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FREEDOM OF INFORMATION

By

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The concept of freedom of information stems from the principle that in a democracy the people in whom ultimate power is vested must subject to certain necessary exceptions or qualifications, a right of access to information in the possession of agencies and departments of government and that such agencies and department should where necessary be compelled to produce inform-ation which do not fall under the exceptions or qualifications.

Traditionally, governments have tended to be secretive. The less liberal the government the more secretive it is. Under a dictatorship, for example, the people are allowed to receive or to have access only to such information as those in power choose to reveal. Everything also is treated as a state secret. Even under a liberal democracy the bureaucracies of govern-ment are usually reluctant to release information which they think should not be made known to the public. Whether under a dictatorship or a democracy the excuse given for withholding information from the public domain is that exposure will endanger the security of the state or be otherwise injurious to the public interest.

The concept of freedom of information and its acceptance is quite modern. The recognition of freedom of information as an essential right has developed largely since the end of the second world war. There has been a growing awareness that the government of a country and its agencies are not always frank and truthful in dealing with the people. As a result much information about governmental activity is either concealed or distorted. The public is therefore kept in ignorance of the doings of government in many important areas. Sometimes they are actually told lies!

It is pertinent to ask: what is the need for freedom of information? There are many good reasons for having freedom of information in a democratic society. The unquestioned basis of our constitutiónal order is that the ultimate repository of the power of the state is the people. That being the case it must follow that the people should not be kept in ignorance of what is being done in their name and on their behalf for their supposed benefit. In a democracy the people are entitled to know fully the activities of the government and its agencies and departments. Secrecy is one of the most potent enemies of democracy.

Secrecy is the best friend and protector of corruption, dishonesty, incompetence and abuse of human rights. The powers of the agencies and the

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departments of government and of the officials who run them are easily abused with impunity if their activities are covered by a blanket of secrecy which cannot be penetrated. Participatory democracy is meaningless and impossible with an uninfor-med and ignorant public. Ignorant citizens cannot truly enjoy their rights because information they need to have in order to assert those rights or to seek redress for their denial or infringement is concealed from them. Secrecy enables officials to cover up serious wrongdoing which could seriously harm the public interest. It also breeds fanciful speculation and rumour mongering. The lack of transparency inevitably created by suppres-sion of information gives rise to loss of confidence, fear and resentment among the people. Their negative sentiments may not necessarily be given any outward expression but they can have a corroding impact socially, economically and politically.

The Constitution of Ghana recognises and guarantees the right to information. Article 21(1)(f) confers on every person the right ***"to information subject to such qualifications and laws as are necessary in a democratic society".*** This provision of the constitution while conferring the right to information also recognises that there must be some limits to this right. In order to know the nature and the scope of information to which the right extends, it is therefore important to know what ***qualifications and laws are necessary*** in a democratic society. The Constitution itself gives no hint as to what such qualifications are or must be. There is no existing law which spells out in detail such qualifications.

The Official Secrets Act 1962 Act 101 is concerned mainly with wrongful commu-nication of information to agents of a foreign power. It does not specify comprehensively what information is exempt from disclosure to the public. The qualifications in Article 21 (1)(f) must necessarily refer to information which is exempt from the public domain. The Constitution does not specify the category of information which must be so exempt and there is no existing law which does so. It is therefore necessary that there should be a law passed by Parliament which clearly sets out precisely what sort of information is covered by the qualification. Without such a law what constitutes qualification to the right to information will be decided either by the agency or department holding the information or by the Court. In the former case there is always the danger that the holders of information will decide in an arbitrary manner the information to which a person may have a right of access. In the latter case the courts will be confronted with formidable tasks of interpretation with only the vague provisions of Article 21(1)(f) as their guide. There could be interminable arguments about the meaning of ***"necessary in a democratic society".***

Some degree of certainty is required as to the nature of the qualifications which should be imposed on the right to information. The surest way of providing this certainty is by Parliament passing an appropriate law spelling out the information to which there is a right of access and that which is exempt from access. With such a law as a guide those who hold and those who seek information will also know what they can and cannot get. The courts will also have solid grounds for their decisions when called upon to decide which information should be accessible and which should not. A law on access to information must be carefully drafted. It must be precise in its provisions and must leave nothing to doubt or speculation. The law should be the final arbiter in the resolution of any conflict between the holders of information and those who seek it. It cannot resolve such conflicts if it is vague in its terms and does not cover sufficient ground. It must clearly spell out information to which there is a right of access and that which constitutes the qualifications envisaged by the Constitution.

The guiding principle should be that all information must be accessible except those which are exempt from disclosure. The following types of information would be suitable for exemption. In fact they are exempt in most jurisdictions. These are information relating to:

(i) *national security and defence.*

(ii) *international relations between the state and foreign governments*

(iii) *Matters communicated in confidence by or on behalf of a foreign power or international organisation to the government or an agency of the government*

(iv) *information which would unnecessarily invade the privacy of third parties*

(v) *Commercial and industrial secrecy.*

(vi) *matters under investigation by law enforcement agencies before investigation is complete*

(vii) *Cabinet papers*

(viii) *Departmental internal working documents*

(ix) *Information subject to professional privilege*

(x) *Information the disclosure of which would constitute contempt of court or contempt of Parliament.*

This list cannot be considered exhaustive. There may well be other types of information which may be treated as exempt. Care must, however, be taken not to extend the scope of qualification to the point where the right to information conferred by the constitution is strangled. Even with the passage of such a law there may be conflicting opinions about which information properly falls under any of these headings. Such conflicts must necessarily be resolved by the Courts. Article 135(1) of the Constitution confers on the Supreme Court "exclusive jurisdiction" to determine whether an official document shall not be produced in court because its production or the disclosure of its contents will be prejudicial to the security of the state or will be injurious to the public interest.

Article 135(2) lays down the procedure the Court should follow if the issue arises in proceedings in any court as to the production or otherwise of an official document. Article 135(3) provides that the proceedings of the Supreme Court as to whether an official document may be produced shall be held in camera. This provision of the Constitution deals with only one category of exempt information where the question of its production arises in court proceedings. A person may wish to exercise his right to information not necessarily for the purpose of court proceeding and the claim to exemption by those holding information may not be based on security of the state or injury to the public interest. The law must therefore make provision for these situations.

The law must confer on every person a legally enforcement right of access to all information held by the agencies and departments of government which do not fall within the category of exempt information as defined by it. This right of access to non-exempt information should not be curtailed by those who hold such information on any ground if the information is available. If information which is not exempt is available every person should have a right of access to it without regard to his reason for seeking access.

There must be imposed on agencies departments and officials holding information a duty to make information readily accessible. The procedures for accessibility must be clearly defined. The range of non-exempt information must necessarily be very wide. Some of it may in fact be contained in papers published by the state for general circulation. A large proportion of information is unpublished. There may be information which is contained in voluminous documents. Some may be stored electronically. Clear procedures must be laid down for the manner in which each type of information may be assessed. For example in some cases a copy of the document containing the information may be made for an applicant.

In other cases, especially in the case of bulky documents, the applicant may be allowed to read the documents at the place where they are usually kept.

A person seeking information must formally apply for access. The mode of application should be spelt out and a time limit must be set for the agency holding the information to respond to the application. Without such time limit an application can easily be killed by inaction. If a person's application for access is refused the agency holding the information must be placed under a duty to disclose reasons for refusal. If an application is refused or ignored or there is undue delay in responding to it the person seeking information must have a right to apply to the High Court for an order compelling disclosure.

There should also be provision that after the lapse of a certain number of years - 25, 30, 50 certain exempt information should fall into the public domain and be accessible as of right to any person who seeks it. Where the process of providing information involves the expenditure of money, the applicant for access to information should be liable to pay a fee. Fees should not however, be fixed at such a high rate as to effectively defeat the right of access.

It is important that the law should contain clear and comprehensive definitions of all relevant terms. Without such definitions the meanings of such terms may become a matter of speculation and would give rise to controversy and unnecessary litigation.

Since the concept of right to information is new, it is necessary that the proposals for any law on access to information should be widely publicised and a public debate generated before it is introduced into Parliament. A series of seminars and symposiums should be held countrywide so that public interest is generated. In the face of public apathy there may be no real incentive to pass such a law. It is unlikely that the government would be in a hurry to sponsor such a law. The pressure to have such a law passed must come from the people. It must be apparent that the public are aware of the right to information and want to exercise that right. The ordinary person is not usually inquisitive about what goes on in government. It is however, such inquisitive-ness which compels the revelation of many things done by government department and agencies which threaten the right of citizens and the exposure of which is in the public interest.

Ideally the passage of a freedom of information law should not be the subject of acrimonious partisan politics. It is for this reason that a sustained public debate must be mounted. Such debates may, hopefully, produce a measure of consensus as to the desirability of having such law and its passage through Parliament.

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