FREEDOM OF INFORMATION BILL, 2012 OF THE BAHAMAS

A PRELIMINARY ANALYSIS OF THE BILL

AND

RECOMMENDATIONS FOR IMPROVEMENT

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People's right to access information has gained wide recognition as an indispensable feature of a functional democracy. The Constitution of The Bahamas includes the "right to receive and impart ideas and information without interference" as part of the protection of freedom of expression (Article 23).

CHRI congratulates the Government of The Bahamas for demonstrating its commitment to legislating on the right to information as an instrument to promote transparency and accountability in the Government of the Bahamas. CHRI also appreciates the Government's efforts to engage with civil society in the drafting of the Freedom of Information Bill, 2012 (the FOI Bill).

CHRI has analysed the provisions in the FOI Bill, drawing on international best practice standards, and good legislative models from the Commonwealth, in particular from South Asia. This submission contains preliminary recommendations for improving the effectiveness of the access law. CHRI hopes that the Government of The Bahamas will take these recommendations into consideration and incorporate the necessary changes into the FOI Bill.

CHRI has worked with access legislation throughout the Commonwealth, particularly the global South. CHRI's efforts in this area have included analysing the draft model law on access to information for the African Union; making recommendations for Barbados' Freedom of Information Bill, 2008, which was subsequently revised incorporating these recommendations; and resourcing a workshop on the Freedom of Information for members of Parliament in the Caribbean under the aegis of the Commonwealth Parliamentary Association in 2006.

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Preliminary Analysis of The Bahama's Freedom of Information Bill, 2012

General Comments

CHRI appreciates the inclusion of several positive provisions in the Bill, including:

- Provisions that encourage the applicant and the public authority to work together to precisely identity the information required.
  - Section 7(3)(a) requires a public authority, upon request, to assist applicants in identifying records relating to their application.
  - Section 11(1) requires public authorities to allow the applicant a reasonable opportunity to consult with them to reformulate applications that are not specific.
- A provision that declares that no fees will be charged for information requests.
  - Section 13(3) declares that "[n]o fee shall be charged in respect of a request for information."
- A provision that protects whistleblowers. This sends a message to the public and officials that the government is serious about opening up to legitimate scrutiny.
  - Section 50 protects whistleblowers disclosing information in good faith from "any legal, administrative or employment related sanction"

CHRI would like to point out the following changes that may be made at various places throughout the FOI Bill:

- The phrase "Freedom of Information" may be replaced by "Right to Information" in accordance with Recommendation #1
- The term "record" may be replaced by the term "information" in accordance with our Recommendation #5.
- In accordance with international best practice, consideration should be given to extending the right to access information to cover private bodies, at least where it is necessary to exercise or protect any right. The Bill covers public authorities and public corporations but leaves out private bodies entirely. Many private bodies—in the same way as public bodies—are institutions of social and political power that have a huge influence on people's rights, security, and health. More so, with the outsourcing of government activities or due to privatization of erstwhile public bodies, it is conceivable that private bodies will hold information whose disclosure is in the public interest of fostering transparency and accountability. A number of countries around the world have already brought private bodies within the ambit of their right to information regimes. The access to information legislation of Antigua and Barbuda,[1] and South Africa,[2] both allow access to information held by private

[1] Section 16(3) of Antigua and Barbuda's Freedom of Information Act, 2004: "A person making a request for information to a private body which holds information necessary for the exercise or protection of any right shall, subject only to the relevant provisions of Parts II and IV of this Act, be entitled to have that information

bodies where it is required for the exercise or protection of any rights. The Jamaican Access to Information Act 2002 covers private bodies that provide services of a public nature.[3] The Indian RTI Act recognises the right of every citizen to access information about a private body from the regulatory agencies that oversee their functioning.[4] Consideration may be given to extending the right of access to information to private bodies where it is necessary for the exercise or protection of a right. This will entail adding references to private bodies to provisions that refer to bodies with a duty to disclose information.

- The Bill uses masculine pronouns such as "he" and "his" (*e.g.* Section 3(2)). It is common practice, however, in both developed and developing countries to use gender-sensitive language in the drafting of legislation. For example, the Indian Right to Information Act uses gender-friendly language while referring to the requestor for information. Consideration may be given to replacing all pronouns with gender sensitive pronouns (*e.g.* replace "he" with "he or she").

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communicated to him." URL:
http://humanrightsinitiative.org/programs/ai/rti/international/laws_papers/antigua/antigua_foi_act.pdf (accessed on 10th May, 2012).

[2] Section 50(1) of South Africa's Promotion of Access to Information Act, 2000:

> A requester must be given access to any record of a private body if—
>
> > (a) that record is required for the exercise or protection of any rights;
> >
> > (b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and
> >
> > (c) access to that record is not refused in terms of any ground for refusal 10 contemplated in Chapter 4 of this Part.

URL: http://www.sun.ac.za/university/Legal/dokumentasie/access%20to%20information.pdf (accessed 21st May, 2012).

[3] Section 5(3) of Jamaica's Access to Information Act, 2002:

> The Minister may, by order subject to affirmative resolution, declare that this Act shall apply to—
>
> > (a) such government companies, other than those specified in paragraph (e) (i) of the definition of "public authority", as may be specified in the order;
> >
> > (b) any other body or organization which provides services of a public nature which are essential to the welfare of the Jamaican society,
> >
> > or to such aspects of their operations as may be specified in the order.

URL: http://www.jis.gov.jm/special_sections/ATI/ATIACT.pdf (accessed 21st May, 2012)

[4] Section 2(f) of India's Right to Information Act, 2005: "'information' means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force;". URL: http://rti.gov.in/rti-act.pdf (accessed on 18th May, 2012).

Part I – Preliminary:

Section 1 – Short title and commencement.

1. Section 1(1) lists the short title of this Bill as *"The Freedom of Information Act, 2012"*. The term 'freedom' implies the freedom of an individual to seek and receive information and that the State or anybody else should not create obstacles in the enjoyment of that freedom. However, this term does not impose an obligation on the information holder, such as a public body, to provide information to the requestor. CHRI recommends the phrase 'Right to Information' be used in place of Freedom of Information because it is indicative of an individual's right to seek and receive information while also imposing a *duty* on the information holder to provide the requested information.[5]

   Consideration may be given to replacing the term "Freedom of Information" with the term "Right to Information".

> **Recommendation #1**
>
> **Consideration may be given to replacing, in all sections, the phrase 'Freedom of Information' with the phrase 'Right to Information'.**

2. Section 1(2) states that the "This Act shall come into operation on such date as the Minister may appoint by notice published in the Gazette". Information access legislation must provide for a specific timeline for commencement and implementation of the operative provisions of the Bill.[6] Failure to specify a commencement date in the legislation itself can otherwise undermine the establishment of the transparency regime, because it may be postponed indefinitely.

   For example, in India, Parliament passed the Freedom of Information Act, and the President assented to it in 2002. However, this Freedom of Information Act never came into force because its provisions did not include a date for commencement. There was no pressure on the Government to take steps to implement the law. Although it is understandable that the

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[5] One way to look at this is through Hohfeld's definitions of liberty and right in his *Fundamental Legal Conceptions*. According the Hohfeld, "freedom" is the jural co-relative of "no-right", and "right" is the jural co-relative of "duty". So, in this case, "Freedom of Information" implies that the State has "no-right" to interfere with the sending and receiving of information (unless illegal); and "Right to Information" implies that the State has a "duty" to provide information.

Another way to see this is as a liberty right versus a claim right. "Freedom of Information" suggests a liberty right, while "Right to Information" suggests a claim right. A liberty right to information means that you have permission to send and receive information, but others are not obligated to help you get information, and wouldn't even be wrong to prevent you from getting information. A claim right to information, on the other hand, means that others are prohibited from preventing you from getting information, and may also be obliged to help you get information. In other words, "Freedom of Information" suggests that the Government should permit the sending and receiving of information, while "Right to Information" suggests that the Government should assist, and not prevent, the sending and receiving of information.

[6] The 2011 version of The Bahama's Freedom of Information Bill included a deadline of 1st July, 2012. URL: http://www.bahamas.gov.bs/wps/wcm/connect/a0ed6de7-e51d-4862-884b-703dd298aeda/FreedomofInformationBill,2011_29th+September,+2011.pdf?MOD=AJPERES (accessed on 1st May, 2012)

Government may wish to allow for time to prepare for implementation, international best practice requires that the Act itself should specify a maximum time limit for implementation, to ensure there is no room for postponing implementation of this law indefinitely. For example, Mexico allowed one year for implementation while India's Right to Information Act 2005 allowed 120 days.

A phased approach may also be adopted, where certain departments are required to implement the Act first, and other agencies have later deadlines. A number of countries, including the Cook Islands, have taken this approach

Recommendation #2

Consideration may be given to amending Section 1(2) to include a specific date (or dates, for a phased approach) for the Act to come into force.

Section 2 – Interpretation.

3. The definition of the term "public authority" under Section 2 does not include two of the three organs of the State. The Legislature and the Governor General's Office are excluded from obligations of transparency under the law. These bodies should be included under the Bill to ensure accountability and transparency. Antigua and Barbuda's Freedom of Information Act, 2004, follows the best practice of covering all bodies established by, or constituted under, the Constitution in its access legislation.[7]

Recommendation #3

Consideration may be given to inserting in Section 2, under the definition of "public authority", after the words "'public authority' means –", another subsection reading: "(aa) an office, authority or body established or constituted under the Constitution".

4. The interpretation section does not define 'private body'. If the general recommendation to include information held by private bodies where that information is necessary to exercise or protect any right is accepted, then private bodies should be defined here.

Recommendation #4

Consideration may be given to inserting into Section 2, after the definition of "Minister" and before the definition of "public authority", a definition for "private bodies" which reads:

"private body" means any body, excluding a public authority that:

(a) carries on any trade, business or profession, but only in that capacity; or

[7] Section 3(1)(d)(i) of Antigua and Barbuda's Freedom of Information Act, 2004 defines 'public authority' to include bodies "established by or under the Constitution or any other law". URL: http://humanrightsinitiative.org/programs/ai/rti/international/laws_papers/antigua/antigua_foi_act.pdf (accessed on 10th May, 2012).

(b) has legal personality.

5. The definition of the term “record” under Section 2, and use of this term instead of “information” throughout the Bill may lead to some misunderstanding. Although the Bill defines “record” broadly to include “information held in any form”, the lay meaning of the word “record” suggests that only information in the form of paper records are covered by the Act. The international best practice of maximum disclosure suggests that the term “information” should be used in access legislation.

Recommendation #5

Consideration may be given to using the term “information” rather than “record” throughout the Bill.

6. Including the term “record” as part of the term “information” ensures that information is an inclusive term. This would clarify that information is not limited to records, and allow for the inclusion of new forms of records as information in the future. Consider India’s Right to Information Act, 2005, which defines “information” as “any material in any form, *including records*, documents, memos, emails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force” (emphasis added).

   Also, if the recommendation to provide access to models and samples of materials (Recommendation #31) is accepted, then those forms of information should also be included in the definition.

Recommendation #6

Consideration may be given to amending Section 2 by replacing the words “means information held in any form” with the words “includes”, and inserting after the definition of “hold” and before the definition of “information manager”, a definition for “information” that reads:

> **"information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, and data material held in any electronic form.**

7. Section 2 currently does not include a definition of the term ‘person’. If Recommendation #16 is accepted, giving access to information by all persons, then the term ‘person’ should be defined. Because the Bill is a public law defining the rights of private persons vis-à-vis agencies of the State it is important that that there is absolute clarity as to whom the rights bearers are. In common parlance the term ‘person’ connotes a biological human being. However in the context of law, a person is anybody or any entity that has a legal personality and is capable of suing or being sued. So in addition to biological beings the term ‘person’ includes artificial juridical entities such as societies, organizations, labor unions, partnerships

associations, corporations, legal representatives of individuals or bodies, trusts and trustees and other such entities. Therefore it is important that a definition of the term 'person' may be taken from The Bahamas Interpretation and General Clauses Act, 1976,[8] which defines a person as including 'any public body and any body of persons, corporate or unincorporate'. This will ensure that individuals and organised groups such as civil society organisations and companies can also access information under this law.

Recommendation #7

Consideration may be given to inserting after the definition of 'minister', and before the definition of 'private authority' (assuming Recommendation #4 is accepted, otherwise, before the definition of 'public authority'), a definition of the term 'person' that reads: "'person' includes any public body and any body of persons, corporate or unincorporate"

Section 3 – Application.

8. Section 3(1)(a) allows other laws to override the Bill. According to international best practice, access legislation should take precedence. There are, of course, circumstances in which information may not be disclosed, but the exemptions section of the Bill already covers these circumstances. India's RTI Act, for example, includes a provision that provides it with the power to override all other laws to the extent of inconsistency.[9] This positive principle ensures that older laws enacted at a time when transparency was not the defining value of governance do not derail the vision of creating an overarching regime of transparency.

Recommendation #8

Consideration may be given to removing the portion of Section 3(1)(a) allows other laws to override the Bill by deleting the text after "(a) public authorities;" and before "and any other body or class of information".

9. Section 3(1)(a) and Section 3(5) contain a variety of exemptions to the right to information. Exemptions should be kept together under Part III—which is appropriately entitled "Exempt Records"—rather than scattering the exemptions throughout the Bill.

Recommendation #9

Consideration may be given to moving exemptions under Section 3(1)(a) and Section 3(5) to

[8] The Statutory Interpretation and General Clauses Act, 1976. URL: http://laws.bahamas.gov.bs/cms/images/LEGISLATION/PRINCIPAL/1976/1976-0020/InterpretationandGeneralClausesAct_1.pdf (accessed on 10th May, 2012)

[9] Section 22 of India's Right to Information Act, 2005: "The provisions of this Act shall have effect notwithstanding anything inconsistent there with contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act". URL: http://rti.gov.in/rti-act.pdf (accessed on 18th May, 2012).

Part III of the Bill.

10. Section 3(4) and 3(5)(c) give the Minister the power to pass orders to exclude public corporations, and statutory bodies or authorities from the Bill. Note in particular that the ability to exempt statutory bodies or authorities under Section 3(5)(c) is not even subject to negative resolution. These powers give the Minister broad powers to dramatically limit the reach of the Bill. The Minister, because he or she is responsible for making and implementing decisions and policies, may wish to keep potentially embarrassing information secret. These provisions provide the Minister with an effective means of hiding such information. What is more, Section 3(5)(c) allows the Minister to unilaterally remove all statutory bodies or authorities from the purview of this Bill. Exclusion of bodies from the Bill should be made subject to the deliberative process of the Legislature, rather than merely at the discretion of the Ministers. At the very least, such orders should all be subject to negative resolution.

Recommendation #10

Consideration may be given to deleting Sections 3(4) and 3(5)(c).

11. Section 3(5)(b) exempts security and intelligence services from the purview of the Bill. According to the international best practice principle of minimum exceptions, access legislation should avoid blanket exceptions such as this. This is because it can be used to hide wrongdoing and avoid embarrassment. There are legitimate reasons to withhold information. However, these are better handled with specific and precise exemptions, instead of blanket exceptions. In fact, these cases are already covered effectively under Section 15 of the Bill.

Recommendation #11

Consideration may be given to removing Section 3(5)(b), and also removing Section 3(7), which merely elaborates on Section 3(5)(b).

12. Section 3(5)(d) exempts private holdings in the National Archives under contracts that contradict disclosure. Taxpayers fund storage and maintenance of holdings in the National Archives. Therefore, the public should have access to the private holdings in the archives, which are, after all, held at their expense. Exemption of disclosure of private holdings should be based only on the harm to public interests. At the very least, a list or register of such holdings must be available to the public.

Recommendation #12

Consideration may be given to removing Section 3(5)(d).

Section 4 – Objects of this Act.

13. Section 4 includes a list of three fundamental principles underlying constitutional democracy that the Bill will reinforce: government accountability, transparency, and public participation in

national decision-making. However, access to information can also contain corruption. This should also be included in the list to ensure that it is taken into account when balancing disclosure and non-disclosure in the public interest.

Recommendation #13

Consideration may be given to adding in Section 4, after subsection (c), and before the words "by granting to the public", another subsection reading: "(d) containment of corruption".

14. Section 4 alludes to the balancing that must be struck between a general right of access to information and other public interests. However it does not provide guidance as to how the balancing test should be done. This section should state clearly that the preservation of democratic ideal is paramount in the balancing to assure the most liberal interpretation of the right to information in accordance with democratic principles, and to promote a presumption in favour of access.

Recommendation #14

Consideration may be given to adding to the end of Section 4, after the words "personal information", the words "while preserving the paramountcy of the democratic ideal".

Part II – Right of Access

Section 5 – Publication of information by public authorities.

15. Section 5 creates an obligation for proactive disclosure. This is a fundamental best practice feature of access to information laws. However, Section 5(4) allows the Minister to amend the list of proactively disclosed information with only an order. Because proactive disclosure is a fundamental part of access to information legislation. Changes should be made only with the approval of Parliament and not by executive direction. At the very least the changes should be subject to approval and modification by Parliament.

Recommendation #15

Consideration may be given to removing Section 5(4).

Section 6 – General right of access.

Section 6(1) gives general right of access to all citizens and permanent residents of The Bahamas. According to the best practice principle of maximum disclosure, any person should be able to access information under the legislation regardless of citizenship or residency. If RTI is a human right, it must be available to all human beings, especially in a globalised world where mobility of people, resources and capital is increasing. In India, despite the right being

restricted to citizens, scrutiny of identity is discouraged because it can lead to harassment. The ATI legislation in Antigua and Barbuda,[10] Belize,[11] and St Vincent and the Grenadines[12] all provide right of access to every person–not only citizens. Section 6(1) should be expanded to provide a right of access to all persons, as per the recommended definition of person in Recommendation #7.[13]

Recommendation #16

Consideration may be given to providing a right of access to all people by replacing in Section 6(1) the words "— (a) Bahamian citizen; or (b) permanent resident within the meaning of the Immigration Act (Ch. 191)," with the word "person".

16. Section 6(2) subjects the exemptions prescribed in the Bill to a time limit, also known as a sunset clause, of 30 years. This is a welcome provision, and sunset clauses are in tune with best practices. However, 30 years is an unnecessarily long time limit. The sensitivity of certain categories of information diminishes with the passage of time, so the disclosure of such information after a considerable time period may not harm the public interest in any way. International best practice is to prescribe a shorter period, such as ten years.

Recommendation #17

Consideration may be given to replacing in Section 6(2) the word "thirty" with the word "ten".

17. Section 6(3) specifies that applicants "shall not be required to give any reason for requesting access to that record." This is a welcome provision that is in line with international best practices. If the general recommendation to include information held by private bodies, where that information is necessary to exercise or protect any right, is accepted, then an exception

[10] Section 115(1) of Antigua and Barbuda's Freedom of Information Act, 2004: "Notwithstanding any law to the contrary and subject to the provisions of this Act, every person has the right to obtain, on request, access to information." URL: http://humanrightsinitiative.org/programs/ai/rti/international/laws_papers/antigua/antigua_foi_act.pdf (accessed on 10th May, 2012).

[11] Section 9 of Belize's Freedom of Information Act, 1994: "Subject to this Act, every person shall have a right to obtain access in accordance with this Act to a document of a Ministry or prescribed authority, other than an exempt document." URL: http://www.belizelaw.org/lawadmin/PDF%20files/cap013.pdf (accessed on 10th May, 2012).

[12] Section 10 of St Vincent and the Grenadines' Freedom of Information Act, 2003: "Subject to this Act, every person shall have a right of access in accordance with this Act, to an official document other than an exempt document." URL: http://humanrightsinitiative.org/programs/ai/rti/international/laws_papers/vincent/foi_act_2003.pdf (last accessed on 10th May, 2012)

[13] Section 6(1) of the 2011 version of the Freedom of Information Bill provided the right of access to everyone: "Subject to the provisions of this Act, every person shall have a right to obtain access to a record other than an exempt record." URL: http://www.bahamas.gov.bs/wps/wcm/connect/a0ed6de7-e51d-4862-884b-703dd298aeda/FreedomofInformationBill,2011_29th+September,+2011.pdf?MOD=AJPERES (accessed on 1st May, 2012)

for private bodies should to be made here. In cases where the applicant is seeking information from a private body, they will need to provide reasons why the information is necessary for the exercise or protection of a right.

Recommendation #18

Consideration may be given to adding to the end of Section 6(3), after the words "requesting access to that record", the words "other than reasons that may be required for accessing information held by private bodies under Section 7(1A)"

18. Section 6(4) states that records available to the public pursuant to another law, or for purchase "shall be obtained in accordance with . . . those procedures." However, the availability of information by purchase or through other laws does not ensure the right to information. Information may be available, but practically inaccessible. For example, there may be an insufficient quantity of copies, the copies may be difficult to obtain or prohibitively expensive, or the copies may be in a format that the information seeker cannot use. When information that is otherwise required to be available under other laws is sought under the FOI law, it should not be denied. The principles, procedures and regulations related to the FOI law must apply to such requests irrespective of what is contained in other laws. Where there is an inconsistency, FOI law must prevail Where there is no inconsistency, access will not be a problem

Recommendation #19

Consideration may be given to removing Section 6(4).

19. Section 6(5) specifies that where the factors for disclosure and nondisclosure are equal, it should be resolved in favor of disclosure, "but subject to the public interest test prescribed under section 26." Since 6(5) only applies when the factors for disclosure and nondisclosure are equal, in these cases a public interest test would not provide any further guidance, and this clause can be safely removed.

Recommendation:

Consideration may be given to removing from Section 6(5) the words "but subject to the public interest test prescribed under section 26".

Section 7 – Application for access.

20. Section 7 specifies how applications for access to information are to be made. If the general recommendation to include information held by private bodies where that information is necessary to exercise or protect any right is accepted, then an additional provision needs to be made here for applications for information from private bodies. Such applications will need to include reasons why the information is necessary for the exercise or protection of a right.

Recommendation #20

Consideration may be given to adding to adding to Section 7, after subsection (1), the following subsection:

> **(1A) A request to a private body for information shall identify the right which the person making the request is seeking to exercise or protect and the reasons why the information is required to exercise or protect that right.**

21. Section 7(2)(a) requires that applications "be made in writing". However, members of the public may, due to physical disabilities or other reasons, be unable to create and submit written applications. In order to ensure that all members of the public have a meaningful access to information, a process for oral requests should be included. Antigua and Barbuda's FOI Act allow applications to be made orally.[14] The Indian RTI Act also includes provisions to ensure that disabled persons have access, such as a provision to allow the submission of oral requests. [15]

Recommendation #21

Consideration may be given to adding to Section 7(2) after the words "enable the public authority to identify it", a proviso reading "Provided that where such request cannot be made in writing, the information manager, shall render all reasonable assistance to the person making the request orally to reduce the same in writing."

22. Section 7(4) stipulates that a public authority should respond to an application no later than 30 calendar days from the date the public authority receives the application. This period of 30 days is too long, particularly in light of the relative population size of The Bahamas. India's access legislation has a time period of 30 days,[16] but it has a far larger population and government. Other countries have much shorter time periods. For instance, public authorities

[14] Section 17(3) of Antigua and Barbuda's Freedom of Information Act, 2004: "A person who is unable, because of illiteracy or disability, to make a written request for information may make an oral request, and the official who receives the oral request shall, subject to subsection (6), reduce it to writing, and include his name and position within the public authority or private body, and give a copy thereof to the person who made the request." URL: http://humanrightsinitiative.org/programs/ai/rti/international/laws_papers/antigua/antigua_foi_act.pdf (accessed on 10th May, 2012).

[15] Section 6(1) of India's Right to Information Act, 2005 ensures that disabled persons can make applications: ". . . Provided that where such request cannot be made in writing, the . . . Public Information Officer . . . shall render all reasonable assistance to the person making the request orally to reduce the same in writing." Section 7(4) ensures that disabled persons can access disclosed information: "Where . . . the person to whom access is to be provided is sensorily disabled, the . . . Public Information Officer . . . shall provide assistance to enable access to the information, including providing such assistance as may be appropriate for the inspection." URL: http://rti.gov.in/rti-act.pdf (accessed on 18th May, 2012).

[16] Section 7(1) of the India's Right to Information Act, 2005: ". . . the Central Public Information Officer or State Public Information Officer, as the case may be, on receipt of a request undersection [*sic*] 6 shall, as expeditiously as possible, and in any case within thirty days of the receipt of the request, either provide the information on payment of such fee as may be prescribed or reject the request for any of the reasons specified in sections 8 and 9:" URL: http://rti.gov.in/rti-act.pdf (accessed on 18th May, 2012).

are required to dispose requests within a period of 14 days in Belize,[17] and within just 10 days in Georgia[18]

Recommendation #22

Consideration may be given to amending Section 7(4)(a) by replacing the word 'thirty' with 'twenty-one'.

23. Section 7 does not include a provision for faster provision of information when the request is related to the life or liberty of a person. When someone's life or liberty is concerned, or especially when it is under threat, the timeliness of the information because paramount. Where the requested information concerns the life or liberty of a person, the information shall be provided within 48 hours in Antigua and Barbuda,[19] within 48 hours in India,[20] and within 24 hours in Bangladesh.[21]

Recommendation #23

Consideration may be given to adding a provision to Section 7, after 7(5) with the words:

> **6) Notwithstanding anything contained in this Act, where the information sought for concerns the life or liberty of a person, the same shall be provided within forty-eight hours of the receipt of the request.**

Section 8 – Transfer of requests.

24. Section 8(1) commendably contains provisions allowing for the transfer of applications to another public authority if the requested information is held by that other body. The time limit

[17] Section 16 of the Belize Freedom of Information Act, 1994: ". . . the Ministry or prescribed authority shall take all reasonable steps to enable the applicant to be notified of a decision on the request as soon as practicable but in any case not later than two weeks after the day on which the request is received by or on behalf of the Ministry or prescribed authority." URL: http://www.belizelaw.org/lawadmin/PDF%20files/cap013.pdf (accessed on 10th May, 2012).

[18] Article 40 of the General Administrative Code of Georgia: "A public agency shall render a decision on providing or denying access to public information immediately or not later than ten days" URL: http://rti-rating.org/pdf/Georgia.pdf (accessed on 1st March, 2012)

[19] Section 18(2) of Antigua and Barbuda Freedom of Information Act, 2004: "Where a request for information relates to information which reasonably appears to be necessary to safeguard the life or liberty of a person, the official shall provide a response within 48 hours." URL: http://humanrightsinitiative.org/programs/ai/rti/international/laws_papers/antigua/antigua_foi_act.pdf (accessed on 10th May, 2012).

[20] Section 7(1) of India's Right to Information Act, 2005: "Provided that where the information sought for concerns the life or liberty of a person, the same shall be provided within forty-eight hours of the receipt of the request." URL: http://rti.gov.in/rti-act.pdf (accessed on 18th May, 2012).

[21] Section 9(4) of Bangladesh's Right to Information Act, 2009: "Notwithstanding anything contained in sub-section (1) and (2), if a request made under sub-section (1) of section 8 is relating to the life and death, arrest and release from jail of any person, the officer-in-charge shall provide preliminary information thereof within 24 (twenty-four) hours." URL: http://www.moi.gov.bd/RTI/RTI_English.pdf (accessed on 18th May, 2012).

for transfer of requests may be shortened to ensure that information requests are answered in a timely manner. For example, the Indian RTI Act prescribes five days for transfer of a request,[22] and the Nigerian FOI Act allows seven days.[23]

Recommendation #24

Consideration may be given to replacing in Section 8, the word "fourteen" with the word "five".

Section 9 – Vexatious, repetitive or unreasonable requests.

25. Section 9(a) permits public authorities to not comply with an application on the grounds that it is vexatious. In the absence of what constitutes vexation in the law, any application for information that may reveal corruption, poor decision-making, wastage, or misuse of public funds is liable to be considered vexatious by a public authority. Furthermore what may be serious and public spirited to an applicant, may be termed as frivolous information request by unscrupulous officials who stand to gain from continued secrecy about their actions.

Recommendation #25

Consideration may be given to removing Section 9(a) and removing "Vexatious," from the title of Section 9 to reflect the removal.

26. Section 9(c) permits public authorities to not comply with an application on the grounds that it "unreasonably divert[s] its resources". Diversion of resources of the public authority should not be a reason for denying access to information. Allowing public authorities to avoid disclosure in cases where retrieving information is costly encourages poor record management. Where access cannot be granted because of the form requested by the applicant would require an unreasonable diversion of resources, access should be given in some other form. Such cases should be provided for under Section 10 (Forms of access), as is suggested in Recommendation #32.

Recommendation #26

Consideration may be given to removing Section 9(c), and removing the words "or unreasonable" from the title of Section 9 to reflect the removal.

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[22] Section 6(3) of the India's Right to Information Act, 2005: ". . . Provided that the transfer of an application pursuant to this sub-section shall be made as soon as practicable but in no case later than five days from the date of receipt of the application." URL: http://rti.gov.in/rti-act.pdf (accessed on 18th May, 2012).

[23] Section 5(1) of the Nigeria Freedom of Information Act, 2011: "Where a public institution receives an application for access to information, and the institution is of the view that another public institution has greater interest in the information, the institution to which the application is made may within 3 days but not later than 7 days after the application is received, transfer the application" URL: http://humanrightsinitiative.org/programs/ai/rti/international/laws_papers/nigeria/FREEDOM%20OF%20INFORMATION%20%20BILL%20EXPLANATORY%20MEMORANDUM%20-%20ORIGINAL%20COPY[1].pdf (accessed on May 18th, 2012).

27. Section 9(d) permits public authorities to not comply with an application on the grounds that "the information requested is already in the public domain". This is liable to be misused. When information is in the public domain, it may be freely disseminated, published, and used, without copyright implications. While being in public domain implies that the information may be freely *used*, it implies nothing about the *accessibility* of the information. Information in the public domain may, in fact, be difficult to obtain. Public authorities could abuse this provision since a great deal of information is held by the government is in the public domain, but is difficult or practically impossible for a member of the public to obtain.

    For example, a rule or regulation made by a Government department may be officially notified in the Gazette. This exercise has both notionally and physically placed the information in the public domain. However when hard copies of the Gazette notification are exhausted they are no longer physically available, although, in theory, they had been made public. Such records should be accessible under the FOI law if a request is made. The reason why FOI will be used to request such records is because the records are no longer easily available in the public domain.

<u>Recommendation #27</u>

Consideration may be given to removing section 9(d).

Section 10 – Forms of access.

28. Section 10(1) outlines the forms in which access to a record may be granted to an applicant. Applicants may inspect records under 10(1)(a) and hear sounds and see images under 10(1)(c), but are not expressly permitted to take notes, recordings, or copies. Allowing the applicant to take notes, recordings, or copies of records does not incur costs to public authorities. In fact, it may reduce the burden on public authorities since applicants may review the notes, recordings, or copies instead of making prolonged or multiple inspections of records.

<u>Recommendation #28</u>

24.1: Consideration may be given to inserting into Section 10(1)(a), after the words "reasonable opportunity to inspect the record", the words "and to take notes, photographs or video record the work at their own expense"

24.2: Consideration may be given to inserting into Section 10(1)(c), after the words "hear the sounds or view the visual images", the words "and take notes or copies in similar media".

29. Section 10(1) does not include the taking of certified copies of documents or records. Certified copies could be vital evidence in proceedings before courts or tribunals for the purpose of seeking accountability.

<u>Recommendation #29</u>

Consideration may be given to allowing the taking of certified copies by inserting into Section 10(1) another provision after Section 10(1)(d) reading: “(e) the authority concerned may furnish the applicant with certified copies of documents or records.”

30. Section 10(1) does not include the inspection of works. Given the fact that corruption in public works is not uncommon, developing countries such as India have included the right to inspect models and public works within the definition of ‘right to information’. If the ability to inspect models and public works were available as a matter of right, then people would be able to crosscheck contracts, works, and models at their own expense. Where discrepancies are found, they may approach the relevant authorities for remedial action. Since this Bill seeks to improve government transparency and accountability in The Bahamas it is advisable to include similar provisions in this Bill.

Recommendation #30

Consideration may be given to inserting into Section 10(1)(a), after the words “reasonable opportunity to inspect the record”, the words “or work”.

31. Section 10(1) does not include the taking of certified samples of materials. Given the fact that corruption in the procurement of materials for office work or the construction of roads, public buildings or other facilities is not uncommon, developing countries such as India have included the right to seek and obtain certified samples of such materials within the definition of ‘right to information’. If samples of materials used in public works are available as a matter of right people would be able to crosscheck the quality at their own expense, and where discrepancies are found, they may approach the relevant authorities for remedial action. Since this Bill seeks to improve government transparency and accountability in The Bahamas it is advisable to include similar provisions in this Bill.

Recommendation #31

Consideration may be given to adding in Section 10(1), after Section 10(1)(d), the following new subsection: “(e) the applicant may be given certified samples of materials used by a public authority in its work.”

32. Section 10(3) permits public authorities to grant access in a form other than that requested if is detrimental to the preservation of the record, inappropriate with regard to its physical state, or would constitute an infringement of intellectual property rights. Public authorities should also be allowed to provide access in a different form when the requested form requires an unreasonable diversion of resources. This would protect public authorities from needless consumption of resources.

Recommendation #32

Consideration may be given to adding to the end of Section 10(3), after subsection (b), the following new subsection: “(c) unreasonably divert the public authority’s resources”.

Section 11 – Assistance and deferment of access.

33. Section 11(3) sets a time limit of fourteen days to inform the applicant of a decision to defer access. Once the decision has been made to defer access there is no reason to delay informing the applicant of the deferral. A time limit of fourteen days is much more liberal than necessary, and a shorter time limit of five days is sufficient to allow for such communication.

Recommendation #33

Consideration may be given to substituting in Section 11(3) the words "fourteen calendar days" with the words "five working days".

Section 13 – Cost of access.

34. Section 13(1) makes the disclosure of information contingent on the payment of a "prescribed fee for reproducing, preparing and communicating the information". It is international best practice not to charge fees that is more than the actual cost of reproduction of the information from the original source. It is also international best practice in developing countries not to pass on the burden of the costs incurred by the public authority on searching, compiling or collating the record. The taxpayer already pays for costs incurred on searching, compiling and collating the information through taxes. There is no reason why the taxpayer should be burdened twice.

Recommendation #34

Consideration may be given to inserting into Section 13(1), after the words "fee for reproducing, preparing and communicating the information", the words "not including the cost of search, retrieval, collation or calculation of the amount of fee payable by the applicant".

35. Section 13(2)(c) specifies, "no fee is to be charged in relation to certain cases." This stipulation that no fees are required in certain cases is well appreciated. It would be helpful here to clarify the conditions where fees are not to be charged.

    In both developed and developing countries it is common practice to waive the requirement of payment of fees for requestors of meager means. It is also common practice for countries to waive fees for disclosing information that it is of relevance to large segments of the public. For example, in Australia payment of fees may be waived on grounds of financial hardship or where it is in the public interest to do so.[24] In Malta fees may be waived for an applicant on similar grounds.[25] The Indian RTI Act does not require citizens living below the official poverty

[24] Section 29(5) of Australia's Freedom of Information Act, 1982: "Without limiting the matters the agency or Minister may take into account in determining whether or not to reduce or not to impose the charge, the agency or Minister must take into account: (a) whether the payment of the charge, or part of it, would cause financial hardship to the applicant, or to a person on whose behalf the application was made; and (b) whether the giving of access to the document in question is in the general public interest or in the interest of a substantial section of the public." URL: http://www.austlii.edu.au/au/legis/cth/consol_act/foia1982222/ (accessed on 18th May, 2012).

line to pay any fees for seeking information.[26] In Antigua and Barbuda the Freedom of Information Act provides for the waiver of fees in the public interest.[27]

Further, it is also international best practice to provide the information free of cost if it is disclosed after the stipulated time limit. For example in Trinidad and Tobago, if the fees have been collected but the public authority fails to provide the information within the deadline the fee must be refunded.[28] Similarly in Malta it is possible to obtain the information free of cost if the public authority fails to meet the stipulated deadline.[29] The Indian RTI Act also requires the information to be provided free of cost if it is given after the 30-day deadline has lapsed.[30]

Recommendation #35

Consideration may be given to amending Section 13(2)(c) to read:

(c) that no fee is to be charged in relation to certain cases., including:

(i) where the applicant is a person below the poverty line as may be determined by the Government of The Bahamas;

(ii) where the disclosure of information is in the larger public interest; and

(iii) where the public authority fails to provide the information within the time limits stipulated within this Act.

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[25] Article 9(5)(b) and (c) of Malta's Freedom of Information Act, 2008: "(b) payment of the fee would cause financial hardship to the applicant, bearing in mind the applicant's means and circumstances; or (c) disclosure of the information requested is in the public interest." URL: http://www.foreign.gov.mt/Library/FOI/FOI%20Act.pdf (accessed on 18th May, 2012).

[26] Section 7(5) of India's Right to Information Act, 2005: "Provided that the fee prescribed under sub-section (1) of section 6 and sub-sections (1) and (5) of section 7 shall be reasonable and no such fee shall be charged from the persons who are of below poverty line as may be determined by the appropriate Government." URL: http://rti.gov.in/rti-act.pdf (accessed on 18th May, 2012).

[27] Section 20(2) of Antigua and Barbuda's Freedom of Information Act, 2004: "Payment of a fee shall not be required for requests for personal information, and requests in the public interest." URL: http://humanrightsinitiative.org/programs/ai/rti/international/laws_papers/antigua/antigua_foi_act.pdf (accessed on 10th May, 2012).

[28] Section 17(1) of Trinidad and Tobago's Freedom of Information Act, 1999: "Notwithstanding subsection (2), where a public authority fails, to give an applicant access to an official document within seven working days of the payment of the relevant fee pursuant to section 16(1)[c], the applicant shall, in addition to access to the official document requested, be entitled to a refund of the fee paid." URL: http://www.foia.gov.tt/sites/default/files/FOIA1999.PDF (accessed on 18th May, 2012).

[29] Article 9(6) of Malta's Freedom of Information Act. "Where a public authority fails to meet the time limit set by article 10 or, if applicable, article 11, it shall not charge any fee for access to a document." URL: http://www.foreign.gov.mt/Library/FOI/FOI%20Act.pdf (accessed on 18th May, 2012).

[30] Section 7(6) of India's Right to Information Act, 2005: "Notwithstanding anything contained in sub-section (5), the person making request for the information shall be provided the information free of charge where a public authority fails to comply with the time limits specified in sub-section (1)." URL: http://rti.gov.in/rti-act.pdf (accessed on 18th May, 2012).

Section 14 – Grant of access.

36. Section 14 specifies that access to the requested information be granted where the applicant has paid "(b) the cost incurred by the public authority in granting access". This requirement is redundant with Section 13(1). The broader language used in Section 14 may also be misused to charge applicants for the search, retrieval, and collation of information, which is contrary to international best practices.

Recommendation #36

Consideration may be given to removing Section 14(b).

Part III – Exempt Records

37. Many of the sections under Part III—namely Sections 15, 16, 17, 18, 19, 20, 21, 22, and 24—use the language "record is exempt from disclosure if" with minor variations for purposes of grammar. This language suggests a blanket exemption. According to the international best practice principle of minimum exceptions, access legislation should avoid blanket exceptions. Exceptions should be based on consequential harms, such as damage to public interests. Following this principle, information may only be exempted to prevent particular harms. Alternative language such as "information may be exempted from disclosure if" is more inline with this principle.

Recommendation #37

Consideration may be given to replacing language in Part III like "record is exempt from disclosure if" with language like "information may be exempted from disclosure if".

Section 15 – Records affecting security, defence or international relations, etc.

38. Under Section 15(a), information may be exempted from disclosure if it "would prejudice the security, defence or international relations of The Bahamas". This harms test of mere "prejudice" is a very low threshold. The key concern ought to be whether disclosure would actually cause serious damage to a legitimate public interest that deserves to be protected. Consideration may be given instead to withholding disclosure only when it will lead to "serious harm" or "serious damage".

Recommendation #38

Consideration may be given to substituting in Section 15(a) the word "prejudice" with the words "cause serious harm or serious damage"

39. Under Section 15(b), information may be exempted from disclosure if it was "communicated in confidence" from a foreign government or international organization. This is too broad and ripe for abuse. Simply because information was given to the Government of The Bahamas in

confidence by a foreign government or international organization does not require it to *remain* confidential. This amounts to providing blanket exemptions, which is not in tune with the twin principles of maximum disclosure and narrowly drawn circumstantial exemptions.

At the time the information was communicated it may have been sensitive, but at the time it is requested it may be harmless. Disclosure need not be prevented in such cases. Adding a harms test to the provision would avoid this issue.

Recommendation #39

Consideration may be given to adding to the end of Section 15(b), after the words "by an international organization", the words "if disclosure of that information will seriously harm the relations of the Bahamas with a foreign State or an international organization".

Section 16 – Records relating to law enforcement

40. Under Section 16(a), information related to law enforcement may be exempted from disclosure if it "could reasonably be expected to . . . endanger any person's life or safety". This provision is well received because personal life and safety are important public interests that should be protected. However, this interest is protected more broadly later on in this Bill by the exemption of information likely to endanger health and safety of any individual under Section 24. Because of this, Section 16(a) is redundant and unnecessary.

Recommendation #40

Consideration may be given to removing Section 16(a).

41. Under Section 16(b), information related to law enforcement may be exempted from disclosure if it could reasonably be expected to affect investigations, prosecutions, or trials. This is too broad because affecting these processes does not necessarily amount to having a negative effect. In many cases, it could *positively* affect these processes. For example, the disclosure of information may reveal facts that facilitate the prosecution of a guilty party, or end the investigation of an innocent party. Section 16(a) should only exempt the disclosure of information that *detrimentally* affects or impedes or obstructs these processes.

    Consideration may be given to amending Section 16(a) to exempt disclosure of information with a *detrimental* affect on the listed processes.

Recommendation #41

Consideration may be give to replacing the word "affect" in Section 16(b) with the words "impede or cause detriment to".

Section 19 – Records revealing Government's deliberative processes.

42. Under Section 19(1), information may be exempted from disclosure if it was prepared for the Cabinet or a record of the Cabinet's consultations or decision-making. It is international best practice not to include such class exemptions in laws aiming to establish an overarching

regime of transparency. While some of this information may be sensitive, not all the information should be dubbed sensitive, and once the decision has been made, disclosure to the people is a priority. This is a hallmark of responsible and open government based on the twin principles of rule of law and accountability. The Bahamas is a functional and responsible democracy and the people should have the right to know about the proposals submitted to the Cabinet and the subsequent decisions made by Cabinet. People should also have access to the reasons informing these decisions and the materials that formed the basis of the decisions made.

The appropriate protection for Cabinet documents should be directed at whether premature disclosure would undermine the policy or decision-making process. Such an exemption should protect against disclosures that would seriously frustrate the policy formulation process, by premature disclosure of information. In recognition of the fact that Cabinet papers are largely time sensitive, it is worth noting that in Wales, UK, Cabinet proactively discloses all minutes, papers and agendas of its meetings within six weeks unless there are overriding reasons not to. In Israel, Cabinet decisions are automatically made public on the Prime Minister's Office website. In India, Cabinet decisions, and the material they are based on, are made public after the decision has been taken and the matter is complete.[31]

Recommendation #42

Consideration may be given to adding to the end of Section 19(1), after the words "the Cabinet or of a committee thereof", the words:

> **"and the disclosure thereof would seriously undermine the policy or decision-making process.**
>
> **Provided that the information shall be made public after the decision has been taken, and the matter is complete, or over."**

43. Under Section 19(1), there appears to be a typographical error where it says: "Subject to subsection (2)". Contrary to this language, Section 19(2) does not provide an exception to Section 19(1). Section 19(3) does, however, provide such an exception. This suggests that it should actually read "Subject to subsection (3)"

Recommendation #43

Consideration may be given to replacing in Section 19(1) the words "subsection (2)" with

[31] Section 8(1)(i) of India's Right to Information Act, 2005:

> (i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:
>
> Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:
>
> Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;

URL: http://rti.gov.in/rti-act.pdf (accessed on 18th May, 2012).

the words "subsection (3)".

Section 20 – Prejudice to effective conduct of public affairs.

44. Under Section 20(1)(a), information may be exempted from disclosure if it "would, or would be likely to, prejudice the maintenance of the convention of collective responsibility of Ministers". This immunizes a large amount of information from disclosure, and prevents the people from gaining insight into the decision-making process. Although we want to ensure that the government can have free and frank discussions while deliberation, Section 20(1)(b) already adequately protects this public interest.

Recommendation #44

Consideration may be given to removing Section 20(1)(a), and also removing Section 20(2)(a) which merely elaborates on Section 20(1)(a).

45. Under Section 20(1)(c), information may be exempted from disclosure if it is legal advice given by or on behalf of the Attorney-General. This information should be available because the public has a right to know what legal advice the government is receiving. Concerns regarding free and frank deliberations are sufficiently protected by Section 20(1)(b).

Recommendation #45

Consideration may be given to removing Section 20(1)(c).

46. Under Section 20(1)(d), information may be exempted from disclosure if it would likely prejudice the effective conduct of public affairs. This is overbroad and liable to be misused. Consider, for example, the disclosure of information that would expose widespread wrongdoing by government officials. The fallout of this scandal would surely prejudice the effective conduct of public affairs, but this is not a good reason to exempt disclosure. If the concern is preserving free and frank deliberations in the conduct of public affairs, Section 20(1)(b) sufficiently protects this.

Recommendation #46

Consideration may be given to removing Section 20(1)(d).

47. Section 20(2)(b) specifies that the initial decision regarding Section 20(1)(b), (c), and (d) shall be made "by the responsible Minister or chief officer concerned". Under this provision, it is not clear who shall take the initial decision for public authorities that have both a responsible Minister and a chief officer.

Recommendation #47

Consideration may be given to removing from Section 20(2(b), the words "by the

responsible Minister or".

Section 22 – Records relating to heritage sites, etc.

48. Section 22(2) extends the 22(1) exemption of disclosure of information that could reasonably be expected to interfere with the conservation of heritage resources and vulnerable living resources to 75 years, overriding the lower time limit specified in Section 6(2). This time limit of 75 years is extremely long, spanning across at least three generations. There is little reason why information covered under the broad language of Section 22(1) should be exempt for 75 years while other exemptions have a shorter lifespan.

Recommendation #48

Consideration may be given to removing Section 22(2), and removing the words "Subject to subsection (2)" from Section 22(1).

Section 23 – Records relating to personal information.

49. Section 23(1) uses the language "shall not grant access to a record" to exempt information. This language suggests that disclosure of this information is strictly prohibited. This is at odds with Section 26(1), which provides for a public interest exception to Section 23(1), along with other sections. The language should be changed to clarify that exemption from disclosure under this section is discretionary and not obligatory.

Recommendation #49

Consideration may be given to replacing in Section 23(1), the words "a public authority shall not grant access to a record", with the words "information may be exempted from disclosure".

50. Section 23(1) exempts the disclosure of personal information. Personal information may be interpreted as information relating to an individual who can be identified from the data.[32] However, not all personal information is sensitive; some personal information is publicly available, so disclosing this information would not be harmful. For example, phone books, such as the BTC White Pages,[33] provide name, address, and phone number listings. This is information relating to identifiable individuals, and hence personal information, that is released

[32] While the term "personal information" is not defined in this Bill, a similar term—"personal data"—is defined under Section 2(1) of The Bahamas' Data Protection (Privacy of Personal Information) Act, 2003 as "data relating to a living individual who can be identified either from the data or from the data in conjunction with other information in the possession of the data controller" URL: http://www.lexbahamas.com/Data%20Protection%202003.pdf (accessed on 15th May, 2012).

[33] URL: http://www2.btcbahamas.com/directories/white/index.php

publicly. Mere disclosure of personal information is not harmful in itself, rather it is the disclosure of personal information that causes invasion of privacy which should be prevented.

Recommendation #50

Consideration may be given to adding to the end of Section 23(1), after the words "whether living or dead", the words "where the disclosure of which would cause unwarranted invasion of the privacy of the person".

51. Section 23(2) allows disclosure of personal information where the applicant is the person to whom the information relates. This is a welcome provision since individuals have a strong interest in knowing what personal information the government has collected about them. Expanding this provision to allow disclosure with consent of the person, or consent of family where the person is deceased would further protect this interest.

Recommendation #51

Consideration may be given to amending Section 23(2) to the following:

(2) Subsection (1) shall not apply in any case where:

(a) the application for access is made by the person to whose affairs the record relates;

(b) consent has been given by the person to whose affairs the record relates; or

(c) consent has been given by the family of the person to whose affairs the record relates, when the person to whose affairs the record relates is deceased.

52. Section 23(3) overrides the sunset clause in Section 6(2), extending the exemption of personal information indefinitely. This provision runs contrary to the international best practice of maximum disclosure because it will render enormous amounts of information permanently immune from disclosure. Once the person to whom the information relates has passed on, although the public interest in withholding the information will also end, under Section 6(2) this information will continue to be unobtainable by the public indefinitely. It would be more appropriate for the sunset clause to allow the exemption to run for up to ten years after the death of an individual.

Recommendation #52

Consideration may be given to replacing in Section 23(3), the words "without limitation as to time", with the words "up to ten years after the death of the person to whose affairs the record relates"

Section 25 – Issuance of certificate regarding exempt record.

53. Section 25(3) specifies that certificates issued by Ministers under Section 25(1), exempting information, is conclusive and not subject to any judicial or quasi-judicial proceedings of any kind. This lack of independent appeals mechanisms causes problems for the effective enforcement of the Bill. Ministers are essentially granted unlimited powers to exempt information, since they can exempt information by issuing a certificate under Section 25(1), and under Section 25(3), that decision is not subject to any review or appeals process.[34] The ministers, being holders of the information, may not be in the best position to make an unbiased decision regarding the disclosure of information. Unbiased third parties with adjudicatory powers are better suited to make such decisions.

Recommendation #53

Consideration may be given to removing Section 25(3).

Section 26 – Some exemptions are subject to the public interest test

54. Section 26(2) specifies that "[p]ublic interest shall be defined in regulations made under this Act." This opens the door to the adoption of a very limited definition of public interest that could allow information to be withheld even when disclosure is in the public's best interest. Since the key aim of exemptions is to protect and promote the public interest, information should not be exempt where it is in the public's interest to disclose the information. Therefore, the public interest should not be subject to a potentially limiting definition under regulations passed under this legislation. Instead, the definition of public interest should conform to a more general understanding of the term, in line with jurisprudence and other legislation. The independent adjudicatory, namely the Information Commissioner, must have the power to determine what may or may not be disclosed to protect the public interest. Appellate courts will also exercise such power.

Recommendation #54

Consideration may be given to removing Section 26(2).

Section 27 Making of decisions and reasons public.

55. Section 27 requires public officials to "make their best efforts to ensure that decisions and the reasons for those decisions are made public unless . . . exempt under this Act." This provision is well received because it requires public authorities to be accountable for their decisions. In order to avoid any confusion, however, this section should clearly specify that "all decisions" be made public.

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[34] Note also that in addition to the general immunity under Section 25(3), the decision has specific immunity to internal review under Section 33(4), and specific immunity to appeal to the Information Commissioner under Section 42(4).

Recommendation #55

Consideration may be given to inserting in Section 27, after the words "ensure that", and before the words "decisions and the reasons", the word "all".

56. Section 27 does not include any provision for accessing information used to formulate decisions. The Indian RTI Act, for example, requires the publishing of all relevant facts involved in the formulation or announcement of decisions that impact the public.[35] Such a provision ensures that the public can participate meaningfully in the decision making process.

Recommendation #56

Consideration may be given to inserting in Section 27, after the words "decisions are made public", and before the words "unless the decision", the words ", and all relevant facts are also made public while formulating important policies or announcing the decisions which affect public,"

Part VI – Information Commissioner

Section 36 – Independence and powers.

57. Section 36 provides for the establishment of a Freedom of Information Unit to support the functions of the Information Commissioner. This is inline with international best practices to ensure the independence of the Information Commissioner. To ensure that this important unit is put into effect, the composition, functions, responsibilities and powers of the Freedom of Information Unit should be defined within this Act also stipulating that the necessary resources are made available for this unit to be formed and to function properly.

Recommendation #57

Consideration may be given to inserting into Section 36, after subsection (1) and before subsection (2), the following two subsections:

> **(1A) The Bahamas Government shall provide the Commissioner with such officers and employees as may be necessary for establishment of a Freedom of Information Unit, the efficient performance of their functions under this Act, and the salaries and allowances payable to and the terms and conditions of service of the officers and other employees appointed for the purpose of this Act shall be such as may be prescribed.**
>
> **(1B) The composition, functions, responsibilities and powers of the Freedom of Information Unit shall be such as may be determined in the Regulations prepared in**

[35] Section 4(1)(c) of India's Right to Information Act, 2005: "publish all relevant facts while formulating important policies or announcing the decisions which affect public". URL: http://rti.gov.in/rti-act.pdf (accessed on 18th May, 2012).

consultation with the Commissioner.

Section 40 – Reports.

58. Section 40 requires the Commissioner to lay a report before parliament outlining information such as the number of applications, use of exemptions, and reviews. This is an important means of tracking the compliance of public authorities to the Act. Because the imposition of punitive actions are also an important measure of compliance, the number, nature, and particulars of fines, penalties ,and disciplinary actions should be required in the report.

    Consideration may be given to amending Section 40(2) to include the number and nature of fines and penalties imposed in the report.

Recommendation #58

Consideration may be given to adding to the end of Section 40(2), after subsection (d), the following two subsections:

(e) the number and nature of any fines and penalties imposed on public authorities;

(f) the particulars of any disciplinary action taken against any officer in respect of the administration of this Act.

Part VII – Enforcement By Commissioner

Section 42 – Appeal to Commissioner

59. Section 42(4)(b) specifies that the Commissioner "shall not nullify a certificate issued under section 25." As explained in comment 53, the power of Ministers to issue certificates under Section 25 should be subject to review. Ministers, because they are the holders of information, are unlikely to render unbiased decisions about the disclosure of that information. Therefore, Ministers should not have the unilateral power to exempt information—exemption of information by Ministers should be subject to review.

Recommendation #59

Consideration may be given to removing Section 42(4)(b), and removing the words ", subject to paragraph (b)," from Section 42(4)(a).

Section 44 – Implementation of decision.

60. Section 44(2) specifies what the Commissioner may, in exercising their power under this Bill, do in their decision. The Commissioner must have the powers of sanction in order to secure compliance with its decisions. This is a key feature of international best practice access legislation. A competent court can impose punishment for the more serious offences in the manner described in Section 55.

    Consider, for example, the powers of sanction available to Commissioners under Antigua and Barbuda's FOI Act. The Commissioner may impose fines for willful failure to comply with proactive disclosure requirements,[36] and unreasonable or willful failure to comply with right to access to information provisions.[37]

    In South Asia, most access to information laws empower independent appellate authorities to enforce their decisions through sanctions. In India, the Information Commissions may impose monetary penalties on officials who violate the RTI Act.[38] Repeated contraventions of the RTI Act are dealt with through recommendations to the concerned public authority for initiating disciplinary action against the erring officials.[39] If a requestor for information has suffered any

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[36] Section 42(4)(d) of Antigua and Barbuda's Freedom of Information Act, 2004: "the Commissioner may – (d) in the case of willful failure to comply with an obligation pursuant to Part II, impose a fine on the public body." URL: http://humanrightsinitiative.org/programs/ai/rti/international/laws_papers/antigua/antigua_foi_act.pdf (accessed on 10th May, 2012).

[37] Section 43(1)(f) of Antigua and Barbuda's Freedom of Information Act, 2004: "the Commissioner may require the public authority to[,] … (f) in the cases of unreasonable or willful failure to comply with an obligation under PART III, pay[] a fine" URL: http://humanrightsinitiative.org/programs/ai/rti/international/laws_papers/antigua/antigua_foi_act.pdf (accessed on 10th May, 2012).

[38] Section 20 of India's Right to Information Act, 2005:

> Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause, refused to receive an application for information or has not furnished information within the time specified under sub-section (1) of section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall impose a penalty of two hundred and fifty rupees each day till application is received or information is furnished, so however, the total amount of such penalty shall not exceed twenty-five thousand rupees:
>
> Provided that the Central Public Information Officer or the State Public Information Officer, as the case may be, shall be given a reasonable opportunity of being heard before any penalty is imposed on him:
>
> Provided further that the burden of proving that he acted reasonably and diligently shall be on the Central Public Information Officer or the State Public Information Officer, as the case may be.

URL: http://rti.gov.in/rti-act.pdf (accessed on 18th May, 2012).

[39] Section 20(2) of India's Right to Information Act, 2005:

> Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause and persistently, failed to receive an application for information or has not furnished information within the time specified under sub-section (1) of section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall recommend for

financial loss or detriment, the Commissions may also order the public authority to compensate the requestor.[40] While the monetary fine is an individual liability of the information officer, the public authority is liable to pay the compensation amount to the requestor. In Nepal, the Information Commission may impose monetary fines for refusal of access or delay in furnishing the information without reasonable cause.[41] In Bangladesh the Information Commission is similarly empowered to impose penalties on erring officials and order the payment of compensation to the applicants.[42]

Recommendation #60

Consideration may be given to adding to the end of Section 44(2), after subsection (d), the following two subsections:

> **(e) impose a monetary fine not exceeding ten-thousand dollars on an information manager or any other officer responsible for any or all of the following contraventions of this Act:**
>
> > **(i) refusing to receive an information request without reasonable cause;**
> >
> > **(ii) not furnishing the requested information within the time limits**

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disciplinary action against the Central Public Information Officer or the State Public Information Officer, as the case may be, under the service rules applicable to him.

[40] Section 19(8) of India's Right to Information Act, 2005: "In its decision, the Central Information Commission or State Information Commission, as the case may be, has the power to— . . . (b) require the public authority to compensate the complainant for any loss or other detriment suffered". URL: http://rti.gov.in/rti-act.pdf (accessed on 18th May, 2012).

[41] Section 32 of Nepal's RTI Act, 2007:

> Punishment:
>
> (1) If the Commission finds that Chief of public Body or Information Officer has held back information without any valid reason, refused to part with information, provided partial or wrong information or destroyed information; the Commission may impose a fin to such Chief or Information Officer from Rupees 1,000 to 25,000 and if such Chief or Information Officer is in a Post to be punished by Department, it may write to the concerned Body for departmental action.
>
> (2) If the Chief of public Body or Information Officer delay to provide information which has to be provided on time without reason, they shall be punished with a fine Rupees 200 per day for the information is delayed to provide.
>
> (3) If the Commission writes to the concerned Body for Departmental action in accordance with Sub-section (1), the Public Body will have to take Departmental action against that Chief or Information Officer within three months and notify the Commission thereon.
>
> (4) The Commission may impose a fine between NRS 5000 to 25000 considering that seriousness of misuse of information if any person is found misusing the information acquired from public Body instead of using it for purpose it was obtained for.
>
> (5) The Commission may impose a fine up to Rupees 10,000 to the concerned person in case its decision or order in accordance with this Act is not obeyed.

[42] Section 11(a)(vi) of Bangladesh's Right to Information Act, 2009: "At the time of taking decision under this section, the Information Commission shall have the following powers namely : . . . (vi) to give compensation for any loss or damage". URL: http://www.moi.gov.bd/RTI/RTI_English.pdf (accessed on 18th May, 2012).

stipulated in this Act without reasonable cause;

(iii) malafidely denying information;

(iv) knowingly providing false, misleading or incomplete information.

provided that the information manager shall be given a reasonable opportunity of being heard before any penalty is imposed on him or her;

provided further that the burden of proving that he or she acted reasonably and diligently shall be on the information manager; or

(f) require the public authority to compensate the information applicant, for any loss or other detriment suffered;

Section 45 – Commissioner's powers generally to investigate.

61. Section 45(1) gives the Commissioner the power to issue orders "requiring the production of evidence and compelling witnesses to testify. In order to allow the Commissioner to make thorough and effective investigations, it is necessary to give him or her broader powers to compel testimony and the production of evidence. The Indian RTI Act, for example, provides its Information Commissioners many of the same powers that a civil court has while trying a suit.[43]

Recommendation #61

Consideration may be given to amending Section 45(1) to read:

(1) The Commissioner shall, while coming to a decision pursuant to section 43 or 44, have the same powers as are vested in a civil court while trying a suit, in respect of the following matters, namely:

(a) summoning and enforcing the attendance of persons and compel them to give oral or written evidence on oath and to produce the documents or things;

[43] Section 18(3) of the India's Right to Information Act, 2005:

(3) The Central Information Commission or State Information Commission, as the case may be, shall, while inquiring into any matter under this section, have the same powers as are vested in a civil court while trying a suit under the Code of Civil Procedure, 1908, in respect of the following matters, namely:—

(a) summoning and enforcing the attendance of persons and compel them to give oral or written evidence on oath and to produce the documents or things;

(b) requiring the discovery and inspection of documents;

(c) receiving evidence on affidavit;

(d) requisitioning any public record or copies thereof from any court or office;

(e) issuing summons for examination of witnesses or documents; and

(f) any other matter which may be prescribed.

URL: http://rti.gov.in/rti-act.pdf (accessed on 18th May, 2012).

> **(b) requiring the discovery and inspection of documents;**
>
> **(c) receiving evidence on affidavit;**
>
> **(d) requisitioning any public record or copies thereof from any court or office;**
>
> **(e) issuing summons for examination of witnesses or documents; and**
>
> **(f) any other matter which may be prescribed;**
>
> **in the exercise of these powers he or she may call for and inspect an exempt record, so however, that, where he or she does so, he or she shall take such steps as are necessary or expedient to ensure that the record is inspected only by members of staff of the Commissioner acting in relation to that matter.**

62. Section 45(2) exempts information from examination by the Commissioner if the Minister has certified that the examination the information would not be in the public interest. Section 45(3) immunizes these certifications from review. As explained in comment 53, Ministers are naturally biased when it comes to making decisions on disclosure of information. Therefore, Ministers should not have the ability to withhold information from examination by the Commissioner, which is a third party and less likely to be biased. This is especially true when certifications are immune from review.

> **Recommendation #62**
>
> **Consideration may be given to removing from Section 45(2) the words "unless the Minister, under his hand, certifies that the examination of such record would not be in the public interest", and removing Section 45(3) which merely elaborates on the aforementioned portion of Section 45(2).**

Part VIII – Measures to Promote Openness

Section 49 – Information Managers

63. Section 49(1) specifies that "[e]very public authority shall appoint an information manager". This Section makes handling information requests the sole responsibility of information managers. It is assumed that he or she will be able to manage the task single-handedly. Experience from developing countries like India, where they are called "information officers", suggests that information managers will often be unable access all the information held by a public authority. They may also lack the seniority to requisition records in the custody of their colleagues (senior or contemporary) in the absence of adequate powers. For example in the absence of statutory authority an information manager may not be able to requisition a file if his or her senior does not want to part with it. Experience also shows that unscrupulous officers may refuse to part with information, with the resulting penalty borne by the information manager even though they are not at fault. In order to avoid such unpleasant situations in the

Bahamas, information managers should be empowered to seek assistance from other officers, and such officers should be obligated to assist the information manager. Sanctions should apply to the officers who refuse to part with information rather than the information manager.

Recommendation #63

Consideration may be given to adding to the end of Section 49, after subsection (3), the following two subsections:

> **(4) An information manager may seek the assistance of any other officer as he or she considers it necessary for the proper discharge of his or her duties under this Act.**
>
> **(5) Any officer whose assistance has been sought under clause (2) of this section shall render all assistance to the Information manager seeking his or her assistance and for the purposes of any contravention of the provisions of this Act such other officer shall be treated as the Information manager.**

Section 50 – Whistleblowers.

64. Section 50 protects people who release information on wrongdoing (when in good faith and based on reasonable belief). This is an important for provision for access legislation.[44] In the interest of clarity, the illustrative list of types of wrongdoing in Section 50(2) should be clarified to include the abetment and planning of criminal offences.

Recommendation #64

Consideration may be given to inserting into section 50(2)(a), after the words "(a) the" and before the words "commission of a criminal offence", the words "abetment, planning, or".

Part IX - Miscellaneous

Section 54 – Protection from liability regarding defamation, breach of confidence and intellectual property rights.

65. Section 54(1)(a) states that the Bill does not authorize the disclosure of any official records that contain defamatory matter. This provision may be exploited to hide cases of wrongdoing from disclosure. Evidence of wrongdoing may easily be categorized as containing defamatory matter, and therefor exempted from disclosure under this provision. An exception for evidence of wrongdoing should be included in this provision.

Recommendation #65

[44] Please note however that a comprehensive whistleblower law is necessary to create a truly effective whistleblower protection.

Consideration may be given to inserting in the end of Section 54(1)(a), after the words "containing any defamatory matter", the words "unless it is information on wrongdoing, or would disclose a serious threat to health, safety or the environment".

66. Section 54(1)(b) does not allow the disclosure of information that "would be in breach of confidence or of intellectual property rights." This is unnecessary. Section 17(b)(i) already protects against breaches of confidence, and Section 10(3)(b) already protects against breaches of intellectual property rights.

Recommendation #66

Consideration may be given to removing Section 54(1)(b).

67. Section 54(2) provides limited protection against liability for good faith disclosure of information that is defamatory, in breach of contract, or in breach of intellectual property rights. It does not provide protection against other liabilities that may be triggered by disclosure of information. Protecting against liability for disclosures information on good-faith belief that it is permitted under the access to information legislation is vital to ensuring that the Bill's goal of granting a general right of information is met. If the person deciding on whether to disclose information faces potential penalties for mistakenly allowing access in good faith, then they will naturally favor non-disclosure. Such protections for good-faith disclosure are provided in many countries, including Antigua and Barbuda,[45] St Vincent and the Grenadines,[46] and Trinidad and Tobago.[47]

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[45] Section 40(1) of Antigua and Barbuda's Freedom of Information Act, 2004: "The Commissioner, any officer or employee of his Office or any other person acting on behalf of or under the direction of the Commissioner shall not be personally liable in criminal or civil proceedings for any act done in good faith pursuant to this Act." URL: http://humanrightsinitiative.org/programs/ai/rti/international/laws_papers/antigua/antigua_foi_act.pdf (accessed on 10th May, 2012).

[46] Section 38 of St Vincent and the Grenadines' Freedom of Information Act, 2003:

> Where access has been given to a document and
>
> (a) the access was required by this Act to be given; or
>
> (b) the access was authorised by a Minister or by an officer having authority, in accordance with section 23 to make decisions in respect of requests, in the *bona fide* belief that the access was required by this Act to be given,
>
> neither the person authorising the access nor any person concerned in the giving of the access is guilty of a criminal offence by reason only of the authorising or giving of the access.

URL: http://humanrightsinitiative.org/programs/ai/rti/international/laws_papers/vincent/foi_act_2003.pdf (last accessed on 10th May, 2012).

[47] Section 38(1) of Trinidad and Tobago's Freedom of Information Act, 1999:

> Where access to a document has been given in accordance with the requirements of this Act or in good faith, in the belief that it was required to be given in accordance with this Act, unless malice is proved –
>
> (a) no action for defamation, breach of confidence or infringement of copyright may be brought against the public authority or against the responsible Minister, or an officer or employee of the public authority as a result of the giving of access;

Recommendation #67

Consideration may be given to inserting a new Section 54A after Section 54 reading:

> **Section 54A. Protection of action taken in good faith.**
>
> **No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act or any rule made thereunder.**

Section 55 – Offences.

68. Section 55(1) lists acts that qualify as offences under the Bill. Other access legislation, such as the Indian RTI Act, also includes malafide denials of requests, and knowingly giving incorrect, incomplete, or misleading information.[48] The Bahamas FOI Bill thankfully includes a broad offence for concealing information. This broad offence presumably includes both these situations. However, in the interest of clarity, it is advisable to explicitly include these categories of offences in Section 55(1).

Recommendation #68

Consideration may be given to inserting in Section 55(1), after subsection (d), and before the words "the record with the intention", the following two subsections:

> **(e) malafidely denies a request for the record; or**
>
> **(f) knowingly gives incorrect, incomplete or misleading information,**

> (b) no action for defamation or breach of confidence may be brought, in respect of any publication involved in the giving of access by the public authority, against –
>
> > (i) any person who was the author of the document; or
> >
> > (ii) any person as a result of that person having supplied the document or the information contained in it to the public authority;
>
> (c) no person shall be guilty of an offence by reason only of having authorized, or having been involved in the giving of the access.

URL: http://www.foia.gov.tt/sites/default/files/FOIA1999.PDF (accessed on 18th May, 2012).

[48] Section 20(2) of the India's Right to Information Act, 2005:

> Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause and persistently, failed to receive an application for information or has not furnished information within the time specified under sub- section (1) of section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall recommend for disciplinary action against the Central Public Information Officer or the State Public Information Officer, as the case may be, under the service rules applicable to him.

URL: http://rti.gov.in/rti-act.pdf (accessed on 18th May, 2012).

69. Section 55(4) specifies that the "Official Secrets Act shall apply in relation to the grant of access to an official document in contravention of this Act". A natural reading of this provision is that the Official Secrets Act applies when information is disclosed in violation of the Bill. This provision is worrisome because it will have a chilling effect on the disclosure of information. If a government official released official documents under this Bill on a good-faith understanding that it should be disclosed under this Bill, but they were mistaken, then they could face severe punishment under the Official Secrets Act. The whistleblower protection under Section 50 provides little protection. First, it only protects disclosures of information on wrongdoing or serious threats. Second, even in those cases, it is not clear that it would prevent the disclosure from being covered by the Official Secrets Act. The risks of incurring the penalties of the Official Secrets Act would make government officials very reluctant to release any official documents.

    As explained in comment 8, in order for this access legislation to be effective, it must override all older legislation, including the Official Secrets Act. This access legislation should take precedence over older laws that were passed at a time when secrecy was the norm, rather than transparency.

Recommendation #69

Consideration may be given to amending Section 55(4) to read:

> **The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."**

Section 56 – Regulations.

70. Section 56 empowers the Minister to make regulations to give effect to the Bill. Such regulations should be made in consultation with the public in order to ensure accountability in the rulemaking process. Generally rulemaking processes should ensure that the public is informed of proposed rules before the take effect, may comment on those proposed rules, and may analyse the data and analysis underlying proposed rules. In India, for instance, rule-making authorities must publish draft proposed rules before adopting them.[49] If the rulemaking

[49] Section 23 of India's General Clauses Act, 1897:

> Provisions applicable to making of rules or bye- laws after previous publication.- Where, by any Central Act or Regulation, a power to make rules or bye- laws is expressed to be given subject to the condition of the rules or bye- laws being made after previous publication, then the following provisions shall apply, namely:--
>
> > (1) the authority having power to make the rules or bye- laws shall, before making them, publish a draft of the proposed rules or bye- laws for the information of persons likely to be affected thereby;
> >
> > (2) the publication shall be made in such manner as that authority deems to be sufficient, or, if the condition with respect to previous publication so requires, in such manner as the Government concerned prescribes;

process in The Bahamas does not already require a notice and comment period or comparable process before rules and regulations take effect, then such a process should be added to this provision.

Recommendation #70

Consideration may be given to adding after Section 56, a new Section reading:

Section 56A. Regulation making process
Where the Minister makes a regulation under Section 56 the following provisions shall apply:

(1) the Minister shall, before making them, publish a draft of the proposed regulations for the information of persons likely to be affected thereby;

(2) the publication shall be made in such manner as that authority deems to be sufficient, or, if the condition with respect to previous publication so requires, in such manner as the Government concerned prescribes;

(3) there shall be published with the draft a notice specifying a date on or after which the draft will be taken into consideration;

(4) the Minister and the Commissioner shall consider any objection or suggestion which may be received by the Minister from any person with respect to the draft before the date so specified;

(5) the publication in the Gazette of a regulation purporting to have been made in exercise of a power to make regulations after previous publication shall be conclusive proof that the regulation has been duly made.

71. Section 56(b) specifies that the Minister may "make regulations . . . prescribing the period of time for the doing of any act under this Act". This suggests that the Minister may, through regulations, override the time limits specified in this Bill. Such a reading would render this Bill largely ineffectual. It is vital that information is disclosed in a timely matter in order to effectuate access to information. Timely disclosures assists the monitoring of compliance with the Act, and ensures that information is disclosed when it still has relevance to the applicant. To prevent this troublesome interpretation of this provision, the provision should be removed. The

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(3) there shall be published with the draft a notice specifying a date on or after which the draft will be taken into consideration;

(4) the authority having power to make the rules or bye- laws, and, where the rules or bye- laws are to be made with the sanction, approval or concurrence of another authority, that authority also, shall consider any objection or suggestion which may be received by the authority having power to make the rules or bye- laws from any person with respect to the draft before the date so specified;

(5) the publication in the Official Gazette of a rule or bye- law purporting to have been made in exercise of a power to make rules or bye- laws after previous publication shall be conclusive proof that the rule or bye- law has been duly made.

Minister would retain the ability to set time limits for acts that do not already have time limits prescribed in the Bill, under Section 56(a).

Recommendation #71

Consideration may be given to removing Section 56(b).

Schedule – Information to be Published by Public Authorities

Paragraph 1 of the Schedule

72. Paragraph 1 of the Schedule specifies the types of information that are required to be proactively disclosed under Section 5 of the Bill. While the items on the list are no doubt basic information that people must be informed about proactively, they are not comprehensive enough when compared with international best practices. This section notably does not include information regarding budgets; powers, duties, and salaries of employees, and the manner of execution of subsidy programs.

    The notion of a right to information holds within it the duty on public bodies to actively disclose, publish, and disseminate, as widely as possible, information of general public interest—for example, information regarding the structure, norms and functioning of public bodies, the documents they hold, their finances, activities and any opportunities for consultation—even when not asked for. Proactive disclosure is a particularly important aspect of access laws because often the public has little knowledge of what information is in the possession of government and little capacity to seek it. It is a duty that is fundamental to increasing transparency in public bodies and thereby reducing corruption and increasing accountability of officials.

    Proactive disclosure also works to increase confidence in government, while at the same time reducing the number of requests made under access legislation. Article 7 of the Mexican Federal Transparency and Access to Public Government Information Law, 2002 and Section 4 of the Indian Right to Information Act 2005 both provide excellent models for consideration. They require disclosure of information such as the recipients of government subsidies, concessions and licenses, publication of all government contracts and information about proposed development works. Such provisions assist the public to track public bodies and open their activities to public scrutiny. Although the initial effort of collecting, collating, and disseminating the information may be a time-consuming exercise, it saves work in the long run by reducing the volume information requests because people will be able to easily access routine information without having to file applications for the information.

    Consideration may be given to amending Paragraph 1 of the Schedule to include more categories of information especially regarding budgets; powers, duties, and salaries of employees; and the manner of execution of subsidy programs.

Recommendation #72

Consideration may be given to adding to the end of Paragraph (1)(b), after the words “functions of the public authority” the following:

and—

(i) the powers and duties of its officers and employees

(ii) the procedure followed in the decision making process, including channels of supervision and accountability;

(iii) the norms set by it for the discharge of its functions;

(iv) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;

(v) a directory of its officers and employees;

(vi) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations

(vii) the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;

(viii) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;

(ix) particulars of concessions, permits or authorisations granted by it;

(x) details in respect of the information, available to or held by it, reduced in an electronic form;

(xi) such other information as may be prescribed; and thereafter update their publications within such intervals in each year as may be prescribed

Conclusion:

The Bahamas' Freedom of Information Bill, 2012, brings together many of the key provisions needed for a progressive information access law. With the refinements recommended above, the Bill can be a truly powerful tool for the people to seek accountability and act to contain corruption in The Bahamas. The analysis and recommendations given above are based on CHRI's first-hand experiences drafting, using, and monitoring such laws in many different parts of the Commonwealth.

One important note is that education and training are absolutely vital to implementing an effective right to information. For many countries, access to information legislation requires a sea change from the days of secrecy. Government officials are not accustomed to disclosing information, especially potentially embarrassing information, and the public is not used to having the right to demand information. In order for the legislation to be effective, both public authorities and the public have to be educated about the right to information, and trained in how to exercise that right. Ideally, the Bill should include provisions to allocate the funds and responsibilities necessary for such education.

CHRI would be more than happy to assist in the drafting and implementation of The Bahamas' Freedom of Information Bill.

Annexure 1: Best Practice Legislative Principles

In CHRI's 2003 Report, *Open Sesame: Looking for the Right to Information in the Commonwealth* (see enclosed), the RTI team captured the key principles which should underpin any effective right to information law, drawing on international and regional standards, evolving State practice, and the general principles of law recognised by the community of nations. Article 19, an NGO which specifically works on right to information, has also developed "Principles on Freedom of Information Legislation" which were endorsed by the United Nations Special Rapporteur in 2000.[50] The Organisation of American States[51] and the Commonwealth[52] - both of which Grenada is a member - have also endorsed minimum standards on the right to information. These generic standards have been summarised into the five principles below, which we would encourage you to consider when you finalise your own right to information bill.

Maximum Disclosure

The value of access to information legislation comes from its importance in establishing a framework of open governance. In this context, the law must be premised on a clear commitment to the rule of maximum disclosure. This means that there should be a presumption in favour of access in the objectives clause of any Act. Every member of the public should have a specific *right* to receive information and those bodies covered by the Act therefore have an *obligation* to disclose information. Any person at all should be able to access information under the legislation, whether a citizen or not. People should not be required to provide a reason for requesting information.

To ensure that maximum disclosure occurs in practice, the definition of what is covered by the Act should be drafted broadly. Enshrining a right to access to "information" rather than only "records" or "documents" is therefore preferred. Further, the Act should not limit access only to information held by public bodies, but should also cover private bodies "*that carry out public functions or where their activities affect people's rights*". This recognises the fact that in this age where privatisation and outsourcing is increasingly being undertaken by governments, the private sector is gaining influence and impact on the public and therefore cannot be beyond their

[50] Hussain, A. (2000) Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression submitted in accordance with Commission resolution 1999/36, Doc.E/CN.4/2000/63, 5 April. See also Ligabo, A., Haraszti, M. & Bertoni, E. (2004) *Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression*.

[51] See Organisation of American States - General Assembly (2003) *Access to Public Information: Strengthening Democracy*, resolution adopted at the fourth plenary session, June 10 2003, AG/RES.1932 (XXXIII-O/03).

[52] See (1999) Commonwealth Freedom of Information Principles, in *Promoting Open Government Commonwealth Principles And Guidelines On The Right To Know*, Report of the Expert Group Meeting on the Right to Know and the Promotion of Democracy and Development, Marlborough House, London, 30-31 March 1999.

scrutiny. Part 3 of the South African *Promotion of Access to Information Act* 2000 provides a very good example. Bodies covered by the Act should not only have a duty to disclose information upon request, but should also be required to proactively publish and disseminate documents of general relevance to the public, for example, on their structure, norms and functioning, the documents they hold, their finances, activities, any opportunities for consultation and the content of decisions/policies affecting the public. Section 4 of the Indian *Right to Information Act 2005* provides a useful model.

An Act should also provide that bodies covered be required to make every reasonable effort to assist applicants on request. "Every reasonable effort" is an effort which a fair and rational person would expect to be done or would find acceptable. The use of "every" indicates that a public body's efforts are to be thorough and comprehensive and that it should explore all avenues in verifying the completeness of the response. The burden of proof should be on the public body to show that it has conducted an adequate search. Section 6 of British Columbia's *Freedom of Information and Protection of Privacy Act* provides a useful model.

In order to support maximum information disclosure, the law should also provide protection for "whistleblowers", that is, individuals who disclose information in contravention of the law and/or their employment contracts because they believe that such disclosure is in the pubic interest. Whistleblower protection is based on the premise that Individuals should be protected from legal, administrative or employment-related sanctions for releasing information on wrongdoing. It is important in order to send a message to the public that the government is serious about opening itself up to legitimate scrutiny.

Minimum Exceptions

The key aim of any exceptions should be to protect and promote the public interest. The law should therefore not allow room for a refusal to disclose information to be based on trying to protect government from embarrassment or the exposure of wrongdoing. In line with the commitment to maximum disclosure, exemptions to the rule of maximum disclosure should be kept to an absolute minimum and should be narrowly drawn. The list of exemptions should be comprehensive and other laws should not be permitted to extend them. Broad categories of exemption should be avoided and blanket exemptions for specific positions (e.g., President) or bodies (e.g., the Electoral Commission) should not be permitted; in a modern democracy there is no rational reason why such exemptions should be necessary. The law should require that other legislation be interpreted, as far as possible, consistently with its provisions.

Even where exemptions are included in legislation, they should still all be subject to a blanket "public interest override", whereby a document which is presumed exempt under the Act should still be disclosed if the public interest in the specific case requires it.

Simple, Cheap and Quick Access Procedures

A key test of an access law's effectiveness is the ease, inexpensiveness and promptness with which people seeking information are able to obtain it. The law should include clear and uncomplicated procedures that ensure quick responses at affordable fees. Applications should be simple and ensure that the illiterate and/or impecunious are not in practice barred from utilising the law. Officials should be tasked with assisting requesters. Any fees which are imposed for gaining access should also not be so high as to deter potential applicants. Best practice requires that fees should be limited only to cost recovery, and that no charges should be imposed for applications nor for search time; the latter, in particular, could easily result in prohibitive costs and defeat the intent of the law. The law should provide strict time limits for processing requests and these should be enforceable.

All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information. Likewise, provisions should be included in the law which require that appropriate record keeping and management systems are in place to ensure the effective implementation of the law.

Effective Enforcement: Independent Appeals Mechanisms & Penalties

Effective enforcement provisions ensure the success of access legislation. In practice, this requires that any refusal to disclose information is accompanied by substantive written reasons (so that the applicant has sufficient information upon which to appeal) and includes information regarding the processes for appeals.

While internal appeals provide an inexpensive first opportunity for review of a decision, oversight by an umpire independent of government pressure is a major safeguard against administrative lethargy, indifference or intransigence and is particularly welcome where court-based remedies are slow, costly and uncertain. The fear of independent scrutiny ensures that exemption clauses are interpreted responsibly and citizens' requests are not unnecessarily obstructed. While the courts satisfy the first criteria of independence, they are notoriously slow and can be difficult to access for the common person. As such, in many jurisdictions, special independent oversight bodies have been set up to decide complaints of non-disclosure. They have been found to be a cheaper, more efficient alternative to courts and enjoy public confidence when they are robustly independent, well-funded and procedurally simple.

Best practice supports the establishment of a dedicated Information Commission with a broad mandate to investigate non-compliance with the law, compel disclosure and impose sanctions for non-compliance. Experience from a number of Commonwealth jurisdictions, including Canada, England, Scotland and Western Australia, has shown that Information Commission(er)s have been very effective in raising the profile of the right to information and balancing against bureaucratic resistance to openness. Of course, there are alternatives to an Information Commission. For example, in Australia, the Administrative Appeals Tribunal has appeal powers and in New Zealand and Belize the Ombudsman can deal with complaints. However, experience

has shown that these bodies are often already overworked and/or ineffective, such that they have rarely proven to be outspoken champions of access laws.

The powers of oversight bodies should include a power to impose penalties. Without an option for sanctions, such as fines for delay or even imprisonment for willful destruction of documents, there is no incentive for bodies subject to the Act to comply with its terms, as they will be aware that the worst that can happen is simply that they may eventually be required to disclose information.

In the first instance, legislation should clearly detail what activities will be considered offences under the Act. It is important that these provisions are comprehensive and identify all possible offences committed at all stages of the request process – for example, unreasonable delay or withholding of information, knowingly providing incorrect information, concealment or falsification of records, willful destruction of records without lawful authority, obstruction of the work of any public body under the Act and/or non-compliance with the Information Commissioner's orders.

Once the offences are detailed, sanctions need to be available to punish the commission of offences. International best practice demonstrates that punishment for serious offences can include imprisonment, as well as substantial fines. Notably, fines need to be sufficiently large to act as a serious disincentive to bad behaviour. Corruption – the scourge that access laws assist to tackle – can result in huge windfalls for bureaucrats. The threat of fines and imprisonment can be an important deterrent, but must be large enough to balance out the gains from corrupt practices.

Monitoring and Promotion of Open Governance

Many laws now include specific provisions empowering a body, such as an existing National Human Rights Commission or Ombudsman, or a newly-created Information Commissioner, to monitor and support the implementation of the Act. These bodies are often empowered to develop Codes of Practice or Guidelines for implementing specific provisions of the Act, such as those relating to records management. They are usually required to submit annual reports to parliament and are empowered to make recommendations for consideration by the government on improving implementation of the Act and breaking down cultures of secrecy in practice.

Although not incorporated in early forms of right to information legislation, it is increasingly common to include provisions in the law itself mandating a body to promote the Act and the concept of open governance. Such provisions specifically require that the government ensure that programmes are undertaken to educate the public and the officials responsible for administering the Act.

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Annexure 2: Arguments in Support of the Right to Information

When presenting any Bill in the State legislature, you may wish to draw on some common arguments as to why the right to information is so crucial to democracy, development and human rights. In fact, more than fifty years ago, in 1946 the United Nations General Assembly recognised that "Freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated".[53] Soon after, the right to information was given international legal status when it was enshrined in Article 19 of the International Covenant on Civil and Political Rights which states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and *to seek, receive and impart information and ideas through any media and regardless of frontiers*" (emphasis added). Over time, the right to information has been reflected in a number of regional human rights instruments, including the American Convention on Human Rights[54]. This has placed the right to access information firmly within the body of universal human rights law.

In addition to the overarching significance of the right to information as a fundamental human right which must be protected and promoted by the state, the following arguments in support of the right should also be recalled when advocating the right to parliamentarians and other key stakeholders:

It strengthens democracy**:** The right to access information gives practical meaning to the principles of participatory democracy. The underlying foundation of the democratic tradition rests on the premise of an informed constituency that is able thoughtfully to choose its representatives on the basis of the strength of their record and that is able to hold their government accountable for the policies and decisions it promulgates. The right to information has a crucial role in ensuring that citizens are better informed about the people they are electing and their activities while in government. Democracy is enhanced when people meaningfully engage with their institutions of governance and form their judgments on the basis of facts and evidence, rather than just empty promises and meaningless political slogans.

It supports participatory development**:** Much of the failure of development strategies to date is attributable to the fact that, for years, they were designed and implemented in a closed environment - between governments and donors and without the involvement of *people*. If governments are obligated to provide information, people can be empowered to more meaningfully determine their own development destinies. They can assess for themselves why development strategies have gone askew and press for changes to put development back on track.

It is a proven anti-corruption tool**:** In 2004, of the ten countries scoring best in Transparency International's annual Corruption Perceptions Index, no fewer than eight had effective legislation enabling the public to see government files. In contrast, of the ten countries perceived

[53] UN General Assembly, (1946) Resolution 59(1), 65th Plenary Meeting, December 14.

[54] See Art. 13(1), *American Convention on Human Rights*, 1969, Costa Rica, OAS Treaty Series No. 36, 1144 U.N.T.S. 123.

to be the worst in terms of corruption, only one had a functioning access to information regime. The right to information increases transparency by opening up public and private decision-making processes to scrutiny.

***It supports economic development*:** The right to information provides crucial support to the market-friendly, good governance principles of transparency and accountability. Markets, like governments, do not function well in secret. Openness encourages a political and economic environment more conducive to the free market tenets of 'perfect information' and 'perfect competition'. In turn, this results in stronger growth, not least because it encourages greater investor confidence. Economic equity is also conditional upon freely accessible information because a *right* to information ensures that information itself does not become just another commodity that is corralled and cornered by the few for their sole benefit.

***It helps to reduce conflict*:** Democracy and national stability are enhanced by policies of openness which engender greater public trust in elected officials. Importantly, enhancing people's trust in their government goes some way to minimising the likelihood of conflict. Openness and information-sharing contribute to national stability by establishing a two-way dialogue between citizens and the state, reducing distance between government and people, thereby combating feelings of alienation. Systems that enable people to be part of, and personally scrutinise, decision-making processes reduce citizens' feelings of powerlessness and weakens perceptions of exclusion from opportunity or unfair advantage of one group over another.

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