Green Climate Fund

Submission on Information Disclosure Policy: Stakeholder Consultation Draft

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September 2015

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Introduction

The Green Climate Fund (GCF) Board adopted the Interim Information Disclosure Practice (Interim Practice) at its fifth Board meeting, held from 8-10 October 2013 in Paris, France (Decision B.05/23, Annex XX).[1] At that meeting, the Board also requested the Secretariat to develop a comprehensive information disclosure policy in 2014 (Decision B.05/15, para. (b)). On 27 August 2015, after operating under the Interim Policy for nearly two years, the GCF released a document titled Information Disclosure Policy: Stakeholder Consultation Draft (Consultation Draft), soliciting comments from interested stakeholders.[2]

In the very first clause of the Consultation Draft, the GCF "recognizes the need to ensure public access and stakeholder participation in fulfilling its role" and commits to "the greatest degree of transparency in all its activities". Clause 6 sets out the principles that should guide the policy. It calls for exceptions to the disclosure of information to be "predicated upon the possibility, narrowly and clearly defined, that the potential harm to interests, entities or parties arising from the disclosure of information would outweigh the benefits" (although it also mentions legal commitments and third party notice of confidentiality as grounds for exceptions). For its part, clause 7 states: "The GCF will apply a presumption in favour of disclosure for all information and documents relating to the GCF and its funding activities."

We very much support these policy directions, with the exception of the idea that third parties can effectively veto the disclosure of information, and believe that a disclosure policy based on these principles would provide a robust basis for openness at the GCF.

The Consultation Draft includes a number of features which conform to the broad and positive policy commitments outline above. We particularly welcome the fact that the Consultation Draft is far more aligned than the Interim Information Disclosure Practice with the idea of creating a presumption of disclosure, subject to a narrow and limited regime of exceptions. We also welcome the commitments to establish more detailed rules on procedures for lodging and processing requests than the Interim Practice and an appeals body.

However, the Consultation Draft also suffers from a vastly overbroad regime of exceptions which substantially undermines its potential for ensuring access by external stakeholders to the information held by the GCF.

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[1] Available at: http://gcfund.net/fileadmin/00_customer/documents/pdf/Interim_Information_Disclosure_Practice.pdf.

[2] Available at: http://www.gcfund.org/fileadmin/00_customer/documents/Calls_for_public_input/CALL_FOR_PUBLIC_INPUT_-_Information_Disclosure_Policy__2015.8.27_.pdf.

This Submission is based on international standards and better comparative practice of both other IFIs and national laws on the right to access information held by public authorities (right to information or RTI laws). The Submission is the contribution of the involved organisations in order to help the GCF develop a policy on information disclosure which conforms as fully as possible to the standards which the Consultation Draft proclaims as its guiding principles.

1. Proactive Disclosure of Information

The Governing Instrument for the GCF provides that the GCF will operate in a transparent and accountable manner guided by the principles of efficiency and effectiveness. This commitment to transparency requires a robust policy in favour of proactive disclosure, as well as reactive (request-driven) disclosure.

The proactive disclosure of information is one of the most effective ways to ensure the highest levels of transparency in any operation or activity. By creating a culture of proactive disclosure regarding routinely produced information and documents in its possession, the GCF will follow many other international, regional and national entities which have recognised the importance of open access to information. By maximizing access to information as set forth in Principle 1 of the Consultation Draft the GCF, it can create an efficient and cost-effective system for providing stakeholders with the information necessary to understand GCF processes and decision-making. This will support meaningful participation and reduce the volume of information requests (inasmuch as this information is already available to there will be no need to request it).

The World Bank's Access to Information Directive/Procedure[3] (Section B, clauses 2-7) contains an extensive and detailed list of information that is publicly available on a routine basis, as well as the criteria used to periodically release information that it may approve for public disclosure. Ongoing declassification of information is also carried out according to guidance contained in the directive. For example, "the Bank discloses monthly statements of loans and credits, and individual loan, credit, and trust fund documents such as financing, loan, development credit agreements, development grant agreements, project agreements, guarantee agreements, administration agreements, and grant and trust fund agreements" (See Section B.f. Public Availability of Certain Financial Information). Recognising that there is a positive correlation between a high level of transparency through information sharing and public participation in development activities, UNDP has also created a strong practice for public disclosure.[4]

Unfortunately, the Consultation Draft does not provide proper guidelines on the proactive disclosure of information. While Section 8.1 of the Consultation Draft mentions some information and documents that will be disclosed on a proactive or routine basis,

[3] World Bank Directive / Procedure: Access to Information, 2015 available at: http://pubdocs.worldbank.org/pubdocs/publicdoc/2015/7/173131435852879745/AI-Directive-Procedure.pdf

[4] UNDP Information Disclosure Policy, available at:http://www.undp.org/content/undp/en/home/operations/transparency/information_disclosurepolicy.html

this is far too limited in nature and involves undue conditions and restrictions on the disclosure of this information. The information policy should establish a minimum baseline of information that will be made available on a proactive basis, which the Consultation Draft fails to do.

The following information should, at a minimum, be subject to proactive disclosure and published or made available, including through its website, in a user friendly manner that ensures easy public access:

- Project and programme proposals that are submitted for consideration to the Independent Technical Advisory Panel, subject to limited redactions based on the regime of exceptions in the policy. Projects or programme proposals that are up for consideration by the Board should also be proactively disclosed at least 30 days prior to the Board meeting, when other Board documents for that meeting are released, along with any supplemental information provided during the application process (again subject to the regime of exceptions).
- Accreditation applications should be made public when filed, with redactions of the information that is exempt under the narrow and limited regime of exceptions in the policy. Additionally, the identity of applicants that are up for consideration by the Board should be disclosed when other Board documents are released, along with any supplemental information provided during the application process that is not subject to exceptions under the policy
- Readiness support proposals, before being approved by the Executive Director
- GCF Board decisions, not later than one week after the Board meeting.
- Board meeting documents, at least 21 days before the first day of the meeting.
- Project related information documents, in English and when possible in other UN languages.
- Environmental and social reports, including the required socioeconomic and gender assessment, within established timeframes (see below).
- The annual reports to the Conference of the Parties on Board activities and the Fund's annual report, including the audited financial statements.
- Information and documents regarding the initial resource mobilization for the Fund and the Fund replenishments, including the timing of the replenishment, discussion documents for contributors meetings and the final contributors report.
- Key transparency, accountability and integrity policies and procedures of accredited entities, including information disclosure, and fiduciary, environmental, social safeguard and related gender policies.
- Interests (proprietary, financial, professional, and advisory) of Covered Individuals under the GCF's Ethics and Conflict of Interest Policies.
- Project grant and loan contracts with accredited entities, where necessary in redacted form.
- Readiness grant agreements.
- Contracts between the GCF and accredited entities regarding their accreditation.

- Registries of gifts and services valued over USD$50 received by Covered Persons under the GCF's Ethics and Conflict of Interest Policies and GCF Secretariat staff.
- Dispute-settlement mechanisms and procedures.
- The following policies, procedures and/or documentation relating to procurement should be disclosed in a timely manner, except for information which is legally protected, for example for reasons of national security or the protection of intellectual property, in accordance with international best practices such as the Global Principles for Open Contracting and Transparency International's minimum standards for transparency in public procurement:
    - Activities carried out prior to initiating the contracting process, such as needs assessment, the development of a procurement plan and budget allocation.
    - Procurement budgets and plans.
    - Tender opportunities.
    - Technical specifications.
    - Selection criteria.
    - The key elements of all bids in a public tender opening event, including bidder identity, beneficial ownership for corporate bidders and information responsive to the evaluative criteria.
    - The key elements of the bid evaluation process.
    - The award decision and its justification.
    - The issuing authority.
    - The contract and any amendments (including significant change orders) or subcontracts/agreements with executing entities.
    - Implementation, evaluation, oversight and auditors' reports.

In order to give interested stakeholders direct access to Board proceedings, the Fund should commit to webcasting Board meetings. If prior registration is deemed to be necessary for following a live-streamed meeting, the GCF should make the video publicly available immediately after the meeting.

Environmental and social reports

Clause 18 of the Consultation Draft, "project and programme proposals that have a significant environmental or social impact, reports documenting environmental and social due diligence, including related studies and analyses" is missing a reference to the mandatory socioeconomic and gender assessment mandated by the GCF gender policy, which should be added. These documents should be disclosed a minimum of 45 days in advance of a Board decision. The main reason for this extended period is to afford stakeholders adequate time to review more complex and technical data relating to potential impacts and risks related to project or programme implementation. Proposals of projects and programmes that do not have a significant environmental, gender or social impact should at the very least be disclosed within 45 days of a Board decision.

Historical Disclosure

Considering the nature and scope of the GCF's mission, limitations on the disclosure of information should not only be the exception, but they should also be limited in time. The time limit for disclosure of Board documents deemed confidential under clause 11(h), as provided for in clause 20, should be reduced to five years and such documents should be disclosed on a proactive basis, without the need for a specific request. Historical information described in clause 21 should also be made publicly available within a period of five years, noting that the distinction between GCF-funded and GCF-assisted project documents does not justify a different period for historical release.

Recommendations:

- The policy should establish minimum mandatory requirements for information that the GCF needs to make available on a proactive basis, in digital form via websites, offices and from accredited entities. A specific section on proactive disclosure of information should be included in the policy.
- Clause 18 of the Consultation Draft on Environmental and Social reports should be amended to include a reference to socioeconomic and gender assessments, and the timeframes set forth in this submission.
- The information referred to in clauses 20 and 21 of the Consultation Draft should be made available on a proactive basis after five years.
- Information published digitally should be updated periodically to maintain current records and information about ongoing activities at GCF and accredited entities which will foster proper feedback loops and lessons learned.

2. Scope of the Consultation Draft

The Consultation Draft should define more clearly the information it covers. Clause 4 states that it covers information produced by the GCF, as well as "specific information that is in the possession of the GCF", which lacks clarity. There is no other specific statement as to the scope of the policy in terms of information covered.

Better practice in this area is simply to cover all information which is held, regardless of who produced it. Thus, clause 1 of Section III of the World Bank's 2015 Bank Policy: Access to Information (World Bank Policy)[5] provides: "The Bank allows access to any information in its possession that is not on a list of exceptions". It is clear, for example from the regime of exceptions and other parts of the Consultation Draft, that the general intention is to cover information provided by third parties, but the quote from Clause 4 seems to allocate discretion to the GCF as to how far this will go. This is unnecessary as

[5] Available at: http://pubdocs.worldbank.org/pubdocs/publicdoc/2015/7/393051435850102801/World-Bank-Policy-on-Access-to-Information.pdf.

any interests of third parties in keeping information confidential are adequately, indeed excessively, protected by the regime of exceptions.

The Consultation Draft consistently refers to 'information' as being the subject to which it applies. We assume that this would automatically cover a request for a specific document as well as a request for information contained in a document. What is not clear from the Consultation Draft, however, is the extent to which the GCF will compile information from various documents to respond to a request. For example, a request might be for information for certain administrative information over time, which would be found in annual reports, or for country-level administrative information, which would need to be compiled from different country-level reports. Better practice is to commit the GCF to compiling such information, noting that clause 26(b) of the Consultation Draft allows the GCF to refuse a request where this would be "an excessive demand on the GCF's resources".

Recommendations:

- The policy should state simply that it covers all information held by the GCF.
- The policy should make it clear that the GCF will make reasonable efforts to compile information from different documents as necessary to respond to a request, subject to clause 26(b).

3. Processing Requests

Clause 6(c) commits the GCF to employing "all practical means to facilitate access to information" and to adopting guidelines setting out "clear and cost-effective procedures and timelines for processing requests". A framework of procedural rules is set out in clauses 22-25. These provide for requests to be made in writing, in English, to be sent via mail or email to the Secretariat, based in the Republic of Korea, and to specify in sufficient detail the information sought. The Secretariat will endeavour to respond to requests within 30 working days, unless additional time is needed due to "the scope or complexity of the information requested". In addition, Clause 26(b) allows the GCF to refuse a request on the basis that satisfying it would place an "excessive demand" on its resources.

These rules are positive but could be both improved and extended. Better practice is to make it clear that only a description of the information sought and an address for delivery of that information is required to be included in a request for information. The Consultation Draft should make it clear that this is all that is required and that, in particular, requesters do not need to provide reasons for their requests or even to personally identify themselves.

We also believe that a stronger commitment to receiving requests in languages other than English would be appropriate. In particular, we would welcome a commitment by

the GCF to process requests from residents of developing countries in their native languages, subject to resource and capacity constraints. To facilitate the making of requests, the GCF should also commit to other ways of receiving requests, specifically in person or via mail, which could then be forwarded to the central processing office. This would be particularly relevant for interested parties that do not have Internet access but are affected by a GCF funded project or programme.

Thirty working days is an excessively long initial time limit. The World Bank, for example, a larger and more complex organisation than the GCF, commits to providing information within 20 working days (see clause C(1) of Section III of the World Bank's 2015 Bank Directive/Procedure: Access to Information (World Bank Information Procedure))[6] and this is also a common time limit at the national level. Furthermore, while it is acceptable to provide for extended time limits in complex cases, better practice is to establish an overall time limit, for example of 40 or 50 working days, to avoid delays being extended for unduly long periods of time. If additional time is required to process information, notice, including the estimated time, should be provided to the requester.

In addition to a maximum time limit for processing requests, better practice is to commit to processing requests as soon as possible. Otherwise, there may be a tendency for officials to wait until the end of the time limit to provide information.

Clause 26(b) is open to abuse since it fails to define clearly the conditions under which this 'exception' would be engaged. A clear indication of what would constitute an "excessive demand" on the GCF should be included in the policy, perhaps expressed in terms of hours of work required to process the request.

We appreciate that it may not be possible to include minute detail about the processing of requests in the actual policy, but we believe that at least the following rules should be included in the policy, rather than being left to be addressed in guidelines:

- A commitment to provide reasonable assistance to requesters who may be in need of such assistance for whatever reason, including because they are having difficulty describing the information they are seeking sufficiently clearly or they face challenges producing a request in English and/or in writing.
- A commitment to provide an acknowledgement of receipt of a request within a set time limit, for example of five working days (see clause C(1) of Section III of the World Bank Information Procedure).
- A commitment to provide information in the form preferred by requesters (such as a physical or electronic copy) unless to do so would harm the record containing the information or unduly disrupt the work of the GCF.
- An indication that there is no charge for requesting information and a commitment to provide information free of charge, while reserving the right to charge for larger requests if this should be deemed necessary, albeit after providing for fee waives in cases of need (see clause C(4) of Section III of the

[6] Available at: http://pubdocs.worldbank.org/pubdocs/publicdoc/2015/7/173131435852879745/AI-Directive-Procedure.pdf.

World Bank Information Procedure). The rule on charging for requests should be set out in clear terms (i.e. charges will apply only after a certain number of pages of photocopying).

Recommendations:

- The policy should make it clear that only an address for delivery of the information and a clear description of the requested information needs to be included in a request and that reasons for making a request are not required to be given and that requesters do not need to identify themselves personally.
- A commitment to receive requests in languages other than English, subject to resource and capacity constraints, should be added to the policy.
- It should be possible to submit requests by mail, by email or in person.
- The time limits in the Consultation Draft should be amended to commit the GCF to providing information as soon as possible and in any case within 20 working days. An overall time limit, say of 40 or 50 working days, should be established even in cases where the initial limit is extended, and where the time limit is extended, the requester should be provided with notice of this and an indication of the extended time limit.
- The policy should define clearly what would constitute an "excessive demand" on the GCF triggering its power to refuse a request.
- Requesters should be provided with assistance where they need it.
- The GCF should provide acknowledgement of receipt of a request within five working days.
- The GCF should commit to providing information in the form stipulated by requesters, subject to certain limited exceptions.
- The policy should make it clear that it is free to make a request and that information will be provided for free except where the request exceeds a certain pre-set size in terms of photocopies, in which case fee waivers will be available based on need.

4. Exceptions or the Negative List

Structural Considerations

The Consultation Draft states that information will be available subject only to clearly and narrowly defined exceptions. However, it is in this area that the Consultation Draft is most problematical and diverges most sharply from accepted international standards on transparency. Those standards dictate that information should always be disclosed unless all of the following three conditions are met:

1. The information falls within the scope of a clearly described list of interests the protection of which is deemed worthy of overriding openness.

2. Disclosure of the information would pose a clear risk of harm to the relevant interest(s).
3. That harm is greater than the overall public interest in disclosure of the information.

The regime of exceptions in the Consultation Draft fails to meet any of these three conditions and substantial revision is needed to bring it into line with these standards.

Clause 6(b) contains Principle 2: Limited Exceptions and starts out with an almost classical statement of the three conditions above, namely that "exceptions to disclosure will be predicated upon the possibility, narrowly and clearly defined, that the potential harm to interests, entities or parties arising from the disclosure of information would outweigh the benefits". However, the rest of the Principle goes on to undermine that, adding exceptions based on legal obligations of the GCF or where a third party has marked a document as confidential. Furthermore, the GCF may refuse to disclose even information which is not covered by these exceptions where it is of the view that the harm might outweigh the benefits.

The idea of an exception to protect the legal or contractual obligations of the GCF seems reasonable at first blush, until one considers that most legal obligations derive from contracts which the GCF itself has negotiated. Put differently, this rule essentially allows the GCF to contract out of its disclosure obligations. The better approach would be for the GCF to be clear with its clients upfront what information will be made public pursuant to its disclosure policy, so that clients do not have unreasonable expectations of confidentiality.

The second additional exception in clause 6(b) – a designation of confidentiality by a third party – grants a veto over disclosure to third parties, and has been soundly rejected in access regimes at the national level. Instead, those regimes set out objective, harm-based grounds for non-disclosure which provide adequate protection for the rights and interests of third parties, and then requires third parties that choose to engage with public authorities to accept that level of openness. In other words, at the national level, one has to accept access rules as a condition of doing business with government. Put differently, third parties should not be able to impose their own openness conditions on the GCF.

Clause 8 of the Consultation Draft includes a vague statement that the timing of disclosure may vary depending on the type of information. It is unclear what this adds to the policy, given the very detailed regime of exceptions and provision for historical disclosure of information which follow. Given the potential for misunderstanding or even abuse, this reference should be removed.

The main regime of exceptions is found in clauses 9-14 of the Consultation Draft, with historical disclosure rules being provided in clauses 20-21. Clause 10 includes a welcome rule on severability, whereby if only part of a document is sensitive, the rest of the document, if segregable, will be disclosed.

The third internationally set condition for exceptions is that the harm to the protected interest outweighs the overall public interest in accessing the information, often referred to as the public interest override. Procedurally, this is assessed once it is found that release of the information would harm a protected interest, and it essentially involves weighing that harm against the benefits of disclosing the information, for example in terms of reducing corruption or exposing mismanagement. Better practice is to provide for a broad public interest override for all exceptions.

Clause 13 of the Consultation Draft provides for a limited public interest override that will apply on a discretionary basis in "extraordinary circumstances", after receiving the express authorisation of the Information Appeals Panel (IAP) and either the Executive Director or the Board, depending on the information in question. This imposes very significant procedural restrictions on the application of the public interest override. First, it is necessary to convene the IAP to apply it, although this is an *ad hoc* body (based on the *ad hoc* appointment of external members; see below). While this may work for appeals, it does not seem very realistic for the public interest override and would seem to limit any chance of this being applied to truly "extraordinary circumstances". Essentially, this means that the public interest override will only be engaged on appeal. This may ultimately be problematical for the GCF, if requesters opt to lodge a larger number of appeals than they otherwise might so as to obtain a public interest balancing in their cases. Furthermore, the fact that the approval of either the Executive Director or the Board is required essentially means that the application of the override remains at the discretion of the affected body. A more realistic approach, which is more in line with better practice, would be for the initial decision-maker to apply the public interest override, perhaps subject to appeal to the IAP (and, if this is deemed absolutely necessary, for any original decision to apply the override to be approved by the Executive Director or the Board).

Clause 14 provides for a negative public interest override, again with the agreement of the IAP, whereby information normally subject to disclosure might be refused where this was deemed to cause more harm than good. Better practice is not to provide for such a negative public interest override. If the regime of exceptions provides comprehensive protection to legitimate interests, there will be no need for such an override. Such negative overrides are virtually unknown at the national level and yet there is no suggestion that this has been a cause for concern.

Clauses 24 and 25 call for requesters to be given reasons where their requests are refused, including the particular rule in the policy relied upon to justify the refusal (see also clause 6(d)). This is useful but it would be more effective, in such cases, to provide notice to requesters of their right to appeal against this decision.

Specific Exceptions

The main categories of exempt information are found in clause 11. The introductory paragraph to this clause includes the unfortunate statement that the "following categories of information/documents will not be accessible because the potential harm caused by

their disclosure outweighs the benefit to be derived from accessibility". If this were really to be applied, it would effectively negate both the requirement of harm and the public interest override. Both can only be assessed taking into account all of the specific circumstances at the time the assessment is made, rather than in advance, as this statement suggests.

The regime of exceptions in clause 11 is analysed below by reference to the types of interests that the Consultation Draft is seeking to protect (rather than by sub-clause).

1. Privacy

It is legitimate, indeed necessary, to include an exception in favour of private information in information disclosure systems and such exceptions are found in the policies of all IFIs and national laws. The term 'private information' is to be preferred over the term 'personal information', found in clause 11(a)(i) of the Consultation Draft, due to the fact that the latter is normally understood to include all information from which an individual may be identified (personally identifying information), much of which has no privacy value, although the clause does go on to refer to "legitimate privacy interests". Clause 11(a)(i) is limited in scope to persons connected with the GCF, whereas better practice is to provide protection to any natural person whose privacy may be harmed by a disclosure.

Once general protection for privacy is provided for, there is no need to go beyond this, as clause 11(a)(ii) does, to exempt all information "relating to staff appointment and selection processes". Much of this information is not private and should clearly be made public (for example, eligibility criteria and the nature of the process).

Personal information is also referred to in the title of clause 11(c), relating to communications with the Board, although that exception is actually a blanket exclusion of all Board communications which has little or nothing to do with privacy (this is addressed below).

Clause 11(d), titled "Safety and security", also provides protection for privacy, as well as "the rights" of any individual. If clause 11(a)(i) were amended to cover all individuals, as recommended above, there would be no need to slot privacy into this clause where it does not really fit and also partly duplicates the earlier clause. Protection for "the rights" of individuals might appear to be legitimate but it is ultimately a broad and vague term. A better approach is to identify the specific rights which may be impacted by disclosure – in practice privacy, legal rights and commercial interests – and provide specific protection to them.

2. Legally Privileged Information and Investigations

It is also common to exempt legally privileged information from disclosure. However, in the context of public authorities like the GCF, it is important to word this exception so that it only covers information which is legitimately sensitive. For private individuals, legal privilege normally covers all communications with their lawyers. But this needs to be adapted for public authorities, which may obtain views from their

lawyers on a wide range of policy and other non-litigation related matters, much as they might from any other type of expert. The scope of the exception should, therefore, be limited to "matters in legal dispute or under negotiation" or information the disclosure of which would expose the GCF to "undue litigation risk", as provided for in part of clause 11(b). Instead, the exception covers all communications with the Office of the General Counsel or external legal counsel. The exception also includes any information which could violate a contractual obligation, which is problematical for reasons elaborated upon above.

Clause 11(b)(i) covers information relating to investigations of "fraud, corruption or misconduct or disciplinary proceedings", except to the extent permitted by the rules relating to such investigations (see also clause 11(e)(iii)), as well as information which, "if disclosed, would or would be likely to materially prejudice an investigation or the administration of justice or violate applicable law". The former is simply too broad, particularly since it lacks a harm test. The latter is a much more precise and legitimate formulation of this type of exception.

3. Third-party Information

It is accepted that information disclosure rules need to provide protection to the legitimate interests of third parties. For private third parties these interests are privacy and legitimate commercial interests (and in limited cases legally privileged information). The latter is understood as an objective assessment of whether disclosure of the information would directly (i.e. as a direct result of the disclosure) harm the competitive or negotiating position of the third party. The views of the third party as to any risk of harm are relevant, inasmuch as they may improve the assessment as to whether such a risk does in fact exist, but they should not be determinative or constitute a veto.

It is additionally recognised that public authorities like the GCF have a legitimate interest in maintaining good relations with States and intergovernmental organisations (IGOs), and that where the release of information would cause harm to those relationships disclosure may be refused. This is a substantially stricter test than simply having a confidentiality stamp on a document, since there is a tendency among many States to vastly over-classify even non-sensitive information. Releasing such information will not harm relations with other States.

In stark contrast to this limited and yet protective approach, clause 11(e)(i) provides that the "GCF will not disclose information provided by anyone who has indicated in writing that such information be kept confidential". Clause 11(e)(ii) goes even further, stating that "[f]inancial, business or proprietary and non-public information belonging to a party outside the GCF will not be disclosed" without consent. As noted above, this grants a veto to third parties over the disclosure of information. It also places a shroud of secrecy over all business information, even if the third party has not indicated that it is sensitive. It also reflects a misunderstanding about the proper relationship between a public authority such as the GCF and the third parties with which it interacts.

The approach described above is standard in national laws and it has not caused problems either for public authorities or for the entities with which they do business or their relations with other States and IGOs. Unfortunately, many IFIs still have not put in place this common sense approach,[7] perhaps due to their long established practices and relationships, developed before they made a strong commitment to openness. This is a problem that the GCF, as a relatively new entity, is well poised to avoid. Third parties should be put on notice that doing business with the GCF – an international public entity committed to best governance practices – entails certain minimum transparency obligations.

4. Deliberative Information

Public authorities need to protect what is sometimes referred to as their 'space to think' and this need is reflected in 'deliberative' or 'internal' information exceptions in access to information laws and polices around the world. However, if cast too broadly, such exceptions can seriously undermine the right of access. Better practice is to identify relevant interests – such as the free and frank provision of advice, the process of developing policies or the likely success of policies – and then to provide for exceptions to protect them against harm. This, like third party confidentiality, is an area where there is a significant difference in the approach taken by many IFIs and by better practice national laws,[8] a problem the GCF should take steps to avoid.

The Consultation Draft signally fails to do this and instead includes significantly overbroad exceptions in this area. Clause 11(f), as currently drafted, proposes, in brackets, to conflate two completely different ideas, namely commercial confidentiality (see above) and the deliberative process, which should be avoided. Otherwise, although the introductory paragraph to this clause includes useful language – specifically the reference to damage to "the free flow of information and ideas among staff in the decision-making process" – the three categories of information it lists cover a vast range of both potentially sensitive and non-sensitive information.

Specifically, the three-sub-clauses of 11(f) fail to identify interests that would need protection and fail to subject non-disclosure to a harm test. Clause 11(f)(i) covers all information "prepared for or exchanged during the course of its deliberations" with external parties. Clause 11(f)(ii) covers the same for internal deliberations and clause 11(f)(iii) goes on to include "[s]tudies, audit reports, assessments, evaluations or analyses prepared to inform the GCF's internal decision-making and assessment processes". It is immediately apparent that these categories cover an enormous amount of information, only a small part of which is sensitive in any proper sense.

The Consultation Draft also fails to accommodate the fact that it is important to disclose key policy documents in draft form in a timely fashion so as to enable effective public consultations. According to accepted practice at other IFIs, policies that directly

[7] See Centre for Law and Democracy, *Openness Policies of the International Financial Institutions: Failing to Make the Grade with Exceptions* (2012). Available at: http://www.law-democracy.org/live/cld-publishes-report-on-problematical-exceptions-to-transparency-at-ifis/.
[8] *Ibid.*

implicate the rights and interests of third-party stakeholders should be developed through a structured public consultation process. This process should: (a) provide sufficient time for public input on draft versions; (b) proactively seek inputs from affected parties; and (c) allow for an iterative process in which public comments on a first draft are incorporated into a second draft, which is also sent out for public comment in advance of final Board consideration.

5. Protection of the Board and Other GCF Bodies

The Consultation Draft provides broad protection for Board information, stipulating in clause 11(c) that Board communications are secret unless they specifically provide for their own release. Clause 11(h) states that the GCF will not disclose Board documents that are "deemed confidential" (presumably by the Board). In other words, when it comes to the Board, the policy does not really apply (since release of information remains at the unfettered discretion of the Board). Clause 11(h) also stipulates that the GCF will not record closed sessions of the Board which suggests that no record of those sessions will be kept, retained or recoverable by any person. This provision overrides basic principles of accountability.

This is a serious failing in the Consultation Draft and not an approach which is followed at other IFIs. The World Bank Policy, for example, does protect certain Board communications, but does not grant the Board complete discretion in this area. Better practice is to treat Board information in the same way as other information held by the entity, i.e. to require disclosure unless this would pose a risk of harm to a legitimate interest.

Clause 11(b)(iii) subjects the release of information relating to internal conflict resolution mechanisms to the rules on disclosure pertaining to those mechanisms. Given that the information policy already includes all legitimate grounds for refusing to disclose information, it need not be expanded by other GCF policies or rules.

Clauses 11(i) and 11(j) relating, respectively, to Committees, Panels, Groups and Accountability Units, and Trust Fund reports, provide that information relating to these bodies and their reports will not be disclosed insofar as it contains "confidential information", whatever that may mean, which, if disclosed, "may cause prejudice to the GCF or related parties". This is obviously an unacceptably broad formulation – since prejudice could be interpreted in many different ways – which effectively grants wide discretion to the GCF to decide whether or not to release information.

Finally, Clause 11(k) imposes special rules regarding the disclosure of information regarding any country or other entity applying for accreditation with the GCF. It essentially carries forward the approach of the Interim Practice, in which the public (and Board members, for that matter) have no visibility into the accreditation process whatsoever. This approach has proven to be unworkable and highly contentious. Once again, it is unclear what would justify special rules in this case, over and above the broad

exceptions which are already found in the Consultation Draft, such as relations with other States, private information and internal deliberations.

Recommendations:

- Clause 6(b) should be amended so as to remove the references to non-disclosure based on legal obligations, the third party veto and an assessment of the overriding public interest.
- The last sentence in clause 8, allowing for variation in the timing of disclosure based on a vague reference to the type of information, should be removed.
- The procedural rules for applying the public interest override should be revised to apply at the initial decision-making level and to reduce the discretionary power of affected bodies to refuse to apply it.
- Clause 14, providing for a negative public interest override, should be removed.
- The policy should require the GCF to provide requesters whose requests have been refused not only with the reasons for that refusal but also with information about their right to appeal against it.
- The introductory paragraph of clause 11 should be amended to make it clear that it describes interests which will be protected against harm but that the assessment of whether the interest is at risk will be made at the time of a request, in light of all of the relevant circumstances.
- Clause 11(a)(i) should be amended to protect the legitimate privacy interests of any individual, and clause 11(a)(ii) should be removed.
- The reference to "personal information" should be removed from the title of clause 11(c).
- The references to "privacy" and "rights" should be removed from clause 11(d).
- The exception in favour of legally privileged information in clause 11(b) should be limited to "matters in legal dispute or under negotiation" or the disclosure of which would expose the GCF to "undue litigation risk".
- The exception to protect investigations in clauses 11(b) and 11(e)(iii) should be limited to information the disclosure of which would prejudice an investigation, the administration of justice or respect for the law.
- Instead of applying a third party veto and a blanket exception for proprietary information, as is the case in clause 11(e), the policy should condition exceptions in this area on harm to the privacy or (objectively determined) commercial interests of third parties and relations with other States and IGOs.
- Clause 11(f), on deliberative processes, should be completely redrafted so as not to refer to commercial interests. Instead, it should refer only to specific interests which need protection, along the lines of the reference in the introductory paragraph to the "free flow of information and ideas".
- The policy should recognise the need for advance release of certain types of documents – specifically policy documents which implicate the rights and interests of third-party stakeholders – sufficiently early to allow for effective

public input into those policies before they are finally considered by the Board.

- Clauses 11(c) and (h) should be removed and Board documents should be disclosed, subject to the (rest of the) regime of exceptions.
- The GCF's internal conflict resolution mechanisms, Committees, Panels, Groups and Accountability Units, Trust Fund reports and countries or other entities applying for accreditation should be subject to the same rules on disclosure as the main GCF bodies.
- Clauses 11(k) should be removed and information about accreditation procedures and applications should be disclosed, subject only to the (rest of the) regime of exceptions.

5. Appeals

Better practice among IFIs is to establish a two-tier system of appeals, first to a more senior internal body and then to an independent external body. Thus, the World Bank has the Access to Information Committee, an internal body which advises management on access to information issues, and the Access to Information Appeals Board, an external body comprised of independent experts.

The Consultation Draft, in contrast, only provides for one level of appeal, to the Information Appeals Panel. This is neither a fully internal body – although clause 5(h) describes it as "an internal body of the Secretariat" – nor a properly independent body. Pursuant to clause 30 of the Consultation Draft, it is composed of three senior staff members appointed by the Executive Director for fixed three-year terms, along with two members from "Board-appointed panels and external groups", appointed on an *ad hoc* basis, "depending upon the nature of the information requested". Staff members of the IAP cannot be involved in appeals where they were involved in the original decision to which the appeal relates, and the quorum for appeals is four persons. The chair shall be selected from among the IAP members.

This is a potentially interesting approach which attempts to strike a balance between the cost of a two-tier appeals system and the need for some independence of decision-making on appeal. It could, however, be improved in various ways. First, the Consultation Draft fails to stipulate how the external members shall be appointed. Having them appointed by the Board could improve their independence. Second, although the *ad hoc* procedure appears designed to involve subject matter experts, it also means that the external members have no security of tenure and may be subject to pressure, formal or informal, real or assumed, from the GCF. Third, since there is no consistency of IAP members (due to the fact that external members are appointed on an *ad hoc* basis), it is unclear how the chair might properly be selected, unless this were done on an appeal-by-appeal basis, which would probably be less than ideal. Otherwise, it would appear that only a staff member could fill the position of permanent chair of the IAP. Fourth, the independence of the body, both real and perceived, would be enhanced if a majority of the members were external as opposed to the current situation where the ratio would

either be equal or internal members would outnumber external by three to two. Fifth, it remains unclear who is really intended to be included among the external members.

In terms of the appeals process, clause 28 provides for an appeal whenever a requester has been denied access to information. Better practice is to provide for appeals whenever a requester feels that his or her request has not been dealt with in accordance with the policy, rather than just when a request has been refused. This might cover, for example, instances where a requester had received no response to their request (which is technically not a denial of the request) or where time limits or fee maximums had been exceeded. The same clause also allows for appeals only where the requester is able to establish a *prima facie* case that the policy has been violated or make out a case for applying the public interest override. This seems to envisage an initial screening process for appeals to see if they meet the conditions, which is not appropriate (and it is not clear who would undertake this). Instead, this should be recast in terms of what a requester has to make out to succeed on an appeal.

Clause 34 provides that the IAP is not required to provide a detailed explanation of the reasons for its decisions. This is rather remarkable and flies in the face of both good practice and the interests of the GCF. From an administrative law point of view, it is extremely problematical not to provide reasons for a decision. This is not fair to the appellant and it is likely to encourage sloppy reasoning on the part of the IAP. From an organisational point of view, reasons are just as important, as they provide staff with measured analyses of how to apply the exceptions which is not otherwise available from any other source.

Equally important is clause 33, which effectively reduces IAP 'decisions' to recommendations to, respectively, the Board and Executive Director. It might be difficult, within the structure of the GCF, to render IAP decisions binding. However, some effort should be made to at least create some barriers to the Board or Executive Director rejecting their recommendations. For example, the relevant actor could be required, in such cases, to provide reasons as to why it was refusing to follow the recommendation of the IAP.

Finally, IAP should be evaluated periodically to make sure that it is maintaining its independence and impartiality. This would provide an opportunity to learn lessons and improve performance.

Recommendations:

- The policy should stipulate how external members of the IAP will be appointed, preferably by the Board.
- External members should be appointed for fixed terms, like internal members, and be eligible to be elected as chair of the IAP.
- Consideration should be given to providing for at least an equal number or a majority of external members on the IAP and who is eligible for these positions

should be clarified.

- Requesters should be able to lodge an appeal for any breach of the policy relating to the processing of requests and no pre-screening conditions should be placed on the lodging of appeals.
- The rule in clause 34 that the IAP does not need to provide reasons for its decisions should be removed.
- Some burden should be placed on the Board or Executive Director before they can refuse to follow a recommendation of the IAP, such as requiring them to provide reasons in such cases.
- The IAP should be subject to periodical evaluations.

Conclusion

We welcome the fact that the GCF is moving forward with a longer-term policy on the right to information. We welcome the positive commitments in the Consultation Draft to move to a proper presumption in favour of disclosure, subject only to the regime of exceptions in the policy, the inclusion of more detailed rules on procedures for lodging and processing requests and the establishment of a mixed internal and external appeals body. At the same time, these positive measures are substantially undermined by the regime of exceptions to the right of access, including exceptions that are cast in vague or overbroad terms, exceptions that fail to incorporate a harm test, a weak public interest override and a negative public interest override.

Ultimately, it is the regime of exceptions, which determines the line between what information is public and what is not, which fundamentally defines a right to information policy. We call on the GCF to amend the Consultation Draft so as to narrow the regime of exceptions and otherwise to improve it in line with the recommendations in this Submission.

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