

OPINION

*The White Paper on freedom of information (1)***The rise and fall of official secrecy**

The counterparts of official secrecy – transparency and accountability – are here to stay insofar as public administration-held information is concerned. They come in the form of a White Paper entitled *Towards Greater Transparency And Accountability: The Government's Proposals For A Freedom Of Information Act In Malta*.

Consisting of 79 pages of text, this document is divided into two parts: A White Paper and, more importantly, a draft Freedom of Information Act (FOIA).

The Freedom of Information Bill (FOIB) complements the secrecy provisions set out mainly in the Official Secrets Act and in other laws by creating a legal requirement that information held by the public administration is to be made available to the public unless there is good reason to withhold it.

If the FOIB Bill becomes law, together with the Public Administration Bill currently under discussion in Parliament, then 2007 can be celebrated as the Year of Administrative Law.

Administrative law is no longer considered to be an appendage to constitutional law as the more time passes the more it continues to gain its independence from constitutional law, so much so that it can be stated without any trepidation that a *corpus* of administrative law has continued to be developed over time, including during this year, to such an extent as to make it merit to continue to be studied in its own right as a distinct branch of the law.

Indeed, earlier on during this year, Parliament enacted the Administrative Justice Act, a law aimed to introduce an element of order in a chaotic world of administrative tribunals. Now, when the House of Representatives resumes its sittings after the summer recess it will discuss at committee stage the Public Administration Bill and, hopefully later on during the year, the Freedom of Information Bill and the Whistleblower Bill. I say so because from a reading of page 11 of the White Paper, the government is proposing to go beyond the sole public interest disclosure provision in the Public Administration Bill in order to develop it into a fully-fledged law, the Whistleblower Act. This is indeed a wise decision and one hopes the public takes up the government's invitation at page 11 of the White Paper and submits to the Principal Permanent Secretary at the Office of the Prime Minister suggestions as to the contents of a Whistleblower Act.

Mentioning the Principal Permanent Secretary, I must congratulate him and all his staff who have contributed to the compilation of the White Paper and draft FOIB. They have done a marvellous job and produced an excellent piece.

I must also thank those civil society organisations who gave feedback to a previous version of the White Paper and Bill, in particular, the Institute of Journalists and the Journalists' Committee, for their studious feedback which has, undoubtedly, ameliorated the original proposals in the interest of the Maltese citizen.

A few thoughts on the White Paper and draft Bill are, of course, due.

Overall, the Bill is very comprehensive and covers most issues adequately. I fully endorse the proposal that the Data Protection Commissioner should be tasked with the duties of a Freedom of Information Commissioner. In this way, the same person can balance out both extremes – data protection and freedom of information. Indeed, although these two laws are considered opposed to each other yet they are very much related and complimentary. Hence, having one commissioner to oversee both data protection and access to information will ensure that there are no conflicting interpretations of both laws.

Even, at appeals stage, there will be only one Appeals Tribunal – the Information and Data Protection Appeals Tribunal – to ensure uniformity and consistency in decision making. This is indeed a very important part of the White Paper and Bill because once one gets correctly the administrative structure in place then one makes life easy both for the staff administering both laws and for the citizen.

I will now address the contents of the FOIB and propose concrete suggestions for improvement on the basis of a comparative exercise based on experience gained in foreign countries and in foreign FOIAs.

Objectives of the FOIA

A provision should be included at the very beginning of the law – prior to the interpretation section – setting out the objectives of the law to the effect that the constitutionally-enshrined right to information presupposes free access to the sources of information and that, in the exercise of this right, free access to the data and documents produced or in the possession of the public administration, in accordance with the principles of transparency and accountability, is the right of all citizens in the terms envisaged in the FOIA.

Indeed, although the principles of transparency and accountability are the *leit motif* of the White Paper and Bill, there is no provision in the Bill which sets them out unequivocally. For instance the Access to Information Act 2002 of Jamaica has a provision to this effect: "The objects of this Act are to reinforce and give further effect to certain

*Kevin Aquilina*

'... the government is proposing to go beyond the sole public interest disclosure provision in order to develop it into ... the Whistleblower Act.'

fundamental principles underlying the system of constitutional democracy, namely – (a) governmental accountability; (b) transparency; and (c) public participation in national decision making, by granting to the public a general right of access to official documents held by public authorities, subject to exemptions which balance that right against the public interest in exempting from disclosure governmental, commercial or personal information of a sensitive nature".

Again, the government might wish to refer to the Bill as giving effect to the fundamental right to information, which will contribute to strengthening democracy, improving governance, increasing public participation, promoting transparency and accountability and reducing corruption.

The Kenyan section of the International Commission of Jurists has proposed the following wider clause: "The objects of this Act are – (a) to promote open government through maximum disclosure of information; (b) to facilitate the right of all persons to have access to information held by public authorities and to require that public authorities proactively publish and disseminate information to the public in a useful form and manner in order to further the public interest generally, including in particular to promote – (i) public participation in democratic and development processes; (ii) greater accountability of public and private authorities; (iii) better informed discussions and the free interchange of opinions; (c) to ensure that persons are given reasons for decisions taken by public authorities which affect them; (d) to facilitate and encourage the disclosure of information, promptly and at the lowest reasonable cost; and (e) to enable individuals to see information held by public authorities about their affairs and to ensure that it is accurate".

Definition of information

The FOIB is about information in the possession of the public administration and private bodies. Yet, there is no definition as to what constitutes "information". Instead reference is made to a "document" which is a narrower term as it excludes access to information not yet recorded but which should have been so. It would be better to substitute the word "document" wherever it occurs with the word "information" which is, after all, the word used in the short title of the Bill.

Commercial information

The FOIB as drafted is not intended to apply to commercial information. The Bill states that the FOIB does not apply to documents held by a commercial partnership in which the government or another public authority has a controlling interest, insofar as the documents in question relate to the commercial activities of the commercial partnership.

First, there is no definition in the Bill of what constitutes "commercial activities" and, hence, it is at the absolute discretion of the commercial partnership in question to decide what is a commercial activity or not.

Secondly, commercial information should not be automatically excluded from the application of the Bill but there should be the possibility of establishing whether a substantial adverse effect on the commercial partnership in question would ensue if the document is released.

Such partnerships are still owned by the public and their obligation to be a good employer and to exhibit a sense of corporate social responsibility justifies their being held accountable to the public and, therefore, falling within the remit of the FOIB even if subject to the public interest test.

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

Tomorrow: The quest to release information proactively.