Commonwealth Human Rights Initiative

NGO in Special Consultative Status with the Economic & Social Council of the United Nations

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Office of the Principal Permanent Secretary
Office of the Prime Minister
Auberge de Castille
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MALTA

29 October 2007

Dear Prime Minister,

Toward Greater Transparency and Accountability and the Draft Freedom of Information Bill 2007 – CHRI comments

I am writing from the Commonwealth Human Rights Initiative (CHRI), an international non-government organisation headquartered in New Delhi. CHRI's Access to Information Programme works to promote transparency and good governance, in particular by assisting governments to develop strong RTI legislation and to support implementation of new access laws (please log on to our website www.humanrightsinitiative.org for more information).

Earlier in the year, CHRI provided your Government with comments on the Draft Paper on Freedom of Information and a draft Freedom of Information Bill, which we sent through the Institute of Maltese Journalists. In July 2007 your Government released its paper "Towards Greater Transparency and Accountability" for public comment. The paper includes a draft Freedom of Information Bill, which has been modified in response to the comments made by stakeholders including CHRI.[1]

While it is evident that some very positive improvements have been made since CHRI's original comments were made in January this year, we remain concerned that the in a number of ways the Bill does not yet conform to international best practice.

Our main comments are as follows:

- The draft Bill remains severely limited in its ability to ensure disclosure by provisions such as Article 5 which excludes a range of documents and bodies from the scope of the law and provides broad reasons for refusing access. Too many bodies are excluded in their entirety from the scope of the law regardless of the sensitivity of the actual information requested. This creates the potential for public authorities to avoid disclosure and abuse these broadly drafted provisions (see paragraphs 24-27 of the critique attached). We would point out that freedom of information acts are based on the presumption that all information except for a very narrow band of information naturally belongs to the public and must not be withheld from them.

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- Disclosure is the norm and withholding information is the exception. There is a presumption that giving information is always in the public interest. Withholding information is to be allowed only if there is a greater public interest in withholding information than giving it. Whether to give or withhold information is to be decided when weighing the information sought. Therefore we do not see any merit or logic in exempting whole categories of documents or departments from disclosure merely by virtue of their status. The criteria rest on the nature of information that is contained in those documents rather than the origin or resting place of a file or document. Illustratively, the administrative guideline of how a ministry functions; the administrative costs and such like cannot be protected information merely because the entire ministry or department is exempted from disclosure. There is no logic in such across the board exemptions and in fact it creates an arbitrary distinction between departments that are exempt and not exempt about the same information. We would urge that all information be in the public domain save and except where it can be shown before an independent adjudicator that there is a greater public interest in retaining the information than in giving it.
- The draft Bill has only minimal proactive disclosure requirements. Routine publication and dissemination of information is a key mechanism for increasing government transparency and accountability. Proactive disclosure promotes efficient public sector records management and aids public participation in decision making. At the very least, more information about Government services and decision-making processes should be provided. Additionally, the routine publication of Government contracts would be a big step forward for public accountability (see paragraphs 53-58 of the critique attached). Greater and routine proactive disclosure is also cost effective in the long run in that it allows a large amount of materials to be readily available and cuts down on dealing with repeated requests year on year. It is also very good governance practice and spurs better record keeping and accountability.
- We would urge that the exemptions section includes a clause which reads as follows: "*Notwithstanding any of the exemptions specified in the Act or any other law in force, including the Official Secrets Act, a public authority shall allow access to information if public interest in disclosure of the information outweighs the harm to the public authority".*
- This is extremely important as it clarifies that all exemptions are subject to the test of being in the public interest. This is essential to an effective access to information regime. This would require that information will be released if the public interest in disclosure outweighs the public interest in withholding the information (see paragraphs 91-115 of the critique attached).
- Based on experience, we would once again urge that the law contain penalties for non compliance. The law is a new concept which seeks to change the cultures of secrecy that exist and displace long held practices of withholding information. There is a need for incentives and disincentives to bolster new ways of governing. This will not come about without penalties for non-compliance. At present, the draft Bill lacks an effective penalties regime to sanction non-compliance with the law. Without an option for sanctions, such as fines for delay or imprisonment for wilful destruction of documents, there is no incentive for bodies subject to the Act to comply with its terms. (see paragraphs 85-90 of the critique attached).

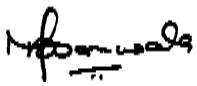
The comprehensive critique which is attached details these issues further and makes recommendations for how the law could be improved.

Finally, CHRI would like to remind the Government of Malta of the many commitments it has made to freedom of information. Malta is one of only three European Union countries (out of 27) that have failed to pass a freedom of information law. It is a member of the United Nations, which has recognised the right to access information since 1946. The Commonwealth too has recognized time and again the fundamental importance of the right to information including at the Commonwealth Heads of Government meeting hosted in Malta in 2005. CHRI therefore encourages the Government of Malta to continue in its efforts to guarantee the freedom of information through domestic legislation. However, the cautious and narrow approach to providing access to information that permeates the paper and the draft Bill may undermine the effectiveness of the law in practice.

Accordingly, CHRI recommends that the draft Bill be amended to ensure that the benefits of transparent and accountable governance will be fully realised by the people of Malta. To assist in this, in addition to CHRI's critique, I have also attached a document that compares the key provisions of the thirteen freedom of information laws of Commonwealth countries.

If we can be of any further assistance with reviewing the FOI Bill, please do not hesitate to contact me on +91 9810 199 745 or +91 11 2685 0523 or via email at maja.daruwala@gmail.com. Alternatively, please contact Ms Claire Cronin, Programme Officer, Access to Information Programme at claire@humanrightsinitiative.org.

Yours sincerely,



Maja Daruwala
Director