

Comments Regarding the Draft Public Communication Policy of the Asian Development Bank

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Information Clearinghouse Japan

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1 Introduction

For the past 24 years, the NPO Information Clearinghouse Japan (Clearinghouse) has promoted the establishment of information disclosure systems in Japan, promoted information disclosure in society through the use and monitoring of such systems, and undertaken activities to safeguard the peoples' right to know. Clearinghouse is honored to have this opportunity to submit this opinion upon the occasion of the review by the Asian Development Bank (ADB) of its *Information Policy* and *Disclosure Policy* and the creation of a new Public Communications Policy.

Clearinghouse calls upon public agencies in Japan to fairly and impartially account for their policies and operations through the disclosure of information. Clearinghouse acts because we believe that taxpayers have the right to know regarding the policies and operations of public agencies, and we believe that it is necessary for taxpayers to participate in and monitor such matters. Regarding the ADB, the Japanese government is its largest investor, and it is the Japanese taxpayer that bears the burden of that investment. The ADB also receives investments from other governments, and these facts show that the ADB must account for its policies and operations to the people of those contributor countries. Furthermore, the people should verify whether or not those policies and operations are consistent with the interests of society, and in order to do so a system of information disclosure and participation is indispensable.

While we appreciate the ADB's position on adopting a policy of placing communications at the forefront by bringing two policies into one and changing the name to Public Communications Policy (PCP), we believe that the PCP contains the following problems, and in order to make sure that it is a policy that is effective and lives up to its name, we call on the ADB to consider how it can resolve these issues.

2 Basic Approach

Broadly speaking, the PCP is made up of three basic elements: (i) in regard to specific types of information, what information is to be made available and when it is to be made available, (ii) general policy as to the manner in which information is to be made available, and (iii) rules for disclosure of information other than information that is otherwise to be made available. Generally, in Japan, public agencies are called upon to base their information disclosure systems on the principle that "disclosure is the rule, and non-disclosure is an exception to the rule" and to base non-disclosure on the harm caused by disclosure being greater than the benefit of disclosure, with the harm not simply being a "risk of harm," but a "concrete harm."

Furthermore, we believe that an information disclosure system indicates two mechanisms, one that is the policy of disclosure by automatically and independently making available information, and one which establishes the right to request disclosure, guarantying citizens the right to demand the disclosure

information. At the ADB it would not be possible to introduce the same information disclosure laws and mechanisms that have been put into operation by each country's government, yet the basic thinking of the information disclosure policy should not differ. After all, because of the very fact that the ADB is an international financial institution, there will be areas that require a different approach.

In the PCP, as the purpose of introducing the policy, it should be clearly set out that in principle the ADB will disclose all information that it holds, that information will not be disclosed only where disclosure brings about a concrete harm, and regarding the policy of making information available, that a mechanism will be adopted to effectively make available such information.

3 Information That Is To Be Made Generally Available

Paragraphs 77 through 127 of the PCP indicate the contents of information that is to be made available and such matters as the timing with which such information is to be delivered. However, this information should not just be made available, but should be delivered in a way that makes it usable to the persons who need it. While paragraphs 68 and 69 discuss means of delivery, in addition to these types of general means, rules should be established for carrying out more effective delivery of information. For example, information that is made available regarding a specific operation should not only include the documents that concern that operation, but should be collected together with other relevant documents, and it should be required that these are provided to local offices and made available in a way that is possible for interested persons to easily search for and obtain the information.

Paragraph 147 sets forth the approach regarding the burden of costs. In this regard, please make clear in the PCP that requesters will not be charged where the requested information is of the kind that normally should be made available at government agencies of member countries or at the ADB's local offices, but because it was not available at such locations the requester had to request it from the ADB's head office. Furthermore, where information is provided upon request, in addition to provision of information through the ADB's wide range of member countries, provision should be actively carried out via the Internet in order to decrease the burden on both the ADB and the requesters, and this policy should be included in the PCP.

4 Information That Is Provided Upon Request

We welcome the fact that public sector loan agreements will be disclosed in principle. However, we note the difference in expressions used in paragraphs 120 and 121 to identify the subject documents (i.e., the phrase "Public sector loan agreements and related documents" is used in paragraph 120, and the phrase "Public sector loan agreements and related documents, including any amendments" is used in paragraph 121). While we understand that this difference in expression may indicate that the documents subject to

disclosure differ, we would like to ask, what is the scope of difference of the disclosed documents?

Paragraphs 123 through 127 deal with the handling of historical information, and paragraph 124 mentions information that cannot be disclosed even after a certain amount of time has gone by. Regarding the various types of information mentioned in paragraph 124, the classification of documents that were originally classified as confidential should be reviewed after a set amount of time has elapsed, and even other types of confidential documents such as those set out in items (i) and (iii) should not be classified confidential as a matter of form, but in order to limit the scope of non-disclosure to the smallest degree necessary, those documents too should be reviewed from time to time to determine whether or not their contents must remain confidential.

5 Regarding the Approach to Non-Disclosure

The approach of the “Constraints” section is a fundamental departure from the basic approach to what is required in an information disclosure system. The fundamental approach to information disclosure is that information is disclosed in principle and non-disclosure is the exception, and where there is non-disclosure it should not be formulaic, but should be based upon substantive reasons. Also, the decision as to disclosure or non-disclosure should be based upon a comparative balancing of the benefits of disclosure in principle and the interests protected through non-disclosure.

The ADB is realized from the investments of its member countries, and as mentioned above, that organizational context requires accountability. Therefore, we believe that accountability should be achieved by promoting disclosure while at all times balancing the public interest.

Paragraph 130 states that “ADB will not make publicly available information that, in its considered judgment, will harm the interests of ADB, its members, its private sector sponsors and/or ADB staff when such harm would be greater than the public interest in making the information publicly available.” While this type of consideration of interests is necessary, so long as it is premised on certain information formulaically being deemed information that must not be disclosed, the disclosure decision that results from the comparative balancing of the public benefits and the interests of the ADB and its affiliates will not be meaningful. Thus, we recommend the following revisions.

Paragraph 131: Regarding information received on the condition that it not be disclosed or that access to the information be limited, such information should not be disclosed only where that condition remains reasonable and effective at the time that the disclosure request is made.

Paragraph 133: While it is necessary to preserve the free exchange of ideas in the deliberative process, it is a mistake to decide for that reason that information found in the list should not be

disclosed. Naturally, the contents of information that should not be disclosed will change depending on whether the discussions and deliberations are under way or whether a decision has been made based upon the discussions and deliberations. Information that is part of the deliberative process should only be withheld from disclosure in the case that disclosure will result in undue harm to the neutrality and impartiality of the deliberations. After the deliberative process is complete, it is a sound practice for doubts and issues to be raised in connection with the contents of the deliberations as a result of the disclosure of the deliberative information, and a rule providing for non-disclosure should not be created due to the difficulties that may arise in operations due to such doubts and issues being raised. Thus, from among the items on the list, a condition should be added by which such items will not be disclosed only in the case that disclosure will result in undue harm to the neutrality and impartiality of the deliberations.

Paragraph 137: Disclosure of the proceedings of the Board of Directors should not be limited only to the meeting minutes as referenced in paragraph 111 and summaries referenced in paragraphs 79 and 82; non-disclosure should be allowed only where disclosure will result in a concrete difficulty.

By formulaically classifying information as not to be disclosed, the system takes on a structure that blocks the ADB from actively making decisions about what information should be disclosed as part of its promotion of information disclosure. As stated above, the basic approach to information disclosure is “disclosure in principle, non-disclosure as the exception,” and if that principle is to be realized, non-disclosure information should not be specified, but rules should be provided by which disclosure decisions are made based upon a balancing of the relative benefits of disclosure or non-disclosure. By providing for such rules, substantive disclosure decisions will be made for the requested information, and information disclosure will be promoted by requiring objective and rational reasons for non-disclosure.

6 Disclosure Request Procedures

While paragraph 142 provides that requests for the disclosure of ADB documents or information should be sent by mail to ADB headquarters, more convenient methods should be adopted. In Japan, both local governments and the national government are increasingly allowing requests under their information disclosure systems to be made online (via the Internet), and starting this past April, it has become possible to make online requests at most national government agencies. Even among local governments, it is becoming increasingly possible to make online requests.

Where there is a request, if the requester’s contact information is clearly

stated it should be possible to take the steps necessary to process the request, and in an organization such as the ADB where there are many member countries, it is necessary to adopt a system of accepting online requests. Therefore, in paragraph 142, it should be clearly stated that online requests are accepted. Moreover, it should be clearly stated that requests and consultations are accepted at the ADB's regional offices.

Paragraph 145 provides for time limits for responses to information disclosure requests, but it should be confirmed that the response should be made at the first opportunity where it is clear that the requested information is such that should be made generally available under the ADB's information disclosure system. Furthermore, the process from request to response should adopt the thinking of each country's administrative procedure law, providing for confirmation of receipt of requests, the provision of reasons for the extension of the response period, and where the response does not comply in part with the request, a clear and understandable reason for such noncompliance.

7 Introducing Mechanisms to Improve the Effectiveness of the PCP

It is putting the PCP into practice that is of the highest importance. While in order to put the PCP into practice it is important in principle to thoroughly carry out the necessary education of ADB staff regarding the PCP, when actually put into practice various problems will occur on a practical level and circumstances will arise that cannot be supposed in discussion or writing. In fact, in the case of Japan's information disclosure systems various problems have arisen on a practical level: information disclosure review boards and the courts have provided redress in connection with non-disclosure decisions, and other measures to deal with complaints have also been called for.

In order to raise the effectiveness of the PCP when it is implemented at the ADB, it is necessary to have mechanisms for handling the various complaints that will arise in connection with the putting into practice of the policy, and it is necessary to strive to improve the operation of the PCP based upon such complaints. To this end, an ombudsman system should be introduced to the PCP by which complaints are received and necessary recommendations are made. By not only receiving complaints from the outside, but also by providing necessary advice for internal implementation of the PCP, the introduction of an ombudsman system will raise the effectiveness of the system to a higher level.

In an institution that is comprised of a council system it is practically impossible to handle specific complaints and it is difficult to take quick action, but an independent ombudsman system is well suited to handling the complaints that will arise. Furthermore, an ombudsman system may address non-disclosure responses and disclose its advisories via the Internet.