

## **The fundamental rights of citizens pertaining to access to information**

### **A short introduction to the approach of Macau, China**

The fundamental right of freedom to seek, receive and impart information and ideas has been widely recognized and, among others, is enshrined in The International Covenant 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 one considers that in this age, when our lives are evermore dependent of information of all kinds, 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 non-procedural 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:

- 1<sup>st</sup> – the legal framework;
- 2<sup>nd</sup> – the efficient and independent judiciary;
- 3<sup>rd</sup> – the preventive action of the Ombudsman.

## **1. 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.

## **2. 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.

## **3. 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.