SUBMISSIONS TO THE JOINT SELECT COMMITTEE BY THE INDEPENDENT JAMAICAN COUNCIL FOR HUMAN RIGHTS ON THE ACCESS TO INFORMATION ACT REVIEW

THE INDEPENDENT JAMAICAN COUNCIL FOR HUMAN RIGHTS (1998) LIMITED

February 5, 2006

INTRODUCTION-

1. The implementation of the Access to Information Act commenced on January 5, 2004, on a phased basis. All Ministries and Agencies were brought under the provisions of the ATI Act by July 5, 2005. By virtue of section 38 the ATI Act is to be reviewed from time to time by a committee of both Houses of Parliament appointed for the purpose and the first such review shall be conducted not later than two years after the appointed day. The present Joint Select Committee is undertaking this requirement.

2. The Independent Jamaican Council for Human Rights (IJCHR) has been using the ATI Act to request information and access to documents to promote its work. It has also been a member of the Consortium of Access to Information Users, an organization of civil society groups, which has been monitoring the operation of the Act.

3. IJCHR is also a founding member, along with The Jamaican Bar Association and the Carter Center/Jamaica of the Volunteer Attorneys Panel, which offers assistance, pro bono, to appellants before the Appeals Tribunal established by the ATI Act.

ADMINISTRATION OF THE ATI ACT-

4. Several other organizations, including the Access to Information Association of Administrators (AITAA), Jamaicans for Justice and the Jamaican Environment Trust have presented submissions on the need for public education and for provisions mandating the establishment, maintenance and functions of a dedicated monitoring and implementation Commissioner or Agency. This later need is particularly urgent at this time as the ATI Unit originally established is presently severely understaffed and ineffective.

5. The designated entity should be independent in its operations, budget and decision-making. It should be responsible for public education and promotion of the use of this right to access to information. The Mexican access to information legislation establishes a public Federal Institute of Access to Information, made up of five commissioners. There is a model in this legislation that should be considered.

IJCHR'S SUBMISSIONS-

6. IJCHR supports the submissions of other civil society organizations and hopes this Committee will take their submissions into account in this review.

7. The topics which IJCHR wishes to address separately are:

    a. The Public Interest Test
    b. Exemption Certificate
    c. Clarification to Time
    d. Transfers
    e. Enforcement provisions; particularly the Appeals Tribunal

PUBLIC INTEREST: AN EXTRAORDINARY BALANCING ACT-

8. Section 2 of the Access to Information Act (ATI) establishes the basic principles of the law:

> "to reinforce and give further effect to certain fundamental principles underlying the system of constitutional democracy- accountability, transparency and public participation in national decision-making by granting to the public a general right of access to official documents …"

9. The aims of the legislation are to:

    a. Enable people to participate in the policy and decision making processes of government;
    b. Inform people of government functions and enable them to access decisions that affect them;
    c. Open government's activities to scrutiny, discussion, review and criticism;
    d. Enhance the democratic accountability of the government;
    e. Provide access to information collected and created by public officials.

10. The starting point for a public authority dealing with a request under the ATI Act should be that an applicant has a right to obtain the requested document.

11. Section 6 (1) of the ATI Act creates a legally enforceable right to obtain access to a document of a public authority in accordance with the Act, but does not give rise to an automatic statutory right of access. There is a prima facie right of access which is subject to the deferment provisions in section 10 and the exemption provisions in Part III of the Act. When a public authority decides to grant access to a document, it is making a decision that no exemption will be made and access to the document will not be deferred.

12. The exemptions, set out in Part III of the ATI Act, cover issues such as security, defense, international relations, formulation of government policy, commercial confidentially and legal professional privilege.

13. Some of the exemptions are subject to a "public interest test" which requires a public authority to balance the competing interests; *the general public interest in disclosure and the public interest in maintaining the exemption*. There is a presumption that the document should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the document available.

14. The ATI Act does not define "public interest" and the concept is typically not defined in access to information legislation throughout the world. This is because public interest will change over time and according to the varying circumstances.

15. The public interest test is set out in section 2 of the ATI Act: "subject to exemptions which balance that right (to general access) against the public interest in exempting from disclosure governmental, commercial or personal information of a sensitive nature".

16. A public authority should have a procedure in place to objectively evaluate a request, but each decision should be made on its own merits, taking into account the different factors which may influence the decision.

17. The concept of the public interest is deliberately flexible and may include:

    a. Promoting public debate of current issues;
    b. Promoting accountability in decision-making on public expenditure;
    c. Allowing individuals to understand decisions of government and, in some cases, assisting individuals in challenging these decisions;
    d. Bringing to light information affecting public safety.

18. Several countries with access to information legislation have however recommended that guidelines should be issued setting out the factors that should and should not be taken into account in weighing the public interest. The list of factors should not be exhaustive or the guidelines will be counter-productive.

19. Among the relevant factors to be considered, that have been identified in other jurisdictions, are those set out above in paragraph 10 of these submissions as well as the following:

    a. The general public interest in accessible information;
    b. Would disclosure contribute to the administration of justice or enforcement of law?
    c. Would disclosure inform the people of any danger to public health or safety?
    d. Would disclosure contribute to a debate of importance?; and
    e. Would disclosure prejudice a person's privacy rights?

20. Factors which should NOT be taken into account include:

    a. The possible embarrassment of public authorities or other officials;
    b. The possible loss of confidence in government or a public authority;
    c. The seniority of persons involved; and
    d. The risk of an applicant misinterpreting the information.

21. The section 2, public interest test, applies in the ATI Act at:

    - Section 10 – deference of the grant to access in two situations: (a) the authority believes the premature release of the document would be contrary to the public interest (10 (3)©, and (b) the authority believes Parliament should be informed of the contents of the document before it is made public and there is general public interest;

    - Section 19 – documents revealing government's deliberative processes;

    - Section 21- documents relating to heritage sites, endangered plants or animals or a rare or endangered living resource.

22. It is necessary for the public authority to consider the application of the public interest test when dealing with a request that may be exempt under these sections. Any public authority seeking to rely on an exemption under these sections must genuinely and reasonably perform the required public interest analysis, and equally important, maintain a record of that analysis (an audit trail).

23. Guidelines issued by an administrative body and/or by the Appeal Tribunal would assist public authorities in the application of the public interest test and enable them to respond quickly and within the statutory timetable in the Act.

24. Other jurisdictions have made more exemptions subject to the public interest test. In India's new Act, The Right to Information Act,2005 at section 8(2) makes all of the exemptions setout in subsection (1), subject to the public interest test in the following words:

> "(2) Notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information , if public interest in disclosure outweighs the harm to the protected interest."

PROPOSED AMENDMENTS TO THE ATI ACT-

25. The public interest lies at the heart of freedom to information legislation, it is submitted that the ATI Act should be amended to include an over-riding public interest test, similar to the Indian section 8(2), with respect to all the exemptions in Part III and not just the two referred to above.

26. There is a presumption running through the ATI Act that openness is to be regarded as something which is in the public interest. Setting out of the reasons for a public authority claiming an exemption that incorporates a public interest test should be

required. The public authority should be made to list all the factors it took into account in applying the test and coming to the decision to deny access. This will assist the applicant to assess whether the public authority applied the test properly and therefore whether a review or appeal is warranted.

27. Imposing a statutory obligation to account for the public interest factors considered would also improve the quality of decisions making by the public authorities.

EXEMPTION CERTIFICATE:

28. Section 23 of the ATI Act relates to the issuance of a certificate to the effect that a document is an exempt document. The Appeal Tribunal has been denied jurisdiction to nullify this certificate by section 32 (6) (b) of the Act.

29. The Exemption Certificate applies to Cabinet documents (s.15(1)), documents affecting security, defense or international relations (s. 14), documents relating to law enforcement (s.16) and documents affecting national economy (s. 18).

30. It is submitted that these sections should be subject to an over-riding public interest test (see paragraph 18).It can be argued that highly sensitive information and documents, the release of which would not harm the public interest but which would precipitate a public accountability debate, is exactly the sort of documents which the ATI Act is designed to give access because it involves responsibility at the highest levels of government. The public interest test can be used to exempt documents that are particularly sensitive in nature and should not be released.

PROPOSED AMENDMENT TO THE ATI ACT-

31. There should also be a limit to the duration of an exemption certificate. In the UK such certificates are limited to maximum duration of two years. It is unreasonable for this certificate to remain in force indefinitely or for the thirty years set out in section 5(1) (b) of the ATI Act.

32. While section 5(2) of the Act does allow for a Minister by order subject to negative resolution to declare that the Act shall to apply to a document that has been exempted this places the initiative on the Minister. If the Prime Minister or responsible Minister was required to reassess the relevant document every two years or more he or she would be required to take into account any changes in the circumstances that may mean the document can be released and that certificate is no longer necessary.

CLARIFICATION OF TIME-

33. Two issues arise under this heading:

(1). under section 7 of the ATI Act, time limits are set out for applications for access to be dealt with: generally -30 days after the

receipt of the application. The issue is whether the 30 days are calendar days or work days; and

(2). Determination of the "date of receipt" of the request for access in necessary.

34. Problems have arisen concerning the date of receipt of applications. In some situations, the Responsible Officer has stated that he has not received the application until days after the applicant has delivered it. This has caused problems where a member of the public requests an internal review, especially when he is saying his request has not been dealt with within the time limits and he is informed that his request is premature.

PROPOSED AMENDMENTS TO THE ATI ACT-

35. The Attorney- General of Jamaica has given his advice on the first issue. He has said that the days are to be calculated as *calendar days*. Section 3 of the ATI Act should be amended to include this definition of "days".

36. The definition section should also include a definition of "date of receipt" which would inevitably require the public authority to establish, if it has not already done so, a registry to stamp/record incoming application immediately on their arrival in the Ministry or authority.

TRANSFERS

37. The Review and Appeal provisions of the ATI Act are set out in sections 30 – 32. No where in these three sections is the right to an internal review or an appeal allowed where a public authority transfers an application under section 8.

38. In some cases, an applicant has a belief or actual knowledge that the document he seeks access to, is in fact with the authority to whom the application has been addressed and the transfer therefore amounts to a refusal. In other cases the transfer has been made to a public authority that does not hold the document. The applicant presently has no right to contest the transfer to another authority not to which other authority.

PROPOSED AMENDMENTS TO THE ATI ACT-

39. Section 30 (1) should be amended to include a subsection (e) to allow for an internal review of a decision to transfer an application or such part of it as may be appropriate to another public authority.
40. The actual wording of the amendment could include the following: " transfer the application, where the applicant contends that the public authority has the document(s) or some of the documents specified in the application in its possession, custody or control."

41. An applicant should also be allowed to appeal the decision to transfer an application. This can be easily achieved by an amendment to section 32 (2) (b) by stating that matters referred to in paragraphs (a) to (e) of section 30(1) can be appealed.

42. This would also allow an appeal concerning subsection (d) – the charge of a fee for action taken or as to the amount of the fee.

ENFORCEMENT PROVISIONS- THE APPEALS TRIBUNAL

43. Part V of the ATI Act sets out the provisions dealing with "Reviews and Appeals". Sections 30 and 31 set out the procedure for an internal review by the Permanent Secretary or Minister of the public authority.

44. Section 32 provides for an appeal to a tribunal established by the Second Schedule of the ATI Act. The Appeal Tribunal is given the power by paragraph 12 of the said Schedule to regulate its own proceedings and Rules were gazetted on August 11, 2005.

45. No where in the Act, the Second Schedule or the Rules is there any reference to the establishment of a Secretariat for the Tribunal. Presently the secretariat for the Tribunal is presently housed in the Office of the Prime Minister where the current ATI Unit is also operating.

46. This vacuity has resulted in delays in the acknowledgement of the receipt of appeals as well as delays in the hearing of appeals. The Submissions from Jamaica Environment Trust outlines their experience with appeals lodged by them. These are examples of the inefficiency caused by the lack of a properly resourced and functioning secretariat for the Tribunal.

47. The present Rules for the Appeals Tribunal requires the Tribunal to "cause a receipt …to be issued.." , "cause to be issued to a public authority…" and other duties which should be undertaken by a secretariat

48. The ATI Act is designed to make it as easy as possible for ordinary citizens to request documents. The Appeal process should also be designed to make it as easy as possible for citizens to ask the Tribunal to consider a refusal of their request. The appeal procedures should be guided by the principles of:

    - Accessibility;
    - Timeliness;
    - Affordability; and
    - Independence.

    These are similar objectives to those in the Act itself.

49. The Rules as presently promulgated are neither effective nor user-friendly. Although the Tribunal is given the power to regulate its own proceedings, this Joint Select Committee should be in a position to comment on the necessity for revision of the Rules by the Tribunal. Therefore our submissions on the Rules are very detailed.

50. In Rule 3, the form for the lodging of an appeal is said to be set out in Form 1 and is mandatory-"shall". The Form is very complex for an ordinary citizen to complete and can lead to severely limited access to the Tribunal. To ask the appellant to set out the *challenges to findings of fact and of the law and grounds of appeal* are too legalistic for the average person. A friendlier Notice is more within the objectives of the Act.

51. The Notice need only contain the following information:
- Name and address of the appellant;
- An address for service of notices and other documents on the appellant;
- The name and address of the public authority to whom the request was made;
- Particulars of the requested document(s);
- Particulars of the decision by the relevant public authority;
- Particulars of the decision on internal review;
- A list of relevant documents or correspondence (if any);
- Any request for an early hearing of the appeal and the reasons for that request (if needed);
- Name and address of any legal representative.

52. There is no need for the following to be in the Notice of Appeal:

- The legal basis for the appeal;
- Specification of the power which the Tribunal is being asked to exercise;
- Grounds of Appeal- the onus is on the Public Authority to prove that the relevant decision was justified;
- Names and addresses of witnesses- this can be ascertained at the first hearing date;

53 An appeal should be received and heard once it is in writing, even if not in the prescribed form, and the information set out in paragraph 50 is set out.

54. There should be a time frame for acknowledgement of the receipt of the notice of appeal in Rule 4; the time suggested is 2 to 3 days.

55. Again a time frame is suggested for the setting of a date for the appeal in Rule 6- the suggested time is within 14 days. The Tribunal does not appear to be sitting on any regular basis. Setting dates for the hearing of appeals in a timely manner with some measure of predictability requires the Tribunal to sit on specific dates per month, for example every second and fourth Tuesday.

56. Rule 16 states that the Tribunal's decision shall be in writing and should be sent to the parties not later than 21 days after the decision but fails to set a time limit for the decision after the hearing of the appeal.

57. In The Right to Information Act, 2005 in India, section 19 (6) states that an appeal "shall be disposed of within thirty dates of the receipt of the appeal or within such extended period not exceeding a total of forty-five days from the date of filing thereof". There are no reasons why such a timetable can not be set in Jamaica as well.

58. The Rules state (Rule 17) that the decisions of the Tribunal are to be published in the Gazette or in a daily newspaper circulating in Jamaica. The decisions in the appeals that were heard and determined in December, 2005 have still not been published in the Gazette or in a daily newspaper. This should also be subject to a time limit so that the public can know what has been decided by the Tribunal.

59. Rule 7 requests lists of documents on which each party proposes to rely, when this is already been asked for on the Notice. If the Notice were made friendlier as suggested, then maybe this Rule would be necessary. The exchange of documents and copies to be provided could be much deal with much easier by the Secretariat of the Tribunal.

60. Rules 9 and 10 allow for the Tribunal of hear an appeal in the absence of any or all of the parties. These Rules could deny a citizen the right to present his case to the Tribunal and they need to be tightened up with provisions for service, time for service and provisions for the Secretariat to contact appellants and public authorities before hearings.

61. It is inappropriate to award costs on an application as is set out in Rule 10 (b). This application arises where an applicant was absent and the Tribunal heard the appeal in his absence and he applies for the appeal to be re-considered in his presence.

62. Rule 15 (2) concerns adjournments and again speak of costs. The Civil Procedure Rules for the Supreme Court at Rule 56:15 (5) says : *" the general rule is that no order for costs may be made against an applicant for an administrative order unless the court considered that the applicant has acted unreasonably in making the application or in the conduct of the application."* Costs are therefore inappropriate in these Rules.

63. Rule 18 speaks to the right of parties to inspect and obtain a copy of the notes of appeal, but makes no reference to the public at large having a right to request a copy of the notes. This matter has been raised when a request was made for the notes by a non-party applicant. It can not be in the spirit of the ATI Act to refuse access to these notes.

64. Rule 19 does not state that service by registered post is deemed to be served within 2 or 3 days after it is registered.

65. Rule 24 concerning the dismissal by the Tribunal of frivolous appeals do not give the appellant a right to be heard before his appeal is dismissed, this is only fair and in accordance with the rules of natural justice.

66. The Rules fail to deal with several matters of importance:

- Mediation;
- Directions;
- Service of documents by fax;

67. Mediation is an opportunity for an applicant and a public authority to try to negotiate a settlement of their dispute with a neutral third party's assistance. The mediator is trained not to tell the parties what to do or decide the case, but to help the parties to arrive at an agreement. If an agreement is reached, the parties will sign a written agreement and the appeal can be withdrawn. If no agreement is reached after mediation, the appeal can proceed. Even if an agreement is not reached, mediation often narrows the issues for hearing by the Tribunal.

68. Mediation can be mandatory or the Chairperson of the Tribunal can be given the power to decide that the case should go to mediation before the hearing.

69. Powers should be given to the Tribunal at the first hearing of an appeal to give directions that will facilitate the proper conduct of the hearing; such as exchange of documents, number of witnesses to be called, admission of facts and determination of the issues that are to be decided by the Tribunal.

70. Technology has provided an easy, sure and inexpensive way to service documents – facsimile. This method of service should be allowed in the Rules.

AMENDMENTS TO THE ATI ACT- APPEALS TRIBUNAL RULES-

Amendments to the rules have been suggested in paragraphs 50 to 70 above. The need for a Secretariat with a proper budget and stated functions has also been made in these submissions.