Observations on the Central American Bank for Economic Integration's Draft Access to Information Policy

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These Observations[1] were prepared in response to CABEI's public consultation on its 2023 draft Access to Information Policy (draft Policy), which would replace the current Policy which dates from 2020.[2]

Overall, the new draft Policy introduces some significant improvements, particularly in establishing a clearer presumption of disclosure and clarifying that information should only be withheld according to defined exceptions. Some other changes are quite positive, such as the formalisation of an Access to Information Unit and new provisions on accessibility.

Less positively, the draft still lacks strong harm tests for the exceptions and a public interest override, and some exceptions need further refinement. The relationship of this Policy to internal classification systems is still somewhat unclear in the draft. In addition, in terms of oversight, the draft Policy fails to provide any details on the structure of the Access to Information Committee, a disappointing change from the current Policy. Although appeals are now allowed to the CABEI's Board, the system also lacks an independent appeals option such as an external appeals panel.

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[2] The current policy is available in English at https://www.bcie.org/fileadmin/bcie/english/files/news-and-media/publications/regulations/CABEI_Policy_on_Access_to_Information.pdf and in Spanish at https://www.bcie.org/fileadmin/user_upload/ANEXO.DI.12.2020.pdf; the proposed draft is available in English at https://www.law-democracy.org/live/wp-content/uploads/2023/11/CABEI.AIP_.dra_.Oct23.pdf and in Spanish at https://bcie2014.sharepoint.com/:b:/s/DocPub/EeWyqB7qxkdFvlaKjWDeT3MB-0IcpKyqHDzajvMcIwMqCg?e=HFaH90.

Thus, while the draft Policy is a step in the right direction, bringing the Policy closer into alignment with policies from peer organisations, additional reforms are needed to substantially improve the Policy. These Observations make recommendations accordingly, focusing on the regime of exceptions, the system for monitoring and oversight, the process for making requests and appeals, and the provisions on proactive disclosure.

Principles and Exceptions

Both the principles (Article 1) and exceptions (Article 16) in the new draft Policy represent an important shift towards a clearer presumption in favour of disclosure of information, subject only to defined exceptions, as called for in international standards.

Overall, the principles articulated in Article 1 represent a substantial improvement over the current Policy. The current Policy outlines three principles, two of which reference specific confidentiality concerns which are not very appropriate as broader guiding principles. While the third references the importance of maximising access to information, it says this must be balanced again a concern for information sensitivity, which does not establish a proper presumption in favour of access to information.

Article 1 of the draft Policy articulates a stronger vision of maximising information access as well as a principle of "clear and delimited exceptions". Such an approach is a needed change and creates a strong framework for interpreting the Policy in a manner consistent with international standards.

However, the last sentence of Article 1(b), on "clear and delimited exceptions", states that "exceptions to disclosure are based on a determination that disclosure of **certain categories** of information would cause greater benefits" (emphasis added). Decisions about whether the harm of disclosure outweighs the benefits should not be made for categories of information but, rather, on an individual basis. Under international standards, the proper analytical framework for applying an exception to disclosure is as follows:

- Determining that the information falls within the scope of a legitimate protected interest that is specified in the regime of exceptions.
- Determining that disclosure of the information would pose a real risk of harm to the identified interest (the "harm test").
- Determining that, taking into account any public interests that would be generated by disclosing the information are overridden by the harm that this causes (the "public interest override").

In the context of international financial institutions, this approach is also emerging as a better practice. For example, the European Investment Bank Group's Transparency Policy incorporates a harm test into its exceptions (disclosure must "undermine the protection of" the interest and in some cases must "seriously undermine" it) and most exceptions do not apply if there is an "overriding public interest in disclosure".[3] The Inter-American Development Bank is in the process of developing a replacement for its current 2010 Access to Information Policy; the 2010 Policy has a limited positive override but the draft proposal for a new Policy would create a clear harm test and expand the positive override to apply to all exceptions.[4]

Positively, the exceptions to disclosure section at Article 16 embraces a default of disclosure unless an exception applies ("CABEI will disclose information in its possession that is not protected by any of the exceptions to disclosure set forth in this policy"). This presumption of disclosure is not clearly articulated in the current Policy and is an important and welcome reform.

However, as with the principles section of the draft Policy, Article 16 suggests that the listed exceptions consist of categories where harm is presumed, stating that the categories are "based on a determination that disclosure would result in actual, demonstrable and identifiable harm to the Bank and its counterparties". Instead, Article 16 should set out a list of protected interests and then allow information to be withheld only if it its disclosure would cause "actual, demonstrable and identifiable harm" to that interest. This should be assessed on an individual basis such that not all information in these categories is kept secret. The definition of "exceptions to disclosure" in the definitions section of the draft Policy should similarly be adjusted, as currently it says information in these categories should not be disclosed "under any circumstance", rather than when this would cause harm.

Each of the eight exceptions in Article 16 contains a very weak harm test, if it can be characterised as a harm test at all, stating that they apply to information the disclosure of which would "affect" the interest in question. The term "affect" is not the same as a finding

[3] See clauses 5.3-5.8, https://www.eib.org/attachments/strategies/eib_group_transparency_policy_2021_en.pdf.

[4] The 2010 Policy and draft Proposal are available at: https://www.iadb.org/en/who-we-are/access-information. CLD's analysis of the draft Proposal is available at: https://www.law-democracy.org/live/wp-content/uploads/2022/12/IDB-Analysis.Dec22.FINAL_.pdf.

of harm, since it would cover positive as well as negative impacts, and, in any case, much stronger language is needed, such as "negatively impact" or "harm" or "damage".

The third part of the test elaborated above, namely the public interest override, is entirely missing from the draft Policy. This is a key part of any regime of exceptions and is reflected in many of the better practice policies which have been adopted by international financial institutions. We very strongly advise that an override along these lines is added to the policy. If a fully general public interest override is for some reason not considered to be feasible, at least a partial override should be included, for example to apply where the requested information relates to corruption, human rights violations or environmental risks.

Article 16 indicates that the draft Policy's eight exceptions include an "illustrative and non-exhaustive list of information" which the Bank will not disclose. On a positive reading, this might mean that the list of specific types of information that are provided under the general description of each of the eight exceptions is meant to be an illustrative rather than exclusive list. However, in the English version the wording is ambiguous and could be interpreted as meaning that the eight exceptions themselves represent a non-exhaustive list, such that additional grounds for not disclosing information might be added. This would dramatically undermine the rigour of the regime of exceptions and essentially grant broad discretion to the Bank to refuse to disclose information. As such, the English wording of this phrase should be revised.

Turning to the eight exceptions themselves, the broad subject matter of these exceptions largely reflects legitimate interests. However, in some cases their wording should be tweaked and in most cases the list of specific types of information falling under them is problematical, depending on how these lists are understood. For example, it is legitimate to protect private information but the fifth item on the list here covers any information which identifies an individual who is not Bank staff. It is fairly obvious that while there may be circumstances in which to disclose this information would harm privacy there would be other circumstances where this was not the case.

Each of the items of the specific list under the "deliberative information" exception covers broad categories of information which go far beyond the core idea set out in the overview paragraph – which is about protecting the decision-making process and the free and frank exchange of ideas. This includes the reference to minutes of the meetings of any Bank body, any statement by a range of actors in the context of an internal meeting, all internal and external communications "of any nature" and "non-final documents and inputs". In addition, this exception should cease to apply once documents have been finalised.

The exception for legal, disciplinary and investigative matters encompasses information which would generate "undue litigation and legal risks" and would undermine procedures established by CABEI's regulations. This is too broad. Protecting "legal risk", for example, is almost inherently subjective and could lead to an overly cautious approach about disclosure of any information that reflects negatively on CABEI. Instead, a better approach would be to focus on harm to ongoing court proceedings or litigation, anchoring the exception to a risk for particular ongoing legal proceedings instead of a hypothetical future legal risk. The European Investment Bank's Transparency Policy, for example, refers to disclosure undermining court proceedings or the purpose of inspections, investigations and audits (these are also defined more precisely in a footnote). The reference to undermining CABEI procedures is also problematic; it perhaps is meant to cover disciplinary and sanctioning procedures as specified in the illustrative list but, if so, this should be said precisely. As for the list under this exception, the exclusion of all information on litigation in process, disciplinary and sanctioning matters and complaints and investigatory processes would, formally, prevent even acknowledging that these processes were ongoing, which is clearly not realistic.

Similarly, elements of the "information provided in confidence" exception are too broadly formulated. "Information of Private Sector clients" is significantly overly expansive as not all disclosures of information of such clients would affect their commercial, financial and competitive interests of those clients, as required in the chapeau. The very broad exclusion of information which was protected by a confidentiality agreement essentially allows the Bank and its clients the power to contract out of this policy, which is clearly not legitimate. Secrecy should be limited to cases where disclosure of the information would harm a legitimate interest, including commercial interests, and contractual arrangements should not be allowed to expand on this, just as they cannot under national laws. This exception should also qualify that information provided in confidence may be released with the consent of the entity who provided it, and a procedure should be established for seeking such consent.

The financial information exception is also framed expansively. Information that could "affect" markets could in theory cover information about any major political or economic development that could impact financial markets, for example, while protecting "the Bank's development and ability to run its internal" systems is also far too general and should be reframed to focus on harm to the Bank's financial interests (in this respect, it is essentially duplicitous of Article 16(g) and should be merged with that exception).

The list under the "Information from internal and external control bodies" is also far too broad covering all internal audit and controller's office reports, regardless of their actual sensitivity. It also refers to all technical and supporting documents whereas better practice is specifically to exclude technical documents which are not themselves sensitive (such as factual or statistical reports).

The list under the security exception is, once again, far too broad, insofar as it does not incorporate harm tests. Thus, it is appropriate to protect contingency plans only if their disclosure would undermine their effectiveness but this is in fact rarely the case (for example with fire escape routes, regularly posted on the walls of hotels). This caveat also applies to the other items on this list.

One other key issue relates to the interaction of the information policy with CABEI's internal classification schemes. The current Policy specifies that only information classified as public can be requested (see Article 11). Then, even if information is classified as public, it is not disclosed if its falls into an exception. The 2023 draft Policy eliminates this language. This is one of the most important changes in the Policy as it signals that all information is subject to a presumption of disclosure, regardless of its classification.

However, the draft Policy should clearly state that the its presumption of disclosure and regime of exceptions are applied regardless of whether documents have otherwise been administratively classified as secret. There is still some ambiguity about this point, particularly because the definition of "disclosure" refers to the process of making information available that is "previously classified as public". Article 9's promotion of declassification in the context of proactive disclosure also raises questions about the interaction of the two regimes. This point is extremely important because if the information policy does not override rules providing for administrative classification, the positive reforms noted above are rendered largely pointless.

Monitoring and Oversight

The draft Policy formalises the existence of an Access to Information Unit within CABEI's Secretariat, which appears to exist already but is not formally established in the current Policy. Such central units can be crucial to supporting implementation of access to information commitments, so this is a positive addition in the draft Policy. The functions assigned to this new entity at Article 14 appropriately reflect the important role such units can play, such as technical support, coordination, monitoring, reporting and awareness

raising. One small improvement would be to specify that the reporting mentioned in Article 14(j) occurs at least annually.

The draft Policy also substantially changes the Access to Information Committee established in the current Policy. Under the draft Policy, this Committee would be renamed the "Communications and Access to Information Committee". The reasons for this name change are not clear, since the mandate of the Committee appears to be focused on access to information issues. In any case, this name change should not be adopted. Adding "Communications" implies a public communications function and that the Committee is acting as a communication arm of CABEI. Instead, the Committee should make decisions about access to information independently of the impact that would have on CABEI's public image. Indeed, the Committee is not even tasked with public awareness raising in relation to the access to information system, since this role is given to the Access to Information Unit. Accordingly inserting "Communications" in the title of this Committee is likely to confuse its role and purpose and this change should not be adopted.

Another major change in the draft Policy is that the composition of the Committee and other operational details, such as how it will vote, are no longer specified. Instead, the draft Policy merely says that the Committee's composition will be governed by regulations of the Board of Directors and the Attached Dependencies. Presumably such regulations will also contain some other details on its operations.

Although precise details of the Committee's operations do not need to be articulated in the information policy, it should at least contain information on, at a minimum, the composition of the Committee, how it is appointed, its powers and some basic high-level rules on how it will make decisions. Although the Committee is not acting as an independent oversight body, it still plays an important role in supporting implementation and monitoring of the policy, and its structure and composition will greatly impact its ability to make decisions in accordance with the policy and in favour of disclosure even when doing so may be unpopular with other voices within CABEI. These details should also be subject to public debate and comment as part of the process of adopting the new policy. This would render then be susceptible to change or alteration in response to of-the-moment political pressures.

In addition to providing information about the composition and structure of the Committee, the policy should provide for some kind of external, independent oversight system. This is discussed further below, under Appeals. If this recommendation is rejected, consideration should be given to at least including some independent voices on the Committee.

Making and Processing Requests

The current Policy only provides for making a request via an online form. Article 17 of the draft Policy specifies that applicants without access to the Internet may submit requests in writing to any of the Bank's offices. This is a positive step which will promote accessibility, but the language about applicants without access to the Internet should be dropped, as it would not make sense for the Bank to require some kind of proof of lack of Internet access before receiving a written request. It is simpler merely to state that written requests will be accepted (applicants with Internet access are likely to default to the convenience of the digital form in any case). In addition, allowing verbal requests (such as via telephone) would enable requesters who are illiterate or who are unable to write due to a disability to submit a request more easily.

Like the current Policy, the draft Policy requires applicants to submit their full name, identification, contact e-mail and country of residence. This is excessive and better practice is to ask only for a means of contacting the requester. Providing identifying information can deter requesters who are seeking information about sensitive topics or who have genuine concerns for their safety, as is the case for many environmental defenders in the Central American region, for example. In addition, "identification" is not very clear but it seems to suggest identification documents, which is a practical barrier and simply not needed.

In practice, the current online form also asks for a mailing address, sector (i.e. academy or media) and country.[5] While such information may be helpful for reporting purposes, this should not be a mandatory field (and it is not clear why a mailing address is required at all for most requests where information is delivered electronically, unless this is supposed to mean email address). The policy should clarify that requesters are not required to provide any information which is not listed in the policy. Instead, the draft Policy says that the form shall include the specified information "at a minimum", meaning an online form could be developed that requires requesters to provide additional identifying information or other information that could be burdensome for some requesters. This language should be amended to avoid this.

Positively, the draft Policy adds language stating that CABEI shall not require explanations or evidence of interest to support an information request. This is an important and welcome clarification.

[5] See https://www.bcie.org/en/access-to-information/information-request-form.

Another positive change is the reduction of the timeline for responding to requests from two months to 30 calendar days. However, Articles 20 and 23 of the draft Policy – which both address extensions and should be consolidated into a single article – allow for indefinite extensions. This should be amended and limits on extensions to the initial deadline should be imposed, such as one extension for another 30-day period.

Less positively, the draft Policy omits provisions in the current Policy which require that, if information is available on an official website, the requester will be directed to that link and that, if the request is denied, the applicant will be informed of the reason for this (see Articles 16 and 17 of the Policy). Such language should be restored and strengthened, specifying that when a request is denied, the precise paragraph of the policy/exception relied upon to deny disclosure should be listed, and the requester should be informed about appeal options which are available.

The draft Policy is also silent about whether requesters can be asked to pay a fee at any stage of the requesting process. However, Article 15(j) empowers the Communications and Access to Information Committee to establish "service rates and regulation, if necessary and in exceptional situations" for requests that involve a high investment of resources. The draft Policy should clarify that no fee will be charged for making a request and should set clearer limits on the imposition of other fees. Better international practice is to limit fees to the cost of reproducing and sending the information (and not, for example, for staff time spent searching for the information).

Article 22 of the draft Policy also enables CABEI to dismiss "unreasonable or generic requests". Article 22 is a substantial improvement from the equivalent provision in the current Policy, which offered a wide-ranging set of grounds for refusing requests, including some which effectively created new exceptions to disclosure (such as disclosure "may cause damage or materialize a legal risk" or when the Access to Information Committee determines so for reasons of institutional convenience). This change is much needed as exceptions should all be contained in a consolidated section and should identify a clear protected interest (see the section above on Principles and Exceptions).

However, Article 22 could be improved by clarifying that when the description of the requested information is too vague to identify it, the requester should be contacted and offered assistance in an attempt to clarify the nature of their request. In addition, requests being of a "commercial" nature, defined as being included within the scope of "unreasonable or generic" in Article 22, should not be a reason to refuse them; the use to which information is being put should play no role in the processing of requests. As for "malicious" requests,

also excluded by Article 22, a better approach is to focus on repetitive requests for the same information after a request has been processed but care should be taken with any such requirements, as researchers or journalists (for example) may have legitimate reasons to make frequent requests for similar information.

Article 22(d) of the draft Policy also permits the dismissal of requests which require information in "non-existent dashboards" to be compiled or which otherwise involve the creation of information. The first part of this is unclear but the entire provision should be amended. While the scope of an information policy should be limited to information which is held, this should not rule out requests for information which can be compiled reasonably expeditiously or largely by automated means. This exclusion should be amended to reflect that idea.

Article 3 makes a commitment to release information in accessible formats, which is positive. This should be supplemented by a provision which requires the Bank to provide information in the format stipulated by the requester, subject to this not being unduly onerous for the Bank.

Appeals

Under the current Policy, if a request for information is denied, the requester may appeal to the Access to Information Committee and the decision of the Committee is final. The new draft Policy establishes a two-tier review system, with a first review to the Committee and a second appeal to the Board of Directors of the Bank.

Although the provision for an additional appeal option is an improvement, better practice is to provide for an appeal to an independent, external body, not to the Board of Directors. In addition to not being properly independent of the Bank, the Board of Directors does not have expertise in access to information issues and handling such appeals is questionably a good use of their time. The Board, consisting of State representatives, also is likely to default to secrecy. In national contexts, access to information laws establish independence information commissioners shielded from political interference for this very reason.

Other international financial institutions have established external panels or boards consisting of outside experts to hear second instance appeals, such as the Inter-American Development Bank's ATI External Panel, the World Bank's AI Appeals Board and the International Financial Corporation's Access to Information Appeals Panel. CABEI should do the same.

Some aspects of the appeals procedure in Article 24 could also be improved. There should not be a time limit on lodging appeals. Requesters may not have a sophisticated awareness of access to information procedures and are unlikely to know about or understand the appeals process (as suggested earlier, the notice of a denial should also inform requesters of the possibility of making an appeal for this reason). The requirement that decisions shall be "public and reasoned" is a positive feature of the process but there should also be a clear requirement to inform the requester about the outcome of the appeal (and, for first instance appeals, the possibility of the second appeal).

The Committee and the Board should also have the option of partially releasing information or releasing redacted versions of documents. More generally, the Policy should clarify that where only part of a document contains information falling within an exception, that information should be redacted from the document and the remainder released.

Broadening the grounds for lodging an appeal from just denials would be another positive addition. For example, "silent denials" can be a problem for access to information systems and so can delays and charges. If a requester never receives a response to a request, he or she should be able to appeal to challenge the failure to respect the timelines in the Policy.

Proactive Disclosure

The draft Policy includes a new section on routinely disclosed information. This specifies that CABEI will release a non-exhaustive illustrative list of routine disclosure documents that will be updated regularly. Presumably this is meant to refer to something like this inventory already available in the Spanish language version of CABEI's website. It also requires regular publication of key indicators related to CABEI's compliance with its own access to information policy, including, for example, declassified information rates, trends in the processing of requests for information, response averages and so on.

The draft Policy also includes an Annex of specific documents that are to be proactively disclosed. This is also a new addition. Combined with the new section on routine disclosure, the draft Policy accordingly offers a more detailed listing of some types of information that should be proactively disclosed.

While the greater detail is welcome, this more precise listing is not necessarily more comprehensive than the approach in the current Policy. The current Policy does not address proactive disclosure in much depth but it does state (at Article 10) that CABEI will voluntarily and periodically disclose information classified as public and "related to programs and

projects financed with its resources, environmental and social information on these, corporate governance and institutional information".

The draft Policy commits to the principle of maximum access to information and to do this through promoting proactive as well as reactive access to information. It could, therefore, benefit from a more general commitment such as that contained in Article 10 of the current Policy, although the language could be revised to be more ambitious in scope. It is important to signal that the information specified in the draft Policy and Annex 1 is merely a baseline for proactive disclosure and not a complete list, and to set a framework for broad proactive disclosure over time.

Recommendations

CABEI should improve the draft Policy by making the following changes:

- Reframe its approach to exceptions, clarifying that they represent legitimate interests which should be protected against rather than categories of information to be kept secret.
- Articulate a clear harm test for each exception which is stronger than "affect" and which is applied individually rather than by category.
- Introduce a public interest override or at the very least an override when information relates to corruption or human rights violations.
- Refine the specific lists under the exceptions to focus on harm to precise interests, including the specific recommendations made in these Observations.
- Clarify that the presumption of disclosure/principle of maximum disclosure applies regardless of whether a document is classified as public and that all documents, however classified, should only be withheld if an exception applies.
- Provide details on the composition and structure of the Access to Information Committee along with basic operational information in the policy itself, instead of leaving this to Board regulations.
- Avoid changing the name of the Access to Information Committee to "Communications and Access to Information Committee".
- Drop requirements for requesters to provide unnecessary identifying information and specify that the online form should not require additional identifying information from requesters.
- Place clear time limits on extensions to the original 30-day timeline for responding to requests.

- Restore language stating that requesters should be directed to links if information is already available online and, if their requests are denied, informed of the reason for the denial and of the possibility of appeal.
- Clarify that fees will not be charged for requests and establish limits on any fees that can be imposed for providing information, which should be limited to the cost of reproducing and sending the information.
- Limit the power to dismiss requests to clearly abusive repetitive requests.
- Establish the option of a second appeal to a panel of independent, outside experts instead of the Board of Directors, and broaden the grounds for appeals.
- Provide stronger language committing to proactive disclosure in general terms in addition to the specific proactive disclosure requirements.