

OPINION

The White Paper on freedom of information (2)

The quest to release information proactively

The Freedom of Information Bill does not apply to documents insofar as they contain information the disclosure of which is prohibited by any other law.

This is a blanket provision, bearing in mind the several secrecy and confidentiality provisions that exist in Maltese law, some of which date to colonial times. By framing this provision in such a general way, it is possible, through other laws, to narrow down, not to say exclude, the purport of the FOIA. These other laws, which are numerous, can indeed nullify the FOIA. Hence, an exercise should be carried out before the Bill is published to identify these various laws and decide which are to be excluded from the purview of the FOIA and which not. An appendix in the form of a table should state which are these laws that are to be excluded from the operation of the FOIA.

Manner of granting access

The manner in which access may be granted should also include the possibility of obtaining copies of recordings of sounds or visual images on an audio cassette or a video cassette or a digital versatile disk or compact disk and, in the case of data held on computer, through a floppy disk, compact disk, digital versatile disk, and other electronic equipment which the citizen may provide so that in this way s/he would not need to incur hefty amounts of money for photocopying.

Information held by private bodies

The FOIB empowers the minister to make regulations concerning access to information held by private bodies insofar as such bodies provide services to the public on behalf of the public administration or receive government funding for projects or initiatives. But it must also be added that such private bodies should grant access to information held by them when the information is required by the applicant for the exercise or protection of a human right or fundamental freedom, preservation of public safety and protection of the public interest.

Furthermore, a private body could be defined as a natural person who carries on any trade or any business or profession and who is registered or licensed under any enactment governing the operation of a profession, trade or the registration of a business body, a civil partnership, a commercial partnership registered under the Companies Act, a trust, a foundation and any other body corporate not being an entity of the public administration. In certain cases it can also include a non-governmental organisation which might be in receipt of public funds or other benefits such as exclusion from the payment of income tax.

Application form

The text of the application form to request access to information should be part of the FOIA, in a schedule thereto.

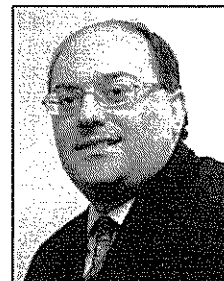
Proactive disclosure

The FOIB has a provision requesting the public administration to publish information irrespective of whether there is a request to that effect by a member of the public. This provision however needs to be strengthened by first imposing obligations on the public administration to proactively publish certain information without the need for the public to submit requests for access to public administration held information. Such requests would be reduced once the information is readily available while transparency of the public administration is augmented. The more information provided, the less will the public administration be clogged by FOIA requests.

Secondly, the Act can establish which categories of information ought to be automatically disclosed. The Indian Right to Information Act 2005 and the Mexican Federal Transparency and Access to Public Government Information Law 2002 can be easily emulated. These enactments require the disclosure of recipients of government subsidies, concessions and licences and publication of all government contracts and information about proposed development. A requirement for regular updating of this information is of paramount importance.

Limitation of period for exempt information

A provision should be inserted in the FOIB whereby information classified as exempt should cease to be so considered on the expiry of 30 years calculated from the end of the calendar year in which the information came into existence and, on the expiry of that period, any person may seek access to that information and, for the purposes of the FOIA, will no longer continue to be considered as an exempt information. The entity of the public administration will thus be bound to give access thereto in terms of the FOIA. Otherwise the government might wish to apply a procedure similar to that set out in article 10(2) of the National Archives Act whereby the commissioner shall examine these



Kevin Aquilina

'The more information provided, the less will the public administration be clogged by FOIA requests.'

records and determine whether they should be declassified after the expiration of 30 years and made available for public inspection.

Lost documents

One reason for not providing a document is because "the document requested cannot be found, and this is certified in writing by the head of the public authority". It must be ensured that each entity of the public administration has a records management system in place which follows good records keeping practices in terms of the National Archives Act.

Furthermore, safeguards and disciplinary sanctions need to be in place to ensure that records do not disappear when requested by a member of the public. Otherwise, it would be a very convenient way how to abuse this provision. Indeed, when the 1995 amendments to the Code of Organisation and Civil Procedure were made, it was only the Prime Minister who, under his/her hand, could certify that a document could not be produced in court and this duty was vested only in the Prime Minister to ensure that the provision in that Code was not abused. A similar provision needs to be added here.

Information officers

Although the White Paper refers to the appointment of information officers within the public administration there is no legal requirement to that effect. A provision should be added obliging the various entities of the public administration to appoint information officers, who will be the central contact points in terms of access under the FOIA. Their exact role should also be legislatively delineated. All contact details for all information officers should be readily available and posted on the entity's website, on the Department of Information's website and on the commissioner's website apart from being available on the telephone directory. The latter requirement, for instance, is included in the South African Promotion of Access to Information Act 2000.

Appeals Tribunal

The exact powers of the Appeals Tribunal need to be specified. A reference to the powers of the same tribunal when hearing appeals concerning data protection is not sufficient. For instance, will the Appeals Tribunal have power to make binding determinations and compel the public administration to enforce its decisions? Or to enforce enforcement orders? To impose sanctions on the public administration when the latter defaults? Or to fine officers who procrastinate in providing the required information? Or to have access to the information in question to review the public administration's decision as to whether such document ought to be exempt or not? Or to investigate whether the public interest test has been reasonably applied? Or to set out the rules of procedure to be followed by the Appeals Tribunal (say, the burden of proof should be placed on the public administration entity refusing disclosure)?

Court of Appeal

The FOIB proposes that decisions of the tribunal should be subject to an appeal to the Court of Appeal. I would add that such appeals should be heard by the Court of Appeal sitting in its inferior jurisdiction – presided over by one judge – and should be limited to points of law only as is usually the case with appeals to the Court of Appeal from decisions of other administrative tribunals.

Dr Aquilina is senior lecturer, Department of Public Law, Faculty of Laws, University of Malta.

Tomorrow: Transparency, accountability and public participation in decision-making.