

# Office of the United Nations High Commissioner for Human Rights

## Submission 2:

### Recommendations for AIIB Public Information Interim Policy

30 May 2017

#### Introduction

1. In January 2016, the Asian Infrastructure Investment Bank (AIIB) published a “Public Information Interim Policy” (“Interim Policy”) as one of its first acts since its establishment, setting out its commitment to transparency and guiding principles on disclosure and confidentiality of information. OHCHR congratulates AIIB for the stated commitment to disclosure of information to promote transparency in its operations.

2. OHCHR notes the vital function that freedom of information laws and policies play throughout the world in fostering transparency, accountability and good governance. Transparency is fundamental to sustaining relations of trust and an active public dialogue and awareness about the AIIB’s mission. It is also a foundation stone for accountability. We note that all major multilateral development banks (MDBs) have information policies and these have contributed greatly to institutional learning, accountability, and better development outcomes.

3. Paragraph 12 of the Interim Policy provides that the policy will be “updated regularly” until a “comprehensive Policy on Public Information would be adopted by the Board of Directors in the future.” With a view to contributing to this process, this document provides OHCHR’s comments on areas where strengthening of transparency is warranted based on applicable international standards and practice by other multilateral development banks (MDBs). A number of general comments are offered first, followed by specific comments on the Interim Policy.

#### 1. General comments on the Interim Policy

4. OHCHR welcomes the Interim Policy’s presumption in favour of openness and its proactive approach to release of information as well as the commitment to respond to requests for information. However, OHCHR is also concerned that the guidance and principles in the current version of the Interim Policy appear to fall well short of the standards set by other MDBs, many national freedom of information laws, and international good practice. The AIIB has approved 12 projects in 7 countries to date, and an additional 11 projects are currently proposed.<sup>1</sup> Underscoring the importance of robust access to

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<sup>1</sup> As of 3 May 2017, see list of approved projects: <https://www.aiib.org/en/projects/approved/index.html> and list of proposed projects: <https://www.aiib.org/en/projects/proposed/index.html>

information policy, three of these approved projects are standalone projects in respect of which the Bank is the only source of information. OHCHR respectfully suggests that a draft Comprehensive Policy should be prepared and submitted for public consultation as a matter of urgency, in order to bring the AIIB closer to the standards of other lenders and help ensure effective transparency, better results, and that human rights are respected throughout the AIIB's operations. Recommendations regarding the consultation process are dealt with at the end of these submissions.

5. The starting point for any information policy of this kind, in OHCHR's view, is article 19 of the Universal Declaration on Human Rights: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Article 19 of the International Covenant on Civil and Political Rights, which has been ratified by 169 countries, contains a similar provision as does the UN Convention on the Rights of the Child. All but two of the 9 countries where AIIB has commenced or is proposing projects,<sup>2</sup> and all but 8 of the AIIB's 57 founding members,<sup>3</sup> are parties to the Covenant. All are bound by the Convention on the Rights of the Child.

6. For OHCHR, it is especially important, therefore, that the right to freedom of information, as a component of the internationally recognised right of freedom of opinion and expression,<sup>4</sup> be respected and safeguarded in the AIIB's operational policies, including a new Comprehensive Policy on Public Information. While other MDBs, such as the ADB and EIB, explicitly reference the right to information in their access to information frameworks, the Interim Policy contains no such reference.

7. OHCHR is also concerned that the AIIB has not yet outlined how the access to information policy will be implemented, including the specific procedures for requesting information and processing requests. OHCHR is not aware whether guidelines on the processing of requests (as called for by paragraph 11) have yet been developed, as other MDBs have done. OHCHR recommends that procedures should be time-bound and provide opportunities for public participation by affected people and other interested stakeholders both at the project level and policy level. An independent appeals process is also crucial, as the experience of an increasing number of MDBs affirms. The exceptions provided for in the Interim Policy also need tightening, in OHCHR's view, as they are currently unduly broad and may undercut the AIIB's commitment to transparency. These points are further elaborated in the specific comments below.

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<sup>2</sup> The exceptions are Myanmar and Oman.

<sup>3</sup> The exceptions are Brunei, Malaysia, Myanmar, Oman, Qatar, Saudi Arabia and the United Arab Emirates. China has signed, though not ratified the Covenant, which means that it is obliged to refrain from acts that would "defeat the object and purpose" of the Covenant (Vienna Convention on the Law of Treaties, art. 18(a)).

<sup>4</sup> Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 (Sept. 12, 2011), paras. 18-19.

## 2. Specific comments on the Interim Policy

### A. Guiding Principles

8. OHCHR welcomes the recognition by AIIB of the presumption in favour of disclosure of information, articulated in Principle 1, subject to case-by-case justification in accordance with recognized exceptions. However, in OHCHR's view, the phrase "whenever possible" is unclear and unduly restrictive, and perhaps tautological, and should be deleted. Principle 1 already makes it clear that the presumption in favour of disclosure is overridden where there is a "compelling reason for confidentiality." Moreover, consistent with the practice of other MDBs, OHCHR recommends that the scope of Principle 1 be extended to all information held by the Bank, and not only information "concerning the Bank's activities."<sup>5</sup> The type of documentation held is less important than the interests affected by disclosure, in OHCHR's view.

9. Regarding Principle 2, "Enhancing accountability", OHCHR notes that AIIB recognises that it is accountable to its shareholders, and would encourage AIIB to extend that recognition of accountability to individuals and communities affected by AIIB-supported projects. Accountability to other stakeholders has legal as well as moral dimensions. International organizations are subjects of international law and are bound by general rules of international law.<sup>6</sup> The AIIB is not bound directly by any human rights treaty however there are many human rights protected by other (non-treaty) sources of international law that can be impacted – positively and negatively – by AIIB-supported projects. The right to life and the prohibition against forced evictions are just two examples. OHCHR welcomes the AIIB's explicit commitment to support international human rights through the projects it finances and to encourage respect for them, and to support the implementation of Clients' national and international obligations relating to environmental and social risks (ESP, para 4). These commitments, and the AIIB's recognition of its own accountability to people affected by the projects it supports, would in no way absolve others (especially States) of their obligations under international or national laws. But this recognition would be a foundation stone for robust and state-of-the-art transparency policies and accountability mechanisms.

10. In OHCHR's view, Principle 3, "Protecting Confidentiality", does not currently reflect an appropriate balance between confidentiality and the public interest. Principle 3, as elaborated in Section C, outlines broad categories of information that are deemed confidential. Yet, under international law, many national laws and the policies of other MDBs, the presumption of disclosure of all information should be conditioned only by the case-by-case application of narrow and limited exceptions defined by reference to specific interests (such as privacy) that may be harmed by disclosure. This, in turn, should be subject to a public interest override (see e.g. IFC Information Policy 2012, s. 12; World Bank Access to Information Policy, s. III.B.1). OHCHR thus recommends that the list of examples either

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<sup>5</sup> For example the World Bank's information policy, states that "The Bank allows access to any information in its possession that is not on a list of exceptions." The World Bank, Bank Policy: Access to Information, No. EXC4.01-POL.01 (July 1, 2015), para. III.B.1.

<sup>6</sup> Interpretation of the Agreement of 25 March 1951 between WHO and Egypt, Advisory Opinion, 1980 I.C.J. Rep. 73, 89-90 (Dec. 20).

be deleted or that the exceptions focus on the specific legitimate interests that need protection from disclosure in order to avoid harm, and that there also be a public interest override for where the public interest in disclosure outweighs the risk of harm from that disclosure.

## **B. Public Information**

11. In OHCHR's view, more detail is needed on how the Bank will share information with stakeholders beyond providing information in English on the Bank's website. The qualification "wherever feasible" should be deleted, in OHCHR's view, as the exceptions to disclosure should be governed by the case-by-case application of the criteria of "protected interest" and "public interest" rather than a feasibility criterion.

12. OHCHR notes that the Interim Policy provides no time frame for disclosure. In OHCHR's view, an indicative deadline for responses of 5 working days would be appropriate, taking into account the practice of the IDB and AfDB. Consistent with leading practice in other MDBs, OHCHR recommends that the AIIB commit to making information available in multiple languages, as needs require, and publish contact details for the persons/committees responsible for handling access to information requests, and information pertaining to independent appeal processes (where requests for disclosure are refused) and declassification processes (World Bank, s. III.B.6).

## **C. Institutional information**

13. OHCHR notes that the categories of public information are narrower in scope than those of other MDBs. OHCHR recommends that "institutional information" includes documents circulated to the Board (e.g. World Bank Access to Information Policy, s. III.B.4.d) and that the AIIB publish clear timeframes for the publication of Board meeting agendas (not merely the schedules, as s.6A. currently stipulates).<sup>7</sup> Early disclosure is essential if stakeholders are to be able to engage in good faith with the Board in relation to decisions that affect them. In line with the practice of virtually all other MDBs, OHCHR also recommends that the AIIB commit to publishing *full* strategies (not merely summaries) within a specified period after Board approval. Similarly, other MDBs, such as AfDB, ADB, IDB and the World Bank disclose their budgets and not merely summaries of them.

14. The names and contact details of senior managers in the Bank should also be publicly available, in OHCHR's view. As an example, the ADB commits to disclose the names of senior management and contact information for its staff. The World Bank also makes available the names of its senior officials. Papers and reports produced by internal evaluation units are disclosed by other MDBs. The Interim Policy is silent on such documents.

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<sup>7</sup> The ADB's Public Communications Policy is a good practice in this regard: "ADB shall post on its website (i) the provisional schedule of items for Board consideration for the forthcoming 3 weeks on a rolling basis." ADB, Public Communications Policy 2011: Disclosure and Exchange of Information, para. 85.

#### **D. Operational information**

15. Clear requirements for the publication of operational information are especially important, in OHCHR's view. OHCHR recommends that the terms "detailed documents" and "summary documents" in s. 7.A. be clarified, along with the type of documents that will be disclosed and the time limits for disclosure.<sup>8</sup> It is particularly important to disclose project implementation and completion reports, as other MDBs routinely do, for the sake of transparency, accountability, and to provide the feedback loops necessary to sustain strong development outcomes.

16. Moreover, OHCHR notes that the Interim Policy does not require disclosure of draft operational policies and sector strategies before they are approved by the Board, or of final versions after Board approval. Many MDBs, including AfDB, ADB, EBRD, EIB, IDB and the World Bank, do both. OHCHR recommends that the AIIB do likewise, and in addition, commit to publish advance information about future strategy and policy reviews.

17. Transparency would also be enhanced by publication of Bank procedures and guidelines for staff including for project administration as is done by other MDBs such as ADB and the World Bank. Publication of legal agreements relating to operations are routinely disclosed by other institutions, such as AfDB, ADB, IDB and World Bank, but are not addressed in the Interim Policy. OHCHR also recommends that the policy lay out specific timeframes for the release of social and environmental information about projects prior to their approval.

18. Translation of project documents as well as operational policies and strategies into relevant languages of affected communities is another very important measure enhancing transparency and accessibility of information. The Interim Policy does not contain a commitment to this, in contrast to the ADB, EBRD and the World Bank.

#### **E. Confidential information**

19. OHCHR welcomes the stated commitment to transparency in AIIB's Guiding Principles. However, the exceptions laid out in this section are unduly broad. Exceptions to access should be narrow and limited and focus on interests to be protected from harm rather than blanket exclusions of broad categories of information. A number of the listed exceptions use the term "includes" in setting out the categories of information excepted from disclosure, thereby leaving open other categories of information not specified that might be deemed confidential. It would better serve AIIB's commitment to transparency to use more closed definitions of the types of information that are deemed confidential i.e. to delete the word "includes" and treat the contents of the exceptions as exhaustive.

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<sup>8</sup> The ADB requires disclosure of documents 30 days prior to Board, and 120 days for category A projects. The latter timeframe is also the general rule for category A projects under the World Bank's current safeguard policies.

20. OHCHR recommends that there should also be a public interest override, such as the IFC and World Bank have in place, governing instances where the public interest in disclosure outweighs the harm to the protected interest. Moreover, OHCHR notes that other MDBs provide in their information policies a system of declassification for certain confidential information so that such information becomes available for access after a designated period of time. OHCHR recommends that the AIIB adopt similar requirements. A specific rule on severability is also advisable so that where only part of a document is confidential, rather than exempting the entire document from disclosure, the confidential part can be redacted or severed and the rest of the document can be disclosed.

21. On the listed exceptions more specifically, exception 9A (Personal Information) should be narrowed so to protect the legitimate interest of privacy rather than deem whole categories of information confidential. Similarly, OHCHR recommends that the exception from disclosure for investigative information, mentioned in 9C, should be narrowed to protect the specific interest at stake, namely, the integrity of investigations.

22. As currently drafted, the third party and proprietary information exception in 9D is very broad, effectively giving third parties a veto on disclosure. In order to protect third party interests, including commercial interests, OHCHR recommends that the exception be applied objectively and narrowly and that the specific legitimate interests to be protected by non disclosure be listed, in lieu of the blanket prohibition as stated. Such information should be disclosed unless to do so would cause harm to the competitive or negotiating position of the entity. The subjective perspective of the entity on the likelihood of harm is a relevant factor, but, as indicated above, should not be determinative or operate as a veto on disclosure. OHCHR recommends that the AIIB should make its own assessment of the risk of harm and thus whether there should be an exception from the presumption of disclosure.<sup>9</sup>

23. The exceptions in 9E, 9F and 9H are similarly very broad and should, as suggested above, be narrowed to better balance specific legitimate interests in need of protection from harm with the interest in greater transparency.

## **F. Implementation**

24. In order for requests for access to information to be made, applicants need to know where to direct their requests. We note in this regard the creation of [information@aiib.org](mailto:information@aiib.org) to receive requests. A form could be useful to assist requesters in making their requests. Other MDBs provide a variety of contact information including email addresses, online forms, mailing addresses etc. to facilitate the submission of information requests through a variety of means.

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<sup>9</sup> An example of how another MDB treats commercial information in its information policy is the ADB. Its Public Communications Policy 2011 in paragraph 97(v) excepts from disclosure a more limited array of commercial information, namely, information that “would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or another party that was the source of the information, or any confidential business information (information covered by a confidentiality agreement or non disclosure agreement that ADB has entered into with clients and/or other related parties).”

25. Paragraph 11 refers to the AIIB's intention to produce and post Guidelines on processing of requests. OHCHR notes that common topics addressed in similar guidelines elsewhere include: what the request should contain, the procedure the Bank will follow in handling the request including maximum processing time, the languages in which such requests may be made, what the fee structure is if any including waivers for need, and what assistance is available for requesters in making their request.

26. OHCHR notes that there is an internal review process outlined in paragraph 11. It is, however, more narrow than provided for by other MDBs. It is triggered only where a requester believes that a request has been unreasonably denied. However, there are other situations where review may be warranted, such as where there has been no response or decision on a request. OHCHR also recommends that the internal appeal process be complemented by an independent review mechanism such as those that the ADB, AfDB, IDB and the World Bank have put in place.

### **G. Public Information Policy Review**

27. OHCHR also recommends that AIIB commit to report publicly on an annual basis on its implementation of its access to information policy and produce such reports. This would be consistent with the policy and practice of a number of other MDBs. Such reports typically contain information such as the number of requests received and their disposition, the type of information requested, appeals and outcomes, and compliance with the institution's time limits for processing of requests.

## **3. Consultation process**

28. As indicated at the outset, OHCHR would strongly encourage the AIIB to consult widely on a draft comprehensive information policy. The quality and legitimacy of the policy and strength of stakeholder relationships will be greatly enhanced if public consultation on the policy is perceived to be comprehensive and fair. OHCHR notes that other MDBs, including the World Bank, ADB, EBRD and EIB, undertake regular, comprehensive reviews of their access to information policies within stated timeframes. The World Bank Group Consultation Guidelines<sup>10</sup> address topics such as the suggested length of consultation periods, principles to underpin consultation processes, the importance of a consultation plan and its contents, the form and method of consultations, documentation and communication of the process, feedback management and how feed forward into decision making is to occur. OHCHR recommends that a public consultation on the comprehensive policy on public information be guided by such considerations. The languages in which consultation materials are available is also important to facilitate participation.

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<sup>10</sup> The World Bank Group, Consultation Guidelines The World Bank Group (October 2013), available at: [http://consultations.worldbank.org/Data/hub/files/documents/world\\_bank\\_consultation\\_guidelines\\_oct\\_2013\\_0.pdf](http://consultations.worldbank.org/Data/hub/files/documents/world_bank_consultation_guidelines_oct_2013_0.pdf)

29. OHCHR notes that the ADB's Public Communications Policy is currently the subject of public consultation.<sup>11</sup> The ADB is providing the opportunity for the public to comment on a consultation draft and staff instructions via email, by mail or at one of a number of face to face consultations. The ADB has also committed to publish a second draft online for further public comment and post the submitted comments and ADB's responses to key comments online.

30. OHCHR also notes the consultation plan that the AIIB has published for the proposed Complaint Handling Mechanism (CHM). That plan has many good elements, in OHCHR's view, and provides a number of channels for stakeholders to provide their input. However, OHCHR would recommend that the AIIB commit to publishing stakeholders' comments and the AIIB's response to them while the consultations are still underway, rather than after the final policy is approved.

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<sup>11</sup> <https://www.adb.org/site/disclosure/pcp-review>