

THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT'S PROPOSED ACCESS TO INFORMATION POLICY & DIRECTIVE

Comments & Recommendations

March 2019

We, the undersigned organizations, welcome the opportunity to provide comments on the draft Access to Information Policy and Directive (the “Policy” or the “draft Policy” or the “Directive”) proposed by the European Bank for Reconstruction and Development (“the Bank” or “EBRD”). Our organizations are civil society organizations and networks that have worked to support communities impacted by projects financed by development institutions, including by the EBRD. This document builds on a complementary analysis of EBRD’s information disclosure practices assessing the information made available online for potentially affected communities to access.¹

INTRODUCTORY REMARKS AND CONTEXT

Fulfilling the right of access to information is the beginning and foundation of true development that respects the rights of all people. Access to information goes hand-in-hand with meaningful consultation and stakeholder engagement to ensure that projects and policies actually better the lives of those they affect. We welcome EBRD’s commitment to enhancing transparency, accountability and good governance, but urge it to **consider its Access to Information Policy and Directive as the basis for early, ongoing and meaningful engagement with communities to improve the outcomes of its projects.**

The proposed Policy and accompanying Directive fall considerably short of international best practice and do not align with international law. The draft Policy and Directive are not people-centered and are instead excessively client-oriented. In addition, the Policy and Directive carve out unreasonable amounts of discretionary power for the EBRD and its clients, lending itself to abuse and the circumvention of principles and commitments set out in this Policy. While we welcome the shift from *Public Information Policy* to *Access to Information Policy*, we also note that this change is significant in meaning, and cannot simply be approached as a change in name. Access to information is a fundamental human right, set out in Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. It must be recognized and rooted as such within this Policy, if it is to adopt this title. We urge the EBRD to improve on the **draft Policy by expressly referencing access to information as a fundamental human right, embedding this understanding at the core of its provisions, and ensuring that it prioritizes the fulfillment of this right for its key stakeholders - communities, the intended beneficiaries of development.**

¹ International Accountability Project (IAP), In Practice: Information Disclosure at the EBRD, available at: https://accountabilityproject.org/wp-content/uploads/2019/03/In-Practice_-Information-Disclosure-at-EBRD.pdf

Further, the political context in which EBRD invests and operates warrants emphasis: increasingly, people face risks and retaliations for simply requesting information, compounding existing barriers to access information. Regrettably, **the draft Policy and Directive lack any substantive provisions designed to prevent and address reprisals or threats to individuals, communities or groups who might request or share information.** Despite global trends consolidating access to internet and social media, the space for civil society is rapidly shrinking and becoming increasingly dangerous and restrictive – particularly in relation to projects promoted by development institutions. The omission of any provision addressing the risks faced by communities and whistleblowers indicates that clients’ interests remain the clear priority and take precedence over the interests of persons affected by client actions. In the same vein, the draft Policy and Directive **also lack recognition and plan to mitigate the varied barriers faced by different vulnerable and marginalized groups,** including gender-distinct risks differentially affecting men, women, and sexual minorities. **As a Policy that deals with a fundamental human right, its focus should be people-centered, and based on international norms and established best practice.**²

The split between the draft Policy and Directive also poses considerable issues. Establishing a **Directive that can be changed every year without public consultation and Board approval is problematic, and does not maintain the necessary level of clarity, consistency and openness.** While there is potential for regular and timely improvements in disclosure requirements, there is also a danger of the provisions being weakened. In addition, as currently drafted there are several provisions which introduce additional exceptions to those outlined in the draft Policy. The Directive should be subject to the same checks as the Policy itself for any revisions and additions that might be proposed, including approval by the Board and meaningful public consultation.

Furthermore, the Directive attempts to be exhaustive, instead of illustrative, regarding documents to be publicly disclosed. This does not align with a presumption for disclosure, as the Bank commits to within the draft Policy’s *Principles* (Section III.1.1), nor the internationally accepted principle of maximum disclosure, which determines that all information should be disclosed, except when falling under a set of narrow exceptions.³ Additionally, the provisions of the Directive should provide guidance on the appropriate means of ensuring that information reaches those most affected by projects proposed. As currently drafted, the Directive is web-centred and does not recognize and provide for the challenges communities may encounter in

² Many of these international norms and best practice have been in place and in development since freedom of information was recognized as a cornerstone to the realization of all other human rights by United Nation’s first General Assembly meeting through [resolution n. 59](#). Most recently, access to information and participation have been the principal subject of the successful negotiation of the [Escazú treaty](#) for the realization of Principle 10 of the 1992 Rio Declaration on Environment and Development. These processes of recognition only solidify the understanding that real development is only possible through the appropriate participation of those affected by it, as made clear by articles 1 and 2 of the 1986 UN Declaration on the Right to Development.

³ For more detail, refer to Section III.4 *Policy Principles* of this document.

attempting to access information without ready internet or computer access. We address additional concerns with the Directive in our analysis below.

Finally, **we are disappointed by the lack of commitment to improving information disclosure about projects financed by financial intermediaries, given previous engagement and attention to the issues around these investments in recent years.** Financial intermediary investments constitute approximately a quarter of EBRD's investments.⁴ Yet, impacted individuals, communities and the public have virtually no information about where this money ends up. The lack of justification for hiding the final beneficiaries of financial intermediary investments has been underlined in recent years by a spate of small hydropower plants built across the Western Balkans, some of which with EBRD money through financial intermediaries.⁵ Due to failures in national permitting procedures and financiers' transparency, often communities only find out about the projects when the diggers appear. This has resulted in serious resistance against individual projects and small hydropower in general. It would be more effective to disclose information to impacted communities and to the public about financial intermediary sub-projects in advance of approval, in order to address concerns, mitigate risk and improve project design early on in the project cycle.

The following sections provide comments and recommendations tracking the provisions of the draft Policy and Directive, with the aim of strengthening the disclosure policy and practice of EBRD. We urge the EBRD to lead by example in its *Access to Information Policy* and disclosure practice, and uphold its international commitments including, but not limited to, the Aarhus Convention. Finally, we call upon the EBRD to release a final draft of this *Access to Information Policy and Directive* for public comment prior to approval, and we expect the Bank to follow up on the comments submitted during this consultation period explaining clearly the rationale behind adopting or rejecting recommendations made.

RECOMMENDATIONS FOR DRAFT ACCESS TO INFORMATION POLICY

Section I - Purpose

As currently drafted, the *Purpose* states:

"The purpose of the Access to Information Policy is to increase awareness and understanding of the EBRD's role and its Operations and Activities, to continue to strengthen public trust in the institution and its mandate to foster transition in its recipient countries or economies of operations towards sustainable market economies,

⁴ International Accountability Project (IAP), *In Practice: Information Disclosure at the EBRD*, available at: <https://accountabilityproject.org/wp-content/uploads/2019/03/In-Practice -Information-Disclosure-at-EBRD.pdf>

⁵ CEE Bankwatch, *Destructive Hydropower in Southeast Europe*, available at: <https://bankwatch.org/project/destructive-hydropower-in-southeast-europe>

while taking into account the needs of stakeholders and the Bank's private sector orientation."

Recommendation: This section frames the entirety of this Policy and for this reason, the language should be amended to recognize and reference access to information as a fundamental human right. Flowing from the right of communities to seek, receive, and access information about EBRD investments, the draft should also explicitly state that the organizational purpose of this *Access to Information Policy* is to provide access to information on EBRD's activities for key stakeholders - in particular, communities affected by projects financed by the EBRD.⁶ Express recognition of the right to access to information is not only aligned with the EBRD's own human rights commitments, both as an international organization and by and through the obligations of its State shareholders (many of whom have adopted binding regulatory frameworks on human rights and access to information), but is consistent with the best practice of other development finance institutions.⁷ Finally, adding express language on human rights to this draft Policy would harmonize and further operationalize the EBRD's stated human rights commitments, such as those proposed in the draft Environmental and Social Policy.⁸

Section III.1 - Policy Principles

As currently drafted, the EBRD commits to *"the principles of transparency, a business-sensitive approach, accountability and good governance in all of its Operations and Activities."*

We note the change in order from the previous *Public Information Policy* which ordered *"accountability and governance"* as second while *"safeguarding the business approach"* was placed fourth. The shift in order and language point to a further prioritization by the Bank, favoring an attitude that places clients over people.

Recommendation: In accordance with international standards and best practice, this Policy should comply with and adopt key principles on access to information, as embodied by the UNECE Aarhus Convention, and endorsed by the United Nations, and Organization of American

⁶ For example, the Asian Development Bank's recently updated *Access to Information Policy* lists the objective of the Policy as, in part, that: "[The policy] It also recognizes the right of people to seek, receive, and impart information about ADB's operations" (paragraph 1).

⁷ See, for example, Inter-American Investment Corporation, *Access to Information Policy* (draft 2018), paragraph 3 (Introduction):

"...the IIC recognizes the solid developments made in recent years to advance the recognition and exercise of the right to access information as a fundamental human right... Similarly, in recent years, most International Financial Institutions (IFIs) have revised their information policies to adapt them to current international standards on this topic."

⁸ Draft EBRD Environmental and Social Policy (2019), Section 2, paragraph 2.4, noting in part: *"The EBRD is committed to the respect for human rights in projects financed by EBRD. EBRD will require its clients, in their business activities, to respect human rights, avoid infringement on the human rights of others, and address adverse human rights risks and impacts caused by the business activities of clients..."*

States Special Rapporteurs on the theme.⁹ While the current draft Policy includes some language leaning towards this best practice, seeking coherence with the full suite of principles is an important step in pursuit of a system that guarantees proper access to information. For example, while we welcome the language under “*Transparency*” which states that the “*EBRD is guided by the presumption that information relating to the Bank’s Operations and Activities shall be disclosed in a clear, timely and appropriate manner...*” this provision should be amended to fully embrace the principle of maximum disclosure, which determines that all information should be disclosed, except when falling under a set of narrow exceptions.

The full set of internationally accepted principles include: maximum disclosure; the obligation to publish; promotion of open government; limited scope of exceptions; processes to facilitate access; costs; open meetings; disclosure takes precedence; and protection of whistleblowers.¹⁰ We also recommend that the bank incorporate the principles of the “*Transparency Charter for International Financial Institutions: Claiming the Right to Know*”, which were specifically designed by expert organizations to fit the work of international financial institutions, such as the EBRD.¹¹

In addition, we recommend that the Policy’s *Principles* include an express commitment by the EBRD to provide information to project-affected people. The language used in the Asian Development Bank’s recently revised *Access to Information Policy* provides guidance.¹²

⁹ Article 19, The Public’s Right to Know: Principles on Freedom of Information Legislation, available at: <https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf>.

¹⁰ Ibid.

¹¹ Global Transparency Initiative (GTI), Transparency Charter for International Financial Institutions: Claiming our Right to Know, available at: http://www.ifitransparency.org/doc/charter_en.pdf.

- Principle 1: The Right of Access
- Principle 2: Automatic Disclosure
- Principle 3: Access to Decision-Making
- Principle 4: The Right to Request Information
- Principle 5: Limited Exceptions
- Principle 6: Appeals
- Principle 7: Whistleblower Protection
- Principle 8: Promotion of Freedom of Information

¹² The Asian Development Bank’s recently adopted *Access to Information Policy* includes in its Policy Principles the following:

Providing information to project-affected people and other stakeholders. ADB works closely with its borrowers and clients to ensure two-way communications about ADB projects with project affected people and other stakeholders. This is done within a time frame, using relevant languages, and in a way that allows project affected people and other stakeholders to provide meaningful inputs into project design and implementation.

(Section II, paragraph 3(vi). Internal citation omitted.)

The EBRD should also reconsider the principle of “*a business sensitive approach*” within the *Principles* section of this Policy. Explicitly catering to client concerns regarding confidential and commercially sensitive information is counterproductive to the goals and ethos of this section, which should seek to align with best practice on access to information. Adopting and implementing the recommended principles instead would ensure that any information that may be legitimately considered harmful would be defined under a limited scope of exceptions. The EBRD should not be prioritizing client retention within the very principles of its *Access to Information Policy*.

We also note the framing of the principle of “*Accountability*” within this section, which states that the “*the EBRD works closely with its clients to provide appropriate information, in a suitable manner, to people affected by its Operations and Activities.*” When compared to the text under the principle of “*Business Sensitive Approach*”, which explicitly states that “*the EBRD must maintain the confidence and trust of its clients, co-financiers and other counterparties*”, this framing sets up the Policy to cater to client interests without regarding affected communities as key stakeholders. We strongly recommend that the Policy consider individuals and communities affected by EBRD operations as key stakeholders, and fundamentally reflect in its entirety that the Policy’s aim is to fulfill the human right to access information.

Section III.2 - Exceptions to Disclosure

We welcome that, as currently worded, the EBRD will be guided by a presumption of disclosure. However, we note that the majority of the draft Policy is dedicated to *Exceptions to Disclosure* listed in paragraphs 2.1 - 2.17. These are numerous, overly broad and vague, thereby undermining this presumption of disclosure.

For illustrative purposes, take the example of paragraph 2.2 dealing with “*Financial Information and Information Provided in Confidence*” which states that “*this category includes information that would, in EBRD’s view, be detrimental to the financial or commercial interests of the EBRD or EBRD counterparties if disclosed.*” This language is too broad, and allows for subjectivity and discretion over the disclosure of information, potentially withholding information such as negative project impacts or results. Furthermore, sections in the Directive also create added provisions to these exceptions.

Recommendation: For an access to information policy, this practice of a wide, ambiguous and broad range of exceptions is unacceptable. We strongly urge the EBRD to comprehensively revise this section so that the exceptions are narrowly defined and limited in scope, so as to avoid ambiguity in interpretation. We recommend that this section be amended to comply with internationally accepted best practice and adhere to the principle of “*Limited Exceptions.*”¹³

¹³ Global Transparency Initiative (GTI), Transparency Charter for International Financial Institutions: Claiming our Right to Know, available at: http://www.ifitransparency.org/doc/charter_en.pdf.

The regime of exceptions should be based on the principle that access to information may be refused only where the international financial institution can demonstrate (i) that disclosure

The draft Policy should recognize that while there may be legitimate interests which could take precedence over disclosure, an analysis must be undertaken to determine this, and that no interest is absolute. We advise the EBRD to comply with the internationally endorsed three-part test to formulate a limited and reasonable hall of exceptions that should relate to a legitimate aim.¹⁴ When determining to withhold information, the information in question should be taken as a substantial threat to this aim, and the harm to the aim must be greater than the public interest in accessing the information. This recommendation also applies to Section III paragraph 3 on *Override to Exceptions to Disclosure and Disclosure Requirements*.

We also strongly recommend that any exceptions deemed legitimate by the EBRD be codified within the Policy, and not the Directive. Provisions in the Directive should not create additions, and given the difference in nature between documents, all changes to exceptions should be subject to public consultation and Board approval.

We also recommend that paragraph 2.6 on *"Security, Safety and Compliance"* explicitly address and provide for risks and threats experienced by those seeking to access information, in addition to circumscribing the language to be less subjective, and a more reasonably defined and well delimited hall of exceptions.

Section III.5 - Information Requests and Appeals

Paragraph 5.1 - Making a Request for Information

The *Information Requests and Appeals* section must be framed in a way that acknowledges that access to information is the right of requesters - not a favor the Bank bestows upon stakeholders.

We have concerns about the threshold established in paragraph 5.1 (iii), which provides in part that: *"The Bank shall not respond to anonymous or unsupported requests or to any request that requires the Bank to create, develop or collate information or data."* This provision is unnecessary and runs counter to best practice.¹⁵ Moreover, this restriction

would cause serious harm to one of a set of clearly and narrowly defined, and broadly accepted, interests, which are specifically listed; and (ii) that the harm to this interest outweighs the public interest in disclosure.

(Principle 5: Limited Exceptions, p.2)

¹⁴ The three-part test is a test developed under Principle 4 "Limited Scope of Exceptions" of the Principles on Freedom of Information Legislation developed by Article 19 and endorsed by international courts and experts around the world. For details, see Article 19, *The Public's Right to Know: Principles on Freedom of Information Legislation*, available at:

<https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf>

¹⁵ See, for example, the African Development Bank's Disclosure and Access to Information Policy (May 2012), which states in paragraph 4.4.2 (Responding to Information Requests):

fails to recognize the threats individuals and communities face in simply making requests for information. Given the context in which the EBRD operates, civil society space is already restricted and rapidly shrinking. Additionally, the use of the word “*unsupported*” is ambiguous and subjective, and may pose as a deterrent to those seeking to access information.

Recommendation: We recommend that the policy explicitly allow for anonymous requests for information, referencing the shrinking space for civil society and human rights defenders as rationale. We also recommend that the language on “unsupported requests” be omitted.

We are concerned that paragraph 5.1 gives the EBRD subjective and discretionary control over rejecting requests for information: “*The Bank further reserves the right to reject requests that are unclear in what information is being sought or, in the Bank’s view, unreasonably broad.*” Additionally, paragraph 5.1 (iii) states: “*The Bank shall not respond to... requests for information on the same subject from the same person or organization if the Bank has previously provided such information or has given reasons why it cannot provide the information.*”

Recommendation: As with our recommendations under the section on *Exceptions*, we strongly recommend that the EBRD thoroughly revise this section to excise any language that is vague, discretionary and subject to interpretation. Furthermore, the EBRD should not have discretionary control over rejecting requests for information - access to information is a right of the public, not the Bank’s right to give. Requests for information should only be denied in the situation where the information requested falls under a reasonable hall of exceptions, as determined by the aforementioned three-part test.

We also recommend that the EBRD construct and utilize a publicly available database where information requests and responses are disclosed and maintained, as is practice at other development finance institutions.¹⁶ Once disclosed to one person, information should be in the public domain for anyone to consult. Additionally, information requests dealing with the same topic previously denied by the Bank should not be precluded, and should be subject to the three-part test. The test is an objective analysis divorced from the requester, and determines whether the harm justifying secrecy outweighs the public interest in knowing information. While the objective of the additional request might be the same, the reasons might be different and legitimately influence the weightage of public interest in the three-part test, which could change with time and circumstance.

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 release of the document.

¹⁶ See, for example, the World Bank’s system logging summaries of access to information requests submitted to the Bank, available at: <http://www.worldbank.org/en/access-to-information/summaryreports>

Paragraph 5.2 - Appeals

We welcome the proposal to establish an information appeal panel for access to information requests. A well-resourced, independent appeal panel could guard against arbitrary and inconsistent decisions on information requests. However, we express concerns about the independence of this mechanism. Specifically, paragraph 5.2(i) provides that the Information Appeals Panel is currently composed of *“the Secretary General, the General Counsel and another member of the Bank’s Executive Committee designated by the President.”*

Recommendation: We recommend that the information appeals panel be independent and includes experts who are external to the EBRD, as is current international best practice.¹⁷ In addition, the panel should have sufficient resources to operate and its members should be chosen in an open and participatory manner based on clear criteria, such as expertise, proven record and independency. This would further ensure the independence and legitimacy of the appeals panel.

Further, information on how and when to submit an appeal should be made available at the time of the request, and at the time the information is provided or denied. We recommend that information about filed appeals be tracked within the system of access to information and reasons for denial be published, so as to increase transparency and predictability of the process.

Paragraph 5.3 -

The draft Policy provides the following provision in relation to the EBRD’s independent accountability mechanism: *“The applicable version of the Access to Information Policy and/or the Directive on Access to Information that is subject to IPAM review regarding disclosure of Project information is the version of the policy and/or directive, as applicable, that was in force at the time the Project was approved...”*

Recommendation: The draft Policy should not limit requests, appeals and complaints regarding disclosure of information to the policy which was in place at the time of the appeal, request, or complaint. It is not logical for the institution to acknowledge that its policy on the fulfilment of the human right to access information needs to be updated with a revised version, and at the same time apply it only *ex nunc*. The application of human rights should be *ex tunc*, that is, retroactively. This commentary is also applicable to the second paragraph of *Section V - Transitional Provisions* of the Policy.

¹⁷ See, for example, the Asian Development Bank’s *Access to Information Policy* (2018), which sets out a two-tier appeal process for information requests denied and as the second tier, an Independent Appeals Panel consisting of “three external experts on access to information, independent from ADB.” See also, the International Finance Corporation’s *Access to Information Policy* (2012), paragraph 65, footnote 25, stating in relation to the Access to Information Appeals Panel: *“The Access to Information Appeals Panel comprises three outside experts on access to information in a commercial setting.”* See also, the African Development Bank’s *Disclosure and Access to Information* (2012), which sets out an appeal panel comprised of three members, two of whom are external to the Bank.

Additionally, we recommend that the Policy clearly articulate that complaints by project-affected people alleging EBRD's violation of the Access to Information Policy and Directive, in the course of the formulation, processing, or implementation of a project, can also be filed under the EBRD's independent accountability mechanism, in addition to the appeals process articulated in paragraph 5.2 (discussed above).¹⁸

Section III.6 - Policy Monitoring

We welcome the foresight of this section in ensuring adequate monitoring of the implementation of this Policy. However, given the shift from a *Public Information Policy* to an *Access to Information Policy*, we are concerned about the capacity granted to effectively implement and monitor the changes made.

Recommendation: We recommend that the *Policy Monitoring* section be amended to include provisions for training and resources to properly implement the new Policy. We advise the EBRD to consider establishing an administrative body independent of the Bank's administration, which would be in charge of activities such as:

- Developing an implementation document for the Policy containing the procedures and steps to be followed for instituting the regime of access to information encoded in the new Policy;
- Coordinating the performance and ensuring correct implementation of the Policy;
- Organizing, classifying and systematizing the information owned by the Bank;
- Advising and training staff on the new regime of access to information;
- Monitoring requests for information, denials to requests, and the general responsiveness of staff to requests for information;
- Carrying out and publishing yearly assessments of the Policy's implementation; and
- Carrying out a periodic review of policy implementation, with public consultation.

Section IV - Waivers, Exceptions and Disclosure

As currently worded, the *Waivers* section simply states that "*the Board of Directors may grant a deviation from a requirement of this Policy.*"

We are concerned about the broad discretionary power granted in this section, which effectively gives the Board carte blanche to circumvent the application of this Policy, without any justification. This is unreasonable and undermines the principles of

¹⁸ See, for example, the Asian Development Bank Access to Information Policy, Section E, paragraph 23, which states:

E. Compliance Review

23. The AIP is subject to the appeals process (paras. 14–21). The AIP is an "operational policy" within the meaning of the ADB Accountability Mechanism Policy. As such, complaints by project-affected people alleging ADB's violation of this policy in the course of the formulation, processing, or implementation of a project can also be filed under ADB's Accountability Mechanism Policy.

maximum disclosure and limited hall of exceptions. Similarly, specific paragraphs of the Directive reinforce this unacceptable provision.¹⁹

Recommendation: We recommend omitting the section pertaining to waivers entirely from this Policy. Any exceptions to disclosure should already be outlined and provided for by the three-part test within the Policy.

RECOMMENDATIONS FOR DRAFT ACCESS TO INFORMATION DIRECTIVE

Section IV.1.2.2 - Information on Country Strategies and Sector Strategies Approved by the Board of Directors

We note the change in disclosure period in this draft Policy for draft country and sector strategies to 30 days from 45 days, as provided for in the *Public Information Policy* in paragraph 1.2.2 (iv). Based on our collective experiences, this timeline for disclosure is inadequate and not justified. While in general there is an increased accessibility of information disclosed online, this does not account for the many people who still do not have ready access to internet or computers. Electronic availability does not lessen the need for consultation, organizing, and agreement for communities to be able to meaningfully participate in strategies setting the priorities for future development.

Recommendation: At minimum, we strongly recommend that the country strategy and sector strategy consultations remain at 45 days, and not be shortened to 30 days. Country and sector strategies should be aligned with communities priorities so as to pursue real development. Therefore, we also recommend that the Bank incorporates access to information and participation methods that allow communities, especially vulnerable ones, to meaningfully engage in those strategies.

Section IV.1.4 - Project Information

We welcome the provision mandating Project Summary Documents (PSDs) to also be disclosed for projects which are delegated to management from approval in paragraph 1.4.1. In addition to financial intermediary investments, the EBRD operates a number of facilities where sub-projects are approved by management after the facility as a whole has been approved by the Board of Directors. Since these sub-projects were previously only added to existing PSDs for facilities, the information was not easily accessible early-on in the project cycle, precluding the opportunity for communities to raise concerns and recommendations that would mitigate risk and better outcomes. This new provision improves the consistency and accessibility of EBRD's disclosure practice.

However, we note with concern that PSDs are “*not provided for individual guarantees issued by the Bank within the framework of the Bank's Trade Facilitation Programme or*

¹⁹ For more detail, see *Recommendations for Draft Access to Information Directive* in this document.

other guarantee facilities for which a PSD shall only be provided for the programme or facility as a whole.” This omission is not justified within the Directive.

Recommendation: To remain consistent with the reasoning and approach adopted for projects with delegated approval, separate PSDs should be created and disclosed for individual guarantees under the EBRD’s Trade Facilitation Programme and other guarantee facilities. In addition, separate PSDs should be created and disclosed for sub-projects in financial intermediary investments, especially those with higher environmental and social risks.

Paragraph 1.4.1 - Project Summary Documents

Given the importance of the PSD in sharing information about proposed and ongoing projects for communities affected by EBRD activities, we welcome the codification of specific information to be disclosed in the Directive. However, in a recent analysis of the EBRD’s actual disclosure practices which assessed the adequacy of the information provided, including within PSDs, we found that the EBRD falls considerably short in fulfilling communities’ right to access information.²⁰

Recommendation: Since policy dictates practice, the Directive should pay specific attention in detailing the requirements of PSDs in disclosing information. In order to ensure that communities have timely and accessible information early in the lifecycle of a project, the list of information to be disclosed for each PSD should also include:

- Current and updated status of a project;
- Complete list of Performance Requirements deemed both applicable and inapplicable;²¹
- All material environmental and social documents, including, but not limited to, non-technical summaries and full texts of environmental and social impact assessments, greenhouse gas emissions assessments, monitoring reports, environmental and social action plans, and stakeholder engagement plans;²²
- Information on consultation dates and locations;
- Contact information for the client;²³
- Contact information for project-specific leads at the EBRD;²⁴

²⁰ International Accountability Project (IAP), In Practice: Information Disclosure at the EBRD, available at: https://accountabilityproject.org/wp-content/uploads/2019/03/In-Practice_-Information-Disclosure-at-EBRD.pdf

²¹ Ibid. According to IAP’s analysis, only 35% of 195 projects disclosed between November 1, 2017 and November 30, 2018 clearly specified which environmental and social safeguards were triggered, and which were considered inapplicable.

²² Ibid. According to IAP’s analysis, only 25% of the 195 projects provided non-technical summaries of environmental and social impact assessments, and only 6% provided access to the full text. Only 14% disclosed stakeholder engagement plans despite 20% referencing their existence within the PSD text. Similarly, only 6% disclosed environmental and social action plans although a staggering 52% referenced them within the PSD text.

²³ Ibid. Although IAP’s analysis showed that 93% of 195 projects in the dataset included client contact information, this practice should be codified within the Directive to ensure adherence and consistency.

²⁴ Ibid. None of the projects analyzed in IAP’s dataset included information for project-specific leads at the EBRD. Communities should have the ability to easily follow-up directly with the Bank for additional

- Information about and a link to the Bank’s independent accountability mechanism, the Independent Project Accountability Mechanism.

We also strongly recommend that the PSD explicitly state when specific assessments, safeguards and documents have been deemed inapplicable or not required. Only a few EBRD-financed projects generate environmental and social impact assessments, however this does not mean that other projects do not have noteworthy environmental and social impacts. In particular, communities possess legitimacy and local expertise that can better the design of potential projects, including identifying and recommending alternatives for often overlooked impacts. Early, consistent and proactive disclosure of such information will only serve to further mitigate risk and improve project outcomes. The EBRD must promote the application of international standards, such as the Aarhus Convention, leading by example.

Paragraph 1.4.2. - Timelines for Disclosure of PSDs

This paragraph determines differentiated timeframes for disclosure based on whether projects pertain to the private or the public sector. For private sector projects, *“the PSD shall be disclosed at least 30 calendar days prior to consideration of the Project by the Board of Directors”*, and correspondingly, the EBRD allows for 60 days disclosure prior to Board date for public sector projects.

Recommendation: We strongly urge the EBRD to institute and codify disclosure timeframes based on project risk categorization, and not on the actors involved. Moreover, communities should be afforded at least 120 days to be able to have access to information and meaningfully participate in decision making processes. The same is valid for environmental and social information disclosed under the provisions in paragraph 1.4.6 (ii).

Based on the aforementioned analysis of the Bank’s disclosure practices, projects categorized as B and FI are in fact regularly disclosed after the Board date, comprising the majority of EBRD’s projects.²⁵ This is unacceptable, and specific timeframes for disclosure must be codified within the Directive for all risk categories, to ensure that information is disclosed and accessible to communities well before a project can be considered for approval. In addition to barriers in accessing technical documents, a community has little less than two months to translate and understand the information disclosed, organize themselves, evaluate the project’s impacts and propose recommendations based on their expertise to decision-makers — all assuming they are able to access the website immediately on the date of disclosure.

Access to information must ensure those who need the information most are able to receive and understand it. This Directive must also recognize that it is unrealistic for local communities to visit the EBRD website each day to see if a proposed project may affect them. We strongly

information, and to share their own concerns, analysis and recommendations for proposed and ongoing projects.

²⁵ Ibid. This finding is based on the dates provided by the EBRD for disclosure and targeted Board date on PSDs. See the overview for this breakdown, available at: <https://public.tableau.com/profile/iaptableau#!/vizhome/EWSNov2017-Nov2018/Dashboard>

recommend that communities be given as much time as possible, ideally at least 120 days, to meaningfully engage in the proposal stage of a project, and that the information be proactively made as accessible as possible to better enable their participation.

Paragraph 1.4.3 - PSDs for Technical Assistance Activities

This provision states that PSDs for technical assistance activities *“shall be disclosed following internal approval by the Bank of the relevant technical assistance activity.”*

Recommendation: For the reasons stated above, we recommend that disclosure for technical assistance activities be treated with the same rigor as those for other types of Projects, and should, at minimum, be disclosed before approval.

Paragraph 1.4.4 - Deferred Disclosure

We are concerned about the broad and ambiguous language used in this paragraph, which lists the circumstances in which deferred disclosure of PSDs is warranted. The current provisions prioritize market conditions over communities’ public interest to receive information and meaningfully participate, contradicting the very reason for the existence of the Policy. Additionally, as currently worded, this paragraph states that disclosure of PSD may be deferred in *“likelihood of substantial changes in Project design at “Final Review” stage by the Bank’s management”* raising the same concerns stated under paragraph 1.4.2 regarding adequate disclosure periods.

Recommendation: We recommend amending the text of this paragraph to read, *“Disclosure of PSDs may be deferred in accordance with the Exceptions laid out in the Access to Information Policy.”* The three points currently listed in the draft Directive are subjective and open to discretionary interpretation, and constitute further exceptions to those laid out in the draft Policy. As previously stated, exceptions to an access to information policy must be limited and well-defined, and have no place in a Directive that is not subject to wider revisionary approval.

Paragraph 1.4.6 - Environmental and Social Information Relating to Projects

Currently worded, section (i) under this paragraph provides that the *“Bank may, at its discretion, disclose other environmental and social information from time to time for public comment or for public information.”* In line with the presumption of disclosure, all information - including environmental and social information - should be disclosed unless it falls under the narrow and clearly delimited hall of exceptions. The language used here is concerning as access to information is not the Bank’s right to give *“at its discretion”*, but rather a human right.

Recommendation: To comply with the principle of maximum disclosure, the EBRD should clearly commit to publicizing all information not falling under a narrow hall of exceptions set out in the Policy. As above, creating further grounds for exceptions within the Directive is problematic unless the provision seeks to clarify exceptions already outlined in the Policy.

Additionally, we were very disappointed to find a complete lack of commitment to disclose environmental and social information for Category B projects. Over half of the Bank's projects are considered Category B, with many having significant environmental and social impacts, including mine expansions and changes in industrial facilities, but still do not require a full environmental impact assessment or public consultation according to the EBRD's Environmental and Social Policy. While we remain concerned about a clear tendency to under-categorize projects with the potential to pose significant risks to the environment and people, we are focused here on the lack of adequate justification for failing to disclose information on other documentation produced for Category B projects, including but not limited to, environmental and social action plans, and monitoring reports.

Recommendation: The EBRD should commit to disclosing all environmental and social information produced and in possession of the Bank for all risk categories, including Category B, unless falling within a narrow and well delimited hall of exceptions determined by the three-part test. Withholding environmental information on projects is in clear conflict with the principles of the Aarhus Convention, does not adhere to a presumption for disclosure and is not international best practice - even among other peer international financial institutions.²⁶

Paragraph 1.4.7 - Updates to PSDs

This paragraph details when updates to the PSD are mandated by the Directive, including *"as appropriate for environmental and social sections of PSDs of Category A projects following an annual review."* The language used in this section is again vague and discretionary, and is not directly tied to time-bound markers in a project cycle.

²⁶ See, for example, International Finance Corporation, *Access to Information Policy* (2012), paragraph 29 (Pre-Approval Disclosure):

For each proposed investment, IFC makes publicly available certain information, including relevant project, environmental and social, and development impact information. Except as noted in paragraph 14, IFC makes this information available while the investment is still under consideration by IFC and provides periodic updates on the investment.

See also, paragraph 31 (Environmental and Social Information), section a (Direct Investments), which is provided in part below:

For each proposed Category A and B project, iFC discloses a summary of its review findings and recommendations, the Environmental and Social Review Summary (ESRS). The ESRS includes:

(iii) a description of the main environmental and social risks and impacts of the Project;

(vi) electronic copies or web links, where available, to any relevant Environmental and Social Impact Assessment (ESIA) documents prepared by or on behalf of the client; and

(vii) for those projects where the verification of the Free, Prior, and Informed Consent (FPIC) of indigenous peoples is required, a description of the status of that consent process.

Recommendation: The EBRD should commit to updating PSDs for all projects regularly, including the status of the project, throughout the lifecycle of a project. At minimum, the Directive should note when updates to a project should be expected, based on the project lifecycle. The date of said update should also be disclosed for transparency and accountability.

Paragraph 1.4.8 - Board Reports for State Sector Projects

We welcome the commitment to proactively disclose public sector board reports. However, there is no justification given for why private sector board reports should not also be disclosed.

Recommendation: In order to align with international best practice, the EBRD should commit to disclosing all information in its possession, unless it falls within a reasonably delimited hall of exceptions determined by the three-part test. Any commercially sensitive information that falls under the scope of these exceptions can be redacted, as is currently the case with public sector board reports.

Paragraph 1.4.9 - State Sector Project Assessment

We welcome the commitment to proactively disclose state sector project assessments. However, there is no justification given for why private sector project assessments should not also be disclosed..

Recommendation: In order to align with international best practice, the EBRD should commit to disclosing all information in its possession, unless it falls within a reasonably delimited hall of exceptions. Any commercially sensitive information that falls under the scope of these exceptions can be redacted, as is currently the case with other documents disclosed.

Section IV.2 - Requests for Information and Appeals

Our comments above on the language and provisions used in Section III.5 *Information Requests and Appeals* of the draft Policy apply wholly to this section of the Directive as well. A few illustrative points include:

Paragraph 2.1 relies heavily on computer-based or cost-intensive means of communication for submitting requests for information, disregarding easier means that might be preferable for communities, such as social media, telephone calls and others.

Recommendation: We recommend that the Directive provide means and alternatives for people seeking to submit a request for information, for whom electronic access and mailing costs may pose a barrier in fulfilling their right to access information.

Paragraph 2.2 (ii) uses the same problematic language deployed in the draft Policy that allows for discretionary and subjective barriers to access to information. For example, the first provision states that “*where a request for information is not sufficiently precise so as to identify the information sought or is unreasonably broad, the Bank may ask the*

applicant to provide clarifications including by narrowing down the scope of the request within 20 working days after receiving the request or clarification.”

Additionally, paragraph 2.2 (ii) states that *“the EBRD may, if and when appropriate, consult with the client, co-financier or other counterparty before disclosing the requested information.”*

Recommendation: As above, we strongly recommend that the language used in these complementary sections of the Policy and Directive should not be ambiguous and allow for subjectivity in interpretation. For example, the text in paragraph 2.2 (i) could be amended to clarify that the Bank may follow-up with requesters for additional detail and specificity in the request. Again, if the information does not fall within the hall of exceptions identified by the three-part test, the information should be disclosed - regardless of the opinion of a client or co-financier. The language used in paragraph 2.2 (ii) should also clarify that this does not give the client or co-financier the right to veto disclosure.

Moreover, we note with concern that draft policy has scaled back the clear commitment to answer standard information requests within 20 working days, as was present in the 2014 *Public Information Policy*, which stated in paragraph 2 (vi) of the Annex that, *“The Bank will normally respond within 20 working days after receiving the request or clarification, or if a timely explanation for a further delay is provided (within 10 working days following receipt), no later than 40 working days.”* 20 working days is nearly a month, already a long wait for a basic request, yet in practice 40 days has been the norm, and in some cases even much longer. The new draft makes clear that 40 days is the standard for complex cases but fails to make clear that 20 working days is the norm.

Recommendation: The draft Policy needs to be reformulated to make clear that 20 days is the norm, and 40 days is an exception.

We wish to reiterate that access to information is not a right of the Bank to grant, nor a favor they bestow. Access to information is a human right, and a presumption for disclosure takes as its starting point that all information will and should be disclosed, unless falling under the reasonable hall of exceptions.

CONCLUSION

We appreciate the opportunity to share our recommendations and urge the EBRD to adhere to and embrace international norms and best practice on access to information as a human right. By guaranteeing proper access to information and participation to individuals and communities, the EBRD could foster an environment where development can truly be pursued by those who live it.

Please contact Ishita Petkar from International Accountability Project (ishita@accountabilityproject.org) and Fidanka Bacheva-McGrath (fidankab@bankwatch.org) from CEE Bankwatch for any questions or clarifications.

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CounterBalance, Europe

Crude Accountability, USA

Ecological Society Green Salvation, Kazakhstan

Eurodad, Europe

Global Rights, Nigeria

Green Alternative, Georgia

International Accountability Project (IAP), International

Oyu Tolgoi Watch, North Eurasia

Rivers Without Boundaries International Coalition, North Eurasia

Tamkeen Fields for Aid, Jordan

Turkmen Initiative for Human Rights, Turkmenistan

Urgewald, Germany

Annex: Referenced Access to Information Standards and Norms

Aarhus Convention

<http://ec.europa.eu/environment/aarhus/index.htm>

Escazú Agreement

<https://www.cepal.org/en/escazuagreement>

ILO Convention 169

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169

Openness Policies of International Financial Institutions: Failing to Make the Grade with Exceptions (elaborate by GTI)

<http://www.law-democracy.org/wp-content/uploads/2010/07/IFI-Research-Online-HQ.pdf>

The Public's Right to Know: Principles on Freedom of Information Legislation (endorsed by UN and OAS Special Rapporteurs)

<https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf>

(see three part-test at Principle 4: Limited Scope of Exceptions)

Transparency Charter for International Financial Institutions: Claiming our Right to Know (elaborated by the Global Transparency Initiative (GTI), a group of international experts, including those involved in the principles above)

<https://www.right2info.org/resources/publications/ngo-statements/ngo-statements-transparency-charter-for-ifi-en>

UN Declaration on the Human Right to Development

<http://www.un.org/documents/ga/res/41/a41r128.htm>

UN Declaration on the Rights of Peasants and Other People Working in Rural Areas

<https://undocs.org/en/A/C.3/73/L.30>