Plenary Session 2

Sub Theme

The Fundamental Right of Citizens Pertaining to Access to Information

Some observations on how to protect the right of citizens pertaining to access to information

Mr. Alan N. Lai
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HONG KONG

"A democracy requires accountability, and accountability requires transparency. …The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. "

— Barack H Obama[1]

Ⅰ. History

The first ombudsman appeared in Sweden in 1809. But the oldest piece of freedom of information legislation predated the existence of the ombudsman. Sweden was the first country in the world to legislate more open government through its Freedom of the Press Act in 1766. The present wave of access to information laws began in the second half of the twentieth century. The passage of the Freedom of Information Act in the United States in 1966 was followed by Denmark, Norway, Australia, Canada and New Zealand. According to a study[2] in 2007, access to information legislation, sometimes called "sunshine law", can be found in more than 85 countries, which include both parliamentary democracies and socialist states. In most jurisdictions, access to information is underpinned by legislation. It may even be enshrined in the constitution. In other jurisdictions, such as Hong Kong, access to information is stipulated administratively in the form of a code.

Ⅱ. Rationale

In modern democracy, access to information held by public authorities is a fundamental right of the people. It enables the public to be fully informed about government processes and decision making. The existence of an access to information regime replaces discretion of officials with a right of the

1 "Memorandum for the Heads of Executive Departments and Agencies – Freedom of Information Act" issued by the Office of the Press Secretary of the White House on 21 January 2009

2 Staples, William R. (2007) *Encyclopedia of privacy* Westport, Conn. Greenwood Press

public to information without having to justify the application, and reverses the burden of proof. An underlying principle is that public records belong to the people and are held on trust for the people by the government. Access to information works as a check and balance against government decisions and provides the yardstick and standard towards which officials should work. Under an access to information regime, government officials should carefully prepare documents, make recommendations and record decisions, fully expecting them to be released and scrutinised by the public.

That there should be in existence an access to information regime does not mean that all government records should be open to the public. Normally an access to information regime tends to strike a balance between public interest considerations favouring the disclosure of information and public interest considerations favouring the withholding of information.

Ⅲ. Typical features

In determining whether there is good reason to withhold information, a control regime may adopt either a class based approach (e.g. Australia) or an outcome based approach (e.g. New Zealand). The class based approach exempts certain classes of official documents. The outcome-based approach focuses essentially on the predicted prejudicial effect of release rather than the nature of the information on its own. In short, the key question for holders of information is "What is the harm if we disclose this information?" This requires an intelligent value judgement in each case, with a bias in favour of release, if there is doubt about whether the "harm" will actually occur.

Apart from the exemption provision, a modern access to information regime normally comprises the following characteristics :

- procedures for obtaining information are simple and subject to specific time frame
- no need for requesters to provide justification
- no need for requesters to seek legal representation
- no or affordable costs
- approval not subject to political influence
- existence of an appeal mechanism (e.g. an information commissioner or ombudsman)

Ⅳ. Weaknesses

The existence of an access to information regime, however, does not guarantee that public information, other than the exempted items, is readily available to the public. It is the effective enforcement of the regime that is the most critical for the ultimate success of the right of access to information. Weak or ineffectual enforcement mechanisms can lead to arbitrary denials or encourage

agency silence, whereby no explicit denial is made, but rather the government agencies ignore the request for information or pretend that the law does not exist.[3]

In 2010, my Office completed an own motion investigation into the access to information regime in Hong Kong. The report identified a number of shortcomings in the system, for example :

(1) many government officers who were designated as Access to Information Officers in the departments displayed considerable misunderstanding of the provisions and procedural requirements of the regime;
(2) some departments had refused requests for information without giving any reason or with reasons not specified in the publicised exemption categories; and
(3) some departments had failed to inform requesters of the avenues of internal review and the appeal channel to the ombudsman, while others had overlooked their responsibility to coordinate replies involving multiple organisations.

Our findings further revealed that the crux of the problem was due to the fact that :

(1) the government had provided little or no training for Access to Information Officers and other staff;
(2) there had been no media publicity of the access to information arrangements for the preceding 11 years;
(3) while the government homepage featured the Code on Access to Information in both official languages, i.e. English and Chinese, the guidelines for the administration of the access to information regime was only in English;
(4) there was inadequate publicity within the government of the access to information regime. For a decade only two general circulars and one memorandum had been issued to remind staff of the regime; and
(5) there was no central monitoring of how individual departments should handle requests for information. Some departments issued their own internal circulars/guidelines, which had not been vetted by any central coordinating body. This resulted in a diversity of guidelines which might be inconsistent with the access to information system.

Ⅴ. Culture and mindset

However, in deeper analysis, the shortcomings I mentioned above are not the most damaging. There are remedies. What is most worrying is rather many government officials have yet to adjust their mentality and attitude in line with the development of open government, when they handle requests for information from the public.

[3] Laura Neuman, "Access to information Laws : Pieces of the Puzzle," in *The Promotion of Democracy through Access to Information : Bolivia*, Atlanta, GA : Carter Center, 2004.

There is a tendency for bureaucrats to over interpret into the exemption provisions. Let me give you an example.

An academic researcher asked the transport authority to provide information about the suicide incidents that had taken place along the local railway tracks during a given period. He asked for specific information about the date, time and location of the incident, age and gender of the person involved and duration of service disruption. The authority turned down the request claiming that disclosure of the information would lead to identification of the deceased or injured, thereby infringing upon the privacy of the individuals and their families.

Not satisfied with the refusal, the researcher made a complaint to my Office. Our investigation concluded that the transport authority was over-cautious and in breach of both the letter and spirit of the access to information system. The researcher asked for anonymised information. It would not be reasonably practicable to ascertain or deduce from such information alone the identity of the individuals concerned. Even if matching was carried out, it would be information not from the transport authority but those media reports that contained personal information. By extension, it would be information already in the public domain that might facilitate identification, and not the anonymised information requested of the transport authority. We concluded by substantiating the complaint. And the transport authority followed our advice to release the requested information to the researcher.

Here is another example.

The food and hygiene authority in Hong Kong conducted tests for melamine in food samples and announced the results on its website. However, only the amount of melamine found in unsatisfactory samples would be disclosed, while samples passing the test would all be classified as “satisfactory” without specifying the amount of melamine found.

A member of the public requested the authority to provide information on the amount of melamine found in food samples that had been tested “satisfactory”. The request was rejected on the ground that disclosing the amount of melamine in satisfactory food samples might cause concern and mislead the public that these foods were also unsafe because they contained melamine. The food industry might thus be affected unnecessarily and sue government for compensation.

A complaint was made to my Office. At the end of our investigation, we concluded that if the amount of melamine found in food products was made known, consumers could make an informed choice. Food manufacturers might adjust their production methods or prices to attract customers and avoid decline in sales. The authority should not have kept the community in the dark for fear of causing

public concern or disruption to the market. It's worry that disclosure might lead to legal liability was unnecessary, so long as it could state clearly on its website that the food samples had passed the test and that the results were based on evidence. We concluded that the complaint was substantiated and the authority released the information accordingly.

VI. Information systems and technologies

There are other impediments which can stifle access to information despite the presence of the relevant legislation. I can cite two here.

One factor affecting the effectiveness of an access to information regime is whether a comprehensive and duly protected record management and archive system is in place.

If records are not properly kept, even if citizens are entitled to access government records, this right to information is as good as none. Poor record management system or lack of archive system renders access to information stipulations useless because no record will remain that will reveal information about major functions and decisions made by the government. Without such, the public has no way of monitoring and scrutinising government decisions.

Archive law is one way of ensuring the maintenance of records of value. It provides that bureaucrats who carelessly or intentionally dispose of government records are to be punished. It ensures that records that reveal the operation and decisions of government and records of ethical, political and historical significance are archived and passed on to the future generations.

Another factor affecting the effectiveness of an access to information regime is bureaucrats' response to advancements in information and communications technology. In the modern age of information, official communication is carried out through a variety of mediums and official records take numerous forms. Electronic mails are only one of them. Other mediums and forms include text messages, SMS, facsimiles and even blogs and facebooks. Whether and how these records are filed, managed, archived and retrieved directly affects the ease of public access.

Paperless office and electronic information system enhances accessibility and openness of records by minimising their physical storage space, shortening the time for records retrieval and enabling parallel access by a number of users at the same time. Indeed, some jurisdictions take full advantage of electronic information system by proactively providing and updating information about government operation through the websites of government agencies. Using information and communications technology, some jurisdictions have released information in innovative ways and have enlarged the type and scale of information available to the public.

However, electronic information system could also facilitate the destruction of records. While a citizen can have access to a variety of information at the press of a button at the comfort of his home, a government agency can, also at the press of a button, dispose of electronically archived information.

Let me illustrate this with an actual case. A parent requested information about the academic banding of his twin boys. For your background, in Hong Kong, the examination authority assigns a banding number to each student for internal reference to facilitate the allocation of secondary school place. Such information is not disclosed to the public. The banding number ranges from 1 to 3, with 1 representing best academic results. A Band 1 student would be assigned to the top schools.

Going back to the case, the parent believes that both boys are of similar academic standing. But after the school place allocation exercise, one of the twin boys was assigned to an academically inferior secondary school. The parent requested the examination authority to reveal the boys' banding information. The authority refused on two grounds: first, disclosure would create an undesirable labeling effect and bring about unnecessary pressure on the students; second, the information had been destroyed already. Indeed, immediately after the school place allocation exercise was completed, the examination authority disposed of the information. Since the information was gone, no one had a legitimate claim of access.

We found the second reason arbitrary. Is the examination authority's decision to hastily erase the data reasonable? Shouldn't the students be entitled to view data that belongs to them, in the spirit of freedom of information and for safeguarding of personal data? At the end of the investigation, we urged the authority to re-consider its policy of instant destruction of banding information in the spirit of freedom of information. This case may well exemplify how bureaucrats work its way around the information request system.

Ⅶ. Conclusion

Administration of an effective access to information regime is a delicate matter. To maintain an effective regime, one has to fight bureaucratic tendencies, while maintaining a balance between public and private interests. The task of an ombudsman or whoever authorised to monitor the enforcement of an access to information regime is to discern and ensure that due process in compliance with access to information stipulations is practised by government agencies before they respond to information requests. Advancement in information and communications technology has raised public expectation for better and speedier government services. It has also presented good tools for government agencies to manage, store and share information. Yet technological advancement is only instrumental to facilitating access to information. It is the will and commitment of the bureaucracy and its culture that makes for a successful access to information regime.

For fellow ombudsmen who are present at the conference today, I would urge that if you are also tasked with the duties of enforcing an access to information regime in your jurisdiction, you should exercise fully your power to befit your role as "champion of open government". This is not easy, because as observed by John McMillan, "Ombudsman investigations have customarily focused on the way in which a decision is made, and less on the merits of the decisions under investigations."[4] It is therefore always difficult for an ombudsman to pressure an agency to exercise discretions in favour of public access without giving some deference to the agency that might argue for contrary decisions.

To overcome this difficulty, we need to equip ourselves for the job and stand ready to challenge the decisions of agencies. We cannot be wrong so long as we stick to the cardinal principle that access to government information on is a right and not a favour.

[4] McMillan, John 2008 Speech given at Australasian Pacific Ombudsman Region Meeting, March 27 Melbourne, Australia http://www.ombudsman.gov.au/commonwealth/publish .nsf/content/speeches_2008_02.

12th Asian Ombudsman Association Conference

Challenges for the Ombudsman in a Changing Socio-Economic Environment

"Some observations on how to protect the right of citizens pertaining to access to information"

Presented by
Mr Alan Lai, The Ombudsman of Hong Kong
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OFFICE OF THE OMBUDSMAN HONG KONG

"A democracy requires accountability, and accountability requires transparency. …The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."

— Barack H Obama

2

History

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- First Ombudsman: Sweden 1809
- First Freedom of Information ("FOI") legislation: Sweden's Freedom of the Press Act 1766
- Wave of FOI laws began in the 1950s -
  - USA 1966
  - Norway 1970
  - Australia 1982
  - New Zealand 1982
  - Canada 1983
  - Denmark 1985
  - Hong Kong: Administrative Code on Access to Information 1995

3

Right to information

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- In modern democracy, access to information ("ATI") -
  - is a fundamental right of the people;
  - enables the public to be fully informed about government processes and decision-making;
  - replaces discretion of officials with a right of the public to information without having to justify their information requests;
  - provides checks and balances against government decisions;
  - provides the yardstick and standard towards which officials should work;
  - urges officials to carefully prepare documents, make recommendations and record decisions

4

ATI regime allows exemptions

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- An ATI control regime may adopt -
  - a class-based approach; or
  - an outcome-based approach
- A class-based approach exempts certain classes of official documents.
- The outcome-based approach, which focuses on the predicted prejudicial effect of release, asks "What is the harm if we disclose this information?"
- Bias in favour of release

5

Typical features of ATI regime

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- A modern ATI regime normally comprises the following characteristics –
  - procedures for obtaining information are simple and subject to specific time frame
  - no need for requests to provide justification
  - no need for requestors to seek legal representation
  - no or affordable costs
  - approval not subject to political influence
  - existence of an appeal mechanism (e.g. an information commissioner or the ombudsman)

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Weaknesses

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- The key to success of an ATI regime lies in effective enforcement
- Study of Hong Kong's regime in 2010 identified systemic shortcomings, including –
  - many designated ATI officers in Government misunderstood the provisions and procedural requirements;
  - some departments refused information requests without giving any reason or with reason not specified in the publicised exemption categories;
  - some departments had failed to inform requestors of the avenues of internal review and the appeal channel;
  - some overlooked their responsibility to coordinate replies involving multiple organisations.

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Weaknesses (continued)

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- The crux of the problem lies in –
  - little or no staff training;
  - lack of publicity, internal and external;
  - the guidelines for the administration of the ATI regime was in English only;
  - no central monitoring of individual departments' handling of requests for information
  - a diversity of guidelines with inconsistent information.

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Culture and mindset

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- Government officials have yet to adjust their mentality and attitude in line with the development of open government.

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Culture and mindset

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- **Case 1**
  - Requestor: An academic researcher
  - Government agency: The transport authority
  - Information requested: Information about the suicide incidents that had taken place along railway tracks during a given period
  - Outcome: The request was rejected
  - Reason: The transport authority considered that disclosure would lead to identification of the deceased or injured, thereby infringing upon the privacy of the individuals and their families.
  - Ombudsman's conclusion:
    - The requestor's complaint against the transport authority was substantiated.
    - The authority was over-cautious and in breach of both the letter and spirit of the ATI system.
    - Not reasonably practicable to ascertain from the information requested the identity of the individuals concerned.

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Culture and mindset (continued)

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- **Case 2**
  - Requestor: A citizen
  - Government agency: The food and hygiene authority
  - Requested information: The amount of melamine found in food samples that had passed the tests and classified as "satisfactory"
  - Outcome: The request was rejected
  - Reasons:
    - Disclosure might cause concern and mislead the public that the food was unsafe because they contained melamine;
    - the food industry might be unnecessarily affected and sue Government.
  - Ombudsman's conclusion:
    - Disclosure would enable customers to make an informed choice;
    - food manufacturers might adjust their production methods or prices to attract customer;
    - the authority's worry was unnecessary, so long as it states clearly that the food samples passed the tests and the results were evidence-based.

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Information systems and technologies

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- Two other impediments to ATI –
  - Lack of comprehensive and duly protected record management and archive system
  - Advancements in information and communications technology –
    - official records take many forms: electronic mails, text messages, facsimiles, blogs, facebooks…
    - type and scale of information available to the public much enlarged; but
    - electronic information system could also facilitate the destruction of records.

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Information systems and technologies (continued)

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- **Case 3**
  - Requestor: A parent
  - Government agency: The examination authority
  - Information requested: The academic banding of his twin boys
  - Outcome: The request was rejected
  - Reasons:
    - Disclosure would create an undesirable labelling effect and bring about unnecessary pressure on students;
    - the information requested had been destroyed
  - Ombudsman's conclusion:
    - Students should be entitled to view their own data in the spirit of freedom of information.
    - The authority should review its policy of destroying banding information immediately after the allocation of school places.

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Conclusion

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- To maintain an effective ATI regime requires -
  - fighting against bureaucratic tendencies;
  - keeping a balance between public and private interests.
- An ombudsman's tasks are to -
  - discern and ensure that due process in compliance with ATI stipulations is practised by government agencies;
  - exercise fully his/her power to befit the role of "champion of open government", standing ready to challenge agencies' decisions.

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Conclusion (continued)

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- Access to government information is a right, not a favour.

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Thank You

The Fundamental Rights of Citizens Pertaining to Access to Information

Mr. Man Chong Fong
Commissioner
Commission Against Corruption
MACAO

A short introduction to the approach of Macau, China

The fundamental right of freedom to seek, receive and impart information andideas has been widely recognized and, among others, is enshrined in The InternationalCovenant on Civil and Political Rights, to which most countries in the world are signatories.

The full significance of this recognition is perhaps more clear when oneconsiders that in this age, when our lives are evermore dependent of information of allkinds, with societies woven in the complex processes of creation, transformation and exchange of information, the struggles for power are in a very significant way, struggles for access to information.

The fundamental right to a fair treatment by the administrative authorities often puts the individual in the awkward position of depending precisely on those who might be infringing on his or her rights, to access the information he or she needs to counter the wrongs being done.

And this as we all know very well, is why the right of access to information is a cornerstone of the protection of fundamental human rights.

Besides, this is not just a simple matter of secrecy vs. publicity.

To make matters more complex, the relationships between the State and the individual are asymmetric in that governments have huge information machineries working for them, while the individual is usually confined to those pieces and bits that are publicly available.

This means that individuals are frequently in no position to target specific files in their requests for information because they don’t even know that such files exist.

The veil of secrecy was once heralded as the most valuable of tools of government. As the prime-minister of a French King said, “deception is the knowledge of kings”.

The concept of Ombudsman embodies the exact opposite of that idea.

We have a mission that includes – and I quote from our by-laws – a clear mandate to investigate the grievance of any person or body of persons concerning any decision or recommendation made or any act committed or omitted by any administrative authority over which the jurisdiction exists. This implies that we should be able to protect the fundamental rights of individuals, including the access to information.

In our time, someone, somewhere must establish some kind of system to make sure that the individuals get adequate and timely access to the procedural and the nonprocedural information to which they are entitled, by reason of legitimate, personal and direct interest or by reason of a collective interest protected by law.

Collectively, we are the proof that there are many different ways to structure such a system.

Taking advantage of events like this also means sharing experiences and what I propose now is to describe the approach we have to the access to information in Macau, China.

Our current situation is of a generally easy and simple access by members of the public to the relevant information they need.

A brief review of the cases processed in 2010 by the Ombudsman shows that a total of 438 enquiries and 527 complaints were received overall.

Out of these, only a handful was due to failure of the Public Administration to disclose relevant information.

We attribute this positive situation to three main different factors:

1st – the legal framework;
2nd – the efficient and independent judiciary;
3rd – the preventive action of the Ombudsman

Ⅰ. The legal framework

The legal grounds to the system is laid by the Basic Law of Macau, which embodies the principle of "One country, two systems", under the Constitution of the People's Republic of China to establish the Special Administrative Region of Macau, enjoying a high degree of autonomy, with its own Executive, Legislature and Judiciary up to the power of final adjudication.

The Basic Law states that Macao residents shall have freedom of speech, of the press and of publication. In connection with this, it also states that the provisions of the International Covenant on Civil and Political Rights as they were applied to Macao in the past shall remain in force and shall be implemented through the laws of Macao. It further states that these rights and freedoms shall not be restricted unless as prescribed by law.

On the other hand, the Basic Law asserts the right of residents to resort to law and to have access to the courts and namely, the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.

It is interesting to learn that, on this basis, the two ordinary Laws pertaining to this matter are statutes which have been in force even before the hand-over of Macau in 1999.

The first one is the Administrative Procedure Code, dated 1999 in its current version, but largely inspired in previous versions dating back as far as 1991.

The rule of law is set as the first principle to which all administrative activity must adhere: Article 3 of the Code states that the Public Administration owes "obedience to the statutes...". This obedience has to be understood not just as abstaining of going "against the law" but as a specific command to have a positive legal basis to all its administrative acts.

In articles 4 and 5 the goals and proportionality of the administrative activity require that the Administration pursues the public good, while respecting the citizen's rights and legally protected interests.

In this context and besides being required to always act "*in good faith*" the Public Administration is then subjected to the "*principle of collaboration between the Public Administration and private persons*", under which "*both the bodies of the Public Administration and the private persons shall act in tight reciprocal collaboration, namely by (a) rendering the requested information and*

clarifications, unless they're of a confidential nature or belong in the sphere of personal privacy; (b) supporting and encouraging every socially useful initiatives."

Not just the principles are outlined but also specific provisions are included.

One article (63) describes in detail the right to be informed of all procedural facts and acts directly concerning the private person, as well as off all decisions made on their regard. It goes on to list the items that necessarily must be included in such information, e.g. notice of any insufficiency in the case of the private person that he or she should remedy. However, information which is lawfully classified as secret, confidential or detrimental to the success of the concerned administrative procedure must not be disclosed. The requested information must either be supplied within 10 days or else the grounds for refusing it must be provided in writing.

Another two articles (64 and 65) establish at length the right to access files and obtain administrative certificates of their contents, provided that these documents are not classified nor include trade or industrial secrets.

The Code extends these rights to all persons who, even with no direct concern to the information or the files, prove to have a legitimate lawful interest in the said access.

Finally, article 67 embodies the principle of open-file administration. Non-personal data may be accessed by anyone regardless of any procedure concerning him or herself. Security, criminal investigation and privacy are the admissible grounds for refusing access to those administrative files. Personal data may only be accessed by the interested parties.

This or any other equivalent set of provisions, however, would amount to just wishful thinking, should they be left to stand for themselves, at the mercy of compliant or non-compliant officers.

Ⅱ. The role of the judiciary

The legal system of Macau includes the well known principle that every right must be supported by a corresponding action and this is indeed the case of the right to access information.

The Administrative Litigation Process Code completes the previous provisions, creating a specific type of action for obtaining a notice of order to comply with the provisions of the Administrative Procedure Code I have just mentioned.

This makes all the difference because any public officer found in non-compliance with the court order commits a crime under the provisions of the same Code, punishable with imprisonment up to one year or fine.

Our experience shows that with adequate legal provisions in place and the means to make them effective, the fundamental right of access to information is protected.

The most common issues in this respect are cases where the administrative authority invokes limitations based on confidentiality or unavailability of information. But these may be scrutinized by the court, as such limitations cannot be opposed to the judiciary, except when a secret of State is involved. Even this must be documented by a certificate issued at the highest level, that the required information is indeed a secret of State.

Summing this up, I should say that the very existence of this system works well as a deterrent. The total number of actions started at the Administrative Court, which includes also other types of actions, is usually under 20 per year, and are decided within a short period.

Ⅲ. The role of the Ombudsman

So, you may ask, which role is left for the Ombudsman in regard of the protection of the right to information in Macau?

A preventive one. As I said before, the total number of relevant complaints received is negligible.

We organize regularly seminars targeting public servants, addressing issues of integrity, governance and transparency in the public administration, covering a wide range of topics which include the protection of citizen's rights as prescribed by the Law.

In 2010 we conducted a total of 2,821 such seminars and that has been and continues to be an essential part of our activity.

The same issues and topics are also addressed in seminars and meetings with the civil associations of Macau, promoting their awareness of integrity and fairness matters.

The few cases where the members of the public come forward complaining are caused by some of the administrative authorities taking longer than prescribed by law to reply to the requests.

These are almost always solved as soon as we ask the concerned department to explain the reasons for the delay.

Should they fail to take adequate steps to correct the reported issues, or submit an unreasonable explanation, we have the power to send a recommendation to that effect and, if we think it is justified, even to publish the recommendation and give it a high-profile in the media.

Once again, we feel that this set of tools acts as an additional deterrent to the authorities who might, otherwise, be tempted to keep relevant information away from the legitimate interested parties.

I hope that this very short introduction to the approach of Macau was informative and thank you for your patience.

The Fundamental Rights of Citizens Pertaining to Access to Information

Mr. Justice Narendra Kishore Mehrotra
Provincial Ombudsman (Lokayukta)
Uttar Pradesh, INDIA

In recent times, the right of the citizens to obtain information from the Government in regard to the functioning of the government has come to the forefront in all democratic countries.

Today, in most of the countries of the world, there are democratic forms of Government and people have rejected the monarchy or the King's rule. It was possible in the rule of monarchies that people could not know why they were being governed in the way they were. There has been a prerogative right of the King to prevent the disclosure of state secrets or even of "preventive the escape of inconvenient intelligence regarding intrigues of public servants." Even in India, there was a secrecy in the governance prior to independence by the Official Secret Act. The first of such Act was enacted by the Britishers in 1889 which was replaced by another Official Secret Act in 1923. This Official Secret Act has not been repealed even after the enactment of Right to Information Act. Only overriding effect has been given to Right to Information Act, 2005 over the inconsistent provisions of the Official Secret Act, 1923. The Right to Information Act, 2005 was enacted in India because of Article-19 of the Universal Declaration of Human Rights, 1948. It was reiterated in Article-19 of the International Covenant on Civil and Political Rights (ratified in 1978) which provides the Right to Freedom of opinion and expression without interference and to obtain and impart information and ideas through any media and regardless of frontiers.

The importance accorded to Freedom of Information internationally can be gauged from the fact that the United Nations General Assembly, in its very first session in 1946, adopted Resolution 59 (I), which states:

"Freedom of Information is a fundamental human right and the touchstone of all the freedoms to which the UN is consecrated."

Article-19 of the 'Universal Declaration of Human Rights', a United Nations General Assembly Resolution 217 (III) A of 1948, has laid out equal rights for all people and three fundamental

principles governing human rights: these rights are “universal”, meaning that rights apply to everyone whoever or wherever that person is, “inalienable”, in that they precede state authority and are based on the “humanity” of the people; and indivisible in that all rights are of equal importance. The Declaration recognizes Freedom of Expression- including Freedom of Information and Free Press- a fundamental human right. Freedom of Expression includes the right to seek, receive impart information and right to access information held by public authorities.

Article-19 (2) of the ‘International Covenant on Civil and Political Rights’, a United Nations General Assembly Resolution 2200A (XXI) of 1966 states:

“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

A similar right of the public to be informed and of the free press to inform the public is guaranteed by Article-10 of the declaration of European Convention of Human Rights, 1950.

After the independence, Indian Constitution was enacted and enforced on the 26th of January, 1950. There is a separate chapter of The Fundamental Rights in the Indian Constitution. Article-19 (1) (g) of the Constitution of India provides the fundamental right to freedom of speech and expression. The right to receive information may be deduced as a counterpart of the right to impart information, which is an ingredient of the freedom of expression guaranteed by Art. 19 (1) (a). In this fundamental right, the right to receive information was implicit. I say so, on the basis that without receiving the information about the act and conduct of public servants, it was not possible to develop an express and well considered opinion on any matter.

Secrecy can be defended in monarchic rule, but it is not acceptable in a sovereign democracy where there is a government of the people and the rulers are merely the people’s representative. In this reference, I may refer the views expressed by James Madison, the fourth president of The United States, which I quote, “A popular government without a popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own governers, must arm themselves with the power which knowledge gives.”

In Indian Constitution, State means- the Legislature, the Executive and the Judiciary. Legislature consists of elected politicians who govern the state, the executive consists of elected politicians and the bureaucrats who administer the state and the Judges judge everything in the state because of the different provisions in the Indian Constitution. Therefore, the people of India have a right to know

whether these public servants are acting in accordance with the Constitution and how well they are using or are determining the use of the people money and resources to run a country. In the democratic system, people cannot be denied the right to participate in deciding the policies which will ultimately determine their rights and obligations. After independence in India, the elected politicians liked the practices discharged by their erstwhile British rulers by maintaining secrecy and not disclosing the reasons behind their acts and functions. That is why, at the time of drafting Constitution, the drafters had the foresight to include several fundamental rights which were guaranteed against encroachment by the State and its agencies, including the Right to Equality, Right to Life, Right to freedom of expression. Political democracy, the foundation of which is free election based on appeal to reason, cannot function in a society where there is no freedom of speech. It is thus indispensable for the operation of the democratic system, which is based on "free debate and open discussion for that is the only corrective of government action," and which envisages changes in the composition of legislatures and governments. However, that the freedom of speech and expression includes the liberty to express to propagate one's own views only. It also includes the right to propagate or publish the views of other people; otherwise this freedom could not have included freedom of the press which is obviously included in it.

As I said earlier, the right to freedom of expression cannot be exercised without obtaining the entire information.

In a democratic country, the elected government is accountable to the people who elect them to rule every after five years. Therefore, I say that all the agents of the public must be responsible and accountable for their conduct. Where, there is a democracy and the state is run by elected representatives, the people have a right to know every public act, everything that is done in a public way by their public functionaries. They are entitled to know the particulars of the every public transaction in all its bearing.

There is a historic judgement of the Indian Supreme Court in 1975 in which one of the hon'ble judge found the right to know in the fundamental right of freedom of speech guaranteed under the Indian Constitution. But, at the same time hon'ble court clarified that the right was not absolute and was subject to consideration of public security.

This fundamental right to know about the conduct and actions of the public servants is such a right which is found to be a safeguard against oppression and corruption. Indian Supreme Court has expressed this view that the responsibility of the official to explain and to justify their acts, is the chief safeguard against oppression and corruption.

Indian courts had taken a step further and have said that besides the fundamental right of expression which implicit the people's right to know, there is another fundamental right included in the Indian Constitution is the right to life itself and the right to know is the part of this right.

I may remind that International Covenant on Civil Political Rights mandates that everyone shall have right to receive the information for which I may refer Article-40 and 49 of International Covenant on Civil and Political Rights. The member countries to these covenant had undertaken to take measures to give effect to all the rights including the right to information.

Now-a-days corruption is a world-wide problem and it is a subject-matter of inquiry and investigation by Lokpal/ Lokayukta/ Ombudsman or Vigilance Commissioner or Anti-Corruption Organization and people have started demanding corruption-free service as a fundamental right. This demand of fundamental right as a corruption-free service can be granted only if the right to information is guaranteed as a fundamental right in each and every country of the world. In the absence of the right to information as a fundamental right even the media is unable to expose cases of misuse of resources and corruption by public functionaries. That is why in most of the countries; it was considered necessary that there should be a separate institution to give recognition of a legal right to information and to ensure that people do not have to go court every time they want to exercise a constitutional right.

The public servants are the depositories of public trust. The public must be informed if the trust is breached. The people of the country have the right to know every public act and everything that is done in a public way by the public functionaries.

The right to information is a facet of and underlies all fundamental rights whether it be equality, liberty or any of the seven freedoms guaranteed to the citizens under either the Indian Constitution or any other Constitution of any other country because it can act as check against the misuse of power by those who are constitutionally bound to ensure the realization of those rights. In order to eradicate corruption, it is now for the public to be alert and watchful of their right to such information and compel disclosure because ultimately it is for them to use this weapon against all public functionaries to fix their accountability.

The Role of the Ombudsman in a Democratic Legal State

Dr. Máté Szabó
Parliamentary Commissioner for Civil Rights
HUNGARY

The nowadays ombudsmen have multiple, but changing roles and functions matching to the 21st century's new and transforming requirements. The Ombudsman is a trusted person who acts as an intermediary mediator between organizations within a broad scope of constitutional concept as well as representing the public interests.

The legal basis, his/her jurisdiction and the institutional forms can be diverse in every different country following traditions and the state structure. Observing Hungary, we can see that this country has gone through huge political and economic change since 1989. Although, the (old) Constitution was adopted in 1949, and later comprehensively amended in 1989, Hungary was the only former communist country in Eastern Europe that did not adopt an entirely new basic law after the fall of Communism. This situation has changed in 2011, when the Hungarian Parliament adopted a new Fundamental Law, which has also brought significant amendments in relation to the previous ombudsman-system in the country.

The Hungarian ombudsman institution came to life during the democratization process of the early 1990s and the office was formally established in 1995. The overall organizational structure with a range of ombudsman institutions was complex, with a general civil rights ombudsman (Parliamentary Commissioner for Civil Rights, sometimes referred to as the human rights ombudsman/commissioner) and three independent and equally ranked specialized ombudsmen assigned to guard specific constitutional rights (including data protection and freedom of information, the rights of national and ethnic minorities, and environmental rights). In accordance with the Fundamental Law of Hungary (adopted in April 2011), the new Act on the Commissioner for Fundamental Rights will create a unified ombudsman system with new mandate and new challenges.

Constitutional reforms in Hungary, 2011-12

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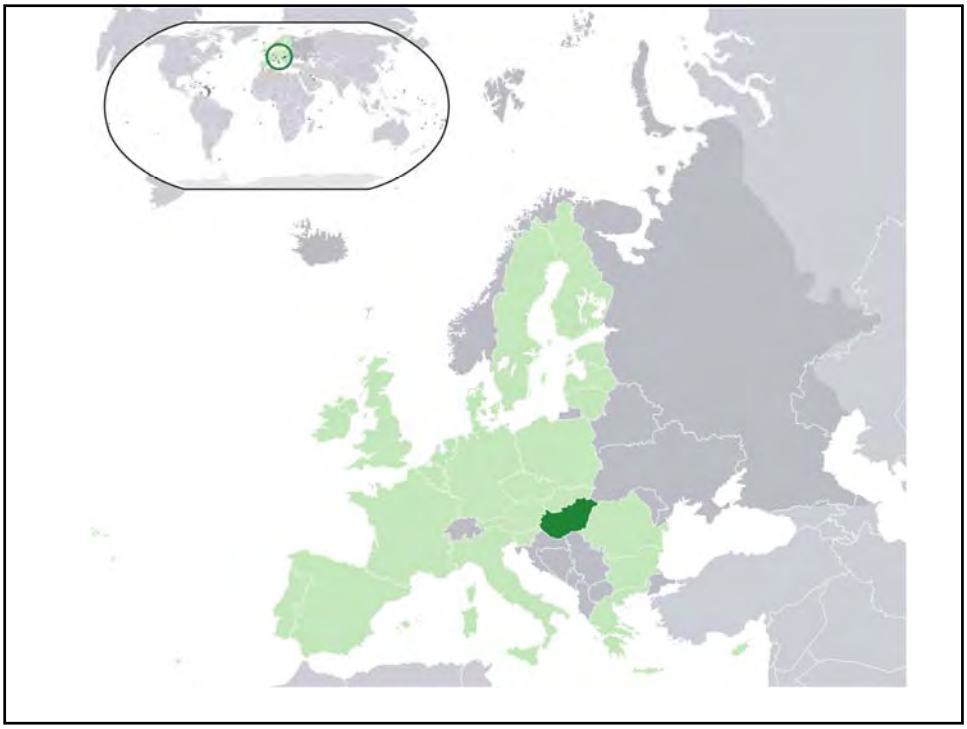


Introduction: Republic of Hungary

- Middle-Europe, member of the European Union
- Population: appr. 10 Million
- History: Hungarian tribes from Central Asia

896: Principality of Hungary

1000: Kingdom of Hungary

1848: revolution against the Habsburg empire (demanding political and human rights reforms)

- The form of government was changed from Monarchy to Republic briefly in 1918 and again in 1946, ending the Kingdom and creating the Republic of Hungary.

1948-1989: Communist era

The (old) Constitution was adopted in 1949 (Act XX/1949)

People's Republic of Hungary

23 October 1956: Revolution

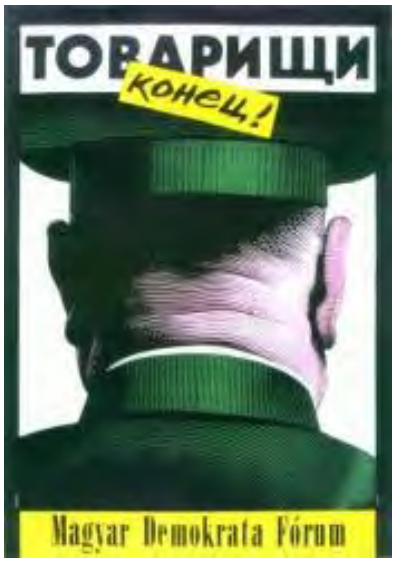
1989 – fall of Communism in Eastern Europe

Hungary, 1989: Round Table Negotiations- complete amendement of the 1949 Constitution,

1989: reburial of Imre Nagy

Republic of Hungary

Free parliamentary elections, 1990



Transition to Western-style democracy

Parliamentary representative democratic state, multi-party system, free elections, economic market

2004: member of the EU

Respect for human rights and political freedoms:

(Constitution, Constitutional Court, Ombudsman, 1993: general ombudsman for civil rights and specialised ombudsmen for data protection/freedom of information, national/ethnic minorities, environmental issues)

Constitutional reforms, 2011-12

April 2010: parliamentary elections won by a centre-right party (FIDESZ) with two-thirds majority and with the promise of introducing constitutional changes.

June 2010: ad-hoc committee for the preparation of the New Constitution.

March 2011: draft of the new Constitution submitted to the Parliament and presented to the public

18th April, 2011: parliamentary acceptance of the New Fundamental Law

(entering into force by 1st January, 2012)

„Easter Constitution" - Hungary

Socially and fiscally conservative constitution

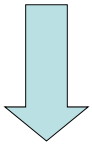
- preamble contains references to the Holy Crown, as well as to God, Christianity, the fatherland and traditional family values
- life of a fetus is protected from the moment of conception, same-sex couples may legally register their partnerships but not marriage
- ban on discrimination does not mention age or sexual orientation
- Life imprisonment for violent crimes without the possibility of parole
- judges' mandatory retirement age is lowered from 70 to the general retirement age of 62

- public debt from 80% to less than 50% of GDP: powers of the Constitutional Court on budget and tax matters restricted, the President may dissolve Parliament if a budget is not approved, only companies with transparent activities and ownership structures are allowed to bid for government contracts, the powers of the head of the National Bank also limited, the modification of tax and pension laws requires a two-thirds majority

Changes in the ombudsman system:

Art. 30 of the new Fundamental Law and new Act on the Commissioner for Fundamental Rights

(cardinal law: CXI/2011)



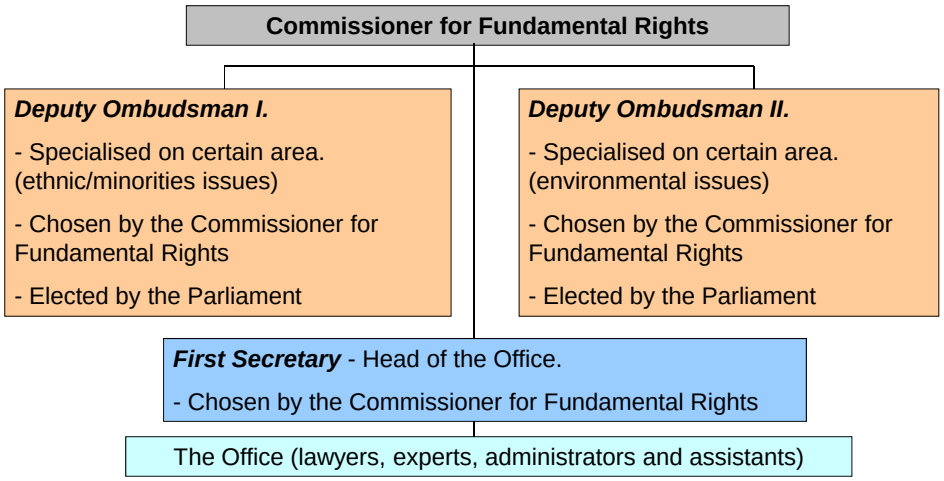
Create a simplified and unified ombudsman system with new opportunities.

- New name: **Commissioner for Fundamental Rights** (instead of Parliamentary Commissioner)
- **One single person** shall be nominated by the President of the Republic and elected by the Parliament for six years.
- Changes in the **organizational structure**:

An unified ombudsman system will be created from the current complex system with four ombudsmen.

Changes in the organizational structure:

Hierarchical structure:



The mandate of the General Ombudsman

- **Greater independence** (even from the parliament by leaving the former „parliamentary" attributive from the name of the institution)

  Through investigating „improprieties related to fundamental rights", the commissioner is a controller of the public administration and not part of it.
- **Empowers the commissioner with special competencies in the field of human rights protection.**

  In the new legislation, there will be an opportunity to launch **special proceedings** related to organizations which are not public bodies (e.g.: companies, banks, social organizations).
- The Commissioner acts like a kind of "*constitutional filter*".

  (He will forward the constitutional complaints to the **Constitutional Court**.)

Different scenes of the ombudsman's work…

Thank you for your attention
and see you in Budapest!