



BRIEFING PAPER

Information Disclosure & Grievance Mechanisms
of the New Development Bank (NDB)

MARCH 2021



OXFAM
South Africa

About Oxfam South Africa

Oxfam South Africa (OZA) is a social justice organisation working at the intersection of poverty and inequality. OZA is part of Oxfam International made up of 20 Affiliates who together work in more than 90 countries across the world to end poverty and injustice.

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Centre for
Environmental Rights
Advancing Environmental Rights in South Africa

About Centre for Environmental Rights

The Centre for Environmental Rights (CER) is a non-profit organisation of activist lawyers who help communities and civil society organisations in South Africa realise our Constitutional right to a healthy environment by advocating and litigating for environmental justice.

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The NDB has a clear operational focus on sustainable infrastructure development, a primary focus of NDB's operational strategy from 2017-2021.

Reference:

NDB's General Strategy 2017 - 2021.

<https://www.ndb.int/wp-content/uploads/2017/08/NDB-Strategy.pdf>

FOREWORD

Oxfam South Africa has commissioned the Centre for Environmental Rights (CER) to develop a briefing paper on the “Information Disclosure Mechanisms of the New Development Bank (NDB)” in response to the priorities of the South Africa (SA)/Africa Civil Society Organisation (CSO) NDB Working Group related to country systems and transparency. The SA/Africa CSO NDB Working Group, co-chaired by Oxfam South Africa and African Monitor is a network formed in 2018 during the time of Civil BRICS when South Africa hosted the 10th BRICS Summit in Johannesburg. The SA/Africa CSO NDB working group seeks to engage the NDB and its Africa Regional Center (ARC) on its role in South Africa and the region, in coordination with BRICS civil society.

Since the outbreak of the COVID-19 pandemic, the public has become more aware of the role of international financial institutions (IFIs) given the South African government’s efforts to raise USD 7 billion from these institutions. This includes USD 1 billion secured from the NDB in July 2020 to support South Africa’s emergency response to COVID-19. Transparency is recognised as a principle of good governance among multilateral development banks (MDBs), including the NDB that affirms its commitment to promoting the highest levels of transparency, responsible conduct, integrity and accountability in the NDB’s first General Strategy (2017-2021). Public access to information is a critical aspect of the transparency of MDBs, especially by affected communities of where MDB investments are located. Such information is the cornerstone for ensuring that MDBs adhere to the social and environmental standards.

This briefing paper is an initial step towards understanding how one can apply South African legislation, policy and processes

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to NDB projects, given that NDB policies are directed toward the goal of using country systems. The paper specifically reviews which local frameworks relate to NDB projects in South Africa in terms of access to information, consultation, and grievance mechanisms. While the NDB commits to promoting the highest levels of transparency, this briefing paper demonstrates areas in which the NDB can improve on making its policies and processes more clear to the public, including how the NDB can make project information more accessible.

The NDB is the first MDB established exclusively by emerging and developing countries to support infrastructure and sustainable development in BRICS and other emerging market economies. When the NDB was launched in 2016, it was thought that the vision of the NDB could be transformative, inclusive and participatory as one of the first multi-regional development banks led by the South, for the South. How the NDB operates, including its level of transparency of its operations in South Africa will be indicative of the path it will take beyond its borders and if the NDB can be positioned to further offer the African continent promise of any new way of working. The jury is still out as the NDB’s First General Strategy approaches its 5-year end date, and soon begins its next important phase which will likely involve new member countries beyond the BRICS, including the African region.

A handwritten signature in black ink, appearing to read "Siphokazi Mthathu".

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ABBREVIATIONS

AoA:	Articles of Agreement
ARC:	Africa Regional Center
CPP:	Country Partnership Plan
CSO:	Civil society organisation
EMDCs:	Emerging Markets and Developing Countries
EIA:	Environmental Impact Assessment
ESF:	Environmental and Social Framework
FEA:	Financial and Economic Analysis of Projects
IDP:	Information Disclosure Policy
IFI:	International financial institutions
MDB:	Multilateral development banks
NDB:	New Development Bank
OECD:	Organisation for Economic Cooperation and Development
PAIA:	Promotion of Access to Information Act
SA:	South Africa
SANRAL:	South African National Roads Agency
TA:	Technical assistance
UNGPs:	United Nations Guiding Principles on Business and Human Rights
OHCHR:	Office of the United Nations High Commissioner for Human Rights

Executive Summary of Briefing paper on the Information Disclosure and Grievance Mechanisms of the New Development Bank (NDB)

March 2021

BACKGROUND/CONTEXT

The purpose of the New Development Bank (NDB) is to “mobilize resources for infrastructure and sustainable development projects in BRICS and other emerging economies and developing countries, complementing the existing efforts of multilateral and regional financial institutions for global growth and development”. Since the NDB Africa Regional Center (ARC) was launched in August 2017, the NDB has approved 9 projects for South Africaⁱ (8 projects in South Africa and 1 project in Lesotho) valued at an estimate USD 3.2 billion.

The NDB as a development finance institution operating for and in the global South, presents stakeholders with a number of challenges and opportunities in relation to the financing of infrastructure and sustainable development projects. Opportunities include socio-economic and other social benefits which accrue from appropriate, well-considered and environmentally sustainable projects in harmony with nature. However, development finance projects are known to have the potential to create unintended environmental, social and governance impacts and to negatively affect the marginalised and the poor in a disproportionate manner.

In order to properly engage with both the risks and opportunities which arise in relation to NDB financed projects, relevant information about such projects are required, such as environmental and social impact assessments, information on consultations which have or have not occurred, roles of intermediaries, as well as information on grievance mechanisms which are available to those who are affected

by projects financed by the NDB. It is clear then, that in order for the NDB to be held accountable for impacts of its financing, including potential failures to consult with vulnerable and marginalised stakeholders and properly addressing environmental and social impacts, information on both the projects and policies of the NDB are centrally important.

COUNTRY SYSTEMS

The NDB promotes the transparent and rigorous use of country systems. In its application of country system usage, the NDB makes a clear distinction between itself and its client. For purposes of South African projects, NDB clients would include Eskom, the Industrial Development Corporation, the Development Bank of South Africa, the Trans-Caledon Tunnel Authority, SANRAL and Transnet. While NDB's Environmental and Social Framework (ESF) explains that it is the responsibility of the client to meet the key requirements for environment and social assessment, involuntary resettlement and indigenous peoples standards in the preparation and implementation of NDB projects, the ESF also states that the NDB plays an active role in these processes and may support clients during project processing, monitoring and supervision. Both the preparation and implementation of projects should be made available in terms of country systems. Currently project applications are not publicly available.

For the screening of projects, the NDB applies a risk-based framework on a project-by-project basis, which is based on NDB experience and international good practices. Although a brief description of the screening

ⁱ For the list of NDB projects in South Africa, see NDB website: <https://www.ndb.int/projects/list-of-all-projects/>. The exchange rate applied is USD 1 to ZAR 17 for the total 9 projects listed.



Durban Container Terminal

Photo by Chris Bloom

process guidelines is set out in the ESF, the detailed risk assessment process, screening process deliberations, classification decision and reasons for the classification decision are not publicly available. Such information is critical to review in order to understand decision making considerations and criteria in more detail.

Once categorised, the client is responsible for assessments, consultations, plans, implementation of plans, grievance redressal, dispute resolution, and disclosure and monitoring. The classification of a project and the decisions for such classification is an important step in the project lifecycle. The following example demonstrates how information related to the detailed risk assessment is critical for the success of a project, including appropriate management plans to address environmental and social impacts.

The Case of the Durban Container Terminal Berth Reconstruction Project

In relation to Transnet's project application concerning the Durban port, the NDB categorized the project as "A" in accordance with the NDB Environment and Social Framework.¹ The NDB Environment and Social Framework indicates that "a proposed project is classified as Category A if it is likely to have significant adverse environmental and social impacts that are irreversible, diverse, or unprecedented. These impacts may affect an area larger than the sites or facilities subjected to physical works."² For any environmental and social impacts identified, the NDB requires the client to develop management plans as appropriate (e.g. environmental and social management plan, resettlement action plan, indigenous peoples plan, or equivalent) to avoid, minimize or otherwise compensate the adverse impacts. These plans are not publicly available.

NDB Access to Information Guided by the Environmental and Social Framework (ESF) and the Information Disclosure Policy (IDP)

This **briefing paper** makes reference to the various processes related to the approval of NDB project loans that require clarity, including the need to make available project documentation to the public. Two primary documents which guide access to information on NDB financed projects are the NDB's ESF and the Information Disclosure Policy (IDP). The NDB's ESF states that the implementation of the ESF is the responsibility of the client, including all assessments, consultations, plans, implementation of plans, grievance redressal, dispute resolution, disclosure and monitoring. It is unclear how the NDB monitors the implementation of a fair grievance mechanism, which is the responsibility of the client.

On access to information, Section 23 of the ESF states that the "NDB is committed to working with the client to ensure that social and environmental documents are made available in a timely manner, in an accessible place, and in a form and language(s) understandable to affected people and to other stakeholders, including the general public, so they can provide meaningful inputs into *project design and implementation*".³ Centre for Environmental Rights's view is that all project *assessment* information can be requested directly from the NDB in terms of the IDP of the NDB, however, further clarity is required on a clear process as there is room for dispute in relation to this.

Similarly, it is unknown as to whether ongoing information about the project, including monitoring and evaluation assessments, due diligence, gap analysis and monitoring and oversight reports in respect of the client's compliance with environmental and regulatory requirements, are subject to the same form of disclosure. While information can be sought in discussions with the NDB, one can also seek clarity for these processes in terms of the NDB's IDP and/or the Promotion of Access to Information Act, 2 of 2000 (PAIA) as set out in **Annexure A**.

Other project documentation that is not publicly made available by the NDB include records of decision making; due diligence outcomes; Financial and Economic Analysis of Projects (FEA); and the Country Partnership Plan (CPP). The FEA is important to assess sustainability. As for the CPP, CER has not been able to locate the CPP and relevant studies used to prepare such plans for South Africa. It is also clear that the development of the CPP is not subject to any public participation process. Such documents can be requested both in terms of the IDP and PAIA, directly from the NDB, alternatively from the South African government such as from the National Treasury as set out in **Annexure A**.

It is important to note for the briefing paper that the insight gleaned has been as a result of CER's interpretation of policies and processes, vague as they are, as well as engagement with the NDB. In order for the NDB to achieve high levels of transparency, a key recommendation of this paper is that information related to its policies and processes as set out in this paper, should be provided for, in detail, on its website and made accessible to the public.

Briefing paperⁱⁱ on the Information Disclosure and Grievance Mechanisms of the New Development Bank (NDB)

March 2021

INTRODUCTION

The New Development Bank (NDB), as a development finance institution operating for and in the global South, presents stakeholders, which include governments, business, civil society, affected communities and other interested and affected parties, with a number of challenges and opportunities in relation to the financing of infrastructure and sustainable development projects.

The NDB's own value statement addresses the negative impacts of development finance, saying that, "progress has been skewed, insufficient and often harmful to our environment".⁴ Development finance projects are known to have the potential to create unintended environmental, social and governance impacts and to negatively affect the marginalised and the poor in a disproportionate manner. In this regard, and in addressing the negative impacts of development on our natural environment and on marginalised and poor communities, the United Nations General Assembly adopted a resolution dealing with 'sustainable development in harmony with nature,' in which it recognised that "*in order to achieve a just balance among the economic, social and environmental needs of present and future generations, it is necessary to promote harmony with nature*".⁵

Objectives

Sustainable development and the work of the NDB, also presents stakeholders with a number of opportunities, which include the socio-economic and other social benefits which accrue from appropriate, well-considered and environmentally sustainable projects in harmony with nature. When considering the development aspirations of the NDB, the potential for poverty alleviation and the

creation of sustainable opportunities for women is immense. As noted further in the previously mentioned resolution, "*sustainable production and consumption patterns can contribute to the achievement of the Sustainable Development Goals, including by fostering economic growth, alleviating poverty and creating full and productive employment and decent work for all, including for women and youth, while promoting local culture, protecting the environment, improving quality of life and promoting rural development and better living conditions for rural populations*".

However, in order to properly engage with both the risks and opportunities which arise in relation to NDB-financed projects, relevant information about such projects are required. This would include environmental and social impact assessments, information on consultations which have or have not been conducted in relation to interested and affected parties, information on financial flows and the roles of intermediaries, as well as information on grievance mechanisms which are available to those who are affected by projects financed by the NDB. It is clear then, that in order for the NDB to be held accountable for impacts of its financing, including potential failures to consult with vulnerable and marginalised stakeholders and properly addressing environmental and social impacts, information on both the projects and policies of the NDB are centrally important.

This briefing paperⁱⁱⁱ therefore considers the processes which govern access to information in relation to projects which are financed by the NDB. In particular, it aims to provide:

- An understanding of the NDB's policies and procedures regarding country systems;

ⁱⁱ Prepared by the Centre for Environmental Rights for the South Africa/Africa CSO NDB Working Group.

- An understanding of South African legislation, policy and processes which underscore its country systems;
- An understanding of the tools used to assess approved projects and internal procedures in terms of NDB policies; and a
- Mapping of the South African project implementation landscape.

In addition, the report will investigate and consider the following:

- How communities are being consulted (if at all);
- Which local frameworks relate to projects in terms of access to information, consultation, and grievance mechanisms; and
- Whether grievance mechanisms have been established at the country level, and if so, whether they are fit for purpose.

In order to contextualise the above points, the next sections provide background information on the NDB, followed by sections dealing with access to information within the context of the NDB's use of country systems, a discussion of grievance mechanisms and a brief discussion of its legal personality.

ABOUT THE NDB

An agreement for the establishment of the NDB was formally concluded in 2015 and requires the NDB to operate in terms of its Articles of Agreement (AoA). According to Article 1 of the AoA⁶, the purpose of the NDB

is to *"mobilize resources for infrastructure and sustainable development projects in BRICS and other emerging economies and developing countries, complementing the existing efforts of multilateral and regional financial institutions for global growth and development"*.

The stated mission of the NDB is to support infrastructure and sustainable development efforts in BRICS and other under-served, emerging economies for faster development through innovation and cutting-edge technology. The Bank aims to partner with nations through capital and knowledge, achieving development goals with transparency and empathy and creating an equal opportunity for the development of all countries.⁷

The values of the NDB should guide any information and grievance policies. Important for this briefing paper is the NDB's commitment to being open and approachable, with mutual respect and a spirit of collaboration driving effective results. According to its website, the NDB is committed to egalitarianism and the Bank is founded on the principles of equality and democracy, with a firm belief in democratic decision-making and inclusivity of all stakeholders; it understands that the true meaning of development is, at the core, the vision of a great leveller, a vision that is inclusive and not selective.

It is stated further that the Bank believes in transparency and complete disclosure and is committed to ensuring that proceedings are transparent and that all policies, procedures and documents are publicly available. The following diagram provides a summary of the NDB's establishment and key milestones.⁸

⁶ This paper has been presented at a workshop co-hosted by Oxfam South Africa and African Monitor on 25 February 2020. The intention of this paper is to inform strategic discussions around accessing information about projects financed by the NDB as well as other financial and operational information held by the NDB. This briefing paper can be used to further examine the NDB's policies and procedures on access to information which will then enable the development of a practical access to information toolkit or manual.

FOUNDING DOCUMENTS	<ul style="list-style-type: none"> • Articles of Agreement signed in Fortaleza in July 2014 and entered into force in July 2015 • Headquarters Agreement with China and the MoU with the Shanghai Municipal People's Government signed in February 2016 • Key governance, operational and risk policies and procedures established covering all functional areas
RATINGS	<ul style="list-style-type: none"> • AA+ long-term issuer credit ratings from S&P and Fitch • AAA foreign currency long-term issuer rating from Japan Credit Rating Agency (JCR) • AAA institutional rating from Chengxin and Lianhe rating agencies • AAA rating from Analytical Credit Rating Agency (ACRA)
PROJECTS	<ul style="list-style-type: none"> • USD 15bn in cumulative project approvals, for 53 projects (as at December 31, 2019) • The Project Preparation Fund supports bankable projects in the Bank's member countries, through technical assistance
BORROWINGS / CAPITAL	<ul style="list-style-type: none"> • Comprehensive Funding Strategy • Strong focus on local currencies
STRATEGY	<ul style="list-style-type: none"> • General Strategy for 2017-2021 approved
PARTNERSHIPS	<ul style="list-style-type: none"> • Partnerships with fellow MDBs, as well as key national and global institutions • Partnerships with academic institutions on research and knowledge dissemination • Mutual training and capacity building, through collaboration and staff exchange programs
REGIONAL PRESENCE	<ul style="list-style-type: none"> • Offices in member countries provide local expertise to strengthen NDB operations

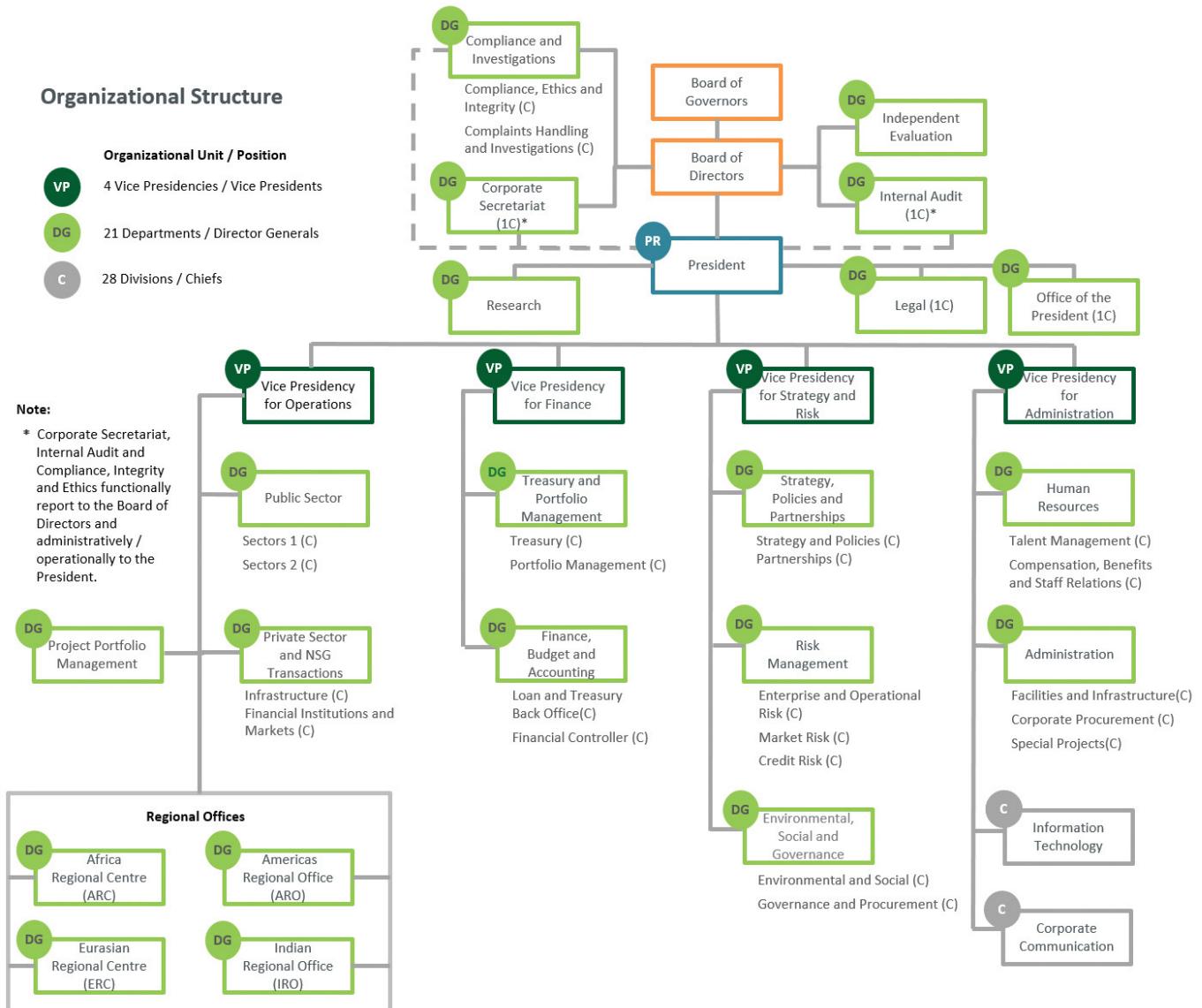
ORGANISATIONAL STRUCTURE OF THE NDB⁹

Organizational Structure

Organizational Unit / Position
4 Vice Presidencies / Vice Presidents
21 Departments / Director Generals
28 Divisions / Chiefs

Note:

- * Corporate Secretariat, Internal Audit and Compliance, Integrity and Ethics functionally report to the Board of Directors and administratively / operationally to the President.



Projects and Loans

NINE PROJECTS HAVE BEEN APPROVED FOR SOUTH AFRICA,¹⁰ THESE INCLUDE:

1 	South African National Toll Roads Strengthening and Improvement Programme with a loan amount of R7 billion (South African National Roads Agency SOC Limited)	7 	Project Finance Facility with a loan amount of USD 180 million (Eskom)
2 	Renewable Energy Sector Development Project with a loan amount of R1,15 billion (Industrial Development Corporation)	8 	Battery Energy Storage Project with a loan amount of USD 400 million (Eskom)
3 	Lesotho Highlands Water Project Phase II with a loan amount of R3.2 billion (Trans Caledon Tunnel Authority)	9 	COVID-19 Emergency Program (Public Health Social Safety) with a loan amount of USD 1 billion (Republic of South Africa)
4 	Environmental Protection Project for Medupi Thermal Power Plant with a loan amount of USD 480 million (Eskom)	South Africa's borrowing from the Bank is about USD 1.7 billion with a further USD 1.5 billion pledged to South Africa. ¹¹ According to the former President of the NDB, Mr Kamath, the NDB has approved 46 projects for USD 12.8 billion in member countries, with approvals expected to reach USD 15 billion by end 2019 and targeted approvals of USD 8-10 billion in 2020. ¹²	
5 	Greenhouse Gas Emissions Reduction and Energy Sector Development Project with a loan amount of USD 300 million (Development Bank of Southern Africa)	The Africa Regional Center (ARC) of the NDB was opened in Johannesburg in August 2017 and is the face of the Bank for the African continent. It employs 18 South African professionals both at the ARC and the NDB's headquarters in Shanghai, China. ¹³ The ARC works closely with the South African government, public and private sector agencies and other relevant stakeholders to identify projects that have a strong development impact to be supported by the NDB.	
6 	Durban Container Terminal Berth Reconstruction Project with a loan amount of USD 200 million (Transnet)		

Legal Personality

In accordance with article 28 of the AoA¹⁴, the Bank possesses full international personality and is guided by international laws which are applicable to multilateral development banks (MDBs) including the United Nations Guiding Principles on Business and Human Rights (UNGPs). For purposes of understanding best practices, the Organisation for Economic Cooperation and Development (OECD) Guidelines on Multinational Enterprises (OECD Guidelines) are useful. In addition, the **Draft Benchmarking Study of Development Finance Institutions' Safeguards and Due Diligence Frameworks against the UN Guiding Principles on Business and Human Rights issued by the Office of the United Nations High Commissioner for Human Rights (OHCHR)** in September 2019, is quite important in framing our assessment of the NDB, particularly in relation to remedies and transparency.

In terms of Article 29(b)(i)–(iii) of the AoA, the Bank also has in the territory of each member, full juridical personality, and in particular, full capacity to contract, acquire and dispose of immovable and movable property and institute legal proceedings.

It is however interesting that in terms of Article 30 of the AoA, the Bank enjoys immunity from every form of legal process “except in cases arising out of or in connection with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities, in which cases actions may be brought against the Bank in a court of competent jurisdiction in the territory”

of a country in which the Bank has its headquarters or offices, or has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities”¹⁵. Article 31 provides that property and assets of the Bank are immune from search, requisition or any form of executive and legislative action, while the archive of the Bank and, in general, any documents belonging to it are inviolable, wherever located.

In addition, in accordance with Article 33, all Governors, Directors, alternates, officers and employees of the Bank have privileges and immunities, including immunity from legal process, except where the Bank waives immunity. This is an interesting provision, albeit not unusual for MDBs. It creates potential difficulty in relation to the use of the local information law, the Promotion of Access to Information Act, 2 of 2000 (PAIA), in order to access information from the Bank, which could be regarded as a private body^{iv} for purposes of information requests in terms of PAIA. In this regard, using the information disclosure process prescribed by the NDB, which is elaborated further on below, is the best option for requesting information from the Bank.

The question of absolute immunity of international organisations from suit in the United States was considered in *Jam v International Finance Corporation*,^v where it was decided that for purposes of international organisations with commercial activities with

^{iv} Section 1(c) of PAIA defines a private body as a former or existing juristic person, excluding a public body which is turn defined as: “(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or (b) any other functionary or institution when-
(i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
(ii) exercising a public power or performing a public function in terms of any legislation”.

^v 139 S. Ct. 759 (2019). See <https://earthrights.org/media/historic-supreme-court-win-world-bank-group-is-not-above-the-law/>. Note that in February 2020, the US District court dismissed a lawsuit against the IFC for its role in financing the Tata Mundra Power plant, however the district court decision is being appealed. See <https://earthrights.org/media/farmers-and-fishermen-to-challenge-world-bank-group-immunity-ruling/>.

sufficient nexus to the United States, such organisations do not enjoy absolute immunity but a more limited form of immunity, similar to immunity granted to foreign sovereigns in terms of US legislation. Although the NDB does not claim to have absolute immunity, by virtue of the exception which is contained in Article 30, litigation related to PAIA, for example, may be regarded as legal process from which it is exempt. However, given the Bank's full juridical personality in SA, the constitutional laws and obligations may well hamper any efforts to enforce immunity of legal processes related to access to information.

At a consultation with the NDB's ARC on 27 February 2020, the ARC indicated to the SA/Africa CSO NDB Working Group that the NDB is not subject to South African legislation, including the PAIA. In order to obtain a formal written response from the NDB confirming this position, the PAIA request process should be tested out with the NDB. It is important to note that the engagement between the NDB's ARC and the CSO working group has largely been informal and inconsistent over the years, and that the need for a more formal approach and regular meetings has been identified.

INFORMATION REQUESTS

In considering an information request, one has to determine what type of information is required. Information requests could relate to information which would help to better understand the NDB, its decisions and processes or information on projects and whether or not environmental and social

issues were properly assessed by the NDB or its client. The type of information being sought will guide any process or parallel processes for the request of such information, as well as whether the NDB or its client is obliged to provide such information.

This is important because the NDB has adopted policies which allocate a great degree of responsibility to borrowers or clients, including project application, approval, assessment and implementation, as well as allocation of responsibility for the implementation of grievance mechanisms. These policies also require the use of country systems^{vi} for project application, approval, assessment and implementation which means that the client's legal obligations are determined by the particular laws and regulations applicable in the country in which the project is implemented.

In this regard, the NDB's commitment to the use of country systems is reiterated in its General Strategy: 2017-2021 (NDB General Strategy),¹⁶ which states that the

"NDB sees using national systems as the best way to strengthen a country's own capacity and achieve better long-term development results. As such, in every project, NDB intends to verify ex-ante the quality of borrowing-country environmental, social, fiduciary and procurement systems, and use them whenever they meet NDB's requirements. In cases where a country's systems are not deemed acceptable, NDB will fill gaps with additional requirements tailored to the specific needs

^{vi} Environmental Social Framework (version 4, 11 March 2016). Section 5(b), p4 states that the "NDB promotes the use of strong country and corporate systems in the management of environment and social risks and impacts. NDB also assists in further strengthening the country systems through a variety of mechanisms in both the public and private sector, including by (i) favoring use of country systems, with adequate support, at the operational level as it also fosters greater accountability and ownership; (ii) coordinating closely with other multilateral development banks, international financial institutions and relevant centers of expertise; and (iii) maintaining a risk based and outcome focused approach through measures aligned with the core principles". See also the report of the Collaborative African Budget Reform Initiative (CABRI), 'Towards a Greater Use of Country Systems in Africa: Recent trends and approaches' 2014.

https://www.effectiveinstitutions.org/media/Towards_a_greater_use_of_country_systems_in_Africa.pdf



Kelly Alcock, Global Impact Programme, Oxfam South Africa

Prioritising gender and women's rights in NDB investments is critical for promoting more effective and sustainable economic development.

Source: <https://www.news24.com/citypress/Voices/will-the-new-development-bank-live-up-to-its-promises-20190328>

of the project at hand. Importantly, use of country systems for NDB will mean following processes closely to encourage clients to thoroughly apply the country's own legislation and procedures, and work together with relevant agencies to propose actions whenever compliance falls short of national and local requirements".

Further to this, the NDB General Strategy sets out the complexity of addressing the challenge of ensuring that resources are used efficiently and transparently and that adverse project impacts on the environment or social groups are minimised or mitigated. The strategy refers to how the World Bank and other MDBs had utilised safeguards and fiduciary requirements such as standards and procedures related to environmental and social protection that borrowers needed to observe over and above national legislation, however, such safeguards had a number of weaknesses which has resulted in a number of MDBs adopting country systems as the preferred safeguard. The NDB General Strategy states that, "it is in everyone's interest to have systems fully capable of managing social, environmental and procurement risks in investment projects, and the best way to do so is to use existing country systems rather than bypass them with external standards".¹⁷

In terms of partnerships with MDBs, according to the NDB General Strategy, the "NDB will seek to undertake joint projects and knowledge exchanges with the World Bank and major regional MDBs to make the most of their decades of experience. NDB is also engaging with development institutions controlled by Emerging Markets and Developing Countries (EMDCs), such as the Asian Infrastructure Investment Bank, the Development Bank of Latin America, the Eurasian Development Bank

and the International Investment Bank".¹⁸ Apart from these and statements in the NDB General Strategy, it is unclear as to how collaboration with other MDBs is conducted or if there are formal processes related to such collaboration.

On the issue of country systems, it is incredibly important to note that the NDB makes a clear distinction between itself and its client, which for purposes of South African projects, would include Eskom, the Industrial Development Corporation, the Development Bank of South Africa, the Trans-Caledon Tunnel Authority, SANRAL and Transnet.

Any information which is requested directly from the NDB should be requested formally in accordance with the PAIA (in terms of which we have classified the NDB as a private body), or in accordance with the NDB's Information Disclosure Policy (IDP), bearing in mind that the IDP process is prescribed while the PAIA process in respect of the NDB is one which is suggested in order to test the NDB's response, remembering its privileges and immunity.^{vii}

Any information sought from a client or borrower should be requested by submitting a PAIA request (in terms of which all current borrowers are classified as public bodies although in some instances, public bodies may declare themselves a private body for purposes of certain classes of information "depending on whether that record relates to the exercise of power of performance of a function as public body or as private body"). CER has prepared sample requests for information directly from the NDB in terms of its IDP process as well as information requests in terms of PAIA to selected borrowers for consideration by the network.

^{vii} See <https://www.ndb.int/wp-content/uploads/2017/01/information-disclosure-policy-revised.pdf> The NDB adopted a ten-page Information Disclosure Policy (IDP) in June 2017. The adoption of the IDP is consistent with Article 15 of the Bank's AoA which highlights its commitment to transparency and accountability. This commitment is reiterated in the NDB's General Strategy (2017/2021). See also, Oxfam India, 'Right to Know' <https://www.oxfamindia.org/workingpaper/6096>

Briefing on the New Development Banks

Information Disclosure and Grievance Mechanisms

25 February 2020



Centre for Environmental Rights
Advancing Environmental Rights in South Africa



Presentation by Leanne Govindsamy of the
CER during the SA/Africa CSO NDB Working
Group Meeting, 25 February 2020.

Photo by Oxfam South Africa.

The sections below deal with the various aspects of such information requests.

Environmental and Social Considerations

Aside from the general assertions of transparency and openness reflected in the NDB's AoA or founding document as well as in its stated mission and values, the two primary documents which guide access to information on NDB-financed projects are the NDB's Environmental and Social Framework (ESF)¹⁹ and the IDP.

The NDB's ESF states that the implementation of the ESF is the responsibility of the client, including all assessments, consultations, plans, implementation of plans, grievance redressal, dispute resolution, disclosure and monitoring. However, the NDB plays an active role in these processes and may support clients during project processing, monitoring and supervision. The processes include the following steps.

Section 5 of Part 1²⁰ of the NDB's ESF states that clients must meet the key requirements^{viii} for environment and social assessment, involuntary resettlement and indigenous peoples standards in the preparation and implementation of NDB projects. It is therefore clear that the client or borrower prepares all projects and submits the project to the NDB for consideration. Project applications are not publicly available.

Both the preparation and implementation of projects should be in terms of country systems.

The NDB applies a risk-based framework on a project-by-project basis in order to screen projects and this framework is based on NDB experience and international good practices.^{ix} Although a brief description of the screening process guidelines are set out in Part 2 of the ESF, the detailed risk assessment process, screening process deliberations, classification decision and reasons for the classification decision are not publicly available.

Once categorised, the client is responsible for assessments, consultations, plans, implementation of plans, grievance redressal, dispute resolution, and disclosure and monitoring. The classification of a project and the decisions for such classification is an important step in the project lifecycle. "In relation to Transnet's project application concerning the Durban port, the NDB categorized the project as 'A' in accordance with the NDB Environment and Social Framework".²¹ The NDB ESF indicates that "a proposed project is classified as Category A if it is likely to have significant adverse environmental and social impacts that are irreversible, diverse, or unprecedented. These impacts may affect an area larger than the sites or facilities subjected to physical works".²² For any environmental and social impacts identified, the NDB requires the client to develop management plans as appropriate (e.g. environmental and social management plan, resettlement action plan, indigenous peoples plan, or equivalent) to avoid, minimize or otherwise compensate the adverse impacts.

^{viii} The NDB's ESF refers to key requirements for consideration under Part 2 of its ESF (page 14) and these relate to early screening of potential risks and impacts, impact assessment, alternative analysis, management plan, meaningful consultation, grievance mechanism, information disclosure and monitoring. It is important to note that these requirements are not set out in detail and that we do not have access to NDB documents which illustrate the decision-making processes in relation to the application of these requirements.

^{ix} ESF, Part 1, section 9 at p 7-8 states that the NDB screens and assesses each proposed project to determine its risk categorization. Category A projects are deemed to have significant adverse environmental and social impacts and category B projects are less adverse than category A. For category A and B projects, the NDB requires the client to conduct an environmental and social assessment. Category C projects are deemed to have minimal or no adverse impacts and this requires a review of environment and social implication in the project documentation. A final category is F1 and is so classified as it involves investment of funds to or through a financial intermediary. For projects classified as F1, the client is required to provide environmental and social impact assessment and environmental and social management plans for sub-projects where such impacts are significant.

These plans are not publicly available. What is known is that after it had been classified, the Environmental Impact Assessment (EIA) for the project did not pass muster, having failed to address environmental concerns, in particular, climate change considerations related to the sea-level rise. The Department of Environmental Affairs rejected the EIA and required resubmission.²³

The client is required to conduct a meaningful public consultation process and ensure transparency and disclosure of information in terms of the ESF, Part 1, and sections 22 and 23 respectively.

According to section 24 of Part 1 of the ESF, the client is required to conduct monitoring on the implementation of environmental and social mitigation measures and provide periodic reports in terms of legal agreements or country systems.

Section 25 of Part 1 of the ESF states that the NDB plays a role in ensuring client compliance and conducts its own due diligence of monitoring through progress/monitoring report review as well as a gap analysis of the design and implementation to identify whether any additional studies or mitigation measures are required to meet the requirements of the Policy. It is important to note that the NDB does have allocated roles and responsibilities^x as set out in its ESF, however, its record of decision-making is not publicly available, making it difficult to assess the extent to which the NDB has applied the various factors and the mitigating factors attendant to projects with high environmental and social risk. It does not appear that the outcomes of any due diligence or the gap analysis carried out by the NDB is made publicly available.

As stated, in accordance with section 27 of Part 1 of the ESF, the client is also required to establish and implement a grievance redress mechanism although it is unclear how this is monitored for fairness or proper implementation.

Section 23 of the ESF states that the “NDB is committed to working with the client to ensure that social and environmental documents are made available in a timely manner, in an accessible place, and in a form and language(s) understandable to affected people and to other stakeholders, including the general public, so they can provide meaningful inputs into *project design and implementation*”. Our view is that all project assessment information can be requested directly from the NDB in terms of the IDP of the NDB however there is room for dispute in relation to this. It is recommended that this section be discussed with the ARC and that clarity is sought on the holders of information. This informal engagement with the ARC should be accompanied by a formal request for assessment documentation in terms of this section from the NDB. The process for a request in terms of the NDB’s IDP and in terms of PAIA is set out in Annexure A.

As indicated, it is unclear as to whether ongoing information about the project, including monitoring and evaluation assessments, due diligence, gap analysis and monitoring and oversight reports in respect of the client’s compliance with environmental and regulatory requirements, are subject to the same form of disclosure. Clause 2.1.2(b)

^x See NDB ESF at p 11, “The NDB is responsible for: (a) screening each project to assign a category to it; (b) undertaking due diligence review of the Client’s environmental and social assessment reports, to ensure compliance with country and corporate system and consistency with key requirements of NDB’s ESS; (c) determining the feasibility of NDB financing for the project; (d) monitoring and supervising the Client’s compliance with its environmental and social obligations under the legal agreement between NDB and the Client, throughout the project implementation period, (e) working with the client to strengthen the country systems; and (f) knowledge sharing with clients on international good practices. NDB may also provide assistance to clients during project processing, and provide support for enhancing monitoring and supervision, where necessary.

of the IDP does however state the “Bank shall aim at establishing a procedure for disclosing information, not only after the approval of a project but also during the project lifecycle via a special section on the official website of the NDB”. It is suggested that this grey area be tested by requesting information related to an ongoing project, particularly where there are concerns about due diligence in relation to the client or the project implementation. This can be requested via PAIA or the NDB’s IDP. These processes are set out in **Annexure A**.

It is clear that the grievance mechanisms are required to be established and implemented by the client^{xi} and that the processes for such grievance mechanisms must be requested directly from the client in terms of PAIA or in a formal letter. This process will also need to be tested by requesting information from the client (public body) in terms of PAIA.

Financial Analysis and Economic Evaluation of Projects

The NDB policy on the Financial and Economic Analysis of Projects (FEA)²⁴ states that in order for the NDB to comply with articles 21(vii)^{xii} and article 13(e)^{xiii} of its articles of agreement, it must assess the economic and financial viability of its projects and requires sound financial management practices to be followed by its clients.

According to section 18 of the FEA policy, the financial and economic analysis^{xiv} of a project is appended to the project document for the Board, and this can, where necessary and after redacting, be disclosed in accordance

with the NDB’s IDP. The financial and economic analysis of projects is really important in order to assess sustainability and these do not appear to be publicly available (i.e. one would have to request it through the NDB’s information disclosure procedure – and even then, some information may be redacted from the documents).

Country Partnership Plans and Project Pipelines

If one is seeking information about the strategic planning for South African projects, including project pipelines and the reasons for decision making or determination of a project pipeline, then South Africa’s country partnership plan, including studies and thematic analyses used in the preparation of such a plan would become vitally important. A country partnership plan is not to be confused with a host country agreement with South Africa which governs operational issues related to the Bank’s presence and co-operation with South Africa.²⁵ The process for the development of a country partnership plan is as follows:

- The NDB policy which guides the preparation of a Country Partnership Plan (CPP)²⁶ was approved in 2016 and section 3 thereof states that a CPP is prepared before the expiry of an ongoing CPP by the country team, comprising staff with relevant sector and thematic expertise under the guidance of the vice-president and chief operating officer of the NDB.

^{xi} Clause 27 of the ESF states that the client establishes and maintains a fair and effective grievance redress mechanism to receive and facilitate timely resolution of affected peoples’ concerns and grievances about the client’s environmental and social performance at project level. Existing national mechanisms for grievance redress may be used for purposes of this.

^{xii} Article 21(vii) of the NDB AoA requires the NDB to apply sound banking principles to all its operations and to take necessary measures to ensure its support is used with due attention to economy and efficiency.

^{xiii} Article 13(e) stipulates that the NDB base its decisions only on economic considerations.

^{xiv} According to section 17 of the FEA policy, a project’s financial analysis and financial evaluation, and economic analysis are carried out by the project team at appraisal and endorsed by the director general of the concerned operations division. Financial evaluation and economic analysis are carried out at project completion by the client as part of the project completion report.

- Part of the background work in preparation of a CPP is done by development partners, national and international level think-tanks and agencies, and the government. Additional studies may be commissioned by the NDB in close consultation with member country governments and other development agencies.
- Based on country analysis, a country partnership framework paper is prepared to present an understanding of the country's macroeconomic environment, public investment plans, and government's sector policy and investment priorities.
- The country partnership framework paper then forms the basis for consultations with the member country government and for agreement to be reached on, among other things,^{xv} a country project pipeline for the initial CPP period. Based on the consultations with the member government and financial intermediaries, the country pipeline identifies firm/standby projects and technical assistance (TA)^{xvi} for the first year and proposed projects and TA for the subsequent two years.
- Once agreed upon, a CPP is circulated to the NDB Board of Directors for approval and this CPP may be revised during annual programming cycles. In this regard, the NDB management issues, from time to time, detailed staff guidelines to help staff prepare country partnership plans and annual project pipelines.

CER has not been able to locate the CPP for South Africa; any studies or thematic analyses used to prepare such plans; additional studies conducted by development partners and think-tanks; any country partnership framework paper; or a country project pipeline or summary of projects subject to technical assistance.

It is also clear that the development of the CPP is not subject to any public participation process. Our view is that the abovementioned documents be requested both in terms of the IDP and PAIA, directly from the NDB, alternatively from the South African government such as from the National Treasury.

At a meeting between the SA/Africa CSO NDB Working Group and the NDB held on 5 August 2020, the ARC informed us that South Africa has drafted a framework of the CPP, however, the process has been halted as the ARC needs guidance from the new NDB President with regards to the President's new vision for the CPP for the next 5 years. Thereafter, consultations will take place and the ARC will reach out to civil society.

^{xv} According to section 6 of the CPP policy at p 4, these include:

(i) the CPP's strategic approach and its sector, thematic, and geographical focus;
 (ii) sector roadmaps detailing investment plans, institutional and policy framework in the sectors of interest, and the lending and or non-lending support needed;
 (iii) co-financing and coordination arrangements with other development partners;
 (iv) the country project pipeline for the initial CPP period; and
 (v) the outputs and outcomes of the CPP and its results framework.

^{xvi} The NDB Technical assistance policy elaborates on Article 3 of the AoA which "authorises the NDB to provide technical assistance for the preparation and implementation of development projects to be supported by the bank". The NDB's project processing division is responsible for designing, implementing and supervision project technical assistance, in close collaboration with the project executing agency and the member government. Importantly, for projects subject to TA, the NDB may help prepare feasibility studies, which may include preliminary designs; preliminary engineering; cost estimates; technical, financial, economic, and socioeconomic analysis; environmental analysis; social impact assessment; and, determine initial benchmark indicators; carry out detailed engineering, including detailed designs, specifications, detailed cost estimates, prequalification of bidders, and bidding documents, or do pre-implementation work for a project. This is important because if the NDB provides such technical assistance, related documents may be obtained from the NDB.

CONCLUSION AND RECOMMENDATIONS

This section includes concluding remarks and questions for discussion and engagement with the NDB

QUESTIONS

How are grievance mechanisms established and implemented by clients assessed both in terms of form and substance? How does the NDB ensure that the mechanisms are accessible and fair?

ANSWERS

In a recent meeting between the SA/Africa CSO NDB Working Group and the NDB ARC, reference was made to an individual performing a monitoring and evaluation role and that interested and affected parties should approach the individual for information such as the assessment of a client's implementation of a grievance policy.

Recommendation: Information related to the NDB's grievance mechanism should be available publicly on the NDB's website.

Does section 23 of Part 1 of the ESF mean that the NDB will ensure that the client makes all social and environmental documents available to affected people and other stakeholders or that the NDB will make such documents available?

It appears from the ARC's response that it is the client that is responsible to share such documentation and information however, it is advisable to seek a formal response from the NDB ARC in this regard.

Recommendation: All processes for accessing information and all project information should be on the website. The duality created by the NDB having its own IDP and then also saying that their clients have the responsibility to provide project information creates confusion and does not advance transparency and accountability. In particular, information on the NDB's country partnership plan and oversight of projects is rightly held by the NDB and should be made publicly available.

Why does the NDB not provide for civil society and broader public consultation in relation to the NDB's Country Partnership Plan with South Africa?

The NDB ARC has advised that such consultations are within the purview of National Treasury and that civil society approach National Treasury for access to such information.

Recommendation: The ARC advises that civil society seek information on the Country Partnership Plan from National Treasury and engage with relevant Treasury officials on co-ordination of and participation of civil society.

Why does the NDB not make provision for civil society and broader public consultation in relation to its policies and procedures, particularly its ESF and IDP?

The detailed procedures and guidelines with respect to the ESF, according to section 3, are to be developed over time, approved by management and submitted to the BoD for approval. These detailed procedures and guidelines are not on the website and do not appear to be subject to consultation with stakeholders. Why is this the case?

On formalising a mechanism for CSO engagement, the NDB have offered to have meetings with the CSO group on a bi-annual or quarterly basis (if needed).

Why does the NDB consider itself not subject to South African legislation, for example, the PAIA despite its commitment to the use of country systems?

The NDB ARC did not provide a great deal of clarity around this.

Recommendation: This should be the subject of continued and on-going engagement with the NDB ARC, as opposed to the subject of intermittent meetings.

It appears from the ARC's response that it is the client that is responsible to share such documentation and information however, it is advisable to seek a formal response from the NDB ARC in this regard.

Recommendation: All processes for accessing information and all project information should be on the website. The duality created by the NDB having its own IDP and then also saying that their clients have the responsibility to provide project information creates confusion and does not advance transparency and accountability. In particular, information on the NDBs CPC and oversight of projects is rightly held by the NDB and should be made publicly available.

Recommendation: CSO bi-annual or quarterly meetings can be used to engage with the NDB around:

- Specific projects funded by the NDB;
- Grievance mechanisms in relation to those projects; and
- Access to information procedure and concerns.

The first of these consultation meetings took place on 5 August 2020. Topics discussed by the working group included: updates on the NDB's developments since its 5th AGM in March; a discussion on the NDB's COVID-19 Emergency Loan to South Africa; developments on the NDB SA Country Partnership Plan developments; and project monitoring.

In terms of information disclosure, the ARC has indicated that the NDB is neither a public or private entity and as such PAIA did not apply to the organisation. When there are disputes, the NDB would follow UN conventions.

Recommendation: Seek a formal written response on its position regarding the applicability of PAIA to the NDB in the context of country systems.

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ANNEXURE A

REQUESTS IN TERMS OF THE NDB'S INFORMATION DISCLOSURE POLICY

It must be noted that Article 15 of the **Articles of Agreement** (attached) – the founding document of the New Development Bank (NDB) – stipulates that “the Bank shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents”. In this regard, the NDB has published an **Information Disclosure Policy (IDP)**ⁱ (attached) which sets out its own rules and procedures regarding access to information from the NDB. The NDB's Information Disclosure Policy stipulates the categories of records it holds, which ones are public (available on its website) and which ones are confidential, as well as the procedure to follow when making a request for information.ⁱⁱ

REQUESTS FOR INFORMATION IN TERMS OF NDB'S INFORMATION DISCLOSURE POLICY

As mentioned above, the NDB's Information Disclosure Policy stipulates a procedure for submitting requests for information to the NDB. This procedure, set out in Chapter III of the Policy, is as follows:

- The NDB will disclose information in accordance with the Key Principles of Information Disclosure, as set out in Chapter I (pages 3-4) of the Policy.
- Requests for information must be submitted through the NDB website (online form), e-mail, fax or regular mail. Contact information for requests will be available on the NDB website.
- The Bank shall acknowledge receipt of a request **within 5 working days** via the communication channel specified by the requester. If no specific communication channel is specified, the NDB shall use the same medium for providing a response.

- The Bank may request the requester to provide clarifications if it is required.
- The Bank will respond **within 30 working days** after receiving the request or clarification.

The Policy also provides for an appeal and review remedy for requesters who are denied access to information:

- Requesters who are able to make a case that the NDB has violated the Information Disclosure Policy by improperly restricting access to information shall be able to make an appeal for impartial review of the Bank's decision.
- Appeals should be submitted by letter or e-mail to the Corporate Secretary **within 30 working days after the date of the decision** not to disclose the information.
- The Corporate Secretary, in consultation with the Legal and relevant departments, will notify the appellant in writing of a decision on the appeal and provide reasons for this decision **within 20 working days** after receiving the appeal.
- In the case of a dismissal of an appeal, the Corporate Secretary will inform the Board of Directors and provide reasons for such a decision. At the same time, for matters not within the exclusive competence of the Board of Governors, the final decision regarding disclosure remains with the Board of Directors. For matters within the exclusive competence of the Board of Governors, the final decision regarding disclosure remains with the Board of Governors.
- In the case of exceptional circumstances and with the approval of the Board of Directors, the NDB reserves the right not to disclose information that would otherwise normally be disclosed under this Policy.

ⁱ 2017, Version 2.

ⁱⁱ Chapter II (page 5) and Chapter III (page 9).

REQUESTS IN TERMS OF PAIA

Section 32 of the Constitution of South Africa states that: *"Everyone has the right to access any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights".*

The **Promotion of Access to Information Act (PAIA)** gives effect to section 32 of the Constitution and is the primary legislation for information disclosure in South Africa. PAIA provides a procedure and set of rules for making requests for access to information. In terms of PAIA, anyone can make a request for information from a private body or a public body. Generally, private bodies are companies (e.g. insurance companies) or individuals (e.g. doctors), and public bodies are government bodies (e.g. City of Cape Town or the Department of Justice) or parastatals (e.g. Eskom).ⁱⁱⁱ

This section sets out the rules and procedure for accessing information in terms of PAIA in relation to both private bodies (e.g. the NDB) and public bodies (e.g. clients of the NDB – for example, Transnet).

WHAT KINDS OF INFORMATION CAN BE REQUESTED IN TERMS OF PAIA?

PAIA MANUALS

Both public and private bodies (depending on their size) are required to prepare a PAIA manual^{iv} and make it publicly available (usually on their website). These PAIA manuals should include: contact details; process guidelines; **categories and lists of records they hold; and lists of records that are available without making a PAIA request.** If you are unsure which specific records to request, it would make

sense to make a PAIA request just to find out what records exist so that you can make your real PAIA request.

RECORDS THAT MUST BE GIVEN AND CANNOT BE GIVEN TO YOU IN TERMS OF PAIA

The following diagram illustrates which kinds of information must be given to you and cannot be given to you in terms of PAIA. Although there are **grounds of refusal** preventing you from obtaining access to certain information, every decision on a PAIA request has to be made in consideration of PAIA's '**mandatory disclosure in the public interest clause**', also known as the 'public interest override'. What this means is that a private body must grant a request for access to a record if:

"a) the disclosure of the record would reveal evidence of –

*(i) A substantial contravention of, or failure to comply with, the law; or
(ii) Imminent and serious public safety or environmental risk; and*

b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question".^v

If you are not sure whether the information you are requesting can be disclosed, continue with the request because the Information Officer of the public or private body is obliged to provide you with a reason for refusing access to the information you are requesting.

According to the NDB's Information Disclosure Policy, the final decision on the disclosure of information shall be vested in the Board of Directors. The NDB shall provide a written explanation of its decision when the requested information cannot be immediately disclosed.^{vi}

ⁱⁱⁱ Sometimes companies do work for government and they hold information that the government would have if it had done the work itself. So, whether a body is considered public or private depends on the function of the work. If a private company is contracted by government to provide a public service, then anything to do with that service can (and must) be requested as if it were a public body.

^{iv} PAIA, section 51.

^v PAIA, section 70.

^{vi} Chapter III (page 9).

RECORDS THAT MUST BE GIVEN AND CANNOT BE GIVEN TO YOU

1 | CERTAIN RECORDS MUST BE GIVEN

You can ask for any record through PAIA, however, the following records must be given to you:

Mandatory disclosure in the public interest: if a record from a public or private body would reveal evidence of seriously breaking the law or a serious public safety or environmental risk and it is in the public's interest to disclose this information.

(see sections 46 and 70 of PAIA).

Public body records that would reveal defence, security or international relations information or any information used by public bodies in the process of making laws and policy if those records came into existence more than 20 years ago.

(see sections 41 and 44 of PAIA).

Certain information from public bodies that is already publicly available.

(see sections 34, 36, 37, 42 of PAIA).

2 | CERTAIN RECORDS CANNOT BE GIVEN TO YOU

While most information should be made available upon request, there are certain records that cannot be released for very serious reasons:

Certain information from a public or private body about someone else (called a third party) that would involve unreasonable disclosure of personal information such as medical records or their salary. This would violate their right to privacy.

(see sections 34 and 63 of PAIA).

Certain records of the South African Revenue Service (SARS) cannot be given.

(see section 35 of PAIA).

Trade secrets of a third party or the commercial, financial, scientific or technical information of a third party held by both public and private bodies.

(see sections 36 and 64 of PAIA).

Information about research carried out on behalf of a third party, public body or private party if the disclosure would cause serious disadvantage to the research and researcher.

(see sections 43 and 69 of PAIA).

The disclosure of confidential information if this would be in breach of a duty of confidence owed to a third party in terms of an agreement.

(see sections 37 and 65 of PAIA).

Police dockets in bail proceedings, and protection of law enforcement or legal proceedings must not be given by public bodies.

(see section 39 of PAIA).

Information held by public and private bodies that could endanger the safety or life of a person.

(see sections 38 and 66 of PAIA).

Certain privileged legal records also cannot be given by both public and private bodies unless the person to whom the records relate to gives their permission.

(see sections 40 and 67 of PAIA).

Adapted from the Diagram taken from "PAIA: A Practical Guide for Social Justice Activists and Organisations" (Ndifuna Ikwazi, 2014)

3 | THE DISCLOSURE OF CERTAIN RECORDS CAN BE DECIDED BY THE INFORMATION OFFICER/HEAD OF A PRIVATE BODY

The following records may be withheld under certain conditions, and whether or not these records can be disclosed must be decided by the Information Officer or head of a private body:

Defence, security, and international relations information of South Africa may be refused if disclosure could cause prejudice to South Africa's defence, security or international law relations or would reveal confidential information.

(see section 41 of PAIA).

Information given to a public body in confidence by a third party, if by releasing this information it could prejudice the supply of future information by that third party and it is in the public's interest to continue the supply of that information.

(see section 37 of PAIA).

If the information given to public or private bodies would impair or prejudice the safety of property or methods and plans to keep individuals, the public and property safe.

(see sections 38 and 66 of PAIA).

Methods of law enforcement where disclosure could prejudice the effectiveness of those methods or prejudice investigation or law enforcement activities.

(see section 39 of PAIA).

Information held by a public body that was provided by or to another country's government or international organisation, where that information should be kept private in terms of an international agreement, obligation or law.

(see section 41 of PAIA).

Records held by a public body that may jeopardise South Africa's economic or financial interests, or the ability of the government to manage the economy effectively and in the best interest of South Africa.

(see section 42 of PAIA).

Records containing trade secrets and other information of a private body, including information that could put that body at a disadvantage in contractual or other negotiations or prejudice the body in other commercial competition.

(see section 68 of PAIA).

Records about the operation of public bodies when they contain advice, an opinion, report, or recommendation or an account of a consultation, discussion, or deliberation for the purposes of making a decision or policy.

(see section 44 of PAIA).

Frivolous or vexatious requests may be refused. These are senseless requests or those made to simply harass a body. A request may also be refused by a public body if the work involved in processing that request would unreasonably use up the resources of that public body.

(see section 45 of PAIA).

STEPS FOR MAKING A PAIA REQUEST

STEP 1	PROCESS	▶ PUBLIC BODY	▶ PRIVATE BODY
	Complete the prescribed form	<p>Complete Form A.^{vii}</p> <p>NOTE: For public bodies, there is no requirement that a requester provide the public body with a reason for requesting access to the information.</p>	<p>Complete Form C.^{viii}</p> <p>NOTE: For requests to private bodies, there is an additional requirement of indicating in the Form the following:</p> <p>a) which right is to be protected or exercised and b) explaining why the record requested is required for the exercise or protection of that right.</p>
STEP 2	Send the completed form by fax, post or email to the designated Information Officer (find contact details in the body's PAIA Manual or on its website) and pay the request fee (if any). ^{ix}	<p>The Information Officer is usually the person who is in charge of a government department, municipality or another public body (e.g. the Director-General, Executive Director, or Municipal Manager). Sometimes the Information Officer delegates his/her duties to a Deputy Information Officer.</p> <p>REQUEST FEE: A public body request costs R35 (the bank details for payment of this fee should be included in the body's PAIA Manual).</p>	<p>The Information Officer is usually the head of the organisation, company (e.g. CEO), or other private body.</p> <p>REQUEST FEE: A private body request costs R50 (the bank details for payment of this fee should be included in the body's PAIA Manual).</p>

^{vii} Downloadable at: https://www.justice.gov.za/forms/paia/J750_paia_Form%20A.pdf

^{viii} Downloadable at: https://www.justice.gov.za/forms/paia/J752_paia_Form%20C.pdf

^{ix} You do NOT have to pay this fee if you earn less than R14,712 a year, or if you and your partner earn less than R27,192 a year combined.

STEP 3

PROCESS	PUBLIC BODY	PRIVATE BODY
<p>The body will have 30 days^x from the day that it receives a request to notify the requester of its decision. The notice will convey the Information Officer's decision to either grant or refuse access to the records. If the Information Officer does not respond at all, it is a deemed refusal^{xi} (this means you should treat this as a refusal to grant access to the information).</p> <p>NOTE: Within these 30 days, the Information Officer can ask you for another 30-day extension to respond to the request^{xii}. If you deny the extension, the body can file an internal appeal which will take another 30 days.</p> <p>RECORDS THAT CANNOT BE FOUND OR DO NOT EXIST: If a public or private body cannot find a record requested, and there are reasonable grounds for believing that the record is in that body's possession but cannot be found, or the record does not exist – then the Information Officer must, by way of an affidavit or affirmation, notify the requester that it is not possible to provide access to that record. The affidavit must give a full account of all steps taken by the body to find the record or to determine whether the record exists. This notice is to be regarded as a decision to refuse a request for access to the record.</p>	<p>Transfers of requests: If a PAIA request is made to a public body in respect of which the record is not in the possession or under the control of that body, but is in the possession of another public body; the record's subject matter is more closely connected with the functions of another public body; or the record contains commercial information contemplated in which any other public body has a greater commercial interest; then the Information Officer must transfer the request to the correct public body – as soon as reasonably possible, but no later than 14 days after receiving the PAIA request.^{xiv} Upon transfer of the request, the Information Officer must notify the requester of the transfer, the reasons for the transfer, and the period within which the request must be dealt with.^{xv}</p>	<p>Not applicable.</p>

^x These are calendar days, which means that when counting the days you must exclude the first day and include the last day – unless the last day falls on a Sunday or public holiday, in which case you must exclude that day and use the following day as the last day.

^{xi} PAIA, sections 27 (public body) and 58 (private body).

^{xii} PAIA, sections 26 (public body) and 57 (private body).

^{xiii} PAIA, sections 23 (public body) and 55 (private body).

^{xiv} PAIA, section 20.

^{xv} PAIA, section 20.

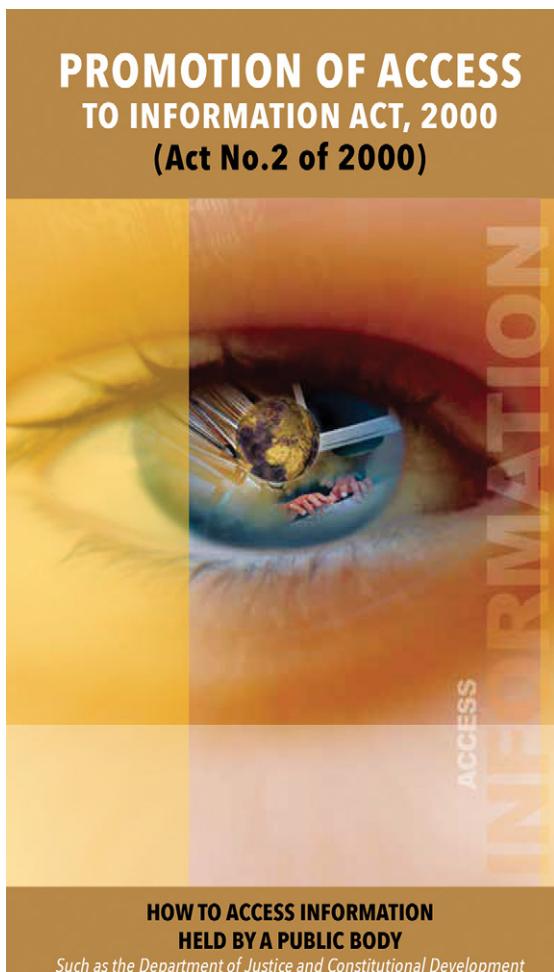
STEPS FOR MAKING A PAIA REQUEST CONT.

STEP 4

PROCESS

If access to the record has been granted, the body may ask you to pay an **access fee** for the costs of preparing the records for disclosure (e.g. costs of copying; transcription; postal fees; time searching for records). If there is an access fee, then you must be given access to the records as soon as this fee is paid.

The body might give you a particular record with information that has been **redacted** (some information blacked-out or covered up). The body must provide you with **adequate reasons** for these redactions in terms of PAIA. If you feel that the reasons for the redactions are not in line with PAIA, then you can make an **appeal to a public body** on that basis. That appeal must comply with the same rules and procedure as is set out in Step 5 below.



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<https://www.justice.gov.za/paia/paia.htm>

STEP 5

PROCESS	PUBLIC BODY	PRIVATE BODY
<p>If access to the record has been refused, then the Information Officer must, in its decision notice, state adequate reasons for the refusal (including any provisions of PAIA relied upon) and that the requester may lodge an internal appeal (public bodies) or an application with a court (private bodies), as the case may be, against the refusal of the request.^{xvi}</p>	<p>INTERNAL APPEAL: If access to the record of a public body has been refused and the requester is unhappy with the reasons given for the refusal and believes that the Information Officer has not interpreted the provisions of PAIA correctly, the requester can lodge an internal appeal in terms of Part 4 (sections 74 – 77) of PAIA. The appeal, including grounds of appeal, must be lodged in the prescribed form (Form B^{xvii}) and must be submitted to the Information Officer by person, post, fax or email within 60 days of receiving notice of the decision the requester is appealing. The Information Officer must, within 10 working days after receipt of the appeal, submit the internal appeal to the relevant authority. The relevant authority of the public body – the political head of the body (Minister of a national department; MEC of a provincial department; Mayor or Speaker of a municipality) – is responsible for determining an internal appeal. The relevant authority must determine an appeal within 30 days of the Information Officer receiving the appeal.</p> <p>JUDICIAL REVIEW: If a requester is not satisfied with a decision of the relevant authority on an internal appeal, the requester may apply to the court for a review of that decision. An application for judicial review must be lodged within 180 days of the decision. This appeal process only applies to public bodies.</p>	<p>JUDICIAL REVIEW: In terms of PAIA, there is no internal appeal remedy for refusal of access to records of a private body (i.e. you cannot make an appeal to a private body). An aggrieved requester would have to apply to court for review of the decision within 180 days of the decision.^{xviii}</p> <p>This will be a costly procedure and will require you to obtain legal advice from a lawyer. The burden of proof in PAIA applications rests with the private body who must establish that its refusal to grant access to information complies with the provisions of PAIA.</p>

^{xvi} PAIA, sections 25 (public body) and 56 (private body).

^{xvii} Downloadable at: https://www.justice.gov.za/forms/paia/J751_paia_Form%20B.pdf

^{xviii} PAIA, section 78.

PAIA APPLICATION PROCESS



Adapted from Diagram taken from "PAIA: A Practical Guide for Social Justice Activists and Organisations" (Ndifuna Ikwazi, 2014).

1. INFORMATION REGULATOR

The Information Regulator is an independent body established by statute in terms of the Protection of Personal Information Act 4 of 2013 (PPI) that is, among others, empowered to monitor and enforce compliance by public and private bodies with the provisions of PAIA. The Schedule to the PPI Act is intended to effect certain amendments to existing legislation including PAIA, and to ensure that all the responsibilities of the South African Human Rights Commission in terms of the PAIA are assigned to the Information Regulator. The amendments reflected in the Schedule further aim to establish the Information Regulator as the sole functionary, apart from the courts, that may consider complaints against decisions that have been taken by public or private bodies in respect of requests for access to records of the bodies concerned in terms of PAIA. However, to date, neither the substantive provisions of the PPI Act nor the amendments to PAIA have been brought into force, despite the PPI Act having been signed into law in 2013, and the members of the Information Regulator having been appointed in 2016.^{xix} This has resulted in the Information Regulator being rendered effectively toothless. In June 2020, the President issued a proclamation indicating that the sections of the PPI Act (sections 110 and 114(4)) which deal with the transfer of the enforcement of PAIA from the South African Human Rights Commission (SAHRC) to the Regulator will come into effect on 30 June 2021.^{xx} Civil society organisations and activists in South Africa have been calling for urgent operationalisation of the Information Regulator, which will empower the Information Regulator to investigate PAIA non-compliances, and apply penalties and fines for matters related to access to information under PAIA.

2. SOUTH AFRICAN HUMAN RIGHTS COMMISSION (SAHRC)

The SAHRC aims to play an oversight role in protecting and monitoring human rights in South Africa – including the right of access to information. As such, the SAHRC has a specific responsibility to monitor the implementation of PAIA, to assist requesters with making PAIA requests, processing questions, following up on complaints by requesters about refusals to access records, and to provide requesters with information and training in relation to PAIA. Until such time as the Information Regulator has been operationalised, these responsibilities in terms of PAIA remain with the SAHRC.

3. PUBLIC PROTECTOR

The Public Protector is an investigator of state affairs and can investigate allegations of prejudice or improper conduct. The Public Protector has the power to investigate any member of government and any other person performing a public function (including the President of South Africa). A requester who thinks that he/she has been treated unfairly or that a public body has abused its powers through the PAIA request process can approach the Public Protector, who will advise the requester as to whether the complaint can be dealt with by them, or refer the requester to the appropriate authority.

^{xix} <https://altadvisory.africa/2019/10/08/information-rights-in-the-digital-age-why-we-need-an-effective-information-regulator/>.

^{xx} <https://www.justice.gov.za/inforeg/docs/ms-20200622-POPIA-SectionsCommencement-IR.pdf>



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