THE EIB PUBLIC DISCLOSURE POLICY
Draft II Published 20 October 2005

Comment from Idasa
17 November 2005

Introduction

1. Idasa welcomes the opportunity to comment on the latest draft of the EIB Public Disclosure Policy and further notes the EIB's commitment to the idea of a disclosure policy based on the 'presumption of disclosure'.

2. Idasa is an independent African public interest organisation committed to promoting sustainable democracy by building democratic institutions, educating citizens and advocating social justice.

3. Idasa is headquartered in South Africa, where it was founded, but now works throughout the continent of Africa. It is a founding organisation and member of the Global Transparency Initiative (GTI) serving as its secretariat.

4. We note the very substantial role that the EIB now plays as a lending agency in Africa. As we understand it, for the period 2000-2004, EIB lending to ACP countries was 2.1bn Euros, and to South Africa, 700,000 Euros.

5. Because of the impact that such lending and project-funding practices have on the democratic and socio-economic environment, we assert that it is essential that the EIB operate in a manner that promotes trust and encourages meaningful participation with all of the affected social stakeholders.

6. With this imperative in mind, we submit that transparency is a crucial operating principle. The Public Disclosure Policy is critical to this process and therefore deserves to be properly scrutinized by as wide a group of stakeholders as possible.

7. Idasa contends that the "right to know" is a fundamental human right and vital to fully a functioning, vibrant democracy. Further, it asserts that the right to know, effectively implemented, is an obligation that falls upon all public and private bodies that fulfil functions that impact on the democratic, political and socio-economic environment.

8. This submission has been prepared by the head of Idasa's Right to Know Programme Manager, Richard Calland, who is also the Executive Director of the Open Democracy Advice Centre – an organisation that specialises in freedom of information law and policy. Calland has advised a number of governments around the world on

their transparency law and policy; this submission aims to take full account of international trends and best practice.

9. ODAC itself monitors the implementation of the South African national law – the Promotion of Access to Information Act 2000 – and works with the South African government agencies to help build capacity to strengthen the implementation of the Act. In this context, it is worth stating that it is clear that effective implementation of disclosure regimes represents a very considerable challenge. Shifting a culture of secrecy is not accomplished overnight. As the recent Open Society Institute study of which ODAC was a partner, *Transparency & Silence*, illustrated, there are many obstacles to effective implementation. Perhaps the major one is that institutions tend to ignore requests for information unless there are sanctions for non-compliance.

10. In addition to workable procedures and user-friendly mechanisms for requesting information and appealing denials, it is important to institute training within institutions to enable bureaucrats to properly appreciate the purpose of openness and to understand the public policy objective of the law or voluntary disclosure system. The design of any law or voluntary policy must have the implementation challenge very firmly in mind; the system should be structured with the operating principle of 'workability' as a primary guiding light. Accordingly, more or less detail may be appropriate, depending on the institutional culture of the particular organisation.

11. With these brief introductory remarks, Idasa respectively tenders the following comments on Draft II of the Disclosure Policy. We are conscious of the fact that other organisations have made detailed submissions. We prefer to highlight, therefore, what we regard as the most serious matters for further consideration.

General Comments

12. Draft II of the Public Disclosure Policy is seriously weakened by defects that undermine the good intentions of the statement of principle at the beginning of the Policy Principles – namely, that the Disclosure Policy is founded on a presumption of disclosure of information.

13. The fundamental problem with the draft is one of structure: splitting the document into two parts has mainly served to create a very confusing and legally contradictory document. Many of the primary defects stem from this one main source. This confusion will impact not only its credibility in the eyes of potential users and external stakeholders, but will undermine effective implementation internally. It is clear from the international experience of implementing national freedom of information laws that the employees whose responsibility it will be to administer the policy must be entirely clear about the provisions. Any ambivalence is likely to tilt the balance away from a presumption of disclosure towards one of secrecy.

14. Idasa fully accepts that there are legitimate grounds for withholding some information. But the most significant problem is that the main policy document contains numerous “hidden” or “embedded” exemptions. International best practice is entirely clear now: an open information regime needs to declare that everything shall be open unless it is covered by a specified exemption (further balanced by a public interest over-ride test, see below).

15. Thus, whilst the Annex purports to present a number of exemptions, the preceding policy document refers, inter alia, to:

    - With-holding information where “there is a compelling reason” (paragraph 4)
    - “Confidential business information” – a phrase that bears absolutely no relation to any of the exemptions listed in the Annex (paragraph 39)
    - “Internal confidential documents” (paragraph 46).

16. Moreover, paragraph 39 contains a list of ‘examples of the main kind of information that have to be kept confidential’. This seriously breaches what is commonly now understood as the best practice approach to drafting exemptions: documents should be withheld on the basis of the harm that disclosure would cause to a legitimate interest and not on the basis of the what the document is or is not. Listing documents separate to the exemptions themselves, or even under an exemption, will invite and attract the abuse of the policy as they will provide an obvious ‘loophole’.

17. The exemptions themselves are not balanced by a public interest over-ride clause, as nearly all modern freedom of information regimes do. The purpose of a public interest over-ride clause is to remind the information holder that there are competing public interests at stake and that when weighing up whether or not to apply an exemption the balance must be struck in favour of disclosure where the public interest in disclosure outweighs the public interest in withholding the information.

18. Without revision of the policy document to remedy these fundamental flaws, it will lack any meaningful credibility and will in practice prove in all likelihood to be as unworkable as it is self-defeating.

19. The “recourse” mechanism is both confusing and unwieldy. It appears to create, in effect, two parallel procedures to two different bodies, without any detail about how and on what basis they will operate. Rather, we submit that the EIB should invest in the establishment of a single, new, independent appeal body. Once again, the international experience supports the view that the establishment of a useable, efficacious, speedy and independent appeal body is essential to the effective operation and legitimacy of a public disclosure system.

Points of Specific Detail

20. Paragraph 58 appears to contradict the Annex by referring to non-EU appellants, whereas the Annex says that only EU residents or citizens can make requests under the policy. We submit that such a limitation is inappropriate, given the scope of the mandate and operations of the EIB beyond the EU. The nationality or residence of the requester should be immaterial to the question of disclosure. Again: if the presumption in favour of disclosure is operable, the information should be open unless an exemption applies.

21. We do not see why Private Sector documents (paragraph 42) should not be made public on the same basis as other information, if necessary subject to a third party notice procedure.

22. On costs: our view is that reasonable fees for reproduction are not unreasonable provided that there is a requirement to waive the fees in the case of an indigent requester.

23. We support the existence of a third party notice procedure but not the formulation currently offered by Article 3 of the Annex, which effectively creates a right of veto in favour of the third party. In national freedom of information legislation, the modern approach is to require the holder of the information to notify the third party where the information relates to that third party and to invite its view on whether there should be disclosure. Notwithstanding this, the holder of the information shall still only be entitled to withhold the information if an exemption properly applies. Hence, it should constitute a notice and not a veto procedure.

24. As to the form in which the information is provided: we submit that it should be at the option of the requester – either hard or electronic copy. Some people prefer to email, other to visit and inspect the hard copy, and others to have a hard copy posted where they do not have electronic access.

25. Lastly, we submit that the policy should include a clear time limit for responding to requests for information under the policy, one that balances what is realistic for the EIB but that does not keep the requester waiting unreasonably. Twenty eight days is the common time limit in most national jurisdictions, often with a mechanism for an extension in complicated cases, and there is no evidence to suggest that the EIB should require anything longer. And, as indicated in the introduction, it would be wise and perhaps essential, to include some provisions that provide a sanction for non-compliance with the policy and the time-limit in particular.

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