

***Comments and Recommendations on the Inter-American Development Bank's  
Update to the Access to Information Policy Profile***

*December 24, 2019*

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We, the undersigned civil society organizations, appreciate the opportunity to participate in the consultation process of the Inter-American Development Bank (“IDB” or “the Bank”) on its *Update to the Access to Information Policy Profile* (“*Policy Profile*”). As human and environmental rights organizations that support communities impacted by development finance, including IDB Group, we welcome the impending review of IDB’s *Access to Information Policy* (“*Policy*”) as an important step towards ensuring that the Bank’s operations avoid harm and fulfill the development priorities of those affected.

Although we welcome the Bank’s commitment to enhancing transparency and strengthening governance and accountability, the changes proposed in the *Policy Profile* are narrow and conservative, falling woefully short of “*reflect[ing] new information access trends and standards seen in International Financial Institutions and globally*” and indeed, already established international best practice.<sup>1</sup>

Fulfilling the right to information is the foundation for meaningful participation and stakeholder engagement, and is key to ensuring that projects and policies actually better the lives of those they affect. Our collective experiences have shown that having early access to information can mean the difference between a community learning about a development project when the bulldozers arrive, and a community engaging with investors to co-design a project that avoids harm and creates real benefits. In practice, the right to access information goes far beyond simple information disclosure — it ensures that communities are equipped with the necessary information to substantively engage in and influence the development processes that will ultimately shape their lives.

**We strongly recommend that the IDB produce a revised draft *Access to Information Policy* that is people-centered and reflects that access to information, as a fundamental human**

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<sup>1</sup> Policy Profile, para. 1.3, p.1

**right, is integral to the successful implementation of its mission as a bank aiming to further development.** In addition, we urge the IDB to expand the scope of the changes proposed, and seek to align itself with not just the policies of peer development finance institutions, but with international and regional best practice and norms. Globally, the Latin American and Caribbean region is at the forefront of normative advances in access to information, including through precedent established by the Inter-American Court of Human Rights and the recent adoption of the *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement)*.<sup>2</sup> In particular, the *Escazú Agreement* also solidifies the understanding that rights-respecting development is only possible through the meaningful participation of those affected, predicated on meaningful access to information.<sup>3</sup> With this *Policy* review, **the IDB has a key opportunity to present itself as a leader in the space of access to information, in line with the history and expectations of the region.**

Finally, we remind the IDB that a meaningful consultation on key policies involves an exchange of information, with the ultimate purpose of producing a final document that reflects the comments, concerns and feedback of the public. We are concerned about the inclusion of a statement in the *Policy Profile*, under the heading “Risks,” which states that this review process

*“is expected to generate significant interest among diverse stakeholders, who may have different expectations as to the scope that the updated IDB access to information framework should have given the international advances made in issues related to access to information.”<sup>4</sup>*

This statement categorizes robust public participation in this process as a “risk” and indicates that the scope of the review has already been set - without taking into account the feedback from the consultation process. This, in combination with the short 45 day comment period at the end of the calendar year, the lack of a clearly indicated deadline on the Bank’s website and lack of consultations in-region for this phase of the *Policy* review, cause us to seriously question the meaningfulness of this public comment period, and the Bank’s good faith in listening to and incorporating feedback. Further, this statement acknowledges itself that the changes proposed by the IDB fall short of meeting international and regional advances in the right to information.

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<sup>2</sup> In 2006, the Inter-American Court of Human Rights decided the first case recognizing access to information as a human right in international jurisprudence, *Claude Reyes vs. Chile*. See [https://www.oea.org/es/cidh/expresion/docs/cd/sistema\\_interamericano\\_de\\_derechos\\_humanos/index\\_IA\\_LFRAI.html](https://www.oea.org/es/cidh/expresion/docs/cd/sistema_interamericano_de_derechos_humanos/index_IA_LFRAI.html)

<sup>3</sup> This understanding is also embedded in Articles 1 and 2 of the United Nations Declaration on the Right to Development. See <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RightToDevelopment.aspx>

<sup>4</sup> *Policy Profile*, para. 6.4, p.21

We strongly recommend that the IDB ensures that subsequent phases of its consultation process on this *Policy* meaningfully consult with civil society and communities affected by Bank investments in the region, and that the draft *Access to Information Policy* reflects the comments and recommendations received. In addition, we urge the IDB to widen the scope of this review and not be limited by the 22 narrow gaps outlined in the *Policy Profile* which overlook key issues, so that the *Policy* may be comprehensively updated to meet international and regional expectations. Those points raised during the last review conducted in 2010 which were subsequently not addressed within the current *Policy* should also be considered within the scope of this update.

We offer the following comments and recommendations with the aim of contributing to a robust consultation process, and a stronger *Access to Information Policy* and practice at the IDB. We look forward to continuing our engagement with the IDB and seeing our feedback meaningfully incorporated within the draft *Policy*.

### ***Overall Recommendations for Draft Access to Information Policy***

- **Recognize and embed the right to information at the core of a new *Access to Information Policy* that is people-centered.** The right to information is a fundamental human right, and has had a long history in practice internationally since the very first resolution of the United Nations General Assembly in 1946, and the adoption of the *Universal Declaration of Human Rights* in 1948.<sup>5</sup> As stated above, regional advancements, including the *Escazú Agreement*, are particularly relevant for the context IDB operates within, and the framing of the *Policy* should reflect this understanding. The purpose of information disclosure as fulfilling the rights of communities and bettering development outcomes should be reflected in the contextual framing of the new draft as well, and throughout its provisions.
- **Revise and update all language in the *Policy* to ensure provisions are no longer vague, subjective or discretionary.** Although we welcome the identification of specific Gaps in the *Policy Profile* where the *Policy* could benefit from clearer and more precise language, there are many additional provisions within the existing *Policy* that require the same attention which are overlooked. We note that the *Policy Profile* also uses similarly vague and subjective language in its proposed changes, and strongly recommend the excision of all such language in the draft *Policy*, including language that indicates effort

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<sup>5</sup> For more information, see UNESCO, "About Freedom of Information," available at <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/about/>

but not commitment on the part of IDB to implement provisions and timelines.

- **Adhere to and respect the *Policy*'s own commitment of “maximizing access to information” and “narrow and clear exceptions” by instituting the three-part test when determining disclosure of information.** The exceptions outlined in IDB's current *Policy* are neither narrow nor clear, and we advise the Bank to follow the internationally endorsed three-part test, formulating a limited and reasonable hall of exceptions that should relate to a legitimate aim.<sup>6</sup> When determining to withhold information, the information in question should be taken as a substantial threat to this aim, and the harm to the aim must be greater than the public interest in accessing the information.<sup>7</sup> In accordance with the principle of maximum disclosure, we urge the Bank to disclose all information in its possession by default, unless it falls under a narrowly defined field of exceptions, as determined by the three-part test.
- **Codify environmental and social information disclosure practices, including timelines for disclosure, within the draft *Policy*.** In line with a people-centered approach, the significance of environmental and social information for those affected by Bank operations warrants the regulation of its disclosure practices within the *Policy* itself, not solely within the non-binding *Implementation Guidelines*.

In addition to providing clear timelines for disclosure of all environmental and social documents, among other project-related information, the *Policy* should specify the proactive disclosure of:

- Rationale for project risk categorization to encourage participation and transparency prior to Board approval;
- All environmental and social documents prior to Board approval, and provide explanations when certain documents are considered inapplicable or not required;
- Information about which policies are considered applicable for each project, including a list of relevant safeguards likely to be triggered and explanations for those that are considered inapplicable;
- Timely updates about the status of a project within the project cycle, and about the status of consultations and processes of free, prior and informed consent;
- Information pertaining to sub-projects of all financial intermediary investments, especially those deemed high-risk; and

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<sup>6</sup> The three-part test is a test developed under principle 4 “limited scope of exceptions” of the Principles on Freedom of Information Legislation developed by Article 19 and endorsed by international courts and experts around the world, such as the UN Special Rapporteur on Freedom of Opinion and Expression and the OAS Special Rapporteur on Freedom of Expression. For details, see <https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf>, principle 4.

<sup>7</sup> See *idem*, pp. 5/6

- Existence of and procedures for accessing MICI, IDB's independent accountability mechanism.

Given the clear interlinkages between the *Access to Information Policy* and the *Environmental and Social Policy Framework (ESPF)* as core documents within IDB's sustainability and accountability frameworks, we advise the Bank to clarify how both policies will work together to ensure all aspects of project information disclosure are addressed - particularly given that the *ESPF* is currently under review with a different timeline than this *Policy*.

- **Address the issue of the lack of compliance with publication deadlines for Bank staff within the draft *Policy*.** We are encouraged to see the IDB acknowledging that “*there are noticeable delays in complying with the statutory disclosure periods*”, a practice that we have also observed in accessing information about proposed projects, particularly those classified as Category C or low-risk FI.<sup>8</sup> However, this shortcoming is not addressed in the Gaps identified by the *Policy Profile*. While the delays in publication of project information and proposals may seem inconsequential on face, failure to disclose information prior to Board approval precludes the opportunity for communities to meaningfully participate in the project's design - in addition to failing to comply with Bank policy. We recommend substantively addressing this issue in the draft, and embedding a people-centered ethos at the heart of the *Policy* which would prioritize access to information for those affected by the Bank's operations.
- **Eliminate the exception that allows countries to object to disclosure of “country-specific information”.** We were disappointed to observe that the *Policy Profile* neglects to identify one of the biggest gaps in IDB's current *Access to Information Policy* - the broadly worded and discretionary exception for “country-specific information.”<sup>9</sup> Annex 1 of the *Policy Profile* shows that this exception has been used by countries to object to the publication of key documents, such as country strategies and project-related documents, which are publicly disclosed by other peer development finance institutions. As is acknowledged in the same Annex, no other multilateral development bank considers this as a valid exception in their policies on access to information. The Office of Evaluation and Oversight's (OVE) evaluation of IDB's access to information systems highlights that this exception is unique to IDB policy, and is “*inconsistent with the core principle of transparency,*” as it is a “*broadly written*”

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<sup>8</sup> Policy Profile, para. 2.13, p.5

<sup>9</sup> IDB Access to Information Policy, para. 4.1.i, p.4

exception to disclosure of country-specific information to which a country objects.”<sup>10</sup> OVE also explains why the application of this provision is problematic:

*“The application of this exception raises **problems of inconsistency** with the overall Access to Information policy for three reasons: (i) the notion of information as “potentially damaging” is difficult to define and to limit in scope; (ii) the open-endedness of the wording allows countries to object to the publication of virtually any “country-specific information,” including, for example, a project proposal; and (iii) the remedy of publication with redactions is implied but not clearly stated in the policy.”<sup>11</sup>*

As OVE highlights, this provision could “completely undermine the access to information reform endeavor.”<sup>12</sup> We strongly recommend excising this exception in its entirety and to utilize the three-part test to formulate a new, reasonable and narrowly defined list of exceptions for the draft *Policy*.

### ***Specific Recommendations on Gaps Identified by the Policy Profile***

- **Gap #2: Safety and Security.** We welcome the clarification of this exception, and recommend that this provision be explicitly extended to individuals, groups or communities who may experience reprisals in seeking access to information. Particularly in the region where IDB operates, people increasingly face risks and retaliation for engaging with or attempting to participate in development processes - a context the *Policy* should both acknowledge and address.<sup>13</sup> Similarly, the *Policy* should also add provisions missing from the current document that would protect whistleblowers from personal or professional consequences, in line with international best practice.<sup>14</sup>
- **Gap #4: Deliberative Information.** This exception should be based on the three-part test. In addition, the *Policy* should clarify that the exception applies to information on which a specific decision or agreement is to be based. This is consistent with better practice at

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<sup>10</sup> Office of Evaluation and Oversight (OVE), “Mid-term Evaluation of IDB-9 Commitments: Access to Information Background paper” March 2013, p.3 available at <https://publications.iadb.org/en/idb-9-access-information>

<sup>11</sup> Idem, p.7

<sup>12</sup> Idem.

<sup>13</sup> For more information, see Global Witness, “Enemies of the State”, July 2019, available at [https://www.globalwitness.org/en/campaigns/environmental-activists/enemies-state/?gclid=EAJaIQobChMlzPTXuLfm5gIVT\\_jBx2p0gJAEAAAYASAAEgKBF\\_D\\_BwE](https://www.globalwitness.org/en/campaigns/environmental-activists/enemies-state/?gclid=EAJaIQobChMlzPTXuLfm5gIVT_jBx2p0gJAEAAAYASAAEgKBF_D_BwE)

<sup>14</sup> See Principle 9 in Article 19, “Public’s Right to Know: Principles on Freedom of Information Legislation”, available at <https://www.article19.org/wp-content/uploads/2018/02/public-right-to-know.pdf>

other peer development finance institutions, including the World Bank's interpretation of its own *Access to Information Policy*.

- **Gap #6: Information Provided in Confidence and Business / Financial Information.** Although we welcome clarification for this provision within the existing *Policy*, the *Policy Profile* indicates that the change would “*emphasize[] that this exception applies to information deemed confidential by member countries, third parties or other entities that has been provided in confidence and/or with restrictions on disclosure.*”<sup>15</sup> The language proposed is too broad and does not align with the principle of narrow and clear exceptions, particularly the reference to “third parties or other entities” which could have any number of definitions. We reiterate that the new *Policy* should avoid such vague, broad and discretionary language and apply the three-part test when determining a clear and narrow hall of exceptions.
- **Gap #7: Annexes.** We recommend that the new *Policy* add an Annex which provides a non-exhaustive list of documents that are routinely disclosed, and the time frames for their disclosure. Stakeholders and communities affected by IDB operations should know which documents they should expect to routinely be made publicly available, and when these documents will be made public during the project cycle. This will not only improve predictability and transparency during the project cycle, but also clarify how the commitment to maximum disclosure will be implemented in practice. Additionally, Annex I of the existing *Policy* should be removed, if the *Policy* is to truly comply with the principle of maximum disclosure, as any information not to be disclosed should be determined through the three-part test.
- **Gap #10: Deadlines for Responding to Requests for Information from the Public.** We note that the proposed timeframe to respond to requests for information is longer than the time frames set out by other multilateral development banks. For example, the African Development Bank, European Bank for Reconstruction and Development, European Investment Bank and World Bank all establish 20 working days or less as presumptive maximum processing times for requests. We recommend the *Policy* update consider reducing the timeframe to align, at minimum, with the better practice of the IDB's peers.
- **Gap #12: Protecting the Identity of Requestors of Information.** We support the proposed changes, and suggest also allowing for anonymous complaints, to further protect those who might fear retaliation for requesting information from IDB. As mentioned above, the current oppressive climate for individuals, groups and communities

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<sup>15</sup> Policy Profile, para. 3.10, p.11

seeking access to information should be reflected within the contextual framing of the *Policy*, and accounted for within its provisions.

- **Gap #13: Review of the Access to Information Policy.** The *Policy* should establish a clear timeline for regular review and update (e.g., every five years), and for the production and disclosure of annual reports on the implementation of the *Policy*. These reports should also seek feedback and comments from those who have used the IDB's information request systems, and communities affected by IDB projects who may speak to the realities of information disclosure practices.
- **Gap #14: Accessibility and Languages.** Regarding public consultations, the proposed change of “*a clarification that the Bank will disclose material regarding the public consultations for operations with high social and environmental risks*” is vague, and does not clarify what documents will be disclosed on IDB's website for public consultation. We recommend that a plan for consultations also be released prior to embarking upon a consultation process. Furthermore, IDB should disclose documents regarding public consultations for all projects, not simply high-risk projects as is currently indicated in the *Policy Profile*.

In order for communities affected by the Bank's operations to have meaningful access to information, the *Policy* should require disclosure in relevant local and Indigenous languages, and should include at least one Bank official language in addition to the national language, if different. Our experiences have shown that often, Bank project webpages are only available in one language, and are overly reliant on acronyms or terms specific to the Bank's internal functions, which can be inaccessible. The *Policy* and subsequent Implementation Guidelines should provide guidance to Bank staff in order to rectify this. The *Policy* should also strengthen its emphasis and specificity on format, particularly accessible formats for persons with disabilities, and take into account the situation of communities without easy or reliable access to the internet.

- **Gap #19: Adjustment to the Positive Override.** The *Policy Profile* proposes “*specify[ing] the levels of approval for positive overrides (governors, countries, and third parties) based on the various information types, including the Access to Information Committee's responsibilities in this matter*” are not consistent with the practices of other leading development finance institutions, including the World Bank, the Asian Development Bank, and the European Bank for Reconstruction and Development. A requirement to secure approval from countries, governors, and third parties is an unnecessary barrier to the exercise of the IDB's positive override, and contravenes the principles of best practice. The *Policy* should clarify and narrowly define the circumstances under which

the Board of Governors or the Board of Directors would need to approve the positive override, consistent with the better practices of peer multilateral development banks, and internationally endorsed principles on best practice in access to information.

In the same vein, the current *Access to Information Policy* includes the possibility of a “negative override”. We strongly recommend excising this provision from the *Policy* completely. A negative override contravenes the *Policy*’s own principle of maximum disclosure, and creates an additional exception which can be used as a blank cheque to prevent disclosure. Any exception to disclosure should be determined by the three-part test and fall under the hall of exceptions codified within the *Policy*.

- **Gap #20: References to the MICI.** We understand that it may be helpful to clarify the role of MICI in relation to the Access to Information External Panel. However, rather than removing the current reference to MICI, paragraph 9.3 should be left largely intact. The central thrust of paragraph 9.3 — that MICI is available to receive complaints of alleged violations of the *Policy* that has or may result in harm — must be retained. Communities affected by a potential violation of the *Policy* may not know of MICI’s existence. Paragraph 9.3 helps direct affected communities to MICI, where they can seek redress for harm. By directing alleged violations of the *Policy* to MICI, paragraph 9.3 also enables MICI to identify gaps in the *Policy*’s implementation or in the *Policy* itself, thereby promoting institutional learning and improvement.
- **Gap #21: Evaluation of Other Disclosure Practices.** Under this Gap, the *Policy Profile* states that, “*the Bank’s obligation under the Access to Information Policy is to disclose information and not monitor how it is disseminated by member countries.*”<sup>16</sup> We are disappointed by this derogation of responsibility from the IDB and reiterate that the Bank is a public institution, and as such has a duty to ensure that its clients are adhering to the applicable policies and standards. The new *Policy* should instead explicitly address the necessary oversight and verification exercised by IDB over its clients’ disclosure practices, and the specific disclosure requirements clients must follow, including timing of disclosure. We strongly urge the IDB to not shirk its responsibilities and do all it can to ensure that the right to information of those affected by its operations is meaningfully fulfilled, including by its clients implementing projects financed by the Bank.

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<sup>16</sup> Policy Profile, para, 3.25, p.14

## ***Recommendations on Consultation Process for the Policy Review***

Given our previous experiences engaging with IDB Group in its varied policy consultation processes, in the context of this review, we call on IDB to:

- Open in-person consultations to the general public and to anyone who wishes to contribute to the *Policy* review process - not limit participation by invitation to only a group of organizations whose work aligns with the topic, as currently established by the IDB's Consultation Plan;<sup>17</sup>
- Ensure that materials and information about the public consultation are disseminated widely and early on in the process, so that there is sufficient time for participants to meaningfully participate;<sup>18</sup>
- Rethink the fixed, general and broad questions asked during the consultation process in favour of more specific questions that probe for feedback and opinion on the documents being consulted upon;
- Hold, at a minimum, a virtual public consultation on the final version of the *Policy*, before its approval by the Board; and
- Conduct a robust public consultation process on the *Policy's* Implementation Guidelines, including in-person consultations, that allows for a longer review period than 30 days, as was afforded by the review of IDB Invest's *Access to Information Policy Implementation Guidelines*. The IDB's *Access to Information Policy* is only as effective as its implementation, making this document critical in ensuring that the Bank's policy commitments translate to practice and that the culture of the institution understands, embraces the ethos and principles of access to information.<sup>19</sup>

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<sup>17</sup> See para. 4.1.1.2 of the IDB Civil Society Consultation Plan:

*"Participation will be by invitation only due to logistics and space constraints. Organizations will be selected based on their work in the areas of access to information, transparency, open government, and other sectors as determined by the Consultations Team."*

<sup>18</sup> Unfortunately, this has not been the experience of civil society in previous review processes hosted by IDB Group. See "Recommendations to Strengthen the IDB Invest Sustainability Policy Review", available at [https://bankinformationcenter.cdn.prismic.io/bankinformationcenter/dbf588ee-6839-4fb5-8d7b-5a69cb19cbbc\\_12%3A17%3A19-IDB+INVEST+letter-ENG+%28fv%29.pdf](https://bankinformationcenter.cdn.prismic.io/bankinformationcenter/dbf588ee-6839-4fb5-8d7b-5a69cb19cbbc_12%3A17%3A19-IDB+INVEST+letter-ENG+%28fv%29.pdf); and "Recommendations for the Upcoming In-Person Consultation Process on the Draft IDB Environmental and Social Policy Framework", available at [https://bankinformationcenter.cdn.prismic.io/bankinformationcenter/c8bab79f-3216-4586-b964-d5c7d09919fb\\_12%3A17%3A19-+IDB+Letter+ENG-%28fv%29.pdf](https://bankinformationcenter.cdn.prismic.io/bankinformationcenter/c8bab79f-3216-4586-b964-d5c7d09919fb_12%3A17%3A19-+IDB+Letter+ENG-%28fv%29.pdf)

<sup>19</sup> We were severely disappointed with the quality of the Implementation Guidelines proposed by IDB Invest to accompany its *Access to Information Policy* and expect to see a much stronger document proposed by IDB.

## *Signatories*

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International Accountability Project (IAP)  
Bank Information Center (BIC)  
Fundación para el Desarrollo de Políticas Sustentables (FUNDEPS)  
Accountability Counsel

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See “IDB Invest’s Access to Information Policy Implementation Guidelines: Comments and Recommendations”, December 2019, available at <https://drive.google.com/file/d/1phBZj77rizkOFGXImgHpmxsKJKBnhDVE/view>