MEMORANDUM

on the

European Investment Bank's Information Policy

by

ARTICLE 19
Global Campaign for Free Expression

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I. Introduction

This Memorandum analyses the European Investment Bank's (EIB) public information policy[1] for consistency with international and European standards regarding freedom of expression and the related right to information.

The EIB was created in 1958 under the Treaty of Rome, which also created the European Community. The EIB claims a dual legal status both as a European Union institution and as a bank with autonomous legal personality. The Bank makes long-term loans for projects that will further the objectives of the EU. All EU Member States are shareholders of the EIB and provide its capital, and each is eligible for EIB loans. The EIB is also increasingly making loans to developing countries.

Despite efforts to revamp its public information policy in 2002, the Bank continues to be criticized for its lack of transparency, particularly when compared to advances made by other similar institutions, including the World Bank and the International Monetary Fund. As our analysis reveals, the new policy – adopted in 2002 – leaves much to be desired.

[1] The Bank's information policy is contained in four main documents: How EIB Communicates – An Overview, the Information Policy Statement, the Code of good administrative behaviour for the staff of the European Investment Bank in its relations with the public and the Rules on Public Access to Documents. These documents are available at: www.eib.org.

In our view, there are good legal grounds for arguing that the EIB is bound by standards of openness found under EU law, as well as those found in general international law. In assessing the EIB's policy, we rely significantly on EU Regulation 1049[2] and, to a lesser extent the Aarhus Convention.[3] We also look, for more general international standards, among others, to Recommendation (2002)2 of the Committee of Ministers of the Council of Europe (Council of Europe Recommendation),[4] which elaborates the right to access to information in the context of the *European Convention on Human Rights*, and the ARTICLE 19 publication, *The Public's Right to Know: Principles on Freedom of Information Legislation* (the ARTICLE 19 Principles),[5] a standard-setting document based on international human rights treaties, as well as international best practice.[6]

II. International and European Union Standards

II.1 General International Standards

Article 19 of the *Universal Declaration of Human Rights* (UDHR),[7] a UN General Assembly resolution, binding as a matter of customary international law, sets out the fundamental right to freedom of expression in the following terms:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

The *International Covenant on Civil and Political Rights* (ICCPR),[8] a formally binding legal treaty, guarantees the right to freedom of opinion and expression, also at Article 19, in terms very similar to the UDHR. Freedom of expression is also guaranteed by the three regional human rights treaties, the *European Convention on Human Rights* (ECHR),[9] the *African Charter on Human and Peoples' Rights*[10] and the *American Convention on Human Rights*.[11]

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[2] Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001.
[3] *Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*. UN Doc. ECE/CEP/43, adopted by the European Community at the Fourth Ministerial Conference in the "Environment for Europe" process, 25 June 1998, entered into force 30 October 2001.
[4] On Access to Official Documents. Adopted 21 February 2002. Available at: http://cm.coe.int/stat/E/Public/2002/adopted_texts/recommendations/2002r2.htm.
[5] (London: ARTICLE 19, 1999). Available at: http://www.article19.org/docimages/512.htm.
[6] The ARTICLE 19 Principles have been endorsed by, among others, the UN Special Rapporteur on Freedom of Opinion and Expression. See UN Doc. E/CN.4/2000/63, 5 April 2000, para. 43.
[7] UN General Assembly Resolution 217A(III) of 10 December 1948.
[8] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.
[9] Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953
[10] Adopted at Nairobi, Kenya, 26 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.
[11] Adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978.

In these international human rights instruments, freedom of information was not set out separately but was instead included as part of the fundamental right to freedom of expression, which includes the right to seek, receive and impart information. Freedom of information, including the right to access information held by public authorities, is a core element of the broader right to freedom of expression. There is little doubt as to the importance of freedom of information. The United Nations General Assembly, at its very first session in 1946, adopted Resolution 59(I), which states:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the UN is consecrated.[12]

The right to freedom of information as an aspect of freedom of expression has repeatedly been recognised by the UN. The UN Special Rapporteur on Freedom of Opinion and Expression has provided extensive commentary on this right in his Annual Reports to the UN Commission on Human Rights. In his 1998 Annual Report, for example, the Special Rapporteur declared that freedom of information includes the right to access information held by the State:

> [T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems…."[13]

In 2000, the Special Rapporteur provided extensive commentary on the content of the right to information.[14] His views were welcomed by the Commission on Human Rights.[15]

In November 1999, the three special mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – came together for the first time under the auspices of ARTICLE 19. They adopted a Joint Declaration which included the following statement:

> Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.[16]

The right to freedom of information has also explicitly been recognised in all three regional systems for the protection of human rights. As noted above, the Committee of Ministers of the Council of Europe adopted a Recommendation on Access to Official Documents in 2002.[17] Principle III provides generally:

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[12] Adopted 14 December 1946.
[13] Report of the Special Rapporteur, 28 January 1998, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, para. 14.
[14] Report of the Special Rapporteur, 18 January 2000, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, para. 44.
[15] Resolution 2000/38, 20 April 2000, para. 2.
[16] 26 November 1999.
[17] Note 4.

> Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.

The African Commission on Human and Peoples' Rights recently adopted a Declaration of Principles on Freedom of Expression in Africa,[18] Principle IV of which states, in part:

> 1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.

Within the Inter-American system, the Inter-American Commission on Human Rights approved the Inter-American Declaration of Principles on Freedom of Expression in October 2000.[19] The Principles unequivocally recognise freedom of information, including the right to access information held by the State, as both an aspect of freedom of expression and as a fundamental right on its own:

> 4. Access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.

II.2 European Union Standards

The European standards identified by the Bank as informing its public information policy include Articles 255 and 287 of the EC Treaty, Regulation 1049, best practice in the banking sector, and the Aarhus Convention.[20]

Article 2(1) of Regulation 1049 states:

> Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.[21]

The Regulation has several positive features, including a narrow list of exceptions, all of which are subject to a harm test. The Regulation also provides for an internal review of any refusal to disclose information, as well as an appeal to the courts and/or to the Ombudsman.[22]

The Aarhus Convention recognises access to information as part of the right to live in a healthy environment,[23] rather than as a free-standing right. The Preamble of the Aarhus Convention, which sets out its rationale, states in part:

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[18] Adopted at the 32nd Session, 17-23 October 2002.
[19] 108th Regular Session, 19 October 2000.
[20] See, for example, the Preamble to the Rules, paras. 6, 7 and 9.
[21] Note 2.
[22] Articles 7 and 8.
[23] Note 3, Article 1.

> Considering that, to be able to assert [the right to live in a clean environment] citizens must have access to information …
>
> Recognizing that, in the field of environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns …

The Convention requires State Parties to take legal measures to implement its provisions on access to environmental information.[24] Most of those provisions are set out in Article 4, which begins by stating:

> (1) Each Party shall ensure that … public authorities, in response to a request for environmental information, make such information available to the public …
>
> (a) Without an interest having to be stated.

Among other things, it requires States to adopt broad definitions of "environmental information" and "public authority",[25] to subject exceptions to a public interest test,[26] and to establish an independent body with the power to review any refusal to disclose information.[27]

II.3 Relevance of These Standards to the EIB

General International Standards

The general international openness standards noted above are most obviously and explicitly relevant for States. However, ARTICLE 19 is of the view that fundamental international human rights obligations, including the right to access information held by public bodies, are also binding on inter-governmental bodies such as the EIB. In our view, States' common legal obligations – which would embrace customary international law and the common treaty obligations of Members – apply to bodies they create collectively, just as they apply to bodies they create on their own, such as national public bodies.

We are also of the view that there is a basis for arguing these obligations are directly binding upon IGOs. It is established that IGOs are responsible to States for breaches of obligations arising out of either their direct treaty obligations or a principle of customary international law.[28] There is no principled ground for differentiating between legal obligations owed to States and those owed to individuals.

[24] *Ibid.*, Article 3(1).
[25] *Ibid.*, Articles 2(2)-(3).
[26] *Ibid.*, Article 4(4).
[27] *Ibid.*, Article 9.
[28] See *WHO Regional Office Case*, ICJ Reports, 1980, P. 73. See also Shaw, M., *International Law, 4th Ed.* (Cambridge: Cambridge University Press, 1997), pp. 919-920.

The right to freedom of expression as set out in the UDHR, embracing the right to access information held by public bodies, is part of customary international law. All 25 EU Member States have ratified both the ECHR and ICCPR.

EU Standards

The EIB maintains that, due to its legal status as an autonomous EU body, general EU standards only establish guidelines for it, and not legally binding obligations. Its Information Policy Statement makes clear its view that Regulation 1049 is only formally binding on the European Parliament, Council and Commission, although it is also committed to respecting those standards. The first paragraph under Information Policy Principles states:

> The Bank's information policy reflects its commitment to 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. EIB is not directly covered by the Regulation, which is addressed to the Parliament, Council and Commission in application of Article 255 of the EC Treaty….[29]

Recent jurisprudence of the European Court of Justice has established that, even if the Bank is not a European Community institution *per se*, "none the less [it] is a Community body established and endowed with legal personality by the EC Treaty."[30] Indeed, the Bank's own Information Policy Statement declares, in the Introduction: "EIB operations are guided by EU policy and are subject to EU law, which legitimates and safeguards its operations." As a result of this, the Court has noted that the Bank cannot avoid scrutiny of whether measures adopted by it, "are in conformity with the basic constitutional charter" of the EU and its Member States.[31]

Part of the EU's constitutional framework is laid down in Article 6 of the Treaty of the European Union, which states:

> The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.[32]

We think a strong case can be made that the right of access to information held by public authorities is a common community principle and constitutional understanding. It has been recognised by the European Court of Human Rights on a number of occasions to be guaranteed by the ECHR,[33] and the Council of Europe Recommendation is to some

[29] The same document reflects the goal of respecting, to the extent possible, the Aarhus Convention.
[30] *Commission v. EIB*, 10 July 2003, Case C-15/00, para. 75. See also ECJ 3 March 1986, Case 85/86, ECR 1988 and ECJ 15 June 1976, Case 110/75, ECR 1976.
[31] *Ibid.*
[32] Official Journal C 325, 24 December 2002.
[33] See *Leander* v. *Sweden*, 26 March 1987, Application No. 9248/81, 9 EHRR 433; *Gaskin* v. *United Kingdom*, 7 July 1989, Application No. 10454/83, 12 EHRR 36; *Guerra and Ors*. v. *Italy*, 19 February 1998, Application No. 14967/89; and *McGinley and Egan v. United Kingdom*, 9 June 1998, Application Nos. 21825/93 and 23414/94.

extent a reflection of that.[34] Equally important is the legal recognition of the fundamental nature of freedom of information by EU Member States, as reflected, among other things, in legislative guarantees of that right.

Practical Considerations

The overwhelming practical rationale for access to information held by national public bodies applies equally to intergovernmental organisations, including international financial institutions. As the World Bank has recognised in relation to its activities: "Transparency and accountability are crucial for promoting good governance and are essential for drawing more stakeholders and supporters in the development process."[35] The EIB has clearly recognised this in its own policy statements, as reflected in the quotations above to the effect that the Bank will, to the extent possible, endeavour to respect Regulation 1049 and the Aarhus Convention. This should, in practice, lead the Bank to adopt the same standards as if it were legally bound by these documents, since they already allow public bodies to refuse to disclose documents, but only where this is necessary to protect a legitimate secrecy interest.

III. The EIB's Public Information Policy

The Bank's information policy is contained in four main documents:

- How EIB Communicates – An Overview describes the types of documents available on the EIB website, its principal printed publications and other methods used by the Bank to communicate with the public;
- the Information Policy Statement sets out the European policy framework and the principles underpinning the information policy;
- the Code of good administrative behaviour for the staff of the European Investment Bank in its relations with the public (the Administrative Code) specifies how staff are to respond to requests for information; and
- the Rules on Public Access to Documents (the Rules) contains the procedure for obtaining access to documents and sets out the exceptions to disclosure. The key documents are the Rules and the Administrative Code, as the other two are primarily descriptive.

We note that spreading the policy out over four different documents is confusing and makes it difficult for the public to understand it. Other multilateral banks, such as the World Bank, have a single comprehensive policy document for information disclosure and it would be far preferable if the EIB did so as well.

The Rules

A lengthy preamble at the beginning of the Rules on access to documents sets out the basis upon which the Bank has formulated its policy. The most important paragraphs include the following declarations:

- The European Parliament, Council and Commission have "called on the institutions and bodies of the European Union to adopt internal rules on public

[34] That Recommendation refers, among other things, to the ECHR in its preamble.
[35] See: http://www1.worldbank.org/operations/disclosure/.

access to documents which take account of the principles and limits laid down in Regulation 1049/2001" (paragraph (4)).

- Article 255 of the EC Treaty, pursuant to which Regulation 1049 was adopted, applies only to the European Parliament, Council and Commission but, nonetheless, the Bank, "under the requirements of good administration applicable to Community institutions and bodies including the Bank, documents be publicly available to the maximum extent possible" (paragraph (6)).
- Article 287 of the EC Treaty "prohibits the disclosure of information of the kind covered by the obligation of professional secrecy" and therefore the Bank must ensure that the parties involved in a project "can rely on the confidentiality of the banking relationship" (paragraph 9).
- The Bank has to respect the confidentiality of documents exchanged between itself and bodies both within and outside the Community framework (paragraph 10).
- Despite these obligations of confidentiality, the Bank is nonetheless committed to "applying an active information policy" (paragraph 12).

Article 1 of the Rules, entitled "Scope" is essentially a definitions section. Under the policy, access is granted to "members of the public", defined to include any citizen of the Union or natural or legal person residing or having its statutory registered office in a Member State, or in a State in which the Bank conducts its activities. "Document" and "Third party" are also defined in Article 1 in broad terms.

Article 2 states that applications for access shall be made in written form, including electronically, and sent to the Bank's Information and Communications Department. Applications are then handled in accordance with the Code. Applicants are not obligated to state reasons for their request. Where insufficient details are provided, the Bank will request clarification. Article 2(4) provides: "The Bank shall nevertheless retain the possibility of refusing to follow up any application of an excessive or patently disproportionate nature."

Article 3 states that where a request concerns a document received from a third party, the Bank will with that third party before releasing it to the public, unless it is clear from an examination of the document, "that it must or must not be disclosed."

Article 4 lists the circumstances in which access to documents will be refused, discussed in more detail below.

Article 5 specifies the manner in which access to requested documents will be provided, either on Bank premises or by sending copies to the applicant. Article 6 provides that decisions on access shall be made without prejudice to copyright and Article 7 provides that costs for making documents available may be charged to the applicant.

Article 8 states that where a reply to a request has not been received within the time frame specified by Article 13 of the Code, or in the event of a total or partial refusal to

grant access, an applicant "shall be free to contact" the European Ombudsman in accordance with Article 195 of the EC Treaty.

The Administrative Code

The provisions of the Administrative Code of particular relevance here are Articles 10 to 15. Article 10(1) stipulates that staff will provide the public with information that is requested and that staff should ensure that the information provided is clear and comprehensible. Article 10(2) allows staff to require requests to be made in writing and Article 10(3) states that when a request is refused, the staff member must provide reasons for the refusal.

Article 12(1) requires staff to send a letter acknowledging receipt of a request for information within two weeks of receiving the request, unless a substantive reply can be sent within the same period. Article 12(4) stipulates that no acknowledgement will be necessary where "an excessive number of letters or requests has been received or where these are of a repetitive or inappropriate nature."

Article 13(1) requires staff to respond to all requests and complaints "without delay" and, in any case, within two months of receipt of the request. Where requests raise complex issues and a reply cannot be provided within two months, the responsible staff member must communicate this to the applicant. In this case, a reply must still be provided as soon as possible.

Article 13(3) requires staff to provide reasoned responses to all requests and complaints. However, where a "large number of persons are concerned by similar replies", making it impossible for staff to provide reasoned replies to each person, a standard reply may be sent. Nonetheless, if a "citizen" expressly requests an individual reasoned reply then this should be provided. Cryptically, Article 13(5) provides: "Members of staff shall refrain from sending any reply to other external parties unless the persons concerned have been informed."

Article 14 states that the Bank will keep a record of all requests received and replies provided, and Article 15 requires staff to respect Directive 95/46 regarding the protection of personal data.

IV. Analysis

Notwithstanding its stated intention to "take account of" the principles and limits set out in Regulation 1049, "to the extent that that this shall not undermine the full performance of its task as a financial institution",[36] the Bank's information policy fails in serious respects to meet the standards set forth in that Regulation and otherwise under international law, for reasons that cannot be justified on performance grounds.

It is our view that Regulation 1049 sets out the minimum standards that should be reflected in the information policies of European Union institutions. This is so whether or

[36] Paragraph (7), Preamble to the Rules.

not the Bank regards these as formally legally binding. The Bank is, of course, free to put in place a policy which promotes even greater openness than required by Regulation 1049. However, at a time when the global trend among governments and international institutions is towards greater transparency, the fact that the EIB has done the opposite by establishing a restrictive access system appears retrograde.

IV.1 Maximum Disclosure and Scope

Paragraph (11) of Regulation 1049 states: "[I]n principle, all documents of the institutions should be accessible to the public," subject to certain exceptions. This type of statement is known as the principle of maximum disclosure and encapsulates the basic rationale underlying the very concept of freedom of information.[37]

In contrast to this, the EIB's information policy contains no statement of principle along these lines. Instead, Article 1(1) of the Rules states that access to Bank documents will be "in accordance with the principles, on the conditions and within the limits laid down in this section." Restrictive language permeates the policy documents, such as that information will only be released "where and to the extent possible"[38] and that the Bank only aims "to release information whenever possible".[39]

Regulation 1049 also provides for access to institution documents by natural or legal persons regardless of whether they reside or have their registered office in a Member State (Articles 2(1) and (2)). The Aarhus Convention, consistent with international standards, does not impose limits on who may request information, in recognition of the fact that the right to information – in this case environmental information – belongs to everyone. Principle III of the Council of Europe Recommendation specifically states that the right of access "should apply without discrimination on any ground, including that of national origin."

The EIB information policy, conversely, only applies to natural or legal persons within a Member state or "in a State in which the Bank conducts its activities."[40]

Recommendations:

- The principle of maximum disclosure should be the starting point of the EIB information policy, and should be stated clearly and explicitly in the policy.
- The Bank's information policy should apply to all persons, natural and legal, regardless of national origin.

IV.2 Documents Published

Many information policies and national access to information laws require the publication and dissemination of specific documents of significant public interest, even in the absence of a request, subject only to reasonable limits based on resources and

[37] Principle 1 of the ARTICLE 19 Principles.
[38] Paragraph (12), Preamble to the Rules.
[39] See p. 2 of the Information Policy Statement.
[40] Article 1(2) of the Rules. The wording is consistent with Article 255(1) of the EC Treaty. However, Regulation 1049, adopted pursuant to Article 255(2), is, as detailed above, more expansive.

capacity. Examples of categories of information that public bodies should have the obligation to publish, include:

- operational information about how the public body functions, including costs, objectives, audited accounts, standards, achievements and so on;
- guidance on processes by which members of the public may provide input into major policy or legislative proposals;
- the types of information which the body holds and the form in which this information is held; and
- the content of any decision or policy affecting the public, along with reasons for the decision and background material of importance in framing the decision.[41]

Article 5 of the Aarhus Convention imposes extensive obligations on Parties to collect and disseminate environmental information, including that "which could enable the public to take measures to prevent or mitigate harm" arising from an imminent threat to human health. Regulation 1049 requires each institution to publish an annual report including "the number of cases in which the institution refused to grant access to documents, the reasons for such refusals and the number of sensitive documents not recorded in the register."[42]

Principle XI of the Council of Europe Recommendation states that a public authority should, "at its own initiative and where appropriate, take the necessary measures to make public information which it holds when the provision of such information is in the interest of promoting the transparency of public administration and efficiency within administrations or will encourage informed participation by the public in matters of public interest."

In contrast to these standards, the EIB policy fails to set out categories or types of information which should be subject to publication. The EIB policy document, How EIB communicates – an overview, does list the types of information available to the public through the Bank's website, print publications and so forth. But this is quite different from a commitment to ensure that certain categories of information are published. Furthermore, the policy provides for the exclusion of material from these channels of communication. Information about a given project, for example, may be excluded from the website at the request of the project promoter and "in addition the Bank will not disclose financial data on promoters, borrowers and co-financing institutions, its own internal analysis and comments on such data, industrial processes and market information."[43]

The Bank does disseminate a lot of descriptive material – project summaries, its general lending strategy, its corporate strategy – but there does not appear to be much information available regarding the Bank's decision-making processes or the information used in the decision-making processes. The general introduction to the information policy mentions the number of access requests that were satisfied in the previous year (70%),

[41] Principle 2 of the ARTICLE 19 Principles.
[42] Principle 17.
[43] How the EIB communicates – an overview, page 2.

but this is far from the systemic reporting on this key issue required under Regulation 1049; neither the reasons for refusing certain requests nor what follow-up measures were taken by either party is, for example, provided.

Recommendations:

- The Bank should develop a more systemic approach to the publication and dissemination of specific categories of information, with a view to providing the public with insight into its decision-making processes. In particular, the policy should list categories of information which should be actively published, rather than just describe what is available in the various Bank publications and on the website.
- The Bank should publish an annual report that provides information on the management of its disclosure policy including the number of requests received, the number of requests denied, the grounds for denial, whether any appeal was taken and the outcome of the appeal.

IV.3 Regime of Exceptions

It is well established that a refusal to grant access to a document may be justified only in accordance with a strict three-part test. The information must: (1) relate to a legitimate aim listed; (2) the disclosure must threaten to cause substantial harm to that aim; and (3) the harm to the aim must be greater than the public interest in having the information. This last branch of the test is known as a "public interest override". The burden of satisfying each branch of the test lies with the body seeking to deny access.

The Council of Europe Recommendation sets out this three-part test at Principle IV as follows:

> **IV. Possible limitations to access to official documents**
>
> 1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:
>
> i. national security, defence and international relations;
> ii. public safety;
> iii. the prevention, investigation and prosecution of criminal activities;
> iv. privacy and other legitimate private interests;
> v. commercial and other economic interests, be they private or public;
> vi. the equality of parties concerning court proceedings;
> vii. nature;
> viii. inspection, control and supervision by public authorities;
> ix. the economic, monetary and exchange rate policies of the state;
> x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.
>
> 2. Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.[44]

[44] Note 4.

The list of legitimate aims is clear and precise and disclosure may only be refused where necessary in a democratic society and where this is proportional to the benefit to the protected interest. Furthermore, Principle IV(2) contains what is normally referred to as a public interest override: notwithstanding any harm to a legitimate interest, the information must still be disclosed if this is in the overall public interest.

Article 4 of Regulation 1049 sets out the regime of exceptions. Article 4(2), for example, states that access to institution documents may be refused if, among other things, it would undermine the protection of the commercial interests of a legal or natural person, court proceedings or legal advice, or the purpose of inspections, investigations or audits. However, this does not apply where there is an overriding public interest in disclosure. Again, this encapsulates the three elements of the test. A list of legitimate aims is provided, disclosure must threaten to cause harm to on of those interests and there is a public interest override.

Article 4 of the Aarhus Convention allows for non-disclosure of information only were disclosure would adversely affect a list of legitimate interests. It then goes on to state that: “The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions in the environment.”

Principle 4 of the ARTICLE 19 Principles also sets provides a list of legitimate aims and for the requirement of harm to one of those aims. Regarding the public interest, it states: “Even if it can be shown that disclosure of the information would cause substantial harm to a legitimate aim, the information should still be disclosed if the benefits of disclosure outweigh the harm.”

Article 4(1) of the Rules sets out the regime of exceptions to the right of access. It provides: “Access to all or part of a document shall be refused where its disclosure would undermine the protection of,” and then lists eight reasons for either the total or partial refusal to disclose a document. These include:

- international relations or the financial, monetary or economic policy of the Community, its institutions and bodies or a Member State;
- privacy;
- court proceedings;
- legal advice;
- the purpose of inspections, investigations and audits;
- commercial interests;
- professional secrecy, including professional banking ethics, rules and practices; and
- the legitimate interest of the Bank in organising its internal management, notably with respect to human resources.

Article 4(2) provides for the confidentiality of internal documents where disclosure would undermine the Bank’s decision-making processes, even after a decision for which the document was prepared has been taken.

Article 4(3) provides for the non-disclosure of information concerning third parties where the information has been identified as confidential, where there is an undertaking of confidentiality between the third party and the Bank or "where the information is otherwise of such a nature that it is subject to the Bank's confidentiality towards third parties." These exceptions do not apply where the third party has consented to disclosure (Article 4(4)).

Pursuant to Article 4(5), the exceptions generally last for 30 years but, where they relate to privacy, commercial interests or internal management powers, they may be extended beyond this time period.

By-and-large, the aims protected by these exceptions are in line with international standards. We note, however, that the exception in favour of professional secrecy is undefined and effectively grants the Bank wide latitude to avoid disclosing a document. It may be noted that national freedom of information laws do not include exceptions of this sort, even though banking operations are often included within their ambit. Furthermore, some of the exceptions are phrased in unduly broad terms. For example, Article 4(2) refers simply to decision-making processes, without specifying exactly what sort of harm is sought to be avoided. This could be abused in a way that largely undermined the right of access.

Article 4(3) is also an extremely broad provision, effectively granting third parties a right of veto over the disclosure of information. It is not subject to a harm test; indeed, the third party does not even need to show that any legitimate interest they may have is affected.

The Rules do not include any provision for a public interest override to overcome these exceptions where this is in the overall public interest.

Article 4(5) envisages an unduly long period of confidentiality. The question of whether or not information should be disclosed should be assessed at the time of any request, in the light of the situation at that time. While an overall time limit on classification can be helpful, this provision does not establish one. Rather, it appears to establish a presumption period of secrecy of 30 years.

It is well-established under international law that, where only part of a document is legitimately secret, the rest should be disclosed, known as severability. For example, the Council of Europe Recommendation states:

> If a limitation applies to some of the information in an official document, the public authority should nevertheless grant access to the remainder of the information it contains. Any omissions should be clearly indicated. However, if the partial version of the document is misleading or meaningless, such access may be refused.[45]

[45] Note 4, Principle VII(2).

The only reference in the Rules to the concept to the severability is in Article 4(2), which states that "all or part of a document…shall be refused if disclosure of the document would undermine the Bank's decision-making processes." It is unclear, therefore, whether Bank staff will apply this concept to the other exceptions.

Recommendations:

- The EIB information policy should subject any refusal to disclose information to a strict three-part test, as described above, including a requirement of harm to a protected interest and a public interest override.
- The exceptions in the EIB information policy should be drafted clearly and narrowly and the policy should include a paragraph that requires them to be interpreted narrowly. In particular, the exceptions in favour of decision-making processes and confidentiality should be redrafted in narrow terms and be subject to a harm test.
- The exception in favour of professional banking rules should be removed from the policy.
- The policy should not set presumptive periods of confidentiality; rather, it should set time limits on confidentiality.
- The concept of severability should apply to all exceptions.

IV.4 Access Procedure

The procedure that must be followed by the public for requesting information, and by Bank staff for responding to information requests, is described broadly above. ARTICLE 19 has identified a number of ways in which this system could be improved.

Article 2(4) of the Rules grants Bank staff the discretion not to follow-up a request for information, and to refuse a request outright, if it is of an "excessive or patently disproportionate nature." This provision is not found in national laws and may be abused. It may be appropriate to refuse vexatious requests, or requests which would unduly divert the resources of the Bank. The notion of excessive, on the other hand, is highly subjective and does not relate the refusal to a legitimate Bank interest.

Article 12(4) of the Administrative Code extends the discretion to refuse to respond to requests for information where these are of a "repetitive or inappropriate nature." With no set criteria regarding what constitutes a "repetitive" or "inappropriate" request, this provision could be abused. For example, if a number of persons in a community are concerned about the same issue, and each sends a separate request for information, could the Bank rely on this provision to refuse to acknowledge their concerns on the basis of the repetitive nature of the requests? ARTICLE 19 suggests that a more appropriate formulation is that provided for in the Council of Europe Recommendation, which states that a request for access may be refused if the request is "manifestly unreasonable."[46]

Article 13(1) gives Bank staff two months to respond to requests for information. Article 13(2) of the Administrative Code states that where a request raises complex issues, there

[46] Principle V(6). Reasons for the refusal must still be provided. See Principe V(7).

may be a further delay in responding, but that the applicant will nonetheless receive a definitive reply "as soon as possible."

The time limit in Article 13(1) is excessive. Article 8 of Regulation 1049 states that either a response or access must be provided in 15 days. Principle VI(3) of the Council of Europe Recommendation states: "A request for access to an official document should be dealt with promptly." Time limits in national laws very rarely allow beyond 30 days to answer a request.

The phrase "as soon as possible" in Article 13(2) is not sufficiently circumscribed to give full effect to the right to information, and could be abused to deny access indefinitely. Consistent with access to information legislation in many countries, Regulation 1049 provides for an extension of the response period of an additional 15 days provided that the applicant is notified in advance of the delay. Failure to respond within the time limit is to be treated as a deemed refusal, thereby entitling the applicant to make a complaint to the Ombudsman.[47]

Article 13(5) states: "Members of staff shall refrain from sending any reply to other external parties unless the persons concerned have been informed." The meaning and practical effect of this are unclear.

Recommendations:

- Vague concepts such as "excessive or patently disproportionate" and "repetitive or inappropriate", which grant wide discretion to staff members to refuse to disclose information, should be removed from the Rules and Administrative Code. Instead, clear and narrow terms should be used.
- Article 13(1) should be amended to provide for a shorter time limit for responding to requests.
- Article 13(2) should be amended to provide a fixed extension period, to be applied only where strictly necessary for handling complex information requests.
- The meaning of Article 13(5) should be clarified.

IV.5 Access to Documents and Costs

Article 5(1) of the Rules states that applicants will be granted access to information by either consulting documents "on the spot" – presumably on Bank premises – or by receiving a copy, in electronic form where available. Article 7 states that applicants may be charged a fee to cover costs associated with making documents available.

Since applicants may have to cover costs, they should be entitled to receive hard copies of documents should they so wish. Article 10 of Regulation 1049 states that applicants will receive a copy of the requested document *including* an electronic copy, where available. The EIB policy implies that an electronic copy will preclude receipt of a hard copy. Not everyone is able to download lengthy documents from email and travelling to the Bank's premises may not be practical.

[47] Articles 7 and 8.

Regarding costs, the EIB policy should specify that applicants will only be liable to cover reasonable expenses related to processing requests. The Council of Europe Recommendation states: "A fee may be charged to the applicant for a copy of the official document, which should be reasonable and not exceed the actual costs incurred by the public authority."[48] Regulation 1049 states that charges for documents "shall not exceed the real cost of producing and sending the copies."[49]

Recommendations:

- Documents should be made available to applicants in hard copy where they specifically request this.
- Any fees charged for access should be reasonable and should be not exceed the actual costs associated with producing and sending the copies.

IV.6 Appeals

Article 16 of the Administrative Code provides for both complaints to the Secretary General of the Bank and to the European Ombudsman. This latter recourse is also repeated in Article 8 of the Rules, which states that in the absence of a reply within the prescribed deadline, or "in the event of a total or partial refusal following a complaint", applicants are free to contact the European Ombudsman in accordance with Article 195 of the EC Treaty.

The complaints procedure outlined at Article 16 of the Administrative Code is very sparse and fails to state how such complaints will be processed, or even that they will be processed. Given that the Bank is not subject to European law in the same manner as the other European institutions, the potential impact of an appeal to the Ombudsman is unclear.

We recommend that complaints be directed to an independent body with binding powers to order the Bank to disclose information. As noted in the ARTICLE 19 Principles, the complaints body should:

> …be granted full powers to investigate any appeal, including the ability to compel witnesses and, importantly, to require the public body to provide it with any information or record for its consideration, *in camera* where necessary and justified.
>
> Upon the conclusion of an investigation, the [administrative] body should have the power to dismiss the appeal, to require the public body to disclose the information, to adjust any charges levied by the public body, to fine public bodies for obstructive behaviour where warranted and/or to impose costs on public bodies in relation to the appeal.
>
> The [administrative] body should also have the power to refer to the courts cases which disclose evidence of criminal obstruction of access or wilful destruction of records.[50]

[48] Principle 8(2).
[49] Article 10(1).
[50] Principle 5.

Recommendations:
- The EIB information policy should provide effective recourse to members of the public whose requests for information have been denied.
- The body charged with overseeing appeals should have the power to investigate claims and enforce their decisions, as outlined above.

IV.7 Omissions

The EIB's public information policy has a number of omissions which, if remedied, would improve the quality of the policy and bring it further into line with international standards in this field.

First, there is no protection for whistleblowers, or members of staff who release information on wrongdoing. 'Wrongdoing' in this context includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body. It also includes a serious threat to health, safety or the environment, whether linked to the individual wrongdoing or not.

Whistleblowers should be protected from legal, administrative or employment-related sanctions so long as they acted in good faith. Such protection should apply even where disclosure would otherwise be in breach of a legal or employment requirement.[51]

Second, unlike the Aarhus Convention, there is very little provision in the Bank's information policy for actual public participation in specific activities. As pointed out in the ARTICLE 19 Principles, "Freedom of information includes the public's right to…participate in decision-making processes."[52] The Bank's How EIB Communicates – an overview, lists the ways in which it seeks to communicate with NGOs. It does not, however, provide for input by the public, merely for communication to them.

Finally, the Administrative Code fails to impose an obligation on staff to preserve documents. Maintaining records over an extended period of time, and preserving their physical (or electronic) condition, is an important element of the right to information. The Council of Europe Recommendation calls on Member States to manage their documents efficiently and "apply clear and established rules for the preservation and destruction of their documents."[53]

Recommendations:
- The public information policy should include whistleblower protection.
- Meaningful provision should be made to encourage public participation in Bank decision-making processes.
- The information policy – and specifically the Administrative Code – should create a system for the proper maintenance and appropriate destruction of records.

[51] See the ARTICLE 19 Principles, Principle 9.
[52] Principle 7.
[53] Principle X(2).