

## AIC decision on appeal #88

### CASE NUMBER AI7243 SIERRA LEONE DOCUMENTS CONCERNING THE CONTRACT FOR AUDIT SERVICES

(Decision dated November 3, 2021)

#### Summary of Decision

- The Access to Information Committee (“AIC”) upholds the Bank’s decision to deny public access to the requested information. The AIC notes, however, that the terms of reference (“TOR”) identified as responsive to the Request *has been disclosed* and is publicly available online ([click here](#)).
- **Violation of Policy.** The AIC found that the restricted information in question (a) serves both the Bank’s own decision-making process and deliberative process with the borrower on operational procurement matters, and (b) contains information provided to the Bank in confidence for such deliberations. Such information is crucial for the Bank’s relationship and open communication with the borrower, and the carrying out of the Bank’s business and fiduciary obligations under the Bank’s Articles of Agreement as set forth in the Procurement Regulations. For the above reasons, the AIC found that the information is properly and reasonably restricted by the *Deliberative Information* and *Information Provided by Member Countries or Third Parties in Confidence* exceptions under the AI Policy and, thus, there is no violation of policy. Based on the above, the AIC upholds the Bank’s decision to deny public access to the requested information.
- **Public Interest.** The AIC dismisses the public interest portion of the appeal because the requested information is restricted by the *Information Provided by Member Countries and Third Parties in Confidence* exception under the AI Policy (in addition to the *Deliberative Information* exception) which is ineligible for consideration on a public interest ground. For this reason, the AIC dismisses this portion of the appeal for appealing a matter that the AIC does not have authority to consider.

#### The Decision

##### *Facts*

1. On November 2, 2020, the World Bank (“Bank”) received a public access request (“Request”) for:

all Bank documents concerning the contract (...) for audit services in Sierra Leone as part of the Covid-19 project, including Bank review documents about this contract <https://projects.worldbank.org/en/projects-operations/procurement-detail/OP00091562> (...) (“Requested Information”).

2. On February 23, 2021, the Bank responded to the Request by denying access to the Requested Information, understood at the time to solely mean the contract for the audit services, because the information is restricted from public access by the Bank’s prerogative to restrict.<sup>1</sup>
3. On March 29, 2021, the Secretariat to the Access to Information Committee (“AIC”) received an application (“Application”) appealing the Bank’s decision to deny access to the Requested Information. The Application challenges the Bank’s decision on both “violation of policy” and “public interest” grounds. Consultations with the responsible business unit started on the same date.
4. On May 10, 2021, the business unit provided its views on the Requested Information in light of the appeal. Such views included six additional pieces of information located as a result of the appeal that had not been considered during the request phase.
5. On May 26, 2021, the AIC started discussions on the Application at its regular meeting. The AIC’s discussions continued through its regular meetings of June 30, 2021, and August 18, 2021. The Chief Procurement Officer, OPSPR, attended the AIC meeting of August 18, 2021, to clarify certain questions on the nature of the Requested Information.
6. Following the AIC meeting of August 18, 2021, the Bank sought the member country’s written consent to disclose the terms of reference (“TOR”) identified as responsive to the Request.
7. On September 13, 2021, the member country’s representative, through its Ministry of Health and Sanitation, expressed its consent to have the TOR made publicly available. As a result, ***the TOR has been disclosed*** and is available online ([click here](#)).
8. On September 29, 2021, the AIC met at its regular meeting to discuss the appeal in light of the above developments since its August meeting.

### ***Findings and Decisions***

9. 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;

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<sup>1</sup> Although the record shows the Bank’s decision is dated January 11, 2021, the actual date when the Bank’s denial was issued to the requester is February 23, 2021.

- (c) the Application and the grounds for appeal;
- (d) input from the relevant business units;
- (e) the nature of the Requested Information and the reasons restricting it from public access; and
- (f) information publicly available responsive to the Request.

### ***Preliminary Matters***

#### *Overcoming the Bank's lack of initial denial of access*

10. The AIC has authority to consider appeals after the Bank has denied access to information (see AI Policy, at Section III.B.8.(a) and (b).i). The Bank's initial decision to deny public access to the Requested Information was solely based on the document initially located by the business unit during the request phase, namely the signed procurement contract under a Bank financed project and an amendment to such contract. However, during the consultations for the appeal phase, the business unit identified six additional pieces of information restricted by the *Deliberative Information* exception under the AI Policy, including the TOR that was later disclosed (see para. 7 above). Despite the technical finding that there was no Bank denial of access to such additional information located by the business unit during the appeal phase, the business unit's views clearly indicated that the outcome would have been the same (i.e., denial) had those documents been remitted back to the request phase for consideration and been actually considered then. Based on the above, for the sake of economy and efficiency and for completion of the record, the AIC decided to rectify the Bank's initial denial of access to consider it as including the five additional pieces of information that remained restricted from public access by the *Deliberative Information* exception under the AI Policy and located by the business unit during the appeal phase.

#### *Scope of the Request and information under appeal*

11. The Request seeks access to information "*concerning* the contract (...) for audit services in Sierra Leone as part of the Covid-19 project, including Bank review documents about this contract" and excludes the contract itself although it was listed by the business unit among the information identified in response to the appeal (emphasis added). The contract for audit services for the project referred to in the Request was the subject of the appeal under Case No. AI7461, for which the AIC issued a decision on May 26, 2021 (see [AIC Decision on appeal under Case No. AI7461](#)). For the avoidance of doubt, and because the Request is not about the contract itself and the AIC has already addressed the request for the contract itself under Case No. AI7461, the AIC found no reason to consider the contract as part of the Request under this appeal. For this

reason, the AIC solely considered the six additional pieces of information identified by the Bank during the appeal phase as restricted by the *Deliberative Information* exception under the AI Policy, out of which only five remained restricted under appeal (see para. 7 above regarding the disclosure of the TOR).

### ***“Violation of the AI Policy”***

12. Under the AI Policy, the Bank allows access to any *information* in its possession that is not on a list of exceptions set forth in subparagraphs (a) through (j) of the AI Policy (*see* AI Policy, at Section I.1, Section III.B.1, and at Section III.B.2). The AI Policy states, in relevant part, that under the:

- (a) *Information Provided by Member Countries or Third Parties in Confidence* exception, 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 (see AI Policy, at Section III.B.2.(g)). The AI Policy also states, in relevant part, that “[w]hen a member country or a third party provides [...] non-public information to the Bank with the understanding that it will not be disclosed, the Bank treats the information accordingly” (*see* AI Policy, at footnote 7); and
- (b) *Deliberative Information* exception, 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 agreements that result from its deliberative process, the Bank does not provide access to information prepared for, or exchanged during the course of, (i) its deliberations with member countries or other entities with which the Bank cooperates, and/or (ii) its own internal deliberations (*see* AI Policy, at Section III.B.2.(i).i and ii). Pursuant to the AI Policy, safeguarding the deliberative process is also one of the AI Policy’s five principles (*see* AI Policy, at Section III.A.1).

13. 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 Section III.B.8.(a).i).

14. The Bank is required by its Articles of Agreement to “make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.” In accordance with this requirement, and other applicable Bank rules, the Bank has adopted [The World Bank Procurement Regulations for IPF Borrowers](#) (“Procurement Regulations”) governing the procurement of goods, works, non-consulting

services, and consulting services for investment project financing operations to be financed in whole, or in part, by the Bank. (see Procurement Regulations, at para. 1.2).

15. The Procurement Regulations include requirements for the disclosure of certain procurement information under Bank financed projects, e.g., procurement plans and contract award information (see Procurement Regulations, at paras. 4.2, 5.93, 5.94, and 5.95). However, the Procurement Regulations also states that:

Without prejudice to the principle of transparency and other obligations pursuant to these Procurement Regulations, in particular those relating to the publication of the Contract Award Notice and debriefing of unsuccessful Bidders/Proposers/Consultants, ***the Borrower shall not disclose information provided by Applicants/Bidders/Proposers/ Consultants in their Applications/Bids/Proposals, which they have marked as confidential.*** This may include proprietary information, trade secrets and commercial or financially sensitive information. (see Procurement Regulations, at para. 5.19, emphasis added).

16. In this case, the AIC found that information authorized to be disclosed pursuant to the Procurement Regulations is indeed publicly available in this case, namely the [procurement plan](#), updates to the procurement plan (see “Plans” tab on the [project website](#)), and [contract award](#) information (note that contract award information is already known to the requester; see link in para. 1 above). The AIC also found that the part of the Requested Information that remains restricted:

- (a) was prepared by the bidder in response to an invitation for bids by the borrower. As such, it contains confidential commercial and financial information (such as cost breakdown of financial proposal) that may impact future participation of the bidder in future competitive procurement. Such information remains confidential during the bidding and evaluation of bids/proposals and becomes part of the contract after negotiations between the borrower and the bidder. Pursuant to the Procurement Regulations, “The Borrower shall not divulge any other Consultant’s confidential or proprietary information such as: cost breakdown, trade secrets, methodology or other confidential business or financial information”. (see Procurement Regulations, at para. 5.77(f));
- (b) was produced by the Bank as part of project implementation support and is solely for use by the Bank for its project supervision obligations and the Borrower to improve procurement performance. Disclosing such information during a project under implementation may cause reputational risk to the Bank and strain the relationship between the Bank and the borrower;

(c) consists of background information for developing and/or updating the procurement plan. As such, the information is subject to constant change based on input from the project's implementation and is, for this reason, deliberative in nature;

(d) reflects the deliberations between the borrower's project management and the Bank.

17. Finally, the AIC found that, given the sensitivity of the deliberative information involved, the Bank did not seek the member country/borrower's views on the possible disclosure of such information. The Bank did not do so because even if the member country/borrower was to agree to disclose this information, the Bank would not agree to disclose it, rendering the override of the *Information Provided by Member Countries or Third Parties in Confidence* ineffective as the *Deliberative Information* exception still restricts the information in question. Lastly, the AIC recognizes that the Bank's denial solely referred to the prerogative to restrict, omitting both the *Information Provided by Member Countries or Third Parties in Confidence* and *Deliberative Information* exceptions from the Bank's denial. Nevertheless, the error in denying access to the information based on the AI Policy exceptions is harmless because the information remains restricted from public access.

18. Based on the above, the AIC found that the Requested Information contains information that (a) serves both the Bank's own decision-making process and deliberative process with the borrower on operational procurement matters, and (b) contains information provided to the Bank in confidence for such deliberations. The AIC found that such information is crucial for the Bank's relationship and open communication with the borrower, and the carrying out of the Bank's business and fiduciary obligations under the Bank's Articles of Agreement as set forth in the Procurement Regulations.

19. For the above reasons, the AIC found that the remaining portion of the Requested Information considered under appeal is properly and reasonably restricted by the *Deliberative Information* and *Information Provided by Member Countries or Third Parties in Confidence* exceptions under the AI Policy. Thus, there is no violation of policy and the AIC upholds the Bank's decision to deny public access to the Requested Information.

20. With respect to this portion of the appeal referring to the Requested Information restricted from public access based on the *Deliberative Information* and *Information Provided by Member Countries or Third Parties in Confidence* exceptions under the AI Policy and the violation of policy claim, the requester can appeal to the Access to Information Appeals Board. The link to appeal is sent to requesters by separate communication.

#### ***“Public Interest” case***

21. 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 (*see* AI Policy, at

Section III.B.8.(a).ii). 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 id.*).

22. The AI Policy does not allow the restriction of information pursuant to the *Information Provided by Member Countries or Third Parties in Confidence* exception to be appealed on public interest grounds (*see* AI Policy, at Section III.B.8.(a).ii). Accordingly, as the Requested Information is restricted by the *Information Provided by Member Countries or Third Parties in Confidence* exception, in addition to the *Deliberative Information* exception, it is not subject to appeal on public interest grounds. For this reason, the portion of the appeal on public interest ground is hereby dismissed as it is not properly before the AIC for consideration (*see* AI Policy, at Section III.B.8.(a).ii, and AI Policy Directive/Procedure, at Section III.D.1.a.iii).

23. 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 Section III.B.8.(b).i.).