



# Commonwealth Human Rights Initiative

NGO in Special Consultive Status with the Economic & Social Council of the United Nations

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25 January 2007

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Dear Ms Simpson Miller,

### Re: Implementation of the Access to Information Act 1992

I am writing from the Commonwealth Human Rights Initiative (CHRI), an international non-government organisation headquartered in New Delhi. CHRI's Right to Information Programme works throughout the Commonwealth to promote the right to information, in particular, by assisting governments to develop strong access to information legislation and to support implementation of access laws.

I was concerned to read in the *Jamaica Gleaner Online*, dated 3 December 2006, a report of a recent staff meeting where civil servants working in the Ministries in your portfolio were given advice concerning their duties of disclosure under the *Access to Information Act 1992* (ATI Act). As I understand, you are reported as having advised civil servants that their duties under the Act do not override or dilute their duties to withhold information in accordance with the *Official Secrets Act 1911*. In addition, the report makes reference to your alleged concerns over the impact of disclosure of certain types of information. Although I deeply commend you on being one of the only 13 countries in the Commonwealth to have enacted Access to Information legislation, if the news report is an accurate representation of your concerns, I would like to take this opportunity to encourage you to withdraw or amend the *Official Secrets Act* in order to clarify the precedence of the ATI Act, and to advocate for its full and proper implementation.

As you are obviously aware, an ATI law can be a key tool in the establishment and success of democratic governance. By creating a culture of openness and transparency, freedom of information can serve to reduce any gaps between official and public knowledge and create an informed citizenry who are able to participate fully in the democratic process. Jamaica's ATI Act recognises this in its preamble, stating: 'The objects of the Act are to reinforce and give further effect to certain fundamental principles underlying the system of constitutional democracy, namely – (a) governmental accountability; (b) transparency; and (c) public participation in decision making'. It also serves to support the rule of law, and in such an atmosphere, access to information is a tool to recognise people's human rights.

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First, it is imperative that when an ATI law is enacted, all existing legislation which advocate official secrecy or serves to undermine the provisions of the act are repealed or amended as part of the implementation process. Retaining secrecy and openness laws simultaneously is always problematic: If one law encourages a culture of openness amongst public officials but another informs them that they will be prosecuted for any unauthorized information disclosures, they are more than likely to err on the side of caution and continue to withhold information. This essentially undermines the ATI Act and neutralizes its effectiveness as a tool for public use. Operating both the Jamaican ATI Act and the current *Official Secrets Act* simultaneously will inevitably lead to confusion amongst public officials making it difficult for them to understand exactly how much and what kinds of information they are able to disclose to the public. It is imperative that officials are given clear and unambiguous guidelines regarding their obligations to respond to public enquiries for information and that the *only* exemptions to disclosure of information are those found in the ATI Act itself.

Therefore, in line with the Government's 2005 promise, we recommend that the *Official Secrets Act* should be repealed; alternatively the ATI Act should be amended to make it clear that its provisions override all other secrecy laws or clauses contained within other legislation.

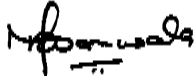
Secondly, the news report refers to your concern over the release of specific types of information – information of a personal nature and information regarding national security. If the report is an accurate representation of your speech, your concerns regarding the disclosure of personal information are well-founded; however, the ATI Act already contains sufficient provisions to ensure that such information is protected. Section 22(1) explicitly states that 'a public authority shall not grant access to an official document if it would involve the unreasonable disclosure of information relating to the personal affairs of any person, whether living or dead.' Likewise, the Act has a similar clause exempting information whose disclosure may prove a threat to national security. Section 14(a) states that official documents are exempt from disclosure if this would 'prejudice the security, defense or international relations of Jamaica.' Further exemptions prevent the disclosure of information which has been given in confidence from foreign governments and information which may threaten or endanger an official's life.

If anything, when compared to international best practice, these exemptions are considered unnecessarily broad. In order to fulfill the objectives of the Act as stated in its preamble, *all* exemptions in the law should be subject to a 'public interest override' wherein exempt information should still be disclosed if the benefits to the public interest outweigh the need to keep the information secret. Even with the inclusion of such a provision the exemptions will be sufficient to protect both the rights of the public and the needs of the government. It also ensures recognition of the full breadth of people's fundamental human right to information which must be protected at all times. It is recommended that the ATI Act is amended to include such an overriding provision (as is already included for certain specific exemptions in the Act).

Jamaica has an advantage over many of its Caribbean neighbours by already having a law that guarantees their right to information, and I hope you will encourage its full and proper implementation. Such a law can have many benefits for a country and I have attached a summary of these in Appendix 1. For your information, I have also attached in Annex 2 a summary of key principles which should underpin any effective right to information law which are given in more detail in the enclosed CHRI 2003 Report, *Open Sesame: Looking for the Right to Information in the Commonwealth*. To support you in implementing the law I have also enclosed a step-by-step guide on effective implementation: *Implementing Access to Information - a practical guide to operationalising freedom of information laws*.

I hope that you find these materials useful and informative. In case you require our services to assist with the implementation of the ATI Act or for more copies of our resource materials, please do not hesitate to contact me on (0)9810 199 745 or (011) 2685 0523 or via email at [majadhun@vsnl.com](mailto:majadhun@vsnl.com). Alternatively, please contact Ms Claire Cronin, Programme Officer, Right to Information Programme at [claire@humanrightsinitiative.org](mailto:claire@humanrightsinitiative.org).

Yours sincerely



Maja Daruwala  
Director

Encl: CHRI Report: '*Open Sesame*: Looking for Right to Information in the Commonwealth';  
CHRI Report: Implementing Access to Information: A Practical Guide for Operationalising freedom of information laws;

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## Annex 1: Arguments in support of right to information

In 1946, more than fifty years ago, the United Nations General Assembly recognised that “Freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated”.<sup>1</sup> Soon after, the right to information was given international legal status when it was enshrined in Article 19 of the International Covenant on Civil and Political Rights which states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and *to seek, receive and impart information and ideas through any media and regardless of frontiers*” (emphasis added). Over time, the right to information has been reflected in a number of regional human rights instruments, including the African Charter on Human and Peoples’ Rights<sup>2</sup>, the American Convention on Human Rights<sup>3</sup> and the European Charter of Human Rights<sup>4</sup>. This has placed the right to access information firmly within the body of universal human rights law.

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

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

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

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

*It supports economic development:* The right to information provides crucial support to the market-friendly, good governance principles of transparency and accountability. Markets, like governments, do not function well in secret. Openness encourages a political and economic environment more conducive to the free market tenets of ‘perfect information’ and ‘perfect competition’. In turn, this results in stronger growth, not least because it encourages greater investor confidence. Economic equity is also conditional upon freely accessible information because a *right* to information ensures that information itself does not become just another commodity that is corralled and cornered by the few for their sole benefit.

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

<sup>2</sup> See Article 9(1), *African Charter on Human and Peoples’ Rights*, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 27 June 1981.

<sup>3</sup> See Article 13(1), *American Convention on Human Rights*, 1969, Costa Rica, OAS Treaty Series No. 36, 1144 U.N.T.S. 123.

<sup>4</sup> See Article 11(1), *Charter of Fundamental Rights of the European Union*, 2000, Nice, Official Journal of the European Communities, C 364/1.

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

## Annex 2: Best Practice Legislative Principles

CHRI's 2003 Report, *Open Sesame: Looking for the Right to Information in the Commonwealth* (see enclosed), captured the key principles which should underpin any effective right to information law, drawing on international and regional standards, evolving State practice, and the general principles of law recognised by the community of nations. Article 19, an NGO which specifically works on right to information, has also developed "Principles on Freedom of Information Legislation" which were endorsed by the United Nations Special Rapporteur in 2000.<sup>5</sup> The Organisation of American States<sup>6</sup> and the Commonwealth<sup>7</sup> - the latter of which Mauritius is a member - have also endorsed minimum standards on the right to information.

These various generic standards have been summarised into the five principles below, which I would encourage you to consider when you finalise your own right to information bill.

### Maximum Disclosure

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

To ensure that maximum disclosure occurs in practice, the definition of what is covered by the Act should be drafted broadly. Enshrining a right to access to "information" rather than only "records" or "documents" is therefore preferred. Further, the Act should not limit access only to information held by public bodies, but should also cover private bodies "*that carry out public functions or where their activities affect people's rights*". This recognises the fact that in this age where privatisation and outsourcing is increasingly being undertaken by governments, the private sector is gaining influence and impact on the public and therefore cannot be beyond their scrutiny. Part 3 of the South African *Promotion of Access to Information Act 2000* provides a very good example to draw on.

Bodies covered by the Act should not only have a duty to disclose information upon request, but should also be required to proactively publish and disseminate documents of general relevance to the public, for example, on their structure, norms and functioning, the documents they hold, their finances, activities, any opportunities for consultation and the content of decisions/policies affecting the public. Section 4 of the new Indian *Right to Information Act 2005* provide a useful model.

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

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

<sup>6</sup> See Organisation of American States - General Assembly (2003) *Access to Public Information: Strengthening Democracy*, resolution adopted at the fourth plenary session, June 10 2003, AG/RES.1932 (XXXIII-O/03).

<sup>7</sup> See (1999) Commonwealth Freedom of Information Principles, in *Promoting Open Government Commonwealth Principles And Guidelines On The Right To Know*, Report of the Expert Group Meeting on the Right to Know and the Promotion of Democracy and Development, Marlborough House, London, 30-31 March 1999.

important in order to send a message to the public that the government is serious about opening itself up to legitimate scrutiny.

### Minimum Exceptions

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

Even where exemptions are included in legislation, they should still ALL be subject to a blanket “public interest override”, whereby a document which is presumed exempt under the Act should still be disclosed if the public interest in the specific case requires it.

### Simple, Cheap and Quick Access Procedures:

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

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

### Effective Enforcement: Independent Appeals Mechanisms & Penalties

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

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

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

has shown that these bodies are often already overworked and/or ineffective, such that they have rarely proven to be outspoken champions of access laws.

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

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

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

#### *Monitoring and Promotion of Open Governance:*

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

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