Submission to the UN Special Rapporteur on the Right to Freedom of Opinion and Expression

The Right to Information and Intergovernmental Organisations

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Centre for Law and Democracy
info@law-democracy.org
+1 902 431-3688
www.law-democracy.org

Introduction[1]

Sweden adopted the world's first law granting a public right of access to information 250 years ago, but popularisation of the right to information (RTI) is a relatively recent phenomenon. Of the 112 national RTI laws globally which are currently in place, 98 (88 percent) were passed within the last 25 years, and 21 (19 percent) were passed within the last five years. Over the past two decades, RTI has gone from being viewed primarily as a governance reform to being recognised as a fundamental human right. International courts and other authoritative sources have read the right into Article 19 of the UN *Universal Declaration of Human Rights*[2] and the freedom of expression guarantees found in international and regional human rights treaties.[3] In some cases, international treaties specifically recognise the right. For example, the *Charter of Fundamental Rights of the European Union* enshrines RTI in Article 42.[4]

The recognition of RTI as a human right has been accompanied by the development, through jurisprudence and international standard setting, of established better practices in terms of both the formal guarantees and the implementation of this right. At the core of this understanding of RTI is the basic idea that the people, from whom all legitimate public bodies ultimately derive their authority, have a right to access any information held by or under the control of those bodies. This understanding has primarily been applied to national governments and other national level public bodies. However, there is a growing recognition that intergovernmental organisations should also be subject to RTI obligations.

There are several reasons for this. First, in most cases these organisations, including bodies belonging to the family of UN agencies, are inherently quasi-governmental in nature in the sense that they perform public functions. This is reflected in the fact that they are created by States as well as the specific tasks that they are mandated to undertake. Just as RTI obligations apply to 'downstream' public bodies, such as publicly owned companies and arms length bodies which are controlled by

[2] UN General Assembly Resolution 217A(III), 10 December 1948.

[3] See, for example, *Claude Reyes and Others v. Chile*, 19 September 2006, Series C, No. 151 (Inter-American Court of Human Rights). Available at: www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc.

[4] Adopted 7 December 2000, Official Journal of the European Communities, 18 December 2000, C 364/01. Available at: www.consilium.europa.eu/uedocs/cms_data/docs/2004/4/29/Charter%20of%20fundemental%20rights%20of%20the%20European%20Union.pdf .

ministries, so they should apply to 'upstream' bodies which States create on a collective basis. For this reason, in this Submission references to 'public bodies' shall be deemed to include both national public bodies and intergovernmental organisations.

Second, and closely related, a core underpinning of the right to information is that it applies to any body which receives public funding, since taxpayers have a fundamental democratic right to monitor how their money is being used. As a result, intergovernmental organisations, most of which are financed by States, should also be subject to RTI obligations.

Third, States obviously cannot avoid their human rights obligations simply by creating other bodies to carry out tasks on their behalf. Just as States should be held responsible if human rights abuses are carried out by private military contractors in their employ, if a group of States creates an external agency for example to advance global development goals or facilitate global diplomacy, the RTI obligations that attach to States should also apply to these collective creations. This idea has come into particular focus with the inclusion of ensuring "public access to information" among the UN Sustainable Development Goals (SDGs), a set of global targets approved by the UN General Assembly.[5] It would be odd indeed for intergovernmental organisations, such as the UNDP and UNESCO, which oversee the process of assessing and promoting compliance with the SDGs, not to be expected to practice what they preach by establishing strong RTI policies and practices of their own.

Beyond these principled reasons there is a fourth, more pragmatic, reason for applying RTI to intergovernmental organisations, namely that many of the benefits it brings are just as likely to be realised in the context of intergovernmental organisations as they are in the national context. For example, a key benefit of a robust RTI system is its role in combating corruption and mismanagement, by allowing broad oversight of public bodies. Intergovernmental organisations face the same need to combat corruption and mismanagement as national public bodies, and in both instances malpractice thrives in a climate of secrecy. Similarly, RTI is important in generating public trust and facilitating public dialogue and participation. For intergovernmental organisations, which often need to engage with an even wider and more diverse network of stakeholders than States, RTI is key to fostering open discussion about and engagement in their work.

This Submission by the Centre for Law and Democracy (CLD) on the applicability of RTI to intergovernmental organisations was prepared in response to a call for input on this issue by the UN Special Rapporteur on the Right to Freedom of Opinion and Expression. It examines the current RTI landscape among intergovernmental

[5] Available at: www.un.org/sustainabledevelopment/peace-justice/.

organisations and provides a set of recommendations regarding the content of RTI policies in this sector. Proactive disclosure, including open data, is an extremely important part of RTI, but it is not discussed in this Submission in part because the enormous diversity of intergovernmental organisations makes it difficult to establish common standards for what should be disclosed proactively and how. It is worth noting that as important as proactive disclosure is, it is not, contrary to the claims made by some politicians, by itself sufficient since decisions about what to reveal and what to withhold on a proactive basis ultimately remain at the discretion of officials, limiting the degree to which proper institutional accountability can be achieved simply through this tool.

RTI and Intergovernmental Organisations

Despite strong conceptual arguments in favour of imposing RTI obligations on intergovernmental organisations, practical implementation of the right is far less developed among these organisations than it is at the national level. Eighty percent of the world's population lives in a country that has an RTI law, including virtually every well-established democracy and all of the G20 countries except Saudi Arabia. By contrast, among intergovernmental organisations, RTI policies remain the exception rather than the norm.

In general, the international financial institutions (IFIs) are well ahead of other intergovernmental organisations in this area. Among the early adopters was the World Bank, which in 1985 adopted its first rules on the disclosure of information, in the form of the Directive on Disclosure of Information.[6] Many IFIs have since followed suit, including, among others, the European Investment Bank,[7] the Asian Development Bank,[8] the Inter-American Development Bank[9] and the African Development Bank.[10] The prevalence of RTI policies in this sector is largely due to heightened civil society scrutiny of their work, given its high impact, and also partly due to the fact that Member States are keen to ensure that their money is being handled appropriately. Of particular note here is work undertaken by the Global Transparency Initiative, including their 2006 *Transparency Charter for International Financial Institutions*[11] and their 2009 *Model World Bank Policy on Disclosure of*

[6] See: World Bank, Evolution of the World Bank's Disclosure Policies. Available at: go.worldbank.org/2I4JROD0I0.
[7] *European Investment Bank Group Transparency Policy*, March 2015. Available at: www.eib.org/attachments/strategies/eib_group_transparency_policy_en.pdf.
[8] 2011 Public Communications Policy (PCP) of the Asian Development Bank: Disclosure and Exchange of Information. Available at: https://www.adb.org/documents/pcp-2011.
[9] *Access to Information Policy*, April 2010. Available at: www.iadb.org/document.cfm?id=35167427.
[10] Bank Group Policy on Disclosure and Access to Information - In Effect Since 3rd February 2013. Available at: http://www.afdb.org/en/documents/document/bank-group-policy-on-disclosure-and-access-to-infomation-in-effect-since-3rd-february-2013-23779/.
[11] Available at: www.ifitransparency.org/doc/charter_en.pdf.

Information.[12] CLD has published a detailed critique of the problems with the regimes of exceptions to RTI among the policies of the IFIs, *Openness Policies of the International Financial Institutions: Failing to Make the Grade with Exceptions*.[13]

In contrast, RTI policies are relatively rare among UN agencies. Although several UN agencies, including the UN Environment Programme (UNEP),[14] the UN Children's Fund (UNICEF),[15] the World Food Programme,[16] the UN Population Fund (UNFPA)[17] and the UN Development Programme[18] have disclosure policies, we were unable to locate RTI policies for the vast majority of UN bodies. Particularly notable is the fact that UNESCO, which has institutional responsibility within the UN for promoting RTI and which recently proclaimed 28 September 2016 to be International Day for Universal Access to Information, still does not have an RTI policy of its own.

Among regional organisations, the European Union adopted a set of rules on RTI, Regulation 1049 regarding public access to European Parliament, Council and Commission documents, in 2001.[19] While this is to be applauded, the rules it embraces are not particularly strong. An analysis using the RTI Rating, a globally recognised methodology for assessing the strength of legal frameworks for the right to information, found that Regulation 1049 scored just 96 points out of a possible 150.[20] This would rank in 37th position among the 111 national legal frameworks currently assessed on the RTI Rating.

In the Organization of American States (OAS), RTI is guaranteed by Executive Order No. 12-02.[21] Although this policy is reasonably robust, it is still significantly weaker that the OAS's own *Model Inter-American Law on Access to Information*.[22]

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[12] Available at: www.ifitransparency.org/uploads/7f12423bd48c10f788a1abf37ccfae2b/GTI_WB_Model_Policy_final.pdf.
[13] January 2012. Available at: www.law-democracy.org/wp-content/uploads/2012/01/IFI-Research-Online-HQ.pdf.
[14] UNEP Access-to-Information Policy (Revised), 6 June 2014. Available at: www.unep.org/environmentalgovernance/UNEPsWork/AccesstoInformationPolicy/Revised2015/tabid/1060867/Default.aspx.
[15] UNICEF, Information disclosure policy, 16 May 20111. Available at: www.unicef.org/about/legal_58506.html.
[16] WFP Directive on Information Disclosure, 7 June 2010. Available at: documents.wfp.org/stellent/groups/public/documents/newsroom/wfp220973.pdf.
[17] Information Disclosure Policy, 2009. Available at: www.unfpa.org/information-disclosure-policy.
[18] Information Disclosure Policy, 1 October 2015. Available at: www.undp.org/content/undp/en/home/operations/transparency/information_disclosurepolicy.html.
[19] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001. Available at: http://www.europarl.europa.eu/register/pdf/r1049_en.pdf.
[20] See: www.rti-rating.org/international-institutions/.
[21] Available at:www.oas.org/legal/english/gensec/EXOR1202.DOC.

RTI policies have also been developed in at least some cases by non-governmental organisations which undertake public functions (and should therefore be treated as public bodies). A good example is the Internet Corporation for Assigned Names and Numbers (ICANN), an international non-profit which is responsible for overseeing key functions related to the functioning of the global Internet. ICANN adopted the *Documentary Information Disclosure Policy* (DIDP), which governs the receipt and processing of requests for information.[23] That ICANN takes openness seriously is perhaps not surprising, given widespread suspicion of ICANN's role in global Internet governance[24] and their essential role as stewards of a global public resource.

Key Recommendations

There are developed and broadly recognised principles for how RTI should be protected at the national level.[25] Many of these standards are equally applicable to intergovernmental organisations, although they sometimes need to be adapted to take into account the institutional differences for intergovernmental organisations. This section sets out CLD's key recommendations for the policies of intergovernmental organisations regarding RTI.

1. Intergovernmental organisations should adopt binding policies which recognise a broad right to information

An important starting point for implementing a robust RTI system is for intergovernmental organisations to adopt policies which recognise RTI as a human right, emphasise the organisation's commitment to transparency and highlight the importance and benefits of openness. While formal recognition of RTI as a human right by intergovernmental organisations is relatively uncommon, many policies do include broad statements expressing a commitment to transparency. For example, the Access to Information Policy of the Inter-American Development Bank (IADB) states:

> **Principle 1: Maximize access to information**. The Bank reaffirms its commitment to transparency in all of its activities and therefore seeks to maximize access to any

[22] See: www.rti-rating.org/international-institutions/. The Model Law is available at: http://www.oas.org/en/sla/dil/access_to_information_model_law.asp.
[23] Available at: www.icann.org/resources/pages/didp-2012-02-25-en.
[24] See, for example, Cecilia Kang and Jennifer Steinhauer, "Ted Cruz Fights Internet Directory's Transfer; Techies Say He Just Doesn't Get It", New York Times, 15 September 2016. Available at: www.nytimes.com/2016/09/16/us/politics/ted-cruz-internet-domain-names-funding.html?_r=0.
[25] See, for example, the Indicators used in the RTI Rating to assess the strength of legal frameworks for RTI. Available at: http://www.rti-rating.org/wp-content/uploads/Indicators.pdf.

> documents and information that it produces and to information in its possession that is not on the list of exceptions.[26]

These policies should also define their scope of application broadly. A broad definition of 'information' is particularly important. The right of access should apply broadly to all information held by the organisation, with no restrictions based on the medium in which the information is stored or the substantive nature of the information. The UNFPA's Information Disclosure Policy defines information as "any produced content, whatever its medium (paper, electronic or sound, visual or audiovisual recording), concerning a matter relating to the policies, activities and decisions of UNFPA." [27] The first part is positive but the second part unnecessarily limits the scope of the right to certain types of information (i.e. information relating to policies, activities and decisions).

In addition to material held by the organisation, the policy should apply broadly to material to which the organisation has a right of access, in order to ensure that sub-contractors in the agency's employ are covered to the extent that they are producing material for the organisation, but over which they retain physical control. The same principle that precludes States from contracting out of their RTI obligations by delegating core responsibilities to intergovernmental organisations makes it unacceptable for these organisations to place information generated for them by contractors or other third parties off limits.

RTI policies should also extend the right to make a request for information to everyone, including legal persons, regardless of their residency, citizenship or place of registration, even where the mandate of the organisation is geographically limited. This principle is well established at the national level, with many better practice laws allowing anyone to make a request.

2. Intergovernmental organisations should establish clear and simple procedures for making and responding to requests for information

A particular weakness of the RTI policies of many intergovernmental organisations is that the procedures governing how to make requests for information and how the organisation will respond to (process) these requests are limited and often vague. Broadly recognised standards, which also apply to intergovernmental organisations, mandate that there should be clearly defined procedures for lodging requests for information, including requirements that requesters should only have to provide the details necessary to identify and deliver the information and should be able to file requests by any available means of communication. A strong policy should also require the organisation to provide reasonable assistance to requesters who need it,

[26] *Access to Information Policy*, April 2010. Available at: www.iadb.org/document.cfm?id=35167427.
[27] *Information Disclosure Policy*, 2009. Available at: www.unfpa.org/information-disclosure-policy.

particularly where they are illiterate, disabled or unable to identify adequately the information they are seeking, to comply with requesters' reasonable preferences regarding the form in which they wish to access the information, and to respond to requests as soon as possible and within reasonable maximum time limits, ideally of two weeks or less, with strict limits on any extensions to this.

The world's best RTI laws spell out these rules in detail either in the RTI law or, less commonly, in accompanying regulations. Indeed, in many cases a substantial proportion of the RTI law is devoted to these procedures. This level of specificity is conspicuously absent from the RTI policies of most intergovernmental organisations. For example, the only details on requesting procedures in ICANN's DIDP are as follows:

> **Responding to Information Requests**
> If a member of the public requests information not already publicly available, ICANN will respond, to the extent feasible, to reasonable requests within 30 calendar days of receipt of the request. If that time frame will not be met, ICANN will inform the requester in writing as to when a response will be provided, setting forth the reasons necessary for the extension of time to respond. If ICANN denies the information request, it will provide a written statement to the requestor identifying the reasons for the denial.
> …
> To submit a request, send an email to didp@icann.org[28]

Although the DIDP is even more skeletal than most, underdeveloped procedures for the lodging of requests and a lack of clarity regarding the organisation's responsibilities when handling requests are extremely common.

Most intergovernmental organisations' RTI policies fail to include any mention of requesting or access fees. In most cases, this is likely positive inasmuch as it indicates that no fees are to be levied, but better practice would be to clarify this in the policy in order to remove any doubt. This can be particularly important to avoid deterring potential requesters who may be put off by the idea that they could be asked to pay for access.

3. Intergovernmental organisations should define clear and specific exceptions to the right of access which protection only legitimate interests and are subject to a requirement of harm and a public interest override

Every RTI regime has exceptions to disclosure to protect information the release of which would be likely to cause harm to a legitimate public or private interest. It can be tempting for decision-makers to want to define these exceptions broadly. Under international law, exceptions should be based on the three-part test for restrictions

[28] Available at: www.icann.org/resources/pages/didp-2012-02-25-en.

on freedom of expression set out in Article 19(3) of the *International Covenant on Civil and Political Rights* (ICCPR).[29] This recognises restrictions as being legitimate only where they are: i) prescribed by law; ii) for the protection of an interest that is specifically recognised under international law, which is limited to the rights and reputations of others, national security, public order, and public health and morals; and iii) necessary to protect that interest.

In the specific context of the right to information, this translates into a similar three-part test, as follows:

- The information must relate to an interest which is clearly defined in law and which falls within the scope of the interests recognised under international law.
- Disclosure of the information may be refused only where this would pose a risk of substantial harm to the protected interest (the harm test).
- The harm to the interest must be greater than the public interest in accessing the information (the public interest override).

The three parts of the test are cumulative, in the sense that an exception must pass all three parts to be legitimate, and together these constraints reflect the idea that restrictions on rights bear a heavy burden of justification. It is clear that only exceptions which serve to protect the interests recognised under international law may be legitimate. This narrow list ensures that only interests of significant weight may trump the right to information.

The harm test flows directly from the requirement of necessity in the general test for restrictions on freedom of expression. If disclosure of the information poses no risk of harm, it clearly cannot be necessary to withhold the information to protect the interest.

Finally, the idea of weighing the public interest in openness against the potential harm from disclosure also flows from the necessity test. It is widely recognised that this part of the test involves a proportionality element. Thus, the European Court of Human Rights has, in the context of freedom of expression, repeatedly assessed whether "the inference at issue was 'proportionate to the legitimate aim pursued'".[30] If the overall public interest is served by disclosure, withholding the information cannot be said to be proportionate.

In terms of the interests which may be protected by secrecy under an RTI law or policy, according to international standards and based on the legitimate interests recognised in Article 19(3) of the ICCPR, these should be limited to national security,

[29] Adopted by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976.
[30] See *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40.

international relations, public health and safety, the prevention, investigation and prosecution of legal wrongs, privacy, legitimate commercial and other economic interests, management of the economy, fair administration of justice and legal advice privilege, conservation of the environment and legitimate policy making and other operations of public authorities.

Generally speaking, these interests are all broadly applicable in the context of intergovernmental organisations, although they may need to be adapted to take into account institutional differences. For example, ICANN's policy does not include an exception for national security but instead exempts "[i]nformation that relates in any way to the security and stability of the Internet, including the operation of the L Root or any changes, modifications, or additions to the root zone."[31] Many would agree that ICANN has an obligation to protect this sort of security interest but the coverage of all information which "relates in any way" to the interest is illegitimate because it does not include any harm test (instead, the exception should be limited to cases where disclosure of the information would pose a risk of serious harm to the security of the Internet).

Two problems related to exceptions are commonly found in the RTI policies of intergovernmental organisations and, in particular, IFIs.[32] The first is to exempt all information received from a third party – whether a commercial party or an official body or State – which is the subject of an expectation of confidentiality or a non-disclosure agreement. For example, the World Bank's 2010 Policy on Access to Information recognises the following as an exception:

> Thus, the Bank does not provide access to information provided to it by a member country or a third party on the understanding of confidentiality, without the express permission of that member country or third party.[33]

It might seem legitimate for organisations to respect their confidentiality commitments in this way but in practice this is unnecessary and the lack of clear standards regarding when such assurances may be given essentially amounts to giving third parties a veto over the disclosure of information provided by them.

Better practice is to set objective standards for when information which is sensitive vis-à-vis third parties for commercial or other reasons may be withheld, based on the idea of disclosure causing harm to the third party rather than that party's wishes. What is important here is that fair notice about the standards that apply in the context of doing business with public bodies is provided, and thereafter third parties engage with the public body understanding the ground rules for such

[31] Available at: www.icann.org/resources/pages/didp-2012-02-25-en.
[32] See CLD, *Openness Policies of the International Financial Institutions: Failing to Make the Grade with Exceptions*, note 13.
[33] Para. 14.

engagement. The very extensive experience with this at the national level demonstrates conclusively that there is no evidence that imposing robust openness standards dampens enthusiasm by third parties to engage with public bodies, the main potentially legitimate concern here.

The second generally problematical area of exceptions in IFI disclosure policies is in relation to internal or deliberative information. Once again, the World Bank's policy, which is otherwise recognised to be one of the more robust, serves as a good example of the problem. Paragraph 16 of the policy defines a very broad class exception for deliberative information which includes the following:

> (a) Information (including e-mail, notes, letters, memoranda, draft reports, or other documents) prepared for, or exchanged during the course of, its deliberations with member countries or other entities with which the Bank cooperates.
>
> (b) Information (including e-mail, notes, letters, memoranda, draft reports or other documents) prepared for, or exchanged during the course of, its own internal deliberations ….

It is recognised that public bodies need space to think and that the premature disclosure of policies and advice may sometimes cause harm. At the same time, the approach taken by the World Bank, which is similar to that taken by many other IFIs, may be contrasted starkly with better practice at the national level, which identifies the interests in need of protection and then protects them against harm. Section 36 of the United Kingdom Freedom of Information Act is a good example of a better approach to framing this exception:

> (1) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—
>
> a. would, or would be likely to, prejudice—
>
> i. the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
>
> ii. the work of the Executive Committee of the Northern Ireland Assembly, or
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> iii. the work of the executive committee of the National Assembly for Wales,
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> b. would, or would be likely to, inhibit—
>
> i. the free and frank provision of advice, or
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> ii. the free and frank exchange of views for the purposes of deliberation, or
>
> c. would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.[34]

Beyond these two areas of relatively systematic weaknesses in the RTI policies of intergovernmental organisations, another common problem is the inclusion of

[34] Freedom of Information Act 2000.

broad catchall exceptions which fail to identify any particular harm or even subject matter. An example is the UNFPA's exception for "kinds of information, which because of their content or the circumstances of their creation or communication must be deemed confidential."[35] Similarly, OAS Executive Order No. 12-02 grants the organisation "the right to restrict, under exceptional circumstances, the access to information that it normally discloses".[36] These types of exceptions clearly do not pass muster under the international test outline above. They do not define the interest to be protected and, instead, effectively allow for refusals at the whim of the organisation and its officials.

A related problem is the all too common inclusion of reverse public interest tests in the RTI policies of intergovernmental organisations. Properly drafted, a public interest test operates as an exception to the exceptions, providing for the release of information where an exception is *prima facie* engaged but where disclosure is still warranted due to the overriding public interest this serves. However, some intergovernmental organisations have crafted these exceptions so that they operate to allow for general withholding of information based on the so-called public interest even where no exception otherwise applies. For example, ICANN's DIDP states:

> Information that falls within any of the conditions set forth above may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. Further, ICANN reserves the right to deny disclosure of information under conditions not designated above if ICANN determines that the harm in disclosing the information outweighs the public interest in disclosing the information.[37]

A proper public interest override should be limited to the first sentence of this provision, allowing for additional disclosures, but not additional withholding. There are a number of reasons for this. First, a proper regime of exceptions should protect all legitimate secrecy interests, so that there is no need to provide for such discretionary extension of the regime. The overwhelming experience at the national level, where reverse public interest overrides are virtually unknown, amply demonstrates that all confidentially interests can in practice be protected effectively in this way. Second, the reverse public interest override fails to align with human rights standards, which hold that restrictions on rights are the exception and may be legitimate only if drafted narrowly and very clearly. Third, and related to the previous point, affording this sort of discretion to officials will almost inevitably lead to abuse.

[35] Information Disclosure Policy, 2009. Available at: www.unfpa.org/information-disclosure-policy.
[36] Available at: www.oas.org/legal/english/gensec/EXOR1202.DOC.
[37] Available at: www.icann.org/resources/pages/didp-2012-02-25-en.

4. Intergovernmental organisations should create independent oversight mechanisms to monitor compliance with their policies and to decide on appeals

One of the most important components of an effective framework for RTI is the creation of a robust system of oversight, including a right to appeal against refusals to provide information and other violations of the rules. Better practice at the national level is to provide for three levels of appeal. The first is an internal appeal to a higher authority within the same public body, so as to provide it with an opportunity to correct any mistakes internally. The second is to appoint an information commission(er) to hear appeals and often to perform wider oversight and promotional functions. And the third is the right to lodge appeals with the courts.

Many RTI polices of intergovernmental organisations do reasonably well in terms of the first level of appeal, namely to a higher internal appellate authority. For example, at the United Nations Children's Fund (UNICEF) appeals are handled by the Deputy Executive Director for Management. It is unfortunate, however, that UNICEF's policy states that "there will be no requirement for providing a detailed explanation of the outcome of the review".[38] Respect for basic due process rights, including proper notification of reasons for decisions, is as important for intergovernmental organisations as for other public actors. At the World Food Programme, refusals may be appealed to the Information Disclosure Oversight Panel, a five-person body comprised of senior staff and chaired by the Director of the Communications, Public Policy and Private Partnerships Division.[39]

It is clear that, at least in the current institutional environment, intergovernmental organisations cannot provide for the third level of appeal, namely to courts. However, better practice, as implemented by several IFIs, is to provide for an independent external panel to hear appeals, in an analogous fashion to the information commission(er)s which are found at the national level. For example, the IADB has established an independent three-member panel to hear appeals, which operates on an on-call basis (i.e. rather than sitting permanently, it sits as needed when appeals are forthcoming). Importantly, panel members are not eligible to accept any staff, consultant or contractor positions from the IADB until three years have elapsed from the end of their service as a member of the panel. The review panel is responsible for appeals relating to information requests, and therefore represents an expert resource which the Bank can and does also use for other purposes.

[38] UNICEF, Information disclosure policy, 16 May 20111. Available at: www.unicef.org/about/legal_58506.html.
[39] WFP Directive on Information Disclosure, 7 June 2010. Available at: documents.wfp.org/stellent/groups/public/documents/newsroom/wfp220973.pdf.

A challenge in terms of guaranteeing the independence of the oversight mechanism is ensuring that this is promoted through the rules relating to making appointments and dismissing members. At the national level, this can be ensured through the system of checks and balances that exist in any healthy democratic environment. For example, commissioners may be appointed by the head of State from a list of nominees prepared by parliament following consultations with civil society and other key external stakeholders. RTI laws often grant commissioners security of tenure, for example by requiring the consent of a super-majority of parliamentarians or the head of the supreme court before they can be dismissed. At the intergovernmental organisation level, formal protection of tenure can be provided, but the closest institutional parallels to these forms of checks and balances would be requiring the approval of the governing board for appointments and dismissals. Independence can also be promoted by requiring members to have relevant expertise and by providing for consultations with civil society and other stakeholders as part of the appointments process.

In order to function effectively, oversight bodies at both the national and international levels need to be able to exercise an appropriate set of powers. This includes the powers to review any document, including documents claimed to be confidential, and to make orders for the disclosure of information. For intergovernmental organisations, the policy should include clear rules setting out these powers. Given the institutional framework in which these organisations exist, allocating final powers to oversight bodies to disclose information may not be possible, but governing bodies should make a strong commitment to respect their decisions.

5. The RTI policies of intergovernmental organisations should provide for appropriate sanctions and protections

Experience suggests that officials often suffer from what has been termed a 'culture of secrecy' or reluctance to disclose information even when it is not protected by the regime of exceptions. There are a number of ways to address this but an important one is to provide for sanctions for more egregious forms of behaviour in this regard, i.e. where officials wilfully obstruct access. At the national level, such sanctions often take the form of criminal penalties, sometimes in addition to administrative and/or disciplinary measures. Not all of these measures can be incorporated into the RTI policies of intergovernmental organisations, but those policies can at least provide for sanctions of a disciplinary nature.

Another measure is to provide for protection against sanction for officials who release information in good faith. At the national level, there may be other laws – whether criminal or civil in nature – and/or other rules – for example civil service or contractual rules – which provide for secrecy in a manner which contradicts the

standards in the RTI law or policy. Formally, such conflicts can be resolved by providing for the supremacy of the RTI regime in case of conflict. Even where this is done, however, officials, who may not be legal or policy experts, will be far more comfortable disclosing information where the RTI law or policy provides that they may not be subject to sanction as long as they acted in good faith to apply the rules.

A third measure is to provide protection for whistleblowers. This can be defined as anyone who discloses information which exposes wrongdoing, serious maladministration or other threats to the overall public interest in the reasonable belief that the information was substantially true and exposed the wrongdoing or other threats. In such cases, the policies of intergovernmental organisations should protect the individual against sanction, for example of a disciplinary or employment-related nature, even if their actions were formally in breach of the rules.

6. Intergovernmental organisations should put in place appropriate promotional measures for their RTI policies

Monitoring and evaluation are essential to the successful implementation of an RTI regime. At the very least, this means that public bodies should proactively report basic statistics, such as the number of requests received, the proportion which were denied, in whole or in part, the average time taken to respond, and so on. This can be included formally as one of the commitments in the RTI policies of intergovernmental organisations or simply undertaken regularly in practice.

Because RTI standards evolve over time, and intergovernmental organisations are often reluctant to provide for robust standards in the early phases of making policy commitments to respect RTI standards, it is important for them to commit to undertaking periodic reviews of the RTI policy, for example every five years. In its 2010 Policy on Access to Information, for example, the World Bank noted that it had reviewed its information policy in 1993, 2001 and 2005.[40] It is vitally important that these reviews provide adequate opportunities for civil society and other external stakeholders to engage and provide their inputs and feedback.

At the national level, a large majority of RTI laws require public bodies to appoint officials with dedicated responsibilities for ensuring proper implementation of the rules, including by receiving and processing requests for information, so-called information officers. This is also better practice for intergovernmental organisations. The IADB, for example, has an Access to Information Section, which operates directly under the Office of the Secretary, and which is responsible for ensuring proper implementation of the policy.

[40] Paragraph 2.

With very few exceptions, the experience of most intergovernmental organisations has been that the volume of requests under their RTI policies has been low. There are no doubt a number of reasons for this, but one is likely to be the low level of awareness about the existence and nature of most of these policies. One way to help address this is to take specific steps to raise public awareness about the policy. The precise measures that will be appropriate in this regard will depend on the individual intergovernmental organisation and the ways that it can best reach out to the public. As a general principle, integrating information about the RTI policy into any other public outreach activities the intergovernmental organisation conducts would be useful.

Another way to facilitate requests is to make it clear to external stakeholders what sort of information the intergovernmental organisation holds. This can be done, for example, by publishing a list of the categories of information it holds and whether they are disclosed on a proactive basis, may be available via a request or are confidential.