

Comments to the EIB Public Disclosure Policy
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I. Introduction

We welcome the EIB process of consulting stakeholders on its information policy and publicly posting the comments received on the first draft of the policy.

At the same time we would like to express our dissatisfaction about how few of the comments from the first round are reflected in the document and how far behind other institutions of a similar nature the second draft of the EIB Public Disclosure Policy still is.

We believe that people have a right to information from public institutions and a right to participate in the development policies and projects that affect their lives. In EIB-supported activities, transparency can help to better achieve lending goals, reduce corruption, identify potential social, environmental and economic benefits, and avoid damaging communities and sensitive ecosystems. It is therefore crucial that information is released in timely manner to allow interested members of the public and affected communities to take part in the decisions affecting them and the environment.

The EIB's information policy should be based on the principle of "presumption of disclosure" - namely that all information is open unless it falls within an exemption regime and the public interest in non-disclosure outweighs the public interest in disclosure. This principle should be mainstreamed throughout the whole policy. There should be a clearly defined regime of exceptions and clear timelines for release. An independent appeals mechanism needs to be also set up to ensure the public's right to challenge the implementation of the policy.

The current draft, presented on October 20th, despite stating that "presumption of disclosure" is a main principle, contains numerous "hidden" or "embedded" exemptions and generally lacks coherence.

Our comments to the second draft of the EIB Public Disclosure Policy are arranged in two parts – general comments related to the whole document and specific comments related to various points in the second draft.

II. General comments

1. We welcome the fact that the EIB bases its disclosure policy on the "presumption of disclosure of information" as stated in point 4 of the policy. However, the presumption of disclosure needs to be reflected in the whole policy and throughout all its elements, which is currently not the case.
2. The exceptions to disclosure need to be clearly and narrowly defined, including indicating the precise harm that would arguably be avoided by non-disclosure. There needs to be a definition of "overriding public interest" to require taking into account all circumstances where the public interest would be served by disclosure. At the moment

- this concept is not mentioned in the policy draft nor is there any kind of “public interest balancing” test to determine when information should be released in the public interest.
3. Information on ALL projects assessed for financing should be released. Allowing a client’s veto to block disclosure goes against the presumption of disclosure, as well as being contrary to current practice at similar international financial institutions.
 4. Environmental and social information needs to be disclosed on a timely basis for ALL projects with environmental and social impact. It is necessary to give affected communities and the interested public information on the impacts of EIB lending, which is crucial for protecting the life, health and wellbeing of the affected people as well as the environment more generally.
 5. The policy does not set clear and enforceable timelines for releasing information, specifically for releasing various project-related documents throughout the project cycle, which is the current practice at other international financial institutions. The timeline indicated in points 36 and 37 is not clear and is insufficient. At the same time the timeline for handling specific information, governed now by the Code of Good Administrative Behaviour, sets an unacceptably long period of 2 months for provision of information.
 6. There is a lack of clarity about the appeal mechanism. The proposed various appeal bodies, apart from the European Ombudsman, are not independent. The introduction of an appeal option to the Bank’s Inspector General (point 58) is a new option, which needs more clarity. Ultimately, the EIB should have an appeal mechanism independent from its structure, developed through an international consultative process.
 7. The document is confusing regarding its regulatory and descriptive parts: It is not clear what constitutes actual policy and binding rules and what is merely a description of how the EIB communicates and operates.
 8. It is not clear who within the EIB is responsible for oversight concerning the policy, including especially its implementation. It is especially worrying that the last point in Annex I Art. 9 states: ‘The Secretary General of the Bank may, in consultation with the departments concerned, set in place the arrangements for applying these rules’. The policy should be binding and implementation steps and responsibilities clearly articulated, and not left to the good will of the EIB’s management or staff. Please change the word “may” to “shall”.
 9. As Global Loans constitute almost 1/3 of the EIB’s portfolio, it is necessary that the information policy applies also to them. This should be implemented through a clause in contract agreements between the EIB and intermediary banks requiring that the intermediary banks follow EIB rules on disclosure when using global loans.
 10. We suggest that the EIB include the recommendation from Members of the European Parliament provided in the first round of consultations¹ about adhering to EU Mandates:

“Compliance with EU Mandates. As a financial institution (FI) entrusted with EU and member state public monies to promote various EU goals both in Europe and many other regions and countries, the views and policies of the EU will be at the heart of policy design, strategic decision-making and choice of projects to finance, so as to ensure accountability to shareholders and their publics as well as to the European Parliament, the Court of Auditors, OLAF and other EU institutions. This

¹ See the proposal presented by Members of the European Parliament (Gabriele Zimmer and Alain Lipietz): http://www.eib.org/attachments/general/events/contribution_meps.pdf

will be true on both procedural and substantive grounds, covering EIB procedures as well as the nature and design of any projects being financed in whole or in part. Among the most important EU mandates that will guide the EIB are those dealing with the environment, sustainable development, transparency and public access to information. EIB relies on the EU's policy-making and legislative bodies, making extensive use of policy-related documents, including country reports prepared by other EU institutions such as the European Commission. Similarly, EIB is bound to follow the policy positions of the European Union's political and legislative bodies on human rights, development and environmental issues in countries and regions in which EIB operates.”

III. Specific comments

Part II. Policy principles

11. Point 4. We welcome the fact that the EIB Public Disclosure Policy is based on a presumption of disclosure of information. However, unless this statement is backed up by concrete commitments to actually release important information on a timely basis, along with procedures and timelines for doing so, it will remain a rather hollow statement. We suggest that the EIB include a clear statement about transparency and timeliness of releasing information about projects, along the lines recommended by the MEPs:

“The EIB is guided by the presumption that information concerning the EIB’s operational activities will be made available to the public on a timely basis in the absence of a compelling reason for confidentiality. The EIB’s Information Policy reflects its commitment to comply with EU policy initiatives on transparency and public disclosure of information as well as the principles and limits of the Regulation EC/1049/2001 on Public Access to European Parliament, Council and Commission documents.”

12. Point 5. According to Regulation No. 1049/2001 and Directive 2003/4 access to information should only be refused when disclosure would cause serious harm to a legitimate protected interest **clearly listed** in the policy, which is not the case now. Therefore, we would recommend a new formulation of the principle, accompanied by changes in the list of exceptions: “Access to information will be refused only when disclosure would undermine the protection of a legitimate interest laid out in the list of exemptions and where harm to the protected interest outweighs the public interest in disclosure”.
13. Point 7. We recommend that the rules embedded in these two documents, which are crucial for the information disclosure policy, should be included in the text of the policy itself.
14. Point 12. The statement describing the Public Disclosure Policy as ‘an evolving and flexible instrument, subject to a continuous process of internal evaluation’ allows broad interpretation of the policy instead of setting out clear rules for the interested public as

well as bank staff. Regarding reviews of the policy in the future, the EIB should present clear procedures and timelines for its policy reviews, which should be done in a participatory manner with interested members of the public and from public institutions such as the European Parliament.

15. Point 13 and 14 as well as 17. The EIB's information policy-making background should be included in the introduction or executive summary text, rather than being a part of the section called "Policy principles".
16. Point 18: As the general policy principles should apply to the whole EIB Group, there is no need for a specific disclosure policy for European Investment Fund.
17. Point 19. There is an inconsistency in the current information policy document in that the document contains an annex with "Rules on Public Access to Document" while at the same time point 19 indicates they will be revised along the lines of the currently prepared Regulation on application of the Aarhus Convention to EC institutions and bodies. Even more worrisome is the fact that the EIB conducted strong lobby activities towards the Council and the European Parliament to include "banking" in the exceptions to the Regulation in order to avoid the binding rules on access to information that flow from Aarhus. We suggest that the EIB include the recommendation from MEPs for a clear statement on Aarhus:

"In applying this policy, the environmental policy and other relevant policies, the EIB will follow the Aarhus Convention, the general spirit, purpose and ultimate goals of which are subscribed to by the EIB in the implementation of its Environmental and Information Policies, along with other relevant international conventions."

18. Points 20-25: These points, however interesting, constitute a description of how the EIB is functioning and in what framework. Therefore, it is confusing to have them included in the policy – see point 7 of these comments. We recommend removing these statements from the "policy" so that it is clear what the policy actually consists of.
19. Point 26: Respecting business confidentiality can only be applied within the framework of clearly and narrowly defined exceptions as described in point 2 of these comments. We suggest that the EIB draw on the recommendation from MEPs in developing a clear statement about how the EIB will balance confidentiality and disclosure:

"The EIB will ensure that an atmosphere of mutual trust is maintained in all its business transactions. For this purpose the EIB will find ways to honour its commitment to protect the confidentiality of commercially or financially sensitive information in tandem with its publicly stated intent to provide the public early access to important details of all projects that can affect them or their environments.

At the same time, the EIB will reassure other stakeholders that such protection of valuable business information will co-exist with the presumption of disclosure and will not be used to lessen accountability;

Potential project partners of the EIB will be fully informed that cooperation with the EIB comes at the price of providing information to the public and interested stakeholders;

As part of this revision of its Information Policy, the EIB will publish the definitions of the areas in which confidentiality is being applied and the criteria for applying it, and a logbook of all such usage will be maintained for review by the Board, the EU Ombudsman or other relevant persons and agencies.”

20. Point 27: This point is redundant if the presumption of disclosure together with clearly defined exceptions is applied throughout the policy. As mentioned in other parts of these comments, exceptions must be clearly and narrowly defined. Therefore, we recommend deleting this point.
21. Point 28: As an EU institution the EIB should follow and implement EU policies and legislation rather than merely using it “as the best reference”. It remains unclear how the EIB is measuring its activities and on what basis information on the results of this measurement is disclosed.
22. Point 29: It is unclear what the meaning is of “the Bank also uses as reference international developments...” - which in the present text is completely useless as a matter of policy. Therefore, we suggest the following text: “As a part of the regular review of the policy the EIB will make a comparison of its policy with the other International Financing Institutions’ and Multilateral Development Banks’ policies and apply best practices from those.”
23. Point 30: This point goes against the principle of presumption of disclosure. It is not the issue of establishing balance between confidentiality and transparency. Properly applied, the principle of presumption of disclosure should result in all information being subject to disclosure unless there is a compelling reason for non-disclosure that falls in the regime of exceptions as stated in point 4 of the EIB draft. Point 30 of the current draft clearly undermines point 4 of the same draft. Additionally as already noted in this document, exceptions should be clearly and narrowly defined; providing a non-exhaustive list of categories in this way undermines the presumption of disclosure.
24. Point 32: We welcome the EIB’s awareness-building attempts toward its own staff. However, this can only be useful if based on clear rules, which the current draft policy fails to provide. It is also unclear how this point relates to Article 9 in Annex 1 (see our comment no. 8 above).
25. Point 33: We welcome the EIB’s plans to conduct public consultations on selected policies. However, the clear process for such consultations should be established and in a participatory manner. The proposed procedure should be:
 - The EIB should maintain a running list of policies and strategies it expects to review in the coming 12 –24 months, posted on the website.

- Immediately upon the development or review of a policy or strategy, the EIB should disclose a detailed plan outlining the nature and scope of the process and the opportunities for public review and comment.
- The materials that will go into the decision-making, including management evaluation of existing policies, relevant background information, and external comments should be disclosed.
- Drafts of proposed policies and strategies should be released for public comments at least 60 calendar days prior to discussion by the EIB's Board. In this regard, management should proactively stimulate stakeholders' interest in, and contributions to, the drafting process of these policies.
- External comments on a given policy or strategy should be publicly available on the website.
- At the end of the consultation period, the Management should post on the website a synthesis of comments received, along with the EIB's responses to these comments.
- Final draft policies and strategies should be disclosed at the same time they are circulated to the Board of Directors for consideration, but no less than 30 calendar days prior to approval.
- A synthesis of the recommendations received during the public consultation process and rationales for their inclusion or rejection into the final draft policy or strategy should be disclosed and attached to the final draft sent to the Board of Directors for consideration.
- Reviews related to the implementation of policies or strategies should be publicly disclosed.

26. Point 35: We recommend changing the formulation of this point with this proposed text: "The Bank disseminates regularly a wide variety of information about its business operations. Some key project related information sources like Project Summaries, Environmental and Social analysis, its Activity Report, Annual Report, Evaluation Reports, press releases are subject to routine disclosure through the Bank's web site and in electronic and hard copy version upon request. At the same time other project related information is provided on request with limits described by the regime of exceptions.

27. Point 36 and 37: There is a need for clear rules and timelines on project-related information. Application of the presumption of disclosure would require all information to be disclosed unless there is a compelling reason for non-disclosure that falls in the regime of exceptions. Project Summaries should be disclosed as early as possible during project development, preferably immediately following project concept review. Without exception, the EIB Public Disclosure Policy should define a time for releasing Project Summaries for both public and private sector projects. The current reference to the 'trigger point' for disclosure being the EIB's request for the opinions of the Member State(s) does not give any clarity on the actual timelines. We recommend the following amendment: "The Bank publishes advance information on projects it considers for financing in the form of a Project List and associated Project Summaries on its website as early as possible during project development but not later than a minimum 120 days prior to Board of Directors approval." It is also crucial that the EIB's staff appraisals of

- projects being considered for financing be made publicly available in advance of a decision by the Board whenever there are adverse environmental or social impacts associated with it, regardless of what name such documents have.
28. Point 38: See general comment no. 3 in this document. It is especially unacceptable to not release information for projects with adverse environmental or social impact, as envisaged in paragraph 2 of point 38.
 29. Point 39: As stated in point 20 of these comments, a properly applied presumption of disclosure must be accompanied by clear definitions of exceptions needed to protect confidential business information. Therefore the proposed non-exhaustive list of information categories undermines the concept of the text in Point 4 on the presumption of information disclosure. In order to keep policy coherence we strongly recommend deleting proposed point 39 and other related references to a non-exhaustive list of documents that cannot be released.
 30. Point 40: As mentioned in comment 27, the project Summaries for ALL projects considered for financing need to be disclosed in a specific timeline prior to Board decision. Additionally the projects should remain on the list until presented in the Annual Report - the current proposal is only for six months following signature. After that, all information on the project should be moved to the section on projects and loans on the web site. Therefore, we propose the following text: "For every project considered for financing, a project summary will be prepared and released on the EIB website as early as possible during project development but not later than a minimum 120 days prior to Board of Directors approval. Each project summary includes the name of the project; the project promoter or financial intermediary (for global loans); the location of the project; the sector it represents; a project description; its objective(s); its environmental and, if appropriate, social aspects; procurement data; proposed EIB finance; the total project cost; and the status of the project "under appraisal" with an indicated timeline for Board decision. It will also include name and contact data of the person responsible for the project from in the EIB. Projects remain on the list until presented in the Annual Report and after that all information on the project will be moved to the respective section on projects and loans on the web site."
 31. Point 41: The environmental and social analysis for medium-impact projects should be publicly available for a period of 60 calendar days before Board approval. The environmental and social analysis for high-impact projects should be publicly available for a period of 120 calendar days before Board approval. The EIB should either release the full Environmental Impact Assessment on its own web site or require release on the project promoter's web site. Bearing in mind the fact that many affected communities may not have access to the internet, the EIB should release the above-mentioned documents in hard copies upon specific request.
 32. Point 42: The current point goes against the presumption of disclosure. The EIB should disclose all project-related information unless the non-disclosure is justified by the regime of exceptions. After approval the EIB should disclose upon request – subject to redaction of certain commercially sensitive information based on the regime of exceptions described in the policy – all project-related documents, including financing

- and guarantee contracts, supervision reports from the staff responsible for a project, environmental and social monitoring reports and Project Completion Reports. Evaluation reports should be prepared for each project and also released.
33. Point 46: Following the principle of presumption of disclosure, all documents mentioned in point 46 should be released, subject to redaction of commercially sensitive information based on the regime of exceptions described in the policy. Keeping these documents confidential as it is in the current policy is unacceptable.
 34. Point 47: See comment 9 of this document.
 35. Point 48: The point on Operation Evaluation activities should also provide information on releasing monitoring and evaluation reports for specific projects. Therefore, the following sentence should be added: “Equally for specific projects, monitoring and evaluation reports, subject to redaction of commercially sensitive information based on the regime of exceptions described in the policy, will be released on the web site.”
 36. Point 53: The Board’s agenda and minutes, including voting records, should be released, subject to redaction of commercially sensitive information based on the regime of exceptions described in the policy. The Board’s agendas should be released at least two weeks prior to the actual meeting.
 37. Points 56-58: see comment 6 of this document.

Annex I

1. The draft policy states that the Rules on Public Access to Documents will be revised after the adoption of regulations on applying Aarhus to EU institutions. However, it is not clear at the moment what the outcome of this regulatory process will be. In the meantime, the meaning of this wording in the annex is obscure. This section should be moved to the policy section and elaborated. It appears to indicate only that the EIB is committing to review and revise its Rules on Public Access to Documents after the Aarhus Convention is revised.
2. Introductory paragraph before article 1: The text states: “The Management Committee of the Bank has issued the following rules for the attention of its Departments”. This is unclear wording allowing an interpretation in which the rules are only a reference and not binding. The language “for the attention” should be dropped. It should be clarified that the EIB staff is obliged to follow them.
3. Article 1.3: This definition is needlessly wordy and potentially restrictive, even if that is an unintended result. The part starting from “concerning a matter ...” is illegitimate. The principle of presumption of disclosure of information should cover all information held by the Bank.
4. Article 2.1: We suggest adding: “or any other staff person relevant for the subject requested”. It needs to be clear that the request for information is directed to concrete persons. It would be most efficient to direct it to the person dealing with particular issue. For example in the case of project related information the Project Summary on the web site

should include the name and contact details of the project manager, so that the request for information is directed to the right person, similar to the practice of the World Bank.

5. Article 2.2: Concrete timelines should be spelled out in the rules, as it is confusing to refer to another document. In general a two-month timeline for response is too long; it should be shortened to a maximum of 4 weeks. Requests for information should be promptly acknowledged within 10 days.
6. Article 2.4: This article is unclear and can be interpreted to allow withholding of information. All requests should be answered.
7. Article 3: As regards third-party documents, the Bank shall consult the third party with a view to assessing whether exception specified in the policy is applicable. This process by no means should be a veto right for the EIB clients and should not slow down the process.
8. Article 4: As already stated, the rules embedded in Annex I should be included in the text of the policy itself. However, the most crucial element described in the Rules on Public Access to Documents, from the point of view of the presumption of information disclosure, is Article 4, which is dedicated to exceptions. The new EIB Public Disclosure Policy should fully conform with the principles and rules for non-disclosure of information laid down in Regulation 1049/2001 of the European Parliament and of the Council and in the Directive 2003/4. Therefore we strongly recommend a new formulation of the rules of exceptions in proposed Article 4:

“Access to information may be refused if disclosure of the information would adversely affect:

- (a) the confidentiality of the proceedings, where such confidentiality is provided for by law;
- (b) international relations, public security or national defense;
- (c) the course of justice, the ability of any person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;
- (d) the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy;
- (e) intellectual property rights;
- (f) the confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for by national or Community law;

(g) the interests or protection of any person who supplied the information requested on a voluntary basis without being under, or capable of being put under, a legal obligation to do so, unless that person has consented to the release of the information concerned;

(h) the protection of the environment to which such information relates, such as the location of rare species.

The grounds for refusal mentioned in paragraphs above shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal. The EIB may not, by virtue of paragraphs (a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to information on emissions into the environment.

If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.”

9. Article 5.1: We recommend deleting ‘either by consulting them on the spot or’. The information in principle should be sent to the person requesting it, in electronic or hard copy form depending on the wish of the person and/or availability of the document. If ‘consulting on the spot’ means in the EIB headquarters in Luxembourg, this option is impossible for the majority of interested stakeholders, especially communities affected by projects. The EIB needs to take the necessary steps to provide documents of interest to civil society either on its website or in their own countries as much as possible.
10. Article 5.3: As there are still many interested parties and affected communities which do not have internet access, the EIB should provide a printed copy if requested. In its current wording this section would appear to mean that the EIB can refer requestors to the EIB web site instead sending them a copy in print or electronically. While a convenience to the EIB, it is potentially inhibiting to those unable to grapple with the web, or too poor to have access.
11. Article 7: Regarding fees, there should be a public interest exception for any person or civil society group requesting information for a non-commercial purposes.
12. Article 8: This point does not refer anymore to the complaint procedure to the EIB Secretary General, point 56 of the Policy text. It is also unclear how mention of the Ombudsman relates to Section 56, which appears to suggest that compliance with the rules will be overseen by the “Group Chief Compliance Officer”. There needs to be a set a procedures for appealing denials of access to information. As recommended before ultimately there need to be an independent appeal mechanism handling also the information related complaints.
13. Article 9: See general comment no. 8