

Problems with the IFC Proposed Exceptions Regime

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ARTICLE 19

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ARTICLE 19 identifies the following problems with IFC's Draft Policy on Disclosure of Information of 22 September 2005:

Paragraph 8:

There are two problems in this paragraph relating to the scope of information covered. First, only information 'concerning its activities' is covered by the policy, whereas the policy should simply cover all information. It is not clear what this qualification will mean in practice, but at a minimum it opens up the possibility of information being denied on the basis that it does not concern IFC's activities.

Second, this paragraph places primary responsibility for disclosure of information on IFC's clients. Again, it is unclear what the implications of this would be but, to the extent that it might lead to a denial of access to information held by IFC, it is inappropriate. Indeed, IFC should make sure it holds relevant information produced by clients, for example, relating to the environment.

Paragraph 9, opening paragraph:

This paragraph sets out the general presumption in favour of disclosure but refers to the (very comprehensive) list of exceptions which follow as non-exhaustive. This is totally inappropriate as it basically leaves it entirely up to IFC to determine whether or not there is a compelling reason for non-disclosure without any limit. The regime of exceptions should, while protecting all legitimate secrecy interests, be exclusive in the sense that no other exceptions are recognised as ground to refuse to disclose information.

Paragraph 9(a):

This provision excepts from disclosure 'financial, business, proprietary or other non-public information' provided to IFC by its clients or other third parties. This is not only circular (not disclosing non-public information) but also fails to identify any harm sought to be avoided and, instead, establishes an extremely broad set of class exceptions. Much financial information provided by clients, for example, will not, if disclosed, cause them harm; indeed, much such financial information is found in the published annual reports of public companies. Indeed, this set of exceptions would appear to be broad enough to cover practically any information provided by a client. The provision goes on to talk about a competitive marketplace and this is starting to approach a more legitimate ground for non-disclosure, namely where disclosure would harm a legitimate business interest of the client.

The provision goes on to talk about the 'legitimate expectations' of clients. This is a common justification for secrecy by IFIs but is ultimately unfounded. Their expectations will depend on the content of the disclosure policy. If the policy provides

for the disclosure of information and this is communicated properly to clients, their expectations will be adjusted accordingly.

The provision then goes on to except 'legal documentation or correspondence pertaining to IFC's projects'. There are no qualifications on this exception so it would cover **all** of IFC's project correspondence, regardless of the nature or content of this correspondence. Again, this is a class exception without even a hint of reference to any possible harm. While it is legitimate to except documents covered by attorney client privilege, as provided for in paragraph 9(d), there is no need to extend this to all legal documentation, much of which is not covered by any privilege and, indeed, is public information.

Paragraph 9(b):

This provision refers, among other things, to the 'free and candid exchange of ideas between IFC and its member countries'. While this is a legitimate reference regarding relations among staff, it is much more dubious when used for relations between IGOs and States, where the sort of free and candid exchange that may be expected internally simply does not apply. The business-type negotiations that take place between these parties is often anything but free and candid. However, this is a minor problem compared to the exception, later in this paragraph, of '**any** documents, memoranda or other communications exchanged with' member countries, the board of directors and their advisors, members of management, staff, consultants, attorneys and agents. Again, this is without qualification and, if read literally, would presumably cover every single piece of information held by IFC, since all of this would at some point be exchanged between one or more of these parties.

Paragraph 9(e):

This provision excepts information the disclosure of which would violate 'applicable law'. It is not clear what 'applicable' means in this context but it might well be interpreted to include any secrecy provision in national law. This is again inappropriate as it effectively subjects IFC's disclosure policy to national law, regardless of whether or not that law is reasonable, fair or in accordance with international law.

Paragraph 9(g):

This provision provides for the confidentiality of personal information, which is legitimate. However, instead of referring to the objective of such a provision, protection of privacy, it refers to types of documents and thus risks being overbroad. For example, it refers to 'individual staff records', which may contain information which should be public. Many public bodies, for example, disclose the salaries of all staff, which would presumably be the sort of thing included in staff records.

Paragraph 10:

This paragraph contains a form of public interest override and, to that extent, is welcome. However, the override is cast in the very narrowest of possible terms, substantially undercutting its potential benefit. First, it grants IFC a right to disclose where the conditions set out in the paragraph are met. Instead, it should grant a right of access where these are met (or, conversely, an obligation on IFC to disclose). Second, the scope of the conditions which would engage the override are very limited, including only 'imminent and serious harm' to public health or safety, or to the

environment. Items such as serious abuse of human rights, or the disclosure of serious corruption or serious mismanagement are not included. Finally, the disclosure is to be limited to the 'most restricted basis necessary' to achieve the objectives. While this may at first blush appear to be appropriate, in fact, in situations where the public interest override is engaged, it will often be beneficial to disclose the information more broadly. This may, for example, not only avoid the imminent threat but also lead to measures being taken to avoid such risks in future, something which limited disclosure to certain authorities, such as is envisaged in the provision, is less likely to lead to. Furthermore, the internal appeals provision in paragraph 35 of the policy does not extend to this override, meaning that it lies entirely within the discretion of management.

Paragraph 35:

This paragraph provides for an internal appeal in case of a claim of misapplication of the policy to IFC's Disclosure Policy Advisor, who reports directly to IFC's Executive Vice President. While an appeals system is welcome, this falls very far short of the sort of independent appeals mechanism which would be required to ensure proper interpretation of the scope of the policy.