Submission on the Fiji Draft Freedom of Information Bill

By

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London
January 1999

ARTICLE 19 welcomes the draft Freedom of Information Bill 1998 as a significant step forward for freedom of expression in Fiji, demonstrating a clear commitment to open government, democracy and human rights. The Bill sets up a system for access to official information which has many positive features.

ARTICLE 19 particularly welcomes the repeal of the Official Secrets Act (UK), the partial inclusion of a public interest balancing test in the exemption provisions, the requirement that government bodies give written reasons for all decisions affecting individuals personally and the requirement that departments publish regular information about their own activities and the categories of information they hold.

Possibilities for Improvement

There remain, however, a number of areas in which the Bill could be improved to reflect the best international standards and national practice in relation to the public's right to request and receive to official information.

<u>The Principle of Disclosure</u>

Section 5 of the Bill states:

The question whether official information is, under this Act, to be made available must be determined in accordance with-

(a) the purposes of this Act; and
(b) the principle that the information should be made available unless there is good reason for withholding it.

Section 10(1) states:

A person who wishes to get access to official information may request an agency to make the information available.

Any regime set up to provide for access to official information should be governed by the presumption that such information ought to be disclosed unless there are good reasons for withholding it. This reflects the public's right to request and receive information on a wide variety of topics. These sections

appear to be an attempt to assert this principle, but fail to do so clearly and unequivocally.

Section 5, while establishing the right to receive information, refers to purposes of the Act which are nowhere defined. Since those purposes must be to implement maximum disclosure of official information in practice, section 5 should spell this out. Section 10(1), which establishes the right to request information, is not directly linked to section 5. The two sections should be combined into one, asserting the positive right of everyone to request and receive access to official documents from agencies, subject only to the exemptions specified in the Act.

Both sections 5 and 10 refer to access to information rather than records. This leaves open the possibility that applicants will be told what information a particular record contains, rather than having access to the record itself. Such a situation is undesirable because of the possibilities for mistake or misrepresentation, particularly where civil servants seek to conceal or obscure what they regard as sensitive information.

The definitions in section 2(1) completely exempt the President, the Bose Levu Vakaturaga, the courts, the Fiji Intelligence Service and government commercial companies from the operation of the Act. Such blanket exclusions are inconsistent with a genuine commitment to the principle of disclosure. No public body should be completely exempt from the operation of the Act, even if the majority of the information it holds falls within one or more of the legitimate exceptions. The legitimate interests of such bodies will be sufficiently protected by the exemptions; there can be no justification for refusing to disclose information held by a public body which does not fall into one of the exemptions provisions. It is in relation to such bodies that the rationale for freedom of information is most important. Public scrutiny of such bodies is likely to strengthen rather than harm them by encouraging them to act in the public interest and by ensuring that corruption and other harmful practices are avoided.

The Exemption Provisions

In this area, the drafting of the Bill is unclear. Sections 6, 7 and 8 set out what initially appears to be an exhaustive list of exemptions to the general right of access to information. On closer examination, however, a further four exemptions are to be found in Section 17. A clearer and more consistent approach would be to include a comprehensive list of all exemptions in one section of the Bill, preferably immediately following section 5.

The principle of disclosure requires that exemptions be narrowly drawn and that access to information may only be refused if the agency concerned establishes that disclosure would satisfy a two-part test. Firstly, disclosure must threaten substantial harm to the interest protected by the exemption and, secondly, the harm from disclosure must outweigh the public interest in having the information.

The exemption provisions in section 6 protect a number of legitimate interests, such as national security and defence, but fail to incorporate the two-part test, notably by not providing for a balance to be struck between harm to those interests and the general public interest in disclosure. Although section 7(2) establishes a public interest test in relation to the interests it protects, it does not require proof of substantial harm to the interests listed and the test does not extend to the further exemptions found in section 17 of the Bill.

A number of the exemption provisions are excessively vague and open to overly broad interpretation. The experience of other countries shows that bureaucrats, accustomed to a culture of secrecy, often minimise disclosure for general reasons of administrative convenience. To avoid this possibility, exemptions should be drafted as clearly as possible. A vaguely worded or general exemption gives scope to the bureaucracy to avoid reform of the culture of secrecy which can have such a detrimental effect upon the right of the public to access to official information. For example, section 7(l) prohibits the disclosure or use of official information for improper gain or improper advantage. It would be preferable if "improper" were defined so as to prevent civil servants from using this provision to block legitimate disclosure. Section 15(2) appears to provide for an agency to refuse to release information in the form requested by the applicant if this is not an efficient means of releasing the information or would involve an infringement of copyright. It is unclear, however, whether the section allows the agency to refuse to release the information altogether or requires them to release the information in some, albeit altered, form. This section should be clarified to ensure that information is released in some form unless it is exempt.

Section 17(c) protects information made subject to a duty of secrecy by another Act. Such a provision has the potential to undermine the whole purpose of the Bill. The Bill already proposes the repeal of the Official Secrets Act (UK) and this commitment to openness should be extended to embrace all other secrecy provisions. Specifically, the Act should be deemed superior to other laws in this area. The exemptions provided for in the Bill should be regarded as comprehensive and other Acts should not be permitted to extend them. Existing secrecy laws should be amended to make it clear that officials will not be punished for disclosing information which they are required to release under the Freedom of Information Act. Finally, officials should be protected where they make an erroneous disclosure in good faith pursuant to a request under the Freedom of Information Act.

Power of the Ombudsman

Sections 21 and 22 provide for a right of applicants to complain to the Ombudsman on a variety of issues, including the refusal of an agency to release information. The powers of the Ombudsman are defined in the 1998 Constitution and the 1998 Ombudsman Act and enable him only to report and recommend action. They do not include any binding power to order an agency to disclose requested information. Decisions of the Ombudsman are not subject to judicial review.

While the possibility of consideration of complaints by the Ombudsman is to be welcomed, the failure to provide for a binding, independent review of agency decisions is a major flaw in the Draft Freedom of Information Bill. In order to be genuinely effective, any freedom of information regime should be subject to a three-level decision making process: the initial decision within the agency concerned, an appeal to an independent administrative body and a final appeal to the courts. The administrative body and the courts should have binding powers to order disclosure of information under the Act and their jurisdiction should cover any decision relating to exemptions, charges, as well as the issue of costs at any appeals. Without these safeguards, and the strictures that a system of independent review necessarily imposes upon civil servants, the culture of secrecy will not be overcome and administrative practices, including routine secrecy, poor record keeping and lack of accountability will continue. Also, the necessarily imprecise wording of the various exemption provisions requires interpretation by an independent body with judicial powers to ensure fairness and consistency in the decision making process across the civil service.

Charges

Sections 13(2) and (3) allow for the levying of charges for the processing of a request under the Bill, while section 13(4) allows for the possibility of advance charges pending consideration of an application. The experience of other countries demonstrates that even high access costs only defray a small proportion of the entire cost of a freedom of information regime and can have a significant deterrent effect. This is particularly the case when advanced charges are levied before a request is even considered. Any system of charges should be specifically defined in the Act, should take into account the right of members of the public to request and receive official information and should minimise the deterrent effect of any payments by avoiding advance charges and providing for full or partial refunds in the event of a refusal to disclose information. Agencies should not be required to levy charges and should be obliged to consider remission of charges in cases of financial hardship or where the release of information is in the public interest.

Other Matters

The Culture of Secrecy

One of the most significant stumbling blocks for freedom of information regimes in other countries has been continued opposition from civil servants due to an entrenched culture of secrecy. Real progress will not be made in ensuring the public's right to access to information until the civil service has adjusted to the idea of a presumption of openness in the transaction of official business. To this end, the Bill should establish mechanisms for education and promotion of the freedom of information regime throughout the civil service. These should stress the importance of freedom of information in a democratic society, promote effective procedural mechanisms for the processing of access requests, demonstrate and require effective and efficient record maintenance, provide incentives for agencies to perform effectively in relation

to requests for information and require agencies to submit annual reports to Parliament detailing measures taken to improve public access to information, remaining constraints and measures proposed to address these constraints.

Whistleblower Protection

To complement and underpin the requirement of openness and maximum disclosure, individuals should be protected from any legal, administrative or employment-related sanctions where they release information on wrongdoing. Wrongdoing in this context includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body. It also includes a serious threat to health, safety or the environment, whether linked to individual wrongdoing or not. Whistleblowers should benefit from protection as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing. Such protection should apply even where disclosure would otherwise be in breach of a legal or employment requirement.

In some countries, protection for whistleblowers is conditional upon a requirement to release the information to certain individuals or oversight bodies. While this is generally appropriate, protection should also be available, where the public interest demands, in the context of disclosure to other individuals or even to the media. Public interest in this context would include situations where the benefits of disclosure outweigh the harm of disclosure or where alternative release is necessary to protect a key interest. Such key interests include situations where whistleblowers need protection from retaliation, where the problem is unlikely to be resolved through formal mechanisms, where there is an exceptionally serious reason for releasing the information, such as an imminent threat to public health or safety, or where there is a risk that evidence of wrongdoing will otherwise be concealed or destroyed.

Access for All

The Bill should ensure that all members of the public have effective access to the regime established in the Bill. This should ensure that those who are unable to read or who are subject to any physical disability are nevertheless able to request and receive official information in a form appropriate to their individual circumstances.