

Recommendations for Transparent Governance

Conclusions of a CPA-WBI Study Group on Access to Information

Held in partnership with the Parliament of Ghana Accra, Ghana, 5-9 July 2004

Freedom of information is a fundamental human right, crucial in its own right and also as a cornerstone of democracy, participation and good governance. Recognition of this key right is essential to empowering all members of society, including Parliamentarians, to strengthening parliamentary democracy, to reversing practices of government by the few and to improving the relationship between Parliament and the media. It is essential that legislation be adopted to give proper effect to this right and countries around the world, and within the Commonwealth in particular, have either adopted, or are in the process of adopting, such legislation.

The Commonwealth Parliamentary Association (CPA) Study Group on Access to Information urges Parliaments to play a leading role in promoting access to information in accordance with these Recommendations. The Group notes international standards in this area, including Article 19 of the United Nations Universal Declaration of Human Rights, the Declaration of Principles on Freedom of Expression in Africa, the Inter-American Declaration of Principles on Freedom of Expression, Recommendation (2002)2 of the Committee of Ministers of the Council of Europe to Member States on Access to Official Documents, the recommendations of the UN Special Rapporteur on Freedom of Opinion and Expression, the freedom of information standards developed by the Commonwealth, and the ARTICLE 19 publication, *The Public's Right to Know: Principles on Freedom of Information Legislation*. It also notes the Principles for an Informed Democracy drawn up by the CPA Study Group on Parliament and the Media in Perth.

The Group notes the central role of Parliament and its Members in giving effect to the right of access to information, as well as the importance of access to information to Parliamentarians in the performance of their duties.

(1) Right of Access

(1.1) Parliaments should pass as a priority effective access to information legislation, in accordance with these Recommendations, giving everyone a right to access information held by public authorities.

(2) Scope of Application

(2.1) The obligations set out in access to information legislation should apply to all bodies that carry out public functions, regardless of their form or designation. In particular, bodies that provide public services under public contracts should, to that extent, be covered by the legislation. The Group commends the situation in South Africa, whereby even private bodies are obliged to disclose information where this is necessary for the exercise or protection of any right.

(3) Routine Publication

(3.1) Public bodies should be required by law to publish and disseminate widely a range of key information in a manner that is easily accessible to the public. Over time, the amount of information subject to such disclosure should be increased.

(3.2) Public bodies should be required to develop publication schemes, with a view to increasing the amount of information subject to automatic publication over time.

(3.3) Public bodies should make use of new information technologies so that, over time, all information that might be the subject of a request, and that is not covered by an exception, is available electronically. This will not only significantly promote public access to this information but also result in considerable savings for public bodies due to the drop in the number of requests that this will occasion.

(3.4) Where information has been disclosed pursuant to a request, that information should, subject to third party privacy, be routinely disclosed.

(4) Processes to Facilitate Access

(4.1) No one should have to state reasons for their request for information.

(4.2) Public bodies should be required to respond to requests within set time periods. A failure to respond to a request within that time period should be deemed a refusal of the request.

(4.3) Any refusal to provide information should be accompanied by the reasons for that refusal, including which provision in the legislation is being relied upon, as well as information detailing any right of appeal the requester may have.

(4.4) Requesters should have the right to appeal any refusal to provide information to an independent administrative body. A final appeal should also lie to the courts.

(4.5) Wilful obstruction of the right of access, including by destroying or damaging information, should be a criminal offence.

(5) Costs

(5.1) Costs for access to information should not be so high as to deter requesters. When putting in place statutory fee systems, consideration should be given to the following:

(5.1.a) requesters only have to pay for the cost of reproducing the information;

(5.1.b) requests for certain types of information – such as personal information – are free or very low cost;

(5.1.c) requesters cannot be subject to higher charges simply because public officials do not maintain their records in a sufficiently accessible format;

(5.1.d) if the information is not provided within a set time period after the fee has been paid, the money will be returned and the request will be free of charge;

(5.1.e) costs are charged only where requests go beyond a certain size or complexity; and

(5.1.f) costs be waived for requesters who are unable to pay.

(6) Exceptions

(6.1) The right of access should be subject to a narrow, carefully tailored regime of exceptions to protect certain overriding public and private interests. Exceptions should not be phrased in vague or subjective language but should, as far as possible, be set out in clear and objective terms.

(6.2) Exceptions should apply only where there is a risk of substantial harm to the protected interest, and where that harm is greater than the overall public interest in having access to the information. The practice in Scotland in this regard is commended.

(6.3) No public body should be completely excluded from the ambit of the legislation; rather, exceptions should be applied on a case-by-case basis in light of specific information requests.

(7) Inconsistent Legislation

(7.1) Where there is a conflict between the access to information law and any other legislation, the access to information law should, to the extent of that inconsistency, prevail.

(7.2) Urgent steps should be taken to review and, as necessary, repeal or amend, legislation restricting access to information.

(8) Records Management

(8.1) Effective systems of record management are key not only to the effective functioning of an access to information regime but also to good governance. The introduction of such systems, where they do not already exist, should be a part of the access to information legislation.

(8.2) Codes of practice relating to record maintenance can help promote a consistent approach across public bodies and can be used to ensure the highest possible standards in this area. Access to information legislation should require such codes to be developed in consultation with public bodies and then laid before Parliament.

(8.3) Assistance for improved record management should be provided, for example in the form of training and guidance, to public bodies to ensure that records are maintained in an appropriate manner.

(9) New Information Technologies

(9.1) New information technologies, and in particular the Internet, have the potential to make a very important contribution in the area of access to information and open governance in general, and should as a result be promoted. New technologies can significantly facilitate record management, promoting better record maintenance practices.

(10) Addressing the Culture of Secrecy

(10.1) There should be a concerted effort by government and public bodies to address the problem of a culture of secrecy. This should include comprehensive training programmes on implementation of the access to information regime, as well as the importance of openness in society. Such training should also seek to promote an understanding among civil servants of the benefits of openness to them, including through a better two-way flow of information that can enhance policy development.

(10.2) Parliamentarians should play a leadership role in this area, sending a clear signal to public officials that they fully support openness and setting a positive example through their own openness. Parliamentarians should also seek to employ innovative strategies to address the culture of secrecy and to involve public officials in promoting openness. The Group commends in this regard the good practice in Trinidad and Tobago.

(10.3) Individuals who disclose information pursuant to the access to information law should be protected against sanction and victimization, including for defamation.

(10.4) Individuals who in good faith release information that discloses evidence of wrongdoing should be protected by law against sanction.

(11) Publicising the Right to Information

(11.1) Public education campaigns should be undertaken to ensure that the public are aware of their right to access information.

(11.2) Parliamentarians have an important role to play in this process by making sure that their constituents are aware of their rights. A range of other bodies also have a role to play here, including the independent administrative body that is responsible for implementation of the law, human rights groups, the media (and the broadcast media in particular), public bodies themselves and civil society generally. Use should also be made of regular educational systems, including universities and schools, to promote civic understanding about the right to access information.

(12) Role of the Independent Administrative Body

(12.1) There should be an effective independent administrative body which should be allocated a range of statutory functions to ensure appropriate implementation of access to information legislation. This may be either an existing body or a body specifically created to serve that function. In either case, the body should be adequately resourced and protected against official or other interference, including through the appointments process, funding mechanisms and control over the hiring of its own staff.

(12.2) The independent administrative body should have the power to hear appeals from any refusal by a public body to provide information, along with all necessary powers to effectively exercise this role. This should include the power to mediate disputes, to compel evidence and to review, in camera if necessary, the information which is the subject of the request, to order the disclosure of information. and, where appropriate, to impose penalties.

(12.3) The independent administrative body should also play a role in ensuring that public bodies properly implement access to information legislation. This should include an obligation to keep the performance of public bodies under effective review, as well as the power to review the performance of any particular public body. The independent administrative body should be required to report annually, as well as on an *ad hoc* basis as necessary, to Parliament.

(12.4) The independent administrative body should also play a role in ensuring that other legislation is consistent with the access to information law. This should involve reviewing existing legislation and making recommendations for reform of any inconsistent laws, as well as being consulted on whether or not proposed legislation would impede the effective operation of the access to information regime.

(13) Parliamentary Oversight of Access to Information

(13.1) Parliaments have a key role to play in overseeing and reviewing access to information regimes and in ensuring the public's right to know is guaranteed. Parliaments should take these responsibilities seriously and actively pursue their oversight functions.

(13.2) The access to information legislation should be reviewed on a regular basis to ensure that it is effective in ensuring the public's right to know. We commend the practice whereby in some jurisdictions the law requires the legislature to conduct regular reviews, such as in British Columbia where it takes place every six years.

(13.3) All public bodies should be required to provide a full annual report, either to the responsible minister or to the independent oversight body, on the information requests they have received and how they have been dealt with. This information should then be laid before Parliament in a public document.

(13.4) Parliament's oversight role includes such mechanisms as questions to ministers and holding ministers to account for any failures to implement the access to information law in their ministries.

(13.5) Parliament should play a key oversight role regarding the independent administrative body responsible for implementation of the access to information legislation. Parliament should, in particular, play a leading role with respect to appointments to and funding of the body. Consideration should be given to an appointments process that requires either unanimous approval or a super majority vote. The appointments process should be conducted in a transparent manner. The body should, in addition, formally report to and be accountable to Parliament.

(13.6) Consideration should be given to regular parliamentary review, for example on a biannual basis, of implementation of the access to information regime.

(14) Parliamentary Openness

(14.1) Parliament should play a leadership role in promoting open government by opening up its own practices and procedures to the widest possible extent. Parliamentary debates should be televised and records of these debates should be made publicly available as soon as possible, including through the Internet.

(14.2) Constituency offices, as well as elected officials at all levels, should be used as a means of promoting parliamentary openness.

(14.3) There should be a presumption that committee meetings are open to the public, so that closed meetings are the exception rather than the rule. Where it is necessary to hold a meeting, or part of a meeting, in private, a decision to that effect should be taken in public and reasons for that decision should be given. The Group notes, in this regard, Recommendation 8.9 of the CPA Study Group on Parliament and the Media's

Recommendations for an Informed Democracy, which also provides for open meetings.

(15) Promotional Measures

(15.1) The Group notes the importance of international assistance to implement a number of these Recommendations, including promoting awareness of the right of access to information, developing public educational materials, training public officials, addressing the issue of laws that are inconsistent with the right to access information and improving record maintenance. We therefore call on the international community to provide assistance to achieve these ends.

(15.2) The Group commits itself to active promotion of these recommendations, including by disseminating them widely to their fellow Parliamentarians, civil society, the media and their constituents.

(15.3) The Group notes the following specific areas of interest and we encourage the Commonwealth Parliamentary Association, the World Bank Institute, the Commonwealth Human Rights Initiative, the Commonwealth Secretariat, NGOs and the international community to provide assistance for the following:

(15.3.a) Certain jurisdictions, such as small states, countries in transition and specific regions face greater challenges and needs for technical and expert assistance in the field of access to information and, therefore, the above bodies should give prompt attention to their requests for activities, information, targeted meetings and advice;

(15.3.b) The Group recognized the need for better information on access and, as a result, recommended that Commonwealth-wide comparative studies be conducted in key thematic areas; and

(15.3.c) The Group supported the idea of developing a code of record maintenance practice for the Commonwealth.

Conclusion

The Group recognizes the enormous variety that exists within the Commonwealth and that the implementation of these Recommendations for access to information will vary from country to country. At the same time, we believe that these Recommendations represent a foundational set of standards to which all Commonwealth jurisdictions should aspire. We call on all Commonwealth Parliaments and their Members to take effective measures, as soon as possible, to implement these Recommendations in practice.