

## Access to Information Appeals Board Decision

### Case Number AI7115-A Documents concerning Institutional Review Board (IRB) Documents

Decision dated June 3, 2021

#### **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 that was filed with the World Bank (hereafter WB or Bank) on October 23, 2020 and transmitted to the AIAB on November 6. The requestor's appeal asked the AIAB to review the Bank's handling of his request for access and his earlier appeal to the Bank's Access to Information Committee (AIC). The [AIC had issued a decision on October 22](#), dismissing the appeal on the grounds that the application for appeal was "not properly before the AIC for consideration because it was submitted before a decision by the Bank to deny access to the requested information."
2. As explained below, the AIAB concludes that the Bank and the AIC fell far short of what is required by their own policies and procedures in handling the request. Nevertheless, the AIAB's authority to hear the appeal in this case is constrained by a technical, but critical, point: at the time of the appeal, the AIC had not made a decision to uphold an initial World Bank decision to deny access. [See AI Policy, Sec. III.B.8(b)(ii); AIAB Operating Procedures, Sec. III.A(1) and (2)(a)(c)(i)].
3. Although the AIAB concludes that it must refuse the appeal for that reason--i.e., that the AIC had not yet made a decision--the AIAB also decides that procedural fairness to the requestor demands that the matter be remitted to the AIC for it to hear the case on the substantive merits, now that is clear that the Bank did reach a decision to refuse access to the information requested.
4. The reasons for our decision are set out below, along with our observations about the case.<sup>1</sup>

#### **Background of Initial Request, Delays, and Appeal to AIC**

5. The initial request and much of the subsequent correspondence between the requestor and the Bank is set out in the [AIC decision of October 22](#), which is available on the Bank's website. Nevertheless, we summarize here the correspondence that preceded this appeal.

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<sup>1</sup> The AIAB regrets the long delay in issuing its decision in this case, due mainly to the priority the Appeals Board has given since last October to another appeal which was already before the Board and which involved careful review and deliberation of a large number of documents.

6. On August 9, 2020, the requestor had asked for the Institutional Review Board (IRB) “approvals” for a study undertaken in Kenya on “Enforcing Payment for Water and Sanitation Services in Nairobi’s Slums.”<sup>2</sup> (The [study was published by the National Bureau of Economic Research and then withdrawn](#), apparently as a result of controversy.)
7. Interim responses from the Bank in August 2020 gave the requestor links to already-public IRB approvals for the project in Kenya. At the same time, the Bank’s reply on August 18 acknowledged and quoted the requestor as having stated the following on August 9:

“I noticed that the paper mentions study received local and international ethical clearance Maseno University and Innovations for Poverty Action International Review Board, so I am assuming that they would have their own IRB too, in addition maybe to the Bank's IRB. As i've explained, I'm asking for all the IRB relating to this study that are in possession of the World Bank.”
8. After that August 18 communication from the Bank, the requestor wrote back asking the Bank to explain the nature of these responses and how he could file an appeal.
9. The requestor confirmed with the Bank on September 2 that his request for the IRB was not for the approval of the IRB but rather the IRB itself—that is to say, the proposal for approval of a research project: “These are not the documents I requested. I asked for the IRB for this study. Instead you've sent me letters that approve the IRB. This is clearly not the same thing.” This letter became what the Bank called the “Modified Request.”
10. The Bank’s three responses to the requestor in September 2020 all say in essence that the document (“the IRB”) was being reviewed and would become available by the end of September:

Bank response on September 9, 2020:

“On 9/2/2020, you clarified your request is for the IRB itself, not the approvals. In light of this clarification, the Bank restarted its due diligence to have the IRB considered for publicly disclosed. This due diligence is ongoing at this time.

“Kindly note that the IRB will be made publicly available after internal clearances are concluded, which is expected by the end of September. We will update you once the information has become publicly available. Please note that your request is open and at this time there is no denial of access to the information. To the contrary, the information will be made publicly available in due course, just not ripe yet for public disclosure.”

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<sup>2</sup> As the [Bank explains on its website](#), “An institutional review board (IRB) is an organization that reviews and approves (or disapproves) any research study involving human subjects. A human subject is any individual about whom the [research team](#) collects data through an intervention, or interaction with the individual. Institutional review boards (or IRBs) can recommend changes in all aspects of an impact evaluation, including [protocols](#), [content](#), and [data security](#). The research team must seek IRB approval to ensure that they are protecting the rights and welfare of human subjects.”

Bank response on September 18:

“In response to your request under S2008-1053, we would like to inform you that the IRB is under review and will be disclosed soon. We just cannot give a firm date but we will let you know when it is public.”

The requestor responded on the same day, September 18, asking a perfectly reasonable and pertinent question:

“Dear Bank,  
So this is a refusal or not?  
If so, then please provide me with an appeal link. Otherwise please give me the document as per your policy's timelines.”

Bank response on September 23:

“The Bank's September 18, 2020 response is not a denial of access.  
The information you requested will be disclosed in due course and when it is disclosed, the Bank will provide you with a link to the information.”

11. The Bank then noted that it needed additional time to respond, which it can do in “special circumstances,” for example, if the request is complex or voluminous or if it requires further review by or consultation with internal World Bank units, external parties, the Access to Information Committee, or the Bank’s Board. [AI Policy Directive/Procedure Sec. III.C.1.] The Bank promised to notify the requestor promptly of any updates on the status of his request.
12. On October 5, the requestor filed an appeal to the AIC, again saying he did not want the approvals, but rather he wanted the application (or proposal) for approval by the IRB to conduct the Kenya research project.
13. On October 22, the requestor was sent three separate letters:

Letter #1 dated October 22 conveyed to the requestor the [AIC's response](#) (also dated October 22) to his Appeal to the AIC: “the application is not properly before the AIC for consideration because it was submitted before a decision by the Bank to deny access to the requested information.” The initial request, for IRB approvals, had been fulfilled so the Application was considered moot as to that request.

With regard to the “Modified Request”, the AIC stated that:

“the IRB proposal is an intrinsic part of a draft report restricted by the Deliberative Information exception under the AI Policy and cannot be detached from the draft report;” and

“the Bank has indicated that the IRB proposal will be disclosed after ‘internal clearances are concluded’, i.e., at the same time as the final version of the draft report, that the Request remains open, and that the Bank’s response is not a denial of access; thus, the Application is not eligible for consideration at this time.”

The appeal was dismissed in its entirety:

- For “failure to file within the required time (i.e., the Application in this case was filed before a denial of access to the information, i.e., has not been filed within 60 calendar days of the Bank’s initial decision to deny access to the requested information and, thus, is outside the period of time that makes an appeal eligible for consideration),”
- For “failure to provide sufficient information that would reasonably support the appeal (i.e., a Bank decision to deny access to the requested information),”
- For “appealing a matter that the AIC does not have authority to consider (i.e., no Bank decision to deny access to the requested information).”

Letter #2 dated October 22 conveyed the Bank’s denial of access to the draft report of which the IRB proposal is a part, claiming the Deliberative information exception. This time the Bank admitted that “there is no specific date for disclosing the final version of the draft report and all that is included in such report.”

Letter #3 dated October 22 The Bank also sent yet another letter to the requestor stating that although its previous letters in September were not denials of access, its letter of that same date (Letter #2) was indeed a “denial of access” and he could appeal.

### **Arguments on appeal to AIAB**

14. On October 23, the requestor appealed to the AIAB from the Bank’s denial and the AIC’s decision. Among the salient points made in the appeal are these (emphasis added by AIAB):

“One of the key problems is that **it is never clear when the Bank makes a final response** under their AI policy. Responses are retrospectively labeled as “updates” which allows the Bank to backtrack on its word as well as delay/deny any appeal.

“Furthermore, the possibility of appeal to the AI committee is not mentioned in the responses. When I’ve asked to appeal, the Bank has ignored my requests for months. In order to get an appeal link, for most requests I’ve had to write to the AI committee who then asked the Bank (A2I mailbox) to send me the link, which they then usually eventually do.

As you'll see, the Bank (A2Imailbox) provided several responses that it later labeled as "updates", "first/initial response" or "status update", **making it impossible to know which stage of the AI process we were at, and blocked any appeal. It was Kafkaesque.**

"I asked the A2Imailbox and the AI Secretariat **how I could appeal a request that was endlessly delayed** and received no clarification. It seems that they believed that a request can only be appealed once a denial of access is sent, which never happens since all the responses are merely "updates" . . . .

The requestor also indicated in relation to the refusal that:

"Furthermore, **the deliberative exemption does not stand.** The IRB underpinned a study that has already been published (and then withdrawn). An IRB approval letter (<http://pubdocs.worldbank.org/en/814001598873101215/Amendment-Approval-Letter-IPA-IRB-31072018.pdf>) makes it clear that an "IPA IRB Protocol #: 13 December-004" has been submitted by a World Bank employee and approved. Based on this version of the IRB, the study was then implemented in 2018 in Kenya on 5,091 water accounts, i.e. households. This was clearly a final document, not a draft."

### **Admission of the Appeal**

15. The Bank's AI Policy, Sec. III.B.8(b) sets out a two-stage appeal process. At the second appeals stage, the AIAB must look at whether the appeal is timely; establishes 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 Policy;" and involves a matter that the AIAB "has authority to consider." [See also AIAB Operating Procedures, Sec. III.A.2(a)-(c)].
16. We address the third point first, as the AIAB finds its authority to hear the appeal in this case hinges on a technical, but critical, point: at the time of the appeal, the AIC had not made a decision on any initial World Bank decision to deny access [See AI Policy, Sec. III.B.8(b)(ii); AIAB Operating Procedures, Sec. III.A(1) and (2)(a)(c)(i)].
17. Accordingly, although we do not believe that it is necessary at this time to look at whether the requestor's appeal was timely, we note that the requestor filed an appeal with the AIAB one day after he received simultaneously two communications from the Bank that he was being denied access (and one from the AIC seeming to confirm the same). At the least, the responses were confusing and not in the spirit of what is required by the Bank's own policies and procedures in handling the request—leading the requestor to ask again and again what his appeal rights were and how to exercise them (see paragraph 14 above).
18. It also is unnecessary to address whether the requestor made a *prima facie* case "that the Bank has violated this Policy by improperly or unreasonably restricting access to information that it would normally disclose under the Policy." See AI Policy, Sec. III.B.8(a) (i).

At the same time, as shown in the correspondence set forth above, the Bank repeatedly told the requestor that the document(s) he requested would be released if only he would be patient. Moreover, the requestor put forward a cogent argument that the proposal—which was approved and upon which the next phase of research was conducted—was a decisional document that has lost its protected status as deliberative.

### **Findings of the AIAB**

19. The AIAB further finds that on the same day that the Bank issued two letters unequivocally confirming that the Bank was, in fact, denying the requestor access to the information requested, the AIC handed down its decision dismissing the requestor’s appeal and indicating the following:

“The Bank is carrying out the necessary due diligence to finalize the draft report which includes the IRB proposal. The final version of the draft report is expected to be disclosed after the Bank’s internal review and clearances are concluded.”

20. This was self-evidently unsatisfactory and, from the requestor’s perspective, no doubt, an absurd situation. As noted above, the AIAB must conclude that it does not have the authority to determine this appeal. However, in the circumstances of the case, the question of procedural fairness arises. Any administrative justice process, including an access to information regime created by an international financial institution such as the World Bank, is underpinned by the principle of procedural fairness, which is not an abstract concept but an essentially practical one. It would be practically unjust to require the requestor to file yet another appeal from the Bank’s October 22, 2020 decision denying access to the “Modified Request.” Accordingly, we further decide that the case should be remitted to the AIC to make a decision on the substantive matter of the case.

21. In coming to this finding we refer to a previous decision of the AIAB [decision dated November 30, 2012](#), Case No. AI1362 - Certain information concerning the Turkey Emergency Flood and Earthquake Recovery Project where the AIAB addressed this form of relief:

“In our view, the sensible and reasonable thing to do would be to remit the matter back to the AIC, thereby inviting it to address the question [of disclosure]. But it is unclear whether we have authority to do so, since both the AI Policy and its Operating Procedures are silent on the point. We submit that a purposive interpretation of that silence would conclude that since the purpose of the AI Policy is in general to assist a broad range of the World Bank’s stakeholders to access information about the Bank’s operations and to help the Bank respond to that legitimate interest, it would not be unreasonable to infer an authority to remit a case back to the AIC, with reasoning from the AI Appeals Board.

“In the absence of such authority the AI Appeals Board would be unable to address or remedy procedural flaws or omissions, the consequence of which could be significant if the

only options available to the AI Appeals Board were to uphold or reverse decisions of the AI Committee.”

22. In the case before us now, the AI Appeal Board remits the matter to the AIC to act on the requestor’s October 23, 2020 appeal from the Bank’s denial of October 22, 2020. This is a remedy that preserves both the requestor’s right to appeal and protects the integrity of the Bank’s appeal process.

23. The AI Appeals Board’s decision is final.