific concerns with the proposed Disclosure Policy that we believe should be addressed. In our view, significant changes should be incorporated which transform the system from an essentially internal, discretionary regime to one that provides for clear tests for disclosure along with the right to appeal any refusal to disclose to an independent appeals body. To do this, amendments need to be made to the system of exceptions, and explicit process guarantees and provision for an independent review mechanism need to be added to the Policy. The Disclosure Policy also contains what appear to be substantial internal contradictions regarding what information is actually subject to disclosure.

International Standards

Under international law, everyone has the right freedom of expression and information, including the right to access information held by public authorities. In his 1998 Annual Report, the UN Special Rapporteur on Freedom of Opinion and Expression declared that freedom of information includes the right to access information held by public bodies: "[T]he right to seek, receive and impart information imposes a positive obligation on

States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems...." The OAS Special Rapporteur on Freedom of Expression has also affirmed the fundamental nature of access to information held by public bodies.

These statements by the Special Rapporteurs, as well as many other authoritative statements on the right to information, are directed to States. However, ARTICLE 19 is of the view that these international human rights obligations are also binding on inter-governmental bodies such as the ADB. In our view, States' universal legal obligations apply to bodies they create collectively, just as they apply to bodies they create on their own, such as national public bodies. Furthermore, if this were not the case, States could effectively avoid their obligations by creating inter-governmental bodies and allocating responsibilities to them, a situation which is clearly untenable. It cannot be the case that inter-governmental bodies are allowed to breach human rights rules of universal application. Regardless of the formal legal position, the overwhelming rationale for access to information held by national public bodies applies equally to intergovernmental organisations, including international financial institutions. As the World Bank has recognised in relation to its activities: "Transparency and accountability are crucial for promoting good governance and are essential for drawing more stakeholders and supporters in the development process."

ARTICLE 19 has published a standard setting work, *The Public's Right to Know: Principles on Freedom of Information Legislation (ARTICLE 19 Principles)*, a copy of which is attached. These standards, which explicitly state that they are applicable to both national governments and inter-governmental bodies, have been endorsed by both the UN Special Rapporteur and the OAS Special Rapporteur, among others. We hope that they may be of use to the ADB in the process of preparing a new Disclosure Policy and Information Strategy.

The Regime of Exceptions

The Bank's Disclosure Policy declares that its objective is to "disclose all information on its operations and its activities unless there are compelling reasons not to do so." As a statement of principle, this is a positive starting point for the Policy, except that it immediately precludes from disclosure any information in the Bank's possession that cannot be characterized as relating to operations or activities.

Overall, the system of exceptions provided for in the Disclosure Policy fails to conform to the standards established under international law, whereby a refusal to disclose information is legitimate only where the refusing body can show that the following conditions are met:

1. the information relates to a legitimate aim listed in the law/policy;
2. the disclosure threatens harm to that aim; and
3. the harm to the aim is greater than the public interest in having the information disclosed.

The opening statement of principle declaration is seemingly limited by two statements that follow, the first of which reads: "Furthermore, the information generated, drafted,

prepared or obtained in the course of Bank Group activities is considered part of its archives, and may be released only in accordance with established policies authorized by duly constituted Bank Group authorities." The second statement, found within the principles upon which the Disclosure Policy is "premised and anchored", declares that the availability of information pursuant to the Policy "shall not be construed as an express or implied waiver of the privileges and immunities afforded to the Bank Group pursuant to the provisions of the Agreement Establishing the African Development Bank, including those regarding the inviolability of the Bank's archives...."

The combined meaning of these statements is far from clear. First, it is not evident whether the policies referred to in the first statement includes the Disclosure Policy, although we assume that it is included. In any event, the Agreement Establishing the ADB effectively trumps the Disclosure Policy in case of conflict. While this may to some extent be unavoidable, the ARTICLE 19 Principles, which reflect international best practice in this area, provide that laws - or in this case, policies - implementing the public's right to know should require that other legislation - or agreements - be interpreted, as far as possible, in a manner consistent with its provisions. We therefore recommend that a commitment be made to interpret the Agreement in light of the principles of information disclosure.

Instead of providing that all information will be subject to disclosure, subject only to a limited regime of exceptions where all legitimate grounds for refusing access are listed, the Disclosure Policy takes the opposite approach, providing access only to a list of 30 categories of information. Documents that do not fall within one of the identified categories will not be disclosed. For instance, major contract award decisions over 50,000 UA will be published, but not those for smaller amounts. This makes little sense, serves no legitimate purpose and is contrary to the internationally accepted standards noted above.

Within the categories of information that are identified as accessible to the public, in many circumstances the final decision for release depends on permission from the Board of Directors and/or the country concerned. This is true, for example, of "reports prepared by the Bank Group and presented at consultative group meetings" - a very broad category - and also Highly Indebted Poor Country Initiative-related documents. No indication provided as to when the Board or the country concerned may legitimately withhold permission to disclose information from these categories, beyond the general requirement stated in the Disclosure Policy that reasons for withholding information must be "compelling." This is, therefore, another highly discretionary area in the Policy.

While we recognise the need for the Bank to have clear and accepted arrangements with members countries and others regarding the disclosure of information they provide, we are of the view that it is not enough simply to allow the provider to classify information. Instead, the ADB should use its influence to negotiate clear and open criteria for labelling information as confidential, and should then apply these criteria when deciding whether or not to disclose documents. These criteria should address legitimate aims and their application should be subject to both the harm and public interest tests.

The Disclosure Policy also identifies eight classes of information the disclosure of which may be explicitly restricted. Some of the exceptions do serve legitimate aims, while others do not. For example, one exception states: "public availability of some information may be precluded on an ad hoc basis when, because of its content, wording, or timing, disclosure would be detrimental to the interests of the Bank Group, its partners, a

member country, or Bank staff." This grants almost unfettered discretion to the Bank to refuse access to information and seriously undermines the entire Disclosure Policy.

None of the eight classes of information access to which may be restricted are subject to a harm test or even to the Policy's own requirement that the reason to refuse disclosure be "compelling". Indeed, some of the exceptions apply to entire classes of information, rather than to documents the disclosure of which might cause harm. Exceptions should only be applied on a case-by-case basis so as not to unnecessarily frustrate the goals of the Disclosure Policy. There is also no public interest override in the current Disclosure Policy.

Process Guarantees

In practice, implementation of the right to know requires clear process guarantees, including requirements of timely decision-making and that refusals be accompanied by substantive written reasons. The former is necessary to prevent undue delay in the provision or refusal of information. Written reasons for a refusal are necessary not only for any appeal, but also because requesters have a right to know why their requests have been refused. In particular, if information is withheld, either in whole or in part, it should be clear to external stakeholders exactly what is not being disclosed and why. The Bank should also consider a requirement that the public be informed of the existence of a document requested, even if its disclosure is prohibited by the specified confidentiality requirements, outside of those rare cases where even acknowledgement of the existence of the document may cause harm to a legitimate secrecy interest.

These process guarantees are provided for in almost all national access to information laws, as well as some policies adopted by inter-governmental organisations, such as the UNDP's Public Information Disclosure Policy. The latter requires requests to be responded to within 30 business days and denials to be accompanied by written reasons.

The guiding principles of the ADB Disclosure Policy do provide some indication of how the regime will be implemented. However, they fall short of international best practice in this area. For instance, the principles provide: "Information provided to the public shall be made available in a form and at a time that enhances the quality of Bank activities." This places Bank interests above the idea that disclosure is a right that should be respected in accordance with clear principles set out in advance. Furthermore, there is no requirement that refusals be accompanied by written reasons.

Independent Review Mechanism

Any disclosure system is ultimately discretionary unless requesters have a right to appeal any refusal to disclose information to an independent body. Such a right of appeal is crucial to the success and credibility of a disclosure system because, in the absence of a review body, there is no independent check on whether a refusal to disclose information is in accordance with the applicable law or policy.

This is recognised in practically all national laws on access to information, which often provide for an appeal to an independent administrative tribunal or ombudsman, and then

to the courts. Significantly, it has also been accepted by UNDP in its Public Information Disclosure Policy, which provides for the establishment of an Oversight Panel for appeals, consisting of three UNDP professional staff members and two members from the non-profit sector.

The ADB Disclosure Policy, by contrast, does not provide for any independent review. Indeed, in stark contrast to this principle, the Policy states: "The final determination as to what information may be released to the public will rest with the Bank Group."

Whistleblower Protection

The staff of international institutions, private sector organizations and government civil servants sometimes have access to information which may expose official wrongdoing, potentially of a very serious nature, but they are afraid to release it because they may face legal or employment-related sanctions for doing so. It is increasingly being recognized, in both the private and public sectors, that protection for individuals who release such information - sometimes referred to as whistleblowers - is crucial to the exposure of wrongdoing and protecting the public interest. The ADB's Disclosure Policy does not provide protection for whistleblowers.

Recommendations

In our view, proper transparency requires the African Development Bank, like national public authorities and, increasingly, intergovernmental organizations, to accept the public's right to know as reflected in an effective and enforceable disclosure system that meets international standards on freedom of information. The present, essentially discretionary system of disclosure based on vague categories of exceptions should be replaced with a system which effectively guarantees the right to access information held by the Bank, subject only to the regime of exceptions. In order to do this, the Bank's Disclosure Policy needs to be further revised. We recommend, in particular, that improvements be made to:

- reduce, as far as possible, the possibility of conflict between the Disclosure Policy and the Agreement Establishing the Bank by providing for the latter to be interpreted in accordance with the principles underlying the former;
- replace the existing system of exceptions with one based on the internationally accepted principles noted above, based on a narrow list of legitimate aims, a requirement of harm and a public interest override;
- introduce process guarantees, including strict timelines for disclosure of information and a requirement that any refusals be accompanied with substantive written reasons;
- establish an independent body to review refusals by the Bank to disclose information; and

- provide whistleblower protection for Bank staff who disclose protected information, provided the disclosure was made in the reasonable belief that it disclosed wrongdoing and that it was made in good faith.

We recognize the challenges associated with drafting an improved Policy on the Disclosure of Information, arising from the number of interests that must be balanced. Nevertheless, we are of the view that the proposed Policy will fail effectively to guarantee the public's right to know unless further significant changes are introduced. As a result, despite the challenges, we urge you to bring the Bank's Policy into line with the standards outlined in this letter and contained in the ARTICLE 19 Principles. We would be happy to provide further elaboration of the analysis and recommendations contained herein and we are also available to assist the Bank in redrafting and improving its Disclosure Policy.

Yours truly,

Toby Mendel
Law Programme Director