Submission to the
Joint Select Committee of Parliament
Reviewing the Access To Information Act 2002
by the
Commonwealth Human Rights Initiative
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The Commonwealth Human Rights Initiative (CHRI) is an independent, non-partisan, international non-government organisation mandated to ensure the practical realisation of human rights in the lives of the people in the Commonwealth. CHRI's Right to Information Programme has been working for more than 8 years to support Commonwealth member states to develop and implement strong right to information laws. CHRI works with intergovernmental organisations, governments, and civil society to promote the right. Please visit CHRI's website at http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_&_papers.htm if you would like to know more about CHRI's work.

CHRI welcomes the Jamaican House Committee on Access to Information's review of the *Access to Information Act 2002*. Although the legislation is only three years old, implementation has proven challenging. This is an opportune time to review the law and implementation practices to ensure that the Jamaican public is able to exercise its right to access information in a simple, cheap and timely way.

Drawing on CHRI's right to information expertise as well as information provided to CHRI by civil society organisations working on these issues in Jamaica, CHRI submits the following recommendations to the Committee for consideration:

BROADEN COVERAGE

1. 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. 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. All arms of Government should clearly be covered, as should all public authorities, and private bodies, at least where the information requested affects people's rights.

Use the term "information" throughout in place of "official document"

2. The Act currently defines and uses the term "document" and "official document" throughout, rather than the broader term "information". However, allowing access to "information" means that applicants will not be restricted to accessing only information, which is already in the form of a document or hard copy record at the time of the application. Otherwise, the current formulation excludes access to things like scale models, samples of materials used in public works and information not yet recorded by an official but which should have been. This approach has been incorporated into the Indian *Right to Information Act 2005*, one of the newest access laws in the world, which enshrines the latest standards in openness.

3. In any case, the definition of "official document" should be deleted because it adds nothing and only serves possibly to limit access further. The definition could easily be abused by resistant officials to restrict access. Indeed, there are already signs that officials may be using the review process to lobby for the narrowing of the right to information, as may be indicated by recent worrying comments made by the Attorney-General and Minister of Justice, who proposed changing the title of the law to the "Access to Official Documents Act". There is no good governance reason to support such a narrowing of the law.

Recommendation 1: The term "information" should be included in the definitions section in Part 1. Preliminary section and then used throughout the Act instead of "official document".

Expressly require the collation of information, as necessary

4. CHRI understands from Jamaicans for Justice that in practice, officials are rejecting applications where the request is for information which needs to be collated from a number of different sources or from a computer database. The Act should be amended to make it

clear that information *must* be collated. A proviso may be added that collation is not required where it would cause an excessive and unreasonable diversion of the public authority's resources. This approach accords with best practice, for example, in India and in the UK, information must be collated. In New Zealand, information must usually be collated and the Act has even been interpreted to require that a record will be created anew, if it *should* have been created but an official failed to do so.

Recommendation 2: The Act should be amended to make it clear that information should be collated, if necessary, unless to do so would cause an excessive and unreasonable diversion of the public authority's resources.

Include the Governor-General

5. Section 5(6)(a) puts the Governor-General outside the purview of the Act. This is inappropriate if the law is to entrench public accountability practically. The immunity of the Executive from oversight stems from traditional assumptions that the monarchy (which historically comprised the Executive) is above the people and unaccountable to anyone but God. This approach to executive power is no longer considered appropriate in a modern democracy. In keeping with current democratic practice, such distance from the public is no longer appropriate. Many other jurisdictions have recognised this. For example, in India the Office of the President is covered by the Act. In Australia, the Governor General is at least not exempt in relation to his/her administrative functions. Notably, considering the exemptions in Part III for sensitive national security, international relations and policy-making information, there is no reason for a blanket immunity for the Governor-General.

Recommendation 3: The Act should cover the Governor-General.

Include Parliament and its Committees

6. CHRI also understands that there is some ambiguity about whether Parliament and its committees are covered by the Act. In the interests of promoting the principles of accountability and public participation, which are at the core of effective representative democracy, the Act should make it clear that they *are* covered. As the Commonwealth Parliamentary Association Right to Information Study Group of MPs which met in July 2004 agreed, "Parliament should play a leadership role in promoting open government by opening up its own practices and procedures to the widest possible extent." It goes directly against best practice to actually put Parliament beyond the scrutiny of the public, rather than using this new law as an opportunity to draw the public in and make them more aware of the work of Parliament, This is particularly true in relation to parliamentary committees, which throughout the world are usually seen as opportunities for MPs to engage with and draw on the ideas and experiences of their constituents as they develop and review policies. At the time a parliamentary committee is set up, if it is to deal with sensitive issues, at that stage, the terms of reference approved by parliament could include a secrecy requirement, if absolutely necessary.

Recommendation 4: Parliament and its Committees should be covered by the Act.

Include all Government commissions

7. CHRI understands from Jamaicans for Justice that it has become practice in Jamaica to deny information related to the work of some Commissions. This is not appropriate if the Act is to promote public accountability across all arms of Government and in relation to all aspects of official activity. CHRI endorses the submission made by Jamaicans for Justice recommending that bodies such as the Police Service Commission, the Public Service Commission, and the Scientific Research Council be explicitly covered by the Act. These bodies directly deal with issues relating to the provision of key public services and would benefit from a better understanding of their work by the public. Their decisions and activities would also gain credibility if made public. Any fears that the disclosure of information by these Commissions and the Council may harm national security are unfounded because the exemption in section 14(a) which prohibits disclosures that would "*prejudice the security, defence or international relations of Jamaica…"* provides sufficient protection.

Recommendation 5: All Government Commissions, including the Police Service Commission, the Public Service Commission and the Scientific Research Council, should be covered by the Act.

Remove security and intelligence services exemptions

8. Section 5(6)(c) currently exempts security and intelligence services, including the Constabulary Forces, Rural Police and Defence Force. This is very unusual – and unjustifiable considering the key role that these bodies play in maintaining national stability and the strong coercive powers they are given to do that. Common practice in other jurisdictions supports bringing the police and security forces within the coverage of the law, but then including exemptions to protect against the release of sensitive national security or law enforcement information. The policing services currently exempted provide an important service to the public and unfortunately in many countries have been a source of human rights violations and corruption. If the Act is to achieve its objectives of exposing corruption and official abuse, then these bodies must be made subject to public scrutiny.

Recommendation 6: The list of "security and intelligence services" exempted under section 5(8) should be deleted so that the Constabulary Forces, Rural Police and Defence Force are covered by the Act.

Include the Director of Public Prosecutions (DPP)

9. Although the Act does not overtly exclude the DPP, constitutionally the DPP is not subject to the control of any Government authority. As a result, it may technically fall outside the ambit of the Act. This should be clarified by amending the Act or by use of section 3(b) which permits the Minister, *"by order subject to affirmative resolution, to declare that the Act shall apply to any body or organization which provides services of a public nature which are essential to the welfare of the Jamaican society…"* In this respect it is clear that the DPP "provides services of a public nature which are essential to the welfare of the Jamaican society."

Recommendation 7: The office of the Director of Public Prosecutions (DPP) should be explicitly covered by the Act.

NARROW THE EXEMPTIONS

10. While it is well accepted that there can be a small number of legitimate exemptions in any access regime, exemptions should be kept to an absolute minimum and should be narrowly drawn. The key issue should be whether disclosure would actually cause serious damage to a legitimate interest, which deserves to be protected.

Include a public interest override in favour of disclosure

11. Currently, section 2 of the Act refers to the public interest "in exempting from disclosure governmental, commercial or personal information of a sensitive nature." Surprisingly, this means that the Act actually allows the public interest test to be used *in favour* of exemptions. This is the reverse of common international best practice. Section 19 (exemption re deliberations of Cabinet) and 21 (exemptions re national heritage documents) are the only other sections which incorporate a public interest test in favour of disclosure can only be applied in two areas: section 19, which applies to advice prepared for and records of deliberations of the Cabinet and section 21, which covers Jamaican national heritage documents.

12. International best practice favours an overriding public interest test that *favours disclosure* in the public interest. This would mean that a document which falls within the terms of a *general* exemption provision should still be disclosed if the public interest in the *specific* case requires it. This ensures that every case is considered on its individual merits and public officials do not just assume that certain documents will always be exempt. It ensures that the "public interest" is always at the core of a right to information regime. Section 8(2) of the Indian Right to Information Act 2005 sets out that "a public authority may allow access to information, if public interest *in disclosure* outweighs the harm to the protected interest." Similarly, section 46 of South Africa's law states that "both public and private bodies must disclose information when…the public interest in disclosure outweighs the public interest in refusing."

Recommendation 8: Include a catch all public interest override which will apply to all exemptions in the Act. Every test for exemptions (articulated by the Article 19 Model FOI Law) should therefore be considered in 3 parts:

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

Remove or limit any Ministerial discretions

13. Sections 4(4), 5(4), 5(5) and 5(6) give the Minister broad discretions in determining what bodies are covered by the law, and what information can be accessed from them. Such a broad Ministerial power is very troubling within a parliamentary system. It is important that the access law is carefully drafted to ensure that only the most sensitive information is kept secret. Most importantly in practice, this means that exemptions – of bodies or classes of information – must be scrutinised and discussed before being approved by Parliament to ensure that they are only as broad as required. It is not appropriate that additional exemptions can simply be added by an Order of the Minister. Even if Parliament can review such Orders, in practice, they are less likely to review Ministerial orders and regulations, as opposed to proper amendment Bills. In practice, these Ministerial discretions could completely undermine the law.

Recommendation 9: Amend ss.4 and 5 so that the Minister cannot, by Order, exempt bodies from the Act.

Remove the power to issue Ministerial certificates

14. The power given to the Minister under s.23 to issue Ministerial certificates (which prevent the appeal tribunal or courts from reviewing the decision) is entirely contrary to international best practice. In Australia, one of the few jurisdictions in the world where Ministers are granted such discretion, the practice has often been attacked by parliamentarians and civil society as being contrary to good governance because they allow the Minister to remain unaccountable. Even at its inception, in 1978, the Parliamentary Committee which considered the Australian Bill concluded: "There is no justification for such a system tailored to the convenience of ministers and senior officers …This can only confirm the opinion of some critics that the bill is dedicated to preserving the doctrine of executive autocracy". In 1994, two officials from the Attorney General's Department concluded that: "The provisions for conclusive certificates are now anachronisms with little if any relevance to the contemporary world of FOI decisions. Time has proven that the substantive exemption provisions, without the added strength of certificates, are in fact more than adequate to the task of the exemption of genuinely sensitive documents."[1] In a law which is specifically designed to make Government more transparent and accountable, the use of Ministerial discretion cannot be defended.

15. If Ministerial certificates are retained, at the very minimum, the use of Ministerial discretion should only be permitted if the Minister can show that "the disclosure of the document would be contrary to the public interest". An additional clause should also be added requiring any Ministerial Certificate issued to be tabled in Parliament along with an explanation. This is the practice in the UK, where the UK Information Commissioner noted in May 2004 that "issues relating to each and every use of the veto will be brought before Parliament".

Recommendation 10: The power to issue Ministerial certificates should be removed and at the very least, severely limited.

Remove exemption for Cabinet confidences

16. Although the Cabinet is the most important decision-making hub in Government, the fact remains that information about the policy and decision-making processes of Government - particularly the highest forum of Government - is exactly the kind of information that the public *should* be able to access, unless it is particularly sensitive - in which case it will be protected by the exemptions in Part III. It is not enough to argue that disclosure would inhibit internal discussions. All officials should be able – and be required – to ensure that their advice can withstand public scrutiny. To fear such transparency raises questions about the soundness of the entire decision-making process. In such different jurisdictions as Israel, India and Wales, there are at least requirements that once Cabinet decisions are made, they shall be published.

Recommendation 11: The entire regime of protection for Cabinet confidences as set out in sections 15 and 19 should be deleted or at least, narrowed.

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

Remove exemption covering information provided in confidence by foreign Governments

17. Section 14(b) of the Act currently exempts "documents containing information communicated in confidence to the Government by or on behalf of a foreign government or by an international organization". This is a poorly drafted exemption however, because it does not include any "harm test" – requiring only that the information was providing in confidence, but not that release would harm key Jamaican interests. Notably though, just because information was given to the Government of Jamaica in confidence does *not* mean that it should necessarily *remain* confidential. At the time it was communicated it may have been sensitive, but at the time it is requested it may be harmless. Even worse, information could be communicated confidentially by a corrupt government, but disclosure may be in the interests of the Jamaican public. Disclosure should not be prevented in such cases.

Recommendation 12: Section 14(b) should be reworded so that confidential information provided by another government or intergovernmental agency can only be withheld if disclosure would cause serious prejudice to Jamaica's international relations.

Narrow the privacy exemption

18. Section 22 properly attempts to protect against unwarranted invasions of the individual's privacy. However, it should be amended to make it clear that it cannot be used to prevent the release of information concerning public officials where the information relates to their official duties, reflects their capacity to discharge public functions or relates to an allegation of wrongdoing or a human rights violation. It is vital to government accountability that public officials can individually be held to account for their official actions. In Uganda for example, s.26 of the national access law specifically allows access to private personal information if:
    - the individual is or was an official of a public body and the information relates to any of his or her functions as a public official including but not limited to:
        (i) the fact that the person is or was an official of that public body;
        (ii) the title, work address, work phone number and other similar particulars of the person;
        (iii) the classification, salary scale or remuneration and responsibilities of the position held or services performed by the person; and
        (iv) the name of the person on a record prepared by the person in the course of employment.
    - the information given to the public body by the person to whom it relates and the person was informed by or on behalf of the public body, before it is given, that the information belongs to a class of information that would or might be made available to the public;

Recommendation 13: Amend s.22 to make it explicit that personal information must still be released if the information relates to their officials duties, reflects on their capacity to discharge public functions or relates to an allegation of wrongdoing or a human rights violation.

Override all non-disclosure provisions in other laws

19. Currently, section 35(2) allows provisions relating to the non-disclosure of information set out in other Acts to overrule the disclosure provisions in the Act. This provides a significant loophole which could seriously diminish the effect of the Act over time if future Governments pass new legislation that further narrow disclosure of Government information. An access law should be comprehensive and should capture all openness and secrecy provisions in one place. This will ensure that the framework is internally consistent. By allowing other Acts to override the ATI Act, section 35(2) not only undermines the Acts objectives, but could confuse and overburden public officials

handling applications because they will need to check that any information they can disclose under the ATI Act is not still exempted by some other Act of Parliament.

Recommendation 14: Amend s.35(2) to require that confidentiality provisions in other statutes cannot override the ATI Act. Require that all other legislation – including the Official Secrets Act – be reviewed to identify provisions which conflict with the Act and develop a timetable for amending or repealing such provisions.

Do not permit rejection of requests because of lack of official time

20. It was reported by the media that a public official by the name of Helen Rumbolt testified before a parliamentary committee about the need to refuse requests on the grounds that requests requiring extensive research have harmed pubic officials' ability to perform their regular duties, and sometimes requires the government to pay overtime to staff. She also proposed giving greater authority to public officials to deny information to the public on the grounds of "reasonableness" in their ability to provide the information. This is an astonishing suggestion.

21. Officials should not be given a discretion to reject applications if processing them interferes with their work. Officials could consider more than a couple of hours spent on processing a request an unreasonable interference with their activities, simply because they may not accept that providing access to information should be part of their core business. However, a clear message needs to be sent that facilitating transparency and access to information IS a key part of their work and should be prioritised as such. If they do not have time to do all their work, then they should make a submission to the Government for more resources, but they should not use lack of Government funding for staff as a justification for narrowing the fundamental democratic right to access information. Although Ms Rumbolt's proposal is modelled on the Australian Freedom of Information Act 1982, that Act does not constitute best practice. It was enacted more than two decades ago and transparency norms have developed considerably since then. Consider in contrast, that in some countries, dedicated public information officers are employed in Freedom of Information Units whose sole task is to process requests. Moreover, this is a particularly unfair proposal when one considers that it may be the public body's own poor record-keeping practices that are responsible for the time taken to process a request. Should the requester be penalised because the public body has not kept its record properly?

Recommendation 15: Reject Government requests to include an additional exemption ground permitting officials to reject requests if it is not reasonable to process them.

STRENGTHEN THE APPEALS PROCESS

22. Effective enforcement provisions are necessary to ensure the success of access legislation. While internal appeals provide an inexpensive first opportunity for review of a decision, proper oversight by an umpire independent of government pressure has been shown to be a major safeguard against administrative lethargy, indifference or resistance, particularly where court-based remedies are slow, costly and uncertain. Where special external oversight bodies are set up to decide complaints of non-disclosure, it is important that they are independent, have strong investigation and decision-making powers and are cheap, quick and accessible.

Bolster the Appeals Tribunal's independence

23. The Appeals Tribunal currently lacks the independence and powers required to make it an effective body that enjoys public confidence. The procedure for appointing members of the Tribunal must be impartial and independent of government interference, to ensure that the Tribunal is seen as non-partisan and can act as an independent body. In this respect, the current provisions for appointment in section 1 of the Second Schedule of the Act need to be strengthened. Parliamentary endorsement of candidates to the Tribunal should be required. At the very least, the shortlist for candidates should be published and open for public comment, and the final resume and reasons for the selection of the candidate should be tabled in Parliament.

Recommendation 16: Amend s.1 of the Second Schedule to make the process more transparent, participatory and independent. Candidates should be endorsed by Parliament.

Give the Tribunal proper financial and staff resources

24. CHRI understands that the Appeals Tribunal lacks full-time members of staff and a dedicated secretariat. This is a major problem as the Tribunal will obviously struggle to function if it lacks sufficient resources and expertise to discharge its duties. The Tribunal will need not only administrative staff, but access to legal expertise to ensure that it's decisions are made on strong legal grounds. The Tribunal Secretariat apparently resides in the Office of the Prime Minister, a situation which has undermined the Tribunal's independence and public confidence in its impartial functioning.

Recommendation 17: The Tribunal should be properly resources and funded to ensure that it can employ full-time, dedicated staff and set up a proper office. The Secretariat to the Tribunal should have its own office separate from the Prime Minister's.

Broaden the scope of complaints that can be lodged with the Appeal Tribunal

25. Currently, sections 30(3) and 32(2)(b) of the Act deal with the appeal grounds in ss.30(1)(a) to (c), but for some reason they both omit a reference to the fourth appeal ground in section (30)(1)(d), which deals with appeals in relation to fees. There is no logical reason why the last appeal ground has been treated differently – although perhaps this was a drafting error. Regardless, the Act should be amended to address this anomaly.

26. In any case, as already pointed out in the Independent Jamaican Council for Human Rights and Jamaicans for Justice's submissions to the Committee, the review and appeals provisions as set in sections 30-32 of the Act currently provide an unnecessarily restricted right of internal review. In particular, it is worrying that the Act does not specify that an applicant can appeal against a transfer of an application, because it is understood that there have been cases in Jamaica when an applicant has knowledge that the document sought resides with the authority to whom the application has been addressed but the authority has still transferred the application. There have even been cases where the

authority has made a transfer simply as a means of refusing the request. A better appeal mandate can be found in s.18 of Indian Right to Information Act. A model provision could read as follows:

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

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

Recommendation 18: Amend sections 30 and 32 to broaden the grounds on which applicants can make internal appeals and appeals to the Tribunal. At a minimum clarify that appeals are allows in relation to incorrect transfers, and address the poor drafting in ss.30(3) and 32(2)(b) which appear to restricted the right to appeal in respect of unreasonable fees.

Amend forms required to lodge an appeal

27. The form required to make an appeal to the Appeals Tribunal is mandatory as set out in Rule 3 of the Appeals Tribunal Rules. However, the form is unnecessarily complicated and could, in practice, limit the ability of ordinary people to complain against decisions. This is unfortunate, because an access law should be designed to ensure maximum accessibility and should be user-friendly. Currently, the Appeal Form goes so far as to require the appellant to set out
    - challenges to finding of fact and of the law and grounds of appeal;
    - the legal basis for the appeal;
    - specification of the power which the Tribunal is being asked to exercise;
    - names and addresses of witnesses.

28. The Appeal Form is too legalistic and complex for the average layman to use. In countries with entrenched bureaucratic cultures of secrecy, where officials may use process requirements to deny access, it needs to be made explicit that appeals cannot be refused under the law simply because they were not on the right form. Considering that s.32(5) currently requires the public authority to justify non-disclosure, it should only be practically necessary for the appellant to lodge a complaint, at which point it will become the public authority's responsibility to put forward the grounds of fact and law in support of their position.

Recommendation 19: Rule 3 of the Appeals Tribunal Rules should be amended to make it clear that although the prescribed form may be used for appeals, requesters will not be *required* to use the form, as long as they provide sufficient information for the appeal to be processed. Specifically, the required criteria of "challenges to finding of fact and of the law and grounds of appeal; the legal basis for the appeal; specification of the power which the Tribunal is being asked to exercise; names and addresses of witnesses" should be deleted from the current form.

Include timeframes for appeals

29. CHRI understands from Jamaicans for Justice that the Tribunal has only heard three appeals over the last two years of the Act. They have reported a case where one appellant had to wait four months to get an acknowledgement of having lodged an appeal and is still awaiting a hearing date 5 months later. Such delays are unacceptable. Notably, the problem is compounded because the Notice of Appeal in Rule 4 and the setting of the date for an appeal in Rule 6 of the Appeals Tribunal Rules both lack deadlines. Clearly this is contributing to the delays of complaints being handled.

30. In practice, appeal delay undermine the objectives Act because often, the timely release of information will be crucial to ensuring that officials are held accountable. If the information is kept secret for months or even years, the officials involved may have already left office or the issue may no longer be as important to the public. Section 19(6) of the Indian *Right to Information Act 2005* deals with this problem by specifically requiring that an appeal shall be disposed of within 30-45 days of the receipt of the appeal.

Recommendation 20: In accordance with the Submission by the Independent Jamaican Council for Human Rights, the timeframe for the notice of appeal should be included in Rule 4 and set at 2-3 days, while the timeframe for the setting of a date for appeal should be set at 14 days.

Notify appellants of hearings

31. According to Rules 9 and 10 of the Appeal Tribunal Rules, the Tribunal can hear an appeal in the absence of any or all of the parties. This is very troubling because in practice, these Rules may deny an appellant the right to present his/her case to the Tribunal. The Rules should be amended to at least require that all parties must be notified of their hearing date and every effort must be made to assist appellant's to attend hearings, if they choose, What this means in practice is that the Government may need to provide some funding to support travel for appellants. If this is not possible, the Rules should require that the Tribunal will make every effort to facilitate appellants' involvement in hearings, for example, by using teleconferencing or even telephone facilities.

Recommendation 21: The Rules should be amended to require that all appellants are notified of their hearing date and invited to appeals before the Tribunal. The Rules should also require the Tribunal to facilitate appellants' participation in hearings.

Strengthen the Tribunal's decision-making powers

32. For the law to have teeth and make a dent in bureaucratic cultures of secrecy, the Appeals Tribunal needs to have strong powers to require public bodies to take the necessary steps towards greater openness. Experience from a number of Commonwealth jurisdictions, including Canada, England, Scotland and Western Australia, that bodies equipped with such powers have been very effective in raising the profile of the right to information and balancing against bureaucratic resistance to openness. Currently, s.32(6) only gives the Tribunal the same rights as the original decision-maker, but if the Tribunal is to be strong enough to ensure an effective framework for access to information, it would be worthwhile providing more detail as to the Tribunal's decision-making powers. Section 19(8) of the Indian *Right to Information Act 2005* provides a good model:

The [Appeals Tribunal] has the power to:

- *(a) require the public authority to take any such steps as may be necessary to bring it into compliance with the Act, including by;*
  - *(i) providing access to information, including in a particular form;*
  - *(ii) appointing an information officer;*
  - *(iii) publishing certain information and/or categories of information;*

(iv) making certain changes to its practices in relation to the keeping, management and destruction of records;
(v) enhancing the provision of training on the right to information for its officials;
(vi) providing him or her with an annual report, in compliance with section X;

(a) require the public body to compensate the complainant for any loss or other detriment suffered;
(b) impose any of the penalties available under this Act;
(c) reject the application.

Recommendation 22: Give the Tribunal clear, strong powers to require public bodies to comply with the Act.

Strengthen the penalty provisions

33. The Act is seriously weakened by the absence of comprehensive offences and penalties provisions, a shortcoming which should be rectified as a priority. Section 34(1) lists only a limits number of offences and s.34(2) only permits a Resident Magistrate's Court to impose penalties. In practice, this process is unlikely to act as a serious deterrent which will prevent non-compliance with the Act. Most officials will – probably rightly – assume that the process is too complicated to be pursued except for the most extreme of offences.

34. The penalty provisions need to be fixed in 2 key ways:

- it is important that the Act provide a more detailed list of actions which 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, obstruction of the work of any public body under the Act and/or non-compliance with the Information Commissioner's orders.
- The Appeals Tribunal should be empowered to impose sanctions. 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.

35. In reality, without personalised penalty provisions, many public officials may be content to shirk their duties, safe in the knowledge that it is their employer that will suffer the consequences. It is therefore important in combating entrenched cultures of secrecy that individual officers are faced with the threat of personal sanctions if they are non-compliant. The relevant provisions need to be carefully drafted though, to ensure that defaulting officers, at whatever level of seniority, are penalised. It is not appropriate for penalty provisions to assume that penalties will always be imposed on Information Officers. The official responsible for the non-compliance should be punished.

36. A model penalty provision is provided below, drawing on best practice from around the world:

(1) Where any official has, without any reasonable cause, failed to supply the information sought, within the period specified under section X, the appellate authorities and/or the courts shall have the power to impose a penalty of [X], which amount must be reviewed and, if appropriate, increased by regulation at least once every five years, for each day/s delay in furnishing the information, after giving the official a reasonable opportunity of being heard, and the fine will be recovered from the official's salary

(2) *Where it is found in appeal that any official or appellate authority has .*
(i) Mala fide denied or refused to accept a request for information;

(ii) Knowingly given incorrect or misleading information,
(iii) Knowingly given wrong or incomplete information,
(iv) Destroyed information subject to a request;
(v) Obstructed the activities in relation to any application or of a Public Information Officer, any appellate authority or the courts;

commits an offence and the Appeal Tribunal shall impose a fine upon summary conviction of not less than rupees two thousand or imprisonment of up to two years or both.

(3) Where any official has been sanctioned under sub-sections (1) or (2), appropriate disciplinary action under the service rules applicable to him or her shall also be commenced by the Head of the Public Authority;

Recommendation 23: Include more comprehensive offences and penalty provisions in the Act and make it explicit that they can be imposed by the Appeals Tribunal.

Do not award costs against members of the public who lodge appeals

37. Section 10(b) of the Appeals Tribunal Rules permit the Tribunal to award costs on an application. This approach completely contradicts international best practice. There are very few jurisdictions which have similar Rules, as it is well understood that such an approach will act as a serious disincentive to the lodgement of appeals by the public. This will play into the hands of resistant bureaucrats who may unfairly reject applications with impunity, safe in the knowledge that their decisions will rarely be appealed. If the costs provision is retained, at the very least it should be amended so that costs can only be awarded for manifestly unreasonable or vexatious appeals.

Recommendation 24: Delete section 10(b) from the Appeal Tribunal Rules or at the very least amend s.10(b) to allow costs to be awarded only where an appeal is manifestly unreasonable and vexatious.

Publicise Tribunal decisions

38. Rule 17 of the Appeals Tribunal Rules states that Tribunal decisions are to be published in the Gazette or in a daily newspaper but decisions made in December 2005 have yet to be published either in the Gazette or in a daily newspaper. Rule 18 of the Appeals Tribunal Rules gives the parties to the appeal the right to inspect and obtain a copy of the notes of appeal. However, it does not make it clear whether the public will have a right to request a copy of the notes. The lack of proper access to and dissemination of decisions and appeal notes contradicts the Government's object to further transparency through the Act. In any case, consideration should also be given to publishing the decisions on a Government website, by way of building up a database of precedents that will be accessible over time.

Recommendation 25: Impose a time limit for the publication of Tribunal decisions. Require that Tribunal decisions and notes are collected and made available to the public on a Government website.

ADDRESS PRACTICAL IMPLEMENTATION PROBLEMS

39. Many laws now include specific provisions directed at supporting implementation. This recognises that the Act is only the first step in entrenching the right to information. Operationalisation of the law is an ongoing challenge.

Strengthen the Access to Information Unit

40. CHRI endorses the assertion in the Submission from Jamaicans For Justice that the resignation of the Executive Officer and Public Relations Officer of the Access to Information (ATI) Unit - leaving the Unit with a staff of one Administrative Officer - has severely handicapped the implementation and monitoring of the Act. The lack of staff resources has meant that public officials no longer have a dedicated resource unit from which to gain advice and has thus caused them to respond by rejecting applications which may not be clear about what information is being requested.

41. Furthermore, the Unit's performance monitoring role has been neglected, which has contributed to the inconsistency of implementation across public authorities. The dysfunction of the ATI Unit has also meant that any efforts towards raising public awareness about the Act and providing the public with an official resource where their queries about the Act and the application process have stalled.

42. If the Government is sincerely committed to the goals of government accountability, transparency, and public participation in national decision-making, the staffing and funding problems of the ATI Unit must be rectified with immediate effect. Furthermore, the ATI Unit's responsibilities (training public officials, improving record management practices, raising public awareness, monitoring and reporting) should be included in a separate section in the Act so that the existence of the Unit – which acts as a key player in implementation – will be secure. If its duties are legally binding there is also a greater likelihood that the Government will prioritise funding.

Recommendation 26: Entrench the ATI Unit within the Act, to ensure its continued existence and promote better funding from Government. Ensure that the ATI Unit has sufficient human and financial resources to undertake its responsibilities (eg. training public officials, improving record management practices, raising public awareness, monitoring and reporting).

Ensure receipts of applications are sent out in a timely manner

43. Section 7(3) requires the public authority to "acknowledge receipt of every application in the prescribed manner". However, as the Independent Jamaican Council for Human Rights' submission points out, there have been problems with the Responsible Officer stating that he/she did not receive the application until days after the applicant had delivered it. This has caused problems when the applicant has requested an internal review, especially when the applicant has claimed that the request was not dealt with within the time limits and is informed that the request for a review is premature. A better system needs to be developed to ensure that the date an application is physically received by a public authority is the date that the deadlines in the Act start to run, to ensure that public authorities do not avoid their duties by simply delaying the point at which their Responsible Officer acknowledges that they received the application.

Recommendation 27: Require public authorities to establish better systems to record incoming applications as soon as they are received, even if a receipt is sent out later. Amend section 7(3)(b) to require that receipts are sent out within 5 days of the application being received by the public authority. The content of such notices should also be prescribed in the Act.

Clarify how time limits are calculated

44. Section 7 of the Act sets out time limits for dealing with applications but does not specify whether they are judged by calendar or working days. The Attorney-General of Jamaica has already states that the definition of "days" should be calculated as *calendar days.* Some advice has also been provided to officials on this issue by the ATI Unit. However, to ensure better bureaucratic compliance, it would be useful for the Government to issue a circular, or even amend the Act or the Rules to clarify the definition of "days".

Recommendation 28: Clarify the definition of "days" to ensure compliance with processing time limits.

Include whistleblower protection

45. In order to support the principal of 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 pubic 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. The inclusion of strong whistleblower protection is important in order to send a message to the public and officials that the government is serious about opening up to legitimate scrutiny. Section 47 of the Article 19 Model FOI Law as set out below provides a good model:

(1) No one may be subject to any legal, administrative or employment-related sanction, regardless of any breach of a legal or employment obligation, for releasing information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment, as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious threat to health, safety or the environment.

(2) For purposes of sub-section (1), wrongdoing includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body.

Recommendation 29: Include an additional provision providing for whistleblower protection.

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