

AIC Decision on appeal #77

CASE NUMBER AI6929 KENYA SUPPLIER CONTRACTS

(Decision dated November 24, 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 stating the Bank was not in possession of the information, the error is harmless as the information remains restricted from public access. 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 April 30, 2020, the World Bank (“Bank”) received a public access request (“Request”) seeking access to:

(...) all of the supplier contracts funded by the two following projects since the 10th of February 2020 until today:

P173820 - Kenya Covid-19 Emergency Response Project:
<https://projects.worldbank.org/en/projects-operations/project-detail/P173820>

P152394- Transforming Health Systems for Universal Care:
<https://projects.worldbank.org/en/projects> (“Requested Information”).

2. On May 4, 2020, the Bank referred the requester to publicly available information related to the Requested Information.¹ The Bank also referred the requester to a help desk email account in case the requester wished to submit additional questions.

3. On May 5, 2020, and on June 8, 2020, the requester replied to the Bank asking whether the contracts exist. On June 8, 2020, in particular, the requester complained that he had heard no response from the help desk email account the requester was referred to.

4. On August 14, 2020, the Bank consulted the business unit responsible for the help desk email account to inquire the status of the requester's email addressed to such help desk. A consultation with such business unit ensued and concluded on August 24, 2020, stating that "the award information of **all** awarded contracts are primarily with the Borrowers' project implementation agencies. Bank publishes only prior review contracts [awards] and when specifically requested by the Borrower, some post review contracts [awards]. These contract awards are visible in the concerned project's pages in the Bank's external website".

5. On August 19, 2020, the Bank offered the requester a detailed explanation of where publicly available information related to the Requested Information can be found. The requester replied on the same date asking his/her communication to be treated as an appeal and to access the contracts themselves not the information that is publicly available.

6. On September 1, 2020, the requester wrote to the Bank reiterating his/her request for "**all** of the **contracts** concluded under P173820 and P152394" and claiming the Bank's responses were "quite clearly a denial of my request, and I would like to appeal".

7. On September 8, 2020, the Bank informed the requester that, with respect to the two projects of interest, "the Bank only has information on the contracts [awards] that are published (due to being prior review or specifically requested by the Borrower)" and again referred the requester to the publicly accessible resources. The Bank also noted, in relevant part:

The supplier contracts for the two projects are not in the Bank's possession (...)

To Clarify, this is not a denial of access since the Bank is not in possession of the exact information you requested. For this reason, the system does not automatically generate the link for you to file an appeal electronically.

8. On October 5, 2020, the requester submitted an appeal by email.

9. On October 6, 2020, the Bank provided the requester with the link to submit an appeal so it could be properly captured in the Bank's case management system under the AI Policy.

¹ The requester was referred to the "[Procurement for Projects and Programs](#)" website.

10. On October 7, 2020, the Bank received an application (“Application”) appealing the Bank’s decision regarding the Requested Information. The Application challenges the Bank’s decision on the basis that it “violates the AI Policy” and that there is a “public interest” to disclose the Requested Information. On the same date, the AIC, through its secretariat (“AIC Secretariat”), consulted the responsible business unit to seek its views on the possible disclosure of the Requested Information in light of the Application.

11. On November 10, 2020, the responsible business unit informed the AIC Secretariat that it identified the contracts in the Bank’s possession that are responsive to the Request as restricted from public access by the Bank’s prerogative to restrict access under the Bank Policy: Access to Information, July 1, 2015, Catalogue No. EXC4.01-POL.01 (“[AI Policy](#)”). The responsible business unit also noted, in relevant part, that specific details on the contract awards are publicly available.²

Findings and Related Decisions

12. In reviewing the Application in accordance with the AI Policy, the AIC considered:
- (a) the Request;
 - (b) the Bank’s responses to the requester;
 - (c) the Application;
 - (d) input from the relevant business unit;
 - (e) the nature of the Requested Information;
 - (f) whether any exception(s) under the AI Policy sufficiently protects the specific interests that could be harmed if the Requested Information is disclosed;
 - (g) the specific interests that could be harmed if the Requested Information is disclosed;
 - (h) 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

13. 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 its denial as including additional

² Publicly available information can be found at <https://projects.worldbank.org/en/projects-operations/project-procurement/P152394> and <https://projects.worldbank.org/en/projects-operations/project-procurement/P173820>.

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.

14. The same applies in this case. The Bank's communications to the requester on May 4, 2020, and on August 19, 2020, during the request phase were silent on whether the Bank was in possession of the Requested Information. The Bank's communication of September 8, 2020, explicitly stated that "the Bank is not in possession of the exact information you requested". However, on November 10, 2020, the responsible business unit identified the contracts responsive to the Request that are in the Bank's possession. Therefore, the Bank's communications during the request phase failed to consider the contracts responsive to the Request that are in the Bank's possession. Nevertheless, had the contracts been considered during the request phase, public access to such contracts would have been denied because the Requested Information remains restricted from public access.

15. Based on the above, the AIC hereby rectifies the Bank's communication of September 8, 2020, to consider such communication as a denial of access to the Requested Information, i.e., contracts identified as responsive to the Request that are in the Bank's possession. For this reason, the AIC has authority over the entirety of the Application.

"Violation of the AI Policy"

16. 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).

17. The AIC found that the Bank is in possession of the Requested Information. In this case, the Requested Information consists of contracts resulting from procurement processes under two projects financed by the Bank. Similar to the AIC's decision in *Case No. AI6359, Lithuania Lease Tender*, dated November 18, 2020, such contractual information contains details whose disclosure 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 restricting public access to contractual information resulting from procurement processes carried out in Bank financed projects. Such interest is to enable the Bank

to fulfill its mandate under its Articles of Agreement, i.e., 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)).

18. Because (a) the AI Policy exceptions are insufficient to ensure the protection of the Bank’s interests in procurement processes carried out under Bank financed projects, 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, as well as to the interests of contractors who are parties to those contracts, there are exceptional circumstances that justify the business unit’s decision to exercise the Bank’s prerogative to restrict access to the Requested Information.

19. For the avoidance of doubt, the AIC recognizes that the Bank erred on September 8, 2020, by stating the Bank was not in possession of the Requested Information. Nevertheless, the error is harmless because the information remains restricted from public access by the Bank’s exercise of prerogative to restrict.

20. 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

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. 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)).

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.).