

OPINION

The White Paper on freedom of information (2)

Transparency, accountability and public participation in decision-making

The proposed Freedom of Information Act should contain a provision whereby the Committee for the Consideration of Bills of the House of Representatives carries out a compulsory parliamentary review of the FOIA after the expiry of three years from the date of enactment plus regular reviews every five years therefrom.

Training

One aspect of the White Paper and Bill which need to be reinforced concerns training.

The public administration should be required by law to provide freedom of information training programmes for its employees. This applies to the public service and to the public sector.

Freedom of information officers should be appointed within each ministry, department, division, unit, section, etc. of the public administration. For instance, the Antigua and Barbuda Freedom of Information Act 2004 has a provision which reads as follows: "Every public authority shall ensure the provision of appropriate training for its officials on the right to information and the effective implementation of this Act".

The public administration already has in place the Staff Development Organisation and this can be tasked with carrying out the necessary training programmes.

Defamation and breach of confidence

Sometimes, documents held by the public administration might contain wording which is considered defamatory in terms of the law or which might constitute a breach of confidence. It is thus important to add a provision to the effect that where access has been given to a document in terms of the FOIA, no civil or criminal action for defamation or breach of confidence lies by reason of the authorising or giving the access against the entity of the public administration or the commissioner or any of his/her staff who authorised the access, unless it is shown that the information was not provided in good faith. Such is the case under Belize's Freedom of Information Act, 1994.

Moreover, where access to information is given under the FOIA and the officer who gives access believes, in good faith, when making the decision that the law permits or requires the decision to be made, s/he will not be held guilty of having committed a criminal offence simply because of his or her decision to give access.

Protecting whistleblowers

Whistleblowers need protection. This should be kept in mind when drawing up the Whistleblower Act.

The Act should not apply to a board of inquiry appointed under the Inquiries Act as the reports of these boards are considered confidential, unless a decision is taken by the government to release such information or to exhibit it in court proceedings.

Annual report to Parliament

The annual report provision in the FOIA is too vague when it provides that the commissioner has to report "on the workings of this Act". More substance has to be given to this provision to ensure that the annual report contains more specific information, *inter alia* relating to the number of requests made to each entity of the public administration for access to information, how many requests were entertained in full or in part, rejected or considered frivolous and vexatious, the provisions under which access to information was rejected and the quantity of such



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rejections, the number of complaints lodged with the commissioner, the number of appeals lodged with the Appeals Tribunal and how they have been determined, particulars of any disciplinary or criminal action taken against any officer of the public administration for breach of the FOIA, the amount of fees collected by each entity of the public administration in the administration of the FOIA, how many time-limit extensions had to be given for an entity to compile the required information, recommendations for reform, the adequacy or otherwise of the reading facilities provided by each entity of the public administration, the number of information notices and enforcement orders issued by the commissioner, etc.

Moreover, the two-month period for drawing up the annual report might end up being short. At least three months should be afforded for the compilation of such a report.

Time-limit extensions

For time-limit extensions not to be abused there should be a maximum extension that would have to be complied with by the public administration. Such a maximum period should be agreed to by the entity and the applicant and, if the latter is of the opinion that such a time-limit is unreasonable, s/he can request the commissioner to rule as to what a reasonable time-limit should be in the circumstances of his/her case. The public administration entity would be bound by that decision – which has to be considered by the commissioner with urgency – and which should be final, with no appeal to the Appeals Tribunal.

The penal provision in the Bill applies to the destruction, damage, mutilation, alteration or removal of documents with the intention of preventing the disclosure of information. This provision should be widened to make the list of offences more comprehensive, by including penalty provisions to deal with unreasonable delay or withholding of information, wilful provision of incorrect information, concealment or falsification of records, non-compliance with the commissioner's or Appeals Tribunal's orders and persistent non-compliance with the Act by an entity or officer of the public administration. The

commissioner should be empowered to investigate upon persistent non-compliance and empowered to punish the officer/s involved or else recommend the taking of disciplinary or criminal action against such officer/s. Sanctions should be imposed personally on the public officer or employee in the public sector who is found guilty of an offence under the Act.

The commissioner and Appeals Tribunal may also be empowered in minor cases to impose sanctions on an entity of the public administration in addition to the courts of criminal jurisdiction.

Again, a person who wilfully discloses exempt information, the disclosure of which is prohibited under the FOIA, should be considered to having committed a criminal offence and, on conviction – subject to other laws that might impose a higher punishment – should be liable to imprisonment for a term of not less than five years or to a fine (*multa*) not exceeding Lm50,000, or to both such imprisonment or fine. Sometimes, it might be financially rewarding to disclose exempt information and should this be the case the perpetrator should be harshly punished because of the harm s/he may occasion to the state of Malta.

The White Paper explains the proposed entry into force of the Bill when enacted. The FOIA will enter into force in different dates but all the provisions will be in force within 12 months from enactment. Bearing in mind the designation of information officers, the training which needs to be given to these information officers, the making of subsidiary legislation, the compilation of forms – application forms, enforcement forms, the establishment of tariffs, the drawing up of codes of practice, etc. – it might be too optimistic to bring the law completely in force within a year of enactment even though this is a desirable effect. An action plan should thus be formulated to set out the tasks that need to be met and by when if the one-year target is to be achieved.

Transitory provision

A transitory provision needs to be added to clarify that the FOIA applies to information regardless of whether it came into existence before or after the entry into force of the FOIA.

A member of Parliament has the right to lodge a parliamentary question and obtain the required information. The public does not enjoy such a privileged status. An FOIA will not only introduce the principle of open government within the context of the public administration but it will empower the citizen to obtain directly the information s/he needs without the intercession of any other person.

This law, when enacted, will undoubtedly change for the better the nature of the political process and introduce three new concepts within the public administration – transparency, accountability and public participation in decision-making – thereby increasing progressively the availability of official information to promote the good governance of Malta. As has been stated elsewhere: While a law alone cannot always ensure an open regime, a well-crafted law, which strengthens citizens' democratic participation, is half the battle won.

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Concluded