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# Comments on the UNEP Access-to-Information Policy

This document sets out Access Info Europe’s submission to the UNEP Access-to-Information Policy consultation.

Access Info Europe is a human rights organisation dedicated to promoting and protecting the right of access to information in Europe as a tool for defending civil liberties and human rights, for facilitating public participation in decision making, and for holding governments accountable.

Our expertise on international standards has fed into the development of our Global RTI Rating ([www.rti-rating.org](http://www.rti-rating.org)), which is regularly referenced by civil society, national governments and inter-governmental organisations.

Access Info Europe has based its submission on the existing international standards for the right of access to information, a right which has been confirmed as a fundamental human right by, inter alia, the European Court of Human Rights, the Inter-American Court of Human Rights, and the UN Human Rights Committee.

1. **Obligation to Ensure Right of Access to Information**

Of particular relevance for UNEP is [UN Human Rights Committee General Comment 34](http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf), which recognises the right of access to information as a fundamental right, linked to the right to freedom of expression, and which should apply to all UN bodies as is an interpretation of Article 19 of the ICCPR and hence of the Universal Declaration of Human Rights.

Paragraph 18 of General Comment 34 makes this clear: *“Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production.* *Public bodies are as indicated in paragraph 7 of this general comment. The designation of such bodies may also include other entities when such entities are carrying out public functions.”*

It is clear that, just as it is the role of all UN bodies to respect the right to freedom of expression and other civil and political rights, the UNEP should ensure exercise of the right of access to information with respect to its functions.

This is both an obligation to publish information proactively and to respond to requests for information, as set out in Paragraph 19 of General Comment 34: *“To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation. The procedures should provide for the timely processing of requests for information according to clear rules that are compatible with the Covenant. Fees for requests for information should not be such as to constitute an unreasonable impediment to access to information. Authorities should provide reasons for any refusal to provide access to information. Arrangements should be put in place for appeals from refusals to provide access to information as well as in cases of failure to respond to requests.”*

1. **Overbroad Exceptions**

Access Info Europe is concerned about **the exceptions contained at the UNEP Access to Information Policy as they are wide-ranging.**

Although it is appropriate to have exceptions and this is supported by international standards, some of the exceptions listed in the draft policy are not supported by international standards, based on comparative law, treaties such as the Council of Europe Convention on Access to Official Documents and the model access to information laws of the African Commission on Human and Peoples Rights and the Organisation of American States.

The following exceptions in particular are out of line with international standards:

*(a) Documents created by the United Nations, received from or sent to third parties, under an expectation of confidentiality;*

 *(g) Other kinds of information, which because of their content or the circumstances of their creation or communication must be deemed confidential.*

- Confidentiality or an expectation of confidentiality are not permissible as exceptions and undermine the very concept of the right of access to information which may only be limited in order to protect from harm a specific interest. Confidentiality is not per se an interest, particularly not in a 21st Century vision of open accountable governance. These exceptions should be removed.

*(d) Documents covered by legal privilege …;*

- When it comes to legal privilege this is not a permitted exception and may certainly not be an absolute exception. Inter alia the European Court of Justice has found that there cannot be an absolute exception for legal advice provided to EU bodies.

*(d) Documents … related to internal investigations;*

- Internal investigations should not be a blanket exception. It is legitimate to protect both criminal and disciplinary investigations, but there must always be a harm to the protected interested as well as a requirement to apply a public interest test in the context of any particular request for information. Hence this exception should be amended.

*(e) Internal inter-office or intra-office documents and other communications, including draft documents, if disclosure would undermine the Organization’s free and independent decision making process;*

- No types or classes of information should be automatically excluded from the scope of the right to request information from the UNDP; only if the release of a document would cause actual harm to a specific decision-making process may it be withheld, again only after application of a public interest test. The very concept of “internal” is alien to the principles of the right of access to information, which should apply to all information held by public bodies. Many national FOI regimes apply equally to communications and often to draft documents.

**3. Harm and Public Interest Tests & Independent Oversight**

The current UNEP Access-to-Information Draft Policy states in Article 22. *“In extraordinary circumstances, the Executive Director or such officials as the Executive Director so authorizes may disclose certain information covered in the list of exceptions set out in the paragraphs above, if the overall benefits of such disclosure outweigh the potential harm to the interests protected by the exceptions, or to restrict access to information that it normally discloses if such disclosure is likely to cause harm that outweighs the benefits of disclosure. The disclosure of information received from a Government or a third party in confidence requires the written consent of the Government or the third party concerned*

Such an approach is out of step with the mechanisms for the functioning of the harm and public interest tests in international standards. For example, the Council of Europe Convention on Access to Official Documents states that “*Limitations shall be set down precisely in law, be necessary in a democratic society and be proportionate”* andthat there are no absolute exceptions – rather, exceptions are only applicable when the protected interest may be harmed by its publication, unless there is an overriding public interest in disclosure.

Absolute or blanket exceptions to access to information are never acceptable in any access to information legal framework. The European Court of Justice has stated, in a [case that referred specifically to the decision-making exception](http://curia.europa.eu/juris/liste.jsf?language=en&num=C-280/11), that “*it should be noted that, according to settled case-law, although, in order to justify refusing access to a document, it is not sufficient, in principle, for the document to fall within an activity or an interest referred to in Article 4 of Regulation No 1049/2001, as the institution concerned must also explain how access to that document could specifically and actually undermine the interest protected by an exception*.”

Consistent with international standards, exceptions may be applicable only where there is a demonstrable harm in releasing the information in that particular case and it is not outweighed by the public interest test not *“In extraordinary circumstances”.* Hence, Access Info Europe takes that stance that any information should fall under the scope of the access to information standards, and information may only be refused to a requester where there is a demonstrable harm in releasing the information in that particular case, and there is no overriding public interest in the public obtaining the information.

Likewise, regarding Article 22 of the UNEP Access-to-Information Draft Policy. **UNEP should have an independent board of experts acting as a review body for any decisions to refuse to release information.** It should not be the Executive Director who decides upon this.

Access Info Europe notes that many more recent access to information laws have an independent oversight body such as an Information Commissioner or Information Commission whose decisions are mandatory. Examples include countries such as Croatia, Slovenia, and Serbia, Brazil, India, Indonesia, and Mexico, and a number of others.

In most countries with access to information laws, requesters have the right to appeal to the independent body when information is denied to ensure the right to access to information is respected, complying with of Article 19 of the ICCPR and hence of the Universal Declaration of Human Rights.

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*Submission made by Access Info Europe, 30 November 2015.*

For more information, please contact:

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