



Bold Measures Towards a Responsive PCP

Joint Recommendations on the ADB Public Communications Policy

Submitted by:

**NGO Forum on the ADB
and
Global Transparency Initiative**

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On 15 February this year, the Asian Development Bank (ADB) opened for comments its Public Communications Policy (PCP), pursuant to a commitment under paragraph 166 thereof to conduct a “comprehensive review after a period of time, not to exceed 5 years from the effective date of the Policy”. The PCP became effective on 1 September 2005.

In response to such call for comments, the NGO Forum on the ADB (Forum) and the Global Transparency Initiative (GTI) hereby submit these Joint Recommendations on the PCP. The recommendations consolidate our common and most important proposed revisions to the PCP, based on two reports: first, the report titled *Securing the People’s Right to Information: Will the ADB Rise to the Challenge?* prepared by the GTI, and second, the report titled *Failure to Deliver: The State of People’s Access to Information under the ADB PCP* prepared by Forum. These two reports are attached herewith and form integral parts of this submission.

Our recommendations focus on three aspects of the PCP that are of utmost public concern, namely: (1) the regime of exceptions; (2) the oversight or appeals systems; and (3) access by affected people to project information.

Recommendations on the Exceptions

The main exceptions under the PCP are set out in paragraphs 126, 127 and 130 of the Policy. Paragraph 126 is the main provision, while paragraph 127 provides for a more limited set of exceptions that continue to apply after twenty years (under the heading Historical Disclosure). Some of the proactive disclosure commitments, found at paragraphs 60-122 of the PCP, also include exception provisions.

While we recognise that the right of the people to information held by the ADB is not absolute, any system of exceptions must adhere to international norms that require disclosure of information unless doing so would cause harm to a clearly identified legitimate private or public interest, which harm outweighs the benefits that would result from disclosure of the information. Outside the recognized exceptions, disclosure of access cannot be discretionary on the part of the public entity or any third party. When disclosure is denied based on a claimed exception, the public entity has the burden of showing that the information requested falls within the scope of one or more exceptions. Such burden is not discharged by a bare reference to an exception.

Examined against these standards, while many of the exceptions adhere to a harm test, there remain a number of exceptions covering whole categories of information without reference to any legitimate interest being protected by non-disclosure. Also, there are provisions that allow discretionary withholding of information. Finally, there is lack of definiteness in the requisite substantiation of a denial of access. The results of these flaws are the abuse of exceptions as confirmed in community consultations and specific case experiences.

To address the foregoing issues, we recommend the following:

1. In paragraph 126(1), the reference to “internal documents, memoranda, and other similar communications” should be deleted.
2. The deliberative process exceptions under paragraphs 126(1) and 126(2) should expressly exclude background information such as facts, analysis of facts and technical data.
3. Paragraph 126(9), protecting “confidential business information”, should be replaced by protection of trade secrets, and the definition of “confidential business information” should be deleted.
4. Paragraph 130, protecting legal agreements on confidentiality, should be removed.
5. The provisions in paragraph 99 giving a bilateral or multilateral co-financier the right to object to the disclosure of legal or financial agreements in official co-financing transactions, as well as the provisions giving blanket exception to commercial co-financing agreements, should both be removed.
6. The provision in paragraph 104 exempting private sector legal agreements from public availability should be removed, and the section revised to align with paragraph 103 where public sector loan agreements are made publicly available after excising exempt information.
7. Protection of information related to procurement processes, as provided for in paragraph 126(10), should be removed.
8. The exception in favour of privacy, in paragraph 126(4), should incorporate a harm test (such as unreasonable disclosure of private information).
9. The exception in paragraph 126(5), protecting various types of ADB economic data, should refer to a legitimate interest and incorporate a harm test.
10. The exceptions at paragraph 126(16), in favour of audit reports, and at paragraph 126(6), in favour of country credit ratings, should either be removed or conditioned by reference to the idea of harm to a legitimate interest.
11. The protection to Board of Directors proceedings under paragraph 126(7) should be removed. Instead, Board meetings proceedings should be made available on a proactive basis.
12. The names of those declared ‘ineligible’ under the anticorruption policy should be published on the ADB website, instead of being rendered confidential pursuant to paragraph 126(15).

13. Protection of whistleblowers (“source of a corruption allegation” under paragraph 126(14)) should be made subject to a harm test such as serious prejudice to the prevention or detection of corruption.
14. The provision for public interest override under paragraph 129 should be revised to make it mandatory and so that it applies whenever disclosure is in the overall public interest.
15. The historical protection to certain types of information under paragraph 127 – such as Board information and internal information – should be shortened to five or at most ten years.
16. The requirement under paragraph 155 for ADB to provide reasons when information in a document is removed for being confidential, and in paragraph 157 for ADB to provide the reasons why a request has been denied, should be made more definite by requiring a clear statement of the legitimate aim or interest sought to be protected, and the facts and circumstances that demonstrate the substantial harm to, or the frustration of, the legitimate aim or interest that will result from the disclosure of the information.

Recommendations on the PCP Appeals Mechanism

Anyone who believes that an international financial institution has failed to respect its access to information policy has the right to have the matter reviewed by an independent and authoritative body.

There are two appeals mechanism under the PCP. First, paragraphs 158 and 159 provide for review of denial, or interpretation, by a Public Disclosure Advisory Committee. Second, paragraph 177 provides that the disclosure requirements of the Policy shall be subject to compliance review in line with ADB’s accountability mechanism.

There are limitations to the use of the accountability mechanism to seek redress for violation of access to information. One, it is restricted in scope to those who have suffered harm from the non-application of a policy. Second, the procedure for accountability reviews is normally cumbersome and time-consuming.

This leaves the PDAC as the principal appeals mechanism available to the public. However, the PDAC lacks independence given its composition.

While the ADB can maintain the PDAC as a level of internal appeal, we recommend that ADB also put in place an independent body, perhaps along the lines of the proposed new World Bank oversight body, to consider appeals from decisions of the PDAC (see paragraph 28(b) and footnote 40 of the new Disclosure Policy of the World Bank).

Recommendations on Access by Affected People

The Forum, with participation from GTI, hosted three community consultations with select affected communities and their support groups from Indonesia (held in Yogyakarta, Indonesia on 22-23 January 2010), the Mekong region (held in Siem Reap, Cambodia on 19-21 February 2010) and South Asia (held in Dhulikhel, Nepal on 26-28 February 2010). Forum also solicited comments from groups from Central Asia. The consultations aimed to gather inputs and experiences on accessing ADB information from affected communities and groups working with them in project monitoring and advocacy in ADB funded projects.

The problems identified by the participants are in general similar. These include:

- Ineffective public/community notice of projects under preparation.
- Limited, incomplete information on the project and on the ADB, if at all available at the local level.
- Lack of timeliness of information.
- Deficit of gender segregated data and analysis in providing reliable information related to projects
- Inaccuracy of information.
- Lack of women's participation in consultative phase or a balanced gender representation in any level of communication process
- Difficulty in accessing information from the government or private sponsor.
- Poor information delivery mechanisms.
- The primary means of public access to information, which is the ADB website, is not available to most members of the community and even more difficult for women who are often excluded from means of communication technologies.
- Severe lack of documents translated in local language.

To address these problems, we recommend the following:

1. Paragraph 74 should be improved to make clear a direct obligation on the part of the ADB to provide information to communities affected by projects to which it provides assistance.
2. Paragraph 75 should be revised to make the joint development of communication plans for ADB assisted projects and programmes mandatory, and not merely discretionary as presently provided. The requirement should apply not just to borrower governments, but to private project sponsors as well. The communication plan should form an integral part of publicly available preparatory project documents.

3. A new paragraph should be inserted, providing the minimum content of the communication plan, to include the following:

a) Communication strategy appropriate for the project or programme

The communication strategy would differ based on a number of factors, including the nature and scope of the programme or project and its location, the profile of the affected people, including gender segregated data, and the expected level of public interest in the project. The strategy should include a gender sensitive and responsive multi-stakeholder mechanism for information management and flow at the local level.

b) Mechanism for effective public notice

The plan should indicate how and when the ADB and the borrower/project sponsor will notify a community that a project or programme expected to affect them is under preparation. The notice may be disseminated in different ways, such as on board notices in conspicuous areas, via notice letters through local government administrative units or announcements through the mass media, and through other appropriate means. The notice should reach out to as many right-holders as possible, including women and marginalized groups. It should also identify where and how more detailed information about the project or programme may be accessed.

c) Designation of information centres

The information centre for the project or programme should be identified. For projects affecting communities, the information centre should be located within the community, such as at a public school or local government office. The information centre should be also gender sensitive and responsive.

d) Complete and timely information to be made available

Information centres should have copies of all publicly available information, on the project or programme (such as the PID, safeguard documents as amended by the new Safeguard Policy Statement, the gender action plan), with a documents index for easy reference, updated on a rolling basis, including as new project/programme documents are produced.

e) Key information that should be produced or translated in accessible language and form.

f) Reporting and monitoring of implementation of the communication plan

The communication plan should indicate the responsibility and mechanisms for monitoring of and reporting on its implementation.

Other Recommendations

1. The right to access information held by public bodies, including inter-governmental organisations like the ADB, is a fundamental human right. We recommend that the ADB make unequivocal its recognition of the right by replacing the word “supports” in paragraph 31 with the word “recognizes”
2. Under the definitions, “publicly available” means available on ADB’s website. This definition is misleading. The confusion is apparent when we look at the reference to “publicly available” in paragraph 154, in relation to heading #2 immediately before it, referring to “exception-based requests for information”. The paragraph seems to imply that documents not identified as publicly available (available on the website) are “exception-based”. This contradicts the disclosure presumption. We recommend that availability on the website be referred to differently.
3. There must be a review of the documents identified for pro-active/automatic disclosure, to see whether there are important documents routinely produced by ADB or submitted to it, but are not automatically disclosed. A number of these documents have been identified in the case experiences as very important (such as Aide Memoire, etc.) to communities and advocates.
4. The PCP should strengthen its provisions on translations. It should include a requirement for translation of a minimum, specifically identified set of documents/information into local language for project affected people or for the general public.
5. During the consultations, there have been consistent questions about ADB’s accountability for failure to observe its obligations under the PCP. The accountability question is important considering the effects of violations of the people’s right to information to equally important related rights, such as the right to participate, and the right to free, prior informed consent in the case of indigenous communities. Failure of deliver adequate information also often leads to higher transactions cost for everyone concerned, and in some cases, to total project failure. It is therefore high time that the ADB introduces a mechanism for administrative complaint and sanction to personnel found in violation of the right to information through non-observance of obligations under the PCP. This is a common feature in advanced national right to information legislations.

Beyond the above joint recommendations, our respective full reports referred to earlier contain detailed analysis of the PCP as well as other recommendations. We hereby also submit these reports as our respective comments and supplementary recommendations.

We hope that the ADB will seriously consider the concerns we raise, and favorably respond to our recommendations. We challenge the ADB to take the bold measures necessary to bring the PCP fully into line with the people's right to information.

The **NGO Forum on the ADB** is a 250-strong Asian-led network of civil society organizations and communities that has been monitoring the Asian Development Bank's policies, projects and programs since 1992. Communications may be forwarded to:

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