

**REPORT OF THE JOINT SELECT COMMITTEE TO CONSIDER AND REPORT ON THE
OPERATION OF "THE ACCESS TO INFORMATION ACT, 2002" RELATIVE TO THE
REVIEW OF THE LEGISLATION AS PROVIDED BY THE ACT**

Members of this Honourable House are reminded that on March 27, 2008, the House of Representatives, on a motion moved by the Leader of the House, passed the following resolution:

BE IT RESOLVED that this Honourable House appoint a Special Select Committee comprising the following Members:

Hon. Olivia Grange - Chairman
Mrs. Marisa Dalrymple-Philibert
Mr. Desmond Mair
Mr. Tarn Peralto
Mrs. Sharon Hay-Webster
Rev. Ronald Thwaites
Ms. Lisa Hanna

to sit jointly with a similar Committee, to be appointed by the Senate, to consider and report on the operation of "The Access to Information Act, 2002" and to make recommendations relative to the review of the legislation as provided for in the Act.

On the 27th day of March, 2008, on a motion moved by the Leader of Government Business in the Senate, a similar resolution was passed and the following Members were appointed to serve on the Committee:

Senator the Hon. Dr. Ronald Robinson
Senator Warren Newby
Senator Hyacinth Bennett
Senator André Franklin
Senator Sandra Falconer
Senator Basil Waite

On June 23, 2009, the House of Representatives passed a resolution deleting the name “**Olivia Grange**” from the list of Members and appointing “**Daryl Vaz**” as chairman of the Committee.

On the 27th day of November, 2009, the Senate passed a resolution deleting the name “**Hyacinth Bennett**” from the list of Members and substituting therefor “**Dennis Meadows.**”

On the 31st of March, 2009, the Leader of the House, having obtained suspension of the Standing Orders, moved a motion thereby enabling the Committee to complete the deliberations on the matters that were under consideration prior to the prorogation of Parliament. The Leader of Government Business moved a similar motion in the Senate on March 27, 2009. A further carry-over motion was moved in the House on March 17, 2010 and in the Senate on the 19th day of March, 2010.

On July 30, 2010, the Leader of Government Business in the Senate passed a further resolution deleting the name “**Ronald Robinson**” from the list of Members and substituting therefore the name “**Ian Murray**”

Your Committee began its deliberations on March 26, 2009 and held sixteen (16) meetings, the last of which took place on January 27, 2011. Written submissions were received from the following groups and individual:

The Access to Information Advisory Stakeholders Committee

The Media Association of Jamaica

Mrs. Carole Excell, LLM, LLB

1.0 OVERVIEW

The Access to Information Act, 2002 (hereinafter referred to as “the Act”) aims to preserve certain fundamental principles underlying the system of constitutional democracy namely governmental accountability, transparency, and public participation in decision-making. The Act was brought into force on January 5, 2004 and made applicable to the various public authorities on a phased basis. It seeks to enable the shift from a culture of secrecy to one of openness. To facilitate that change, on

July 5, 2005, all public authorities were subjected to the provisions of the legislation, which gives the public a general right of access to official documents as defined in paragraphs (a) through (d) of section 3. Section 38 makes provision for a review of the Act no later than two years following the appointed day and as such there was a review by a Joint Select Committee of Parliament between January and March 2006.

This present Committee, as part of its mandate, has continued the review of the operation of the Act and now presents our findings and recommendations.

2.0 FINDINGS AND RECOMMENDATIONS

2.1 TITLE OF THE ACT

Your Committee recommends that the existing name of the Act be retained.

2.2 DEFINITION OF DOCUMENT

Your Committee considered the submission that the definition of the term 'document' was too narrow. However, the Members are of the view that the existing definition should remain since the term is clearly defined in the Act.

2.3 TELEPHONE REQUESTS

Concern was raised that the procedure for requesting documents via the telephone was neither simple nor straightforward and therefore regulation 8 of the Access to Information, 2003 ("the Regulations") should be amended. Your Committee considered the matter at length and recommends that there be no amendment to either the ATI Regulations or the Act since adequate provision has been made for addressing telephone requests. With regard to concerns about when the thirty-day period for granting access would begin, it was made clear that it would start on the day of the telephone request.

2.4 FEE PAYMENT SYSTEMS AND PAYMENT FOR DELIVERY BY REGISTERED MAIL

It is the view of the Members that the methods of payment should be simplified and the Regulations should be amended to permit public authorities to collect fees for postage. Accommodation should be made for payments online or through any local financial institution.

2.5 SECTION 6

Concern was expressed about section 6 (4) of the Act, which makes it clear that where a document is accessible under some other statutory regime, access to the document is to be obtained under that other statutory regime and not under the Access to Information Act.

2.6 LACK OF RESPONSE TO APPLICATIONS MADE UNDER THE ACT AND DELAY IN OBTAINING INFORMATION

Your Committee was told that even though section 7(4) of the Act stipulated that a public authority should respond no later than 30 days following the receipt of an application, applicants have had to wait for months without getting a response. The Members were advised that in most cases requests were granted within the specified period. However, some requests were voluminous or difficult to handle and would require additional time.

It was recommended that regulation 12 of the Regulations made under the Act be amended to specify that receipt of applications should be acknowledged within 5 business days, to which the Committee agreed.

2.7 NON-EXISTENCE OF DOCUMENTS

It was recommended that the Regulations be amended to indicate that access officers should notify applicants in cases where requested documents do not exist. Having considered the matter, your Committee recommends that section 7 (5) of the Act be expanded to address the non-existence of documents. It is also the view of the Members that it should be clear as to the course of action to be taken by the applicants in cases where the requested document did not exist.

2.8 TRANSFERS

Your Committee is of the view that applicants should have the right to make an appeal if they are dissatisfied that their requests had been transferred. The Members recommend that section 30 (1) of the Act, which deals with internal reviews and 32 (2), which relates to appeal be amended to address the issue of transfers.

2.9 INTERNAL REVIEW PROCEDURES

It was proposed that the application form for requesting documents be amended to include a section, which would clearly indicate whether or not the permanent secretary was involved in the decision to grant or deny access to information. Your Committee discussed the issue at length and recommends that the Regulations be amended to make it clear to applicants that if a principal officer took the decision to deny access to information, they would have to make appeals to the Appeal Tribunal as there could be no internal reviews.

Your Committee is also of the view that when applicants are denied access to documents they should receive a response which would not only inform them of the reasons for the denial, as is the case now, but would indicate the rank of the officer who took the decisions without naming the individual. The applicants would be told in the response that their requests had gone through the various channels within the entity but a decision was taken based on the law that governs access to information not to grant access. The applicants would also be advised as to the next steps to take.

2.10 SECTION 36

A proposal was made to the Committee that section 36 of the Act should be amended to make provision for the reports to include the number of applications transferred to and from the public authority filing the report. Your Committee considered the matter and recommends that section 36 (4)(a) be amended to ensure that the Minister would include information on transfers in his annual report.

2.11 THE ROLE OF THE ATI UNIT

Concern was raised by the Stakeholders that no mention was made of the ATI Unit within the body of the Act. Additionally, the view was expressed that the Unit should not only assist Government agencies to establish performance standards but should oversee the overall operation of the Act, manage public education programmes and supervise mandatory publishing of ATI reports and internal training programmes where information on international best practices would be provided.

During the deliberations, your Committee was informed that the Unit has implemented a training programme, which focuses on individual training sessions for access officers to address the concerns raised about the unevenness in the discharge of duties and the inability of access officers to provide needed information. Furthermore, it has been providing support in addressing the weaknesses identified in the Statement of Organization and Function, which should be published by all public bodies. Additionally, both the Unit and the Jamaica Archives and Record Department have been addressing the recommendation by the previous Committee that there be proper record keeping and filing of documents to ensure an overall improvement in the system and the sharing of best practices. It was therefore proposed that there be an efficient electronic record system in place at all public bodies. Furthermore, there should be information audits on a regular basis.

2.11.1 THE ATI UNIT AS A STATUTORY BODY

A proposal was made that the ATI Unit should be empowered to ensure that public bodies comply with the provisions of the Act. Such a move would address the current situation whereby many public authorities not only fail to comply with certain rules under the Act but fail to submit reports to the Unit. In trying to arrive at a solution for tackling the problems, your Committee considered whether a model similar to that which exists in the United Kingdom, where an Information Commissioner was employed, could be adopted. The Members were advised that the Information Commissioner would give guidance on the interpretation and administration of the Act and would assist public entities and applicants at any stage of the application process. However, the Information Commission would be below the Appeal Tribunal, which would be the final appellate body. Some Members of the Committee expressed concern that the roles of the Information Commissioner would overlap with that of the Unit and the Appeal Tribunal and were of the view that unless the Commissioner would have administrative responsibilities for other pieces of legislation there would be no justification for his

appointment. The question of whether the country would be able to afford an Information Commissioner also arose.

Your Committee then sought advice on the additional roles and changes which would result from the Unit becoming a statutory body and was told that the Unit would have enhanced monitoring functions, would carry out systemic investigations and issue report cards. Furthermore, the Unit would require additional human resources and a budgetary allocation of approximately 30 million dollars for the next financial year in order to carry out its added duties.

As regards systemic investigations, effort would be made to find out what was causing the problems being encountered concerning access to information and then a determination would be made as to the actions that need to be taken to ensure compliance. It was brought to the Committee's attention that the systemic model was similar to the system employed by the Office of the Canadian Information Commissioner, where one would be involved in carrying out investigations, reviewing the report cards of the public authorities and then give advice. Follow-up monitoring and implementation, which would involve assessing the leadership of the public bodies, would subsequently occur. Additionally, questionnaires would be issued to the various public agencies and there would be interviews and meetings with certain officials. In an effort to identify systemic issues, there would also be data analysis and a draft report card, which would be sent to public authorities followed by a report to Parliament.

Your Committee after considering the various issues recommends that the Unit become a statutory body (see Appendix 1.)

2.11.2 Development and Enforcement of Statutory Code of Practice on the Discharge of Functions under the Act

It was brought to the Committee's attention that there were guidelines as to how the various functions should be discharged by access officers but they were not being followed. It was therefore proposed that a new provision be inserted in the Act, which would provide for the issuing of a Code of Practice on Functions and Obligations under the Act. Your Committee was advised that the ATI Unit after

consultation with the responsible Minister would issue a Code of Practice which would guide public authorities as to how they should discharge their duties in complying with the Act.

It was also recommended that there be a new statutory provision in the Act to provide for the issuing of a Code of Practice on Records Management, which would be developed in collaboration with the Jamaica Archives and Records Department (JARD) after consultation with the relevant authorities. That Code would be reviewed every seven years or at whatever time interval determined by the Minister and would provide guidance to public entities as to how to maintain records as well as transfer records to JARD.

2.11.3 Publication Schemes

As a statutory body, the ATI Unit will be required to develop and publish model schemes for different public authorities. Your Committee was told that effort would also be made to ensure that the publication schemes for the various public bodies would be updated when there was any significant change in information. Significantly, failure to prepare the publication schemes in time for approval will be seen as a breach of the statutory requirement and might result in the Unit issuing a compliance notice to the relevant public authorities.

Your Committee recommends that the First Schedule be deleted from the Act and that section 4 be amended to include provisions for approving, revoking and monitoring publication schemes consistent with the UK and Scottish models (See appendix 2).

2.12 CUSTOMER SERVICE EVALUATION FORM

It was recommended that upon completing the application process, applicants should be provided with a Customer Service Evaluation Form which should be on all the relevant websites and be present in the relevant offices. Applicants should be invited to complete the Customer Service Evaluation Form and submit it to the ATI Unit or any body that the Ministry deems fit. The role of the ATI Unit, upon receiving a completed questionnaire would be to make an assessment as to whether an access officer would require further training or should be removed from his office. That decision would ultimately be made by the personnel department of the relevant Ministry or department and not the ATI Unit.

Your Committee was advised that each access officer would receive a copy of the questionnaire and would be given an opportunity to respond to any negative comments concerning the performance of his duties. In cases where applicants complained about a breach of procedure and the access officer refuted the complaint, the matter should be addressed by the ATI Appeal Tribunal.

2.13 REPEAL OF THE OFFICIAL SECRETS ACT

The Stakeholders raised concern about the co-existence of the Official Secrets Act and the Act and recommended that there be a piece of legislation to repeal the Official Secrets Act followed by an appropriate system of criminal and disciplinary sanctions for unauthorized disclosure of official information. They submitted that the Official Secrets Act was an old piece of legislation, which had been enacted in 1911 and last amended in 1939 and that the previous administration had promised that it would have been repealed upon the passing of the Act.

It is appreciated however that in order to protect certain public interest there will continue to be a need for the criminalization of the unauthorized disclosure of a limited number of categories of information. In the UK, the Official Secrets Act, 1989 repealed and replaced the 1911 Official Secrets Act as it applied in the UK. Under the 1989 Act, criminal liability now arises in relation to the unauthorized disclosure of official information falling within a limited number of specific categories including information relating to unauthorized disclosure of information relating to security or intelligence, defence and international relations.

Your Committee recommends that the Official Secrets Act be repealed and replaced by an Act that would include penalties for the release of information that would put the State at risk.

2.14 EXEMPTION CERTIFICATES

During the deliberations, it was proposed that exemption certificates should be rarely issued and that there be a statutory duty to issue such documents in good faith. Your Committee recommends that exemption certificates issued under section 23 should be subjected to a mandatory review to be carried out either by the Prime Minister or the Responsible Minister every two years so as to make a determination as to whether it would be in the interest of the public to release certain documents. Additionally, a copy of all exemption certificates should be submitted to the ATI Unit.

Your Committee also recommends that there be a review of all exempt documents every ten years.

2.15 COURT DOCUMENTS

The Stakeholders proposed that section 5(6)(b)(i) of the Act be amended so that transcripts of court proceedings, documents filed in civil proceedings, indictments, No. 1 Information Court Sheets, criminal index book entries and depositions in preliminary inquiries and coroners' inquests would be excluded from the list of exempt documents. It was further recommended that the term "matters of an administrative nature" be defined in the Act. Your Committee considered the proposals and recommends there be no changes as it relates to court documents. It is the view of the Members that section 5(7) makes it clear which documents would be accessible and there is no need to define the term "matters of an administrative nature" in the Act.

2.16 APPLICATION OF A PUBLIC INTEREST TEST

During the deliberations it was pointed out that section 2 of the Act makes it clear that there must be a balance between the public interest in maintaining exemption and the public interest in disclosing information. The Stakeholders, in their submission to the Committee, proposed that the Act be amended to include an overriding public interest test to be applied to all exemptions listed in Part III. They strongly recommended that a provision be inserted in the Act similar to that which can be found in section 8(2) of the Right to Information Act, 2005 of India which states that:

"notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with subsection (1), a public authority may allow access to information, if public interest and disclosure outweighs the harm of the protected interest."

Your Committee was of the view that a public interest test could be applied to some of the exemptions within Part III of the Act and decided that the various sections be examined individually.

Section 14 – Documents affecting security, defence or international relations

As regards Section 14, the view was expressed that documents related to security and defence should not be subjected to a public interest test because unbridled access to those documents could create mischief. Your Committee was later told that a document would not be automatically granted to an applicant simply because a public interest test was applied. It was further pointed out that such

documents were not absolute exemptions in some jurisdictions, for example the United Kingdom and ample safeguards were in place to protect sensitive information. The Committee recommends that the section be subjected to the overriding public interest test.

Section 15 – Cabinet documents

Your Committee recommends that a public interest test be applied to all exempt Cabinet documents after ten years of their existence.

Section 16 - Documents relating to law enforcement

Your Committee recommends that documents relating to law enforcement be subjected to a public interest test.

Section 17 - Documents subject to Legal privilege

Your Committee was told that documents subject to legal privilege were standard absolute exemptions in some jurisdictions. However, in some instances such documents were considered to be qualified exemptions and as such legal advice given to a Government could be released. The Committee recommends that the documents covered under this section should remain as absolute exemptions.

Section 18 - Documents affecting national economy

The Committee recommends that a public interest test be applied to documents affecting the economy.

Section 20 - Documents relating to business affairs

Your Committee recommends that a public interest test be applied to the documents covered under this section.

Section 22 - Documents affecting personal privacy

Your Committee is of the view that a public interest test should not be applied to documents affecting personal privacy.

Your Committee, having considered the various exempt documents covered under sections 14-22, recommends that the status quo remain for documents covered under sections 19 (Documents

revealing Government's deliberative process) and 21(Documents relating to heritage sites etc.). Additionally, a public interest test should be applied to all exempt documents save those under sections 17 (Documents subject to legal privilege etc.) and 22 (Documents affecting personal privacy). In the case of information covered under section 15 of the Act (Cabinet documents), the public interest test will only become applicable after ten years of the existence of those documents.

There was a general consensus among the Members that a public interest test should be included in the Act. Additionally, a public interest test must be applied by officers not below a certain rank and the final decision to release or withhold a document should be made by the most senior administrative officer.

2.17 MATTERS RELATED TO THE APPEAL TRIBUNAL

2.17.1 INDEPENDENCE OF THE APPEAL TRIBUNAL

The Stakeholders strongly recommended that the independence of the Appeal Tribunal be strengthened by separating it from the Access to Information Unit and by providing it with its own personnel and support. Reference was also made to the United Kingdom and Scotland where individuals were employed full-time to hear appeals. It was proposed that the Act be amended to ensure that at least one individual would be appointed full-time to the Appeal Tribunal. With regard to the concerns about the independence of the Tribunal, your Committee was advised that while the secretariat at the ATI Unit played an administrative role they did not provide legal advice to the Tribunal. Furthermore, your Committee was told that advice was sought from the Attorney General's Chambers concerning the possibility of a conflict of interest arising from the ATI Unit serving as the secretariat for the Appeal Tribunal and the advice given was that no conflict would arise. As regards the membership of the Tribunal, your Committee was informed that the Tribunal consisted of five independent members appointed by the Governor-General after consultation with the Prime Minister and the Leader of Opposition.

It was highlighted that under the Act, the Tribunal could inspect exempt documents. However, the rules of the Tribunal did not adequately address the power of the Tribunal to carry out investigations and enquiries. It was therefore recommended that the Tribunal be given specific power to serve public authorities with a notice requiring them to furnish the body with specific data or documents within a specified time. Provisions should also be made to ensure that the Tribunal would have the power to

carry out an enquiry to the same extent as a superior court of record; that is, they should be able to summon and examine on oath any person who, in the Tribunal's opinion, might have information relating to the hearing.

2.17.2 CHALLENGES IN MAKING APPEALS

It was brought to the Committee's attention that there have been lengthy delays on the part of the Appeal Tribunal in handing down decisions following hearings. Your Committee considered the matter and is of the view that the Act should not be amended to specify a timeline within which the Appeal Tribunal should make its decision. However, the members of the Appeal Tribunal will be advised of the concern.

With regard to the publishing of decisions, your Committee recommends that Rule 17 of the Rules of the Appeal Tribunal be amended to make provision for the publication of a notice of decision in a daily newspaper in Jamaica. The notice of decision would advise the public where the decision could be found. It is also the Committee's recommendation that all decisions of the Appeal Tribunal should be gazetted and be placed on the ATI Unit's website.

2.18 ACTS WITH NON-DISCLOSURE PROVISIONS

Your Committee recommends that the various Acts with non-disclosure provisions be reviewed by the relevant Ministers to determine which provisions should be retained or deleted and where the Act could override those provisions. It is the Committee's view that those pieces of legislation be revised so that they would conform to the Act.

3.0 ACKNOWLEDGEMENTS

Your Committee wishes to express gratitude to all individuals and organizations that contributed to our deliberations. Special thanks are extended to Hon. Shirley Miller, Q.C., Senior Consultant/Advisor at the Ministry of Justice, the Chief Parliamentary Counsel and staff, personnel from the Attorney General's Chambers, the Legal Reform Department, the Jamaica Archives and Records Department, the Access to Information Association of Administrators and the ATI Unit. Your Committee also

wishes to thank the Clerk to the Houses and staff for their administrative support and for the kind courtesies extended during the meetings.