Debate & Analysis

Freedom of Information Act: out of the pan into the fire?

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Freedom of information legislation permits the mass media to access government held information.

By 'government held information', I do not mean information held only by Cabinet Ministers but also information by the public administration at large, including the public service (that includes the civil service) and the public sector. The latter comprises public corporations, government companies, government foundations and other government entities.

In the case of Malta, the matter is dealt with by the Freedom of Information Act, Chapter 496 of the Laws of Malta, which allows certain persons, including the mass media, the right to divulge information which is normally kept secret by the state were it not for freedom of information legislation which allows for the dissemination of government held information in the public interest, especially where some sort of wrong doing is concerned. This law is thus an asset in the mass media's armory in the democratization of the institutions of the state. Nevertheless, there are some deficiencies in this law discussed below which do not allow the mass media to carry our effectively – not to mention promptly – their fourth estate supervisory function of the public administration to be fulfilled to the desired extent.

Although the law was enacted in 2008, it was only by means of Legal Notice 156 of 2012 published in The Malta Government Gazette of 18 May 2012 that the remaining provisions of the Freedom of Information Act, 2008 which had not yet been brought into force became law on 1st September 2012. 39 provisions out of 48, the vast majority, entered into force on that date. Indeed, it took nearly four years for the administration to bring this mass media friendly law into force. One cannot but ask why all this lethargy in bringing the Freedom of Information Act into force?

Since September 2012, the fourth estate is now empowered to be more vigilant of Government's actions especially when Government tries to hide embarrassing decisions from the public and the media. The culture of secrecy, very much prevalent till today and even after the entry into force of the Freedom of Information Act should have, one should have thought, started to be dismantled. The procrastination of the public administration to see the Freedom of Information Act coming into force is very much evident by the fact that this law was enacted on 19 December 2008 and has taken roughly three years and eight months to see the light of day. Between 19 December 2008 and 31August 2012 it was nothing more and nothing less than a dead letter for the mass media as the latter could not seek, let alone obtain, as of right, information under this enactment.

As fifteen years have passed since its enactment, a legitimate question is whether it has ushered into Maltese politics an era of openness which renders the public administration more accountable and transparent in its workings. This has not been the case even though the mass media have and continue to exploit the law to the full. Evidence of this are the various learned Freedom of Information Act judgments delivered by Mr Justice Wenzu Mintoff where the court has invariably found in favour of the mass media and against the public administration.

Although one should celebrate 1st September 2012 as Freedom of Information Day, this does not mean that one should be content with this law. This is because the law sets up various hurdles to make it difficult and, at certain times impossible, for the citizens, the local mass media and foreign bona fide journalists to arrive at the truth. In the meantime, the public administration's working will continue to be shrouded in secrecy even in those cases where secrecy cannot – and should never – be necessarily justified. Let me refer to four restrictive provisions of the law.

According to article 5(4) of the Freedom of Information Act, no Maltese citizen is entitled to apply to see documents held by: the Electoral Commission, the Employment Commission, the Public Service Commission, the Office of the Attorney General, the National Audit Office, the Security Service, the Ombudsman and the Broadcasting Authority when the latter authority is exercising its constitutional function.

I see no reason why all the records of the Electoral Commission should not be available to public view when the political parties have a right to see all documents held by the Electoral Office in terms of article 10(3) of the General Elections Act, Chapter 354 of the Laws of Malta. It seems that there are some stakeholders which are more equal than others! I do understand that there might be situations where these entities of the public administration should have their records protected but not in the nature of a blanket prohibition that would also cover innocuous information to the proper functioning of these institutions.

According to article 3 of the Freedom of Information Act, it is only an 'eligible person' who has a right of access to public administration held documents. In terms of article 2 of the Freedom of Information Act, an eligible person is defined as a person resident in Malta for a period of five years. Such resident can be a Maltese citizen or an EU citizen. But the five-year restriction is another unwanted hurdle especially for EU citizens who might not necessarily be resident throughout that period in Malta. Take the case of a BBC reporter who is writing a story on Malta and needs government held information. The public administration may refuse to disclose the information simply because the English journalist has not resided for the last five years in Malta. The only way for the English journalist to get hold of the required information through a Freedom of Information Act application is by making arrangements with a Maltese or other EU citizen who has resided in Malta for the last five years.

Moreover, it is not clear in the law how do you count these five years. Take the case of a Maltese citizen who is working abroad or studying abroad or simply on holiday abroad. Is it five years before the freedom of information request is made? Have the five years to be uninterrupted? What happens if one goes abroad for a week? Does it mean that you must have resided in Malta for 5 years and one week to be considered that you are an eligible person? Or does it mean that the one week abroad interrupts the period of residence and thus one must start counting afresh? How does one prove that one has been resident in Malta for the last five years? Do you have to subscribe to an oath? Is an affidavit required? Do you need witnesses to testify that during the last five years you have resided in Malta?

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Or does the public administration simple presume that this is so if you happen to be a Maltese or an EU citizen?

The Prime Minister is empowered to overrule the Information and Data Protection Commissioner. If the Commissioner issues a decision or enforcement notice of a decision to the effect that a document should be made available to an eligible person, the Prime Minister can annul the Commissioner's decision. This is wrong because if the public administration disagrees with the Commissioner's decision or enforcement notice, the public administration should instead have a right of appeal before the Information and Data Protection Appeals Tribunal and not have recourse to its political master to bring the independent Data Protection Commissioner's ruling to naught without due process of law and where the Prime Minister has a political interest in the matter being the de facto head of the public administration.

What has happened to the rule of law? The Prime Minister should not annul the Commissioner's decision as the Prime Minister is not an independent and impartial arbiter. He might want to conceal certain damaging information to the public administration or to his government which should be disclosed in the public interest and gives instead irrelevant or general reasons not to divulge that information. In addition, the Tribunal is an independent and impartial Tribunal and it, not the Prime Minister, should be vested with determining whether the document should or not be released. Powers like these are very much arbitrary, autocratic, and undesirable in a democratic society and should always be reviewable by an independent and impartial tribunal established by law. This is however not the case under the Freedom of Information Act where the Commissioner loses all his independence and becomes subservient to the Prime Minister's whims!

In this respect, the Prime Minister entertains a conflict of interest because once the Information and Data Protection Commissioner rules against the Prime Minister headed by, or responsible to, none other than the Prime Minister, it is the Prime Minister who decides on his own cause. Yet it is a principle of natural justice that no person can be a judge in his own case as is the situation with the Prime Minister under the Freedom of Information Act. If the Prime Minister were to flip a coin the result would be: 'Heads, I win; tails I win' – the Prime Minister can never lose.

Finally, the Freedom of Information Act does not meet the high standards of the Council of Europe's European Convention on Access to Official Documents done at Tromsø on 18 June 2009 (Council of Europe Treaty Series No. 205 available at conventions.coe.int/Treaty/Commun/QueVoulez.asp?NT=205&CM=1&CL=ENG.), which is by far more data seeker friendly. Our law, on the contrary, is restrictive and tries to protect as much as possible the public administration from revealing information held by it.

That is why the Freedom of Information Act needs to be thoroughly and radically revised once it does not establish an adequate transparent regime of data access in a democratic society based on the rule of law. It is one of those enactments intended to embellish the statute book, to give the impression that journalists have access to government held information, when – as a matter of fact – this is not (and cannot be) the case under the current legal regime. But at least government can boast that Malta has a Freedom of Information Act even though it works out to be ineffective, unpractical, and useless in so far as abuse of power, maladministration, and bad governance by the government are concerned. The Nationalist government must have considered this law as historic. I consider it to be in a total mess from a citizens' rights perspective that aims to keep the government in check.

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