

# **FREEDOM OF INFORMATION BILL, 2008**

## **OF** **BARBADOS**

### **A CRITIQUE** **AND** **RECOMMENDATIONS FOR IMPROVEMENT**

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## Background

The Commonwealth Human Rights Initiative (CHRI) understands the Government of Barbados has drafted a Bill entitled *Freedom of Information Bill 2008* (draft Bill) with a view to institutionalise transparency and accountability in the administration. The Government is moving to keep a promise made to the people of Barbados, earlier this year, to have a *Freedom of Information Act* on the statute books. CHRI welcomes the initiative taken by the Government as few countries in the Caribbean have implemented laws requiring transparency in governance.

The Barbados Cabinet has established a Governance Unit and a Governance Advisory Board to facilitate the implementation of various pieces of legislation relating to integrity and transparency in public administration. This Board is requesting entities such as the Bar Association, the Congress of Trade Unions and Staff Associations of Barbados and the news media for inputs on the draft Bill. The text of the draft Bill has been publicised through the Government website: [www.gov.bb](http://www.gov.bb) and people's feedback is being sought. A schedule of Town Hall meetings has also been uploaded on the website to enable people to participate in this consultative process.

CHRI welcomes the efforts of the Government of Barbados of consulting with the people and key stakeholders before the draft Bill is tabled in Parliament. Experience has shown that a participatory law-making process can be a major factor in laying a strong foundation for an effective right to information regime. Implementation is strengthened if right to information laws are 'owned' by both the government and the people.

The draft Bill is a very positive step toward implementing an effective freedom of information law in Barbados. It is evidence of the Government's continuing and increasing commitment to transparency and accountability and the important role such characteristics can play in developing a well informed society, reasonably transparent economy and democratic and accountable government.

CHRI believes that the draft Bill can be improved upon in order to fully comply with international best practice standards on information access legislation. CHRI submits the following analysis of the contents of the draft Bill and recommendations for strengthening its provisions:

## General Comments:

In order for the access to information regime to work effectively in Barbados – for officials of public authorities to be clear about their duties and for the people to be clear about their rights – a single law should establish the framework for all information held by various arms of the government, pertaining to all subject matter. This means that the Government will have to launch an intensive exercise of reviewing all existing laws, rules and regulations in order to harmonise them with the provisions of the draft Bill.

CHRI is appreciative of the inclusion of several positive provisions

- The draft Bill has a comprehensive proactive disclosure requirement. Routine publication and dissemination of information is a key mechanism for increasing government transparency and accountability, promotes efficient public sector records management and aids public participation in government. The routine publication of government contracts would also be a big step forward for public accountability.
- The acknowledgment of Atlanta Declaration is a very positive development in the drafting of access laws. By making express reference to the Atlanta Declaration, while non-binding domestically, the Act will bring directly into the domestic legal system of Barbados the objects of the Atlanta Declaration on any appeals to the judiciary. By this

process of informing judicial decisions this provision will no doubt have a positive effect in favour of disclosure.

- The role of the information officers is well-defined within the draft Bill and it is positive that they will serve as central contact within the public authority for dealing with access requests. It is equally positive that the Information Commissioner will be responsible for the training of information officers under s. 14(3) “in each year to better enable them to discharge their duties under this Act.”
- The draft Bill provides for an effective penalties regime to sanction non-compliance with the law. What is especially striking is the inclusion of ss. 16(7) which will serve as effective impetus for government to make all rules, regulations, etc., widely accessible to people.

### Arrangement of Clauses

- It is advisable to follow a logical order for the arrangement of clauses in the draft Bill. After the preliminaries mentioned in Part I and the measures to promote openness outlined in Part II publication of certain documents and information should become Part III (instead of being Part IV). Access to documents should be Part IV followed by exempt documents as Part V. Keeping in tandem with our argument given below that the Information Commissioner should become the independent appellate authority the clauses relating to Information Commissioner and employees etc. and the review of decisions should become Part VI and VII respectively. Miscellaneous clauses may remain under Part VIII as they are currently. This arrangement is reflected in similar laws across the Commonwealth such as the Indian *Right to Information Act, 2005*,<sup>1</sup> the Ugandan *Access to Information Act, 2005*,<sup>2</sup> and the Freedom of Information Act of Antigua and Barbuda.<sup>3</sup>

The draft Bill is generally well written. Yet there are a few general concerns regarding the content which are addressed below:

- There are a number of references to “public authorities” at various instances throughout the draft Bill, and this is an undefined term. These references should be replaced with references to “Ministries and prescribed authorities” or the Interpretation section should include a definition of the term “public authorities” to include both Ministries and prescribed authorities. There are also a number of oversights in the choice of certain words used in the Bill, such as the use of “following” in s. 3(2), and the phrase “members of the public authorities public” in s. 7(3). The phrase “public authorities” should be deleted from this sentence. Additionally, ss. 17(3) and (4) make reference to s. 17(2), but this provision is missing from the draft made available to the public. Punctuation and sentence structure are also lacking in some instances such as s. 8(3), 12(1) and 15(1)(f) and 23(1)(a) and this may lead to confusion.
- A final comment should be made on the absence of gender-sensitive language throughout the draft Bill. Part of the reason behind the introduction of an access regime is to create a culture of openness and continued use of male pronouns can be perceived as being discriminatory as it fails to mention half of the population. Consideration should be given to complimenting all male pronouns in the male with female pronouns (e.g., replacing “he” with “he or she”).

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<sup>1</sup> Please visit [http://www.humanrightsinitiative.org/programs/ai/rti/india/national/rti\\_act\\_2005.pdf](http://www.humanrightsinitiative.org/programs/ai/rti/india/national/rti_act_2005.pdf) to access the Indian law.

<sup>2</sup> Please visit [http://www.humanrightsinitiative.org/programs/ai/rti/india/national/rti\\_act\\_2005.pdf](http://www.humanrightsinitiative.org/programs/ai/rti/india/national/rti_act_2005.pdf) to access the Ugandan law.

<sup>3</sup> Please visit [http://www.humanrightsinitiative.org/programs/ai/rti/international/laws\\_papers/antigua/antigua\\_foi\\_act.pdf](http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/antigua/antigua_foi_act.pdf) to access the Antigua law.

## Specific Comments:

### Preamble

1. The first paragraph of the Preamble (as it is currently structured) appears to be intended to give effect to what is presumably s. 20 of Constitution (though it is noted as being s. 12 – it is presumed this is intended to be a reference to s. 20, or a combination of ss. 11 and 20, and it should be changed accordingly, both because ss. 11 and 20 are more to the point and for internal consistency with s. 6 of the Bill). However it must be noted that these constitutional provisions only recognise and guarantee the freedom to receive and communicate ideas and information without interference. They do not place an express duty on the public authorities to furnish information to people either *suo motu* or on request. However the draft Bill rightly creates a general right of access to information held by public authorities.
2. The second paragraph concerns proactive disclosure and those things falling under Part IV of the Act. Reference to “law” or “enactment” affecting members of the public is missing from this list (it would be preferable that the term “enactment” be used in this instance, and in other instances throughout the Bill as opposed to use of the term “law”, as “enactment” is a defined term in the draft Bill). The third paragraph promotes a balanced approach to the “general right of access” created by the draft Bill, which is positive, but reference to information in “documentary form” should be replaced with “any form” or at the very least “material form” to include information that would not be considered to exist in the form of a document. Lastly, paragraph four makes reference to the establishment of the independent Office of the Information Commissioner, which is a positive inclusion under the draft Bill, and more will be discussed on this subject in the discussion on Part III of the draft Bill.
3. The fourfold preamble of the Bill is a positive elucidation of the goals to be achieved. Consideration may be given to including a fifth paragraph in the preamble recognising the importance of public participation in the decision-making processes of public authorities. This would serve to highlight the spirit behind the inclusion of para. 15(1)(h) on the publication of information concerning the functions of Ministries and prescribed authorities.

#### **Recommendation:**

- Include a fifth paragraph in the Preamble, as follows:

*“facilitate the informed participation of people in the decision-making processes of public authorities”*

### **Part I: Preliminary**

4. Section 2 of the Bill provides that the Act shall come into operation on a day to be appointed by the Minister. It is not good practice to leave it to the discretion of Government. International best practice requires that a specific date be selected for operationalising all provisions of such laws. 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 implementation, to ensure there is no room for this power to be abused and implementation to be stalled indefinitely. As experience in India demonstrated (in respect of the old *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 coming into operation, despite receiving Presidential assent. This possibility should be avoided at all costs. International experience suggests a between four to twelve months between passage of the law and implementation is sufficient (as in India and Mexico respectively). 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. 2 to include a maximum time limit for the Act coming into force, which is no later than twelve months from the date the Act receives assent from the Governor General.*

### **Section 3: Interpretation**

5. **“Document”**: The draft Bill defines and uses the term “document” throughout, rather than the broader term “information”. In CHRI’s experience, the use of the word “document” is much more limiting, (see in contrast, the broader definitions captured in the information access laws in India and New Zealand for example). It is recommended that the term “information” be included in the definitions section and then used in the Bill instead of “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.
- This definition is also problematic for other reasons. First, the phrase “...information recorded in any form, or any written or printed matter...” is what actually defines what a “document” is, and should be the first thing to appear in the definition. This should be the definition of “information” and examples of which should follow or should be listed in a separate definition of “document”.
  - Second, if examples of “documents” are to be provided then consideration should be given to the inclusion of “public and private partnership contracts” and “samples” of materials used in public authorities especially in relation to construction works as this would accord with international best practice standards.
  - Third, there is reference to a “right in respect of information held by...” provided in s. 6(1) of the Bill, on Construction of the Act, and elsewhere. This is one example of the confusion created by the adoption of a definition of “document” rather than a specific and clear definition of “information”.
  - Fourth, and lastly, use of the term “record” concurrently with “document” is confusing, and one term – preferably “information” – should be adopted and used throughout the Bill.

**Recommendation:**

*Replace the definition of “document” with the more expansive definition of “information” and delete the alternative definition of “record” in favour of a consistent use of “information” throughout the Bill.*

6. **“Exempt Document”**: The phrasing of the definition of “exempt document” is of concern as it gives the strong impression that a whole document is exempted from disclosure if it includes any information exempted under the draft Bill. This is particularly true when read in light of the definition of “exempt matter” and is contrary to s. 28 of the Bill, providing that exempted information” can be severed from a document and the remainder of the document may be disclosed.
- It would be preferable if the definition of “exempt document” were replaced with a definition of “exempt information” and the definition of “exempt matter” abandoned from the Bill altogether. The definition of “exempt matter” does not seem to add anything and defining “exempt information” should be sufficient for the purpose of easy reference and good drafting throughout the Bill. Accordingly, the definition of “exempt matter” should be deleted.

- Further to this, “matter” is used throughout the act but is not defined and it’s use over defined terms is confusing; all reference to “matter” should be replaced throughout the Bill with references to “information” or “exempt information” as necessary and use of the word “matter” dropped.

**Recommendation:**

*Replace the definition of “exempt document” with the more expansive definition of “exempt information” and delete the definition of “exempt matter”. Refrain from using the term “matter” throughout the Bill as continued use of “information” will promote certainty for information officers in deciding matters concerning “exempt information”.*

7. **“Personal Information”:** The definition of “personal information” should be drafted with more care. The way this term is currently drafted could potentially extend the relevant exemption to all Ministers, officers and functionaries of public authorities even for their official activities. For example, access to information about their official address and contact numbers, opinions and views expressed on official files and documents; age, education and employment record and views and opinions of a supervising officer evaluating the performance of a subordinate officer can all be denied under the pretext that it attracts the privacy exemption. Information about the activities of a public functionary in his/her official capacity should not be exempted from disclosure in any responsible and democratic government. The information access law of Hungary provides a good example of personal information about public functionaries being accessible to people:

*“(4) Unless otherwise provided for by an Act, personal data relating to the sphere of tasks of a person exercising the sphere of tasks and powers of organs laid down in paragraph (1) [state or local government bodies], furthermore the personal data relating to the sphere of tasks of a person performing public function shall be regarded as data public on grounds of public interest. The provisions on access to data of public interest of this Act shall apply to the access to these data.”*  
[explanation added]<sup>4</sup>

It is advisable to include a proviso to this clause stating that information relating to public officials or representatives of public authorities acting in their official capacity shall not be treated as ‘personal information’.

8. Additionally, the following changes are urged:

Use of “implicitly or explicitly of a private or confidential nature” in correspondence is both vague and overbroad and is, in any case, adequately covered by the language of s. 36(1). This qualifier, along with all other qualifiers in this definition, should be deleted.

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<sup>4</sup> Article 19(4) of Hungary’s Act LXIII of 1992 on the Protection of Personal Data and Public Access to Data of Public Interest. Please visit the website of the Hungarian Parliamentary Commissioner for Data Protection and Freedom of Information at [http://abiweb.obh.hu/dpc/index.php?menu=gyoker/relevant/national/1992\\_LXIII](http://abiweb.obh.hu/dpc/index.php?menu=gyoker/relevant/national/1992_LXIII), as on 30th October, 2008.



**Recommendation:**

- Add the following proviso below the definition of ‘personal information’:

*“Provided that information relating to a Minister, officer, employee or representative of a public authority acting in his or her official capacity shall not be exempt from disclosure under this Act.”*

9. **“Prescribed authority”:** This definition appears to be incomplete. Examples of access legislation from around the world follow two distinct models for defining the public authorities covered by the Act: either explicitly, or implicitly. Under the explicit approach the legislation enumerates the “public authorities” that are covered under the Act, and may or may not provide a list of public authorities covered in a Schedule. The implicit model is more open-ended and non-exhaustive in its coverage. For example, in the United Kingdom, the *Freedom of Information Act, 2000*, is styled as, “[a]n Act to make provision for the disclosure of information held by public authorities or by persons providing services for them”. Public authorities are defined at section 3(1):

*In this Act “public authority” means—*

*(a) subject to section 4(4), any body which, any other person who, or the holder of any office which—*

*(i) is listed in Schedule 1, or*

*(ii) is designated by order under section 5, or*

*(b) a publicly-owned company as defined by section 6.*

In order to achieve the aims of public participation, transparency and accountability in all forms of decision making that affect the public, consideration should be given to making it clear in the law as to which entities are covered. For precision, a Schedule of “prescribed authorities” should be provided, at the back of the enactment indicating the identity of all entities that have obligations of providing access to information. This would remove all confusion as to which body is covered by the access law and which one is excluded.

10. Additionally, the scope of “public purpose” should be expanded upon so that it is clear which bodies corporate or unincorporated bodies are included; these too should be listed in a separate Schedule at the back of the enactment. The scope of “established for a public purpose” is also unnecessarily narrow, and as such, provides no consideration of whether disclosure of information held by private bodies 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 especially when their actions affect people’s wellbeing. International experience demonstrates that, with more and more private companies providing public services through outsourcing or under government contracts, previously clear distinctions between public and private information may need to be reconsidered for the public good. It is increasingly important that the public interest receive greater attention under the Act in light of these ongoing developments.
11. Consider section 50 of South Africa’s *Promotion of Access to Information Act 2000*, and section 16(3) of Antigua and Barbuda’s *The Freedom of Information Act, 2004*, both of which apply the respective Acts to private bodies where the information requested is “required for the exercise or protection of any rights”. Consider the following international examples where private bodies have been brought within the ambit of access to information regimes:

***South Africa’s Promotion of Access to Information Act, 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: as this formulation is too broad, South Africa placed a financial benchmark for private companies that are covered by its ATI Act]*

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

**India's Right to Information Act 2005, s. 2(h):** A "public authority"...includes any non-Government organization substantially financed, directly or indirectly by funds provided by the appropriate Government.

**Jamaica's Access to Information Act, 2002, s. 5(3):** Bodies which provide services of a public nature which are essential to the welfare of society can be covered by the Act by Order.

**United Kingdom's Freedom of Information Act, 2000, s. 5(1):** Bodies which appear to exercise functions of a public nature, or are providing any service whose provision is a function of an authority under a contract made with that public authority can be covered, by Order of the Secretary of State.

**Recommendation:**

Amend the definition of "prescribed authority" to include a positive definition identifying criteria by which a public body, body corporate or unincorporated by body may be identified as a "prescribed authority" and include a list of prescribed authorities in two separate Schedules to the Act.

**Sections 4: Excluded Authorities**

12. Section 4 should be deleted from the Act because it is contrary to the principle of maximum disclosure to exclude certain classes of public authorities and entire classes of documents from the coverage of the law. There is no reason why blanket exclusion should be created for some public agencies that are no different from other public authorities directly funded through the money of taxpayers. All organisations and bodies supported by taxpayer funds and all bodies financed by public money or mandated to perform certain functions or actions for the benefit of the people should be covered by the access law. These provisions also jeopardise the future implementation of the law, as they encourage bodies that do not wish to be transparent to lobby government for the inclusion of their name on this list, a practice which has been witnessed internationally. Similarly access to information may be denied only when disclosure is likely to harm the public interest under specific circumstances such as those identified under Part VI.
13. In particular, no organ of the State must be excluded: the traditional assumption that access laws cover only the Executive leaving out the Legislature and the Judiciary is no longer appropriate in a modern democracy. Consider the example of the United Kingdom where, under Schedule 1 to the *Freedom of Information Act 2000*, it is expressly provides that any government department, the House of Commons, the House of Lords, the Northern Ireland Assembly, and the National Assembly for Wales are considered public authorities under the Act. At the outset it is important to distinguish the threshold question of whether and to what extent elected representatives are *prima facie* covered by the access legislation and the separate question of what, in light of legitimate exceptions to the right of access, they are actually required to disclose. While MPs are not expressly mentioned in the Schedule of the UK Act or otherwise within the text of the Act, the Act has nevertheless been used to request information concerning MPs from the Secretariats servicing these bodies.
14. Consider also the examples from Trinidad and Tobago under the *Freedom of Information Act*, where both Parliament and Tobago House of Assembly are included in the exhaustive definition of "public authorities", and from Antigua and Barbuda, where under *The Freedom of Information Act, 2004*, the exhaustive definition for "public authority" provided under section

3(1) includes (a) the Government and (c) the “Barbuda Council”. Furthermore, in Sweden, Chapter 2 of *The Freedom of the Press Act* concerns public access to information and includes the Riksdag (i.e., Swedish Parliament) within its ambit. Article 1 provides that, “[e]very Swedish subject shall have free access to official documents.” Article 5 provides, “...the Parliament, the General Assembly of the Church, and any local government assembly vested with powers of decision-making shall be equated with a public authority.”

**Recommendation:**

Delete s. 4

## Sections 6 and 34: Construction of the Act in relation to Other Laws

15. The inclusion of s. 6(2) in the Bill, on the proposed construction of the Act, is very positive and the broad language that the Act “applies to the exclusion of the provisions of any other law” is a step away from a culture of secrecy towards a culture of openness. However s. 6(2) is contradicted by s. 34 which states that any document whose disclosure is restricted under another Act is exempt. The impact of s. 34 will seriously undermine the effectiveness of this law and this overarching provision is in direct conflict with not only s. 6(2), but also the objects of the Act as described in the Preamble, with s. 20 of the Constitution, and with the spirit of the Atlanta Declaration. Section 34 should be deleted and consideration should be given to redrafting s. 6(2) along the lines of s. 22 of the *Indian Right to Information Act 2005*:

*“The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.”*

**Recommendation:**

Replace s.6(2) with the following:

*“The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any law for the time being in force or in any instrument having effect by virtue of any law other than this Act.”*

## Part II: Measure to Promote Openness

16. This Part contains a positive set of provisions in the draft Bill and is representative of the latest generation of access laws in other jurisdictions that lay emphasis on proactive or voluntary disclosure. While the inclusion of this Part is very positive, and on the whole it is well-drafted, consideration may be given to the following suggestions for improvement:

- While the requirement that “clear and simple guides” be produced and be made available on the Ministry or prescribed authority’s website under s. 7(1) is very positive, and an obviously worthwhile exercise given the proliferation of the availability of internet access, it is, however, ambiguous what is intended by inclusion of the phrase “and any other accessible form”. Consideration should be given to providing more instructive language in order to avoid confusion during implementation. If a print resource is intended to be complementary to the electronic resource, by being available at the premises of the Ministry or prescribed authority, then this could be specified in the draft Bill. Consideration may also be given to providing an explanation to the term “disseminate” under this section. For example under s. 4 of the *Indian Right to Information Act 2005* which relates to proactive disclosure the following explanation has been provided:

...“disseminated” means making known or communicated the information to the public through notice boards, newspapers, public announcements, media broadcasts, the internet or any other means, including inspection of offices of any public authority.

The advantage of specifying various modes of dissemination lies in making available to public authorities a set of viable opportunities to choose from. For example, if a public authority is particularly under-resourced and cannot afford to print information in the form of books or upload it on websites the simplest manner of disseminating information is to type it out neatly on sheets of paper, put them in a file and make the file available for free inspection at a place in the office that is easily accessible to people. This would adequately serve the purpose of proactive disclosure in the face of resource constraints.

- It is also unclear as to intended timeframes for producing and updating user guides. While s. 7(2) indicates the guides shall be updated on “regular basis” and in any case once every year “if necessary” the language could be more precise. Such a guide should be published within no more than six months of the Act coming into force, and thereafter updated regularly every year, so that public authorities have guidance on how best to meet their proactive disclosure obligations. This language does not create an obligation and the addition of “if necessary” is either superfluous in the case where it is obvious the contents of user guides cannot be changed, or ripe for abuse for information officers that interpret this section as being discretionary rather than mandatory. Consideration should be given to adopting language such as “user guides shall be reviewed and updated on an annual basis by the information officer as soon as practicable after the end of each year ending on 31<sup>st</sup> December” (as is the case for reports of the Minister under s. 55).

**Recommendation:**

*Tighten the language of s. 7(1) by providing unambiguous methods for dissemination. Provide concrete timeframes and a date by which user guides shall be updated.*

### **Part III: Information Commissioner**

17. The Bill proposes a strong vetting procedure and comprehensive list of requirements for nomination to the Office of the Information Commissioner. CHRI makes the following general recommendation on this issue:

- To promote public confidence in the office of the Information Commissioner, and to ensure that the right person is appointed to this office, ideally, the selection process should include a strong element of public participation. For example, when a list of possible candidates for the positions is being created, it should be required that nominations be invited from the public. At the very least, any list which is put together should also be published at least one month prior to consideration by Parliament and the public should be permitted to make submissions on this list. Notably, at a minimum, the list prepared should also include a detailed explanation of the reasons for the candidate being nominated, in accordance with agreed criteria.

18. The Bill envisions the creation of a strong office of the Information Commissioner under ss. 11, 12 and 13, but there should also be a provision under this Part that specifically provides that the Commissioner also has budget-making autonomy and is completely independent of the interference of any other person or authority other than the courts.

**Recommendations:**

- Ensure there is public participation in the Information Commissioner's nomination process.
- Ensure this Act provides the Information Commissioner will have budgetary autonomy.

**Section 8: Appointment of Information Commissioner**

Section 8(1)

19. The nomination procedure for the appointment of an Information Commissioner should be amended to include certain the "terms and conditions as may be specified" in the Act itself. Specifically, s. 8(1) should provide an indication of the level of compensation (e.g., same as a Supreme Court Justice) should be included, and ideally there should also be included sub-articles requiring broader experience and skills as it is essential that a candidate is impartial and well-respected by the public as an upstanding citizen who is pro-transparency and accountability. For example, s.12(5) of India's *Right to Information Act 2005* requires that "...the Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance." Minimum positive requirements could include:

- be publicly regarded as a person who can make impartial judgments;
- have a demonstrated commitment to open government and a sufficient knowledge of the workings of Government;
- have a demonstrated interests/knowledge of one or more of the following subjects - law, governance, medicine, science, technology, journalism, management; and
- be otherwise competent and capable of performing the duties of his or her office.

Section 8(2)

20. Section 8(2) additionally describes a series of negative requirements for nomination. Under s. 8(2)(d) it is required that the nominee for Information Commissioner not be convicted within the ten year period immediately preceding his (or her) appointment of an "offence involving dishonesty". While it is essential to appoint a Commissioner who has the integrity and experience to be the champion of moving the government to an environment of openness and transparency, and to lead by example by implementing the law effectively, it is obvious that s. 8(2)(d) is an arbitrary compromise between requirements of having never been convicted of a criminal offence and being silent on the issue. It appears that the law would allow for the appointment of a person as Information Commissioner if he or she was convicted of an offence of fraud or dishonesty 11 or 12 years prior to the appointment. This could lead to absurd situations. There is a logical connection between having no criminal record of dishonesty and assuming the office of the Information Commissioner, but this requirement should also encompass any crime against the community (e.g. murder, rape, arson, drugdealing etc.). If this provision is included to prevent the justice system from being brought into disrepute, arguably, including other serious offences might be more inline with the public sentiment. This question will ultimately be left to Parliament to decide but international best practices suggest that the requirements for being nominated to a High Court are a strong measure.

21. Section 8(2)(e) requiring that nominee for the Office of the Information Commissioner not be a "political activist" but this requirement, while appearing to be within the restraints of s. 21(2)(c) of the Constitution of Barbados, in practice could serve to be overly restrictive. Being a political activist is a legitimate calling, career or profession in a democracy. If allowed to

become law, this provision can be misused to prevent activists demanding more transparency in public authorities from being considered for appointment to the office of Information Commissioner. The mere labelling of such persons as 'political activists' is adequate for the purpose of disqualifying them for life. This is clearly discriminatory and ought not to be tolerated in a democracy whose fundamentals are rooted in the principle of equality of all individuals. However consideration may be given to amending this provision to require a candidate to resign from political office or parties before being short-listed for consideration in Parliament and for the full term of office if appointed Information Commissioner. Consideration should be given to amending s. 8(2)(e) suitably.

#### Section 8(4)

22. Section 8(4) provides for what appear to be rather draconian measures for the removal of the Information Commissioner. There should be a transparent underlying reasoning for why a Commissioner can be dismissed so that they can be confident of their position and its independence from politics. Many laws around the world place their Information Commissioners on par with a Justice of the High Court and therefore require that a Commissioner can only be removed under the provisions (possibly constitutionally enshrined) for removal of a Judge. At the very least, provision should be given for the Commissioner to be able to speak to his accusers in the case of alleged wrongdoing. Consider for instance s. 84(5) of the Constitution of Barbados on the removal of a Judge.
23. Alternatively, the law could provide a list of such reasons, for example the Indian *Right to Information Act 2005* lists a number of specific reasons for removal in Article 14(3):

*...the President may by order remove from office the Chief Information Commissioner, or any Information Commissioner if the Chief Information Commissioner or a Information Commissioner, as the case may be, -*

*(a) is adjudged insolvent; or*

*(b) has been convicted of an offence which, in the opinion of the President, involves moral turpitude; or*

*(c) engages during his term of office in any paid employment outside the duties of his office; or*

*(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as the Chief Information Commissioner or a Information Commissioner.*

#### **Recommendations:**

- Amend s. 8 to include a list of positive qualifications for the Information Commissioner.
- Delete the words "or is a political activist" from s. 8(2)(e) and amend the provision to require all potential candidates to demit political office or membership of a political party before being short-listed for Parliament's consideration.
- Amend s. 8(4) to incorporate the language of the process for the removal of a judge under s. 84(5) of the Constitution of Barbados.

### **Section 10: Functions of the Information Commissioner**

24. The draft Bill creates a new office, namely, the Information Commissioner, and empowers an existing office, namely, the Ombudsman, to undertake duties that are in other jurisdictions the sole prerogative of the Information Commissioner. For example, in the UK, Canada, Mexico, India and now Bangladesh, Information Commissions or Information Commissioners have both adjudicatory and monitoring functions under their respective FOI laws. In Australia, New Zealand and Trinidad and Tobago the Ombudsman perform this role. However these laws were passed between 2-3 decades ago. Current international best practice is to create

an independent appellate authority such as the Information Commissioner or a multi-member Information Commission to adjudicate over information access disputes. The same body is also vested with the responsibility of monitoring compliance with statutory obligations in all public authorities covered by the FOI law. There is no reason why Barbados should not have a similar system. This will avoid duplication of work and overlap of jurisdiction.

25. Under the current scheme of the draft Bill some provisions can become unworkable. For example, Section 10(a) requires the Information Commissioner to monitor the compliance of Ministries and prescribed authorities but it is unclear how this will be done as the Information Commissioner is not involved with hearing complaints or appeals under the Act. Second, Section 10(a) requires the Information Commissioner to prepare a report for Parliament on compliance similar to s. 55(1) under which the Minister is required to prepare a report. But it is unclear how the Commissioner will acquire information for the purpose of creating a report given the absence of adjudicatory powers envisioned for the Commissioner. Furthermore, Section 10(d) requires the Information Commissioner to “refer to the appropriate authorities cases which reasonably disclose evidence of criminal offences.” This is a novel addition for containing corruption and is something that should be included in every Act. But, again, it is unclear how this will be accomplished as the Information Commissioner is not likely to be involved at any stage of the complaints or appeals procedure, nor is the Information Commissioner empowered to initiate appeals of decisions on its own behalf or to attain intervener status in front of the Ombudsman or the Supreme Court. In order for the Information Commissioner to actualizes function established under s. 10(d), he or she needs the power to hear complaints or appeals, and to compel disclosure of documents like those of the Ombudsman.
26. Furthermore it is not advisable to have an Ombudsman as an independent appellate authority under the FOI law as he is an officer of Parliament. The FOI law should cover Parliament within its jurisdiction as has been argued above. If this change were effected it would be a violation of an important principle of natural justice – *nemo iudex in causa sua* - that no one shall be a judge in one’s own case. The Ombudsman would be called upon to adjudicate information disputes involving the secretariat of Parliament. Therefore it is advisable to remove all references to the Ombudsman and empower the Information Commissioner instead to become the independent appellate authority under the FOI law.<sup>5</sup>

**Recommendation:**

*Make the Information Commissioner the independent appellate authority under the Act in place of the Ombudsman so that he or she is better equipped to fulfil one’s functions under s. 10. Additionally include functions under ss. 10(f) and (g) on public education and declassifying records.*

## **Part IV: Publication of Certain Documents and Information (Proactive Disclosure)**

27. The inclusion of this Part is very positive. The new generation of access laws recognise that proactive disclosure can be a very efficient way of servicing the community’s information needs efficiently, while reducing the burden on individual officials to respond to specific requests. The more information is actively put into the public domain in a systemised way, the less information will be requested by the public.

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<sup>5</sup> See para #62 below for more arguments in favour of replacing the Ombudsman with the Information Commissioner as the adjudicatory authority.

## Section 15: Publication of Information

28. CHRI urges the following changes to be incorporated under this section:

- Section 15(1)(a) should include a list of officers in the Ministry or prescribed authority as well as functions and duties of the officers. This paragraph, as it applies to finances, should also be very explicit as to content of the information required to be published and this would be appropriately listed in the Regulations or Rules set to follow.
- Section 15(1)(e) should apply not only to senior officers but also all officers and employees with decision-making powers. There should also be a requirement for Ministries and prescribed authorities to publish the salaries of these officers and employees in addition to their powers and duties.
- Sections 15(1)(g) and (h) are both very positive inclusions, requiring public authorities to publish content of all decisions and policies, along with reasons, authoritative interpretations and background material, and mechanisms by which the public may make representations to influence their formulation. However, in paragraph (g) it is recommended that “public” be replaced with the term “any person” so that it is clear that this section refers to information affecting individuals as well as groups. Additionally, it should be clear that under paragraph (h), “mechanisms” includes “consultative mechanisms”.
- Consideration should also be given to including an additional section styled as 15(1)(i) providing for the details of beneficiaries of, e.g., licenses or government contracts. Consider the situation in Trinidad and Tobago where the *Freedom of Information Act* was abused to deny access to information requests for the identities of beneficiaries of government scholarships.<sup>6</sup> The scholarships were intended to be “catalysts in the various communities for improving and developing our communities as viable and sustainable units for family and family life,” and hence had to fall within the overall plan of development for the country. However, as a result of flawed interpretation, the scholarships were categorised as personal information and blended with several exemption clauses as include educational records or current educational status and financial transactions within the Ministry.

29. It is positive that s. 15(1) requires the proactively disclosed information to be regularly updated at least annually. However, some of the information which is being collected and published may change often, such that it could be terribly out of date if it is not updated regularly. Accordingly, a maximum time limit of no more than six months should be allowed for updating and the rules should prescribe shorter time limits for specific categories of information, as appropriate (for example, new government contracts should be published weekly or monthly).

30. Additionally, the comments on the term “disseminate” made at para #16 above apply equally to the use of the same term in s. 15(1). The language in s. 5(2) should be extended to include language of s. 16(2) on making documents available for inspection or purchase at the relevant Ministry or prescribed authority. Consideration could also be given to establishing one day per month where individuals may attend at Ministries and prescribed authorities to inspect documents for free as is the case in several other countries.

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<sup>6</sup> Trinidad and Tobago's *Newsday*, “Govt clamps down on freedom of information,” 6 July 2008, [http://www.newsday.co.tt/news/print\\_0,82006.html](http://www.newsday.co.tt/news/print_0,82006.html), as on 25 October 2008.



**Recommendations:**

- Amend ss. 15(1)(a) and (e) to provide for additional information on officers and employees with decision- or policy-making duties (e.g., duties with far-reaching consequences). Also replace the word “public” with “any person” under s. 15(1)(g) and ensure “mechanisms” shall include “consultative mechanisms” under s. 15(1)(h)
- Insert an additional section styled as 15(1)(i) providing for the details of beneficiaries of, e.g., licenses or government contracts.
- Impose a maximum time limit of no more than six months for Ministries and prescribed authorities to update the information disclosed under s. 15(1).

**Section 17: Statement of Possession of Certain Documents**

31. Section 17(2) is missing and consequently CHRI is unable to provide an informed opinion on the missing provisions. CHRI anticipates that s. 17(2), based on the language of s. 17(3), is intended to require Ministries and prescribed authorities to make known publicly the existence of information relating to the various clauses found under s. 17(1). However, CHRI nevertheless recommends the removal of s. 17(3), as the existence of all or many of the types of records listed in s. 17(1) clearly fall within the public interest. The determination of whether or not information should be disclosed should be made in accordance with the exemptions listed under Part VI but to omit reference to that information in lists published under this section is contrary to international best practice standards as it is tantamount to denying its existence.
32. Access to information laws are like any other class of laws whose primary objective is to lay down norms and standards with a certain degree of fixity so that the outcomes of the legal process are predictable to a large extent. It is this fixity which makes State agencies professional and dependable. Similarly such uncertainties must not be permitted to come in the way of the operation of access to information laws. A record either exists or can be created from a set of disaggregate records or it simply does not exist. Therefore a public authority has the duty to confirm or deny the existence of a record that is the subject of a request. If public interest is better served by withholding access to the record one or more of the exemptions provided in the Act may be invoked. However, people have a right to know whether a record exists or not. Consideration may be given to amending this sub-section to place a duty on the head of the government institution to confirm or deny the existence of a record.

**Recommendations:**

- Delete s. 17(3) and insert s. 17(2) as follows:

(2) The responsible Minister or principal officer of a Ministry or prescribed authority shall:

- (a) cause to be published in the *Gazette*, as soon as practicable after the commencement of this Act but not later than 12 months after that commencement, in a form approved by the Minister administering this Act, a list of the documents in possession of that Ministry or prescribed authority falling within the definition of subsection (1); and
- (b) within 12 months after the publication of the statement under paragraph (a), that is the first statement published under that paragraph, and thereafter at intervals of not more than 12 months, cause to be published in the *Gazette* statements bringing up to date the information contained in the previous statement or statements published under that paragraph.

## Part V: Access to Documents

### Sections 18 and 19: Access Right and Procedure

33. Section 18 aims to create a global right of access by using the phrase “every person shall have a right.” The use of this terminology is important for an economy that is partly driven by offshore finance and tourism. In an increasingly globalising world, where students, migrant workers, and tourists visit Barbados, they will also have information needs whether or not they are in Barbados at the time of making the request. These groups are equally deserving of access rights. While it does not expressly provide as much in the text of the Bill, it should be clear whether this right extends to natural persons alone or whether it includes juridical persons. If information can be given to individuals there is no reason why it should be denied to juridical persons or their representatives who are also human beings.
34. The construction of s. 19(b) is also potentially problematic. Where documents are made available for purchase, but where the supply runs out, it is unclear whether the applicant will nevertheless be able to obtain the documents through the framework of this Act, or not. This should also be considered in light of the effect of both ss. 6(2) and 34. Consideration should be given to adopting clear language to ensure applicants will not fall through any gaps created by this section. The public authority will continue to be duty bound to make arrangements for supplying information even if printed copies have been exhausted

#### **Recommendations:**

- Provide a definition of “person” under the Act that includes both natural and juridical persons or amend s. 18 to specify that “person” includes both natural and juridical persons.
- Amend s. 19(b) to indicate that a person will be provided access to a copy of a printed publication in some other form under this Act if copies have been exhausted.

### Sections 21(1) and 24(3): Writing Requirements

35. Sections 21(1) and 24(3) require that requests be made in writing. According to Internet sources,<sup>7</sup> Barbados has 99.7% literacy rate, high-speed internet is presumably available throughout country, and keeping in mind that requests are not merely restricted to citizens/residents of Barbados or people physically located in Barbados, the Internet is obviously accessible elsewhere in the world. If there is no other legislation indicating that Acts requiring documents to be submitted in writing include electronic documents then an expression provision should be provided under this Act or a reference to the existing legislation should be made if such exists. Consider Canada’s *Personal Information Protection and Electronic Documents Act* s. 41, under which “[a] requirement under a provision of a federal law for a document to be in writing is satisfied by an electronic document,” or Nova Scotia’s *Electronic Commerce Act*, under which s. 3(8) provides, “use of words and expressions like “in writing” and “signature” and other similar words and expressions does not by itself prohibit the use of electronic documents.”
36. The inclusion of electronic requests, as well as oral requests (e.g., telephonic), will also serve to assist physically challenged Barbados residents who are otherwise unable to file requests in person. The Act should therefore be amended to enable a person who is unable to make a written request due to disability or illiteracy, to make an oral request, and the duty to assist under s. 21(4) should be also extended to assist the applicant in this capacity. Depending on the local circumstances, it may also be appropriate for oral requests to be permitted more

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<sup>7</sup> Central Intelligence Agency, *The World Fact Book: Barbados*, <https://www.cia.gov/library/publications/the-world-factbook/geos/bb.html>, as on 25 October 2008.

generally, if for example, geography may make it difficult in practice for people to make applications in writing (e.g., because the post is unreliable or because telephone requests will expedite the process). In this regard consider s. 6(1) of India's *Right to Information Act, 2005*:

*A person, who desires to obtain any information under this Act, shall make a request in writing or through electronic means...specifying the particulars of the information sought by him or her:*

*Provided that where such request cannot be made in writing, the Central Public Information Officer or State Public Information Officer, as the case may be, shall render all reasonable assistance to the person making the request orally or to reduce the same in writing.*

**Recommendation:**

- Allow for requests under the Act to be made orally or electronically.

**Sections 21(3), 23(2) and 26(3)(a): Unreasonable Interference with Operations**

37. It is positive that there is a duty to consult with applicants to redefine the scope of requests under s. 21(5)(b) where compliance with requests “interfere unreasonably with the operations of the Ministry or prescribed authority” under s. 21(3). However, there is too much discretion provided in the language of s. 21(3), and similarly under ss. 23(2) and 26(3)(a), for requests involving use of computers and different forms of access, respectively. The language in these sections needs to be clear about what this means and reference should be made in ss. 23(2) and 26(3)(a) to the qualifying language of s. 21(5)(b). The discretion afforded to information officers should be specifically linked to, e.g., disproportionate diversion of resources, or safety and preservation of records, rather than providing an absolute discretion.

38. Furthermore, if Ministries and prescribed authorities adopt “best practices” in record-keeping, archiving and destruction of records, as is required under Parts III and IV, these provisions should be unnecessary in most circumstances. Lastly, where compliance with a request is likely to “unreasonably interfere” with operations then extensions for the timeframe of compliance should be sought under s. 46(3), to which a direct reference should be incorporated under this section, and a requirement for “best practices” to be redefined to comply with future requests should accordingly be incorporated in this section.

**Recommendations:**

- Qualify use of the term “unreasonably interfere” in ss. 21(3), 23(2) and 26(3)(a) by specifically linking it to, e.g. disproportionate diversion of resources, or safety and preservation of records, rather than providing an absolute discretion.

- Amend ss. 23 and 26 such that 23(2) and 26(3)(a) incorporate the requirements under s. 21(5)(b).

**Section 22: Transfer of Requests**

39. Section 22 allows for the transfer of requests but the language in this section should be tightened and consideration may be given to allowing for the severability of information transfers prior to transfers. In other words if only a part of the requested information is available with the public authority receiving the request, it should deal with that part and transfer the remaining portion of the request to the other public authority that is most likely to have that information. Section 22(1)(b) permits the transfer of an application if the information is not “in the possession” of the authority. This language, however, should be clarified such

that the provision also pertains to information “under the control” of the authority. This broader formulation ensures that applications cannot be passed on simply because it is not physically in the possession of the public authority, a common practice in this age of outsourcing of activities to private companies.

40. Section 22(1) uses “may transfer” rather than “shall transfer”. Imposing duty on authorities to transfer applications is in line with international best practice principles as this should not be a discretionary practice.
41. Section 22 does not impose a timeframe under which to transfer the application to the other authority. International best practice requires such information to be transferred within five (5) days and this timeline is recommended for Barbados. Consideration should also be given to the insertion of a new provision under s. 22(3), requiring the Ministry or prescribed authority with whom the request was first filed to send to the applicant written intimation of any transfers. International best practice requires that five (5) days be the maximum allowable time for effecting such transfers.

**Recommendations:**

- *Replace in s. 22(1)(b) the expression “in the possession” with “under the control” and make this provision mandatory by replacing “may” with “shall”.*
- *Impose a timeframe for transfers under s. 22*
- *Insert a new provision styled as s. 22(3) requiring the Ministry or prescribed authority to whom the request was initially made to inform the applicant of the transfer within five (5) days of the date of the initial request.*

**Section 24: Access and Fees**

42. While there are no express provisions on the fees to be levied under the Act, the waiver of fees for access is contemplated under ss. 24(2) for instances where records already exist in paper form. Several improvements are being suggested with respect to provisions relating to payment of fees:

- First, international best practice principles require that no fees be imposed for accessing information, particularly government information, as costs should already be covered by the taxes that people pay. At the very least, no application fee should be levied because the initial work required in locating information and assessing its sensitivity is a routine and expected task of government. This is the case in Trinidad & Tobago where s. 17(1) of the *Freedom of Information Act 1999* specifically states that no fees shall be imposed for applications.
- Second, a separate section should be included under this Part, or s. 24 should be expanded with respect to fees, establishing:
  - (1) Any fee set by a public authority shall not exceed the cost of reproducing the information as requested by the applicant, whereas if regulations issued prescribe a range of standard fees, such fees shall not exceed the average cost of copying the document.
  - (2) Regulations issued may provide for the payment of a fee specifically for the processing of a request for access to documents, and for the payment of such a fee on presentation of the request.
- Third, there are other instances where the waiver of fees should be contemplated, and this should also be provided under ss. 24(2). These include instances where:
  - (1) the fee payable is so small as to be not worth collecting; or

- (2) the timeframe established for responses under the Act has been exceeded; or
  - (3) payment of the fee would cause financial hardship to the applicant, bearing in mind the applicant's means and circumstances; or
  - (4) disclosure of the information requested is in the public interest.
43. As noted above, provision should be made for requests to be "duly made" orally or electronically, and s. 24(3) should be altered accordingly or removed.
44. A new subsection should be entered in s. 24(4) (or to replace s. 24(3)) stating that reasons shall not be required to be provided by the person making the request. Unless the law contains an explicit provision that does not require citizens to give reasons Information Officers steeped in the colonial mentality of maintaining undue secrecy in public affairs are likely to harass requestors for reasons and delay the decision-making process unreasonably. International best practice principles require that information holders not be entitled to reasons for information requests. This is based on the principle that the State has a perfect obligation to respect, promote and fulfil fundamental rights of persons. Therefore no reasons are required to be given for exercising the fundamental right to information from government agencies.

**Recommendations:**

- *Include a separate section on fees specifically identifying: (a) that fee should be levied for the initial application for information; (b) that fees shall not exceed the cost of reproducing the information as requested by the applicant; and (c) that fees may be waived in specified circumstances.*
- *Delete ss. 24(3) and insert a new subsection stating that reasons shall not be required to be provided by the person making the request.*

**Section 25: Time Limit for Making Decisions**

45. It is positive that under s. 25 response time to applications is limited to within three working days when a document already exists and two weeks where the document does not yet exist (but can be created from existing documents) or is not readily available. However, consideration may given for incorporating the following measures:
- Section 25 uses "three working days" and "two weeks". There are other instances in the Act where both "days" and "working days" are used (e.g., s, 45(2)(b)). The draft Bill should be amended such that one term is consistently used throughout the Act and so there is no room available for abuses of discretion and unnecessary delays. CHRI recommends consistent use of the term "working days" and replacing all two-week and fourteen-day periods with 10-working-day periods.
  - A new subsection should be entered here in the style of s. 25(2) with specific reference to timing for deemed refusal (as is currently provided under Part VII). Consider the example from Canada's *Access to Information Act* under which ss. 4(3) imposes a duty to create records where none already exist:

*For the purposes of this Act, any record requested under this Act that does not exist but can, subject to such limitations as may be prescribed by regulation, be produced from a machine readable record under the control of a government institution using computer hardware and software and technical expertise normally used by the government institution shall be deemed to be a record under the control of the government institution.*

**Recommendations:**

- Replace all reference to “days” or “weeks” in the Act which relate to timeframes for responses to access requests to “working days” to avoid uncertainty. Accordingly, replace instances specifying “14 days” or “two weeks” to “ten working days”.
- Insert an additional subsection in the style of s. 25(2) imposing a duty upon Ministries or prescribed authorities to create records where no records already exist subject to reasonable limitations prescribed in the Regulations.

**Section 26: Forms of Access**

46. It is positive that s. 26(1) provides for a variety of different forms of access upon request, that the applicant may select the preferred form under s. 26(2), and that access may be given in another form where it is practicable to do so under s. 26(3). With evolving technologies, including digital sound recorders and text-capturing pens, applicants should also be afforded reasonable opportunities to capture information in forms suitable for their purposes. An additional paragraph should be entered under s. 26(1)(e) where applicants are invited to “use their own machines” as is the case under s. 20(8) of Uganda’s *The Access to Information Act, 2005*:

*Where a record is made available in terms of this section to a person for inspection, viewing or hearing, that person may make copies of, or transcribe the record using his or her equipment, unless to do so would*

- a. *interfere unreasonably with the effective administration of the public body concerned;*
- b. *be detrimental to the preservation of the record; or*
- c. *amount to an infringement of copyright not owned by the State or the public body concerned.*

**Recommendation:**

*Insert a new paragraph under s. 26(1) that will allow an applicant to use his or her own technology for reproducing information.*

**Section 27: Deferred Access**

47. Section 27 allows a Ministry or prescribed authority to defer the provision of access until the happening of a particular event or until the expiration of some specified time. It is positive that this is qualified by the words “where it is reasonable to do so in the public interest or having regard to normal and proper administrative practices” coupled with individual fines under s. 56(4) for non-compliance. However, in addition to a requirement for reasons, there should also be imposed definite timeframes for deferment under s. 27(2) and this notice should include notice to the applicant that he or she may file a complaint with the Information Commissioner or Ombudsman.

48. A government institution must not be given the power to deny access to any information that is likely to be published at a future date. Instead a suitable time limit should be prescribed in the Act to defer access to such record. However if the government institution fails to publish the information within such a period the requestor must be provided access at the end of such period. Consideration may be given to amending section 27 of the Act suitably to incorporate a provision for deferring access to a document.

**Recommendation:**

*Include a suitable time limit for deferment under s. 27(2) and amend the notice under s. 27(2) to include notice to the applicant that he or she may file a complaint with the Information Commissioner or Ombudsman.*

## **Part VI: Exempt Documents**

### **General Comments:**

49. Exemptions clauses in an access law that accords with international best practice standards indicate the circumstances under which access to information may be denied by a public authority. The reasoning behind denial of access has nothing to do with the fact that a public authority may have stamped a record 'secret' or 'confidential' or that the government claims privilege over entire classes of documents. In a democracy, any public authority, and indeed the entire government apparatus, exists for only one purpose – to serve the public interest. As all information is collected, maintained and used by government to serve the public interest refusal of access must also be based on some clearly identifiable public interest reasoning. In other words access to information may be denied only if public interest is likely to be severely harmed by disclosure. It is not open to a public authority to refuse access to information because it thinks that no public interest will be served by disclosure. A public authority cannot be the sole arbiter of what is and what is not in the public interest. It is crucial that the FOI law draw up circumstances under which access may be legitimately denied, as narrowly as possible, because the purpose of this law is to place a statutory obligation on public authorities to disclose information to the maximum extent. As public authorities are guided by a mindset of keeping almost all information generated by them hidden away from public gaze, exemption clauses must be carefully drafted so that the primary objective of the law is not defeated. Guided by this logic CHRI makes the following general recommendations:

- First, the draft Bill currently provides for the identification of documents that are to be exempted from disclosure. This does not accord with international best practice. Drawing upon our recommendation at paras #5 and #6 for replacing references to 'documents' the term 'information' CHRI recommends that all references to exempt documents be deleted. Instead the following phrase may be used in all exemption related clauses:

*“Access to information may be denied if its disclosure may...”*

- Second s. 43 does not adequately serve the purpose of creating a public interest override on the exemptions as is required in a good FOI law. Even if an exemption can be legitimately invoked by a public authority to withhold access to information a good FOI law should place an additional obligation on it to make a determination as to whether disclosure of the exempt information would serve the public interest better. For example, if some information is requested in relation to the use of public funds in a department the Information Officer may invoke the exemption provided for in s. 35 claiming that disclosure would have a substantial adverse effect on the financial interests of the Government. However if the use of funds in that department has become a matter of public debate because of allegations of mismanagement and poor decision-making then disclosure would serve the public interest better on all counts. If the allegations are true, disclosure of the information will be guided by the public interest requiring the fixing of accountability. If the allegations are false disclosure is essential for restoring people's faith in the Government. Therefore all of the exemptions in the Act

should be subject to a blanket public interest override, in the manner provided in the FOI laws in India, Antigua and Barbuda and St. Vincent and the Grenadines<sup>8</sup>:

**s. 8(2) of the Indian RTI Act:** “Notwithstanding anything contained in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with subsection (1), [which lists all grounds for exempting disclosure of information ] a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.” [explanation added]

**s. 24 of the FOI Act of Antigua and Barbuda:** “Notwithstanding any provision in this Part, a public authority may not refuse to indicate whether or not it holds a record, or refuse to communicate information, unless the harm that would result from the refusal outweighs the public interest in the disclosure of the that information.”

**s. 35 of the FOI Act of St. Vincent and the Grenadines:** “Notwithstanding any law to the contrary, a public authority shall give access to an exempt document where there is reasonable evidence that significant

- a) abuse of authority or neglect in the performance of official duty;
- b) injustice to an individual;
- c) danger to the health or safety of an individual or of the public or
- d) unauthorized use of public funds;

has or is likely to have occurred or in the circumstances giving access to the document is justified in the public interest having regard both to any benefit and any damage that may arise from doing so.”

- Exemptions to disclosure of information are not granted in perpetuity in a good FOI law. While there may be a legitimate reason for keeping some information away from the public gaze at the current moment, the same reason may not be valid after the passage of 10 years or more. A good FOI law should contain a sunset clause that requires a public authority to disclose exempt information after a specific period of time. Consideration may be given for the example from India’s *Right to Information Act*:

s. 8(3) ...[A]ny information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made...shall be provided to any person making a request under that section...

CHRI recommends that the draft Bill incorporate a sunset clause that requires disclosure of exempt information if it is more than 10 years old at the time of making the request.

- The exemptions contained in Part IV prescribe a low threshold of harm tests. This is indicated by the frequent use of the term “prejudice”. Determining ‘prejudice’ is a highly subjective decision with no criteria for guidance. It is recommended that all such references be replaced with phrases such as “serious harm” or “substantially impede” as may be appropriate. This will ensure that the appropriate authority does not invoke the exemptions casually but only after

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<sup>8</sup> Please visit: [http://www.humanrightsinitiative.org/programs/ai/rti/international/laws\\_papers/vincent/foi\\_act\\_2003.pdf](http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/vincent/foi_act_2003.pdf) to access the FOI Act of St. Vincent and the Grenadines.



serious application of mind with regard to the possible harm caused by disclosure of exempt information.

**Recommendations:**

- *Replace the opening phrase of all exemption clauses with the following –*

*“Access to information may be denied if its disclosure may...”*

- *Insert a public interest override for application to all exemptions under Part VI:*

*“Notwithstanding any of the exemptions specified in the Act or any other law in force, a Ministry or prescribed authority shall allow access to information if public interest in disclosure of the information outweighs the harm to the public authority.”*

- *Insert a “sunset clause” under Part IV containing a procedure by which records may be declassified after a specified length of time and disclosed to people. The period of secrecy may be limited to ten (10) years in the following manner:*

*“Notwithstanding any of the exemptions to disclosure described under this Act, a public authority shall provide access to any information relating to any occurrence, event or matter which has taken place, occurred or happened ten years before the date on which any request is made.”*

- *Replace the word “prejudice” in these sections with either “serious harm” or “substantially impede” wherever applicable.*

***Specific Comments:***

**Sections 32: Cabinet Documents**

50. Although it was common practice in some older FOI laws to include blanket exemptions for Cabinet documents, in the contemporary context where governments are committing themselves to more openness this is no longer recognised as good practice. Considering all other exemptions already contained in the draft Bill, it is not clear why such blanket exclusion for Cabinet documents should be included. One of the primary objectives of an FOI law is to open up government so that the people who are the real masters in a democracy can see how decisions are made and make sure that they are made right. People have the right to know what advice and information the Cabinet bases its decisions on and how the Cabinet, being the most important decision-making forum in the country, reaches its conclusions.

51. Currently, the provisions are extremely broadly drafted, with s. 32(1)(a) exempting whole documents from disclosure if it includes an extract from a document submitted for Cabinet for its consideration. This could capture a huge number of documents and could easily be abused. The exemption also extends to ‘Cabinet Committees’ under s. 32(4) – another broad and blanket exemption. 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.<sup>9</sup>

52. It is also not clear what public interest is served in Article 32(1)(b) that protects official records of the Cabinet from disclosure. These records are presumably vetted by Cabinet before they are finalised – and if Cabinet members sign off on them as a legitimate record of

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<sup>9</sup> Times Online, “59 things that would have stayed secret”, 7 March 2007, <http://www.timesonline.co.uk/tol/global/article1471409.ece>, as on 24 October 2008.

decisions taken, there is no reason to be hesitant about their disclosure. So long as they capture Cabinet decisions accurately, they should be open to public scrutiny (unless some other legitimate exemption provided in the FOI law 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 and over. The *Indian Right to Information Act 2005* provides a good example of such a clause:

*“8(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—*

*(j) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:*

*Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:*

*Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;”*

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. In Wales and Israel for example, Cabinet documents are routinely disclosed.

53. This was the position taken by the European Court of Justice in the July 2008 ruling of *Turco et al. v. Council of the European Union*, which was decided pursuant to Regulation (EC) No. 1049/2001 of the European Parliament and of the Council. Therein the Court held that when asked to disclose a document, the Council had to assess – in each individual case – whether the document fell within one of the enumerated exceptions. In the case of legal advice received by the council, it first had to satisfy itself that the document, or parts of it, did indeed relate to legal advice, the heading of the document not being conclusive in that regard. Second, it had to verify disclosure of the document, or parts thereof, would undermine the protection of the advice: the risk of such undermining had to be reasonably foreseeable and not merely hypothetical. Third, if the Council concluded that there was such a risk, it had to determine whether there was an overriding public interest justifying disclosure despite the undermining of its ability to seek legal advice and receive frank, objective and comprehensive advice made. Notably, the Court reasoned that the advice given to Council on the formulation of policy and laws is precisely the kind of information to which the public should be entitled to receive.

**Recommendations:**

- Replace section 32 with the following:

*“Access to cabinet papers including records of deliberations of the Ministers, Secretaries and other officers may be denied if disclosure is likely to severely frustrate the decision-making process or the successful outcomes of a policy under consideration:*

*Provided that the decisions of the Cabinet, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:*

*Provided further that those matters which come under the exemptions specified in this Act may not be disclosed;”*

## Sections 31, 33 and 40: National Security, Law Enforcement and Confidential Information

54. While it is appropriate to exempt access to information if disclosure may seriously harm key national security and international interests, consideration may be given to amending the heading of Article 31(1) to focus on the need for “serious harm” and not just that information will “prejudice” such interests. The differences in wording could otherwise confuse officials. Similar remarks can be made for documents affecting the enforcement and administration of the law under s. 33 where reference is made to “prejudice” in clauses (a), (b) and (d). While inclusion of this section is acceptable, the term “prejudice” should be replaced with “substantially impede” for the same reasons provided.
55. The reference to “information communicated in confidence” in s. 31(1)(b) should be deleted because the key issue for any exemption should be whether harm would be caused by disclosure not whether the information was confidential at the time it was provided. Just because information was given to the Government of Barbados in confidence does not mean that it should necessarily remain confidential in perpetuity. At the time it was communicated it may have been sensitive, but at the time it is requested it may be harmless. As long as the more general protection in s. 31(1)(a) which guards against disclosures that would seriously harm international relations is retained, the relevant interests will be protected. This also reduces the chances that the provision will be abused by unscrupulous officials who may connive with foreign officials in confidence but then seek to hide their activities using this clause. Similar arguments are applicable to documents containing material obtained in confidence s. 40, as this is arguably covered adequately by the combined application of ss. 31(1)(b) and 38(1)(a).
56. Sections 31(2), (3) and (4) make arrangements for issue of ministerial certificates to withhold access to information. The practice of issuing certificates to deny access to records even to adjudicatory bodies is no longer in tune with international best practice principles. This provision should be removed from the Act altogether. A public authority may legitimately deny access to information by invoking one or more exemptions contained in the FOI law while disposing an information request. However in an appeal process the records containing the information must be furnished to the independent appellate authority in order to make a judgement as to whether public interest is better served by disclosure or denial of access. Ministerial certificates can be misused to prevent impartial adjudication of information access-related disputes. As has been argued above a public authority is not always the best judge of what is and what is not in the public interest. Courts in Commonwealth countries and in the US have refused to recognise the privilege of public authorities to make a final decision on access to official records in relation to any dispute.<sup>10</sup> Instead the authority for making a final decision of granting or refusing access is vested in independent adjudicatory bodies. In the instant case the Information Commissioner should have the powers to requisition records containing exempt information from any public authority in order to make a determination regarding disclosure.
57. It is recommended that s. 40 be redrafted or deleted. Section 40 could be redrafted to deny access to information in specific instances where material obtained in confidence needs to be protected and it is not otherwise covered in the draft Bill or this language could be incorporated into s. 33. This could include, for instance, information on intelligence gathering operations. Importantly, this should cover specific circumstances and not be blanket

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<sup>10</sup> Please refer to the following renowned judgements on the subject of public interest immunity: *Conway v Rimmer* [1968] UKHL 2, [1968] AC 910 from the House of Lords, UK; *United States v Nixon*, 418 U.S. 683 (1974) 418 U.S. 683 from the Supreme Court, USA and *State of Uttar Pradesh v Raj Narain*, AIR 1975 SC865 from the Supreme Court, India.

exclusions, which are vaguely drafted to cover instances where any information is “received in confidence”. There should also necessarily be an element of harm in disclosure identified that is logically connected to the public interest for reasons already stated.

**Recommendations:**

- Delete ss. 31(2), (3) and (4).

- Amend or delete s. 40 and make specific reference to those instances intended to be covered, e.g., information on intelligence gathering operations, under ss. 31 or 33.

**Section 35: Operations of Ministries and prescribed authorities**

58. Section 35 is a reasonably positive provision. However, the references to harm to the “financial” or “property” interests of the Government or prescribed authority appear to be instances of loose wording. Considering that s. 35 already purports to protect the Ministry or prescribed authority’s “efficient and economic conduct” from “substantial adverse effect”, it is unclear why a public authority’s “financial interests” need to be separately protected. Likewise, the reference to “property interests” is very vague. Considering that corruption often occurs exactly in the areas of government finances and property interests (especially regarding property procurement), this clause could far too easily be abused by unscrupulous officials. In the ultimate analysis public authorities are owned by the people and run with money they pay in the form of taxes and for the benefit of the people and as such, people should have access to information about the financial and property interests of government.

**Recommendations:**

- Delete references to “financial” and “property” interests in s. 35.

- Ensure the public interest override is applicable to considerations on whether disclosure could have “a substantial adverse effect on the efficient and economical conduct...” if it is decided that no public interest override shall be included to have general application to this Part.

**Section 36 and 38: Personal Privacy and Third-Party Commercial Information**

59. The most striking omission in ss. 36 and 38 is the absence of a means for third-parties to receive notice or initiate appeals for reviews of decisions of a public authority. International best practice requires that where information that is the subject of a dispute under FOI laws pertains to confidential or sensitive information relating to a third party such third party ought to receive notification of the public authority’s intention to disclose the information (provided no exemption can be legitimately invoked to deny access). The third party should be given sufficient opportunity to make a representation to the information officer before making the initial decision regarding disclosure and at the various stages of the review/complaint proceedings. The third party should be empowered under the Act to file complaints and initiate appeals to the Information Commissioner or the Supreme Court. Consideration should be given to adopting provisions similar to those found under ss. 27-29 and 43-44 of Canada’s *Access to Information Act*.

*27. (1) If the head of a government institution intends to disclose a record requested under this Act that contains or that the head has reason to believe might contain trade secrets of a third party, information described in paragraph 20(1)(b) or (b.1) that was supplied by a third party, or information the disclosure of which the head can reasonably foresee might effect a result described in paragraph 20(1)(c) or (d) in respect of a third party, the head shall make every reasonable effort to give the third*

party written notice of the request and of the head's intention to disclose within 30 days after the request is received.

(2) Any third party to whom a notice is required to be given under subsection (1) in respect of an intended disclosure may waive the requirement, and where the third party has consented to the disclosure the third party shall be deemed to have waived the requirement.

(3) A notice given under subsection (1) shall include (a) a statement that the head of the government institution giving the notice intends to release a record or a part thereof that might contain material or information described in subsection (1);

(b) a description of the contents of the record or part thereof that, as the case may be, belong to, were supplied by or relate to the third party to whom the notice is given; and

(c) a statement that the third party may, within twenty days after the notice is given, make representations to the head of the government institution that has control of the record as to why the record or part thereof should not be disclosed.

(4) The head of a government institution may extend the time limit set out in subsection (1) in respect of a request under this Act where the time limit set out in section 7 is extended under paragraph 9(1)(a) or (b) in respect of the same request, but any extension under this subsection shall be for a period no longer than the period of the extension under section 9.

28. (1) Where a notice is given by the head of a government institution under subsection 27(1) to a third party in respect of a record or a part thereof, (a) the third party shall, within twenty days after the notice is given, be given the opportunity to make representations to the head of the institution as to why the record or the part thereof should not be disclosed; and (b) the head of the institution shall, within thirty days after the notice is given, if the third party has been given an opportunity to make representations under paragraph (a), make a decision as to whether or not to disclose the record or the part thereof and give written notice of the decision to the third party.

(2) Representations made by a third party under paragraph (1)(a) shall be made in writing unless the head of the government institution concerned waives that requirement, in which case they may be made orally.

(3) A notice given under paragraph (1)(b) of a decision to disclose a record requested under this Act or a part thereof shall include (a) a statement that the third party to whom the notice is given is entitled to request a review of the decision under section 44 within twenty days after the notice is given; and

(b) a statement that the person who requested access to the record will be given access thereto or to the part thereof unless, within twenty days after the notice is given, a review of the decision is requested under section 44.

(4) Where, pursuant to paragraph (1)(b), the head of a government institution decides to disclose a record requested under this Act or a part thereof, the head of the institution shall give the person who made the request access to the record or the part thereof forthwith on completion of twenty days after a notice is given under that paragraph, unless a review of the decision is requested under section 44.

29. (1) Where the head of a government institution decides, on the recommendation of the Information Commissioner made pursuant to subsection 37(1), to disclose a

*record requested under this Act or a part thereof, the head of the institution shall give written notice of the decision to (a) the person who requested access to the record; and (b) any third party that the head of the institution has notified under subsection 27(1) in respect of the request or would have notified under that subsection if the head of the institution had at the time of the request intended to disclose the record or part thereof.*

*(2) A notice given under subsection (1) shall include*

*(a) a statement that any third party referred to in paragraph (1)(b) is entitled to request a review of the decision under section 44 within twenty days after the notice is given; and*

*(b) a statement that the person who requested access to the record will be given access thereto unless, within twenty days after the notice is given, a review of the decision is requested under section 44.*

...

*43. (1) The head of a government institution who has refused to give access to a record requested under this Act or a part thereof shall forthwith on being given notice of any application made under section 41 or 42 give written notice of the application to any third party that the head of the institution has notified under subsection 27(1) in respect of the request or would have notified under that subsection if the head of the institution had intended to disclose the record or part thereof.*

*(2) Any third party that has been given notice of an application for a review under subsection (1) may appear as a party to the review.*

*44. (1) Any third party to whom the head of a government institution is required under paragraph 28(1)(b) or subsection 29(1) to give a notice of a decision to disclose a record or a part thereof under this Act may, within twenty days after the notice is given, apply to the Court for a review of the matter.*

*(2) The head of a government institution who has given notice under paragraph 28(1)(b) or subsection 29(1) that a record requested under this Act or a part thereof will be disclosed shall forthwith on being given notice of an application made under subsection (1) in respect of the disclosure give written notice of the application to the person who requested access to the record.*

*(3) Any person who has been given notice of an application for a review under subsection (2) may appear as a party to the review.*

60. The inclusion of s. 36(3) is intriguing. This provision implies that a person may be mentally and physically fit to make an FOI request however he or she may be considered unfit to receive information about his or her own well being. Other questions with regard to this section are:

- How could disclosure be prejudicial to the applicant's physical or mental health?
- How would the principal officer make such an assessment?
- If the medical practitioner nominated by the requestor discloses the information to him or her then the purpose of this provision is defeated.

Therefore CHRI recommends that s. 36(3) be deleted.

**Recommendations:**

- Insert new sections in this Part with reference to ss. 36 and 38 to provide notice to third-parties of the potential disclosure of information relating to them as well as empowering them to make representations to information officers, etc., and to appeal decisions .

- Delete s. 36(3).

## **Part VII: Review of Decisions**

61. This entire Part is not easily understood in terms of the step by step process of seeking review or filing a complaint. The Act is intended to empower people with information and the provisions should therefore flow logically in a manner that is easily understood lest the Act itself serve as an additional barrier to acquiring information.

- The structure of the review process should flow logically starting with internal review mechanisms, to appeals to the Information Commissioner (in accordance with our recommendation contained in paras #24-26), to the ultimate appeal to the Supreme Court.
- The Bill should also expressly provide that first decisions are to be made by information officers other than Ministers or the principal officers of Ministries or public authorities. This will ensure there is always opportunity for internal review prior to appeals to the Information Commissioner and it will avoid any confusion under this Part.

**Recommendation:**

*Reorganize the provisions of this Part so that the appeals procedures described flow logically from internal review to the ultimate appeal to the Supreme Court.*

62. As has been argued it is unclear why appeals should be directed to the Ombudsman rather than the Information Commissioner especially considering the inherent limitations in the Office of the Ombudsman' investigative powers under s. 11 of the *Ombudsman Act* (1980), ch. 8A. It states that matters not subject to investigation by the Ombudsman shall include:

- Actions taken in matters certified by the minister responsible for Foreign Affairs or other minister of the Crown to affect relations or dealings between the Government of Barbados and any other Government or any international organisation of States or Governments.
- Actions taken, in any state or territory outside Barbados, by or on behalf of any officer representing or acting under the authority of Her Majesty in respect of Barbados or any other public officer of the Government of Barbados.
- Action taken by the Attorney General under the Extradition Act.
- Action taken by or with the authority of the Attorney General or any other minister of the Crown, the Director of Public Prosecutions or Commissioner of Police for the purposes of investigating crime or protecting the security of Barbados, including action taken with respect to passports.
- The commencement of conduct of civil or criminal proceeding before any court of law in Barbados, or proceedings under the Defence Act.
- Action taken in connection with the exercise or possible exercise of the prerogative or mercy under the Constitution or otherwise.

- Action taken in matters relating to contractual or other commercial transactions, being transactions of a department of government or a statutory board not being transactions relating to:
  - (1) the acquisition of land compulsorily or in circumstances in which it could be acquired compulsorily;
  - (2) the disposal of surplus land acquired compulsorily or in circumstances in which it could be acquired compulsorily.
- Any action or advice of a qualified medical practitioner or consultant involving the exercise of professional or clinical judgment.
- Any matter relating to any person who is or was a member of the armed or police forces of Barbados in so far as the matter relates to:
  - (1) The terms and conditions of service of such member, or
  - (2) Any order, command, penalty or punishment given to or affecting him in his capacity as such member.
- Any action which by virtue of any provision of the Constitution may not be inquired into by any court.
- The grant of honours or awards.
- Matters relating to the grant of liquor licences.
- Matters relating to the regulation of public utilities.
- Any function of the Minister under the Immigration Act or the regulations made thereunder.
- Any judicial function not specifically excluded above.

Considering these limitations on the ability of the Ombudsman to investigate several matters his or her ability to adjudicate over information access disputes in relation to such matters will be severely hampered. Therefore CHRI recommends that the Information Commissioner be vested with adjudicatory powers instead of the Ombudsman and all references to the Ombudsman in art VII be replaced with references to the Information Commissioner.

**Recommendation:**

*Remove all references to the Ombudsman under this Bill and transfer all powers to receive complaints and hear appeals to the Information Commissioner because: (a) the Office of the Information Commissioner will be specialised and uniquely equipped to deal with complaints and appeals; and (b) transferring these powers is necessary for the Information Commissioner to carry out the functions listed under s. 10 of the Bill.*

63. There is also no requirement under this Part, and specifically under ss. 46(3) or (4), for the independent appellate authority (Information Commissioner replacing the Ombudsman) to inform other parties affected by these sections (e.g., the applicant, Ministry or prescribed authority). This is potentially troublesome where time extensions are being sought or granted.
64. Similarly, there is no express duty on the independent appellate authority (Information Commissioner replacing the Ombudsman) to provide reasons under this Part for any decisions that he or she arrives at with respect to a complaint or appeal. While this might be implied by virtue of the combination of ss. 44(2) and 30(1) it should nevertheless be expressly provided under this Part.
- Equally troublesome is the potential inability of the independent appellate authority (Information Commissioner replacing the Ombudsman) to require production of documents in respect of force certificates under s. 31 (national



security, etc.) and s. 32 (cabinet). As has been argued above, any reference to certificates should be deleted from the draft Bill and the independent appellate authority (Information Commissioner replacing the Ombudsman) should be empowered to investigate all complaints under the Act as well as empowered to deny requests for investigation or appeal.

Consideration should be given to imposing under s. 49, using precise language, a duty on Ministries and prescribed authorities to disclose information to the independent appellate authority (Information Commissioner replacing the Ombudsman) where any discretion has been exercised under the Act. Consideration should also be given to the deletion of ss. 49(3), (4) and 50 for reasons already described in the discussion under Part VI on certificates issued under ss. 31 and 33.

**Recommendations:**

- *Insert new subsections under ss. 44-46, as appropriate, requiring the independent appellate authority (Information Commissioner replacing the Ombudsman) to inform other parties affected by the decision, and to provide detailed reasons for decisions.*
- *Include a duty under s. 49 for Ministries and prescribed authorities to disclose information to the independent appellate authority (Information Commissioner replacing the Ombudsman) in any cases where discretion has been exercised under the Act.*
- *Delete ss. 49(3), (4) and 50.*

65. It is also recommended that a new subsection be inserted under s. 52 expressly indicating that the independent appellate authority (Information Commissioner replacing the Ombudsman) has the power to make a decision upon review of an earlier decision or to deny the application for review.

**Recommendation:**

*Insert new subsections under s. 52 that the independent appellate authority (Information Commissioner replacing the Ombudsman) has the power to make a decision upon review of an earlier decision or to deny the application for review.*

66. Consideration should also be given to including several additional sections in this Part:

- A new section should be included contemplating instances of “bad faith” on the part of decision makers. Where there exists evidence of “bad faith” the independent appellate authority (Information Commissioner replacing the Ombudsman) should be empowered to order that all reasonable expenses associated with the appeals process be paid to the requestor by the Ministry or prescribed authority.
- It is recommended that the independent appellate authority (Information Commissioner replacing the Ombudsman) be granted *suo motu* powers under this Part to conduct inquiries to ascertain compliance with the provisions of the Act.
- It is recommended that he or she be granted the powers of search and seizure where necessary. Consider the powers of the Information Commissioner under s. 36 of Canada’s *Access to Information Act*.

*36. (1) The Information Commissioner 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 before the*

*Information Commissioner and compel them to give oral or written evidence on oath and to produce such documents and things as the Commissioner 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 Commissioner 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 Information Commissioner under this Act as the Commissioner 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.*

**Recommendations:**

- *Insert a section empowering the independent appellate authority (Information Commissioner replacing the Ombudsman) to order the return of any expenditures incurred during the appeals process where evidence of "bad faith" on the part of decision makers is found.*

- *Insert a new section vesting with the independent appellate authority (Information Commissioner replacing the Ombudsman) powers for conducting compliance related inquiries suo motu.*

- *Insert a new section vesting with the independent appellate authority (Information Commissioner replacing the Ombudsman) powers to conduct search and seizure operations in during any inquiry launched under this Act.*

**Part VIII: Miscellaneous**

67. Section 53(2) is overly restrictive and is completely contrary to the object of the Act and the idea of making information publicly accessible. When information is made public by disclosing it to an applicant there is no reason why that applicant should not be able to publish the information so long as there are no issues of, e.g., copyright infringement. If the information is published with comments not palatable to the public authority or government that is not sufficient reason for launching defamation suits in a functional democracy. People have a right to debate and form opinions on matters of public interest and an access to information law should facilitate this process. However, if the information is used to commit any penal offences then appropriate action may be taken under the existing penal laws. There is no reason why caveats should be introduced in a law that deals only with matters relating to seeking and obtaining information. Section 53(2) should accordingly be deleted from the draft Bill.

68. It is positive that there are individual penalties imposed under s. 56 for varying amounts for any contravention of the provisions of this Act. However, it is not clear from the draft Bill who will impose these penalties. As there is no reference to powers of sanction in the context of the independent appellate authority (Information Commissioner replacing the Ombudsman) it is presumed that only courts will be empowered to make such decisions. This is presumption is further strengthened by the observation that penalties are being levied against 'offences'.

The commission of offences requires to be proven before judicial bodies. This is a time consuming and expensive process. In all probability there will be other laws restricting the prosecution of Ministers and Officers for any offence without sanction from the Government. For example in India, the Criminal Procedure Code prevents any court from taking cognizance of any criminal charge against an officer unless sanction for prosecution has been given by the Government. Such restrictive procedures will render the penalties provisions in the draft Bill unworkable. Furthermore if the Information Commissioner has to secure compliance with his or her orders he or she must have some powers to impose sanctions for non compliance. Consideration should be given to the following points intended to provide a more balanced approach to penalties and also to highlight the regulatory nature of the Act:

- The references to 'offences' in s. 56 should be replaced with references to 'contraventions'.
- The independent appellate authority (Information Commissioner replacing the Ombudsman) should be empowered to impose monetary penalties for non-compliance with his or her orders and for all the other reasons mentioned in s. 56.
- Contraventions such as refusal to receive and process an information request without reasonable cause, lack of any reply to an information request within the time limits specified in the Act, charging exorbitant fees with a view to discourage the requestor from seeking information, destroying information that is the subject of a current request should also be liable for penalties.
- Consideration should be given to including qualifying language such that penalties do not exceed 25% or 50% of the decision-maker's monthly salary.
- Insert a new subsection under s. 56 explicitly providing that Courts may also impose these penalties.

Furthermore s. 56(2) contains an erroneous reference to another section in the draft Bill. Reference should be made to s. 21(4) instead of s. 22(4) and (5).

69. Section 57(1)(a) currently allows the Minister to make regulations about the payment of charges and fees for 'access to documents' and includes 'requiring deposits on account of such charges or fees'. It would be preferable for the draft Bill to *require* such regulations to be made within a certain time period. At the very least, the Bill should make it explicit that only the Minister can make fees regulations, and that no public authority is permitted to impose their own fee rates, as this will undoubtedly lead to inconsistencies, and resistant authorities may use fees as one way of deterring requests. Draft Regulations should also be made available for public consultation and this should be included in a separate provisions as ss. 57(1)(c).

**Recommendations:**

- Delete s. 53(2).

- Replaces the word "offence" as it occurs in s. 56 with the phrase "contravention of this Act" and limit individual fines under s. 56 to either 25% or 50% of the monthly salary of the individual.

- Insert a new subsection under s. 56 styled as s. 56(6) providing that both the independent appellate authority (Information Commissioner replacing the Ombudsman) and the Courts may impose these penalties except in the same case.

- Insert a new subsection under s. 56 indicating that contraventions such as refusal to receive and process an information request without reasonable cause, lack of any reply to an information

*request within the time limits specified in the Act, charging exorbitant fees with a view to discourage the requestor from seeking information, destroying information that is the subject of a current request will also attract penalties for the officer responsible.*

*- Insert a new paragraph under s. 57 styled as s. 57(1)(c) requiring the Minister to make any draft regulations available for public consultation.*

## Annexure 1: Best Practice Legislative Principles

In CHRI's 2003 Report, *Open Sesame: Looking for the Right to Information in the Commonwealth* (see enclosed), the RTI team captured the key principles which should underpin any effective right to information law, drawing on international and regional standards, evolving State practice, and the general principles of law recognised by the community of nations. Article 19, an NGO which specifically works on right to information, has also developed "Principles on Freedom of Information Legislation" which were endorsed by the United Nations Special Rapporteur in 2000.<sup>11</sup> The Organisation of American States<sup>12</sup> and the Commonwealth<sup>13</sup> - both of which Grenada is a member - have also endorsed minimum standards on the right to information. These generic standards have been summarised into the five principles below, which I would encourage you to consider when you finalise your own right to information bill.

### Maximum Disclosure

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

To ensure that maximum disclosure occurs in practice, the definition of what is covered by the Act should be drafted broadly. Enshrining a right to access to "information" rather than only "records" or "documents" is therefore preferred. Further, the Act should not limit access only to information held by public bodies, but should also cover private bodies "*that carry out public functions or where their activities affect people's rights*". This recognises the fact that in this age where privatisation and outsourcing is increasingly being undertaken by governments, the private sector is gaining influence and impact on the public and therefore cannot be beyond their scrutiny. Part 3 of the South African *Promotion of Access to Information Act 2000* provides a very good example. Bodies covered by the Act should not only have a duty to disclose information upon request, but should also be required to proactively publish and disseminate documents of general relevance to the public, for example, on their structure, norms and functioning, the documents they hold, their finances, activities, any opportunities for consultation and the content of decisions/policies affecting the public. Section 4 of the new Indian *Right to Information Act 2005* provides a useful model.

An Act should also provide that bodies covered be required to make every reasonable effort to assist applicants on request. "Every reasonable effort" is an effort which a fair and rational person would expect to be done or would find acceptable. The use of "every" indicates that a

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<sup>11</sup> Hussain, A. (2000) Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression submitted in accordance with Commission resolution 1999/36, Doc.E/CN.4/2000/63, 5 April. See also Ligabo, A., Haraszti, M. & Bertoni, E. (2004) *Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression*.

<sup>12</sup> See Organisation of American States - General Assembly (2003) *Access to Public Information: Strengthening Democracy*, resolution adopted at the fourth plenary session, June 10 2003, AG/RES.1932 (XXXIII-O/03).

<sup>13</sup> See (1999) Commonwealth Freedom of Information Principles, in *Promoting Open Government Commonwealth Principles And Guidelines On The Right To Know*, Report of the Expert Group Meeting on the Right to Know and the Promotion of Democracy and Development, Marlborough House, London, 30-31 March 1999.

public body's efforts are to be thorough and comprehensive and that it should explore all avenues in verifying the completeness of the response. The burden of proof should be on the public body to show that it has conducted an adequate search. Section 6 of British Columbia's *Freedom of Information and Protection of Privacy Act* provides a useful model.

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

### Minimum Exceptions

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

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

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

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

### Effective Enforcement: Independent Appeals Mechanisms & Penalties

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

While internal appeals provide an inexpensive first opportunity for review of a decision, oversight by an umpire independent of government pressure is a major safeguard against administrative

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

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

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

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

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

#### Monitoring and Promotion of Open Governance:

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

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

## Annexure 2: Arguments in support of the right to information

When presenting any Bill in Parliament, you may wish to draw on some common arguments as to why the right to information is so crucial to democracy, development and human rights. In fact, more than fifty years ago, in 1946 the United Nations General Assembly recognised that “Freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated”.<sup>14</sup> Soon after, the right to information was given international legal status when it was enshrined in Article 19 of the International Covenant on Civil and Political Rights which states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and *to seek, receive and impart information and ideas through any media and regardless of frontiers*” (emphasis added). Over time, the right to information has been reflected in a number of regional human rights instruments, including the American Convention on Human Rights<sup>15</sup>. This has placed the right to access information firmly within the body of universal human rights law.

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

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

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

*It is a proven anti-corruption tool.* In 2004, of the ten countries scoring best in Transparency International’s annual Corruption Perceptions Index, no fewer than eight had effective legislation enabling the public to see government files. In contrast, of the ten countries perceived to be the worst in terms of corruption, only one had a functioning access to information regime. The right to information increases transparency by opening up public and private decision-making processes to scrutiny.

*It supports economic development.* The right to information provides crucial support to the market-friendly, good governance principles of transparency and accountability. Markets, like governments, do not function well in secret. Openness encourages a political and economic environment more conducive to the free market tenets of ‘perfect information’ and ‘perfect competition’. In turn, this results in stronger growth, not least because it encourages greater investor confidence. Economic equity is also conditional upon freely accessible information

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<sup>14</sup> UN General Assembly, (1946) Resolution 59(1), 65th Plenary Meeting, December 14.

<sup>15</sup> See Art. 13(1), *American Convention on Human Rights*, 1969, Costa Rica, OAS Treaty Series No. 36, 1144 U.N.T.S. 123.



because a *right* to information ensures that information itself does not become just another commodity that is corralled and cornered by the few for their sole benefit.

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