World Bank Access to Information Appeals Board

August 21, 2020

Dear AIAB:

This is an appeal to the Access to Information Appeals Board of the World Bank’s Aug. 28, 2019, initial denial of my request, S1907-0030, and the subsequent partial denial by the Access to Information Committee (AIC), which issued its [decision](http://pubdocs.worldbank.org/en/486521596051348569/pdf/AIC-Decision-73-appeal-AI6479-July-29-2020-FINAL.pdf) on July 29, 2020.

On July 8, 2019, I submitted the following request seeking:

All World Bank documents concerning amendments to the Tanzanian Statistics Act between April 1, 2018, and July 8, 2019. This request should be interpreted broadly and should include communications to and from the country office in Tanzania to WB headquarters and all correspondence on this topic with the Tanzanian government.

**Background on the Request**

Some context about the request may be useful.

The law passed on Sept. 10, 2018, criminalized the dissemination of “any statistical information which is intended to invalidate, distort or discredit official statistics.” Offenses were punishable by a $6,000 fine or a three-year prison sentence.

The Bank on Oct. 1, 2018, said in a statement that it was “deeply concerned” about severe restrictions placed on freedom of speech concerning statistics in Tanzania. The Bank called the law “out of line with international standards such as the UN Fundamental Principles of Official Statistics and the African Charter on Statistics.” With $50 million in support for the Tanzanian statistics agency hanging in the balance, the Bank said it had “shared” its concerns with the Tanzanian government and was “in discussions” with officials about a new law.  (See Oct. 1, 2018, [article](https://eyeonglobaltransparency.net/2018/10/01/world-bank-holding-up-50-million-for-tanzania-over-statistics-bill/) in Eyeonglobaltransparency.net, the requester’s blog. Follow-up articles: Oct. 11, 2018, [article](https://eyeonglobaltransparency.net/2018/10/11/world-bank-mum-on-whether-statistics-discussed-in-meeting-with-tanzanian-president-magufuli/) on Bank officials meeting with the Tanzanian president; Oct. 24, 2018, [article](https://eyeonglobaltransparency.net/2018/10/24/imf-seeking-information-from-tanzania-on-amendments-to-statistics-law/) on IMF concerns; March 18, 2019, [article](https://eyeonglobaltransparency.net/2019/03/18/world-bank-restates-objections-to-restrictive-tanzanian-statistics-law/) a restatement of the Bank’s position, and April 17, 2019 [article](https://eyeonglobaltransparency.net/2019/04/17/world-bank-reiterates-concerns-about-tanzanian-education-statistics-policies/) on the Bank’s position on an education loan and the statistics law.)

Tanzania modified the legislation in June of 2019, dropping the criminalization provisions, changes that won Bank approval.( See EYE June 29, 2019, [article](https://eyeonglobaltransparency.net/2019/06/28/tanzania-to-require-prior-approval-for-domestic-statistical-research/), and [another](https://eyeonglobaltransparency.net/2019/07/21/tanzania-statistics-law-still-restricts-free-speech-panel-could-require-corrections/) on July 21, 2019.)

In September 2019 the Bank issued a statement to EYE saying, in part: “Approval of this project acknowledges efforts by the government of Tanzania to address the policy issues by amending the statistics law (2018) in line with international practice, as well as the government’s commitment to facilitate all girls to complete their education.” Subsequently, the Bank released the funds to the government statistics agency.

What is obvious from the public record is that the Bank analyzed the amendments to the Statistics Law in 2018 and 2019. In 2018, the Bank determined the initial amendments to be “out of line with international standards.” After passage of the 2019 amendments, the Bank ambiguously said “efforts“ by the government to amend the law are “in line with international practice.”

The Bank clearly engaged in an analysis of the changes to the Tanzanian statistics law, particularly as related to international standards. The Bank undoubtedly reached a conclusion and transmitted it to the government.

My interest as a journalist is to understand the Bank’s views and actions in order to explain them to the public.

It is in the public interest for the public and government officials to understand and evaluate the Bank’s position on this law. This is not just an exercise in post hoc analysis. Restrictions by the Tanzanian government on public discussion of statistics may be a continuing issue because of a new social media law. And similar issues exist in other countries. The Bank’s role as a funder and influencer makes understanding its position on this issue an important one, with free speech and other human rights implications.

The disclosures sought in this request would serve the public interest.

**Delayed Process Raises Questions**

The Bank’s year-long process in handling my July 8, 2019, access request generates little confidence.

Both the reply to the initial request (Aug. 29, 2019) and the [decision](http://pubdocs.worldbank.org/en/486521596051348569/pdf/AIC-Decision-73-appeal-AI6479-July-29-2020-FINAL.pdf) of the AIC (July 29, 2020) took significantly longer than the standards set in the AI Policy..

The decision revealed gross mishandling of the initial request. As reported by the AIC, the original staff search found only 20 relevant documents.

After the AIC got involved because of my Sept. 17, 2019, appeal, many more documents were found. However, it took six months for the Bank to discover that there actually were 535 documents. It wasn’t until March 15, 2020, that the business unit reported back to the Board with a full accounting of the documents involved.

The Bank, when periodically contacted by the requester, said the delays were caused by the “high number” of documents involved, but at no time asked to discuss the request.

On April 29, 2020, the AIC considered the matter again, learning that the Bank staff had reviewed “a sample of 30 random documents” thought to be covered by the deliberative process exception. The committee decided to assign a Bank staffer to review *all* documents restricted by the deliberative information exception.

At the May 17 AIC meeting the committee was informed that this review was ongoing, and not until July 1 that the committee got the results. The AIC decision was issued Aug. 28, 2020.

During the course of this extended review, I appealed on Feb. 20, 2020, to the AIAB about the delay.

The Board March 18 said it “might properly intervene” in case of “unreasonable delay” by the Bank in handling requests for information, but said the Bank “has made good faith assurances to the AIAB that the business unit and the AIC Secretariat are actively working on the request.” (March 18, 2020, [decision](http://pubdocs.worldbank.org/en/920781584662735326/pdf/11-Case-No-AI6479-Documents-concerning-amendments-to-the-Tanzanian-Statistics-Act-Decision-dated-March-18-2019.pdf).)

In retrospect, the record raises many questions about management of this request. Why was the initial identification of responsive records off target by 515? Why did it take seven months to get an accurate count? Was the committee aware that the staff in its almost two-month review of the identified documents was “sampling” concerning the deliberative process exception, and would review just 30 documents?

In sum, there is reason to question the “good faith assurances” provided by the Bank to the Board in early 2020. The 13 months it took to handle this request merits Board examination and comment.

In the end, nine documents were released, eight of them official documents, such as copies of the Statistics Act and proposed amendments.

**Summary of Appeal**

This appeal will demonstrate that:

* The use of the attorney-client privilege exemption is patently unjustified.
* The deliberative process exemption is being too broadly applied and has been used to prevent disclosure of conclusory documents and factual information.
* The Bank is violating its policy by not using redaction to disclose portions of documents which do not fall under the exceptions.

**Attorney-Client Privilege Exemption Overused**

The determination that 22 documents are covered by the attorney-client privilege exception is incorrect and violates the AI Policy.

Section III.B.2(d) of the policy states: “Attorney-Client Privilege. The Bank does not provide access to information subject to attorney-client privilege, including, among other things, communications provided and/or received by the General Counsel, in-house Bank counsel, and other legal advisors.”

This exception, which tracks similar exceptions in other IFI policies and national access to information laws, is designed to protect communications covered by legal privilege. This protection is limited to communications between clients and lawyers which relate to the legal position or interests of the client, such as when the lawyer is handling a legal matter affecting the client. The “attorney-client” language of the policy rules out a more expansive interpretation.

It is widely accepted that attorney-client exceptions do not cover policy advice prepared by lawyers, even by in-house lawyers except insofar as they express or reflect a proper client “secret.” It does not apply to policy analysis. In analyzing policy, for example, a draft national statistics law, a World Bank lawyer does exactly what a World Bank economist does.

To adopt the position that such policy advice is covered by the attorney-client privilege is both fundamentally incorrect and too expansive a reading. Such an application of the exception could open the door to serious abuse,  covering any communication involving a lawyer, even where identical communication would not be exempt if it had been made by anyone else. When a Bank lawyer is consulted on a programmatic policy matter rather than an issue affecting the Bank’s legal interests, he or she is acting as a policy advisor and not as the Bank’s legal counsel.

It is normal for the Bank to consult its lawyers when it wishes to assess the quality of a law. But this does not mean that those lawyers are acting in protection of the Bank’s legal interests in this assessment, let alone articulating any client “secret.”The problem with attempting to cover this by the attorney-client privilege exception becomes clear by way of analogy. If, instead of a law, the Bank wished to assess the quality of an economic policy, it would consult with its economists or other qualified professionals. The notion that policy advice on a law is covered by the privilege while policy advice on anything else would not be (unless, perhaps, another exception applied) is clearly illogical and not how the exception should operate.

**The Deliberative Process Exemption Is Being Abused**

The use of the deliberative process exception to completely deny access to 467 documents is excessive and violates the AI Policy. The Bank is very likely shielding factual information that does not fall within the exception.

First, consider the logical course of events as the Bank develops its position on an issue, in this case on what to say to the Tanzanian government about a statistics law. There may be an exchange of views by Bank officials about the merits of the law and potential problems with it. Experts with different skills might weigh in: political experts, human rights experts, statisticians, etc. But in the end the Bank reaches a conclusion: a decision to send a certain message for the Tanzanian government. (It can be assumed that this conclusion of the deliberative process was more than the Bank’s statement to the press and the statement at a Parliamentary hearing.)

In other words, the outcome of deliberation is a conclusion (i.e. a decision) and that decisional document itself is not fairly privileged from disclosure.

Second, the blanket invocation of the deliberative process exception is a misapplication of the AI Policy.

The AIC has overlooked, and not addressed in its decision, an important distinction between disclosures that actually might interfere with the “integrity of the deliberative process” and disclosures that do not cause any such interference but, instead, usefully inform the public.

The use of this exception is inappropriate when it shields from disclosure information of a factual nature.

The exception states:

Section III.B.2 Deliberative Information. The Bank, like any institution or group, needs space to consider and debate, away from public scrutiny. It generally operates by consensus, and it needs room to develop that consensus. During the process it seeks, and takes into account, the input of many stakeholders; but it must preserve the integrity of its deliberative processes by facilitating and safeguarding the free and candid exchange of ideas.

There are major problems with the way this exception has been applied in this case.

First, it is widely accepted in the application of the deliberative process exemption that there is a key distinction between statements of fact and statements of opinion.

The policy itself looks to safeguard “ideas” not facts. In context, the protections are meant for opinions, brainstorming, suggestions, etc. (For example, the United States Department of Justice, which oversees implementation of the U.S. Freedom of Information Act, regularly articulates this as “advice, opinions, recommendations, and analysis.”) The rationale for this is that staff may be reluctant to share controversial advice if they think their advice might become public.

But no such impact is possible when it comes to facts. Thus, for example, suppose a Bank report concluded: “No country imprisons people for issuing statistics which contradict official statistics.” That is a factual statement that is outside of the deliberative process privilege and which should be disclosed because its release would not upset the deliberative process (i.e. this would not prevent staff in future from including such factual statements in reports).

In addition, not even all advice or opinion merits protection. The test should be whether it actually would impede the “integrity” of the decision-making process.

**Failure to Redact Violates Bank Policy**

The language and history of the Bank’s AI policy clearly indicate that redaction was expressly contemplated and is allowable in fulfillment of the Bank’s stated philosophy favoring a “presumption of disclosure.”

Redaction, to segregate nondisclosable material so that the remainder can be disclosed, is nearly universal standard practice under access to information laws worldwide. The requester is aware that redaction can be complicated and also that many jurisdictions have set standards and found efficient ways to manage redaction.

In this case, it is not credible to believe that every sentence of the 535 relevant documents would, if released, qualify for confidentiality under the Bank’s exemptions. At a minimum factual information should be released.

First, a look at the background of the Bank’s AI Policy.

One of the first three members appointed to the AIAB, Daniel J. Metcalfe, has described “a troubling ambiguity” in the Bank’s AI policy. He wrote that a policy of withholding documents in full because they contain exempt material would be a “radical departure from the norm.”

His analysis is contained in a [chapter](https://books.google.com/books?id=6xJCBAAAQBAJ&pg=PA339&lpg=PA339&dq=world+bank+redaction&source=bl&ots=__uZnh2nCZ&sig=ACfU3U1spwQUszaYbdKSM-nHmKDog3AL1Q&hl=en&sa=X&ved=2ahUKEwibzvqZjITrAhUwgXIEHfxrDCQ4ChDoATAIegQIChAB#v=onepage&q=world%20bank%20redaction&f=false) of the 2014 book *Research Handbook on Transparency.* Metcalfe, now retired, was an Adjunct Professor of Law at the Washington College of Law, American University. He served as the Founding Director of the U.S. Department of Justice’s Office of Information and Privacy from its founding in 1981 until his retirement from government service in 2007. He was Executive Director of “Collaboration on Government Secrecy,” a non-partisan academic project devoted to the study of government openness and secrecy.

Describing Bank’s inconsistency on this key point, Metcalfe wrote:

“In the precatory language to the section that lists its disclosure exceptions, the following can be found: “the Bank does not provide access to information whose disclosure. Could cause harm to specific parties or interests. Accordingly, the Bank does not provide access to documents that *contain or refer* to the information listed in paragraphs 8-17.” World Bank Transparency Policy Section 7 (emphasis added), On the other hand, in a more specific context it speaks of “the *information* requested” and of “the process for making the *information* available to the requester.” *Ibid.* at Section 40 (emphasis added). And most specifically, it contemplates what would appear to be an ordinary document-redaction process in elsewhere specifying that the Bank will “take an approach to disclosing information” of “mak[ing] adjustments to the document to address the matters of concern to the country/borrower.” *Ibid*. at Section 20(a); see also *Ibid*. at Section 20(b) (same).

Tellingly, Metcalfe reports assurances made by the Bank’s then General Counsel**,** Anne-Marie Leroy,on September 2010 at an event held at American University’s Washington College of Law, shortly after the AI Policy became effective, where she said that the Bank’s policy “does contemplate redaction when necessary.” Metcalfe continues, “…indeed, she went so far as to advise that anyone concerned about that “should look at, for instance [Section] 20” of the policy, which she quoted in pertinent part as “contemplating redaction.”

In practice, the Bank has made redaction a rare occurrence by claiming its use to be discretionary and by having no standards governing its use.

The AIC on July 14, 2010, just two weeks after the effective date of new policy, issuing its third [interpretation](http://pubdocs.worldbank.org/en/453041434139030640/AI-Interpretations.pdf) of the new policy, took a restrictive approach. The interpretation’s begins:

Under the AI Policy, the Bank considers disclosure of documents in their original form. If a requested document includes restricted information, the AI Policy does not mandate the Bank to redact (black out) restricted information in order to make the document acceptable for public access.

The 2010 interpretation, however, goes on to make redaction discretionary. The second sentence is:

While the Bank does not have a redaction policy to black out restricted information in response to public access requests (meaning, documents that include restricted information are not publicly available), the Bank is not prevented from redacting restricted information on a case-by-case basis if it chooses to do so.

Four years later, on June 24, 2014, the AIC issued another “interpretation,” reaffirming that redaction is a “discretionary decision.”

The Bank's determination as to whether to redact restricted information from a document in order to make it publicly available is a discretionary decision to be taken by Bank. As the Access to Information Committee (AIC) indicated in the Access to Information (AI) Policy interpretation dated July 14, 2010, "[u]nder the AI Policy, the Bank considers disclosure of documents in their original form. If a requested document includes restricted information, the AI Policy does not mandate the Bank to redact (black out) restricted information in order to make the document acceptable for public access. While the Bank does not have a redaction policy to black out restricted information in response to public access requests (meaning, documents that include restricted information are not publicly available), the Bank is not prevented from redacting restricted information on a case-by-case basis if it chooses to do so.” The AIC confirms that (a) neither the AI Policy nor the AI Policy interpretation of July 14, 2010, imposes an obligation or duty on the Bank to either consider redaction (or modification) of a document that includes information restricted by one or more AI Policy exceptions, or to redact (or in any way modify) a document that includes such restricted information, and (b) under the AI Policy, the Bank considers disclosure of documents in their original form and thus documents that include information restricted by one or more AI Policy exceptions are, on their face, restricted from disclosure under the AI Policy, unless the Bank, in its sole discretion, chooses to redact or modify the document as the Bank may deem appropriate to make it eligible for disclosure in accordance with the AI Policy.

Curiously, the second interpretation was issued only a few weeks after a decision by the AIAB taking a contrary position.

The AIAB on June 11, 2014, said “the Bank has a duty to consider redaction in appropriate cases.’

In the case before the Board, the Bank had denied all access to a month’s worth of letters to the Bank requesting information under the AI Policy, saying it was under no obligation to redact personal information while disclosing the language of the request. The denied request was made by this appellant, then editor of FreedomInfo.org. (Freedominfo.org sent an [appeal letter](http://www2.gwu.edu/~nsarchiv/freedominfo/worldbankappealFeb7.docx) Feb. 7, 2014.)

The AIC reaffirmed the initial denial and said it would not redact any personal information to address its concerns about not releasing personal information about the requesters. Rather than using redaction, the Bank totally denied access to the request letters. Justifying its March 19, 2014, [decision](http://www2.gwu.edu/~nsarchiv/freedominfo/worldbank2014march19denial.docx) not to redact names and personal information, the Bank cited its 2010 interpretation.

The Appeals Board observed that per the 2010 interpretation the Bank may redact “if it chooses to do so.” (AIAB [decision](http://freedominfo.org/documents/worldbank2014june11decision.pdf) dated June 11, 2014; Freedominfo.org [article](http://www.freedominfo.org/2014/06/appeals-body-says-world-bank-violated-access-policy/), June 26, 2014)

But the Appeals Board has very clearly said that “the Bank has a duty to consider redaction in appropriate cases,”

27. In our judgment this makes it clear that the Bank has a duty to consider redaction in appropriate cases. So another option open to the Bank in this case, if indeed there was a well-founded concern of harm, was to redact the name and/or contact details of the requesters. By declining to do so, the Bank thereby caused the content of the request, as opposed to the personal details of the requesters, also to be withheld. No suggestion has been made that disclosure of the content would compromise security or likely endanger any individual.

The Board also commented and that in the context of the request, “the process of redaction would have been straightforward and not onerous.”

28. Neither the Bank in the first instance based on the requester’s submission, nor the AIC considering the first level appeal, applied their respective minds properly to this aspect of the matter and so, therefore, there was a failure to apply the AI Policy properly. Had the Bank or the AIC done so, and done so reasonably, it would have found that in this instance the process of redaction would have been straightforward and not onerous. First, there were a manageable number of records arising out of the requests for information made during the month of October 2013. Second, the way the records are organised makes for ready identification of the information to be redacted. And third, the redaction of the name of the requester is easily done. Indeed, we note that for the purposes of this appeal all of the records of the requests that have been provided to us have been redacted in this fashion.

This decision thus kept faith with the AI Policy and the explicit assurance given by the Bank’s general counsel during the Bank’s official “roll-out” of the policy at the Washington College of Law.

Despite this decision, the AIAB on Dec. 3, 2015, in a case brought by another requester, upheld the World Bank’s refusal to disclose documents about a controversial procurement in Serbia and said it could not order specific redactions.  ([Decision](http://pubdocs.worldbank.org/pubdocs/publicdoc/2015/12/937861449508686375/AI-Appeals-Board-Decision-AI3634.pdf).)

The panel said:

7. Regarding redaction, it is the role of the AIC to issue AI Policy interpretation, and it has done so regarding redaction, making clear that the Bank is under no obligation or duty to consider redaction. The AI Appeals Board cannot require information to be redacted and disclosed.

What is becoming clear over time, is that the vague “optional” redaction policy is in practice a “we don’t redact” policy. The committee’s interpretation and Bank behavior are undermining the philosophy of the disclosure policy set by the Board.

If the committee sets separate guidance interpreting the AI Policy that is inconsistent, in theory and/or practice, with the AI Policy, the Board should refuse to apply it in any case that comes before it. Since the Board is the review body for the AIC, and has an overriding mandate to apply the Policy, guidance adopted by the AIC cannot bind the Board.

**Conclusion**

In conclusion, I believe this is a prima facie case that the Bank has violated its own AI Policy.

On the basis of the arguments presented, I request that the Board:

* Specifically review the “privilege” documents and a sample of the “deliberative” ones to see if the exceptions were applied properly.
* Reassert the Board’s 2014 judgment that the Bank has a “duty” to consider redaction.
* Call on the AIC to develop positive standards on redaction and set out general principles to guide that document, based on the Policy.

I appreciate the time and effort I know you put into considering these appeals and look forward to your conclusions on these issues, which have ramifications beyond this case.

Sincerely yours,

Toby McIntosh

703 887-5197