

2. Freedom of Information Bill 2014 – First Reading approved

The Acting Attorney General to move:

That the Freedom of Information Bill 2014 be read a first time.

The President: We turn now to Item 2, Hon. Members, the Freedom of Information Bill 2014. I call on Her Majesty's Acting Attorney General to take the First Reading

The Acting Attorney General: Thank you, Madam President.

This First Reading of the Freedom of Information Bill continues with the Island's aim of providing for its citizens greater rights of access to, and so more openness and transparency in respect of, information held by public authorities.

The proposals of the Bill offer a balance between the establishment of a legally enforceable right of access to information, at the same time as considering the potential financial implications and impact on the day-to-day business of public authorities that such a right may create, especially in this current economic climate.

At the forefront of the Council of Ministers' thinking, when developing the Bill, has been a sense of achieving a balance of how to enhance the public rights of access to information held but, at the same time, doing so in a controlled and responsible manner.

The right to information is a significant right but it is not, however, an overriding right; and the Island's Data Protection legislation is a good example of where the rights to personal data still has to be balanced with other rights, such as legal privilege and the cost burden of compliance. It is, therefore, a right that is still qualified or circumscribed in various ways: in ways that reflect other countervailing public interests, including the efficient delivery of public administration. This sense of achieving a balance is, however, broader than purely financial considerations and is enshrined in the purpose clause of the Bill, which states that it:

'is to enable persons who are resident in the Island to obtain access to information held by public authorities in accordance with the principles that the information should be available to the public to promote the public interest; and exceptions to the right of access are necessary to maintain a balance with rights to privacy, effective government and value for the taxpayer.'

The desire for balance is reflected in the Bill; and at subsequent readings, should the Bill pass its First Reading stage today, Hon. Members, we will have the opportunity of considering how the Bill seeks to redress this balancing exercise.

I do wish to emphasise today, however, that even with a focus on a required balancing exercise the Freedom of Information Act will, if passed, have a profound effect on the Isle of Man. Our residents will have a legal right to information from our public authorities who in turn will, unless the Act allows otherwise, have to provide this information. Moreover, although there are provisions in the Bill designed to encourage the informal resolution of any disputes concerning disclosure, where these efforts fail there is then to be a formal review and enforcement structure which can result, in certain circumstances, in a public authority being held in contempt of court. So, the stakes are high.

I would wish at this stage to highlight a few essential and general features of the Bill which Hon. Members might wish to consider. Firstly, the legally enforceable right to access information under the Bill is only available to Isle of Man residents, a proposal which seeks to limit exposure to the potential endless commercial and other requests, which, it seems, many public authorities in the UK are routinely subject to. We want to try and avoid, for example, companies who gather and sell information. So by limiting the scope of the Act to Isle of Man residents we can then, hopefully, focus our limited resources on requests for information from those who are directly affected by a public authority's decisions.

Secondly, the Bill proposes that the legally enforceable right of access is available to information created or after 11th October 2011, which date is the start of the current administration as marked

by the election of the Chief Minister. Having such a start date has meant that the additional costs associated with reviewing historical information and preparing it for potential release can be minimised.

Thirdly, the Council of Ministers is proposing that the Act's implementation will be phased in over two years. The purpose of this phased implementation is not to postpone the right of access for the sake of it; rather it is to properly manage the impact of the Act and, crucially, to learn from mistakes and to address teething problems that will inevitably arise. Experience from elsewhere shows that a 'big bang' approach has a profound effect on public administration – and not always for the better.

It is proposed, therefore, that if the Act is passed, it will go live from February 2016 – or very shortly thereafter – for two public authorities: the Cabinet Office and the Department of Environment, Food and Agriculture. These two authorities will provide a pilot for the Act's implementation and for the guidance and training that will sit beneath it. The pilot will provide Government with real time experience of how the Act operates in practice – invaluable in allowing for a proper assessment of the Act's impact upon routine business. The overriding aim is to make the progressive implementation of the Act as trouble-free as possible.

I am advised it is proposed that, subject to statutory consultation, the Act will then be extended across the public service using the following timetable: January 2017, other Government Departments, the Information Commissioner, Tynwald and its Branches; June 2017, Statutory Boards and Offices; and January 2018, local authorities and companies, to the extent that they perform functions or exercise powers conferred on a public authority under an enactment.

It is important to emphasise that the parameters proposed by the Bill as to the statutory rights for information, do not in any way restrict the access rights which people currently enjoy. For requests from non-residents, for requests for information pre-dating October 2011, and for requests for information from a public authority which is a Government body which is not initially covered by the Act, access will continue to be governed by the existing 1996 Code of Practice on Access to Government Information. I am advised that the 1996 Code will be reviewed to ensure that it is compatible with the Act; but it is important to stress that the Act will not restrict what is currently available to people. Indeed, it serves to enhance the current position.

It is believed that in setting parameters as to limiting the right of information to Manx residents, and having a cut-off date of October 2011, this will allay some of the fears that have been expressed about the affordability of the Freedom of Information regime. However, it is true that the new Act will come at a cost which will introduce what is, in effect, a demand-led statutory service. In addition to the central costs the office of Data Protection Supervisor – which is set to become the Information Commissioner under the Act, with additional roles and responsibilities – will also require extra funding.

A draft version of the Bill was consulted on over a six-week period during 2014 and the Bill was, after consideration of the responses, further refined by the Council of Ministers to take account of that consultation. As Hon. Members will be aware, the Bill has completed its Reading before the House of Keys.

Madam President, I have taken a little time to explain to you, and Hon. Members, the approach taken in preparing the Bill and in outlining its purpose. The Bill is necessarily quite lengthy intending, as it must, to seek to define the right to information which people will be entitled to enjoy. The Bill will bring the Isle of Man in line with many jurisdictions across the world and reflects the Island's commitment to openness and transparency. It is a significant step forward.

The Act will create for the first time a legally enforceable right of access to information held by public authorities for the people of our Island

Madam President, I move the Freedom of Information Bill 2014 be read for a first time.

Mr Coleman: Madam President, I beg to second, and reserve my remarks.

The President: The Hon. Member, Mr Crowe.

Mr Crowe: Yes, just a simple question to the Acting Attorney General.

In clause 3 it says:

‘The purpose of this Act is to enable persons...’

If this includes ‘person’ to include a company, it would be simple for off-Island people to incorporate a company in the Isle of Man and seek information that way if ‘person’ includes... Or is it to include just individuals? That is one question.

The other question I would raise is schedule 1, where you mentioned the definition of ‘public authorities’ in the Bill is limited to the Cabinet Office and the Department of Environment, Food and Agriculture. The Cabinet Office is very wide ranging because it includes all, I would imagine, the records of the Council of Ministers and I am just wondering if that falls within the initial Act of the Bill, or inclusion of the Bill?

Thank you, Madam President.

The President: The Hon. Member, Mr Downie.

Mr Downie: Thank you, Madam President.

On a similar line to my colleague in Council, Mr Crowe, there has always been some difficulty in defining what is an ‘Isle of Man resident’ – is it a taxpayer, is it a person on the voters’ list?

As Mr Crowe has indicated, if you wanted to find information out about a company or a business here, you could just come and form an Isle of Man company – there are no rules saying that you must be domiciled in the Isle of Man. I think that could lead to one or two problems there.

I think one of the things I want clarification on is: the Cabinet Office is referred to in the Bill and we have already heard from people outside of this Council that the Cabinet Office is yet to be a legal entity. I think that needs to be resolved quite quickly, because some of the people who are saying that are former very senior civil servants and people who would know quite a lot about these things.

One of the other areas that I want some information about today is: under what circumstances does the power of veto by the Chief Minister come in? Where he can veto certain requests? I think that needs to be dealt with as well, because that was raised at a number of industry-related meetings when the Bill went out to consultation.

I am pleased to hear that the introduction of the legislation will not affect in any way people’s rights because, at the present time, people can go to court, they can apply to the High Bailiff or the Deemster for certain information. I actually think the existing system that we have in place now has actually stood us in reasonably good stead. I hope that embarking on this route we are not going to finish up in a situation where Government, for whatever reason, is inundated with requests when a lot of this can be dealt with by somebody picking up a phone or speaking to their MHK who will provide the information for them.

Other than that, I am supportive.

The President: The Hon. Member, Mr Butt.

Mr Butt: Thank you, Madam President.

I just wish to make a few general comments. I wish the Attorney well with the progress of this Bill and I absolutely support the principle of freedom of information. But I think in trying to achieve the balance which he mentions, it has turned the Bill into a very complex and complicated piece of legislation. I have read it twice and I am not looking forward to reading it a third time, because I would have thought it would have been a simpler matter to provide freedom of information without a Bill of this complexity.

I appreciate we have probably followed something of the UK system, but I did expect it to be an easier document to use. I suspect that the current Code of Practice which is in being now is, perhaps, a better way for the public to go if they want information, because there are so many caveats within

this Bill that it is going to be a nightmare for some people to understand what they can and cannot get.

Also it does create, obviously, a huge bureaucracy which is going to cost money. When the Chief Minister said it is not going to be cheap I thought 'You must be wrong'; because it is a simple matter to provide information. But the way this Bill is worded it does provide a lot of extra people – and bureaucracy is going to cost money.

I also have a bit of a concern about the role of the Data Protection Officer: on one hand he is there trying to protect people's data – and that is his main job under the Act – then, on the other hand, he is there also trying to provide the public with information on these people, which might affect people as well.

I know there are safeguards in there to make sure that there is not a conflict, but it does appear to *me* to be a conflict; so the man who is trying to guard people's rights including their data, is now the man who has to distribute it as well – and he will also need extra staff.

I think in part 4, sections 28 to 41, there are so many caveats in there about restrictions where information cannot be found that, in the end, the public will not be much better off than they are now using the current Code of Practice.

Those are my general comments, Madam President. I also do find – and it may come in some queries later – the Council of Ministers seem to have some powers which I am concerned about: they seem to have powers to do things well beyond what I would expect them to be able to have. I would hope the Information Commissioner would have more power than them but, in some cases, he has not.

So those are my general comments and I wish the Attorney well with the progress of this Bill.
Thank you.

The President: The Hon Member, Mr Turner.

Mr Turner: Thank you, Madam President.

I agree with the sentiments of the last speaker, the Hon. Member Mr Butt. I think the importance of having access to information, nobody would argue with that principle; it is so important that the public have confidence in the administration and the administration is open about what it is doing.

I am just not convinced this is necessarily a good vehicle that is before us. It has all the ingredients of building a huge empire – a raft of bureaucracy and huge cost. I just wonder whether the Attorney could maybe explain what the differences are here, and what information is going to be accessible under *this* legislation that is not accessible under the current arrangements.

There seems to be a feeling maybe outside that we do not have any access to information, when of course there is the Code on Access: applications can be made and then, if necessary, a ruling by the High Bailiff. So there is a procedure in place. I wonder whether that procedure has failed at any point in time because, if that procedure is not right, then I would certainly support doing something else.

I am just wondering what *this* is going to enable that we cannot actually do under the current system, because the huge bureaucracy and possibly getting the same end result... I really do not see the point in that. That said, I think it is vitally important that we do have a Freedom of Information regime, but whether this is *technically* the right way of going about it I do not yet know.

I would not want it to be said that I am against the principle of freedom of information but what I want to know is: we already have a system which seems to be working. Is it working? What is different about this, other than the huge cost and empire that it appears it is going to build to enable the same end result?

The President: The Hon. Member, Mr Wild.

Mr Wild: Thank you, Madam President.

First of all, I wish the Acting Attorney General every success in taking the Bill through and I support the principle of freedom of information. I, like other colleagues, am concerned about the complexity of the Bill; but I am guessing it *has* to be complex because there is information out there that has to be protected and, therefore, the Bill has to be very specific in terms of that information.

I would just make the observation that when it comes to 'Interpretation' under clause 5, I think it would be useful to have a definition of 'person' and a definition of 'Isle of Man resident'.

Thank you.

The President: The Hon. Member, Mr Coleman.

Mr Coleman: Thank you, Madam President.

I follow on from the previous speaker about the definitions, and I just wondered whether we are now coming into the first part of the usage of the Interpretation Act which set up default interpretations. I wonder whether the Interpretation Act defines 'person' and 'company'?

Maybe the Acting Attorney General can comment on that?

The President: The Hon. Member, Mr Braidwood.

Mr Braidwood: Thank you, Madam President.

Madam President, I agree with a lot of the previous speakers. It is a fundamental right for an individual, as the learned Acting Attorney General has said – particularly if it is a local resident – to obtain information.

I have my reservations, because the Code of Practice on Access to Government Information has worked exceedingly well for the last, near enough, 20 years. Are we getting a hammer to crack a nut with the Freedom of Information Bill?

We have already seen the additional resources which are going to go into the Cabinet Office, the additional resources for the Data Protection Supervisor who will become the Information Commissioner under this Act. We do not know the actual cost of the resources required.

The only thing I can look at, with the impact assessment of this Bill, is that the Act does provide for a charging regime; and it is saying:

'for the additional work that may be required by a public authority in order to respond to a request and for making an application for a review decision by the Information Commissioner.'

There is nothing in the Bill, where I have looked through any of the schedules, on what those fees may be; and, of course, it also says in the Act that the fees can be waived.

I am just wondering what type of cost? Is this very similar to the UK Freedom of Information and what are the relevant costs?

The President: The Lord Bishop.

The Lord Bishop: Thank you, Madam President.

Trying to get my head round this Bill has led me to realise just how risky the process of drafting new legislation like this might be, because of the complexity that is obviously here. It seems to me it is very easy to add to the existing rights that... some of them are written, some of them are assumed, some of them are part of what we might call our unwritten constitution.

It is easy to add cards to the house of cards and accidentally, in the process, knock the whole lot down. That worries me quite a lot because, for instance in the Road Traffic Bill that we have looked at a few minutes ago, we referred to the fact that a minor omission had to be put right. Now, a minor omission in that way is of very little consequence in the whole scale of things. Something that goes wrong with *this* could have enormous consequences and I am worried that it is too much to try and get hold of in one go.

The President: The Hon. Member, Mr Corkish.

Mr Corkish: Thank you, Madam President.

I have no wish to repeat what my hon. colleagues have said, but I would certainly agree this is not an easy Bill. I would also voice the concerns I have of just how complicated this is and just look at how we actually bring this into being.

The Government Code on Access of Information, I thought, certainly works. The big question I would have would be: in these straitened times, the actual cost of this? I think Jersey reckoned it was £1 million plus for this.

The other question being, there are two fees which are shown here: has an exercise been done regarding fees and would the mover think that this could be self-funding through fees?

A Member: Good point.

The President: The learned Acting Attorney General to reply.

The Acting Attorney General: Thank you, Madam President; and thank you, Hon. Members, for... albeit your *guarded* support, perhaps, for the Bill; but quite rightly because, as I said, the stakes are high as far as you considering the introduction of this legislation for the Island is concerned.

I will do my best to answer the queries which Hon. Members have kindly raised.

If I could first turn to the Hon. Member, Mr Crowe: consideration was given to the difficulties with reference to a non-resident abusing the position, with reference to the possibility, for example, of forming a Manx-resident company to enable them to access this information. I think the realism has been identified that that is a door which is very difficult to close: somebody *could* do that. But there is this overarching power on the public authority when it considers a request for information: if it considers it – and it has evidence – to be vexatious or an abuse of process, it could decline. It could challenge, if they had information which would lead them to believe that it was an abuse of the process, that there was a UK resident using this door which is there. It is *very* difficult to close it. But, certainly, there has been a realism that is something that could happen.

As far as the Hon. Member, Mr Crowe, made reference to the Cabinet Office and exactly what is being planned to be transferred, or *open*, to a request for information in that regard: I do not know the specific answer to that, I have not been part of the thought process there, or planning. But if I could come back at the Second Reading stage and answer that specific point; because I think Hon. Members need to know whether or not it would be a means of access to the Council of Ministers' own records, to the extent that that is not excluded already under political or parliamentary exclusion provisions in the Bill. So if I could come back to that.

With reference to Mr Downie and his concerns again, quite properly, with reference to what is an Isle of Man resident. If I could just remind Hon. Members that, along with the Act, if it is passed, there is an obligation on the Council of Ministers to actually introduce a code of practice, and the Code of Practice under the Bill itself is required to give guidance to public authorities as to the practice which they are to follow in exercising their functions. One of those functions will be to address the issue of the Isle of Man resident and what tests they ought to have in mind, if that is the case, to identify whether the person making the request for information falls within that category.

There has been no attempt under the Bill – as you have quite rightly seen, Hon. Members – at this point in time, to define what that means. That will come out with the Code of Practice in due course which, as I say, the Council of Ministers is required under the Bill to actually issue.

I entirely agree with the point which Mr Downie has made that there is currently debate as to the status of the Cabinet Office – it is not a legal entity. That, again, is something that I am sure will be brought forward perhaps for Hon. Members here to consider, or Tynwald, in due course; but certainly there are some questions which need answering as to the status of the Cabinet Office and its persona – and that, as yet, has not been resolved.

Mr Downie then made reference to a matter which I am aware did cause some concern in the House of Keys, and that is with reference to the Chief Minister's veto. The Bill does make reference specifically to the circumstances where the Chief Minister can use his override, so to speak, and essentially he can veto the decision relating to a default notice. So, in other words, you can say that, in crude terms, he does not accept there has been a default in any of the circumstances which pertain to a qualified exemption. So he could, for example if the Information Commissioner decided that, in a particular set of circumstances, the qualified exemption which the public authority claimed in respect of a matter – and that is set out in the Act which sets out those circumstances – did not pertain, he could veto that.

In that regard there is a right of appeal which would be by way of petition of doleance. So, the Chief Minister certainly would have to comply with an Act reasonably in exercising his right of veto and if that was challenged there would be firstly, the point of law – he could go to the High Court if he acted illegally – but, alternatively, if it was simply a suggestion that he had wrongly formed a conclusion in exercising his decision in making that veto, that could be referred to the court by way of a petition of doleance.

Turning then to the point which Mr Downie, again quite fairly, made, with reference to the existing system under the Code on Access to Information. As I have said in my opening submission to you, it is not intended that the Act will supersede or replace that Code, it will work in parallel until such time as all public authorities are brought under the Act. The existing Code: it is intended – I am instructed – will be reviewed to ensure that it does fit in and comply with the provisions of the Act going forward.

The Hon. Member, Mr Butt: I thank him for his, again, guarded support for the Bill. I take the point which I said in my submission that the balancing act is a very complicated one and, certainly, when Hon. Members come to consider, hopefully, the detail of the clauses, that is where I am sure you will have the opportunity of looking more carefully in detail with reference to the balancing provisions which are put in place.

It is inevitable, however, that with this legislation, as I have said, it comes at a cost and it comes with added bureaucracy – there is no way that we can avoid that. The fact of the matter is that, in actually introducing statutory rights to access of information, the controls have got to be there, because, as I indicated, the stakes are high. A public authority not complying could be held in contempt of court, so we have actually got to try and set down the framework upon which the public authority will be assessed, as to whether or not it *has* been in breach of any requirements by statute and, accordingly, whether it is in contempt of court. This is no easy task; which is why, as the Lord Bishop very fairly indicated, the drafting exercise here has been rather complicated to ensure that we can actually best define those circumstances. And time will tell, unfortunately – that is the way of the world – whether any mistakes have been made; and no doubt the courts, if it comes to it, will have to consider that in the future.

The Hon. Member, Mr Butt, also expressed his concern about the dual role of the Data Protection Supervisor, as he now is, with the Information Commissioner under the Act. It is the view of the promoters of the Bill that there is some synergy between the two roles and that the Data Protection Supervisor will not be conflicted with reference to his role in that regard, with his role under this particular Bill. That was consulted on and, I have said, the results of that consultation have been included within the Bill.

The Hon. Member, Mr Turner, again raised concern about the bureaucracy and cost, and also the difference between the Code as it exists at the moment – effectively asking the question what is wrong with what we have got. The only thing I would say to that, in general terms, is it does not actually have the *stick* which this Act has on the public authorities, where they will be required by *statute* to comply with the request for information, as opposed to, under the Code at the present time which has no actual *criminal* restraints on the authority who are asked questions under the Code. Under this Bill those restraints will be put in place where, I have said already, they could be found in contempt. It is the strength and the hand of the person who is actually making the request

that the Freedom of Information legislation has developed, not only in the UK, but in other countries throughout Europe, in particular; and this Bill follows the models, as I have said, of those other jurisdictions and I believe it works in those jurisdictions albeit, as has been quite fairly pointed out, at some cost.

The cost in the Isle of Man has been addressed and, as I have said, they have tried to minimise that by restricting the start date to October 2012, and restricting it to Isle of Man residents – as the experience, I am told in other jurisdictions, is that the major cost has been when companies of the likes that I mentioned, who are seeking to collate information or data for sale, have been abusing the process. So we have tried to close that door as best as possible.

To the hon. Mr Wild: again, I thank him for his guarded support for the principle of the legislation, and I have noted his concerns about the complexity of the Bill. All I can say in that regard is essentially that, because of the statutory rights which were being created, the protections were necessary to set out in some detail the rights to exemption – be it the overall exemption or qualified exemption – have been difficult to provide for; and to enable the test to be applied as to whether the public authority has *met* the request for information, it has been necessary to set it out in some detail, which I would have pleasure in, hopefully, helping Hon. Members with, when we come to deal with the clauses.

The issue of whether or not clause 5 should contain a definition of ‘person’ or ‘Isle of Man resident’: again, I will take that away if I may and come back at the Second Reading and, if necessary, an amendment could be moved in that regard. However, to repeat what I said before, even providing a definition is not necessarily going to help anybody minded to abuse the process and that is something that certainly the promoters of the Bill have had in mind.

To the Hon. Member, Mr Coleman: I thank him firstly for seconding the First Reading of this Bill; and with reference again to his points concerning person and company, again if I could come back at the next Reading to see how that interacts with the Interpretation Act which is currently undertaking its legislative progress.

To the Hon. Member, Mr Braidwood: I thank him for his comments, and note again his reservations concerning the comparison between the existing Code and what is proposed here. I do not actually have the information by way of comparison as to the existing Code against the Bill, and perhaps I can come back at the Second Reading and address the more significant ways that the Act, or the Bill itself, actually differs.

I am not aware of any work having been carried out on the question of fees – and certainly I did ask the question. The provisions under the Bill at the moment are simply enabling provisions, there is no proposal that I have seen to actually fix a fee, and I do not actually know... and, again, I can make some enquiries what the costs have been in the UK. Reference was made to the costs in Jersey and I have heard the same message but I have got no evidence of that – but I can see if I can find out any data on that and help Hon. Members with that at the Second Reading. As I have said, without a doubt, it comes at a cost and it is going to be a demand-led cost, and it is going to be very difficult to actually put a figure on that with any accuracy.

To the Hon. Lord Bishop: I accept what he says concerning the complexity of drafting and it is really necessitated because, when you are creating new rights or adding to existing rights, that is when the problems often happen; and, as he more than fairly pointed out, sometimes the cards come tumbling down if you get it wrong.

We have done our best here and I am sure, with Hon. Members’ help, we can do whatever tidying up is necessary as we go through with this process. I live in hope. *(Laughter)*

To the Hon. Member Mr Corkish: again, I thank him for his guarded support. The big question, as he says, is cost, and I share that concern; but the exercise has been done insofar as trying to reduce the cost but, until it goes live and until the demands and the process is put to the test, it is not going to be possible to identify that.

There has certainly been no recognition, or proposal, that I am aware of, of this being a self-funding exercise – I think that would be, quite frankly, cloud cuckoo land when you look at other

experiences in other jurisdictions. Funding has been set aside for the staffing requirements that are necessary in both the Data Protection Supervisor's office and in the Cabinet Office itself to actually launch this legislation, if it passes.

I hope, Madam President, I have adequately dealt with the queries that are raised; and, in so doing, I would move the First Reading of the Freedom of Information Bill 2014.

The President: The motion is that the Bill be read a first time. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

That concludes consideration of Items on Order Paper, Hon. Members. Council will now adjourn and the adjournment will be until 10.30 a.m. next Tuesday in this Chamber.