

Office of the United Nations High Commissioner for Human Rights

Recommendations for EBRD's Access to Information Policy

6 March 2019

Introduction

1. The Office of the United Nations High Commissioner for Human Rights (OHCHR) welcomes the opportunity to comment on the draft Access to Information Policy (“draft Policy”) of the European Bank for Reconstruction and Development (EBRD, or Bank) and accompanying draft Directive. We welcome certain positive features in the draft Policy and Directive, including the extensive listing in the Directive of information routinely disclosed, clear timeframes for responding to requests, clear guidance on translations, among others. We note that EBRD’s review draws, or is intended to take into account, benchmarking other IFIs’ best practices.¹

2. OHCHR notes the vital function that freedom of information laws and policies play throughout the world in fostering transparency, accountability and good governance. Transparency is fundamental to sustaining relations of trust and an active public dialogue and awareness about the EBRD’s mission. It is also a foundation stone for better long-term investment and development results.

3. However, in a number of respects (outlined below), we note that the draft Policy appears to fall short of the 2014 Public Information Policy (PIP) and comparable policies of other Multilateral Development Banks (MDBs). Mindful of the EBRD’s core values and mandate to promote well-functioning market economies, multiparty democracy and pluralism,² and conscious of downward pressures from some of the newer development financing institutions, OHCHR would urge the EBRD to strive for the highest possible transparency standards.

4. OHCHR notes that the need to safeguard a “business-sensitive approach” as been elevated in the list of Policy Principles, from the PIP to the draft Policy, and that and breadth of proposed exceptions to disclosure (Section III.2) may privilege business sensitivity over the more fundamental goal of transparency. OHCHR recommends that the EBRD spell out further in Section III the functional importance of transparency for better project performance,

¹ EBRD, Public Information Policy 2014, Section F.5.

² EBRD Articles of Agreement 1990, Article 1 ; and <https://www.ebrd.com/our-values.html>.

promotion of good governance, minimisation of corruption, and improved stakeholder relations, and that the reference in the PIP (C.1.) to promoting “adherence to internationally-recognised standards” be retained.³ OHCHR would also recommend that the EBRD retain the important qualification in the final sentence of PIP Section C.4., specifying that the “business approach” principle is governed by the exceptions regime, in order to set clearer boundaries for interpretation.

A. The right of access to information

5. OHCHR welcomes the recognition (Section III, para. 1.3 of the draft Policy) of the right of people to seek and receive information which may affect them. The fact that access to information is recognised as a human right under international, regional and (increasingly) domestic human rights law is of critical importance in framing the balance between commercial interests and the rights of communities potentially affected by Bank-supported projects.

6. The explicit recognition of the right to access information under global and regional human rights instruments is particularly important when the freedom of the press and freedom of expression are facing unprecedented threats in the region, and world-wide.⁴ The importance of these rights for development was put beyond doubt by its inclusion within SDG 16, target 10: “Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements.”⁵

7. With these factors in mind, we would recommend that the right of access to information under international law explicitly be referenced in the EBRD policy, as the public information policies of the IFC, EIB and ADB have done,⁶ and that the recognition in PIP

³ Paras 9-14 of the ADB’s former policy (2005) may provide inspiration for this purpose, including the recognition that : “[G]reater openness and information sharing have improved the quality of operations. Experience has also shown that projects generate complaints from local constituencies when insufficient information is made available during project design and implementation and when information is not made available early enough.”

⁴ See e.g. Committee for the Protection of Journalists’ global impunity index:

<https://cpj.org/reports/2017/10/impunity-index-getting-away-with-murder-killed-justice.php>.

⁵ See <https://sustainabledevelopment.un.org/sdg16>, and SDG indicator 16.10.2: “Number of countries that adopt and implement constitutional, statutory and/or policy guarantees for public access to information.” See also UNESCO, Press Freedom and Development (2008) at

<http://unesdoc.unesco.org/images/0016/001618/161825e.pdf>.

⁶ For example in its discussion of “Recent Global Trends in Public Communications”, para 17 of the ADB Public Communications Policy notes: “Freedom of information is recognised as a fundamental human right as set forth in the Covenant on Civil and Political Rights. Citizens are demanding greater transparency and holding governments and private sector corporations to higher standards of accountability.” The ADB policy also provides (para iii, p.3; replicated in para 30, p.12): “Right to access and impart information and ideas: ADB

(Section B) of the importance of the UNECE Aarhus Convention be restored. Article 19 of the Universal Declaration on Human Rights provides: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” Article 19 of the International Covenant on Civil and Political Rights, which has been ratified by 171 countries, Article 10 of the European Convention on Human Rights (47 member States of the Council of Europe), Article 13(1) of the American Convention on Human Rights (23 states parties) and Article 13(1) of the UN Convention on the Rights of the Child (194 states parties) contain similar provisions. International organizations, including the EBRD, are subjects of international law and are bound by general rules of international law,⁷ including with respect to human rights.

B. Scope of application

8. An important threshold issue, in OHCHR’s view, is the lack of clarity concerning the scope of application of the policy and its relationship with information disclosure requirements in other EBRD policies. In OHCHR’s view, it is important that disclosure requirements across the full range of the EBRD’s policies are clear and internally consistent, and harmonised upwards in accordance with the draft Policy’s commitment to transparency.⁸

9. OHCHR welcomes the fact that the draft Directive retains the PIP’s listing of documentation routinely disclosed, and recommends that it includes: (a) a timeframe for disclosure of Board meeting minutes (e.g. ADB Public Communications Policy, 60 days); and (b) documents circulated to the Board (e.g. World Bank s.III.B.4.d, AfDB Disclosure and Access to Information Policy 2012, s.4.10.1) including reports to the Board from its Committees (e.g. IFC s.III.E.18.d and e). Should the Bank agree to the latter recommendation, OHCHR notes that Section III.2.1.i and ii of the draft Policy would also need to be amended.

recognizes the right of people to seek, receive, and impart information and ideas about ADB assisted activities. ADB shall provide information in a timely, clear, and relevant manner. Information shall be given to affected people and other stakeholders, including women, the poor, and other vulnerable groups early enough for them to provide meaningful inputs into project design and implementation. ADB shall not selectively disclose information. People will have equal access to the information that ADB makes available under the policy.”

⁷ Interpretation of the Agreement of 25 March 1951 between WHO and Egypt, Advisory Opinion, 1980 I.C.J. Rep. 73, 89-90 (Dec. 20). In this regard OHCHR welcomes the EBRD’s recognition of its human rights responsibilities in its draft Environmental and Social Policy (21 January 2019), Section III, para. 2.

⁸ Para 1.3 of the EIB Group’s Transparency Policy appears to be among the clearest and strongest in this regard: “In applying this Policy, the EIB Group takes into account other EIB Group Policies and rules such as the Anti-Fraud Policy, the Whistleblowing Policy, the Complaints Mechanism Principles, and relevant Codes of Conduct applicable to staff and governing bodies. This Policy does not override these Policies and rules but must be read in conjunction with them as they are mutually reinforcing. In case of conflict between specific transparency and disclosure rules in other EIB Group Policies and this Transparency Policy, the provisions of the latter shall prevail.”

10. OHCHR notes that the draft Policy reflects a presumption of disclosure subject to defined exceptions intended to protect legitimate interests from harm, and that the list of exceptions is similar to those of other MDBs. However, the substance of the draft list of exceptions could be strengthened in certain respects, as outlined further below, taking into account comparative practice and Indicator 29 of the Access Info Europe and Center for Law and Democracy’s Global Right to Information Rating (an authoritative source in this field).⁹ In certain instances, the harm that may result from disclosure is not evident and should be further specified. In other cases, such as Sections III.2.2, III.2.3 and III.2.5, proposed exceptions are defined in an open-ended way (with the descriptor “includes”), the effect of which is to create potentially open categories and administrative discretions de-linked from the “harm” criterion.

11. In OHCHR’s view, the “harm” criterion (which is functionally related to, but not the same as, “legitimate interests”) should be mentioned explicitly in Section III.2 along with the objective of ensuring maximum transparency. In OHCHR’s view, the harm underpinning the protected interest in Section III.2.1 (“Information associated with Deliberation and Decision-Making”) is not specified sufficiently clearly, and should refer to the need to protect the integrity of the Bank’s deliberative processes. The proposed carve-out for information “intended for internal purposes” seems unduly broad, absent a clear risk of harm to the legitimate interest of protecting the integrity of decision-making processes.

12. We note that the proposed exception in Section III.2.3 (“Policy Engagement”) is a carry-over from the PIP (E.1.4) but appears not to have a parallel in other IFI information policies. Given the breadth and generality of this exception (which on its face might apply to any information that a member country deems sensitive), and the fact that better defined and more widely recognised interests are already included within the “Deliberation and Decision-making” exception, OHCHR would recommend that it be deleted.

13. In OHCHR’s view, the proposed exceptions in Section III.2.2 (“financial information” and “legal information”) appear unduly broad and open-ended. OHCHR would recommend a formulation more closely tied to the risk of harms to legitimate interests, such as that in the ADB policy (para 94.viii): “Financial information that, if disclosed, would or would be likely to prejudice the legitimate financial or commercial interests of ADB and its activities ..”

14. In OHCHR’s view, the proposed exception in Section III.2.4 (“Legal, Investigative and Integrity Information”) is similarly problematic. OHCHR recognises that the desire to minimise

⁹ See <http://www.rti-rating.org/methodology/>.

exposure to litigation is included among the justifications for exceptions in certain other MDB information policies (e.g. IFC, Section II.C.I). However we would respectfully contend that this is not a sufficiently well recognised basis for an exception. In any case, the EBRD’s proposed formulation (“subject the Bank to an undue risk in any contested matter such as any litigation or arbitration”) appears to be unjustifiably broad, contrary to the objectives of transparency and accountability.

15. OHCHR recommends that the draft Policy restore Section E.3 of the PIP (disclosure to avoid “imminent and serious harm to public health or safety, and/or imminent and significant impacts on the environment”). We note that other MDBs have similar provisions (e.g. IFC Access to Information Policy 2012, Section II.C.12). In a similar vein, OHCHR recommends that the public interest override should apply in cases of serious violations of human rights.¹⁰ This is not an academic matter: human rights violations (such as forced resettlement, killings, torture, labour rights violations, gender-based violence, and so forth) are frequently associated with infrastructure investment, extractives, agribusiness and other business ventures, directly or through equity stakes, supply chains or financial intermediaries.

16. In relation to Section III.5.1.iii, given the increasing personal risks faced by many individuals in connection with development projects and business activity, OHCHR would strongly recommend against the proposal to exclude anonymous requests. The public information policy of the AfDB (para 54) provides a potential model: “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 the release of the document.”

17. In relation to Section III.5.1.ii, OHCHR notes that – as proposed – requests may be refused if they are deemed “unreasonably broad.” In line with other MDBs’ information policies, and for the sake of transparency, we would respectfully encourage the EBRD to set a higher bar and only refuse “blanket requests”. In relation to Section III.5.1.iv, where a request is denied, OHCHR recommends that requesters be advised of avenues for appeal, in addition to the reasons for the decision given. The same considerations apply to Section IV.2.2.ii of the draft Directive.

¹⁰ OHCHR notes that the OAS model law on Access to Public Information contains such a provision (s.44).

C. Other issues

18. Given that the sensitivity of almost all kinds of information diminishes over time, OHCHR recommends the inclusion of a de-classification schedule. The AfDB, for example, provides that non-public information will be made available after 5, 10 or 20 years or more, depending upon its sensitivity and harmful effects (AfDB Policy on Disclosure and Access to Information (2013), paras 4.8.1 and 4.8.2). The World Bank, EIB, ADB and IDB public information policies contain similar provisions. The World Bank policy (s.B.6) lists specific categories of information that will be made publicly available after 5, 10 and 20 years, respectively, as well as documents that are not eligible for declassification.

19. It should be recognised that extra effort and proactiveness may be needed by the EBRD and client in order to inform and engage stakeholders experiencing particular types of discrimination, such as women, indigenous peoples, ethnic minorities, persons with disabilities, migrants, internally displaced persons and many others.¹¹ OHCHR welcomes the draft Directive's provisions regarding the translation of documentation into alternative languages and recommends that all efforts be undertaken to make information available to persons with disabilities in accessible formats whenever such persons may be affected by an EBRD-supported investment.

20. On the question of costs (which do not appear to be dealt with in either the draft Policy or Directive), OHCHR recommends that the requester should only pay for the costs of reproduction of the information requested, and, if applicable, costs of delivery, and that information provided electronically should be free of charge. No costs should be levied against requesters below a specified income level.

21. OHCHR welcomes the fact that the requirements that the Secretary General report annually to the Board, and that the implementation report be made public, have been retained (Section VIII). OHCHR also recommends that the draft Policy retain the specific requirements that annual implementation reports should include statistics on the number of requests received, the timeframe and nature of the banks' responses, and data on appeals.¹² Moreover, given the increasing threats faced by communities and the EBRD's (excellent) public statement on "Retaliation Against Civil Society and Project Stakeholders" (January 2019), OHCHR strongly recommends that the Secretary General's annual report include

¹¹ In international law, measures to remove structural obstacles to inclusion are called "special measures" or "positive measures", or in the case of persons with disabilities, "reasonable accommodation." See UN Convention on the Elimination of Discrimination Against Women, article 4(1); UN Convention on the Elimination of All Forms of Racial Discrimination, article 2(2); and UN Convention on the Rights of Persons With Disabilities, article 5(3).

¹² PIP, Annex, para 4. To similar effect see EIB Transparency Policy, para 9.4.

statistics (anonymised as needed) on the number and type of incidents of intimidation and/or reprisals associated with EBRD-supported projects and investments, and the nature of the EBRD's responses.

D. Concluding remarks

22. OHCHR is grateful for the opportunity to contribute to the EBRD's consultation on the draft Policy. We hope that our comments are useful, and that the final version of the policy will fully reflect best practice in other MDBs and national freedom of information laws, and thereby assure maximum transparency, accountability, and superior development outcomes. We look forward to our continuing dialogue and stand ready to provide further comments and clarifications on request.

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