

# EXECUTIVE COUNCIL

## CONFIDENTIAL

**Title of Report:** Committees (Public Access) Bill

**Paper No:** 130/12

**Date:** 25 April 2012

**Report of:** Attorney General

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### 1.0 Purpose

1.1 The purposes of this paper are:

(a) to report on the outcome of the public consultation on a draft Committees (Public Access) Bill, which is intended to implement recommendations of the Working Group on Access to Information that were previously approved by Executive Council; and

(b) to seek Executive Council's approval for the draft Bill.

1.2 Please note that ExCo paper 131/12 deals separately with the proposal to repeal the Access to Personal Files and Data Protection Ordinances.

### 2.0 Recommendations

2.1 Executive Council is recommended to approve the publication in the *Gazette* of the Committees (Public Access) Bill. A draft of the Bill is being circulated with this paper.

2.2 Executive Council is also recommended to approve the presentation of the Bill to Legislative Assembly in May 2012.

### 3.0 Summary of Financial Implications

None

### 4.0 Background

4.1 At its meeting on 24 February 2011, Executive Council considered ExCo paper 63/11 and approved the recommendations of the Working Group on Access to Information, indicating that drafting of the necessary legislation should be given priority.

4.2 At its meeting on 27 October 2011, Executive Council considered ExCo paper 278/11 and approved a recommendation for public consultation on the draft Committees (Public Access) Bill, the draft Data Protection (Repeal) Bill and the draft Access to Personal Files (Repeal) Bill.

4.3 The public consultation on the draft Committees (Public Access) Bill also covered proposals to repeal the Data Protection and Access to Personal Files Ordinances. However, given the way in which the debate in relation to data protection has developed, it seems sensible to treat the two issues separately.

## **5.0 Consultation and responses**

5.1 The draft Committees (Public Access) Bill was dealt with as part of a consultation exercise that ran throughout February 2012. They were explained in sections 1 and 2 of the consultation document – a copy of the consultation document is being circulated with this paper for ease of reference.

5.2 Prior to the consultation commencing all Members were provided with a briefing note about the consultation process which also reminded Members about amendments made to the Bill following the EXCO meeting in October 2011 and highlighted that the Bill reflects some policy decisions that have the effect of restricting access to information to a greater extent than is currently the case. These are:

- (a) the exclusion of public access to working groups is not new but the existing legislation lacked clarity on this issue. The Bill makes the position clear;
- (b) the provisions for access to background papers are considerably more restrictive than the current provisions;
- (c) although there is a large degree of overlap, the categories of exempt information reflect categories currently listed in the existing Ordinance and Code of Practice.

5.3 In addition to the distribution of the consultation paper and publicity for its release, the consultation document and draft Bill were circulated for response to FIG officers identified as having involvement with committee work.

5.4 As part of the consultation exercise, the Attorney General gave a presentation at the Public Meeting on 20 February 2012. There was some discussion at the meeting following that presentation and this included the extent to which rights of public access should apply to oral reports and the interaction between the public access regime and the Public Accounts Committee Ordinance as it applies to internal audits.

5.5 A briefing was held for representatives from the local media organisations (Penguin News, FIRS, FITV and FINN) and, as well as them being informed about the proposals, feedback was obtained from them at the same time.

5.6 In addition to the feedback obtained at the Public Meeting and the media briefing, formal responses were received from the Chamber of Commerce and the Rural Business Association and an informal approach was made by a member of the public. There was also internal correspondence within FIG.

5.7 The responses made in writing were made available to MLAs for consideration, but the following bullet points are intended to be a useful summary of the key issues raised in them (and the issues that emerged during the consultation process are analysed in paragraph 6 below):

- It was suggested that the Committees (Public Access) Bill should be delayed until a “proper public debate takes place” (because – it was alleged, although this is not accepted – the issue had been inadequately publicised and debated) and “more information about the details is forthcoming” (because the FIG Code of Practice on Access to Information had not been included in the consultation).
- It was also suggested that the Bill did not go far enough in terms of openness and, in particular, concerns were expressed about some committees being closed completely; that some of the proposed new categories of exempt information were too broad or went too far; and that they would not be subject to a “public interest” test.
- A number of practical suggestions were made about how the public access legislation could be operated better (including suggestions about the use of the FIG website, when it is relaunched).
- The point was also made that there are proposals being separately taken forward to allow speaking rights for the public at some committee meetings and the draft Bill did not cater for these.
- There was a question at the Public Meeting about the exemption for internal audit reports and how that exemption would interact with the provisions of the Public Accounts Committee Ordinance. The answer to the question is that a cross-reference in the PAC Ordinance to the current Committees (Access to Information) Ordinance had been overlooked – this has now been corrected.

If the Committees (Public Access) Bill is passed, internal audit reports would be exempt information, but they could – in certain circumstances – be published under the PAC Ordinance.

- Finally, there were (on one hand) queries why Falkland Land Holdings had not been included within the legislation in spite of being a publicly owned statutory corporation, but concern (on the other) that there was scope for private bodies to be designated as public and subjected to public access.

## 6.0 Analysis

6.1 In relation to the suggestion that there had been insufficient publicity for these issues or debate about them, it is difficult to see what other publicity there could have been and that as much debate as could have been expected has taken place. It is not suggested, therefore, that there needs to be a delay for further debate.

6.2 As regards the relationship between the legislation and the Code of Practice, the existing Code of Practice goes beyond the existing Ordinance and, since it is not being proposed that there should be a more comprehensive Freedom of Information Ordinance, it is not suggested that the replacement of the Committees (Access to Information) Ordinance should wait for a review of the Code of Practice. It is intended that the Code be reviewed in due course to make sure that it is best complements the proposed new legislation, and to ensure that it reflects Members' policies, but in the mean time, although it may not be entirely consistent with the policies underpinning the new legislation; it would not frustrate implementation of the proposed new legislation.

6.3 It is recognised that decisions will need to be taken in future about the scope of the public access regime in terms of how far it is appropriate that it be extended to further bodies. This could be done under the existing draft by means of subsidiary legislation. Concerns about excessive reach could be addressed by a statutory requirement for consultation with a body before rights of public access are extended to it (eg if it were thought appropriate to extend the regime to FLH).

6.4 Although some concerns were expressed about the list of "closed committees", it is still considered that the committees on the list genuinely are special cases – in any event, some of them are subject to requirements under the Constitution or other legislation (eg the PAC Ordinance).

6.5 In relation to the proposed categories of exempt information, it is recognised that the concerns raised about these being too broad could be conceded. If so, a solution might be to introduce a "public interest" balancing test in relation to some of the more contentious categories of exempt information.

6.6 However, it is noted that the categories of exempt information were carefully compiled by the working group, and are not inherently unreasonable. It is also worth bearing in mind that the categories of exempt information can be amended in the future by subsidiary legislation made under the terms of the existing Bill, so the categories can be kept under review and changed if problems with the new categories really do emerge. Therefore officers do not recommend that a "public interest" balancing interest test be introduced into the legislation; and on the basis that in practical terms such a test would make the system more administratively complex and more open to challenge. In the mean time, it should be noted that the Code does contain a public interest balance element in so far as it deals with access to information outside the system for rights of access to committees and committee documents.

6.7 It is worth singling out the proposed exemption for internal audit reports because this has aroused most comment from those responding and was the subject of specific discussion at the Public Meeting. It is suggested that this exemption does need to be kept to ensure candour and, if need be, protect “whistleblowers”. The PAC has its own regime about meeting in public or private under the PAC Ordinance and this would remain the case. The PAC Ordinance does allow for exempt information (such as internal audit reports would become) to be published in an appropriate case but only after the event and subject to safeguards: it could only be done by agreement between the Governor and the PAC (and, in some cases, the consent of the witness would be required as well). The Attorney General believes that an appropriate balance has been struck.

6.8 It had been proposed to replace the current requirement for committee meetings to be publicised on the Secretariat notice board with a more flexible requirement for “adequate publicity”. However, it has been accurately commented that this flexibility does not provide any certainty to the public about where they can rely on finding out about forthcoming committee meetings. Once the FIG website is relaunched, this is likely to be a key source of information. However, until it is relaunched, it would be unwise to include a requirement for meetings to be publicised in this way – a specific requirement would also sacrifice flexibility. The suggested compromise is to provide for a power to make subsidiary legislation about what counts as “adequate publicity”.

6.9 Although it was also suggested that MLAs should not have additional rights to obtain information, it is still considered that the proposal to allow MLAs access to information on a “need to know” basis strikes the appropriate balance.

6.10 In relation to public speaking rights that may be introduced for some committees, this can be dealt with in due course by clarifying the relationship between the public access regime (which does not include speaking rights for the public) and other legislation that might provide for speaking rights (either now or in the future), although a small amendment to the Bill now also ensures that the potential for public speaking can be accommodated under its terms.

6.11 It is suggested that some of the practical issues and the apparent confusion about certain aspects of the legislation can be dealt with by means of administrative arrangements and guidance.

6.12 However, although it was initially considered that administrative arrangements might be sufficient to deal with the issue of last minute requests by the public for documents to be made available at meetings, it is now suggested that a cut-off of the working day before the meeting would be sensible.<sup>1</sup>

6.13 It is accepted that provision should be made for documents to be requested in electronic form but it is also suggested that it should be possible to charge for transmitting documents – it would be unlikely that a charge for e-mailing a

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<sup>1</sup> This would not prevent documents still being provided at shorter notice – if possible – but that would be a courtesy rather than a requirement. Nor would it stop the member of the public obtaining the papers after the meeting. However, it would deal with the issue of last minute requests just before meetings having to be dealt with straight away.

document could be justified as reasonable but it is still possible that a request might be made for a document to be faxed somewhere and the cost of this might be substantial.

6.14 In relation to oral reports at committee meetings (which was raised as an issue at the Public Meeting), it is suggested that the wording of the provisions about reports is clarified.

## **7.0 Revised draft Bill**

7.1 There is a detailed set of Objects and Reasons at the end of the draft Bill, which explain its provisions and the effect of those provisions. Further explanation was provided in section 5 of ExCo paper 278/11.

7.2 However, some changes have been made to the draft Bill in an attempt to take in the comments made during the consultation process. The Objects and Reasons have been amended to reflect these changes.

7.3 The draft Bill being circulated for approval with this paper is marked up to show the changes that have been made. However, the following explanations may be helpful:

- Clause 9 of the Bill has been amended to include a requirement for consultation before extending the public access regime to other bodies. This is intended to address (to some extent, at least) the concern that private bodies might inappropriately be designated as public bodies and the public access regime extended to them.<sup>2</sup>
- Clause 12 has been amended to include a power to make regulations about “adequate publicity”. This could be used in the future to make it a requirement that the FIG website is used as the primary means of publicising committee meetings.
- Clause 15 has been amended to clarify that it is only reports that are being circulated in advance to members of the committee that have to be made available to members of the public. Reports that are given orally at the meeting will still have to be covered in the minutes of the meeting.
- Clause 16 has been amended to provide for a cut-off of the working day before a meeting for requests for documents to be made available at the meeting.
- Clause 21 has been amended to provide that documents can be requested in electronic form.
- A new clause 29 has been inserted to replace the cross-reference in the PAC Ordinance to the existing Committees (Access to Information) Ordinance with one to the new Ordinance (assuming the draft Bill is

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<sup>2</sup> Consideration will still need to be given to how far the public access regime should reach.

approved and subsequently passed by the Legislative Assembly). For ease of reference, section 21 of the PAC Ordinance (as amended) would read as follows:

**“21. Exclusion of public**

*(1) The Committee is to exclude the public from its meetings when it is hearing or considering evidence of the following nature —*

*(a) evidence in respect of which the Governor has issued a certificate under section 28(2);*

~~*(b) evidence that relates to exempt information, as defined in section 2 of the Committees (Access to Information) Ordinance 2000; or*~~

*(b) evidence that relates to information that is exempt information for the purposes of the Committees (Public Access) Ordinance (No ?? of 2012); or*

*(c) evidence by a member of the Executive Council, where disclosure of the evidence would contravene the oath of secrecy to which section 64 of the Constitution refers.*

*(2) The Committee may exclude the public from its meetings when —*

*(a) it is hearing or considering evidence by a witness who has asked to give it in private; and*

*(b) the Committee is satisfied that the evidence is of a secret or confidential nature, and that it should be heard in private.”*

- What was clause 29 has been renumbered as clause 30 and a minor style change has been made.

## **8.0 Financial Implications**

None

## **9.0 Legal Implications**

The legal implications of this paper are set out in sections 4 to 7.

## **10.0 Human Resources Implications**

None – as indicated in ExCo paper 278/11, primary responsibility for compliance would remain with those officers who are committee secretaries and overall coordination would continue to be dealt with by the officer already tasked with that.