

AIC decision on appeal #57

CASE NUMBER AI4674

CERTAIN INFORMATION RELATED TO THE ACCELERATING SUSTAINABLE PRIVATE INVESTMENT IN RENEWABLE ENERGY PROJECT (Decision dated February 9, 2017)

Summary of Decision

- The Access to Information Committee (“AIC”) upholds the World Bank’s decision to deny access to the requested draft lease agreement and draft guarantee agreement. The AIC considered the appeal on both violation of policy and public interest grounds.
- **Violation of Policy.** The AIC found that both the draft lease agreement and the draft guarantee agreement are properly restricted by the *Deliberative Information* exception under the Bank Policy: Access to Information, July 1, 2015, Catalogue No. EXC4.01-POL.01 (“AI Policy”); as they both remain drafts and the draft lease agreement is a document received by the World Bank from a member country. The AIC further found, though, that the draft lease agreement has already been made public, and hence it can be provided to the requester.
- **Public Interest.** The AIC discussed the public interest claim in the appeal with respect to the draft guarantee agreement and found no compelling ground to support the appeal on a public interest basis. In accordance with the AI Policy, the AIC decided not to override the *Deliberative Information* exception that restricts the draft guarantee agreement on the basis of public interest.

The Decision

Facts

1. On November 28, 2016, the requester submitted a public access request (“Request”) for certain information related to the Accelerating Sustainable Private Investment in Renewable Energy Project (the “Project”). Specifically, the Request concerned the following information:

[...]1/Year wise,component wise a)procurement Notices b) Contract bidding data c) procurement plan

2/ Contact details of PMU like e-mail address and phone No etc

3/ Drat Copy of Guarantee and lease agreement. [...]

2. On December 1, 2016, the World Bank (“Bank”) replied to the Request by: (a) providing access to the information identified as responsive to the portions of the Request for “year wise,component wise a)procurement Notices b) Contract bidding data c) procurement plan” and “contact details of PMU like e-mail address and phone No etc”; and (b) denying access to the portion of the Request for “the draft Copy of Guarantee and lease agreement” on the basis of the *Deliberative Information* exception under the Bank Policy: Access to Information, July 1, 2015, Catalogue No. EXC4.01-POL.01 (“AI Policy”).

3. On December 13, 2016, the secretariat to the Access to Information Committee (“AIC”) received an application appealing the Bank’s decision to deny access to the draft guarantee and lease agreement. The application challenges the Bank’s decision on “violation of policy” and “public interest” grounds. The application states, in relevant part, the following:

[...] 1) I am an emerging social entrepreneur working in the field of renewable energy to eradicate poverty.

2) I intend to offer a social business proposal for ASPIRE project, therefore, draft copy of guarantee and lease agreement is required.

3) In draft copy I need to know the terms and conditions not any banking or billing or any data which can be under exception of the AI policy.

[...] Therefore, I appeal to please provide me the draft copy of the guarantee and lease agreement which may help the project.

I await favorable decision in this case.

Findings and Related Decision

4. In reviewing the application in accordance with the AI Policy, the AIC considered:

(a) the Request;

(b) the Bank’s denial of access;

(c) the application;

(d) the nature of the restricted information, namely the draft lease agreement and the draft guarantee agreement;

(e) the *Deliberative Information* exception under the AI Policy that justified the Bank’s decision to deny public access to the requested information; and

(f) the information provided by the relevant business unit.

“Violation of the AI Policy”

5. 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 Section III.B.1). 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).

6. The AI Policy states that the Bank “does not provide access to documents that contain or refer to information listed in sub-paragraphs (a) through (j)” of Section III.B.2 of the AI Policy, which set out the

AI Policy's list of exceptions. Sub-paragraph (g) of Section III.B.2 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. Sub-paragraph (i) of Section III.B.3 of the AI Policy further explicitly states, under the *Deliberative Information* exception, that the Bank does not provide access to information prepared for, or exchanged during the course of, the Bank's deliberations with member countries or other entities with which the Bank cooperates, to facilitate and safeguard the free and candid exchange of ideas for the purpose of preserving the integrity of the deliberative processes.

7. The Bank Directive/Procedure: Access to Information, July 1, 2015, Catalogue No. ECR4.01-DIR.01 ("AI Directive/Procedure") provides that "for information given to the Bank [...], if the country/borrower has assigned an information classification that restricts public access, the Bank does not disclose the material without obtaining the country's/borrower's written consent; in such cases, the Bank decides whether to refer the requests for information to the country/borrower authorities. If the country/borrower has not assigned an information classification to the material, and if, to the Bank's knowledge, the information has not already been made publicly available by the country/borrower, such information is considered to be deliberative [...]." (see AI Directive/Procedure at Section III, Part B.3 d). In addition, the AI Directive/Procedure provides that guarantee agreements (for guarantees issued by the Bank in a Bank guarantee operation) require the written consent of the relevant part(ies) to disclose, otherwise they are restricted under the *Information Provided by Member Countries or Third Parties in Confidence* exception under the AI Policy (see AI Directive/Procedure at Annex 2, A-4 e.2).

8. In this case, the AIC considered the application of the AI Policy to the draft lease agreement and the draft guarantee agreement. First, with respect to the draft lease agreement, the AIC found that:

- (a) the lease agreement is a contract expected to be entered between the government of Maldives (as the owner of certain roofs) and the prospective winning bidder, under which the government will lease the roofs to the winning bidder for the installation and operation of solar panels under the Project;
- (b) the draft lease agreement was shared with the Bank for review and comment, in the course of the relevant procurement process undertaken by the Project management unit; and
- (c) the draft lease agreement has not been finalized, but – since the Bank's denial of access – the draft lease agreement has been disclosed as part of the procurement process and the Project management unit has confirmed that the Bank may disclose the draft lease agreement that was included in the relevant bidding documents.

9. Based on all the above findings, the AIC concluded that – at the time of the Request – the draft lease agreement was properly restricted by the *Deliberative Information* exception, and hence the Bank's decision to deny access did not violate the AI Policy. Accordingly, the AIC upheld the Bank's decision to deny public access to the draft lease agreement. While the AIC upholds the Bank's decision to deny public

access to the draft lease agreement, the AIC recognizes that this document has – since the time of the Bank’s decision – been made publicly available. The draft lease agreement is attached below.

10. Second, with respect to the draft guarantee agreement, the AIC found that:

- (a) the guarantee agreement is a contract between the International Development Association (IDA) and the winning bidder under which IDA guarantees certain payment obligations that may be owed by the government of Maldives;
- (b) the guarantee agreement remains a draft and under negotiation between IDA and the winning bidder, and has not been made public; and
- (c) in general, guarantee agreements (in respect of Bank guarantees) would normally be restricted by the *Information provided by Member Countries or Third Parties in Confidence* exception under the AI Policy. This is because these agreements normally contain commercial and other confidential information about the counterparts thereto, who are typically lenders, commercial banks, private sector sponsors and developers.

11. Based on all the above findings, the AIC concluded that the draft guarantee agreement was properly restricted by the *Deliberative Information* exception, and hence the Bank’s decision to deny access did not violate the AI Policy. Accordingly, the AIC upheld the Bank’s decision to deny public access to the draft guarantee agreement. Under the AI Policy, if the AIC upholds the initial decision to deny public access to information in appeals alleging “violation of policy,” the requester can appeal to the Access to Information Appeals Board (“AI Appeals Board”) as the second and final stage of appeals (see AI Policy at Section III.B.8 (b) ii). If you wish to file an appeal to the AI Appeals Board, [click here](#).

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

Public Interest case

12. 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 Section III.B.8 (a) ii).

13. As the draft lease agreement is made available to the requester, the AIC discussed the public interest claim made in the Application only with respect to the draft guarantee agreement. The AIC found that guarantee agreements (in respect to Bank guarantees) in general are made public only with written consent of all the relevant parties. In this case, the draft guarantee agreement has not been signed, and hence such written consent cannot be obtained. In light of this, the AIC noted that there is a heightened harm of disclosing drafts agreements, when the concerned parties are still in negotiations about said agreements. The AIC recognized, though, the public’s interest in understanding the basic terms and conditions of any agreement that the Bank enters into. The AIC found that the publicly available Project Appraisal Document

[\(Report No: 84385-MV\)](#) includes a description of the structure of the guarantee as well as the guarantee term sheet, which summarizes the terms and conditions of the guarantee agreement and the related agreements (see in particular, Annex 6 of the Project Appraisal Document). Accordingly, the AIC found no compelling ground to support the appeal on a public interest basis. In accordance with the AI Policy, the AIC decided not to override the *Deliberative Information* exception restricting the draft guarantee agreement.

14. For the reasons discussed above, the AIC upholds the Bank's decision to deny public access to the draft guarantee agreement. 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).