



MEMORANDUM

on

Pacific Islands Forum Secretariat Information Disclosure Policy

by

**ARTICLE 19
Global Campaign for Free Expression**

**London
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1. Introduction

This Memorandum contains an analysis by ARTICLE 19 of the draft Information Disclosure Policy (Disclosure Policy) of the Pacific Islands Forum Secretariat (PIFS). The Pacific Islands Forum Secretariat is the paramount regional inter-governmental organisation in the South Pacific and it is dedicated to enhancing regional co-operation - focussing on maintaining security, improving living standards and ensuring sustainable development throughout the region.¹ The type of information which PIFS is likely to hold includes feasibility studies of proposed development plans and security initiatives, including any community consultations and environmental impact assessment; and deliberations on funding proposals to specific Member states and strategic action plans.

ARTICLE 19 welcomes the move to adopt an information disclosure policy on the right to freedom of information which expressly undertakes to facilitate greater public participation in regional policy making and debate. Access to information is a fundamental human right, crucial to the functioning of public participation in decision-making of government and regional bodies and also critical to the realisation of other

¹ The PIFS website gives details of its activities: <http://www.forumsec.org.fj/>.

key human rights. The right of access to information has been codified in international human rights law and its centrality has been recognised by the three regional systems for the protection of human rights. Declarations on freedom of information exist worldwide.

The Disclosure Policy contains a number of positive elements, including the commitment to posting as much relevant information as possible on the PIFS website, and the provision of a procedure for the consideration of requests in addition to the proactive disclosure scheme. However, it can be improved in a number of ways. Primarily, we would urge PIFS to consider publication on its website of all material that is not classified. This would not only greatly enhance transparency of its operations; it would also save time and effort in the processing of access requests. In addition, we urge that the current classification procedure be tightened and brought in line with the international law test for withholding information, and that the requests procedure is clarified. Although the current draft does envisage disclosure of information upon request, it lacks clear provisions governing the consideration of such requests. Also, it is not sufficiently clear whether the exemptions regime outlined in Paragraphs 16 to 22 apply to documents disclosed by request. This needs to be made much clearer. We have presumed for the purposes of this Memorandum that it does. In addition, we recommend the creation of an appeals mechanism, an internal disclosure review committee and a standardised process for the assessment of information when documents are created.

This Memorandum sets out our concerns and recommendations in regard to these and other related issues. Our analysis of the Disclosure Policy is based on international law and best practice in the field of access of information, as crystallised in two key ARTICLE 19 documents: *The Public's Right to Know: Principles on Freedom of Expression Legislation*² and *A Model Freedom of Information Law*.³ Both publications represent broad international consensus on best practice in these fields and have been used to analyse domestic legislation around the world. Best practice as adopted by other inter-governmental organisations (IGOs) is also outlined where relevant. Section Two of this Memorandum provides an overview of international law on access to information, while Section Three contains the substantive analysis of the draft Disclosure Policy.

2. International and Constitutional Obligations

2.1. The Guarantee of Freedom of Expression

Article 19 of the *Universal Declaration on Human Rights* (UDHR),⁴ guarantees the right to freedom of expression in the following terms:

² ARTICLE 19, *The Public's Right to Know: Principles on Freedom of Information Legislation*, London June 1999 (ARTICLE 19 Principles). This has been endorsed by, among others, the OAS Special Rapporteur on Freedom of Expression. See Annual Report of the Inter-American Commission on Human Rights, 1999, Volume III, Report of the Office of the Special Rapporteur for Freedom of Expression, OEA/Ser.L/V/II.106, Doc. 3 rev., April 13, 2000, Chapter II, Part III, Freedom of Information.

³ ARTICLE 19, *A Model Freedom of Information Law*, London, July 2001 (ARTICLE 19 Model FOI Law).

⁴ UN General Assembly Resolution 217A (III), adopted 10 December 1948.

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The UDHR is not directly binding on States but parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.⁵

The *International Covenant on Civil and Political Rights* (ICCPR),⁶ a legally binding treaty which PIFS members Australia, New Zealand and Nauru have ratified, guarantees the right to freedom of opinion and expression in very similar terms to the UDHR, also in Article 19.

2.2. Freedom of Information

Access to information is an essential component of the guarantee of freedom of expression. This status has repeatedly been recognised by United Nations bodies and in each of the three regional systems for the protection of human rights.⁷ International human rights law has, over the years, developed detailed guidance on the content of the right to information. For example, in his 1998 Annual Report, the UN Special Rapporteur on Freedom of Opinion and Expression declared that freedom of expression includes the right to access information held by public bodies:

[T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems...⁸

The Commonwealth, in which most of members of PIFS are included, has recognised the fundamental importance freedom of information on a number of occasions. As far back as 1980, the Commonwealth Law Ministers declared in the Barbados Communiqué that “public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access to official information”.⁹

More recently, the Commonwealth has taken a number of significant steps to elaborate on the content of that right. In March 1999, the Commonwealth Secretariat brought together a Commonwealth Expert Group to discuss the issue of freedom of information.

⁵ See, for example, *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase)*, ICJ Rep. 1970 3 (International Court of Justice); *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice); *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit). Generally, see M.S.McDougal, H.D.Lasswell, L.C.Chen, *Human Rights and World Public Order*, Yale University Press (1980), pp. 273-74, 325-27.

⁶ UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.

⁷ See for example, the Resolution of the United Nations Commission on Human Rights, Resolution 1997/27, 11 April 1997, para. 12(d); and the approval of the *Inter-American Declaration of Principles on Freedom of Expression*, 108th Regular Session, 19 October 2000.

⁸ *Annual Report of the Inter-American Commission on Human Rights 1999, Volume III, Report of the Office of the Special Rapporteur for Freedom of Expression*, 13 April 2000, OEA/Ser.L/V/II.106, Doc. 3 rev., Chapter II.3.

⁹ See:

http://www.humanrightsinitiative.org/programs/ai/rti/international/cw_standards/communiqué/default.htm

The Expert Group adopted a document setting out a number of principles and guidelines on the right to know and freedom of information as a human right, including the following:

Freedom of information should be guaranteed as a legal and enforceable right permitting every individual to obtain records and information held by the executive, the legislative and the judicial arms of the state, as well as any government owned corporation and any other body carrying out public functions.¹⁰

These principles and guidelines were adopted by the Commonwealth Law Ministers at their May 1999 Meeting in Port of Spain, Trinidad and Tobago. The Ministers formulated the following principles on freedom of information:

1. Member countries should be encouraged to regard freedom of information as a legal and enforceable right.
2. There should be a presumption in favour of disclosure and Governments should promote a culture of openness.
3. The right of access to information may be subject to limited exemptions but these should be narrowly drawn.
4. Governments should maintain and preserve records.
5. In principle, decisions to refuse access to records and information should be subject to independent review.¹¹

2.3. Restrictions on Freedom of Information

One of the most important issues to be addressed in information disclosure policies is when a public body may legitimately refuse to disclose information. Under international law freedom of information, like freedom of expression, may be subject to restrictions but only where these restrictions meet a strict test of legitimacy. The third paragraph of Article 19 of the ICCPR states:

The exercise of the rights [to freedom of expression and information] may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

In concrete terms, this translates into a three-part test whereby a public body must disclose any information which it holds and is asked for, unless:

1. The information concerns a legitimate protected interest listed in the law;
2. Disclosure threatens substantial harm to that interest; and
3. The harm to the protected interest is greater than the public interest in having the information.¹²

¹⁰ Quoted in *Promoting Open Government: Commonwealth Principles and Guidelines on the Right to Know*, background paper for the Commonwealth Expert Group Meeting on the Right to Know and the Promotion of Democracy and Development (London: 30-31 March 1999).

¹¹ *Communiqué*, Meeting of Commonwealth Law Ministers (Port of Spain: 10 May 1999).

¹² See ARTICLE 19 Principles, Principle 4.

International standards recognise that legitimate aims span matters such as law enforcement, the protection of personal information, national security, commercial and other confidentiality, public or individual safety, and protecting the effectiveness and integrity of government decision-making processes.¹³ Exceptions should be narrowly drawn to avoid capturing information the disclosure of which would not harm the legitimate interest. To meet this standard, exceptions should, where relevant, be time-limited.

The second part of the test confirms that simply because the information falls within the scope of a listed legitimate interest does not mean non-disclosure is justified. This would create a class exception that would seriously undermine the free flow of information to the public and would be unjustified.

The third part of the test requires the public body to consider whether, even if disclosure of information causes serious harm to a protected interest, there is nevertheless a wider public interest in disclosure. For instance, in relation to national security, disclosure of information exposing instances of bribery may concurrently undermine defence interests and expose corrupt buying practices. The latter, however, may lead to eradicating corruption and therefore strengthen national security in the long-term. In such cases, information should be disclosed notwithstanding that it may cause harm in the short term.

Cumulatively, the three-part test is designed to guarantee that information is only withheld when it is in the overall public interest. If applied properly, this test would rule out all blanket exclusions and class exceptions as well as any provisions whose real aim is to protect the government from harassment, to prevent the exposure of wrongdoing, to avoid the concealment information from the public or to preclude entrenching a particular ideology.

2.4.Obligations apply to IGOs

Historically, obligations at international law were framed to apply to States only. However, increasingly IGOs have been recognised to have international legal personality and to be bound by customary international law as well as by specific treaty obligations. No international body can operate in a legal vacuum. Furthermore, there is significant developing practice among IGOs in the field of access to information. It is accepted as good governance to ensure that the body's decision-making processes are transparent and its records are accessible to all interested parties. The overwhelming practical rationale for access to information held by national public bodies applies equally to intergovernmental organisations. A growing number of IGOs, such as the European Union, the UNDP, the World Bank and the Asian Development Bank (ADB) have produced and implemented information disclosure policies facilitating broad access to their records.

¹³ *Ibid.*

In the absence of a publicly available treaty on the establishment of the body, it is unclear whether the Pacific Islands Forum actually has international legal personality. However, even if it has no international legal personality of its own, it is bound by the international legal obligations of its member States. In other words, if PIFS is an informal heads of state grouping without international legal personality, the Member states' common legal obligations – which would embrace customary international law, common treaty obligations and the advisory Commonwealth Principles on freedom of information as outlined above at Section 2.2 – apply to bodies they create collectively, such as PIFS, just as they apply to bodies they create on their own, such as national public bodies.

If PIFS does have international legal personality, it is bound by rules of customary law, including the right to freedom of expression, as well as by specific treaty obligations.¹⁴ It is established that IGOs are responsible to States for breaches of obligations arising out of either their direct treaty obligations or a principle of customary international law.¹⁵ There is no principled ground for differentiating between legal obligations owed to States and those owed to individuals.

3. Analysis of the Disclosure Policy

3.1. Overview

The Disclosure Policy consists of a Background section identifying the principles to which the policy seeks to give effect; the Secretariat's Commitment to Proactive Disclosure, which focuses on providing access to the maximum amount of relevant material through the PIFS website; the Exemptions to Disclosure policy of the Secretariat; the Declassification System for documents to be disclosed and the ongoing Oversight and Review of the Disclosure Policy. Paragraphs 15-21, headed 'Exemptions', deal with exemptions for the proactive disclosure regime and the request-based disclosure regime.

While the Disclosure Policy provides a strong basis for a solid proactive publication scheme, we would like to see it extended to all non-classified material. In other words, any information that is not classified should be automatically available through the Secretariat website, regardless of whether Secretariat staff judge it to be of public interest.

However, we do have a number of concerns with the currently envisaged classification scheme. Our primary concern is that it fails to take into account the three-part test at international law for the withholding of information. We also have a number of concerns relating to the envisaged procedures for access requests. The Policy fails to provide a clear exceptions regime for information requests; and it also omits to provide for an appeals mechanism which would allow requesters to challenge access refusals. Finally,

¹⁴ As argued in Section 2.1, above, the right to freedom of expression as set out in the UDHR, which embraces the right to access information held by public bodies, is part of customary international law.

¹⁵ See *WHO Regional Office Case*, ICJ Reports, 1980, P. 73. See also Shaw, M., *International Law*, 4th Ed. (Cambridge: Cambridge University Press, 1997), pp. 919-920.

we recommend that more standardised procedures be formulated for the review of all information and that a centralised information management body be established within PIFS.

We elaborate on these recommendations in the following paragraphs.

3.2. Proactive disclosure

3.2.1. Proactive disclosure - Identification of documents for posting on website

The Disclosure Policy states that the key platform of the policy is **pro-active disclosure**, with the website as the main source of public access to Secretariat information.¹⁶ Paragraph 9 of the Policy identifies a broad range of material that should always be disclosed proactively, and Paragraph 10 states that in addition to this staff should “...get into the habit of considering all documents which are not exempted and may be of public interest, for publication on the website”.

While we welcome this commitment to openness, we would urge that proactive publication is extended to cover any document that is not classified as Confidential, regardless of whether the Secretariat or a member of its staff thinks that it may be of public interest. Given that most new information is likely to be created in electronic format, this should be very easy to implement – and it would save time and effort by reducing the number of information requests PIFS is likely to receive. An example of a scheme that approaches this level of openness is currently being implemented at the Secretariat of the Council of the European Union.¹⁷

Short of this, the procedure as envisaged in the current draft can be improved by establishing more effective and accountable mechanisms in place for the identification of appropriate material to be posted. As the Disclosure Policy presently stands, too much discretion is left to individual members of staff to assess the relevance of potentially disclosable information.

One option could be to require a document coversheet to be created, with an initial consideration of the document’s relevance. The coversheet should include a checkbox format, requiring a yes/no consideration of the document’s public interest relevance and any possible sensitivity of the information. Once the coversheet has been completed, the document should be forwarded to the line manager within the Division for consideration of the publication of the information. Strict time-limits should be set to ensure that information published is up-to-date and relevant.

Recommendations:

- The proactive publication policy should be extended to apply to any material that is not classified.
- Alternatively, a formalised mechanism needs to be introduced to assess the

¹⁶ Disclosure Policy, paragraph 8.

¹⁷ See <http://ue.eu.int/showPage.asp?id=549&lang=en&mode=g>.

relevance of potentially disclosable information, along the lines suggested above.

3.2.2. Classification regime

As the Policy stands, documents classified as Confidential cannot be disclosed proactively, and unless they are more than three years old, it is unclear whether they are disclosable following a request. The classification regime may be summarised as follows.

Paragraph 18 of the Disclosure Policy stipulates that when a document is created or marked to file, the author or staff member responsible for the document should assess whether it needs to be exempted and, if so, mark it ‘confidential’. For documents marked ‘confidential’, the Forum Secretariat will then assess whether the document should be classified as Confidential, Restricted or Unrestricted.¹⁸ This section addresses information classified as Confidential and associated provisions.¹⁹

If the information is classified as Confidential according to Paragraph 19, it is restricted to members and the Secretariat, or to others with the permission of the Secretary General. It is important to note the distinction between a document being marked ‘confidential’ by the document’s author and the classification as Confidential – these are distinct concepts.

The considerations for exemptions are stated in paragraphs 16 and 17. Paragraph 16 provides that “[a] document will be exempted from disclosure when immediately disclosing it is judged likely to cause harm to the interests of the Forum Secretariat or to one or more of its member countries.” A non-exhaustive list of interests is provided, which includes such matters as ‘policy advice on a sensitive or potentially contentious issue’; or where ‘reference is made to specified Forum members’. Pursuant to Paragraph 17, “[r]ecruitment and personnel files, and other information of a personal or private nature relating to one or more individuals (including but not limited to Secretariat staff) will be exempt from disclosure in perpetuity.”

In addition, Paragraph 14 of the Disclosure Policy permits the participants of PIFS workshops and Forum meetings to agree on the exemption or release of the documents produced. The Disclosure Policy notes that the presumption of disclosure should still be observed and the considerations for exemption outlined in Paragraph 16 still apply.

Analysis

Our concern with this classification system is primarily with its failure to incorporate the three-part test required under international law. While we appreciate that this test normally applies to the consideration of requests, we note that the primary focus of the PIFS regime is on proactive disclosure. The current draft of the Policy proposes a

¹⁸ Disclosure Policy, paragraph 19.

¹⁹ The procedure for the declassification of information to Restricted and Unrestricted is outlined below at 3.2.3.

detailed regime for classification of all documents, and that classified documents will not be proactively disclosed or disclosed upon request.

In light of these considerations, we believe that the entire disclosure regime should be based on the test at international law for restrictions on freedom of information. We restate that test here:

A public body must disclose any information which it holds and is asked for, unless:

1. The information concerns a legitimate protected interest listed in the law;
2. Disclosure threatens substantial harm to that interest; and
3. The harm to the protected interest is greater than the public interest in having the information.²⁰

The first part of this test requires there to be a clear and exhaustive list of legitimate interests, for the protection of which information may be withheld. As presently drafted, the list of protected interests is neither exhaustive nor do they all correspond to a legitimate interest under international law.

As discussed above at Section 2.3, a legitimate aim encompasses matters such as law enforcement, the protection of personal information, national security, commercial and other confidentiality, public or individual safety, and protecting the effectiveness and integrity of government decision-making processes.²¹ While some of the protected interests in Paragraph 16 correspond to these aims, others do not. For example, the first interest listed in Paragraph 16 allows documents to be withheld if they relate to a politically sensitive matter. This is not a legitimate protected interest under international law – we note that many politically sensitive documents are in fact of significant and legitimate public interest. Insofar as the aim of this clause is to protect the integrity of the decision making process, we recommend the following alternative:

Policy advice where disclosure would cause serious prejudice to the effective formulation or development of member State policy, or would seriously frustrate the success of such a policy.

In relation to the second factor – “where reference is made to specified Forum members” – ARTICLE 19 submits that this broad drafting would cover a large amount of the information generated by the Secretariat. It would potentially be a cover-all provision to exempt any information from disclosure without proper justification. We recommend that this clause is removed or modified to demonstrate that disclosure would cause significant harm to the legitimate interests of a member State.

In relation to the sixth factor – “where information is ‘commercial in confidence’ or legal in nature, and disclosure would unfairly damage the commercial or legal interests of a person or entity, or may have a bearing on legal proceedings” – ARTICLE 19

²⁰ See ARTICLE 19 Principles, Principle 4.

²¹ *Ibid*, Principle 4.

recommend the provision is redrafted as follows to ensure that the scope of the provision does not exceed a legitimate aim:

Where information was obtained in confidence from a third party and to communicate it would seriously prejudice the commercial or financial interests of that party; or where information is privileged from production in legal proceedings, unless the person entitled to the privilege has waived it.

We are also concerned about the privacy exemption stated in paragraph 17, which could be used to hide corruption or other instances of malfeasance. We recommend that this exemption applies only so long as disclosure would cause actual harm to the privacy of the person concerned, and that it be qualified to ensure that it cannot be relied on to refuse the release of information that would disclose wrong-doing.

ARTICLE 19 also submits that the second element of the international law test is not properly reflected in the Disclosure Policy. As presently drafted, Paragraph 16 states that “a document will be exempted from disclosure when immediately disclosing it is judged likely to cause harm to the interests of the Forum Secretariat or to one or more of its member countries”. The second element of the international law test has a higher threshold than this – the disclosure of the information must **threaten substantial harm** to a protected interest. Accordingly, ARTICLE 19 recommends that the cited part of Paragraph 16 is redrafted accordingly:

Information will be exempted from disclosure if immediately disclosing it is judged to pose a significant threat to one of the protected interests, as defined by the factors listed in Paragraph 16.

Also, the third part of the international law test, requiring the public interest in disclosure to be taken into account, is also insufficiently reflected in the Disclosure Policy. Only information older than three years is presumptively disclosed unless there is a “compelling reason for continued exemption”. ARTICLE 19 recommends that this policy should be introduced across the board, regardless of the age or classification of the material requested. The following drafting, in accordance with the ARTICLE 19 Model FOI Law, may be considered:

Notwithstanding any Paragraph of the Disclosure Policy, PIFS may not refuse to disclose information unless the harm to the protected interest outweighs the public interest in disclosure.

There should be no exceptions to this three-part test. Neither Member States nor workshop participants should be able to block disclosure, unless their objections are justified according to the three-part test.

We are also concerned that there is not sufficient identification of who within the Forum Secretariat will make the final determination on classification. The PIFS website notes that the Forum Secretariat consists of four Divisions and has more than 70 staff. While such an arrangement is likely to exist in practice, ARTICLE 19 recommend establishing a formal accountability mechanism to determine the disclosure status of documents. For

example, the Head of each Division could be given the responsibility to determine the disclosure status of each document marked 'confidential' by the document author.

Finally, the automatic classification of documents as Confidential is a serious incursion on the presumption of disclosure. While the limited resources of the Secretariat are recognised, ARTICLE 19 submits that an automatic Confidential classification where a document is not available for disclosure for three years effectively postpones the proper functioning of the information disclosure regime for at least the next three years. ARTICLE 19 recommends that any document should be automatically classified as 'Under Review' for a one year period rather than as Confidential, which would give sufficient time for the proper assessment of the document's sensitivity, is more appropriate. If, during that period, a request is received for access, this should be considered in line with the normal procedure for access requests, which should incorporate the three-part test outlined in the paragraphs above.

Recommendations:

- Paragraphs 16 and 17 should be amended along the lines suggested above to properly reflect the three-part test at international law for restrictions on freedom of information.
- A formal accountability mechanism should be established to determine the disclosure status of documents.
- Neither Member States nor participants in PIFS workshops and Forum meeting should be able to block the disclosure of information. A preference can be indicated but the determination should be made through the formal mechanism recommended above and in line with the three-part test.
- Documents dated before 2006 should default to an 'Under Review' classification for one year. During that period, access requests must be considered in line with the three-part test.

3.2.3. Declassification

The declassification regime may be summarised as follows.

Paragraph 19 provides that all Confidential documents are automatically declassified to Restricted after three years unless a member country or the Secretariat objects, in which case the document remains classified as Confidential for a further three years.²² Documents classified as Restricted are available to parties such as universities and government institutions for the purposes of study or research and are not for publication. Restricted documents are automatically declassified to Unrestricted after three years. Unrestricted documents are immediately available to the public.

All documents on registry files dated to 31 December 2005 (unless already made public) will be regarded as Confidential until subject to the declassification system.²³ All documents created from 1 January 2006 marked 'confidential' will be subject to the

²² Our comments in relation to the lodging of an objection are outlined below at Section 3.2.4.

²³ *Ibid*, paragraph 20.

same declassification system.²⁴ All documents on registry file after this date and not marked 'confidential' shall be immediately disclosed upon request.²⁵

A list of all formal PIFS papers three or more years old and proposed by the Secretariat for declassification to Restricted will be provided to members on an annual basis. Unless an objection is received within three months, the document will be declassified. If an objection is received, the document shall remain Confidential for a further three years after which declassification will be proposed again.²⁶ All other documents on registry files which are three or more years old and classified as Confidential will be assessed by PIFS staff for declassification when a disclosure request is made.²⁷ In the absence of a compelling reason, the document will be declassified and disclosed on a Restricted basis.²⁸

Paragraphs 19 and 21 provide that a classified document will not be declassified from Confidential to Restricted if a member country or the Secretariat objects. If an objection is made, then the document will not be reconsidered for declassification for a further three years.

Analysis

We stress, first, that the initial classification decision must be made in line with the three-part test at international law. In our opinion, this should lead to one of two results: the material is either classified, or it is not. We fail to see the merit of the intermediate category of Restricted, as envisaged for material that will be available only to universities and government institutions. We note that of IGOs with disclosure policies, such as UNDP, the ADB and the European Union, none impose a preferential status for these bodies. To the contrary, some of these bodies' policies note the importance of wide dissemination – the UNDP information disclosure policy expressly notes that the wide dissemination of information is key to the proper functioning of development programs,²⁹ which is in line with the PIFS mission statement of the social and economic development of the region. While PIFS is not a stated development agency, as a regional Heads of State organisation, it will be addressing issues of key public interest with a wide range of stakeholders.

Second, we are concerned at the apparent vetoes held by the Secretariat and Member States over declassification.³⁰ This approach violates the test at international law for restrictions on freedom of information (see Section 2.3 above) in a significant manner. An objection from a member or Secretariat will only be justified if it is necessary to prevent substantial harm to a legitimate aim. Accordingly, the recording of an objection

²⁴ *Ibid*, paragraph 20.

²⁵ *Ibid*, paragraph 20.

²⁶ *Ibid*, paragraph 21.

²⁷ *Ibid*, paragraph 22.

²⁸ *Ibid*, paragraph 22.

²⁹ UNDP Public Information and Documentation Disclosure Policy, available at www.undp.org/idp/, paragraph 3.

³⁰ Disclosure Policy, Paragraphs 19 and 21.

should not automatically lead to restricting the availability of the information – it should be assessed by the relevant internal authority on the basis of the three-part test.

Also, ARTICLE 19 considers that the proposed system of not reconsidering the declassification of information after the lodging of an objection for a further three years is not sustainable. ARTICLE 19 propose that a document should be eligible for reconsideration after a shorter automatic period or there should be a consideration of what is an appropriate period of continued exemption given the sensitivity of the document and weighed against the public interest of disclosing the document. This should be determined by the internal disclosure review committee. In any event, access requests received during the period of classification should be considered on their merits.

Finally, in line with our recommendation in Section 3.2.1, we recommend that declassification should lead to automatic publication of the material on the website.

Recommendations:

- The classification of Restricted should be removed.
- Paragraphs 19 and 21 should be amended to provide that an objection can only be recorded if it satisfies one of the grounds listed in Paragraph 16.
- The automatic three-year cycle before reconsidering information for declassification in Paragraph 21 should be removed and replaced with a shorter automatic period. Alternatively, the appropriate period of continued exemption should be determined on the sensitivity of the document and weighed against the public interest of disclosing the document, determined by the internal disclosure review committee.
- Declassification should lead to automatic website publication.

3.3. Request-based disclosure of information

We note that this is the second method of disclosure under the Disclosure Policy.

Crucially, it is not clear whether the exemptions provisions outlined in Paragraphs 16 and 17 apply to all requests. The Policy can be read either as stating that the considerations in these paragraphs should apply to all requests that come in, or as merely affirming that documents exempted in accordance with these provisions cannot be considered for disclosure. In relation to documents older than three years, Paragraph 22 does explicitly state that these should be considered for disclosure in accordance with the considerations stated in Paragraph 16. Therefore, while we welcome the intention of the request-based procedure and the evident intent of the policy to accommodate requesters, we are concerned that as currently drafted the Policy lacks in detail and clarity and leaves too much discretion to individual members of staff. We suggest a number of amendments to address this and some other concerns.

Firstly, the Policy should clearly state that each and every request for information should be considered in line with the three-part test outlined above, regardless of the formal classification of the document or its age. It should be noted that, with time, certain protected interests lose their significance. For example, while the withholding of frank

internal discussion documents may have been justified as protecting the integrity of the decision making process at the time that this was on-going, one or two years later, the assessment of the sensitivity of the documents may be very different.

Secondly, there should be clear time limits for responding to requests. Currently, Paragraph 12 of the Disclosure Policy states that the Secretariat should undertake all reasonable efforts to respond to requests in a timely way. ARTICLE 19 submits that, in line with information disclosure policies of other IGOs and standards at international law, stated time limits should apply to requests for information, for example a three-week period. For large requests, it is noted in Paragraph 13 that these will take some time to fulfil. Again, definite time periods should be given, with an option to extend these on a reasonable basis.

Thirdly, it is suggested that a deemed refusal provision be inserted into the Disclosure Policy. If a request is not responded to within the time limit set for responding, the requester should be entitled to treat the lack of response as a denial of its request and appeal the decision.

Fourthly, as currently drafted, Paragraph 13 states that large requests may attract an ‘access and search fee’, which will be determined by the Manager Corporate Services and requesters may be asked to cover the costs of photocopying and postage. ARTICLE 19 notes that it is important that this discretionary fee provision is not used as a deterrent or in a punitive fashion. Accordingly, a schedule outlining the ‘search and access’ fee on a graduated scale, depending on the size or complexity of the request, should be available from PIFS to a requester. The amount of the fee should not be left to the discretion of the Manager. We note that the ‘access and search fee’ is only for large requests and we recommend also including responding to public interest requests for free – for example, requests from relevant NGOs or from the media.

Recommendations:

- The Policy should clearly state that all requests will be considered in line with the three-part test.
- A three-week time period should be set for the processing of information requests. The Policy should state that large requests, or requests that involve a trawl through a large amount of material, this period may be extended.
- The Policy should include a deemed refusal provision.
- The Policy should provide for an access fee schedule.
- Consideration should be given to exempting public interest requests from the access and search fee.

3.4. Appeals

Paragraph 23 of the Disclosure Policy provides that where information disclosure is denied, the applicant will be advised of the reasons for the denial based on the exemption policy and advised of when the document will next be reviewed under the declassification procedure.

ARTICLE 19 notes that it is an integral part of an access to information regime that a denial of a disclosure request is open to review,³¹ and recommends that an appeals or review committee be established within the Secretariat, separate from the person making the determination. The committee could consist of a senior representative from each of the Divisions not concerned with the information requested, as well as a representative of the Deputy Secretary General, as well as knowledgeable persons from outside the Secretariat (for example, a judge).

Recommendations:

- An appeals or review committee should be established within the Secretariat to provide an avenue of review of any denial of a request for information.

3.5. Storage and indexing of PIFS documents

It would greatly facilitate information requests if PIFS would follow practice at organisations such as the Council of the European Union and makes available an on-line register of the documents it holds – including those that are classified. In the absence of such a register, members of the public will be likely to make very vague requests for information, which will be frustrating for both PIFS secretariat staff and for the requester – a vague request for information is more likely to be refused than a precise one. In addition, for information that has already been declassified but which has not been made available on-line, a depository library for the inspection of material may be appropriate.

Recommendations:

- Consideration should be given to providing an on-line and freely accessible index of PIFS documents for public review.
- Consideration should be given to establishing a depository library for the inspection of material.

3.6. Miscellaneous provisions

3.6.1. *Protection for whistleblowers*

Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing.³² ARTICLE 19 notes that such whistleblower protection is becoming standard within information disclosure policies and we recommend that an appropriate provision should be inserted into the Disclosure Policy. The following provision is suggested:

No one may be subject to any legal, administrative or employment-related sanction, regardless of any breach of any legal or employment obligation, for releasing information, so long as they acted in good faith and in the reasonable belief that the

³¹ ARTICLE 19 Principles, Principle 5; and the applicable Commonwealth principles, outlined above at Section 2.2.

³² *Ibid*, Principle 9.

information was substantially true and disclosed evidence of wrongdoing, or a serious threat to health, safety or the environment.

3.6.2. Definitions

Defining the following terms would clarify some ambiguity in the Disclosure Policy.

The use of the term ‘confidential’ creates some confusion, particularly in Paragraphs 18 to 22. In these paragraphs, it is open to interpretation whether ‘confidential’ is referring to the marking of the document by the author or its classification by the Secretariat. Also, the use of title case for the term should be consistent throughout the Disclosure Policy to help clarify the use of the term. It is suggested that if the intermediary term of the declassification system – Restricted – is removed from the Disclosure Policy, the term Restricted could be used to apply to the top level of the declassification system.

‘Staff’ should be defined, presumably to refer to the various levels of employees at the Secretariat. It should be noted whether or not Divisional Heads, the Deputy Secretary General and Secretary General are included.

Finally, given that it is a fundamental term of the Disclosure Policy, ‘Information’ should be given a full definition, to ensure that its scope is clear. The following definition is suggested, in line with ARTICLE 19’s Model FOI Law:

Information includes any recorded information, regardless of its form, source, date of creation, or official status, whether or not it was created by the body that holds it and whether or not it is classified.

3.6.3. Review of the policy

Given its ongoing importance in ensuring access to information, it is recommended that the monitoring on the maintenance system for the keeping of records be included as a stated issue in the overview and review of the Disclosure Policy.

Recommendations:

- Amend the Disclosure Policy by inserting the whistleblower protection provision, outlined above.
- Amend the Disclosure Policy by inserting the definitions, as outlined above.
- Amend review procedure to include a review of the monitoring of its record maintenance system.

DRAFT Forum Secretariat Information Disclosure Policy

Background

The importance of information disclosure to good governance and sustainable development has been recognised by national governments and international organisations around the world. A high level of transparency directly facilitates greater public participation in regional policy making and debate, enhancing the quality and effectiveness of decision making at national, regional and international level.

2. The Pacific Islands Forum is directly accountable to its member countries, and indirectly holds responsibilities to their parliaments and people. Access by the public to information and documentation held or generated by the Forum Secretariat will facilitate the transparency, accountability, legitimacy, and the national and local ownership of our work. For these reasons Forum members recognise and wish to facilitate the right of interested persons to access information about the Secretariat and its work.

3. The following sets out the Secretariat's policy and procedures relating to the disclosure of information.

Definition of Information

4. Except where otherwise stated, this policy applies to all documents (in printed and/or electronic form) created by the Forum Secretariat or in its control.

Presumption of Access

5. This policy is intended to ensure that information concerning the Pacific Islands Forum and its work will be made available to the public in the absence of a compelling reason for confidentiality.

6. Accordingly, the policy is based on a **presumption in favour of the public disclosure of all information generated or held by the Forum Secretariat**. This presumption is subject to specific exemptions, set out in paragraphs 15 to 22 below. Documents generated or held by the Secretariat that are not specifically exempted are governed by the presumption in favour of public disclosure, and shall be made public.

Existing Forum Policies

7. There are two existing Forum Secretariat policies relating to disclosure of documents which provide a useful basis for this policy:

- *Confidentiality of Forum Documents* policy agreed by the Forum Officials' Committee (FOC) in November 1998 (SPFS(98)OCS.9)

- Forum Economic Ministers' Meeting policy on *Release of Papers* (PIFS(05)FEMF.09), agreed at FEMM 2005.

This policy seeks to expand on the existing policies to facilitate broad information disclosure across the Forum Secretariat. In addition, this policy responds to the direction of the 2004 Budget FOC to the Secretariat to review its declassification policy, with a view to reducing the time required for declassification and reducing the level of confidentiality of some Forum documents.

Commitment to proactive disclosure – what information is publicly available

8. The Secretariat will continue to work toward the comprehensive redevelopment of its website, which should be the key source of public access to information.

9. At a minimum, from 1 January 2006 the Secretariat shall make the following documents publicly available at all times on its website:

- A Statement of the vision and purpose of the Pacific Islands Forum
- The Agreement Establishing the Forum (Secretariat) and any other decisions, agreements or arrangements relating to its establishment and governance
- Membership of the organisation, including details of members' official contacts
- Information on PIFS organisational structure including pay scales, decision making powers and delegations
- Details on services offered and issues managed by each programme
- PIFS Annual Budget as approved by FOC, detailed by programme
- Details and documentation related to any PIFS official audits
- Communiqués, declarations and other outcomes documents from Forum Leaders' meetings, FOC meetings, other Ministerial and officials' committees, and workshops³³
- Text and status reports on all treaties for which PIFS is the depositary
- All official PIFS speeches and press releases
- Annual reports
- PIFS policies
- Issues papers and reports produced by staff and/or consultants or submitted by member governments, unless exempted (see below)
- Programme and/or project information including details of projects undertaken and contracts entered into by PIFS

³³ Note that at present FRSC Session Two outcomes document is confidential, but this may be able to be revised by the Meeting, or put in a form other than an outcomes document if not appropriate for publication

- Details on the types of information held by PIFS, and a request form (with appropriate contact details or submission system) for information requests

10. Line staff responsible for the production of the above documents will be expected to take responsibility for ensuring that up to date documents are provided to the Website managers for posting on the website. On a day-to-day basis, Staff should get into the habit of considering all documents which are not exempted and may be of public interest, for publication on the website. In addition to the above, examples include workshop papers, meeting agendas and other documentation, visit reports (eg EPGs or election observer missions), and consultants' reports. Publication of the largest possible amount of relevant material on the website will cut down on the number of information requests received and enhance the transparency and good governance of the Forum Secretariat.

Other Information available on request

11. All other information, except that exempted in accordance with paragraphs 15-22 below, will be made available to the public upon request. The website will provide appropriate contact details and a request form to direct requests for information. While initial enquiries may be received by telephone, people requesting more than one document should submit the request in writing (preferably using the form provided) and be as specific as possible. In line with the presumption of disclosure, the requester is not required to provide a reason justifying the request.

12. The Team Leader, Library and Registry (TLLR) will take responsibility for responding to requests for information, which will be managed by library and registry staff in consultation with other staff and management as appropriate. All staff should notify the TLLR of requests received directly by them, and provide all assistance necessary to the library and registry staff in responding to an information requests. While recognising that the Forum Secretariat has limited information management resources and that all staff are busy, the Secretariat should undertake all reasonable efforts to respond to requests in a timely way.

13. When information requests are very broad or relate to a large volume of information, staff may wish to discuss them with the requester to clarify the quantity and parameters of the information sought. Requesters may be advised that information requests that will require a large input of resources will take some time to fulfil. Large requests may attract an access and search fee to be determined by the Manager Corporate Services, and requesters may be asked to cover the costs of photocopying and postage.

Documents arising from meetings and workshops

14. The documents covered by this policy include those created by and for PIFS meetings and workshops, including agendas, papers, records and outcomes documents. Forum meetings and workshops may wish to include a regular agenda item where

participants agree on the release or exemption of the meeting documents (a practice already adopted by the FEMM). Such consideration should be made by the meeting in line with the presumption of disclosure, and the considerations for exemption as outlined below. Staff managing meetings should aim to have all releasable documents posted on the website within a week of the conclusion of the meeting.

Exemptions – Classified documents and declassification

15. As stated above, Secretariat policy is based on a presumption of disclosure – that is, all information is to be disclosed unless specifically exempted.

16. A document will be exempted from disclosure when immediately disclosing it is judged likely to cause harm to the interests of the Forum Secretariat or to one or more of its member countries. Factors to be taken into account when making such a judgment in regard to a document include:

- Where policy advice is given on a sensitive or potentially contentious issue
- Where reference is made to specified Forum members (ie countries are “singled out”)
- Where papers of a sensitive nature have been prepared by organisations other than the Forum Secretariat, its agents or consultants – here the presumption of disclosure still applies but the general exemptions may be relevant. Careful consideration should be given in particular to any document where the originator has requested confidentiality. The originator should be made aware of PIFS’ information disclosure policy and the document judged on its merits.
Note that this means information produced by member countries is not automatically exempt, nor do member countries hold a “veto” over the disclosure of material produced by them and shared with the Forum. Rather, each document will be considered on a case-by-case basis using the criteria in this paragraph.
- Where intellectual property rights in the document are not held by the Forum Secretariat: in these cases discussion should be held with the originator relating to any legal limits on disclosure before publication by PIFS on the website or elsewhere
- Where documents are in draft form and not yet cleared by appropriate management or Executive staff when the document is internal, or by members when the draft is a document for members’ approval, or by other relevant persons such as Eminent Persons’ Groups or working groups when they are to take responsibility for the findings in the document
- Where information is commercial (“commercial-in-confidence”) or legal in nature, and its disclosure would unfairly damage the commercial or legal interests of a person or entity (eg company, organisation or government), or may have bearing on legal proceedings

17. Recruitment and personnel files, and other information of a personal or private nature relating to one or more individuals (including but not limited to Secretariat staff) will be exempt from disclosure in perpetuity.

18. **When staff create a document or mark it to file (including documents created by others), they should assess whether it needs to be exempted and if so, mark it clearly with either Confidential or Forum Eyes Only** (which means the same thing). Marking documents, including e-mails, in this way, will also assist staff and members to be aware of the need for appropriate handling of such documents while in use. While simply exempting all documents relating to a particular issue may be a speedy option for staff, this is not consistent with the presumption of disclosure nor with good governance. Documents should be assessed individually and a specific decision made with regard to each document sent to file, considering the above criteria.

19. In relation to documents marked as Confidential (or Forum Eyes Only), the Forum Secretariat adopts a three-stage approach:

Confidential *No access without permission of Secretary General except to members and Secretariat
*Automatic declassification after **three** years to “Restricted” unless a member country or the Secretariat objects (see below)

Restricted *Available to parties such as universities and government institutions and made available to these organisations or individuals for study and research purposes but not for publication
*Automatic declassification after **three** years to “Unrestricted”

Unrestricted * immediately available to the public

20. Due to the absence of a classification system to date, all documents on registry files dated to 31 December 2005 (other than those already public) will be regarded as “confidential” until subject to this declassification system. From 1 January 2006, all documents on registry files marked “Confidential” or “Forum Eyes Only” will be subject to the same declassification system. **All documents on registry file dated 1 January 2006 or later, and not marked Confidential or Forum Eyes Only, shall be immediately disclosed upon request.**

21. A list of all formal PIFS papers (ie numbered documents) three or more years old and proposed by the Secretariat for declassification from “Confidential” to “Restricted” will be provided to members on an annual basis. Unless an objection is received within 3 months the items will be declassified. If an objection is received the document will remain at the confidential classification for a further three years, after which declassification will again be proposed.

22. All other documents on registry files three or more years old and classified as confidential will be assessed by PIFS staff (Team Leader Library and Registry in

consultation with relevant staff and SMM if necessary) for declassification at the time when a request is made for the disclosure of such documents. In the absence of a compelling reason for continued exemption, the documents will be declassified and disclosed as per the above procedure. If continued exemption is warranted, the document shall remain classified as confidential for another three years, after which it may be reviewed again.

23. Where information disclosure is denied, the applicant will be advised of the denial and the reasons, based on the exemption policy herein (eg “we can not release that document because it provided sensitive policy advice to a Forum member and thus was exempted from disclosure”). The requester will be advised about the declassification procedure and when the document will be reviewed (or next reviewed) for declassification.

Oversight and review of this policy

24. The Senior Management Meeting (SMM) will oversee the implementation of this policy. The Team Leader, Library and Registry (TLLR) will report on a quarterly basis to SMM, through Manager Corporate Services (MCS), on information requests received and responses. Difficult cases relating to information disclosure may be referred to SMM through MCS for consideration and advice in accordance with the policy.

25. After six months of operation a review of this policy will be undertaken by TLLR in consultation with relevant staff, with any recommendations for amendments to be presented to the 2006 FOC Meeting. After that, the policy may be reviewed and submitted to FOC for amendment or update as required.

Pacific Islands Forum Secretariat
22 July 2005