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Comments of Leader of Government Business on unveiling of Freedom of Information Bill, 2005

The Leader of Government Business, the Hon D Kurt Tibbetts made the following comments upon laying before the House on Friday (4 November) morning Government's landmark Freedom of Information Bill, 2005 as a discussion document.

"Mr Speaker and Members of the Legislative Assembly, I wish to lay before this Honourable House the Freedom of Information Bill, 2005, as a discussion paper for public consultation.

Mr Speaker, the most logical point to begin in this matter has to be the debate we had in this House in 1998, seven years ago now. In that year, as a Member of the Opposition, I seconded a motion moved by the Hon. Roy Bodden, then a Member of this House and the previous Education Minister. That motion was aimed at urging Government to enact a freedom of information/official information act. The Government of the day, supported the motion and I thanked them on that occasion for that laudable decision.

In the course of that debate I said in this House, and I quote:

"....while the government has accepted the motion amended, the timing of the legislation is going to be very important. My challenge to the government is to get on with it immediately." (*Hansard*, 1 July 1998, column 1).

During that same debate, I went on to state and I quote:

“The Government of the day should not - and if I have anything to do with it in the future, will not - hold a monopoly on information. It has been used in the past, that is, information and facts, to seek political advantage. Today, this country is still paying the price for that type of action.” (*Hansard*, 1 July 1998, column 2).

Mr Speaker, I stand in this House today to say the same thing that I said seven years ago, which is that we should move immediately towards the enactment of this legislation as soon as possible. Whereas I was disappointed that previous Governments did not proceed to present to this House a bill for the enactment of a law on freedom of information for all these years, I do not wish to be negative. I have no doubt that the Opposition will give their support to this motion and eventually the bill when it is presented for enactment.

Mr Speaker, even up to the run-up to the last elections, we were singing the same song. During the campaign, the PPM promised a government in the sunshine. In other words, we promised that we would change in fundamental ways the manner in which these Islands were being governed. The bill that I seek to table today before this House and through it to the nation, namely, the Freedom of Information Bill, 2005, is one of the significant ways in which the People’s Progressive Movement intends to deliver on this promise.

The House will be aware, Mr Speaker, that the operations of government are often shrouded in mystery. A document may be classified as “secret” or “confidential” even if it does not contain anything that is really sensitive. Further, such classified documents may be very important for the private citizen who may be mentioned in it. In some cases the document may even contain false or misleading information. Regardless of what the case might be, the private citizen may require that information so that he can make a case before a public authority or in private dealings, and yet he or she does not have access to it or have a chance to correct the details contained in it. The modern trend has been to create a fair balance between the right of the Government to govern without always being in the glare of

the public and the right of the public to access certain information. This bill, Mr Speaker, seeks to ensure greater justice to the individual by rewriting the rules on secrecy of government documents.

I will now endeavour, Mr Speaker, to highlight some of the provisions of this important piece of legislation. The objects of the bill are:

“...to reinforce and give further effect to certain fundamental principles underlying the system of constitutional democracy, namely -

- (a) governmental accountability;**
- (b) transparency; and**
- (c) public participation in national decision-making, by granting to the public a general right of access to official documents held by public authorities, subject to exemptions which balance that right against the public interest in exempting from disclosure governmental, commercial or personal information of a sensitive nature.”**

Mr Speaker, you will notice that in this bill we have included the objects in a substantive provision of the law so that it may remain on the statute book even after the bill becomes law. This is to ensure that each and every one of its provisions will be interpreted by users, and even by the courts, in accordance with these clear tenets.

Having stated the objects, Mr Speaker, let me now proceed to state what institutions will be bound by this law and the documents to which it will apply.

Firstly, the law will apply to every “public authority”. A “public authority” is defined as meaning: (a) a ministry, portfolio or department; (b) a statutory body or authority, whether incorporated or not; (c) a government company which is wholly owned by the Government or in which the Government holds more than 50% of the shares, or a government company which the Governor in Cabinet designates as one to which the law should apply; (d) any other body or organization which provides services of a public nature which are essential to

the welfare of Caymanian society. In other words, Mr Speaker, we are saying two things. One is that any institution which is run exclusively or substantially using the people's money must open its documents to scrutiny by the people. Further, we are also saying that if you are an organisation that holds itself out to the people as being committed to doing public good, the people must have access to your documents.

Secondly, not all documents will be liable to production. One restriction under this head has to do with the age of a document. Accordingly, one cannot ask for a document which is more than 30 years old. Thus upon the passing of this bill, a member of the public will be able to exercise the rights conferred by this act in relation to documents that have just been created, but cannot reach back more than 30 years. However, Mr Speaker, as in any such legislation, there will be exceptions. Whereas we would like the public to have access to official documents, we are fully cognizant of the fact that certain documents must not be disclosed if we are to protect our economy. Thus certain categories of documents will not be liable to disclosure. For example, certain documents referred to under the Monetary Authority Law will not be liable to disclosure. Documents relating to exempt companies under the Companies Law will also not be disclosed.

Mr Speaker, we have identified these two categories as two obvious areas where it is important to retain confidentiality. However, out of an abundance of caution, we have included a provision which will allow the Governor in Cabinet, by order, to protect any other class of information. Honourable Members are asked to note, Mr Speaker, that this is not a power to decide on an ad hoc basis that a particular document be kept confidential. It will allow the Governor in Cabinet only to name a category of documents or information. This will ensure that the provision does not appear to be imbued with too much discretion.

As to the general right itself, Mr Speaker, the bill provides that every person shall have a right to obtain access to an official document other than an exempt document. Care has been taken to ensure that this right is not indirectly undermined. Thus, there is a

provision which makes it clear that an applicant for access to an official document shall not be required to give any reason for requesting access to that document. This provision is there because, once a person shows that he or she has a right to access to any document, government does not wish to interfere with his or her privacy by seeking to know why he or she requests access.

Mr Speaker, it is important to note, however, that exemptions will not go on forever. In this regard, the bill provides that after 20 years, all exemptions shall cease and documents will be declassified. However, again to be on the safe side, as this is new legislation, and we are a small jurisdiction whose economy is not very diversified, we propose to retain a power on the part of the Governor in Cabinet to provide for a longer or shorter period after which documents will be declassified and made public.

Mr Speaker, my Government is well aware that it is not meaningful to grant a right which is too expensive to enjoy. Thus we have provided that any fee that is charged for the granting of access to information shall not exceed the actual cost of searching for, reproducing, preparing and communicating the information requested. In fact, we have gone even further. The Governor in Cabinet will be given power to make regulations to provide that no fee is to be charged in certain categories of cases.

Mr Speaker, having outlined above what the general right of access to information will entail, allow me now to move on to another important area, namely, that of exemptions. These are cases, as I have said, in which access to information will be restricted or prohibited. The exemptions relate to: documents affecting security, defence or international relations; cabinet documents; documents relating to law enforcement; documents that are covered by legal professional privilege as well as those whose disclosure would infringe upon the privileges of this Honourable House; documents affecting the national economy; documents revealing the deliberative processes of government; documents relating to business affairs; documents whose disclosure may result in the destruction of, damage to,

or interference with, the conservation of heritage sites and other areas relating to the environment; and documents relating to personal affairs. I must hasten to add, Mr Speaker, that each of these provisions must be read carefully as not all of them are blanket exemptions. Some of them are narrower than the general heading might indicate.

Mr Speaker, in every system, no matter how well crafted the legal provisions might be or how well-administered in practice the system might be, in order for justice to be done to both sides, there will be a degree of discretion on the part of officials who will make decisions whether or not to grant access. The bill before the House, therefore, provides for appeals. Appeals will be at two levels. Firstly, an aggrieved party may appeal by way of internal review of any decision not to grant access. Where such an appeal is made in certain specified categories that relate to policy, the Minister or Official Member will reconsider the matter. In all other cases, the Chief Officer of the entity concerned will make the decision. Secondly, if the applicant is still dissatisfied by a decision of the Minister, Official Member or Chief Officer, he may appeal to a tribunal appointed by the Governor in Cabinet.

Mr Speaker, it is not enough to provide for appeals. We must always remember that before matters become contentious, systems must be in place to promote openness. Thus the bill provides that every public authority must appoint an information officer who, under the general and specific supervision of the head of the public authority concerned, will promote best practices in relation to document maintenance, archiving and disposal. This officer will also be responsible for receiving complaints and assisting people seeking information. Such officers, Mr Speaker, will operate under guidelines set by the Chief Secretary.

In legislation of this kind, Mr Speaker, one needs to protect those people who, in the public interest, reveal some wrongdoing on the part of public authorities. To meet this need, the legislation will protect whistleblowers. Therefore, a person who reveals wrongdoing, will be protected from any administrative or employment-related sanction if he reveals in good

faith: (a) the commission of a criminal offence; (b) failure to comply with a legal obligation; (c) miscarriage of justice; or (d) corruption, dishonesty, or serious maladministration.

Now, in some rare cases, once access is granted to information, the person seeking that information may find that it is incorrect. This legislation provides for that eventuality. It stipulates that where a person seeking access to information about himself or herself finds that it is incomplete, incorrect, out of date or misleading, he or she may apply for amendment or annotation of such information. This ensures that the right of access to such information is meaningful and offers the government a chance to maintain records that are fair and accurate.

Finally, Mr Speaker, we do not want this new and very important legislation to be relegated to the back burner. We want it to take on a conspicuous existence and to be given the attention it deserves. To this end, the bill provides that after one year from the date when it comes into force, it will be reviewed. And it will be reviewed not by the Governor in Cabinet or by a committee of the Government Executive, but by a committee of this Honourable House.

As usual, Mr Speaker, there are a number of provisions that are ancillary to the ones that I have outlined. Only a reading of the entire bill will give a fuller understanding of all the details of this important piece of legislation.

In closing, Mr Speaker, let me emphasize one thing. It would be absurd for me to be speaking about open government and yet restrict consultation on the very bill whose main purpose is to guarantee and encourage open government. It is for this reason that government decided that this bill be made public and be discussed by all those who are going to be affected by it, that is, employees of all public authorities and especially the person in the street. Indeed, this will also give all Honourable Members of this House, both the Government and the Opposition, enough time to study it and consult with the people they represent. I trust that this dialogue will be fruitful and benefit all concerned. On behalf of

Government, I promise that in considering the final draft of what will eventually be presented for passage, all views expressed will be accorded the serious consideration that they deserve.”

(GIS)