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RIGHT TO INFORMATION: PREPARATORY DOCUMENTS AND VEXATIOUS REQUESTS

QUERY

Can you provide information about best practices regarding, first, the treatment of unofficial and working versions of documents and, second, best practices regarding potential abuses of right to information requests?

CONTENT

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SUMMARY

Freedom of information (FOI) laws are fundamental components for healthy, open societies. Yet, in many countries, freedom of information laws are weak or contain loopholes that, in practice, restrict the right to access information.

This Helpdesk answer explores good practices related to two types of request that tend to be exempted from freedom of information laws: preparatory document requests and vexatious requests. Preparatory document requests ask for working or unofficial documents related to a legislative process. Vexatious requests are those that are considered to be an abuse of the freedom of information process by the person or group making the request. In dealing with these requests, effective and open FOI regimes aim to provide clear and precise definitions of exemptions so as to avoid intentional mislabelling and non-disclosure.

1. INTRODUCTION

Freedom of information (FOI) laws are fundamental components for open societies. FOI laws grant citizens the ability to request information from public institutions or public officials, in the form of official documents or data. Freedom of information laws are in place in over 100 countries (Right2Info 2014).

FOI laws do not grant absolute access to governmental information. In order to protect state secrets and individual privacy, most governments choose to establish exceptions to FOI laws. Exceptions to FOI laws tend to include, but are not limited to:

- documents classified as secret in the interest of national defence or foreign policy;
- trade secrets or privileged or confidential commercial or financial information obtained from a person;
- personnel, medical or similar files, the release of which would constitute a clearly unwarranted invasion of personal privacy;
- documents related to ongoing law enforcement processes;
- documents that would cause harm (either to health or safety).

In many cases, documents may be exempted from FOI laws on a conditional basis, meaning that, depending on the context, an authority considers the release of a document if it is in the public interest to do so. Currently, many FOI regimes implement public interest tests to determine if releasing a document is in the public interest or whether it would be harmful.

Nevertheless, exceptions to FOI laws could be used instrumentally to impede the release of information generally considered to be in the public interest. For example, a document (or part of a document) may not be published in order to save public officials from embarrassment or from being held accountable for their actions. FOI exceptions must be clear and precise so as to not give individual officials too much discretion. The overall objective of freedom of information laws is to release requested information that is in the public interest without causing significant harm.

Recently, there has been a growing debate among FOI experts over the exception of two types of requests from FOI laws. The first of these are exceptions made to requests for preparatory documents. These are requests that enquire into documents and data that are unofficial versions or working versions of legislative documents. The second of these exceptions relates to vexatious requests, which are requests that are considered to be an abuse of freedom of information laws committed by a person or group making the request.

2. GOOD PRACTICES RELATED TO DOCUMENTS UNDER PREPARATION

Documents under preparation pertain to two different types of documents: working or unofficial documents and decision-making data. Working and unofficial documents are documents that have not yet been officially published by a state body. These documents may include draft versions of bills or plans. Decision-making data, on the other hand, is data related to the preparation of legislative or executive policy. This type of data includes minutes of meetings or internal policy formulation sessions. Requesting documents under preparation can be used to understand the process of how decisions are made and what kinds of facts and opinions go into making a certain decision.

There are legitimate concerns to exempting documents under preparation from FOI laws. Some feel that requesting this data takes “the notepad from underneath the pen of public officials” (Right2Info 2013). Disclosing working documents or unofficial versions may slow the legislative process or may lead to the termination of a project before it begins, due to public pressure.

Another legitimate concern is that requesting decision-making data eliminates a public official’s “space to think”. Space to think refers to debates and discussions away from public scrutiny where public officials can freely state rudimentary ideas and opinions that may be harmful to them if made public. For example, many public officials would refuse to propose radical or out-of-the-box solutions to a

problem if they knew they would be publicly scrutinised for saying them. Many practitioners consider this space to think a crucial component of the decision-making process that should be kept secretive (Right2Info 2013).

On the other hand, exempting documents under preparation from freedom of information requests may act as a loophole around FOI laws. If decision-making data is exempted from the laws, public officials can simply claim that any document of public interest is part of a broader decision-making process and for that reason cannot be disclosed (Right2Info 2013). Similarly, it may be in the public interest to know what documents influence a decision. There is some factual basis to most decisions, whether it is in the form of measurements, reports, testimonies, and so on. It may be in the public interest to know which documents influenced a decision and which documents were discussed. If, for example, a lobbyist for a lumber company gives a presentation to a group of legislators who are developing a new environmental policy, citizens may find it in their interest to know what kinds of facts were presented.

Best practices

In so far as good practices for the documents under preparation go, any exemption of this type of data from FOI laws should aim to be as clear and precise as possible to avoid use of the exemption for inappropriate means. The term "preparatory document" or "document under preparation" should be clearly and precisely defined so that it is not too overarching to include many documents. For example, article 2 of France's 1978 Access to Information law states: "The right to delivery shall apply to completed documents only. It shall not apply to documents that are instrumental in an administrative decision until the latter has been taken" (Right2Info 2013). The exemption later describes types of preparatory documents and goes further by including exceptions to the exemption.

The scope of what type of preparatory documents are exempt is important as well; if a government wishes to protect space to think, for example, they might exempt requests relating to decision-making data, not draft documents or working documents. The Australian Office of the Information Commissioner, for example, has published extensive guidelines relating to the types of preparatory documents which are exempt from the domestic FOI law. To cite one example, while documents submitted or deliberated during cabinet minutes are clearly exempt from the FOI law, the information commissioner explicitly states that, "purely factual material in a Cabinet submission, record or briefing is not exempt unless its disclosure would reveal a Cabinet deliberation or decision and the decision has not been officially disclosed" (Office of the Australian Information Commissioner 2013).

As with any exception to an FOI law, governments should weigh whether providing the information would cause harm, or whether there is an overriding public interest in disclosure and must state any reasons for refusal in writing. A good example is provided by the UK's Information Commissioner's Office. The office has published a guideline on exceptions to the Freedom of Information Act related to documents that are to be published. While the UK's act exempts documents that are going to be published in the future from being released, the information commissioner's office has provided an outline intending to clarify the extent to which this exemption applies. For example, the guideline states that if an authority intends to publish a document, regardless of whether a publishing date has been chosen or not, it can withhold that document; if it does not intend to publish a document, it should be released. The guideline goes into detail about what kinds of documents fall under the exception, providing examples from real requests and a summary of the public interest test that the commissioner applies to requests (Information Commissioner's Office 2014).

The Open Society Justice Initiative, through its Right2Know webpage, states that India's Right to Information Act provides a good model for dealing with requests for documents under preparation. The act neither excludes nor exempts documents under preparation or pending the conclusion of a decision-making process. "Instead, the act requires that all public authorities publish all relevant facts while

formulating important policies or announcing decisions that affect the public" (Right2Know 2013).

3. GOOD PRACTICES RELATED TO VEXATIOUS REQUESTS

Vexatious requests are requests that are intended to harass, annoy or distress the receiving agency. These requests can be considered abuses of the formal institution of FOI. Vexatious requests take many forms, but common types of vexatious requests are those that use offensive or aggressive language and requests that are significantly repetitive, burdensome, futile or accusatory.

In many FOI regimes around the world, vexatious requests are not addressed for various reasons. First, they are considered to clog the FOI request system with requests that are not in the public interest and divert public resources from other matters. This concern was recently voiced by the supreme court of the Indian state of Rajasthan, which stated in a recent case that, "Indiscriminate and impractical demands or directions under the Right to Information Act for disclosure of all and sundry information (unrelated to transparency and accountability in the functioning of public authorities and eradication of corruption) would be counter-productive as it will adversely affect the efficiency of the administration and result in the executive (government) getting bogged down with the non-productive work of collecting and furnishing information" (Shubhdeep Sharma vs. Raj. Technical University, Kota 2012).

Furthermore, many governments choose to not address vexatious requests on the justification that information provided may lead to harmful consequences. If a request contains threatening language against a certain public official, or if it includes racist language, many authorities choose to refuse to comply with the request to avoid harm.

Refusal to comply with requests for information based on the pretext that a request is vexatious can be used as a loophole to refuse to answer requests for information. In some cases, requests can be considered vexatious because they are repetitive or considered futile, but may be legitimate. For example, if the aim of the requester is to trace the development of a policy or an official measurement over time, they may need to make the same request on a regular basis (Information Commissioner's Office 2013a). Another problem arises if perceptions of burdensome or futile requests differ between those making the requests and those having to process them.

Best practices

Policies for addressing vexatious requests should be clearly stipulated within FOI laws or in accompanying literature. What constitutes a vexatious request as an abuse of the institution or the FOI should be clearly outlined by the issuing body. If the law does not contain detail on what counts as a vexatious request, FOI authorities should aim to provide a clear and precise definition of what constitutes a vexatious request.

A good example of this is presented by the Office of the Information Commissioner in the UK, which has an extensive guide related to vexatious requests. In the guide, the office outlines types of requests that are considered vexatious under the Freedom of Information Act and outlines the process that authorities should take in determining whether or not a request is vexatious (Information Commissioner's Office 2013b). The office also features a blog on their website that provides the public with developments in what is considered to be a vexatious request or not (Smith 2013).

Any refusal to comply with a request, vexatious or not, should be given in writing accompanied by case-specific reasons to help the requester understand why the request is considered vexatious. Helping the requester to understand the refusal, as well as giving advice on how to reformulate a request, may reinforce a user's trust in the FOI process (FOI Central Policy Unit 2014).

The Scottish Information Commissioner made an announcement in April 2013 discouraging public servants from effortlessly branding requests as vexatious in order to refuse them. The announcement included three good practices in dealing with vexatious requests. First, refusals of

vexatious requests on the basis of being excessively burdensome should aim to, "quantify how responding to the information request will divert resources from other statutory functions and justify why those functions take precedent over dealing with the request". Second, the responding authority should provide well-reasoned evidence when claiming a request is vexatious. Third, an authority should try to engage the requester and explain why they considered the request to be vexatious, as the requester may not agree and may correct their request (Scottish Information Commissioner 2013).

A final example of a good legal practice when dealing with vexatious requests can be found in the draft model law proposed by the African Commission on Human and People's Rights for the African Union. The draft law stipulates that any request considered to be vexatious merits a formal written refusal including reasons for the denial (African Commission on Human and People's Rights 2012). This strategy places emphasis on the right to a full response when requesting information, even if the request is abusive.

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