The Commonwealth Human Rights Initiative's Recommendations for Strengthening the EBRD's Public Information Policy Implementing Procedures

1. The Commonwealth Human Rights Initiative (CHRI) works to promote the right to information in Commonwealth countries, as well as organisations of which Commonwealth states are members. In support of this work, CHRI is a participating member of the Global Transparency Initiative (GTI), which CHRI understands has forwarded detailed comments on the draft EBRD's Public Information Policy (PIP) Implementing Procedures. CHRI's submission supplements this work, and suggests additional areas which could be reconsidered and reworked, drawing on international best practice standards, in particular, good models from other international financial and governmental organisations as well as national freedom of information laws in the Commonwealth.
2. At the outset, CHRI commends the EBRD for calling for public comments on the procedures and for giving the public and non-government organisations an opportunity to discuss the Policy and its procedures with its Secretary General. Experience has shown that for any disclosure policy to be effective, it needs to be respected and 'owned' by the individuals and organisations which will be using the Policy, as well as by the officials implementing the Policy.

Making a request for information

3. Section 2, which sets out how a request for information is made, is a crucial provision. Best practice requires that access procedures should be as simple as possible and designed to be easily availed by all members of the community, whether illiterate, disabled or geographically distant from centres of power. To ensure that the application procedures are user-friendly, CHRI makes the following recommendations:

   (a) Section 2(1) should make it explicit that a specific application form is not required to lodge a request. Requiring requestors to submit a specific form may in practice prove an obstacle to access, for example because people do not have the facilities to download it from the internet or because they are not proximate to an office where a form can be obtained. As long as the requestor provides sufficient particulars to allow information to be identified, located and sent to the requester, that should be sufficient.

   (b) Section 2(ii) should be reworded to make it clear to officials that they cannot rely on translation requirements to unreasonably delay processing requests. The time limits in section 2(v) should apply in all circumstances, and the allowance for a time extension in 2(v) should be sufficient to deal with any translation delays.

   (c) Section 2(iii) should clarify that requests will be acknowledged in writing, unless to do so would cause an unreasonable delay and another notification method is possible (eg. by telephone).

   (d) Section 2(iv) should be reworded to make it clear that a request for clarification will be undertaken by officials as soon as possible, and cannot unreasonably delay the processing of an application, Notably, at national level, some officials use so-called clarifications as an opportunity to delay an application. This possibility must be avoided at all costs.

   (e) Section 2(v) should specifically require that requests are responded to "as soon as is reasonably possible and no later than 20 working days after receiving the request…" The European Ombudsman's Code of Good Administrative Behaviour, similarly specifically enjoins officials to deal with requests in a timely fashion. [1]

   (f) Section 2(v) should specify restricted criteria which justify an extension of the Bank's response time. In the other national FOI laws where extensions are allowed, the

[1] See Articles 17 and 25: http://www.euro-ombudsman.eu.int/code/en/default.htm as on 1 October 2003.

extension is usually only permitted "where the application relates to a very large number of documents". Section 2(v) should also require the requester to be notified in writing where time limits are extended and should make it explicit that only one extension of up to 40 days is permitted; otherwise, the provision may be used to block access in effect, by permitting extensions *ad infinitem*. To reduce the possibility of abuse, consideration should also be given to requiring the Secretary-General or his/her designate to specifically approve any extensions.

(g) Section 2(vi) should specify in detail the contents of a rejection notice, requiring at a minimum, that a requester be given a notice in writing which states: the provision in the PIP being relied upon to justify the decision, a detailed explanation and details of any appeal rights (including how to appeal, to whom, by when and in what form).

Appeals against denials of requests

4. Best practice international standards require that access regimes include an appeals mechanism which is independent of the organisation's governing bodies, as well as cheap, quick and procedurally simple. The EBRD's Secretary-General is mentioned as the appeals body under the Policy. This arrangement is a positive start, because it requires that refusals to disclose information by lower level officers are subject to senior review, thus ensuring that officers take information requests seriously. To ensure that the appeals process is user-friendly, CHRI makes the following comments:

   (a) All of the recommendations at paragraphs 3(a)-(f) above similarly apply to the appeals process.

   (b) Section 3(i) should permit the Secretary-General to extend the time for appeals to be lodged, in the public interests and in the interests of fairness. This recognises that there may be cases where requesters take some time to assess their options decide whether they are willing and/or able to lodge an appeal. The current 20 day limit is very short and considering how long it may take for requesters to formulate an appeal and lodge it with an EBRD office (eg. in some countries the post may be slow), enforcing the time limit rigidly could result in unfairness in practice.

   (c) Section 3(vi) should require that the notification to the Board make reference to the specific provisions in the PIP being relied upon to justify the decision and include a detailed explanation in support of the decision. Consideration should be given to requiring the Board to specifically approve the Secretary-General's decision before it is actioned.

5. While the internal appeal process is a positive step forward, nevertheless, in accordance with international best practices, CHRI recommends that an Information Ombudsman, who is independent of the Bank's governing boards and Executive Committee be appointed to receive complaints and review refusals. This arrangement would ensure a level of impartiality and independence in the review process. The Ombudsman should have the same status as a senior official and could be located within the EBRD's Independent Recourse Mechanism department. In other regional and international governmental organisations, different models have been used. The UNDP, for example, uses an Oversight Panel which includes some non-UNDP members to review information disclosure decisions.[2] At the Asian Development Bank, it is now proposed that a Public Disclosure Advisory Committee staffed by high level management staff will review appeals. At the European Union, the Ombudsman and the European Court can handle appeals.

Reporting

6. It is positive that section 4 requires annual reporting on how the Public Information Policy (PIP) is being implemented. However, in accordance with common practice at national level, the PIP should explicitly require that annual reports must, at a minimum, include details of:

[2] UNDP (1997) *Public Information Disclosure Policy*, paras 20-23, http://www.undp.org/csopp/CSO/NewFiles/policiesinfo.html, as on 1 October 2003.

- the number of requests made and their outcome, including, for decisions where an applicant was not entitled to access to information, the provisions of the PIP under which the decisions were made and the number of times each provision was invoked;
- the number of appeals under the PIP and the outcome of those appeals;
- any other facts which indicate an effort by officials to effectively administer and implement the spirit and intention of this PIP;
- recommendations for amendment of the PIP or reform of the Bank's information access procedures.

7. CHRI recommends that section 4 be extended to require that a regular review of the Policy is undertaken so that any problems with implementation can be ironed out and the Policy keeps up with the evolving best practice international standards. For example, the ADB's disclosure policy states that "the ADB shall conduct a comprehensive review after a period of time, not to exceed five years from the effective date of the Policy. The review will actively engage interested individuals and organisations."[3] Any new section should also specify what issues should be scrutinised during the review process in order to ensure that it is a useful, participatory process that can effectively benefit the PIP. For example, any evaluation of the Policy must at least consider whether the Policy:
   - ensured timely access to information by project-affected people in a manner and form which enabled more meaningful participation all aspects of the project cycles;
   - improved project outcomes (by ensuring that projects supported by the Bank had the support of their beneficiaries, who were able to participate more effectively in project identification as a result of improved communication);
   - improved project design and implementation (by ensuring more meaningful participation by project-affected people); and
   - improved the EBRD's reputation among civil society in terms of its commitment to transparency, accountability and participation.

Additional recommendations

8. **Adapt internal practices:** The current implementation procedures fail to set out how the EBRD will have to adapt its internal practices to effectively operationalise the policy. It is often the case that organisational structures and well entrenched management and administrative practices can diminish the effectiveness of information disclosure policies. This needs to be addressed by adapting internal administrative and management mechanisms to build and strengthen internal support for the Policy. For example:

   - a **practical action plan** could be developed to help keep the implementation of the new Policy on track. This could be produced within 2 months of the Policy becoming effective and include a consideration of how incentives and other management approaches can be used to strengthen internal support for the Policy. Any action plan should incorporate training on the new Policy for all staff, both at headquarters and resident missions, within six months of the Policy becoming effective. Indeed, undertaking training could be a performance criteria built into officials' employment contracts. Seminars on the new Policy could also be run for government officials, to enhance understanding of the Policy and support for increased access to information as a strategy for improving the EBRD's transparency and accountability. Following the World Bank's lead, a Disclosure Handbook outlining for staff the workflow arrangements for making operational information available to the public could also be developed;

   - **performance incentives** can be a very effective mechanism for ensuring that officials prioritise their new responsibilities under the Policy;

   - **records management systems** should be created and maintained which are designed to facilitate the aims of the Policy; and

[3] ADB (2005) *The Public Communications Policy of the ADB*, para 168, p30.

- consideration should be given to developing **public education programmes** and/or a media strategy publicising the new policy and people's rights under it.

9. **Sanctions:** CHRI recommends the inclusion of sanctions for a failure by officials to follow the procedural provisions and the PIP more generally. For example, officials should be disciplined where there has been knowing provision of incorrect information, concealment or falsification of records, willful destruction of records subject to requests, obstruction of the work of any body covered by the Policy and/or unreasonable delay or withholding of information. Such offences are very common in national access laws because it is recognised that bureaucrats entrenched in a culture of secrecy may need the strong incentives arising from penalties to prod them into implementing openness and access seriously. At national level, penalties can be in the form of fines and disciplinary action under relevant service rules. Such penalties serve a useful role in protecting the organisation against officers working against its interests and those of its constituents.

More information: *If the EBRD wishes to discuss this paper or if CHRI can provide any additional assistance or input, please contact Ms Cecelia Burgman from CHRI's Right to Information Programme. Cecelia can be contacted at cecelia@humanrightsinitiative.org or by phone on +91-11 2686 4678 / 2685 0523.*