

AI Appeals Board Decision
Case Number AI5197
CBI Report
(Decision dated October 17, 2018)

Decision of the AI Appeals Board

1. The Access to Information Appeals Board (the AI Appeals Board or AIAB) has reviewed the application for appeal regarding the above case number and decided to admit the application in its entirety. The AIAB reverses the decision by the Access to Information Committee (AIC) to uphold the initial decision by the World Bank to deny the requested information. The reasons for our decision are set out below.

Background

2. On August 28, 2017, the Bank received a public access request for the Consensus Building Institute's (CBI) report on "Conflict Management and Mitigation for Energy Projects in Nepal" (the CBI Report) which was finalized in September 2016.
3. The Bank denied the request on December 18, 2017 based on the "Deliberative Information" exception under the World Bank's Policy on Access to Information (the AI Policy).
4. An appeal against this decision was made on January 18, 2018 on both a violation of policy and public interest grounds.
5. The appeal was considered by the Access to Information Committee, which concluded that the Bank had properly and reasonably restricted public access to the CBI Report based on the "Deliberative Information" exception under the AI Policy and, therefore, did not violate the AI Policy. The AIC also concluded that the requester was unable to make a public interest case to override the "Deliberative Information" exception restricting the information from public access. On April 6, 2018, the AIC's decision to uphold the Bank's decision to deny access to the requested information was transmitted to the requester.
6. On June 4, 2018, the requester filed an appeal before the AI Appeals Board, contending that the information sought does not constitute deliberative information. (It should be noted that the AIAB is not authorized to consider whether the Bank should use its discretion to disclose information, to which the Deliberative exemption applies, in the public interest, and this was not a ground of appeal submitted to the AIAB.)

Admission of the Appeal

7. The AI Appeals Board admitted the application for appeal on the following grounds:

- In Time: the application was filed before the AIC and the AI Appeals Board within 60 days.
- A *prima facie* case that the World Bank has violated the AI Policy by improperly or unreasonably restricting access to information that it would normally disclose under the policy has been established.
- Authority: The AI Appeals Board has authority to consider the appeal, as it follows an AIC decision to uphold a World Bank decision to deny access on the basis that the denial did not violate the AI Policy.

Arguments on Appeal

8. The appellants have argued that:

- a) The CBI Final Report is not Deliberative Information in accordance with section III.B.2.(i) of the Bank's AI Policy. Rather, the CBI Final Report is an analytical and advisory (AAA) product, relating to the Bank's economic and sector work (ESW), which is routinely disclosable; and
- b) even if the CBI Final Report is not an AAA product, it does not constitute Deliberative Information as defined in the AI Policy.

The CBI Report and Analytical and Advisory products

9. The AIAB has considered the document and the internal definitions of an Advisory Services and Analytics (ASA) task, (as AAA is now known) and determined that the CBI report does not fit the definition of an ASA product. It was not produced by the Bank for an external client; rather the bank was the client and commissioned the report from an external provider for its own purposes.^{1[1]}

The Deliberative Information Exception(s)

10. The AI Policy states:

(i) "*Deliberative Information*. The Bank, like any institution or group, **needs space to consider and debate, away from public scrutiny**. It generally operates by consensus, and it **needs room to develop that consensus**. During the process it seeks, and takes into account, the **input of many stakeholders**; but it must preserve the integrity of its deliberative processes **by facilitating and safeguarding the free and candid exchange of ideas**. Therefore, while the Bank makes publicly available the decisions, results, and agreements that result from its deliberative processes, it does not provide access to the following information:

^{1[1]} Information from which this conclusion is based was derived from "World Bank Directive/Procedure Advisory Services and Analytics," Official Use Only.

- i. Information (including e-mail, notes, letters, memoranda, draft reports, or other documents) **prepared for**, or exchanged during the course of, **its deliberations with member countries or other entities** with which the Bank cooperates.
- ii. Information (including e-mail, notes, letters, memoranda, draft reports or other documents) **prepared for**, or exchanged during the course of, **its own internal deliberations, (...)**”

[Our emphasis added].

11. The business unit and the AIC claim that both (i) i and ii apply to exempt the CBI report from disclosure.
12. In accordance with the *Operating Procedures of the Access to Information Appeals Board*, dated July 2012, in fulfilling its mandate the AI Appeals Board must read and apply the AI Policy as it is written, using the ordinary meaning of the words (*see* Operating Procedures, para. 7).^{2[2]}
13. In ascertaining the applicability of the exceptions, we note that (i) i only applies to documents shared or intended to be shared externally during the course of deliberations with member countries or other entities. Regarding the creation, use, and intended uses of the CBI report the most reliable account of why the CBI report was commissioned is the one provided to the Inspection Panel on August 5, 2016:

“Management has hired an international firm, the Consensus Building Institute, to draw experiences/lessons **for Bank management** learned from this and other infrastructure projects and to develop recommendations **for conflict prevention** and management for Nepal energy sector projects.” (emphasis added)
14. Further reference has been made to an occasion when highlights from the report were shared and discussed in a PowerPoint presentation with the Government and Nepal and its agencies. On this basis exception (i)i is claimed.
15. We do not find that this engages the exception because the report itself was neither intended to be shared nor actually provided to the Government or its agencies either in draft or final form. Additionally, the Bank described the meeting as a “knowledge sharing event with GON agencies to discuss the findings of this report.” While discussion on aspects of the summaries provided may have taken place it cannot be said that these amount to disclosure of the CBI report in the course of deliberations. No decisions or agreements were to be made as a result of that presentation. It cannot be the case that drawing some information from a document, converts the underlying document into a

^{2[2]} The references to the AI Policy and the interpretations of the AIC in the Operating Procedures are now understood to include the AI Directive/Procedure.

^{2[3]} The business unit has confirmed that the report was never shared externally.

deliberative document. This is especially true where, as here, the dissemination is not intended to engage in or produce deliberations with member countries or other entities.

16. In light of these articulated purposes we do not find that the report falls within the exception as it was neither used or intended for use externally^{3[3]} and it was not prepared for financial purposes articulated in the AI Policy. See FN 9.4^{4[4]} Consequently we find that the report was not “prepared for, or exchanged during the course of, its deliberations with member countries or other entities with which the Bank cooperates,” and therefore, contrary to the finding of the AIC, and claim by the business unit, it does not fall within exemption (i) i of the AI Policy.
17. Thus, in order to uphold the determination of the Bank and AIC we must analyze whether exception (i) ii was properly applied. With regard to the second exception, the AIAB concludes that it applies to documents prepared for internal use. Furthermore, consistent with the overriding principle of transparency, to be exempt from disclosure under the AI Policy the information must be deliberative. As defined in the AI Policy, deliberative information must facilitate: debate, away from public scrutiny; room to develop consensus; and the safeguarding of the free and candid exchange of ideas. Information that is not prepared for or exchanged for these purposes fails to meet the threshold of deliberative information. To assess whether the document in question satisfied this threshold we reviewed the information provided, and solicited additional information from the business unit. In response to our questions the business unit provided the following responses:
 - 17.1 “[t]he intention of the report was to analyze the causes and impacts of the conflicts on the ongoing energy program supported by the Bank, and prepare proposals for conflict prevention and management, including conflict resolution services and process, for transmission line and hydropower project development.”
 - 17.2 “[t]here were no specific decisions to be made based on this study and neither was there any intention when the study commenced that any sort of decision would be made after completion. However, the findings and recommendations of the study **could be used** in designing/preparation of new energy projects to avoid potential conflicts.” (Our emphasis added).
 - 17.3 “Bank management may likely refer to the CBI report in its discussion with counterparts to inform itself about the nature of conflicts in the energy project and possible mitigation approaches.”
 - 17.4 “[t]here was no final decision expected or subsequently taken. The study is based on an analysis of a limited number of energy projects supported by the Bank. There is perhaps a need to analyze projects not funded by the Bank to get a more comprehensive picture

^{4[4]} Footnote 9 describes the types of information included in exception (i)(i) as: This includes financial sector stress tests, the aide-mémoire following Bank-Fund financial sector assessments under the Financial Sector Assessment Program (FSAP), the report following the Bank’s assessment of government debt management capacity, other technical advisory reports requested by member countries from Treasury, deliberations relating to IDA replenishments, IDA country allocations, and deliberations with donors relating to trust funds.

about conflict in energy projects. The recommendations were neither accepted or rejected.”

18. In applying the policy rationale to the CBI document, we have determined that it does not meet the criteria to be deliberative information. First, and to be clear, the document does not contain any information which constitutes deliberation by the Bank. Any analysis or recommendations contained within it are those of the external consultants and not of the Bank. Second, as indicated above, the fact that the document may have been discussed or informed discussion on energy policy within the Bank is not sufficient for it to be regarded as deliberative. As the business unit acknowledges “[t]here were no specific decisions to be made based on this study and neither was there any intention when the study commenced that any sort of decision would be made after completion.” As the document was never intended to be used to inform a decision-making process there was no requirement to come to a consensus or safeguard the information from the public. The potential future use of the document for a deliberative purpose does not support a current finding that the document is deliberative information and covered under the exception.

Conclusion

19. In coming to our decision, we maintain that the deliberative exception must be narrowly construed. It cannot simply be used to withhold any information which has been the subject of internal discussion by staff of the Bank at whatever level. If that was to be the case almost all internal documents would be subject to the exception.
20. The deliberative process has to be one which is time-limited with the intent of coming to a conclusion on a matter of substance. (It is notable that the AI policy on this exception makes specific reference to six categories of documents pertaining to Board of Governors and Board deliberations.)
21. The CBI report is a document which was commissioned to “analyze the causes and impacts of the conflicts on the ongoing energy program supported by the Bank, and prepare proposals for conflict prevention and management....” The information withheld is an external document which does not of itself contain any deliberation by the Bank. Furthermore, according to the business unit “[t]here were no specific decisions to be made based on this study and neither was there any intention when the study commenced that any sort of decision would be made after completion.” Thus, we cannot find that the document is or was “**prepared for**, or exchanged during the course of, **its own internal deliberations**” and therefore it is not a deliberative document.

AI Appeals Board Findings

22. Accordingly, we find that the Bank violated its AI Policy and so must overturn the AIC’s decision.
23. The AI Appeals Board’s decision is final.