

Detailed Analysis of Cayman Islands Draft Freedom of Information Bill 2005 & Recommendations For Amendments

"The great democratising power of information has given us all the chance to effect change and alleviate poverty in ways we cannot even imagine today. Our task, your task...is to make that change real for those in need, wherever they may be. With information on our side, with knowledge a potential for all, the path to poverty can be reversed."

--- Kofi Annan



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Analysis of the Cayman Islands draft Freedom of Information Bill 2005

1. The Commonwealth Human Rights Initiative (CHRI) downloaded from the internet a copy of the draft Caymans Islands Freedom of Information Bill 2005, which was published by the Cayman Islands Government. It is understood that the Bill is being released for public comment, CHRI has now analysed the Bill, drawing on international best practice standards, in particular, good legislative models from the Commonwealth. This paper suggests areas which could be reconsidered and reworked, as well as providing examples of legislative provisions which could be incorporated into a revised version of the Bill.
2. At the outset, CHRI commends the Government for stating that it will publish the Bill and shortly call for public comments on its appropriateness. Experience has shown that for any right to information legislation to be effective, it needs to be respected and 'owned' by both the government and the public. Participation in the legislative development process requires that policy-makers proactively encourage the involvement of civil society groups and the public broadly. This can be done in a variety of ways, for example, by: convening public meetings to discuss the law; strategically and consistently using the media to raise awareness and keep the public up to date on progress; setting up a committee of stakeholders (including officials and public representatives) to consider and provide recommendations on the development of legislation; and inviting submissions from the public at all stages of legislative drafting.

ANALYSIS OF DRAFT BILL AND SUGGESTIONS FOR IMPROVEMENT

3. While it is necessary to ensure that the public participates in the drafting process to ensure that the final legislation developed is appropriate for the national context, it is generally well accepted that there are basic minimum standards, which all RTI legislation should meet. Chapter 2 of CHRI's Report, *Open Sesame: Looking for the Right to Information in the Commonwealth*¹, provides more detailed discussion of these standards. The critique below draws on this work.²
4. Overall, CHRI's assessment is that the Bill in its current form contains some useful provisions. Nonetheless, this analysis suggests a number of amendments, modeled on recent right to information legislation. At all times, the recommendations proposed attempt to promote the fundamental principles of: maximum disclosure; minimum exceptions; simple, cheap and user-friendly access procedures; independent appeals; strong penalties; and effective monitoring and promotion of access.

General

5. Throughout the Act, there are numerous provisions, which permit the Cayman Islands Governor in Cabinet to amend the Act to narrow its scope. This is not in line with best parliamentary practice. It is not appropriate that the legislature – the elected body which represents the public – should not be part of any process to change the scope of the law.

Recommendation:

- Review the entire Act and reassess whether it is appropriate for the Governor-in-Cabinet to be given such broad-reaching powers to amend the Act without the amendments first having to be referred to and/or approved by Parliament.

Part I: Preliminary

Section 1 - Commencement

6. Although it is understandable that a government may wish to allow for time to prepare for implementation, best practice has shown that the Act itself should specify a maximum time limit for

¹ http://www.humanrightsinitiative.org/publications/chogm/chogm_2003/default.htm

² All references to legislation can be found on CHRI's website at http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_&_papers.htm

implementation, to ensure there is no room for the provision to be abused and implementation to be stalled indefinitely. As experience in India demonstrated (in respect of the *Freedom of Information Act 2002*), without a commencement date included in the Act, the law sat on the books for more than 2 years without being operationalised, despite receiving Presidential assent. This possibility should be avoided at all costs. International experience suggests a maximum limit of 1 year between passage of the law and implementation is sufficient (see Mexico for example). Alternatively, as has happened in Jamaica, a phased approach can be adopted, but any timetable for implementation should be specified in the Act itself.

Recommendation:

- Amend s.1(2) to include a maximum time limit for the Act coming into force in, ideally the first implementation phase should be completed immediately, and any other phased not more than 1 year from the date the Act receives the assent of the Governor in Cabinet.

Section 2 - Definitions

7. The Bill currently defines and uses the term “document” and “official document” throughout, rather than the broader term “information”. The current definitions are very limiting, unlike India and New Zealand for example, which allow a broad right to access “information” or “official information”. It is recommended that the term “information” be included in the definitions section and then used in the Bill instead of “official document”. Allowing access to “information” will mean that applicants will not be restricted to accessing only information which is already in the form of a document or hard copy record at the time of the application. Otherwise, the current formulation excludes access to things like scale models, samples of materials used in public works and information not yet recorded by an official but which should have been. In any case, the definition of “official document” should be deleted because it adds nothing and only serves to possibly limit access further. The definition could easily be abused by resistant officials to restrict access.
8. The current definition of “public authority” in s.2 is very narrow and will therefore reduce the usefulness of the law for the public by reducing its scope. The definition should be reworked to:
 - Make it clear that it covers all arms of government. In this context, it is particularly important to recognise that in any modern democracy, it is not appropriate to give the executive broad immunities from disclosure. Such protection is a hangover from the days when the monarch was supreme, but this is no longer an appropriate approach to good governance.
 - Broaden the coverage of the Act over “government companies” to include more bodies in which the government has an interest. Otherwise, as has happened in Canada at the federal level, other forms of entity may be set up by government departments to avoid the application of the act, for example, trusts or joint ventures. Consideration could be given to replicate the definition at s.2(h) of the new Indian *Right to Information Act 2005* which covers “any...body owned, controlled or substantially financed...directly or indirectly by funds provided by the appropriate Government”.
9. Section 2 should be amended to insert a definition of the term “access” to clarify the content of the right to “access” information. This will promote maximum accessibility by the public. In this context, the law should be drafted to permit access not only to documents and other materials via copying or inspection. It should also permit the inspection of public works and taking of samples from public works. Such an approach has been incorporated into the India *Right to Information Act 2005* in recognition of the fact that corruption in public works is a major problem in many countries, which could be tackled by facilitating greater public oversight through openness legislation.

Recommendation:

- Delete the definition of “official document” and amend the remainder of the Bill accordingly.

- Add a definition of the term ‘information’, which should subsume the current definition of document. A model definition could be:
“information” means any material in any form, including records, documents, file notings, memos,

emails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data, material held in any electronic form and any information relating to a private body which can be accessed by a public authority under any law.

- Broaden the definition of “public authority” to clarify that the law covers all arms of government and to cover:

“any...body owned, controlled or substantially finances...directly or indirectly by funds provided by the appropriate Government”.

- Add a definition of the term “access”. A model definition could be:

“access” to information means the inspection of works and information, taking notes and extracts and obtaining certified copies of information, or taking samples of material.

Section 3 [and section 6(1)] – The right to information

10. Section 3(1), which sets out the basic parameters of the right to information is unnecessarily complicated as well as unjustifiably narrowing the scope of the law. It also overlaps with s.6(1). Accordingly, a number of amendments should be considered:

- Sub-sections 3(1)(a) and (b) and s.6(1) can be combined to simply provide that “every person has a right to access information held by a public authority other than exempt information”.
- Sub-section 3(1)(b) narrows the law by restricting access to documents which are not more than 30 years old. This is not in accordance with international practice where it is, in fact, common for ALL information to be automatically released after 30 years. For example, in Australia, all documents, including Cabinet documents, are released after 30 years. If there is a concern that documents more than 30 years old will be difficult to find, an additional clause could be included in the law requiring that where a requested document cannot be located – whether it is 30 years old or not – an official will attest to that fact in a Statutory Declaration which will be sent to the requester.
- Sub-sections 3(1)(c) and (d) should be reconsidered. Best practice requires that a right to information law is comprehensive and overrides all other secrecy provisions in other laws. Accordingly, the exemptions referred to should be (i) reviewed to ensure that they are absolutely necessary and then (ii) specifically included in Part III: Exemptions. In any case, at a minimum, the sub-sections should be moved to Part III so that all the exemptions are together and can more easily be considered by officials.
- Sub-section 3(1)(e) should be deleted because it is not appropriate to exempt whole classes of documents from the coverage of the law. As discussed under Part III below, exemptions need to be very tightly drafted to ensure that they only permit non-disclosure of information where it could or would cause harm. It is also not appropriate that sub-section 3(1)(e) allows the Governor in Cabinet to him/herself choose what types of documents can be exempt. Any exemptions should be carefully considered by Parliament before they are approved because they have such a drastic effect on the law by substantially narrowing its scope. Also, such a provision is ripe for abuse, particularly where sensitive political information is being requested. In practice, it could end up putting the Governor in Cabinet in a difficult position, if the Cabinet recommends an exemption in order to block disclosure of information requested by the Opposition.

11. It is positive that section 3(3) permits private bodies to be brought within the ambit of the law in future, via an Order is passed by the Governor in Cabinet. However, in accordance with international best practice, rather than waiting for an Order, consideration should be given to capturing private bodies within the scope of the law from the outset. Private bodies are increasingly exerting significant influence on public policy and the delivery of public services because of outsourcing and privatisation. In this context, it is unacceptable that these bodies, which have such a huge effect on the rights of the public, should be exempted from public scrutiny simply because of their private status. Notably, a number of countries around the world have already brought private bodies within the ambit of their right to information regimes. South Africa’s law is the most progressive:

- *South Africa s.50: Information held by or under the control of a private body where access to that information is necessary for the exercise or protection of any right. [NB: if this formulation is too broad, consideration could be given to limiting the application of the law to private bodies over a certain size (determine according to turnover or employee numbers)]*
- *India (FOI Act 2002) s.2(f) Any other body owned, controlled or substantially financed by funds provided directly or indirectly by the appropriate Government.*
- *Maharashtra, India s.2(6): Any body which receives any aid directly or indirectly by the Government and shall include the bodies whose composition and administration are predominantly controlled by the Government or the functions of such body are of public nature or interest or on which office bearers are appointed by the Government.*

12. Sections 3(4) and (5) should be deleted. As has been discussed below, although exemptions are an essential part of any access law, they must be very carefully drafted and – most importantly – they must be scrutinised before being approved by Parliament to ensure that they are only as broad as required. It is not appropriate that additional exemptions can simply be added to the law by an Order of the Governor in Cabinet. This provision could be used to completely undermine the law.

13. Section 3(6) should also be deleted because, as discussed hereinbelow, it is contrary to international best practice to exempt entire agencies from the scope of the law. Information should only be withheld if disclosure would cause harm. While it is understandable that the Government should wish to protect against the disclosure of sensitive information, this is adequately provided for by the exemptions in Part III. It is unnecessary and unjustifiable to go beyond this and simply assume that *all* the information held by certain organisations is sensitive and needs to be put beyond the scope of the Act. For example, basic information such as personnel records, procurement contracts and general budget information cannot be justifiably exempted. At the very least:

- Sub-section (a) which exempts the Governor in Cabinet is unnecessary. Executive protection is a hangover from when the monarchy reigned supreme and was above the scrutiny of the people. In keeping with modern democratic practice though, this is no longer appropriate. Many other jurisdictions have recognised this. For example, in India the Office of the President is covered by the Act, in Jamaica executive agencies are specifically covered, and in Australia the Governor-General is covered at least in respect of his/her administrative functions.
- Sub-section (b) which exempts the judicial functions of courts and court officers is unnecessary because s.17(b)(ii) already protects against disclosures which could affect a person's trial or the adjudication of a case. This sort of harm test is much more appropriate.
- Sub-section (c) which exempts some of the functions of security and intelligence agencies is unnecessary because sensitive information held by such agencies is already protected by the exemptions in s.15 (which protects sensitive security and defence documents) and s.17 (which protects sensitive law enforcement documents). It is particularly worrying that s.3(8) defines "intelligence and security agency" to include the Police Service. This is completely beyond what is necessary to protect the interests of the State. The police are a key organisation of the State and should be subject to public scrutiny. It is completely contrary to international practice to exclude the police. If this exemption is retained, at the very least, information held by such agencies should still be released where it relates to an allegation of corruption or a violation of human rights. This is the approach adopted in the new Indian *Right to Information Act 2005*.
- As discussed in paragraph 5 above, sub-section (d) which gives a broad power to the Governor in Cabinet to exempt other statutory bodies is inappropriate and unjustifiable. Once the access regime is agreed upon by Parliament, it should not be able to be undercut by regulation. At the very least, any such power to exempt certain bodies or their functions should be exercised in accordance with certain agreed criteria so that the Governor's discretion is limited.

Recommendation:

- *Combine sections 3(1)(a) and (b) and s.6(1) to simply provide that “Every person has a right to access information held by a public authority other than exempt information.”*
- *Amend s.3(1)(b) to permit application for information regardless of how old it is and consider including a provision requiring officials to sign a Statutory Declaration where a requested document cannot be located.*
- *Reconsider sections 3(1)(c) and (d) and either delete them or specifically incorporate them into Part III: Exemptions.*
- *Delete section 3(1)(e) because blanket exemptions are not justifiable.*
- *Rework s.3(3) to capture a broader range of private bodies within the scope of the law.*
- *Delete sections 3(4), (5) and (6)(d) because it is not appropriate to give the Governor-in-Cabinet unilateral power to narrow the scope of the law.*
- *Delete sections 3(6)(a)-(c) because the blanket exemption of whole agencies from the law is not justifiable, when sensitive information they hold is already protected under Part III.*

Section 4 - Objectives

14. It is positive that s.4 of the Bill specifically states that it seeks to enable access to information to promote accountability, transparency and participation. However, the objects clause then limits the right by limiting it to “official documents” and making it broadly subject to exemptions for sensitive government, commercial and personal information. Such a loosely worded objects clause could be relied upon by resistant bureaucrats to narrow the right through litigation. 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, the objects clause should be extended to establish clearly the principle of maximum disclosure, and to make it explicit that access should be given promptly and at the lowest reasonable costs. Section 2 of the *Jamaican Access to Information Act 2002* provides a good model. This is an important clause to amend because courts will often look to the objects clause in legislation when interpreting provisions of an Act.

Recommendations:

- *Amend the current Objects clause, for example:
The objects of this Law are to:*
 - (i) *give effect to the fundamental Right to Information, which will contribute to strengthening democracy, improving governance, increasing public participation, promoting transparency and accountability, promoting and protecting human rights and reducing corruption*
 - (ii) *establish voluntary and mandatory mechanisms or procedures to give effect to right to information in a manner which enables persons to obtain access to records of public authorities, and private bodies where the information is needed for the exercise and/or protection of a right, in a swift, effective, inexpensive and user-friendly manner.*

Sections 5 and Schedule 1 – Proactive disclosure requirements

15. It is positive that requires the proactive disclosure of a considerable amount of information in accordance with Schedule 1. However, as a technical matter it is not clear why the proactive disclosure provisions are separated out into a Schedule. Proactive disclosure duties are an essential element of any disclosure law and should therefore be included in the body of the legislation.

16. Section 5(1)(a) sets out the timeline for the initial publication of the information, while s.2 of the Schedule specifies how often the information needs to be updated. As discussed in paragraph 6 above, the commencement dates for the law should be reconsidered – and accordingly, the implementation dates for proactive disclosure should also be reconsidered. In keeping with common international practice, all public authorities covered by the law should implement the proactive

disclosure requirements within 6 months of the law coming into force. The information should then be updated at least every 6 months. Notably however, some of the information which is being collected and published may change very often, such that it could be terribly out of date if it is not updated more regularly. Accordingly, section 5(3) should make it explicit that the Rules can prescribe shorter time limits for specific categories of information (currently specified in s.1 of Schedule 1), as appropriate.

17. The categories of information in s.1 of Schedule 1 which need to be automatically disclosed should be extended, in line with the most recent best practice. Section 4 of the new India Right to Information Act 2005 and Article 7 of the Mexican *Federal Transparency and Access to Public Government Information Law 2002* provide excellent models for consideration. They require the 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 operate to assist the public to keep better track of what the government is doing as well as ensuring key activities of public bodies are always and automatically kept open to public scrutiny. Notably, although the initial effort of collecting, collating and disseminating the information may be a large undertaking, over time it will be worth the investment as it will reduce requests in the long run because people will be able to easily access routine information without having to apply to public bodies.
18. Section 5(3) and s.2 of Schedule 1 should be amended to clarify how the information is to be published and disseminated. This is of vital importance because the provisions will only be effective, in terms of improving public participation and governance, if the information is easily accessible to the public.
 - Section 2(a) of Schedule 1 requires the information is “available for inspection”, although it does not make it explicit that the information should be available in all offices of a public authority rather than just the headquarters. This is an important clarification, because the public must not be simply referred elsewhere when they ask for the information, they should be able to access it quickly, easily and cheaply.
 - Section 2(b) requires the information to be published in the Official Gazette, but in practice this is not a very useful method of dissemination because ordinary members of the public are extremely unlikely to ever read the Gazette. It would be more effective to utilise the internet more and to consider using existing media outlets and local dissemination channels. The law should explicitly provide for wider dissemination of information and as such consideration should be given to effective methods for ensuring the information reaches smaller towns – for example, by posting it on notice boards, broadcasting it on the radio or television or including it in telephone directories.
19. While it is not uncommon for an access law to allow the extension of proactive disclosure provisions, the provision at s.5(4) is flawed because it leaves open the possibility that the proactive disclosure obligations on public authorities can actually be narrowed. This provision should be amended to clarify that Schedule 1 can only be amended by regulation to require additional proactive disclosure, but that any amendment to reduce these obligations must be approved by Parliament.

Recommendation:

- Amend s.7 to include additional proactive disclosure obligations based on Indian & Mexican laws:

“(1) Every public body shall

(a) publish within 6 months of the commencement of this Act:

- (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) *the names, designations and other particulars of the Public Information Officers, and appeals bodies under the Act;*
- (xii) *such other information as may be prescribed;*
and thereafter update there publications within such intervals in each year as may be prescribed;
- (b) *publish all relevant facts while formulating important policies or announcing the decisions which affect public;*
- (c) *provide reasons for its administrative or quasi judicial decisions to affected persons;*
- (d) *before initiating any project, or formulating any policy, scheme, programme or law, publish or communicate to the public in general or to the persons likely to be affected thereby in particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interest of natural justice and promotion of democratic principles.*
- (e) *Upon signing, public authorities must publish all contracts entered into, detailing at a minimum for each contract:*
 - (i) *The public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service and/or terms of reference;*
 - (ii) *The amount;*
 - (iii) *The name of the provider, contractor or individual to whom the contract has been granted,*
 - (iv) *The periods within which the contract must be completed.*
- (2) *Information shall be updated at least every 6 months, while regulations may specify shorter timeframes for different types of information, taking into account how often the information changes to ensure the information is as current as possible.*
- (3) *It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of clause (b) of sub-section (1) to provide as much information proactively to the public at regular intervals through various means of communications so that the public have minimum resort to the use of this Act to obtain information.*
- (4) *All materials shall be disseminated taking into consideration the cost effectiveness, local language and the most effective method of communication in that local area and the information should be easily accessible, including through notice boards, newspapers, public announcements, media broadcasts, the internet or any other means, including inspection at the offices of a public authority.*
- (5) *The obligations in sub-section (1) and (4) can be extended by regulation.*
- *Delete s.5(4) or at least amend the section so that the scope of the proactive disclosure provisions can be extended but not narrowed by the Governor-in-Cabinet.*

Section 6 – Right of access

20. As discussed in paragraph 10 above, section 6(1) largely replicates section 3 (which sets out the parameters of the right to information) and should be combined with section and deleted from s.6.
21. Section 6(4) is commonly found in access legislation. However, it should be amended to require that even where information is already publicly available, if an application is made for it, then the public authority should at least respond and advise the requester of the alternate procedure that needs to be followed. This will contribute to the objective of promoting user-friendly systems to facilitate public participation in governance.

Recommendation:

- *Combine section 6(1) with s.3(1)*
- *Amend section 6(4) to clarify that even where information is publicly available, if an application is made, an official must direct the requester to where the information is held, rather than rejecting the application outright.*

Section 7 – Applications for access

22. It is positive that section 7(3) requires officials to assist requesters with their applications. However, to ensure that officials properly recognise their duties towards requesters and that requesters are given as much assistance as possible, consideration should be given to moving s.11(1) to sit with s.7(3). It should then be made explicit that applications cannot be *rejected* until a requester has been given reasonable opportunity to amend their application if it is not in the proper form.
23. In accordance with international best practice, consideration should be given to amending s.7(4) to requires that information shall be provided within 48 hours where it relates to the life or liberty of an individual. This clause has been included in the new Indian *Right to Information Act 2005* and has since been replicated in a number of draft Bills.
24. Section 7(4) should also be reworked to make it clearer what cases would warrant the extension of the regular time limits. Currently, the time limits can be extended by up to 30 days “for good cause”. However, this provision could easily be abused by resistant officials who want to delay information disclosure. In the other jurisdictions where extensions are allowed, the relevant provisions commonly only permit an extension where the application relates to a very large number of documents. The criteria which permit an extension should be specified in s.7(4). The clause should also require that the requester be notified in writing where time limits are extended. Additionally, it should be made clearer that only one extension of up to 30 days can be permitted; otherwise, the provision may be used to block access in effect, by permitting extensions *ad infinitum*. To reduce the possibility of abuse, consideration should also be given to requiring the Appeal Tribunal to approve any extensions.
25. Section 7(5) should be drafted in more detail to make it simple and clear to officials exactly what information needs to be conveyed to requesters when applications are approved or rejected. This will allow for consistent responses to be given. The Bill should make it clear that *written* notice is given to all requesters of the outcome of their application.

Recommendation:

- *Move s.11(1) to sit with s.7(3) to clarify that applications cannot be rejected until a requester has been offered and refused assistance to reformulate their request.*
- *Insert a new clause providing that “information will be provided within 48 hours where it relates to the life and liberty of a person”*
- *Amend the s.7(4) to clarify that only one extension of up to 30 days can be given where an application relates to a very large number of documents, and/or that any extension shall be approved by the Appeal Tribunal and/or the requester shall be notified in writing of the extension.*
- *Insert a new clause specifying the content of decision notices:*
 - *Disclosure notice: Where access is approved, the PIO shall give a notice to the applicant informing:*
 - (a) *that access has been approved;*
 - (b) *the details of further fees [see paragraphs 30 and 31 below re fees] together with the calculations made to arrive at the amount and requesting the applicant to deposit the fees;*
 - (c) *the form of access provided, including how the applicant can access the information once fees are paid;*
 - (d) *information concerning the applicant’s right with respect to review the decision as to the amount of fees charged or the form of access provided, including the particulars of the appellate authority, time limit, process and any other forms*
 - *Non-disclosure notice: Where access is refused or partially refused, the PIO shall give a notice to the applicant informing:*
 - (a) *that access has been refused or partially refused;*
 - (b) *the reasons for the decision, including the section of the Act which is relied upon to reject the application and any findings on any material question of fact, referring to the material on which those findings were based;*
 - (c) *the name and designation of the person giving the decision;*
 - (d) *the amount of any fee which the applicant is required to deposit, including how the fee was calculated;*
 - (e) *the applicant’s rights with respect to review of the decision regarding nondisclosure of the information, the amount of fee charged or the form of access provided, including the particulars of the appellate authority, time limit, process and any other forms.*

Section 8 - Transfer

26. While it is common to permit applications to be transferred, s.8(2) should be amended to require applications to be transferred more quickly. Currently, when s.8(2) is read together with s.7(4)(b) a requester could have to wait up to 44 days for a response in cases where an application is transferred. Six weeks is an unnecessarily long time. In line with best practice, 5 working days or 7 standard days should be sufficient to decide upon whether an application needs to be transferred.

Recommendation:

- *Amend s.8(2) to require applications to be transferred within 5-7 days.*

Section 9 – Procedural grounds for rejection

27. Section 9(a) should be deleted because best practice requires that no application shall be rejected unless the information requested falls under a legitimate and specifically defined exemption. Information that does not fall within an exempt category cannot be denied. Accordingly, s. 9(a), which permits rejection on the grounds that the “*request is vexatious*” is not appropriate. More worryingly, in practice this provision could too easily be abused, particularly by resistant bureaucrats, many of whom may be of the opinion that any request for information from the public is vexatious. If this clause is retained, at the very least the provision needs to be amended to clarify what constitutes a ‘vexatious request’.

28. Section 9(c) which allows applications to be rejected because processing would “*unreasonable divert its resources*” should also be deleted. This provision is ripe for abuse. While it is understandable that there may be cases where a request is genuinely too large to process without unreasonably interfering with the public or private body’s workload, the bottom line should be that in such cases the public body should be required to consult the applicant and assist them to try to narrow their search. Applications should not be summarily rejected simply because of the anticipated time it will take to process them or would unreasonably divert their resources.

Recommendation:

- *Delete section 9(a) or at the very least provide criteria as to what constitutes a “vexatious request”.*
- *Delete s.9(c) or at least clarify that applications can only be rejected if the requester is first assisted to narrow their information request.*

Section 10 – Forms of Access

29. As discussed in paragraph 7 above, the right to information provided by the Bill should be broadened to allow, not only access to documents, but access to information more broadly, which will include the right to inspect public works and the right to take samples of public works. This approach has been incorporated into the Indian *Right to Information Act 2005*, one of the newest access laws in the world and one of those which enshrines the latest standards in openness. The forms of access permitted under s.10 (1) should be amended to take into account this broader right of access.

Recommendation:

- *Section 10(1) should be amended to permit access via inspection of public works and taking samples from public works*

Section 11 – Deferral of access

30. Although it is understandable that in some cases a public authority may genuinely need to defer access because premature disclosure of the information could cause harm to legitimate interests, the provisions in s.11(2) are broader than what is necessary:

- Sub-section (b) allows deferral if the document is already being presented to Parliament. However, it is not clear what purpose this section serves – other than to allow the Minister to publicise a key piece of news before it is published anywhere else? But this smacks of “spin”; if the information is in the public interest, then it should be released – whether in Parliament or not. In its current formulation, this section could be abused because there is no time limit for presenting the information in Parliament or giving it to the person it was prepared for.
 - Sub-section (c) which protects against premature disclosure of a policy is a legitimate provision but would more properly be situated in Part III because it actually operates as an exemption, allowing non-disclosure until and unless the information is no longer sensitive and/or the public interest requires disclosure. As discussed below, ideally this sub-section should replace the Cabinet documents exemption at s.16.
31. In any case, s.11(2) should be reworked to impose a maximum time limit on any deferral, after which the public authority should be required to reconsider release or some external body should be required to approve continued deferral. Additionally, any deferral should be appealable to the Appeal Tribunal. Otherwise, publication could be delayed *ad infinitum* with no recourse for the applicant. Accordingly, any notice sent in accordance with s.11(3) should include information regarding the requester’s appeal rights.

Recommendations:

- *Move s.11(1) to sit with s7(3) – see paragraph 22 for discussion.*
- *Delete s.11(2)(b) and move s.11(2)(c) to Part III.*
- *Amend s.11(2) to include a specific maximum deferral time limit – eg. 28 days – after which time the requested information will be released nonetheless and/or any additional deferral must be approved by the Appeal Tribunal and/or the deferral can be appealed against.*

Section 12 – Partial Disclosure

32. It is positive that section 16(2) allows for severability of exempt information and partial disclosure of non-exempt information. However, consideration should be given to amending s.16 to require the relevant notice to the requestor advising of partial disclosure to also include advice regarding the opportunity and process for appealing that decision. This should be worded along the lines of rejection notices in recommended at paragraph 25 above.

Recommendations:

- *Amend s.12(2) to specify that the decision notice to be sent to the requester must include details of how the requester can appeal the decision..*

Section 13 – Fees

33. Best practice requires that no fees should be imposed for accessing information, particularly government information, as costs should already be covered by public taxes. The Bill follows this best practice to the extent that it does not provide for payment of fees at the application stage, but it could usefully clarify that there will also be no fee payable for appeals. Notably, the Bill could go further and replicate s.17(3) of the Trinidad & Tobago Act and s.7(6) of the Indian *Right to Information Bill 2004* which state that even where fees are imposed, if a body subject to the Act fails to comply with the time limits for disclosure of information, access to which the applicant is entitled shall be provided free of charge.
34. Section 13 does however impose fees for accessing information. It is encouraging that the provision specifies that fees shall be commensurate only with the cost incurred in making the documents available, but the Bill should make it explicit that rates should be set with a view to ensuring that the costs imposed for access are not so high as to deter potential applicants. Fees should be limited only to cost recovery, with no additional margin for profit, and a maximum limit should be imposed. Charges should only cover reproduction costs, not search or collation/compilation time. Imposing fees in respect of the latter could easily result in prohibitive costs, particularly if bureaucrats

deliberately drag their heels when collating information in order to increase fees. Also, where the costs of collecting the fee outweighs the actual fee (for example, where only a few pages of information are requested), fees should be waived.

35. Furthermore, a provision should be included in the Bill allowing for fees to be waived where that is in the public interest, such as where a large group of people would benefit from release/dissemination of the information or where the objectives of the Act would otherwise be undermined (for example, because poor people would be otherwise excluded from accessing important information). Such provisions are regularly included in access laws in recognition of the fact that fees may prove a practical obstacle to access in some cases. Section 29(5) of the Australian *Freedom of Information Act* actually provides a good model.

Recommendations:

- *Extend s.14 to clarify that any fees charged for provision of information "shall be reasonable, shall in no case exceed the actual cost of providing the information such as making photocopies or taking print outs and shall be set via regulations at a maximum limit taking account of the general principle that fees should not be set so high that they undermine the objectives of the Act in practice and deter applications".*
- *Amend s.14(1) to permit the imposition of fees to cover only the cost of providing the information, not the cost of searching for or preparing the information.*
- *Insert a new clause which states that "if a body subject to the Act fails to comply with the time limits for disclosure of information, access to which the applicant is entitled shall be provided free of charge".*
- *Insert a new clause, which allows for the waiver or remission of any fees where their imposition would cause financial hardship or where disclosure is in the general public interest.*

Section 14 – Access

36. To ensure that there is no confusion on the part of officials, s.14 should be amended to specify a time limit for providing the information to the requester following the payment of any fees. Otherwise, a reluctant official could still delay the release of the information with impunity.

Recommendations:

- *Amend s.14 to clarify that once the fees are paid, the information must be provided to the applicant forthwith and no later than 5 days from payment of the fees.*

PART III – EXEMPT DOCUMENTS

34. One of the key principle of access to information is minimum exemptions. The key principle underlying any exemption is that its purpose must be to genuinely protect and promote the public interest. All exemptions should therefore be concerned with whether disclosure would actually cause or be likely to cause harm. Blanket exemptions should not be provided simply because a document is of a certain type – for example, a Cabinet document, or a document belonging to an intelligence agency. The key issue should be whether disclosure would actually cause serious damage to a legitimate interest, which deserves to be protected.

35. In accordance with international best practice, every exemption (articulated by the Article 19 Model FOI Law) should be considered in 3 parts:

- (i) Is the information covered by a legitimate exemption?
- (ii) Will disclosure cause substantial harm?
- (iii) Is the likely harm greater than the public interest in disclosure?

New provision - Public interest override

36. The question of whether or not the public interest is served by disclosure of information should be the primary question guiding all decisions under the law. All exemptions should be subject to a

blanket “public interest override”, whereby a document which falls within the terms of a *general* exemption provision should still be disclosed if the public interest in the *specific* case requires it (see paragraph 61 below for more). This ensures that every case is considered on its individual merits and public officials do not just assume that certain documents will always be exempt. It ensures that the “public interest” is always at the core of a right to information regime. Notably, s.8(2) of the recently passed Indian *Right to Information Act 2005* now includes this type of broad public interest override and it is strongly recommended that the Cayman Islands law draw on this best practice.

Recommendation:

Insert a new “public interest override” at the start of Part III as follows:

“notwithstanding the exemptions specified in the Act or any other law in force, including the Official Secrets Act, a public authority shall allow access to information if public interest in disclosure of the information outweighs the harm to the public authority”

Section 15 – National security and international relations

37. Sub-section 15(b) should be deleted because the focus of the exemptions is purely on the fact that the information was provided in confidence, whereas the key issue for any exemption should be whether harm would be caused by disclosure. Just because information was given to the Government of the Cayman Islands in confidence does *not* mean that it should necessarily *remain* confidential. At the time it was communicated it may have been sensitive, but at the time it is requested it may be harmless. Why should disclosure be prevented in such cases? As long as the more general protection in s.15(a), which guards against disclosures that would prejudice international relations, is retained, the relevant interests will be protected. This also reduces the chances that the provision will be abused by corrupt officials who may connive with foreign officials in confidence but then seek to hide their activities using this clause. What if the confidential information that was passed on relates to a corrupt deal undertaken by a previous administration? Is it really legitimate that it be withheld? What harm will it cause the nation – in fact, will it not be of benefit in exposing corrupt dealings and making government more accountable?

Recommendation:

Delete s.15(b) on the basis that s.15(a) provides adequate protection against disclosures that would harm international relations.

Sections 16 and 20 – Cabinet documents

38. Although it has historically been very common to include blanket exemptions for Cabinet documents in right to information laws, in a contemporary context where governments are committing themselves to more openness it is less clear why the status of a document as a Cabinet document should, in and of itself, be enough to warrant non-disclosure. Considering all of the exemptions already contained in the law, it is not clear in addition why such a broad Cabinet exemption needs to be included. One of the primary objectives of a right to information law is to open up government so that the public can see how decisions are made and make sure that they are made right. The public has the right to know what advice and information the Government bases its decisions on and how the Government reaches its conclusions – particularly in the most important decision-making forum in the country, Cabinet.

39. It is therefore recommended that the Cabinet exemptions in ss.16 and 20 be deleted and Cabinet documents protected under other exemptions clauses as necessary – for example, national security or management of the national economy. At the very least, all of the Cabinet exemptions need to be reviewed to ensure that they are very tightly drafted and cannot be abused. Currently, the provisions are extremely broadly drafted, with s.16(1)(a) protecting even documents simply “created for the purpose of submission to Cabinet”, while s.20(1)(a) protects “opinions, advice or recommendations prepared for...Cabinet or a committee thereof”. This could capture a huge number of documents and could easily be abused by the bureaucracy, who could claim that a vast number of documents were prepared for Cabinet even if never sent there! It is notable in this

respect that even some MPs in some other jurisdictions have complained that broad Cabinet exemptions have been abused because Cabinet members simply take documents into Cabinet and then out again and claim an exemption.

40. It is also not clear why s.16(1)(b) protects official records of the Cabinet. These records are presumably vetted by Cabinet before they are finalised – and if Cabinet members sign off on them as a legitimate record of discussions then why should they be worried about their release? So long as they capture Cabinet discussion accurately, they should be open to public scrutiny (unless some other exemption applies). In fact, at the very least a provision should be added that all decisions of the Cabinet along with the reasons thereof, and the materials on which the decisions were taken shall be made public after the decisions have been taken and the matter is complete. Section 8(1)(i) of the Indian *Right to Information Act 2005* provides a good example of such a clause.
41. Of course, it will generally not be appropriate to disclose advice to Cabinet *prior* to a decision being reached. In this context, protection should be provided for “premature disclosure, which could frustrate the success of a policy or substantially prejudice the decision-making process”. Notably though, relevant information should still eventually be disclosed – it is only premature disclosure that should be protected.
42. On a more positive note, it is encouraging that s.20 at least is made subject to a public interest override via sub-section (3). As discussed in paragraph 36 above, all of the exemptions should be made subject to such an override, but at the very least s.16, which also relates to Cabinet documents should similarly be made subject to the public interest.

Recommendations:

- *Replace sections 16 and 20 with the following:*
 - “A public authority may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would, or would be likely to:*
 - (a) cause serious prejudice to the effective formulation or development of government policy; or*
 - (b) seriously frustrate the success of a policy, by premature disclosure of that policy; and*
 - (c) disclosure would be contrary to the public interest.*
- *Alternatively, review sections 16 and 20 to ensure that they protect only disclosure, which would harm the national, interest and at the very least make s.16 subject to a public interest override.*
- *Insert an additional provision requiring that once a decision of Cabinet is made, the decision along with reasons and materials upon which the decision was made shall be made public (unless an exemption applies) and all related materials shall be accessible upon request (unless and exemption applies).*

Section 17-21– Law enforcement and economic interests

43. Section 17 is generally properly focused on whether disclosure would harm law enforcement activities. However, s.17(b) should be amended because it currently requires only that the disclosure would “affect” an investigation or trial. This is not a sufficiently stringent harm test. It should be necessary for the disclosure of the requested information should actually cause (serious or substantial) prejudice to warrant continued secrecy.
44. Section 18 is generally properly focused on whether disclosure is privileged, but it is not clear what the necessity of s.18(b)(iii) is, which protects parliamentary privilege. While parliamentary privilege is a recognised Westminster convention, it is not clear how disclosure could undermine said privilege.
45. Section 19 is generally properly focused on protecting Cayman Islands economic interests, but the clause is very confusingly worded and could be simplified to ensure that officials can apply it easily and effectively. Additionally, it is not clear what interests are trying to be protected by s.19(2), which incorporates the *Confidential Relationships (Preservation) Law (1995 Revision)* into the Bill. As discussed at paragraph 10 (bullet point 3), the current Bill should be comprehensive and set out all

secrecy provisions. This will make it simpler for officials to apply as well as ensuring that the regime of disclosure and secrecy is consistent and clear. As such, the *Confidential Relationships (Preservation) Law (1995 Revision)* should be reviewed and any legitimate secrecy provisions explicitly incorporated into the current Bill.

46. Section 21 is too broad, providing too general a protection for private commercial interests. In particular, s.21(a)(ii) and (b) have too low a harm test (interests need only be “diminished” or prejudiced”) and there is no consideration of whether disclosure could actually be in the public interest. This is a key deficiency, because private bodies have a huge impact on public life such that the public increasingly feels the need to exercise their right to know in respect of private business information as well as Government information. It is an indisputable fact that most of the corruption that occurs in Government happens at the public/private interface – most commonly a private body contracting with a public authority makes an agreement for both sides to divert public money. It is in recognition of this fact that the strong push for greater “corporate responsibility” is occurring internationally. Facilitating access to key business information from private bodies is one way of supporting this agenda. At the very least, disclosure which relates to possible environmental, human rights or social hazards should be permitted, even if they could prejudice the interest of a private body.

Recommendations:

- Amend s.17(b) to require that disclosure “(seriously) prejudice” the relevant interests;
- Delete s.18(b)(iii);
- Amend s.19 to remove the reference to other legislation and provide a comprehensive protection for national economic interests;
- Review s.21(a)(ii) and (b) to ensure that the level of harm required to justify non-disclosure is sufficiently high to warrant protection, taking note of the need to promote greater corporate social responsibility and accountability of the private sector. At the very least, information should still be disclosed where the disclosure of the record would reveal evidence of:
 - (i) a substantial contravention of, or failure to comply with the law; or
 - (ii) an imminent or serious human rights violation or public safety, public health or environmental risk.

Section 23 – Personal privacy

47. While it is common to exempt the disclosure of information that would constitute an unwarranted invasion of personal privacy, nonetheless the exemption at s.23 is much too broad. In particular, it is worrying that the section could be misused to permit non-disclosure of information about public officials. It is vital to government accountability that public officials can individually be held to account for their official actions.

Recommendation:

- Insert an additional sub-clause in s.23 to permit disclosure where:
 - (a) the third party has effectively consented to the disclosure of the information;
 - (b) the person making the request is the guardian of the third party, or the next of kin or the executor of the will of a deceased third party;
 - (c) the third party has been deceased for more than 20 years; or
 - (d) the individual is or was an official of a public body and the information relates to any of his or her functions as a public official OR relates to an allegation of corruption or other wrongdoing

Section 24 – Ministerial Certificates

48. The use of Governor in Cabinet/Ministerial certificates in s.24 is entirely contrary to international best practice, such that it is disappointing that this device has been incorporated into the Bill. Even in Australia, one of the few jurisdictions to retain the use of such certificates, such certificates have

often been attacked by parliamentarians and civil society alike, as being contrary to good governance because they allow the Minister to remain unaccountable. In 1978, the Parliamentary Committee which considered the Australian Bill concluded:

“There is no justification for such a system tailored to the convenience of ministers and senior officers in a Freedom of Information Bill that purports to be enacted for the benefit of, and to confer rights of access upon, members of the public. This can only confirm the opinion of some critics that the bill is dedicated to preserving the doctrine of executive autocracy”.

49. In a law which is specifically designed to make Government more transparent and accountable, the use of such certificates cannot be defended. In 1994 two officials from the Australian Attorney General’s department concluded that:

“The provisions for conclusive certificates are now anachronisms with little if any relevance to the contemporary world of FOI decisions. Time has proven that the substantive exemption provisions, without the added strength of certificates, are in fact more than adequate to the task of the exemption of genuinely sensitive documents.”³

50. CHRI strongly recommends that s.24 be deleted. If this recommendation is not implemented, at the very minimum, all of the provisions permitting the use of these certificates should justify the use of a certificate, namely that “the disclosure of the document would be contrary to the public interest”. Further, an additional clause should be added requiring any certificate issued by the Governor in Cabinet/Minister to be tabled in Parliament along with an explanation. This is the practice in the United Kingdom, where the UK Information Commissioner noted in May 2004 that “issues relating to each and every use of the veto will be brought before Parliament”.

Recommendation:

Delete section 24 to remove the power for the Governor in Cabinet/Ministers to issue conclusive certificates. In the event that this recommendation is not adopted, require that where a certificate is issued it must specify how disclosure of the document would be contrary to the public interest and that it must be tabled in Parliament along with an explanation.

PART IV – AMENDMENT AND ANNOTATION OF RECORDS

51. CHRI has not commented on this Part as CHRI does not specialise in privacy rights issues.

PART V – REVIEW AND APPEAL

52. Oversight via appeals to 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.

53. Best practice supports the establishment of a dedicated Information Commission with a mandate to review refusals to disclose information, compel release 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. However, there are alternatives to an Information Commission. For example, in

³ Campaign for Freedom of Information UK (2001) *The Ministerial Veto Overseas: Further evidence to the Justice 1 Committee on the Freedom of Information (Scotland) Bill*, <http://www.cfoi.org.uk/pdf/vetopaper.pdf>.

Australia, the Administrative Appeals Tribunal has appeal powers and in New Zealand and Belize the Ombudsman deals with complaints.

54. It is encouraging that the Cayman Islands Bill includes an appeal process, with a first internal appeal and a second appeal to a newly created Appeal Tribunal. However, there are a number of deficiencies in the appeals mechanism as currently drafted, most notably the failure to make it explicit that the courts provide the final resource in the appeal process. It is strongly recommended that the drafter look at Parts IV and V of the new Indian *Right to Information Act 2005* which drew on a range of international legislative best practice provisions in developing its appeals regime. Model clauses relating to most the issues below can be found in that Act.

Recommendation:

Consider including a new provision making it explicit that the superior Court has the power to consider appeals de novo, and will not be restricted to considering only points of law.

Section 30 – Internal Review

55. Section 30 is a key provision because it sets out the ground of appeal available to complainants, both in terms of internal appeals and appeals to the Tribunal (when read with s.32(2)). As such, it is important that the provision is broadly drafted to ensure that appeal bodies have a wide remit to review non-compliance with the law. At the very least, an additional catch all provision should also be included which allows appeals on “any issue related to disclosure”. This will ensure that the types of appeals are not inadvertently limited. Section 88 of the Queensland (a State of Australia) *Freedom of Information Act 1992* and s.31 of the Canadian *Access to Information Act 1982* provide good models.

Recommendations:

Amend s.30(1) to broaden the appeal ground available to requesters, as follows:

“Subject to this Act, an appeal may be made, first to any internal appeal mechanism available and then to the Appeal Tribunal, by or on behalf of any persons:

- (a) who have been unable to submit a request, either because no official has been appointed to receive requests or the relevant officer has refused to accept their application;*
- (b) who have been refused access to information requested under this Act;*
- (c) who have not been given access to information within the time limits required under this Act;*
- (d) who have been required to pay an amount under the fees provisions that they consider unreasonable including a person whose wishes to appeal a decision in relation to their application for a fee reduction or waiver;*
- (e) who believe that they have been given incomplete, misleading or false information under this act;*
- (f) in respect of any other matter relating to requesting or obtaining access to records under this Act.”*

Section 31 – Procedure for internal review

56. It is quite common for a right to information law to include an internal review mechanism as a first step. However, the process suggested in s.31 could be quite difficult to implement and should be reviewed to ensure that it will work in practice. In particular:

- Section 31(1)(a) envisages that the Minister or the Chief Officer of a Ministry will conduct each review. This is a very unusual provision. While there may be some appeals which are so sensitive that they require very senior official review, to expect that the Minister or Chief Officer would be involved in every appeal is impractical. A better alternative is to include a provision permitting the Minister and Chief Officer to delegate their appeal powers. They can then take on the appeals they want to but pass on appeal which are less sensitive or delegate when they are too busy to handle an appeal.
- Section 31(2) permits appeals only within 30 days of a decision or a deemed decision. To ensure that requesters have sufficient time to consider their options and actually lodge an appeal, consideration should be given to extending this time limit and/or at least granting the

appeals bodies the discretion to accept appeals after the expiry of the time limit if there is reasonable cause for the delay or at their general discretion.

Recommendations:

- *Amend s.31(a) to permit the Minister and Chief Officer to delegate their appeal powers*
- *Amend s.31(2) to permit appeals to be made even after the expiry of the time limits where there was reasonable cause for the delay and/or at the general discretion of the Minister or Chief Officer.*

Sections 32(1) to (4) and Schedule 2 – Appeals to Appeal Tribunal

57. It is not clear why the key provisions relating to the establishment and operation of the new Appeal Tribunal are contained in Schedule 2. As noted in respect of Schedule 1, as a technical matter it is not clear why these provisions have been separated out into a Schedule. At the very least, the provisions relating to the *operation* of the Appeal Tribunal – namely s.2, s.5, s.11 and s.12 of Schedule 2 – should be included in the body of the legislation so that at least all the operational provisions can be read together.

58. It is very positive that the Bill proposes the creation of a new Appeal Tribunal. As discussed earlier, best practice international standards require that access regimes include an appeals mechanism which is independent of government, as well as cheap, quick and procedurally simple. While the courts satisfy the first criteria of independence, they are notoriously slow and can be difficult to access for the common person. Experience from a number of Commonwealth jurisdictions, including Canada, England, Scotland and Australia, has shown that such independent bodies have been very effective in raising the profile of the right to information and balancing against bureaucratic resistance to openness. One minor issue which could be considered in the Cayman Islands context is renaming the Appeal Tribunal as the “Information Tribunal” or “Information Commission” to make it clear what exactly the body is focused on.

59. Section 32(1) sets out the basis appeal remit of the Appeal Tribunal. It is very complicatedly worded however, and should be simplified. This would be easier if the recommendations in paragraph 55 were accepted and the appeal remit of the internal appeal mechanism in s.30 was clarified.

60. Sections 32(2) to (4) which deal with lodging an appeal should be amended as follows:

- Section 32(2)(a)(ii) wrongly cross-references s.31(2)(b) instead of s.31(3)(b);
- Section 32(2)(b) is incredibly confusing. It is not clear what it intends to achieve or how it extends the appeal remit in s.32(2)(a).
- Section 32(3) envisages the lodgement of a “document” to start an appeal, but does not clarify what should be in the notice of appeal. When reworking the provision, care should be taken to ensure that the requirements for an appellant are not too onerous. For example, the appeal notice should require the appellant’s name, contact details, the department to which the appellant submitted the application and contact details of the officer handling the application (if the appellant has said contact details), details of the information requested, a copy of the order received (if any) and any other information the appellant thinks is relevant.
- Section 32(4) wrongly cross-references s.32(2) instead of s.32(3). In any case, it appears that s.32(4) seeks to impose a time limit for lodgement of appeals. Sections 32(3) and (4) should be combined and reworked for clarity.

Recommendations:

- *Move the entirety of Schedule 2, or at the very least s.2, s.5, s.11 and s.12 of Schedule 2 (which deal with the operations of the Appeal Tribunal) to sit with s.32.*
- *Consider renaming the Appeal Tribunal the “Information Tribunal” or “Information Commission” so its function is clear to the public and officials.*
- *Amend s.32(2)(a)(ii) to fix the incorrect cross-referencing.*
- *Delete or reword s.32(2)(b) to remove confusion and ambiguity;*

- Amend s.32(3) to clarify what needs to be included in document to lodge an appeal, for example:
The appellant's name, contact details, the department to which the appellant submitted the application and contact details of the officer handling the application (if the appellant has said contact details), details of the information requested, a copy of the order received (if any) and any other information the appellant thinks is relevant.
- Combine ss.32(3) and (4) to clarify the time limits for lodging a second appeal, as follows:
An appeal to the Appeal Tribunal shall be made within [X] days of receipt of a decision from the internal appeal body or after the decision should have been made, provided that the Appeal Tribunal may extend that period if it is satisfied that the appellant's delay was not unreasonable.

Section 32(5) – Decision-making power

61. Section 32(5) deals with the Appeal Tribunal's decision-making powers, but only very cursorily and could usefully be elaborated upon. In light of the fact that the Tribunal will be a new body which will have to carve out a strong niche for itself within the bureaucracy, it is very important that there is complete clarity about what the Tribunal has the power to do. This will also ensure that bureaucrats cannot sideline the Tribunal as only a mediator or arbitrator and that Tribunal members themselves will feel confident in exercising their powers to capacity.
62. In accordance with best practice evidenced in a number of jurisdictions (eg. the State of Queensland in Australia, Mexico), the Commission should have the power to make binding determinations, compel parties to take action, enforce compliance with orders and impose penalties as appropriate. The law should also make it explicit that the Tribunal can see any document which is subject to an appeal, regardless of whether or not an exemption is claimed. This is a standard provision in any access law and recognises that the appeal body's powers will be very limited if they are not permitted to review all documents which are in dispute. Without strong powers, the Tribunal could easily be ignored and sidelined by a bureaucratic establishment which is determined to remain closed. Section 88 of the Queensland *Freedom of Information Act 1992* (which is replicated in paragraph 55 above), as well as s.82 of the South African *Promotion of Access to Information Act* and ss.42-43 of the Article 19 Model FOI Law provide very useful examples.
63. Notably, in keeping with the recommendations at paragraph 36 above, even if an exemption is found to apply to certain information, the Tribunal as an independent arbiter should have the power to look at whether the public interest in disclosing the information outweighs the public interest in withholding the information and to decide to release information on that basis. This will ensure that an impartial judge is responsible for deciding what is in the public interest – which is preferable when one considers that officials can sometimes confuse the general national public interest with the Government's interests.
64. Section 32 should also make it explicit that written notice is given to all requesters of the outcome of their appeal. The content of such notices should be prescribed in the Bill.
65. In line with the time limits in s.31(3)(b) in relation to internal appeals, a time limit should also be specified in the Bill requiring a decision from the Appeal Tribunal within 30 days. Without such a time limit, the usefulness of the Tribunal as a cheap and *timely* alternative to the courts could be undermined, as decisions could be delayed *ad infinitum*.

Recommendations:

- Amend s.32(5)(a) to clarify exactly what decision making powers the Information Tribunal has, specifically:
 - (1) The Appeal Tribunal has the power to:
 - (a) require the public authority to take any such steps as may be necessary to bring it into compliance with the Act, including by;
 - (i) providing access to information, including in a particular form;
 - (ii) appointing an information officer;
 - (iii) publishing certain information and/or categories of information;
 - (iv) making certain changes to its practices in relation to the keeping, management and

- destruction of records;
 - (v) enhancing the provision of training on the right to information for its officials;
 - (vi) providing him or her with an annual report, in compliance with section X;
 - (a) require the public body to compensate the complainant for any loss or other detriment suffered;
 - (b) impose any of the penalties available under this Act;
 - (c) reject the application.
 - (1) The Appeal Tribunal shall serve notice of his/her decision, including any rights of appeal, on both the complainant and the public authority.
 - (2) Decisions of the Appeal Tribunal shall be notified within 30 days of the receipt of the appeal notice.
 - (3) Decisions of the Appeal Tribunal shall be binding on all parties.
- Insert a new clause giving the Appeal Tribunal power to “disclose document even where they are exempt, where the public interest in disclosure outweighs the public interest in withholding the information”
 - Insert a new clause requiring that Tribunal decisions are made within 30 days of receipt of a notice of appeal.
 - Insert a new clause requiring written notice to be provided to all parties of the Tribunal’s decision.
 - In accordance with the recommendations in paragraphs 48-50 above, delete s.32(5)(b) – Ministerial certificates have no place in an effective right to information regime.

Section 32(6) – Power to Investigate

66. In order to ensure that the Information Tribunal can perform its appeal functions effectively, it is imperative that the Tribunal is explicitly granted the powers necessary to undertake a complete investigation and ensure enforcement of their orders. Section 8 of the Schedule does this to some extent but it is not comprehensive. The powers granted to the Canadian Information Commissioner under s.36 of the Canadian Access to Information Act 1982 provides a better model.

Recommendations:

Amend s.32(6) to clarify the investigations powers of the Appeal Tribunal, as follows:

- (1) The Appeal Tribunal has, in relation to the carrying out of the investigation of any complaint under this Act, power:
 - (a) to summon and enforce the appearance of persons and compel them to give oral or written evidence on oath and to produce such documents and things as the Information Tribunal deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;
 - (b) to administer oaths;
 - (c) to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Information Tribunal sees fit, whether or not the evidence or information is or would be admissible in a court of law;
 - (d) to enter any premises occupied by any government institution on satisfying any security requirements of the institution relating to the premises;
 - (e) to converse in private with any person in any premises entered pursuant to paragraph (d) and otherwise carry out therein such inquiries within the authority of the Appeal Tribunal under this Act as the Appeal Tribunal sees fit; and
 - (f) to examine or obtain copies of or extracts from books or other records found in any premises entered pursuant to paragraph (d) containing any matter relevant to the investigation.
- (2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Appeal Tribunal may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from any the Appeal Tribunal on any grounds.

New provision - Burden of proof in appeals

67. Consideration should be given to including an additional provision in the Bill, which sets out the burden of proof in any appeal under the law. In accordance with best practice, the burden of proof should be placed on the body refusing disclosure and/or otherwise applying the law to justify their decision. This is justified because it will be unfair and extremely difficult for members of the public – who will never have seen the document they are requesting – to be forced to carry the burden of proof. Section 61 of the Australian *Freedom of Information Act 1982* provides a useful model.

Recommendation:

Insert a new provision specifying that:

“In any appeal proceedings, the public authority to whom the request was made has the onus of establishing that a decision given in respect of the request was justified.”

New provision – Investigations for persistent non-compliance

68. An additional provision should be included replicating s.30(3) of the Canadian *Access to Information Act 1982*, which gives the Information Commission the power to initiate its own investigations *even in the absence of a specific complaint by an aggrieved applicant*. In practice, this provision could be used to allow the Appeal Tribunal to investigate patterns of non-compliance, either across government or within a department and produce reports and recommendations for general improvements rather than in response to specific individual complaints. In the State of Victoria in Australia, the Ombudsman (who performs a similar role to the Tribunal) was recently given a similar power because it was recognised that, as a champion of openness within government, he needed to be able to investigate and take public authorities to task for persistent non-compliance.

Recommendation:

Insert a new provision permitting the Appeal Tribunal to initiate its own investigations in relation to any matter, whether or not it has received a specific complaint, eg. persistent cases of departmental non-compliance.

“Where the Appeal Tribunal is satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to records under this Act, the Appeal Tribunal may initiate its own complaint in respect thereof.”

PART VI – MEASURES TO PROMOTE OPENNESS

Section 33 – Public Information Officers

69. It is very positive that the Bill proposes appointing Public Information Officers (PIOs) to promote the law within the bureaucracy and assist requesters. However, it would be useful to reword s.33(1)(b) to clarify that PIOs “serve as a central contact within the public body for receiving requests for information, for assisting individuals seeking to obtain information, *for processing requests for information, for providing information to requesters*, for receiving individual complaints regarding the performance of the public body relating to information disclosure *and for monitoring implementation and collecting statistics for reporting purposes.*” By making PIOs the central point for processing requests, PIOs can be developed as a repository of expertise on how to apply the law.

70. It is also positive that s.33(2) requires public authorities to publish the names of PIOs. However, it would be useful to include minimum publication requirements to ensure that all public authorities properly disseminate these important details. In line with practice in other jurisdictions, at a minimum, the information should be published at one central government website location, on individual departmental websites and on the noticeboards of all public authorities’ offices. Following the best practice of South Africa, the information should also be published in the telephone directory.

Recommendation:

- *Amend s.33(1)(b) to clarify that PIOs are responsible for processing and monitoring requests.*

- Amend s.33(2) to require fulsome dissemination of PIOs' name and contact details.

New provision – Public awareness raising

71. It is increasingly common to include provisions in the law itself mandating a body not only to handle appeals and monitor implementation of the Act, but also to actively promote the concept of open governance and the right to information within the bureaucracy and amongst the public. The Appeal Tribunal – a sub-office within the Tribunal – could do this job, in furtherance of the Tribunal's role as an independent champion of openness in administration. In other jurisdictions, such provisions often specifically require that the government ensure that programmes are undertaken to educate the public and the officials responsible for administering the law. Sections 83 and 10 of the South African *Promotion of Access to Information Act 2000* together provide a very good model:

South Africa: 83(2) [Insert name], to the extent that financial and other resources are available--

- (a) develop and conduct educational programmes to advance the understanding of the public, in particular of disadvantaged communities, of this Act and of how to exercise the rights contemplated in this Act;
- (b) encourage public and private bodies to participate in the development and conduct of programmes referred to in paragraph (a) and to undertake such programmes themselves; and
- (c) promote timely and effective dissemination of accurate information by public bodies about their activities.

(3) [Insert name of body] may--

- (a) make recommendations for--
 - (i) the development, improvement, modernisation, reform or amendment of this Act or other legislation or common law having a bearing on access to information held by public and private bodies, respectively; and
 - (ii) procedures by which public and private bodies make information electronically available;
- (b) monitor the implementation of this Act;
- (c) if reasonably possible, on request, assist any person wishing to exercise a right [under] this Act;
- (d) recommend to a public or private body that the body make such changes in the manner in which it administers this Act as [insert name of body] considers advisable;
- (e) train information officers of public bodies;
- (f) consult with and receive reports from public and private bodies on the problems encountered in complying with this Act;

10(1) The [Insert name of body] must, within 18 months...compile in each official language a guide containing such information, in an easily comprehensible form and manner, as may reasonably be required by a person who wishes to exercise any right contemplated in this Act.....

(3) The [Insert name of body] must, if necessary, update and publish the guide at intervals of not more than two years.

Recommendation:

Insert a new section placing specific responsibility on a body(s) – ideally the Appeal Tribunal, but alternatively a unit in the Ministry responsible for administering the Act - to promote public awareness, including through the publication of a Guide to RTI, and requiring resources to be provided accordingly.

PART VII – MISCELLANEOUS

Section 38 – Protection for officials

72. Section 38(1)(b) prevents the disclosure of information, which would constitute a copyright infringement. This clause operates in practice as an exemption clause and should therefore be incorporated into Part III, most likely s.21(1)(a) which deals with trade secrets and the like.

73. It is positive that s.38(2) attempts to protect officials who bona fide but wrongfully disclose information under the Act. Officials responsible for making decisions regarding information disclosure may legitimately be concerned that wrong decisions on their parts could result in action being taken against them. Similar concerns could be harboured at an institutional level. In order to encourage openness and guard against this possibility, a protection provision is essential, but the

current clause at s.38(2) is unnecessarily complicated and could be difficult to apply as a result. Section 38 of the *Trinidad and Tobago Freedom of Information Act 1999* provides a good model:

(1) *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;*

(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 authorised, or having been involved in the giving of the access.*

(2) *The giving of access to a document, including an exempt document, in consequence of a request shall not be taken for the purposes of the law relating to defamation, breach of confidence or copyright, to constitute an authorisation or approval of the publication of the document or its contents by the person to whom access is given.*

(3) *Nothing in this Act affects any privilege, whether qualified or absolute, which may attach at common law to the publishing of a statement.*

Recommendations:

- *Move s.38(1)(b) to sit with the exemptions in Part III.*
- *Amend s.38(2) to make the protection for officials clear and more comprehensive.*

Section 39 – Penalties

74. Section 39 creates offences only for a very limited number of acts of non-compliance (defacement, erasure, destruction, concealment, etc). However, this section does not state who shall levy such a fine – the Appeal Tribunal? The courts? or both?

75. More generally though, it is a major shortcoming in the Bill that it does not contain a more fulsome range of offences, particularly for non-compliance with the provisions of the Bill. The Bill needs to sanction practical problems like a refusal to accept an application, unreasonable delay or withholding of information, and knowing provision of incorrect, incomplete or misleading information. These acts could all seriously undermine the implementation of the law in practice and should be sanctioned to discourage bad behaviour by resistant officials. This would ensure, particularly in the early days of implementation, that there is a strong imperative for officials to learn about the law and apply it properly. They should not simply be able to plead ignorance and rely on that ignorance to block applicants from requesting information. A minimum fine should be considered, as this is a simple provision to comply with and non-compliance should therefore be strictly sanctioned. Additionally, erring officials should be subject to disciplinary proceedings under relevant public service rules.

76. It is absolutely essential that, at a very minimum, provisions are inserted into the Bill which permit the punishment of officers who deliberately attempt to circumvent, ignore or undermine this law. Bureaucrats should not be permitted to wilfully flout the law. These offences are very common throughout the world. For example, see s.77 of the UK *Freedom of Information Act 2000*; or s.67 of the Canadian *Access to Information Act 1983* or s.34 of the Jamaican *Access to Information Act 2002*.

77. In order to ensure that public authorities properly implement the law, they too should be liable for sanction for non-compliance. This would ensure that heads of department take a strong lead in bedding down the law and ensuring that staff across their authority undertake their duties properly. An additional provision should be included in the Bill to penalise public authorities for persistent

non-compliance with the law. A fine could be imposed for example, where a public authority fails to implement the suo moto disclosure provisions in a timely manner, does not appoint PIOs or appellate authorities, consistently fails to process applications promptly and/or is found on appeal to consistently misapply the law to withhold information. The minimum fine should be sufficiently large to act as a deterrent.

Recommendations:

- *Insert a new provision to provide a more comprehensive list of offences which can attract a fine, for example, permitting sanctions for refusing to accept an application, unreasonable delay or withholding of information, knowing provision of incorrect information, concealment or falsification of records, and/or persistent non-compliance with the Act by a public authority.*
 - (1) *Where any official has, without any reasonable cause, failed to supply the information sought, within the period specified under section X, the appellate authorities and/or the courts shall have the power to impose a penalty of [X], which amount must be reviewed and, if appropriate, increased by regulation at least once every five years, for each day/s delay in furnishing the information, after giving the official a reasonable opportunity of being heard, and the fine will be recovered from the official's salary*
 - (2) *Where it is found in appeal that any official or appellate authority has:*
 - (i) *Mala fide denied or refused to accept a request for information;*
 - (ii) *Knowingly given incorrect or misleading information,*
 - (iii) *Knowingly given wrong or incomplete information,*
 - (iv) *Destroyed information subject to a request;*
 - (v) *Obstructed the activities in relation to any application or of a Public Information Officer, any appellate authority or the courts;**commits an offence and the Appeal Tribunal shall impose a fine upon summary conviction of not less than rupees two thousand or imprisonment of up to two years or both.*
- *Insert a new provision requiring that any official on whom a penalty is imposed shall also be liable to appropriate disciplinary action under the service rules applicable to him or her.*
- *Insert a new provision permitting the imposition of departmental penalties for persistent non-compliance.*
- *Clarify who can impose penalties.*

Section 40 – Overriding conflicting laws

78. Section 40(1) appears to overlap with s.38 which protects officials who bona fide but wrongly release information under the law. The section should be moved and combined with s.38.

79. Sections 40(2) and (3) must be totally reworked so that they explicitly provide that the new access law overrides ALL other inconsistent legislation. As noted earlier, a right to information law should be comprehensive, both in the right it extends and the restrictions it recognises. The list of exemptions included in the law should be exhaustive and other laws should not be permitted to extend them. Otherwise, public officials could be very confused when trying to apply the law, and the law could be inadvertently undercut by unrelated legislation, which imposes contrary secrecy obligations. The whole point of the law is to reassess old secrecy laws and update them. To retain the secrecy provision in the Official Secrets Act in particular, completely undermines the intent of the Act and will severely restrict its effectiveness. The new law should override all other statutory or common law prohibitions on access to information. Section 22 of the Indian *Right to Information Act 2005* provides a good model.

Recommendation:

- *Incorporate s.40(1) into s.38.*
- *Amend ss.40(2) and (3) to make it clear that the law overrides all other statutory or common law prohibitions on access to information:*
 - “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*

Section 41 – Annual reporting

80. Section 41 makes the Minister responsible for preparing and submitting to the Legislative Assembly an annual report on the operation of the Act. However, the Minister is not an impartial body, such that it would be more appropriate for the Appeal Tribunal to be given additional powers and resources to produce the report. At the very least, s.40(3) could then be amended to explicitly require the Appeal Tribunal to include in the report recommendations for improving implementation. Such recommendations are commonly included in reports by Information Commissioners (see Canada for example), or Human Rights Commissions (see South Africa for example) where they are made responsible for annual reporting. In any case, to assist with the compilation of the Report, a specific duty should be placed on all public authorities to provide the Ministry/Tribunal with whatever statistics they need to compile the Annual Report. This will require systems to be put in place to ensure ongoing monitoring and collection of statistics.
81. Consideration should also be given to amending s.40(2) to specifically require that the Annual Report – whosoever produces it – is not only referred to the Assembly, but is specifically sent to a Parliamentary Committee for consideration and review. The Committee could then call on the Government to take action on key issues as necessary. This is the practice in Canada, where Information Commissioner reports are sent to a Parliamentary Committee designated or established to review the administration of the Act.

Recommendation:

- *Make the Appeal Tribunal responsible for collating and submitting the Annual Report under s.41 because the Ombudsman is an independent body and will therefore in a better position to produce an impartial report assessing the satisfactoriness of the Government’s implementation of the law.*
- *Insert a new provision requiring public authorities to provide the Ministry/Tribunal with statistics for the Annual Report, as follows:
Each public authority shall collect and provide such information to the Ministry/Tribunal as is required to prepare the report under this section and to this end shall ensure that proper monitoring and statistics collection systems are in place.*
- *Amend s.40(2) to require the Annual Report to be referred to a Parliamentary Committee for review and comment.*
- *Insert an additional clause at s.40(3) requiring that the Annual Report include:*
 - (a) the nature of the complaints and the outcome of the appeals;*
 - (b) particulars of any penalties imposed or disciplinary action taken against any officer in respect of the administration of this Act;*
 - (c) any facts which indicate an effort by public authorities to administer and implement the spirit and intention of this Act;*
 - (d) recommendations for reform, including recommendations in respect of particular public authorities, for the development, improvement, modernisation, reform or amendment of this Act or other legislation or common law or any other matter relevant to operationalising the right to access information, as appropriate.*

Schedule 1

82. See paragraphs 15-19 above for discussion.

Schedule 2

83. It is positive that an independent Appeal Tribunal is being set up under the new law, but it should be recognised at the outset, that the creation of a new Information Tribunal will require the allocation of financial resources from the Government if it is to be effective. It is important that the Government is genuinely committed to ensuring the new Information Tribunal can discharge their mandate effectively and does not indirectly exert influence via the (non) allocation of funding.

84. The procedure for appointing members of the Information Tribunal must be impartial and independent of government interference, to ensure that the Information Tribunal is seen as non-partisan and can act as an independent body. The current provisions for appointment at s.1 of Schedule 1 do not fulfill this criteria. A nomination by the Leader of Government Business means that Tribunal members will effectively be government appointees. This severely undermines the notion of the Tribunal comprising an *independent* appeal body. The appointment process for most Information Commissioners and/or administrative tribunals responsible for handling freedom of information appeals throughout the world are designed to maximise independence of appointees – usually by requiring a committee comprising representatives of Government, the Opposition and the Chief Justice to nominate candidates, and often requiring those candidates to subsequently be endorsed by Parliament.
85. It is appropriate that s.12 of Schedule 1 allows the Tribunal to develop its own procedures because this will ensure the Tribunal's autonomy. However, to ensure that the public can properly access and understand the Tribunal's operations, it is essential that the procedures are publicly promulgated and published. Ideally, it should also be a requirement that the draft procedures are open for public comment, to ensure that they properly address the public's needs.

Recommendations:

- *Replaced s.1 of Schedule 1 with the following provision:*
 - (2) *The Leader of Government Business, the Leader of the Opposition and the Chief Justice shall, in committee, nominate a candidate or candidates to the Information Tribunal from persons qualified under the provisions of this Act and the [Governor in Cabinet or Legislative Assembly, by a special majority vote,] shall confirm the said nomination.*
 - (3) *The persons appointed to the Information Tribunal shall –*
 - (a) *be publicly regarded as a person who can make impartial judgments*
 - (b) *have sufficient knowledge of the workings of Government;*
 - (c) *not have had any criminal conviction and not have been a bankrupt;*
 - (d) *be otherwise competent and capable of performing the duties of his or her office;*
 - (e) *not be a Member of the Legislative Assembly; and*
 - (f) *not hold any other public office unless otherwise provided for in this Act.*
 - (4) *Members of the Information Tribunal shall have budgetary, operational and decision-making autonomy and should be completely independent of the interference or direction of any other person or authority, other than the Courts.*
- *Amend s.9 of Schedule 1 to require wider publication of the names and official contact details of the Appeal Tribunal members, including on the Government website and in the telephone directory.*
- *Amend s.12 of Schedule 1 to require that any internal procedures of the Appeal Tribunal shall be published, including on the Government website.*

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