

JOINT SUBMISSION
on the
ACCESS TO INFORMATION ACT 2001
from
The Farquharson Institute for Public Affairs,
Jamaicans for Justice
and
Transparency International Jamaica

Principles Underlying an Information Act

The Access to Information Act 2001, presently before Parliament as a Bill, sets out its objectives in Section 2. These are "... to reinforce and give further effect to certain fundamental principles underlying the system of constitutional democracy, namely -

- (a) governmental accountability;
- (b) transparency; and
- (c) public participation in national decision-making;

by granting to the public a general right of access to official documents held by public authorities ...".

In its present form, the Bill poses a great number of obstacles to the attainment of these objectives, and these objectives - even the title of the Act - are couched in language that is out of keeping with the principles and spirit that should underpin any Information Act for a democratic society.

In any democracy, it is the people who appoint their government; it is from the people that any democratically elected government receives its franchise to carry out and regulate the nation's business. Any information held by the Government is thus only held on the people's behalf and, in the long run, forms part of the recorded history of the nation. No Information Act can therefore *grant access* to official documents and information; it can only regulate the manner in which the exercise of the people's *inherent right* to this information is to be regulated.

In recognition of these considerations, any Act regulating freedom to have available to the public the information held by the Government must satisfy the following principles:

- A. The Act must declare in clear and simple language that all government records are open to the public, unless there is a specific exemption, and that, in order to participate in the formation of their future, the people have the right to be made aware of all decisions made by Government.
- B. The Act must protect this right to information.
- C. The Act must interpret the right of freedom to information in the most positive and liberal terms.
- D. The Act must construe in the most specific and narrow manner any exemptions to the free access to any information, and such exemptions can apply only to information the disclosure of which would
 - (i) affect the collective national security in circumstances of clear and present danger; or
 - (ii) violate the legitimate privacy of individuals.

Any information withheld under (i) above must nevertheless become available to the public after the expiration of a clearly stated time interval.

- E. The Act must ensure that persons highly placed in Government, with a vested interest in withholding embarrassing information, are not the sole arbiters of what information is to be exempt from public scrutiny. To this end, the Act must provide for an independent Appeals Tribunal with powers to view any document and to challenge the exempt nature of any such document.
- F. The Act must ensure that the freedom to obtain information is unimpeded. It must provide for the appointment in each ministry or public authority of a public officer with full responsibility for satisfying swiftly and efficiently the public demand for official information. This public officer must not participate in any internal review of decisions on access.

There remains one other principle the usually extremely liberal interpretation of which is in total conflict with the above principles: This is the Doctrine of Collective Responsibility (see Section 69 (2) of the Constitution of Jamaica - 1962). It is on the basis of the liberal interpretation of this doctrine that Clause 15 of the Bill allows the hiding from public view of any and all cabinet documents that the Cabinet wishes not to be seen.

This doctrine is designed to ensure that all cabinet decisions are perceived by the public to be based on a collective view. This gives ministers "safety in numbers" for possibly unpopular decisions, fosters the free airing of controversial views and the flow of vigorous argument. However, it does not justify the keeping secret of cabinet decisions; these, after all, affect the very people who placed the members of Cabinet in their high positions, in the first place. Neither does it justify the hiding of information on the basis of which such decisions were made. The Act must therefore ensure that, henceforth, the interpretation of the Doctrine of Collective Responsibility be reduced to the limit within which it can be justified in a democratic society.

Below are to be found the proposed changes in the Act designed to make it comply with the above underlying principles.

Proposed Changes

Part I Preliminary

Section 1. Short Title and Commencement

The title of the Act must revert to its original form: Freedom of Information Act.

Reason: The word "Access" implies *permission* to obtain information. The word *freedom* implies a right inherent to the people.

Section 2. Objects of Act

Change subparagraph (c) to
"...public participation in all national decision-making, by *securing for* the public *its inherent* right of access to *all* official documents held by public authorities, subject to *stated* exemptions."

The remainder of the sub-paragraph to be deleted.

Reason: See Principles

Section 3. Interpretation

Change the definition to "exempt matter means any matter the inclusion of which, in the document, causes that *part of the* document to be *exempt*".

Reason: See Principles

Section 5. Application of Act

Subsection (1):

Delete "Subject to subsection (2)". Begin next sentence with "This Act applies to...".

Rewrite sub-paragraph (b) as:

"official documents created by or held by a public authority."

Reason: Documents which constitute the recorded history of Jamaica must be readily available.

Add sub-paragraph "(c) any other body or organisation which provides services which are essential to the welfare of the Jamaican society."

Reason: Too unspecific if left as subsection (3) (b).

Subsection(2): Delete.

Reason: It is unspecific and redundant after deletion of paragraph (b) of subsection (1)

Subsection (3):

Rewrite as:

"The Minister may, by order subject to affirmative resolution, declare this Act shall apply to -

(a) such government companies, other than those specified in paragraph (e) (i) of the definition of "public authority", as may be specified in the order;

(b) *any other body that* enjoys the position of a monopoly in relation to the services provided by it,

or to such aspects of their operations as may be specified in the order."

Reason: See above

Subsection (5): Delete.

Reason: This is unspecific, and therefore unacceptable.

Subsections (6) and (7): Delete

Reason: See Principles. These matters are dealt with more specifically in Part III. Exemptions.

Part II Right of Access

Section 6. Right of Access

Subsection (1):

Rewrite as "*Subject to the provisions of this Act, every person shall have the right of access to an official document, other than an exempt document, and the exemption of any document is not absolute, but limited to a period of seven years from the date of its exemption.*"

Reason: See Principle D.

Disclosure before seven years is protected by limited privilege, and after seven years by absolute privilege.

Subsection (2):

Rewrite as: " Where an official document is -

(a) ...

(b) ...

access to that document shall be obtained in accordance with the provisions of that enactment or those procedures, *except where this Act provides greater right of access, in which case the access and procedures shall be those of this Act*".

Reason: To provide for the greatest possible access within existing provisions or those of the proposed Act.

Section 7. Application for Access

Subsection (2) (b): Delete.

Reason: There should be no fee for access, only for the cost of reproduction.

Section 9. Forms of Access

Subsection (1):

Change word "may" to "shall" in line 1.

In (c), change word "may" to "shall", and add "*or to furnish the applicant with a copy of the sounds or images*".

In (d), change "may" to "shall".

Subsection (3)

Paragraph (d): Add to "constitute an infringement of copyright subsisting in any matter contained in the document", "*other than where that copyright subsists in the Government of Jamaica or one of its public authorities*"

Reason: Self-evident

Section 10. Refusal or Deferment of Access

Subsection (1):

Delete (b) (i) as too unspecific, and therefore unacceptable.

Add to (b) (ii) to read "*contain information of a particular kind or relate to a particular topic...*"

Subsection (3):

Paragraph (c): Change the phrase "public interest" to "*national interest*" in both instances.

Reason: "National Interest" is to be interpreted as in Principle D (i)

Paragraph (d): Delete

Reason: Any document of "general public interest" must be immediately accessible to the public.

Section 11. Deletion of Exempt or Irrelevant Matter

Subsection (1):

Paragraph (b): Delete.

Reason: This is a subjective decision.

Rewrite 11 (1) as: "Where an application is made to a public authority for access to an official document which contains exempt matter, the authority shall grant access to a copy of the document with exempt matter deleted therefrom."

Section 12. Fees, etc.

Subsection (1):

Rewrite to read: "There shall be no fee payable in respect of each application for access to an official document".

Reason: The right to information is a basic right and should not be constrained by the ability of the applicant to pay a fee, however small.

Subsection (3):

Rewrite as: "The responsible Minister may waive, reduce or remit the *payment of the cost of reproducing* any documents, where he is satisfied that such waiver, reduction or remission is justifiable."

Section 13. Grant of Access

Subsection (1): Delete (b).

**Part III
Exempt Documents**

Section 14. Documents Affecting Security, Defence or International Relations

In (a), delete the phrase "or could reasonably be expected to".

Reason: This is unspecific, and therefore unacceptable.

Section 15. Cabinet Documents

Delete, and rewrite as: "An official document is exempt from disclosure if it is a document the disclosure of which would involve disclosing any deliberations of the Cabinet"

Reason: See Principles.

Section 16. Documents Relating to Law Enforcement

In (c), delete the phrase "or the nonexistence of such a source"

Reason: This institutionalises lying.

Section 17. Documents Subject to Legal Privilege, etc.

Delete (b) (iii).

Reason: Too unspecific, and therefore unacceptable.

Section 18. Documents Affecting the National Economy

Subsection (2):

Delete the phrase "but are not limited to" and the word "rates".

Subsection (2) will then read:

"The types of documents referred to in subsection (1) include documents relating to taxes, duties, interest rates or currency or exchange rates."

Reason: Retention of this phrase and word makes the subsection too unspecific, and therefore unacceptable.

Section 19. Documents Revealing Government's Deliberative Processes

Delete.

Reason: This section destroys any transparency in government. See the objectives as stated in Section 2.

There is no section exempting the Deliberative Process of Government in the FOI Acts of Australia or Belize, which were the foundation documents to for the drafting of the Jamaican Bill.

It is worth noting that , today, in a number of Commonwealth countries, e.g. New Zealand, "the opinions, advice or recommendations" are readily available to the public.

Section 20. Documents Relating to Business Affairs, etc.

Subsection (1)

In (a), after "trade secrets", add "*that would not be accessible in other lawful ways*".

In (c), delete "(including a public authority)".

Reason: The business of public authorities is the business of the people.

Rewrite (c) as: "information (other than that referred to in paragraphs (a) and (b)) concerning a person's business or professional affairs (*other than information concerning*

a person's status as a member of a profession) or the business , commercial or financial affairs of an organisation, being information the disclosure of which - ...

Delete: (c) (ii)

Reason: Too unspecific, and therefore unacceptable.

Subsection (3)

Delete.

Reason: Now covered in reworded (c).

Section 21. Documents Relating to Heritage Sites, etc.

Delete.

Reason: Heritage sites and endangered species cannot be protected through exemptions. Heritage means it belongs to the people by inheritance. Therefore, what is needed is protection, not secrecy.

Section 22. Documents Affecting Personal Privacy

Subsections (3) and (4):

Delete.

Reason: Badly drafted, unclear and subjective.

Suggested Replacement:

"Should an application be made for a document to which this section applies, being a document of a psychiatric or medical nature and the applicant is unable, through reasons of health, to access the document, the public authority shall release the document to any person so legally designated in writing by the applicant and otherwise to a person given power of attorney to do so."

Section 23. Refusal to Confirm or Deny Existence of Exempt Documents

Delete.

Reason: This section institutionalises and legitimises lying to the Jamaican people by the Government of Jamaica. If not deleted, this section destroys the credibility of the Act.

Section 24. Issue of Certificate re Exempt Document

Subsection (1):

Rewrite as:

"(1) Where the Cabinet is satisfied that an application for access to a document relates to a document specified in Section 15, the Cabinet shall issue a certificate to the effect that the document is an exempt document and shall specify to the applicant the basis of the exemption."

Reason: Individual Ministers are tempted to protect their ministries by unnecessarily exempting documents. Joint Cabinet decisions make this less likely (method now used in New Zealand).

Subsection (2):

Rewrite as: "Where the *Cabinet* is satisfied as mentioned"

Subsection (3):

Delete.

Reason: This subsection, if retained, would deny the right to judicial review.

**Part IV
Amendment and Annotation to Personal Records**

No changes are proposed for this Part.

**Part V
Review and Appeal**

Section 31. Internal Review

Subsection (4):

In (b), after the words "established for that purpose" add ", *sitting in public*, constituted in accordance...".

Reason: Transparency of the proceedings of the Appeals Tribunal.

Subsection (5):

Delete, and replace by:

"Each Ministry or Public Authority shall appoint a designated senior public officer, other than the Minister, permanent secretary of the Ministry or the principal officer of the public authority, to make decisions to deny access to documents of that Ministry or Public Authority.

Reason: With the present wording, internal review is not available, where the decision to deny access was made by the Minister, a permanent secretary or a principal officer of the public authority concerned. Instead, a specified senior officer must be designated to make the relevant decision to deny access.

Section 32. Procedure Re Internal Review

Subsection (2):

In paragraph (a), after "exceeding thirty days, ..", rewrite "*as the authority empowered to conduct the internal review may permit; or*"

In paragraph (b), after the words "the authority", insert "*empowered to conduct the internal review and pursuant to paragraph (a).*"

Section 33. Appeal

Subsection (5);

Rewrite as:

"(5) On hearing an appeal, the appeal tribunal -

- (a) may make any decision which could have been made on the original application;
- (b) shall not grant access to an exempt document in so far as it contains exempt matter."

Delete paragraphs (b) (ii)

Reason: Sections 19 and 21 must be deleted.

Delete paragraph (b) (iii).

Reason: The decision to issue an exempt certificate must be subject to time limitation and judicial review,

Part VI Miscellaneous

Section 34. Protection from Liability Re Defamation, Breach of Confidence or Copyright

Subsection (2):

Replace "required" with "*not prohibited*".

Reason: See Principles.

Section 35. Provisions Re Other Acts

Subsection (2):

Rewrite as:

"(2) *To the extent that any other Act or a provision of any other Act is inconsistent with this Act, the provisions of this Act shall prevail.*"

Reason: This Act must supercede any other Act in respect to the right to information.

First Schedule Information to be Published by Public Authority

No changes are proposed for this Schedule.

Second Schedule Constitution of Appeals Tribunal

Sections 4. and 5. Chairman and Acting Appointments

The Chairman or Acting Chairman shall be elected by the members of the Tribunal.

Reason: To achieve greater independence.

Section 10. Remuneration of members

Rewrite: "*There shall be paid to the Chairman and other members of the tribunal a salary equal to that of a judge of the Court of Appeal.*"

Reason: The members of the tribunal must be made independent of the Minister, and protected from reductions in salary.

1st January, 2001

Beth Aub
General Secretary, Transparency International (Jamaica) Tel: 944-8219

for
Frank Phipps Q.C., Chairman, Farquharson Institute of Public Affairs, Tel: 922-5550
Carolyn Gomes, Chairman, Jamaicans for Justice. Tel: 968-0683

**JOINT SUBMISSION
on the
ACCESS TO INFORMATION ACT 2001
from
The Farquharson Institute for Public Affairs,
Jamaicans for Justice
and
Transparency International Jamaica**

ADDENDUM

**Second Schedule
Constitution of Appeals Tribunal**

Paragraph 1. Constitution of Tribunal

Change to read: "*The tribunal shall, subject to paragraph 2,, consist of five members nominated by the Prime Minister after consultation with the Leader of the Opposition, and appointed by the Governor-General, on the recommendation of a two-thirds majority of the votes of the membership of the Senate, following public hearings.*"

Reason: Transparency, accountability and public participation in national decision-making.

Five members are proposed to form the tribunal in order to allow sittings of the tribunal in the absence of some of its members.

Paragraph 2. Power of One Member to Sit Alone

Change to read: "*For the hearing of any appeal under this Act, three members shall sit. One member may sit alone, if the parties to the appeal agree.*"

Change title appropriately

Reason: See above

Paragraph 3. Tenure of Office

Change period of tenure of office to *seven* years.

Reason: To provide stability of the tribunal by overlapping more than one governmental period.

Paragraphs 4. and 5. Chairman and Acting Appointments

Change to: "*The Chairman or Acting Chairman shall be elected by the members of the Tribunal.*"

Reason: To achieve greater independence of the tribunal.

Paragraph 7. Revocation of Appointments

Change to read: "*The Governor-General, on the recommendation of a two-thirds majority of the votes of the membership of the Senate, may terminate the appointment of any member of the tribunal who -....*"

Reason: To further protect the tenure of the members of the tribunal by ensuring bi-partisan support.

Paragraph 10. Remuneration of members

Rewrite: "*There shall be paid to the Chairman and other members of the tribunal a salary equal to that of a judge of the Court of Appeal.*"

Reason: The members of the tribunal must be made independent of the Minister, and protected from reductions in salary.

**JOINT SUBMISSION
on the
ACCESS TO INFORMATION ACT 2001
from
The Farquharson Institute for Public Affairs,
Jamaicans for Justice
and
Transparency International Jamaica**

MEMORANDUM

To: Chairman, Joint Select Committee of Parliament on the Access to Information Act

**From: Farquharson Institute for Public Affairs,
Jamaicans for Justice,
Transparency International (Jamaica)**

Date: February 19, 2002.

Re: Access to Information Act

Our joint submission on the Access to Information Act was the only submission to meet the deadline set by the Joint Select Committee. In the attempt to meet this deadline immediately after the holiday season, not enough time was allowed to pay full justice to the need for in-depth study of all the features of the Bill.

Following the submissions made by various organisations, particularly by the Ministry of National Security and the Bar Council, and in the light of further reflection by the members of our civic associations, we would therefore like to submit further arguments for consideration by the Joint Select Committee to support certain of our original proposals to amend the Access to Information Act. We think that there is need for more education, discussion and further elucidation in order to arrive at an Act that is implementable and achieves its stated objectives.

A. Public Interest Test

It is essential for the successful acceptance and implementation of the Act and the establishment of a sense of trust between Government and public that the Act should contain a statement of the principle on which it bases the adjudication of the balance between the competing wishes for disclosure of everything and the need for restricting access to sensitive information the release of which would create collective harm. This is a feature of the New Zealand and British Columbia acts.

It is proposed that the Act contain a section making it clear that, notwithstanding any provisions of the Act that makes a document exempt from disclosure, access to such a document would be allowed if disclosure would, on balance, do less harm to the public interest than non-disclosure.

B. Re Section 5.

Subsections (5), (6) and (7) provide for the wholesale exclusion from the purview of the Act all information held by, or concerning certain public authorities or government entities and government companies.

This exclusion not only causes such information to be inaccessible to the public, as is the case for exempt documents, but also removes any possibility of a review of the decision to withhold this information, and blocks any recourse to the process of appeal.

The fact that such exclusions disallow any questioning of the legitimacy or a defensible rational basis for refusing information will create the perception that Jamaica's culture of secrecy in governance is being perpetuated, and that power can be abused without any checks or balances. Such perception will hinder any attempts to create trust between the government and the governed.

There are particularly illustrative examples for our concerns:

- (i) Given that it is the Government's policy to divest to Executive Agencies an increasing number of its functions, and given that Parliament rarely challenges the wishes of the Executive, Subsections (5), and paragraph (e) of subsection (6) give the Minister, in effect, wholesale discretion to exclude, as for instance in (6) (e), "...any statutory body or authority as the Minister may exempt by order subject to affirmative resolution...". Thus, access to any and all information held by some public authorities or quasi-governmental bodies can be removed, and there is no possibility for appeal.
- (ii) Subsection (6) also provides for exclusion from the rights given under this Act all documents having to do with the judicial process. As Dr. Barnett has pointed out in the submission from the Jamaican Bar Association and the Independent Jamaica Council for Human Rights, this would be a retrograde step.

That all the matters which Subsections (5) to (6) would exclude can safely be dealt with by making them subject to categories of exemptions to be narrowly defined in Part III of the Act has been shown quite clearly in the submission made by the Ministry of National Security which holds much extremely sensitive material, has shown.

It should also be noted that official documents matters pertaining to intelligence gathering activities were not excluded from the application of the Act in the previous version of the Bill.

Subsections (5) and (6) of Section 5, and therefore Subsection (7), should be deleted, and any documents requiring concealment be made subject to exemptions to be narrowly defined in Part III of the Act.

C. Re Section 10 (1) (b) (ii)

This paragraph is intended to protect public authorities from being overwhelmed by applications for official documents in excessive volume. However, the public must be protected from arbitrary use of this provision in which it is made a spurious excuse not to comply, rather than a legitimate explanation. In addition, there are going to be well-founded applications for large volumes of documents to be accommodated, for those

cases only, possibly by lengthening the time-period within which such requests will be fulfilled, as provided for in Section 7 (4), or by charging a special fee.

D. Re Section 15

This section provides for the wholesale exemption from disclosure of all cabinet submissions, deliberations and decisions. The decisions made by the Cabinet, and the submissions and advice on which those decisions are made, are of the utmost importance to the public; the people of Jamaica are, after all, subjected to all the consequences of those decisions, made on their behalf.

While, on the basis of the Doctrine of Collective Responsibility, there is a case to be made for the exemption of documents revealing the deliberative process of Cabinet, such as minutes of its meetings, no such case can be made for the exemption of other Cabinet documents, purely because they are Cabinet documents. The withholding of such information needs to be based on other clearly defined and limited exemptions provided in Part III of the Act.

Section 15 should be amended to read:

"An official document is exempt from disclosure if it is an official record of the proceedings of Cabinet."

E. Re Section 19.

This section provides for the exemption of all documents that would reveal the advice and opinions given to the Government by its Civil Service, other government employees and outside bodies.

Given that among the objectives of the Act are the fostering of governmental accountability and transparency, knowledge of the advice on the basis of which vital, and possibly controversial decisions are made by Government is vital to the achievement of these objectives: Not to know whether Government acted on advice or ignored advice, clouds the transparency of the governmental process, and makes it impossible to hold the Government accountable for its actions.

The basis on which the provisions of Section 19 are defended is the view that advice to the Government would be withheld, or not freely given, or would be affected by the wish to play to the public. Prof. Alasdair Roberts observes that both the US and British Information Acts restrict access to documents containing such advice if "disclosure would harm the frankness and candour of internal discussion". This harm could, however, be easily avoided by shielding from public view the identities of the advisers concerned, making their identities an exempt matter as defined in Section 3. of the Act. In any case, given the smallness of Jamaican society and the propensity for verandah talk, it is more than likely that knowledge of such advice will already be in the

public domain, albeit in a distorted form according to the principle: "If it don't go so, it nearly go so".

Section 19. should be amended to read:

"(1) In connection with any official document containing opinions, advice or recommendations, or containing a record of consultations or deliberations prepared in the course of or for the purpose of discharging government functions and, subject to subsection (2), the identity of any persons giving advice or participating in such consultations or deliberations shall be exempt matter.

(2) A public authority shall grant access to a document containing the exempt matter referred to in subsection (1), without deleting it, if it is satisfied, having regard to all the circumstances, that such disclosure would, on balance, be in the public interest."

(However, subsection (2) would become redundant if Proposal A were to be implemented.)

F. Re Section 35

The culture of secrecy that this Act is to turn into one of openness and transparency has its basis of legitimacy in the Official Secrets Act (1911). The continued presence on the statute books of this act will not only cause great confusion in the minds of the civil servants who will have to implement the new Act, but will undermine all attempts to change that culture.

The Official Secrets Act should be repealed with effect from the appointed day.

G. Enforcement

The Act does not currently contain any provisions for its enforcement.

To do this, it must

- (i) provide for a widening of the powers of the Appeals Tribunal to compel compliance with the provisions of the Act,
- (ii) contain a clear statement to the effect that all decisions taken under the Act are subject to judicial review, and,
- (iii) make it a criminal offence to conceal, falsify or destroy an official document for the purpose of preventing its disclosure.

Given the fact that the proposed Act is based on the Australian Act, which gives the Appeals Tribunal the power to determine whether the grounds for exempting a document were reasonable grounds, and the power to apply penalties for contempt, **we propose that similar powers be given to the Appeals Tribunal in the Jamaican Act.**

Dr. Carolyn Gomes

On behalf of the Farquharson Institute for Public Affairs, Jamaicans for Justice and
Transparency International (Jamaica)