

FREEDOM OF INFORMATION UNDER MALTESE LAW¹

By Kevin Aquilina

1. Constitution Aspects of Freedom of information Legislation

In Malta, freedom of information is contemplated in two distinct fundamental freedoms' enactments. The first is contained in article 41 of the Constitution of Malta² and the second in Article 10³ of the First Schedule to the European Convention Act, 1987.⁴ The latter enactment incorporates into Maltese Law the Council of Europe's Convention on Human Rights and Fundamental Freedoms and the First, Second, Third and Fifth Protocols thereto. The text of the said Convention and the First Protocol thereof are contained in an Act of the Maltese Parliament and the Maltese Courts are empowered under the European Convention Act to declare ordinary legislation (other than the Constitution of Malta) which runs counter to the Convention and First Protocol as being null and void to the extent of their inconsistency with the rights and freedoms set out in the European Convention Act.⁵

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² Article 41 of the Constitution of Malta provides for freedom of expression and freedom of information. It reads as follows:-

'(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communications be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.'

³ This article reproduces *verbatim* the text of Article 10 of the European Convention of Human Rights and Fundamental Freedoms.

⁴ Chapter 319 of the Laws of Malta.

⁵ A law has been enacted by Parliament and published on 11th October 2002, the European Convention (Amendment) Act, 2002 (Act No. XXI of 2002) which, when brought into force, will also add the Fourth, Sixth and Seventh Protocols to the European Convention Act, thereby incorporating into Maltese Law the provisions of the said three Protocols.

2. Meaning of freedom of information

Freedom of information as dealt with in this article deals with seeking information. Freedom to seek information is not expressly mentioned in both Article 10 of the European Convention on Human Rights and Fundamental Freedoms and in article 41 of the Constitution of Malta. However, it is expressly contemplated in a few other international documents (e.g. Article 19 of the Universal Declaration of Human Rights and the draft Convention on Freedom of Information). On the other hand, it could well be argued that the latter two international instruments do not have the force of law in so far as they are not 'hard law' as defined in paragraph 1 of Article 38 of the Statute of the International Court of Justice: they are, 'soft law' having no legally binding effect.

Nevertheless, it must also be pointed out that both the Convention and the Constitution do permit any person who is pursuing information and ideas in which he has an interest to seek it. In other words, although there is no explicit obligation on, say, a Government authority to disclose certain information in its possession, the individual is permitted to seek that information which is freely available on the market. If, however, the information happens to be of a confidential nature, then the individual would be debarred from receiving such information as the Convention and the Constitution do not provide for such freedom. As Helen Fenwick argues,

'... the wording of Article 10 of the European Convention which speaks in terms of the freedom to "receive and impart information", thus appearing to exclude from its provisions the right to demand information; from the unwilling speaker. Moreover, the phrase "without interference from public authorities" does not suggest that Government would come under any duty to act in order to ensure that information is received'.⁶

⁶ Fenwick Helen, *Civil Liberties*, (London: Cavendish Publishing Limited, 1994), p. 191.

Even the European Court of Human Rights is of this opinion. In *Leander v. Sweden*⁷ the Court held that Article 10 does not confer on an individual a right of access to a register containing information on his personal position. Nor does Article 10 embody an obligation on a Government to impart such information to an individual. In *Gaskin v. U.K.*,⁸ whilst the Court reiterated what it had established in the *Leander* case vis-a'-vis access to information, it did grant access to information held by the local authority but in terms of Article 8. Further, Article 10(2) indicates that the disclosure of confidential material would be debarred *inter alia* under the ground of "national security". Indeed, every person is permitted to use all such means at his disposal to seek information if such information happens to be in the public domain. Nonetheless, apart from being conditioned by the exceptions to Article 10, freedom of information is restricted by other rights, notably, the right to respect for privacy contemplated under Article 8 of the Convention or the right not to interfere with one's correspondence found in article 41.

The exceptions to freedom of information under article 41 are wider than those of Article 10(2). What is to be noted is that the law considers telephony, telegraphy, posts, wireless broadcasting and television as means of communication whilst in paragraph (b) any law which imposes restrictions upon public officers which is shown to be reasonably justifiable in a democratic society is considered as not running counter to freedom of expression.

⁷ 9 E.H.R.R. 433.

⁸ 12 E.H.R.R. 36.

⁹ This Article deals with privacy.

Again, it should be noted that the exceptions mentioned in article 41(2) contain certain elements which do not seem to be listed in Article 10(2) such as those which impose restrictions upon public officers. But, on the other hand, due to the generic wording of the exceptions in Article 10(2), it would be necessary to consider each case on its own merits.

2. European Contribution to Access to Information Legislation

The United Nations Economic Commission for Europe has adopted on 25 June 1998 the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*. This Convention entered into force on 30 October 2001 and has been given effect to in Maltese Legislation in the Environment Protection Act, 2001 and the Development Planning Act, 1992 (as amended in 2001).¹⁰

Apart from the European Convention on Human Rights and Fundamental Freedoms and Protocols thereto referred to above, the Council of Europe has drawn up several recommendations to Member States on access to official documents, the latest being *Recommendation Rec (2002) 2 of the Committee of Ministers to Member States on Access to Official Documents* of 21 February 2002. In the said Recommendation, which, admittedly, has no binding force on Member States, the Committee of Ministers is recommending to Member States, subject to certain well-defined exceptions, to guarantee the right of everyone to have access, on request, to official documentation held by public

¹⁰ Malta signed the Convention on 18th December 1998 and ratified it on 23rd April 2002. For other measures taken by Malta, vide the Address by the Hon. George Pullicino, Parliamentary Secretary responsible for Planning and the Environment in the Ministry for Home Affairs and the Environment at the First Meeting of the Parties of the Aarhus Convention held at Lucca, Italy, on 21st October 2002 at <http://www.unece.org/env/pp/mop1/malta.doc>

authorities. This and previous Recommendations¹¹ on the same subject matter have nonetheless not been implemented by the State of Malta in its legislation.

3. Freedom of information and the National Archives Act

Chapter 339 of the Laws of Malta, regulates the National Archives of Malta. This Act came into force on 1st June 1990 and, prior to such enactment, there was no law obtaining in Malta which regulated the establishment a National Archives for the Maltese Islands. Furthermore, before 1st June 1990 there was no legal right of access to the documents which were stored in Government Ministries and Departments or which belonged to bodies established by law. It was at the absolute discretion of the Government of the day and its departments and bodies to permit or refuse access to documentation held under their custody even if such documents were no longer in use or were even rendered public at some time or other. The Act under consideration sets up the National Archives of Malta wherein documents of a public nature which are no longer in use for the purpose of administration are preserved.

The National Archives are to store administrative and departmental documents of the Government of Malta, including all documents of Ministries, Government Commissions, Authorities or Boards, after the lapse of thirty years from their being put away and it is not in use for the purpose of administration as may be certified by the authority in possession of that document. A blanket provision is given to the head of the authority who possesses the document in question to decide whether it may be retained or not by

¹¹ Confer, *inter alia*, the *Declaration on the Freedom of Expression and Information* adopted on 29 April 1982 and *Recommendation No. R (81) 19 on the Access to Information held by Public Authorities* adopted

that authority for more than thirty years. The rule in Maltese Law therefore is that access will be given to officially held documentation which is no longer in use thereby excluding public access by simply deciding not to close and put away a file, even if the file in question might no longer be needed by the public administration. A further restriction is that the competent Minister may limit access by the public to documents and objects which are preserved at the National Archives in certain circumstances listed in the enactment.

The purport of the National Archives Act is relatively restricted as it is mainly concerned with the maintenance of documents which are of historical importance and significance. It does not regulate documents which are still used by the administration. Thus, one should not confuse the National Archives Act with any future Freedom of Information Act which may be enacted for Malta as it is only the latter type of legislation which caters for access to current documents used by the administration. Undoubtedly, any future Freedom of Information Act should work hand in hand with the National Archives Act.

4. Access to Government held Information by Journalists

Article 47 of the Press Act¹² provides that the Government has to establish procedures to give representatives of the press the information which helps them fulfill their public tasks. However, this right is curtailed in the following instances:

(a) where such information could foil, impede, delay or jeopardize the appropriate process of pending legal proceedings or where Government or another public authority

on 25 November 1981.

¹² Chapter 248 of the Laws of Malta.

would be legally entitled to refuse to grant such information in a court or other tribunal established by law;

(b) where the granting of such information would entail the disclosure of information received by Government in confidence;

(c) where such information would violate an overriding public interest or a private interest warranting protection;

(d) where the information concerns matters related to national security or public safety;

(e) when the gathering of the information requested would place a disproportionate burden on the public administration.

The Press Act also provides that it shall not be lawful for Government to issue general instructions that prohibit the giving of information to any newspaper or licensed broadcasting service holding a particular view or to any specified newspaper or licensed broadcasting service.

5. Sectoral laws giving effect to Freedom of Information: the contribution of European Union Legislation

The Environment Protection Act contains a whole Part entirely devoted to the 'Right to Information'. Indeed, the Minister responsible for the environment may by regulations provide that members of the public or such categories of persons as may be prescribed shall be entitled to request from such Government departments, authorities, public corporations or other persons as may be prescribed such information that they may have in their possession and relating to the environment. Effect has been given to this

provision through the Freedom of Access to Information on the Environment Regulations 2001¹³ which, in effect, transpose European Union Directive 90/313/EEC of 7 June 1990 on *Public Access to Environmental Information*, which Directive however is in the process of being revised by the European Union, *inter alia*, in order to be aligned with the Aarhus Convention above-mentioned.¹⁴

6. Freedom of information in ordinary law

It cannot be said, from an examination of Maltese Law that, provision has been made therein to allow to individuals access to government held information. Indeed, from a study of the official secrets provisions and from the access to information provisions found in Maltese Law, one can note the following:

1. The rule is that all documents pertaining to the Government are secret and confidential unless otherwise expressly provided for or unless they have been placed at the National Archives and open for public inspection.

2. Government Ministries, Departments and Bodies have in various instances a right to demand the production of books, registers and other documents belonging to an individual (and here one has to consider the privacy implications of this right) but no corresponding right exists in the case of individuals vis-a-vis information held by a

¹³ Legal Notice 217 of 2001 which came into force on 1st March, 2002 in terms of Legal Notice 50 of 2002.

¹⁴ The latest position on the preparation of a new directive on public access to environmental information is that the Commission has amended on 5th September 2002 its proposal for a revised directive on the said subject. Vide COM (2002) 498 final at http://europa.eu.int/eur-lex/en/com/pdf/2002/com2002_0498en01.pdf

government ministry, department or body, even though such information may concern that particular individual (e.g. medical records, personal files, etc.).

3. Government employees and employees of various bodies established by law have a duty to maintain secrecy with regard to the business of their respective department or body.

4. There is no enactment of general purport where the citizen is given access to government held information. The matter is dealt with only sectorally. The most important legislation in this field is mainly legislation relating to archives and registries such as, e.g., the National Archives Act although legislation concerning parliamentary, judicial and environmental matters may make also some limited sectoral provision for access to government held information.

7. Conclusion

Malta remains a Western European country which has not yet enacted freedom of information legislation. On the contrary, the most salient characteristic of government administration in Malta concerning access to information is that the criminal law provides for the unauthorised dissemination of official information and this irrespective of the epoch of information technology in which we are living today. This is, indeed, a vestige of previous colonial administration where the British – prior enacting of the 1989 amendments to the Official Secrets Act and the Freedom of Information Act 2000¹⁵ - were encapsulated in a culture of secrecy.

¹⁵ The Freedom of Information Act received the Royal Assent on 30 November 2002 but in terms of article 87 thereof the right of access will come into force by not later than January 2005.

The legal position in Malta is that unpublished information in the possession of the Government of Malta and certain other statutory bodies however stored and which has been created, received or is used for official business belongs to the Government and the said bodies alone and (where there is no requirement that the said Government and bodies do not divulge the said information) it is almost always in the discretion of the said Government and bodies to divulge the contents of the information in their possession or control. Indeed, no one has got a legal right to access to information held by the Maltese Government or by a statutory body established by law unless such right is expressly bestowed upon such individual by means of a law obtaining in Malta.