

CAMPAIGNING FOR FREEDOM OF INFORMATION IN FIJI:

Lunchtime Speech to the World Association of Christian Communication

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Freedom of information is a familiar-sounding concept to which most people instinctively subscribe. In fact, it is a fundamental human right which has been recognised by the United Nations since its inception in 1945.

However, the legal implications of freedom of information are not widely understood – especially in countries which do not have a freedom of information law. This applies to all of the Pacific island nations, including Fiji.

Successive Governments in Fiji have expressed their support for the concept of freedom of information. In fact, I have been told that the SVT Government led by Rabuka through the 1990s laid the groundwork for an FOI law; but no Bill ever appeared. The Fiji Labour Party Government led by Mahendra Chaudhry from 1999 to 2000 prepared an exposure draft of an FOI Bill, which was released to the public for comment. However, the May 2000 coup intervened before the Bill could be introduced into Parliament.

The current SDL/CAMV Coalition Government, led by Laisenia Qarase, has also said that an FOI Bill is on its list of legislative priorities. However, it has not set a date for introducing the Bill into Parliament.

In an effort to re-start public debate on this issue, and put pressure on the Government to act, the Citizens' Constitutional Forum prepared a discussion paper and draft Bill on freedom of information earlier this year. This document was launched by the Leader of the Opposition, the Hon Mick Beddoes MP, at a workshop we co-hosted with the Journalism Programme at the University of the South Pacific on September 30.

The draft Bill we published includes three main sets of rules and processes. These are:

- First, a mechanism by which all government agencies are required to publish key categories of information relating to their activities, on a regular basis. In our discussion paper, we have called this the "Obligation to Publish".
- Secondly, a mechanism to enable members of the public to gain access to information held by government agencies, on request. This process entails a number of different principles, including the need for maximum disclosure across all branches of government, the need to limit the scope of exceptions, the need to establish

procedures within government agencies to facilitate access to information on request, and the need for an appeals process.

- Thirdly, we are proposing the inclusion of a provision to protect whistleblowers. This is to ensure that individual public officials, and others, are protected from sanctions for releasing information about wrongdoing. This would include, for example, protection from being dismissed from employment, provided the official had reasonable grounds to believe the information he or she released was true.

[If people wish to obtain a copy of the discussion paper and draft Bill perhaps we can e-mail it to them?]

Our FOI workshop was well attended, and feedback from participants has been excellent. There appears to be strong support for an FOI law in Fiji at the present time – at least among those who attended on the day. While this is encouraging, there are both political hurdles and resource issues still to be overcome if we are to get a new law into place.

One of the resource issues is the need for training of officials across the public service in operating under an FOI law. The law itself is only half the battle. The other half is instilling an understanding of open government among public officials, and ensuring they have the ability to respond to requests for information. This is likely to require an extensive training program during the implementation phase of the

new law, and periodic training after that for new staff entering the public service.

At the moment, there is something of a culture of secrecy within the public service in Fiji. A journalism lecturer who spoke at our recent workshop gave the following example. One of his students was seeking a copy of a report written by a delegation from the Government of India which had come to Fiji to review the sugar industry. There was no reason to think that the report was secret, but still the student had not been able to obtain it. The lecturer therefore got on the phone himself, thinking that one or two calls to the relevant Fiji government ministry would probably sort this out. However, an hour later, after more than 10 phone calls, he found he was not getting anywhere. As he put it, none of officials he spoke to “felt that they had the authority” to release the report. In other words, the problem was not that they knew it to be confidential, but rather that the officials were not sure, and perhaps preferred to err on the side of caution. The end result was that the lecturer had just as little luck in obtaining the report as his student.

What this story illustrates is that if you are to have open government then public officials must feel confident enough about what they are doing to release information on request.

Another example of secrecy in the Fiji government was given at our workshop by a lawyer. He described an incident in which he was acting for a client in a transaction involving a lease of Crown land.

There were certain restrictions on who might lease such land, and the relevant government ministry had informed the lawyer that his client was not eligible to do so. However, further inquiries revealed that the client might be able to lease the land, provided he could meet certain conditions. The public official to whom the lawyer was speaking listed the conditions for him over the phone. The lawyer asked to see a copy of the conditions in writing, so that he could be sure his advice to the client was accurate and complete. The public official said he could not release a written copy of the conditions.

As a consequence, the lawyer was left in a position where he could not analyse the conditions in detail and advise his client of all the options available, because he only had the information the public official had given him on the phone. He also had no way of knowing whether this information was accurate or what legal and other risks there might be for his client in agreeing to the conditions suggested by the official.

By contrast, if there had been an FOI law in place, the lawyer in this example could have enforced his request for a written copy of the conditions. This would have improved his advice and reduced the risks to his client. If the public official had felt that he had the authority to release the conditions on request, it might also have speeded up the transaction. Making sure that rules, procedures manuals and so on are available to the public also has the potential to reduce maladministration and opportunities for corruption, because everyone involved can then see how things should be done. This enables

people to object when things are not done properly, and take action to protect themselves.

In other words, members of the public will be able to see whether public officials are doing their jobs “by the book” only if “the book” is made available to them.

So one element of the training that public officials will need to implement an FOI law in Fiji is a clear set of rules for identifying which officials are authorised to release information. It might be that there is some information that any official can release, whereas other types of information require a formal request to be considered by a senior official within the agency concerned. This set of rules should ensure that officials know whether they have the authority to release information when it is requested.

A second element of the training will need to enable designated officials to determine whether particular requests for information should be refused. The FOI law will of course include various exceptions to the general duty of disclosure, and some officials will need to be trained to determine which requests fall within those exceptions. The CCF has taken the view that the exceptions to the duty to disclose information should be strictly limited to circumstances where a legitimate aim of government would be harmed if information were disclosed. Legitimate aims of government include national security, for example, and the protection of individual human rights, such as the right to privacy, as well as public health and safety, and

the protection of the environment. The CCF has also suggested that, where there is a possibility that disclosure of information would harm a legitimate aim of government, then the agency which holds the information should carry out a balancing exercise between the competing interests concerned, to determine whether the public interest in disclosure of the information is outweighed by the harm that disclosure would cause. This is called the Public Interest Override test.

In effect, what we are proposing is that the FOI law should identify certain categories of information which may need to be kept secret and, if a member of the public requests information that comes within one of these categories, then the government agency which holds the information should be required to apply the Public Interest Override test to determine whether the information will be disclosed. Our draft Bill also provides for an agency to grant part of a request for information, and not other parts, if there are legitimate reasons for withholding some of the information concerned.

Besides the need for training of public officials, another resource issue that will be significant for Fiji, in implementing an FOI law, is the need to improve record-keeping systems. Many government agencies in Fiji do not have computerised records, and often the paper records are not well organised or maintained. In fact, anecdotal evidence suggests that some agencies have back rooms full of bundled paper files without any system for retrieving information when it is needed.

Clearly, no matter how well trained the officials are, they are not going to be able to respond to requests for information in a timely way if the agency's record-keeping system is poor. Besides not knowing where particular information may be found, officials may well not know what information they actually hold. Where this is the case, the information might just as well not exist, because neither the public nor the agency itself is in a position to use it.

So, coupled with the need for training, there will be a need to update government agencies' record-keeping systems in the implementation phase of the FOI law. This is likely to be a costly exercise. However, the CCF argues that the cost is justified, because improved record-keeping will not only ensure that agencies can respond quickly to requests for information – it has the potential to increase effectiveness and efficiency across all areas of service delivery.

In closing, I might say something about what I referred to earlier as the “political hurdles” to the enactment of a freedom of information law in Fiji. As I have already mentioned, the current Government has indicated that an FOI Bill is on its list of legislative priorities. However, Ministers have been saying this ever since the Government was elected in 2001. What is more worrying is that their occasional positive comments on this issue have not been matched by their general conduct in office. There have not been any moves to instigate the cultural shift towards open government that will be needed to

accommodate an FOI law. In fact, there is no reason to think that secrecy within the public service is currently being addressed at all.

Shortly before I left Fiji on this trip, the Auditor-General released his annual report for 2003. As in previous years, this included a long and depressing list of cases where the Auditor-General has concluded that public funds were misused, either through corruption or maladministration. And this misuse extends right to the top, with a number of Chief Executive Officers and Cabinet Ministers being implicated.

What this shows is that we have a widespread problem in Fiji which affects all levels of the public service. Corruption and maladministration flourish in an environment of secrecy and fear. Like mould, they prefer the dark. Freedom of information will help to let the sunlight in, and for this reason it is a potential source of exposure and embarrassment for the Government. So this is one reason why they may not be in a rush to introduce the new law.

Another reason is that the current Government is not wholeheartedly supportive of our Constitution. They have made repeated calls for unspecified amendments to the Constitution to increase protection for the rights of indigenous Fijians, over and above the rights of other communities. Some Government supporters have even called for the entire Constitution to be replaced. Now, a freedom of information law is seen as being consequential to the Constitution. This is because it would fulfil an outstanding Constitutional obligation of the Parliament,

and it would enhance and extend the Bill of Rights set out in Chapter 4 of the Constitution. Enacting a freedom of information law would therefore demonstrate a level of commitment to the Constitution. Unfortunately, the Government appears to be reluctant to show this commitment, because they see it as being inconsistent with their calls for amendments. Or perhaps they simply see it as being a lower priority than their amendments.

Either way, there is some reason to doubt the Government's commitment to introduce an FOI law at the present time. Nonetheless, Ministers' comments continue to be positive, and there is a national election coming up in 2006. I am hopeful that our recent workshop will have served to re-start the public debate, and the CCF is now looking for ways to increase the pressure and gain wider support in Fiji for a new law to implement this important human right. If the Government does not act sooner, then at the very least we may be able to make it an issue in the election.