

Letter from the European Ombudsman to the European Investment Bank on how the institution handled a request for public access to a document concerning environmental and social information on a transport project in Nairobi - 2252/2022/OAM

Correspondence - 22/02/2023

Case 2252/2022/OAM - Opened on 22/02/2023 - Decision on 20/11/2023 - Institution concerned European Investment Bank (Maladministration found) |

Subject of case: How the European Investment Bank handled a request for public access to a document concerning environmental and social information on a transport project in Nairobi

Dear Mr X,

The Ombudsman has received a complaint against the European Investment Bank (EIB). The complainant, CEE Bankwatch Network, contests the EIB's refusal to give public access to the Environmental and Social Data Sheet (ESDS) for the Nairobi Sustainable Transport Programme BRT3 project, [1] at the time of the confirmatory decision. In addition, the complainant takes issue more generally with the EIB's practice of publishing the ESDS for projects it funds only after the loan has been approved.

On the specific public access to documents request

The complainant initially contacted the Ombudsman in November 2022, expressing dissatisfaction with the EIB's delay in replying to its confirmatory application. As the extended deadline to reply to the complainant's confirmatory application had not yet expired, we did not proceed to an inquiry at that stage. [2]

The complainant contacted us again in December 2022, after it had received the EIB's confirmatory decision maintaining its refusal to grant public access to the requested document.

In its confirmatory decision, the EIB said that it does not hold a final version of the ESDS for this project. [3] The EIB refused access to a draft version of the ESDS, arguing that disclosure at that stage could undermine the ongoing decision-making process related to the approval of the project. [4] The EIB considered that partial access was not possible and that there was no overriding public interest in disclosure. The EIB noted that the ESDS would be published on its



website once the project loan is approved.

We take note that, on 27 January 2023, the EIB published the ESDS on its website, after the approval of the loan on 24 January 2023.

Following the publication of the ESDS, we asked the complainant if it wanted to pursue the matter and it confirmed that it did. The complainant argues that the EIB's decision to refuse access, at the time of the confirmatory decision, was not in line with the relevant transparency rules. [5] The complainant claims that the EIB did not provide compelling reasons to justify how disclosure of the draft ESDS, before the approval of the loan, would have undermined its decision-making process.

On the proactive publication of ESDS

We note that the complainant has raised this issue with the EIB in the past, in particular in the context of consultations on the Transparency Policy. In its view, the Transparency Policy adopted by the EIB in 2021 did not bring about any changes in relation to the proactive publication of the ESDS. Furthermore, the complainant referred to the launch, in January 2022, of EIB Global, which focuses on supporting climate action, economic growth and development beyond the EU. The complainant argues that, in this context, the *"transparency, timely publication of information and public participation in the EIB's environmental and social decision-making should also be enhanced"*.

We have decided to open an inquiry into both aspects of the complaint, that is, the EIB's refusal to grant access to the specific draft ESDS at the time of the confirmatory decision and the EIB's practice of proactively publishing the ESDS only after the approval of loans.

As a first step, we consider it necessary to review the draft version of the ESDS to which public access was refused, as it existed at the time of the confirmatory decision. We would be grateful if the EIB could send us this document, preferably in electronic format through encrypted e-mail, [6] by 8 March 2023.

The document will be treated confidentially, along with any other material the EIB chooses to share with us that it marks confidential. Documents of this kind will be handled and stored in line with this confidential status and will be deleted from the Ombudsman's files shortly after the inquiry has ended.

We also consider that it would be helpful to meet with the EIB on the second aspect of the complaint. Specifically, we would be grateful if the EIB could address the arguments put forward by the complainant in relation to the proactive disclosure of the ESDS and the following points:

- The timing for the proactive publication of the ESDS is not specifically provided for in the EIB Transparency Policy. [7] Could the EIB please clarify on which basis it has decided that the most appropriate timing for such proactive publication is after the approval of a loan?
- Given the public interest in having access earlier to this kind of information, which includes 'environmental information' within the meaning of the Aarhus Convention, [8] would the EIB



consider changing the timing for proactive publication of the ESDS? If not, why not?

- · Has the EIB assessed the practices of similar financial institutions in terms of proactive publication of environmental and social information for projects considered for funding? If yes, what conclusions did it reach?

Please note that this meeting should take place after we have received the document at issue and before the end of March, if possible.

The inquiries officers responsible for the case, Ms X and Ms Y can be contacted to arrange the meeting and for any further questions.

Yours sincerely,

Rosita Hickey

Director of Inquiries

Strasbourg, 22/02/2023

[1] <https://www.eib.org/en/projects/all/20150460> [Link].

[2] Case 2001/2022/OAM.

[3] The EIB refers to Article 5.1(a) of its Transparency Policy, available at: https://www.eib.org/attachments/strategies/eib_group_transparency_policy_2021_en.pdf [Link].

"5.1 Presumption of disclosure:

a. All information and documents held by the EIB are subject to disclosure upon request, unless there is a compelling reason for non-disclosure (see "Exceptions" below)."

[4] Article 5.7 first indent of the EIB Transparency Policy:

"5.7 Access to information/documents, drawn up by the EIB for internal use or received by the EIB, which relate to a matter where the decision has not been taken by the relevant body of the EIB, shall be refused if disclosure of the document/information would seriously undermine the EIB's decision-making process."

[5] The complainant refers to the EIB Transparency Policy, Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, Regulation 1367/2006 of the European Parliament and of the Council on the application of the provisions of



the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies and Article 15 TFEU.

[6] Encrypted emails can be sent to our dedicated mailbox eo-secem@ombudsman.europa.eu. Please contact eo-secem@ombudsman.europa.eu [Link] beforehand.

[7] It appears that the timing is specified in the EIB Guide to accessing environmental and social information/documents held by the EIB:

https://www.eib.org/attachments/access_to_information_en.pdf [Link].

[8] <https://unece.org/environment-policy/public-participation/aarhus-convention/text> [Link]