Truth, Transparency and Accountability

The State’s duty to inform

Essential to the right to good governance

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The Parliamentary Ombudsman - Malta

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Truth, Transparency and Accountability

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Public Service Ombudsman Group Round Table Conference
On the occasion of the 20th Anniversary of the setting-up
of the Office of the Ombudsman in Malta

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House of Representatives, Valletta – Malta
Truth, Transparency and Accountability

The State’s duty to inform

essential to the right to good governance
“The Parliamentary Ombudsman is the shield of the citizen and the conscience of the Public Administration”

JOSEPH SAID PULVICINO
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It was with great pleasure that I accepted to host and chair the Roundtable organised as part of the activities for the Public Sector Ombudsmen Group of which Malta’s Parliamentary Ombudsman has been a member for many years. The group includes the Parliamentary Ombudsman of the United Kingdom, the Ombudsman of the Republic of Ireland, the Ombudsman for Northern Ireland, the Ombudsman of Wales and the Scottish Public Service Ombudsman and the UK Housing Ombudsman, the UK Local Government Ombudsman and the Ombudsman of Gibraltar.

We had the privilege and the honour of sharing our experiences with these distinguished guests, who actively participated in the proceedings enriching the debate with contributions that reflected their standing in the Ombudsman world and their knowledge of the theme chosen for discussion. The Roundtable coincided with the 20th Anniversary of the setting up of the Ombudsman institution in Malta and was flagged as an event to mark that auspicious occasion. The Ombudsman in Malta enjoys full autonomy and independence from the Executive. It is a constitutional authority, accountable directly to Parliament and the Ombudsman is considered to be an Officer of Parliament.

It was therefore right and fitting that the Roundtable should be held in Malta’s new House of Parliament and chaired by its President. It was also a sign of the respect Parliament has towards the Ombudsman as an institution and participants in the Roundtable showed their appreciation. The theme chosen by Malta’s Ombudsman for the Roundtable - The State’s duty to inform, an essential element of the right to good public administration - is highly topical and controversial in the country’s political scene. The Ombudsman correctly highlighted the theme in the wider context of truth, transparency and accountability.
I have had occasion as Speaker of the House to deliver a number of rulings on the need to be faithful to truth when providing information, following requests made during question time. These included a landmark decision setting out in what circumstance a Minister is bound to present documents before a Parliamentary Committee.

The Roundtable was addressed by a panel of three speakers who introduced the discussion from different angles. Malta’s Data Protection and Information Commissioner, Mr Saviour Cachia, dwelt on the interpretation and application of the Freedom of Information Act, that came into force in 2012. He dwelt on the problems he encounters when reconciling general data protection regulations and requests for the disclosure of information under that Act and the Data Protection Act. Two separate laws under which he exercises functions that could apparently seem to be conflicting.

We were fortunate in having as another main speaker the Irish Ombudsman Mr Tyndall, who is also the Information Commissioner in his country. Mr Tyndall is currently the Vice President of the International Ombudsman Institute. He could therefore speak through experience and with authority on the role of the Ombudsman to promote openness and transparency in the public administration, through a correct interpretation and application of the freedom of information legislation in Ireland.

The third speaker was Judge Giovanni Bonello, a former judge of the European Court of Human Rights and an authority on fundamental rights. Referring to that Court’s case law, Judge Bonello outlined the limits of the State’s duty to disclose information. He emphasised that freedom to receive information could not be construed as imposing on a State a positive obligation to disclose to the public any secret documents and information concerning its military, its intelligence service security and police. Beyond that however, the State is expected to respect the right of citizens to receive information on the conduct of public affairs.

The political parties, represented in Parliament, accepted an invitation to send two representatives to contribute to the Roundtable. The Minister for Justice, Culture and Local Government the Honourable Owen Bonnici, and the Honourable Deborah Schembri, Chairperson of the Social Affairs Committee of the House, participated on behalf of Government, while the Honourable Carmelo Mifsud Bonnici former Minister for Justice and the Honourable David Agius, Opposition Whip, represented the Opposition.

Of note was the contribution made by Minister Bonnici on the right of private citizens to be forgotten in respect of information on their private lives. A right
which is being regularly debated in international fora. Ombudsman Said Pullicino emphasised the need to strike a correct balance between the right of the citizen to be informed and the duty of the State to provide information. He emphasised that the limits of non-disclosure to the State’s duty to inform were central to the theme being discussed. A lively discussion followed these contributions in which participants gave their reactions based on their personal experiences in their jurisdictions.

Finally Professor Aquilina, the Dean of the Faculty of Laws in the University of Malta, rounded up the various contributions. While doing so, he referred to the 54 rulings I gave and published during my Presidency, 20% of which all deal with information matters. He also highlighted my comment that in order to fight corruption and to have good governance one needs to have an efficient right to acquire information. Accessibility to information was in itself a deterrent to corruption.

I can add that Ombudsman Said Pullicino in his concluding statement made an important observation when he said that “I think that first of all it is in the interest of the public administration itself to make public the information that should be made public. Otherwise in the long run it would cause damage to the administration itself. If Blair had been furnished with the correct information at the right time, we might not have had an Iraq war”.

The Roundtable was undoubtedly a success and a positive experience. It was an initiative that focussed attention on a vital aspect of good governance that was being debated in Malta at the moment. The input provided by the Public Sector Ombudsman Group enriched the proceedings giving it a welcome international flavour.

It was also a joint, first initiative between the House of Representatives and its Ombudsman that in a fitting way, marked the 20th Anniversary of the setting up of the Institution. Hopefully the proceedings of the Roundtable would have a wider echo within civil society. It is for this reason that I gladly accepted the suggestion by the Ombudsman Said Pullicino to publish the records of the event that could contribute to promote transparency and good governance.
State’s duty to inform

Introduction to the theme
by the Parliamentary Ombudsman,
Chief Justice Emeritus
Joseph Said Pullicino
Core guiding principles

The core, guiding values that must underpin any discussion on the State’s duty to inform are undoubtedly truth, transparency and accountability. It is a general perception that truth is a rare commodity in politics, in a wide sense. It has been said, and not just in jest, that politicians must sometimes tell the truth. Such a Machiavellian approach is in this day and age, unacceptable. Indeed Ministers, Parliamentarians and administrators of public entities are expected to be honest when imparting information on their activities. It has long been a golden rule in the British Mother of Parliaments that, if a Minister or one of its Members lies or willingly misleads the House - and is caught out in the act - he has only one honourable thing to do - resign or be sacked.

Truth is relevant to the right to good public administration because the Executive and public administrator cannot be held accountable for their actions or inactions unless they are transparent in their management of public affairs. On the other hand, transparency cannot be achieved unless a correct knowledge of the facts and what made them happen are known and in the public domain. That knowledge is essential to ensure proper accountability. Accountability presumes that those to whom one is accountable are put in a position to arrive at an informed judgement, in full knowledge of the relevant facts.

Level of accountability

The level of accountability expected of the Executive depends greatly on the relationship between Government and Parliament. Regrettably, the institutional and constitutional set up in Malta favours a strong Executive and a weak Parliament.
Parliament, as an institution, is not administratively autonomous. There is no clear cut distinction between the legislative and the executive powers. Not only are Ministers and Parliamentary Secretaries Members of Parliament, as is the practice in the Westminster model, but many government Members of Parliament occupy top positions in public entities and corporations. In such a scenario it is obvious that it is difficult for Parliament to exercise real control over the executive. A watchdog cannot credibly and effectively watch over itself.

There is unfortunately a tendency to relegate effective accountability to the time when the electorate is called upon to renew the government's mandate. In such a situation, it becomes even more impellent to strengthen the democratic process, by ensuring the citizen's right to be fully informed of the conduct of the public affairs by the executive and public authorities. This can best be achieved by putting in place legislation to guarantee this right and to define and regulate the consequential duty of the State to provide correct and timely information, within clearly established parameters and due safeguards necessary for the common good. A duty that is a constituent element of the wider right of the citizen to a good public administration.

It is useful at this stage and as an introduction to the theme of the Roundtable, to comment on the general principles of good public administration that need to be kept in mind during these discussions.

**General principles of good public administration**

1. It needs to be generally accepted that it is only through the process of correct and timely information on the actions of the Executive that transparency can be assured and accountability secured. These values are of the essence of democracy and have to be safeguarded at all times.

2. Providing information should therefore be the rule; withholding it the exception. This means that the right of the public to be informed translates into the duty of the executive to inform the public.

3. The executive is answerable to Parliament that has the right and the duty to inquire into the conduct of public affairs. The House of Representatives therefore has the right to be fully informed by Government to be in a position to judge, approve or disprove of the actions of the Executive. At that level the balance of the right to be informed should, in case of doubt be tipped in favour of disclosure.

4. The right to be informed, like all other basic rights, is not absolute. There are constitutional and statutory limitations specifically intended to protect the
national interest and the rights of individuals including legal persons. It is in the
definition of these limitations that conflicts of interpretation arise. It is an area
that needs to be constantly kept under review to ensure that limitations to this
basic right are kept to what is strictly necessary.

The limitations of the constitutional, fundamental right of freedom to receive
ideas and information without interference, set out in sub-article 2 of Article 41 of the
Malta Constitution, are further elaborated in the Freedom of Information Act. This
establishes the right of individuals to receive information held by public authorities
in order to promote added transparency and accountability in Government. Part
V of that Act lists conclusive reasons for not disclosing official documents. The
interpretation of the provisions of this Act, their application as well as the promotion
of their observance by relevant public authorities are entrusted by law, in the hands of
the Information and Data Protection Commissioner.

Guidelines on Disclosure of Public Contracts
Judged from the strict perspective of the principles of good public administration,
the following guidelines should apply when Government is faced by demands for
the disclosure in Parliament of contracts negotiated with commercial entities for the
provision of services:

a. During the process of negotiation the Executive has a wide margin of appreciation
   on whether or not to provide information. At that stage, it should be guided by
   public interest and is entitled to take any measure it deems fit to ensure that
   negotiations would not be prejudiced by untimely disclosure.

b. Once an agreement is finalised it should, in principle, be made available to
   Parliament within a reasonable time and submitted to public scrutiny. Non-
   disclosure should be an exception and strictly regulated by law, regulation or
   protocol. These agreements generally involve the expenditure of public funds
   and often entail long term, binding commitments that could involve successive
   administrations. The underlying, constitutional principle should clearly be that
   the electorate, through their representatives in Parliament, have the right to know
   what agreements that affect their lives have been concluded by the Executive,
   entrusted by them to administer public affairs. At that stage exceptions allowing
   non-disclosure need to be restrictively interpreted.
   Non-disclosure can only be justified on the grounds of national interest. It has
to be adequately proved that substantial harm would result to the national interest if the document is published and that non-disclosure to avoid such prejudice is in the national interest. It is generally accepted that an agreement could contain commercially sensitive information that could undermine the protection of commercial interests of a natural or legal person including intellectual property. In such case the Executive would be entitled to refuse access to such a document but this only and if there is no overriding public interest that requires disclosure.

In these circumstances, if only parts of the requested document are covered by this exception, the remaining part of the document should be released. Care should therefore be taken when negotiating agreements of this nature to ensure that the other contracting party is aware of the Executive’s obligation to respect the right to Freedom of Information and of the limitations of that right. Clearly determining what is in the national or public interest is not to be tainted by political expediency or the sensitivity of the contracting parties.

**European Code of Good Administrative Behaviour**

Reference is made to Article 4 of the Regulation (EC) 1049/2001 of the European Parliament and of the Council of Europe regarding public access to European Parliament, Council and Commission documents. The exceptions to the duty of disclosure listed in that Article though not binding on Malta, form part of the European Code of Good Administrative Behaviour that all Member States are enjoined to observe. One has to be motivated by these guidelines when determining whether transparency should take precedence over commercial sensitivity. It is clear that in some cases non-disclosure is totally unjustified. In others it could be justified in the public interest to disclose the whole document with the exception of commercially sensitive information.

This area lacks definition and needs to be studied to determine with more precision the parameters within which non-disclosure would be justified in the public interest. The Freedom of Information Act should be revisited to bring it in line with more progressive legislation.

The issue becomes more delicate and perhaps even more impellent, when one considers how often the right the Executive invokes the right not to disclose agreements to Parliament even when they contain no commercial, sensitive information. In the light of the principles stated above there should be no reason why Parliament should not be fully informed of the contents of such agreements, even if in a limited and restricted manner.
Striking the right balance

One way to strike a correct balance between the interests of all parties involved would be to have a protocol that would establish how such restricted information could for example be transmitted to the Leader of the Opposition and/or to Select Committees of the House. This under confidentiality and subject to agreed safeguards, thus excluding them from the immediate public domain.

A similar process has already been adopted in certain laws as in the Malta Citizenship Act (Chapter 188) that includes provisions imposing secrecy and confidentiality in the process of granting citizenship. The act provides that the Leader of the Opposition is to be a member of the Monitoring Committee to monitor the workings of the individual investor programme but is himself bound by law not to divulge certain information.

Considering the principles of good administration and also those of institutional and constitutional correctness, it does not seem proper that Parliament or at least the Leader of the Opposition is not privy to commercial agreements entered into by the Public Administration, even if they contain sensitive commercial information. It does not seem to be proper and correct that this is so when it is not only the Government that is fully aware of the contents of such agreements but also top civil servants, executives of public authorities, consultants and technocrats in Malta, Europe and elsewhere.

One can also safely observe that sharing information on the management of public affairs, as far as this is possible in the public interest and within the stated limits, is surely one of the most effective ways to prevent and combat corruption in the management of public affairs.
Conclusion

These considerations prompted me to propose the theme of “The State’s duty to Inform - essential to the fundamental right of the citizen to good public administration” for discussion by the Roundtable, held on the occasion of the visit to Malta of the Public Service Ombudsman Group. It is a theme that interested all participants charged with ensuring good governance. They all welcomed the opportunity to exchange opinions and experiences.

The outcome was a very positive and rewarding one. I am grateful to the President of Malta’s Parliament for hosting and chairing the Roundtable. I also appreciate his willingness to contribute towards the publication of the edited records of the Roundtable, that is being done jointly by his Office and the Office of the Ombudsman.

A position paper outlining important points for discussion is also being published.
Left to Right, Mr Peter Tyndall – Ombudsman and Information Commissioner of Ireland, Mr Jim Martin – Ombudsman of Scotland, Dr Tom Frawley CBE – Ombudsman of Northern Ireland, Ms Denise Fowler – UK Housing Ombudsman, Chief Justice Emeritus Joseph Said Pullicino – Parliamentary Ombudsman of Malta, Dr Jane Martin - UK Local Government Ombudsman, Mr Saviour Cachia - Data Protection and Information Commissioner of Malta, Mr Mick Martin – Managing Director – UK Parliamentary and Health Ombudsman, Mr Nick Bennett – Ombudsman of Wales and Mr Mario Hook – Ombudsman of Gibraltar.
Right to information: The State’s Duty to Inform

Introduction
In his Ombudsplan for 2014 the Parliamentary Ombudsman emphasised that transparency and accountability which should serve as a yardstick to judge whether the public administration has acted correctly. He considered that it was not possible to reach a correct and fair opinion on any administrative act in the absence of essential and timely information. This was more imperative when such information had been legitimately requested.

In recent times there has been sustained controversy regarding the availability of information held by Government and other public authorities in respect of their actions. The reasons given by these authorities for withholding information have been repeatedly challenged, resulting in allegations of lack of transparency and lack of open government. Such conflicts do not augur well for good governance. These conflicts should be resolved once and for all through a serious, serene debate involving the political parties as well as those who have an interest in such issues. Informed debate should in the public interest, lead to regulations which are clear and binding on all. They should include provisions which determine the limitations to the right of Parliament and the citizen to be informed on actions of the public administration, including public authorities and entities, as well as the circumstances in which information of a specific nature may be withheld, within parameters laid down by law. This in the public interest.

An issue that is of interest to institutions within the European Union
It is recognised that the right to information is of immediate concern to institutions of the European Union. The European Parliament, the Council as well as the
Commission, regularly focus their attention on how the right to information should be guaranteed in the process of the formulation of legislation and Directives so as to ensure transparency.

The European Ombudsman has lately held a trialogue on this issue on the premise that the European Institutions are obliged under the Treaty, and moreover have an interest, to legislate in as transparent a manner as possible in order to ensure that the public continues to have faith in them. She had therefore invited the participants to contribute their opinions on the correct balance between facilitating the position of the authorities at the negotiation table while at the same time ensuring more transparency. The participants were further invited to focus on how the administration could be more transparent and how the citizen's right to information on documents needs to be safeguarded. It is manifestly clear that matters relating to inter-state relations impact in a greater way at national level since such matters concern the relationship between the governing authority of the Union and the citizens and therefore have a direct effect on the rights of the citizens of Member States and on the common good. The European Ombudsman's intervention supports the role of the Ombudsman of Member States on this issue.

**The principles involved – some reflections**

Malta's Parliamentary Ombudsman puts forward the following reflections amongst others for consideration:

1. The Executive and management boards of public entities and authorities administer the common wealth which has been entrusted to them either through an electoral mandate or by law.

2. As administrators, they are in duty bound to account for their administrative actions and decisions not only at the expiry of their mandate but also at all times when so requested.

3. This accountability can only be ensured if the administration is transparent. An administrator needs not only to earn, but also to continue to enjoy and sustain the trust of those who elected or appointed him.

4. In a modern and progressive democratic society, such trust must necessarily be built and strengthened on correct and timely information on the policy, decisions and actions of the administrator.

5. It is for these reasons that it is now universally recognised that the right to information is a vital and essential element of the right of a citizen to good public
administration. Such right is not limited to the provision of information that concerns a citizen personally and directly. It also extends to information that concerns such citizen as a member of the society to which he belongs and in the same degree.

It is also recognised that the right to be informed, as in the case of all other rights, is not absolute but is subject to limitations which are reasonable and justified in a democratic society. The principle however remains that information which has been requested must be given in a correct and timely manner in line with parameters established by law. Legislation should lay down in a clear and precise manner, the specific circumstances when, the administrator may as of right, refuse to accede to such a request and the modalities how he could do so. In some cases, non-disclosure is not only a right; it could indeed be a duty to safeguard the common good the national interest.
Maltese legislation already regulates the concepts of freedom of information and the protection of data. The law specifies which data is protected and which, on the other hand, can be released. It also provides for circumstances when a public authority can refrain from making information available when this is requested. It also lays down how and when the relevant provisions of the law are applicable. However, notwithstanding the very important initiatives and investigations undertaken by the Commissioner for Information and Protection of Data, including sometimes the imposition of sanctions for failure to observe his rulings, it would appear that legislation in this important area is not attaining its main aim – that of achieving national consensus on the citizen’s right of access to information from the public authorities.

**Confrontation and contestation**

On the one hand, it is obvious that the authorities are often reluctant to provide information in respect of matters which not only impact directly on important aspects of the country’s economic activity, including the provision of essential services of direct interest to the citizen such as in the health, transport, education and energy sectors, but also relates to matters of lesser importance but which however still remain of public interest such as the engagement of personnel with public entities and authorities, including their conditions of employment.

On the other hand it is being strongly objected that the refusal to provide the requested information, or delaying such information, allegedly in a systematic manner, is being used as a tool to shield the public administration, thus enabling it to govern unhindered. This situation has led to allegations that the administration is deliberately hiding important facts and lack of transparency.

It has to be stated that this is not something new. It has been and still is the philosophy of a style of governance that considers that the citizen should only be informed of what the administration deems fit and at the moment in time when it so decides. How this style of governing is actually implemented in practice by different administrations is more a matter of degree than substance.

The crux of the question is that it seems that the public administration, including public authorities and entities that provide essential services, do not readily recognise the right of the citizen to be informed. The public administration frequently invokes in ordinary circumstances, as a rule to justify its non-disclosure, provisions in the law which grant it the right to refuse to provide such information even though these refer to exceptional circumstances.
Such refusal is often couched in vague, stereotyped terms. By way of example, it is not unusual to refuse access to a legitimate request for information on the grounds that it is not opportune to release such information at that stage, or that it is not in the public interest to do so, or that the information requested was commercially sensitive and confidential. There have been cases where the authorities went as far as to refuse to immediately implement directives issued by the Information and Data Protection Commissioner even when threatened by sanctions.

The Ombudsman and the Information and Data Protection Commissioner

In the opinion of the Ombudsman, such justifications are, except in exceptional cases, unacceptable and should be addressed. It is not the function of the Ombudsman to analyse and determine if a public entity is more correct and diligent than another in the disclosing of information regarding its actions to which the citizen is entitled. Nor is it his remit in the first instance, to investigate and decide whether Parliament and civil society are entitled to information regarding any specific administrative act which manifestly and directly affects a citizen.

These issues fall within the remit of the Information and Data Protection Commissioner who is in duty bound to interpret and apply the laws he has to administer. The Ombudsman is however, interested in the way the public administration considers and respects the right of the citizen to information, as well as whether existing laws, international conventions and European Directives adequately safeguard such a right which is a vital element of the fundamental and wider right of the citizen to good administration.

It is in the interest of the public administration to provide information

It is widely recognised that in the long run, it is not in anybody’s interest to withhold information to which the citizen is validly entitled. In this modern world, with global media accessible to all, no information, however sensitive, can be kept secret for long. Somehow or other the information will be leaked or otherwise becomes public knowledge, at the risk that when it becomes public, it might not be necessarily fully correct. It is therefore in the interest of the administration itself to recognise this reality. An administrator should recognise and accept that the best defence against criticism on whether it has acted rightly or wrongly is to provide as full and timely information as possible, within the parameters of law.
An administration which keeps citizens informed of all the facts that interest them to allow them to reach an informed opinion and evaluate and judge correctly, would in the process, gain the trust of society since it would be satisfied that its right to good public administration is being respected.

It is recognised that the administration of public affairs is becoming more complex and competitive. It is therefore understandable that the administration needs to have enough room to govern without hindrance and efficiently while to some extent, retaining confidentiality to achieve the aims of the common good. This is not however, to be interpreted in the sense that administrative acts of a commercial nature should not be subject to the scrutiny and audit of public opinion that is only able to make a correct evaluation, if it is provided with the necessary information.

Today’s political and economic reality suggests that a public administration needs to negotiate and conclude agreements that often not only bind the administration of the day but also future administrations and generations. This often within the framework of international trade and the context of the audit of the details of projected and concluded agreements by the competent structures of the European Union of which Malta is a Member and others.

It is not therefore proper that essential details of such initiatives are available to the negotiating parties and to the various organs/structures within the European Union and their officials but are withheld from the Maltese citizens and their representatives who are directly interested in them. It is understandable that the timing when sensitive information is made available can be important and indeed of the essence when negotiating and that it may not be in the public interest to reveal certain information at crucial stages when negotiations are nearing conclusion. However, it must also be accepted that any agreement by the public administration (in a wide sense) and third parties is not the same as an agreement between private parties. Any party that negotiates with Government or other public authority or entity must be made aware of the fact that the latter are accountable to the public for their actions. This means that only that information which absolutely needs to be kept secret should be withheld since otherwise it could be of serious prejudice to the country. It is to be stressed that any withholding of information should be the exception rather than the rule, and must be done under specific provision laid down by law.
Transparency and the need for dialogue

One essential element of good administration is transparency which in turn implies knowledge and availability of the facts. This can only take place through timely and correct information. The timeliness of information should only be regulated by the public interest and the common good. It should not in any way be influenced or determined by political gain, by the commercial interests of the other contracting party or by any other manner.

The Ombudsman considers that democracy is a system of Government, built on the active and direct participation of the public on the way the country is to be governed. Such participation can only be considered as valid, effective and real if the public is well informed on all matters of immediate interest regarding public affairs. Such information belongs to the public and should be in the public domain. The authorities are there to administer it simply on the strength that it has been entrusted to govern the country.

Information is imparted to the public either directly or through its representatives, or through the social media, primarily the audio-visual media and the press. Any refusal, without valid cause, to provide timely and correct information when is legitimately requested, cannot but be considered to be an obstacle to the democratic process since it hinders popular, public participation in the administration – something to which every member of society is entitled. Consequently such refusal cannot but be considered to be anti-democratic.

Need for national debate and dialogue

The above considerations are by themselves enough to demonstrate the need for a serious and objective national debate on how the principles of transparency and accountability are being respected and applied. There is a need for dialogue between the political forces and civil society on whether laws, regulations and practices regulating the provision of information by the public administration to citizens are adequate to guarantee transparency and accountability. There needs to be an objective debate on whether the right of the citizen to be adequately informed is being appropriately respected. Such a debate must examine whether the laws, regulations and existing structures are sufficient to guarantee this right, in full respect of the exceptions to such right, while ensuring that such exceptions empowering Government not to disclose information are absolutely necessary. It must also seek to ensure that the modalities and circumstances for such exceptions are clearly defined.
The State’s duty to inform

at law. Such dialogue can and should also take place in the context of the consultation on amendments to the Constitution of Malta which it is envisaged will be undertaken during the current legislature.

One should also explore other mechanisms how Parliament, the Leader of the Opposition and civil society should be kept informed of facts which the public administration in office is authorised at law not to disclose at a given moment. These could include a process of consultation as is presently done in the Committee on National Security, as well as providing other channels for imparting information, subject to confidentiality, to specialised Permanent Committees of the House of Representatives. One can also consider imparting information in the public interest to an organ of government that would be the equivalent of a Council of State that is being proposed in some quarters to evaluate and advise on important issues of vital public interest.

In the light of the above considerations, it is recommended that a starting point for debate could be inspired by one of the Fundamental Laws which comprise the Swedish Constitution. One of its Chapters entitled “The Law regarding Government” provides that every citizen should be guaranteed a number of rights and freedoms in his/her dealings with public institutions. This Chapter includes a list of rights, amongst which is the freedom of information – a freedom to request and receive information and in every other way be informed of what has been stated by others.

The Swedish legislation defines, in a precise manner, what are be considered as official documents and furthermore it regulates the process of documentation. The Swedish “Freedom of Press Act” also provides that - “the Swedish citizen shall be entitled to have free access to official documents in order to encourage the free exchange of opinion and the availability of comprehensive information”.1

The same Act lists and defines the exceptions to this rule. These exceptions include the protection of national security and public relations, fiscal policy, the audit and supervision of pensions of public authorities, the prevention of crime, the interests of public economy, the protection of privacy and the preservation of plant and animal species. However, and above all, the Swedish legislation provides that all the exceptions to the right of the public to access of official documents must be prescribed by law. This is perhaps an aspect which needs a more in depth study in the context of our country.

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In this respect it is useful to quote from an official document on the public access to Information and Secrecy Act published by the Swedish Ministry of Justice that lists the following various forms of the principle of public access to information:

- everyone is entitled to read the documents of public authorities: access to official documents;
- officials and others who work for the state or municipalities are entitled to say what they know to outsiders: freedom of expression for officials and others;
- officials and others in the service of the state or municipalities are normally entitled to disclose information to newspapers, radio and television for publication or to personally publish information: right to communicate and publish information;
- the public and the mass media are entitled to attend trials: access to court hearings;
- the public and the mass media may attend when the chamber of the Riksdag (the Swedish Parliament), the municipal assembly, county council assembly and other such bodies meet: access to meetings of decision-making assemblies."

It is also relevant to refer to the accessibility of data on the actions of the public administration as a useful tool to curb corruption. On this point reference can be made to the Finnish legislation, often described by the Council of Europe Commission against Corruption as an example of good practice. This Commission has declared that the effective Finnish legislation on freedom of information was one of the main factors which ensured a low level of corruption in that country. The law regarding access to information on the activities of Government and of public authorities – the “Law on Openness of Government Activities” (1999 as amended in 2002) – guarantees the right of citizens to automatic access to all official documents which do not contain personal data or state secrets.

It is wise to learn from the experience of other countries.
Transcript of the contributions and comments made during the Round Table Conference
Introductory Comment by the President of the House of Representatives, the Hon. Angelo Farrugia
Chief Justice Emeritus and Parliamentary Ombudsman, Mr Tyndall Ombudsman and Information Commissioner for Ireland, Vice President of the International Ombudsman Institute, Mr Nick Bennet, Ombudsman for Wales, Denise Fowler Housing Ombudsman of the UK, Tom Frawley Ombudsman of Northern Ireland, Mario Hook Ombudsman of Gibraltar, Jane Martin Local Government Ombudsman of the UK, Jim Martin, Ombudsman of Scotland and Nick Martin Managing Director of the Ombudsman of the UK, Hon. Members, distinguished colleagues, welcome.

Welcome to the Maltese Parliament. I hope you enjoy your stay in Malta and I also hope you like this new building by the famous Architect Renzo Piano. We moved house about six months ago.

According to our Constitution and the Ombudsman Act Malta’s Ombudsman is appointed by Parliament. The institution of the Parliamentary Ombudsman is entrenched in our Constitution and that makes it a more effective authority in a Parliamentary democracy. Accountability and transparency play an important role in the lives of each and every administrator particularly when subjected to the scrutiny of who has been assigned the role to defend citizens against abuse of power and maladministration. Within this context, ombudsmen are invaluable to their respective parliaments in holding the executive accountable for its actions.

I am very thankful that you are all gathered here in my country, within this Parliament, to take part in this conference with its main theme is how truth relates to transparency and accountability that are the requirements of a solid and positive reputation. I must confess that the experience of the Parliamentary Ombudsman in Malta, who is an active member of the Public Sector Ombudsman group, has proved to be very fruitful and very rewarding.

Dear Ombudsmen, the theme chosen for this round table is of great interest in Malta, where the limits of citizens’ rights to be informed about matters involving the conduct of public affairs has for years been controversial and debated. In fact, I have here a list of rulings in my three publications regarding the access to information, the contents of the answers to parliamentary questions, when a document has to be put on the Table of the House, the Speaker when Parliament is in session, a minister or not, and when it is time that you can order him to put the document on the Table.

One can at this stage refer to powers of the parliamentary committees. In one of my landmark rulings I held that a parliamentary committee can order the minister to produce a document before it. These are all issues about transparency and about
the discovery of the truth. So, yes, the theme chosen for this round table is of great topical interest, I must confess, even in Malta where the limits of the citizens’ rights to be informed about matters involving the conduct of public affairs has for years been controversial and hotly debated. I can assure you that in Malta politics is a very hot issue irrespective of any topic that is chosen. Just to give you some information, when we have elections in Malta, 97% to 98% of all the Maltese population casts its vote. It is a theme that is highly relevant to the main function of the ombudsman that is to keep the public administration accountable.

As a sub-theme of this round table states, accountability is dependent on transparency, and transparency must necessarily be fuelled by the truth, the truth that can only be established if one is timely informed of the correct facts. It is customary to speak about the citizens’ right to be informed as a pivotal element of the fundamental right to good public administration. It goes without saying that one cannot competently judge whether an act of the executive in a wide sense is good or bad unless one is fully informed of the facts surrounding that act. The organisers of this round table significantly shifted the emphasis of the theme to highlight the duty of the State to inform citizens. One could say that this was obviously the other side of the same coin but others could question whether the State has such a duty. The shift in emphasis is not casual. It is material since it implies that the State is always bound to provide information and that that non-disclosure has to be the exception to the rule. If disclosure is the rule, what are the exceptions to it? That is a question which we have to answer.

What are the limits of the rights of the citizens to be informed and of the State not to disclose information? Ombudsmen are governed by different regimes and legal structures that regulate their functions and relations with the executive and parliament. Clearly, the degree of effectiveness of the ombudsman’s performance depends on the level of autonomy and independence that his office enjoys. I have already stated that the parliamentary ombudsman is totally entrenched under our Constitution and he cannot be removed if not by two-thirds of all the Members present. If he wishes to resign he just writes a letter to the President of the Republic but of course, our Ombudsman is in quite good shape and he is on his second term.

In this regard Malta is very fortunate in that the legislation setting up the ombudsman in 1995, which was amended on various occasions, was drafted on the New Zealand model with the help of Sir John Robertson, a leading authority and Ombudsman in that country. It was and still is a very progressive piece of legislation
that not only recognised the Ombudsman as an Officer of Parliament but also guarantees the full independence and the autonomy to his office.

The Office was later given the status of constitutional authority through an amendment to the Constitution that ensures that there would always be in the country a parliamentary ombudsman. A provision that has been entrenched and that requires a qualified majority of two-thirds of the Members of the House to amend it.

In 2010, another major amendment of the Ombudsman Act provided for the appointment of Parliamentary Commissioners within the Office of the ombudsman to oversee specialized areas in the public administration. These Commissioners are also Officers of Parliament and enjoy the same level of independence and autonomy as the ombudsman. Three Commissioners presently cover health, education and the environment and planning. It is significant that all legislation concerning the ombudsman institution in Malta always enjoyed the unanimous approval of the House.

Dear Ombudsmen and distinguished and esteemed guests, as previously stated, this round table significantly shifted the emphasis of the theme to highlight the duty of the state to inform the citizens. I firmly believe that there is urgent need for this issue to be debated in the country because it concerns a matter of vital importance not only to the democratic environment in the country but also to continuously ensure a transparent and accountable public administration that has to be actively monitored and overseen by Parliament. A service that the elected representatives of the people and the Parliamentary Ombudsman among others, can only perform fully and judiciously if they are fully, correctly and timely informed of the relevant facts.

So with these thoughts, I will introduce this round table and I will ask my good friend Dr Said Pullicino whether he has any initial comments to make - which I assure you he has – and after that we will have the experts in their respective fields make their presentations. We shall then have the opportunity to debate the issues raised. Thank you very much.
Introduction to the Round Table theme by the Parliamentary Ombudsman Chief Justice Emeritus Joseph Said Pullicino
Thank you, Mr Speaker. First of all I would like to thank you heartily for accepting to hold this Round Table in this Parliament which is, as you said, our foremost democratic institution. Thank you for hosting this debate and accepting to chair it.

Today is the 5th November, it's an auspicious day. I was going to be married on this day but then my wife realised it was Guy Fawkes Day. She decided that it wasn’t a good day and we married on the 12th November. I do hope your security arrangements are at least as strong as those that protected the British Houses of Parliament on that day and that information on security is reliable. If you have been fed the wrong information, we might end up in bad shape.

Having said that, I think the subject chosen for this Round Table is very topical. Mr Speaker, in your introduction you have pointed out the main issues that we have to address. Essentially what we have to look at is the correct balance between the rights and duties of the state and the individual. We have to examine whether it is right for the State to withhold information or whether it is in duty bound to provide it. We have to consider what constitutes information in the public interest. What is the public interest? Who is the owner of such information? It is the people who own public information and not the State. The Executive and Public Authorities administer information entrusted to them and they have to administer it in such a way that they should be accountable to the people in all its sections including for. They have to be accountable for the way they administer the provision of information. Therefore, this is a politically charged and hotly debated issue. There is a reluctance to provide information until things have been defined, and even finalised. Sometimes even after contracts have been concluded, there is still a reluctance to disclose these because the public authority might not feel safe in providing the information.

These things need to be regulated. I would suggest that the ideal model to guide us should be the Swedish model, which is very liberal and open. Obviously there have to be limitations. There have to be rules that govern non-disclosure but these rules have to be regulated by law. They have to be established and they have to be made in a way that actions of government and administrators can not only be verified but also brought to account. There have to be structures which can identify whether the administrator has been right in withholding information. I think we already have structures in Malta but the issue is whether they are efficient enough. If they were efficient enough I would say there would not have such controversy on a number of issues. That means that either the issues are not being well ventilated of or the structures are not adequate.
This is a matter on which politicians could also contribute by sharing views in healthy debate. Obviously the government has and the Opposition could have different views, probably depending on which side a party is. I think that as Ombudsmen it is our duty to follow these issues, and to bring the issues to the fore so that people are incentivised to form an opinion and hopefully, things could change. This Round Table and similar initiatives is one of the ways of provoking change. I think we can continue introducing our speakers.
Contribution by the Data Protection and Information Commissioner of Malta, Mr Saviour Cachia
First of all I would like to thank Mr Speaker, the Minister for Justice, the Hon. Members of Parliament and the Ombudsman for giving me this opportunity to speak about freedom of information. I am the Data Protection Commissioner but I also have the responsibility to administer freedom of information as well as the access to environmental information. Sometimes I used to wonder how data protection and freedom of information are two competing laws but they can go together as well.

My intention is to focus on freedom of information in Malta and relate some of my experiences. The Freedom of Information Act was enacted in December of 2008, amending also the access to information on the environment but it was fully brought into force in 2012. Therefore there is quite a gap since it was enacted and when it was brought fully into force. There was some work and preparations in between but this delay was sometimes interpreted to be due to our tradition as public administration to withhold information rather than to be proactive and make information available. That may be one of the reasons which prolonged the time. Politicians will have to accept that it is very important to make information available to the public to have some governance.

When we talk about freedom of information we also talk about open government. Making information available is essential to help open government. When I was doing some research, I found a particular definition of open government and it goes like this:

“It is the governing doctrine that citizens have the right to access the documents and proceedings of the government to allow for effective public oversight”.

Therefore it is obvious that open government and FOI are directly linked with each other. The result of FOI is facilitating open government.

Our Freedom of Information Act begins by stating that it has the purpose to promote added transparency and accountability in government. It also gives the right of access to existing documents held by the state, provides the manner in which the information can be provided and it also provides a number of exemptions. When it was brought into force the Freedom of Information Act was fully retrospective, therefore it also applied to old documents and public information. Like any other law there are instances where the law does not apply especially when there is personal data and there are special prohibitions by specific laws not to disclose information. There are also exemptions when information is at the national archives and when there are
other particular laws, for example the Local Councils Act because that specific law provides access to information within local governments.

Needless to say there are a number of institutions that are exempted from the Freedom of Information Act, least of which is the Parliamentary Ombudsman. The law prescribes where there are exemptions. For example, there are exemptions for when disclosure would cause damage to security, defence or international relations of Malta. These are types of exemptions which can be found in many laws including the data protection legislation. There are instances where Cabinet papers are exempted as long as these are not already made available to the Archives Act.

However, I think what is important is that you need to carry out an exercise to see what falls under public interest. We call this the public interest test. Therefore, one would have to look at how the public interest is better served. Is it by disclosing the information? There are rare instances when non-disclosure serves better the public interest.

As an Information Commissioner, I am independent. I enjoy distinct legal personality and is not subject to any direction or control from any person. I can say that I have never had any interference from the Government or from any person. I have the power of investigation, I have the power to fine and I have the power to order publication of documents.

We are a very small organisation, we are just five technical staff working on three different laws. We are very busy and sometimes, having these limitations would take us time to carry out investigations considering that we also have to administer and regulate data protection. As you all know, there is a lot of activity in that area. Whenever we receive a complaint from an individual and we start an investigation, we make a request for submissions from the public entity concerned. I would say that freedom of information in Malta is at its infancy stage so we have to see how we can improve efficiency in providing the information. Therefore the first step would be that the public organisation would try to justify itself for not making the information available. Upon my appointment I started a procedure that it is not acceptable that the organisation tells me they cannot disclose this because of this reason and that reason and, we also carry out an on-site inspection where I would see the file and then I would challenge the public organisation. I give the organisation the opportunity to make its submissions but we make our own evaluation and also take into consideration any legal aspects. We also take into consideration the public interest and eventually we make a decision.
This is how the process works. Any individual can apply to be provided with information, specific information. The individual needs to be specific about what information he requires and information may be provided or not provided. If it is not provided, then there is also an internal process to review the same application. I can tell you that from my experience that there has not been one instance where the first decision not to provide the information has been changed. I look at the objections to release information more as a way of prolonging the time to provide the information and I have already made proposals to remove this particular provision. Eventually, when the individuals submit an appeal to me, after the investigation we would reach a decision but that decision can be appealed. We have an Appeals Tribunal, it is the same appeals tribunal for data protection, and after the appeals tribunal then there is also room for another appeal on a point of law in the Court of Appeals.

I would now like to present some statistics since the Freedom of Information Act came into force. Like I said it was brought into force in 2012. There are a number of applications that have been accepted, a number that have been rejected and there are also abandoned applications. The largest figures were in 2013. There was quite a good number, but I think this becomes interesting looking at it from a percentage point of view. For example if we look at the number of applications accepted in 2012 that brings it to 40%, in 2013 it was 56%, 2014 it was 55% and up to 2015 it was 36%. The rejected applications is again 40%, 42%, 38% and now it’s 33%. Then there are the number of abandoned applications that when compared to the number of rejected applications they amount to: 2012 there were 28%, in 2013 there were 30%, in 2014 there were 34%, and in 2015 up till now it’s 25%.

Therefore, I think that whilst public authorities tend to withhold information, they also provide information, they make information available. What I would like to see is more activity from the public in general in that if one has a rejected application, one needs to make a complaint. One needs to accept that individuals will not always be right when they complain to us. The decision may go either side, taking into consideration the requirements of different sections of the Freedom of Information Act. My job is to administer freedom of information within the parameters of the law and I cannot go beyond the Freedom of Information Act.

There were other initiatives which were very good, made both by the previous administration and also by the current administration including making information available online via the Ministries’ and departments’ websites. I sometimes have complaints that a particular procedure cannot be found on a website and when I start
investigating I find that the particular procedure is not given prominence. In such a case I give instructions that it be made more prominent. These are issues which we address as we go along.

As I said earlier on, in Malta we have a tradition to withhold information. It’s not just public administration, but it is a mentality in the Maltese society, therefore even socially and in families, but it is very important to have transparency, to have sound governance to make information available to the public. The public needs to know what is going on, needs to know what his rights are, and needs to know how he can benefit from services provided by the administration. Therefore, it is important to change the culture and I think we need an educational process there. We need to change the culture within the public administration and, if I may, even politicians need to change the political culture to make information available. It is very important not to go on fishing expeditions to collect the information and then use it for political means because that automatically would have an effect on the scales when coming to provide information and I think we need to be genuine and sincere. It is very important to make information available to the public no matter what.

Another thing is that the time has come where I would like government to start reviewing certain laws regarding statute-barred provisions of non-disclosures. We have cases where a law, for example, was enacted in the 1960’s and there were statute-barred provisions not to provide the information. Today such provisions do not make sense therefore those laws have to be reviewed and addressed. It is also very important to reduce the timeframes to provide the information. Like I said, at the moment government is reviewing the Freedom of Information Act. Personally I am participating in a working group to review the Freedom of Information Act, to make it work better, to provide information more and in a timelier manner.

It is also very important that public interest should always prevail. This is the foundation block of freedom of information. It is also very important that there is capacity building in government structures. One good thing about the administration is that there is, for example, the freedom of information co-ordination unit within the Ministry for Social Dialogue, Consumer Affairs and Civil Liberties and it acts as a point of reference to other line ministries and departments. There are also freedom of information officers within ministries and departments and this is also another positive aspect. Therefore the structures are there but it is very important that once one is trained as a freedom of information officer, he should continue to deliver those services. I am saying this because the problem with the public service is that at a
certain point in time one is working in a particular ministry then the next day he can move to another ministry or to another department with totally different duties and therefore one would need to appoint another freedom of information officer and start the training again. I think it is very important to keep on the capacity building in the government structures.

Finally, I would like to pose a provocative question. We have too many directives and regulations within the European Union. We are now debating the General Data Protection Regulation which is very important to provide the rights to privacy. Isn’t it the time for the European Union to start thinking of having a directive about freedom of information so that all member states can be put on an equal footing, in a way that all the rights can be enjoyed by all the European citizens? I honestly think that time has come for the European Union to start thinking of an EU directive for freedom of information. For example, recently there was a debate in Parliament on the directive for public sector information re-use. Again, this is another law which is very similar. It is a law to provide data but again, it is also important to facilitate open government. The aims are different, the aims are more of an economic nature because the argument behind the public information re-use is that since government data is processed by the taxes paid by the citizens then that economic benefit should be shared by all stakeholders. How much more important is it to provide a similar directive to make information available to the public? Thank you.
Contribution by the Ombudsman and Information Commissioner of Ireland, Mr Peter Tyndall

The Ombudsman and Information Commissioner of Ireland, Mr Peter Tyndall

Contribution by the Ombudsman and Information Commissioner of Ireland
Mr Peter Tyndall
Mr Speaker, Hon. Member and colleagues, it is a great privilege to be invited to speak in your new home and I hope you continue to enjoy it.

I’m very grateful to have the opportunity to speak here today particularly to pay tribute to the work of Joseph. I’m sure you are well aware that he has a wonderful reputation not only here in Malta but internationally he has been one of the key figures in the various ombudsmen communities. His work, his sharing of knowledge and experience across the various offices has helped us all to learn and develop. So I’m happy to have the opportunity to pay tribute to him here in his homeland. So, thank you Joseph.

I want to share to some extent some characteristics with Malta not the least the fact that our politicians are also very keen on lively debates. Our civil servants and our administration were inherited from the former British civil service system and the first thing virtually any civil servant taking office did was to sign the Official Secrets Act. So, the culture, historically was the culture where transparency and openness were seen as the enemy of government and particularly the enemy of administration. The mystique, the confidentiality, doing things behind closed doors was the normal culture.

Ireland has had an Ombudsman for 30 years now but it introduced freedom of information in 1997. The original Act was quite far reaching. Like with Malta it took some time for it to be fully implemented but we have had the freedom of information regime in place for the best part of 20 years. The freedom of information post sits with the Ombudsman. There are three models internationally. We have heard reference to the Scandinavian model, in Sweden particularly, but in most of the Scandinavian countries the Ombudsman has always had oversight of freedom of information. It’s just been the natural way that the system developed. It has been entrenched there for decades rather than years and the Ombudsman deals with it. I think public officials in the countries we live in would be very surprised with some of the timescales. For instance, in Sweden there is a requirement that information to citizens has to be released in 48 hours and if there is failure to do that, the Ombudsman will criticise the party concerned. We have a slightly more generous timescale. Its 30 days, in which public administration is required to release information to citizens.

We also have a similar system and there is an internal review. Our experience is different to Malta because the internal review is only undertaken by somebody who is an experienced freedom of information officer. They do overturn decisions quite
frequently, so that then it appeals against decisions following internal review which come to my office. In the last year we had round about 250 valid appeals, something over 300 requests for information but in some instances they haven’t exhausted the process in the body, or the information they were requesting didn’t fall within the freedom of information regime.

In Ireland freedom of information is seen as part of the suite of measures to give openness and transparency. You’re probably well aware that confidence in the political system was damaged by things like banking inquiry, by scandals around and issues like planning permissions and in order to restore public confidence in the democratic process, freedom of information, along with other issues, were brought in. One of the most recent which you may be interested and which my office supports is the lobbying register. Anyone wanting to lobby a member of parliament or a senior civil servant or a member of a local authority has to register as a lobbyist and has to put in a report three times a year on the activity. That’s just one of a number of measures.

We have some variations which may interest you on the freedom of information regime. I’m in the second model where there are two lots of legislation, so I hold separately the Information Commissioner post, which is under different legislations. The Ombudsman Legislation, unlike Sweden, is the third model and the one that you have here which is also the model in the UK, where the Information Commissioner is a separate post. There are advantages in having it with the Ombudsman’s Office. You can certainly save on administration and things like telephone system, IT system and so on. You only need one set to support it. But I am sure you can argue with that just for the other.

One of the other distinctive features is that people can opt for a statement of reasons about decisions affecting them under the freedom of information, so they can ask any government department to explain why a particular decision was taken. Let us say there was a decision to give them a benefit or pension or not to. If I look and believe that the government department has not properly complied with the requirements of the FOI, I can require them to release that information. They always do so unless they appeal my decision on a point of law to the High Courts, but there have been no instances that government departments refused to release information once the decision has been made to release it.

One of the big issues within the Ombudsman community – because things have changed in the recent years, and I’m sure it is the same for you here in Malta - is that many public services are now provided by bodies which do not belong to the state.
One of the big changes in the FOI legislation, the new act which was brought into place in 2014, was to bring more that 200 bodies into my jurisdiction as Information Commissioner. These are bodies which provide public services but are not part of either the civil service or local government. I think that it is very significant that you have to extend both the regime of the Ombudsman and that of the freedom of information to cover those particular points. Otherwise I think that many public services simply drift away from oversighted scrutiny.

When the Ombudsman requires information to consider a case, the ombudsman can often see information that would not be liable for release under FOI. Like you, there are certain restrictions. In Ireland, on the release of information, an ombudsman could always see that information in any event if it fell within a case that they wouldn't necessarily quote it in a report, in order to respect the confidentiality individuals. I think the fundamental issue here is the importance of having a well-functioning office is that we require the release of information in more than half of the reviews that come to my office. Either some or all of the information that's been requested is released, so there is still a tendency for government departments not to release information.

A lot of the time, like an Ombudsman we do that on the basis of having a conversation with them and saying from our perspective we can go to a formal ruling, but, on the basis of the facts before us, it's inevitable that the outcome of that ruling will be request to you to release the information. So a very large amount of information is released simply on the basis of our initial intervention.

I can echo some of the points made also by my colleague from Malta. Having well-trained individuals dealing with freedom of information in government departments makes an enormous difference to the quality of the decision making. That's the first point. I think the public interest test is also critical. Many of the exemptions in the law are governed, as we heard, by public interest, so that even if in other words it was exempt from release, the information is released in the public interest, and I think that's quite important.

A further point in the Irish legislation, which is quite powerful, is that government departments, in most of the exemptions, can't just say that harm would flow from the release of information. They have to identify what harm would flow from the release of the information and they also have to identify the likelihood of that harm actually occurring. So it is not enough to say: I think that it is went out it will damage let's say the security of the state, you would have to be able to demonstrate how the security of the state will be damaged by its release. You would also have to be able to demonstrate how
much likely it to happen is and it is not something that is just a theoretical possibility.

As with most Information Commissioners, some of the issues which have been the subject of our decisions have been quite controversial. The bulk of requests come from individual citizens asking for information about themselves, which tend to be non-problematic, a lot ask for information so they can hold Ministries into account, and then we get quite a lot of requests, as you would expect, from journalists. Those have helped to promote a culture of much greater openness and transparency than existed previously.

Just some of the things that have been published. For instance public procurement require that the successful tender is published in the path that would have been held to be commercially sensitive but the government is entering into contracts. Of course the winning tender is published so that people can see what the government is spending the citizens’ money on.

We found that nursing home inspection reports weren't being published. Now they have to be published so that people who are going to put a relative into a nursing home can look to see how well the nursing home is run before making their decision. We also required the publication of the expenses of members of parliament which would prove to be very popular with the press, but probably less popular with the parliamentarians. That again helps to promote that culture of openness and transparency. I hope that gives a flavour of some of the issues from an Irish perspective. Thank you very much.
Contribution by Judge Giovanni Bonello, Former Judge of the European Court of Human Rights
I guess my friend Ombudsman Joseph Said Pullicino invited me because he believes that there is some link between the European Convention of Human Rights and good governance. There certainly is some relevance as there is some input to the concepts of good governance to be drawn from the European Convention of Human Rights, particularly on the subject that has been chosen for today’s discussion: the right to inform and to be informed. I think the basis of this right is reflected in the Convention: the right to freedom of information and the right to freedom of expression.

We tend to think of freedom of expression as the right to impart information and ideas, and that undoubtedly is one the major functions of freedom of expression: the right for me to say, with some limits, whatever I want. That is the primary right, but the implied right is the right to receive information. My fundamental right is to be informed of anything that is relevant to my existence and to my wellbeing. That is where the Convention does throw light on the issues being discussed today.

Another principle that is today generally accepted, but took a long time to be recognized, is that the right to freedom of information, that is to impart information and to receive information, is an almost absolute right. It is not absolute, it has some limitations, but the right does not apply only to information that is easily accepted and that is not controversial - it applies all the more to the right to receive information that offends, that shocks and disturbs. That is a great breakthrough. Before, it was believed that anything was suitable to be thrown at the public so long as it was neutral. Today, the European Court of Human Rights has established that this freedom of information includes the right to disseminate information which offends, shocks and disturbs.

As I said, freedom to information is not an absolute right, and the limitations to this right are the same limitations that govern the dissemination of information for the promotion of good governance. The only exceptions to freedom of disseminating and receiving information are to be interpreted as narrowly as possible - and this is of the utmost importance. The only ‘secrets’ that the state is entitled not to disclose to the people, is information which poses a threat to national security and to public safety, which undermines the prevention of disorder and crime, the protection of health and morals, the reputation of others and the authority of the judiciary. These are the only exceptions, and these are to be interpreted as narrowly as possible.

The rule remains: every data is presumed to be in the public domain. The exception is that if data can genuinely be made to fall under one of the above-listed headings, then that particular data is out of the public domain. That is the only permissible barrier between full dissemination of information and restraint.
We talk a lot – and sometimes this talk is merely a political slogan - about transparency, about pluralism and about accountability. These concepts, not to become only a political slogan, are at the very core of good governance, and any government that has at heart the values that these words represent must feel the duty to translate these values into action to the fullest participation of the people in the affairs of the state. It does not make much sense for democracy to have a government by the people for the people, when, in substance and in fact, the people are told: you have elected us, you are paying our wages and salaries but we don’t want to tell you what we are doing behind your back. That is the very negation of the concept of democracy. The concept of democracy is that, with those limitations which I just mentioned, and except only for those limitations, everything should be in the public domain.

This has been accepted, in fact it has been given prominence, by the Sirbu judgement in Strasbourg which says:

“Freedom to receive information cannot be construed as imposing on a State positive obligations to disclose to the public any secret documents and information concerning its military, its intelligence services and its police.”

Those specified in the Sirbu judgement are the areas which are ringed in and that the public administration has the privilege of drawing a red line. Over these zones the public does not have free entry. Round every other area of information which is not military, intelligence service or police, and possibly some other bona fide areas, there is no hedge, there is no fence and the people should be free to scrutinize.

Let me finish by quoting the relevant section of the Council of Europe’s Resolution. .A resolution of the Council of Europe is advisory but it has a great moral weight which governments which respect themselves, which respect the people who are governed, listen to with very receptive ears. It says:

“...a duty by public authorities to make available information on matters of public interest within reasonable limits and the duty for mass communications media to give complete and general information on public affairs. This is the duty of governments which respect the mandate and the trust which people have put in them.”

Thank you.

(This is a transcript of the intervention by Judge Bonello made without a prepared script).
Discussion
MR SPEAKER: Thank you very much Judge Bonello. We like to proceed with comments by Honourable Members of the House. We have present two members from each side. Parliament of Malta is made up of the two main political parties, the Nationalist Party in the Opposition, and the Labour Party in Government. The Hon. Minister Owen Bonnici who is the Minister of Justice, Local Government and Culture, and Hon. Deborah Schembri, who is the Chairperson of the Social Affairs Committee represent the Government. Former Minister Hon. Carmelo Mifsud Bonnici and Hon. David Agius who is the Opposition’s Whip represent the Opposition.
Comment by the Hon. Carmelo Mifsud Bonnici, Member of Parliament

I am not going to say anything extraordinary. I just want to say how interesting it is to hear the various comments today. I was a Minister so it was really interesting to see how certain laws which we had built are now functioning and the administrative side involved in matters. I think that the greatest difficulty which any government will have to face is to change the culture in the civil service.

At times politicians are accused of keeping back information. At times it is the brief which is prepared by their civil servants to keep away certain divulgation of information. So it takes the courage to be a Minister to divulge information contrary to the opinion the civil service which in any country is always very strong.

I was involved in the discussion on the Freedom of Information Act. It was no
joke to change the mentality of the civil servants in order to start accepting that they have to divulge a great deal of information which does not just concern the Minister. I am saying this because in parliamentary questions the Oppositions’ questions usually tend to go to the neck of the Minister, not to the administration. So for the first time there was the perception that now even someone within your line department is going to become accountable to the public and the former idea that the public is there just to pay the taxes so that you earn your salary now is going to get an added value.

Thus I am very satisfied that the law is functioning and I am also satisfied to hear that there are freedom of information officers and this unit. I assure you it wasn't a joke to manage to do it but I am happy that it is working and it will manage to transform the idea of slowly and steadily.

I am preoccupied, not as a member of the Opposition, that there were fewer requests towards you during this year which shows, as usual, that in the first year there is a lot of interest then it suddenly subsides. So I would also say that it was a very good idea to meet today but also there is the need to inform people of their rights. Unfortunately not a lot of people outside understand what right they have. At times we overdo it in parliament by adding new laws, adding new structures and new amendments but at the end of the day it's a matter of empowering people to be in a position to understand what their rights are and to actually get those rights. This is why democracy is there and why the rule of law is there, so it is just an impromptu contribution. I am happy to be here and to hear the learned impartations which you are giving us. Thank you.

Comment by the Hon. Owen Bonnici, Minister for Justice, Culture and Local Government

Dr Deborah Schembri and myself would like to share some comments and thoughts with you. First of all I happen to have the privilege to represent Malta in the Justice and Home Affairs Council where issues of data protection are the order of the day. I first started attending the Council when Ireland had the presidency. Alan Shatter was the president of the council, so please extend my regards to him. At the time, about two and half years ago, data protection was the subject par excellence. In fact, the data protection package is the order of the day at these Councils. So each time we meet data protection is the order of the day.

Unfortunately, I do not see that debate being mirrored here in Malta. When we had an agreement on the first part of data protection package, I only saw a single
The sentence in our newspapers when it made headlines everywhere in Europe. So I think there is something wrong. The fact that something which hits the headlines everywhere in Europe doesn’t even get mentioned in our media means that there is a long way to go on raising awareness on the issue of data protection.

There is also another argument which is being evolved at European level, that there is a duty of the State to issue information. It is a right of the citizen, as Justice Bonello said, to get to know information but there is also another new right which we need to discuss. This is the right to be forgotten. This is a very crucial right, and as much as it is important for the citizen to have the right to know, the citizen, now, has a newly acquired right to be forgotten. The European Court of Justice had issued the google judgements, these have sent shockwaves everywhere in Europe, at the
Council level we discussed them very thoroughly, but again, in Malta this debate has not reached our shores. I would like to invite both Parliament and the institution of the Office of the Ombudsman to set the mode of how to implement this right to be forgotten because the consequences of this right are far reaching and I believe that we are underestimating what this means.

Recently there was a person who sent me an email. I receive hundreds of emails every day, I try to read them all personally. It's becoming a challenge every day but it also means less time to actually rest but even if it means staying up till the early hours of the morning, I try to read all emails myself. One of the emails was sent by a person who had committed a small crime ten years ago and went to find employment with a company. This company asked him for the conduct certificate. It was a clean conduct certificate but when the company googled the name, the judgement came up. Of course we have systems in our legal system where after some time a person has his conduct certificate rectified if it concerns a small crime, but through google, this employer found out that ten years ago this poor man had stolen a pair of sandals from somewhere and he lost the job. He asked me about what am I going to do about this. These are the questions we are facing regarding the right to be forgotten.

If I decide to say that we do not publish judgements anymore, probably the next day I will be accused of trying to stop information from being received by the general public and probably my good friend the Ombudsman would definitely enter into the merit and say: Mr Minister what are you doing?! On the other side of the coin is this newly acquired right by citizens to be forgotten. I know this is a delicate subject, I know that it is very easy to mistake the right to be forgotten for an excuse for the government, not from the public because it is the first thing which crosses my mind when I first heard about this principle two years ago, but I definitely would like to extend an invitation to the institutions here and to the political class in Malta to make a frank debate on what is the right to be forgotten, what has the European Court for Justice declared and what is the Council of Ministers of Justice doing about the matter. It is important to have a position in Malta about the matter since this issue will come up when we take the presidency of the Council of the European Union.

I would really like to take the opportunity to thank Mr Speaker for organising this very good exercise. I also want to thank Mr Justice Said Pullicino for being such an energetic Ombudsman who certainly did justice to this Office, and I would like to cordially invite everyone to hold a debate on this newly acquired right for citizens not only to receive information, but the right to be forgotten. Thank you very much.
The Hon. Deborah Schembri, Member of Parliament and Chairperson of the Social Affairs Committee

Comment by the Hon. Deborah Schembri, Member of Parliament and Chairperson of the Social Affairs Committee

First of all thank you very much all for being here, all of you. It was very interesting. This law is in its infancy and it is important that we go on the right track from the word go, but it is easier to put laws on the law book than to change a mentality and a culture. This is not just with this piece of legislation but with every piece of legislation.

When a country, like most countries as we’ve been told, has come from a tradition of secrecy, and not divulging too much, into a position where you have to divulge and where you see the importance to divulge, people need to transition into that. I think that our people need to go through that transition. It’s not just telling them: You have the right, they have to feel the need, and they have to see that it is important that this will benefit them.
This particular right, like many other rights, has its limitations and usually also a conflict between what is good to do for the country and what is good to keep away so that you do benefit the country. It's like when you have somebody who has heart problems and you have to give him bad news about his health. You have to be careful how you give it to him because it might kill him of a heart attack. It's just competing rights sometimes. It's just that fine line of when to do well and how to benefit someone by disclosure. Somebody mentioned the public interest test. This is very important. This is the fine line where we see what we should impart and what we shouldn't impart. I am all for the giving of information. I agree with this law completely, but sometimes there is a very fine line that we have to be careful how to cross.

What I find interesting is not whether we should give information, sometimes that's not the problem. We should give information, it is the “when” to give it. To keep to the same example, if someone has a bad heart and you give him bad news about his health instantly while the procedures are still going on, that might kill him. But if you restore his health and then you tell him: Listen, you went through a bad time, that information is good. So sometimes it's not an “if” but a “when” and it's all a matter of balancing things out.

Unfortunately as we have heard, we do live in a small country, we do live in a country where we have two parties, one on the opposition one on government side and sometimes we bicker too much. Sometimes we use information, even public information, to hit at each other, but sometimes this is what makes government keep away from giving too much information. Now we need to get past this and be more mature in our debate. Thus I fully agree with the gentleman who said that we need to get past this and use the information and be genuine and sincere. I think this is where our politicians also need to transition. We need to transition into an era where we use information differently, where we use information really for the good of the people and not to hit out at each other about what you did and what you are doing. Sometimes that is what keeps a government from saying things or revealing enough things. And that is what would make people in the opposition do the same when they are in government. So if the idea is to be genuine and sincere, then it shouldn't make a difference whether a party is in government or in opposition because the standard should be the same.
The Ombudsman of Gibraltar, Mr Mario Hook

Comment by the Ombudsman of Gibraltar, Mr Mario Hook

Thank you. I just want to make this intervention given the similarities between Gibraltar and Malta. We are a very small place. We are just seven square kilometres with a total population of just 30,000 people. However we do have our government, our parliament and our opposition. We have adequate democratic institutions in place.

The present government came into power after the previous government had been in Office for 16 years and it came to power on the ticket of transparency and accountability. This is a very relevant debate for me because we are in the middle of an election campaign now. We go to the polls on the 26th of this month and the words “transparency” and “accountability” have been mentioned continuously, in fact a little bit too much for my liking.
The previous style of government was to have only three or four meetings of parliament every year. Now we have meetings on a monthly basis and the government that we have is all for providing information. Having said this, a question raised in Parliament relating to a specific financial issue was not answered. I think that when it comes to voting, people are very wise. I always have a lot of confidence and trust in the people because we tend to judge and more than transparency and accountability, what we tend to judge is truthfulness.

Truth is the all important aspect that needs to be present before transparency and accountability. There needs to be the willingness from the part of those elected to govern the country and those who are in authority to be able to put out information. That must be based solely on the concept not just of truth, but on willingness for them to be truthful. Of course there will be limitations as we have heard from Mr Justice Giovanni Bonello, but the overriding principle in the whole concept of accountability and transparency is the willingness to be truthful. That is what aids and assists institutions in relation to data protection, such as the Ombudsman, whenever we need the information. We don't just need that the information is made available, we also need the willingness for that information to be available.

I recently had a case relating to health – we have just been given jurisdiction over health – and there was a question that I wanted to deal with, so I got statements from doctors, consultants and anaesthetists, everyone, but I then needed the nurses' side and there I hit a little bit of a problem because I asked to meet with the nurses who were on duty and they said it was pointless for them to meet the ombudsman and that we should go to see the doctors, consultants instead. But I needed to meet with them. Then I got an email from a manager who said: “What exactly do you want to ask?” And so I asked the director into my office on the very same day and told him that I did not know what I wanted to ask them but rather I just want to hear what they had to say. What I'm trying to say is that there must be willingness to be truthful about any one event and it is this exercise which will give way to good accountability. Thank you.
The Ombudsman of Wales, Mr Nick Bennett

Comment by the Ombudsman of Wales, Mr Nick Bennett

Thank you very much, Mr Speaker for hosting this event and also I want to thank your colleagues and the Maltese Ombudsman for his hospitality and for his contribution internationally. I think you’re celebrating your 20th anniversary. In Wales we hope to renew our legislation, it’s ten years old, and certainly one of the reasons why I came here is to have the opportunity to learn your more good practice from Malta and from other colleagues before we renew that legislation.

Back in United Kingdom it’s also the 20th anniversary of the Nolan Principles which Lord Nolan published back in 1995 after a huge scandal in terms of the cash for questions issue which aroused huge issues about transparency and the very values of public life in the United Kingdom. So we have the seven principles – I think
I can remember them – which some of them have been referred today in terms of honesty, transparency and accountability, but there are other very important values such as integrity, selflessness, fairness but also leadership. And in terms of the public interest test, 20 years on from those values, I certainly think that transparency and accountability, whilst they are necessary for good public administration, they themselves alone are not sufficient to ensure good public administration. I think one of the things this debate so far has made the greatest impression on me is the issue of culture. A number of you, have referred to this difficulty to try to transform culture and I think that’s why perhaps in a British context, the most important principle of public life is leadership, because it is leadership which should set alone a really great culture of expectancy when it comes to good public administration. Thank you very much.

Comment by the Ombudsman of Northern Ireland, Dr Tom Frawley, CBE
Thank you very much. I think it’s a really interesting and very challenging subject. It’s particularly interesting in Northern Ireland, where, your truth may not be my truth so we have some really challenging issues in the sense that truth is contested. What is the truth? We are in a situation, where we are attempting to deal with a very dark and difficult history over an extended period of time. There is often a debate around truth and reconciliation - two key issues for us in Northern Ireland in order to seek to move on from that dark time and there is often a sense in which both sides will contest with the other on how truthful they’re being. For example on the one side the State may argue that it has responsibility for all the formal systems of record keeping and files across the architecture, if you like, of government and on the other side who were responsible for some pretty awful things, there is no such formal system. So in those circumstances, how do you agree a form of common shared space that within which people are willing to engage in a way, that will allow people to move on which I think goes to the heart of Nick Bennet’s point.

One of the other discussants described the challenge as overcoming a ‘culture’ of secrecy. I think someone else described it as “mentality”, that is captured in a wonderful quote from a civil servant colleague I hugely admired when he said “we will give you all help short of assistance”. I was always reminded by that same civil servant that the Ombudsman is not a civil servant, I took some consolation from that To be fair to civil servants, they see their primary objective as protecting the politician they are working for. I love the programmes “Yes, Minister” and “Yes, Prime Minister”. Even though we
might think it’s something in the past, the culture portrayed on screen still exists in my opinion in Public Service and in Civil Service where individuals will assure you that what is proposed is being done for your own good and their primary objective is to protect you from the awful consequences that could result from an open approach you may be proposing.

Then we should acknowledge another aspect of freedom of information? Which are these wonderful documents that are so redacted, that even the page numbers seem as though they are blanked out? So there is a sort of a game being played a new culture being developed around us – a game of cat and mouse. A situation where increasingly the courts are being involved with the result that significant sums of public money is being spent in contesting these issues. There are some really fundamental challenges
for us and back to the point well made by Nick Bennet, that really the starting point is how do you build the culture that actually doesn't spend its time expanding huge energy and resource, in its endeavours to outmanoeuvre the other side, but actually approaches to the task in the spirit that was so admirably described by Joseph as adopting a human rights approach to all of this. This is a very timely and helpful intervention from Joseph, but I think it is often very difficult to achieve this sort of breakthrough in how we approach these matters and this is true not only in Malta, but in all so called open societies.

In this very week, the British Home Secretary is publishing new legislation which the media have nicknamed a Snoopers’ Charter which will allow the authorities to examine all kinds and forms of personal information. Protecting the individual's right to privacy is a major issue in a sense. This is yet another aspect of the out workings of freedom of information. I can only see the increasing complexity of these issues Chairman. Freedom of Information is one of those wicked problems to which there is no final conclusion. I once asked a colleague to explain what a wicked problem was and he said “it's a simple problem to build a bridge across the Grand Canyon while it's a wicked problem to raise a family” as such a task is never completed. There is no end point and I think freedom of information is a little like that. Of course we will continue in our efforts to find the route to a conclusion but it will always be a little distance from where we have arrived at. Thank you.

Comment by the Parliamentary Ombudsman of Malta, Chief Justice Emeritus Joseph Said Pullicino

It is the first time I had heard Tom Frawley being a trifle negative, almost defeatist. However, we are not unused to challenges. I think we should take up the challenge and see how we can contribute in this area. Essentially I think, truth has to be based on openness and correct information, on giving people the right facts at the right moment. Now this is the main issue because very often politics tends to act in a self-protecting way. Let us say the truth. Human nature being what it is, this is inevitable. However we must have structures in place that will make things work, that will effectively regulate how the Executive and Public Authorities have to respond when faced with requests to disclose information of public interest.

It still is a question of culture. Apparently we have all been immuned by the Anglo-Saxon culture that practically over-protects the public administration. However, we should turn our sides on the Swedish mentality. I mean their approach is completely
different, even though in practice it might not be as different as it looks. The approach in Nordic countries is that information about public affairs is owned by the people. Not to be informed should therefore be an exception, and if there are exceptions they have to be regulated by law. We do have laws in place but they are not effective. Had they been effective, there would not be so much confrontation and contestation every time that requests for information are refused even when these refer to activities that are of general interest and should be in the public domain. That means that the legislation, although in place, is not working satisfactory. Perhaps it’s a question of public opinion not being effective. On the otherhand politicians could improve matters by taking action through to the right channels. There should be the political will to make things happen. It is not a question of using information strategically for political ends. It is not
as simple as that. It’s a question of informing the public, making information available. I think also that politicians should make efforts to get the public informed. That is how democracy works. Political parties and civil society should ensure not only that the right of the citizen to be informed is respected by the public administration but also that the State’s duty to inform citizens is adequately defined, within established parameters, in enforceable legislation.

Comment by the Ombudsman of Scotland, Mr Jim Martin

Thank you, Mr Speaker. I’ve been interested in the discussion about information and I’m grateful to the Minister for raising the issue of the right to be forgotten, but there is another important right which citizens have which we sometimes overlook, and that is the right to privacy. And one of the issues that those of us who work in the Ombudsman
world face is that we take decisions which we make public about public bodies, which concern private citizens and there's a balance to be struck in the openness with which we discuss these things. So that for example, when I set up the Police Complaints Commission in Scotland, I had to take decisions as to whether the background of individuals bringing complaints were relevant when publishing my judgement.

In the role I have just now I am party to significant health information about individuals and when I come to judgement I do not make them public and I come under intense pressure from journalists and politicians and others to be more truesome in the information I give about the individuals who bring complaints. So the balance between the rights of the citizen to challenge public bodies without detriment to their own privacy is something which everyday most of us here have to tackle.

I'm not sure if I got it right. I'm not sure in the judgement that I make, whether I'm consistently erring on the side of the individual or public knowledge. I was interested in the discussions of the conditions that I nearly set out that people need to look at, and one of these was the judiciary. And I think one of the things that needs to be protecte, when you look at this, is the right of people who hold the positions that we do to make decisions which we believe are in the interest of the individual, but which may not necessarily be within the prime definitions of the statutes on information. One of the ways to get around that is to bring the decision-making on information release and Ombudsman decisions closer together. In Scotland we are quite far apart but we speak to each other and so I think when we look at this we must not lose the right to privacy in here and make that effect in our considerations. Thank you.

Comment by the Ombudsman and Information Commissioner of Ireland, Mr Peter Tyndall

The right to privacy is protected constitutionally in Ireland and is the subject of a great deal of case law so it's something that we're quite used to dealing with. I agree with you, one of the difficult things with making Ombudsman decisions, quite often is that the information you give in order for it to be meaningful is often so specific to one individual and it can be one individual, let's say a medical practitioner, that it's almost impossible to publish the decision without it being possible to identify the individual and that would cause us difficulties in Ireland. We could probably be challenged for doing that, because rights in the Constitution to privacy and to your good name – believe it or not – is enshrined in the Constitution so that does give challenges and I think that's something that Ombudsman have to work with.
There are advantages in holding both roles. I alluded to some of the ones about administration, the skill effects you need in order to manage freedom of information completely, not that different to the skills that you need to be an investigator for the Ombudsman so you can balance work well to those things. But there are other advantages in being able to work hand in glove on those kinds of issues to make sure that there is a proper synergy between the freedom of information régime and the ombudsman régime in both instances. You’re charged with helping to make sure that citizens can hold government to account. I just wanted to pick that up. I think there are advantages in having the two together which go beyond simply the administrative ones.

The other part I wanted to pick up is this issue of culture which I think is of fundamental importance. There is a huge difference between the Swedish system
and the systems in the countries which were formally linked with the UK and the
UK itself. It doesn't occur to anyone in the Scandinavian system that you should be
keeping things secret. There is a presumption that people will get to know what you're
saying so might as well say it publicly. And I think one of the things that you can do
in order to move forward in promoting that kind of culture is to anticipate freedom
of information request and simply publish the information anyway. So rather than
forcing the citizen to come with a request for information, if you know that there
is interest in particular information, government should publish that as a matter of
routine. In the UK and in Ireland there is requirement – I'm not sure if it's the case
in Malta, you may have this also – for each public agency to have the publication
scheme where it sets out what information is routinely published. That in itself saves
an enormous amount of time because if somebody asks for something you can simply
point to the fact that it is already on the website. If you have not already gone down
that route, I would encourage you to think about introducing it. Thank you.

Comment by the Data Protection and Information Commissioner
of Malta, Mr Saviour Cachia

In view that data protection has come in as a subject and given that I also administer
data protection, I always say that as I said at the very beginning, when it comes to
personal data, I consider the Freedom of Information and Data Protection Act as two
competing laws. But there is always the public interest test. Privacy is very important,
it is a fundamental human right of course, it is also enlisted in the European Charter
for Fundamental Rights. But I think here what needs to be done, first of all it's very
important to observe privacy of people. But it is expected that the privacy of certain
individuals or people who are considered as public persons is to be limited. One would
have to assess the difference.

Even in Parliament, I wouldn't expect certain information to be published about
a clerical officer to divulge information about his salary and all these things, but I
would expect that regarding a permanent secretary or the head or maybe any other
person who has got certain responsibilities and has got a particular salary scale which
is towards the high salary scale, I have no problem with that. I think our Members of
Parliament here will have to take into consideration, leaving the employees who are
not in the high salary scale. Whilst they have got every right for transparency sake to
ask questions about salaries and how public funds are being spent, there's no problem
with that, but there is no need to ask for the names, for example, because once these
are presented in Parliament, these are in the public domain and it's not fair to see Saviour Cachia, who is a clerical officer within that particular ministry. I think all this has to be controlled. I think all these issues have got to be addressed. And I think there should be a move, perhaps within Parliament, to have a particular committee to address these issues to try to reach the balance. I will be very happy to participate, if required, and give some of my experiences.

With regard to the right to be forgotten I think this is very important. The Minister said the ‘Google’ judgement has sent shockwaves but the Directive 95/46/EC and also in our Data Protection Act, this right has always been there. There is a particular requirement that personal data cannot be used longer than necessary and that means, therefore, that the person has a right to be forgotten. Now there is this
term of “The right to be forgotten” which is being used, and definitely this will have an impact on many things.

I share your views and I agree with you. In my opinion, there is no need to announce publicly somebody who has committed a crime ten years, fifteen years ago or twenty years ago, especially when it is in line with our Conduct Certificates Ordinance. If it doesn’t appear on the conduct certificate, which is frequently asked for when applying for a job, why is it that when they google his name the details come up? It is not fair and I think it is violating the privacy of the individual because he has already paid for the criminal offence. That will affect the way he will live. On the other hand, however, the details of the case may be used, but without divulging the names. Therefore we have to strike balances here. I think all this will be very important.

Another issue is about the use of personal data when it comes to indiscriminate surveillance by law enforcement authorities. Even that has to be controlled. There are ECJ judgments in this regard. Even the latest one about the safe harbour issues. The safe harbour has been ruled to be invalid just because it does not control indiscriminate surveillance by the United States. That is not accepted in Europe.

There are also the Passenger Name Records (PNR) issues. Again we will have to see how we are going to implement all this. In the Directive in the case of the PNR, for example, there is going to be that all requests have to be approved by my office. You can imagine how many requests we’ll have. Can we five technical people do all these tasks? When looking at these things, I think, the Government will have to realise what this is going to involve. Do we need to invest more in the authorities, be it data protection or freedom of information, and be it the ombudsman, so that we can deliver our responsibilities? All these will have to be looked at. Thank you.

Comment by the Parliamentary Ombudsman of Malta, Chief Justice Emeritus Joseph Said Pullicino

We have established that transparency and accountability are essential to ensure the right to a good public administration and that these can be assured through correctly and timely. I would say that it is in the interest of the public administration to divulge as much information as possible because it doesn’t make much sense to withhold information in this day and age, when technology is such that you can get your facts from many other sources. It is counter-productive to hide information, unless it is essential and necessary to do so in the public interest. In the long-run the facts will come out, perhaps incorrectly, and that would damage the public administration.
Therefore I think that in the first place, it is in the interest of the public to divulge the information that should be made public. Non-disclosure or providing incorrect or misleading information can lead to see these problems. If Blair had been furnished with the correct information, we might not have had an Iraq war.

Therefore I think now is the time to consider new approaches to these issues. Coming back to the notion of culture, and to the concept that the more information you get from government, the better would the public administration be, one should start focusing on the State’s duty to inform the public and on the limits of its right on non-disclosure.
Thank you. If there are no further comments I would like to add a comment to what Dr Said Pullicino just stated. During this round-table debate the question of corruption was not mentioned. In order to fight corruption and to have good governance you need to have an efficient right to information. This reminds me of the report that was published by the Council of Europe Group “States against Corruption” where the findings showed that when you have an efficient freedom of information access to everyone, then corruption is being addressed. In this respect one should examine the legislation of Finland on the access of freedom of information, which is a very strong and comprehensive one.
Comment by the United Kingdom Housing Ombudsman, Ms Denise Fowler

One thing that I’m really interested in is this idea of how, what and when do we disclose. I think that one of the things that really impacts on the culture of disclosure is the idea of a safe space for conversations for government to take place. Your comments, Joseph about the Iraq war reminded me of the Butler report about weapons of mass destruction. One of the things that showed was that decisions in relation to that were not done in a way that followed the normal channels in a good public administration.

One of the concerns around Freedom of Information in the UK is that of politicians being concerned that minuted meetings might be disclosed, so they will be tempted to have discussions outside of formal meetings, in corridors and in other places. So one of the things we need to do in constructing any legislation is making
sure that we address those concerns and talk about the kind of information which is being disclosed, why it is being disclosed, how and where. We should encourage good governance and properly reflect the need for a safe space for discussion. These are issues which should probably be discussed. It is so that politicians can think the unthinkable at times, consider risks and consider options, some of which should not be disclosed at the wrong time.

**Round Table Conclusions by Prof. Kevin Aquilina, Dean of the Faculty of Laws at the University of Malta**

It is very difficult for me to try and summarize all the points which have been raised in these few minutes because there all very interesting. Basically the first point which I would like to address is that we people here, who are around this table, mainly are
coming from the same culture, which is the culture of secrecy which we find in our public administration. This is because our public administration is modelled on the British system and in the United Kingdom, before they enacted the Freedom of Information Act, the culture of secrecy was the prevalent method of functioning for the government. Therefore we have inherited that culture and to a certain extent we are finding it very difficult to detach ourselves from that mentality. I think that is something which is common to all the Ombudsmen and Information Commissioners who have addressed this working group.

We have heard of a number of competing rights, which obviously influence how an Ombudsman or an Information Commissioner has to carry out his or her duties. We have heard, for example, about the right to privacy on the one hand, the right to be forgotten, on the other, there is a need to balance these rights because naturally if you are going to provide a lot of information, you might also imperil the right to privacy and you can also imperil certain state interests. For example Judge Bonello was referring to the European Convention of Human Rights which sets out certain legitimate aims such as national security and defence. In those areas it might not be that easy to provide information because it can imperil the security of the State, public safety or even the well-being of citizens. Thus, here an Ombudsman or an Information Commissioner has to try and balance out these competing interests.

Another point which was made today is that the Ombudsmen in the United Kingdom and in Malta are not structured in the same way. For example there are certain Ombudsmen institutions which are also entrusted with carrying out freedom of information duties whereas the Maltese model is different. The Maltese Ombudsman does not deal with freedom of information and for that role we have our own Data Protection and Information Commissioner. Again, the Maltese Data Protection and Information Commissioner has to balance the two laws which he administers, that is the Data Protection Act and the Freedom of Information Act. Sometimes even there we find certain competing interests since on one hand the Data Protection Act tells him not to divulge personal data and sensitive personal data, whilst on the other hand he has to change hat and wear the one of the Freedom of Information Commissioner which is totally in the direction of providing as much as possible information to the public. In this respect, when you look at the structures of the Ombudsmen and Information Commissioners you find that there is quite a variety of models, as was mentioned earlier by one of the previous speakers.
Another point which has been raised, and which really deserves attention, is the need to educate, educating not only the public but even the politicians. We heard that whilst the members of the public should know their rights, especially in order to be able to exercise the possibility of obtaining information from government departments and public bodies, we must also see that politicians are doing their utmost in the House of Representatives to ensure that this information comes through to the public.

Although in Malta we have enacted our freedom of information legislation very recently, we have had – even since colonial times – the possibility of getting information from the government through parliamentary questions. Through that procedure a lot of information is made available to the public. By far, more information comes to the public through parliamentary questions rather than requests to government departments under the Freedom of Information Act. Therefore, one should also consider that the safeguards which we do find in our legislation such as the Freedom of Information Act and the Data Protection Act, are also carried on board in the parliamentary questions process, mainly to ensure that privacy and other legitimate interests are protected.

More so that in Parliament there is the parliamentary privilege whilst in the case of freedom of information requests and information which is disclosed through freedom of information legislation it naturally does not enjoy parliamentary privilege which a member of parliament, a minister, a parliamentary secretary or a committee enjoys. It is interesting to note – and I was not aware of this – that out of the 54 rulings which the Speaker had delivered since he has been occupying the post of Speaker for the past two and a half years, 20% of them essentially dealt with information matters. That shows that our parliamentarians seem to be very conscious about the need to information.

Another interesting point which has been made was that the information has to be given in a timely fashion. It is useless having the procedures which we have in our Freedom of Information Act, such as having recourse to the Information and Data Protection Commissioner or to the Appeals Tribunal or to the Court of Appeal on an appeal on a point of law, but ending up getting this information three or four years down the line when obviously it might be totally outdated and even irrelevant to that particular purpose. I was very much surprised to learn that in the Swedish model they have got a 48 hour limit within which to provide the information as opposed to the 30 day model which one finds in other jurisdictions. Thus, I think this is a very important aspect which needs revisiting.
Another point was the need for the government to provide information not through the Freedom of Information Act or parliamentary questions, but out of its own will. In fact we do have a provision on the lines of section 47 to this effect which was introduced when the Press Act was amended in 1996. This amendment, now repealed, encouraged the government to divulge as much as possible information. Today this is very much possible through websites and other electronic means of communication and perhaps more information of this nature should be made available, especially on the websites of the ministries and the Department of Information. Sometimes not even innocuous government-held information is put online.

Another aspect which I would like to refer to is basically who is the owner of the information because if we are speaking of a culture where government sees itself as owning the information, then that is one thing and is going to lead to certain consequences and conclusions whilst if on the other hand one is going to look at the public as being the owner of the information, then the government is simply holding the information in trust. From the latter perspective, the government has to open up its documents and records and make them available without any difficulties.

In Malta, as in the United Kingdom, we have the National Archives Act. There are no limitations to obtaining information under the National Archives Act but again, when the records are deposited at the National Archives, normally 30 years (if not more) would have passed and basically it would become historic in nature although still it could be very important to shed light on certain aspects. Although there are very limited restrictions when the record arrives at the National Archives, it would by that time be outdated.

The last point which I would like to mention was raised by the Speaker of the House of Representatives. This is about the importance of disseminating information because that can act as a disincentive for corruption for the more information published, hopefully the less people will perpetrate these types of criminal activities.

There were other points mentioned but due to time restrictions I cannot mention them. Thus I have highlighted those points which were mentioned by various speakers and perhaps should provide more food for thought in the future.
Concluding remarks by the President of the House of Representatives, the Hon. Angelo Farrugia

Thank you very much, Prof Kevin Aquilina. We have now come to the end of this round table conference. I thank you all for your contribution which were interesting and focused on the theme we were discussing. I would like to invite you for a tour of our new Parliament building. Thank you very much.
The President of the House of Representatives, the Hon. Angelo Farrugia explaining the Maltese Parliamentary system to the members of the Public Service Ombudsman Group
The Public Service Ombudsman Group
The Public Service Ombudsman Group

The Public Service Ombudsman Group is the successor of the British Irish Ombudsman Association also called the Ombudsman Association. It is a professional association for ombudsmen and complaint handlers, their staff and others interested in the work of independent complaint resolution.

It is neither a complaint-handling nor an advisory body. It cannot give the public any advice other than signpost to an appropriate ombudsman or complaint handling scheme, if there is one.

It can give general information about ombudsmen, but not specific information about member schemes. Its jurisdiction extends to Government and the Public Sector. Although ombudsman members have to fulfil certain criteria for membership, the Association is one which Ombudsman schemes join entirely voluntarily, and its purpose is to promote the general concept of Ombudsmen, as well as to organise networking opportunities for Ombudsmen and staff through conferences, seminars and meetings.

The association has no role whatsoever in the internal working of member schemes nor any influence or jurisdiction over them.

Malta has been an active of this group for many years. Its members today include Ombudsmen from the United Kingdom, the Republic of Ireland as well as the Gibraltar Public Services Ombudsman, the Public Service Ombudsman of Northern Ireland, the Ombudsman of Wales, the Ombudsman of Scotland, the Bermuda Ombudsman and the Cayman Islands Complaints Commissioner together with the Local Government Ombudsmen and the Housing Ombudsman of the United Kingdom.
“The Parliamentary Ombudsman is the shield of the citizen and the conscience of the Public Administration”

JOSEPH SAID PULlicoINO