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
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> *"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. "*
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> — Barack H Obama[1]

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.

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[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

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 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.

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)

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 :

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[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.

(a) 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;

(b) some departments had refused requests for information without giving any reason or with reasons not specified in the publicised exemption categories; and

(c) 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 :

(a) the government had provided little or no training for Access to Information Officers and other staff;

(b) there had been no media publicity of the access to information arrangements for the preceding 11 years;

(c) 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;

(d) 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

(e) 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.

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.

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.

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.

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 is a right and not a favour.

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The Ombudsman, Hong Kong
17 November 2011

[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.