

AIC Decision on appeal #39

CASE NUMBER AI3634 WORLD BANK'S REVIEW OF THE PROCUREMENT PROCESS FOR THE DEWATERING OF THE TAMNAVA WEST FIELD MINE IN SERBIA

(Decision dated July 14, 2015)

Summary of Decision

- The Access to Information Committee (“AIC”) upholds the World Bank’s decision to deny access to information related to the World Bank’s review of the procurement process of the dewatering of the Tamnava West Field mine in Serbia. The AIC considered the appeal on both violation of policy and public interest grounds.
- **Violation of Policy.** The AIC found that the World Bank (“Bank”) had properly and reasonably denied access to the requested information based on the *Deliberative Information*, and/or the *Information Provided by Member Countries or Third Parties in Confidence* exceptions under the World Bank’s Policy on Access to Information, dated July 1, 2010, as revised on July 1, 2013 (“AI Policy”). The AIC also found that certain information is restricted by the *Attorney-Client Privilege* exception under the AI Policy; while the Bank’s denial was silent on this exception, the AIC found the error to be harmless as the information remains restricted from public access. In reaching its decision on appeal, the AIC considered, among other elements, (a) whether the result of the Bank’s review of the procurement process in question had been disclosed, and (b) the nature of the information considered by the Bank in reaching its conclusion on said review.
- **Public Interest.** The AIC found no compelling public interest reason to override the *Deliberative Information* exception that solely restricts part of the requested information. With respect to the part of the information restricted by the *Attorney-Client Privilege* or the *Information Provided by Member Countries or Third Parties in Confidence* exceptions, the portion of the appeal on public interest ground is dismissed for appealing a matter that the AIC does not have authority to consider, pursuant to paragraph 40 (c) of the AI Policy.

The Decision

Facts

1. On January 21, 2015, the requester submitted a request (“Request”) seeking to access “a copy of World Bank’s report on the Bank’s review of this procurement process [for the dewatering

of the Tamnava West Field mine in Serbia]. If the document is not in the form of a report, [...] a copy of a document produced by the Bank after a review of the procurement process for the Dewatering of the Tamnava West Field and in which the procurement was deemed acceptable to the Bank”.

2. On February 18, 2015, the World Bank (“Bank”) informed the requester that “there is no single World Bank report on the Bank’s review of the procurement process” in question and that “other documentation related to the Bank’s procurement review is restricted from public access (...) by the *Information Provided by Member Countries or Third Parties in Confidence* and/or the *Deliberative Information*” exceptions under the Bank’s Policy on Access to Information, dated July 1, 2010, as revised on July 1, 2013 (“AI Policy”).

3. On April 14, 2015, the secretariat to the Access to Information Committee (“AIC”) received an application (“Application”) appealing the Bank’s decision to deny public access to the requested information.

4. The Application challenges the Bank’s decision to deny public access to the requested information on the basis that the denial “violates the AI Policy” and that there is a “public interest” case to override the AI Policy exceptions that restrict the requested information. The Application states, in relevant part, the following:

As cited in my request, I do realize that there might not be one single report on procurement review, but I believe that any evaluation of different pieces of the procurement process by the Bank must have resulted in production of some paper work.

That work is Bank property and not the third party or government property, and as such the Bank should be able to release it.

If those documents contain ‘Information Provided by Member Countries or Third Parties in Confidence’ or financial data protected as exemptions from AI policy, I would urge the Bank to redact [...] information that cannot be disclosed [...].

I believe that the documents produced in a course of the Bank’s review of procurement process cannot be placed in a category of Deliberative Information (Paragraphs 20, b and d). If documents contain data covered by the exemptions from the AI policy (Paragraph 20, a (footnote 11) and c), I would urge the Bank to redact the information protected as Deliberative Information.

The issue of this specific procurement has been a matter of wide public debate in Serbia since early January, when the Balkan Investigate Reporting Network, BIRN, published an article raising questions about the tender process.

[...]

The dewatering works are still ongoing and the public still calls for answers on numerous questions regarding this project.

I strongly believe that the Serbian public - which will repay a loan provided for this specific works by the World Bank - deserves the answers on numerous questions regarding this procurement. Some of these answers, at least partially, could be provided by the World Bank.

I believe that the World Bank need to lead by example in issues such as transparency and open public debate.

This is all the more important considering that the World Bank is a major funder of the Open Contracting Partnership which relies on such openness and disclosure.

Finally, there is an overriding public interest in disclosing the Bank's review documentation on the tender process and urge the Bank to do so.

Findings and Related Decision

5. In reviewing the Application in accordance with the AI Policy, the AIC considered:
 - (a) the Request;
 - (b) the Bank's denial of access to the requested information;
 - (c) the Application;
 - (d) the nature of the requested information identified as responsive to the Request;
 - (e) the AI Policy's *Information Provided by Member Countries or Third Parties in Confidence* and the *Deliberative Information* exceptions that justified the Bank's decision to deny public access to the requested information, and the *Attorney-Client Privilege* exception; and
 - (f) the information provided by the relevant business units concerning the requested information.

“Violation of the AI Policy”

6. Pursuant to the AI Policy, the Bank allows access to any information in its possession that is not on a list of exceptions (*see* AI Policy at paragraph 6). A requester who is denied public access to information by the Bank may file an appeal if the requester is able to establish a *prima facie* case that the Bank has violated the AI Policy by improperly or unreasonably restricting access to information that it would normally disclose under the AI Policy (*see* AI Policy at paragraph 36 (a)).

7. The AI Policy states that the Bank “does not provide access to documents that contain or refer to information listed in paragraphs 8-17” of the AI Policy, which set out the AI Policy’s list of exceptions (*see* AI Policy at paragraph 7). Paragraph 11 of the AI Policy states that, under the *Attorney-Client Privilege* exception, the Bank does not provide access to information subject to attorney-client privilege, including, among other things, communications provided and/or received by the General Counsel, in-house Bank counsel, and other legal advisors. Paragraph 14 of the AI Policy provides, under the *Information Provided by Member Countries or Third Parties in Confidence* exception, that the Bank has an obligation to protect information that it receives in confidence and, thus, does not provide access to information provided to it by a member country or a third party on the understanding of confidentiality, without the express permission of that member country or third party. The AI Policy further recognizes that if the Bank believes that information was given by a member country or third party (explicitly or implicitly) in confidence, the information is classified accordingly and restricted from disclosure pursuant to the *Information Provided by Member Countries or Third Parties in Confidence* exception (*see* AI Policy at footnote 11). Paragraph 16 of the AI Policy, under the *Deliberative Information* exception, recognizes that, to facilitate and safeguard the free and candid exchange of ideas for the purpose of preserving the integrity of the deliberative processes, while the Bank makes publicly available the decisions, results, and agreement that result from its deliberative process, the Bank does not provide access to information prepared for, or exchanged during the course of, (a) its deliberations with member countries or other entities with which the Bank cooperates, and/or (b) its own internal deliberations (*see* AI Policy at paragraph 16 (a) and (b)).

8. In this case, the AIC found that the result of Bank’s review of the procurement process for the dewatering of the Tamnava West Field mine in Serbia has been recorded in the publicly available Project Appraisal Document (“PAD”) for the Serbia Floods Emergency Recovery Project ([Report No: PAD1129, September 22, 2014](#)). The PAD indicates that the Bank’s assessment was that “[t]he procurement process for the Dewatering of the Tamnava West Field mine was carried out in accordance with the national emergency procedures; it has been reviewed and deemed acceptable to the Bank. The Dewatering contract will incorporate the Bank’s standard clauses on right to audit and Fraud and Corruption” (PAD at paragraph 73). The AIC found no other record reflecting the result of the Bank’s review of the procurement process in question.

9. The AIC also found that the information considered by the Bank during its deliberative processes to reach its conclusion on the review of the procurement process in question, as recorded in the PAD, consists of legal opinions from outside local counsel received by the Bank’s in-house counsel, of bidding documents provided by the competent authorities of the member country (e.g., tender documents, bid evaluations, contracts), and of emails among Bank staff and/or external parties. In reviewing such information, the AIC found that (a) the legal opinions from outside local counsel received by the Bank’s in-house counsel and related information are protected by attorney-client privilege, and (b) the emails and/or bidding documents are deliberative in nature and/or contain information that has been provided to the Bank in confidence; with respect to the information provided in confidence to the Bank, the AIC also found that there is no written consent to disclose such information. For these reasons, the AIC concluded that the information considered by the Bank when reviewing the procurement process in question is restricted by the *Attorney-Client Privilege, Information Provided by Member Countries or Third Parties in Confidence, and/or Deliberative Information* exceptions under the AI Policy.

10. While the AIC found that the Bank’s denial of access was silent with respect to the *Attorney-Client Privilege* exception, the AIC also found this error to be harmless, as the information covered by such exception remains restricted from public access.

11. Based on the above findings, the AIC concluded that the Bank had properly and reasonably denied public access to information related to the Bank’s review of the procurement process in question and, therefore, did not violate the AI Policy. For this reason, the AIC upholds the Bank’s decision to deny public access to the requested information.

12. Under the AI Policy, if the AIC upholds the initial decision to deny public access to information in appeals alleging a violation of the AI Policy, the requester may file an appeal to the Access to Information Appeals Board (“AI Appeals Board”), as the second and final stage of appeals (*see* AI Policy at paragraph 38). If you wish to file an appeal to the AI Appeals Board, [click here](#).

[URL provided in original decision sent to the requester].

“Public Interest” case

13. Pursuant to the AI Policy, a requester who is denied public access to information by the Bank may file an appeal on a “public interest” basis if the requester is able to make a public interest case to override certain AI Policy exceptions that restrict the information. Public interest appeals are limited to information restricted by the *Corporate Administrative Matters, Deliberative Information, and/or Financial Information* (other than banking and billing information) exceptions (*see* AI Policy at paragraph 36 (b)).

14. The AIC considered whether the public interest assertion in the Application merited overriding the *Deliberative Information* exception solely restricting part of the information. Under the AI Policy, the Bank makes publicly available the decisions, results, and agreements that result from its deliberative process, while preserving the integrity of its deliberative process by facilitating and safeguarding the free and candid exchange of ideas (see paragraph 7 above). The AIC acknowledged that the result of the Bank's review of the procurement process in question is publicly available in the PAD and that no other document recording such result exists (see paragraph 8 above). The AIC recognized that the Bank has also issued a [brief public statement](#) with background information on the procurement process for the dewatering of the Tamnava West Field mine in Serbia. The AIC considered the business unit's views on the possible disclosure of the Bank's deliberations on the procurement review and the impact of such disclosure to the integrity of the deliberative process and to the free and candid exchange of ideas, vis-à-vis the alleged public interest in the Application. The AIC found no compelling ground to support the appeal on a public interest basis and to override the *Deliberative Information* exception solely restricting part of the requested information. For this reason, in response to the public interest assertion in the Application, the AIC decided to uphold the Bank's decision to deny access to the requested information solely restricted by the *Deliberative Information* exception.

15. Because the AI Policy does not allow the restriction of information pursuant to the *Attorney-Client Privilege* or the *Information Provided by Member Countries or Third Parties in Confidence* exceptions to be appealed on public interest grounds, the AIC concluded that the restriction of the requested information covered by the aforementioned exceptions cannot be the subject of a public interest appeal. Accordingly, the portion of the Application that appeals the Bank's denial of information restricted by the *Attorney-Client Privilege* or the *Information Provided by Member Countries or Third Parties in Confidence* exceptions is not properly before the AIC for consideration (see AI Policy at paragraph 40 (c)).

16. For the reasons discussed above, in light of the appeal on public interest ground, the AIC upholds the Bank's decision to deny public access to the part of the information solely restricted by the *Deliberative Information* exception, and dismisses the portion of the public interest appeal referring to the part of the information restricted by the *Attorney-Client Privilege* or by the *Information Provided by Member Countries or Third Parties in Confidence* exceptions for appealing a matter that the AIC does not have authority to consider.

17. Under the AI Policy, for appeals that assert a public interest case to override an AI Policy exception, the decision of the AIC is final (see AI Policy at paragraph 37).

18. Notwithstanding the AIC's determination with respect to both the violation of the AI Policy and the public interest appeal, the AIC noted that the Application requested the Bank to consider the possible disclosure of the requested information in redacted form. As the AIC has previously indicated in the AI Policy interpretations dated July 14, 2010, and June 24, 2014, the "Bank's determination as to whether to redact restricted information from a document in order to make it

publicly available is a discretionary decision to be taken by Bank. (...)” (*see* AI Policy Interpretations at <http://go.worldbank.org/ZU1HZL0O60>). Neither the AI Policy nor the AI Policy interpretations impose an obligation or duty on the Bank to either consider redaction (or modification) of a document that includes information restricted by one or more AI Policy exceptions, or to redact (or in any way modify) a document that includes such restricted information.