

## AIC Decision on appeal #76

### CASE NUMBER AI6359 LITHUANIA LEASE TENDER

(Decision dated November 18, 2020)

#### Summary of Decision

- The Access to Information Committee (“AIC”) found that all the information identified as responsive to the request is restricted from public access because the Bank exercised its prerogative to restrict. The AIC considered the appeal on both violation of policy and public interest grounds. The AIC decision on appeals challenging a Bank denial of access on the basis of the Bank’s exercise of prerogative to restrict is final.
- **Violation of Policy.** The AIC found that the information is restricted from public access because there is more harm in disclosing the information than benefit. Despite the error in denying information based on two AI Policy exceptions, the information remains restricted so the error is harmless. For this reason, the AIC found that the Bank properly and reasonably restricted the information from public access and there is no violation of policy. Based on the above, the AIC upholds the Bank’s decision to deny public access to the information.
- **Public Interest.** The AIC dismisses the public interest portion of the appeal because the information is restricted by the Bank’s exercise of prerogative, which is not subject to a public interest appeal.

#### The Decision

##### *Facts*

1. On May 3, 2019, the World Bank (“Bank”) received a public access request (“Request”) seeking access to information related to:

- the World Bank’s involvement in the 2001-2002 Lease Tender [of the Vilnius district heating infrastructure concluded on February 1, 2002], in particular information as to whether and how the World Bank may have been involved in, and may have assessed, the tender process;

- the Vilnius District Heating Project (World Bank Project ID P063656); and

- the Vilnius Heat Demand Management GEF Project (World Bank Project ID: P073242) (“Requested Information”).

2. The Bank consulted the responsible business unit to locate the Requested Information. As a result, the business unit located three documents as responsive to the Request. One of such documents was identified as public; two documents were identified as restricted from public access either by the *Information Provided by Member Countries or Third Parties in Confidence* or the *Corporate Administrative Matters* exceptions under the Bank Policy: Access to Information, July 1, 2015, Catalogue No. EXC4.01-POL.01 (“[AI Policy](#)”).
3. On November 6, 2019, the Bank replied to the Request. The Bank provided access to one document and denied access to part of the Requested Information because two documents were identified as restricted by the AI Policy exceptions referred to above.
4. On January 3, 2020, the secretariat to the AIC received an application (“Application”) appealing the Bank’s decision to deny public access to part of the Requested Information.<sup>1</sup> The Application challenges the Bank’s decision to deny public access to part of 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 part of the Requested Information. In this case, the Application also alleged “various irregularities, including corruption, (...) during the Lease Tender and through the performance of the Lease Agreement” of the projects referred to in the Request.
5. On March 10, 2020, the AIC, through its secretariat (“AIC Secretariat”), consulted the responsible business unit (“IECE1”) to seek its views on the Requested Information in light of the Application.
6. On March 12, 2020, due to the allegations of corruption in the Application, the AIC Secretariat consulted the World Bank Group Integrity Vice Presidency (“INT”).
7. On March 19, 2020, INT informed the AIC that upon review of its files INT had no records to disclose responsive to the Request relating to Bank projects under IDs PO63656 and PO73242.
8. On March 23, 2020, INT confirmed that it found no records that INT received a complaint related to either of the two projects referred to in the Request. Thus, no case or investigation had been opened.
9. On April 30, 2020, and May 15, 2020, IECE1 provided 12 documents in response to the Request. Out of the 12 documents, four were marked as public, and the remaining eight were restricted by the *Deliberative Information* exception under the AI Policy.
10. On May 27, 2020, the AIC held its regular meeting. The AIC discussed IECE1’s views in light of the Application. Considering the procurement nature of the Requested Information, the

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<sup>1</sup> For the sake of clarity, due to a process change in the new case management system adopted in late calendar year 2019 to manage requests and appeals under the AI Policy, the AIC Secretariat was only notified of this appeal on February 25, 2020, hence the delay in consulting management in this case.

AIC, decided to seek additional views from the Bank’s Chief Procurement Officer (“OPSPR”). The AIC Secretariat consulted OPSPR on the same day.

11. On May 29, 2020, and on June 9, 2020, OPSPR provided its views on the possible disclosure of the Requested Information in light of the appeal. OPSPR advised:

- (a) not to release these documents as (...) both the nature and context of the information included are confidential and the release may cause harm to the Bank, [one donor], and the Borrower;
- (b) the confidentiality of the Requested Information should remain protected as “these communications were intended as confidential”;
- (c) that should the decision be to disclose this information, “it would be important to also consider and proactively manage the potential impact on the relationship with the Client and [the donor]”; and
- (d) to further clarify, all the Requested Information is restricted by the *Information Provided by Member Countries or Third Parties in Confidence* and the *Deliberative Information* exceptions under the AI Policy.

12. On July 1, 2020, and on July 29, 2020, the AIC held its regular meetings. Based on the above, the AIC found that the Requested Information is restricted from public access. However, because the Requested Information was restricted by the *Information Provided by Member Countries or Third Parties in Confidence* exception under the AI Policy, the AIC decided to request IECE1 to seek the express written permission from the member countries and/or third parties concerned, prior to the AIC’s final consideration of the appeal.

13. Based on the above, IECE1 sought the express written permission from the member country and/or third parties concerned (“Counterparts”) to disclose the Requested Information.

14. Between August 10, 2020, to September 4, 2020, all Counterparts provided their express written permission to disclose their respective portions of the Requested Information.

15. In light of the above, the AIC sought the views of IECE1 again because only the *Deliberative Information* exception remained as the justification to restrict the information from public access. As the AIC has the authority to exercise the Bank’s prerogative to disclose deliberative information, IECE1’s views on the assessment of harm v. benefit were needed for the AIC’s continued deliberations.

16. On August 21, 2020, the Governance – Procurement East Asia and Pacific (“EEAR2”) requested additional discussions on the possible disclosure of the Requested Information “given the potential impact of the proposed disclosure on procurement related documents more broadly”, noting the potential need to escalate the matter to management.

17. On September 18, 2020, OPSPR and EEAR2 provided their views on the possible harm in disclosing the Requested Information and advised against disclosing the Requested Information noting, in relevant part:

- (a) the confidentiality of the bidding process is a bedrock of the Bank's procurement framework and is highlighted as paramount in the procurement rules and bidding documents;
- (b) the Requested Information was provided to the Bank as part of a bidding process and, as such, the information is provided with the understanding that it will not be disclosed;
- (c) there are serious reputational and legal risks to the Bank from the disclosing the Requested Information because it includes sensitive and/or proprietary third-party information;
- (d) disclosing the Requested Information could harm the interests of the Bank (and others);
- (e) with specific respect to the Bank's internal communications, including the references to and summaries of internal reviews (formal and informal), it is important to recognize that deliberation is a linchpin of the Bank's procurement function. This deliberation entails the exercise of professional judgment in forming positions and taking decisions in relation to third parties – their qualifications, their experience, their actions and motivations – and these **third parties include not only bidders and contractors but their management, personnel, subcontractors, agents, competitors of these companies, as well as borrower procurement staff, government officials, members of the public, etc. It would be practicably impossible to obtain consent from these third parties to release of the internal deliberative documents which refer to or implicate them** (emphasis added);
- (f) the ability to engage in open, candid discussion and debate about procurement issues is essential to the successful fulfillment of the Bank's function.

18. On September 30, 2020, the AIC held its regular meeting. The AIC considered the business units views and decided that further discussion with OPSPR was needed.

19. On October 5, 2020, AIC members met with OPSPR to clarify OPSPR's concerns regarding the possible disclosure of the Requested Information in light of the appeal.

20. On October 28, 2020, OPSPR met the AIC Secretariat to update the status of its views on the appeal.

21. On November 5, 2020, EEAR2 provided a table listing the Requested Information as restricted by the Bank's exercise of prerogative to restrict pursuant to discussions with OPSPR, which table was confirmed on November 9, 2020.

## *Findings and Related Decisions*

22. In reviewing the Application in accordance with the AI Policy, the AIC considered:
- (a) the Request;
  - (b) the Bank's initial denial of access;
  - (c) the AI Policy's *Information Provided by Member Countries or Third parties in Confidence and Corporate Administrative Matters* exceptions that justified the Bank's initial decision to deny public access to part of the Requested Information;
  - (d) the Application;
  - (e) inputs from the relevant business units;
  - (f) the procurement nature of the Requested Information;
  - (g) the AI Policy's *Deliberative Information* exception;
  - (h) whether any exception(s) under the AI Policy sufficiently protects the specific interests that could be harmed if the Requested Information is disclosed;
  - (i) the specific interests that could be harmed if the Requested Information is disclosed;
  - (j) the Bank's exercise of its prerogative to restrict access to the Requested Information.

### *Preliminary Matters*

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

23. In *Case No. AI6479-A, Tanzanian Statistics Act*, dated July 29, 2020, the AIC decided it may rectify the Bank's initial denial of access to consider it as including additional documents restricted from public access that were located by the business unit during the appeal phase. Such decision by the AIC is for the sake of economy and efficiency, despite a technical finding that there was no Bank denial of access to documents located by the business unit during an appeal.

24. The same applies in this case. The Bank's initial decision to deny public access solely applies to two documents located by the business unit during the request phase. The business unit found a total of 12 documents during the appeal phase. Out of the 12, one document had already been identified by the business unit during the request phase. Therefore, the Bank's initial denial of access failed to consider 11 documents and its attachments located later during the appeal phase.

25. Based on the above, the AIC hereby rectifies the Bank’s initial denial of access to consider it as including all the documents located by the business unit during the appeal phase. For this reason, the AIC has authority over the entirety of the Application.

***“Violation of the AI Policy”***

26. Under 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). Notwithstanding the broad intent of the AI Policy, under exceptional circumstances, the Bank reserves its right to restrict access to information that it would normally disclose if it determines that such disclosure is likely to cause harm that outweighs the benefits of disclosure (*see* AI Policy, at Section III.B.1 and Section IV.2). 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). Appeals challenging the Bank’s exercise of prerogative to restrict are considered by the AIC, whose decisions in the cases are final (*see* [Bank Directive/Procedure on Access to Information Policy](#), at Section III.B.5.b.ii).

27. As a public international organization, the Bank shall make arrangements to ensure 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 (*see* [Articles of Agreement](#), at Article III, Section 5(b)). Procurement processes are established to ensure the Bank can fulfill this part of its mandate.

28. The AIC recognized that the content of the Requested Information refers to procurement processes under two projects that were supposed to have been financed by the Bank (i.e., the lending portion of the project was canceled and not financed by the Bank).<sup>2</sup> Such content includes information on the selection of bidders, bid proposals, bid proposal comparison, comments on bid proposals, comments on the bid selection criteria, bid evaluation reports, procurement arrangements and recommendations on such arrangements. Bidding processes aim at ensuring competition and the efficient use of Bank proceeds. Disclosing procurement process information could negatively impact competition under projects financed by the Bank, increase costs, and prevent the Bank from ensuring the economy and efficiency necessary in the use of its funds. Thus, the Bank has an interest in protecting procurement information from public access in order to fulfill its mandate under its Articles of Agreement.

29. While questioning the different business units on their respective views regarding the possible disclosure of the Requested Information under appeal, the AIC found that the concerns expressed by the Bank to justify keeping the information restricted from public access were not fully captured by any exception under the AI Policy. More specifically:

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<sup>2</sup> See [Note on Canceled Operation](#).

- (a) the *Information Provided by Member Countries or Third parties in Confidence* exception aims at protecting the interests of member countries or third parties. It fails to protect the interests of other parties that provided information to member countries or third parties, i.e., bidders, who could have their information disclosed upon consent of the member country or third party without being consulted as well. It also fails to protect the Bank's interests and to provide the Bank the means to opine;
- (b) the *Deliberative Information* exception solely protects the deliberations on procurement processes and fails to capture the need to protect the broader interest of protecting the Bank's interest in ensuring economy and efficiency in the use of its proceeds.

30. The business units concern with the harm that the potential disclosure of the Requested Information could cause the Bank's interests in procurement processes went beyond any AI Policy exception. Because (a) the AI Policy exceptions are insufficient to ensure the protection of the Bank's interests in procurement processes, and (b) disclosing the Requested Information is likely to cause harm to the Bank's interests in the procurement process that outweighs the benefits of disclosure, there are exceptional circumstances that justify the business unit's decision to exercise the Bank's prerogative to restrict access to the Requested Information.

31. For the avoidance of doubt, the AIC recognizes that the *Corporate Administrative Matters* exception was erroneously applied. Nevertheless, the error in denying access to the information based on such exception, as well as the *Information Provided by Member Countries or Third parties in Confidence* exception, is harmless because the information remains restricted from public access by the Bank's exercise of prerogative to restrict.

32. Furthermore, the AIC recognizes that this appeal took an extraordinary amount of time to be decided. As evidenced by the facts, the complexity of the nature of the Requested Information, the many interests that could be harmed if the Requested Information is disclosed, and the numerous internal consultations needed to detangle the concerns keeping the Requested Information restricted from public access were, however, all necessary to reach a decision on the appeal.

33. Based on the above, the AIC decided that the Bank properly and reasonably exercised its prerogative to restrict access to the Requested Information. For this reason, the AIC upholds the Bank's decision to deny public access to the Requested Information. The AIC decision on this appeal is final (*see* Bank Directive/Procedure on Access to Information Policy, at Section III.B.5.b.ii).

***“Public Interest” case***

34. 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.*).

35. In this case, the Requested Information is restricted by the Bank’s exercise of prerogative to restrict access (*see* AI Policy, at Section IV.2). Information restricted by the Bank’s exercise of prerogative to restrict is not eligible for public interest appeals. For this reason, the AIC dismisses the public interest portion of the Application because it appeals a matter that the AIC does not have authority to consider (*see* AI Directive/Procedure, at Section III.D.1.a.(iii)).

36. 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.).