

**OBSERVATIONS OF THE  
ACCESS TO INFORMATION ACT 2002 IN JAMAICA**

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The Carter Center**

Jamaica is a leader in the region on transparency and access to information. In passing and implementing the Access to Information Act 2002, Jamaica has established a new and more open form of governance and accomplished what many other countries are still attempting. The Act, which provides citizens an enforceable right to official documents held by public authorities, is key in enhancing democracy, ensuring citizen's participation, and building greater trust in the decision-making of Government. Access to public documents can assist citizens in exercising their other fundamental socioeconomic rights, such as the right to housing, appropriate health care, and a clean and healthy environment, and it can serve to make government more efficient and effective.

Passing an access to information law is relatively easy in comparison to the practise of implementation, which can be challenging for any country. Successful implementation of an open information regime requires a commitment of resources (human, financial, and time), preparation of public bodies, development of procedures, change in culture and behaviours, and expertise. It is clear that the Jamaican Government and it's public authorities, who entered into effect in phases with the final large group beginning in July 2005, have made great progress in the implementation of the Act including training of civil servants in the law and best practices. Many of the efforts in Jamaica serve as a model for other jurisdictions. However, as with any new regime there is the potential for constructive reform and advancement.

The Jamaica Access to Information Act is unique in providing for an automatic Parliamentary review of the law two years after its implementation began. This is a positive provision as it allows for reflection as to both the terms of the Act as well as its impact for the Jamaican administration and its users. In general, Jamaica's Access to Information law meets the emerging international norms with a sound structure and provisions to promote openness. But as experience has shown, there are a few provisions that could benefit from renewed consideration and debate. As with the passage of the law, the starting point for any review should be a dedication to strengthening the Act's ability to promote transparency and openness while taking into account the necessities of its implementers and users.

The Carter Center has been privileged to support the Jamaican Government and civil society throughout the establishment of the new information regime. We began in 1999 working to inform the debate regarding the passage of the law and have remained present, including the opening of a local field office in 2004, to provide technical support to government and civil society and to share the international experiences regarding implementation and enforcement. There are now 68 countries with access to information legislation, and many more considering the passage of a law. Like Jamaica, as countries work to implement these difficult acts, new lessons are being learned on the value of a well drafted law and its consequences for the executing public authorities and users.

Therefore, we welcome the opportunity to provide brief observations on the Jamaica Access to Information Act 2002 and its implementation. We respectfully provide the comments below in the spirit of cooperation as Jamaica seeks to ensure the broad exercise of this fundamental human right. These observations are not exhaustive, but it is our hope that

these general ideas can be used as an additional input for consideration and debate. As always, ultimately, it is the Jamaican people and their representatives who will undertake the difficult task of ensuring an access to information law that satisfies their needs and realities. We trust that this Parliamentary period of reflection and consideration will serve to enhance and strengthen the Act, and that Jamaica will remain a committed leader in ensuring transparency and the comprehensive right to information.

## 1. Scope

The scope section of access to information legislation provides the extent to which public and private entities are covered under its provisions. For the most part, the definition of public authority within the Jamaican Access to Information Act 2002 meets the international standards. In addition to all agencies of government and statutory bodies and authorities, it provides the possibility for including some relevant private sector bodies, such as those wholly owned by the government or an agency of government and those companies that provide “services of a public nature which are essential to the welfare of the Jamaican society.”<sup>1</sup> This is consistent with the trend that increasingly incorporates more private sector entities within the scope of the legislation. Modern laws vary from applying to those organizations that receive some public funding, such as in the Mexican law, to those bodies which provide public services, as is found in the Jamaican act, to the South African case which covers all private bodies when the information requested is “necessary to protect or exercise a right.”

The rationale for including all public bodies under the provisions of the act, as well as extending coverage to some private sector bodies, is that through access to information those in power may be held accountable for their decisions. For most citizens, it does not matter whether the government is responsible for their electricity supply or a private entity, what is of concern is that it is accessible, consistent and affordable. “It seems unwise and unfair to create duties for the public sector to provide a right to access to information while exempting powerful private interests. Nevertheless, with private sector information it is appropriate to include a caveat to ensure that there is not an unjustified intrusion on privacy. As with publicly held information, a right to private bodies’ information also can be limited with appropriate exemptions, such as for commercial confidentiality or trade secrets. But where a private company is clearly providing a public service, such as after a privatization process, its information should be defined in the law as “public information” and covered under the Act.”<sup>2</sup>

Although, as stated above, the definition of public authority is well-drafted, the provision allowing for certain public entities to be exempt from the act may serve to frustrate the broad definition and undermine the law’s objectives. International best practice dictates that all public institutions should fall within the scope of the law, but that specific documents that meet the clearly drafted legally prescribed exemptions may be properly withheld from disclosure. With the multitude of safeguards provided by the exemptions section, it is difficult to imagine a rationale that would justify the wholesale exclusion of agencies or public bodies from the scope of an access to information act. Therefore, section 6 of the Jamaican Act may warrant additional consideration as to whether it is necessary given the exemptions section and whether it in fact advances the objectives of the law. Moreover, for the private sector companies listed within the act to be covered, there is the necessity for an affirmative resolution, which in practice has not occurred. Deletion of this additional step for inclusion

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<sup>1</sup> The Jamaica Access to Information Act 2002, sec. 5(3).

<sup>2</sup> Access to Information Laws: Pieces of the Puzzle, The Promotion of Democracy Through Access to Information, L. Neuman, The Carter Center, 2004.

within the scope of the Act would be a positive reform of the law, and serve to ensure that all relevant bodies holding critical “public information” are covered by the legislation.

## **2. Implementation Issues**

As Jamaica has experienced over the past two years, the full and effective implementation of an access to information act is challenging and resource intensive. In the United Kingdom, a recent report of the Information Commissioner’s Office found that in surveying 500 persons responsible with the day-to-day operation of the act, 31% found that the introduction of the act was either fairly or very difficult.<sup>3</sup> Often problems revolve around outdated or disregarded record-keeping systems, overburdened and untrained personnel, under-resourced public agencies, and a prevailing culture of secrecy. Many of these issues cannot be resolved through legislative amendments, but rather practice and time. Often, it is more important to consider the way in which the law is being interpreted or applied than it is to alter the legislation. However, there are a few areas where reforms in the Act could serve to further implementation efforts and support public servants and the users of the Act.

### **a. Need for a Legislated Oversight Body**

An oversight body with the responsibility of coordinating implementation efforts across government agencies, promoting training of functionaries and public education, responding to agencies questions, and ensuring consistency and sustainability is critical to the success of any access to information regime. The benefit of the voluntarily established Access to Information Unit in Jamaica is well-known. This Unit served as a link between the implementers and the users, established guidelines and responded to public authority concerns. International experience supports these findings, demonstrating that without a dedicated and specialized oversight body, such as the Jamaica Unit, the compliance rate is lower, the number of requests more limited, and the right to information eroded. Without a continuous oversight body, government efforts are dispersed and diluted with no clarity in responsibilities or guidelines and reduced ability to conduct long-term planning and to promote best practices, thus costing government’s more in terms of human and financial resources. For those jurisdictions without an oversight body, there is no one for the agencies to contact for support or with questions and concerns, and the weight of implementation and public education falls squarely on their already overburdened shoulders. The issue, however, is that without mandatory legislation these critical body’s may be reduced or eliminated.

In Trinidad and Tobago, for example, their Freedom of Information Law did not provide for a statutorily mandated oversight mechanism, although there does exist a requirement for periodic reporting. For the first two years of implementation from 2001-2003, the Trinidadian Parliament voluntarily established an Access to Information Unit. During these years, the Unit supported the public functionaries, received and monitored agency implementation reports, and conducted training and public education campaigns. After two years, the Parliament reduced the staff and then finally eliminated the Unit and moved their responsibilities to a division under the Ministry of Public Administration and Information. According to accounts, when the Unit disbanded the agencies almost completely stopped fulfilling their report requirements and the number of requests declined dramatically. For example, in the first quarter of 2001, 52% of the agencies completed their reports and in 2002 during the same period there was a compliance rate of 45%. In 2003, when the Unit no

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<sup>3</sup> Freedom of Information: One Year On, Information Commissioner’s Office, United Kingdom, January 2006.

longer existed, during the same reporting quarter the number of reports completed had dropped to 7%. Total requests received in Trinidad have continued to be low, with fewer requests over the last three years in Trinidad than have currently been made in Jamaica in the first two years of implementation (one year of which was phased implementation), and an 80% decline in requests following the disbanding of the Trinidadian Access to Information Unit. In addition, without dedicated responsible personnel, the submission of Trinidad's annual report to Parliament for 2001-2003 was delayed a number of years. As the Jamaican Unit is not legislatively mandated it is potentially subject to the same fate as the Trinidadian Unit.

A similar experience has been demonstrated in Belize, where the lack of a specifically legislated oversight body in the Freedom of Information Act has resulted in a corresponding low awareness of the law, no tracking or monitoring of implementation, and a dismally low request rate. In fact, in Queensland State Australia, a study recently found that an independent enforcement body was not enough and that they also needed a "new monitoring/promotion function."<sup>4</sup> The 2001 report recommended the creation of a freedom of information oversight entity designed to promote public awareness, provide advice and assistance to applicants, and monitor public agencies' compliance.

For these reasons, a number of countries have created a statutory oversight body, with powers and responsibilities clearly outlined within their legislation. By mandating the oversight body within the law, rather than rely on the good will of the Parliament or responsible Minister, jurisdictions have sought to overcome the problem of changing administrations and scarce resources being drawn away from the entity.<sup>5</sup> In these cases, the statutory oversight bodies have served to enhance the government's implementation efforts and ensure that the objectives of the law are more fully met.

Jamaica's Access to Information Act would benefit from a specifically legislated specialized access to information oversight body. As is found in the most advanced laws, the Act could make provision for an implementing agency or individual to be in charge of reviewing the manner in which records are maintained and managed by public authorities; monitoring implementation efforts and the automatic publication of documents by the public authorities; receiving monthly reports and assisting in the annual report to Parliament, and training of public servants and material development. In implementing the Act, thus far, one of the greatest concerns raised has been the lack of a diverse requester base and applications arriving to the wrong public body, incomplete or confused. Greater public education will address many of these complaints. Thus, this body could also assume the responsibility for public education and promotion campaigns, including raising awareness about the functioning of the Act and the government's successes.

#### **b. Costs**

The Jamaica Access to Information Act as presently written fully conforms to emerging international standards and experiences. The general principle with relation to costs is that there should be no fee for the request, search and compilation of information, but that minimal payments should be applied to offset the reproduction costs. There are a number of

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<sup>4</sup> Report of the Queensland Legal, Constitutional and Administrative Review Committee, December 2001. See also Hodgson D., and Snell, R. Freedom of Information in Queensland – A Preliminary analysis of the Report of the Queensland Legal, Constitutional and Review Committee.

<sup>5</sup> For jurisdictions with statutory oversight bodies, *see*, South African Promotion of Access to Information Act, the United Kingdom Freedom of Information Act, Mexico Transparency and Access to Information Act, and Canada Access to Information Act.

reasons to limit the fees to reproduction costs only. First, fees for submitting a request for information can serve as an obstacle for many users. For example, when Ireland amended their freedom of information law to include a flat £10 charge for information requests the number of request dropped by almost a third. Second, it is costly for the government to process the fees and they do not recoup the actual costs. In Canada there is a C\$5 dollar charge, but it costs the administration significantly more just to process the fee. The Canadian Information Commissioner in his annual report of 2004 stated that “At their current levels and as currently administered, fees for requests under the Act seem designed to accomplish one purpose--and one purpose only: to discourage frivolous or abusive access requests. The fee system is not designed to generate revenue for governments or even as a means of recovering the costs of processing access requests. That is not an acceptable premise on which to build a right of access.” Moreover, many experts argue that the provision of information is a fundamental government service, much like the police department, libraries or public education and as such should not extract an additional cost.

In addition, it may be unfair to charge requesters for the actual time public officers spend processing and searching for documents. In many countries with recently enacted access to information laws, the archiving and recordkeeping systems are often in disarray. What might take minutes to find under well-ordered systematized record-keeping systems, may take days or weeks when records are unorganized and dispersed. In these cases, to charge the requester for the time it takes to find a document is patently unfair as the citizen will bear the burden of the state’s poor administration of records. Finally, fees can inequitably limit the number of requests from persons outside of the capital when there is no process for paying locally.

As written, the Jamaica law provides that a fee may be charged for reproduction costs only, and that this may be waived, reduced or remitted. In practice, presently there is not a systematic mechanism for remitting payment for photocopying, other than in person. Should additional fees apply for submission of requests or search for documents, this problem would be amplified. Fees for search add a dimension of discretionality to the process, as the time that it takes to find documents depends greatly on the information officer and the organization of information. Consequently, the trend is away from including such fees and rather finding other cost-saving means of providing information such as automatic publication (discussed below). Therefore, we would encourage the retention of the fee schedule as presently exists.

### **c. Automatic Publication**

The “right to know” approach, whereby governments automatically publish as much information as possible, is important in increasing transparency, reducing costs for both the state and the requester, and making the law more convenient. As discussed above, governments are often faced with resource limitations and the need to seek mechanisms to reduce bureaucratic costs while continuing to meet all of their obligations. One way in which this can be accomplished is through automatic publication. The more information that is made available, without the need for individualized decision-making related to each request, the less costly for the state.

Thus, most modern laws include provisions for automatic publication of certain official documents by each public authority. Unfortunately, if these provisions are not clear or are too difficult to implement they will not encourage public authorities to publish and widely disseminate documents of significant public interest. Thus, the automatic publication scheme must be well-defined and mandated within the law.

A number of jurisdictions including India, South Africa, and the United Kingdom have, within their access to information laws, unambiguously spelled-out provisions governing the automatic publication of information. This has provided clear guidance to the public authorities on their duties, and in many cases had a great impact on the public sector and accountability to the public. In Trinidad and Tobago, the law requires that each public authority publish three statements, in accordance with Sections 7, 8 and 9 of the Act. Where a statement has not been published the Minister under the Act is required to give reasons, published in the Gazette, for the failure to publish. Broadly, the statements must contain the purpose, structure and functions of the authority, type of information they hold and how members of the public may participate in the decision making processes of the authority; a description of those documents that guide the employees of the public authority in doing their work; and a complete list of certain types of documents created after the commencement of the Act. The Act itself sets out clear guidelines and lists the types of documents that must be contained in the statement, as well as where and when it must be published.

The Jamaica Access to Information Act of 2002 provides for a “roadmap,” supported by the First Schedule, i.e. statement of the public authorities’ organization and functions and documents held. But it is not clear within the law that these documents will be automatically published, even the most benign. Moreover, in practice, it appears that the majority of public authorities in Jamaica have not complied with even this more limited mandate. Perhaps additional details, such as the lists included within the Mexico, India and Trinidad legislation, with relation to the types of documents that must be made available automatically, where these must be published (such as on each agencies websites) and frequency with which these publications must be made current would help to ensure better understanding and compliance with this cost-saving and transparency promoting mandate.

#### **d. Reasonableness of Request**

A denial based on “reasonableness” is discretionary, and one that is ripe for abuse. Nevertheless, it is important that the public authorities have some mechanism for addressing voluminous requests, such as extending time limits or direct contact with the applicant to reformulate their request. When a provision is made to address “the reasonableness of a request,” the standards for applying such powers must be exacting and establish affirmative duties on the public officials prior to its invocation. If utilized, these provisions must be carefully drawn and executed to preserve the international tenet that a request for information may be made regardless of the reason or personal interest in the document.

In ARTICLE 19’s Principles on Freedom of Information they suggest that before any request is denied based on reasonableness, the public authorities and access officers should be required to “assist applicants whose requests are unclear, excessively broad or otherwise in need of reformulation.” In both the New Zealand Official Information Act and the Trinidad and Tobago Act there is a mandate to assist the applicant prior to a refusal on the grounds of reasonableness, stating that “before refusing to provide information on [these] grounds the authority has taken reasonable steps to assist the applicant to reformulate the application so as to avoid causing such interference.”<sup>6</sup>

Similarly, the Australian Freedom of Information Act allows a request to be refused when the “Agency or Minister is satisfied that the work involved in processing the request: (a) in the case of an agency—would substantially and unreasonably divert the resources of the agency from its other operations; or (b) in the case of a Minister—would substantially and

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<sup>6</sup> The Freedom of Information Act, 1999 sec. 21(1), Trinidad and Tobago.

unreasonably interfere with the performance of the Minister's functions".<sup>7</sup> Once again, there are a number of conditions which must be met before such a decision is taken, including written notice and identification of an officer of the agency or member of staff with whom the requester may consult in order to remove this ground for refusal. There is even a specific provision that states that refusal may not be based on the costs of copying or reason for the request, and this decision is appealable.

This section of the Act has been criticized by the Australian Law Reform Commission (ALRC) on the grounds that the power to refuse a request without processing it is potent and that every attempt should be first made to assist the applicant. In addition, the ALRC notes that agencies should not be able to use this section simply because their information management systems are poorly organised and documents take an unusually long time to identify and retrieve. In other words, the decision should be based on the reasonableness of the request itself, not on the agencies ability to satisfy the request.

Thus, many jurisdictions have found other mechanisms for addressing voluminous requests, such as extending the time period for processing. The Canadian Access to Information Act allows the authority to extend the time limit for a reasonable time when the request is for "a large number of records or necessitates a search through a large number of records and meeting the original time limit would unreasonably interfere with the operations of the government institution or when consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit," and notice is provided to the requester.<sup>8</sup>

Currently the Jamaican Access to Information Act does not include provisions for dealing with voluminous or broad requests nor is there any affirmative duty to assist applicants. The Act provides that assistance be made available when requested and that applicants should have an opportunity for consultation, but these place the duty on the requester of information rather than the responsible information officer. Should there be contemplation of reforming the act to address the issue of reasonable requests, we would urge consideration of allowing the extension of time period rather than outright denials and that all safeguards be established, such as an affirmative duty for the information officer to assist the applicant. Finally, automatic publication of large bodies of documents again may serve to reduce the number of voluminous requests, and increased public education assists applicants in submitting more carefully crafted requests.

### **3. Public Interest Test**

All access to information laws include exemptions for release of information when such disclosure would cause a specified harm to the public interest. In the best access to information laws, exemptions to the right to access information are narrowly and clearly drafted and explicitly define the public interest that is being protected (and harm avoided) by the disclosure denial. Nonetheless, in ultimately determining whether a document is exempt from disclosure, the best international practice dictates that a second "public interest" test be administered. Under this public interest test, a balancing exercise is undertaken that weighs the potential harm in releasing the document against the public good in the document's disclosure.

The more modern access to information laws, such as South Africa, the UK, and most Canadian Provinces, include a general statutory provision for a "public interest test" prior to a

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<sup>7</sup> Freedom of Information Act, 1982, sec. 24, Australia.

<sup>8</sup> Access to Information Act, 1985, sec. 9, Canada.

denial based on one of the listed exemptions. In the Trinidad law there is a comprehensive public interest test, which states that:

*S. 35. 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) Unauthorised use of public funds,*

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

In the UK's Freedom of Information Act 2000, the public interest test applies to any exempt information, and mandates that the public authority must consider if "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information".<sup>9</sup> A similar public interest test is included in New Zealand's Official Information Act Section 9(1) whereby consideration must be given as to whether, "in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available."

In Part III of the Jamaica Access to Information Act there are a number of exemptions where release of information would pose a significant harm to a protected interest. However, there are only two exemptions subject to the critical public interest test.<sup>10</sup> Undoubtedly, as witnessed in similar legislation, if the Jamaica Act added an effective public interest override that applies to all it would help ensure an appropriate balance between the application of exemptions and release of information in the public interest.

#### **4. Enforcement**

The enforcement mechanisms of any access to information law are crucial to the ultimate success of the new transparency regime. If enforcement mechanisms are weak or ineffectual it can lead to arbitrary denials of information or ignoring of requests. And if applicants believe that there is not an effective mechanism for review, they will lose confidence in their right to access to information. Thus, some independent external review mechanism is critical to the law's overall effectiveness.

In the multitude of countries that now count on a statutory right to information, there are a number of different models for enforcement of the right to information, but in all of the most successful information regimes, the review body is:

- Accessible
- Affordable
- Timely

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<sup>9</sup> Sections 2(2) and (3), Freedom of Information Act (United Kingdom). In the United Kingdom the public interest test does not apply to a number of areas including information already available, court records, personal information, information relating to security matters, Information related to Parliamentary Privilege and information given in confidence

<sup>10</sup> See, sec. 19 Documents Revealing Government Deliberations and sec. 21 Documents Relating to Heritage Sites.

- Independent, and
- Specialist.

At present, the Jamaica Access to Information Act provides a number of appeal mechanisms, including an Appeals Tribunal. However, in practice this has proven difficult for users and burdensome for the public authority. In our observations, there have been very few appeals thus far. Although one reason for this may be positive, i.e. agencies are making correct decisions so that there is no basis for appeal, there may be a number of other reasons that applicants are not seeking appeals. It may be that there is a lack of awareness as to the right to appeal, the regulations relating to appeals may be too burdensome, or the requirements for appeal unclear or weak. Therefore, consideration may be due for methods of strengthening the appeal provisions to ensure that in practice they more fully meet the five criteria above.

The Jamaica Access to Information Appeals Tribunal is a body of five persons appointed by the Governor-General after consultation with the Prime Minister and Leader of the Opposition. The members serve part-time with no specific legislative guidance as to their duties or the resources available to them to comply with their mandate. The Appeal Tribunal has the power to make binding decisions in relation to appeals against public authorities for refusal of access, deferment, or related to fees for access to information. Additional guidance and powers may be needed to enable the Tribunal to carry out its mandate in a way that is more accessible to member of the public and ensures greater timeliness of both hearings and decisions to appellants.

#### **a. Powers and Orders**

Currently s.32 of the Jamaica Act states that the Appeal Tribunal may make any decision which could have been made on the original application. This provision is more limiting and a broader right, such as found in the Connecticut Freedom of Information Act, may allow greater latitude to address the concerns on appeal. In the Connecticut law, the Information Commission may “provide any relief that the Commission, at its own discretion, believes appropriate to rectify the denial of any right conferred by the Freedom of Information Act.”<sup>11</sup> Moreover, there are a number of decisions by the public authorities which appear exempt from review or it is unclear, such as the issuance of a certificate of exemption or transfer of a request.

As with most jurisdictions that have an interim body with binding order powers, the Appeal Tribunal could be vested with the specific power to uphold the decision under review (affirm); reverse the decision and make their own order (vary and set-aside); remand to the agency for further action; find that the information is not exempt, or that on balance release of the information is in the public’s interest. The law could further detail such powers as the right to issue a decision when the statutory period has elapsed, the ability to recommend sanctions, and the ability to review and reverse a certificate of exemptions.

#### **b. Power to Carry out Inquiries and Investigations**

Most access to information laws provide extensive powers for the decision-maker to carry out formal inquiries and investigations as to how and why a document was created or destroyed and investigate allegations of altering of records and refusal of access. In the Jamaica Access to Information Act there is only a provision to inspect exempt documents but no power to carry out investigations. The Access to Information (Appeal Tribunal) Rules 2004 passed in August 2005 also does not address in any detail the power of the tribunal to

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<sup>11</sup> The Connecticut Freedom of Information Act, sec. 1-206(2).

carry out investigations and inquiries. In the Ontario Freedom of Information and Privacy Act, in the course of an inquiry, the Commissioner is empowered to summon and examine on oath any person to the same extent as a superior court, when there is a belief that he or she may have information relating to the inquiry. This power allows a Commissioner to carry out further investigations into any matter brought to their attention including the right to utilize the results of such an investigation at the hearing after a copy of the same shall be furnished to the appellant.

The Tribunal would benefit from a specific power to serve the public authority with a notice (sometimes called an “information notice”) requiring it to furnish the Tribunal with specific data or documents within a specified time period.<sup>12</sup> The Irish Freedom of Information Act contains useful language as it provides that the Information Commissioner has the power to require the head of the Authority concerned to furnish additional justifications within 3 weeks. Provisions could also be added to ensure the power to carry out an inquiry to the same extent as a superior court of record, i.e. to summon and examine on oath any person who, in the Tribunal’s opinion, may have information relating to the hearing.

### **c. Power to Mediate**

The trend in administration of justice is to provide options for alternative dispute resolution, and access to information laws are no exception. In many of the more recently passed or amended laws, there are specific provisions in the Act for mediation prior to litigation. Hearing all appeals cases, whether orally or on the record, is costly, time consuming and depending on the size of the administration, not realistic. It can also be more cumbersome and intimidating for the appellant if hearings are extremely formal akin to a court and can make the process adversarial in nature. Mediation, on the other hand, “can succeed in settling some or all of the issues, reducing the number of records in dispute, clarifying the issues and helping the parties to better understand the Acts.”<sup>13</sup>

Therefore, in many jurisdictions, the enforcement body is vested with the power to mediate claims before they move to the hearing stage. The January 2006 report of the UK Information Commissioner indicates that since the Act came into force at the end of 2005, the Information Commissioner’s Office has received over 2300 complaints about public authorities not releasing information. Of these, almost half of them have been resolved either by negotiation or informal resolution. This is also true of the Ontario Information Commissioner where in their 2003 report notes that sixty percent (60%) of the appeals were mediated in full and that mediation has been the preferred method of dispute resolution since the inception of the Information Commissioners Office.

In the Jamaica Access to Information Act and in the Appeals Tribunal Regulations there are no provisions for mediation, even though mediation is recognised and used in the Jamaican Supreme Court and Resident Magistrate Courts. Of course, safeguards must be considered to ensure the integrity of the mediation and adjudication process and avoid any inherent conflict of interests. Provisions could be considered to make specific allowances for mediation of a disputed access to information decision when all parties agree.<sup>14</sup> Binding mediation efforts could be undertaken at any stage of the hearing process, and if the matter is not resolved through mediation, it would then proceed to a hearing.

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<sup>12</sup> Freedom of Information Act 2000, United Kingdom.

<sup>13</sup> The Appeals Process and Ontario’s Information and Privacy Commissioner, September 2000.

<sup>14</sup> See, Freedom of Information and Privacy Act, Ontario Canada, Freedom of Information Act 1992, Western Australia.

#### **d. Appeal Tribunal Conformation and Procedures**

Experience has shown, in countries such as Canada, the UK, and Mexico, that for intermediary appeal bodies to be successful they must be endowed with appropriate resources, including full-time personnel that can become expert on the intricacies of applying the access to information law and support the Tribunal in their investigations, mediations, and hearings. Unlike other jurisdictions, the Jamaican Access to Information Appeal Tribunal does not meet on a regular basis, nor does it count on an independent secretariat, with a staff and a budget dedicated solely to the support of its proper functioning. A secretariat is helpful in assisting claimants, particularly when the rules for appeal are quite formalistic. In practice, resolution of appeals in Jamaica has taken many months thus adversely affecting the realization of law's objectives, and this may be linked to a lack of human resources and full-time members of the Tribunal. In Western Australia where there is a specialized and resourced Information Commission, they responded to most written inquiries in a matter of days and in Ireland over 50% of the cases were resolved within 3 months (although in the State of Connecticut, the Commission 328.4 days from the date of complaint until final resolution).

For the Tribunal to embody the authoritative weight found in other like bodies, reform of the system and regulations may be necessary. Consideration could be given to creating an independent, full-time professional secretariat to support the Tribunal, providing greater procedural guidance within the statute and reviewing the internal rules to assure they more closely conform to the principles listed above.

#### **4. Authoritative Weight of Access to Information Legislation**

The Jamaica Access to Information Act specifically states in s.35 that, "nothing in the Access to Information Act shall affect any other Act other than the Official Secrets Act". The report of the Joint Select Committee on access to information, March 2002, in commenting on submissions in relation to this section of the law stated, "There were a number of Acts that would be affected by the ATI Act...all other related Acts should be reviewed as early as possible to ensure there is uniformity." The effect of s. 35 of the ATI Act is to require the Government to complete the task of reviewing large numbers of sections of legislation and amending each individually over a number of years. This is often difficult for any government to complete as demonstrated by the examples of the UK, Australia and Canada where the review of such laws has on average taken more than 3 years to complete.<sup>15</sup>

The modern practice is to ensure that the ATI law is the umbrella, primary law governing all issues relating to access to information. This ensures that all other legislation is interpreted, as far as possible, in a manner consistent with the objective of transparency and openness. When well drafted, the exemption section of an Access to Information law will cover all documents that should legitimately be withheld from disclosure, this obviating the need for other duplicative or potentially inconsistent and conflictive laws.

In the United Kingdom a specific provision was added to ensure the power to bring the existing legislative regime into conformance with their Freedom of Information Act. Section 75 of the UK Freedom of Information Act vests the Secretary of State with the authority to

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<sup>15</sup> UK Government identified nearly 250 statutory restrictions on the disclosure of information in 1993. They are listed in the 'Open Government' white paper, Cm 2290, Annex B and to be found at <http://www.dca.gov.uk/statbarsrep2005sm1.pdf>

order repeal or amend the enactment of any provision that prohibits disclosure of information “for the purpose of removing or relaxing the prohibition,” so that these other laws become consistent with the new information regime.

The difficulty with the current approach taken in the Jamaican ATI Act is that it allows any other statutory provisions to take precedence over the Act, which may prevent access to information in all circumstances including those where there may be an overriding public interest in disclosure. Moreover, it creates a greater burden on public authorities and responsible officers to review all potentially determinative legislation and regulations, rather than just the Access to Information Act. To ensure greatest consistency with the principles of transparency, and aide the public servant in fulfilling its tenets, a specific provision such as found in the UK law may be considered.

## **Conclusion**

The Jamaican government and public administration has shown great commitment to instituting a more open and transparent regime. Through the use of the Access to Information Act, civil society applicants have demonstrated their interest in the success of the Act and the benefits that information can provide as they strive to more fully participate in public life and more effectively exercise their fundamental human rights. In reflecting on the tenets of the law and the experiences in implementing and enforcing the Access to Information Act of 2002, Jamaicans have an opportunity to further advance their right to information. The Carter Center remains dedicated to supporting this process, and looks forward to continuing our rewarding collaboration.

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