

Comment on ADB's 1994 Disclosure and Information Policies

TO: disclosure@adb.org

FROM: **Henneke Brink**
Both Ends
The Netherlands

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Dear Madam, Sir:

Thank you for the opportunity to submit our comments on the ADB's 1994 Policy on Confidentiality and Disclosure of Information and the related Information Policy and Strategy. We commend the Bank for undertaking a comprehensive review of this fundamentally important policy and the manner in which it is put to practice.

Both ENDS would like to submit the following comments and recommendations. The aforementioned policy and strategy will together be referred as "the Policy."

Public accountability

As a public institution with a public mandate, the Bank is publicly accountable for all its operations. Since the legitimacy of the Bank's decisions needs to be assessed in the light of the underlying and motivating considerations, the Bank must also provide complete transparency with respect to its decision making processes.

This obligation to ensure complete transparency is intrinsic to the Bank's identity as a public institution. It relates to a condition for institutional legitimacy. There exists an international public interest to safeguard the Bank's accountability and transparency, which, in principle, should be taken as to override any private sector client's or borrowing governments' individual preference for confidentiality.

Furthermore, the Bank cannot negate or compromise these international public obligations in a contractual relationship with a private party or borrowing member. Nor can the observance of these responsibilities be related to a third party's benevolence or willingness to cooperate. In all of the Bank's operations and relations, with private sector clients as well as with borrowing governments, the information disclosure regime should be primarily determined by the Bank's obligations to ensure public accountability.

These notions should be strongly secured in the Bank's Disclosure Policy. The current Policy falls short in this respect. Our main concerns and recommendations are listed hereafter.

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Our Main Concerns

1. Third party's prior consent

The current Policy frequently provides that documents or information may only be disclosed with the consent of the party that provided the information. In most of these instances, a party's objection to disclosure is not or hardly qualified. There are no specific requirements or criteria to distinguish a legitimate from an unjustified claim to confidentiality.

As noted above, we are concerned that the notion of public accountability and the ensuing obligations cannot be compromised by a third party's unwillingness to cooperate.

Private Sector operations

The Policy provides that disclosure of information regarding private sector operations may not "materially harm the business and competitive interest of Bank clients." It is provided that disclosure of "business plans and objectives" requires the client's consent.

However, it is unclear what constitutes as "material harm" or a legitimate "business interest." Clients are not required to substantiate their claim to confidentiality; why and how confidentiality is needed to prevent "materially harm"; or why the protection of the business interests stake is more important than the protection of the public interest in disclosure.

There are no criteria to preclude or recognize, for instance, a client's claim to confidentiality that merely serves to avert lawful yet "burdensome" popular resistance to its operations.

Moreover, the Policy should provide that a client's potential harm following from the Bank's declining to support a project proposal should be considered as part of the normal commercial risks implicated in dealing with a public financial institution.

The Bank's relations with governments

The Policy provides basically that information will not be released if a government objects to disclosure. In this case, the government does not need to (publicly) substantiate or justify its objection with reference to a critical public interests at stake. Thus, there is no way to preclude a government's claim to confidentiality that merely relates to, for instance, an illegitimate attempt to curb or suppress local resistance to a project proposal.

In this respect it is worth to note that respectable borrowing governments should recognize similar obligations to ensure public accountability regarding their operations, including their dealings with the Bank. Like the Bank, they should at all times be ready and able to publicly motivate their actions and decisions. Obviously, this requires openness rather than confidentiality.

Moreover, the Bank cannot justify a compromise to its responsibilities to ensure transparency and protect public accountability with reference to a borrowing member's failings in that respect.

2. The Bank's internal proceedings

The current Policy provides that the Board proceedings are confidential, including the internal processing of documents. It is stated that confidentiality serves "to protect these decision-making processes" and "to ensure that all participants can candidly express views without self-imposed limitations in anticipation of an external audience."

As noted before, transparency of the deliberative process is a prerequisite to public accountability. Since the result does not necessarily justify the process, the Bank must ensure openness regarding its deliberations in order to demonstrate the legitimacy of its decisions. As needed, the Bank could depersonalize the records of deliberations to ensure that participants can freely express their ideas. The provision that such records are confidential is too broad and thus constitutes an unjustified compromise to accountability.

Moreover, it may be presumed that Board deliberations that lack the strength or validity to withstand public scrutiny cannot provide a legitimate basis for a decision either.

We also note that in deliberations involving third parties, a general imposition of secrecy might conflict with a third party's commitment to transparency and thus form a practical impediment for its participation.

3. Local Stakeholders

Local stakeholders have the most imperative interest in disclosure and adequate access to comprehensive and comprehensible information. They must at all times, throughout the different phases of project design and implementation, be fully informed and enabled to voice their concerns. Moreover, for the assessment of a proposed project and at the earliest stages of project design, the Bank needs to gain a comprehensive understanding of the local needs and conditions. For this purpose it needs to build a frank and fair, well informed "dialogue" with the local and directly affected people.

However, in particular these local stakeholders often lack access to modern communication techniques, financial means and adequate knowledge of the English language. The Bank must therefore pro-actively disseminate to the local and affected people comprehensive information, in the local language and at no cost.

We note that this baseline cannot be accorded with the current Policy's guiding principle that the user of information should pay the costs of disclosure. Since it is the Bank's responsibility to ensure transparency, it may not convey part of this (partly financial) burden to the public.

4. On specific documents

The public should have access to all documents and Information regarding projects in which the Bank is or was engaged in any way. All documents containing information pertaining to such a project, e.g. its rationale, impacts, design or implementation, including draft documents and information prepared by hired consultants, should be publicly available at the earliest possible stages.

If a private sector party take part in the development of such a project, it must accept the Bank's public transparency requirements.

Recommendations

1. Specific criteria for confidentiality

The policy should explicate that the Bank's responsibility to ensure transparency relates to a fundamental and mandatory obligation that is rooted in its character as a public institution. The policy should explain that this obligation serves to protect an international public interest in information disclosure that cannot, as a general rule, be compromised by a third party's individual interests or preferences.

The Bank must formulate clear and stringent standards as to what, and under what circumstances, constitutes a legitimate claim for confidentiality. The formulation and application of these criteria must be subject to public scrutiny.

This means that any party's request for confidentiality must be substantiated and justified with reference to these criteria. The requesting party must be ready and able to demonstrate why the specific interest in confidentiality at stake outweighs the public international interest in transparency.

The Bank should at all times be ready to provide detailed arguments, referring to specific detailed criteria, to substantiate and justify the classification of documents or information. If information was erased from documents that were disclosed, the Bank should attach statements on the nature of the deleted information, and the reasons why this deletion was justified.

2. Transparency relating the deliberations

In accordance with general and basic requirements of accountability, the Bank should always be ready to provide a comprehensive insight into the considerations that gave rise to a decision. Any questions or concerns raised in the deliberative process by the negotiating or third parties must to be specifically addressed.

3. Review of decisions on disclosure

We propose the establishment of an independent mechanism to review specific decisions on classification and disclosure of documents, upon the request of Bank staff or third parties. This mechanism could for instance relate to a review committee, that should preferably include non-Bank Staff, and that could be formed on an ad-hoc basis to review specific decisions.

4. Provision of Information to Local Stakeholders

The Bank should ensure that local stakeholders continuously have direct access to comprehensive and comprehensible information in their local language. Such information must be made available at no costs.

5. Other Documents

All documents and information pertaining to projects, including documents prepared by external consultants and draft documents, should at any time be publicly available.

A document's status should always solely be determined by the nature of the information contained therein without consideration for the author or assembler of the information. Documents prepared by external consultants should be subject to a similar disclosure regime as Bank documents.

Draft documents should be made available to general public consultation at the earliest possible time. Comments and concerns brought forward should be disclosed and attached to drafts that are submitted to the Board.

We believe that a strong disclosure policy is necessary to uphold the ADB's institutional legitimacy, and in the interest of all stakeholders. We therefore urge you to review and strengthen the Disclosure policy into a mechanism that fiercely protects transparency, which is indispensable to secure the Bank's accountability.

Sincerely,

On behalf of Both ENDS,

Henneke Brink
hb@bothends.org
Both ENDS - <http://www.bothends.org>
Nieuwe Keizersgracht 45
1018 VC Amsterdam
The Netherlands
Tel (+31) 20 62 30 823
Fax (+31) 20 62 08 049